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Case No: CO/2777/2010

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
ADMINISTRATIVE COURT

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 10/05/2010

Before :

THE HONOURABLE MR JUSTICE SALES

Between :

The Queen (on the application of the Public and Commercial Services Union)	**Claimant**
- and -	
Minister for the Civil Service	**Defendant**

Mr Nigel Giffin QC & Mr Nicholas Randall (instructed by **Thompsons Solicitors**) for the **Claimant**
Ms Elisabeth Laing QC & Mr Clive Sheldon (instructed by **the Treasury Solicitor**) for the **Defendant**

Hearing dates: 22/4/10 – 23/4/10

Approved Judgment

R. Sales

Mr Justice Sales :

Introduction

1. This is an application for judicial review of the introduction by the Defendant of amendments to the Civil Service Compensation Scheme. The Minister designated as the Minister for the Civil Service at present is the Prime Minister. I will refer to the scheme as it was in existence prior to the introduction of the amendments as "the CSCS" and to the scheme as now amended as "the amended CSCS".

2. The CSCS was made under section 1 of the Superannuation Act 1972 ("the 1972 Act") in 1994 and has been amended from time to time since then. The amendment provisions to create the amended CSCS were laid before Parliament by the Defendant on 5 February 2010 and purported to take effect with effect from 1 April 2010. The application came on before me as a rolled-up hearing for permission with detailed argument on the merits to follow. Having read into the case in advance of the hearing, I gave permission at the outset of the hearing for judicial review to proceed and heard full argument on the merits.

3. The purpose of the judicial review claim is to contest the lawfulness of amendments to the CSCS which have now been introduced. These have the effect of reducing in some cases the benefits to be received by civil servants who are made redundant, are compelled to take early retirement or are dismissed on grounds of structural reorganisation or in similar circumstances. The background to the introduction of the changes is the growing cost of pension provision as life expectation increases (since some of the benefits in question involve early payment of pensions), constraints upon the public finances in current circumstances and a desire on the part of the Government to reduce the costs of redundancy through restructuring of government departments and so forth.

4. The Claimant is a trade union representing large numbers of civil servants. It objects to the introduction of the changes to the CSCS. The Claimant maintains that the amendments to the CSCS deprive its members of what it says are accrued rights in respect of redundancy and other payments which might have to be made to them if certain contingencies occur - e.g. if they are made redundant or are compelled to take early retirement - and that by virtue of section 2(3) of the 1972 Act its consent is required before such changes could validly be brought into effect. It has not consented to the changes.

5. In the alternative, the Claimant submits that it had a legitimate expectation that its consent would be sought and obtained before the introduction of such changes to the CSCS, which legitimate expectation has been defeated by the Defendant without proper justification.

6. The CSCS contains many complicated, detailed provisions setting out various payments and pensions which may become payable in certain circumstances to civil servants. It was not necessary for the purposes of this application for me to be taken through the detail of all these benefits. The benefits may vary depending on when individuals became civil servants. Many of them are defined by reference to length of service or by reference to accrued pension entitlements, which in turn depend on the length of service or additional voluntary contributions which have been made by

employees. By way of example, it is helpful to set out the following passages from section 2 of the CSCS, which is headed "Compulsory and redundancy category (1972 Section Members)":

> "2.1 A civil servant who is compulsorily retired early on grounds of structure or limited efficiency, or retired early on grounds of redundancy, will receive the benefits as described in rules 2.2 to 2.9. ...
>
> *Early retirement for civil servants in post on or before 31 March 1997*
>
> 2.2 This rule applies where a civil servant:
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> (a) was in post on or before 31 March 1997;
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> (b) is retired early on or after 6 April 2006 under rule 2.1 above;
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> (c) is aged 50 or over;
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> (d) has five or more years' qualifying service;
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> (e) has not opted out of the 1972 Section; and
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> (f) has not opted in accordance with rule 2.4 to be treated under section 2A.
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> The civil servant will be eligible for a pension and lump sum payable under the [Principal Civil Service Pension Scheme] in accordance with rule 3.11 of the 1972 Section, but with reckonable service increased by 6 2/3 years and the benefits being brought into payment immediately. ... If the civil servant's pension under rule 3.11 of the 1972 Section would have been higher if rule 1.6b of the 1972 Section were disregarded the civil servant will also be eligible for a lump sum compensation payment under rule 2.3a. ..."

7. In cases covered by rules 2.1 and 2.2, therefore, where compulsory early retirement is imposed on a civil servant who is aged 50 or over, his pension is brought into payment at the level to which his accrued pension entitlement entitles him on the basis of his years of reckonable service, without actuarial adjustment downwards and with the benefit of the notional increase of 6⅔ years of reckonable service. By contrast, where a civil servant elects to take early retirement at age 50 or over, he becomes entitled to early receipt of pension payments but actuarially reduced in amount on the grounds that the pension is being taken earlier than the normal retirement age.

8. In cases governed by rule 2.2 of the CSCS, both the amount of the pension which becomes payable and the amount of the lump sum payable are determined by reference to provisions in the Principal Civil Service Pension Scheme ("the PCSPS").

The amounts payable depend upon the years of reckonable service performed by the civil servant within the civil service and any additional voluntary contribution payments he has made to augment his entitlements under the PCSPS.

9. The effect of the changes in the amended CSCS will be to reduce the level of benefits available to some civil servants covered by rule 2.2 and other rules in the CSCS. The changes have been introduced as part of an overall package which produces increased benefits for some classes of worker but fewer benefits for others. The package has been accepted by five of the six trade unions who represent civil servants. However, the Claimant, which represents the largest number of civil servants, objects to the amendments on the grounds that a significant number of its members will be detrimentally affected by them.

