
STATES OF JERSEY



STATES OF JERSEY COMPLAINTS BOARD: FINDINGS – COMPLAINT AGAINST THE STATES EMPLOYMENT BOARD BY MRS. X REGARDING THE WAY IN WHICH HER REQUEST FOR ILL-HEALTH RETIREMENT WAS HANDLED

**Presented to the States on 18th May 2017
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 against the States Employment Board regarding the way in which her request for ill-health retirement was handled.

Connétable L. Norman of St. Clement
Chairman, Privileges and Procedures Committee

STATES OF JERSEY COMPLAINTS BOARD

3rd April 2017

**Findings of the Complaints Board constituted under
 the Administrative Decisions (Review) (Jersey) Law 1982
 to consider a complaint by Mrs. X
 against the States Employment Board regarding the way in which her request for
 ill-health retirement was handled**

Present:

Board members –

C. Beirne (Chairman)
 R. Bonney
 J. Moulin

Complainant –

Mrs. X
 Mr. X (the former husband of Mrs. X)
 Mrs. Y (the daughter of Mr. and Mrs. X)
 Mr. Z (a former colleague of Mrs. X)

States Employment Board –

T. Family, Assistant Legal Adviser
 D. Woodside, Senior Legal Adviser
 R. Larkman, Senior Human Resources Manager, Education Department
 M. Byron, Project Director, Pensions
 L. Darwin, Head of Case Management
 C. Stephenson, Director of Employment Relations
 Dr. Y. Habbab (*via speakerphone*), Consultant Occupational Physician, AXA

States Greffe –

L.-M. Hart, Deputy Greffier of the States
 K. Slack, Clerk

The Hearing was held in private at 10.00 a.m. on 3rd April 2017, in the Blampied Room, States Building.

1. Opening

The Chairman opened the Hearing by introducing the members of the Board and outlining the process which would be followed. He thanked both parties for their written submissions, which all the members had read and, mindful of the sensitive nature of some of the evidence, asked all those present to maintain the confidentiality of the Hearing. The Chairman indicated that the Board was an independent body and not a court of law. The Board's role was to act as an examination of conscience and, although its findings were not legally binding, the Chairman hoped that any recommendations made would help to improve the system.

2. Summary of the Complainant's case

- 2.1 Mr. X explained that his former wife, Mrs. X, had worked as a science laboratory technician in Jersey schools for 25 years, most recently at a secondary school from which she departed at the end of 2012 (hereinafter referred to as 'the school'). Mrs. X had been employed at the school on a full-time basis which, he indicated, was rare, as ancillary posts were more often term-time only. Her previous employment, when in the United Kingdom, had been as a research scientist working with animals for various major corporations over a 7 year period.
- 2.2 Mr. Z, a former colleague of Mrs. X, who was employed alongside her in the science department, explained that Mrs. X's role at the school was essential and that she was working under constant pressure. Up to 200 practical science experiments were undertaken each week in the school, and although Mrs. X had assistants, they had minimal experience, so the majority of the more complex work was carried out by her. In 2011 the school had altered its syllabus and had moved from offering applied science to double science, which had significantly impacted on Mrs. X's workload and required her to prepare a new range of experiments. In Mr. Z's view, some of the teachers would take advantage of Mrs. X's goodwill and expect assistance with science experiments at short notice. The departure of an experienced assistant at the end of 2011 and their replacement with a new assistant had further impacted on Mrs. X, and the fact that the head of department was relatively new and was perceived as brusque and blunt in her dealings with colleagues did not improve the situation.
- 2.3 Mr. X explained that the reason for Mrs. X's departure was deteriorating health. He indicated that during the period from 2008 to 2012 she had attended 66 medical consultations, predominantly for acute respiratory infections and asthma, and their frequency was increasing. Her sickness record was relatively good, but was getting worse. Accordingly, on 12th October 2012, Mrs. X had written to the head teacher of the school (who, it was noted, was no longer in the employ of the Education Department), in the following terms – *"Please accept this letter as my formal application for early retirement on ill-health grounds which I wish to be effective from 1st January 2013 ... over recent months my health has deteriorated. I have struggled with high blood pressure over many years and I have now finally accepted my doctor's recommendation that it is time for me retire (sic). I have also developed arthritis in the joints of my fingers, and I am finding it more difficult and painful to continue with my duties."*
- 2.4 At this time, Mrs. X was 63 years old and had, for the previous 12 years of employment with the States of Jersey, made additional voluntary contributions ("AVCs") of an extra 5% to the Public Employees Contributory Retirement Scheme ("PECRS") in order to supplement her pension. Her reason for doing so was because, when she joined the States in the 1980s, she had worked part-time, and the Pension Regulations which were in force at that time meant that she was unable to join PECRS. She was later able to join the scheme in 1990, but by that time the scheme had been revised in respect of all public sector employees and had a lower accrual rate.

