

States Employment Board – follow up: Employment of the former Chief Executive

20 May 2021

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Summary

Introduction

1. On 9 November 2020 the Chief Minister announced that he had agreed with the former Chief Executive that the former Chief Executive should stand down from his role.
2. This review evaluates the circumstances surrounding the severance of the employment of the former Chief Executive and constitutes the first phase of my follow up of my predecessor's 2019 review of the *Role and Operation of the States Employment Board (SEB)*. My work evaluates the severance of employment of the former Chief Executive in so far as it relates to:
 - internal control
 - economy, efficiency and effectiveness; and
 - corporate governance.
3. The review is limited to this single severance of employment but is designed to identify lessons that are applicable more generally.

Key findings

4. The key findings from my review are as follow:
 - in 2017, the SEB, as employer of the former Chief Executive, took a key role in agreeing the former Chief Executive's terms and conditions of employment outside the terms and conditions that apply to other staff. It is not unusual to negotiate individual terms and conditions with a chief executive. The inclusion of specific provisions relating to a mutually agreed exit reflects the risks associated with assuming such a high-profile leadership role
 - at the time that the contract of employment was agreed, the SEB considered the employer's potential liabilities in the event of early termination of the contract or early retirement of the former Chief Executive. It made an informed decision on the nature of the terms which it was willing to agree

- the contract of employment allowed the former Chief Executive to be engaged in secondary employment provided it was approved in writing by the employer. The former Chief Executive sought and received verbal approval from the Chief Minister for his non-executive directorship at NewRiver REIT plc. He accepts that he did not seek or receive written approval from his employer prior to the appointment
- the SEB has a statutory right to delegate its functions as employer to a member of the SEB and to the Chief Executive. In practice the Chief Minister acted as line manager for the former Chief Executive. This position was not however supported by a formal delegation from the SEB. Therefore, any request for secondary employment should have been considered by the SEB as a whole rather than by the Chief Minister as a member of the SEB. The SEB subsequently consented to the secondary employment on 29 October 2020
- there were limited procedures in place to deal with situations where the Chief Executive had a conflict of interest. In my view the former Chief Executive was conflicted in approving the response to a press enquiry regarding his non-executive director role at NewRiver REIT plc, as he was the employee who had secured secondary employment. In my view the response should have been approved instead by appropriate senior officers who did not have a personal interest in the matter
- after consideration, on 5 November 2020 the Council of Ministers expressed the opinion that the non-executive director role held by the former Chief Executive at NewRiver REIT plc was incompatible with his role as Chief Executive
- the SEB considered alternative options before reaching a compromise agreement with the former Chief Executive for the severance of his employment. There were however limitations to the alternative options
- the compromise agreement reached resulted in a payment of £500,000 to the former Chief Executive. This £500,000 payment to the former Chief Executive was, at the time of the compromise agreement, in excess of his maximum entitlement under his contract of employment and associated side letter. However, I consider that the actual settlement agreed was reasonable in light of the potential claims that the employer might have faced and the costs of defending them
- the fact that the value of the settlement agreed was for more than the contractual entitlement had consequences in respect of the requirements

of the Public Finances Manual issued under the Public Finances (Jersey) Law 2019. The external auditors of the States of Jersey, Mazars LLP (Mazars), have qualified their audit opinion on the regularity of the States' income and expenditure in 2020 on an 'except for' basis. Mazars report that, in their opinion, except for the settlement with the former Chief Executive, income and expenditure transactions conform to the authorities which govern them in all material respects. In respect of the settlement with the former Chief Executive, Mazars report that the Public Finances Manual (Special Payments) requires that, where special payments are being considered, Treasury and Exchequer must be consulted in advance. Mazars concluded that the amount agreed was in excess of the minimum contractual requirements and the consultation required by the Public Finances Manual did not take place. Whilst Mazars have issued a qualified opinion on regularity, this does not mean that the States lacked the power to agree and make the payment

- there was initial uncertainty as to which budget head the severance payment fell under and therefore who should be the Accountable Officer for the payment made to the former Chief Executive. Clarification of the scope of Government Plan approvals would reduce the incidence of such ambiguities
- the former Chief Executive was subsequently re-employed under a fixed term contract with a period of seven days between the termination of his original contract of employment and the commencement of a new fixed term contract. During this seven day period the former Chief Executive acted as an unpaid advisor to the Council of Ministers. The exact nature and status of his role was not documented or communicated to senior staff; and
- there was a common understanding that the former Chief Executive remained Chief Executive (and therefore held the associated roles of Principal Accountable Officer and Head of Paid Service) in the period of overlap of 31 days between the former Chief Executive's fixed term contract and the employment of the Interim Chief Executive. However, there was the potential for confusion as the written contracts of both individuals stated that they held the post of Chief Executive and performed the associated roles.