The legal background to the Superannuation Act 1972

10. The position of civil servants at common law is that they are employed by the Crown at will and may be dismissed at any time without notice or other compensation: see Wade and Forsyth, *Administrative Law*, 9th ed., pp. 61-65. The harshness of that position has been significantly moderated by legislation, schemes made under legislation and administrative practice. In addition, in the 19th century pension provision for civil servants was introduced by legislation. The Superannuation Act 1834 ("the 1834 Act") and later Superannuation Acts included provisions which appeared to set out entitlements or rights of civil servants to receive pension when certain conditions were fulfilled: see, e.g., section 2 of the Superannuation Act 1859 ("the 1859 Act").

11. However, it was clearly established by authority that such entitlements did not constitute legal entitlements to payments. An important provision in that regard was section 30 of the 1834 Act, which stated:

> "Provided always, and be it further enacted, that nothing in this Act contained shall extend or be construed to extend to give any person an absolute right to compensation for past services, or to any superannuation or retiring allowance under this Act, or to deprive the Commissioners of His Majesty's Treasury, and the heads or principal officers of the respective departments, of their power and authority to dismiss any person from the public service without compensation."

This provision remained unrepealed in later Superannuation Acts and was consolidated in the Superannuation Act 1965 ("the 1965 Act") in section 79 of that Act, set out below.

12. The fullest discussion of the issue of entitlements for civil servants under these legislative provisions is in the judgment of the Court of Appeal in *Nixon v Attorney General* [1930] 1Ch 566. The case went on appeal to the House of Lords where, in a short decision, the Judicial Committee affirmed the judgments given in the Court of Appeal: see [1931] AC 184, especially at 190-191.

13. In the Court of Appeal in *Nixon* it was observed by Romer LJ that the 1834 Act was "one passed for the purpose of authorising the expenditure of public money and

defining the circumstances and manner in which it shall be expended and not one passed for the purpose of conferring rights upon any class of public servant" ([1930] 1Ch at 606); he went on to hold that that result was, in any event, achieved by section 30 of the 1834 Act. This meant that use of the word "entitled" meant no more than "entitled to expect" or "qualified to receive" (at pp. 606-607). Romer LJ dismissed the attempt by counsel for the civil servants in that case to draw a distinction between "right" and "absolute right", proposed by counsel in order to suggest some form of conditional legal "right" to a pension which, albeit not an "absolute" right, still existed as a right in law (at pp. 607 and 609). Lord Hanworth MR rejected the same argument and held that section 30 "destroyed the possibility of a claim of legal right" (at pp. 592 and 595). Lawrence LJ referred to authority which made the same point and came to the same conclusion (at pp. 599-603).

14. All members of the Court treated the speech of Lord Buckmaster LC in *Considine v McInerney* [1916] 2 AC 163 as authority against the proposition that the language of entitlement to superannuation allowances used at places in the 1834 Act and 1859 Act created a legal right to receive a pension (pp. 596-597 per Lord Hanworth MR, p. 601 per Lawrence LJ, and pp. 610-613 per Romer LJ). Lord Buckmaster emphasised that this was precluded by section 30 of the 1834 Act: see [1916] 2 AC at 169.

15. In *Nixon* in the House of Lords, Viscount Dunedin gave the leading speech. He approved the reasoning of the Court of Appeal and said this at [1931] AC 191:

> "My Lords, there is, first, the question of how the matter stands upon the statutes. The learned counsel had to admit that in quite the early days there obviously was no actual right in a servant of the King to have a pension, and he really pinned his faith to the Act of 1859 and the second section of it. It is impossible, of course, in that section to find positive words which direct that a pension must be granted; the phrase is: "Subject to the exceptions, the Superannuation Allowance to be granted after the commencement of this Act to persons who shall have served shall be," so-and-so. All through the Acts that follow there is a frequent use of the word "entitled", but "entitled", I take it, shows no more than entitled to such as the Acts give him. I cannot do better there than quote the phrase which Lord Buckmaster used in *Considine v. McInerney*, where, summing up the position, he says: "He was entitled to expect an annual allowance," and then he goes on, in the well known words that have been so often quoted, to say: "This expectation, though it might be relied on with full certainty, was none the less not a legal right, and no claim for it could be enforced by any legal proceedings." But the difficulty under that Act and the following Acts does not end there, because, in the first place, there is s. 30 of the Act of 1834, which was specially exempted from the repeal which was made of all other sections, and has to be read with all the Acts up to the present date. The only argument that was presented upon that was that s. 30 of the Act of 1834 says there is to be no absolute right. My Lords, to get out of a provision that you are not to have an

> absolute right a positive provision that you are to have a right, is an argument which has only to be stated to be rejected. ..."

16. In the Court of Appeal in *Nixon* at [1930] 1 Ch 607-608 Romer LJ commented as follows on the change to language apparently of entitlement in section 2 of the 1859 Act, which sat alongside a forfeiture provision in section 9 of that Act:

> "Why, it is asked, should this change of language occur in s. 2, and what was the necessity for this express power conferred by s. 9, if the Legislature intended the grant and the amount of the pension to be a matter of grace and not of right? I think that the explanation is as follows: The Commissioners of the Treasury in the exercise of the powers conferred upon them by the 1834 Act were, I strongly suspect, in the habit of always granting the maximum pensions allowable. When, therefore, the Legislature was passing the amending Act of 1859 for the purpose of apparently further defining the powers of the Commissioners, it might quite intelligibly have done so in the language employed in the Act, without intending to confer upon the civil servants a legal right to have the pensions awarded to them. It would, on the other hand, be very surprising if the Legislature when conferring such a right for the first time should have made so great a change in the law by such vague and ambiguous language. ..."

This is of some relevance to the arguments raised by the Claimant before me.

17. The position under the Superannuation Acts, therefore, as established by strong authority, was that they were to be regarded primarily as setting out a code detailing authorisation for payments to civil servants without creating any rights for the civil servants to receive such payments, and that the absence of any right for a civil servant to receive payment was the effect of the inclusion of section 30 of the 1834 Act in the statutory scheme, quite apart from other considerations. The language of the legislation, which appeared to be redolent of entitlements and rights for civil servants, fell to be read subject to these points and against the background of an absence of any rights against the Crown at common law to compensation or payment and did not create any such rights.