- 2.5 The head teacher responded to Mrs. X on 15th October 2012 to accept her “*resignation*”. Mr. X contended that Mrs. X had not resigned, but had sought ill-health retirement. He emphasized that she had not wanted to leave her post, but felt that she had no option but to do so, because she was concerned that her ill-health was affecting her ability to perform her role in a safe manner.
- 2.6 Mr. Z notified the Board that Mrs. X had reached a crisis point in October 2012 and there was a growing recognition within the department that she was struggling. She often had chest infections and was taking blood pressure tablets, despite having an exemplary attendance record. Mr. Z indicated that he, and other colleagues, had drawn the attention of the head of department to the difficulties that Mrs. X was experiencing. He referred to Mrs. X as ‘*old school*’ and said she was someone who, even when unwell, would come into work, rather than take sick leave, and would not share her concerns with colleagues.
- 2.7 On 18th October 2012, Mrs. X sent a follow-up letter to the head teacher, asking for advice on the necessary steps that should be taken in connection with her “*formal application for ill-health retirement under the PECRS*” as she had not, at that time, been contacted by the States of Jersey’s Occupational Health Scheme (hereinafter referred to as “AXA”).
- 2.8 The head teacher met with Mrs. X on 2 occasions on 22nd October 2012. A ‘return to work interview’ was conducted with her, following a period of sickness, and the form was endorsed to the effect that Mrs. X was “*feeling weak*”. Mrs. X informed the Board that at this meeting she had told the head teacher that she feared that her impaired manual dexterity and deteriorating eyesight (she could not see colour or easily read labels on the chemicals) were putting both her, and the children in the school, at risk because she was handling hazardous materials. However, in her opinion, the head teacher had made light of the situation and had made reference to also being ‘tired’.
- 2.9 The head teacher handwrote a file note of the second meeting, which recorded – “*Clarified with [Mrs. X] that she is retiring at the end of Dec. Clarified that she would like to have referral via Occ. Health – [head teacher] will action this today. Clarified that the new incumbent will be advertised this week ... [Mrs. X] confirmed all the above was correct.*”. The note was signed by the head teacher, but not by Mrs. X. That the head teacher was preparing to advertise Mrs. X’s post within one week of the latter indicating that she wished to leave on ill-health grounds was, Mr. X opined, indicative that the head teacher was thinking of the monetary savings that could be made by replacing Mrs. X, a full-time employee, with a term-time only employee.
- 2.10 On that same day, the head teacher sent a case management referral form to AXA. The reason given for the referral was ‘possibility of ill-health retirement’. No other box was ticked, despite there being the opportunity to select other reasons, including ‘performance deterioration’, ‘ill-health caused by work’, ‘capability to continue in present post’ or ‘ill-health retirement assessed against relevant pension regulations legislation and scheme rules’. The form contained scant other information, although it highlighted that Mrs. X was exposed to chemicals for 90% of her time at work and had ‘arthritis’.

