

STATES OF JERSEY



VOTE OF NO CONFIDENCE: STATES EMPLOYMENT BOARD

Lodged au Greffe on 20th December 2016
by Deputy M.R. Higgins of St. Helier

STATES GREFFE

PROPOSITION

THE STATES are asked to decide whether they are of opinion –

that they have no confidence in the States Employment Board.

DEPUTY M.R. HIGGINS OF ST. HELIER

Note: In accordance with Standing Order 22(a), this proposition has been signed by the following additional members –

1. Senator S.C. Ferguson
2. Deputy G.P. Southern of St. Helier
3. Deputy J.M. Maçon of St. Saviour.

REPORT

I have brought this Vote of No Confidence in the States Employment Board following the findings of the States Complaints Board into the dismissal of Mr. Alwitry, a Consultant Ophthalmologist, and the subsequent attempts by the States Employment Board, the Chief Minister and the Minister for Health and Social Services to justify what was a grossly unfair and shabby act, and to denigrate and question the work of the States of Jersey Complaints Board who have investigated the matter thoroughly, with integrity, and reported on this matter to the States.

Unfortunately, what has happened to Mr. Alwitry is not an isolated incident in which States employees have been badly treated by Ministers, civil servants and the States Employment Board.

Over the last 8 years we have witnessed the way in which Mr. John Day, the former Consultant Obstetrician at the hospital; Mr. Simon Bellwood, a former social worker in the employ of the Health and Social Services Department; and Mr. Graham Power, the former Chief Officer of the States of Jersey Police were appallingly treated and denied natural justice.

These are just some of the high-profile cases that have made it into the States Assembly and media headlines, and one wonders how many other States workers have been badly treated in their dealings with their employer that we have not heard of.

When challenged and proved wrong, Ministers have time and time again promised that lessons have been learned, that processes have been changed, and that States employees will be treated fairly in the future, only to have other equally bad cases rear their heads within a very short time interval.

It is my view that the States should be an exemplary employer that follows the [Employment \(Jersey\) Law 2003](#) and other legislation which has been passed in the States Assembly that applies to all employers, and that it treats its workers fairly, with respect, and in accordance with the principles of natural justice.

These rules or principles of natural justice, also known as procedural fairness, have developed to ensure that decision-making is fair and reasonable. Put simply, natural justice involves decision-makers informing people of the case against them or their interests, giving them a right to be heard (the 'hearing' rule), not having a personal interest in the outcome (the rule against 'bias'), and acting only on the basis of logically probative evidence (the 'no evidence' rule).

It will be apparent to anyone who has read [R.75/2016 – 'States of Jersey Complaints Board: findings – complaint against 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; and [R.75/2016 Res. \(the response of the Complaints Board to the SEB's response\)](#) presented to the States on 2nd December 2016 that Mr. Alwitry was denied natural justice.

The States Employment Board's response to the original States of Jersey Complaint Board's report, which is contained in R.75/2016 Res., and the Chief Minister's answers to Members' questions in the States Assembly on 12th December 2016, were simply attempts to justify the unjustifiable; the basic argument being that the ends justify the means. They do not, nor do their arguments stand up to scrutiny. It also called into

question the probity of the States of Jersey Complaints Board, which has 2 lawyers among its members, including an eminent Queen’s Counsel.

Although I ask all Members to read or re-read [R.75/2016](#) (presented on 4th July 2016) and [R.75/2016 Res.](#) (presented on 2nd December 2016), before the States debates this proposition, I reproduce the States Complaints Board’s summary findings below –

‘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 than '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.'*

The States of Jersey Complaints Board's Report is one of the most damning reports I have read since becoming a Member of the States. They should be commended for their independent investigation, integrity and forthright comments.

I hope Members will support this Vote of No Confidence and press for the States of Jersey Complaints Board's recommendations to be accepted.

Financial and manpower implications

There are no additional financial or manpower implications for the States arising from this proposition.

APPENDIX

The States of Jersey Complaints Board which considered Mr. Alwitry's complaint comprised –

G.G. Crill, Chairman
S. Catchpole, Q.C.
J. Eden.

The membership of the States Employment Board at the time of Mr. Alwitry's contract being withdrawn in 2013 was –

Senator I.J. Gorst, *Chairman*
Deputy A.K.F. Green, M.B.E.
Connétable D.W. Mezbourian of St. Lawrence
Deputy E.J. Noel of St. Lawrence
Deputy J.M. Le Bailly of St. Mary.

The Minister for Health and Social Services in 2013 was Deputy A.E. Pryke of Trinity.

The current membership of the States Employment Board is –

Senator I.J. Gorst, *Chairman*
Senator A.J.H. Maclean
Senator A.K.F. Green, M.B.E.
Connétable J. Gallichan of St. Mary
Connétable M. Le Troquer of St. Martin.