18. Section 7 of the 1859 Act provided that it should be lawful for the Treasury "to grant to any person retiring or removed from the public service in consequence of the abolition of his office, or for the purpose of facilitating improvements in the organisation of the department to which he belongs, by which greater efficiency and economy can be effected, such special annual allowance by way of compensation" as the Treasury consider "reasonable and just compensation for the loss of office". It was thus clear, both by the terms of section 7 and by the continued operation of section 30 of the 1834 Act, that a civil servant dismissed on grounds of what would now be termed redundancy or for reasons of structural reorganisation might be paid an allowance but had no enforceable right to such payment.

19. The Superannuation Acts were consolidated in the 1965 Act. In contrast to some of the provisions in the earlier legislation, the main substantive provisions of that Act providing for payment of pensions and compensation in certain circumstances were expressed in permissive rather than mandatory terms ("the Treasury may grant..." etc.).

20. Part I of the 1965 Act contained detailed provisions dealing with superannuation benefits. These included a provision which in substance re-enacted section 7 of the 1859 Act (section 8) and a provision (section 10) providing that an appropriate Minister could grant superannuation allowances (pensions) and additional allowances (lump sum payments) to civil servants aged 50 or more compelled to take premature retirement in the interests of efficiency. Section 11 of the 1965 Act provided for reduction of pensions and allowances on grounds of defaults or demerit in relation to public service. Part II of the 1965 Act contained special provisions relating to superannuation benefits for members of the diplomatic service. Section 30 of the 1834 Act was re-enacted as section 79 of the 1965 Act, as follows:

> "Nothing in this Act shall extend or be construed to extend to give any person an absolute right to any allowance or gratuity under Part I or Part II of this Act or to deprive the Treasury or the head or principal officer of any department of their or his power and authority to dismiss any person from the public service without compensation."

21. In light of the authorities referred to above, which had authoritatively explained the effect of section 30 of the 1834 Act, there can be no doubt that Parliament intended section 79 of the 1965 Act to have the same legal effect, namely to ensure that civil servants had no legal entitlement to receive nor any legal right with respect to the benefits referred to in the 1965 Act. Again, the object of the 1965 Act was to set out a statutory authorisation for making payments rather than to create entitlements for civil servants to receive payments.

22. The 1965 Act was supplemented by an administrative code known as "Estacode" which reflected negotiations between the management side and the staff side, represented by trade unions, under the Whitley Council system. Estacode set out detailed administrative provisions explaining, inter alia, how matters such as redundancy, compulsory early retirement on efficiency grounds and the like would be handled and the Act and Estacode set out what payments civil servants could expect to receive in such cases, both in terms of early payment of pension and lump sum payments.

23. Section M of Estacode dealt with the topic of superannuation and payments under the 1965 Act. Paragraph 2(a) of Estacode stated: "The following points should be noted: (a) there is no legal right to any allowance or gratuity (section 79 [of the 1965 Act])...". This spelled out in the administrative code the effect of section 79 of the 1965 Act. The legal effect of section 79 and the absence of any legal right to any allowance or gratuity (i.e. including any pension payments or lump sum payments) was clear to all concerned, both on the staff and management sides.

24. Notwithstanding the discretionary nature of such payments, for a long time before 1965 it appears that full payments of pensions and lump sums had in fact been made under the various legislative regimes and administrative codes: see the observations of Romer LJ in *Nixon v Attorney General* quoted at para. [16] above and of Lord Buckmaster LC in *Considine v McInerney* at [1916] 2 AC 170 (referring to the payment which a civil servant was "entitled to expect" and saying, "This expectation, though it might be relied on with full certainty, was nonetheless not a legal right, and no claim for it could be enforced by any proceedings"). This is unsurprising, since the Crown had an interest in attracting good quality civil servants into its service despite the absence of legal rights for them at common law and under statute, and the regular exercise of discretionary powers in their favour would be likely to encourage such service. The regularity of payment did not convert the 1965 Act and Estacode into a regime of entitlement, as the express reservation in section 79 of the 1965 Act and paragraph 2(a) in section M of Estacode made clear. In line with the earlier practice, it appears that the practice after 1965 remained that 1965 Act payments were always made and Whitley Council agreements incorporated into Estacode were also always honoured.

25. In the late 1960s/early 1970s the position of civil servants was subject to review by the Fulton Committee. In parallel with that review, the Joint Superannuation Committee of the National Whitley Council ("the Joint Committee") was set up in 1968 to review the provisions of the 1965 Act and associated legislation. The Joint Committee produced its report in February 1972 at a time when a new Superannuation Bill was before Parliament. The Joint Committee noted that improvements were necessary to the superannuation scheme "to restore to the civil service the position it had traditionally held as one of the leaders in pension practice". The Joint Committee's report was written with notice of the terms of the Superannuation Bill then before Parliament and was intended to inform the drafting of the Bill and the superannuation scheme later to be introduced under it (see paragraphs 10-12 of the report: it was noted that in the interest of flexibility and easy adaptability to new circumstances, the civil service pension scheme was to be removed from the statute book and replaced by pension terms set out in administrative documents promulgated by the Minister for the Civil Service).

26. The Joint Committee's report dealt with entitlement to benefit and forfeiture at paragraphs 91-95 as follows:

> "*Entitlement to benefit*
>
> 91. Hitherto, Civil Service pension benefits have always been discretionary. Section 79 of the Superannuation Act 1965 states that nothing in the Act shall be construed as giving any civil servant an absolute right to benefit. The Government are satisfied that they have never abused this power of discretion; nevertheless, the Committee feel that it is wrong that there should be such a power and that there is no good reason why civil servants should not have a legal entitlement to their pensions. In all the other public service schemes (except the armed forces), and in the great majority of private schemes, there is a legal right to benefit.