- 2.11 On 24th October 2012, AXA wrote to Mrs. X to invite her to a consultation with Dr. W. on 6th November 2012 and enclosing a consent form, which Mrs. X signed and returned, in the belief that this would afford AXA access to her medical records. Mrs. X told the Board that her recollection of the consultation with Dr. W. was that it lasted for only between 5 and 10 minutes. On 8th November 2012, Dr. W. wrote to Mrs. D., a Human Resources ("HR") officer employed by the Education Department, in which he noted that Mrs. X was suffering with high blood pressure and arthritis in her hands and concluded – *"As Mrs. X as yet has not had all treatment options considered, and adjustments could allow her to remain at work, I would doubt that ill-health retirement would succeed at this time."*.
- 2.12 Mr. X expressed significant concern that Dr. W. did not appear to have had sight of Mrs. X's medical records, and that he had not taken into account the depression from which she was also suffering at the time. Further, it was contended that Dr. W. had drawn negative inference from the absence of any referral to a specialist, whereas Mrs. X's view was that she had refused such referrals, as she preferred for her own G.P. to conduct tests and explore different treatment options. Mrs. X had highlighted this in a letter both to Mrs. D. and her own G.P., to whom she wrote – *"Although Dr. W. and I did touch upon my struggle with depression, he was of the mindset that my symptoms were not severe. This was I think based on the fact that I have not sought counselling, nor have I required treatment in hospital. Dr. W. also made reference to my work attendance record which shows a very good history of attendance. As you know, I have done everything in my power to keep my job going, as I have not wanted to cause 'a fuss' but I simply cannot go on like this any longer. I have nothing more left to give."*. Mr. X indicated that it was obvious that Mrs. X was in a distressed and vulnerable state at this juncture. In her letter to Mrs. D., Mrs. X asked that she liaise with her G.P. in respect of any further medical evidence for consideration by AXA
- 2.13 Mr. X opined that the policy that an individual could not be given ill-health retirement if they had not been referred to a specialist was unjust to those individuals who were suffering from an undiagnosed illness that could take years to diagnose. He was further of the view that there was an unfair advantage for those individuals who were able to afford private health insurance and could be referred in short order to a specialist.
- 2.14 The head teacher met with Mrs. X on 12th November 2012 to discuss the findings of Dr. W. A letter was subsequently sent to Mrs. X, which referenced proceeding with her 'resignation' at the end of December 2012 *"in order to safeguard [her] health and wellbeing during the next phase in [her] life."* This was clear evidence, Mr. X contended, that the head teacher was aware that Mrs. X was struggling with her health, and he emphasized that the head teacher should have exercised a duty of care and followed this up. The further reference to resignation was also of concern, as Mrs. X had never mentioned resigning. Mrs. X did not recall the head teacher discussing with her the possibility of her taking an alternative role in the school, but conceded that there was unlikely to have been any suitable openings, as she was qualified at a high level as a scientist.

- 2.15 On 16th November 2012, Mrs. D. responded to Mrs. X's letter of 11th November 2012 and confirmed that AXA had dealt with Mrs. X's application in line with the required policy and procedure. She also enquired whether Mrs. X wished to be re-referred to AXA for a second opinion by another doctor, but did not address Mrs. X's request that HR liaise directly with Mrs. X's G.P. in order to obtain any further medical evidence for AXA. Further, it was not made clear to Mrs. X what appeal routes were open to her. Mrs. X did not respond to this letter, and Mr. X explained that by this stage, Mrs. X had effectively '*given up*'. She did not find it easy to speak up and she was clearly unwell and vulnerable. Furthermore, he informed the Board that at that time, he and his former wife were not in communication, so he was unable to offer her any support. He emphasized that Mrs. X had never used the word 'resignation' in any correspondence, but the clear message that was coming from both the school, and HR, was that she would be leaving at the end of 2012, and he stated that she felt '*railroaded*'. She was still in the employ of the school at that time and Mr. X queried why somebody from HR, noting that Mrs. X had not responded to the letter of 16th November 2012, had not taken the trouble to go and meet with her face-to-face in order to discuss the situation.
- 2.16 Mrs. X left the school at the end of December 2012, and in April 2014 was diagnosed with hypersensitivity pneumonitis ("HP") by Dr. Amar, the Consultant in Respiratory and General Medicine at the Jersey General Hospital. That same month, Mrs. X was admitted into hospital with breathing difficulties. She subsequently spent time in a coma on a life-support machine in the intensive care unit and a total of 4 months in hospital. She explained that she had not fully recovered from that episode, and that it had affected her brain and left her unable to speak for some time. She had needed 6 months of physiotherapy treatment in order to sit upright.
- 2.17 Mr. X notified the Board that HP was caused by exposure to hazardous materials, and was a progressive disease which developed over a long period of time, the early symptoms of which included fatigue, weakness, cough, pain, swelling of joints, asthma and shortness of breath. He contended that when Mrs. X presented to Dr. W. at AXA, he should have recognised the symptoms of HP, as it was a well-known condition in occupational health. He drew the attention of the Board to the £290,000 per annum that the States of Jersey paid AXA to provide an occupational health service. It was accepted that Mrs. X's own G.P.'s misdiagnosis of arthritis, rather than HP, had made life even more difficult.
- 2.18 Mrs. Y indicated that the 'clubbing' that Mrs. X had been experiencing in her fingers was characteristic of a lack of oxygen, which was a symptom of HP, but this had been identified as arthritis. Further, the clear indications of illness in her chest were not picked up and, had Dr. W. had sight of Mrs. X's medical records, they should have been mindful of the number of times that she had presented to her G.P. with breathing problems. It was noted that Mrs. X's G.P. surgery had no record of any approach having been made by AXA to obtain her medical records. Mrs. Y drew the attention of the Board to Dr. Amar's letter of 23rd April 2014 to Mrs. X's G.P. surgery, in which he referenced Mrs. X having had "*two years of a progressive breathing problem*" which, Mrs. Y pointed out, would have been an issue for Mrs. X at the time that she was working at the school and when she was seen by Dr. W.

