STATES OF JERSEY

STATES OF JERSEY COMPLAINTS BOARD: FINDINGS – COMPLAINT AGAINST A DECISION OF THE STATES' EMPLOYMENT BOARD REGARDING THE WITHDRAWAL OF AN OFFER OF EMPLOYMENT TO THE POSITION OF CONSULTANT OPHTHALMOLOGIST

Presented to the States on 4th July 2016
by the Privileges and Procedures Committee

STATES GREFFE

2016 R.75

REPORT

Foreword

In accordance with Article 9(9) of the Administrative Decisions (Review) (Jersey) Law 1982, the Privileges and Procedures Committee presents the findings of the Complaints Board constituted under the above Law to consider a complaint by Dr. A. Alwitry against the States' Employment Board regarding the withdrawal of an offer of employment to the position of Consultant Ophthalmologist.

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

STATES OF JERSEY COMPLAINTS BOARD

16th March 2016

Findings of the Complaints Board constituted under the Administrative Decisions (Review) (Jersey) Law 1982 to consider a complaint by Dr. A. Alwitry against the States' Employment Board regarding the withdrawal of an offer of employment to the position of Consultant Ophthalmologist

Present –

Board members –
G.G. Crill, Chairman
S. Catchpole, Q.C.
J. Eden

Complainant's representative –
Advocate S. Chiddicks, Sinel Advocates

Respondent's representatives –

States' Employment Board –
T. Riley, Director of Human Resources, Health and Social Services Department
Advocate L. Ingram, Davies and Ingram Advocates
C. Stephenson, Director, Employment Relations, Human Resources Department

States Greffe
L.M. Hart, Deputy Greffier of the States
K.M. Larbalestier, Clerk

The Hearing was held in public at 10.00 a.m. on 16th March 2016, in the Blampied Room, States Building, and reconvened on the morning of 17th March 2016.

1. Opening

The Chairman opened the Hearing by introducing members of the Board and outlining the process which would be followed.

2. Hearing

Summary of the Complainant's written case

2.1 The Board noted that Dr. Alwitry had entered into a permanent contract of employment with the States' Employment Board (SEB) as a Consultant in Ophthalmology, effective from 1st December 2012. This contract had been terminated by letter dated 22nd November 2012.

2.2 Within his written submission, Dr. Alwitry had submitted a copy of his contract of employment with the SEB and the terms and conditions of service. The

specific areas where Dr. Alwitry believed the SEB had failed to comply with the terms of the contract/terms and conditions of service were as follows –

General mutual obligations (section 3) – Dr. Alwitry contended that the SEB had failed to act in a spirit of mutual trust and that his main aim had been to achieve the best outcome for his patients by ensuring patient safety.

Job planning (section 6) – Dr. Alwitry believed that he could not be criticised for proposing changes to the job plan (in accordance with the terms of the contract), which would have better utilised resources and optimised patient safety.

Programmed activities/scheduling of activities (section 7.1) – Dr. Alwitry was of the view that there had been little attempt on the part of the employer to agree a job plan by discussion. Any assertion that Dr. Alwitry had sought to avoid operating on a Friday to "free-up" Saturdays was, he believed, defamatory and insulting and amounted to a criticism for not agreeing to carry out non-emergency work every weekend.

Dr. Alwitry was a glaucoma specialist and it was recognised that this serious sight disorder could lead to permanent blindness. In his written submission he had stated that he had not wished to operate on patients on a Friday as they would be left over the weekend without an optical pressure check, which could lead to blindness. He contended that Mr. R. Downes, Clinical Director was aware of his concerns in this respect and alleged that Mr. Downes deliberately compromised patient care by refusing to see his (Dr. Alwitry's) patients at weekends if problems arose or when Mr. Downes was on call.

Dr. Alwitry believed that he had raised legitimate patient safety concerns and had been dismissed for doing so. The Board had been provided with a copy of a letter dated 29th April 2014, from Sinel Advocates, representing the Complainant, which refuted assertions that Dr. Alwitry had not previously raised patient safety claims.

Dr. Alwitry also pointed out that his job plan had 11.5 programmed activities each week, whereas the contract stated that job plans would contain 10 programmed activities each week, on average, subject to the provisions for emergency work arising from on-call rotas. Dr. Alwitry alleged that when he had questioned this he had been warned not to make any more demands.

Disciplinary matters (section 17) – Dr. Alwitry was of the opinion that the SEB had not adhered to the terms of the contract in that issues had not been resolved without recourse to formal procedures. Dr. Alwitry contended that the SEB had withdrawn the offer of employment without him being aware that there was a problem. He was of the opinion that the proper disciplinary procedure had not been followed and claimed that he had not been afforded the right to appeal.

Termination of employment (section 29) – Dr. Alwitry was of the view that none of the provisions regarding termination of employment had been followed. Consequently, he did not believe that his contract had been legally terminated. The Board had received an extract of the Employment (Jersey) Law 2003, with

Dr. Alwitry's submission and it was noted that he did not believe that the SEB had acted in accordance with certain provisions of the Law.

Entire terms (section 30) – Dr. Alwitry alleged that he had never been provided with any evidence to suggest that he had diverged from the contract of employment or the terms and conditions which governed his employment with the SEB.

2.3. The Board had been provided with copies of electronic mail exchanges between the Complainant and colleagues regarding clinical timetabling. Dr. Alwitry believed that the content of the e-mails had been relied upon to justify the withdrawal of the job offer. He was of the opinion that the tone of all, barring one e-mail from Mr. R. Downes, was pleasant and courteous. The Board also noted the contents of letters dated 26th November and 4th December 2012, and 7th January 2013, from Dr. B. McNeela, Consultant Ophthalmologist, disassociating himself from the decision to rescind the offer of employment and urging the Chief Minister to review the same. The Board also considered printed copies of text messages from Mr. L. Stevenson, a colleague of Dr. Alwitry's, who had provided him with a reference. It was noted that Mr. Stevenson had tried to intervene when he heard about the withdrawal of the job offer. In addition, Dr. Alwitry had submitted a number of references/personal testimonials from professional colleagues in an attempt to rebut allegations that he was a "trouble-maker". Dr. Alwitry understood that the SEB had been led to believe that this was the view of former colleagues in the UK who were "glad to see the back of him". In addition, Dr. Alwitry had submitted a report from independent glaucoma specialists which set out current best practice for patients, specifically in terms of the requirement for a clinic the day after the performance of glaucoma surgery.

2.4 Dr. Alwitry's submission also included electronic mail exchanges regarding his start date. It was noted that he had made it clear on his application form that he was required to provide 6 months' notice to his employer before taking up the post in Jersey. Dr. Alwitry understood that the SEB was claiming that it was essential that he take up his post within 3 months; a claim which the Complainant did not accept as he understood that waiting lists had reduced, despite the absence of a third consultant. In any case, Dr. Alwitry had ultimately agreed to take up his post within 3 months on the initial basis of a 3 day working week. He had anticipated that his travel would be funded by the employer but had subsequently discovered this was not to be the case. However, he had maintained his agreement to start 3 months earlier.

2.5 In his written submission Dr. Alwitry had referred to discussions between himself and Mr. Downes regarding the possibility of working together in private practice. Dr. Alwitry had, in the end, concluded that this would not be financially viable due to rental costs and an arrangement whereby it was alleged he would have to pay Mr. Downes 20% of his private practice earnings for the use of Mr. Downes' "brand name". This arrangement would continue after Mr. Downes retired and until Dr. Alwitry retired. Dr. Alwitry accepted that he had not made it clear to Mr. Downes that he had decided against a private practice arrangement as he believed that his decision might have been detrimental to their relationship. In addition, he alleged that Mr. Downes had led him to believe that another individual who had been interviewed for the

position offered to Dr. Alwitry had already accepted a private practice deal. In the meantime Dr. Alwitry had decided to see private patients at the Little Grove clinic as this was more cost-effective. It was noted that whilst Mr. McNeela saw patients privately at the Little Grove, it was not intended that they would work in partnership. However, Mr. McNeela's wife was to be employed by Dr. Alwitry to carry out visual field tests. In his submission Dr. Alwitry referred to 2 separate conversations; one with Ms. K. McNay, the administrator in charge of private practice (in the presence of Ms. J. Gindill, Theatre Sister), whom he alleged had warned: "do not get in the way of Richard Downes' private practice"; and the second with Ms. C. Hockenhull, Clinic Sister (in the presence of an Associate Specialist, referred to as Asim), whom he alleged stated "he (Mr. Downes) is being difficult about your timetable because he is paranoid about his private practice and he says you will be doing refractive surgery". The Board's attention was drawn to hard copies of text messages between the Complainant and Mr. Downes, in which reference was made to a private partnership arrangement. Dr. Alwitry described these exchanges as "amicable and friendly".

2.6 In his written submission, Dr. Alwitry advised that he had assumed that his involvement in job planning in Jersey would be similar to the role he had played in the UK (the Board's attention was drawn to the process he had engaged in when commencing his post in the UK). The Board had been provided with a copy of a British Medical Association document entitled "A guide to consultant job planning". Dr. Alwitry viewed his role in job planning as being actively involved in arranging a timetable which was safe for patients, utilised resources effectively and delivered the best service. He conceded that he had made "a few requests" to facilitate his travelling back and forth from the mainland until his family could join him. He felt this was reasonable as long as the service and patients did not suffer. Whilst he had queried aspects of the timetable he stated that he had never refused to accept it. In fact, he contended that it was Ms. Hockenhull who had initiated discussions regarding the structure of the timetable. Negotiations between staff (with the exception of Mr. Downes, who was on annual leave) had followed and some restructuring had been agreed. However, Dr. Alwitry was adamant that he had never made demands and believed that he was merely ensuring that the timetable delivered the safest and most efficient care for patients. He had not perceived his requests as being "pushy" or "troublemaking". In the final electronic mail message he had received from Mr. Downes he (Mr. Downes) had advised that he had tried unsuccessfully to make changes to his own timetable prior to taking up his post and had only been able to do so after being in post for several months. Consequently, Dr. Alwitry alleged that he had not sought to make any further changes to the timetable in the hope that issues could be resolved when he was in post. He had, therefore, been shocked and confused to receive the news that the job offer had been withdrawn.

2.7 Dr. Alwitry had made contact with the British Medical Association to seek advice in relation to job planning and the number of sessions he was due to work. The Association had subsequently contacted the General Hospital regarding these issues. The Complainant alleged that H.M. Solicitor General had conceded that this discussion with the British Medical Association had been a reason for the withdrawal of the job offer. Dr. Alwitry believed that the decision to withdraw the job offer constituted unfair dismissal in accordance

with Article 66 of the Employment (Jersey) Law 2003. The Board's attention was drawn to a number of written exchanges between the Association and the Complainant.

2.8 It was alleged that Mr. Downes had "problems" with Dr. Alwitry's father, a former colleague at the General Hospital and that this had also been a factor.

2.9 The Board noted that the Complainant had made a written subject access request to the Law Officers' Department in accordance with the Code of Practice on Public Access to Official Information. He claimed that he had initially been asked to await the outcome of an investigation into the matter by H.M. Solicitor General. Dr. Alwitry believed that the investigation conducted by H.M. Solicitor General had been biased and designed to cover up his stated concerns regarding patient safety. The Board noted the contents of a letter dated 5th February 2014, from Sinel Advocates, representing the Complainant, which addressed the contents of H.M. Solicitor General's report.

3. Advocate Chiddicks addressed the Board and began by reading from a statement prepared by Dr. Alwitry as follows –

Dear Chairman and members,

I am sorry I could not be with you today, however I am unwell at the moment.

I thank you for looking at my case.

I was brought up on the Island and was looking forward to coming home to serve the people of the Island who paid for my medical education. I had a teaching hospital permanent consultant job, have written 3 textbooks, 2 novels and published more than 35 articles in the world literature. I did the locum at the hospital 3 times without any problems at all. I had an impeccable reputation and unblemished career.

I was pressurised to give up my job in Derby so I could come to the Island. People knew I had 4 children under 7 and my wife had to give 6 months' notice and yet I agreed to start in 3 months.

The last communication I had was a telephone conversation with the Clinical Director which ended by him telling me was looking forward to seeing me in December.

6 weeks later when I had given up my job and all the removal plans were in place I received a letter out of the blue withdrawing my job offer. This came a week before I was due to start, without warning.

I stayed in bed for the whole week and lost a stone in weight due to not eating and vomiting. No one would talk to me. I telephoned Mr. Riley and he refused to discuss it with me or tell me what I had supposedly done. The other consultant at the hospital, Mr. McNeela was not even told and he only found out when I called him after receiving the letter. He subsequently resigned in protest.

No notice, no warning, no right to appeal, no fair trial and I still do not know exactly why they did this to me. I was left jobless with 4 small children to support. My dreams of coming home were stolen away and to this date I still do not know why. The then Solicitor General sent out a letter stating that he wished to continue withholding my personal data as otherwise it would trigger litigation or a report to the General Medical Council. How can that be ethical and how can it be just?

Hopefully today will help me get a step closer to understanding why they ruined by career when all I tried to do was protect my patients.

Thank you for your time and attention.

3.1 Advocate Chiddicks expressed the view that, although the Board had received written submissions, in the absence of Dr. Alwitry and other hospital staff members, it would be very difficult for the Board to get a complete picture. With regard to the report which had been prepared by H.M. Solicitor General, Advocate Chiddicks pointed out that witnesses had been interviewed in private and Dr. Alwitry had not been permitted to respond or challenge any of the statements made and, as a result, felt he had been kept very much in the dark. It was hoped that the subject access request might shed more light on the matter.

3.2 Dr. Alwitry was of the view that the SEB had acted unjustly and contrary to the principles of natural justice. He disputed the findings of the Beal report and the report prepared by H.M. Solicitor General. Advocate Chiddicks contended that it was apparent from documentation included within the Respondent's bundle that there had been deficiencies in the process. He referred the Board to the terms and conditions of service for consultant medical and dental staff and, in particular sections –

3.1.1 Job planning – a partnership approach which was to be adopted in respect of the same. It was noted that the manager and the clinician were required to prepare a job plan which would be discussed and agreed with the consultant.

3.9.1 Resolving disagreements over job plans – it was noted that if it was not possible for a consultant and a manager to reach agreement on a job plan the consultant could refer to the appeals process, as set out in Schedule 4 of the terms of conditions of service.

4.1 Appeals – where it was not possible to agree a job plan or a consultant disputed a decision, an appeals process was available.

18.2.2 Grounds for termination of employment – it was noted that should the application of any disciplinary or capability procedures result in the decision to terminate a consultant's contract of employment he or she would be entitled to an appeal.

3.3 The Board's attention was drawn to Dr. Alwitry's Curriculum Vitae and a number of references and personal testimonials he had included within his submission.

3.4 Advocate Chiddicks referred to a letter dated 8th February 2013, addressed to Dr. Alwitry from Mr. S.A. Vernon, DM. FCRS. FRCOptom.(hon.) DO., Hon. Professor of Ophthalmology and Consultant Ophthalmic Surgeon specialising in Glaucoma, University Hospital, Nottingham. It was understood that Dr. Alwitry had sought Mr. Vernon's opinion on various issues concerning discussions with his future employer in Jersey. In the final paragraph of his letter Mr. Vernon stated –

… I commend you for taking the time and effort prior to your appointment to organise your timetable in a manner that most benefits the service and your patients. This is certainly the approach that one would expect of a specialist who had been a consultant for a few years, as you have. In my view all of your requests have been logical and well considered and should be welcomed by your future colleagues, both medical and managerial. Indeed such pre-emptory discussions involving job planning are an important part of taking up a new consultant position.

3.5 The Board's attention was drawn to a letter dated 13th February 2013, addressed to Dr. Alwitry from Mr. A.W. Kiel, BMed. Sci. B.M.B.S. FRC Opth., Glaucoma Consultant, Ipswich Hospital. Mr. Kiel also stated that it was good practice to sort out a timetable prior to taking up a post, rather than cause logistical and organisation difficulties by changing a timetable when clinics etcetera had already been booked. Mr. Kiel went on to state –

You have a duty of care to the patients and, thus you are obliged to raise concerns about logistics and timetabling which you feel could compromise patient care or deliver a suboptimal service. This should be encouraged by your clinical and managerial colleagues and not condemned.

3.6 The Board's attention was drawn to a letter dated 21st July 2013, addressed to Dr. Alwitry from Mr. A.J. Sidebottom, BDS., FDSRCS., MBChB., FRCS. (OMFS.), Consultant Facial and Oral Surgeon, The Park Hospital, Nottingham. Mr. Sidebottom confirmed that job planning was accepted practice in the United Kingdom. Mr. Sidebottom had concluded that, based on the electronic mail exchanges –

The process of job planning has broken down due to inflexibility and lack of understanding of best medical practice following a period of constructive discussions by Dr. Alwitry. This breakdown seems to be entirely due to Mr. Downes lack of flexibility in the job planning process and subsequent failure to involve a third party in this process to try to resolve issues.

3.7 The Board's attention was further drawn to a report prepared by Mr. M.R.K. Matthew, Consultant Ophthalmic Surgeon, Chesterfield Royal Hospital NHS Foundation Trust in which he had reviewed the electronic mail exchanges between the Complainant and the Respondent and considered Dr. Alwitry's anxiety concerning post-operative care plans to be reasonable.

3.8 Advocate Chiddicks asked the Board to consider the response of the SEB to Dr. Alwitry's complaint. It was alleged that Dr. Alwitry's claims about patient safety were an attempt at rationalising, after the event, the situation in which he found himself, which was not backed up by evidence. It was clear from the

chain of electronic mail messages that the issue of patient safety had been raised by Dr. Alwitry as early as September 2012, and could not, therefore, be construed as an afterthought. This issue did not appear to have been addressed and the Board noted the contents of an electronic mail message addressed to Dr. Alwitry from Mr. R. Downes in which he (Mr. Downes had concluded by stating –

I would finally advise/warn that making too many demands at this stage of your appointment is unlikely to bode well for your future relationships within the organisation!

3.9 Advocate Chiddicks contended that there appeared to be 3 separate areas of process where things had gone seriously wrong, as follows –

- the start date – this had not been discussed at interview, but Dr. Alwitry had made it clear on his job application that he required a 6 month notice period. In his report, H.M. Solicitor General had recognised that: "there were notable defects in the recruitment process that allowed the conflict to go unnoticed by the hospital until after the job had been offered to Dr. Alwitry".

- job planning – proper procedure did not appear to have been followed in this respect and the approach fell well below recognised standards.

- the response to the approach to the British Medical Association – the Health and Social Services Department had wrongly assumed that a formal complaint had been made by Dr. Alwitry and had failed to properly investigate this matter. The Board noted that Dr. Alwitry had sought to clarify a discrepancy in the number of programmed activities which appeared on his timetable and those for which he was contracted to work. In his report, H.M. Solicitor General had noted that there were a number of reasons for the decision to terminate the contract, of which the B.M.A. matter was just one. H.M. Solicitor General further noted that whilst the decision had not been implemented when Dr. Alwitry had contacted the B.M.A., management had already expressed a collective view that the employment contract should be withdrawn.

4. Summary of the written case of the States' Employment Board

4.1 It was stated that Dr. Alwitry had been offered the position of Consultant Ophthalmologist on 1st August 2012, which he had formally accepted on 21st August 2012. This was a new position which had been created following a successful bid for extra funding as a response to growing pressure on Ophthalmology waiting lists. Dr. Alwitry had been due to start work on 1st December 2012. It was alleged that from 1st August – 13th November 2012, there had been a series of discussions between the Complainant and staff at the General Hospital which were considered to be unusual and challenging. On 13th November 2012, management at the General Hospital had concluded that the relationship with Dr. Alwitry had broken down and was viewed as being dysfunctional. Consequently, the employment contract had been terminated by letter on 22nd November 2012.

4.2 In its written submissions, the SEB denied Dr. Alwitry's claims and allegations. It was stated that the offer of employment had been withdrawn on the following grounds –

- the attitude and behaviour displayed in relation to multiple aspects of the role;
- demonstrable evidence of a dysfunctional relationship with the Clinical Director (Mr. Downes) and other senior medical and management staff; and,
- a loss of trust and confidence between the respective parties, resulting in any employment relationship being irreparably damaged.

4.3 The SEB relied upon 3 independent reviews in support of the decision to terminate Dr. Alwitry's employment. Advocate Ingram encouraged the Board to attribute full weight to the conclusions in those reports, as they were the products of third party evidence and not simply an individual's view. It was stated that Dr. Alwitry had originally alleged that the job offer had been withdrawn as a result of private practice disputes (which was refuted). Dr. Alwitry's claims about patient safety were viewed as an attempt at rationalising the situation he found himself in, after the event. He had first raised this issue of patient safety on 7th October 2012, in an electronic mail message addressed to the Clinical Director. His final conversation with the Clinical Director had been on 10th October 2012, after which he had not spoken to senior management. H.M. Solicitor General's report (included within the submission) noted that the Complainant had not raised patient safety concerns with him during interviews. H.M. Solicitor General had concluded that Dr. Alwitry's conduct had led to the breakdown in the relationship. In particular, it was alleged that Dr. Alwitry had advised H.M. Solicitor General that he had not wished to operate on Fridays because he wanted to be with his family in the UK at the weekend (until such time as his family relocated to Jersey in the summer of 2013). The report had concluded that tensions had arisen because Dr. Alwitry had applied for the job in Jersey in the summer of 2012, but did not intend for his wife and children to join him in the Island until the summer of 2013. H.M. Solicitor General took the view that Dr. Alwitry wanted a start date and timetable which meant he was able to spend the maximum amount of time in the UK until the summer of 2013. In contrast, the General Hospital required a new consultant to start full-time as soon as possible. There had been a conflict between these 2 positions, and this had resulted in repeated disagreements about a number of issues from August to November 2012.

4.4 It was alleged that Dr. Alwitry had asked a theatre nurse to move obstetrics and gynaecological surgical procedures to a Friday, even though he had acknowledged that patients who had undergone these kind of procedures were more likely to develop complications following surgery than those who had eye surgery. This request had been made whilst the Clinical Director was on annual leave. The theatre nurse had declined to assist Dr. Alwitry and had referred his request to management.

4.5 With regard to the approach to the British Medical Association, it was noted that H.M. Solicitor General had seen the Association's records and patient safety issues had not been identified. The Association had not wished to become involved in the matter.

4.6 An independent review of the decision to withdraw the contract of employment had been commissioned by Mr. J. Richardson, Chief Executive of the States, and a report subsequently prepared by Mr. P. Beal, Human Resources Consultant. This report had been provided with the written submission. In common with the report of H.M. Solicitor General, the Beal report had concluded that whilst some procedural aspects had been unsatisfactory, even if this had not been the case the outcome would have been the same. Prior to the commissioning of this report, the Chief Executive of the States had commissioned a separate report to establish whether there would be any merit in engaging in mediation between the parties as a possible way forward. A report prepared by Ms. M. Haste, CMP Resolutions, in this connexion had been included within the written submission. Both H.M. Solicitor General and Ms. Haste had concluded that Dr. Alwitry had been reluctant to accept the part he had played in the matter.

4.7 In terms of the process by which the contract had been terminated, H.M. Solicitor General had noted that there had been a failure to properly investigate and understand an electronic mail message dated 12th November 2012, from Dr. Alwitry. Instead, an assumption had been made about the contents of the electronic mail message and that assumption was used as a reason for the decision to terminate the contract. Whilst there was no legal obligation to do so, H.M. Solicitor General took the view that management at the General Hospital should have provided Dr. Alwitry with an opportunity to respond to criticisms prior to terminating the contract. Finally, H.M. Solicitor General had commented on the fact that Dr. Alwitry had been advised of the decision to withdraw the offer of employment very late in the day and this did not reflect well on the General Hospital. However, in spite of the aforementioned procedural issues, H.M. Solicitor General was of the view that even if an appropriate procedure had been followed the outcome would have been the same. This view was based on interviews with the Complainant and the British Medical Association records, which had shed light on the Complainant's behaviour from 10th October 2012 onwards.

4.8 The Board noted that the Complainant had initially decided to pursue a claim for unfair dismissal with the Jersey Employment Tribunal. The claim had been withdrawn by Dr. Alwitry in a letter dated 4th December 2012. The reasons given were, *inter alia*, the Tribunal had failed to follow due process; the Deputy Chair was conflicted; and, that he (Dr. Alwitry) would not have a fair hearing. Dr. Alwitry had subsequently pursued an application in the Royal Court concerning a data subject access request under the Data Protection (Jersey) Law 2005.

4.9 The SEB resisted all claims and allegations made by Dr. Alwitry.

4.10 The Board heard from Advocate L. Ingram, who confirmed that the report prepared by H.M. Solicitor General had been written and perfected on the basis of evidence from witnesses and was not merely the opinion of the author.

Advocate Ingram referred the Board to paragraph 185 of H.M. Solicitor General's report in which he stated –

I have interviewed Dr. Alwitry. I am satisfied that even if he had been afforded an opportunity to respond to the criticism of him, the outcome would have been the same. I have found much of his evidence to be difficult to follow and contrary to the contemporaneous records of this case. I was left none the wiser by his explanations for his behaviour from 10th October onwards and it is only the BMA records that have shed light on that period of the case. Dr. Alwitry does not appear to accept that his behaviour is a real cause for concern.

4.11 The Board was keen to establish exactly which aspects of Dr. Alwitry's behaviour were "a cause for concern", and Advocate Ingram directed the Board to the various electronic mail exchanges. The Board also wished to establish whether Dr. Alwitry's approach to the B.M.A. had played a part in the decision to withdraw the contract. Advocate Ingram advised that this was not the case as the decision had already been made at this point. The Board noted, in particular an electronic mail message dated 12th November 2012, at 16:42 from a member of staff at the B.M.A. to Mr. B. Jones, Medical Staffing Manager, asking if she could call Mr. Jones to discuss: "*a delicate issue surrounding Dr. Alwitry"* and advising that Dr. Alwitry: "*had run into a few problems with the consultant lead"*. At 16:55, Mr. Jones sent an electronic mail message to Mr. T. Riley (copied to Mr. J. Shoebridge) asking: *"where are we with Dr. Alwitry?"* Mr. Riley responded at 16.58 p.m., stating: *"I think everyone is agreed that we formally withdraw the job offer".* Advocate Ingram advised that, in this particular respect, H.M. Solicitor General's report was incorrect in that the approach to the B.M.A. was not a factor in the decision-making process. The Board was referred to a note of a meeting held on 13th November 2012, in Mr. A. McLaughlin's office to discuss Dr. Alwitry. Present at the meeting were: Messrs. McLaughlin, Managing Director, M. Siodlak, Medical Director and T. Riley, HR Director. It was not clear whether Mr. A. Luksza, Medical Director, had been present, as there was a question mark next to him name. The following had been recorded –

those present agreed that, although regrettable, a withdrawal of employment was required. The decision was taken not to discuss the withdrawal of the offer of employment with Mr. B. McNeela at this stage.

4.12 With regard to the issue of timetabling/job planning, Advocate Ingram drew the Board's attention to an electronic mail message dated 9th October 2012, from Mr. Downes to Dr. Alwitry, in which this issue was discussed. The Board noted that in the e-mail whilst Mr. Downes stated that the timetable (produced on 24th September 2012) would be implemented in February 2013 (when Dr. Alwitry had agreed to commence work on a full time basis) in the penultimate paragraph he had also stated that if there were any further queries/questions/ concerns in relation to the timetable, Dr. Alwitry should contact Mr. Downes directly. Advocate Ingram stated that this clearly demonstrated that lines of communication remained open. The Board also noted that in the same e-mail Mr. Downes stated –

We cannot provide you with what is not available. Further, you must understand that your requirements have to fit in with everyone else. I have tried my utmost,

using what influence I have, to get the best possible arrangements for yourself but would remind you that "last man in" must accept that compromise at this juncture is prudent.

4.13 The Board suggested that the above statement indicated that a clear line was being drawn in respect of the timetable. However, Advocate Ingram pointed out that this electronic message followed a series of messages from Dr. Alwitry to various staff members on the same issue whilst Mr. Downes was on annual leave. That was the context. Following this Dr. Alwitry spoke to Mr. Downes on the telephone on 10th October 2012 (billing records confirmed that the conversation lasted 8 minutes). Dr. Alwitry recalled that he had expressed a desire to *"move forward"* and that reference had been made to the issue of private practice. Dr. Alwitry was of the view that the telephone conversation had ended on a pleasant note. Mr. Downes had no recollection of this conversation.

4.14 Turning his attention to the issue of the start date, Advocate Ingram referred the Board to paragraph 20 of H.M. Solicitor General's report, in which he stated –

In my view the tensions in this case arose only because Dr. Alwitry applied for a job at Jersey hospital in the summer of 2012 but did not intend for his wife and young children to join him in Jersey until the summer of 2013. Dr. Alwitry, having been offered the job on 1st August 2012, wanted a start date and timetable that meant he was able to spend the maximum amount of time in the United Kingdom until the summer of 2013.

4.15 Advocate Ingram argued that this desire to be with his family appeared to be the primary motivation for manipulating the timetable, and that patient safety was not a factor. Furthermore, Mr. Downes alleged that Dr. Alwitry had not mentioned the 6 months' notice period during informal pre-interview discussions, in spite of the fact that Mr. Downes had made it clear that there was a pressing need for the appointment to be taken up as soon as possible. Mr. Riley added that Dr. Alwitry's request for a delayed start date was not disputed but that it had been made clear in the verbal job offer that the Department wanted the successful candidate to start within 3 months. Mr. Riley was unclear as to whether this requirement had been made in writing, but advised that Mr. McClaughlin was convinced that Dr. Alwitry had agreed to start in November 2012. However, the Board noted the contents of an electronic mail message dated 1st August 2012, from Dr. Alwitry to Ms. J. Nicholson, Medical Secretary, in which Dr. Alwitry advised that he did not know when he was starting. The Board referenced another e-mail exchange dated 2nd August 2012, between Dr. Alwitry and Mr. A. Thompson, Consultant Anaesthetist (and a member of the interview panel). It was noted that Mr. Thompson asked if Dr. Alwitry was intending to take up his post around October/November, suggesting that he was unaware of Dr. Alwitry's desire for a 6 month notice period. The Board also had regard to an electronic mail message dated 8th August 2016, from Mr. Downes to Dr. Alwitry, asking the latter to contact the former to *"organise a start date*".

4.16 In terms of the contract of employment which had been issued, Mr. Riley stated that there had been a "torrent" of telephone calls and electronic communications prior to the contract being issued. On or around 7th or 8th August 2012, during

a telephone call with Dr. Alwitry, Mr. Riley understood that Mr. McLaughlin had made his concerns clear regarding what he perceived as: "*a lack of compromise on the part of Dr. Alwitry*", and advised that he was considering withdrawing the offer of employment and reverting to the "second choice" candidate. There was no written record of this or other telephone conversations and whilst Mr. Riley accepted that it was good practice to make a record, he stated that this was probably as a result of the volume of telephone calls. Mr. Riley alleged that Dr. Alwitry's response to Mr. McLaughlin's comments was to contact a member of staff in the Human Resources Department and request that his contract be issued. It was alleged that Dr. Alwitry advised that staff member that he was acting on Mr. McLaughlin's instructions. (The Board noted that certain human resources procedures, including the process for issuing contracts of employment, had now been altered.) Mr. Riley also alleged that Dr. Alwitry threatened to seek legal advice and go to the media if the offer of employment was withdrawn. On 10th August 2012, Mr. McLaughlin wrote to Dr. Alwitry, advising that whilst it had been noted in his application that he could not start for 6 months, it had been hoped that he would start sooner (in mid-November) *"given that the possibility of a delayed start date was not discussed with the Department prior to, or indeed during your interview*". The letter concluded by stating that unless Dr. Alwitry commenced employment by 1st December 2012, the job offer would be withdrawn. The Board noted that Mr. McLaughlin's letter did not make reference to the prior telephone conversation between Messrs. McLaughlin and Alwitry. The Board's attention was drawn to an e-mail dated 10th August 2012, from Dr. Alwitry to Mr. McLaughlin, in which he advised that he had received Mr. McLaughlin's letter and fully understood the position. Dr. Alwitry went on to explain that it was never his intention to be difficult and that there had never been any mention of a November start date. He stated: "*not one person mentioned or discussed a start date until after the interview – all any of the literature said was winter 2012, which I erroneously presumed was any time up to Spring 2013!"* Dr. Alwitry then offered to commence a 3 day working week from 1st January 2013, doing 6 clinical sessions from Monday to Wednesday and then working full-time from 11th February. Mr. Riley contended that this suggestion was calculated, as Dr. Alwitry would have known that there was no capacity in the theatre from Monday to Wednesday. The Board considered an e-mail dated 13th August 2012, from Dr. Alwitry to Mr. Downes, in which Dr. Alwitry expressed surprise at the stance taken by Mr. McLaughlin but made it clear that it was his intention to commence a 3 day working week from 1st January 2013. Subsequently, on 14th August 2012, Dr. Alwitry e-mailed Mr. Downes, advising that he had sight of the waiting times spreadsheet and did not believe that his starting work in February 2013, would have a detrimental impact on the service. Mr. Riley confirmed that this type of behaviour was viewed as unusual in the circumstances. He also advised that references made by Dr. Alwitry to alleged conversations with Ms. A. Body were refuted by the latter as she believed she had been misrepresented. Mr. Riley believed that there had been a pattern of misrepresentation throughout.

The Board adjourned at 1:00 p.m. and reconvened at 2:00 p.m.

4.17 Mr. Riley referred to suggestions that the withdrawal of the job offer had been a "bolt from the blue", and that Mr. McNeela had resigned as result of the withdrawal of Dr. Alwitry's contract. Mr. Riley stated that evidence existed to refute the former, and that it was well know that Mr. McNeela intended to leave long before this issue had arisen.

Mr. Riley advised the Board that he wished to read from a statement he had prepared, as follows –

I, Tony Riley am Human Resources Director for the Health and Social Services Department. I joined the States of Jersey on 1st September 2011, and began working at the Jersey General Hospital on the same date.

It was my duty to advise the senior managers and doctors at the Hospital as part of their consideration of withdrawing a job offer that had been made to Dr. Alwitry on 21st August 2012.

In order to provide that advice I drew on my 20 years' experience of being a senior trade union officer and Executive Hospital HR Director and enlisted further guidance and advice from the States Law Officers' Department.

The agreement of a start date for Dr. Alwitry to commence his full time post was an immediately contentious issue that involved a series of intense exchanges by telephone and e-mail between Dr. Alwitry and senior hospital leaders. At one point, with the hospital leadership suggesting that the job offer could be withdrawn Dr. Alwitry inappropriately approached a junior employee and persuaded him to issue a contract of employment which Dr. Alwitry then used to attempt to strengthen his bargaining position. By this stage Dr. Alwitry was also threatening to invoke lawyers to secure his aims. These two steps were considered to be extraordinary examples of behaviour in this context.

A much revised start date of 3rd December 2012, was eventually agreed and the contract was re-issued and signed by Mr. Oliver Leeming, Medical Staffing Officer on 21st August 2012, and by Dr. Alwitry on 24th August 2012.

No sooner was the start date resolved than Dr. Alwitry began to engage in an exceptionally prolonged and disingenuous debate by e-mail and frequent telephone calls, seeking to change his job plan and timetable to suit his personal circumstances. This involved making approaches to a large number of individuals – some inappropriately junior, and frequently subverting what were often thought to be agreed compromise positions.

A particularly serious and damaging event was when Dr. Alwitry deliberately falsely claimed that Mrs. Angela Body, the Director of Operations had stated that there was no need for a new consultant and that there was no problem with waiting lists. As Mrs. Body is one of the most respected and distinguished nurses and managers in Jersey, this blatant lie represented utterly unacceptable behaviour by Dr. Alwitry.

Prior to Dr. Alwitry taking up employment on 3rd December 2012, the three most senior doctors and two most senior Hospital managers were, based on these and other examples, inclined to withdraw the job offer that had been made

to Dr. Alwitry based on their unanimous view that he had repeatedly demonstrated actions, attitudes and behaviours that were so extreme and so unacceptable as to represent a fundamental loss of trust and confidence so as render him unsuitable to be employed.

It should be noted that the doctors and managers who made this decision had between them decades of experience of appointing senior doctors who would often present with challenging behaviours and demands but that all agreed that Dr. Alwitry's was extraordinary and extreme, beyond any they had seen before. On or about 23 October Mr. McLaughlin and Mr. Siodlak, together with their senior colleagues and I agreed to contact the States' Law Officers to be assured that the proposed action was legitimate.

Following advice from the Law Officers' Department and myself the management and medical leadership team, after seeking a relatively fresh pair of eyes from Dr. Luksza, another Medical Director with minimal involvement in the process so far, agreed unanimously to withdraw the offer of employment that had been made to Dr. Alwitry before the proposed employment start date. This ensured that the 3 most senior doctors, two most senior managers and myself were in accord. It was agreed that we would secure political support and ongoing legal advice before proceeding.

On 12th November I e-mailed the Head of Medical Staffing confirming that there was unanimous agreement to withdrawing the job offer. On 13th November, the senior group reconvened and were informed that following an unclear e-mail contact from the BMA late on the 12th, a subsequent telephone conversation on the morning of the 13th identified that Dr. Alwitry was seeking his union's support to lodge a complaint or grievance against Mr. Downes. Whilst it is not unusual for a doctor to seek professional advice from his union about pay and rotas it was astonishing to Health and Social Services Department doctors that this would happen in this way, at this juncture. This undoubtedly further assured the group that they had come to the right decision and that the decision was further validated. To that extent this was "a factor".

It was agreed that I would share our position with the Chief Executive Officer of the Health and Social Services Department, the ministerial team and Human Resources Director for the States of Jersey, to be followed by the States' Employment Board. The decision was unanimously supported by all of them.

Over the course of 21/22 November the full membership of the States' Employment Board were briefed and consulted and supported the immediate withdrawal of the job offer.

This was done by letter dated 22nd November 2012, and signed by me, thereby terminating any contractual relationship, to the extent that it may have existed, between Dr. Alwitry and the SEB. The same letter offered appropriate compensation as advised by Law Officers.

4.18 The Board discussed the process, as set out above, with Mr. Riley, and noted that in recent years issues had arisen with 2 other consultants employed by the Health and Social Services Department. In one case disciplinary action had been taken and the individual had subsequently resigned. Mr. Riley described the other case as "having gone on for years" until the individual eventually retired. In both cases Mr. Riley advised that he would have recommended dismissal. He went on to state that it was not unusual in the UK for job offers to be withdrawn. In Dr. Alwitry's case, advice had been sought as to whether the contract had been enacted and it had been concluded that it had not. The withdrawal of the job offer was, therefore, the recommended route. In response to a question as to whether this was an appropriate way for a public authority to act, Mr. Riley stated that he believed that, in this particular case, this was the correct approach. He believed the circumstances to be "exceptional". It was understood that a senior officer from the Law Officers' Department had briefed the States' Employment Board on the recommendation to withdraw the contract of employment. The absence of a formal meeting with Dr. Alwitry to explain the concerns which were being expressed was highlighted, and Mr. Riley stated this this would only have happened if he had been in post; in other words if he had commenced employment at the General Hospital. It was pointed that it could be perceived that the Complainant had been denied the right to natural justice. The Board acknowledged that it was also likely that Dr. Alwitry had, by this time, tendered his resignation from his post in the UK, as it appeared that he was unaware that the job offer was going to be withdrawn. The Board questioned whether the process which had been followed could be described as fair and reasonable.

4.19 It was noted that, following the decision to withdraw the contract of employment, a candidate who had come a very close second to Dr. Alwitry had been offered the position. However, following some political debate the offer had been suspended and the post had remained unfilled for some time thereafter. Mr. Riley could not be absolutely sure but he thought that the services of a locum had been secured on or around February 2013.

4.20 The Board asked Mr. Riley to comment on references by Dr. Alwitry to the clinical risks which he believed were associated with operating on a Friday afternoon. Mr. Riley stated that there would only have been a risk if Dr. Alwitry was out of the Island over the weekend and, therefore, unable to see patients. In addition, it was the view of medical professionals that moving obstetrics and gynaecological procedures to a Friday afternoon (as suggested by Dr. Alwitry) would have posed a much greater risk to patient safety due to the complexity of these procedures. Mr. Riley stated that Dr. Alwitry's concerns regarding patient safety were exaggerated and were merely a "smoke-screen". The Board referred to various letters from medical professionals which appeared to support Dr. Alwitry's views. Mr. Riley dismissed these, alleging they had been written by Dr. Alwitry's "mates". He did, however, acknowledged that it was usual for there to be a certain amount of "horse-trading" around theatre slots. Mr. Riley explained that, in Jersey, consultants were required to work on a Saturday morning on an on-call basis without pay, but that Dr. Alwitry wished to be paid for this. Mr. Riley confirmed that this requirement had not been included in the contract of employment, but felt the Dr. Alwitry should have known this was the case as he had previously worked as a locum in the General Hospital. His father had also worked in Jersey as a consultant ophthalmologist.

4.21 The Board considered comments contained within electronic mail messages dated 13th and 23rd October 2012, from Mr. M. Siodlak. In his e-mails, Mr. Siodlak had stated: *"I think we should sack this bloke before he gets here"* and *"this appointment will be a disaster and we should withdraw his (Dr. Alwitry's) offer of a job before he gets here. Mark my words he will make XX seem like a walk in the park!"* The Board asked whether it could be assumed from these messages that Mr. Siodlak was driving the decision to withdraw the job offer. Mr. Riley stated that this was not the case. The Board noted that whilst an internal meeting had been held on 23rd October 2012, to discuss withdrawing the offer, no formal record had been produced. The Board noted an e-mail dated 24th October 2012, from Mr. Downes to Messrs. Riley and McLaughlin, stating that Dr. Alwitry had been in the Island on 22nd and 23rd October 2012, but had declined to discuss his concerns with senior staff members. Mr. Riley was asked if he had checked with Dr. Alwitry that he did not wish to discuss his concerns with staff whilst visiting the Island. Mr. Riley stated that he had not as he was: *"not in the habit of checking-up on senior colleagues".* Mr. Riley added that the electronic messages which had been submitted formed only a small part of a bigger story, as there had been numerous telephone calls from the Complainant to a number of staff members. Unfortunately, no records of these telephone conversations had been made.

4.22 The Board decided to adjourn and reconvene at 9:00 a.m. on 17th March 2016.

The Board reconvened at 9:00 a.m. on 17th March 2016, in Morier House.

5. The Board reconvened to hear representatives of both the Complainant and the Respondent sum up.

5.1 In light of the fact that a media representative had been present at the hearing on 16th March 2016, Mr. Riley asked to comment on the discussions which had taken place the previous day in relation to the clinical risks which Dr. Alwitry believed were associated with operating on a Friday afternoon. Mr. Riley outlined the role of the relevant Royal College in the context of the recruitment process, which involved job descriptions, job plans and timetables for specific roles being sent to the Royal College for approval. In this particular case the job plan included the Friday operating slot, and this had been approved. Mr. Riley stated that whilst a doctor may prefer not to work on a Friday afternoon, it was necessary in order to reduce waiting lists. In terms of the number of programmed activities undertaken by doctors in Jersey, the Board was advised that this had been capped at 10 (as part of a collective bargaining agreement), but in practice doctors were required to carry out 11½ programmed activities. When asked if Dr. Alwitry had been made aware of this, Mr. Riley stated: *"he is a Jersey boy and his father worked at the hospital so he would have known".*

The Board's attention was drawn to the specific wording of the terms and conditions of service for consultant medical and dental staff, which stated –

Non-emergency work after 7.00 p.m. and before 7.00 a.m. during weekdays or at weekends will only be scheduled by mutual agreement between the consultant and his or her manager. Consultants will have the right to refuse non-emergency work at such times. Should they do so there will be no detriment in relation to pay progression or any other matter.

5.2 The Board was advised that private practice arrangements in Jersey differed from those in the UK. Mr. Riley was asked about Dr. Alwitry's claim that Mr. Downes had stipulated that Dr. Alwitry pay Mr. Downes 20% of his private practice earnings for the use of Mr. Downes' "brand name". Mr. Riley informed the Board that Mr. Downes refuted this claim and was considering taking legal action. When asked about negotiations between clinicians on private practice issues, Mr. Riley advised that he was not involved in such discussions.

5.3 In terms of the internal meetings which were held with senior management, both in the context of this matter and other operational matters, the Board noted that it was not normal practice for a written record of such meetings to be produced.

5.4 On the related matter of the documents submitted, the Board made it clear that full and frank disclosure of all relevant material was absolutely essential, and that a dim view would be taken of any attempt to withhold any information pertaining to this matter. Indeed, such action could lead to a separate complaint. It was acknowledged that certain documents had not been made available as a result of the pending subject access request.

5.5 The Board invited Advocate Ingram, on behalf of the Respondent, to address/focus on the following issues in his closing statement –

- the process in terms of the job advertisement, which did not appear to reflect what was required of an individual in the Jersey context, with specific reference to differences between practices in the UK and Jersey;
- factual issues surrounding the start date;
- whether Dr. Alwitry was merely doing what was required of him under his contract, with specific reference to job planning/programmed activities;
- the decision-making process in relation to the withdrawal of the job offer;
- the absence of proper record-keeping;
- the potential for a conflict of interest over private practice;
- the question of whether a public authority should take away an individual's livelihood without affording the right of an independent review;
- whether the letter to the States' Employment Board accurately reflected the position and whether the Board was properly informed;

- whether the SEB should have relied entirely and solely on the views of senior officers who were directly involved;

- whether it was appropriate for the Solicitor General to investigate his own department's advice;

- whether the H&SSD should be more proactive in engaging with individuals. Based upon the paperwork, there was an appearance of unfairness;

- the Board's main focus was the decision-making process of a public authority.