92. The Superannuation Bill is so framed as to make it possible for the new administrative scheme to specify benefits as mandatory. In the new scheme, there will be a right to benefits where this is to the advantage of the civil servant. This includes the main pension and lump sum, and widows' and dependants' pensions. But for tax reasons the following benefits will continue to be discretionary:

(i) the death gratuity and supplementary death gratuity;

(ii) the short service gratuity, unestablished gratuity and marriage gratuity;

(iii) all injury benefit payments;

(iv) all compensation (as opposed to pension) payments in the premature retirement terms.

Otherwise there will be an enforceable legal entitlement to the benefits of the scheme, except in the rare cases where the forfeiture rules may apply.

Forfeiture

93. The Committee agree that with the introduction of preservation, and the new role envisaged for pensions nationally, it would be inappropriate to continue the rules whereby Civil Service pensions can be forfeited or reduced in cases of misconduct and other circumstances. In particular, there will be no question in the future of dismissal from the Service automatically leading to forfeiture of pension rights. However, the Committee agree that there is a narrowly-defined range of circumstances in which pensions should be forfeited or withheld:

(i) Pensions will be automatically forfeited under the Forfeiture Act 1870 if the pensioner is convicted of treason (which normally happens only in wartime).

(ii) If a pensioner goes bankrupt, there will continue to be provision (under the Bankruptcy Acts) for the pension to be paid over in discharge of his liabilities.

(iii) Under Clause 5 of the Superannuation Bill, the pensioner will forfeit his pension if he assigns or tries to assign it.

(iv) Departments will have a limited power to impose a lien on pension benefits in respect of sums misappropriated or owed to them by the employee. That is, the Department will be able to reduce the

> pension or deferred pension by the actuarially appropriate amount if the pensioner is unwilling to repay the amount out of his own resources. If the pensioner disputes the liability, the Department will not be able to exercise the lien without first obtaining an order or judgment from a competent Court specifying the sum due.
>
> 94. In the vast majority of misconduct cases, forfeiture will not apply. But the Committee accept that the Government will reserve the right to impose forfeiture on the pensions of those guilty of particularly serious misconduct against the State e.g. a major security offence. But it should be emphasised that these cases will be extremely rare, and that when they occur two safeguards will apply. Firstly, the circumstances of each case will be discussed on a 'without prejudice' basis between the Staff and Official Sides before a decision is taken. Secondly, all staff will have a right to appeal to the Appeal Board (which is being set up in connection with the premature retirement arrangements) against a decision that a pension should be forfeited for misconduct. Moreover, the Department will accept the Appeal Board's judgment in such cases. This right of appeal will be available to those who have already left the Service when they forfeit their pensions, as well as to those who are still in service.
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> 95. These forfeiture rules are necessarily subject to the provisions of the proposed national legislation on preservation of pension rights and on the conditions for exemption from the State Reserve Scheme. They will apply equally to deferred and full-term pensions."

27. The Joint Committee therefore recommended in clear terms that civil servants should have a legal entitlement to their pensions, but not to compensation (as opposed to pension) payments in the premature retirement terms. In my view, the reference in paragraph 92(iv) to "pension payments" in the premature retirement terms was to the entitlement to early payment of pension on enhanced terms which was to be a benefit in certain cases (as noted, e.g., in paragraph 48 of the report; see now rule 2.2 of the CSCS, set out above). Presumably pension payments, including one paid under those provisions, would be taxable income so there would be no tax advantage in leaving it as a discretionary benefit. Other compensation payments (i.e. lump sum payments) might be taxable and so were to be treated as discretionary in order to secure advantageous tax treatment. In view of the practice up to that point of paying such benefits, it is likely that the strong expectation was that they would in practice always continue to be paid, albeit that a discretion not to pay was to be reserved for the Crown.

28. The forfeiture provisions to be introduced were to be narrowed. According to the report, the main focus of the provisions was to be on payment of pensions. This tends

to support the interpretation of paragraphs 91 and 92 of the report as indicating an intention that payment of pensions (including cases where pensions were to be paid under the premature retirement terms) should be as of right, subject only to the detailed forfeiture provisions.

29. Section III of the Joint Committee's report dealt with preservation and transferability of pensions, noting that the object should be "to ensure that occupational pension rights are not lost when an employee leaves his employment before reaching the retirement age" (paragraph 22).

30. Paragraph 12 of the Joint Committee's report included the following:

> "12. The Staff Side have welcomed the Superannuation Bill, given the safeguards it contains. Firstly, the Bill lays a statutory obligation on the Minister for the Civil Service to consult staff interests before making changes. Secondly, there is a provision preventing him from worsening pensions in payment or pension rights already accrued unless the staff interests agree to it. Thirdly, the Bill allows the scheme to give a legal entitlement to pensions rather than to continue on the discretionary basis laid down in the Superannuation Acts. ..."

In my view, the reference to a legal entitlement to pensions as the third protection refers generally to all cases when pensions were to be payable under the new scheme, including cases of compulsory early retirement. That is also the natural inference to be drawn from paragraphs 91 and 92 of the report.

31. The first protection referred to in paragraph 12 of the report was the consultation obligation in what became section 1(3) of the Superannuation Act 1972 ("the 1972 Act"). The second protection referred to was the provision in the Bill which became section 2(3) of the 1972 Act. The long title to the 1972 Act described it, inter alia, as "an Act to amend the Law relating to pensions and other similar benefits payable to or in respect of persons in certain employment...". It is clear from the long title and from its various provisions that the 1972 Act was not confined to dealing with entitlements to pensions alone.