- 2.19 On 23rd May 2014, a letter was sent by Mrs. X to the Director of HR of the States of Jersey, formally requesting a review of the way in which her request for ill-health retirement had been handled by the head teacher, Education and AXA; and also requesting a review of the decision not to accede to that request. The HR Director responded to Mrs. X on 20th August 2014, indicating that her appeal against the ill-health retirement process was not upheld. Mr. X described the review by HR of Mrs. X's case as a '*rubber stamp*' exercise. He indicated that the HR Director had refused Mrs. X a retrospective review of her pension on the basis that she was no longer an employee of the States at the time of her request, yet Mrs. M. Byron, Project Director, Pensions, on behalf of the States Employment Board had given examples of cases where an employee had left the States but had had their case reviewed.
- 2.20 On 21st January 2015, Mrs. X wrote to the Chief Minister to make a formal complaint and to make a subject access request under the Data Protection (Jersey) Law 2005 for any electronic and paper records held by the States and AXA relating to her application for ill-health retirement. Despite paying the appropriate fee, Mr. X informed the Board that the documents were not provided until 13 months after they were requested, and he argued that this was in breach of legislation. He also said right at the beginning that several documents now contained within the bundles submitted by the States Employment Board had not been disclosed at all.
- 2.21 As a result of Mrs. X being unable to continue in employment after the end of December 2012, when she was 63 years old, Mr. X contended that she had lost an additional 16 months' pensionable service which she would have accrued, or been awarded by PECRS through ill-health enhancement. It was accepted that this would have had a modest effect on her pension, but he argued that it negated the additional AVCs which she had paid at a cost to her of £20,000.
- 2.22 Mr. X explained that Mrs. X's primary reason for bringing her complaint to the Board was to have her ill-health recognised, and to have it acknowledged that the system that was in place at the time of her request for ill-health retirement was not fit for purpose and had let her down after many years of service to the Education Department. He hoped that improvements had been made, to ensure that no other vulnerable employee was treated in the same way. He suggested that Mrs. X could have brought a claim for constructive dismissal when she left the school in December 2012, because of the way in which she was dealt with by the head teacher and HR, but accepted that the time for bringing such a claim had long since passed. He hoped that some form of redress could be forthcoming, but reiterated that this was not Mrs. X's main motivator in making the complaint.
- 2.23 Mrs. X reiterated that she had felt that she had no choice but to leave her post at the school because she was unable to breathe, and was of the view that she posed a danger to both herself and the pupils.

3. Summary of the case of the States Employment Board

- 3.1 Miss T. Family, on behalf of the States Employment Board, countered a number of allegations, which had been made by Mrs. X in the document entitled – ‘*Summary of [Mrs. X’s] complaint*’, dated 17th March 2017 (“the summary”).
- 3.2 She denied that Mrs. X had been refused ill-health retirement and reminded the Board that, in his letter of 8th November 2012, Dr. W. had written – “*I would doubt that ill-health retirement would succeed at this time*” which, she contended, was not a refusal. In order for Mrs. X to have been granted ill-health retirement, she would have needed to demonstrate that she had exhausted all treatment options. Miss Family indicated that it would have been clear to Dr. W. that Mrs. X had not done this, because she had not been referred to a specialist at that juncture. In respect of Dr. W.’s statement that “*... adjustments could allow [Mrs. X] to remain at work*”, Miss Family could not identify what adjustments would have needed to be made at the school, but indicated that responsibility lay with Mrs. X to get herself referred to a specialist through her G.P. She did indicate that the hours of one of Mrs. X’s colleagues were increased in order to assist Mrs. X.
- 3.3 Miss Family challenged the statement made in paragraph 3 of the summary that the Education Department had substituted AXA’s judgment for its own. She indicated that the States of Jersey employed AXA as its occupational health specialist and, consequently, it was not unreasonable for the former to take the advice of the medical expert. She also challenged the statement that AXA had ‘failed’, as Dr. W. had given his opinion based on the information that was available to him at that time. Regarding the suggestion that AXA had failed to spot the ‘*warning signs which should have alerted them to Mrs. X’s chronic occupational disease*’, Miss Family emphasized that it was not the role of AXA to diagnose Mrs. X’s condition, and that even Mrs. X’s own G.P. had not made the diagnosis at the time.
- 3.4 Miss Family emphasized that Dr. W. made his judgment that Mrs. X was not suitable for ill-health retirement based on the facts that were presented to him. She contended that it was Mrs. X’s responsibility to bring to his attention any other matters that she wished him to consider. It was largely irrelevant what details the head teacher had included in the referral form to AXA, as it was for Mrs. X to make her case to Dr. W. when she met with him.
- 3.5 Regarding the declaration in paragraph 5 of the summary that Mrs. X had ‘*no choice*’ but to leave her job, Miss Family argued that this was not correct, because Mrs. X had not been seen by a specialist at this time, and could not have known that her symptoms would not improve. She drew the attention of the Board to a letter from Dr. Amar, dated 20th April 2016, in which he indicated that HP was ‘*likely to be responsive to steroids*’ and, that having started on a course of steroids, Mrs. X had shown a ‘*dramatic improvement*’.