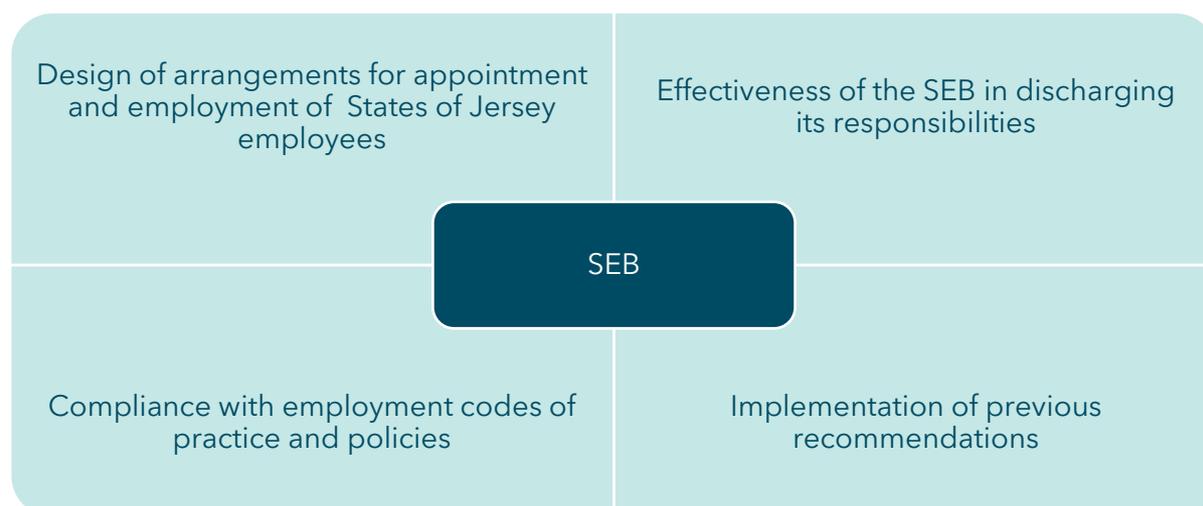
Conclusions

5. The circumstances of and processes followed in respect of the severance of the employment of the former Chief Executive have highlighted a number of weaknesses in policies and procedures in the States of Jersey. Recommendations from previous Comptroller and Auditor General (C&AG) reports in respect of improved documentation standards for cases leading to compromise agreements and ensuring that reports to and minutes of the SEB include a clear rationale for exit terms proposed and agreed, have not been implemented.
6. Whilst I consider that the settlement reached was not unreasonable in the circumstances, I have made a number of recommendations to improve policies and procedures going forwards.

Objectives and scope of the review

7. In 2019 the then C&AG undertook a review of the performance of the SEB. The 2019 review evaluated performance in four areas (see Exhibit 1).

Exhibit 1: Structure of the 2019 report



8. My predecessor concluded that the arrangements for the SEB were not fit for purpose and made recommendations relating to:
- strengthening the arrangements for oversight of human resources (HR), including refining the role of the SEB
 - enhancing the way in which the SEB discharged its functions; and
 - strengthening arrangements for monitoring of compliance with the HR framework and agreed recommendations for improvement.
9. My audit plan for 2021 published in January 2021 includes a follow up review of my predecessor's report on the *Role and Operation of the States Employment Board* (March 2019). This follow up review includes an assessment of the progress made in implementing recommendations relating to HR oversight and management and to the operation of the SEB, from the following previous C&AG reports:
- *Utilisation of Compromise Agreements - Follow Up* (May 2016)
 - *Use of Consultants* (October 2016); and
 - *Financial Management and Internal Control* (September 2019).

10. The recommendations made included recommendations about the use of compromise agreements and more widely about performance management. In particular my predecessor recommended:
 - improved documentation standards for cases leading to compromise agreements, including communications with employees or their representatives, legal advice, checking of calculations and a clear rationale for the proposed terms of an agreement; and
 - ensuring that reports to and minutes of the SEB include a clear rationale for exit terms proposed and agreed.
11. On 9 November 2020 the Chief Minister announced that he had agreed with the former Chief Executive that the former Chief Executive should stand down from his role.
12. This review evaluates the circumstances surrounding the severance of employment of the former Chief Executive by mutual consent and constitutes the first phase of my follow up review of the role and operation of the SEB. My work evaluates the severance of employment of the former Chief Executive in so far as it relates to:
 - internal control
 - economy, efficiency and effectiveness; and
 - corporate governance.
13. The review is limited to this single severance of employment but is designed to identify lessons that are applicable more generally.
14. The review approach is explained in detail in Appendix One.

Detailed findings

Background

The post of Chief Executive

15. Article 3 of the Employment of States of Jersey Employees (Jersey) Law 2005 ('the 2005 Law') establishes the post of Chief Executive. The post holder is:
 - Chief Executive to the Council of Ministers
 - Head of Paid Service, responsible for leading chief officers in the administration and general management of the public service and the implementation of corporate and strategic policies. In this capacity the Chief Executive has certain powers to hold chief officers to account and to direct chief officers; and
 - by virtue of Articles 38 of the Public Finances (Jersey) Law 2019 ('the 2019 Law'), the Principal Accountable Officer. Under Article 39 of the 2019 Law, the Principal Accountable Officer has responsibility for ensuring:
 - the propriety and regularity of the finances of the States of Jersey, other than Non-Ministerial Departments; and
 - that resources are used economically, efficiently and effectively.
16. The role of the Chief Executive and the roles of the Principal Accountable Officer and Head of Paid Service cannot be split. In other words, it is only possible to have one person who acts as the Chief Executive, the Principal Accountable Officer and the Head of Paid Service.

The Council of Ministers

17. Article 18 of the States of Jersey Law 2005 establishes a Council of Ministers comprising a Chief Minister and at least seven Ministers responsible for, amongst other things, co-ordination of policy and administration of the areas for which the Ministers have responsibility.
18. The post of Chief Executive is formally that of Chief Executive to the Council of Ministers. While not employed by the Council of Ministers, the Chief Executive has an accountability to the Council of Ministers.

The Chief Minister

19. Article 18 of the States of Jersey Law 2005 establishes the post of Chief Minister. The Chief Minister is responsible, amongst other things, for co-ordination of discharge of functions through the Council of Ministers.

The States Employment Board

20. The Employment of States of Jersey Employees (Jersey) Law 2005 ('the 2005 Law') establishes the SEB that comprises:
 - the Chief Minister or his nominee
 - two Ministers or Assistant Ministers; and
 - two other members of the States Assembly.
21. The 2005 Law provides for the appointment of one or two independent advisors to the SEB who have a right to attend and speak at its meetings. The SEB has appointed one such advisor.
22. The SEB is the statutory employer of States employees. Its functions include:
 - ensuring that the public service conducts itself with economy, efficiency, probity and regularity
 - ensuring the health, safety and well-being of States employees
 - determining other matters necessary for the proper administration and management of States employees
 - giving directions concerning consultation or negotiation relating to terms and conditions of employment; and
 - issuing codes of practice relating to the employment of States employees.
23. Article 10(1) of the 2005 Law permits the SEB to delegate any of its powers or functions under the Law to any of its members, or to the Chief Executive. Article 10(3) provides for powers or functions delegated to the Chief Executive to be further delegated to another person, as prescribed.
24. On 20 October 2017, the SEB decided to delegate certain of its functions under Article 10(1) of the 2005 Law. The terms of the delegations, and the legislation under which those delegations were made, were recorded in the Report of the SEB to the States Assembly (R.118/2017).

Timeline

25. The key events to which my report relates occurred in a short period in October and November 2020 and led to an agreement for the severance of employment of the former Chief Executive. However, those events should be seen in the context of previous and subsequent events (see Exhibit 2).

Exhibit 2: Engagement and severance of employment of the former Chief Executive

Date	Activity
July - November 2017	SEB discussions relating to terms and conditions of employment the former Chief Executive
28 November 2017	Signature of 'side letter' in relation to pensions from Chair of the SEB to the former Chief Executive
30 November 2017	Signature of contract with the former Chief Executive
8 January 2018	The former Chief Executive takes up post
Late 2019	The former Chief Executive first raised the possibility of the NewRiver REIT plc non-executive appointment with the Chief Minister
Summer 2020	Further conversations between the former Chief Executive and the Chief Minister regarding the NewRiver REIT plc position
10 October 2020	NewRiver REIT plc announces appointment of the former Chief Executive as a non-executive director
26 October 2020	Press enquiry about the former Chief Executive's appointment as non-executive director of NewRiver REIT plc
29 October 2020	Meeting of the SEB to discuss appointment of the former Chief Executive as non-executive director of NewRiver REIT plc The SEB consents to the appointment
30 October 2020	SEB public statement regarding its consent to the secondary employment of the former Chief Executive
1 November 2020	Informal meeting of the Council of Ministers to discuss the issues relating to the secondary employment

Date	Activity
3 November 2020	<p>Meeting of the SEB</p> <p>Letter from the former Chief Executive to the Chief Minister containing an explanation for and chronology of the events, an apology for the omission in securing written approval and a proposed way forward that retained the Chief Executive role and the non-executive directorship</p>
4 November 2020	<p>Meeting of the SEB to discuss the issues arising</p>
5 November 2020	<p>Meeting of the Council of Ministers recording the Council's position in respect of the non-executive directorship held by the former Chief Executive</p> <p>Meeting of the SEB giving further consideration to the circumstances surrounding the non-executive directorship</p>
6 November 2020	<p>Two meetings of the SEB to discuss the situation</p> <p>The former Chief Executive and his representative attend for part of the first meeting</p> <p>The SEB issues a public statement</p>
7 November 2020	<p>Letter from the former Chief Executive to the Chief Minister regarding the situation</p>
9 November 2020	<p>Two meetings of the SEB concerning the former Chief Executive's employment</p> <p>Letter to the Chief Minister from the former Chief Executive in which the former Chief Executive confirms his agreement to step down from the Chief Executive role</p>
12 November 2020	<p>Signing of compromise agreement between the SEB and the former Chief Executive for severance of employment by mutual consent on 31 December 2020</p>
26 November 2020	<p>SEB meeting considers the re-employment of the former Chief Executive prior to the Interim Chief Executive taking up post</p>
8 December 2020	<p>SEB meeting receives an update on progress being made with the contract to re-employ the former Chief Executive on a fixed term basis</p>
23 December 2020	<p>Contract signed for the re-employment of the former Chief Executive on a fixed term basis</p>

Date	Activity
31 December 2020	End of permanent contract of the former Chief Executive
8 January 2021	Commencement of fixed term contract of the former Chief Executive for re-employment as the Chief Executive
29 January 2021	Contract of employment signed with the Interim Chief Executive for a fixed term from 1 March 2021 to 28 February 2022
1 March 2021	Commencement of fixed term contract of Interim Chief Executive
31 March 2021	End of fixed term contract of the former Chief Executive

Contract of employment

26. In 2017, the SEB, as employer of the former Chief Executive, took a key role in agreeing the former Chief Executive's terms and conditions of employment outside the terms and conditions that apply to other staff.
27. There were three elements of the contractual terms that are relevant to events that subsequently transpired:
- the former Chief Executive was allowed to take other employment, whether paid or unpaid, with the consent in writing of the employer
 - there was a provision relating to a mutually agreed ending of the contract. If the former Chief Executive and the employer brought the contract to an end by mutual consent, other than retirement, two or more years after the commencement of employment, the former Chief Executive would be entitled to a payment of up to a specified amount subject to entering into a severance agreement in a form agreeable to the employer. Such a payment would be in full and final settlement of all claims against the employer; and
 - there was a provision dealing with access to pension benefits in the Public Employees' Pension Scheme (PEPS) prior to attaining Normal Pension Age (NPA) which, in the case of the former Chief Executive, was 66 years and 4 months. Normally pension benefits accessed before NPA are subject to an actuarial reduction to reflect the longer period of payment. However, the contract and associated side letter provided that, if the former Chief

Executive chose to retire before his NPA, the employer would use its best endeavours to alleviate any actuarial reduction by making a contribution to PEPS provided that the total cost of such reduction did not exceed a specified amount. It is important to note that:

- the relevant clause is triggered by a decision of the former Chief Executive to retire and draw benefits in PEPS. The rights under it are not dependent on mutual agreement between the former Chief Executive and the employer to bring the contract of employment to an end; and
- the relevant clause only gives a right to early access to a pension without a reduction for early drawing subject to a cap on the cost of providing that benefit. It does not provide a right for any increase in pension benefits in the event of early retirement before NPA.