32. Section 1 of the 1972 Act, headed "Persons employed in the civil service etc.", provided in relevant part as follows:

> "(1) The Minister for the Civil Service (in this Act referred to as "the Minister")-
>
> *(a)* may make, maintain, and administer schemes (whether contributory or not) whereby provision is made with respect to the pensions, allowances or gratuities which, subject to the fulfilment of such requirements and conditions as may be prescribed by the scheme, are to be paid, or may be paid, by the Minister to or in respect of such of the persons to whom this section applies as he may determine;

(b) may, in relation to such persons as any such scheme may provide, pay or receive transfer values;

(c) may make, in such circumstances as any such scheme may provide, payments by way of a return of contributions, with or without interest; and

(d) may make such payments as he thinks fit towards the provision, otherwise than by virtue of such a scheme of superannuation benefits for or in respect of such of the persons to whom this section applies as he may determine. ...

(3) Before making any scheme under this section the Minister, or, if the Minister so directs in relation to a particular scheme, another Minister of the Crown specified in the direction, shall consult with persons appearing to the Minister or that other Minister, as the case may be, to represent persons likely to be affected by the proposed scheme or with the last-mentioned persons.

(4) This section applies to persons serving –

(a) in employment in the civil service of the State; or

(b) in employment of any of the kinds listed in Schedule 1 to this Act; or

(c) in an office so listed.

(5) Subject to subsection (6) below, the Minister may by order-

(a) add any employment to those listed in the said Schedule 1, being employment by a body or in an institution specified in the order,

(b) add any office so specified to the offices so listed, or

(c) remove any employment or office from the employments or offices so listed.

(6) No employment or office shall be added to those listed in the said Schedule 1 unless the remuneration of persons serving in that employment or office is paid out of moneys provided by Parliament or the Consolidated Fund.

(7) Notwithstanding subsection (6) above, the Minister may by order provide that this section shall apply to persons serving in employment which is remunerated out of a fund specified in the order, being a fund established by or under an Act of Parliament. ..."

33. In section 1(1)(a) the words, "are to be paid, or may be paid", and the removal of section 79 of the 1965 Act from the primary legislation made it clear that a scheme made by the Minister under section 1 could provide for both mandatory payments (i.e. as a matter of legal entitlement for the civil servant employee) and for a discretion for the Minister to make payments.

34. Section 1(4)-(7) indicated that the scope of the statutory regime was persons to whom payments were to be made out of the Consolidated Fund or from monies voted by Parliament.

35. Section 2 of the 1972 Act provided in relevant part as follows:

> "...
>
> (2) Any scheme under the said section 1 may make provision for the payment by the Minister of pensions, allowances or gratuities by way of compensation to or in respect of persons –
>
> *(a)* to whom that section applies; and
>
> *(b)* who suffer loss of office or employment, or loss or diminution of emoluments, in such circumstances, or by reason of the happening of such an event, as may be prescribed by the scheme.
>
> (3) No scheme under the said section 1 shall make any provision which would have the effect of reducing the amount of any pension, allowance or gratuity, in so far as that amount is calculated by reference to service rendered before the coming into operation of the scheme, or of reducing the length of any service so rendered, unless the persons consulted in accordance with section 1(3) of this Act have agreed to the inclusion of that provision.
>
> (4) Subject to subsection (3) above, any scheme under the said section 1, or any provision thereof, may be framed –
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> *(a)* so as to have effect as from a date earlier than the date on which the scheme is made; or
>
> *(b)* so as to apply in relation to the pensions, allowances or gratuities paid or payable to or in respect of persons who, having been persons to whom the said section 1 applies, have died or ceased to be persons to whom that section applies before the scheme comes into operation; or
>
> *(c)* so as to require or authorise the payment of pensions, allowances or gratuities to or in respect of such persons. ...

> (9) Any scheme under the said section 1 may amend or revoke any previous scheme made thereunder.
>
> (10) Different schemes may be made under the said section 1 in relation to different classes of persons to whom that section applies, and in this section "the principal civil service pension scheme" means the principal scheme so made relating to persons serving in employment in the home civil service or the diplomatic service.
>
> (11) Before a scheme made under the said section 1, being the principal civil service pension scheme or a scheme amending or revoking that scheme, comes into operation the Minister shall lay a copy of the scheme before Parliament.
>
> (12) Notwithstanding any repeal made by this Act, the existing civil service superannuation provisions, that is to say, the enactments and instruments listed in Schedule 2 to this Act, shall, with the necessary adaptations and modifications, have effect as from the commencement of this Act as if they constituted a scheme made under the said section 1 in relation to the persons to whom that section applies, being the principal civil service pension scheme, and coming into operation on the said commencement and may be revoked or amended accordingly."

36. Section 2(2) specifically authorised the Minister to include in a scheme made under section 1 provision for payment of "pensions, allowances or gratuities" as compensation for persons who suffer loss of office or employment. This covered, for example, provision for payment of early enhanced pensions and lump sum payments to persons who were subject to compulsory early retirement as contemplated by the 1965 Act and as referred to in the Joint Committee report.

37. Where section 2(3) applied, it conferred a particularly strong protection for civil servants, since the agreement of their representative trade union would be required for any changes to take effect - mere consultation would not be enough. By virtue of section 1(12) of the 1972 Act read with Schedule 2 to that Act, the scheme in the 1965 Act – including section 79 of that Act – was deemed to be a scheme made under section 1 of the 1972 Act as at the commencement of the relevant provisions in the 1972 Act on 25 March 1972. Therefore it appears that that scheme was intended to attract the protection in section 2(3), notwithstanding the incorporation of section 79 of the 1965 Act in the scheme.

38. That impression is reinforced by the terms of paragraph 12 of the Joint Committee report, which records the understanding of the staff and management sides at the time regarding the protections which would apply with the introduction of the Superannuation Bill. Such contemporaneous understanding of the effect of an Act, particularly by an official body like the Joint Committee, constitutes a powerful form of *contemporanea expositio* and is a legitimate aid to the construction of that Act: see

Bennion on Statutory Interpretation, 5th ed., pp. 702-706 and 711-712. That is especially the case where, as here, an Act is being introduced specifically to regulate relations between certain persons and it is those persons who have the understanding in question.