- 3.6 In respect of the claim made in paragraph 12 of the summary that Mrs. X had been denied access to the appeal and review mechanisms of the Management Committee of PECRS, Miss Family indicated that the Management Committee was not a body of appeal. She stated that because that body had no role to play when a person was refused ill-health retirement, it could not be argued that Mrs. X had been denied access to it.
- 3.7 With reference to the allegation made in paragraph 15 that the refusal to grant Mrs. X ill-health retirement had '*cost [her] significantly*', it was contended that this was not the case, and that Mrs. X's AVCs to PECRS would not be affected. However, Mrs. X did lose 15 months' pensionable service as a result of leaving the States earlier than her normal retirement age. This was confirmed by Mrs. Byron, Project Manager, Pensions.
- 3.8 In relation to Mrs. X's expressed wish for her '*ill-health to be recognised*' (paragraph 17 of the summary), Miss Family stated that no-one had doubted that Mrs. X was unwell, or had indicated that they felt that she was exaggerating in respect of her symptoms. When Mrs. X had brought her concerns to the head teacher on 22nd October 2012, the head teacher had increased the hours of one of the assistant laboratory technicians in order to help Mrs. X and had taken steps to ensure that both she and the children were protected.
- 3.9 Miss Family rejected the assertion that the HR Director had 'rubber-stamped' Mrs. X's application to have the refusal to grant her ill-health retirement reviewed (paragraph 19 of the summary), as this ignored the fact that the HR team had been directed to revisit the matter. She emphasized that Mrs. X had not responded to Mrs. D.'s letter to her of 16th November 2012, in which the latter had enquired whether Mrs. X wished to be re-referred to AXA for a second opinion by another doctor. Miss Family conceded that Mrs. D. could have sent a follow-up letter to hasten a response, but argued that if Mrs. X herself was too exhausted to respond to the letter of 16th November 2002, the people supporting her could have done so on her behalf.
- 3.10 In respect of the issue raised in paragraph 25 of the summary, where Mrs. X queried whether the number of absences from work was '*the only criteria AXA and HR recognise*', Miss Family emphasized that in order to qualify for ill-health retirement, Mrs. X would have needed to demonstrate that all avenues of treatment had been exhausted, which she had not done. Whilst Mrs. X's 'stoic approach' to her illness was commendable, it was, she suggested, perhaps not appropriate. Regarding the contention in paragraph 27 that the head teacher was '*Dismissive of Mrs. X's response to AXA report*' and had a '*lack of sympathy*' with her illness, Miss Family stated that it was a shame that Mrs. X felt this way, because the head teacher had been emphatic in commending Mrs. X at the time of her departure. It would not have been appropriate for the head teacher to report to the school governors that Mrs. X had made a request for ill-health retirement (paragraph 54 of the summary).
- 3.11 The Board heard from Mrs. M. Byron, Project Director, Pensions, on behalf of the States Employment Board. Mrs. Byron explained that her role was to act as a lynchpin between AXA and the States Treasury, and that individual departments themselves were responsible for dealing directly with AXA. Where AXA made a recommendation for ill-health retirement, Mrs. Byron would

receive the papers and then liaise with the Treasury in order to facilitate the relevant payments. She confirmed that she would only liaise with the Treasury where all the relevant, correctly completed, paperwork had been received. She indicated that PECRS had received no information in respect of Mrs. X's request for ill-health retirement.