6. The Board invited Advocate Chiddicks to deliver his closing statement as follows (this statement was subsequently submitted in writing due to time constraints) –

1. There are clearly a lot of facts and issues not agreed between Dr. Alwitry and the Respondent. Save for Mr. Riley's oral evidence, the evidence that was before the Panel related to the documentation provided by both parties. These closing submissions are based on Mr. Riley's evidence and the documentation.

2. Mr. Riley's evidence appeared to be that the decision taken to terminate Dr. Alwitry's contract was premised on correspondence and communications he had with hospital staff. The communications covered two main areas: start dates and job planning.

Start dates

3. Dr. Alwitry acted completely properly and appropriately with regard to communications about his start date.

4. It is clear from Mr. Riley's evidence that the question of the start date was not discussed at the interview stage. This is notwithstanding that Dr. Alwitry had been full and frank on his application form and clearly stated that his notice period was 6 months.

5. Clearly if there was an issue with Dr. Alwitry's notice period it was incumbent on the interviewing panel to raise their concerns at that stage and identify their requirements in respect of a start date. The interviewing panel did not raise any concern. In the circumstances, Dr. Alwitry, or any reasonable person, could rely on what was stated in on the application form and consider it acceptable.

6. The Respondent must accept that the failure to discuss their start date requirements was down to those involved in the interview process and no blame can be attached to Dr. Alwitry.

7. An issue over Dr. Alwitry requesting and being sent his contract is another example of an internal failure within the Hospital which they seek to unjustly lay at the feet of Dr. Alwitry. It is completely reasonable for a candidate who has been told they have been successful to want to look at and request a copy

of the terms of the contract being proposed. There is nothing wrong with this. To the contrary Dr. Alwitry was doing a reasonable and sensible thing and making sure that the terms of his potential contract were acceptable; clearly this should be done sooner rather than later because if they were not acceptable the Hospital could act accordingly.

8. *Mr. Riley referred to a "torrent" of telephone calls and e-mails about the start date and suggested that this was an example of difficult behaviour and that serious consideration was being given at that stage to withdrawing the job offer.*

9. *This is denied by Dr. Alwitry and there is simply no evidence or particulars put forward to substantiate such allegations. In the absence of such evidence the adverse inference should be drawn.*

10. *For example, if serious thought was being given to not pursuing matters with Dr. Alwitry then one would expect staff to be building a case for seeking approval to properly terminate the relationship with Dr. Alwitry in line with the contractual procedure and pursue other candidates or undertake the recruitment process again. The Hospital is well resourced in its human resources departments has experienced members of staff (as Mr. Riley frequently gave evidence to). In these circumstances there is a reasonable expectation that where thought is being given to moving away from a set plan that there would be a case prepared for doing so that would include a proper paper trail of alleged communications, meetings, discussions and reasoning. There are no file notes of any communications and no records of any discussions. Not only are there no file notes but there are no telephone records at all which may indicate how many calls were made, when they made and how long they lasted.*

11. *Another example is that no member of staff spoke to Dr. Alwitry about issues or concerns they had. Either the concerns were not severe or serious (or even in existence) and there was no need to speak to Dr. Alwitry, or the concerns were serious but the Hospital failed to relay those concerns to Dr. Alwitry. If the latter, then the lack of engagement was a serious procedural error.*

12. *In the Solicitor General's report at paragraphs 55 to 60 there is reference to evidence being given to the Solicitor General about a telephone conversation that took place between Mr. McLaughlin and Dr. Alwitry. It appears to be Mr. McLaughlin's evidence that this conversation lasted 40 minutes. Dr. Alwitry's evidence was that it lasted 5 minutes or so. There is clearly a big difference between a 5 minute conversation and one that lasts 40 minutes. Mr. McLaughlin was unable to provide any evidence of the duration whereas Dr. Alwitry was able to support his assertion which the Solicitor General proceeded with. This does more than just cast serious doubt over the allegations against Dr. Alwitry, it contradicts them.*

13. *There are simply no specifics, particulars or supporting evidence to back up what Mr. Riley says he was told. In the circumstances the Panel should ignore Mr. Riley's unsupported hearsay evidence of an alleged "torrent" of telephone calls. Further and in any event, the Panel has before it written documents which show a very different picture to Mr. Riley's evidence. This documentation should be given more weight and relied upon.*

14. The written documentation shows a completely reasonable, logical and polite number of exchanges regarding the start date which was ultimately agreed. There can be no criticism of Dr. Alwitry or his position in that correspondence.

15. There is a distinction between decisions and actions being taken at this stage (i.e. prior to Dr. Alwitry signing his contract) and after Dr. Alwitry has signed his contract. However there does not appear to be any doubt that some of the views wrongly formed by Hospital staff regarding start dates featured in the decision to terminate; Advocate Ingram himself identified the start date as one of three main issues and Mr. Riley accepted that the discussions regarding start dates would have been in some of the minds of those who made the decision to terminate, but possibly not all.

Job plan

16. Where we come to is that the start date was agreed and Dr. Alwitry signs his contract. The contractual terms are in full force at this stage. This includes a duty to undertake a two-way process of agreeing a job plan, as is common in every consultant appointment of this nature.

17. There was some discussion with Mr. Riley regarding differences between the UK and Jersey practices. This included a distinction between the amount of PAs clinicians are required to work and an expectation that consultants should be available for cover on Saturdays. These issues were not discussed at the interview and in respect of the Saturday cover at least this is plainly contrary to the express terms of service for consultants (terms proffered by the States' Employment Board); in particular paragraph 3.3.3 [AB/T2].

18. The Hospital recruits many consultants from the UK. Like Dr. Alwitry they will no doubt be familiar with UK practices as opposed to Jersey practices. It is incumbent on the Hospital and the interviewing panel to ensure that candidates are fully aware of distinctions between Jersey and UK practices at the interview stage.

19. The distinctions between Jersey and UK are important and will clearly be of interest to candidates. Also, clarifying the situation at the outset will no doubt avoid confusion later down the line including when parties come to negotiate job plans.

20. Dr. Alwitry wasn't told about the Jersey practices. Dr. Alwitry was provided with a contract which he studied and digested. It is abundantly clear from that contract, prepared by the SEB that he does not have to work Saturdays. On 24 September 2012 Dr. Alwitry wrote to Mr. Leeming about his PAs in his contract and wanted to check his understanding [MB/P149]. It was confirmed to Dr. Alwitry that his contract contained 10PAs [MP/P149]. At this stage nothing was said about the Jersey practice, notwithstanding Dr. Alwitry querying the PAs in his contract.

21. On 7 October 2012 Dr. Alwitry wrote to Mr. Downes on the issue of PAs in his contract [MP/140]. Dr. Alwitry refers to the fact that he has had confirmation from medical staffing but is still confused. Mr. Downes' response was on 9 October in which he gave no further explanation as to the PAs and chastised Dr. Alwitry for his efforts to alter the timetable [MB/P139]. At this stage Dr. Alwitry was effectively told to accept what was on offer or walk away. Dr. Alwitry was still not told about the Jersey practices notwithstanding that he had queried the PAs. The Hospital failed to engage with Dr. Alwitry properly and ignored important employment issues.

22. Dr. Alwitry was confused about the different practices and with good reason. Not only are they unfamiliar but they contradict express terms of his employment. Mr. Riley suggested that they were somehow implied terms. At any level an express term will prevail and it is hard to see how an alien and unfamiliar condition could be incorporated into a contract impliedly in the face of a clear express term to the contrary. Other than consultants practicing in Jersey, very few people will know or be familiar with Jersey practices and, in particular, potential employees from the UK. It is unfair for candidates and employees not to know the terms of any potential employment and not to have those terms set out in clear language.

23. The Hospital again must accept fault for failing to engage and address Dr. Alwitry on issues which he had a right to be informed about and had queried. Dr. Alwitry's approach was perfectly appropriate and sensible; he sought to clarify his understanding and identified an issue he was confused about.

24. The e-mail correspondence speaks for itself and shows Dr. Alwitry being polite and professional with Hospital staff. This is a far cry from the allegations that his communications were unreasonable. Further, all of the other e-mails back and forth between the Hospital staff and Dr. Alwitry, save for Mr. Downes' e-mail of 9 October, show a good relationship and rapport. These e-mails extend beyond purported issues with Dr. Alwitry and directly contradict allegations that Dr. Alwitry's communications were considered unreasonable. Dr. Alwitry had worked as a locum and so the Hospital staff were known to him as he was to them. He was an employee looking forward to taking up his post and working with the Hospital staff and, where possible, looking forward adding value and improving services. Mr. Sidebottom and Mr. Mathew considered the correspondence and firmly believed Dr. Alwitry conducted himself with diligence and the utmost professionalism and held the correspondence was not inappropriate or unreasonable.

25. Mr. Riley's evidence was that the hospital at least knew and appreciated that by purporting to withdraw the job offer they were, in fact, terminating the relationship and breaching terms of the contract. Whether this was quite relayed to the States' Employment Board, it is not clear.

26. The decision to terminate was made between a few members of Hospital staff without any proper independent checks or balances in place. Hospital staff were taken at their word without any efforts being made to verify the accuracy of their allegations. There are almost no records, which is astonishing in light of

the suggestion that they already considered there to be a red flag over Dr. Alwitry because of the start date issue.

27. *Due process to check that allegations made by staff against an employee who was already contracted to start were simply not in place or not followed. The Hospital, rather than undertake ordinary investigations, applied a heavy handed, unjust and wholly disproportionate approach to dismiss Dr. Alwitry. There were no statements from staff or allegations put to Dr. Alwitry and he was denied any opportunity to respond to criticisms or have his matter dealt with by someone independent. This is contrary to principles of natural justice and inconsistent with the terms of his contract.*

28. *This is inappropriate for any employer, let alone a public body who should clearly lead by example. This is at complete odds with best practice and clearly does not allow justice to be done, or be seen to be done. On any view it was plainly unfair and has had a profound effect of Dr. Alwitry's professional and personal life.*

29. *It is inconceivable that there should be a different approach taken by the Hospital management regarding disciplinary procedures in respect of someone who has taken up the post, as opposed to someone who has signed a contract but not yet taken up the post.*

30. *The contracts for consultants are signed in advance and it is hard to envisage a potential employee resigning from a permanent post and relocating to Jersey without the comfort of a signed contract of employment. Further, the terms of the contracts anticipate issues being negotiated (for example job plans) before the post is taken up.*

31. *In any event, the contract was entered into in August 2012 and the terms are in full force. This appears to be accepted because it was Mr. Riley's evidence that the hospital staff knew or held the belief that the termination was a breach of contract. This is consistent with the Law Officers' Department's e-mail dated 30 October 2012 [MB/P173].*

32. *The Hospital entered into the contract with its eyes wide open. It had Dr. Alwitry's CV and application form and there had been informal and formal process. The Hospital also had the benefit of observing Dr. Alwitry's performance as he had served as a locum on many occasions. The Hospital were fully aware of their obligations as a party to the contract and as an employer. Dr. Alwitry was an employee who had rights and interests as such.*

33. *It is wholly aggravating that the Hospital took the steps it did just a week before Dr. Alwitry was due to take up his post. Mr. Riley's evidence was that on his risk analysis it was better to sack Dr. Alwitry before he took up his post than to live with the consequences of Dr. Alwitry taking up the post. Mr. Riley's rationale was that he did not have to apply ordinary grievance procedures for employees because Dr. Alwitry was not in the post. That is striking and plainly misconceived. This was a blatant attempt by a few Hospital staff, motivated by personal problems they had with Dr. Alwitry or the way he conducted himself, to block Dr. Alwitry taking up his post and to try and circumvent due process and proper procedures. Further and in order to achieve their aim they grossly*

exaggerated (if not wholly fabricated) allegations and misled themselves and others including the HR Directors, the States' Employment Board and the Ministers.

Patient safety

34. It is also aggravating that the Hospital took the steps it did after Dr. Alwitry had raised legitimate patient safety concerns, which is his duty as a doctor and beneficial for the Hospital as a whole. Mr. Riley says that this was discussed and he felt he had been given comfort from the clinicians that there was no need to go further into the matter. Mr. Riley's evidence was also that the patient safety issues were a red herring.

35. This is a serious allegation for someone without any medical training to make against a very well regarded specialist consultant. It has no merit and there is sufficient evidence before the Panel that confirms that the patient safety concerns had a legitimate basis and were well founded. The Panel's attention was drawn to the 4 reports obtained by Dr. Alwitry which praise Dr. Alwitry and suggest that he should have been commended and not criticised [AB/T10].

36. Mr. Riley's suggestion that there has been some form of collusion or spin or that the reports do not reflect the author's professional opinion is denied. Again this is a very serious allegation to make against a number of senior experienced and well respected individuals. The authors were asked for their professional opinions and they provided them accordingly in their professional capacity and in the knowledge that they may be used.

37. The patient safety concerns were raised because of issues of risk. It is disingenuous to suggest that the ulterior motive was purely to enable Dr. Alwitry not to work Fridays so that he could see more of his family. Dr. Alwitry does not deny that he desired Fridays off but he does strongly deny and take offence to the suggestion that his concerns were raised with that objective in mind. Dr. Alwitry has written extensively about the patient safety concerns he raised and it cannot therefore come as a surprise to the Hospital that he raised them. It is clearly best practice that he does.

38. Further, Dr. Alwitry in his e-mail dated 7 October 2012 provides several possible alternatives and solutions to the timetable problems [MB/P140]. This includes Dr. Alwitry working Fridays and Saturdays. It is not correct to say that Dr. Alwitry was not prepared to work Fridays and Saturdays when it is clear that he would, and could, if he needed to. Not one of Dr. Alwitry's proposals appears to have been considered which is a gross failure in itself.

39. In any event, the purpose or reasoning behind the patient safety concerns being expressed is irrelevant. The fact is patient safety concerns were raised, they were legitimate and the Hospital was duty bound to consider and deal with them appropriately.

40. It is a significant step for Hospital staff to accuse a specialist consultant, who has written on relevant clinical risks, that he was misleading those in the Hospital. There was no misleading and there was no proof or evidence to substantiate the allegations that the patient safety concerns were a red herring.

This is serious and no such allegations should be made without a proper basis for the same.

41. *The evidence before the Panel shows that Dr. Alwitry raised legitimate concerns which he had researched and written about and, in the circumstances, Dr. Alwitry should have been commended and not criticised or accused of fabricating reasons for not working Fridays. Indeed the express terms of his contract require that he should be protected from sustaining any detriment as a result of raising such concerns. The steps actually taken by the Hospital and States' Employment Board could not be further from that.*

42. *The Hospital also failed to properly follow up or record any discussions regarding the patient safety concerns. It is accepted that the hospital will decide how it wishes to manage its risks but it is of concern that an employee is dismissed shortly after having raised legitimate concerns and then is targeted as a troublemaker and dismissed. This is clearly not best practice.*

Before decision

43. *Mr. Riley gave evidence that part of the reason for Dr. Alwitry's dismissal was because of the volume of his communications. On 9 October 2012 Mr. Downes wrote to Dr. Alwitry complaining that there had been an "awful lot of correspondence" and then proceeds to warn Dr. Alwitry about making too many demands [MB/P155]. Subsequently on 19 December 2012 Mr. Downes in an e-mail states that he had not had a response from Dr. Alwitry to his e-mail dated 10 September and appears to complain that Dr. Alwitry had not visited him when he was over in October [MB/P158]. Clearly Dr. Alwitry is damned if he does and damned if he doesn't.*

44. *Mr. Downes' e-mail does not appear to be accurate in any event. First, his e-mail regarding the timetable was sent on 24 September 2012 [MB/P123] and, second, he also sent an e-mail to Dr. Alwitry on 9 October 2012 [MB/P155].*

45. *Advocate Ingram submitted that Mr. Downes' e-mail dated 9 October 2012 [MB/P155] left the door open for further discussion on the timetable. This is misconceived and on any plain reading of Mr. Downes' e-mail it firmly shuts the door in Dr. Alwitry's face. In short, Dr. Alwitry will have to accept what is being offered or go elsewhere but there is to be no further debate and you must stop with your demands. This is a very clear warning about, at least, commenting further on the timetable.*

46. *Mr. Downes' e-mail appears to be praised by other staff members [MB/P155]. It is astonishing that Mr. Downes' e-mail was actually sent in the extraordinarily heavy-handed terms that it was when all that was trying to be agreed was a timetable which both parties were required to work together to agree and wherein Dr. Alwitry had liaised with the consultants he was told to. Further, Mr. Downes' e-mail comes off the back of requests to clarify the PAs issue which he fails to address and, more importantly, it wholly ignores legitimate patient safety concerns raised in Dr. Alwitry's e-mail of 7 October 2012 [MB/P140]. Mr. Downes' e-mail of 9 October 2012 is not constructive to a good and friendly working environment and neither does it*

promote best practice in respect of mutual obligations and protecting employee disclosures regarding patient safety issues.

47. *The Respondent and Mr. Riley have been unable to articulate what it is exactly that Dr. Alwitry did that was so wrong. Mr. Riley's response was to the effect that "there was no straw that broke the camel's back, the camel's back just disintegrated". It has been systematic of the Respondent's case that they fail or refuse to provide any details or particulars as to the facts that lead to Dr. Alwitry being dismissed. That simply is not good enough when coming from a public body.*

48. *When asked if Mr. Riley could point to a time when a procedure was initiated, his response was that "23 October was probably as good as any". It speaks volumes that a HR director is not able to definitively state when a procedure was in place. The reality was there were no procedures followed at all.*

49. *Following Mr. Downes' e-mail dated 9 October 2012, Dr. Alwitry spoke to Mr. Downes over the telephone. Dr. Alwitry has told the Solicitor General about this telephone conversation in which he states he accepted the timetable proposed by Mr. Downes [MB/P43]. It appears that the Solicitor General discussed this telephone conversation with Mr. Downes who was unable to recall it [MB/P44]. Dr. Alwitry supported his allegation that a telephone call took place by supplying his telephone bill records. It is astonishing that Mr. Downes does not have a recollection or make a record of such a conversation which took place.*

50. *In any event and on 31 October 2012 Mr. Downes wrote to Mr. McLaughlin with a proposal that he was happy to send to Dr. Alwitry that would see Dr. Alwitry take up his post. Mr. Downes' e-mail is after the Law Officer's Department's e-mail dated 30 October 2012, which purported to give advice about dismissing an employee or withdrawing a job offer [MB/P173]. It can reasonably be inferred that, at this stage, there is no purported loss of trust and confidence because Mr. Downes is content to work with Dr. Alwitry.*

51. *As is accepted by everyone, Dr. Alwitry had no contact with the Hospital staff from 31 October 2012 until he received notice of his termination. Dr. Alwitry was also not expected to contact the Hospital and, in fact, had been told not to make any demands.*

52. *Mr. Riley gave absolutely no account of anything which changed from 31 October until the decision was made to terminate. What is clear is that on 12 November 2012 the BMA made contact with Mr. Jones and suggested that Dr. Alwitry has "run into a few problems with the consultant lead" [MB/P183].*

53. *Mr. Riley's position was that his e-mail, written a few minutes after seeing the BMA e-mail, provided confirmation that a decision was taken earlier to dismiss Dr. Alwitry. With respect there are absolutely no records of discussions prior to Mr. Riley's e-mail about any decision having been taken to dismiss Dr. Alwitry. It is inconceivable that where a decision is reached on such a serious matter as dismissing an employee that there would be no written note of the same, whether contemporaneous or not.*

Decision

54. *In any event, the decision was not reached until 13 November 2012 when Mr. McLaughlin, Mr. Siodlak and Mr. Riley (and possibly Mr. Luksza) met "to discuss the appointment of Dr. Alwitry" [MB/P166]. If there had been a decision reached earlier by different individuals then no doubt this would have been worth a mention in this note. The note records the following –*

> *"Dr. Alwitry's communication, attitude and behaviour since his offer of employment was accepted with Health & Social Services was discussed, along with his subsequent reporting of Mr. Downes to the BMA.*
>
> *Those present agreed that, although regrettable, a withdrawal of employment was required."*

55. *The decision was taken by those present and the alleged complaint about Mr. Downes was a feature in the decision. While Mr. Riley originally denied that the alleged complaint played any part in the decision, he later conceded that it did but that he considered it de minimis.*

Alleged complaint

56. *It is inconceivable that the alleged complaint was not a factor in the decision to terminate. It was referenced in the note of 13 November 2012 and this is the only record of the decision and the reasons for same [MB/P166]. The Hospital management had received advice from the Law Officers' Department and it was clear that "care should be taken with regard to the reason for subsequently wishing to withdraw" [MB/P173]. No doubt great care was therefore taken when recording the reasons for the decision.*

57. *Mr. Riley's protestations that the alleged complaint was not a material factor in the decision to terminate goes against all the available evidence –*

    a. *First, there is the timing – nothing happens between 31 October and 13 November save that the Hospital staff become aware of an alleged complaint against Mr. Downes;*

    b. *Second, the meeting which records the decision took place on the 13 November;*

    c. *Third, Mr. Riley's letter to Mr. Sinclair dated 15 November 2012 asking the States' Employment Board "to clear the way for [the] decision to be enacted" and which alleges that Dr. Alwitry's behaviour has been unacceptable and that he has "engaged the BMA to support a formal complaint" and that Mr. Downes "not altogether unreasonably, has indicated that he would feel obliged to resign as CD if the offer is not withdrawn". Mr. Riley declined to answer questions about his inclusion of such comments in the letter and the reasonable inference is that the alleged complaint and potential resignation was to smear Dr. Alwitry's character and to add weight to the cause that he should be dismissed summarily.*

d. Fourth, Ms Haste's report in which she refers to being told about complaints being made by Dr. Alwitry to the BMA about Mr. Downes and that it was "regularly stated that it would be "untenable" for the management authority to be devalued by rescinding the decision, which was a result of a very strongly held concerns and beliefs" [BM/P315–317].

58. As an aside, it is deplorable to consider that the threat of one employee resigning from a post or otherwise should or could feature in a decision to terminate another employee summarily. If this is something the decision makers considered a factor or relevant, and Mr. Riley deemed it relevant enough to warrant a mention in his letter, then this is yet another serious error.

59. As the Solicitor General notes in his report at paragraphs 170–179 [MB/P54–56], rather than tackle the issue head on the Hospital are happy to carry on regardless under the mistaken belief that there was a complaint and then to rely on it for termination purposes. This was a serious procedural error which could have been, and should have been, easily avoided by a meaningful call to the BMA.

60. Yet further, even if Dr. Alwitry had made a complaint to the BMA (his trade union) it was plainly wrong for the Hospital or SEB to react as they did. The BMA as the trade union of most (if not all) clinicians, here and on the mainland, performs a vital role. As the Solicitor General recognised in his report, if a complaint had been made then it might have had merit. The appropriate course would be to properly consider and resolve whether it did or not; the plainly inappropriate course would be to sack the Complainant without more.

61. The Hospital staff proceeded completely at their own risk when they failed to ensure what the proper position was. The Hospital staff should have investigated the matter and it was their duty to do so. Instead they proceeded on false assumptions and relayed the same to other senior personnel including the Ministers.

<u>After decision</u>

62. It was incumbent on those individuals who made the decision on 13 November 2012 to properly apprise themselves of the true circumstances and facts (this includes not just the alleged complaint but the complete picture regarding the communications between Dr. Alwitry and Hospital staff). These are senior employees and they wholly failed to apply any form of process or procedure to get a complete picture. It would appear that from the 13 November 2012 at least, everyone has been misled and Dr. Alwitry has had his name dragged through the mud.

63. Mr. Sinclair and others within the States' Employment Board and the Ministers were misled. Whether by commission or omission they were misled as to the grounds and merits behind the decision to terminate which they were being asked to ratify.

64. *Whether the States' Employment Board or Ministers should undertake a more thorough enquiry process may be a separate matter and there was no substantive evidence before the Panel about the processes they undertake. What is clear however is that at least three (possibly four) very senior employees from the Hospital had made a very serious decision (which included breaching terms of an employment contract shortly before the post was to be taken up) and then they made their case for getting that decision ratified with a complete disregard for due process and fact finding.*

65. *Those senior employees would have known that significant weight would be given to their decision because it comes from a position of authority where they would have been expected to have undertaken due process and fully informed themselves of all the facts. In these circumstances, any such reliance by Mr. Sinclair, the States' Employment Board or the Ministers was wholly misplaced.*

66. *There was no independent process or investigation by someone from outside of the departments. The clinicians or management clearly had close ties with one another and their interests were better served by supporting each other. Whatever the merits, without any independent observer and without an accused having an opportunity to face allegations against him, the Hospital was acting contrary to principles of natural justice and basic fairness.*

67. *Dr. Alwitry can rightly feel aggrieved because there were clear terms in his contract that protected him if he raises patient safety concerns or if disciplinary action is taken against him. The evidence (or lack thereof) suggests that there were key Hospital staff who knowingly and intentionally rushed through a decision to terminate to avoid and justify procedures not taking place.*

68. *The decision was not based on an investigation or any form of fact gathering exercise and the decision proceeded on mistaken beliefs regarding the extent and content of communications and alleged complaints. These errors are compounded by the fact that there were personal issues and interests in play (including private practice issues) which were not declared and improper information and threats (i.e. Mr. Downes threatening his resignation) provided to key figures whose authority was required to sign off on such decisions.*

69. *Dr. Alwitry's interests and rights were wholly disregarded because he was not in the post and was therefore considered an outsider and easily expendable. That is plainly wrong, particularly in circumstances where he due to be in the post within a week, having already resigned from his previous post.*

70. *The Respondent proceeded under mistakes that there had been a complaint and that generally Dr. Alwitry's communications or conduct was unreasonable and of such severity that it merited terminating his contract summarily or dismissing him for gross misconduct. In the circumstances the Respondent made a decision which, if it knew the all facts and circumstances, no reasonable employer would have made.*

71. No reasonable employer would, or should, make a decision to dismiss an employee in the absence of due process and where the facts are unknown. Had the Respondent known this alone it is inconceivable that it would have agreed and ratified the decision to terminate Dr. Alwitry's employment.

72. Further, had the Respondent known that Dr. Alwitry had raised legitimate patient safety and that the guidance from the General Medical Association was not followed thereafter, it is inconceivable that it would have agreed and ratified the decision to terminate Dr. Alwitry's employment.

73. The suggestion that the outcome would have been the same in any event even if appropriate procedures been followed is wrong. In any event it is irrelevant. Procedures are inherently important to avoid errors and mistakes being made and to suggest that the same outcome would result is hypothetical and requires a high degree of speculation. The Panel should not concern itself with "what ifs"; it is enough that procedures were not followed or were not adequate. In any event, Dr. Alwitry's position is that had proper procedures been followed his employment would not have been terminated.

Purported investigations

74. Mr. Beal's report fails to deal with a lot of issues and some of those matters are dealt with in Sinels' letter dated 24 June 2013 [AB/T19]. This must be accepted to a degree, since otherwise there would have been no reason for the Solicitor General to conduct his investigation.

75. Dr. Alwitry has grave concerns about the Solicitor General's investigation in general and the findings. Sinels responded to the report in draft in a letter dated 5 February 2014 which was 33 pages in length [AB/T19]. This letter was largely ignored and the report was finalised with little amendments.

76. The Solicitor General was instructed by the States' Employment Board to carry out the investigation. Dr. Alwitry participated fully, including providing confidential correspondence between himself and his trade union. Dr. Alwitry was led to believe that the Solicitor General's investigation was independent; he was never told that it was not and he had previously raised concerns over the independence of Mr. Beal's report.

77. The Solicitor General's investigation was done behind closed doors. The witnesses were all interviewed separately. Dr. Alwitry was not able to attend or participate. In fact, the Respondent resisted the disclosure of the interview transcripts notwithstanding they clearly contained Dr. Alwitry's personal data and were about him. Only because Dr. Alwitry pursued his subject access requests through the Royal Court has this information been made available to him.

78. Dr. Alwitry was completely in the dark regarding the Solicitor General's investigation. Dr. Alwitry had subject access requests pre-dating the Solicitor General's instructions which were promised to be handed over week beginning 7 October 2013. On 4 October 2013 the Solicitor General asked to suspend the requests pending his investigation, which Dr. Alwitry reluctantly agreed to do. After the Solicitor General had finished his report the Respondents declined to

comply with the subject access requests. This is set out in paragraphs 6 to 9 of *Alwitry v The States' Employment Board and another* *[2016] JRC 050.*

79. *On or around 19 February 2015, for the very first time, Dr. Alwitry was first given notice that the Solicitor General had provided the States' Employment Board with legal advice in August 2013 and privilege was asserted over that advice. The advice predates the report and was not disclosed to Dr. Alwitry prior to his participation in the investigation or prior to the request for and receipt of confidential information from Dr. Alwitry. That is astonishing behaviour on the part of any law officer, let alone the Solicitor General.*

80. *The Solicitor General's report is compromised and cannot and should not be relied upon. Leaving aside the many errors and inaccuracies in that report, detailed more fully in Sinels' letter of 5 February 2014, the Solicitor General was plainly in a position of conflict and the process was not open.*

Conclusion

81. *Dr. Alwitry throughout has acted reasonably and professionally. His communications were polite and constructive. He complied with his duties to engage on matters of job-planning and he discussed the relevant issues with people he was directed to talk to. Dr. Alwitry did nothing wrong. He was astute and had the welfare of the hospital and the patients at the forefront of his mind. He took steps to bring patient safety concerns to Hospital staff and was trying to look at ways to improve standards.*

82. *All in all Dr. Alwitry was a model applicant and would no doubt have turned out to have been an outstanding employee who really could have benefitted the Island and raised new standards at the hospital. He should be commended and Jersey, by the actions of a few members of the Hospital staff with personal grievances, has lost a huge asset. Further, Dr. Alwitry has suffered enormously because of this not only financially but emotionally and it has clearly affected his health.*

83. *Dr. Alwitry's prime reason for the complaint is effectively to seek a finding that clears his name and exposes the errors in this case so that lessons can be learned and, should there be similar problems in the future, such errors are not repeated. This is particularly so in relation to the ability of employees to raise patient safety concerns without fear of recrimination or that that they will lose their jobs.*

84. *Dr. Alwitry prides himself on acting professionally (which he did) and feels the way he was dismissed (i.e. a week before he was due to start) draws an adverse inference. Given that the world of Ophthalmology is specialist and small, speculation will be rife and affects his future employability. Dr. Alwitry hopes that the findings of the complaint will show, not only that the hospital acted unjustly, oppressively and contrary to principles of natural justice, but that he acted properly and reasonably. As many others have said, he should be commended for his efforts.*

The Board received the following closing statement from Dr. Alwitry (this statement was submitted in writing after the hearing due to time constraints) –

85. This Reply is pursuant to the Panel's directions. In addition to this Reply Mr. Alwitry also continues to rely on his Written Closing Submissions filed as filed on 18 March 2016 ("WCS").

86. Paragraph numbers mentioned herein, unless stated otherwise, refer to the Respondent's Closing Submissions.

87. The Respondent's Closing Submissions, disappointingly, do not address the WCS. The Respondents maintain that they acted in an appropriate and proper manner yet they fail to address clear failures and deficiencies. This Respondent's stance is, and continues to be, unreasonable and they fail to recognise gross errors which is a serious aggravating factor.

The Respondent's evidence

Paragraphs 3 to 8

88. The Respondent alleges that it would have conducted its case differently but for an indication from the Panel regarding the issues. The Respondent now seeks to rely on and bring in further material. Since such a course flatly contradicts the clear directions given by the Panel, it should be refused in the absence of a very good reason to depart from those directions. There is no good reason to do so, for the reasons which follow.

89. With respect, this is a blatant attempt to try to bring in material after the event and cast doubt in the Panel's minds. This is wholly unacceptable and unreasonable.

90. It is clear that the Respondent was required to provide the Panel with a full response to the complaint. The Respondent's Response was filed on 9 March 2015 and appended to the same was Mr. Beal's Report, the Solicitor General's Report, the interview bundle used by the Solicitor General in compiling his Report and Ms. Haste's Report. That was the extent of the material relied on by the Respondent, at their election.

91. The Respondent's Response was submitted prior to Ms. Hart's e-mails timed of 9 April 2015 and 3 June 2015. It is clear that the Respondent was, at that stage, relying on the reports and Mr. Riley.

92. It is disingenuous of the Respondent to say that it would have conducted its case differently or called more witnesses but for comments made in Ms Hart's e-mails. The Respondent had already put forward their case and it remained unchanged.

93. The suggestion that the Panel explored issues outside of the matter before it is astonishing. The issues raised before the Panel were inextricably linked to the review of the processes under consideration and the issues were considered in the reports relied on by the Respondent. They were also squarely addressed in the Complaint to which the Respondent was responding. The Respondent should have been, and was, aware that the issues would be before the Panel.

Nevertheless it was the Respondent's decision to rely on the reports and only call Mr. Riley as a witness.

94. *Ms Hart's 3 June 2015 e-mail is clear, only those attendees she has been informed of will be able to participate and no further documents will be forwarded to the Panel for consideration.*

95. *It is therefore wholly inappropriate for the Respondent to seek to provide further material to the Panel unilaterally. Mr. Alwitry objects to the new material being introduced at this late stage.*

96. *Mr. Alwitry acknowledges that the Panel is the master of its own procedure and it can proceed as it wishes, which includes accepting further evidence.*

97. *The fact is that the Respondent asks the Panel to accept notes and transcripts of interviews as evidence. They were done behind closed doors and for a different purpose and the Panel should therefore exercise extreme caution in respect of same. The evidence was not available to be tested by Mr. Alwitry or the Panel.*

98. *Further, it is absurd that the Respondent suggests that without the additional material the reports "would be confusing and difficult to understand". This makes no sense as the reports were clearly relied upon by the Respondent without the additional material and there was no suggestion at that stage that they only made sense with the additional material. Moreover, the Respondent was quite content to present those reports to Mr. Alwitry as comprehensively addressing and (in their view) resolving this dispute. It is incredulous that the Respondent should now contend that these same reports are confusing and difficult to understand unless accompanied by material which they strenuously fought to withhold from Mr. Alwitry himself.*

99. *With respect, the reports make little, if any, reference to transcripts or interviews and it is wholly misconceived and disingenuous to submit, as a reason for the material being put before the Panel late, that the reports don't make sense without the underlying notes and transcripts.*

100. *The Respondent also seeks to justify not disclosing the material earlier because of proceedings in the Royal Court. Mr. Alwitry's position is that the Respondent was withholding the material unjustifiably and unlawfully. The Royal Court agreed and the disclosure of the Court was material was ordered. The only reason why the Respondent did not provide that material earlier is because it was strenuously and, in the Royal Court's judgment, wrongfully seeking to avoid ever having to release that material. In other words, any disadvantage of which it complains was entirely of its own making.*

101. *In any event, it was always open to the Respondent to put forward alternative statements and evidence prepared solely for the Panel. There is no good reason why the Respondent did not do this. This would have been the easiest and most sensible thing to do. Instead the Respondent avoided filing witness evidence before the Panel and relied on the reports. It did so at its own risk.*

102. It is also telling that the Respondent asks the Panel to place reliance on the reports and the additional material but makes absolutely no attempt to direct the Panel as to what, if any, parts of the additional material is relied upon or why. It is submitted that the additional material is a complete red herring.

103. In any event, the contemporaneous notes which are already before the Panel should be given more weight. This was averred to at paragraph 13 of the WCS. This does not appear to be disputed.

104. It was also averred to in the WCS (paragraph 10 thereof) that the lack of contemporaneous notes and a proper paper trail is telling and adverse inferences can and should be drawn against the evidence relied on by the Respondent. This does not appear to be disputed either.

105. The additional material is voluminous and it is disproportionate for the Panel to consider it or take it further. If it is accepted then it should be subject to cross-examination and Mr. Alwitry should be permitted the opportunity put in further evidence (particularly in respect of further documentation that may come to light following the disclosure now ordered by the Royal Court Court). To do otherwise would subject Mr. Alwitry to considerable prejudice as a result of the Respondent's own election to withhold much of this material until it lost data access proceedings before the Royal Court. Plainly Mr. Alwitry should not be disadvantaged by the course which the Respondent has elected to take.

106. Allowing further material to be adduced at this late stage is going to increase time and cost and, in light of the time, costs and delay incurred in this matter and the opportunities already afforded to the parties, the Panel should be cautious to allow further material and should seek closure of this matter.

107. In all the circumstances Mr. Alwitry submits that the Panel should reject and ignore the additional material. If it is accepted he would like the time to consider it, the opportunity to cross-examine the individuals and to file further evidence himself.

<u>The Respondent's submissions</u>

Paragraph 12

108. The Respondent alleges that it is accepted by all parties that the contract was terminated by letter dated 22 November 2012. That is not correct. As the Panel are aware there was a dispute in the Jersey Employment Tribunal regarding the validity of the letter which was headed "without prejudice". The Jersey Employment Tribunal decided that the letter could be dissected into privileged and open correspondence. Mr. Alwitry does not agree with the Jersey Employment Tribunal's decision. Whatever the status of the letter Mr. Alwitry was stopped from taking up his post.

Paragraph 13

109. The Respondent alleges that there was a large number of discussions and correspondence and that this was unusual given that Mr. Alwitry had not taken up his post. This is denied and there are no particulars or evidence to support this allegation.

110. It is a theme that the Respondent makes an allegation but fails to support the same with particulars or evidence in support.

111. Mr. Alwitry submits that the evidence that is before the Panel already shows a completely different picture to that alleged by the Respondent.

112. In any event, it is not understood why there should be no discussions before taking up a post. There should clearly be discussions about start dates as it is something that is routinely for negotiation and employers must consider an applicant's notice period and possible relocation. It is wholly reasonable and practicable for an applicant to want to see the terms of any contract and it would be wholly reasonable to discuss the content of same.

113. The suggestion that discussions prior to taking up a post are unusual or should not be entertained is poor practice and, in itself, speaks volumes as to the Respondent's wilful ignorance of ordinary or appropriate procedure in circumstances such as these. The discussions were reasonable and it is clearly inappropriate for the Respondents to hold them against Mr. Alwitry.

Paragraph 16 to 19

114. It is accepted that the Employment Contract was executed on 24 August 2012. This is clearly when the terms of the same took effect and there is no dispute.

115. The Respondent alleges that it was the Respondent's position that the chosen clinician was expected to start within 3 months of the interview. Nevertheless and as set out at paragraphs 4 to 6 of the WCS, a start date was not discussed at the interview stage and Mr. Alwitry had clearly stated in his application form that his notice period was 6 months. This does not appear to be disputed and it was clearly reasonable for Mr. Alwitry to consider that his notice period of 6 months has been accepted. Indeed the Solicitor General was himself heavily critical of the Respondent's approach here, recognising that the job advertisement specified only a "Winter" start date, which season obviously runs to the end of February.

116. The Respondent, without any particulars, alleges that "discussions" were "highly unusual" and Mr. Alwitry's "demands" and "manipulative behaviour" started the "breakdown in relationship". The Respondents have failed time and time again to particularise such allegations and, specifically, to state:–

a. What the alleged discussions were including when and how they took place, between whom and what was said;

b. What is alleged to have been "highly unusual" and why;

c. What were the alleged demands and what, if anything, was unreasonable about the same;

d. What the alleged manipulative behaviour was including when and how it took place, between whom and what was said or done; and

e. How any alleged conduct is alleged to have caused a breakdown in relationship and why.

117. Again, the Respondent, without any particulars, refers to the "tenor, frequency and manipulation" of discussions. It is unacceptable that the Respondent fails to articulate such allegations fully or indicate any evidence upon which it relies in support of the same.

118. Notwithstanding this it is understood that the Respondent adopts and relies on the content of paragraphs 106 to 142 of the Solicitor General's Report in support of the above allegation. With respect the Respondent's reliance on these paragraphs of the Solicitor General's report is misconceived as it deals with Mr. Downes' e-mail of 9 October 2012, a telephone call between Mr. Alwitry and Mr. Downes (which Mr. Downes failed to recall but which was proved by telephone records) and then correspondence between Mr. Alwitry and the BMA.

119. The correspondence between Mr. Alwitry and the BMA was confidential and would not have been known to the Hospital. It is therefore simply impossible for this correspondence to have had any impact on the Hospital deliberations or to have led the Hospital at the time to conclude that the relationship had broken down. If the Respondent now maintains that it was aware of the content of Mr. Alwitry's confidential communications with his trade union prior to Mr. Alwitry volunteering the same to the Respondent in the course of this dispute, it is required to state clearly how it came to be in possession of such communications. If it does not so maintain, then this entire line of argument in the Respondent's submissions must fall away.

120. The Respondent alleges that the Hospital was not influenced "whatsoever" by Mr. Alwitry's reference to the BMA. Reliance is place upon Mr. Riley's evidence before the Panel. With respect Mr. Riley's evidence, as set out paragraph 55 of the WCS, was that he originally stated that the reference to the BMA played no part in the decision to terminate Mr. Alwitry's employment but later conceded that it did.

121. Paragraphs 17 and 18 are at odds with one another. Paragraph 17 alleges that Mr. Alwitry's communications with the BMA allowed the Hospital to conclude the relationship had irretrievably broken down but paragraph 18 alleges that Mr. Alwitry's reference to the BMA was not a consideration.

122. Paragraph 18 is also at odds with the Solicitor General's Report which the Respondent relies on and which states that the Respondent mistakenly believed that Mr. Alwitry had made a complaint to the BMA and that that mistaken belief was a factor in the decision to terminate Mr. Alwitry's employment. Mr. Alwitry also repeats paragraphs 56 to 61 of the WCS.

123. Further, Mr. Alwitry also refers to Mr. Downes' e-mail dated 26 November 2012 [MB/P191]. Mr. Downes' e-mail was in response to Mr. Alwitry's query as to what had recently happened and why had he received the purported termination letter and what was behind the allegation that there was a dysfunctional relationship between them. Mr. Downes' e-mail suggested that Mr. Alwitry should reflect over past correspondence to find the answers to his queries and that "virtually all" of Mr. Alwitry's e-mails were unacceptable as was the alleged decision to report Mr. Downes to the BMA. Clearly the alleged decision to report Mr. Downes to the BMA was a factor in the decision to terminate and the evidence is overwhelming in this regard.

124. With respect the Respondent's case is confused and simply does not make sense. Paragraph 19 alleges the relationship had become "dysfunctional" and that Mr. Alwitry had "breached the implied term of trust and confidence". Again there are no particulars for this allegation or supporting evidence and that, in itself, is fatal for such a serious allegation. Indeed the Respondent's tendency to level such serious allegations without properly particularising the same, much less supporting them by evidence, is itself reflective of the way in which the Respondent dismissed Mr. Alwitry in the first place.

125. The Respondent alleges that the relationship had become dysfunctional and Mr. Alwitry had breached implied terms of trust and confidence by 10 November 2012. The Respondent relies on Mr. Riley's evidence before the Panel. It is denied that this was the evidence before the Panel and the Panel is invited to consult its notes on this point. In any event it is clear that the mistaken belief that Mr. Alwitry had made a complaint to the BMA was a factor in the decision to terminate his employment and this was premised on an e-mail from the BMA on 12 November 2012. The decision to terminate was taken on 13 November 2012 [MB/P166].

126. The Respondent's submissions that the decision to terminate was taken before it mistakenly believed there had been a complaint to the BMA is wholly untenable. Mr. Riley's evidence was such, the Solicitor General's findings were such and the Respondent has failed to address paragraphs 56 to 61 of the WCS which make a clear case that the decision to terminate followed and took into account the mistaken belief that Mr. Alwitry had made a complaint to the BMA.

Paragraph 21

127. The Respondent alleges that there is no dispute that legal advice the Respondent received informed the Respondent to terminate. Privileged is asserted over the alleged legal advice so it is wholly outside of Mr. Alwitry's knowledge and Mr. Alwitry makes no admissions in respect of the same. Given that Mr. Alwitry has not seen that advice because the Respondent asserts privilege over it, it is a mystery as to how the Respondent can now assert that it is undisputed that the Respondent dismissed Mr. Alwitry in accordance with that advice.

128. Further and in any event, it is not accepted that relying on legal advice allowed the Respondent to act unlawfully or to not follow due process.

129. The Respondent asserts privilege over the advice and it is not clear what instructions were relied on for the provision of any advice. Issues regarding advice are a matter for the Respondent and its advisers.

130. It is denied, to the extent that it is the Respondent's case, that the Respondent can seek to be exculpated on the basis of inadequate or wrong advice.

Paragraph 22 and 23

131. Paragraphs 22 and 23 confirm that the terms of the Employment Contract were in effect at the material time.

Paragraphs 24 to 26

132. For the avoidance of doubt the Reports and the findings within the same are not accepted by Mr. Alwitry.

133. It is not accepted that Mr. Riley "described" any manipulation of the start date; this remains an allegation which is unarticulated and unsupported by any evidence.

134. The allegation that timetabling was "orchestrated" by Mr. Alwitry during Mr. Downes' absence to undermine him is denied. The issue of the timetable was raised by the Ms Hockenhull in Mr. Downes' absence [MB/P146]. In any event timetabling is something which should be agreed by negotiation and the terms of the Employment Contract provide for this.

135. Mr. Alwitry's correspondence regarding the timetabling is before the Panel. It is wholly reasonable, logical and polite correspondence which complies with the mutual obligation to negotiate a suitable timetable. Mr. Alwitry went further and also brought legitimate patient safety concerns to the Hospital's attention and practices that could have seen the care and standard improved for the Hospital and patients all round.