39. This understanding of the effect of section 2(3) is also borne out by the words of section 2(3) itself, as originally enacted. In that regard I accept the submission of Mr Giffin QC for the Claimant that on its natural construction the provision applied to pensions, allowances and gratuities of all forms, including those to be paid by way of compensation for loss of office or employment as referred to in section 2(2) (see the word, "any", in section 2(3)), thus covering both lump sum payments and early or enhanced payments of pension in such cases. The words, "in so far as that amount is calculated by reference to service rendered before the coming into operation of the scheme", in section 2(3) were apt to cover the amount of any lump sum payment or pension payment in case of dismissal on grounds of redundancy, departmental restructuring or compulsory early retirement or the like, where the amount to be paid was calculated by reference to service rendered before the commencement of the 1972 Act (and hence before the deemed commencement of the existing scheme as a scheme under section 1 of the 1972 Act by virtue of section 2(12) of that Act). The operation of the provision was not expressed to depend upon the civil servant having legal rights to such benefits.

40. The presence of the general provision in section 79 of the 1965 Act (as part of the original deemed scheme under section 1 of the 1972 Act) preventing any legal rights to such payments and, indeed, preventing any legal rights even to those pension payments and lump sums due to commence or to be paid upon reaching the ordinary retirement age from arising was clearly not intended to have the effect of depriving civil servants of any protection at all under section 2(3). Section 2(3) was expressed in language apt to cover the administrative arrangements governing payments under the 1965 Act and Estacode, which were well known to both the staff and management sides and which were routinely followed in practice.

41. Ms Laing QC, for the Defendant, accepted that the protection in section 2(3) as originally enacted covered pension payments and lump sums due to commence or to be paid upon reaching the ordinary retirement age, but sought to suggest that it did not cover payments (whether by way of early pension or lump sums) as compensation for earlier loss of office or employment. I can see no textual or other warrant for limiting the operation of section 2(3) in this way. As submitted by Mr Giffin, section 2(3) as originally enacted provided no basis for drawing any distinction between ordinary pension payments and pension and other payments payable in the type of circumstances covered by section 2(2).

42. Ms Laing sought to support her submissions by reference to the notes on clauses prepared for Ministers at the time of the passage of the Superannuation Bill through Parliament in 1972. There is no evidence that these notes on clauses were made generally available in the course of parliamentary debates on the Bill. It seems that they were simply for the private use of Ministers in the course of debates. In my view, it is not legitimate to refer to them as an aid to construction of the legislation. In any event, I did not find any clear or helpful indication in the notes on clauses I was shown in relation to the 1972 Act which would have caused me to depart from the analysis above.

43. The conclusion I have reached that section 2(3) of the 1972 Act as originally enacted covered payments due as a matter of administrative practice rather than legal entitlement, payable in circumstances of loss of office or employment, where such payments were "calculated by reference to service rendered before the coming into operation of the scheme" gives rise to what might be regarded from a certain perspective as an odd position. Why should the strong protection in section 2(3) apply in relation to benefits to which there was no legal entitlement? I consider that the oddity disappears when it is recalled that, by long tradition, the discretion not to pay such benefits by virtue of section 79 of the 1965 Act was formally reserved but does not appear to have been operated in practice. As a matter of practice, both staff and management sides in 1972 took the benefits set out in the 1965 Act and Estacode to be entitlements in all but legal theory. In light of that it made considerable sense from the point of view of civil servants and their unions that the 1972 Act should include the protection set out in section 2(3) as a protection covering not just ordinary pension and lump sum payments upon retirement in the ordinary course, but also pension and lump sum payments (if calculated by reference to length of service) payable as compensation for earlier loss of office or employment as contemplated by section 2(2) of the 1972 Act. In both cases a civil servant was to be regarded as having built up by reference to length of service an expectation closely analogous to a right to enhanced protection (something which could be "relied on with full certainty", in the words of Lord Buckmaster), whether in the form of expectation of an increased pension entitlement if retiring at the ordinary retirement age, or enhanced protection if made redundant or compulsorily retired before then.

44. It is noteworthy that paragraph 12 of the Joint Committee report uses the expression, "pension rights already accrued", to refer to pension rights which have accrued according to the administrative practice up to then (as distinct from as a matter of legal entitlement). This underscores the point that the staff side and the management side regarded the detailed administrative rules operated under the 1965 Act as creating what was in substance a set of accrued rights based on length of service. Viewed as accrued rights, these fell to be protected from future changes to the scheme.

45. Moreover, under the scheme contained in the 1965 Act, compensation for early retirement etc. under the scheme was integrated with the general provisions on payment of pensions. So, for example, where a civil servant aged 50 or over was subject to premature retirement, he was to be entitled to early payment of pension and a lump sum (section 10 of the 1965 Act, read with section 5). The scheme did not draw a distinction between ordinary pensions and lump sums payable on reaching ordinary retirement age on the one hand, and pensions and lump sums payable upon termination of employment at different times on the other. This feature of the scheme, in existence when the 1972 Act was passed, serves to reinforce the point made by Mr Giffin that no distinction in terms of protection of "accrued rights" in relation to pensions and other payments was intended to be drawn between retirement at ordinary retirement age or earlier dismissal so far as the protection conferred by section 2(3) was concerned.

46. This integration of compensation rights and pension rights referred to above continued to be a feature of the first scheme made by the Minister under section 1 of the 1972 Act – the PCSPS - which was laid before Parliament on 15 June 1972 and came into operation on 16 June 1972, and of the PCSPS as it stood when section 2(3)

of the 1972 Act was amended in 1990. It also continued to be a feature of the CSCS when it was separated off from the PCSPS as a distinct scheme in 1994 (as described below), as is illustrated by the terms of rule 2.2 of the CSCS set out above. It continues to be a feature of the amended CSCS.