- 3.12 Mrs. Byron clarified for the Board that the Committee of Management of PECRS was not involved in decisions around ill-health retirement. Four members of the Committee of Management comprised the Ill-Health Sub-Committee, whose role was twofold – it made decisions in relation to the lump sum payable when an employee died in service; and in cases of ill-health retirement it audited the paperwork which she received.
- 3.13 Mrs. Byron was able to provide the Board with 2 examples where former employees had been seen by AXA, who had not recommended ill-health retirement, but they had subsequently been granted ill-health retirement. In one case, an employee had suffered a stroke, which had affected their balance. When the employee was seen by an AXA doctor, it was not possible to confirm that the individual had had a stroke, so ill-health retirement was not recommended, and the individual was subsequently made compulsorily redundant. However, within 8 weeks, confirmation was received from the consultant that the individual had suffered a stroke and, therefore, the compulsory redundancy was 'unpicked' and the individual was given ill-health retirement. In the second case, there had also been difficulty in getting a clear diagnosis of an illness, which was ultimately received 2 months after the individual had been seen by AXA. As a result of the receipt of the clear diagnosis, AXA reviewed the case and recommended ill-health retirement.
- 3.14 It was emphasized that the doctors employed by AXA would consider the symptoms that were displayed by an individual at the time that they were seen. In the foregoing cases, there had been some doubt around their illnesses, but the individuals concerned were obviously experiencing some issues. The clarity afforded by their diagnoses, which were obtained within a short time of them having been examined by AXA, supported the applications for ill-health retirement. Mrs. Byron indicated that Mrs. X's case could not be compared to these, as her diagnosis was not obtained until over a year after she had been seen by AXA. Some sort of line needed to be drawn, Mrs. Byron opined, as everyone was likely to fall ill at some point, and there needed to be limitations on how far one went back in the past to establish a causal link.
- 3.15 Miss Family emphasized that where a potentially incorrect decision had been taken by AXA, it could be reconsidered. However, in the case of Mrs. X, she reiterated that AXA had not indicated that ill-health retirement was not possible; Dr. W. had simply made the point that he felt that ill-health retirement was unlikely to succeed at the time that he had seen Mrs. X. Furthermore, breathing difficulties were not referenced in Dr. W.'s letter of 8th November 2012. He had referred to Mrs. X having high blood pressure and arthritis in her hands, so it was moot whether he had been made aware by Mrs. X of any difficulties in breathing.

- 3.16 However, this notwithstanding, when, in August 2016, Dr. R., Consultant Occupational Physician for AXA, had reviewed Mrs. X's medical records predating December 2012, she had reached the conclusion that the medical evidence '*would not have been sufficient to confirm eligibility for early retirement on the grounds of ill-health at that time under the relevant pension scheme criteria.*'.
- 3.17 The Panel was reminded that in Mrs. D.'s letter to Mrs. X of 16th November 2012, Mrs. X had been offered the opportunity to be re-referred to AXA, but had not responded to this correspondence. Mrs. X's application was never going to succeed, Miss Family stated, because Mrs. X had not seen a specialist and had, therefore, clearly not exhausted all treatment options; which was a prerequisite of being recommended for ill-health retirement, on the basis that a specialist would be able to confirm whether all avenues of treatment had been exhausted, and whether there was any likelihood of an improvement in the symptoms of the employee.
- 3.18 The Panel heard via speakerphone from Dr. Habbab, another Consultant Occupational Physician for AXA, who confirmed his colleague's view that there had been nothing sufficiently serious within Mrs. X's G.P. notes at the time that she was seen by Dr. W. to justify a referral for ill-health retirement. When the length of the consultation with Dr. W. was questioned, Dr. Habbab indicated that the duration of the meeting was irrelevant, and that the important thing was for AXA to ensure that they had sufficient information upon which to reach a conclusion. Although he conceded that the referral form to AXA contained very little information, in his view the outcome would have depended upon Dr. W.'s assessment of Mrs. X when he met with her. Whilst the management referral form was viewed by each doctor prior to a consultation, it was completed by a non-medical professional, and the doctor would discuss all concerns directly with the employee at the consultation. He felt that it was unlikely that the meeting with Mrs. X could only have lasted for between 5 and 10 minutes on the basis that Mrs. X had discussed her mental health issues and work pressures with Dr. W in addition to her physical symptoms.
- 3.19 Dr. Habbab explained that when considering whether to make a recommendation of ill-health retirement, the most important thing to assess was whether an individual's condition was permanent and would be unlikely to respond to the appropriate treatment. This would require an appropriate diagnosis from a specialist. AXA would not get involved in a medical investigation or prescribe medication for an individual. Its role was different from that of a medical specialist, and it was tasked with reviewing the relationship between an employee's work and their health.
- 3.20 Dr. Habbab had confirmed that the symptom of clubbing was a distinct physical one, which would be difficult to miss. Clubbing was not an impairment that came and went and, as such, Dr. Habbab was of the view that Mrs. X did not present with clubbing in her hands at the time of her consultation with Dr. W.