136. Mr. Alwitry clearly understood that the timetabling had to be agreed by Mr. Downes and therefore there could be no orchestrated attempt to circumvent or undermine Mr. Downes. Furthermore, Mr. Alwitry was clear to bring the correspondence to Mr. Downes' attention on his return. Mr. Alwitry's e-mail dated 7 October 2012 is telling; it sets out sensibly and reasonably Mr. Alwitry's confusion regarding the PAs, the patient safety concerns and provides 5 potential solutions to the timetabling problem [MB/P69-70]. This was a typical example of Mr. Alwitry's approach to productively and constructively face a problem and deal with it. To the contrary Mr. Downs refused to entertain Mr. Alwitry's suggestions and threatened him that "making too many demands at this stage of your appointment is unlikely to bode well for your future relationships within this organisation!" [MB/P68-69].

137. For the avoidance of doubt, Mr. Alwitry's e-mail of 7 October 2012 expressly accepted that he would work on the Fridays and provide cover on a Saturday if there was no alternative. Mr. Alwitry also states that he had a telephone conversation with Mr. Downes on 10 October 2012 and that he accepted the timetable provided by Mr. Downes. Mr. Downes alleges that he has no recall

of this telephone conversation taking place but Mr. Alwitry's billing records show that the call occurred and lasted for 8 minutes. In the circumstances, Mr. Alwitry's evidence is clearly more reliable. Mr. Downes' recollection is either unreliable or deliberately false.

138. *It is wholly wrong for the Respondent to allege that Mr. Alwitry would not work on Saturdays. He committed to this even when he considered it to be at a substantial disadvantage to him and wherein it was clearly in contrast to the terms of his Employment Contract which expressly stated that he did not have to work weekends.*

139. *The allegation that "Time was not of the essence" and Mr. Alwitry could have and should have waited for Mr. Downes to return from his holiday is nonsense. No doubt if Mr. Alwitry had waited for Mr. Downes' return he would have been accused of sitting on it and that by not raising any issue it was deemed accepted.*

140. *Mr. Alwitry was dealing with a senior staff nurse and it was clearly considered appropriate for discussions to take place but it was clear that the overall decision was with Mr. Downes. Notwithstanding that the decision lay with Mr. Downes, it was never suggested that discussions should wait for Mr. Downes' return. This was not raised by the senior staff nurse or by any other staff member. Mr. Downes' e-mail of 24 September 2012, while it may not anticipate further changes to the timetable it does not suggest that any issues should only be discussed with him and should wait for his return [MB/146–148]. Mr. Alwitry was not told that he was prohibited from discussing the timetable with anyone else and it was reasonable for him to discuss issues with other senior staff members in Mr. Downes' absence.*

141. *Furthermore, it was the senior staff nurse who instigated the timetabling discussion in Mr. Downes' absence when she expressed concern that she could not see the "alternate sessions working well" and that it may result in "clerical chaos" and "make staffing the clinics a nightmare" [MB/P146]. Rather than discourteously ignoring the senior staff nurse's concerns, Mr. Alwitry gave thought and consideration to alternatives and tried to work with the senior staff nurse to achieve a more workable timetable that resolved many of the concerns she had.*

142. *Mr. Alwitry sought to deal with the matter of timetabling timeously and he cannot be criticised for the same. This is clearly appropriate and best practice as the sessions and surgeries need to be fixed in advanced and as soon as possible.*

143. *The allegation that "Instead the Complaint (sic) sought to raise erroneous patient safety issues and manipulate staff and other departments in the hospital to change surgery days to suit his personal needs" is denied and wholly without merit.*

144. *Mr. Alwitry refers to paragraphs 34 to 42 of the WCS. The Respondent fails to respond or deal with any of the important issues within these paragraphs and continues to allege, without any foundation, the serious allegation that the patient safety issues were erroneous and for an ulterior motive. This is wholly misconceived; the patient safety issues were real and the reasoning behind the*

patient safety concerns is irrelevant. In any event, it is clear that the Hospital failed to apply any proper or adequate procedure regarding patient safety concerns and that is a serious error in itself.

145. The Respondent alleges that had Mr. Alwitry been present the Panel could have explored allegations that Mr. Alwitry "breached the relationship" and that the Respondent has been prejudiced by Mr. Alwitry's absence. It is not entirely sure what it meant by "breached the relationship" but it is assumed that the Respondent contends that Mr. Alwitry breached terms of the relationship. This is denied and it is further denied that Mr. Alwitry's absence has prejudiced the Respondent in anyway whatsoever. Given that the Respondent felt able to summarily dismiss Mr. Alwitry without needing to hear from him at the time, it is absurd for them now to suggest that he must be present in order to properly present their case as to why they were right to act as they did.

146. The Respondent, again, without any particulars alleges that Mr. Alwitry has breached terms of the relationship. It is not clear what the terms are that are alleged to have been breached or what specific conduct amounts to the alleged breach. There is simply no merit to such allegations.

147. It is not clear how or why Mr. Alwitry's absence has caused prejudice. With respect Mr. Alwitry has made himself available to Mr. Beal, the Solicitor General (twice as well as providing confidential correspondence between him and the BMA) and he was cross-examined by Advocate Inrgam in the recent proceedings before the Royal Court. Mr. Alwitry was excused from the hearing on medical grounds and would make himself available should the Panel require.

148. Mr. Alwitry had filed his complaint together with his bundle. The Respondent filed its own bundle so it clearly considered it knew enough to respond.

149. Advocate Chiddicks appeared before the Panel and set out Mr. Alwitry's case. Advocate Chiddicks was asked questions by the Panel and it was open to Advocate Ingram to ask questions or ask for an adjournment.

150. The purpose of the hearing before the Panel is to examine the processes and procedures adopted by the Respondent. Mr. Alwitry can provide little, if any, evidence on this, particularly given that those processes and procedures deliberately did not involve him at all at the time of his dismissal. There was and can be no prejudice to the Respondent and the allegation that it has suffered some prejudice is another red herring.

151. The suggestion that Mr. Alwitry's evidence should be treated with some caution because it has not been tested by the Respondent or the Panel is noted. Conversely the Respondent must accept that the same caution must be exercised in respect of the additional material it now seeks to submit to the Panel. Further, the reports, which the Respondent relies on, should be treated with caution and they are not evidence. Mr. Alwitry repeats paragraphs 74 to 80 of the WSC. It is submitted that the best evidence before the Panel are the contemporaneous notes and correspondence.

Paragraphs 27 to 28

152. It is understood that the Respondent accepts that Mr. Alwitry's behaviour did not cause the termination. The allegation that Mr. Alwitry's behaviour caused a breakdown in the relationship between him and Mr. Downes is denied. It is denied that, even if there was a breakdown in that relationship, that the same should have led to his dismissal.

153. It is not understood how Mr. Alwitry's behaviour (which did not cause the termination) caused the breakdown of the relationship. Again there are no particulars nor is there evidence in support of this allegation. In any event, it is not clear how Mr. Alwitry's behaviour did not amount to a ground for termination but caused an irretrievable breakdown in the relationship. With respect this allegation has no merit or standing whatsoever.

154. Mr. Alwitry conducted himself properly and professionally within the terms of the Employment Contract and pursuant to his professional obligations as a doctor. It is inconceivable that acting to the high standards that Mr. Alwitry did, that this should have, or could have, led to a breakdown of a working and professional relationship.

155. Mr. Alwitry did nothing wrong so it is not understood how he could have caused any alleged breakdown of working and professional relationships. To the contrary, Mr. Downes and other Hospital staff's failure to engage with and comply with the Hospital's contractual terms and obligations as an employer and Hospital was clearly the cause of any alleged breakdown.

156. It is clear that as at 31 October 2012 Mr. Downes was prepared to work with Mr. Alwitry [MB/P159]. Mr. Alwitry had no contact with Mr. Downes or the Hospital after this time until the letter purporting to terminate his Employment Contract. Mr. Alwitry was not responsible for any alleged breakdown in the relationship and it is clear that the Hospital staff failed to investigate the alleged BMA complaint and therefore proceeded in error. It was the Hospital's mistake and lack of due process that led to any alleged breakdown in the relationship. It proceeded at its own risk.

157. It is clear that Mr. Alwitry is an employee and has contractual rights, including the right to have the contractually agreed procedures adhered to by the Respondent. Mr. Alwitry was denied those rights. This is wholly inappropriate and wrong.

158. The admission that Mr. Alwitry's behaviour did not cause the termination is relevant and the Respondent and the Ministers were clearly misled on this point. Mr. Riley's letter dated 15 November 2012 [MB/P186] expressly refers to Mr. Alwitry's behaviour as being "adversarial, aggressive, inappropriate, duplicitous, unco-operative and frankly unacceptable" and that "this behaviour constitutes a loss of trust and confidence so fundamental as to undermine the contract of employment."

159. Mr. Riley's letter was wholly misleading. The Respondent was clearly asked to support the decision to terminate on the basis of Mr. Alwitry's deemed unacceptable behaviour. This was wrong and the Respondent should clearly not

have been misled about Mr. Alwitry's behaviour and should have been advised that it specifically was not a cause or basis to terminate his contract.

160. The allegations contained in Mr. Riley's letter were grossly exaggerated and wrong. Such a letter should never be written, let alone by a HR Director for a government body.

161. Further, Mr. Alwitry and the Jersey Employment Tribunal were misled. In particular, the purported termination letter dated 22 November 2012 [MB/P189] stated that the decision was informed by "the attitude and behaviour displayed". The reasonable inference is that Mr. Alwitry's behaviour caused the termination. The change in position wholly undermines the Hospital staff's and the Respondent's credibility.

162. There is absolutely no evidence that the Hospital had "patient care" at the forefront when they concluded the relationship had broken down. The evidence is all to the contrary. It was Mr. Alwitry who had raised patient safety concerns (in numerous e-mails which are all before the Panel) and this was ignored by the Hospital.

163. The Hospital terminated Mr. Alwitry's Employment Contract after he had raised patient safety concerns. Whether or not there was a difference of opinion or the patient safety concerns were considered adequately managed, Mr. Alwitry was criticised rather than commended for his approach.

164. Whatever the reasons for patient safety concerns being raised, once raised they must be dealt with in the proper way. The purpose or reason behind the patient safety concern is irrelevant and the Hospital is bound to consider and deal with them appropriately. Failing to consider and deal with them is serious and unlawful. However it is wholly aggravating that the Respondent then, rather than commend Mr. Alwitry, makes serious accusations and allegations that undermine the reason for the patient safety concerns and amount to an unbridled attack on Mr. Alwitry's character.

165. Doctors are required to carry out their office with a high degree of integrity and Mr. Alwitry takes this very seriously. It is wholly unreasonable that the Respondent failed to address the patient safety concerns properly and needlessly (with the clear deliberate intention of undermining Mr. Alwitry and casting doubt over his character) expressed the view that they were raised for an ulterior motive. There was nothing to substantiate criticisms surrounding raising of the patient safety concerns, to the contrary they were clearly legitimate.

166. The Hospital staff carried out no due process to investigate the patient safety concerns with Mr. Alwitry or to satisfy him (or even themselves) that the concerns were not warranted. They should have done so. The Respondent and the Hospital were bound and obliged to do so pursuant to the Employment Contract and duties owed to the GMC.

167. The Respondent's actions show no regard for patient care and it is unacceptable that the patient safety concerns were not addressed properly with Mr. Alwitry, that he was subject to criticism for raising them and accused of

acting inappropriately. As set out in the reports provided by Mr. Alwitry, he should have been commended and respected for acting in an entirely professional and appropriate manner which was consistent with his contractual duties and general duties and professional obligations as a doctor.

168. The Hospital's approach would likely stifle concerns in the future and that risks the Hospital's development and its overall delivery of patient care. The Hospital staff would have known this when Mr. Downes' sent his e-mail of 9 October 2012 (which was praised by senior staff [MB/P155]).

169. Clearly the Hospital and any government body should be cautious not to link raised patient safety concerns with behaviour alleged to amount to a dismissal or a breakdown in relationship. To allege, as the Respondent does, that Mr. Alwitry's behaviour, which included raising patient safety concerns, caused the alleged breakdown in relationship is therefore wholly astonishing.

170. This is a backward step for the Hospital which, on the evidence before the Panel, victimises, or at least can be perceived to victimise, whistle-blowers or those professionals who raise legitimate patient safety concerns pursuant to their contractual and professional obligations. It is clearly inappropriate and unlawful for the Hospital to act in this way which negatively affects how employees and doctors conduct themselves in the future and it only serves to create a hostile working environment where employees and doctors fear reprisals and recrimination for complying with their obligations. This is the opposite of how the Hospital is supposed to act and is contrary to the GMC guidelines and best practice.

Paragraphs 29 to 31

171. It is alleged that Mr. Riley gave evidence that the working practices would have been explained to Mr. Alwitry at interview or shortly thereafter. This is complete speculation. The Respondent has failed to put forward evidence from any member of staff at the Hospital whom they say actually told Mr. Alwitry about the working practices. This is because no one told Mr. Alwitry.

172. The documentary evidence that there is clearly shows that Mr. Alwitry does not understand the working practices and queried it. On at least two different occasions Dr Alwitry raised the issue of PAs and at no stage was he given an explanation.

173. Mr. Alwitry relies on paragraphs 16 to 23 of the WCS. The onus was clearly on the Hospital to apprise Mr. Alwitry of significant differences in practice which it failed to do. Mr. Alwitry reasonably sought explanations. Remarkably the Hospital seek to use this as evidence against him regarding inappropriate behaviour. This is wholly unacceptable and unreasonable. Clearly the sensible thing for the Hospital to do was to explore whether anyone had actually explained the differences to Mr. Alwitry, or to speak to him and clarify the position itself. The Hospital again led itself into error.

174. The Respondent's position, notwithstanding the available contemporaneous correspondence, is that it was Mr. Alwitry who was at fault for issues regarding the timetabling and this was due to his own family reasons. This is denied and the correspondence is before the Panel to read.

175. Timetabling is something to be negotiated. Mr. Alwitry acted pursuant to the terms of the contract and as per his duty as a doctor. Mr. Alwitry sought to negotiate by providing alternatives and he sought to raise patient safety concerns where appropriate and, in any event, he accepted the timetable.

176. The Hospital failed to enter into any meaningful negotiations and Mr. Alwitry was threatened not to make demands. This is clearly in breach of the Employment Contract. The Hospital's failure to accept any responsibility is wholly aggravating and unreasonable.

177. Mr. Alwitry is well within his rights to seek arrangements which suit his personal life. There is nothing wrong with this and the Respondent's continued reliance on such arguments are misconceived and unreasonable.

Paragraph 32

178. The breakdown in relationship is alleged to be because of the inability to agree a timetable and the complaints by Mr. Alwitry. This is denied. In any event, Mr. Alwitry agreed the timetable and he made no complaint.

179. The Respondent's position is confused. Paragraph 32 and, in particular, the admission that the mistaken complaint to the BMA was a dominant factor which led to the breakdown of the relationship, is at odds with paragraphs 18 and 19.

180. Clearly the Respondent was in error when it took into account a formal complaint about Mr. Downes to the BMA. There was no formal complaint and nothing for the Respondent to take into account. The Respondent should have investigated this matter before proceeding in error.

181. Regarding comments between Mr. Alwitry and the BMA generally, these are confidential and the Hospital were not privy to them. They cannot and could not therefore reasonably be relied on as a factor in deciding to terminate Mr. Alwitry's employment.

<u>Issued raised by the Panel</u>

<u>Factual issues surrounding the start date</u>

Paragraphs 33 to 35

182. The Respondent states its position was that the Clinical Director emphasised the need for a start date in 2012 and that Mr. Alwitry wanted a start date in 2013 to suit his personal needs. The Hospital rejected a 2013 start date and a compromise was ultimately reached.

183. There is nothing wrong with the Respondent seeking a start date that suits his needs and clearly the issue of a start date is up for negotiation. In any event the start date issue was resolved.

184. That should be an end to it however the Respondent's position appears to be that Mr. Alwitry made "concerted effort[s]" to get views from different senior personnel and that this "was a deliberate act to undermine the senior personnel". There is absolutely no evidence for this and the written contemporaneous correspondence shows a completely reasonable and polite number of exchanges.

185. The Respondent also fails to address substantive issues such as the processes at the interview stage which saw no issue raised in respect of Mr. Alwitry's application form (which clearly set out his notice period) or discussion at all regarding preferred starting dates. It was clearly reasonably for Mr. Alwitry to proceed on the basis that his application form had been read and there were no issues.

186. Further, the Respondent fails to deal with its processes for how its staff communicate with successful candidates generally and, if a candidate is perhaps being too demanding, how it deals with issues. There are no notes or written records which evidence Mr. Alwitry had acted inappropriately or that he was deliberately canvassing the views of different senior personnel. Mr. Alwitry was not told he had acted inappropriately or should cease doing anything he had done.

187. The start date was agreed and Mr. Alwitry's Employment Contract was subsequently executed.

<u>The potential for a conflict of interest over private practice</u>

Paragraphs 36 to 37

188. The issues of private practice is not "irrelevant" and the Respondent fails to deal with the issue of private practice adequately or properly.

189. Private practice may well be something the Hospital does not wish to involve itself in but because it involves its employees there is a real potential for conflict, particularly as in this case where Mr. Downes was directly involved in the decision to terminate Mr. Alwitry's employment.

190. The Respondent's allegation, made for the first time in its written closing submissions, that Mr. Alwitry was to go into partnership with Mr. McNeela is completely false. Mr. Alwitry's intention was to practice from Little Grove Hospital but without any partnership or other financial link with Mr. McNeela. Again the Respondents have made completely unsupported allegations, tantamount to giving evidence by their Advocate, without indicating any basis whatsoever for doing so.

191. In any event, it would clearly be inappropriate and unlawful for Mr. Downes to seek that Mr. Alwitry's employment be terminated on the basis that Mr. Alwitry turned down the offer of going into private practice with him and / or that he

chose to go into partnership with someone else and / or that he chose to set up independently.

192. It is irrelevant whether Mr. Downes' support for the decision to terminate included Mr. Alwitry's decision regarding private practice because Mr. Downes being involved in the decision is enough. Mr. Downes has a conflict of interest and he and the Hospital failed to declare it or otherwise manage the situation adequately.

193. It is the failure to recognise and manage the conflict or interest, which may be real or perceived. Regardless of whether justice is done it has to be seen to be done. The conflict was clear and present and would have been obvious to the decision makers and it was clearly inappropriate to proceed as they did without some form of independent process taking place.

<u>Whether the letter to the States' Employment Board accurately reflect the position and whether the SEB were properly informed</u>

Paragraphs 38 to 40

194. Clearly Mr. Riley's letter dated 15 November 2012 [MB/P186] did not reflect the accurate position and the Respondent was not properly informed of all the facts. The Respondent's position to the contrary is wholly untenable.

195. The allegations against Mr. Alwitry in the letter were and are unfounded. To state that Mr. Alwitry's behaviour was adversarial, aggressive, inappropriate and unco-operative is wrong and misleading and it was clearly wrong to advise the Respondent that Mr. Alwitry had engaged the BMA to support a formal complaint about Mr. Downes.

196. Mr. Alwitry repeats paragraphs 62 to 73 of the WCS.

197. The allegation that "great consideration" was taken over the decision is unsubstantiated. It is not particularised and neither is there any evidence of a full investigation into the matters alleged. It is averred that this is because there was no investigation but, rather, senior personnel were taken at their word who had either deliberately misled the Respondent or were reckless as to the same. The Respondent was grossly misled and the "great consideration" was in respect of falsehoods and inaccuracies which wholly undermined the decision in any event.

198. The letter did not accurately reflect the position and the Respondent was not properly informed. The letter was motivated by Hospital staff who wanted to "sack this bloke before he even gets here" [MB/P120]. The Hospital staff did not like Mr. Alwitry's approach and wanted to expedite his termination to avoid any form of disciplinary process.

199. Mr. Riley's evidence was that he considered it unheard of that the disciplinary process would be engaged if an employee's contract was terminated prior to them taking up their post. The Respondent was asked by the Panel to provide authority for this which it has failed to do. Mr. Riley was clearly in error (or

knew the correct position and acted contrary to the same) and the full terms of the Employment Contract were in force.

200. Mr. Riley's letter dated 4 December 2012 addressed to Mr. Alwitry states that "Since your service has not yet commenced, we do not believe that section 18.2.2 is engaged" [MB/P213]. Mr. Riley's letter was wrong and he wholly misrepresented the true position to Mr. Alwitry.

Whether the States' Employment Board should have relied entirely and solely on the views of senior officers who were directly involved with the Complainant

Paragraphs 41 to 42

201. The suggestion that the Hospital staff acted objectively is denied. Mr. Downes was in a position of conflict because of his private practice issues and because he mistakenly believed there was a formal complaint against him. Further, Mr. Riley's letter was misleading and included references to Mr. Downes resigning if Mr. Alwitry's employment was not terminated. Mr. Alwitry was an employee with rights and he was given no opportunity to address any allegations. The decision was not objective and, in any event, not only must justice be done but it must be seen to be done.

202. The suggestion that an independent process would undermine the trust and confidence between members of the Hospital and/or the Respondent is nonsense. Clearly an independent process is best practice as potentially questionable decisions are brought to account. If the decision is just and fair there would be no reason to fear an independent review.

203. Had there been an independent process in these circumstances it is impossible that the Respondent would have terminated Mr. Alwity's Employment Contract. It is aggravating that the Respondents refuse to accept this.

Whether it was appropriate for the former Solicitor General to investigate his own department's advice

Paragraphs 44 to 50

204. The Solicitor General's Report is not independent and was done behind closed doors. Mr. Alwitry relies on paragraphs 74 to 80 of the WCS.

205. The Solicitor General at paragraph 50 of his affidavit dated 19 February 2015 states:–

> *"I did provide the SEB with some legal advice in this case on 19th August 2013. This advice is covered by Legal Professional Privilege and therefore is not disclosed. In any event, I have reviewed the document and there is no personal data in the advice that is not contained in my report and the bundle."*

206. On the face of what is said by the Solicitor General he clearly gave advice prior to commencing his investigation and finalising his Report. This was unknown to Mr. Alwitry until the Solicitor General's affidavit was filed in the course of the Royal Court data access proceedings.

207. It was clearly inappropriate for the Solicitor General to undertake the investigation he did and his Report is unreliable and compromised.

208. For the avoidance of doubt and notwithstanding the inappropriateness or otherwise of the Solicitor General to investigate his own department's advice and conduct, Mr. Alwitry considers the Report flawed in many other respects and the Panel should review Sinels' letter dated 5 February 2014 [AB/T19].

The Law

Paragraphs 51 to 61

209. The evidence from Mr. Riley was that he knew by terminating the Employment Contract expeditiously it was not compliant with its terms and was a breach of contract. Nevertheless it was decided to proceed expeditiously to prevent Mr. Alwitry taking up his post in the hope that they could forgo the disciplinary procedure. That is a cynical and intentional breach of contract on the part of a public body.

210. It is clear that the Respondent wanted to ensure that there was no disciplinary process. The Respondents put forward no authorities in support of dispensing with the disciplinary procedure prior to a post being taken up.

211. The authorities now put forward by the Respondent are a blatant attempt to find a legal technicality after the event to support the decision to forgo the disciplinary procedure. It is wholly untenable that this is a case where it is appropriate to forgo the disciplinary procedure, if indeed it is possible to do so.

212. The disciplinary process is a contractual term and by not complying with it the Respondent breached the terms of the Employment Contract. To do so purposely is unconscionable, particularly for a government department.

213. Mr. Alwitry was entitled to know the allegations against him and to have an opportunity to answer the same. These are principles of natural justice and the Respondents are nowhere near the grounds for dispensing with the same and their reasoning for doing so (i.e. to prevent Mr. Alwitry taking up his post) is flawed.

The Respondent's conclusion

Paragraphs 62 and 63

214. It is not essential to hear from a Complainant directly or at all. In any event Mr. Alwitry was represented and his case was set out in good order and material was relied on which had been filed by both parties. On the material filed by the parties and the evidence provided by Mr. Riley the Panel has more

than enough information to make findings on the balance of probabilities and uphold the complaint.

Paragraphs 64 and 65

215. It is clear that the Respondent was under a contractual duty to negotiate timetables and protect individuals who raised patient safety concerns. The Respondent failed to comply with these terms and breached key terms of the Employment Contract.

216. Conversely Mr. Alwitry acted pursuant to the terms of the Employment Contract and his duties as a doctor. His contract should not have been terminated.

217. It is denied that the Respondent was "left with no other option than to terminate". Even if Mr. Alwitry's conduct had been as poor as the Respondent alleges (which is denied) there were clearly other options available. Ms Haste and the Solicitor General both recognise that early dialogue by the Respondent with Mr. Alwitry could have prevented some issues.

218. Mr. Alwitry on receiving the purported termination letter wrote to Mr. Downes asking for an explanation "so we can hopefully get it resolved?" Mr. Downes unhelpfully suggested that Mr. Alwitry should reflect on his previous correspondence which was "virtually all" deemed to be unacceptable his alleged to decision to report Mr. Downes to the BMA. No further explanation or particulars were provided. Notwithstanding this Mr. Alwitry wrote a polite response explaining some of the difficulties he had had and suggested "we could sit round a table and thrash this out amicably" [MB/P190-191].

219. Mr. Alwitry then on 4 December 2012 receives a letter from Mr. Riley stating that since Mr. Alwitry had not taken up his post the disciplinary process would not be engaged and, regardless of where any fault lay, relations have broken down irrevocably and the best he could hope for was an ex gratia payment [MB/P213]. The Hospital and the Respondent resisted early resolution and their approach was wholly hostile, oppressive, disproportionate and unreasonable.

220. The Respondent and Ministers were misled by the Hospital because they were under some misapprehension that they could forgo the disciplinary process if Mr. Alwitry did not take up his post. This was wrong, unlawful and against principles of natural justice. On any view it was not conduct befitting of a public body such as the Respondent.

221. It is not a defence to act contrary to the law because the same was based upon legal advice. The Respondent acted unlawfully, whether on the advice of its lawyers or not and whether or not that advice was accurate. The issue of the advice is a matter for the Respondent and its lawyers; it is not of concern to Mr. Alwitry nor does it affect the unlawfulness of the Respondent's acts.

222. The "extraordinary level of scrutiny" is meaningless when it is premised on misleading and erroneous facts and when there has been no independent investigation. The suggestion that there was a "higher level of process" than any usual dismissal decision making process is a red herring when the process

ignores the basics and proceeds in error. Fundamentally, it is nonsensical to contend that there was a "higher level of process" than usual when the subject of that process (Mr. Alwitry) was not involved at all until the decision to dismiss him had been reached behind closed doors and implemented.

Paragraph 66

223. The complaint is clearly made out. There are currently no breach of contract proceedings and the Respondent's reference to the same is not understood.

8. The Board invited Advocate Ingram to deliver his closing statement as follows (this statement was submitted in writing due to time constraints) –

Introduction

1. Dr. Alwitry has raised a complaint before the States of Jersey Complaints Board that the termination of his contract of employment on 22 November 2012, is contrary to Article 9(2) of the 1982 Law.

2. It is the States' Employment Board's ("the Respondent") position that the Complainant's contract of employment was terminated in an appropriate, proper and reasonable manner and that Article 9(2) of the 1982 Law is not engaged.

3. At this early juncture in these submissions, the Respondent considers that it is important that the Board understand the premise upon which it conducted its case at the hearing on 16 March 2016. The Respondent was instructed that the Board was only considering the discreet issue of the procedure adopted by it when terminating the Complainant's contract of employment. The Respondent was expressly advised by e-mail from the secretary to the Board that issues such as the grounds for making the decision and in particular those which alleged patient safety issues, would not need to be addressed nor would form part of the hearing itself. The hearing explored various issues which the Respondent considers were outside of the discrete issue. Had it been aware that the hearing would take the course that it did, the Respondent would have called various witnesses to deal with the issues discussed and importantly; filed additional documentation relevant to the Solicitor General's report dated 17 February 2014 and the States of Jersey Independent Case Review, prepared by Paul Beal, dated March 2013 prior to the hearing.

4. The Respondent therefore respectfully invites the Board to carefully consider the papers before it and the evidence heard by the sole witness at the hearing, namely: Mr. Tony Riley. Should the Board consider that it requires additional assistance by way of further submissions, evidence and documentation, the Respondent will provide the same expeditiously.

5. In order to assist the Board, the Respondent has chosen to provide it with redacted copies of the statements, handwritten notes and transcripts which were taken in order to produce the "Beal" and former Solicitor General's reports which investigated the termination of the Complainant's contract of employment.

6. *The Respondent provides the documentation further to the Royal Court's judgment dated 25 February 2016, which concerned their disclosure to the Complainant. These documents had previously been withheld and therefore did not form part of the Respondent's bundle. However, given the above judgment and that these documents are now with the Complainant, it is the Respondent's position that without considering the documentation; the reports of Mr. Beal and the former Solicitor General would be confusing and difficult to understand.*

7. *The Respondent places reliance upon both reports and the witness evidence, which underpins both. Therefore, the Board is invited to consider the documentation prior to reaching any decision.*

8. *As above, should the Board require additional submissions, evidence or documentation the Respondent will oblige expeditiously.*

Submissions

9. *Much of the factual matrix behind the Respondent's decision to terminate the Complainant's contract of employment is in dispute. The Respondent therefore advances the following facts in support of its case that the decision was a proper and reasonable one and not contrary to Article 9(2) of the 1982 Law.*

10. *The States' Employment Board employs persons on behalf of the States of Jersey. It has the responsibility of employing persons to work at the hospital and the delivery of health and social services on the Island.*

11. *The Complainant is a Consultant Ophthalmologist, who specialises in the treatment of eye conditions. He was brought up on Jersey and the States of Jersey paid for his medical training. He wanted to return to the Island and therefore applied for an advertised position as a Consultant in Ophthalmology at the Jersey General Hospital.*

12. *On 1 August 2012, the Complainant was offered the position of Consultant in Ophthalmology following an interview process which involved other candidates. Following some initial dialogue between the Complainant and Respondent, a contract of employment was signed by both parties on 21 and 24 August 2012, respectively. It is accepted by all parties that the contract was terminated by letter dated 22 November 2012.*

13. *Between 1 August and 13 November 2012, there was a large number of discussions and correspondence between the parties which were unusual given that the Complainant had yet to take his physical post at the hospital.*

14. *At the hearing, the Board heard evidence from Mr. Riley, who is a Director of Human Resources at the Department of Health and Social Services. He assisted the Board by explaining that the Consultant position was advertised in early June 2012, with a closing date for applications on 22 June 2012. The application process was a usual one and there were no specific peculiarities associated with it. The application process was supported by the*

Royal College of Ophthalmology and had received its approval and endorsement.

15. *On 26 June 2012, four of the eleven candidates for the consultant position were selected for final interview. The Complainant was one of the four. Pre-interview meetings took place on 31 July 2012, at which time the Complainant met with both the Clinical Director of Ophthalmology and the Director of Hospital Operations. Formal interviews took place on 1 August 2012, and were conducted by an appointments panel. The Complainant was the successful candidate. He was informed of the panel's decision by telephone that afternoon.*

16. *A contract of employment was executed by 24 August 2012, and it is and was the Respondent's position that clinicians, which included consultants in the British Isles, were expected to start a new position within three months of any interview. In early August 2012, there were various discussions concerning the Complainant's start date. The discussions principally took place between the Complainant and the Clinical Director, wherein the Director emphasised the need for an early start date and one which was during that year. He was not prepared to entertain the six month delay required by the Complainant. The Board heard from Mr. Riley that a compromise of working three days per week between 1 December 2012 and 1 February 2013 was discussed to allow the fixing of a start date in 2012. Those discussions were only evidenced in part at the hearing using certain documentation. It was Mr. Riley's evidence that the discussions, even at this very early stage, started the breakdown in the relationship between the parties. He described how the demands of the Complainant to fix a start date to suit his personal agenda became strained and commenced the highly unusual and manipulative behaviour shown by the Complaint throughout.*

17. *It is the Respondent's position that the tenor, frequency and manipulation used within the discussions and correspondence between August and 13 November 2012, allowed the Hospital to conclude that the relationship between the parties had irretrievably broken down. In this regard, the Respondent supports, adopts and relies upon the findings of the former Solicitor General between paragraphs 106–142 of his report.*

18. *Mr. Riley gave evidence which supported the findings of the former Solicitor General, save that he emphasised that at the meeting which took place on 13 November 2012, in the office of the Managing Director of the Hospital he, Mr. Riley, was not influenced whatsoever by the Complainant's reference to the British Medical Association. Mr. Riley gave evidence that the decision to terminate the Complainant's contract of employment took place prior to the meeting and solely as a result of the breakdown in the relationship between the Complainant and the Respondent.*

19. *It was his evidence that by 10 November 2012, the relationship had become dysfunctional and had breached the implied term of trust and confidence necessary for the proper performance of the contract itself, notwithstanding that the Complainant was yet to physically take his post at the hospital.*

20. It is advanced by the Respondent that the decision to terminate the Complainant's contract of employment was considered and carefully explored. Contrary to any standard or usual practice, following the decision to terminate the contract, Mr. Riley referred the matter to the Respondent and took legal advice from the States of Jersey Law Officers' Department. It is reflected in the States' Employment Board Minute dated 18 December 2012 and additionally from the evidence provided by Mr. Riley that the legal advice informed the Department of Health and Social Services and the States' Employment Board to terminate the contract of employment in the manner in which it did.

21. The legal advice tendered remains privileged; however there is no dispute that the advice informed the Respondent to terminate of the contract of employment by letter and without notice.

22. The Complainant's Advocate referred to the contract of employment during his submissions to the Board. It will be aware that clause 29 of the contract refers to Schedule 18 of the document entitled 'Terms and Conditions of Service' which is found in the Complainant's bundle.

23. Schedule 18.2.1 is instructive. It permits the termination of a contract of employment "…where there is some other substantial reason to do so in a particular case…". It is the Respondent's position that the breach by the Complainant of the implied term of trust and confidence within the contract of employment satisfies the termination as it is a substantial reason.

24. It is clear from the content of the two reports written by Mr. Beal and the former Solicitor General that the relationship between the parties had broken down to such an extent that any trust and confidence had been removed. Mr. Riley described the manipulation of the start date; the ever changing working pattern and importantly the intentional effort made by the Complainant to undermine senior personnel at the hospital. One example was the use of a senior staff nurse to move the ophthalmology department's surgery dates away from a Friday, to allow the Complainant to return home on weekends. This was orchestrated whilst his own line manager was away on annual leave. This was a purposeful action seeking to undermine the manager. Time was not of the essence, the Complainant could have simply waited until the line manager's return and entered into discussions with him about the timetabling. Instead the Complainant sought to raise erroneous patient safety issues and manipulate staff and other departments in the hospital to change surgery days to suit his personal needs.

25. Had the Complainant been present at the hearing, the above issue, along with all of the others the Respondent contends breached the relationship, could have been explored. The Respondent should not be prejudiced by the Complainant's absence. Rather, the Board is invited to treat the Complainant's "evidence" with some caution. It has not been tested by the Respondent and the Board itself.

26. The Respondent relies upon the reports from Mr. Beal and the former Solicitor General and Mr. Riley, to evidence the breakdown in the relationship of trust and confidence. The Board can be satisfied that the reports should be given due weight when it reads the witness evidence which underpins the same.

27. It was not the Complainant's behaviour that caused the termination in itself, but the breakdown of the relationship. In particular the relationship between the Complainant and the Clinical Director and line manager. It is clear from the evidence before the Board that in the Complainant's case the Hospital was concerned about the next 30 years with him and that patient care was at the forefront of the Hospital's considerations when it concluded that the relationship had broken down.

28. It is vehemently denied that the Hospital; any of its clinicians, staff and consultants placed their own interests in front of patient safety. There is no evidence before the Board that this was the case. Patient safety was and always is the outstanding principle upon which they provide their medical services.

29. Mr. Riley gave evidence that the working practices and hours of the hospital and their senior staff would have been explained to him at interview or shortly thereafter. In any event they would have been known to him due to his previous experiences and those shared with his Father. The Respondent asserts that it is simply incredulous that the Complainant suggests that he was not aware of the number of hours which needed to be completed every week and the practices of surgery days at the hospital.

30. The issues raised by the Complainant are a throwback to the relationship between his father and Mr. Downes. The Respondent cannot accept and denies that the inability to agree working hours was its fault. It contends that it was the Complainant who would not agree the hours, due to his own family reasons.

31. The papers suggest that the Complainant's wife was not due to move to Jersey until July 2013. This was an addition influence on the Complainant's need to re-arrange working patterns and hours to suit his personal needs.

32. The inability to agree a working pattern, and the associated complaints made by the Complainant was a dominant factor which led to the breakdown in the relationship between him and the senior personnel at the hospital.

Issues Raised by the Board

Factual Issues Surrounding the Start Date

33. It is the Respondent's position that the Clinical Director of the Hospital emphasised the need for the Complainant to start his employment in 2012. He was not prepared to entertain a six month delay. This understanding was confirmed by Mr. Riley in evidence and also by the former Solicitor General in his report at paragraph 25. It is clear from the witness evidence gathered by the former Solicitor General that the Complainant only wanted to commence his employment in 2013 and at a date to suit his personal needs.

The Board is invited to read the witness statements taken by the former Solicitor General of the Clinical Director and Managing Director on this issue.

34. It is clear from the evidence that the Hospital management considered but rejected the proposal of a 2013 start date.

35. Notwithstanding that decision, the Complainant made a concerted effort to seek out views of other senior personnel at the hospital in order to generate support for his proposal that it be changed. It is the Respondent's position that this canvassing was a deliberate act to undermine the senior personnel at the hospital and their requirement that early start date be procured and agreed by the Complainant.

The Potential for a Conflict of Interest over Private Practice

36. Mr. Riley gave evidence on this issue. His evidence was that the issue of a Consultant's private practice was not a relevant consideration for the States' Employment Board or for that matter whether an individual consultant would either be recruited or their contract terminated. Mr. Riley was clear in that the Complainant's desire to enter private practice on this Island did not influence his decision and deliberation when advising the senior personnel at the hospital to terminate the contract of employment. It formed no part of the legal advice received.

37. It was Mr. Riley's belief that the Complainant was going into private practice with Mr. McNeela and not Mr. Downes. Given that Mr. McNeela was not directly involved in the breakdown of the relationship between the parties, the Respondent respectfully submits that this is an irrelevant issue for the Board in deciding whether the decision to terminate the Complainant's contract was a reasonable one.

Whether the letter to the States' Employment Board accurately reflected the position and whether SEB were properly informed

38. It was Mr. Riley's evidence that the letter to the Respondent accurate reflected the position and that the Respondent was properly informed of all the facts.

39. He explained to the Board that he had briefed Mr. Mark Sinclair in great detail. All of the parties concerned understood the reputational and financial exposure that the decision would pose to the Hospital and the Respondent. Mr. Riley emphasised that there was great consideration taken over the decision to terminate the contract of employment and it was, on balance, preferable to all other courses of possible action.

40. The overriding consideration being that there had been a breakdown in the trust and confidence between the Complainant and Respondent which could not be remedied.

Whether the States' Employment Board should have relied entirely and solely on the views of senior officers who were directly involved with the Complainant

41. Mr. Riley gave evidence that he relied on the senior medical staff at the Hospital to make an objective decision. He provided evidence that it was the role of such officers. They undertook a management role alongside their own clinical role.

42. Given their seniority it was accepted that any decision made did not require a second or "independent" opinion. Such a process in itself would have been dysfunctional and undermine the mutual trust and confidence between politicians, who themselves are members of the States' Employment Board, and the senior officers that they employ.

43. The vetting or independent review of decisions in this particular case had been well considered, not only through the Hospital but by the Law Officers Department.

Whether it was appropriate for the former Solicitor General to investigate his own department's advice

44. The former Solicitor General maintains, as he did in evidence before the Royal Court, that his report was independent and not influenced by the involvement of the Law Officers Department, immediately prior to the termination of the Complainant's contract of employment.

45. I am instructed that the former Solicitor General was not involved at any time with the advice that was tendered by the department or the subsequent decision taken to terminate the Complainant's contract. The advice was contained within the Civil Division of the Law Officers Department and concerned two specific officers, neither of which discussed or consulted the former Solicitor General at the material time.

46. The former Solicitor General gave evidence before the Royal Court that he would have no hesitation in criticising members of the Law Officers Department, were he to disagree with their advice and would furthermore have little hesitation in prosecuting a department or officer should the appropriate circumstance arise. He contended in evidence that his report was independent and impartial and disputed any allegations to the contrary.

47. The above submissions need to be placed into context. The Respondent therefore respectfully suggests that it would be appropriate for the board to understand the position of Solicitor General. The position is a Crown appointment. The Solicitor is deputy to Her Majesty's Attorney General for Jersey and performs any of the Attorney's functions as authorised by him.

48. There is a suggestion that in the case of a conflict between the Crown and the States of Jersey, the Attorney General would represent the interests of the Crown and the Solicitor General would represent the interests of the States/public. It is doubted however that this solution would be acceptable today.

49. The Respondent therefore submits that the former Solicitor General's report should be attributed significant weight. It is the product of witness evidence and any findings made arise from the evidence and not merely and singularly from the former Solicitor General's desire to protect his own department.

50. He concludes that there was a breakdown in the relationship between the Complainant and the Respondent. Termination of the contract was appropriate in the unique circumstances of the case.

The Law

51. Where there is a breakdown in the contractual relationship between employer and employee, the absence of a disciplinary process may be justifiable. Where there was a breakdown in the contractual relationship, the absence of a disciplinary process can be justifiable.

52. The House of Lords in Malik v BCC1 [1997] IRLR 262, [1997] 3 All ER 1, recognised the implied trust and confidence term, which it defined as prohibiting the employer from:

> *"Without reasonable and proper cause, conduct itself in a manner calculated and [later clarified to mean or] likely to destroy or seriously damage the relationship of confidence and trust between employer and employee".*

53. In Leach v OFCOM [2012] IRLR 839, the English Court of Appeal considered dismissal following a disclosure from the police regarding a senior employee suspected of child sex abuse. An important part of this case was the Court recognised that an employer had lost trust and confidence in the employee and that this was SOSR to dismiss an appropriate case. The extent of which an employer can rely upon the term of trust and confidence has been controversial. Indeed in Leach, Lord Justice Mummery stated that, "breakdown of trust is not a mantra that can be mouthed whenever an employer is faced with difficulties in establishing a more conventional conduct reason for dismissal".

54. The reliance of the implied term by an employer is controversial and likely to attract close scrutiny by any tribunal or court, however, when he was President of the EAT, Underhill J strongly criticised any development of the term in McFarlane v Relate Avon Ltd [2010] IRLR 196, [2010] ICR 507:

> *"Although in almost any case where an employee has acted in such a way that the employer is entitled to dismiss him the employer will have lost trust and confidence in the employee ... it is more helpful to focus on the specific conduct rather than resort to general language of this kind. We have noticed a tendency for the terminology of "trust and confidence" to be used more and more often outside the context of constructive dismissal in which it was first developed ...; this is a form of mission creep which should be resisted.".*

55. In A v B [2010] IRLR 844, [2010] ICR 849, EAT he said:

> *"We have observed a growing trend among parties to employment litigation to regard the invocation of a "loss of trust and respect" as an automatic solvent of obligations: it is not.".*

56. However, the principle remains sound, albeit treated with a degree of scepticism and disfavour. In Perkin v St Georges Healthcare NHS Trust [2005] IRLR 934, [2006] ICR 617 the Court of Appeal held that in a suitable case the dismissal of an employee with whom colleagues could not work might be justified as substantial reason for dismissal based on "awkward personality", rather than discrete, proven incidents of misconduct on his part.

57. In that case the tribunal had approached the matter on the basis that the dismissal was on the grounds of conduct in circumstances in which the employee, who was a senior finance director, had caused a breakdown in relationships with other members of the senior executive committee by reason of his manner and management style. The Court of Appeal was of the view that although "personality" could not of itself amount to a misconduct reason for dismissal it could manifest itself in such a way as to amount to a fair reason for dismissal. However, it is important to note that the Court of Appeal also stressed that it is still necessary for the employer to prove the facts required to show a genuine breakdown.

58. In Gorf in v Distressed Gentlefolk's Aid Association [1973] IRLR 290 the employee, a domestic worker at an old people's home, was dismissed after complaints had been made by other staff members. She was a "determined and forceful lady" and caused dissension in the home. She was dismissed to restore harmony amongst other staff and that was held to be sufficient to amount to some other substantial reason.

59. An older example is Isle of Wight Tourist Board v Coombes [1976] IRLR 413, EAT, where the manager remarked about his personal secretary that was an "intolerable bitch on a Monday morning". The EAT held that the comments had shattered the relationship of complete confidence which was necessary for that relationship of director and personal secretary. Important here was the need for the two to work closely together. In this case it was the employee who resigned.

60. In Ezsias v North Glamorgan NHS Trust [2011] IRLR 550, EAT an employer was permitted to change the ground for disciplining a consultant, with whom colleagues found it difficult to work, from misconduct to some other substantial reason after the investigations had begun, which had the effect that the employer did not have to go through complex misconduct procedures laid down by the Department of Health; the dismissal was held to be fair, though the case may be explicable on the basis of the urgency of rectifying the position inside the hospital department which was affecting patients. So by changing their case to alleging simply that relations had broken down, that no other member of staff would ever work with him again and that the interests of the hospital and its patients meant that he had to go, they successfully changed the legal categorisation from misconduct to a substantial

reason, which meant that it was not unfair not to have gone through the misconduct procedures, and on the facts of his claim of unfair dismissal failed.

61. Despite the warning of Mr. Justice Keith at 58 that, "We have no reason to think that employment tribunals will not be on the lookout, in cases of this kind, to see whether an employer is using the rubric of "some other substantial reason" as a pretext to conceal the real reason for the employee's dismissal." It is the Respondent's position that this case is of assistance. The principle in Ezsias; that a discipline process is not necessarily required when the relationship has broken down, was applied by the President of the EAT in Westgate v Jefferson (Commercial) LLP [2013] All ER (D) 303 (Feb).