47. Further, although at the time the 1972 Act came into force the relevant scheme (i.e. that contained in the 1965 Act) did not contain any legal entitlements on the part of civil servants to receive the pension and lump sum payments which it was expected would be paid, it did set out a regime by reference to which any civil servant could invite the Minister to exercise his discretion to make such payments in his favour. In relation to a decision in that regard, the civil servant might have public law claims against the Minister if he did not exercise his discretion in a fair and proper manner. Those claims would be likely to be improved if the Minister continued, despite amendment of the scheme, to be subject to an administrative practice or policy of making payments calculated by reference to length of reckonable service in accordance with the scheme prior to its amendment. In particular, it might well be difficult in public law terms for the Minister to fail to recognise existing administrative entitlements as set out in the scheme in individual cases. Therefore, protection by virtue of section 2(3) of "accrued rights" under the administrative scheme, even though they did not constitute legal entitlements as such, would be of real legal benefit to the individuals who had accumulated them by long service. It is plausible to infer that, for this reason also, Parliament intended by section 2(3) of the 1972 Act to confer protection for individuals in relation to such "accrued rights".

Development of the legal framework from 1972 and the interpretation of section 2(3) of the 1972 Act as amended

48. At first, the schemes made by the Minister under section 1 of the 1972 Act followed the pattern of the scheme under the 1965 Act by dealing with pensions and compensation arrangements in a single scheme – the PCSPS. Rule 8.1 of the PCSPS gave effect to the recommendation of the Joint Committee in paragraph 91 of its report by adapting the language of section 79 of the 1965 Act to provide that certain benefits, including "compensation payments for premature retirement under section 10 [of the PCSPS]", should be paid only as a matter of discretion not right. By inference from that provision and from the language of entitlement in relation to other benefits (such as pension benefits) used elsewhere in the PCSPS, the PCSPS conferred legal rights to those other benefits (including, on its proper construction in light of the Joint Committee report, pension benefits when they became payable in respect of early loss of employment).

49. In 1990 the 1972 Act was amended by the Pensions (Miscellaneous Provisions) Act 1990 ("the 1990 Act"). The changes were introduced to take account of pension rights under money purchase schemes which were now to be available (i.e. schemes whereby additional pension rights could be purchased by money contributions made by employees). Section 2(3) of the 1972 Act was amended so as now to read:

> "No scheme under the said section 1 shall make any provision which would have the effect of reducing the amount of any pension, allowance or gratuity, in so far as that amount is directly or indirectly referable to rights which have accrued (whether by virtue of service rendered, contributions paid or

any other thing done) before the coming into operation of the scheme, unless the persons consulted in accordance with section 1(3) of this Act have agreed to the inclusion of that provision."

50. This is the provision which is currently in force. Ms Laing submits that the new reference to "rights which have accrued" in section 2(3) (as amended) shows that the provision confers protection only in relation to benefits under the PCSPS or CSCS to which individual civil servants have a full legal entitlement. She further submits that such benefits are limited to benefits payable when retirement occurs at normal retirement age and do not include benefits payable under the CSCS in relation to redundancy, compulsory early retirement and so forth.

51. I do not accept these submissions. As to the first point, in my judgment the phrase "rights which have accrued" uses the words "rights" and "accrued" in the same natural, non-technical sense in which they were used in paragraph 12 of the Joint Committee report. In the context of the PCSPS as it stood down to 1994 and now in the context of the PCSPS and CSCS, those entitlements which existed as a matter of administrative practice (albeit not as a matter of legal right) were nonetheless regarded by both staff and management sides as "accrued rights" in the sense relevant for the protection of section 2(3) to apply. The position down to 1972, according to which benefits which were as a matter of legal form discretionary were nonetheless treated in substance as entitlements and were in fact always paid, had been continued without a break up to the amendment of the law in 1990. Moreover, the language in the PCSPS in relation to such discretionary benefits was the language of entitlement and right. Thus, on the natural reading of section 2(3) in its particular context and against the background of the Joint Committee report, I consider that the phrase, "rights which have accrued", was apt to cover both those pension and other rights which were a matter of legal entitlement and also other "rights" to benefits which were in substance a matter of administrative entitlement.

52. This interpretation of section 2(3) as amended is supported by a number of other factors:

i) Under the PCSPS as it stood in 1990, entitlements to pension payments and to other lump sum payments were closely bound up together, were expected to be paid in each case as of course, and there was no apparent reason for treating them differently in terms of protection under section 2(3). The reason given in the Joint Committee report and subsequently for continuing to treat some benefits as discretionary was to secure tax advantages for employees, which reason did not suggest that there should be any lesser protection in respect of such benefits than in respect of pension payments so far as concerns the operation of section 2(3);

ii) It appears from examination of the terms of the 1990 Act and the other amendments it introduced into the 1972 Act (see e.g. section 1(2A), referring to money purchase schemes) that the intention of Parliament in the 1990 Act was simply to make amendments to the 1972 Act to accommodate money purchase schemes and not to remove or cut down substantive protective rights

conferred by the 1972 Act as originally enacted, in particular in section 2(3). If the intention had been to remove or cut down the protection for individuals afforded by section 2(3) as originally enacted, I think that much clearer language would have been used; and

iii) The Minister who introduced the 1990 amendment in Parliament made statements on the second reading of the Bill in 1990 (see Hansard, HC Deb., 8 January 1990, vol. 164 cols. 709-727) which made clear that there was nothing "in this largely technical and tidying up Bill that needs to be controversial..." and that the Bill made only "minor changes to the legislative framework for public service pensions" including "minor consequential amendments occasioned by the wider scope for making additional voluntary contributions introduced following the Social Security Act 1986" and did "not make major amendments to the existing law". In relation to the clause containing the amendment to section 2(3) of the 1972 Act, he said: "[it] brings money purchase pension schemes for civil servants within the scope of the existing arrangements for agreeing amendments to civil service pension schemes that may adversely affect the accrued rights of scheme members or pensioners". In my view, these statements constitute statements in Parliament by the promoter of the Bill of the requisite clarity to provide a good indication of the object or mischief at which a provision was aimed, to which it is legitimate and appropriate to have regard when interpreting the legislation in question. The statements clearly show that it was no part of the purpose for the amendment to cut down existing protective rights as already set out in section 2(3), but rather was to extend that existing protection to cover rights of the relevant kind which had been acquired by making additional voluntary contributions as well as by length of service.

53. In addition to these statements in Hansard, both parties sought to rely upon the notes on clauses which were prepared in relation to the relevant amendment in 1990. It appears that these notes on clauses were circulated generally to MPs, unlike the notes on clauses in relation to the 1972 Act referred to in para. [42] above. This seemed to have been done pursuant to a practice which developed for Ministers to share notes on clauses with MPs (see *Craies on Legislation*, 9th edition, paragraph 9.4.1). This was in the period before the adoption of the modern practice of publishing Explanatory Notes alongside Bills: see *Craies*, paras. 9.4.1 to 9.4.5 and 27.1.7; *Bennion, op. cit.*, pages 641-643.

54. There are some examples in the authorities of reference being made to notes on clauses (see *Davidson v The Scottish Ministers* [2005] UKHL 74 at [50] per Lord Hope and *R. v St Helens Justices, ex p. Jones* [1999] 2 All ER 73), but it is unclear quite what weight is given to them in these cases and there was no detailed discussion whether it is in fact appropriate for reference to be made to such materials as aids to the interpretation of an Act of Parliament.

55. In my judgment, notes on clauses (as distinct from published explanatory notes) are not a proper aid to the interpretation of an Act of Parliament, whether they are circulated to MPs (as happened in relation to the 1990 Act) or not (as in relation to the 1972 Act). Although in the former case, unlike the latter case, it might be argued that there are some grounds for saying that the notes on clauses form part of the contextual background against which the Bill was passed by Parliament as a collective body, so

that they should be taken to have an interpretive role and status analogous to that of statements in a White Paper proposing legislation, or in clear statements by a promoter of a Bill in Parliament or in modern form Explanatory Notes, I think that there is an important difference from all these cases. Notes on clauses when not cited in debate are private documents not available to the public at large, unlike White Papers, statements reported in Hansard and published Explanatory Notes. An Act of Parliament creates law applicable to all citizens. In my judgment, it is fundamental that all materials which are relevant to the proper interpretation of such an instrument should be available to any person who wishes to inform himself about the meaning of that law. That is not the position in relation to notes on clauses and for that reason I do not consider they are a legitimate aid to construction of an Act of Parliament. (I should perhaps add that, in any event, even if reference were to be made to the notes on clauses for the 1990 Act, they would in my view serve to confirm the point already made above by reference to Hansard).

56. For these reasons, I accept Mr Giffin's submission that section 2(3) of the 1972 Act as amended is properly to be interpreted as conferring protection in relation to all entitlements in the PCSPS and CSCS referable to length of service and contributions paid, whether they constitute legal entitlements in the full sense or entitlements as a matter of established and declared administrative practice as set out in any relevant scheme made under section 1 of the 1972 Act.

Application of section 2(3) of the 1972 Act in relation to the CSCS

57. It remains to explain the significance of that conclusion in relation to the present situation. After the 1972 Act was amended in 1990, further changes were made to the PCSPS. In 1994, for reasons to do with seeking to ensure that the civil service pension scheme complied with Inland Revenue standards and with seeking to facilitate possible privatisation of public services, the elements of the PCSPS which related to redundancy, compulsory early retirement and so forth were separated off from the ordinary pension provisions, to constitute the CSCS. The CSCS was made as a scheme under section 1 of the 1972 Act, since it amended the PCSPS: see sections 2(9) to 2(11) of the 1972 Act. However, it is clear that this change was not intended to produce any substantive alteration in the pension and other benefits available to civil servants, and the CSCS and PCSPS remained closely linked, as rule 2.2 of the CSCS set out above illustrates.

58. The CSCS continued to include a provision derived from section 79 of the 1965 Act. Rule 1.4 of the CSCS provides:

> "Compensation payments for early retirement or severance under sections 2 to 8 of this scheme and for personal injury under section 10 of this scheme will be paid at the discretion of the Minister, and nothing in this scheme will extend or be construed to extend to give any person an absolute right to them."

But, as with the PCSPS before the changes in 1994, other provisions in the CSCS (including in sections 2 to 8 and section 10) are expressed in terms of entitlement: see e.g. rule 2.1 set out above.

59. The change in 1994 to hive the CSCS off from the PCSPS therefore left the basic pattern for provision of benefits unchanged from what it had been when the 1972 Act was enacted. As before 1994, all benefits under the PCSPS and CSCS, whether payable as a matter of legal or administrative entitlement, were paid without exception. In light of the interpretation of section 2(3) of the 1972 Act as amended set out above, therefore, those benefits under the CSCS in relation to redundancy, compulsory early retirement and the like, which are defined by reference to length of service or contributions paid, all attract the protection of section 2(3). The Claimant's agreement is required before the terms governing the amount of those benefits may be altered.

60. For these reasons, the Claimant's application for judicial review succeeds and the amended CSCS falls to be quashed. Consideration will now need to be given to what any quashing order should say and how far the effects of this judgment extend. The parties should consider the terms of the order which they propose should be made in the light of this judgment. Any outstanding area of dispute in relation to the terms of the order can be referred back to the court for determination.

61. Since I have accepted the Claimant's primary case based on section 2(3) of the 1972 Act, it is neither necessary nor appropriate to consider its alternative case based on an alleged breach of legitimate expectation, nor the other alternative cases it presented in relation to the operation of section 2(3) of the 1972 Act.