4. Duty of care

- 4.1 The Board decided that it wished to examine whether Mrs. X had been shown an appropriate duty of care by the head teacher and the Education Department and the States Employment Board, by association, when in October 2012 she had discussed with the head teacher the difficulties that she was encountering, and had confirmed in writing that her health had '*deteriorated*' and that it was '*difficult and painful*' for her to continue with her duties.
- 4.2 The Board questioned what response the head teacher should have given when faced with a colleague in a '*living environment*', who was responsible for children in a high-risk area and who had expressed concern that she felt that she was putting herself and the children at risk because of impaired manual dexterity and deteriorating eyesight. It suggested that '*alarm bells*' should have been ringing and that much more discussion should have taken place with Mrs. X.
- 4.3 Miss Family indicated that when the head teacher had met with Mrs. X, it had been clear that the latter wished to leave the employ of the school and the head teacher's role was to facilitate this. She accepted that the head teacher should have posed more questions around the health problems and difficulties that Mrs. X had highlighted.
- 4.4 The Board suggested that Mrs. X's application for ill-health retirement had been '*hijacked*' because the head teacher had subsequently accepted her '*resignation*' in a letter of 15th October 2012, and a letter sent by the Human Resources Department on 27th November 2012 had referenced Mrs. X's '*wish to retire*', yet there was no evidence that Mrs. X wished to leave other than on ill-health retirement. It was suggested that the head teacher had acted with '*indecent haste*' in a move to replace Mrs. X, as it was convenient for the school for her to leave.
- 4.5 Miss Family stated that there had been nothing to prevent Mrs. X from notifying the head teacher that she did not wish to leave, and when AXA had not made a recommendation for ill-health retirement she could have revoked her decision. The difficulty, which was highlighted by Miss Family and emphasized by Mrs. Byron, was that Mrs. X had identified, in her letter of 12th October 2012, that she wished to retire on ill-health grounds with effect from a specific date, namely 1st January 2013. Mrs. Byron informed the Board that this was the first time in 17 years that she had seen anybody applying for ill-health retirement stipulate a specific date upon which they wished to leave. The normal procedure to be followed when applying for ill-health retirement was to await the completion of the process with AXA.
- 4.6 The Board was of the view that Mrs. X was clearly in distress at the time that she had spoken to the head teacher, and highlighted the lack of substance in the referral form to AXA for ill-health retirement. It suggested that much more information should have been provided, particularly as Mrs. X was working with hazardous materials. It was further suggested that more conversations should have taken place between the head teacher and Mrs. X. Miss Family reminded the Board that the head teacher had increased the hours of one of the assistant laboratory technicians in order to provide more support to Mrs. X, but

conceded that there was probably more that could have been done, and that the head teacher should have spent more time with Mrs. X to explore her condition. She agreed that the ‘gold standard’ had not been applied in this case, but did not agree that the head teacher had failed in her duty of care to Mrs. X. Whilst accepting that the head teacher had not ticked certain boxes on the AXA referral form, Miss Family argued that in line with the medical evidence presented by Dr. Habbab, this would not have affected the outcome.

- 4.7 It was submitted that the very fact that Mrs. X had referred to a specific date in her letter of 12th October 2012, was indicative that a proper duty of care had not been shown to her, as she was clearly unaware of the correct procedure and had not been told by the head teacher, or by Human Resources, to seek independent, appropriate advice to enable her to reach the best decision for her. Miss Family accepted that when the Human Resources Department wrote to Mrs. X in November 2012, she could have been given additional support and advised to seek legal advice, or to go to JACS (the Jersey Advisory and Conciliation Service).
- 4.8 Miss Family notified the Board that since Mrs. X’s case, improvements had been made to Human Resources policies, but she indicated that these would not have impacted on the decision of AXA. L. Darwin, Head of Case Management, on behalf of the States Employment Board, advised that a central case management team had been established, in order to support individuals applying for ill-health retirement, as the relevant HR teams were not always involved. She undertook to circulate to the Panel the updated ill-health retirement policy, which highlighted the changes that had been made since 2012.