28. The provision in respect of pension was a matter of debate by the SEB before the contract was agreed in November 2017. As originally proposed in the draft contract of employment, there was no cap. The SEB was concerned about the potential liability faced if the former Chief Executive transferred other pension benefits to PEPS. The SEB proposed a cap on the contribution it would make to PEPS to alleviate the reduction in pension for early drawing if the former Chief Executive chose to retire before his NPA. This cap was reflected in the final side letter. If the payment by the employer to PEPS required to remove the reduction for early drawing was less than the cap specified in the side letter, only such lower amount would be payable.
29. I recognise that individual terms and conditions were negotiated with the former Chief Executive. This is not unusual. The inclusion of specific provisions relating to a mutually agreed exit reflects the risks associated with assuming such a high-profile leadership role.
30. The SEB considered the employer's potential liabilities in the event of early termination of the contract or early retirement of the former Chief Executive. It made an informed decision on the nature of the terms that it was willing to agree.
31. There was no requirement in place for the SEB to consult with the Treasurer of the States (the Treasurer) or Treasury and Exchequer before entering into a contract that exposed the States of Jersey to potential liabilities in the event of early termination. Whilst staff from Treasury and Exchequer provided information to the SEB in respect of the potential pension liability, the Treasurer was not formally consulted at the time the contract was signed.

Recommendation

- R1** Change the requirements of the Public Finances Manual to require consultation with the Treasurer and the relevant Accountable Officer prior to entering into an employment contract with non-standard clauses that could expose the States of Jersey to liabilities.

Non-executive directorship

32. The SEB has a statutory right to delegate its functions as employer to a member of the SEB or to the Chief Executive. Whilst certain delegations were in place, there were no specific delegations documented in respect of the line management of the Chief Executive.
33. The Chief Executive position is Chief Executive to the Council of Ministers. In practice, the Chief Minister acted as the line manager of the former Chief Executive even though this was not documented in a formal delegation from the SEB.
34. The former Chief Executive first raised the possibility of the NewRiver REIT plc ('NewRiver') non-executive directorship with the Chief Minister late in 2019. Further conversations had then taken place in the summer of 2020. The Chief Minister gave his verbal consent to the former Chief Executive accepting this secondary employment.
35. The contract of employment allowed the former Chief Executive to be engaged in secondary employment provided it was approved in writing by the employer. The former Chief Executive sought and received verbal approval from the Chief Minister for his non-executive directorship at NewRiver. Around the time of the appointment the former Chief Executive was experiencing some difficult personal issues. He accepts that he did not seek or receive written approval from the employer prior to the appointment.
36. As the SEB had not documented a formal delegation to the Chief Minister in respect of the line management of the former Chief Executive, any request for secondary employment should have been considered by the SEB as a whole.
37. On 26 October 2020, the Government of Jersey's Press Office received an enquiry from a journalist about the former Chief Executive's appointment as a non-executive director of NewRiver. On the same day, the Press Office forwarded the questions posed to the Chief Executive's Office and they were subsequently shared with the former Chief Executive.

38. On 27 October 2020, the journalist concerned requested an update. The former Chief Executive provided information to the Press Office in response to the questions posed. That information was used by the Head of Media and Stakeholder Relations to prepare a response to the queries. This response was subsequently approved by the former Chief Executive and provided to the journalist.
39. The Press Office protocol required appropriate approval from senior officials and Ministers. As there was no ministerial quote in this response to media queries, approval was considered as obtained through the former Chief Executive. The former Chief Executive spoke with the Chief Minister and an Assistant Chief Minister about the non-executive director role. The former Chief Executive has subsequently acknowledged, in the circumstances, it would have been appropriate to have spoken to Ministers before the statement was shared widely to ensure they were in agreement.
40. In my view the former Chief Executive was conflicted in approving the response to the press enquiry, as he was the employee who had secured the non-executive directorship. I consider that the response should have been approved instead by appropriate senior officers who did not have a personal interest in the matter.
41. In fact, the agreed response was inaccurate. It stated that the Chief Minister and the Deputy Chief Minister had both approved the former Chief Executive accepting the non-executive directorship. Whilst the former Chief Executive and the Chief Minister had briefed the Deputy Chief Minister on the non-executive directorship, the Deputy Chief Minister was not required to give and had not given his approval to the appointment.
42. The SEB met on 29 October 2020 and at that meeting consented to the former Chief Executive's secondary employment. The SEB made a public statement to this effect on 30 October 2020 in which it noted that 'we have directed that the administrative shortcomings be corrected immediately and that should any potential conflict of interest arise, this would be brought to our attention without delay'.
43. The Council of Ministers met on 1 November 2020 to discuss the issues relating to the non-executive directorship of the former Chief Executive. The former Chief Executive wrote to the Chief Minister on 3 November 2020 to set out his position and answer matters raised by the Council of Ministers.
44. The SEB met on 4 November 2020 to consider the position further. Various alternative options were discussed including the potential for a negotiated settlement. It was apparent at this meeting that there were weaknesses in any potential disciplinary processes available.

45. The disciplinary processes and procedures for employees in place within the States of Jersey had not been written with the position of Chief Executive in mind. As a consequence, there were no specific procedures that could be used in the event of any need to take disciplinary action in respect of the former Chief Executive, outside of the procedures that applied to any other member of staff. The position of Chief Executive is however unique in that:
- the management reporting line for the Chief Executive is to the Chief Minister and the Council of Ministers, some of whom sit on the SEB; and
 - the normal appeals processes that are part of the disciplinary procedure may not be possible to implement in practice. This is because appeals processes use line management hierarchy with independent, more senior, officers sitting on appeals panels. In respect of the Chief Executive, the SEB would need to operate both the disciplinary process and the appeals process. Given that the SEB includes members of the Council of Ministers (up to three), there may be insufficient remaining members of SEB, who are not conflicted, to operate an effective appeals process.
46. The Council of Ministers met on 5 November 2020 and stated its position that the non-executive directorship held by the former Chief Executive was incompatible with his role as Chief Executive.

Recommendations

- R2** Develop a suitable disciplinary policy and supporting process specific to the post of Chief Executive.
- R3** Document formally a policy in respect of the line management of the Chief Executive as an employee including any specific delegations of responsibilities from the SEB.
- R4** Update policies and procedures for dealing with perceived and actual conflicts of interest of senior employees including the Chief Executive.

Severance of employment

47. Events moved quickly between 6 and 12 November 2020 when the compromise agreement was signed on behalf of the SEB and the former Chief Executive for the severance of employment by mutual consent on 31 December 2020. The SEB met a total of four times (including a meeting with the former Chief Executive). The former Chief Executive wrote to the Chief Minister twice providing his suggestions on a way forward. Discussions also took place regarding the potential terms for a

compromise agreement. It is not necessary for the purposes of this report to set out events in detail. Instead, I focus on the following areas:

- the terms agreed
- a decision of the SEB to review the appointment process; and
- minuting of the SEB deliberations.

Agreed terms

48. Following negotiations, the SEB agreed terms for the former Chief Executive's contract to come to an end on 31 December 2020. As disclosed in the States' Annual Report and Accounts the agreed severance payment to the former Chief Executive was £500,000.
49. I do not question that the settlement was reasonable in light of the potential claims that the employer might have faced and the costs of defending them.
50. The minutes of the SEB second meeting of 9 November 2020 note that the SEB 'was prepared to offer the minimum contractual entitlement in full and final settlement'. In making its decision, the SEB considered that the minimum contractual entitlement was a value of £500,000. However, £500,000 was the maximum potential entitlement under the contract if a particular set of circumstances existed, namely:
 - if there was mutual agreement between the former Chief Executive and the employer to pay the former Chief Executive the maximum specified amount in the mutual termination clause in the contract; and
 - if the former Chief Executive chose to retire before his NPA and the cost of alleviating any actuarial reduction in pension exceeded a specified amount. In this situation the specified amount would be paid as a contribution to PEPS.
51. These circumstances did not exist at the time the compromise agreement was signed. As a consequence, the settlement does not, in my view, fall entirely within the agreed contract of employment terms.
52. Considering the settlement against the contract and associated side letter:
 - the former Chief Executive was entitled to **up to** a specified amount on leaving office by mutual agreement having served more than two years. The settlement the SEB agreed included payment to the former Chief Executive for the maximum specified amount

- under the terms of the side letter the obligation on the employer in respect of pension was only to make best endeavours to alleviate the cost **up to** the amount specified in the side letter by making a payment to PEPS based on an actuarial valuation, in the event that the former Chief Executive chose to retire before his NPA. The SEB did not obtain any advice on the cost of alleviating the actuarial reduction for early drawing of pension prior to agreeing the settlement
- the former Chief Executive had not transferred any pension benefits into PEPS and, as a consequence, the actuarial valuation would have been less than the maximum amount specified in the side letter. I have been provided with evidence that the amount paid as part of the settlement in respect of pension was in excess of the actuarial valuation specified in the side letter; and
- the settlement payment made in respect of pension was a payment made directly to the former Chief Executive rather than a payment to PEPS.

53. As the settlement reached was for more than the sum of:

- the specified lump sum; and
- the contribution to PEPS required to remove the reduction for early drawing of pension

the settlement was in excess of not only the minimum but also the maximum entitlement under the contract of employment and associated side letter. The value of the settlement was therefore more than the contractual requirement.

54. As noted above, I do not question that the actual settlement agreed was reasonable in light of the potential claims that the employer might have faced and the costs of defending them. As there was no suitable documented disciplinary process, the costs of pursuing any disciplinary course of action could have been significant. The SEB was faced with an active potential claim which could have resulted in significant costs to defend.

55. The fact that the value of the settlement was more than the contractual requirement did however have consequences in respect of the Public Finances (Jersey) Law 2019 and the Public Finances Manual, which I consider further later in my report.

Review of appointment process

56. In the course of its deliberations, the SEB identified certain concerns about the original appointment process for the former Chief Executive. At its meeting of 24 November 2020, it resolved to request one member of the SEB and its Independent HR advisor to undertake a review of those aspects. However, that review has not been commenced and there is no reference to it in subsequent minutes of the SEB. The SEB has now commenced the recruitment process for a new permanent Chief Executive. If any lessons are to be learnt from the previous appointment process, it is important for the review planned by the SEB to take place as a matter of urgency.

SEB minutes

57. In the period from 29 October 2020 to 8 December 2020 the SEB met a total of 10 times with six of these meetings taking place in a compressed period between 3 November 2020 and 9 November 2020. The SEB met on multiple occasions, often at short notice, to discuss the former Chief Executive's employment. In one case the minutes of the SEB meeting were not finalised until over four months after the meeting to which they relate. Exhibit 3 contains more details.

Exhibit 3: Approval of SEB minutes

Date of meeting	Date draft minutes circulated to SEB members	Date minutes presented to SEB meeting for approval	Date minutes approved
29 October 2020	3 November 2020	27 January 2021	27 January 2021
3 November 2020*	8 February 2021*	24 February 2021 22 March 2021	22 March 2021
4 November 2020	9 December 2020	27 January 2021	27 January 2021
5 November 2020	9 December 2020	27 January 2021	27 January 2021
6 November 2020 (first meeting)	9 December 2020	27 January 2021	27 January 2021
6 November 2020 (second meeting)	9 December 2020	27 January 2021	27 January 2021
9 November 2020 (first meeting)	9 December 2020	27 January 2021	27 January 2021

Date of meeting	Date draft minutes circulated to SEB members	Date minutes presented to SEB meeting for approval	Date minutes approved
9 November 2020 (second meeting)	9 December 2020	27 January 2021	27 January 2021
26 November 2020	20 January 2021	27 January 2021	27 January 2021
8 December 2020	20 January 2021	27 January 2021 24 February 2021 22 March 2021 25 March 2021	25 March 2021

* evening meeting called at short notice. Member of staff from the States Greffe not in attendance. Informal notes presented to States Greffe on 3 February 2021 for States Greffe to produce formal minutes

58. In my view prompt preparation and agreement of minutes is a key component of effective governance.
59. My predecessor's report *Follow up of the Utilisation of Compromise Agreements* (May 2016) recommended that reports to and minutes of the SEB include a clear rationale for exit terms proposed and agreed. In respect of the compromise agreement entered into with the former Chief Executive, the reports to the SEB were verbal rather than written. The minutes of the SEB document the exit terms agreed although, as noted above, the SEB considered the terms agreed to be the minimum contractual exposure when they should more accurately be described as the maximum potential contractual entitlement.

Recommendations

- R5** Ensure that all decisions to enter into compromise agreements are supported by:
- a clear written rationale as to the decision taken, including alternatives considered and the proposed key terms of the agreement; and
 - clear calculations supporting any payments to be made, with a secondary check performed on such calculations.
- R6** Undertake the proposed review of the original appointment process for the former Chief Executive as soon as practicable and implement the findings from the review in the recruitment and appointment process for the new permanent Chief Executive.

- R7** Ensure that all SEB minutes are prepared promptly and are approved at the next meeting, where possible.

Public Finances (Jersey) Law 2019

60. The 2019 Law requires:
- the Minister for Treasury and Resources to issue a Public Finances Manual including directions and information with respect to the proper administration of the 2019 Law and the public finances of Jersey; and
 - the Principal Accountable Officer to appoint and determine the functions of Accountable Officers for Government of Jersey departments and specify their functions.
61. I consider these two requirements in turn as they relate to the agreed severance of the employment of the former Chief Executive.

Public Finances Manual

62. The Public Finances Manual distinguishes between:
- **'must'** that indicates that a provision must be followed unless an exemption has been approved in advance by the States Assembly, Treasurer or his delegate. In my view the 'must' provisions within the Manual constitute the directions referred to in Article 31 of the 2019 Law; and
 - **'should'** that indicates that there is an expectation that an approach is taken and that, where an alternative approach is taken, evidence should be recorded and retained.
63. The Public Finances Manual contains a section relating to 'special payments'. It defines special payments as 'current transactions outside of the usual planned range of [a] Body's activity' and provides a non-exhaustive list of such payments, including 'special severance payments'.
64. The Public Finances Manual states that 'special severance payments are paid to employees, contractors and others outside of normal statutory or contractual requirements when leaving employment in public service whether they resign, are dismissed or reach an agreed termination of contract.' The Public Finances Manual goes on to say that 'special severance payments always require additional

endorsement from Treasury and Exchequer and People Services because they are typically novel, contentious, potentially repercussive, and may set a precedent.’

- 65. As the payment to the former Chief Executive was more than contractual requirements, I am of the view that it constitutes a special payment to which the relevant provisions of the Public Finances Manual applied.
- 66. As illustrated in Exhibit 4 there was significant non-compliance with the requirements and expectations of the Public Finances Manual in the context of the payment to the former Chief Executive.

Exhibit 4: Compliance with the Public Finances Manual

Provisions of the Public Finances Manual	Analysis
<p>States Bodies must always consult Treasury and Exchequer on special payments unless there are specific agreed delegation arrangements in place. In addition Accountable Officers must take advice, where appropriate, from the Law Officers’ Department when considering the potential for a special payment, to ensure that their proposed course of action is lawful and does not expose the States of Jersey to unnecessary claims or losses or create precedents for future claims.</p>	<p>Although there was extensive engagement with the Law Officers’ Department, there was no consultation with Treasury and Exchequer prior to the decision to enter into the compromise agreement with the former Chief Executive.</p> <p>In my view the fact that the Minister for Treasury and Resources was a member of the SEB and participated in some of the deliberations relating to the matter does not mean that the requirement was complied with:</p> <ul style="list-style-type: none"> • the Minister for Treasury and Resources is not a member of the professional staff supporting the Treasurer of the States • the purpose of the provision is to ensure that relevant professional insight is brought to bear; and • the Public Finances Manual states that ‘Before any proposal for policy or legislation with financial implication is submitted for approval (for example to Corporate Strategy Board, Executive Management Team, OneGov Board,

Provisions of the Public Finances Manual	Analysis
	<p>Council of Ministers, States Assembly), States Bodies must ensure that they consult Treasury and Exchequer at the earliest stage possible.’ This supports the view that the Minister for Treasury and Resources does not form part of ‘Treasury and Exchequer’ for the purposes of the Public Finances Manual: if they did, consultation with Treasury and Exchequer prior to submission to the Council of Ministers (of which the Minister for Treasury and Resources is a member) would not be necessary.</p>
<p>The ultimate responsibility for agreeing to a special payment rests with the Accountable Officer for the head of expenditure from which the special payment will be made.</p>	<p>The decision to enter into the compromise agreement that in turn led to a commitment to make the payment was made without the involvement of an Accountable Officer. Indeed, at the time that the compromise agreement was entered into, the head of expenditure from which the payment would be made had not been determined and therefore the Accountable Officer was not identified (see below).</p>
<p>Special severance payments are paid to employees, contractors and others outside of normal statutory or contractual requirements when leaving employment in public service whether they resign, are dismissed or reach an agreed termination of contract. Special severance payments when staff leave public service employment should be exceptional.</p> <p>Special severance payments always require additional endorsement from Treasury and Exchequer and People</p>	<p>People Services was extensively involved in the deliberations of the SEB through the attendance of the Group Director for People and Corporate Services.</p> <p>Treasury and Exchequer was not consulted and its endorsement was not secured before the compromise agreement was entered into. However, the Treasurer of the States did undertake a review prior to the payment being made.</p>

Provisions of the Public Finances Manual	Analysis
<p>Services because they are typically novel, contentious, potentially repercussive, and may set a precedent. Overall, responsibility for any payment, however, remains with the Accountable Officer. As such, Bodies should always consult the Treasury and Exchequer in advance when considering a special severance payment.</p>	

67. I am concerned that the requirements of the Public Finances Manual that are designed to provide safeguards over the use of public funds were not fully complied with. The external auditors of the States of Jersey, Mazars, have qualified their audit opinion on the regularity of expenditure in 2020 on an ‘except for’ basis. Mazars report that, in their opinion, except for the settlement with the former Chief Executive, income and expenditure transactions conform to the authorities which govern them in all material respects. In respect of the settlement with the former Chief Executive, Mazars report that the Public Finances Manual (Special Payments) requires that, where special payments are being considered, Treasury and Exchequer must be consulted in advance. Mazars concluded that the amount agreed was in excess of the minimum contractual requirements and the consultation required by the Public Finances Manual did not take place. However, that does not mean that the States lacked the power to agree and make the payment.
68. Going forwards, I am of the view that the provisions of the Public Finances Manual should be reviewed:
- the Public Finances Manual is written as if Accountable Officers have authority over all expenditure where, in the context of employee costs, the ultimate decision-maker is the SEB; and
 - consultation prior to entering into a compromise agreement or making a payment is an ineffective safeguard where the quantum and terms of any payment may be affected by the original contract of employment entered into. As discussed under ‘Contract of employment’ above, it would be appropriate to introduce a requirement for consultation with Treasury and Exchequer prior to contractual terms being agreed.
69. More widely, there is an inherent tension between key pieces of legislation:

- the 2019 Law that gives extensive powers and responsibilities to the Principal Accountable Officer including responsibilities for ensuring that resources are used 'economically, efficiently and effectively' and 'ensuring the propriety and regularity of the finances of States bodies'; and
- the Employment of States of Jersey Employees (Jersey) Law 2005 that gives extensive powers and responsibilities to the States Employment Board, including ensuring that the public service conducts itself with 'economy, efficiency, probity and effectiveness.'

70. In my view this tension is unhelpful and enhanced clarity about respective accountabilities is needed.

Accountable Officer

71. A question arose as to the budget head to which the severance expenditure should be charged and therefore the Accountable Officer who was responsible for authorising the expenditure. The SEB has neither a budget nor an Accountable Officer. At the time the SEB made its decision to enter into the agreement no decision had been made as to which budget head the expenditure should fall and therefore which Accountable Officer should discharge the responsibilities set out in the Public Finances Manual.

72. The Accountable Officer for the Office of the Chief Executive was the former Chief Executive. The Chief of Staff was responsible for an area of expenditure within the Office of the Chief Executive which included the budget for the Chief Executive's salary. However, as neither the Chief of Staff nor any of her line reports were involved in the deliberations of SEB, it was considered that it would not be appropriate for the Chief of Staff or her subordinates to authorise the payment.

73. The conclusion reached, in consultation with the Treasurer, was that the SEB is serviced through People and Corporate Services, as part of the Chief Operating Office. The Chief Operating Officer, as the Accountable Officer, agreed the release of the payment through People and Corporate Services.

74. When the States Assembly approves a Government Plan it approves budgets for individual Government departments. The Government Plan Annex and the published Departmental Business Plans include breakdowns by service area for each department and published Ministerial responsibilities set out the boundaries of those responsibilities. While these provide assistance to Accountable Officers in determining whether proposed expenditure reflects the intention of the States Assembly, there is no clear description of what each departmental budget covers to which Accountable Officers can refer.

Recommendations

- R8** To enhance accountability, include in the Government Plan a short description of the scope of revenue income and expenditure budget lines.
- R9** To promote clarity of accountability for decisions and associated expenditure, undertake a fundamental review of the interaction between key constitutional pieces of legislation, in particular the Public Finances (Jersey) Law 2019 and the Employment of States of Jersey Employees (Jersey) Law 2005.

Re-engagement on a fixed term contract

75. The agreement with the former Chief Executive brought his employment to an end on 31 December 2020. The former Chief Executive had however offered to continue in post in order to ensure an orderly transition to a successor.
76. At its meeting on 26 November 2020, the SEB minutes record that 'the Council of Ministers and Executive Leadership Team had expressed concerns about the risks if there were no orderly handover [from the former Chief Executive] to an interim successor'. The interim successor was not anticipated to be in post before February 2021. The SEB had also concluded at this meeting that it would not be feasible to require one of the Directors General to act up into the Chief Executive role until a permanent replacement had been found.
77. The SEB agreed to extend the former Chief Executive's contract to 31 March 2021 at the latest. It agreed to instruct officers to secure the drafting of a contract.
78. The SEB received an update on progress being made in agreeing a new fixed term contract at its meeting on 8 December 2020. Subsequently, on 23 December 2020, a new contract was entered into with the former Chief Executive for him to serve as Chief Executive from 8 January 2021 to 31 March 2021, subject to an option to terminate earlier by either party giving four weeks' notice.
79. The minutes of the SEB indicate that neither the contract nor the key terms of the contract were considered explicitly by the SEB.
80. The contract entered into on 23 December 2020 differed from the previous permanent contract of employment in three main respects:
- there was no mutual termination clause as the contract was a fixed term contract
 - annual leave entitlement; and

- a pension provision.
81. In respect of annual leave, the fixed term contract granted a supplement of additional days by special arrangement on a 'use it or lose it' basis. The rationale for granting this additional benefit was not documented.
 82. In practice no payment is planned under the pension provision. The purpose of this provision is therefore unclear.
 83. There was a break of seven days between the two contracts of employment. During this period however the former Chief Executive continued to have access to States' buildings and States' IT equipment and systems.
 84. I have been informed that the former Chief Executive acted in an unpaid capacity in this period as an advisor to the Council of Ministers. In this capacity, the former Chief Executive attended a meeting of the Competent Authorities on 6 January 2021. However, the exact nature and status of his role was not documented or communicated to senior staff. As a result, there was the potential for confusion about the authority of the former Chief Executive in this period.

Recommendation

- R10** Ensure that there is clear documentation of the nature and role of all advisors to the Government, including those who are unpaid.

Contract with the Interim Chief Executive

85. On 29 January 2021, the SEB entered into a contract for an Interim Chief Executive to serve from 1 March 2021 to 28 February 2022.
86. The contract states that the Interim Chief Executive will be:
 - Principal Accountable Officer for the purposes of the Public Finances (Jersey) Law 2019 unless otherwise advised; and
 - Head of Paid Service.
87. The legislation is clear: there is a single post of Chief Executive and the office holder is the Principal Accountable Officer and Head of Paid Service.
88. Nevertheless, the SEB entered into contracts for both a 'Chief Executive' and 'an Interim Chief Executive' to work at the same time, both performing the full functions of the statutory Chief Executive. The contract for the Interim Chief

Executive did provide that he would be 'Principal Accountable Officer for the purposes of the Public Finances (Jersey) Law 2019 unless otherwise advised'. However:

- there was no written communication to the Interim Chief Executive that he would not assume the role of Principal Accountable Officer until the former Chief Executive's fixed term contract came to an end; and
- there was no provision in his contract that, if advised, he would not serve as Chief Executive or Head of Paid Service.

89. I am advised that agreement was reached that the Interim Chief Executive would assume the statutory role of Chief Executive and the associated roles of Principal Accountable Officer and Head of Paid Service on 1 April 2021. I am also satisfied that in practice, and despite the wording of the contracts of employment, there was clarity that the former Chief Executive continued to perform the Chief Executive role during the period when both the former Chief Executive and the Interim Chief Executive were employed.

Recommendation

R11 Ensure that the post of Chief Executive (and therefore the roles of Principal Accountable Officer and Head of Paid Service) is assigned clearly in writing during any future handover period between two chief executives.

Appendix 1

Audit Approach

The review included the following key elements:

- review of relevant documentation provided by the Government of Jersey; and
- interviews with key officers within the States of Jersey.

The documentation review included over 50 documents, including:

- Minutes of the SEB
- Contracts of employment
- A side letter dated 28 November 2017
- Applicable legislation
- The Public Finances Manual
- Government responses to relevant Freedom of Information requests

The officers and bodies interviewed remotely or who provided written input included:

- Treasurer of the States
- Group Director for People and Corporate Services
- Head of Financial Governance
- Director - Finance Hub
- Assistant Greffier (Committees and Panels)
- the SEB
- the former Chief Executive

I would like to thank everyone who has contributed to this report.

The fieldwork was carried out by the Comptroller and Auditor General and Deputy Comptroller and Auditor General.

Appendix 2

Summary of Recommendations

- R1** Change the requirements of the Public Finances Manual to require consultation with the Treasurer and the relevant Accountable Officer prior to entering into an employment contract with non-standard clauses that could expose the States of Jersey to liabilities.
- R2** Develop a suitable disciplinary policy and supporting process specific to the post of Chief Executive.
- R3** Document formally a policy in respect of the line management of the Chief Executive as an employee including any specific delegations of responsibilities from the SEB.
- R4** Update policies and procedures for dealing with perceived and actual conflicts of interest of senior employees including the Chief Executive.
- R5** Ensure that all decisions to enter into compromise agreements are supported by:
- a clear written rationale as to the decision taken, including alternatives considered and the proposed key terms of the agreement; and
 - clear calculations supporting any payments to be made, with a secondary check performed on such calculations.
- R6** Undertake the proposed review of the original appointment process for the former Chief Executive as soon as practicable and implement the findings from the review in the recruitment and appointment process for the new permanent Chief Executive.
- R7** Ensure that all SEB minutes are prepared promptly and are approved at the next meeting where possible.
- R8** To enhance accountability, include in the Government Plan a short description of the scope of revenue income and expenditure budget lines.
- R9** To promote clarity of accountability for decisions and associated expenditure, undertake a fundamental review of the interaction between key constitutional pieces of legislation, in particular the Public Finances (Jersey) Law 2019 and the Employment of States of Jersey Employees (Jersey) Law 2005.
- R10** Ensure that there is clear documentation of the nature and role of all advisors to the Government, including those who are unpaid.

- R11** Ensure that the post of Chief Executive (and therefore the roles of Principal Accountable Officer and Head of Paid Service) is assigned clearly in writing during any future handover period between two chief executives.



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