Conclusion

62. It is the Complainant's case and it is for him to satisfy the Board that his complaint should succeed on the balance of probabilities; to satisfy the Board that Article 9(2) of the 1982 Law is engaged.

63. The Board did not hear from the Complainant nor any of his witnesses. The Complainant only advanced his case on the papers. It is the Respondent's position that the papers do not support the complaint. It was reasonable for an employer in the circumstances of this case to terminate the contract of employment following the breakdown of the relationship, in the absence of any disciplinary procedure.

64. The Respondent could not afford for the Complainant to take position and affirm any aspects of that dysfunctional relationship. Whilst it may be argued that the termination should have taken place on an earlier date, the Respondent asserts that it tried to assist the Complainant over the months of August, September and October to find an amicable solution. Absent solution and despite discussions with a senior employee with the Complainant's existing employer, the Respondent was left with no other option other than to terminate the contract of employment. It did not wish to allow the Complainant to physically take up his role and then serve three months' notice.

65. The Respondent did not act contrary to law, rather upon legal advice. It did not act contrary to the generally accepted principles of natural justice. The decision to terminate the Complainant's contract was deliberated by senior officers at the Hospital; a Director of the Human Resources Department of the Hospital; the States' Employment Board and the Law Officers Department. On any analysis, this extraordinary level of scrutiny is unique and reflective of the difficult decision presented to the Respondent. This is a higher level of process than any usual dismissal decision making process.

66. In all of the circumstances therefore, the Respondent invites the Board to reject the complaint. It seeks to further the Complainant's breach of contract litigation which falls therefore to be categorised as frivolous, vexatious and not in good faith.

7. The Complainant's reply to the Respondent's closing submissions

1. This Reply is pursuant to the Panel's directions. In addition to this Reply Mr. Alwitry also continues to rely on his Written Closing Submissions filed as filed on 18 March 2016 ("WCS").

2. Paragraph numbers mentioned herein, unless stated otherwise, refer to the Respondent's Closing Submissions.

3. The Respondent's Closing Submissions, disappointingly, do not address the WCS. The Respondent's maintain that they acted in an appropriate and proper manner yet they fail to address clear failures and deficiencies. This Respondent's stance is, and continues to be, unreasonable and they fail to recognise gross errors which is a serious aggravating factor.

<u>The Respondent's evidence</u>

Paragraphs 3 to 8

4. The Respondent alleges that it would have conducted its case differently but for an indication from the Panel regarding the issues. The Respondent now seeks to rely on and bring in further material. Since such a course flatly contradicts the clear directions given by the Panel, it should be refused in the absence of a very good reason to depart from those directions. There is no good reason to do so, for the reasons which follow.

5. With respect, this is a blatant attempt to try to bring in material after the event and cast doubt in the Panel's minds. This is wholly unacceptable and unreasonable.

6. It is clear that the Respondent was required to provide the Panel with a <u>full response</u> to the complaint. The Respondent's Response was filed on 9 March 2015 and appended to the same was Mr. Beal's Report, the Solicitor General's Report, the interview bundle used by the Solicitor General in compiling his Report and Ms Haste's Report. That was the extent of the material relied on by the Respondent, at their election.

*7. The Respondent's Response was submitted prior to Ms Hart's e-mails timed of 9 April 2015 and 3 June 2015 (**Appendix 1**). It is clear that the Respondent was, at that stage, relying on the reports and Mr. Riley.*

8. It is disingenuous of the Respondent to say that it would have conducted its case differently or called more witnesses but for comments made in Ms Hart's e-mails. The Respondent had already put forward their case and it remained unchanged.

9. The suggestion that the Panel explored issues outside of the matter before it is astonishing. The issues raised before the Panel were inextricably linked to the review of the processes under consideration and the issues were considered in the reports relied on by the Respondent. They were also squarely addressed in the Complaint to which the Respondent was responding. The Respondent should have been, and was, aware that the issues would be before the Panel.

Nevertheless it was the Respondent's decision to rely on the reports and only call Mr. Riley as a witness.

10. *Ms Hart's 3 June 2015 e-mail is clear, only those attendees she has been informed of will be able to participate and no further documents will be forwarded to the Panel for consideration.*

11. *It is therefore wholly inappropriate for the Respondent to seek to provide further material to the Panel unilaterally. Mr. Alwitry objects to the new material being introduced at this late stage.*

12. *Mr. Alwitry acknowledges that the Panel is the master of its own procedure and it can proceed as it wishes, which includes accepting further evidence.*

13. *The fact is that the Respondent asks the Panel to accept notes and transcripts of interviews as evidence. They were done behind closed doors and for a different purpose and the Panel should therefore exercise extreme caution in respect of same. The evidence was not available to be tested by Mr. Alwitry or the Panel.*

14. *Further, it is absurd that the Respondent suggests that without the additional material the reports "would be confusing and difficult to understand". This makes no sense as the reports were clearly relied upon by the Respondent without the additional material and there was no suggestion at that stage that they only made sense with the additional material. Moreover, the Respondent was quite content to present those reports to Mr. Alwitry as comprehensively addressing and (in their view) resolving this dispute. It is incredulous that the Respondent should now contend that these same reports are confusing and difficult to understand unless accompanied by material which they strenuously fought to withhold from Mr. Alwitry himself.*

15. *With respect, the reports make little, if any, reference to transcripts or interviews and it is wholly misconceived and disingenuous to submit, as a reason for the material being put before the Panel late, that the reports don't make sense without the underlying notes and transcripts.*

16. *The Respondent also seeks to justify not disclosing the material earlier because of proceedings in the Royal Court. Mr. Alwitry's position is that the Respondent was withholding the material unjustifiably and unlawfully. The Royal Court agreed and the disclosure of the Court was material was ordered. The only reason why the Respondent did not provide that material earlier is because it was strenuously and, in the Royal Court's judgment, wrongfully seeking to avoid ever having to release that material. In other words, any disadvantage of which it complains was entirely of its own making.*

17. *In any event, it was always open to the Respondent to put forward alternative statements and evidence prepared solely for the Panel. There is no good reason why the Respondent did not do this. This would have been the easiest and most sensible thing to do. Instead the Respondent avoided filing witness evidence before the Panel and relied on the reports. It did so at its own risk.*

18. It is also telling that the Respondent asks the Panel to place reliance on the reports and the additional material but makes absolutely no attempt to direct the Panel as to what, if any, parts of the additional material is relied upon or why. It is submitted that the additional material is a complete red herring.

19. In any event, the contemporaneous notes which are already before the Panel should be given more weight. This was averred to at paragraph 13 of the WCS. This does not appear to be disputed.

20. It was also averred to in the WCS (paragraph 10 thereof) that the lack of contemporaneous notes and a proper paper trail is telling and adverse inferences can and should be drawn against the evidence relied on by the Respondent. This does not appear to be disputed either.

21. The additional material is voluminous and it is disproportionate for the Panel to consider it or take it further. If it is accepted then it should be subject to cross-examination and Mr. Alwitry should be permitted the opportunity put in further evidence (particularly in respect of further documentation that may come to light following the disclosure now ordered by the Royal Court Court). To do otherwise would subject Mr. Alwitry to considerable prejudice as a result of the Respondent's own election to withhold much of this material until it lost data access proceedings before the Royal Court. Plainly Mr. Alwitry should not be disadvantaged by the course which the Respondent has elected to take.

22. Allowing further material to be adduced at this late stage is going to increase time and cost and, in light of the time, costs and delay incurred in this matter and the opportunities already afforded to the parties, the Panel should be cautious to allow further material and should seek closure of this matter.

23. In all the circumstances Mr. Alwitry submits that the Panel should reject and ignore the additional material. If it is accepted he would like the time to consider it, the opportunity to cross-examine the individuals and to file further evidence himself.

<u>The Respondent's submissions</u>

Paragraph 12

24. The Respondent alleges that it is accepted by all parties that the contract was terminated by letter dated 22 November 2012. That is not correct. As the Panel are aware there was a dispute in the Jersey Employment Tribunal regarding the validity of the letter which was headed "without prejudice". The Jersey Employment Tribunal decided that the letter could be dissected into privileged and open correspondence. Mr. Alwitry does not agree with the Jersey Employment Tribunal's decision. Whatever the status of the letter Mr. Alwitry was stopped from taking up his post.

Paragraph 13

25. The Respondent alleges that there was a large number of discussions and correspondence and that this was unusual given that Mr. Alwitry had not taken up his post. This is denied and there are no particulars or evidence to support this allegation.

26. It is a theme that the Respondent makes an allegation but fails to support the same with particulars or evidence in support.

27. Mr. Alwitry submits that the evidence that is before the Panel already shows a completely different picture to that alleged by the Respondent.

28. In any event, it is not understood why there should be no discussions before taking up a post. There should clearly be discussions about start dates as it is something that is routinely for negotiation and employers must consider an applicant's notice period and possible relocation. It is wholly reasonable and practicable for an applicant to want to see the terms of any contract and it would be wholly reasonable to discuss the content of same.

29. The suggestion that discussions prior to taking up a post are unusual or should not be entertained is poor practice and, in itself, speaks volumes as to the Respondent's wilful ignorance of ordinary or appropriate procedure in circumstances such as these. The discussions were reasonable and it is clearly inappropriate for the Respondents to hold them against Mr. Alwitry.

Paragraph 16 to 19

30. It is accepted that the Employment Contract was executed on 24 August 2012. This is clearly when the terms of the same took effect and there is no dispute.

31. The Respondent alleges that it was the Respondent's position that the chosen clinician was expected to start within 3 months of the interview. Nevertheless and as set out at paragraphs 4 to 6 of the WCS, a start date was not discussed at the interview stage and Mr. Alwitry had clearly stated in his application form that his notice period was 6 months. This does not appear to be disputed and it was clearly reasonable for Mr. Alwitry to consider that his notice period of 6 months has been accepted. Indeed the Solicitor General was himself heavily critical of the Respondent's approach here, recognising that the job advertisement specified only a "Winter" start date, which season obviously runs to the end of February.

32. The Respondent, without any particulars, alleges that "discussions" were "highly unusual" and Mr. Alwitry's "demands" and "manipulative behaviour" started the "breakdown in relationship". The Respondents have failed time and time again to particularise such allegations and, specifically, to state:–

a. What the alleged discussions were including when and how they took place, between whom and what was said;

b. What is alleged to have been "highly unusual" and why;

c. What were the alleged demands and what, if anything, was unreasonable about the same;

d. What the alleged manipulative behaviour was including when and how it took place, between whom and what was said or done; and

e. How any alleged conduct is alleged to have caused a breakdown in relationship and why.

33. Again, the Respondent, without any particulars, refers to the "tenor, frequency and manipulation" of discussions. It is unacceptable that the Respondent fails to articulate such allegations fully or indicate any evidence upon which it relies in support of the same.

34. Notwithstanding this it is understood that the Respondent adopts and relies on the content of paragraphs 106 to 142 of the Solicitor General's Report in support of the above allegation. With respect the Respondent's reliance on these paragraphs of the Solicitor General's report is misconceived as it deals with Mr. Downes' e-mail of 9 October 2012, a telephone call between Mr. Alwitry and Mr. Downes (which Mr. Downes failed to recall but which was proved by telephone records) and then correspondence between Mr. Alwitry and the BMA.

35. The correspondence between Mr. Alwitry and the BMA was confidential and would not have been known to the Hospital. It is therefore simply impossible for this correspondence to have had any impact on the Hospital deliberations or to have led the Hospital at the time to conclude that the relationship had broken down. If the Respondent now maintains that it was aware of the content of Mr. Alwitry's confidential communications with his trade union prior to Mr. Alwitry volunteering the same to the Respondent in the course of this dispute, it is required to state clearly how it came to be in possession of such communications. If it does not so maintain, then this entire line of argument in the Respondent's submissions must fall away.

36. The Respondent alleges that the Hospital was not influenced "whatsoever" by Mr. Alwitry's reference to the BMA. Reliance is place upon Mr. Riley's evidence before the Panel. With respect Mr. Riley's evidence, as set out paragraph 55 of the WCS, was that he originally stated that the reference to the BMA played no part in the decision to terminate Mr. Alwitry's employment but later conceded that it did.

37. Paragraphs 17 and 18 are at odds with one another. Paragraph 17 alleges that Mr. Alwitry's communications with the BMA allowed the Hospital to conclude the relationship had irretrievably broken down but paragraph 18 alleges that Mr. Alwitry's reference to the BMA was not a consideration.

38. Paragraph 18 is also at odds with the Solicitor General's Report which the Respondent relies on and which states that the Respondent mistakenly believed that Mr. Alwitry had made a complaint to the BMA and that that mistaken belief was a factor in the decision to terminate Mr. Alwitry's employment. Mr. Alwitry also repeats paragraphs 56 to 61 of the WCS.

39. Further, Mr. Alwitry also refers to Mr. Downes' e-mail dated 26 November 2012 [MB/P191]. Mr. Downes' e-mail was in response to Mr. Alwitry's query as to what had recently happened and why had he received the purported termination letter and what was behind the allegation that there was a dysfunctional relationship between them. Mr. Downes' e-mail suggested that Mr. Alwitry should reflect over past correspondence to find the answers to his queries and that "virtually all" of Mr. Alwitry's e-mails were unacceptable as was the alleged decision to report Mr. Downes to the BMA. Clearly the

alleged decision to report Mr. Downes to the BMA was a factor in the decision to terminate and the evidence is overwhelming in this regard.

40. With respect the Respondent's case is confused and simply does not make sense. Paragraph 19 alleges the relationship had become "dysfunctional" and that Mr. Alwitry had "breached the implied term of trust and confidence". Again there are no particulars for this allegation or supporting evidence and that, in itself, is fatal for such a serious allegation. Indeed the Respondent's tendency to level such serious allegations without properly particularising the same, much less supporting them by evidence, is itself reflective of the way in which the Respondent dismissed Mr. Alwitry in the first place.

41. The Respondent alleges that the relationship had become dysfunctional and Mr. Alwitry had breached implied terms of trust and confidence by 10 November 2012. The Respondent relies on Mr. Riley's evidence before the Panel. It is denied that this was the evidence before the Panel and the Panel is invited to consult its notes on this point. In any event it is clear that the mistaken belief that Mr. Alwitry had made a complaint to the BMA was a factor in the decision to terminate his employment and this was premised on an e-mail from the BMA on 12 November 2012. The decision to terminate was taken on 13 November 2012 [MB/P166].

42. The Respondent's submissions that the decision to terminate was taken before it mistakenly believed there had been a complaint to the BMA is wholly untenable. Mr. Riley's evidence was such, the Solicitor General's findings were such and the Respondent has failed to address paragraphs 56 to 61 of the WCS which make a clear case that the decision to terminate followed and took into account the mistaken belief that Mr. Alwitry had made a complaint to the BMA.

Paragraph 21

43. The Respondent alleges that there is no dispute that legal advice the Respondent received informed the Respondent to terminate. Privileged is asserted over the alleged legal advice so it is wholly outside of Mr. Alwitry's knowledge and Mr. Alwitry makes no admissions in respect of the same. Given that Mr. Alwitry has not seen that advice because the Respondent asserts privilege over it, it is a mystery as to how the Respondent can now assert that it is undisputed that the Respondent dismissed Mr. Alwitry in accordance with that advice.

44. Further and in any event, it is not accepted that relying on legal advice allowed the Respondent to act unlawfully or to not follow due process.

45. The Respondent asserts privilege over the advice and it is not clear what instructions were relied on for the provision of any advice. Issues regarding advice are a matter for the Respondent and its advisers.

46. It is denied, to the extent that it is the Respondent's case, that the Respondent can seek to be exculpated on the basis of inadequate or wrong advice.

Paragraph 22 and 23

47. Paragraphs 22 and 23 confirm that the terms of the Employment Contract were in effect at the material time.

Paragraphs 24 to 26

48. For the avoidance of doubt the Reports and the findings within the same are not accepted by Mr. Alwitry.

49. It is not accepted that Mr. Riley "described" any manipulation of the start date; this remains an allegation which is unarticulated and unsupported by any evidence.

50. The allegation that timetabling was "orchestrated" by Mr. Alwitry during Mr. Downes' absence to undermine him is denied. The issue of the timetable was raised by the Ms Hockenhull in Mr. Downes' absence [MB/P146]. In any event timetabling is something which should be agreed by negotiation and the terms of the Employment Contract provide for this.

51. Mr. Alwitry's correspondence regarding the timetabling is before the Panel. It is wholly reasonable, logical and polite correspondence which complies with the mutual obligation to negotiate a suitable timetable. Mr. Alwitry went further and also brought legitimate patient safety concerns to the Hospital's attention and practices that could have seen the care and standard improved for the Hospital and patients all round.

52. Mr. Alwitry clearly understood that the timetabling had to be agreed by Mr. Downes and therefore there could be no orchestrated attempt to circumvent or undermine Mr. Downes. Furthermore, Mr. Alwitry was clear to bring the correspondence to Mr. Downes' attention on his return. Mr. Alwitry's e-mail dated 7 October 2012 is telling; it sets out sensibly and reasonably Mr. Alwitry's confusion regarding the PAs, the patient safety concerns and provides 5 potential solutions to the timetabling problem [MB/P69-70]. This was a typical example of Mr. Alwitry's approach to productively and constructively face a problem and deal with it. To the contrary Mr. Downs refused to entertain Mr. Alwitry's suggestions and threatened him that "making too many demands at this stage of your appointment is unlikely to bode well for your future relationships within this organisation!" [MB/P68-69].

53. For the avoidance of doubt, Mr. Alwitry's e-mail of 7 October 2012 expressly accepted that he would work on the Fridays and provide cover on a Saturday if there was no alternative. Mr. Alwitry also states that he had a telephone conversation with Mr. Downes on 10 October 2012 and that he accepted the timetable provided by Mr. Downes. Mr. Downes alleges that he has no recall of this telephone conversation taking place but Mr. Alwitry's billing records show that the call occurred and lasted for 8 minutes. In the circumstances, Mr. Alwitry's evidence is clearly more reliable. Mr. Downes' recollection is either unreliable or deliberately false.

54. It is wholly wrong for the Respondent to allege that Mr. Alwitry would not work on Saturdays. He committed to this even when he considered it to be at a substantial disadvantage to him and wherein it was clearly in contrast to the terms of his Employment Contract which expressly stated that he did not have to work weekends.

55. *The allegation that "Time was not of the essence" and Mr. Alwitry could have and should have waited for Mr. Downes to return from his holiday is nonsense. No doubt if Mr. Alwitry had waited for Mr. Downes' return he would have been accused of sitting on it and that by not raising any issue it was deemed accepted.*

56. *Mr. Alwitry was dealing with a senior staff nurse and it was clearly considered appropriate for discussions to take place but it was clear that the overall decision was with Mr. Downes. Notwithstanding that the decision lay with Mr. Downes, it was never suggested that discussions should wait for Mr. Downes' return. This was not raised by the senior staff nurse or by any other staff member. Mr. Downes' e-mail of 24 September 2012, while it may not anticipate further changes to the timetable it does not suggest that any issues should only be discussed with him and should wait for his return [MB/146-148]. Mr. Alwitry was not told that he was prohibited from discussing the timetable with anyone else and it was reasonable for him to discuss issues with other senior staff members in Mr. Downes' absence.*

57. *Furthermore, it was the senior staff nurse who instigated the timetabling discussion in Mr. Downes' absence when she expressed concern that she could not see the "alternate sessions working well" and that it may result in "clerical chaos" and "make staffing the clinics a nightmare" [MB/P146]. Rather than discourteously ignoring the senior staff nurse's concerns, Mr. Alwitry gave thought and consideration to alternatives and tried to work with the senior staff nurse to achieve a more workable timetable that resolved many of the concerns she had.*

58. *Mr. Alwitry sought to deal with the matter of timetabling timeously and he cannot be criticised for the same. This is clearly appropriate and best practice as the sessions and surgeries need to be fixed in advanced and as soon as possible.*

59. *The allegation that "Instead the Complaint (sic) sought to raise erroneous patient safety issues and manipulate staff and other departments in the hospital to change surgery days to suit his personal needs" is denied and wholly without merit.*

60. *Mr. Alwitry refers to paragraphs 34 to 42 of the WCS. The Respondent fails to respond or deal with any of the important issues within these paragraphs and continues to allege, without any foundation, the serious allegation that the patient safety issues were erroneous and for an ulterior motive. This is wholly misconceived; the patient safety issues were real and the reasoning behind the patient safety concerns is irrelevant. In any event, it is clear that the Hospital failed to apply any proper or adequate procedure regarding patient safety concerns and that is a serious error in itself.*

61. *The Respondent alleges that had Mr. Alwitry been present the Panel could have explored allegations that Mr. Alwitry "breached the relationship" and that the Respondent has been prejudiced by Mr. Alwitry's absence. It is not entirely sure what it meant by "breached the relationship" but it is assumed that the Respondent contends that Mr. Alwitry breached terms of the relationship. This is denied and it is further denied that Mr. Alwitry's absence has prejudiced the Respondent in anyway whatsoever. Given that the Respondent felt able to*

summarily dismiss Mr. Alwitry without needing to hear from him at the time, it is absurd for them now to suggest that he must be present in order to properly present their case as to why they were right to act as they did.

62. The Respondent, again, without any particulars alleges that Mr. Alwitry has breached terms of the relationship. It is not clear what the terms are that are alleged to have been breached or what specific conduct amounts to the alleged breach. There is simply no merit to such allegations.

63. It is not clear how or why Mr. Alwitry's absence has caused prejudice. With respect Mr. Alwitry has made himself available to Mr. Beal, the Solicitor General (twice as well as providing confidential correspondence between him and the BMA) and he was cross-examined by Advocate Inrgam in the recent proceedings before the Royal Court. Mr. Alwitry was excused from the hearing on medical grounds and would make himself available should the Panel require.

64. Mr. Alwitry had filed his complaint together with his bundle. The Respondent filed its own bundle so it clearly considered it knew enough to respond.

65. Advocate Chiddicks appeared before the Panel and set out Mr. Alwitry's case. Advocate Chiddicks was asked questions by the Panel and it was open to Advocate Ingram to ask questions or ask for an adjournment.

66. The purpose of the hearing before the Panel is to examine the processes and procedures adopted by the Respondent. Mr. Alwitry can provide little, if any, evidence on this, particularly given that those processes and procedures deliberately did not involve him at all at the time of his dismissal. There was and can be no prejudice to the Respondent and the allegation that it has suffered some prejudice is another red herring.

67. The suggestion that Mr. Alwitry's evidence should be treated with some caution because it has not been tested by the Respondent or the Panel is noted. Conversely the Respondent must accept that the same caution must be exercised in respect of the additional material it now seeks to submit to the Panel. Further, the reports, which the Respondent relies on, should be treated with caution and they are not evidence. Mr. Alwitry repeats paragraphs 74 to 80 of the WSC. It is submitted that the best evidence before the Panel are the contemporaneous notes and correspondence.

Paragraphs 27 to 28

68. It is understood that the Respondent accepts that Mr. Alwitry's behaviour did not cause the termination. The allegation that Mr. Alwitry's behaviour caused a breakdown in the relationship between him and Mr. Downes is denied. It is denied that, even if there was a breakdown in that relationship, that the same should have led to his dismissal.

69. It is not understood how Mr. Alwitry's behaviour (which did not cause the termination) caused the breakdown of the relationship. Again there are no particulars nor is there evidence in support of this allegation. In any event, it is not clear how Mr. Alwitry's behaviour did not amount to a ground for

termination but caused an irretrievable breakdown in the relationship. With respect this allegation has no merit or standing whatsoever.

70. *Mr. Alwitry conducted himself properly and professionally within the terms of the Employment Contract and pursuant to his professional obligations as a doctor. It is inconceivable that acting to the high standards that Mr. Alwitry did, that this should have, or could have, led to a breakdown of a working and professional relationship.*

71. *Mr. Alwitry did nothing wrong so it is not understood how he could have caused any alleged breakdown of working and professional relationships. To the contrary, Mr. Downes and other Hospital staff's failure to engage with and comply with the Hospital's contractual terms and obligations as an employer and Hospital was clearly the cause of any alleged breakdown.*

72. *It is clear that as at 31 October 2012 Mr. Downes was prepared to work with Mr. Alwitry [MB/P159]. Mr. Alwitry had no contact with Mr. Downes or the Hospital after this time until the letter purporting to terminate his Employment Contract. Mr. Alwitry was not responsible for any alleged breakdown in the relationship and it is clear that the Hospital staff failed to investigate the alleged BMA complaint and therefore proceeded in error. It was the Hospital's mistake and lack of due process that led to any alleged breakdown in the relationship. It proceeded at its own risk.*

73. *It is clear that Mr. Alwitry is an employee and has contractual rights, including the right to have the contractually agreed procedures adhered to by the Respondent. Mr. Alwitry was denied those rights. This is wholly inappropriate and wrong.*

74. *The admission that Mr. Alwitry's behaviour did not cause the termination is relevant and the Respondent and the Ministers were clearly misled on this point. Mr. Riley's letter dated 15 November 2012 [MB/P186] expressly refers to Mr. Alwitry's behaviour as being "adversarial, aggressive, inappropriate, duplicitous, unco-operative and frankly unacceptable" and that "this behaviour constitutes a loss of trust and confidence so fundamental as to undermine the contract of employment.".*

75. *Mr. Riley's letter was wholly misleading. The Respondent was clearly asked to support the decision to terminate on the basis of Mr. Alwitry's deemed unacceptable behaviour. This was wrong and the Respondent should clearly not have been misled about Mr. Alwitry's behaviour and should have been advised that it specifically was not a cause or basis to terminate his contract.*

76. *The allegations contained in Mr. Riley's letter were grossly exaggerated and wrong. Such a letter should never be written, let alone by a HR Director for a government body.*

77. *Further, Mr. Alwitry and the Jersey Employment Tribunal were misled. In particular, the purported termination letter dated 22 November 2012 [MB/P189] stated that the decision was informed by "the attitude and behaviour displayed". The reasonable inference is that Mr. Alwitry's behaviour*

caused the termination. The change in position wholly undermines the Hospital staff's and the Respondent's credibility.

78. *There is absolutely no evidence that the Hospital had "patient care" at the forefront when they concluded the relationship had broken down. The evidence is all to the contrary. It was Mr. Alwitry who had raised patient safety concerns (in numerous e-mails which are all before the Panel) and this was ignored by the Hospital.*

79. *The Hospital terminated Mr. Alwitry's Employment Contract after he had raised patient safety concerns. Whether or not there was a difference of opinion or the patient safety concerns were considered adequately managed, Mr. Alwitry was criticised rather than commended for his approach.*

80. *Whatever the reasons for patient safety concerns being raised, once raised they must be dealt with in the proper way. The purpose or reason behind the patient safety concern is irrelevant and the Hospital is bound to consider and deal with them appropriately. Failing to consider and deal with them is serious and unlawful. However it is wholly aggravating that the Respondent then, rather than commend Mr. Alwitry, makes serious accusations and allegations that undermine the reason for the patient safety concerns and amount to an unbridled attack on Mr. Alwitry's character.*

81. *Doctors are required to carry out their office with a high degree of integrity and Mr. Alwitry takes this very seriously. It is wholly unreasonable that the Respondent failed to address the patient safety concerns properly and needlessly (with the clear deliberate intention of undermining Mr. Alwitry and casting doubt over his character) expressed the view that they were raised for an ulterior motive. There was nothing to substantiate criticisms surrounding raising of the patient safety concerns, to the contrary they were clearly legitimate.*

82. *The Hospital staff carried out no due process to investigate the patient safety concerns with Mr. Alwitry or to satisfy him (or even themselves) that the concerns were not warranted. They should have done so. The Respondent and the Hospital were bound and obliged to do so pursuant to the Employment Contract and duties owed to the GMC.*

83. *The Respondent's actions show no regard for patient care and it is unacceptable that the patient safety concerns were not addressed properly with Mr. Alwitry, that he was subject to criticism for raising them and accused of acting inappropriately. As set out in the reports provided by Mr. Alwitry, he should have been commended and respected for acting in an entirely professional and appropriate manner which was consistent with his contractual duties and general duties and professional obligations as a doctor.*

84. *The Hospital's approach would likely stifle concerns in the future and that risks the Hospital's development and its overall delivery of patient care. The Hospital staff would have known this when Mr. Downes' sent his e-mail of 9 October 2012 (which was praised by senior staff [MB/P155]).*

85. Clearly the Hospital and any government body should be cautious not to link raised patient safety concerns with behaviour alleged to amount to a dismissal or a breakdown in relationship. To allege, as the Respondent does, that Mr. Alwitry's behaviour, which included raising patient safety concerns, caused the alleged breakdown in relationship is therefore wholly astonishing.

86. This is a backward step for the Hospital which, on the evidence before the Panel, victimises, or at least can be perceived to victimise, whistle-blowers or those professionals who raise legitimate patient safety concerns pursuant to their contractual and professional obligations. It is clearly inappropriate and unlawful for the Hospital to act in this way which negatively affects how employees and doctors conduct themselves in the future and it only serves to create a hostile working environment where employees and doctors fear reprisals and recrimination for complying with their obligations. This is the opposite of how the Hospital is supposed to act and is contrary to the GMC guidelines and best practice.

Paragraphs 29 to 31

87. It is alleged that Mr. Riley gave evidence that the working practices would have been explained to Mr. Alwitry at interview or shortly thereafter. This is complete speculation. The Respondent has failed to put forward evidence from any member of staff at the Hospital whom they say actually told Mr. Alwitry about the working practices. This is because no one told Mr. Alwitry.

88. The documentary evidence that there is clearly shows that Mr. Alwitry does not understand the working practices and queried it. On at least two different occasions Dr Alwitry raised the issue of PAs and at no stage was he given an explanation.

89. Mr. Alwitry relies on paragraphs 16 to 23 of the WCS. The onus was clearly on the Hospital to apprise Mr. Alwitry of significant differences in practice which it failed to do. Mr. Alwitry reasonably sought explanations. Remarkably the Hospital seek to use this as evidence against him regarding inappropriate behaviour. This is wholly unacceptable and unreasonable. Clearly the sensible thing for the Hospital to do was to explore whether anyone had actually explained the differences to Mr. Alwitry, or to speak to him and clarify the position itself. The Hospital again led itself into error.

90. The Respondent's position, notwithstanding the available contemporaneous correspondence, is that it was Mr. Alwitry who was at fault for issues regarding the timetabling and this was due to his own family reasons. This is denied and the correspondence is before the Panel to read.

91. Timetabling is something to be negotiated. Mr. Alwitry acted pursuant to the terms of the contract and as per his duty as a doctor. Mr. Alwitry sought to negotiate by providing alternatives and he sought to raise patient safety concerns where appropriate and, in any event, he accepted the timetable.

92. The Hospital failed to enter into any meaningful negotiations and Mr. Alwitry was threatened not to make demands. This is clearly in breach of the

Employment Contract. The Hospital's failure to accept any responsibility is wholly aggravating and unreasonable.

93. *Mr. Alwitry is well within his rights to seek arrangements which suit his personal life. There is nothing wrong with this and the Respondent's continued reliance on such arguments are misconceived and unreasonable.*

Paragraph 32

94. *The breakdown in relationship is alleged to be because of the inability to agree a timetable and the complaints by Mr. Alwitry. This is denied. In any event, Mr. Alwitry agreed the timetable and he made no complaint.*

95. *The Respondent's position is confused. Paragraph 32 and, in particular, the admission that the mistaken complaint to the BMA was a dominant factor which led to the breakdown of the relationship, is at odds with paragraphs 18 and 19.*

96. *Clearly the Respondent was in error when it took into account a formal complaint about Mr. Downes to the BMA. There was no formal complaint and nothing for the Respondent to take into account. The Respondent should have investigated this matter before proceeding in error.*

97. *Regarding comments between Mr. Alwitry and the BMA generally, these are confidential and the Hospital were not privy to them. They cannot and could not therefore reasonably be relied on as a factor in deciding to terminate Mr. Alwitry's employment.*

<u>*Issued raised by the Panel*</u>

<u>*Factual issues surrounding the start date*</u>

Paragraphs 33 to 35

98. *The Respondent states its position was that the Clinical Director emphasised the need for a start date in 2012 and that Mr. Alwitry wanted a start date in 2013 to suit his personal needs. The Hospital rejected a 2013 start date and a compromise was ultimately reached.*

99. *There is nothing wrong with the Respondent seeking a start date that suits his needs and clearly the issue of a start date is up for negotiation. In any event the start date issue was resolved.*

100. *That should be an end to it however the Respondent's position appears to be that Mr. Alwitry made "concerted effort[s]" to get views from different senior personnel and that this "was a deliberate act to undermine the senior personnel". There is absolutely no evidence for this and the written contemporaneous correspondence shows a completely reasonable and polite number of exchanges.*

101. *The Respondent also fails to address substantive issues such as the processes at the interview stage which saw no issue raised in respect of Mr. Alwitry's application form (which clearly set out his notice period) or discussion at all regarding preferred starting dates. It was clearly reasonably for Mr. Alwitry to*

proceed on the basis that his application form had been read and there were no issues.

102. Further, the Respondent fails to deal with its processes for how its staff communicate with successful candidates generally and, if a candidate is perhaps being too demanding, how it deals with issues. There are no notes or written records which evidence Mr. Alwitry had acted inappropriately or that he was deliberately canvassing the views of different senior personnel. Mr. Alwitry was not told he had acted inappropriately or should cease doing anything he had done.

103. The start date was agreed and Mr. Alwitry's Employment Contract was subsequently executed.

The potential for a conflict of interest over private practice

Paragraphs 36 to 37

104. The issues of private practice is not "irrelevant" and the Respondent fails to deal with the issue of private practice adequately or properly.

105. Private practice may well be something the Hospital does not wish to involve itself in but because it involves its employees there is a real potential for conflict, particularly as in this case where Mr. Downes was directly involved in the decision to terminate Mr. Alwitry's employment.

106. The Respondent's allegation, made for the first time in its written closing submissions, that Mr. Alwitry was to go into partnership with Mr. McNeela is completely false. Mr. Alwitry's intention was to practice from Little Grove Hospital but without any partnership or other financial link with Mr. McNeela. Again the Respondents have made completely unsupported allegations, tantamount to giving evidence by their Advocate, without indicating any basis whatsoever for doing so.

107. In any event, it would clearly be inappropriate and unlawful for Mr. Downes to seek that Mr. Alwitry's employment be terminated on the basis that Mr. Alwitry turned down the offer of going into private practice with him and/or that he chose to go into partnership with someone else and / or that he chose to set up independently.

108. It is irrelevant whether Mr. Downes' support for the decision to terminate included Mr. Alwitry's decision regarding private practice because Mr. Downes being involved in the decision is enough. Mr. Downes has a conflict of interest and he and the Hospital failed to declare it or otherwise manage the situation adequately.

109. It is the failure to recognise and manage the conflict or interest, which may be real or perceived. Regardless of whether justice is done it has to be seen to be done. The conflict was clear and present and would have been obvious to the decision makers and it was clearly inappropriate to proceed as they did without some form of independent process taking place.

Whether the letter to the States' Employment Board accurately reflect the position and whether the SEB were properly informed

Paragraphs 38 to 40

110. *Clearly Mr. Riley's letter dated 15 November 2012 [MB/P186] did not reflect the accurate position and the Respondent was not properly informed of all the facts. The Respondent's position to the contrary is wholly untenable.*

111. *The allegations against Mr. Alwitry in the letter were and are unfounded. To state that Mr. Alwitry's behaviour was adversarial, aggressive, inappropriate and unco-operative is wrong and misleading and it was clearly wrong to advise the Respondent that Mr. Alwitry had engaged the BMA to support a formal complaint about Mr. Downes.*

112. *Mr. Alwitry repeats paragraphs 62 to 73 of the WCS.*

113. *The allegation that "great consideration" was taken over the decision is unsubstantiated. It is not particularised and neither is there any evidence of a full investigation into the matters alleged. It is averred that this is because there was no investigation but, rather, senior personnel were taken at their word who had either deliberately misled the Respondent or were reckless as to the same. The Respondent was grossly misled and the "great consideration" was in respect of falsehoods and inaccuracies which wholly undermined the decision in any event.*

114. *The letter did not accurately reflect the position and the Respondent was not properly informed. The letter was motivated by Hospital staff who wanted to "sack this bloke before he even gets here" [MB/P120]. The Hospital staff did not like Mr. Alwitry's approach and wanted to expedite his termination to avoid any form of disciplinary process.*

115. *Mr. Riley's evidence was that he considered it unheard of that the disciplinary process would be engaged if an employee's contract was terminated prior to them taking up their post. The Respondent was asked by the Panel to provide authority for this which it has failed to do. Mr. Riley was clearly in error (or knew the correct position and acted contrary to the same) and the full terms of the Employment Contract were in force.*

116. *Mr. Riley's letter dated 4 December 2012 addressed to Mr. Alwitry states that "Since your service has not yet commenced, we do not believe that section 18.2.2 is engaged" [MB/P213]. Mr. Riley's letter was wrong and he wholly misrepresented the true position to Mr. Alwitry.*

Whether the States' Employment Board should have relied entirely and solely on the views of senior officers who were directly involved with the Complainant

Paragraphs 41 to 42

117. The suggestion that the Hospital staff acted objectively is denied. Mr. Downes was in a position of conflict because of his private practice issues and because he mistakenly believed there was a formal complaint against him. Further, Mr. Riley's letter was misleading and included references to Mr. Downes resigning if Mr. Alwitry's employment was not terminated. Mr. Alwitry was an employee with rights and he was given no opportunity to address any allegations. The decision was not objective and, in any event, not only must justice be done but it must be seen to be done.

118. The suggestion that an independent process would undermine the trust and confidence between members of the Hospital and / or the Respondent is nonsense. Clearly an independent process is best practice as potentially questionable decisions are brought to account. If the decision is just and fair there would be no reason to fear an independent review.

119. Had there been an independent process in these circumstances it is impossible that the Respondent would have terminated Mr. Alwity's Employment Contract. It is aggravating that the Respondents refuse to accept this.

Whether it was appropriate for the former Solicitor General to investigate his own department's advice

Paragraphs 44 to 50

120. The Solicitor General's Report is not independent and was done behind closed doors. Mr. Alwitry relies on paragraphs 74 to 80 of the WCS.

121. The Solicitor General at paragraph 50 of his affidavit dated 19 February 2015 states:–

> *"I did provide the SEB with some legal advice in this case on 19th August 2013. This advice is covered by Legal Professional Privilege and therefore is not disclosed. In any event, I have reviewed the document and there is no personal data in the advice that is not contained in my report and the bundle."*

122. On the face of what is said by the Solicitor General he clearly gave advice prior to commencing his investigation and finalising his Report. This was unknown to Mr. Alwitry until the Solicitor General's affidavit was filed in the course of the Royal Court data access proceedings.

123. It was clearly inappropriate for the Solicitor General to undertake the investigation he did and his Report is unreliable and compromised.

124. For the avoidance of doubt and notwithstanding the inappropriateness or otherwise of the Solicitor General to investigate his own department's advice

and conduct, Mr. Alwitry considers the Report flawed in many other respects and the Panel should review Sinels' letter dated 5 February 2014 [AB/T19].

The Law

Paragraphs 51 to 61

125. The evidence from Mr. Riley was that he knew by terminating the Employment Contract expeditiously it was not compliant with its terms and was a breach of contract. Nevertheless it was decided to proceed expeditiously to prevent Mr. Alwitry taking up his post in the hope that they could forgo the disciplinary procedure. That is a cynical and intentional breach of contract on the part of a public body.

126. It is clear that the Respondent wanted to ensure that there was no disciplinary process. The Respondents put forward no authorities in support of dispensing with the disciplinary procedure prior to a post being taken up.

127. The authorities now put forward by the Respondent are a blatant attempt to find a legal technicality after the event to support the decision to forgo the disciplinary procedure. It is wholly untenable that this is a case where it is appropriate to forgo the disciplinary procedure, if indeed it is possible to do so.

128. The disciplinary process is a contractual term and by not complying with it the Respondent breached the terms of the Employment Contract. To do so purposely is unconscionable, particularly for a government department.

129. Mr. Alwitry was entitled to know the allegations against him and to have an opportunity to answer the same. These are principles of natural justice and the Respondents are nowhere near the grounds for dispensing with the same and their reasoning for doing so (ie to prevent Mr. Alwitry taking up his post) is flawed.

The Respondent's conclusion

Paragraphs 62 and 63

130. It is not essential to hear from a complainant directly or at all. In any event Mr. Alwitry was represented and his case was set out in good order and material was relied on which had been filed by both parties. On the material filed by the parties and the evidence provided by Mr. Riley the Panel has more than enough information to make findings on the balance of probabilities and uphold the complaint.

Paragraphs 64 and 65

131. It is clear that the Respondent was under a contractual duty to negotiate timetables and protect individuals who raised patient safety concerns. The Respondent failed to comply with these terms and breached key terms of the Employment Contract.

132. Conversely Mr. Alwitry acted pursuant to the terms of the Employment Contract and his duties as a doctor. His contract should not have been terminated.

133. It is denied that the Respondent was "left with no other option than to terminate". Even if Mr. Alwitry's conduct had been as poor as the Respondent alleges (which is denied) there were clearly other options available. Ms Haste and the Solicitor General both recognise that early dialogue by the Respondent with Mr. Alwitry could have prevented some issues.

134. Mr. Alwitry on receiving the purported termination letter wrote to Mr. Downes asking for an explanation "so we can hopefully get it resolved?" Mr. Downes unhelpfully suggested that Mr. Alwitry should reflect on his previous correspondence which was "virtually all" deemed to be unacceptable his alleged to decision to report Mr. Downes to the BMA. No further explanation or particulars were provided. Notwithstanding this Mr. Alwitry wrote a polite response explaining some of the difficulties he had had and suggested "we could sit round a table and thrash this out amicably" [MB/P190-191].

135. Mr. Alwitry then on 4 December 2012 receives a letter from Mr. Riley stating that since Mr. Alwitry had not taken up his post the disciplinary process would not be engaged and, regardless of where any fault lay, relations have broken down irrevocably and the best he could hope for was an ex gratia payment [MB/P213]. The Hospital and the Respondent resisted early resolution and their approach was wholly hostile, oppressive, disproportionate and unreasonable.

136. The Respondent and Ministers were misled by the Hospital because they were under some misapprehension that they could forgo the disciplinary process if Mr. Alwitry did not take up his post. This was wrong, unlawful and against principles of natural justice. On any view it was not conduct befitting of a public body such as the Respondent.

137. It is not a defence to act contrary to the law because the same was based upon legal advice. The Respondent acted unlawfully, whether on the advice of its lawyers or not and whether or not that advice was accurate. The issue of the advice is a matter for the Respondent and its lawyers; it is not of concern to Mr. Alwitry nor does it affect the unlawfulness of the Respondent's acts.

138. The "extraordinary level of scrutiny" is meaningless when it is premised on misleading and erroneous facts and when there has been no independent investigation. The suggestion that there was a "higher level of process" than any usual dismissal decision making process is a red herring when the process ignores the basics and proceeds in error. Fundamentally, it is nonsensical to contend that there was a "higher level of process" than usual when the subject of that process (Mr. Alwitry) was not involved at all until the decision to dismiss him had been reached behind closed doors and implemented.

Paragraph 66

139. The complaint is clearly made out. There are currently no breach of contract proceedings and the Respondent's reference to the same is not understood.

8. The Board's findings

8.1 Dr. Alwitry's contract of employment as a Consultant Ophthalmologist was entered into unconditionally in August 2012.

8.2 The action of the SEB in breaching the contract (or to use their parlance – "withdraw the offer of employment") on 22nd November 2012 was unlawful in that it represented a clear and fundamental breach of contract by the SEB. It is clear from the evidence of the Human Resources Director, Health and Social Services Department and from the paper submitted that the Respondent was aware that the action of withdrawing the offer of employment was unlawful and that its only concern was with the consequential financial exposure of the Department.

8.3 It is for the States Assembly to consider whether it is acceptable general policy for the States to knowingly breach a contract that it has freely entered into but the Board is of the unanimous view that while there may conceivably be exceptional circumstances that would justify a breach of contract if it were clearly in the public interest to do so, we can see no such justification in this case.

8.4 We have set out our detailed reasoning in Annex 1 to these findings. The decision to 'withdraw' Dr. Alwitry's contract of employment was contrary to law, unjust, oppressive, based on irrelevant considerations and misunderstandings as to the factual position and conclusions on alleged facts and law that could not have been reached by a reasonable body of persons properly directing themselves as to the facts and law, and was in breach of the fundamental principles of natural justice applicable to the circumstances of this case. Consequently we are unanimous in upholding the complaint in accordance with the provisions of Article 9(2) of the Administrative Decisions (Review) (Jersey) Law 1982, namely that the decision –

(a) was contrary to law;

(b) was unjust, oppressive or improperly discriminatory, or was in accordance with a provision of any enactment or practice which is or might be unjust, oppressive or improperly discriminatory;

(c) was based wholly or partly on a mistake of law or fact;

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

(e) was contrary to the generally accepted principles of natural justice,

8.5 There are many reasons for reaching that conclusion (as will be apparent from the length and detail of Annex 1). They include, in no particular order of priority, the following:

8.5.1 Dr. Alwitry was given no opportunity to answer the charges against him before the final termination decision was taken: he was not even aware of any charges against him before his contract was terminated.

8.5.2 Dr. Alwitry was allowed no right of appeal, notwithstanding that a right of appeal was clearly set out in the employment contract.

8.5.3 The persons raising the charges against Dr. Alwitry were, to all intents and purposes the same as those who took the decision to terminate the contract. There was absolutely no independent review of the charges brought. Given that there was no independent review body in place to consider the charges brought by the Hospital clinicians and management, the former Minister for Health and Social Services and the States' Employment Board should have done more than merely "rubber stamp" the decision of the Hospital management. This they singularly failed to do. The Minister failed to exercise any scrutiny of the decision and the SEB seemed concerned only that the decision should not attract the attention of the Health and Social Services Scrutiny Panel. This was particularly inexplicable as they had directly received third party evidence in complete contradiction of the submission of the Hospital management.

8.5.4 At no time was Dr. Alwitry given a fair hearing, or indeed a hearing at all. At the SEB meeting at which the Hospital management decision to terminate the contract was ratified, a large delegation of those senior members of the Hospital staff – clinicians and management – making the allegations were present, in order to put additional pressure on the SEB. That could not have happened if the decision to terminate the contract had been arrived at following an independent review of the charges brought.

8.6 The Board makes no finding as to whether, had there been a properly independent review of the claims made in respect of Dr. Alwitry's behaviour, such review would have been likely to find in favour of the employer or the employee. That was not within the terms of reference set out by the Board. It is however appropriate for us to make it clear that there was nothing produced to the Board during the hearing which could, in the Board's view, reasonable justify the summary termination of Dr. Alwitry's contract of employment.

9. The Board's Recommendations

9.1 On a personal level the decision to terminate Dr. Alwitry's contract of employment has destroyed his professional life. He was very highly regarded by his professional peers and was a leader in his field. He was raised and schooled in Jersey and until the unlawful and unjustifiable termination of his contract, was set to return to his childhood home for the remainder of his working life. That was taken from him without any consideration apparently being given to the consequences other than the immediate financial cost. Dr. Alwitry gave up a secure consultancy position on accepting the position in Jersey and has been obliged to take locum and temporary positions since his contract was unlawfully terminated. His career has, in effect, gone backwards. The effect on his personal life will presumably have been similarly traumatic.

9.2 Based on the comments after his interview and the independent references that we have seen, as a result of the unlawful termination of Dr. Alwitry's contract of employment, the community in Jersey was deprived of the opportunity to have at the Hospital a young, highly regarded and motivated consultant with a particular specialism in glaucoma. We also cannot help but conclude that the manner in which Dr. Alwitry was treated – something we have described by way of understatement as "appallingly shabby" – is highly likely to have damaged the reputation of the medical service as a potential employer of high quality staff.

9.3 In an ideal world the recommendation of the Board would be that the contract which was unlawfully breached by the Respondent should be reinstated and Dr. Alwitry take up the position as soon as he was able to make appropriate arrangements for the relocation of his family. The Board further considers that it would not be inappropriate for Dr. Alwitry to receive payment of the salary to which he would have been entitled from 1st December 2012 to go some way towards compensating him for the wrong he has suffered.

9.4 The Board acknowledges that this is probably not going to happen. We are now nearly 4 years on from the time that Dr. Alwitry was offered the job and over 3½ years on since he was arbitrarily dismissed. The Board understands that the consultancy positions in the Ophthalmology Department of the Hospital have been filled and so there is now no vacancy available, even if Dr. Alwitry was of a mind to accept a position if it were to be offered to him. Given the way in which he was treated, a reluctance or refusal on his part to work with the senior personnel at the Hospital would, in our view, be perfectly reasonable and justified.

9.5 The best alternative that the Board is able to recommend is that the Chief Minister and the Minister for Health and Social Services give Dr. Alwitry an absolute and unqualified acknowledgement that the termination of his contract was unlawful and contrary to natural justice. This acknowledgement should be given without a thought to the consequences that may flow from it. The SEB and the Department of Health and Social Services have brought that on themselves.

9.6 As will be apparent from our findings in Annex A, the Board hopes that the States of Jersey will take urgent and effective steps to compensate him and his family for the wrongs which they have suffered at the hands of the States irrespective of the strict legal position. If the States decide to maintain its offer of 3 months' salary plus limited additional expenses, we would recommend that a detailed explanation for that decision is given in public. This is because it would amount to saying, in effect, that the Respondent, headed by the Chief Minister, believes that it is acceptable for a States Department to disregard fundamental principles which should guide proper decision-making (and, indeed, reflect common decency) in relation to its employees irrespective of the consequences to the individual concerned as long as it pays the minimum compensation to the person whose life is affected by it. If that is the position and policy of the States and the Respondent, we would suggest that the public of Jersey has the right and legitimate expectation that its elected officials should say so clearly and unequivocally.

9.7 As far as the Hospital is concerned, the Board has a number of recommendations. These include:

9.7.1 As a matter of the urgency a comprehensive and independent review be undertaken of the management structure and practices for recruitment and disciplinary matters. It appears from this case that senior clinicians (at least in the Ophthalmology Department) have uncontrolled autonomy over aspects of the decision making processes at the Hospital which far exceed their clinical expertise. Their role in management, if any, needs to be clearly defined.

9.7.2 The role of the Human Resources Director in disciplinary matters be clarified. It is his task to ensure that the human resources policies of the employer are implemented in the best interests of the organisation, in particular by ensuring that in employment and disciplinary matters objective and detached assessments and recommendations are made at all stages of the process. We consider that, in the case of recruitment, issues which the employer deems critical should be highlighted in the recruitment pack and expressly brought to the attention of the applicant. Amongst other things, in the present case it is incredible (in the true sense of the word) that:

- the Respondent in this case sought to blame Dr. Alwitry for not having raised at interview the matter of his start date, when he had at the time of applying for the post made his availability crystal clear, while the recruitment pack gave no indication that an early start date was critical;

- Dr. Alwitry was given a contract of employment which specified that he was to work a certain number of hours without mentioning the important fact that he would also be expected to work a certain number of additional hours for free (for which he would be compensated by being permitted to pursue his private practice).

9.7.3 The Hospital put in place a system whereby any disciplinary complaint is subject to independent assessment and recommendation. Those making allegations of wrong doing should never consider those allegations themselves without any independent scrutiny. In this case the senior clinicians and managers put their perceived criticisms of Dr. Alwitry together, concluded that "*we ought to sack this bloke before he gets here*" and then proceeded to do just that. That process involved no proper scrutiny of the available evidence by the small group who made that decision and, because of their asserted belief that Dr. Alwitry had no appeal rights under his executed contract or employment because he had not physically started work, was not subject to any right of appeal or independent scrutiny. We add that it is our very strong view that the conclusion that there was no right of appeal on the latter basis is irrational (i.e. not one to which any reasonable person properly directing themselves could properly reach) and, if it was genuinely held by those involved in the decision-making process, illustrates a profound and deeply worrying lack of understanding on their part which should be rectified by appropriate training. The most cursory independent review of the allegations would have shown they were unsustainable.

9.7.4 The Hospital put in place a proper and efficient system for recording contemporaneously matters which are relevant to the decisions that are made. In the present case, absolutely no contemporaneous records were kept of the conversations or telephone calls giving rise to the majority of the allegations made against Dr. Alwitry. The records that do exist support his version of events rather than those of the Respondent. No adequate records were made of the meetings and discussions between senior clinicians in relation to Mr. Alwitry. Even when the final decision was made to terminate his contract at the meeting on 13th November 2012, the record of the meeting is short and at such a level of generality as to be almost worthless other than as an illustration of the depths of the flaws in the process. Had an independent review procedure been in place any allegation not properly supported by an adequate and contemporaneous record would no doubt have been ruled out immediately.

9.7.5 The Board therefore recommends that all appropriate staff receive training on the vital importance of proper record keeping in all matters which may result in disciplinary proceedings of any kind. All meetings at which matters which may result in disciplinary proceedings are considered should be identified as such with an appropriate degree of formality and due process (including notifying the person concerned of the details of the allegations made against them and allowing them an adequate opportunity to respond/defend themselves). Other than in exceptional circumstances, accurate contemporaneous records of such meetings and any telephone discussions are to be kept.

9.7.6 The role of both the Minister and of the SEB in disciplinary matters, and in particular the extent to which powers of termination are delegated to management, is to be clearly identified in order that management duties retained by the Minister and SEB are clearly understood and discharged by a clear and appropriate process. The role of the Minister for Health and Social Services and of the SEB in this case is unclear. What is clear is that the Minister for Health and Social Services and the Chief Minister as Chair of the SEB knew of and supported the decision to terminate Dr. Alwitry's contract, although there is no record of the basis of their consideration of the matter. The letter to Dr. Alwitry terminating his contract was only sent after consultation with the Minister and the Chief Minister and so it is assumed that their involvement was more that 'for information purposes'. It was not made clear to us whether existing procedures required the Minister and the Chief Minister to authorise the termination of the contract, or whether the Hospital management merely wanted the comfort of ministerial support. Either way, both the Minister and the Chief Minister can in our view be justifiably criticised for, in effect, merely rubber stamping the decision of the Hospital management. Each had the opportunity and responsibility to interrogate those seeking support of the decision as to the appropriateness of the process by which the decision was reached. They each failed to take that opportunity or take that responsibility. Similarly, when the matter came before the full SEB on 18th December (after Dr. Alwitry had been notified of the termination) the Board failed to do anything other than limit what they saw as political fall-out.

9.7.7 We do not know whether what we have referred to in our findings as 'significant institutional failings' were confined to the Ophthalmology Department, but given the role of the Human Resources Director, the Managing Director and indeed the Minister we would be very surprised if the same or similar failings were not evident in other Departments of the Hospital. We therefore recommend that an independent and wide-ranging review of the management of the Hospital and, in particular, the role of senior clinicians in such management be urgently commissioned and the findings publicised.

Signed and dated by:

G.G. Crill, Chairman

S. Catchpole, Q.C.

J. Eden

ANNEX A

DETAILED FINDINGS

A. Summary

1. A careful review of the matters raised by this complaint reveals that almost the entire decision-making process in relating to the appointment of Dr. Alwitry and the subsequent "withdrawal" of that offer of employment was deeply flawed. The picture that is summarised above and is discussed in more detail below does not reflect well on any of the main actors on the States side, from the senior clinicians and managers at the Hospital who were involved in the appointment of Dr. Alwitry in August 2012, through to the small number of senior clinicians and managers involved in the decision to "withdraw" (in their language, "breach" in ours) Dr. Alwitry's contract of employment, the Minister for Health and Social Services and the then members of the SEB. We also have some general concerns about the former Solicitor General being asked to conduct what appeared to be an independent review in the present case, particularly where that was an investigation into what was, in effect, the consequences of advice given by senior members of the Law Officers' Department.

2. The unfortunate but overwhelming impression left by the evidence that was presented to us is of significant institutional failings. It is clear that, for whatever reason, a culture had been allowed to develop at the Hospital pursuant to which senior clinicians and managers felt that it was appropriate to make decisions deliberately to breach a contract of employment based on their subjective belief that a fellow consultant would be a "troublemaker" because he would not simply accept what he was told to do; and to do so in an informal way which ensured that no proper records were kept of their consideration, no proper process followed by which any legitimate concerns that they may have had could be explored with Dr. Alwitry directly, and without any independent scrutiny or right of appeal/review.

3. That was compounded by the fact that the report which was provided to the Minister for Health and Social Services and, subsequently, to the SEB was, in our view, one-sided and inaccurate. For some reason, which we have been unable to fathom, the SEB thought it was appropriate to receive a delegation in support of the decision to recommend the "withdrawal" of Dr. Alwitry's contract of employment which comprised almost entirely of those individuals who had been responsible for making the decision in the first place. Neither the Minister nor the SEB appear to have taken steps properly to scrutinise the decision. Both effectively appear simply to have endorsed the recommendation that was put to them. What is even more surprising is that the one step that the SEB proactively debated was to try to head off any scrutiny of the decision by the Health and Social Security Scrutiny Panel.

4. As will be apparent from our decision, that was wholly inappropriate given the extent and seriousness of the procedural flaws in the decisions that were made and the failure of either the Minister or the SEB themselves to undertake proper scrutiny of that process.

5. We have no hesitation in concluding the decision to 'withdraw' Dr. Alwitry's contract of employment was contrary to law, unjust, based on irrelevant considerations and misunderstandings as to the factual position and conclusions on alleged facts and law that could not have been reached by a reasonable body of persons properly directing themselves as to the facts and law, and was in breach of the fundamental principles of natural justice (principles which, in our judgement, apply as much to the circumstances of the present case as to other categories of administrative decisions). What is most concerning about the case is, however, that no-one involved on the side of the States, from the senior personnel at the Hospital, the HR Directorate, the then Solicitor General and senior members of his staff, the then Minister for Health and Social Services or the SEB perceived that there might even be a risk that the decision-making process might be flawed on any of those grounds, still less that it actually contained such flaws.

6. The foregoing reinforces our conclusion based on the evidence before us that there is a serious institutional failing which has enabled a process which allows decisions by a small elite to be made, without proper records, based substantially on their own personal views, without proper consultation with the person directly affected by the putative decision and without any proper scrutiny as to whether those decisions were well-founded. In effect, the accuser and judge were one and the same. We do not suggest that any of the individuals who were involved in the above process deliberately intended to exercise the power that had been given to them in an unlawful or capricious manner. The problem is that the system (or perhaps the lack of a proper system) allowed those involved to make decisions without the appropriate level of transparency, correct procedures or any adequate independent scrutiny and that this situation was considered to be acceptable and, indeed, normal. It is neither. While decisions made on the subjective and potentially ill-informed views of senior officials may have been the way that public authorities were run in the 19th Century, they are most certainly not appropriate in the 21st Century. The phrase 'appropriate checks and balances' is a hackneyed one, but in this case they were entirely absent.

7. At least one plausible and reasonable interpretation of the events relevant to the present complaint is that a small group of senior officers at the Hospital formed the view that Dr. Alwitry was 'trouble' because he would not simply do what the Clinical Director told him to do or work outside the hours that he had expressly agreed to work, as well as forming other, incorrect beliefs (such as the mistaken understanding that Dr. Alwitry had formally reported Mr. Downes to the BMA) and consciously decided to breach Dr. Alwitry's contract (leaving him jobless) because the cost would be restricted to £25,000 of public funds in compensation. Whether or not that is actually what happened is irrelevant. It is the fact that it is a perfectly reasonably interpretation of the events that occurred which illustrates why the process was so deeply flawed. As it turns out, on the evidence before us, we are also satisfied that the foregoing is what happened.

8. The equally fundamental flaws in process that followed the decision of these senior officers of the Hospital that Dr. Alwitry's contract had to be terminated, is demonstrated by the fact that, at each stage, it effectively endorsed that unjust and unlawful decision without any adequate scrutiny of it – indeed, positively sought to avoid scrutiny of it. Again, it is a perfectly reasonable impression from

those events that there is a rather too cosy a relationship between the politicians responsible for the Hospital and the senior officers at the Hospital who were eager to protect their own.

9. We believe that it is likely that the issues which we have summarised above and discuss in more detail below are a result of a systemic problem, namely the lack of proper procedures, guidance and training for those involved. As such, it is likely that the unfortunate events surrounding Dr. Alwitry's treatment are illustrations of a more widespread failure in the management system at the Hospital and the scrutiny by the Minister and, amongst others, the SEB of relevant decisions. If it is not a systemic problem, and is confined to the particular circumstances surrounding the 'withdrawal' of Dr. Alwitry's employment, then we would be driven to conclude that the individuals directly involved in that decision – specifically Mr. Andrew McLaughlin (the then Managing Director of the Hospital), Mr. Martyn Siodlak (Joint Medical Director), Mr. Andrew Luksza (Joint Medical Director), Mr. Richard Downes (Clinical Director Ophthalmology), Ms. Angela Body (Director of Operations) and Mr. Anthony Riley (HR Director) – would have failed in their duties to such an extent that, at the very least, they should undergo an extensive re-training before being allowed to make decisions on employment (or, indeed, other important matters relating to the management of the Hospital, other than clinical issues) in the future.

10. We strongly reiterate, however, that we do not think any of the foregoing involved conscious decisions by any of the individuals involved to act in an inappropriate way. We have concluded that the system that has built up must have allowed them to believe that what they were doing was right and normal, and in the best interests of the Hospital and that more formal procedures or independent scrutiny were not required. Assuming, therefore, that there was a systemic failure as described above, it is difficult to say they were individually at fault. We do, however, record our surprise that not one of them – including Mr. Riley whose job it was to advise on HR issues – recognised the potential flaws in the process that they were adopting and recommend that they seek further management training to address this issue irrespective of whether or not our recommendation for a more widespread overhaul of the management and decision-making processes is accepted.

11. With that introduction, we now turn to our analysis of the evidence and submissions presented to us.

B. Preliminary Matters

(i) <u>The duty of candour and open dealing with the Complaints Board</u>

12. It is appropriate for us to explain one of our procedural decisions before turning to address the evidence and submissions that were presented to us.

13. The procedural history of this complaint has been summarised within the Minutes of the hearing held on 16th and 17th March 2016. As will be apparent from that section, this Board refused an application by Dr. Alwitry to adjourn the present hearing in order to enable him and his legal advisers to review the documents which the SEB, the Minister for Health and Social Services and the

Data Protection Commissioner had been ordered by the Royal Court to disclose to him. The SEB opposed the application to adjourn.

14. There is a simple reason why this Board rejected the application to adjourn. The Complaints Panel can only operate effectively on the basis that it has faith that a States Department against whom a complaint has been made will co-operate with the Board and will provide full and frank disclosure of all relevant materials to the Complainant and the Board even if such material is adverse to the Department's interests. If that did not happen, it would, in our view, be the ground for a separate complaint to the Complaints Board. If an allegation that a States Department had withheld relevant information was found on enquiry to be correct, it would be reasonable to assume that the Board would regard such actions as a very serious matter indeed – one that would almost certainly result in a recommendation that serious disciplinary action should be taken against any individual, at whatever level, who was involved in or had responsibility for the failure in question.

15. There is no suggestion in the present case that any relevant information has been withheld by the SEB or the Hospital. There are no references even in e-mails to documents which would appear to be relevant which have not been included within the Minister's evidence. We have been provided by the Minister on an open basis with material which ordinarily would be treated as confidential (for example the Minute of the Meeting of the SEB on 18th December 2012 when it considered the termination of Dr. Alwitry's employment). We were and are, therefore, content to proceed on the normal basis that the Minister has complied with the obligation of candour set out above. As we made clear during the hearing, if the review of the documents disclosed pursuant to the Royal Court's order shows that, contrary to our expectation and belief, the Minister has deliberately withheld relevant information without good reason, we would encourage Dr. Alwitry to make a separate complaint to the Complaints Board. For the avoidance of doubt, we confirm that 'good reason' for withholding disclosure of documents would include the fact that the Minister had been acting on the basis of *bona fide* legal advice that certain categories of documents could not lawfully be disclosed even if the Royal Court had subsequently determined such advice to be incorrect.

(ii) <u>The obligation to provide complete evidence to the Complaints Board</u>

16. Mr. Riley suggested on a number of occasions during the course of his evidence before us that, if he had appreciated the nature of some of the questions that would be raised by the Board, he would have ensured that a whole raft of witnesses were produced. We apprehend that one possible response to what is (as will be apparent by now) a damning judgment of the procedures followed in the present case may be that we did not have all of the relevant information before us. Such a response would be incorrect. As noted above, it is the obligation of the relevant States Department to ensure that all relevant information is placed before this Board when a complaint is made. If that does not happen in any case, the fault lies with the States Department in question.

17. Further, we are satisfied that all material relevant to our consideration was placed before us. Although Mr. Riley referred repeatedly in his evidence to telephone discussions which Dr. Alwitry is alleged to have had with various

members of the management and staff all of which (according to his evidence) contributed to the conclusions reached about Dr. Alwitry's character which led to the decision to 'withdraw' the contract of employment, we note that, with odd exceptions (for example, the conversation between Dr. Alwitry and Mr. Downes on 31 July 2012 and with Mr. Leeming on 8 August 2012):

17.1. there are no references to such conversations in the documentary records presented to us;

17.2. there are no telephone attendance notes or other written records of such conversations having taken place;

17.3. there are limited references to such discussions in the former Solicitor General's report which identifies only four relevant telephone conversations which are said to have taken place prior to 23 October 2012 (namely on 31 July 2012 with Mr. Downes[1]; 8 August 2012 with Mr. Leeming[2]; 10 August 2012 with Mr. McLaughlin[3]; a very short telephone call with an undisclosed correspondent on 14 August 2012[4] – all of which predated the execution of the Contract of Employment – and one call with Mr. Downes on 10 October 2012[5]);

17.4. there are no reports of any specific additional telephone conversations in the Report of Mr. Beal;

17.5. there are no reports of specific additional telephone conversations in the report of Ms. Haste.

18. We are satisfied that there were no additional telephone conversations with the key personnel of the manner and type alleged by Mr. Riley. As discussed below, there were some discussions with other members of staff, particularly in relation to the planning of Dr. Alwitry's clinics and surgeries during late September to early October 2012, but none of these could be reasonably characterised as improper or objectionable. If we are incorrect in that conclusion, and there were numerous telephone conversations that were taken into account as part of the decision to terminate Dr. Alwitry's employment, there was a serious failure in the management process (and specifically in the management of Human Resources issues for which Mr. Riley is responsible) in failing either to have a system in place that ensured that details of the conversations were recorded reasonably contemporaneously or that a record was made of the precise conversations which were relied upon in making the decision to terminate the contract of employment.

19. Whatever else, the fact that we were presented with the unsatisfactory situation of Mr. Riley doing his honest best to give evidence about matters in which he was not directly involved, based on his recollection of what others had told him at some point in the past but without any contemporaneous records of what was actually said (if anything), concerning events that took place some 3½ years

[1] Paragraphs 31 to 38.
[2] Paragraphs 43 to 48.
[3] Paragraphs 55 to 63.
[4] Paragraph 59.
[5] Paragraph 125.

ago, is itself an illustration of why the process followed in the present case was so poor. It is hardly surprising that decisions were made on the basis of unsubstantiated anecdotal evidence if proper records were not maintained. It is equally unsurprising that any tribunal or body scrutinising the decision making process should conclude that it fell below the required standards if there are almost no contemporaneous records of the matters which are said to have influenced the decision in question.

20. It follows that we recommend that the senior management and clinicians at the Hospital should be subject to a mandatory requirement to maintain accurate and preferably contemporaneous records of matters which are relevant to decisions made by them. If such records do not exist, save in exceptional circumstances, the matter in question should not be taken into account in reaching the decision. Even in those circumstances, the reasons for a decision should be fully and accurately documented in sufficient detail to enable proper independent scrutiny of the decision to be made. The responsibility for ensuring compliance with such a requirement should rest ultimately with the Director of Human Resources and the Managing Director of the Hospital.

(iii) The former Solicitor General's Report

21. We were urged by Advocate Ingram for the SEB that we should place great weight on the report of the former Solicitor General because, it was said, he had conducted a detailed enquiry and had interviewed witnesses (which we had not).

22. We emphatically disagree. Apart from speculating whether the SEB's enthusiasm for the former Solicitor General's report would have been quite as strong if it had been more critical of the Hospital, we are not bound to follow the conclusions of the former Solicitor General. Our task is to conduct an independent review of the matters relevant to the complaint that has been brought to us. It is a matter for the parties to determine what evidence (including witness evidence) is to be presented to us. The former Solicitor General's report is one part of the evidence which was presented to us. The weight to be attached to any part of the former Solicitor General's report is a matter for us to determine. The fact that the SEB could have called a number of additional witnesses is irrelevant: it chose to rely simply on the documentary evidence in its bundle and the evidence of Mr. Riley in relation to the matters which were clearly in issue. Indeed, the SEB strongly opposed any suggestion that the hearing should be adjourned, with Advocate Ingram positively welcoming the fact that it was going ahead at the beginning of his opening statement to us.

23. As will be apparent from what we have already said, we have concerns about the former Solicitor General's report. Those concerns include the following:

23.1. It is not entirely clear why the former Solicitor General was asked to investigate 'the circumstances surrounding the recruitment of Dr. Alwitry"[6]. All that is said in the introductory part of the report is that the former Solicitor General was asked by the SEB to undertake that investigation. It is difficult to see how the public would be satisfied that an investigation by the former Solicitor General

[6] Paragraph 1 of the Report.

could be seen to be independent if that was the intention behind the instruction to him to undertake the investigation.

23.2. We note the Closing Submission by the SEB which, in part, were based on instructions from the former Solicitor General in which he stresses that he was not responsible for the Legal Advisers in the Law Officers' Department who gave the legal advice in the present case. That is, no doubt, correct. The fact remains, however, that –

23.2.1. Officers within the Law Officers' Department had given advice to the Hospital in relation to the 'withdrawal' of Dr. Alwitry's contract of employment;

23.2.2. Officers within the Law Officers' Department also apparently gave advice to the SEB on 22 December 2012 in relation to its decision to endorse the conclusion that, by 13 November 2012, the relationship with Dr. Alwitry had broken down and was dysfunctional such that the offer of a job could be withdrawn.

23.2.3. Although for perfectly proper reasons, we cannot be shown the legal advice that was given in either instance, it is a reasonable inference that the advice was to the effect that the Hospital and SEB had acted lawfully and properly in making that decision, as well as advice as to whether reinstatement would be appropriate. This is because, if the legal advice was that the decision making process was flawed or breached the principles of natural justice, any decision to ignore that advice and terminate the employment of Dr. Alwitry would be perverse;

23.2.4. It is difficult to see how, in such circumstances, an inquiry by the former Solicitor General into the circumstances of Dr. Alwitry's 'recruitment' could be *seen* to be independent. Effectively, he was being asked, amongst other things, to investigate whether the advice which had been given or ought to have been given by legal officers within his Department was correct. It is not possible in such circumstances for the investigation to be free from the taint of apparent bias – i.e. there will always be a reasonable doubt as to whether the report is truly independent.

23.2.5. That is particularly important where the subject being investigated concerns allegations that senior public officials and politicians had not properly conducted themselves. In a small community such as Jersey it is difficult to escape the reasonable suspicion that even the Law Officers may (and we stress may) be predisposed to accept the view of the "establishment" in such cases even where they are trying their honest and usually capable best to conduct a balanced investigation.

23.2.6. If the intention was, therefore, to hold an independent investigation, it would have been much better if a genuinely independent person had been appointed to undertake the same. That is not to suggest that the former Solicitor General deliberately did anything wrong. Far from it. We have no doubt that he tried his best to conduct the investigation properly. It would, however, have been more likely to instil public confidence in the outcome if the investigation had been undertaken by someone outside of the political establishment.

23.2.7. Further, on the facts of the present case, we had particular concerns about the investigations that were actually undertaken:

(a) The procedure that was adopted is open to criticism: there was no 'Salmon letter' process under which individuals whose conduct might be subject to criticism (including Dr. Alwitry) were alerted to that potential criticism and afforded a proper opportunity to respond; there was limited involvement of legal representatives; Dr. Alwitry did not have the opportunity to examine any of the other relevant witnesses; the inquiry was in private;

(b) On almost every significant matter, the benefit of the doubt appears to have been given to the witnesses from the Hospital. While the former Solicitor General is critical of some aspects of the process that was adopted, these appear generally to be because no one could do other than be critical of the Hospital on such issues. While it is entirely possible for cases to arise where the benefit of the doubt can properly be given to witnesses for a public body on every key issue, it is somewhat unusual (at least in our experience);

(c) More importantly there were a number of key findings made by the former Solicitor General with which we do not agree. Most of these were ones, with the greatest of respect to the former Solicitor General, we do not think could reasonably have been reached on the evidence before him or us.

24. As such, we have carefully reviewed the former Solicitor General's report, along with the other evidence in the case in reaching our independent conclusions. We have also taken into account the fact that the former Solicitor General, and the other persons involved in preparing reports on this case, had the benefit of hearing from witnesses. As will be apparent from what is said below, we agreed with the former Solicitor General's conclusions on some issues but reached a different conclusion on others.

(iv) Mr. Riley's evidence

25. The only witness called by the SEB was the HR Director for the Hospital, Mr. Riley. It is clear that Mr. Riley was not expecting the degree of questioning from the Board that took place over the best part of a day. We have no doubt that Mr. Riley tried to give honest evidence. It some parts it was extremely helpful. In other parts, Mr. Riley was hampered because he was relaying what he believed he remembered others had told him at some point in the intervening 3½ years. There were, however, parts of his evidence which we could not accept. These include his evidence about the numerous additional telephone calls that were allegedly made by Dr. Alwitry and some of his explanations for the decisions in which he was involved.

26. Further, there were certain consistent themes in Mr. Riley's evidence.

27. One theme was a tendency to overstate matters and, effectively, to argue the case for the SEB rather than giving evidence about what happened. His statement in his e-mail to Ms. Garbutt of 13 November 2012, under the heading

'Consultant Problem', that Dr. Alwitry's "*behaviour and attitude since accepting the post has been atrocious*" illustrates both a tendency to express no doubt honestly held beliefs in an extreme manner and also to express firm views when, as we find, there were no reasonable grounds for the belief. That tendency was reflected in his oral evidence.

28. The second general theme was to assert that members of staff who were shown to be acting inconsistently with Mr. Riley's view of events were acting without authority and/or were acting in that manner only because, according to Mr. Riley, they had been duped into so doing by Dr. Alwitry. We do not accept either propositions. What is more likely is that there was an inadequate management structure at the Hospital that meant that lines of communication/ responsibility were not sufficiently clear or defined, with the result that there was inadequate communication between the relevant staff members at the Hospital. That is not the fault of Dr. Alwitry nor did he do anything improper on the basis of the evidence that we have seen.

29. The third general tendency was to start from the premise that everything that Dr. Alwitry said or did was not to be taken at face value, with allegations being made that the latter did not have genuine concerns about patient safety when he was arguing that surgery should not be undertaken on a Friday morning and was simply making arguments to suit his lifestyle or to get more money out of the States. We do not accept those allegations. They are, however, symptomatic of the general attitude of the senior managerial and clinical staff at the Hospital of having formed some fairly harsh views about Dr. Alwitry at a relatively early stage which effectively drove the decision to terminate his employment.

(v) <u>Dr. Alwitry</u>

30. We did not hear evidence from Dr. Alwitry. That is a disadvantage when assessing his written evidence, particularly about his recollection of events. In the event, the relevant evidence is largely in the written material that was placed before us. We accept that Dr. Alwitry is and was someone who is tenacious and demanding. He is clearly someone who will not simply accept being told that something is the case if he cannot understand it. This drives him to question what he is told even if the message is relayed to him by someone more senior than him. That is not necessarily a bad thing but it clearly could be wearing for people who were used to a rather more supine attitude from junior colleagues. It is not, however, a disciplinary matter. Dr. Alwitry does not give up easily. Again, that is not necessarily a bad thing but it can cause problems if the effect of the actions is perceived as a challenge to the established order of things.

31. It is clear that one of the factors that was influencing Dr. Alwitry's actions was the understandable desire to spend time with his wife and 4 children in the UK in the period up to July 2013. He himself accepts that. We do not, however, accept the suggestion that this was the real reason behind almost every communication that he had with the Hospital or that he was raising spurious arguments about patient safety in order to serve his selfish domestic agenda. Indeed, our conclusion is that Dr. Alwitry, as a younger consultant who was eager to make his mark, was always arguing for what Mr. Riley called the 'platinum standard' – i.e. a standard of practice that was above and beyond what might be merely acceptable practice.

32. That is consistent with the references that Dr. Alwitry obtained in November 2012 in an endeavour to counter the allegations that he was a trouble maker. Thus, for example:

32.1. Mr. Stephen FRCS, a Consultant Orthopaedic Surgeon at Royal Derby Hospital said:

> *I was sorry to hear of his resignation from the Trust but delighted for him that he was returning to his to his family roots in Jersey. I was most upset to hear about his current predicament and the untimely unilateral withdrawal of his new contract by the Hospital in Jersey. I am even more concerned to hear that my opinion was apparently sought to confirm this action on the grounds that Amar is a difficult colleague and a "troublemaker". I am happy to state categorically that I have had NO communication with Jersey at all and had I been contacted would have relayed the exact opposite sentiment.*

32.2. Ms. Alison Fowlie, the Executive Medical Director at Royal Derby Hospital confirmed:

> *I was not aware of any issues regarding the Jersey post. I have not spoken to anybody about you.*
>
> *In my term as Medical Director I have not been made aware of any concerns around your work or behaviour.*

32.3. Mr. Anandan, a Consultant in Ophthalmology at the Royal Derby Hospital stated:

> *I am writing in support of Mr. Amar Alwitry. I was surprised to hear that his consultant post was withdrawn at the 11th hour.*
>
> *I can unreservedly say that, if you do not appoint him, it will be a loss to your department.*
>
> *I do not know the reasons behind this decision but find it hard to believe that he has found himself in this position.*
>
> *He is a conscientious hard worker who gets along with everyone. As long as I have known him as a consultant colleague, I have never known him to enter into any disputes with fellow consultants, management or, indeed, anyone. He is easy going and devoted to his patients. He always has a smile on his face and is willing to help out wherever and whenever he can.*
>
> *To my knowledge, he has never caused any trouble and so he must be devastated by being involved in these difficulties.*
>
> *I can only assume that you have gleamed [sic] the wrong impression of him somehow. I can unreservedly assure you that he will be an asset to your Hospital.*

32.4. Mr. Keith Dibble, the Divisional Director of the Royal Derby Hospital stated:

> *I am writing in relation to Mr. Amar Alwitry… who I have worked with for a number of years at the Royal Derby Hospital.*
>
> *I was Associate (Divisional) Director for Surgical Services when Amar joined the Trust, and I was always impressed with his positive and dynamic attitude. Being part of a Division employing 120 consultants, it was very easy for 'jobbing' consultants not to be active in service development nor to engage with management. As Director of this Division, my main interaction was with those clinicians in management roles – Clinical Directors etc.*
>
> *However, Amar immediately stood out as a consultant with ideas for the service, but with a view tempered with realism. He displayed a degree of imagination and entrepreneurism which I, and indeed other management colleagues, found infectious. The debates we had were robust, but positive, and I was impressed with his willingness to understand the 'management' perspective.*
>
> *Amar was both popular and respected by clinical and nursing colleagues alike, and I always felt that he was a Clinical Director of the future.*

32.5. Ms. Liz Curtin, a General Manager at the Royal Derby Hospital and Dr. Alwitry's direct line manager for 5 years wrote saying:

> *… I have always found him to be totally professional, very approachable and helpful. He had a good rapport with patients, staff and the wider management team.*
>
> *Mr. Alwitry was the lead for the Glaucoma service and worked with the trust management team and with Commissioners to review the patient pathway to enhance patient journey and reduce unnecessary follow ups. He has supported nurses, Optometrists and Orthoptists to enhance their clinical skills to support the Glaucoma Shared Care service and in doing so created additional capacity and a new model of working in the department.*

32.6. Mr. S. K. Choudhary, MS, (Opth), MRCOphth (Lon) FRCS (Ed), a Consultant Ophthalmic Surgeon at the Chesterfield Royal Hospital stated:

> *I can honestly say that Dr. Alwitry is one of the best clinicians I have come across in my NHS career and it was a great pleasure and a very good learning experience to work with him.*
>
> *I have always known him to be a very hard working and dedicated professional for whom patient care and safety was always a top priority…*

Throughout the years I have worked with him I have never known him to cause trouble or get into dispute with other consultants or the management. He would rather avoid conflicts and prefer to mediate rather than get involved in any arguments or confrontations. I can categorically and wholeheartedly say that he is not a troublemaker by any means at all.

He has always been a fantastic team play and in fact his personality, behaviour and excellent bed side manners inspired a lot of confidence not only in his colleagues but also his patients…

32.7. Mr. Stevenson, FCRC Ophth, Consultant Ophthalmic Surgeon, wrote saying:

I have known him as a friend and colleague for over 10 years, and I have found him to be a hardworking and conscientious Doctor and Surgeon. He has excellent clinical skills, and his interpersonal skills, both with staff and patients are excellent.

In the years that I have known him, I have not been made aware of any problems he has had in his dealings with members of staff or the managers of our department, or even in the Hospital as a whole. As far as I am aware, he has been a well liked valued member of our team since he was appointed as Consultant.

32.8. The unsolicited reference from Mr. Stephen Vernon (the Hon. Professor of Ophthalmology and Consultant Ophthalmic Surgeon) at the beginning of his report of 8 February 2013 to which we refer below:

Although not requested here I would like to put on record that your organisational skills demonstrated during [the six month period Mr. Alwitry worked as Mr. Vernon's registrar] were exemplary and have become a benchmark for others to aspire to.

33. There were other references to a similar effect. At least 5 of the letters predated the meeting of the SEB (those from Mr. Dibble, Mr. Anandan, Mr. Choudhary and Mr. Stevenson) and one, from Mr. Anandan, dated 30 November 2012, was sent directly to the Hospital in St. Helier with copies to Mr. Siodlak, Ms. Body, Mr. McLaughlin, Mr. Thompson, Mr. Prince, Mr. Downes and Mr. McNeela.

34. We do not know when the above references were received by the Hospital. At least one (from Mr. Anandan) must have been received before the SEB meeting on 18th December 2012. What is remarkable is that:

34.1. The receipt of those references does not seem to have prompted any consideration by any member of the Hospital team, the Minister or the SEB that the decision to 'withdraw' the contract of employment might be wrong;

34.2. None of the references appear to have been given to the SEB by the Minister or the Hospital. If any of them had in fact been received prior to the SEB meeting and were not presented to the SEB, then this would be a very serious matter indeed. It would equate to a deliberate attempt on the part of the individuals concerned to present a one-sided story to the SEB.

34.3. Some were provided directly to Senator I.J. Gorst in his capacity as the Chair of the SEB under cover of a letter from Dr. Alwitry dated 18 December 2012. There is no record of the references being considered in its meeting of 18 December 2012. It is possible that the letter arrived too late for consideration at the meeting. Once they were received, however, they ought to have been placed before the SEB and the decision reviewed in the light of the information the references contained.

34.4. It appears that the references were put before the SEB on 4 March 2013 over 3 months after Dr. Alwitry's contract was terminated. The minute of that meeting records the view that '*the references provided in support of Dr. Alwitry were sketchy at best*'. Assuming (as appears to be the case), the references which were being considered are the same as those presented in the evidence before us, we do not believe that any reasonable person properly directing themselves could have reached that conclusion. The references are from senior professionals with direct, first-hand and extensive knowledge of working with Dr. Alwitry over a period of years. They paint a detailed picture that is so diametrically opposed to the one that had been presented by the Hospital that they inevitably call into question the basis for the decision to terminate Dr. Alwitry's employment. Instead it appears from the Minute that the SEB received a delegation comprised of Ms. Garbutt, Mr. Riley, Mr. Siodlak, Ms. Body and Mr. O'Shea and with Mr. Riley repeating the chronology of events on which the original decision was based and which we find to be misleading and incorrect in material respects. This apparently led the SEB to postpone making any decision until after the outcome of Mr. Beal's report was known. After this, we infer, the matter has not been reconsidered by the SEB. The matter was effectively kicked into the long grass

35. What the references also illustrate is that the absence of a fair and proper process in the present case deprived Dr. Alwitry and the States of the opportunity to test whether the judgements that the senior managers and clinicians had formed of him as a 'troublemaker' were in fact justified. While it is not for us to judge, given the number and extent of the extremely positive references from senior colleagues of Dr. Alwitry who had worked closely with him in Derby over a period of 9 years, it is a real possibility that the outcome of a genuinely independent review would have concluded that the problem lay not with Dr. Alwitry but with the senior managers and clinicians at the Hospital in Jersey.

36. The other remarkable thing about the references is that they do not appear to have been considered by the former Solicitor General at all. It is not clear why this should be the case. It is possible he was not made aware of them. The former Solicitor General notes in paragraph 202 of his report that he had "*received anecdotal evidence from witnesses that Dr. Alwitry has had difficult relationships with Hospitals in the United Kingdom*" which he had not investigated and, quite properly, had disregarded. If he had seen copies of the glowing references from senior colleagues of Dr. Alwitry at the Royal Derby Hospital, we would have expected him either to have accepted such references or interviewed the referees. It is reasonable to expect that, either way, the former Solicitor General's impression of Dr. Alwitry would have been different to the one expressed in his report.

37. As will be apparent from our analysis below, we also take a very different view of Dr. Alwitry's actions at the outset of the present story to that taken by the former Solicitor General and the staff at the Hospital. We cannot see any grounds for criticising Dr. Alwitry's confusion in relation to the suggestion by the Hospital that he should start earlier than the 6 month period that he had expressly identified on his application form. The evidence also appears to us to be clear that, far from trying to be difficult, Dr. Alwitry was genuinely trying to accommodate the belatedly expressed wish for him to start as soon as possible. We also struggle to see how Dr. Alwitry could be criticised for trying to have the clinical timetable adjusted or to raise matters relating to the additional hours that he was apparently being asked to work for free. These are discussed further below.

(vi) Patient Safety

38. A lot of emphasis was placed by the SEB in its submissions and in Mr. Riley's evidence on the suggestion that, in September/October 2012 Dr. Alwitry was raising spurious questions about the safety of patients if operations were undertaken on a Friday morning, in order achieve his real aim of not working on a Friday. Mr. Riley's evidence on this varied from saying his clinical colleagues were of the firm view that there were no grounds for Dr. Alwitry's concern, to accepting that Dr. Alwitry was seeking the 'platinum standard' rather than what was normal or best practice, to suggesting that although there may have been some clinical concerns these were caused by Dr. Alwitry's refusal to work on Saturdays (for free), to suggesting that his clinical colleagues had formed the view that Dr. Alwitry was (rather duplicitously) seeking to use the fig leaf of a concern about patient safety as a means of ensuring that he did not have to work on Fridays (or Saturdays) or of extracting further money from the States for so doing.

39. We are not in a position to judge the precise merits of the concerns raised by Dr. Alwitry. That would not be appropriate in a consideration of the procedure that was adopted. What is clear, however, is that:

39.1. A review of all of the evidence (including his contact with the BMA) shows that Dr. Alwitry had a genuine concern about the safety of operating on patients on Friday morning if, as was the case, there was no junior cover at the Hospital over the weekend.

39.2. That view was a reasonable one for a consultant to hold, particularly in relation to surgery for glaucoma (which was Dr. Alwitry's particular specialism). It is supported by the reports from Mr. Stephen Vernon (the Hon. Professor of Ophthalmology and Consultant Ophthalmic Surgeon specialising in Glaucoma at University Hospital Nottingham) and Mr. A.W. Kiel, BMed.Sci., B.M.B.S. FRCOphth (a Glaucoma Consultant at the Ipswich Hospital):

39.2.1. Mr. Vernon said that it is "most definitely" advisable to have a clinic on the day after surgery, particularly if (as in Jersey) "one is working without junior medical staff or with colleagues who are not conversant with modern glaucoma management" and that it was reasonable not to have surgery on a Friday, pointing to the actual dangers of such a practice –

> *…patients with glaucoma who have cataract surgery should have their intraocular pressure checked the day following surgery. A post-operative pressure spike can be devastating for a patient with advanced glaucoma and I have been an expert in a successful case of litigation where a surgeon failure to make arrangements for post-operative care in a patient having cataract surgery who had advanced glaucoma and suffered "snuff out" of their central vision.*

Mr. Vernon goes on to point out that Dr. Alwitry is the consultant who had performed the "*the largest study on the levels of intraocular pressure that occur on the day following phacoemulsification surgery in patients with and without glaucoma*", from which it is reasonable to infer that Dr. Alwitry was considerably more expert in assessing these risks that the clinical staff at the General Hospital in Jersey. (This is reinforced by the fact that Dr. Alwitry is the author of a text book on glaucoma and, as explained in Sinel's letter to the former Solicitor General of 24 December 2013 had reasonable grounds for believing that there was a risk of pressure rises even in non-glaucoma patients.);

39.2.2. Mr. Kiel said the ideal was to have clinics on the day after surgery and that he had also fought for operations not to be undertaken where there was no clinic on the day after surgery but had been unsuccessful. Mr. Alwitry was raising a concern that was genuinely held by him. He goes on to say:

> *As yet there hasn't been an incident but this is because I have to train all my juniors to know what to do and where there is only locum junior cover I have been lucky, but it is only a matter of time and of great concern to me.*

40. Those reports were dismissed by Mr. Riley as being from friends of Dr. Alwitry which had been written, in effect, to help his cause. Mr. Riley was at pains to say how experienced the clinical team was at Jersey Hospital and was clearly happy to accept their judgement that there were no 'real' safety issues raised by Dr. Alwitry. Mr. Riley's attempt to cast aspersions on the professionalism of Mr. Vernon and Mr. Kiel is and was wholly inappropriate. These are extremely senior specialists in their field who were giving a professional opinion in the knowledge that it would be subject to scrutiny by others, including fellow clinicians. Similarly, the Jersey clinical staff's apparent dismissal of Dr. Alwitry's concerns as having no value (if Mr. Riley's evidence is correct) is and was equally inappropriate. This is a matter that should have been considered seriously and, if necessary, discussed with Dr. Alwitry even if the ultimate conclusion was that the risks of undertaking surgery on a Friday was sufficiently low that, given the other pressures on the clinical timetable, it should go ahead. Mr. Riley's answer that such operations are scheduled on a Friday (and continue to be so) and that there has not been an incident at Jersey Hospital to date is (for reasons which are too obvious to need stating) not an adequate basis for dismissing the concerns raised, particularly when they are raised by a consultant who is known to have a particular interest and expertise in this area and has published on the subject. Nor is it an adequate response that one of the existing Medical Directors (Mr. Siodlak) operated on a Friday morning and was sufficiently bullish about the safety of so doing to record in

rather terse language that "*we should sack this bloke before he even gets here*". This is discussed further below.

41. A proper procedure would have involved the safety concerns being formally noted and proper consideration given to those matters. If it had been discussed (as it should have been) with Dr. Alwitry, we have little doubt that he would have been able to introduce the clinical team in Jersey to other specialists, such as Mr. Vernon and Mr. Kiel who had different views to those of the clinical team in Jersey. Consideration of such issues demands that a proper record of the investigation and reasons for any decision are made. No such record was made in the present case. Instead, as is set out below, what appears to have happened is that the senior clinical team simply formed the view that Dr. Alwitry was raising spurious concerns to achieve a certain agenda and then regarded him as a "troublemaker" and "a disaster" whose behaviour was "atrocious" because he persisted in raising the matter. The reality was that he was none of these things nor was his behaviour anything other than what one would expect from a consultant who held genuine concerns about patient safety and wanted to achieve the standard of care that he believed – rightly or wrongly – was required even if that was better than the historic practice in some Hospitals.

42. We accept that Dr. Alwitry was duty bound to raise any concerns that he had in relation to patient safety and we are not surprised that, without exception, all professionals outside Jersey Hospital who have expressed an opinion on the matter (including, in addition to the above, Mr. Sidebottom and the MDU) have reached the same conclusion. We have to say that we record our frank astonishment that the former Solicitor General reached the conclusion[7] that Dr. Alwitry was not raising legitimate concerns and was only motivated by a desire to "*keep his weekends clear so he could return to the United Kingdom for family reasons*" or that Dr. Alwitry *"was not looking to put in place suitable Saturday cover*". Again, it might have assisted the former Solicitor General if he had actually sought an independent opinion from other specialists outside Jersey but he did not do so.

(vii) <u>The concept of "withdrawing the offer of employment"</u>

43. The concept of "withdrawing the offer" was adopted by the Hospital and SEB in 2012 and has been consistently used by them to describe their conduct ever since (including in the present complaint). While we appreciate the perceived need to put a positive spin on unattractive decisions, it is unfortunate that this language was adopted. There is and was no right or power in the SEB to "withdraw the offer" of employment. The offer had been accepted by late August 2012. As Mr. Riley ultimately recognised, what was happening was that the SEB was consciously deciding to breach Dr. Alwitry's contract of employment and at least Mr. Riley was aware of that at the time. In simple terms, the decision of the SEB was, using Mr. Siodlak's own words "*to sack this bloke before he even gets here*" and, we would add, consciously deny him any right of appeal against that breach of the contract.

[7] Paragraphs 92 to 94.

C. The basis on which the Respondent conducted the appeal

44. At the outset of its Closing Submissions, the Respondent stated as follows:

> *At this early juncture in these submissions, the Respondent considers that it is important that the Board understand the premise upon which it conducted its case at the hearing on 16 March 2016. The Respondent was instructed that the Board was only considering the discreet issue of the procedure adopted by it when terminating the Complaint's contractor of employment. The Respondent was expressly advised by e-mail from the secretary to the Board that issues such as the grounds for making the decision and in particular those which alleged patient safety issues, would not need to be addressed nor would form part of the hearing itself. The hearing explored various issues which the Respondent considers were outside of the discrete issues. Had it been aware that the hearing would take the course that it did, the Respondent would have called various witnesses to deal with the issues discussed and importantly: filed additional documentation from the former Solicitor General's report dated 17 February 2014 and the States of Jersey Independent Case Review, prepared by Paul Beal dated March 2013 prior to the hearing.*

45. It is fair to say that the Respondent appreciated at the hearing that the Board was deeply concerned by the evidence that had been presented to it in the present case. We do not accept, however, that the hearing or this Decision strays outside the areas which reasonably could be expected to be addressed. We are concerned with the procedure that was adopted in the case of Dr. Alwitry. That involves a review of the facts from the time of his interview, through to the decision to terminate his employment and the conduct of the States' Employment Board and others after that termination.

46. It is correct that we are not generally concerned with the substantive merits of the matters that were raised. Thus for example, we have not sought to determine who was right on the issue of whether there was any actual risk to the safety of patients from operating on a Friday.

47. What we are concerned with, however, is whether Dr. Alwitry was genuinely objecting to operating on Fridays because of concerns that he reasonably held about patient safety (as he contends) or whether there was no reasonable basis for any concern about patient safety such that Dr. Alwitry's insistence on that he should not operate on a Friday on such grounds was an inappropriate attempt by him to manipulate the timetable to suit his domestic agenda (as the Respondent and Mr. Riley insisted). If it was the former (as we have found), then the issues required more detailed, formal and independent consideration. That is a flaw in the procedure that was followed and symptomatic of the general approach that we found on the evidence before us of the senior staff at the Hospital insisting that they were right and not giving proper consideration to relevant factors.

48. Further, there are some cases where, on the evidence before us, only one conclusion could reasonably be reached. Where relevant, we have identified this. That is inevitable in what is, in simple terms, a public law challenge. Since

most of the relevant evidence is to be found in the form of the various e-mails and letters that were exchanged, and (as we have explained above) we have to proceed on the basis that all relevant evidence has been disclosed to us, we do not accept that the Respondent has been prejudiced in its preparations for the present hearing nor that it ought to have been taken by surprise by the issues raised at the hearing.

D. The Job Description and Draft Terms and Conditions of Appointment

49. We were told by Mr. Riley, and accept, that the practice in Jersey is for consultants to cap their remuneration at 10 Programmed Activities ('PAs') even though consultants can and do normally work more than 10 PAs. A PA is, in simple terms, a block of 4 hours of work "*within the normal working week*"[8] which the Consultant contracts to work as part of his salaried employment.

50. In other words, the consultants in Jersey are expected to work additional hours for free. This is because Jersey adopts a more relaxed approach to consultants undertaking privately paid work. Indeed, consultants are encouraged to establish and pursue a private practice. It is expected that the remuneration that is received from private practice will more than adequately compensate the consultant for any additional hours that s/he works for free in the Hospital. This means that consultants, including Mr. Downes and Mr. Siodlak, were expected to and do routinely provide 'free' cover for patients on a Saturday.

51. Unfortunately that was not set out in the information pack that was provided to potential candidates for the post for which Dr. Alwitry applied. Indeed, it was not even set out in the draft or actual contract of employment. The latter expressly provided for exactly the opposite of the practice which is summarised above. Thus, for example:

51.1. Paragraph 3.3.3 of Schedule 3 to the 'Terms and Conditions – Consultants (Jersey) 2004' provides:

> *Non-emergency work after 7 p.m. and before 7 a.m. during weekdays or at weekends will only be scheduled by mutual agreement between the consultant and his or her manager. Consultants will have the right to refuse non-emergency work at such times. Should they do so there will be no detriment in relation to pay progression or any other matter.*

Given the terms of this clause, the 'normal working week' for Dr. Alwitry can be taken to exclude weekends.

51.2. It was common ground that Dr. Alwitry's contract of employment was for 10 Pas.

51.3. Paragraph 8.4 of Schedule 8 of the 'Terms and Conditions – Consultants (Jersey) 2004' provided that Consultants participating in on-call rotas out of normal working hours will be recompensed for frequency and intensity of work on an agreed scale.

[8] See, for example, paragraph 8.4 of Schedule 8 to the 'Terms and Conditions – Consultants (Jersey) 2004' which formed part of Dr. Alwitry's contract of employment.

51.4. Paragraph 13.5 of Schedule 13 to Schedule 8 of the 'Terms and Conditions – Consultants (Jersey) 2004' provides:

> ***Additional Programmed Activities***
> *On an exceptional basis, additional PAs may be agreed between the Employer and Consultant. In such cases PAs undertaken beyond the basic number agreed within the contract and job plan will be paid at the consultants own rate on a non-pensionable basis only…*

51.5. Paragraph 15.1 of Schedule 15 to Schedule 8 of the 'Terms and Conditions – Consultants (Jersey) 2004' stipulated that consultants would not receive any supplement for on-call availability and any on-call availability would be recompensed by 'Time Off in Lieu'.

52. Further, it was common ground that there was no start date specified in the information issued to applicants for Dr. Alwitry's post other than a general reference to the job commencing in the winter of 2012. Similarly, there was no indication in the papers that there was any particular urgency about the appointment.

53. The above was an important flaw in the application process. It is and was inappropriate for the draft conditions of employment to fail to identify that remuneration in Jersey was capped at 10 PAs but that the consultant would be expected to work more than that or to give the impression that the consultant could be paid additional PAs for work outside normal working hours if that was not in fact the case. Similarly, if, as the senior managers and clinicians at the Hospital asserted after the contract had been offered to Dr. Alwitry, there was an urgent need for the appointed consultant to start work in November or December 2012, this should have been expressly specified in the Job Description that was given to applicants. That seems to be common sense. Further, given the above, and the terms of the contract of employment once issued to him, we can fully understand Dr. Alwitry's confusion at why the Job Plan was apparently requiring him to undertaken 11.5 PAs rather than the 10 PAs that he had contracted to fulfil. We return to this issue below.

54. Schedule 18 of the 'Terms and Conditions – Consultants (Jersey) 2004' provided for the regime governing Termination of Employment. It included a minimum notice period of 3 months for consultants, like Dr. Alwitry, with less than 5 years' service. It then provided for the limited grounds on which employment could be terminated:

> ***18.2 Grounds for Termination of Employment***
>
> *18.2.1 A consultant's employment may be terminated for the following reasons:*
>
> - *conduct*
> - *capability*
> - *redundancy*
> - *failure to hold or maintain a requisite qualification, registration or license to practice*

- *in order to comply with statute or some other statutory regulation*
- *where there is some other substantial reason to do so in a particular case*

18.2.2 Should the application of any disciplinary or capability procedures result in the decision to terminate a consultant's contract or employment, he or she will be entitled to an appeal.

…

18.2.4 In cases of gross misconduct, gross negligence, or where a consultant's registration as a medical practitioner…has been removed or has lapsed without good reason, employment may be terminated without notice.

55. As will be apparent from what we have already said, paragraph 18.2 was not applied in Dr. Alwitry's case, nor was he permitted any right of appeal against the decision. This process appears to have been premised on the understanding of Mr. Riley and others that Dr. Alwitry was not technically employed or entitled to the benefit of Schedule 18 until he physically stepped through the door of the Hospital and started work – or to use Mr. Riley's legal terminology "gave consideration" to the Hospital. This was despite the fact that Dr. Alwitry had signed the contract of employment and acted (to his significant detriment) in resigning from his consultant's post in Derby in preparation for the move to Jersey. All members of the Board have struggled to discern any rational basis for the understanding of Mr. Riley and others (including, we assume the relevant legal advisers in the LOD) which we have just outlined. Both legally and as a matter of common sense, Dr. Alwitry was employed under the contract of employment and the conduct to which such exception was taken by the managers and clinicians at the Hospital all related to the performance of Dr. Alwitry's obligations under that contract. We have no doubt that, assuming that the relevant people actually held that view, it was wrong. Indeed, we would go further and say that we are satisfied that the view was one to which no reasonable person properly directing themselves could have come.

56. As such we include in our criticism the former Solicitor General in his conclusion that Dr. Alwitry had "*no legal right to [respond to criticism of him] because he had not yet started his employment period*". That confuses the date on which Dr. Alwitry was due physically start work in the Hospital with the date on which the contract took effect and ignores the fact that Dr. Alwitry was properly performing his express obligations under Schedule 3 of the 'Terms and Conditions – Consultants (Jersey) 2004' to agree a Job Plan and timetabling in advance of him physically commencing work. The latter is something which Mr. Vernon, Mr. Kiel, Mr. Sidebottom, the BMA and the MDU are consistent in their view: that Dr. Alwitry should have been commended for trying to resolve efficiently in advance of physically starting work. We agree. It is obvious that an efficient process required such matters to be agreed in advance precisely because of the logistical difficulties involved in timetabling the efficient and proper use of surgical and clinical facilities and that is what Dr. Alwitry's contract of employment required.

E. Dr. Alwitry's Application and the Start Date

57. It is common ground that Dr. Alwitry's application expressly stated that his notice period was 6 months – i.e. that assuming an appointment in August 2012, he would be free to take up the position in February 2013. In fact it seems that Dr. Alwitry's notice period was shorter than this (3 months) but Dr. Alwitry did not wish to take up a full-time post until February 2013 because of the need for him to provide care for his 4 children. Nevertheless, it was or ought to have been clear that Dr. Alwitry was applying for the job expressly on the basis that he would not take up the post until February 2013.

58. Having reviewed all of the evidence, we agree with the former Solicitor General's comment that "*One is left to wonder if anyone at the Hospital troubled themselves to read Dr. Alwitry's online application form*". Indeed, it seems clear that, with the possible exception of Mr. McNeela, none of those involved in the interview of Dr. Alwitry had properly considered his application. We have identified Mr. McNeela as a possible exception because Mr. Downes recorded the following in an e-mail to Mr. McLaughlin and Ms. Body dated 14 August 2012;

> *[Mr. McNeela] also advised that he was aware of the 6 month "point of contention" but omitted to mention/question Amar about this?? Sadly yet another example of him changing his tune without too much thought for the consequences!*

59. There is conflicting evidence as to whether or not Mr. Downes informed Dr. Alwitry informally during a conversation on 31 July 2012 that the Hospital had a pressing need for the successful candidate to start before Christmas 2012. Mr. Downes referred to this in an e-mail to Dr. Alwitry on 15 August 2012:

> *When we met prior to interview for informal discussions and from memory I thought I had made it quite clear that we had a pressing need for a variety of reasons for any appointment to be taken up ASAP and by Xmas at the latest. No mention was made at this time of a 6 month start date.*

60. The former Solicitor General concluded that such a conversation did in fact take place and then relied on that conclusion as justifying the inference that Dr. Alwitry was being disingenuous in his correspondence after the interview in suggesting that the need for an early start date had not been mentioned to him.[9]

61. Mr. Downes was not, however, quite so clear about what was said to Dr. Alwitry in a slightly earlier e-mail. On 14 August 2012, he e-mailed Mr. McLaughlin and Ms. Body stating:

> *Amar was made aware at our informal discussions that I expected the new Consultant to start asap since we had had a miserable response to several adverts for a long term locum. I presumed that, as an established Consultant he would be aware of the usual 3 month start*

[9] Paragraphs 30 to 39 of the former Solicitor General's Report.

> *date; further that he would have mentioned a proposed delay since it appears that there was never a plan to move before next July: the latter did not happen.*

62. Although we appreciate that the evidence given to us was provided by Mr. Riley who was not a party to any alleged conversations, we note that Mr. Riley's evidence was to the effect that the first mention of the need for a start date during the autumn/early winter of 2012 was by Mr. McLaughlin in a telephone conversation with Dr. Alwitry on 1 August 2012 when the former relayed to the latter that he had been successful in in his application. This evidence conflicts with the report of Mr. Beal which records that it was Mr. Downes who telephoned Dr. Alwitry with the good news. Further, in relation to the start date, after also interviewing the relevant witnesses, Mr. Beal records the following in relation to the discussions over the start date:

> *The evidence indicates a discussion started between RD and AA for a short period in August 2012 on this matter, despite the fact either party never [sic] discussed it at interview stage or at the informal meetings.*

63. The above succinctly illustrates the problems created when the fundamental requirements of the putative employer are not set out clearly and formally in the relevant application documentation or included on the check list for discussions with the applicants. It also illustrates the problems created by the failure properly to record relevant discussions in an appropriate and formal record. We agree with Mr. Beal[10] that:

> *This demonstrates a poor recruitment and selection process on this appointment; this is supported by the audit of the paperwork. The Chair has a responsibility to ensure the process is carried out in line with best HR practice which should include picking up any issues around references and ensuring that any issues on the application form are followed up e.g. notice period and start date.*
>
> *Overall the process was poor and not comprehensive.*

64. On balance, we do not accept that Mr. Downes had a specific conversation with Dr. Alwitry at the informal meeting on 31 July 2012 as indicated in Mr. Downes' e-mail of 15 August 2012. At best, there was a conversation where Mr. Downes said that there had been real difficulties in attracting a long term locum so that the Hospital was looking forward to the new consultant taking up his or her post as soon as possible. That is consistent with the evidence given to Mr. Beal and ourselves, as well as Mr. Downes' e-mail of 14 August 2012. More importantly, it is consistent with the correspondence from Dr. Alwitry. Given his reaction to the news that the Hospital wanted a start date before Christmas (and to Mr. McLaughlin's peremptory letter of 10 August 2012) which is discussed below, the fact that he clearly had genuine problems in arranging child care given that his wife was also working (as a G.P.) and the consistent evidence of him challenging matters that he did not like or understand, it is inconceivable that he would not have responded to the suggestion of a pre-Christmas start date with a very clear reminder of the fact

[10] In paragraph 5.5.1 of his Report.

that his application was premised on the basis that he would not start before his six months' notice period had elapsed.

65. Unlike the former Solicitor General, we do not think Mr. Downes' somewhat equivocal e-mail of 15 August 2012 carries matters any further forward. That e-mail was written at the height of the debate over the start date and at a time when the senior management and clinicians at the Hospital thought that there was a possibility that Dr. Alwitry would not take up his post at all. It has the hallmarks of an e-mail written by someone who realises that a large mistake had been made in failing to pick up on the 6 month notice period stipulation in Dr. Alwitry's application and expressing the an opinion that he (Mr. Downes) cannot quite believe that he did not raise this fundamental point at some stage even if it was only at the informal meeting on the day before the interview.

66. It was common ground that the issue of the start date was not raised during the interview itself. We agree with the former Solicitor General that it should have been specifically discussed with all candidates.[11]

67. We also agree with the former Solicitor General that the Hospital was not entitled to rely on the assumption (articulated by Mr. Downes in his e-mail of 14 August 2012) that the successful applicant would start within three months unless the applicant raised an issue. The onus was on the Hospital to raise such matters. The approach of the Hospital was poor employment practice. This was doubly unfortunate because those principally at fault for failing to raise the issue with Dr. Alwitry in the interview (including Mr. McLaughlin and Mr. Downes) then appear to have used the fact that Dr. Alwitry did not raise the matter in interview as evidence of his devious character, in effect seeking to blame him for their mistake.

68. As noted above, Mr. Riley suggested that Mr. McLaughlin first raised the question of the start date with Dr. Alwitry when he telephoned him to inform him that he was the successful applicant. We do not believe that this happened. First, as we have set out above, it is unclear who actually telephoned Dr. Alwitry: the evidence to Mr. Beal was that it was Mr. Downes who made the phone call. Second, it is not consistent with the documentary record at the time. Third, it was not suggested by any of the witnesses interviewed by the former Solicitor General or Mr. Beal. Fourth, Dr. Alwitry's e-mail exchange with Ms. Nicholson on 1 August 2012 was clearly after he had been informed of his success ("Really really really chuffed…") and makes it clear that he did not know when he was starting.

69. Having said that, we think it is likely that Dr. Alwitry was told by whoever telephoned him on 1 August 2012 that the start date would need to be agreed and it seems likely that he was expecting at least some negotiation over the precise date. His e-mail to Ms. Nicholson of 1 August 2012, timed at 17.27, makes it clear that he did not know when he was starting but that *if* he was over in Jersey by 15 December, he would attend the Christmas party. This is consistent with him expecting at least some pressure on him to come earlier than February 2013.

[11] Paragraph 27 of his Report.

F. <u>8 to 15 August 2012</u>

70. The person with whom the discussion in relation to the start date had to take place was the Clinical Director, Mr. Downes.

71. After the weekend of 5 and 6 August 2012, Dr. Alwitry contacted Mr. Downes:

> *Hope you're well and had a lovely weekend. All of it is now sinking in. Really excited about coming over. Thanks again for your support.*
> *…*
> *Please could I also come and see you to discuss my start date – maybe Friday afternoon of the 24th if you're around.*

72. Mr. Downes responded to that message at 8.30 a.m. on 8 August 2012, asking Dr. Alwitry to call him as soon as possible to organise his start date.

73. That correspondence is consistent with our conclusions set out above, that the issue of the start date or the need of the Hospital to have an early start date had not been raised specifically at any time prior to this point.

74. It appears that Dr. Alwitry responded quickly to that e-mail and there was at least one discussion between him and Mr. Downes early on 8 August 2012. It was at this point that Mr. Downes raised, for the first time, the fact that the Hospital had an urgent need for him to take up his post and that he was expecting Dr. Alwitry to start as early as possible. Dr. Alwitry made it clear that he had applied on the basis that he would not start until February 2013. Contrary to the impression given by the Hospital witnesses at various times, it was Dr. Alwitry who was prepared to be flexible and initially suggested that he might be able to work a three-day week. The latter is evident from Dr. Alwitry's e-mail to Mr. Downes of 9 August 2015 where he said "*<u>M</u>y plan to come over and work for three days…*" and the initial offer of employment dated 8 August 2012 ("*Richard Downes has indicated that you would like to start initially on a part time basis…"*).

75. The conversation proceeded on the basis that Dr. Alwitry would see if he could make a three-day week work from his perspective. The conversation with Mr. Downes was followed by a telephone call to Mr. Leeming, the Medical Staffing Officer responsible for issuing the contract of employment. There appears to have been an issue before the former Solicitor General as to whether or not Dr. Alwitry had procured the offer on 8 August 2012 by misrepresenting that Mr. McLaughlin had approved that request although Mr. Leeming himself could not remember the conversation in question. Mr. Riley initially repeated this suggestion in his evidence to us – again seeking to blame Dr. Alwitry and suggesting that he duped Mr. Leeming to act outside his authority – but then conceded that Mr. Leeming had the authority to issue the offer and was the appropriate person for Dr. Alwitry to contact. Mr. Riley explained that, at some point, he had suggested to Mr. Leeming that he was not sufficiently attuned to Mr. McLaughlin's thinking and that, although Mr. Leeming had authority to issue the offer, he should not have done so at that particular point in time – i.e. to the extent that there was a problem with Mr. Leeming issuing the offer on 8 August, it was an entirely internal matter.

76. There is no doubt that Dr. Alwitry spoke to Mr. Leeming on 8 August 2012. It is also clear from the offer letter issued on that day that Mr. Leeming also spoke (as one would expect) to Mr. Downes and that he was aware that the start date was still very much under discussion. The offer letter itself says:

> *Please kindly advise us of a definite start date. I have put the start date as 12th November 2012, if that needs to change please let me know. Richard Downes has indicated that you would like to start initially on a part time basis, 3 days a week to allow you to return to the UK to your family and help with childcare. From speaking to Richard I understand that you resume full time duties from around 4th February 2013. I would be grateful if you could confirm the timescales for the above agreed arrangements.*

77. From that passage, it is evident that the letter reflected Mr. Leeming's detailed discussions with Mr. Downes and was not procured by any misrepresentation by Dr. Alwitry. While it seems that Dr. Alwitry discussed the possibility of working part time until July 2013 with Mr. Leeming[12] that was never going to be acceptable to the Hospital and the offer letter, issued in accordance with Mr. Leeming's authority, reflected what the appropriate person (Mr. Downes) had discussed with Dr. Alwitry and was prepared to sanction at that time.

78. Dr. Alwitry immediately started to see whether the three day working week would be feasible. He e-mailed Mr. Downes on 9 August 2012 at 12.23 p.m. confirming that he was "*furiously trying to sort out logistics for the move over*" and acknowledging that he had not appreciated that there would be logistical problems at the Hospital until he was properly over. He explained that it did not look cost effective for him to fly back and forth but raised the possibility of offering Mr. H (the person who came second in the interview process and was currently employed at the Hospital) a locum post.

79. That was followed by a further e-mail on 9 August 2012 timed at 3.35 p.m., in which Dr. Alwitry said that the flight times did not work for the proposed three day week and requesting that the Hospital accept the February 2013 start date:

> *My plan to come over and work three days and fly back each week is looking unrealistic …*
>
> *… the flight times are also not very conducive either – I have tried to look at making it workable*
>
> *BMI baby have stopped flying. FlyBE are taking over but they don't fly back to the Island on Sunday – only Monday. The flight on Wednesday from Jersey to East Mids is at lunchtime which messes up the Wednesday. In order to be back on Wednesday evening for the kids on Thursday I'd have to fly over to Gatwick or Birmingham at 19:00 each Wednesday and the train it up to Notts.*
>
> *Could we please stick with my original six months to starting please. I promise I did put it on the application form – please check with Olly.*

[12] See paragraph 46 of the former Solicitor General's report.

...

My wife has set up a meeting for Monday and her resignation letter is printed out. 6 months from Monday I'll be with you properly so I plan to start with you on Monday 11th Feb…

80. Dr. Alwitry's plan to revert to his original planned start date is evidenced by his e-mail to Mr. Thompson at 9.30 a.m. on 10 August 2012 when he informed him that the planned start date was 11 February and that he "*would have liked to start sooner but logistics are impossible*".

81. At this point Mr. McLaughlin became involved. On 10 August 2012 he wrote to Dr. Alwitry in fairly peremptory terms:

> *While it is noted in your application that your start date would not be for 6 months, we had hoped that you would be able to join the Hospital team by mid-November given that the possibility of a delayed start date was not discussed with the department prior to, or indeed during, your interview. I am now aware through your conversations with both Mr. Downes and Oliver Leeming that you would be unable to start until mid-February at the earliest.*
>
> *As you may be aware from your conversations with Mr. Downes and Mr. McNeela, the Ophthalmology department is under considerable pressure and it is imperative that the third Consultant starts as soon as possible. Whilst we understand your present circumstances and the reason why you would like to delay your start date, I have met with the Clinical Director of Surgery and am unable to accommodate your request due to service pressures. As an employer we always try to accommodate such requests provided it does not conflict with the exigencies of the service. I understand that Mr. Downes has also suggested a 3-day per week working pattern as an interim measure but that this would not be suitable for you either.*
>
> *I hope you will understand the position we are in given the pressure the service is under. It will be with considerable regret that we will have to withdraw our offer of employment unless you are able to confirm that you will be in post here in Jersey by 1st December 2012.*
>
> *I look forward to receiving a positive response by close of business on Wednesday, 15th August.*

82. As will be apparent from what we have already said, in our judgment that letter reflects an inappropriate understanding of how the Hospital ought to recruit personnel. If there was a genuine and pressing need to have the Consultant appointed by mid-November 2012 or, at the latest, 1 December 2012, this should have been stated clearly and unequivocally in the advertisement and the materials sent to prospective candidates. It was not. It should also have been raised specifically at the interviews. The onus to raise the issue was on the Interviewing Board, not Dr. Alwitry. The failure to do so in the case of Dr. Alwitry is inexcusable in particular given the fact that, as Mr. McLaughlin's letter accurately noted, Dr. Alwitry had made it clear in his application that he

was not anticipating starting in post until February 2013. Having failed to make these matters clear to Dr. Alwitry either before or during the interview, it was equally inappropriate retrospectively to seek to impose on him a different commencement date to the one that he reasonably anticipated, particularly when the attempt is couched in terms that suggest that it was somehow Dr. Alwitry who was being difficult rather than Mr. McLaughlin and his colleagues who were trying to re-write the terms of the job offer.

83. Mr. McLaughlin's rather muscular style of making a demand that Dr. Alwitry should just accept the new terms also fed into the misconception that spread at the Hospital about Dr. Alwitry's attitude. What becomes apparent as one goes through the history of this case is that the senior staff at the Hospital seem to have formed the view that Dr. Alwitry was "difficult" because he would not simply do what he was told or would question the rationale for peremptory demands of the type made by Mr. McLaughlin. We strongly suspect that this reflects an unhealthy style of management at the Hospital, where the senior staff expect to be obeyed unquestioningly, rather than any fault on the part of Dr. Alwitry.

84. Dr. Alwitry immediately responded to Mr. McLaughlin's letter. As is evidenced by his e-mail to Mr. McLaughlin of 10 August 2012 (timed at 3.55 p.m.), he spoke to Mr. McLaughlin by telephone. In his e-mail he apologised that he had "*caused you and Richard hassle*" even though, as we have found, he had nothing for which he ought to apologise; if anything, it should have been the Hospital apologising to Dr. Alwitry for the obvious and fundamental flaw in their recruitment process in failing expressly to provide for a start date for the new post or even mention it during the interview. Dr. Alwitry explained that "*all any of the literature said was Winter 2012 which I erroneously presumed was any time up to Spring 2013!*". That is consistent with Dr. Alwitry's application and his assumption was reasonable in the circumstances. Finally, Dr. Alwitry yet again tried to find a compromise:

> *As previously discussed if I could start the three day week thing on 1st Jan and then start properly on Feb 11th that would really help me out. From Jan to Feb I'd have no problem doing 6 clinical sessions on the Monday to Wednesday – i.e. clinics and theatres to catch up for what I'd miss in Dec. If I started in December I'd end up taking leave anyway which defeats the object of attempting to catch up with activity.*

85. Dr. Alwitry's understandable reaction to Mr. McLaughlin's letter of 10 August 2012 was more accurately captured in two e-mails to Mr. Downes timed at 9.32 a.m. and 10.49 a.m. on 13 August 2012:

85.1. In the earlier of the two e-mails, he stated:

> *Been doing a lot of soul searching about coming to Jersey. This letter and ultimatum from Andy M has shaken me a bit. To be honest if this is typical of the management style of the Hospital I'm wondering if it is the sort of place I want to spend the rest of my working life in.*

> *I've spoken to the BMA and one of my old school mates who's an employment lawyer at Benests. They too really can't understand or believe Andy's stance.*
>
> *You've been really understanding of my family circumstances but clearly management don't/won't listen to the clinicians. If I do decide to walk away its not a reflection on you and Bartley – would have been a pleasure working with you both.*
>
> *I am furiously trying to sort out a nanny to look after the kids and if I can get someone then I will probably still come but I'm not sure yet if I can get everything in place. At least the three day working week till Feb will soften the blow so thanks for sorting that for me.*

85.2. In the later e-mail Dr. Alwitry set out a further complicating factor (one of Dr. Alwitry's children had been scheduled for an operation in the UK on 8 January 2013) and stated:

> *I'm really bewildered by Andy's response. Spoke to Iain about it and his comment was "is that the sort of place you want to work in". Anyway, I'll try and sort it out with Andy. If it all still works out I'll volunteer for Xmas next year!*

86. We have to say that we are not entirely surprised by Mr. Alwitry's reaction. It illustrates why having a flawed procedure for recruitment reflects badly on the Hospital. We should also note at this stage that Dr. Alwitry's decision to speak both to the BMA and an employment lawyer in Jersey about the issue was equally understandable and, indeed, what one would expect a responsible person to do.

87. Mr. Downes sent an e-mail on 13 August 2012 asking what Dr. Alwitry felt "*about 1 Dec. start as 3 day week until 11th Feb?"*. Dr. Alwitry responded saying if it was possible to persuade Mr. McLaughlin to allow a February start date, he would be very appreciative. As is apparent from that e-mail, Dr. Alwitry had clearly (and understandably) identified Mr. McLaughlin as the person who was insisting on the early start date. Mr. Downes responded by a further e-mail to Dr. Alwitry on 13 August 2012:

> *The post was created principally to deal with patient throughput within the department; waiting list times were the principal driver. Funding was made available to support an interim long term locum, a post which has proven impossible to fill (with the exception of the odd week here or there) for a variety of reasons, principally geographic. The waiting lists continue to rise hence the pressing need to have someone in post ASAP. There is no reason to believe we will be any more successful in locum recruitment for these next few months than previously.*
>
> *A start date of February will not be acceptable for the above reasons, but the department could manage with a start date, and limited working conditions, as per my earlier e-mail.*

88. Dr. Alwitry responded with two e-mails on 14 August 2012. He was clearly trying to work out the rationale for what he perceived to be Mr. McLaughlin's insistence on a start date of 1 December 2012. He was equally clearly struggling to identify one. He had spoken to Ms. Angela Body and Mr. McNeela, neither of whom (according to Dr. Alwitry) considered the situation to be as serious as Mr. Downes was suggesting and he had clearly identified Mr. McLaughlin making an irrational demand:

89. In his first e-mail on 14 August (timed at 9.14 a.m.), Dr. Alwitry said:

> *My big issue is – will the few months/10 weeks between the time you guys want me to commence and the time I wanted to commence make that much difference? I don't think it will and everyone I have spoken to about this agrees. I think that Andy M is exaggerating when he says that we are so desperate to have me start then. I can appreciate its desirable and ideally it would be good if I could start then but it is not so desperate that irreversible damage to the department will occur.*
>
> *Having spoken to Angela Body and seen the waiting times spreadsheet she kindly supplied to me its [sic] doesn't look to me like the small wait will sink the ship. I spoke to Bartley … and he said he would be happy with an 11th Feb start and it would not be all that detrimental. He is going to look at the waiting list again tomorrow afternoon. I spoke to Andy L yesterday morning trying to gauge whether the management were all so heavy handed/disregarding of personal circumstances and he couldn't understand Andy's urgency to get me in post.*
>
> *…*
>
> *The strange thing about the locum thing is that apparently (third hand information so not 100% about its truth and not my place to ask him about it) Matt has actually asked for another locum. Andy could easily have given you approval to appoint Matt as a temporary locum and he could have already been in post and sorting the problems out. It would have been cost neutral, good for Matt and good for us. We didn't have to be in this situation.*
>
> *Will get back to you once I've made progress this end (I am still trying to sort logistics) and I've heard back from Andy M. I want closure as much as you and I really hate that I am causing problems before even starting … The whole thing is embarrassing for us as a department and it could have been avoided if Andy had taken a balanced view. I made it clear on my application that I could not start for six months specifically to avoid this sort of problem.*
>
> *Andy's threat to withdraw the job offer has upset Claudia and got my back up too … Andy's intransigence is adversely affecting my whole family for no firm reason I can fathom. I think he thinks that I want the job so much that I would come anyway regardless of what he says or does. He's sadly mistaken.*
>
> *I am asking him to reconsider and allow me my 11th Feb start date. We could use the funds from my wages for those ten weeks to get extra*

> *sessions done to keep us afloat until I can start properly. If he still says no then I guess I take it up the ladder or walk away…*

90. At 11.29 on 14 August, Ms. Body e-mailed Dr. Alwitry recording the fact that he was still waiting for a "*formal response from us regarding your starting date*" and continuing:

> *As agreed we have discussed the situation in depth to see if we can accommodate your request of starting later than 1st December. Mindful of the demands and considerable pressure on the service that Andrew has explained to you unfortunately it still requires the position to be filled as quickly as possible.*
>
> *Therefor it is still necessary that the date of the 1st December stands and we will be grateful if you are able to confirm this by tomorrow the 15th August as outlined in Andrew's letter.*

91. It appears that Ms. Body was therefore relaying the product of further discussions, presumably with Mr. McLaughlin, to Dr. Alwitry and reiterating that nothing had changed from the terms set out in his 10 August letter. We note in passing that this means that paragraph 71 of the former Solicitor General's Report is not correct if it is intending to record a suggestion that the only involvement that Ms. Body had in considering Dr. Alwitry's appointment was on 31 July 2012. The documentary record shows that she was involved in discussing Dr. Alwitry's start date with other senior colleagues in August 2012. We note also the former Solicitor General's conclusion that he was not persuaded that Ms. Body's views were fairly or fully reflected in the e-mail exchanges. We are not in a position to judge whether that conclusion is correct. The documentary record is equally consistent with Ms. Body having been instructed to follow the line set by Mr. McLaughlin.

92. Dr. Alwitry responded to Ms. Body at 12.15 p.m. on 14 August 2012 recording, amongst other things:

> *I made it clear that I would require six months notice for starting for various reasons which I will not bore you with. If 1st December was so critical to start you would have hoped it would be mentioned in the advert, the job description or discussed pre- or even during the interview. Also if I was clear on the application form that I had to have 6 months notice to start why was I shortlisted/interviewed/appointed etc. etc. etc.*

As will be apparent from what we have already said, we agree unreservedly with Dr. Alwitry's comments. The advertisement for the job and the interview were procedurally flawed for the reasons succinctly summarised by him in the above e-mail. The problems that had then ensued were entirely of the Hospital's own making.

93. Dr. Alwitry continued:

> *Very bewildered and saddened by this. Seems a bizarre way to treat a potential new consultant. Anyway not your problem.*
>
> *If you are motivated to (or allowed) could you just let me know what damage will occur with a February versus a December start – would really help with understanding the situation we in [sic]. It seems clear that the 1st December start date will stand but really the decision now is whether I come at all.*
>
> *If I came over in December and did some free clinics for no pay for you would than help??*

There was no reply to that e-mail. We note further that, contrary to the attempts by the Hospital to portray Dr. Alwitry as constantly trying to bend the process to suit his family requirements, no one in the senior management of the Hospital appears to have considered his offer to work for free to relieve any pressure on the system if the same genuinely existed. A good procedural process would have considered that offer both at the time and subsequently when decisions were being made as to whether or not to break the contract with Dr. Alwitry.

94. Ms. Body's e-mail appears in part to have prompted Dr. Alwitry's second e-mail to Mr. Downes on 14 August 2012. This was timed at 3.03 p.m. We also infer that the e-mail followed on from a telephone discussion with, amongst others, Mr. Downes (which is referred to in Mr. Downes' e-mail of 15 August 2016 timed at 13.35, and records that there were discussions with regard to "*waiting times, locum unavailability etc*). Dr. Alwitry said:

> *Thoroughly confused now. Angela was the one who told me that it wasn't that bad. In fact her and I had a discussion about whether we needed a third consultant at all! If it really is that bad then I'll just have to make it work. Just wish someone had written down a start date or at least mentioned it so that I could've sorted something then we wouldn't have had this grief. Will discuss it with my boss tonight and make decision by close of business tomorrow.*

95. Ms. Body forwarded her e-mail exchange with Dr. Alwitry to Mr. McLaughlin at 4.30 p.m. on 14 August 2012. 14 minutes later, Mr. McLaughlin replied to Ms. Body and Mr. Downes in the following terms:

> *Hmm. This really is not what I would have expected. If he doesn't want to come he doesn't have to. I need to speak to Andy L and I think we should take advice from Tony Riley because, even if he does deign to grace us with his presence in December, this chap looks like trouble and if we can I think we should withdraw our offer and take the other candidate while he is still available.*

96. This e-mail shows a lack of any proper understanding of the cause of the problems that had emerged. These were created by the Hospital's failures and Mr. McLaughlin's rather unfortunate letter of 10 August. They were not of Dr. Alwitry's making. As we have already said, we strongly suspect that it is symptomatic of a culture in the senior management of the Hospital (evidenced by the manner in which they dealt with Dr. Alwitry generally) that expects an almost unquestioning obedience to their demands.

97. Further, the e-mail also illustrates why a genuinely independent review of decisions such as those which are the subject of the present complaint should have been undertaken before the decision was taken. From about 14 August, it appears that the senior management at the Hospital had (incorrectly, based on the evidence before us) pigeon-holed Dr. Alwitry as a "trouble-maker" and were almost looking for further signs of it. Those individuals should not have been involved – or at least not without a proper review by independent personnel – in the subsequent decision to break Dr. Alwitry's contract or to present the case to the SEB. It is and was almost impossible to conclude that the subsequent consideration of Dr. Alwitry's employment accorded with the principles of natural justice that we would expect to be applied by a responsible public body in matters relating to the recruitment and dismissal of consultants at a Hospital. Whether or not it was actually fair (which, in the present case, it was not), it is equally important that the process is *seen* to be fair. It cannot be seen to be fair when those involved in making the decision have very clearly made up their minds about the character of an individual in advance and have done so on a misapprehension of the relevant evidence.

98. Mr. Downes responded to Mr. McLaughlin at 17.51 on the same day. This was the e-mail to which we have already referred in which Mr. Downes recorded the fact that Mr. McNeela was aware that Dr. Alwitry had stated that he had a six month notice period on his application form and suggested that Dr. Alwitry was aware from "*our informal discussions that I expected the new Consultant to start asap*". He then went on to say:

> *I presumed that, as an established Consultant he would be aware of the usual 3 month start date: further that he would have mentioned a proposed delay since it appears that there was never a plan to move before next July…*
>
> *I am also confused. If he wants the post then he should accept it as offered. I am no longer sure that we know the complete picture but if this is an example of things to come then I agree with Andrew.*
>
> *On a more positive note Matt is still available and wants to work here with no obvious strings attached.*

We have already criticised the approach reflected in the first paragraph set out above. The subsequent paragraphs are consistent with the management style to which we have referred above.

G. The Contract of Employment is agreed

99. On 15 August 2012, Mr. Alwitry e-mailed Ms. Body, Mr. McLaughlin and Mr. Downes confirming that he would start on 1 December 2012. He asked Ms. Body for a meeting to go through the waiting lists because "*when I looked at them things were not ideal but not so bad as it seems*" in order to "*get a grip with where we are going wrong so I can understand the service needs better and we can all fix it*". He concluded by saying:

> *One last ditch attempt – if I'm starting on 1st December and then taking leave over Xmas as agreed with Richard that means I am only working for 2 weeks before the start of Jan – would two weeks make that much difference? Could I not make a fresh start on 1st Jan? Worth a try.*

100. The revised formal offer of permanent employment was sent to Dr. Alwitry and agreed on 21 August 2012. At that stage there was a binding contract between Dr. Alwitry and the SEB. It was that contract which the senior management subsequently decided deliberately to breach.

101. We note that the former Solicitor General concluded in paragraph 80 of his Report that the various e-mails among senior staff in mid-August 2012 should have prompted a meeting to consider whether to appoint another candidate because "*alarm bells were ringing loud*". We agree that if the exceptional course of withdrawing a job offer is to be taken, it has to be done before the contract is actually agreed. That is a simple matter of the law of contract. As such, if the Hospital wanted to appoint someone else in Dr. Alwitry's place, it should have done so before sending out the revised formal offer of employment on 21 August 2012. We disagree with the implication that Dr. Alwitry had done anything to cause the "alarm bells" to ring. The "alarm bells" that ought to have been heard were those that were sounding as a result of the flaws in the Hospital's appointment procedure. We would add that if a public body was considering taking the exceptional step of withdrawing an offer of employment to a senior consultant to whom they had made the offer some two weeks before, at the very least it should follow a fair procedure which would inevitably involve making any concerns known to the putative employee and considering any representations s/he may make in response.

H. The discussions in September/October 2012 about clinics and surgery times

102. We accept that both the Hospital and Dr. Alwitry had obligations to prepare and agree a draft job plan. This would include the timetable for clinics and surgery. This was an express requirement in Schedule 3 to the Terms and Conditions – Consultants (Jersey) 2004 which was incorporated into the Contract. As paragraph 3.1.1 of Schedule 3 makes clear this was a mutual obligation, reflecting a "partnership" approach. There is and was no requirement on Dr. Alwitry to accept working hours in excess of the 10 PAs agreed. There was equally no requirement on Dr. Alwitry simply to accept what he was given, whether on the basis of the "*last man in*" approach suggested by Mr. Riley in evidence and Mr. Downes at the time or otherwise.

103. On the evidence before the Board it is clear that Dr. Alwitry set about trying to agree his job plan in accordance with the Contract and good practice (as confirmed by the independent references to which we have referred at paragraph 32 above).

I. <u>The discussions over the permanent timetable</u>

104. On 5 September 2012, Dr. Alwitry e-mailed Mr. McNeela asking if he and Mr. Downes had sorted out his timetable for the period after February 2013 (i.e. once Dr. Alwitry was working full time). Understandably, Dr. Alwitry indicated that he was anxious to resolve matters so that he could book flights to and from the UK to be with his family at the weekends. (The references to "MMC trabeculectomy" (or "MMC trabs") below are to a surgical treatment for certain patients with glaucoma).

105. At or about this time, Mr. Downes was on leave. On 16 September 2016, Dr. Alwitry e-mailed Mr. Downes, saying:

> *Hope you had a lovely break. Welcome back to work!*
>
> *Have been speaking to Carol, Bartley, Judith etc. about my proper timetable from Feb as I am keen to get it sorted.*
>
> *Carol is going to sort me out with a clinic room of my own (which is great) so the clinic timetable can be flexible – so I won't be inconveniencing you and messing around with your room thankfully. She doesn't want me to have a clinic on Friday mornings as they are already too busy which is fine by me as I'm hoping the Friday can be my two sessions off in lieu of on-call (instead of the Monday as per the prelim timetable).*
>
> *I gather I'm in DSU theatre on Monday afternoons which is great. I'm hoping I can have a clinic on Monday mornings meaning that I am in all day Monday when I'm on-call. Judith tells me she has Tuesday mornings available in DSU for another theatre session for me. That is ideal as if I do my MMC trabs on the Monday afternoon, I can review them in the morning and take them back to theatre if needs be – flat AC/leaks/haemorrhage blocking osteum needing TPA etc. I really do need lists on consecutive days so that I have the facility to take the glaucoma cases back to theatre next day if needed …*
>
> *…*
>
> *Essentially if we can sort the timetable so that I have clinic Monday AM, theatre Monday PM, theatre Tuesday AM and Fridays my two sessions off in lieu of on-call I'll be happy – the rest I'm not fussed about. Have spoken to Bartley about this and he seems to be happy but obviously I need to make sure you're OK with this and that it is workable/ok for the logistics of the department.*
>
> *…*

106. We note at this point that, consistently with his subsequent correspondence, Dr. Alwitry was making it clear from the outset that he needed the facility (in his view) to review glaucoma patients and take them back into theatre on the day after their initial operation if necessary.

107. At some point Dr. Alwitry must have been given a proposed timetable. At 9.26 a.m. on 24 September 2012, he e-mailed Mr. Downes saying that he had some "*issues*" with the proposed timetable which he would discuss directly with Mr. Downes and Mr. McNeela. Mr. Downes responded on the same day, saying:

> *Timetable now sorted – not adhering to your wish list but it is the best I can do at present!*
>
> *Mon. – am OPD with Tania; pm off*
> *Tues – am DSU*; pm OPD with Asim and Tania*
> *Wed. – no fixed sessions*
> *Thurs. – am OPD with Asim; pm alternate weeks DSU*/OPD*
> *Fri. – am alternate weeks main theatres*/OPD; pm off*
>
> *…*
> *As points of explanation:*
>
> *I will have to keep Mon. DSU list since I cannot do Fri. am's (C.D. business/meetings etc.) and anaesthetic rota difficulties.*
> *…*
>
> **Thurs pm and Fri am lists – these are alternated with O&G but may be possible to negotiate so that you do DSU lists only – I have sown the seeds but not taken it any further since you have stated a requirement for next day theatre availability …*

That e-mail was copied to a number of people including Ms. Body, Mr. Akin F (a consultant gynaecologist and obstetrician at the Hospital), Ms. Judith Gindill, Mr. McNeela, and Ms. Carol Hockenhull (a clinical nurse specialist at the Hospital).

108. Later on 24 September 2012, Dr. Alwitry e-mailed Mr. Leeming asking him to confirm that the Contract was for 10 PAs, split 2 sessions in lieu of on-call, 2.5 SPAs and 5.5 DCC (1 of these an administrative session). Mr. Leeming confirmed that this was correct later that day. We infer from this e-mail that Dr. Alwitry had realised that the proposed timetable required him to work more than 10 PAs.

109. As recorded by the former Solicitor General in paragraph 87 of his Report, Mr. Downes went on Annual Leave from 25 September 2012. Dr. Alwitry was therefore not in a position to liaise with him further about the timetable.

110. At 1.24 p.m. on 24 September 2012, Dr. Alwitry sent an e-mail to Ms. Judith Gindill (the Head of Nursing and Divisional Lead – Theatre and Anaesthesia) saying that he was not happy with the proposed timetable. He explained that his concern related to operating on a Friday. He also said:

> *Going to speak to Richard and Bartley about this but just wanted to ask you first – are there any other slots in DSU or main theatres (pref DSU) for alternate weeks that you could give me instead of Friday morning? Or would/could the gynae lot do every Friday am instead of alternating?*
>
> *Any space on Wednesday mornings so I can have a list to take my glaucoma patients back to theatre on??*

111. Contrary to the implication in paragraph 88 of the former Solicitor General's Report (that Dr. Alwitry had somehow gone behind Mr. Downes' back in contacting Ms. Gindill), Dr. Alwitry was making sensible enquiries to see if there were alternative theatre times available. Ms. Gindill (who, by this time, had been copied in on Mr. Downes' e-mail of 24 September) responded at 14.20 p.m. on 24 September 2012, saying that she thought Dr. Alwitry had been sent an old version of the proposed changes. She enclosed what she believed to be the final version. This was different to the timetable that had been sent by Mr. Downes and showed Dr. Alwitry undertaking his eye list on a Thursday afternoon rather than alternating between Thursday afternoons and Friday mornings.

112. Dr. Alwitry was pleased to receive Ms. Gindill's e-mail but, quite properly, wanted to check that Mr. Downes had agreed to what appeared to be changes from the timetable that he had previously sent to Dr. Alwitry. On 25 September 2012, Dr. Alwitry e-mailed Ms. Gindill saying:

> *Theatre times look great to me.*
>
> *Means that I would have alternate Monday afternoons to put my big glaucoma cases on so I have the next day to take them back to theatre if required. But has RND [Mr. Downes] agreed to sharing the alt Mondays and Thursdays with me? He sent me a provisional timetable with main theatre still on it for Friday mornings alternating with DSU on Thursday afternoons.*
>
> *Hence the confusion.*
>
> *I'm really happy with the timetable you sent me – that'll work out perfectly in the long run and it makes no sense me doing my eyes in main theatres. Also operating on a Friday when you have no junior staff on at the weekend to look after them if things don't go to plan introduces significant clinical risk.*
>
> *If he says no to sharing the Thursday/Monday afternoons is there any chance of an alternative Wed morning or Wed afternoon list in DSU??? Just need lists on consecutive days for my MMC trabeculectomy cases.*

113. Ms. Gindill replied later on 25 September 2012. It is clear that she had spoken to Mr. Downes and relayed the fact that, the "final" timetable was actually the one set out in Mr. Downes' e-mail of 24 September 2012 but that it was open to Dr. Alwitry to negotiate changes to it with other consultants:

> *As far as I understand & I had a telephone conversation this morning with RD [Mr. Downes] he will be keeping the Monday afternoon, Tuesday am is for you Wednesday pm & Thursday am is Bartley and you will have to alternative Thursday pm and alternate Friday am in mains – if you and Akin F agree to change this then that is OK with me.*
>
> *I have taken 6 months to get all parties to agree to these timetable changes and as you can imagine I can not go back now and make any other changes so if you want the occasional Wednesday you will have to negotiate those with Bartley.*

Any reasonable reading of that e-mail would lead the reader to the conclusion that Dr. Alwitry was being told that Ms. Gindill (with the approval of Mr. Downes) was effectively stating that the timetable set out in Mr. Downes' e-mail of 24 September was fixed unless Dr. Alwitry could negotiate changes with Mr. F and/or Mr. McNeela. It made it clear that this was something for Dr. Alwitry to negotiate himself, something that Mr. Riley confirmed in his evidence to us was common practice among consultants. As is set out below, Dr. Alwitry took up that invitation.

114. As suggested by Ms. Gindill, Dr. Alwitry tried to approach Mr. F, initially through Ms. Gindill herself. On 29 September 2012, Dr. Alwitry e-mailed Mr. Gindill asking if she had managed to speak to Mr. F about agreeing to Dr. Alwitry operating on Thursday afternoons, with Mr. F taking the Friday morning slot rather than alternating the times. Dr. Alwitry continued;

> *I am not trying to be difficult. The need to get over to see my family is important to me but isn't the main thrust of this move to try and avoid Friday operating.*
>
> *This Friday operating issue has been debated before and was the source of problems in the past. I had understood that the arguments were made and that the lack of junior support at the weekend was an acknowledged reason for avoiding eye lists on a Friday. In fact Richard [Downes] argued vociferously against Friday operating when he first started – my dad thinks he still has scanned copies of those letters from Richard so he's going to try and dig those out for me – should make interesting reading considering that now he suddenly thinks its ok.*
>
> *Anyway, I am unhappy operating on a Friday when we have no junior cover over the weekend. What happens if I get complications and have to bring people back? My glaucoma cataracts I like to bring back to check their eye pressures anyway as they are at risk of pressure spikes. We're a top heavy speciality without junior worker bees to look after patients at weekends. I think it introduces clinical risk. I will not compromise patient safety. If we had a junior who was there anyway and could do a ward round then its fine but as it is I do not want to risk my patients.*
>
> *As always it's always easy for people to put forward problems but solutions are what we need:*

If I do keep the Friday operating slot I will need to secure agreement from all my colleagues that they will be happy seeing my post-ops on Saturday mornings for me. It would not be many but they would need to have pressure checks or more intervention if they are complicated cases. I would want assurance (written preferably) that the on-call person would be OK with that so that I can ensure my patients do not suffer clinical risk/suboptimal care by being operated upon just before the weekend.

OR
I get an extra PA for Saturday morning to do a post-op ward round? I'm not keen but if that is what we have to do I have no choice. I would want a nurse with me so we can open clinic up.

OR
I do extra-ocular surgery on these Friday mornings – lids etc. Seems a waste of main theatre time to me to be frank.

If you can't secure the Thursday afternoons for me I'll have to make my arguments to Richard and Bartley and if I don't get any joy I'll have to take it up the ladder.

115. There are a number of points about that e-mail which are important to note:

115.1. As we have already held, Dr. Alwitry's concerns about operating on a Friday were both genuinely and consistently held and, on the evidence before us, reasonable ones to hold;

115.2. Dr. Alwitry was not refusing to undertake operations on a Friday morning. He was saying it should not be done unless there was appropriate cover over the weekend. He then set out three ways in which such cover could be provided;

115.3. Mr. Riley suggested in his evidence that his clinical colleagues took this e-mail as evidence of Dr. Alwitry trying to secure extra payment for providing cover on a Saturday morning when he should be providing such cover for free. If that is true, there were no reasonable grounds for that belief. Dr. Alwitry was proposing positive solutions to a problem which he reasonably believed posed a risk to patients in an area when he was one of the leading specialists. It is correct that one of those alternatives was that he should be paid in effect overtime for conducting a clinic a Saturday morning. That seems to us to be entirely reasonable. Dr. Alwitry was not contracted to provide his services for free even if (as we accept) many consultants work longer hours than strictly required by their contracts of employment. The irony of this particular suggestion by Mr. Riley and the senior clinicians who were involved in this story (if Mr. Riley's evidence is correct) is that none of them appear to have appreciated that the offer by Dr. Alwitry to work on a Saturday morning (albeit for an additional PA) is directly contrary to any suggestion that he was trying to manipulate the lists to enable him to fly home every Thursday evening. He was actually offering to remain in Jersey every other Saturday, thus curtailing his time with his family

115.4. None of the options proposed by Dr. Alwitry appear to have been considered by the Hospital at any stage. We were not told why this was the case.

116. The former Solicitor General recorded in paragraph 91 of his Report that the e-mail was provided to management, and that Mr. Downes told him that he "*was very concerned when he saw this e-mail*" and that it was the origin of the comment by one of the Medical Directors that "*I think we should sack this bloke before he even gets here*". It is correct that Ms. Gindill discussed the e-mails with Dr. Alwitry and provided a copy of the e-mail to Ms. Body on 1 October 2012. Ms. Body copied it to Mr. McLaughlin and Mr. Siodlak on 2 October 2012. In our judgement, it is unlikely that this e-mail caused Mr. Downes any concern. He was not copied in on the e-mail. Indeed, Mr. Downes was on holiday at this point and is therefore unlikely to have seen the e-mail at the time. As is set out below, the substance of the e-mail was repeated in an e-mail from Dr. Alwitry directly to Mr. Downes dated 7 October 2012 which preceded his return to work. That e-mail reflected an agreement that had been reached with Mr. McNeela which superseded this e-mail. The comment by Mr. Siodlak was not made until 15 October 2012. We return to this below.

117. In any event, it is not clear to us why anyone would have been concerned about Dr. Alwitry trying to explore with a fellow consultant (Mr. F) about the possibility of switching lists. Mr. F was scheduled to operate on alternate Friday mornings. He was, presumably, happy with that arrangement and had suitable cover for his patients at the weekend. There is no suggestion that what Dr. Alwitry was suggesting would cause patient risk to Mr. F's patients. We do not understand the logic or basis for the former Solicitor General's implicit suggestion in paragraph 97 of his Report that there was such a risk. Even if there was a risk, Dr. Alwitry was only doing what Ms. Gindill had encouraged him to do and what Mr. Riley told us was common practice between consultants – i.e. to see if there was a possibility of negotiating a swap. It was always open to Mr. F to say "no".

118. On 1 October 2012, Ms. Carol Hockenhull returned from her annual leave to see Mr. Downes' e-mail of 24 September 2012. At that stage, Mr. Downes was on annual leave. Ms. Hockenhull concluded that the timetable in Mr. Downes' e-mail was unworkable and should not have been copied to everyone so she recalled it. Her e-mail was timed at 9.05 a.m.:

> *I have been on AL for a week and unfortunately Mr. Downes is on AL this week. I cannot see these alternate sessions working well and think they will result in clerical chaos – they also make staffing the clinics a nightmare. I am not sure why instead of alternate sessions, we could not do all day clinic Wednesday take away the Monday morning and alternate Fridays clinic then if you are not operating you will have the long weekend??*
>
> *I am not sure this entire e-mail should have been sent to everyone so am deleting the message below.*

119. Dr. Alwitry responded at 12.04 p.m. to Ms. Hockenhull only. He agreed that the e-mail should not have been circulated to all of the copy recipients and asked that his e-mail to her should be kept between them for the moment. He continued:

> *Bartley said to avoid Fri am clinic as you were busy enough as it is and yet I was put on alt clinic – alt operating that day.*
>
> *The operating on Fri am I'm not happy about – unless I have the agreement of the on-call people to come and see some of my patients post-op then I'm not happy with doing intraocular surgery on a Friday for fear they will be left over the weekend without any care. Richard [Downes] actually made the same arguments against a Fri eye list when he started. My dads going to dig out his letters from back then so should make interesting reading. I'm hoping we can sort out so I do DSU every Thurs PM but we'll see.*
>
> *Don't really want to ditch Mondays completely as that is supposed to be my on-call day – Richard wants Tues, Bartley wants Weds, leaves Thurs or Monday – if I do Thurs I can't fly off until late Friday (silly flight times) to see the kids. If I do Monday on-call it will mean that I can fly off Thursday evening if I'm not operating on the Friday. I have the two little ones all day Friday so it would work out well.*
>
> *The timetable is too heavy anyway (with too many clinical sessions) so I'll definitely be ditching the Friday alt morning clinic.*
>
> *Are you OK with me being in clinic all day Monday?... Do you think as a favour we could temporarily start the Monday morning clinic at 10am for me. Still same number of patients of course – I'd work through lunch or even right through if required. This would be temporary from my Feb 11th full time start to July when kids will be over and I won't be having to fly back and forth. It will mean I can fly back over to Jersey Monday first thing. Otherwise I have to fly Sunday late morning leaving Claudia with 4 kids for the rest of the day. Once the family are over (at end of school year) I'll move to the proper 9am start.*

120. As is apparent from that e-mail, Dr. Alwitry was also trying to arrange his working timetable to fit in with his family life. That is, however, different to saying that he was exaggerating difficulties in order to manipulate the timetable.

121. At 22.16 on 2 October 2012, Dr. Alwitry e-mailed Ms. Hockenhull again following an agreement that he had apparently reached with Mr. McNeela:

> *Spoke to Bartley this evening. He's (really) kindly agreed to do Mondays on call leaving the Wednesdays on-call for me. I'd thus like to take you up on your offer of clinic all day on Wednesday. I'm in clinic Thursday morning too if that's ok. I do not want to do the alt Friday mornings which works for you too.*
>
> *…*
>
> *I'm hoping the timetable can look like this;*

Mon am SPA
Mon pm SPA
Tues am DCU theatre
Tues pm Admin
Wed am OPD
Wed pm OPD
Thurs am OPD
Thurs pm DCU theatre
Fri am Session in lieu of call
Fri pm Session in lieu of call.

I'm liaising with Judith about theatres.

I know you're meeting Bartley in the afternoon to discuss the timetable so please thank him again for helping me out and doing the Mondays on call.

122. Ms. Hockenhull thought the revised timetable was much better than the one proposed by Mr. Downes. In an e-mail to Dr. Alwitry on the morning of 3 October 2012, she said:

> *Hi – yes Amar think that is more sensible – have to sort out the extra clinic a month you each have to do to make up for the on call reduced rota amongst these guys…*

123. It appears Dr. Alwitry had a further discussion with Mr. McNeela, the content of which he reported back to Ms. Hockenhull on 4 October 2012:

> *Great – had a nice chat to Bartley and answered his concerns and queries.*
>
> *So I gather I'm doing clinic Monday PM, Wed AM and Thurs AM.*
>
> *That will work out fine. Means I can see my Tuesday post ops on Wed morning. I'm hoping to do glaucoma surgeries on my Tuesday AM list when Bartley is on leave so I can steal his Wed PM theatre list in case I need to take them back to theatre.*

124. On 5 October 2012, Ms. Jackie Tardivel (the Acting Lead Nurse for Ambulatory Care) confirmed her view that "*this is a much better plan all round as it provides for a more consistent approach to patient care and should avoid the need for cancelling clinics at the last minute on the Monday in the event of delayed or cancelled flights*".

125. On Sunday 7 October 2012, Dr. Alwitry sent a lengthy e-mail to Mr. Downes. This summarised the results of the discussions between Dr. Alwitry, Mr. McNeela and Ms. Hockenhull, as well as incorporating a slightly revised version of the possible solutions for cover on a Saturday if, contrary to the agreements that had been reached with Mr. McNeela and Ms. Hockenhull, it was necessary for him to operate:

Hi Richard/Bartley,

Richard – welcome back, hope you had a good break. While you've been away Bartley, Carol and I have been furiously thrashing out the clinic timetable. Hopefully its sorted and I'll be doing clinics on Monday PM, Wed AM and Thurs AM. This works out well for everyone so hopefully its ok by you. If you foresee any problems with it please let me know.

I'm a bit confused about number of sessions proposed for my timetable. The job description says that we do 2 sessions in lieu of on-call, 2.5 SPA, and 5.5 DCC sessions one of which is an admin session. Thus 7.5 DCC and 2.5 SPA making a ten-session contract. That should mean that we do 4.5 clinical sessions per week – 2 theatre and 2.5 clinics. I've actually confirmed this in writing with medical staffing but is this right from both your perspectives?

As previous discussed I do need a list on the day following any list I do an MMC Trab on. It is actually a clinical necessity. I have published on the common need and necessity for early interventions in Modern MMC Trabeculectomy [King AJ, Rotchford AP, Alwitry A, Moodie J. Frequency of bleb manipulations following trabeculectomy surgery. B J Ophthalmology 2007; 91(7): 873-7 AND Alwitry A, Rotchford A, Patel V, Abedin A, Moodle J, King AJ. Early bleb leak after trabeculectomy and prognosis for bleb failure. Eye 2009 23(4): 858-63). All fascinating reading! What I though was that I would try and book the trabs on my Tuesday list on weeks when Bartley is away on leave. I could then borrow his Wednesday list and do some cases thus having my next day list in case I need to take someone back to theatre. That way I don't disturb anyone. Hopefully it'll work and not inconvenience/affect either of you while utilizing the empty theatre when Bartleys away.

Friday operating – this is the exact same argument you had when you first started Richard and really the same points you made back then still stand. I thought that the lack of junior support at the weekend was an acknowledged reason for avoiding eye lists on a Friday. What happens if you get complications and have to bring people back? My glaucoma cataracts I like to bring back to check their IOP as they can get big IOP spikes. We're a top heavy speciality without junior worker bees to look after patients at weekends. I think it introduces clinical risk and suboptimal care for patients. If we had a junior who was there anyway and could see post-op patients then its fine but as it is I do not want to risk my patients floundering unattended over the weekend.

So I've been trying to work out a solution:

Richard, you said you were going to try and sort out the Thursday session weekly rather than alternating but you didn't because of my need for lists on consecutive days. The alternate weeks arrangement actually means that the lists are a week apart so it doesn't work anyway. Is there any way you can wave your magic CD wand and sort

out the weekly DSU Thursday list for us? Version 5 of the theatre timetable had eyes scheduled for every Thursday afternoon in DSU so it looks like it was almost done and dusted. I have faith in your powers of persuasion. If you could work your wonders I'd appreciate it. Day Case Gynae are apparently fine for waits/capacity so it shouldn't in theory have any significant service implications.

OR

Would you guys (and Asim of course) be OK with seeing my post-ops on Saturday mornings for me when you're on-call? It would not be many but they would need to have IOP checks or more intervention if they are complicated cases. I will try and be on-call for the weekend on the days when I'm doing the Friday lists so I can sort my own patients out but that would only cover one of them and not the other one.

OR

Give me an extra PA (or half PA probably more realistic) for Saturday morning to do a post-op ward round? I'm not keen but if that is what we have to do I have no choice. I would want a nurse with me though so we can open clinic up/get them visioned and do it properly.

OR

I ditch the alternate Friday morning operating at least in the short term until we can sort something later down the line. I am not entirely happy with this as it will mean I only get 1½ lists per week and I would try and get another list somewhere sometime soon. It would also be detrimental to the waiting lists which was one of the reasons for the third consultant appointment but equally do we want to/need to get the waiting lists that short by having two extra full lists per week?

OR

I only do extra-ocular surgery on those Friday mornings – lids etc. Seems a waste of main theatre time to me to be frank but if that's the only solution then I guess I have no choice. Don't know if we have a back log of lids etc.

I am over on Monday PM and Tuesday AM 22nd/23rd October (bringing the car over ready for Dec) so am happy to meet up and discuss this face to face with you both.

Any thoughts/assistance either of you could offer would be most welcome.

Now the timetable is almost sorted and I know what I'll be doing I'm even more excited about getting cracking and joining you both.

Look forward to hearing from you.

126. As will be apparent from that e-mail, Dr. Alwitry made it clear that his objections to operating on a Friday were based on his perception of the risk to patients, giving references to publications in which he had made his views clear. There is no evidence that any of the clinical staff at the Hospital considered these publications. Mr. Riley's evidence was to the effect that the senior clinicians at the Hospital simply told him the concerns were without foundation (an approach which is consistent with the documentary evidence before us) and, as noted above, came to the conclusion that Dr. Alwitry was both trying to manipulate the lists to suit his domestic circumstances and be paid more for working on the weekends when they thought that he should work on weekends for free.

127. That approach is and was unacceptable:

127.1. As is clear from the fact that Dr. Alwitry had referred to relevant publications, and from the references from the independent experts in the field which were subsequently obtained by Dr. Alwitry, the concerns raised by Dr. Alwitry were genuine and ones which it was reasonable for a consultant to hold.

127.2. It is not for us to judge whether Dr. Alwitry's concerns were sufficiently well-founded to require a change to the timetable. What is relevant for our purposes is that no one appears to have considered them properly or even discussed them with Dr. Alwitry himself. If any consideration was given to the concerns, the details of that consideration and the reasons for rejecting them and/or the details of any risk assessment which resulted in the conclusion that the Friday ophthalmic surgery list would nevertheless have to go ahead (e.g. because there was other, more risky surgery that would have to be undertaken on Mondays to Thursdays or because adequate cover was available at weekends) were not documented. There is and was literally no formal documentary evidence of such a consideration produced to us. That is a flawed procedure in the context of the decision to breach Dr. Alwitry's Contract and, we would have thought, in terms of assessing patient safety.

127.3. Further, as we have set out above, the conclusion that Dr. Alwitry was simply "trying it on" to ensure that he could fly home to the UK on a Thursday evening is not consistent with the evidence and is directly contradicted by the list of solutions proposed by Dr. Alwitry as to what should happen if, despite his representations, he had to operate on a Friday. As such, the apparently adverse impression formed by the senior managerial and clinical staff of Dr. Alwitry on the basis of this e-mail, as explained by Mr. Riley in his evidence before us, is not one that could reasonably or properly be formed. Had there been a proper procedure followed in the present case, including an independent review of the decision to breach Dr. Alwitry's Contract, that should have been identified.

128. As will also be apparent from the e-mail, Dr. Alwitry had done no more than he had, in effect, been told to do by Ms. Gindill (apparently with the agreement of Mr. Downes) in her e-mail of 25 September 2012: he had contacted other professionals at the Hospital to negotiate revisions to the timetable that had been proposed.

129. Finally, Dr. Alwitry also sought clarification of why he was being asked to work for more than the 10 PAs set out in his Contract. That appears to us to be a reasonable request. Mr. Riley's evidence that Dr. Alwitry "knew" that consultants were expected to work additional PAs for free (because they would be compensated by their income from private practice) is not acceptable as a matter of procedure. A public authority should clearly specify the terms on which its employees are to be engaged. If the position is and was that Consultants had agreed to cap their paid work at 10 PAs but would work for 11.5 PAs or more because of the anticipated income from private work, this should have been spelt out in the Job Description and in the Contract.

130. On his return from leave on 9 October 2012, Mr. Downes replied to Dr. Alwitry's e-mail. The former Solicitor General described Mr. Downes as being "*unimpressed*" by the correspondence that had been on-going during his absence:

> *An awful lot of correspondence, in my absence, has arisen consequent upon this e-mail.*
>
> *I feel it is important that you fully understand the position concerning your appointment and timetable so would make the following points for clarification:*
>
> *…*
> *The timetable below will be implemented by you from 11/2/12 – which is the time that you agreed to commence your full time commitments.*
>
> *As I have made clear we cannot provide you with what is not available; further you must understand that your requirements have to fit in with everyone else. I have tried my utmost using what influence I have to get the best possible arrangements for yourself but would remind you that "last man in" must accept that compromise at this juncture is prudent.*
>
> *I suggest you follow my advice (below) with regard to your theatre sessions on Thurs/Fri.*
>
> *Just to clarify my position with regard to theatre allocation on taking up the post in Jersey about which you do not appear to have the full facts. Your father advised the appointments committee that I would only require a single operating session and suggested that a weekly Friday afternoon telephone session would be adequate. In spite of my protests at the time, sadly not supported by my future colleague, I started with this single session. It took me many months in post before I was able to make any inroads in addressing this wholly unsatisfactory arrangement.*
>
> *If you have any further queries/questions/concerns in relation to the above please address them to either myself, Andrew or Angela rather than involving a myriad of different individuals which simply serves to confuse.*

> *I would finally advise/warn that making too many demands at this stage of your appointment is unlikely to bode well for your future relationships within the organisation.*
>
> *I hope to see you when you are next over later in the month.*

The e-mail was copied to all of the senior clinical and managerial staff, namely Mr. Mclaughlin, Ms. Body, Mr. Luksza, Mr. Siodlak, Mr. F, Ms. Gindill and Mr. McNeela.

131. Mr. Riley and Advocate Ingram both sought to portray this e-mail as an offer by Mr. Downes to discuss the timetable further with Dr. Alwitry, an offer which it was said Dr. Alwitry did not accept. The former Solicitor General reached a similar conclusion in paragraph 115 of his Report:

> *The Clinical Director's e-mail of 9th October was intended to address more fundamental management issues but expressly left open the prospect of further discussion with management (and not staff) about the timetable. Dr. Alwitry declined that invitation.*

We have to say that none of us read the e-mail in that way. Indeed, with respect to the former Former Solicitor General, we do not believe it is either capable reasonably of bearing that meaning or that it was intended to convey an invitation to discuss the timetable further with management. On the contrary, the plain intent of the e-mail was to tell Dr. Alwitry to 'toe the line'. It made it clear that he would be working to the timetable set out in Mr. Downes' e-mail of 24 September 2012 irrespective of any concerns that Dr. Alwitry may have and was giving an express warning that any further refusal simply to do what he was told would not be welcomed by the senior staff at the Hospital. It did not even respond to the legitimate enquiry about the discrepancy between Dr. Alwitry's hours under the Contract (10 PA) and the hours he was required to work under the timetable (11.5 PA). In simple terms, Dr. Alwitry was being told to work 11.5 PA in accordance with the timetable set out in Mr. Downes' e-mail of 24 September 2012. That is confirmed by the reaction from Ms. Garbutt ("*Wow. Good letter from Richard*") who clearly interpreted it as, in effect, a stern reprimand to bring Dr. Alwitry into line.

132. That was the last formal contact that Dr. Alwitry had with any of the senior staff at the Hospital. As the former Solicitor General records in paragraph 125 of his Report, there was a telephone conversation between Mr. Downes and Dr. Alwitry at 11.39 on the morning of 10 October 2012. It lasted some 8 minutes. Dr. Alwitry says that he telephoned to accept the Job Plan (i.e. the timetable), apologised for any difficulties he had caused and then discussed private practice with Mr. Downes. Mr. Downes apparently had no recollection of the conversation.

133. The former Solicitor General made no findings of fact about the content of the call. It must, however, have been apparent from the conversation that Dr. Alwitry was intending to take up his post on 1 December, otherwise there would have been no point in the Hospital considering "withdrawing" the job offer. Further, given that the fact that Dr. Alwitry ceased to have any e-mail contact with any personnel at the Hospital after receiving Mr. Downes' e-mail

of 9 October 2012, it is a reasonable inference that it was apparent that he was accepting that he would have to comply with Mr. Downes' instruction. That is also consistent with the fact that Dr. Alwitry's comments to the BMA at the time focussed on being asked to work for 11.5 PAs rather than the 10 PAs in his Contract – i.e. he was accepting that he would have to work according to the timetable set out in Mr. Downes' e-mail but was concerned at being asked to work more hours than required by his Contract.

J. The involvement of the BMA

134. Dr. Alwitry had a right to consult with the BMA. It was his professional representative organisation – his union. It is and was reasonable for him to consult the BMA on matters relating to his Job Plan and the additional hours that he was expected to work beyond those set out in his Contract. Indeed, the BMA noted in its letter to Dr. Alwitry of 28 January 2013:

> *It is entirely appropriate and generally accepted (and indeed encouraged by management (including on Jersey where the BMA is formally recognised) that BMA members should seek advice from the BMA) and we have been instrumental in resolving many issues for our members by actively exploiting the generally good working relationships the BMA has had with Management at Jersey Hospital.*
>
> *…it is an individual's statutory right to be a member of a recognised trade union and to seek its advice and assistance. This is something that is recognised, accepted and encouraged by many employers, including Jersey HSSD.*

135. Dr. Alwitry made contact with the BMA at 9.23 on 10 October 2012 (i.e. before the telephone conversation with Mr. Downes referred to at paragraph 127). The case handler described the 'problem category' as 'Contract Arrangements'. The file note reads:

> *The member has accepted a post in Jersey and is due to start part-time in December and move to full-time work in February. He has received his timetable for February and it is for 11.5 PAs. His full-time contract is for 10.*
>
> *He contacted medical staffing who confirmed that the timetable was correct. He then contacted the clinical director to ask about either adjusting the timetable or getting additional APAs. The clinical director replied via e-mail that was copied to the medical director and the senior sister.*
>
> *In the e-mail the cd told the member to stop making demands and that if he continued to make demands so early in his career, he would jeopardize his future. According to the member, the e-mail basically said to accept the fact he would be working 11.5 PAs while only getting paid for 10 or to leave.*

136. The case handler asked for copies of the correspondence which were provided. Dr. Alwitry's e-mail (timed at 11.46 am on 10 October 2012 which must have been after his conversation with Mr. Downes) confirming that he would send the correspondence said that he was "*feeling helpless and quite distraught*". The case notes record further discussions on 10 October 2012 which included the fact that Dr. Alwitry did not want to seek a Job Plan appeal or mediation. On the following day, 11 October 2012, the notes record:

> *Not sure if Dr. A is seeking support at this time but seeking to have issues recorded.*

137. On 11 October 2012, there was a conversation between Dr. Alwitry and Ms. Chandler of the BMA. The latter had reviewed the correspondence that had been sent to her. She noted that there was a suggestion in the e-mails that Dr. Alwitry was seeking to get a Job Plan that suited his personal circumstances. Dr. Alwitry denied this and reiterated that his concern was for patient safety. Dr. Alwitry recorded the fact that he was upset at being seen as a trouble maker when, as far as he was concerned, he was simply following normal practice (at least in the UK) for job planning. He speculated that Mr. Downes might be "*old school*" and not familiar with current practices. There was a discussion about how to progress matters. Ms. Chandler said she did not believe that the BMA should intervene. There were further discussions about the possibility of mediation and Dr. Alwitry is recorded as, in effect, saying that he did not want to cause further problems since Mr. Downes would retire in 4 to 5 years whereas Dr. Alwitry intended to spend the next 25 years on the Island.

138. The former Solicitor General's conclusion in paragraph 135 of his Report was that the file note of the conversation on 11 October 2012 showed that the BMA did not agree with Dr. Alwitry. With respect to the former Solicitor General, we cannot see how he reached that conclusion. The file notes show that Dr. Alwitry was not making a formal complaint. Taken at face value, he was upset by what he perceived to be another peremptory demand from senior staff at the Hospital. He did not, however, want to cause further problems before he started. The discussions about the best strategy going forward reflected that fact: formal intervention by the BMA might well exacerbate the problem. As such, it was agreed to take matters softly. This was reflected in Dr. Alwitry's e-mail to Ms. Chandler of 18 October 2012:

> *I definitely want to get closure on this 11.5 PA issue for the sake of my sanity. If I'm working 11.5PAs for the next 25 years with no reason given and with my other colleagues working 1 session less per week than me it will drive me crazy. I don't want any resentment and I want to avoid conflict and disharmony at all costs.*
>
> *My only thought is whether I wait until I am physically there at the start of December. When I'm actually on island I can see people and chat to them face to face. Hopefully they will see that I'm not a miserable sod whos making demands but just a decent chap wanting to do the best for my patients.*

139. The BMA's advice (reflected in their e-mails to Dr. Alwitry of 18 and 23 October) was that they should speak to Mr. Brian Jones as the Medical Staffing Officer at the Hospital because:

> *He is understanding and has a pragmatic approach to such issues, I am sure he will be able to help us seek to resolve any misunderstandings…*

The suggestion being that the BMA should approach Mr. Jones informally at first and then introduce him to Dr. Alwitry. Unfortunately the informal approach to Mr. Jones (which was made on 12 November 2012) was to have unintended consequences. This is discussed further below.

K. The Senior Staff at the Hospital decide to sack Dr. Alwitry

140. While Dr. Alwitry was trying to find ways of resolving issues without further confrontation in his discussions with the BMA, things were moving in a very different direction at the Hospital.

141. At 12.17 on 13 October 2012, one of the Medical Directors, Mr. Siodlak commented by e-mail on Mr. Downes' e-mail of 9 October 2012. The comment was terse:

> *You can tell him that I (the medical director) do alternate Friday pm clinics, and if he doesn't like resign now!*

This e-mail does not suggest a particularly strong or reasoned understanding of the issues being raised by Dr. Alwitry. Mr. Downes noted that he had "*not passed on Martyn's comments*" presumably to Dr. Alwitry. This was understandable.

142. A little later, at 12.46, Mr. Siodlak entered the fray again. It appears that he had reviewed the e-mail exchange between Dr. Alwitry and Ms. Gindill on 29 September 2012. Mr. Siodlak's comment was equally terse and equally lacking in an appreciation of the full picture:

> *I think we should sack this bloke now before he even gets here*

143. Mr. Siodlak's e-mail did at least show that he appreciated that what he was advocating was a deliberate breach of Dr. Alwitry's Contract by dismissing him. It was not the "withdrawal of a job offer" that the SEB has subsequently sought to suggest.

144. Mr. Siodlak then sent a further e-mail on 23 October 2012. This time he said;

> *Angela tells me that the newly appointed Eye consultant is getting even more demanding. This appointment will be a disaster and we should withdraw the offer of a job before he gets here. Mark my words, he will make XX seem like a walk in the park!*

It is not clear what new demands either Ms. Body or Mr. Siodlak thought had been made by Dr. Alwitry. As noted above, other than the telephone conversation on 10 October 2012 with Mr. Downes, there had been no contact

with Dr. Alwitry since Mr. Downes' e-mail of 9 October 2012. It is likely therefore that either Mr. Siodlak had misunderstood what had been said to him by Ms. Body or believed that discussions that had taken place in August to 9 October had in fact occurred since his previous e-mail. Either way, there does not appear to be any foundation for the suggestion in his e-mail that Dr. Alwitry was now making more demands. His comparison of Dr. Alwitry to XX (a consultant who was suspended following the death of a patient) was emotive and wholly inappropriate.

145. We did not have the benefit of evidence from Mr. Siodlak. His e-mail exchanges strongly suggest that he had made up his mind that Dr. Alwitry had to be removed on the basis of incomplete evidence and that he was intransigent. Whether or not Mr. Siodlak is or was in fact capable of bringing an open mind to bear in the subsequent debate about Dr. Alwitry's future, it is not possible to conclude that a process which included someone who had expressed himself in quite such trenchant terms could be seen to be fair. In other words, Mr. Siodlak's involvement in the decision to sack Dr. Alwitry was on its own a breach of one of the fundamental principles of natural justice.

146. Mr. Siodlak's e-mail on 23 October 2012 appears to have been the catalyst for what then followed. Two hours after Mr. Siodlak sent his e-mail to Mr. Riley, Mr. McLaughlin sent an e-mail to Mr. Riley:

> *I think it is fair to say that we are all becoming increasingly concerned at the reports we are getting about our latest appointment… and he hasn't even started yet. My experience has been that he will not accept anything he does not like without an argument and when he doesn't get an answer he wants he tries someone else for a different result and so on. Whenever we do call his bluff he appears to back down but then starts the debate all over again. I suspect it will not be long before either you, Julie or the Minister hear from him and I feel it is most important that we all hold the same line so I propose any negotiations with him should be routed through me (or you if you would rather take this one on!)*

147. Mr. Riley replied on 24 October 2012 asking "*what his new demands are and how they differ from the offer and contract please*". His e-mail was copied to Mr. Brian Jones who would later be contacted by the BMA. The answer was given by Mr. Downes later on 24 October 2012:

> *General concerns that the timetable does not suit him and his needs. Not happy/prepared to operate on a Friday. Feels PA's are in excess of his contract (has apparent confirmation from HR that this is the case). These are observations based on his discussions with other members of staff and without Opthalmology. He was visiting the Island on 22 & 23 Oct. but declined to discuss these concerns with myself, Andrew or Angela even though this was suggested when I last e-mailed him with the definitive timetable.*
>
> *He was advised at interview that the timetable was under review and that the job contract included 6 P.A.'s of DCC (from memory since I do not have the contract to hand).*

> *He made no mention of his inability to commence the post in Nov. So interim arrangements have been made until Feb 11 when his full time timetable will be operative.*

148. As is immediately apparent, none of the matters mentioned were "new demands" made by Dr. Alwitry, nor was it a fair summary of the matters raised by Dr. Alwitry in his e-mail correspondence. In summary:

148.1. Dr. Alwitry's primary concern was that operating on a Friday morning gave rise to a risk to patients. It is correct that he was also anxious to spend time with his family in the UK but, as we have set out above, he had made it clear that, if he had to operate on a Friday, appropriate cover would have to be found for the patients to be reviewed on the Saturday including (as an option) by him if necessary.

148.2. The PAs in the timetable were in excess of his Contract. Mr. Downes had not seen fit to respond to Dr. Alwitry's request for clarification. Mr. Riley's evidence that Dr. Alwitry "knew" that consultants had to work extra hours for free is not supported by the evidence and not consistent with Mr. Downes' explanation in this e-mail.

148.3. Dr. Alwitry had not "declined" to attend a meeting to discuss his concerns. No reasonable person reading Mr. Downes' e-mail of 9 October 2012 would have understood it to be an invitation to discuss changes to the timetable or concerns about patient safety on those dates.

148.4. The suggestion that Dr. Alwitry was somehow at fault in failing to mention at interview that he could not start in November 2012 is and was, for the reasons that we have explained at length, misleading and unfair. The fault lay squarely with the Hospital, not with Dr. Alwitry who had always made it plain that he intended to start in February 2013.

149. According to paragraph 145 of the former Solicitor General's Report, Mr. Riley sought legal advice from the Law Officers' department on 23 October 2012. It is interesting to note that this does not appear to have been about whether or not they could lawfully terminate the Contract. According to the former Solicitor General the advice sought was:

> *... as to the consequences of terminating an employment contract in order to understand what damages might be in principle payable if the contract was terminated at this stage.*

In other words, in principle the senior staff wanted to terminate the Contract and appreciated that this would be a breach of contract giving rise to a claim for damages. They sought advice as to the likely level of those damages.

150. The 'generic' legal advice was included in the bundle. The Law Officers' Department correctly advised on 30 October 2012 that a contract of employment comes into force as soon as there has been an offer of employment and unconditional acceptance of that offer (irrespective of whether the contract had been signed) and that "withdrawal" of an unconditional job offer would

constitute a breach of contract which would entitle the consultant to claim damages. The Law Officers' Department cautioned that "*care should be taken with regard to the reason for subsequently wishing to withdraw*" and confirmed that it would not make any difference if the employee was on a probationary period. It was also expressly confirmed that:

> *If an employer dismisses an employee on probation for conduct reasons without following a contractually binding disciplinary procedure, the employer is at risk of a breach of contract claim for failing to follow its own procedure.*

An e-mail from the Law Officers' Department to Mr. Riley confirmed that Dr. Alwitry's case had been discussed.

151. On the same day, 30 October 2012, Mr. Riley circulated a summary of the legal advice that he had received:

> *Advice from LO is that to withdraw the job offer now creates a risk of litigation in the Royal Court – however the remedy would only be 3 months pay – this would be a cost pressure for the Ophthalmology Budget.*
>
> *There are of course other "risks"*
>
> *1. Strong chance that he (and family) will play this into the JEP.*
> *2. Ditto with politicians – probably direct to The Minister if not higher.*
>
> *Do we have an alternative candidate?*
> *If not do we risk locum costs if we have protracted recruitment?*
> *Do we have the appetite for this difficult decision????*

152. As confirmed by Mr. Riley, no consideration was given to raising the concerns with Dr. Alwitry or as to whether or not he should be allowed to have any decision independently reviewed. It appeared to be Mr. Riley's understanding that, until Dr. Alwitry physically started work at the Hospital, the full terms of the Contract (including the disciplinary process and the rights of appeal) would not apply with the result that the unilateral termination of Dr. Alwitry's Contract could be achieved by "withdrawing" the offer of a job. This was legally misconceived and was not an appropriate or fair procedure for a public authority to adopt.

153. The e-mail from Mr. Riley was copied to, amongst others, Mr. Luksza. Mr. Riley said he was included as a 'sense test'. Given that, apart from Mr. Brian Jones, the other recipients (and decision makers) were Mr. Siodlak, Mr. Downes, Mr. McLaughlin and Ms. Body, all of whom had expressed the view that the appointment of Dr. Alwitry was a mistake and had been instrumental in involving Mr. Riley to determine the consequences of the termination of Dr. Alwitry's employment, the inclusion of Mr. Luksza is and was insufficient to satisfy the requirements of natural justice (i.e. to ensure that the decision was both fair and seen to be fair).

154. Mr. Riley e-mailed the legal advisers at the Law Officers' Department concerned on 30 October 2012 thanking them for the advice. His e-mail is instructive because it reveals the internal thinking to the effect that the Hospital was probably prepared deliberately to breach the Contract if the only consequence was a damages payment equivalent to three months' salary and why the termination letter was formulated in the way that it subsequently was:

> *Of particular value is the quantum of risk – if it is ONLY the notice period that will be seen as a worthwhile risk I suspect.*
>
> *The other point of note is the word "unconditional" attached to the phrase about acceptance – I might be able to craft something about him placing unreasonable conditions…*

In other words, with the assistance of the Law Officers' Department, Mr. Riley was seeking to find ways of suggesting that the Contract had not actually been made unconditional and thereby to reduce the potential litigation risk even though the Contract clearly was unconditional. Unattractive though this may be, it reflects a commercial approach in which Mr. Riley was seeking to protect the Hospital's position as far as possible and, in our judgement, almost certainly led to the letter to Dr. Alwitry of 22 November 2012 being phrased in the way it was. The latter is discussed further below.

155. Mr. Riley sent a further e-mail on 30 October saying that:

> *Lawyers have just got back to add that any other costs incurred from the job offer could also be claimed in the civil courts – e.g. removal expenses including associated legal expenses – stuff associated with relocation etc…*

156. Mr. McLaughlin's response (also on 30 October) to the e-mails from Mr. Riley was to identify the question "*do we have the appetite for this difficult decision*" as "*the real issue which we really need to discuss as a team*". Mr. Luksza's '*sense check*' appears to have consisted of an e-mail sent at 21.35 on 30 October 2012 saying simply:

> *If the majority feel we should withdraw the offer, I am happy to support.*

157. Mr. Downes' response was somewhat more cautious. On 30 October 2012 he contacted a senior consultant at Derby Hospital (i.e. where Dr. Alwitry was working out his notice) to check that Dr. Alwitry was still planning to come to Jersey. Having (presumably) received confirmation that this was Dr. Alwitry's intention, he e-mailed Mr. McLaughlin on 31 October 2012 enclosing the timetables for Dr. Alwitry's clinics and surgery. He continued:

> *As discussed he needs to confirm all of these arrangements and in particular his acceptance of the 6 clinical sessions, mostly fixed but some flexible to fit in with sessions when theatre is not available to him i.e. once a month on Tues. mornings and certain Fri. mornings that will be taken by visiting surgeons. He must also agreed [sic] to make up his on-call duties (approx. 3 weekends) when in full time post and will be*

> *expected to cover on call the 2013 Xmas week as he previously volunteered to do.*
>
> *If he remains unhappy he should be afforded the opportunity to re-think his position (in this unlikely event allow 5 working days for a response – if non [sic] forthcoming then we make the decision for him). If he remains unsure we would reluctantly (sic!) agree to his resignation even at this late stage with no financial penalty on either side.*
>
> *Kindly also point out to him, if only to make my life bearable, that my actions and involvement are entirely in keeping with my required role as CD, and not in any way personal decisions designed to make life difficult; rather the reverse.*

158. On the same day, Dr. Alwitry contacted the BMA. He said:

> *Just to update you. I have agreed my job plan but I am still no closer to working out why I am doing 11.5 PAs on a 10 PA contract. I can sort out my safety concerns once I'm in post but I would like an answer on the PA issue at some stage. The last thing I want is to turn up and then have to ask about the 11.5 PA thing.*
>
> *I daren't ask Downes about it again as I fear he'll take offence. We're going to be working closely together for the next 4 or 5 years so want to keep him sweet and want a happy working environment.*
>
> *Strangely Mr. Downes telephoned one of my consultant colleagues in Derby last night asking if I was still coming. He assured him that I was looking forward to it. He thinks he's made life as hard as possible for me from the beginning to try and put me off coming over. I think that's a tad harsh and he and I have a good relationship so he would have no motive for that. He's a well acknowledged control freak but that's just his management style and I only have to live with it for a few more years.*
>
> *All I want is an answer – why am I doing 11.5 PAs when HR have told me I shouldn't be.*

159. Unfortunately for Dr. Alwitry, the Hospital did not act on Mr. Downes' suggestions. Mr. Downes went on holiday for two weeks from 31 October. According to paragraph 152 of the former Solicitor General's report, Mr. McLaughlin could not be certain as to why he had not followed Mr. Downes' suggestions but thought that "*he may have had a change of heart about offering any further chances to Dr. Alwitry*", an explanation that the former Solicitor General accepted. Whatever the reason, we have no doubt that fairness and the need for good decision making (taking account of relevant considerations and disregarding any irrelevant ones) required there to be some form of proper consultation and engagement with Dr. Alwitry to clarify the perceived issues with his attitude and to confirm his acceptance of the timetable. We think it is self-evident that a fair and reasonable process required such an approach. If such a procedure is not adopted then it runs the real risk that, as

here, decisions are made on the basis of misconceptions, misunderstandings and without proper justification. The failure of the Hospital senior management to adopt this obvious course is further evidence of the narrow mind set of those who were ultimately responsible for this decision: they were not interested in considering Dr. Alwitry's response on any of the issues raised because they were not prepared to contemplate the possibility that they might be wrong in their own assessments.

160. We also note at this stage that both Mr. Downes' e-mail of 31 October and Dr. Alwitry's e-mail to the BMA of the same date do not suggest any irretrievable breakdown in the relationship between the two men.

161. Things went quiet while Mr. Downes was away on holiday. On 6 November 2012, Dr. Alwitry again contacted Ms. Chandler at the BMA saying that he had not done anything as yet and saying:

> *I start on December 3rd and have an induction day then – over the first two days I am seeing the two medical directors, the Hospital manager, the chief operating officer, and HR – Olly Leeming (the nice chap who's been looking after me so far) and Brian.*
>
> *How do you want me to play it? Do you want me to discuss my issues with them or keep my head down and speak to HR before raising my issues?*

162. At 16.42 on 12 November 2012, Ms. Chandler of the BMA made contact with Mr. Brian Jones by e-mail. She wanted to discuss the issue relating to the number of PAs that Dr. Alwitry was expected to work informally with Mr. Jones. As has been set out above, the intention was to do so quietly in the hope of finding a way of answering Dr. Alwitry's legitimate question without causing any further difficulties or add fuel to the flames of the perception of Dr. Alwitry as a trouble maker. The e-mail read:

> *Can I call you to discuss a delicate issue surrounding Dr. Alwitry? Dr. Alwitry is a newly appointed consultant and is due to start working full time in the new year and move to the island.*
>
> *Dr. Alwitry has run into a few problems with the consultant lead and I would like to appraise you of the situation for the purposes of avoiding any future conflict.*
>
> *I am in my office on Wednesday. Can you let me know a good time when I can call you.*

163. Mr. Jones immediately (at 16.55) sent the e-mail to Mr. Riley and Mr. Shoebridge asking "*Where are we with Mr. Alwitry?*". The response from Mr. Riley was equally immediate (at 16.58) *"I think everyone is agreed that we formally withdraw the job offer*". Mr. Riley suggested in his evidence that this reflected the fact that the decision to withdraw the job offer was made before receiving the e-mail from the BMA. We do not accept this evidence. It is not consistent with the documentary evidence or, indeed, with the terms of Mr. Riley's own e-mail ("*I think…*"). If the decision had been made earlier, then

there was a remarkable lack of formality in the procedures adopted: no one thought to make a note of the discussion or record the decision. That is highly unlikely, particularly given the fact that the decision was formally recorded on 13 November 2012.

164. Further, we note that the Chronology prepared for the SEB meeting on 4 March 2013 records that the first meeting at which the dismissal of Dr. Alwitry was discussed was "*Early Nov 2012 (just after 12th)*". With some regret, we are driven to the conclusion that Mr. Riley's evidence that there was a decision taken to "withdraw" the job offer before receipt of the e-mail to Mr. Jones on 12 November 2012 was incorrect and untrue. As such we reject the Respondent's submission that the former Solicitor General was wrong to conclude that there had been a serious procedural error. The conclusion is consistent with all of the evidence given to the former Solicitor General and Mr. Beal as set out in the transcripts contained within the documents which accompanied the Respondent's closing submissions, including the evidence of Mr. Riley himself. All of the evidence was to the effect that the decision to "withdraw" the job offer was taken at the meeting on 13th November 2012 following receipt of Mr. Jones' e-mail recording the contact from the BMA.

165. The former Solicitor General's conclusion accords with our own:

Excerpt from the former Solicitor General's report:

Procedural Error

170 The BMA e-mail of 12th November 2012 should not have been taken into account on 13th November 2012 by the hospital management. The hospital did not know what the BMA wanted to say or discuss. If there had been a complaint, it might have been justified. The proper course was for the hospital to speak to the BMA, understand the precise details of the issue and then take a view as to whether that additional information should be considered relevant to the decision to terminate the contract. For obvious reasons, the fact that an employee has made a complaint is not a ground for dismissal. Great care should have been taken.

171 No care was taken. The management assumed that Dr. Alwitry had reported the Clinical Manager to the BMA without further consideration. This assumption was a factor in the decision to terminate. This was a serious error.

172 The Medical Staffing Officer did not speak to a BMA Representative until 15th November and only then in a telephone conversation that lasted three minutes. It is extraordinary that the meeting that took place on 13th November was not delayed a day or so to enable a discussion with the BMA to take place first.

173 The hospital informed the States' Employment Board on 19th November that there had been a 'formal complaint' made to the BMA against the Clinical Director which is not a fair reflection of the hospital's somewhat limited understanding of events at that stage.

174 There was a meeting of the States' Employment Board on 18th December 2012 to discuss the decision. The hospital management attended. The hospital provided a chronology of events for the meeting that omits any reference to the BMA 'complaint' and the minute of the meeting itself suggests that the BMA 'complaint' was not discussed.

175 I am also unimpressed by the fact that Dr. Alwitry was not afforded an opportunity to respond to the criticism of him. I accept that he had no legal right to such an opportunity because he had not yet started his employment period. However the hospital is an organisation that wants to act and be seen to act as a good employer that will continue to attract talented doctors. Such an employer should have provided the opportunity to respond regardless of the legal position. The relationship between employer and employee had moved well beyond the job offer stage by November 2012.

176 It is a pity that the hospital management did not recognise the need to move away from correspondence when it became clear that there were serious problems. There should have been a face to face discussion even if it transpired that Dr. Alwitry had no answer to the criticism.

177 Instead a letter dated 22nd November 2012 was sent out by mail terminating an employment contract in circumstances in which the employee was due to move from the United Kingdom to Jersey to start work just a week later. The posting of such a letter and its timing does not reflect well on the hospital.

178 The hospital should be aware that the procedure adopted in this case has the potential to damage its reputing as an employer. In employment law cases, procedure can be as important as the merits of the decision. If the procedure is non-existent, those failings will cause reasonable observers to worry about the merits of the decision, even if ultimately those worries are proved to be unfounded. The inevitable consequences are investigations that cost money and result in delay".

166. The conclusion is confirmed by the fact that:

166.1. Mr. Riley wrote to the Health & Social Services HR Director, Mr. Mark Sinclair on 15 November 2012, explained the conduct which resulted in them being "*content*" that the contract of employment had been undermined included:

> *He has now engaged the BMA to support a formal complaint about the Clinical Director (CD) – even before he has started in post!!! The CD, not altogether unreasonably, has indicated that he would feel obliged to resign as CD if the offer is not withdrawn.*

166.2. On 26 November 2012, Mr. Downes was clearly of the view that the particularly important feature of Dr. Alwitry's conduct which warranted the decision to terminate his contract was his "*decision to report your manager i.e. me, to the BMA*".

166.3. As recorded in Mr. McNeela's letter to Mr. McLaughlin dated 4 December 2012, the Medical Directors and Mr. McLaughlin on 28 November 2012 where Mr. McLaughlin had *"stated that the involvement of the BMA was the final tipping point which had caused you to recommend that the contract be rescinded*".

167. Mr. Jones sent an e-mail to Mr. McLaughlin, Mr. Luksza, Mr. Siodlak, Mr. Downes and Ms. Body (with copies to Mr. Riley and Mr. Shoebridge) at 10.07 on 13 November 2012. He said:

> *Mr. Alwitry has referred to an unspecified matter to the BMA (see below) in relation to Richard Downes. I have not spoken to the BMA yet regarding this but this possibly strengthens our resolve to terminate the contract accepted by Mr. Alwitry, giving three months notice.*
>
> *Before I do this, I need to be sure we are all in agreement and fully understand there may be subsequent litigation that may incur the following penalties, assessed by the lawyers minimal and to include:*
>
> - *removal and relocation expenses including associated legal expenses in relation to house sale*
> - *salaries due in the next three months (7 Dec – 12 Feb) if the termination is issued today*
>
> *As briefed earlier, there may also be media and politics related risks.*
>
> *If we are in agreement to terminate the contract, Tony will need to brief Julie and the Minister at the earliest opportunity.*

168. As will be apparent from the passages cited above, somehow the e-mail message from Ms. Chandler to Mr. Jones was understood by the Senior Management at the Hospital (to whom Mr. Jones presumably relayed it) as a statement that Dr. Alwitry had made a complaint about Mr. Downes. He had done no such thing – indeed it is clear from the BMA records that he did not want to cause any further problems with Mr. Downes. Quite how the e-mail referred to above was misinterpreted in this way is unclear. Objectively it does not convey that message. We can only infer that the people who had already formed a very negative impression of Dr. Alwitry simply assumed the worst and read something into the e-mail which was not there. There was no attempt by the Hospital to check with the BMA as to whether a complaint had been made and, if so, as to the details of that complaint. Had they done so, they would have been informed that no complaint had been made.

169. Mr. Siodlak responded within an hour saying "*I think we need an urgent meeting about this!*". The meeting was set up for 5 p.m. that afternoon (13 November).

170. In the meantime, Mr. Riley e-mailed Ms. Julie Garbutt, the CEO of Health and Social Services at the States of Jersey at 13.31. Under the heading "Consultant Problem" he said:

> *We have offered Amar Alwitry the post of consultant in Ophthalmology with a December start date.*
>
> *His behaviour and attitude since accepting the post has been atrocious and the Medical Directors, Clinical Director, Andrew, Angela and me and my team are agreed to withdraw the job offer.*
>
> *The financial consequences are minimal and deemed an acceptable risk.*
>
> *The ability to appoint another quickly is very strong.*
>
> *The risks are political – his Dad was a consultant here and still lives in Jersey and will probably play political cards.*
>
> *The Medical and Hospital directors will probably give me the mission of persuading Anne it is a risk worth taking/managing.*

171. That e-mail was grossly misleading. On the evidence before us, there is and was no basis (and we mean no basis) for the allegation that Dr. Alwitry's behaviour had been "atrocious". The e-mail should not have been sent in the terms that it was. What the e-mail does disclose is the fact that there was no proper consideration of the merits or otherwise of the dismissal of Dr. Alwitry. The meeting that was set up for 5 p.m. that afternoon was expected simply to rubber stamp the decision.

172. The Notes of the Meeting at 5 p.m. on 13 November 2012 are thin. They read as follows:

> *Mr. Alwitry's communication, attitude and behaviour since his offer of employment was accepted with Health & Social Services was discussed, along with his subsequent reporting of Mr. R Downes to the BMA.*
>
> *Those present agreed that, although regrettable, a withdrawal of employment was required.*
>
> *This issue had already been raised at Ministerial Level.*
>
> *The decision was taken not to discuss the withdrawal of the offer of employment to Mr. Alwitry with Mr. B McNeela at this stage.*

173. The persons present at the meeting were Mr. McLaughlin, Mr. Siodlak, Mr. Riley and Mr. Luksza. With the exception of Mr. Luksza who was simply prepared to agree with the majority, each person present had already expressed a damning view of Dr. Alwitry, his character and his general behaviour. There was no consideration of the merits of the decision. There was no investigation of the alleged complaint against Mr. Downes. There was no attempt to question whether what they were doing was wrong. There was no consideration of the need to engage with Dr. Alwitry to put their concerns and criticisms to him. We have absolutely no doubt that the process was unfair. It was a decision made by

those who had, with no proper justification, taken against Dr. Alwitry and were not interested in taking a balanced approach.

174. We equally have no doubt that the erroneous belief that Dr. Alwitry had reported Mr. Downes to the BMA was a significant factor in the decision that was made. It is a stark example of how a flawed procedure can lead to decisions being made for which there is no factual foundation.

175. It follows from the above that we do not accept the conclusions of Mr. Paul Beal in his Report of March 2013 that:

- *The evidence indicates the senior team considered all the facts from August 2012 until this point in time to make this decision to rescind the offer*
- *The evidence indicates this decision was not taken lightly by any of the senior team and their priority was patient safety and quality of care*.

Indeed, we would go further and say that, on the evidence before us, it is impossible reasonably to reach those conclusions.

176. Mr. Riley wrote formally to Mr. Mark Sinclair, the HR Director for the States of Jersey on 15 November 2012. This is a remarkable letter. It is misleading and incorrect in material respects:

> *Although an excellent candidate with a strong CV, excellent references and an impressive interview performance, his behaviour and attitude since receiving the offer has been consistently adversarial, aggressive, inappropriate, duplicitous, unco-operative and frankly unacceptable. This behaviour has been directed at senior managers and senior doctors, HR staff and other clinical professionals in other services. He has now engaged the BMA to support a formal complaint about the Clinical Director (CD) – even before he has started in post!! The CD, not altogether unreasonably, has indicated that he would feel obliged to resign as CD if the offer is not withdrawn.*
>
> *We are content that this behaviour constitutes a loss of trust and confidence so fundamental as to undermine the contract of employment.*
>
> *The proposed course of action has some risks and consequences (outlined below) but these would have to be managed and in reality would have a relatively short shelf life.*
>
> *The alternative is to commit to tenure and endure 30 years of trying to manage a disruptive, dysfunctional, high maintenance medic – SoJ has experienced this more than once in recent years and to invite repetition is not considered desirable.*
>
> *Following discussions with the Law Office the litigation risk is deemed to be acceptable. The maximum legal remedy would be 3 months notice and any incurred costs associated with a move to Jersey – we believe these to be nil or de minimis at this point.*

> *The real risk is that he was born and brought up in Jersey – first generation rather than old Jersey blood – but he and his father (a retired JGH consultant) claim to be well connected to the politicians and media here and in fact he has used this as a threat already. This story will therefore play out for a period with politicians and the JEP.*
>
> *The Clinical Director, Medical Directors, Hospital Director, CEO, myself and the 3 members of the Ministerial team are all of a view that 30 years of a dysfunctional ophthalmology department is the greater risk – hence our intention to terminate.*
>
> *In recognition that HSSD is not technically the employer it is accepted that you may wish to discuss this situation as necessary with SEB colleagues to clear the way for this decision to be enacted. There is a need for some urgency as the start date is very imminent.*

177. What this amounts to is that a small group of people (Mr. McLaughlin, Mr. Siodlak, Mr. Downes, Mr. Riley and Ms. Body) had decided that Dr. Alwitry would not fit with their preferred style of management – i.e. to expect others simply to do as they were told. Dr. Alwitry was attempting to agree his job plan in accordance with the terms of his Contract and good practice, raising issues relating to patient safety if eye operations were carried out for glaucoma patients on a Friday and asking legitimate questions about the number of hours that he was being required to work. This small group of senior personnel (with the apparently unquestioning support of Mr. Luksza) decided that this behaviour was inappropriate and that Dr. Alwitry's employment contract should be terminated, irrespective of the fact that Dr. Alwitry had resigned from his post in Derby (a post for life) and made arrangements to relocate to Jersey. They then portrayed a very one-sided and ill-founded version of events to Ministers and the SEB, in order to ensure that the decision they had taken was simply approved ("*... you may wish to discuss the situation as necessary with SEB colleagues to clear the way for this decision to be enacted ...*"). This is and was a wholly inappropriate and unfair procedure. Decisions of this type must be taken in accordance with the basic principles of natural justice. Those decisions should be properly documented, balanced, transparent and fair. None of those descriptions could be applied to the decision in the case of Dr. Alwitry.

178. By an unhappy coincidence, on the same day as Mr. Riley sent the above letter, 15 November 2012, Dr. Alwitry and Ms. Kelly Sheehan, a Medical Secretary at the Hospital were busy arranging Dr. Alwitry's induction schedule for 3 and 4 December.

179. At some point on or before 22 November 2012, there was a consultation about the decision with amongst others, Mr. Riley, the Health Minister (Deputy Anne Pryke), the Chief Minister/Chairman of the States' Employment Board (Senator Ian Gorst) and "*the SEB*". No minutes or records of the discussion were provided to us. From Mr. Riley's evidence, we understand that there was no formal meeting. The only record of the foregoing individuals being involved appears in a document entitled "Briefing to SEB" attached to an e-mail from Mr. Jones to Mr. Stephenson on 11 December 2012. It appears that various individuals were contacted separately. We infer that the key decision

makers were Deputy Pyke and Senator Gorst. We also infer that they approved the decision to send to Dr. Alwitry the letter referred to in the next paragraph since that is what Mr. Jones records: "*Following discussion with SEB, Health Minister and Chief Minister, TR writes to AA informing withdrawal of offer…".*

180. The letter from Mr. Riley to Dr. Alwitry was dated 22 November 2012. Interestingly, his letter was headed "Without prejudice save as to costs" which reflects the fact that Mr. Riley at least was aware that what he was about to do was a breach of Mr. Alwitry's Contract (as had been advised on 30 October 2012). The letter read:

> *I write to inform you that after careful consideration we have decided to withdraw the offer of the post of Consultant in Opthalmology made on 21st August 2012, and to formally notify you that any contractual relationship between us (to the extent that it may exist) is to be treated as terminated.*
>
> *This decision has not been reached lightly. It has been informed by:*
>
> - *The attitude and behaviour displayed in relation to multiple aspects of the role*
> - *demonstrate evidence of a dysfunctional relationship with the Clinical Director and the other senior medical and management staff; and*
> - *loss of trust and confidence between the respective parties, resulting in any employment relationship being irreparably damaged.*
>
> *We appreciate that the above places both parties in a difficult position.*
>
> *On a 'without prejudice' basis, we are amenable to giving sympathetic consideration in respect of any direct and recoverable losses incurred to date. In this regard, I would be grateful if you would furnish me with appropriate copy receipts within 14 days of this letter.*

181. Understandably, Dr. Alwitry was taken aback by the letter. He contacted Mr. Downes on 26 November 2012 explaining that he was (understandably) completely confused by the letter and asking why it was thought that there was a dysfunctional relationship between them. Mr. Downes' response later that day perpetuated the inaccurate understanding that Dr. Alwitry had reported Mr. Downes to the BMA:

> *I suggest you reflect carefully on all the previous correspondence with regard to many aspects, virtually all, of the post and timetable that you found unacceptable and questioned from the outset and in particular your decision to report your manager i.e. me, to the BMA (both surprising, and extremely disappointing, bearing in mind all the time and effort I put into trying to organise the best possible timetable under the circumstances of major organisational constraints) in order to find the answers to your e-mail.*

182. He contacted Mr. McNeela who was equally as surprised. Mr. McNeela wrote a compelling letter to Mr. McLauglin on 26 November 2012:

> *On Saturday 24th November (2012) I received a telephone call from Amar Alwitry. He had received a letter that morning from Tony Reilly, Human Resources Director announcing that the 'offer' of the post of Consultant on Ophthalmology had been withdrawn. Amar e-mailed me a copy of the letter, which I enclose. I then called Richard Downes who confirmed that you and a cohort of senior managers, including the two medical directors and himself, had been party to this decision, and that the discussions leading up to it had been deliberately kept secret until it could be considered a fait accompli. As you are aware, the process had gone well beyond the job offer stage. The contract of employment had been signed by both parties, Amar had resigned from his current post in Derby and made arrangements to start in Jersey on the 3rd December, one week from now. His old job was recently advertised in the British Medical Journal and applications have already been put in.*
>
> *On 8th August all members of the Advisory Appointments Committee (AAC) had unanimously approved the offer of the post to Amar. At the beginning of the discussion of the candidates you had acclaimed him as by far the most suitable. Based on interview performance, academic qualifications, research record and clinical experience we agreed that he was the best person for the job. His references were excellent. His appraisals during his previous post on (sic) Derby had been very satisfactory. Nothing has come to light since the interview to cast doubt on any of this information. We all agreed that Amar seemed very suited for a future lead role in the department.*
>
> *The decision of the AAC has been overturned by a small group of managerial staff with no reference to the four members of the AAC, ie Graham Prince, Alan Thompson, the Royal College of Ophthalmologists representative and myself.*
>
> *I have been party to most, if not all, of the e-mails exchanged between Amar and hospital staff since the interview. His concerns about the timing of clinics were also shared by the eye clinic nursing staff, appointments personnel, junior medical staff and myself. It was readily apparent that there was considerably more opportunity for flexible rescheduling of the clinics than had been stated in the e-mail exchange between Amar and hospital management. It was also clear to everyone that the operating theatre timetable was complex, messy and needing amendment as soon as possible.*
>
> *In vigorously pursuing his view on the best way to provide a service, Amar is no different from many of the consultants now in post at this hospital. Being assertive about getting the best possible job plan to provide efficient, high quality patient care and, to a degree, taking into account one's family and other personal interests is part of the normal two-way discussion between a successful candidate and the*

management team in the period following the AAC decision and before starting in post. Amar had, with justification, questioned the contrast between a contract based on a 10-session rate of pay and a job plan amounting to 11.15 sessions per week. The disparity between the actual workload and the inflexible contractual rate is a regular subject of debate amongst consultants and has frequently been brought up in MSC meetings.

Advancing an argument contrary to one expressed by one of the management team does not justify applying a label of 'dysfunctional relationship'. At no stage, to the best of my knowledge, has Amar stated that he would be unwilling to undertake his contractual obligations, given any ultimate or made any personally offensive statements. These would be the only justifiable grounds for blocking his appointment.

I would like to formally advise the hospital management team that I completely dissociate myself from the decision to rescind Amar Alwitry's contract of employment. He has been treated in an appallingly shabby manner.

I also take great exception to the management team excluding me and other members of the AAC from the discussions leading up to this decision.

Members of the management team are now refusing to take calls from Amar. He has been advised by Tony Reilly that all communications on the matter should only be routed through lawyers acting for both parties. It would take courage and an humbling loss of face to reverse this decision, but I sincerely hope that you will pause to reflect on the matter, open up the debate to other stakeholders and reconsider.

183. Dr. Alwitry tried to speak to Mr. Riley by telephone on 26 November 2012 but he was not available. Mr. Riley sent him an e-mail that afternoon confirming that there was "*no merit in us speaking further as the decision conveyed in the letter is both final and unanimous*".

184. Dr. Alwitry wrote a detailed e-mail in response to Mr. Downes on 27 November 2012 which accurately (as we have found them) recorded the details of his discussions about the timetable and the number of PAs he was expected to work, and continued (again, accurately):

I asked the BMA their advice as to whether there was anything that I could/should do about it and so they decided to speak to Brian. I definitely was not reporting anyone or trying to make trouble. I just really wanted your/their advice as to the least painful way to go about sorting it or whether this was the way things are. Goodness knows what he or she said to Brian to make you think that I was "reporting" you. I think it was this miscommunication that triggered all this.

I do not understand how we got to where we are now. Job planning as I understand is a two way process and I simply wanted to be involved in the planning so I could keep my patients safe and sound. If I came

> *across as too demanding in my request then I apologise but it seems a bit unfair not to let me come and work over that.*
>
> *I would still love to get this resolved and still come over to work with you. It has always been my dream to come over to the Island and I was looking forward to 25 years of dedicated service there.*

185. Later on 27 November 2012, Dr. Alwitry wrote a detailed e-mail to the Medical Directors, Mr. Luksza and Mr. Siodlak. He again explained what had happened from his perspective and reiterated that all he had tried to do was to plan the best treatment for his patients. He explained that he did not think he had been unreasonable and was still did not know what he had done to upset Mr. Downes. He continued:

> *Both Claudia (my wife) and I are now out of work as we've both resigned from our jobs so obviously I will be getting a lawyer and will have to take action against the Hospital. We have 4 small children under 7 so this is a nightmare.*
>
> *Is there anything either of you can (or want to) do. I honestly haven't done anything.*
>
> *I still want to come and work with you all. It's been my dream from the start. Could I be officially reprimanded or put on probation for a while? Not quite sure what for but I'd be happy with anything that sorts out this unpleasantness.*
>
> *...*
> *I have a signed contract which clearly states the disciplinary, appeals, termination processes which should be followed but it hasn't been done at all. I am also supposed to have the right of appeal according to Schedule 4 of the Terms and Conditions of Service.*
>
> *The frustrating thing is that I haven't had the right to reply as I don't know what I'm accused of...*

186. The paragraphs quoted above encapsulate the vice of the lack of a proper or fair decision-making process in the present case. The consequence of the deeply flawed process that was adopted by the Hospital was that Dr. Alwitry and his wife were left without jobs, with a young family to support. (An e-mail from Dr. Alwitry's wife, Dr. Claudia Alwitry, to the senior clinicians/management on 30 November 2012 also explained that they had given up their children's places at their schools in Nottingham in anticipation of the move.) At no stage were the alleged grounds for the decision to breach his contract explained to him properly. At no stage was he given a right to explain his side of the case or to have that considered impartially by an appropriate body. For reasons that for which we cannot find any excuse, he was deprived of his contractual right to an appeal: the suggestion that he was not entitled to an appeal because he had not actually started work is, with respect to Mr. Riley, absurd.

187. An increasingly desperate Dr. Alwitry e-mailed Mr. Downes again on 29 November 2012 asking for his help:

> *If you could try and speak to them for me and ask them to give me a second chance I'd be grateful. You know from my references and from talking to Lee and Iain that I'm not a troublemaker.*
>
> *I'd be prepared to be on probation for a year, work without pay for six months or have a freeze on any private work at the Hospital for a year if that would help pay them back and get me back in. If you can think of any other conditions I'd agree to them to get this sorted.*
> *…*
> *Anyway I'm happy to agree and do whatever it takes to make it up to you and get you back on side although I appreciate it may be too late.*

188. Dr. Alwitry wrote a further lengthy letter to Mr. Siodlak on 30 November 2012. On the same day, the BMA wrote formally to Dr. Alwitry:

> *I am sorry you are unhappy with the situation that has arisen.*
>
> *I can assure you that we are also surprised by it. I can confirm that at no stage did you instruct us to report or formally take up any case against any individual or Jersey HSSD. In communicating with the BMA you clearly indicated that you did not wish to cause any problems and our informal discussions related to the job planning process itself. You asked us to advise you as to the way the process worked and how best to negotiate the job plan itself.*
>
> *The discussion our Employment Adviser, Sheila Chandler, attempted with HR in Jersey was by way of an informal chat and in no way should it have been construed as a formal complaint or initiation of any formal process.*

189. This confirms our findings that no complaint was ever made by Dr. Alwitry. A simple enquiry to the BMA would have revealed that this was the case. That enquiry should have been made before the decision was taken summarily to dismiss Dr. Alwitry and should certainly have been made by the Respondent once Dr. Alwitry made it clear that he had not made any complaint about Mr. Downes. Once the true position was revealed, the decision should have been reviewed. Instead, and very unfortunately, the senior management at the Hospital persisted in its position that its knowledge of the alleged complaint played no part in the decision made when, as the former Solicitor-General and ourselves have found, it clearly did.

190. On 3 December 2012, Dr. Alwitry again wrote to Mr. Riley. He reiterated his wish to appeal the decision as set out in Section 18.2.2 of the "Terms and Conditions of Service, Consultant Medical and Dental Staff". On the same day, he circulated the response from the BMA that we have set out above confirming that the BMA was as baffled as Dr. Alwitry about the suggestion that Dr. Alwitry had lodged a complaint against Mr. Downes (or anyone else) or how the contact from Ms. Chandler could reasonably have been construed as meaning that a complaint had been lodged.

191. Mr. Riley responded with another "without prejudice save as to costs" letter on 4 December 2012. He asserted that there was no right of appeal under Section 18.2.2 because Dr. Alwitry's service had not commenced. As is evident

from our findings above, we are baffled as to how anyone (lawyer or lay person) could have reached such a conclusion. It is plainly wrong.

192. We invited Advocate Ingram to submit authorities to support the proposition that Dr. Alwitry's appeal rights were not engaged until Dr. Alwitry physically started work by entering the Hospital Building as opposed to when the contract of employment was concluded. It is correct to note that, in his closing submissions, Advocate Ingram referred to a number of authorities. These establish that:

192.1. In certain (extreme) circumstances, an *employer* owes a duty of trust and confidence to its employees: **Malik v BCCI** [1997] IRLR 26.

192.2. The sufficiently serious breakdown in trust and confidence between an employer and employee as a result of the conduct of the employee may, in appropriate circumstances, fulfil one of the grounds in the UK for rejecting a statutory claim for unfair dismissal (i.e. that the dismissal was fair for "some other substantial reason") although even in this context Mummery LJ in **Leach v Ofcom** [2012] IRLR 839 stated that "*breakdown of trust is not a mantra that can be mouthed whenever an employer is faced with difficulties in establishing a more conventional conduct reason for dismissal*".

193. The second principle identified above is, of course, concerned with a defence to a statutory claim for unfair dismissal. It is irrelevant when considering simple principles of the law of contract such as was Dr. Alwitry entitled under the terms of his contract to a right of appeal against his (wrongful) dismissal? The answer to which is "yes". Indeed, even under the UK legislation for unfair dismissal, while a breakdown of trust and confidence may in extreme cases make the substantive decision fair, the employer still has to follow a fair procedure in implementing that decision. In most cases, this would include affording the affected employee a right to meet the case against him/her and to pursue an independent review/appeal if the decision to dismiss was maintained.

194. There is no authority for the proposition advanced by Mr. Riley that Dr. Alwitry's appeal rights did not become effective until he had physically started work at the Hospital. We were not surprised by this. Such a conclusion would have been perverse – i.e. one to which no reasonable person properly directing themselves could reasonably have come. Mr. Riley's insistence before us that this was the collective understanding of those involved in making the decision in relation to Dr. Alwitry did not reflect well on him or them. If (which we seriously doubt) this was a genuinely held view at the time, they should not have been involved in making the decision in the first place. That is particularly the case of Mr. Riley and his colleagues in the HR Department.

195. Further, it was unclear whether this view reflected legal advice that had been received. If it did, it was clearly wrong and so clearly wrong that any reasonable person ought to have identified the error.

196. We would add that, if the view was genuinely held, to the extent that any of the individuals involved in the decision to dismiss Dr. Alwitry (or in providing legal advice in relation to such matters) are still involved in decisions affecting the work and careers of other members of staff or applicants for posts, we would

strongly recommend that they receive proper training in relation to basic principles of fairness and the law relating to contracts of employment as a matter of some urgency.

L. The States' Employment Board

197. The matter was put on the agenda for the States' Employment Board Meeting for 18 December 2012. On 10 December 2012, Ms. Garbutt e-mailed Mr. Siodlak, Mr. Riley, Mr. McLaughlin, Ms. Body, and Mr. Downes, saying that Deputy Pyke, Senator Gorst and herself "*are fielding a significant number of calls, letters, e-mails etc from States Members, the Family and friends*" about the treatment of Dr. Alwitry.

198. On the following day, 11 December 2012, Ms. Garbutt e-mailed Mr. Siodlak, Mr. Riley, Mr. McLaughlin, Ms. Body, Mr. Luksza and Mr. Downes saying "*as you will be aware there is considerable noise about the decision to withdraw the contract and it will be important that display [sic] a strong and united front*". Mr. McLaughlin followed this up with an e-mail seven minutes later saying "*If we all turn up mob handed to demonstrate our view is unanimous we stand the best chance of the decision sticking*". As a result Ms. Body confirmed that the theatre lists had been amended to ensure that all on the circulation list were free to attend the meeting.

199. As planned, Ms. Garbutt, Mr. McLaughlin, Mr. Riley, Mr. Luksza, Mr. Siodlak, Mr. Downes and Ms. Body attended at the meeting of the States' Employment Board with the Minister for Health and Social Services, Deputy Anne Pryke, on 18 December 2012. In other words, the Hospital was represented by the full team of people who had been involved at one stage or another in the flawed decision to terminate Dr. Alwitry's contract of employment including the senior clinicians and senior management at the Hospital whose original decision has been subject to serious criticism in this Decision. Dr. Alwitry was not represented or, indeed, invited to make representations. The members of the States' Employment Board present were the Chief Minister, Connétable Mezbourian and Deputies Green, Le Bailly and Noel.

200. The Minutes set out a description of events – presumably provided by the team from the Hospital – which is entirely one-sided and bears little resemblance to the facts as we have found them. There was no attempt to set out a balanced history or even to refer to the fact that the decision had been based at least in part on the mistaken belief that Dr. Alwitry had lodged a complaint with the BMA even though, by this stage, Senator Gorst, Deputy Anne Pryke and the entirety of the team from the Hospital positively knew that no such complaint had been made or instructed since they had seen a copy of the e-mail from the BMA of 30 November 2012.

201. The Board's decision was simply to confirm that an *ex gratia* offer of no more than 3 months' salary plus reasonable expenses should be made to Dr. Alwitry, to require the Director of Human Resources to conduct a review of the recruitment process in conjunction with the Law Officers' Department and to direct that, in the event that the Health, Social Security and Housing Scrutiny

Panel continued to express an interest in the case to respond attempting to suggest that the Panel had no jurisdiction (i.e. to prevent a further review).

202. The next meeting of the States' Employment Board for which Minutes have been provided to us at which Dr. Alwitry's case was considered was held on 4 March 2013. For this meeting, someone had prepared a more detailed chronology of the correspondence. Although this chronology was reasonably detailed it still did not come close to presenting a full and balanced picture. It proceeded on the basis that Dr. Alwitry's demands were unreasonable. It included allegations of dishonesty on the part of Dr. Alwitry that were, on the evidence before us, not true. Thus, for example:

202.1. The entry for 21 August 2012 records that:

> *AA contacts HR and informs them that AML has advised him to obtain his contract paperwork. This was blatantly untrue. However, contract issued in good faith and promptly signed and returned. Subsequently HR discovers AML has no knowledge of this and in fact had written to AA advising of intent to withdraw job offer on August 10th.*

There was no suggestion in the submissions or evidence before us that Dr. Alwitry improperly procured the contract on 21 August 2012 nor is there any suggestion in the contemporaneous documentary evidence (or the reports commissioned for the States' Employment Board) that this was the case. We also note that this suggestion was never put to Dr. Alwitry at any time.

202.2. Under "Behaviour and Risks" the comments included:

> *1. During the months after Mr. AA was offered the position his behaviour and attitude quickly became frustrating, inappropriate, dishonest, threatening and self-centred.*
>
> *…*
>
> *5. AML was also surprised and disappointed by what he perceived to be Mr. A's duplicitous and evasive behaviour with regard to the start date – the need for which had been repeatedly raised in conversations between them prior to and at the interview without any suggestion of any inability to start as requested.*

These statements were untrue.

203. It is a matter of considerable concern that the States' Employment Board was presented with an incomplete and inaccurate version of events. Even against that background, we were concerned that the States' Employment Board did not react proactively to the issue or undertake any detailed analysis of the problem even though members must have realised that, at the very least, there were potentially significant problems with the decision that had been made. As we have noted above, for example, Senator Gorst was sent a copy of the e-mail from the BMA confirming that no complaint had been made about Mr. Downes and that they were baffled as to how the conversation with Mr. Jones could have led to that impression. After the meeting on 18 December, Senator Gorst received the various references from respected consultants to which we have

referred above which showed that, at the very least, Dr. Alwitry had reasonable grounds for taking the stance that he did in relation to operating on a Friday and job planning, as well as providing character references which suggested that the portrayal of him as difficult, duplicitous and dishonest was incorrect. Nothing was done about this, however.

204. We would have thought that, on receipt of such documents the reasonable response would have been to reconvene the States' Employment Board to consider the implications of them. This is not least because, in a case where the employment had just been terminated, time was obviously of the essence: waiting (as they apparently did) for another few months to pass would almost inevitably result in it being impossible to remedy any failure by the Hospital or to allow Dr. Alwitry to take up his post. This must have been obvious to those involved. The decisions of the States' Employment Board seem to us to be more consistent with them pushing a difficult decision off in the hope and expectation that the problem would go away (for example if Dr. Alwitry found another job) rather than dealing decisively with an obvious problem. In our judgement, that was not an appropriate response.

205. One interesting feature of Mr. Beal's report is that, in paragraph 5.16, he records the following:

> *There is a view from some of the senior officers in the HSS that SEB then began to back track on the decision to support these actions due to the political pressure and correspondence from members of the local community on the Island.*
>
> *There is a counter view that SEB became nervous about the decision as more information on AA came to light from the HSS team on the case and did not believe they had been given the full picture at the time.*

The "counter view" is consistent with our impression from the limited evidence that we have seen.

206. We have already set out in our introductory sections above our concerns about the role of the States' Employment Board in this Decision. We do not repeat our observations here. We are not in a position to undertake a detailed critique of the role of the States' Employment Board in the present case. The evidence is not sufficiently complete to enable us to do that. What we can say is that it is clear that the States' Employment Board did not have the full picture before it at any stage, although some members were (as we have set out above) more fully informed than others. We can also say unreservedly that, if (as we would assume) the States' Employment Board was expected to perform any role other than to "rubber stamp" the decision of the senior Hospital staff, we would have expected them to identify the blatant unfairness in the procedure that had been followed and to have insisted that Dr. Alwitry be allowed to exercise his right of appeal and/or to propose a mediation to attempt to resolve the differences and misunderstandings that were apparent.

M. The reports commissioned by the Director of Human Resources for the States' Employment Board

207. The Director of Human Resources for the Health and Social Services Department commissioned a report by an HR Consultant, Mr. Beal and a "*Report on the Independent Conflict Analysis*" by Ms. Michelle Haste of CMP Resolutions which considered the appropriateness of mediation.

208. We have been critical of Mr. Beal's report which was issued in March 2013. Mr. Beal's conclusion was that:

> *The team took a reasoned and well thought through approach, taking sounds on the matter from the law office, informed SEB of their view and took appropriate action based on clinical need and service delivery. I believe they followed due process to try and resolve the issues with AA on his start date and that they tried to seek agreement on the job plan with him.*
>
> *Clearly the trust and confidence between the employer and AA has broken down and this was a reasonable response to the situation at the time. AA appears to lack insight into his part in this situation he now finds himself in which is most unfortunate for him as a consultant.*

209. Those are not conclusions to which one could reasonably come based on the evidence that we have reviewed. Indeed, we struggle to see how they follow logically from some of Mr. Beal's own findings. The latter include (amongst others) a finding that the paperwork for the interview process of all candidates did not demonstrate an objective and robust assessment process; there was no evidence of a robust testing of the person specification demonstrating a poor recruitment and selection process; discussions in relation to the start date only commenced between Mr. Downes and Dr. Alwitry in August 2012 (and did not occur at or before the interview); further training on job planning and a more formal approach to it was required; it would have been prudent to call in Dr. Alwitry to have an "*honest and robust conversation explaining his behaviour and interactions are not acceptable before making a final decision to rescind the offer*"; and "*from the evidence presented there is a question as to the appropriateness and objectively [sic – presumably objectivity] in this case by some who were not directly involved*"; "*I would recommend that SEB look at their employment practices and procedures as part of their workforce modernisation programme, to ensure that they are fair and consistent in line with best practice*".

210. We have not commented in detail on Ms. Haste's report. This seems to us to be an unhelpful report because it reaches no real conclusion. All it states is the obvious namely that the respective parties have diametrically opposed views and objectives but that mediation can be successful so the SEB should give careful thought to the arguments of both sides:

> *…I believe it would be useful for the parties to meet in joint session to explore the reasons for the conflict and also explore whether resolution is feasible.*

> *However, I have concerns about the feasibility of mediation as a dispute resolution mechanism per se given not only Dr. Alwitry's reluctance to explore the issues except as a means to the end of achieving reinstatement of the appointment; but also because of the clear consensus from the decision makers that a reversal of the decision to withdraw is not tenable.*
>
> *However, parties' perceived positions often change during the joint mediation session…*
>
> *Therefore I recommend that careful thought is given to the points raised by both sides in respect of the conflict, and also the reasons advanced by the decision makers as to why the withdrawal should not be rescinded.*

211. As it happens, the members of this particular Complaints Board have extensive experience of mediation and other forms of dispute resolution processes as advisers, mediators and other forms of neutral facilitator. Almost every mediation starts with the parties having strongly divergent views and objectives. Many involve cases which the protagonists will say would "never settle" and, until relatively recently, rarely did. Mediation has a very well documented success rate even in such cases. We would have thought that it was unnecessary for the States' Employment Board to have an expert report to tell them that. It is outside our remit to say whether mediation should have been adopted in the present case. What we can say is that, based on our experience, mediation is the ideal environment within which to deal with the sorts of issues that had arisen in the present dispute but this would have required a mediation to be convened before Dr. Alwitry's position had been filled by a permanent replacement. If such a decision had been made (in December 2012), it had the potential at least to mitigate the consequences of some of the procedural flaws in the process to date that we have highlighted above.

N. Private practice

212. One of the issues raised by Dr. Alwitry was an allegation that Mr. Downes was influenced in his decision-making because of a considerations relating to his private practice. In very short summary, Dr. Alwitry suggested that Mr. Downes had offered Dr. Alwitry the opportunity to join Mr. Downes' private practice but only on condition that Dr. Alwitry paid Mr. Downes a percentage of Dr. Alwitry's income from that practice even after Mr. Downes retired. We were told that Mr. Downes strongly disputed Dr. Alwitry's allegations.

213. We do not find it necessary to make any findings about these allegations. Neither Mr. Downes nor Dr. Alwitry gave oral evidence before us. Given that we have had to refer to the allegations in this Decision, however, it is appropriate for us at least to note that our impression from the evidence before us is that issues relating to Dr. Alwitry's private practice did not overtly causes the flaws in the decision-making process to which we have already referred. To the extent that Mr. Downes' views in relation to Dr. Alwitry certainly appear to have hardened in November 2012, this coincided with the point at which he was incorrectly told that Dr. Alwitry had formally complained about him to the

BMA and it that misinformation which, in our view, finally pushed Mr. Downes into the intransigent camp of the other senior clinicians and management at the Hospital who had already determined that Dr. Alwitry should not be permitted to take up his post.

214. Having said that, it does appear to us that the debate about private practice raises an important issue of principle. As we understand it from the evidence before us, one of the attractions of taking up a post as a senior clinician in Jersey is the fact that there is greater freedom here to pursue a private practice in conjunction with employment at the Hospital than there is or would be in the UK. Clearly discussions and agreements between the existing clinicians – particularly those who are either directly involved in the appointment/disciplinary process or would expect to be consulted about the same – and the applicant/new appointee about private practice *could* give rise to an actual conflict of interest and will almost certainly give rise to an *apparent* conflict of interest (i.e. that appointments/dismissals which are funded out of the public purse are or might be influenced by the private commercial relationships of those involved in the decision and the individual concerned). This is not good practice. At the very least, it leaves an objective observer with the suspicion that the decision may have been influenced by extraneous matters. We repeat that we are not suggesting that anything untoward actually happened in the present case. We do, however, believe that it would be prudent for there to be a procedure which ensures that there is disclosure by those involved in the decision making process (including the applicant/person who is the subject of the decision) of any discussions/agreements about private practice and for such disclosure to be properly recorded and considered (if relevant) as part of the decision. Obviously if the disclosure revealed a potential conflict of interest, the conflicted person on the management side should not ordinarily participate in the decision-making process itself.

O. Conclusion on the procedure leading to the deliberate breach of Dr. Alwitry's contract

215. We agree that this case is a paradigm example of introspective and poor decision-making by a small group of senior public officials. While we are only concerned with the procedure that was adopted rather than the substantive merits of the decision itself, the only conclusion that one can reach is that the process was manifestly unfair, was based on incorrect information and advice, took account of irrelevant considerations and failed to take account of all of the relevant ones (precisely because the process was not designed to ensure that relevant information was confirmed and considered impartially by an independent body). It follows that we also agree that the description by Mr. McNeela of the procedure (or lack of it) that was followed in the present case as "*appallingly shabby*" is apt.

216. It is to be hoped that this decision – and the firm criticisms of the procedures adopted by the Hospital (and the SEB) in the present case will serve as a wider lesson to public officials that such archaic practices will not be tolerated. In a small community such as Jersey, there is a particular need for proper, fair, transparent, balanced and independent decisions be made in order to avoid the strong suspicion that senior officials believe they can implement subjective decisions without proper scrutiny.

217. The Respondent's Closing Submissions stated:

> *The Respondent did not act contrary to law, rather upon legal advice. It did not act contrary to the generally accepted principles of natural justice. The decision to terminate the Complainant's contract was deliberated by senior officers at the Hospital; a Director of the Human Resources Department of the Hospital; the States' Employment Board and the Law Officers Department. On any analysis, this extraordinary level of scrutiny is unique and reflective of the difficult decision presented to the Respondent. This is a higher level of process than any usual dismissal decision making process.*

218. That submission invites us to accept that none of the senior officers at the Hospital, the Director of the Human Resources Department at the Hospital, the members of the States' Employment Board or the Law Officers thought there was anything wrong with the procedure that had been followed. If that is correct, it is a damning indictment of the practices and competence of all those involved. At the most simple level, it is almost inconceivable that it could ever be fair or appropriate summarily to dismiss someone on grounds that there had been a "breakdown in trust and confidence" (grounds which at least in part were demonstrably incorrect), without informing the person concerned of the details of the case against him or allowing him to make representations and then to deny him his contractual right of appeal on the wholly untenable basis that, although he had a binding contract, he had not physically started work.

219. The truly extraordinary feature of the present case is that despite the ostensible level of scrutiny, none of those involved on the States' side appreciated the blatant unfairness of the decision making process. Scrutiny must be robust, diligent and independent – none of which describe how this decision was reached nor the way in which the consequences of this decision were subsequently handled.

P. Conclusion

220. We have summarised our conclusions and recommendations in the Decision and at the outset of this Annex A. For the reasons set out above, we find that the complaint made by Dr. Alwitry is well-founded.