5. Closing remarks by the Chairman

- 5.1 The Chairman thanked both parties for their participation in the Hearing. He emphasized that the Board was not a legal body, but he expressed the hope that its findings would enable both parties to feel that they had been given a fair hearing and draw a reasoned picture of the situation. He expressed gratitude to Mrs. X for her stoic service to the Education Department and wished her well for the future.

6. The Board’s findings

- 6.1 The Board agrees that the decision not to grant ill-health retirement to Mrs. X, which was taken by AXA and Dr. W, was appropriate given the information available at the time.
- 6.2 However, there had been a failing in the duty of care towards Mrs. X. The head teacher and the Education HR team should have given her appropriate advice and ensured that she was adequately informed of the various options available and the processes to be followed, from the moment she began to experience difficulties in the workplace, and particularly when she initiated the ill-health retirement application.

- 6.3 This was especially important because Mrs. X was very unwell with an (as then) undiagnosed condition, which left her vulnerable and unable to make an informed decision without support and guidance.
- 6.4 The Board is conscious that many changes may have been implemented to the ill-health retirement application process since 2012 to ensure greater support from central HR. However, it is worthwhile noting that although processes and procedures may have been enhanced, one size does not ‘fit all’, and it is important that there is still a human element to the process which takes account of the applicant’s mental and physical state and makes some allowances for the same. Ultimately, the Employer has a duty of care and a responsibility to support and guide the Employee through the process, especially when they are not in rude health.
- 6.5 The Board notes that the argument put forward by the Employer is simply that Mrs. X failed to respond to the letter from Mrs. D on 16th November 2012, and that lack of response effectively ended the ill-health retirement application process. The Board agrees that, given Mrs. X was still in the workplace on this date, someone from the school management team or HR should have tried to speak to her to allay her concerns, provide support, and guide her onto the next level of the process. That both the head teacher and the Education HR team failed to offer appropriate advice, reflects a breach in process.
- 6.6 The Board is mindful that it is ultimately the Employer’s decision to grant ill-health retirement, albeit based on the recommendations of AXA, and it considers that there should be some degree of discretion available in special circumstances. It has been accepted that the process followed by the school was not ‘gold standard’, and that the head teacher and HR demonstrated poor duty of care. Rather than being appreciated for her efforts to ‘soldier on’, Mrs. X had in fact been penalised for having an attendance record which belied the medical problems she had been facing, and there appeared to have been indecent haste to bring Mrs. X’s employment to an end.
- 6.7 The Board finds that the failure to provide a sufficient duty of care, together with a lack of clear procedures, set in motion the resignation process contrary to Mrs. X’s intended ill-health retirement. That the decision was made without all of the attendant facts, including Mrs. X’s entire medical history, appears to the Board to be unjust.
- 6.8 The Board considers that the Employer has an opportunity to remedy the situation by acknowledging its failings and reviewing its processes to ensure that those like Mrs. X who are dedicated, stoical and try to endure, are not adversely affected or unfairly prejudiced in the future, and that sufficient compassion and support is given to those applying for ill-health retirement. Furthermore, the Board requests that Mrs. X’s case be subject to a retrospective review, in order to remedy the fact that a loyal and respected employee, after years of unbroken service and having developed demonstrable ill-health, was treated so improperly and without thought to her welfare.

6.9 In summary, the Board upholds the complaint made by Mrs. X in relation to the way in which her ill-health retirement was assessed. It believes that Mrs. X received insufficient guidance and support from the Employer, who had a responsibility to provide an appropriate level of care. The Board therefore finds that the decision not to grant her ill-health retirement, in accordance with Article 9(2)(b), (d) and (e) of the Administrative Decisions (Review) (Jersey) Law 1982 –

9(2)(b): was 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;

9(2)(d): could not have been made by a reasonable body of persons after proper consideration of all the facts; and

9(2)(e): was contrary to the generally accepted principles of natural justice.

6.10 In accordance with Article 9(3) of the aforementioned Law, the Board asks that the States Employment Board consider its findings and advise on the action taken to reconsider Mrs. X's case and the result of that reconsideration, within 2 calendar months of the publication of this report.

Signed and dated by –

C. Beirne, Chairman Dated:

R. Bonney Dated:

J. Moulin Dated: