STATES OF JERSEY

STATES OF JERSEY COMPLAINTS BOARD: FINDINGS – COMPLAINT AGAINST THE STATES EMPLOYMENT BOARD (SEB) REGARDING THE WITHDRAWAL OF AN OFFER OF EMPLOYMENT TO THE POSITION OF CONSULTANT OPHTHALMOLOGIST (R.75/2016) – RESPONSE OF THE COMPLAINTS BOARD TO SEB'S RESPONSE

Presented to the States on 2nd December 2016
by the Privileges and Procedures Committee

STATES GREFFE

2016 R.75 Res.

FOREWORD

Article 9(9) of the Administrative Decisions (Review) (Jersey) Law 1982 ("the Law") requires the Privileges and Procedures Committee ("PPC") to present to the States the findings of every Complaints Board Hearing and the response of the Minister or other States appointed body when a Board has asked them to reconsider a decision.

On 4th July 2016, PPC presented to the States the findings of a Complaints Board Hearing held on 16th March 2016 to review a decision of the States Employment Board ("SEB") regarding the withdrawal of an offer of employment to the position of Consultant Ophthalmologist (*see* R.75/2016).

The States Employment Board has reconsidered the decision as required by the Complaints Board, and PPC is therefore presenting to the States SEB's response, as required by Article 9(9) of the Law, as an **Appendix** to the Complaints Board's own response to SEB's response to R.75/2016.

RESPONSE OF THE COMPLAINTS BOARD TO THE SEB'S RESPONSE TO ITS FINDINGS IN RELATION TO R.75/2016 'STATES OF JERSEY COMPLAINTS BOARD: FINDINGS – COMPLAINT AGAINST THE STATES EMPLOYMENT BOARD (SEB) REGARDING THE WITHDRAWAL OF AN OFFER OF EMPLOYMENT TO THE POSITION OF CONSULTANT OPHTHALMOLOGIST'

The Board has received a lengthy but deeply unsatisfactory response from the States Employment Board ("SEB") in relation to the Board's findings in connection with – in SEB's own words – "*the withdrawal of an offer of employment to Mr. Alwitry*".

It is unfortunate that SEB has sought to maintain the description of the events surrounding the termination of Mr. Alwitry's employment as "*the withdrawal of an offer of employment*". The accurate description of SEB's conduct in this matter was that it deliberately and unlawfully chose to breach Mr. Alwitry's contract of employment by summarily dismissing him in what can only be described as remarkable circumstances: almost every stage of the process both before and after the decision summarily to dismiss Mr. Alwitry was flawed. In its Report, the Board agreed with the contemporaneous description of the procedure (or lack of it) that was followed in Mr. Alwitry's case as "*appallingly shabby*". We remain certain that the description is apt. It <u>was</u> appallingly shabby. There is nothing in the response from SEB that suggests that the Board's conclusion should be revised.

The Board is concerned and confused by SEB's response. We have summarised some of the principal reasons for this below.

The first concern is the speed with which the Minister for Health and Social Services and SEB rejected the findings of the Report, issuing press releases within days of being provided with a copy of it. As the Board set out in its Press Statement dated 11th July 2016, the immediate rejection of the Board's Report by the Minister for Health and Social Services and by SEB did not suggest that the States departments involved would be reviewing the findings and recommendations with the same degree of open-mindedness with which they were made. It is evident from a review of SEB's response that the Board's concerns were well-founded. We also note in passing that, in the Board's strong view, the Press Releases should not have been issued by the departments at the time they were, and we would hope that in the future any department that is the subject of a complaint will respond in detail to the Complaints Board's Report before trying to argue and spin its case in public.

Almost the entirety of SEB's response is aimed at justifying SEB's position that the dismissal of Mr. Alwitry was the 'right' decision on the merits or, in SEB's words, "*SEB and the Hospital remain convinced that it was the correct decision in the best interests of the Hospital and the Island of Jersey*".

The Board thought it had made the position clear in its Report.

The Board was extremely critical of SEB, the Hospital and certain senior States employees and politicians who were involved in the decisions relating to Mr. Alwitry. Given the tone of SEB's response, the Board is now concerned that it was not clear enough in its Report.

We will therefore try to explain the position in simple terms: a decision which was taken in flagrant breach of the basic procedural safeguards to which Mr. Alwitry was entitled (such as the right to know the complaints against the accused, the right to a fair hearing to investigate those complaints and the right to a fair and independent appeal against any adverse decision) cannot, by definition, be the 'correct' decision. The present case is one of the worst examples of a public authority disregarding fundamental principles of fairness and contract law that this Board has seen in the long collective experience of the 3 members. The fact that SEB and the Hospital apparently cannot grasp this basic point is deeply worrying. It is a matter for which they ought to be censured.

It does not matter how many times SEB, the Hospital or the key witnesses repeat their version of how dreadful or difficult *they thought* Mr. Alwitry to be, since the repetition of such views does not make the process that was adopted (and thus the decision) any more '*correct*' or, indeed, any less egregious. Similarly, the repetition of such views/arguments does not mean that they are correct; nor does it mean that they would have prevailed if the decision had only been taken after a proper and fair procedure had been followed in accordance with the requirements of the Contract (and the basic principles of fairness and natural justice which it enshrined). That is the point: the assertions and opinions of the Hospital and its senior staff – many of which appeared on the evidence before us to be exaggerated, based on an incomplete or erroneous understanding of the true facts or simply wrong and a general antipathy to Mr. Alwitry personally – were never subjected to the rigorous independent scrutiny and testing that a fair and proper procedure would have allowed (indeed, required). That is precisely why the decision was procedurally improper and the decision that was spawned by it could never be described as 'correct'.

For all of SEB's lengthy protestations, the reality is that we simply do not know whether the original decision would have been taken or maintained if a proper and fair procedure had been followed. We equally do not know whether a genuinely independent appeal body would have upheld his dismissal if Mr. Alwitry had been allowed to pursue an appeal and, as a result, through his representatives, permitted to test the assertions of the other staff that led to the decision to dismiss him on which SEB so heavily relies.

The importance of such basic procedural safeguards, such as the right of Mr. Alwitry to be informed of the case that was being made against him; to have a decision which profoundly affected his professional and personal life properly examined by an independent tribunal; to present his case and to cross-examine or test the evidence of those who were making allegations against him, cannot be overstated. This Board happened to include 2 experienced lawyers who are both very well aware of the fact that the real merits of a case *only* emerge after a fair hearing at which each party can present their cases and can test/cross-examine the witnesses for the other party.

To take one example from the response of SEB, namely the repeated assertion that Mr. Alwitry had sought "*to manipulate safety issues for personal gain*". Mr. Alwitry has always strongly denied that he was using spurious arguments about patient safety to manipulate the timetable to his personal advantage. He has always maintained (and maintained before us) that his expressed concerns were genuine. This was a matter that was addressed by both parties at the hearing. We dealt with it in in our Report. We explained that, as is the case, we were not concerned to establish who was correct on this issue (since it went to matters outside our remit – although, somewhat bizarrely, we are criticised by SEB in its response for not having formed a concluded view on who was right). No-one knows what conclusion an appeal tribunal would have reached if it

had heard the evidence from both sides. It was not and is not our function to reach a concluded view on the point. What we could say – and unhesitatingly did and do say – is that, on the evidence before us (including evidence from a number of leading and independent consultants in the field which had also be brought to the attention of the Chief Minister and SEB, as well as the former Solicitor General), the concerns as expressed by Mr. Alwitry appeared to be ones which it was reasonable for a consultant to hold. They should have been properly investigated rather than dismissed out of hand (as they were).

We also recorded "*our frank astonishment that the Solicitor General reached the conclusion that Mr. 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 Mr. Alwitry 'was not looking to put in place suitable Saturday cover'*". As we said in the Report, 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.

In the response (pages 36 to 41), SEB goes into great detail about the merits of this point. It is irrelevant to the question that the Board was addressing. The question for us was as to whether the concerns that Mr. Alwitry was raising were such that they warranted investigation, discussion with Mr. Alwitry and/or which he ought to have been allowed to present at an appeal rather than the clinicians/senior management at the Hospital simply dismissing them and using the fact that Mr. Alwitry had raised them to fuel their belief that he was being disingenuous.

What is interesting about the response is that the sections at page 36 onwards appear to proceed on the basis that it *is* correct that glaucoma patients should have follow-up care on the day after surgery.

The first point that the Board notes is that this was *not* the evidence or case that was presented to the Board by SEB. As is set out in the extracts from SEB's written submissions that we have cited later in this reply, SEB's case before us was that "*there were no patient safety concerns whatsoever*" and that this issue was only raised by Mr. Alwitry *after* the termination had occurred. The SEB was wrong on both counts. Mr. Riley's evidence was slightly different. He accepted that Mr. Alwitry had raised safety concerns, but was very clear that his clinical colleagues had dismissed them as being groundless. This was not for the reasons that SEB now suggests (i.e. that the patients could have been treated on a Tuesday), but on the basis that there were no real concerns at all and Mr. Alwitry was, in effect, making it up. Mr. Riley then proceeded to cast aspersions on the professionalism and integrity of the consultants who had written in support of Mr. Alwitry on this issue, suggesting that they were friends of Mr. Alwitry who were, in effect, prepared to say things that were not true in order to help him.

The SEB now contends that there were so few glaucoma cases in Jersey that Mr. Alwitry would never have had to operate on them on a Friday. In other words, the case as *now* presented is that, although there were legitimate concerns in relation to patient safety, these would not have arisen on the facts, because the patients could all have been dealt with in the Tuesday surgery, with follow-up care provided on the Wednesday. Again, that is not the case that was presented to us, nor is it what the former Solicitor General found (a point to which we return below). It is correct, however, that Mr. Downes did give evidence to the former Solicitor General that –

> *"the sort of surgery that he is talking about is glaucoma surgery, he's probably not going to be doing more than maybe 20 or 30 of these a year at the outset, and they can all be done on the Tuesday list, so, you know, the Friday list, this was just, I thought this guy is being very disingenuous and really trying to manipulate the system."*

That leads into the second point that the Board would note: it was never explained to Mr. Alwitry at the time that the number of glaucoma cases was so small that the Hospital did not believe that there would ever be a need to operate on a Friday. It would have been the simplest thing for someone to say to Mr. Alwitry, if that was the genuine belief of the clinical staff at the time. Not one of them said anything. Indeed, as we set out in paragraphs 125 and 130 of the Board's Detailed Findings, Mr. Alwitry specifically raised this issue with Mr. Downes by e-mail dated 7th October 2012. Mr. Downes' response of 9th October 2012 does not mention the case that is now advanced by SEB nor, if they were views that he actually held at the time, the beliefs that he explained to the former Solicitor General. Instead, in an e-mail copied to all of the senior clinical staff, Mr. Downes acknowledged that operating on a Friday was "unsatisfactory", but basically told Mr. Alwitry that he would have to live with the timetable (thus including Friday operations on glaucoma patients) on the basis that he was the "*last man in*". If Mr. Downes' evidence to the former Solicitor General is correct, notwithstanding that he did not see fit even to refer to the fact that the lists could be arranged so that "at risk" patients could be dealt with in the Tuesday surgeries, when Mr. Alwitry was clearly working on the basis that they would also be treated in the Friday lists, Mr. Downes privately concluded that "*this guy was being really disingenuous and really trying to manipulate the system*", a view which undoubtedly coloured his (and others') decisions when it came to termination.

The SEB's new case relies on this and, again, attributes to Mr. Alwitry almost telepathic powers to suggest that he also must have known that the operations could all be carried out on a Tuesday and, so it is argued, "therefore", he was being disingenuous and unprofessional ("*Mr. Alwitry worked as a locum at the Hospital on three previous occasions prior to August 2012 and it reasonable to conclude that he obtained at least some knowledge and insight of the workings of the Ophthalmology Department*") and, when he raised the matter with his Union, "*chose to provide his Union with incomplete and misleading information*".

What SEB's response fails to deal with is that, as we explained in paragraphs 125 and 126 of the Detailed Findings, in his e-mail of 7th October 2012, Mr. Alwitry set out various options which specifically included him either undertaking minor surgeries only on a Friday morning (which he regarded as a "*waste of main theatre time*") or getting an extra PA so that he would work on a Saturday, or asking the other consultants to provide cover on a Saturday, if required, subject to Mr. Alwitry trying to "*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*", all of which is flatly inconsistent with SEB's case that Mr. Alwitry was trying to manipulate the lists so that he did not work on the weekends or did not have a genuine concern about the safety aspects of conducting operations on a Friday.

The foregoing yet again illustrates one of the problems that repeatedly occurred in this sorry saga: the key witnesses never engaged with Mr. Alwitry on the matters which he raised; instead they privately dismissed what he was saying and formed the conclusion,

often without any proper factual basis, that Mr. Alwitry was "*disingenuous*" or "*trying it on*" (and worse).

What Mr. Downes ought to have done, if he actually held the beliefs that he explained to the former Solicitor General, was to write back to Mr. Alwitry acknowledging that there was a risk to patient safety if operations on glaucoma patients were to be carried out on a Friday, but there was in fact no risk because all of those operations could and would be scheduled for the Tuesday theatre. That would have been the end of the matter. The fact that he did not do so only underlines the procedural flaws in the present case. As we set out in our Report, what happened was that key individuals formed adverse views about Mr. Alwitry on the basis of ill-informed or incorrect information or misunderstandings, adopted a process that did not allow any mistakes or misunderstandings to be exposed and resolved, and then made a decision to sack him while keeping him entirely in the dark as to why they had suddenly taken against him. That is not justice. That is not a fair and reasonable procedure. That is not a process that any public authority should be permitted to adopt. We reiterate our profound astonishment that any senior public servant – including in particular Mr. Riley as Human Resources Director and Mrs. J. Garbutt as the Chief Executive Officer – could have thought that such a process was acceptable.

Further, we would have expected that a rigorous and independent review would have questioned Mr. Downes carefully and forcefully in relation to the e-mails to which we have just referred and his evidence as cited above. With respect to the former Solicitor General, we do not see that he was as probing in his questioning as we would have expected. He may well have had good reasons for that. For our part, however, it underlined the point that his report and views were not of great assistance to us in dealing with the present complaint.

That leads into the third point that arises out of SEB's response at pages 36 to 40, namely the suggestion that we were too harsh in our criticism of the former Solicitor General because he accepted in paragraph 94 of his report that "*Mr. Alwitry is correct to say that there is a safety consideration when operating on a Friday*" and that the Board should not therefore have criticised him for not seeking independent expert opinion.

On that issue, we note that SEB continues to assert that Mr. Alwitry raising the issue of patient safety was inappropriate: "*The inappropriate use of patient safety in an attempt to change a timetable and persistent and unfounded allegations made by Mr. Alwitry thereafter made it impossible, in the view of the former Solicitor General, for Mr. Alwitry to work in the Ophthalmology Department of the hospital*".

What the former Solicitor General actually said in his report was –

"*93. Mr. Alwitry stressed during his interviews with me that his primary motivation for seeking to move his Friday operating slot was patient safety as set out in his 29th September e-mail. I disagree. His motivation was to keep his weekends clear so he could return to the United Kingdom for family reasons.*

94. Mr. Alwitry is correct to say that there is a safety consideration when operating on a Friday. There may be some patients on a Friday operating list who will need further care on a Saturday but that merely goes to Mr. Alwitry's personal convenience and the Saturday and not safety. The simple point is that Mr. Alwitry was not looking to put in place suitable Saturday cover.

95. Someone has to operate on a Friday at Jersey Hospital. Mr. Alwitry accepted in questioning that Obstetrics and Gynaecology patients are much more likely to stay in hospital and develop complications following surgery when compared to eye clinic patients. Yet, Mr. Alwitry was trying to move Obstetrics and Gynaecology to the Friday without the knowledge of his own Clinical Director in order to suit his own family convenience."

As such, contrary to SEB's new case, the former Solicitor General appeared to accept that there would be operations on glaucoma patients on a Friday and that this would give rise to "*a safety consideration*". His conclusion was, however, that "*someone has to operate on a Friday at Jersey Hospital*", and concluded that this should have been Mr. Alwitry, despite apparently accepting that this would give rise to safety concerns for the patients. The solution that the former Solicitor General appears to contemplate is not that the Hospital should have provided appropriate cover for the Saturdays when Mr. Alwitry was not contracted to work, but that Mr. Alwitry should have volunteered to work (presumably for free) on a Saturday morning. In other words, in the former Solicitor General's view, it was inappropriate for a consultant to raise a safety risk with the senior clinical staff, and he should simply have dealt with it by working for free on the weekends. That is an astonishing conclusion if it is what the former Solicitor General meant. We would certainly not agree with it. The alternative is that, by using the phrase "*a safety concern*" in the report, the former Solicitor General meant that he accepted that there was *a* risk, but it was so minor that it was not a real concern.

Whatever the former Solicitor General meant, there was no evaluation of the safety risk to the patients other than that Obstetrics and Gynaecology patients might be more at risk (but, equally, might have had cover on the Saturdays). There was no consideration of reports from other consultants as to the nature of the risk. If (and we stress "*if*") Mr. Alwitry was, as those consultants suggest, correct that there was a significant risk to the safety of some patients, it would seem to us both that Mr. Alwitry was duty-bound to raise the issue and to seek to put in place adequate cover or an alternative surgical list. That, in turn, would (and, in the case of the former Solicitor General, did) directly affect an assessment of Mr. Alwitry's motivations at the time and his professionalism generally. As such, we repeat our frank astonishment that the former Solicitor General did not seek evidence from the consultants who had written in support of Mr. Alwitry (or even read Mr. Alwitry's publications on the subject) and, if necessary other consultants, before reaching a conclusion on the safety risk involved; whether Mr. Alwitry was duty-bound to raise the matter; whether that somehow adversely reflected on his motivations for raising it, and whether he was acting unprofessionally or in an inappropriate manner.

Further, if the former Solicitor General was genuinely accepting that there was a safety risk from operating on glaucoma patients on a Friday, we also record our very considerable surprise that the former Solicitor General does not actually consider the options that Mr. Alwitry had put forward in his 7th October 2012 e-mail for dealing with that risk. On their face, these would appear to be reasonable suggestions and, as we have said, the e-mail is flatly inconsistent with Mr. Alwitry attempting to invent concerns about patient safety in order to suit his own personal agenda and to avoid working at weekends. Indeed, one of the options that Mr. Alwitry proposed in that e-mail was to use the Friday list for *non*-glaucoma cases –

> *"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."*

If, as SEB now suggests, that was indeed the solution because there would be insufficient glaucoma cases to require any operations in the Friday list, one would have thought that someone would have said so. If it was correct, that would have resolved Mr. Alwitry's concerns about patient safety and ensured that he could return to his family in the UK for most weekends.

As such, although SEB's new case on patient safety is interesting to read, it does not help matters. It was not suggested to Mr. Alwitry at the time that his concerns were justified in principle, but could have been overcome in practice by listing all glaucoma operations for the Tuesday theatre. The new case was not, as far as we can tell, documented at the time. If Mr. Downes and others held the views explained to the former Solicitor General, he did not record them in any contemporaneous documents that we have seen. Indeed, his e-mail correspondence at the time does not engage with Mr. Alwitry's proposals for dealing with issues of patient safety. The new case may have been mentioned by Mr. Downes in his evidence to the former Solicitor General, but it was not one that the former Solicitor General accepted (at least on the face of his report). The new case was not the one that was presented to us. Even if the new case is valid (and it is not within our remit to judge whether or not it is), it does not help SEB. That is precisely because, as a matter of procedure, the position should have been explained and discussed with Mr. Alwitry rather than the senior medical staff (if Mr. Downes' evidence to the former Solicitor General is to be accepted) simply keeping the matter to themselves and proceeding on the basis that Mr. Alwitry was being disingenuous or unprofessional in trying either to move the Friday list or find alternative solutions including cover by others on a Saturday if necessary. If Mr. Riley's evidence to us is to be accepted, at least some of the senior medical staff did not think there was a safety risk at all. Ultimately, however, the point for our purposes is that, had a proper and fair procedure been followed, this issue and the potential solution to it (if SEB's new case is correct) would have been identified and discussed.

That brings the Board to another area of confusion about SEB's response. The SEB alleges that the Board materially changed its own terms of reference to the effect that the Board chose to consider whether SEB was justified in terminating Mr. Alwitry's employment. The SEB maintains that had it been aware of this extension of the terms of reference, then it would have called further witnesses to support its actions.

There are a number of reasons for the Board's confusion.

First, it did not travel outside its own remit. As was explained in Section C of the Detailed Findings, the Board is and was only concerned with the procedure by which the decision to terminate Mr. Alwitry's employment was made. That involved 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. It did not involve making judgements about the substantive merits of the decision made. That investigation inevitably required the Board to make findings of fact as to what happened. In certain cases, as it turned out, the evidence before the Board was so overwhelming that only one conclusion could reasonably have been reached by someone who was properly addressing their minds to the relevant issue. We identified these instances in our Report.

Unfortunately, the fact-finding process illustrated that, on the evidence presented to us, the senior members of the Hospital had proceeded on the basis of beliefs that had no reasonable foundation in fact or had reached conclusions which would appear to be, in public law terms, perverse – i.e. decisions to which no reasonable person in their position properly directing themselves could reasonably have come. That is not the same as making findings as to the grounds on which the decision to terminate Mr. Alwitry's Contract was supposedly based, or the merits of the Hospital's basis for the decision unceremoniously to "*sack this bloke before he gets here*". It goes to whether the process was fair or unfair, and to an assessment of whether there were matters which Mr. Alwitry ought to have had the opportunity to address, both before the decision to sack him was made, and before an independent appeal board.

The foregoing is so basic that it should not really need spelling out, certainly not to a public body and its advisers. It is remarkable that SEB has devoted so many pages of its response making a misconceived submission that the Board travelled outside its remit, and then presenting evidence as to why its decision was justified on the merits. This again wholly misses the point: Mr. Alwitry should have been given the opportunity to address these matters at the time and, while the Hospital would no doubt have made similar arguments before an appeal body, it is not known whether or not the Hospital would have succeeded.

Our opinion is obviously now invited on the merits, but we decline to express one. What we can say with certainty is that, on the evidence before us, Mr. Alwitry had very strong arguments that his dismissal was not justified on the merits, and that these ought to have been considered by the original decision-makers and an independent appellate body. Whether he would have prevailed on the merits is, however, not a matter for us.

Further, the Board does not accept that that it is appropriate for SEB to respond to the Board's Report to address further detailed submissions setting out its (partly new) case on the merits. Regurgitating a one-sided view, based on the recollections and subjective views of those who participated in the kangaroo court to which Mr. Alwitry was subjected does not assist matters, and is not an appropriate response to the matters raised by the Board. Indeed, it strongly suggests that, even now, SEB and the Hospital have not grasped just how appallingly they treated Mr. Alwitry, or that there is an urgent need to address the obvious flaws in the system that allowed Mr. Alwitry to be treated in this way and then to close ranks to defend such a fundamentally flawed decision. We also note that, from the evidence before us, the much cited "breakdown in trust and confidence" in SEB's response was only mentioned, in effect, after the decision to terminate had already been made, and would note again the observations of Mummery LJ in **Leach v Ofcom** [2012] IRLR 839 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*". Although, again, it is not ultimately for us to determine, we would observe that that we were left with the very strong impression that the Hospital, SEB and certain key individuals have been mouthing the mantra for a very long time now, and it is time they stopped doing so.

Even if one assumes for the sake of argument that, if Mr. Alwitry had been given an opportunity to appeal, the Hospital's arguments on the merits would ultimately have prevailed and the decision to dismiss Mr. Alwitry would have been upheld, that would not make the decision that was actually made any more lawful or acceptable. Put

crudely, a lynch-mob may get the actual wrongdoer, but it is no less a lynch-mob for that.

The fact that it is clear from the response that SEB and the Hospital are still unable to grasp or accept that basic point, and are prepared repeatedly to assert that the 'correct' decision was made, as if that somehow makes things better, only reinforces our conclusion and recommendation that there is a systemic flaw which allowed and continues to allow senior members of staff and politicians to believe that treating Mr. Alwitry in the way that he was is acceptable in a modern society. It is not. It never would be. We repeat our recommendation in paragraphs 9.7.1, 9.7.3 and 9.7.7 of our Report. The need for such steps is only underlined by the nature of SEB's response.

The second area of confusion on this point is the suggestion that SEB was somehow unfairly treated by not being able to call further evidence. The correct position is that SEB and its advisers actively pressed for the hearing to go ahead. At the hearing, SEB placed very substantial reliance on the report of the former Solicitor General to address all of the points which it now complains that it wanted to address further. In other words, it was aware that the issues required to be addressed, but chose to adduce evidence from one witness, Mr. Riley, and the former Solicitor General's report, as their main defence. That was SEB's choice. Indeed, the entirety of SEB's case at the hearing before us was that a review of the facts leading up to the decision on 13th November 2012 showed that the Hospital had reasonable grounds for concluding that the relationship between Mr. Alwitry and the Hospital had irretrievably broken down.

Thus, for example, the first page of SEB's response to the Complaint (i.e. the written opening submissions to us) stated, after reciting the grounds on which the termination was said to be based –

> *"Mr Alwitry's claims about patient safety are an attempt at rationalising, after the event, the situation in which he finds himself, which is simply not backed up by the evidence of this case.*
>
> *The Solicitor General has conducted an investigation in this case. His report is enclosed…He discovered that there were no patient safety concerns whatsoever and instead concluded that Mr Alwitry's conduct led to the breakdown in the relationship.*
>
> *In particular, Mr Alwitry did not want to operate on Fridays because he wanted to be with his family in the UK on Saturdays, as illustrated by paragraph 95 to 98 of the Solicitor General's report:"*

The SEB's case then continued –

> *"[Mr. Alwitry] has consistently failed to accept that there was a breakdown in the relationship between him and the Hospital management at that time and to acknowledge any responsibility for his role in that. This is clearly reflected in all three of the independent reports commissioned on this matter:*
>
> *The Solicitor General's report provides a detailed account of the correspondence between Mr. Alwitry and the hospital from August to November 2012 leading to the decision to terminate (paragraphs 23 – 142).*

Mr. Alwitry's claims about patient safety are an attempt at post hoc rationalisation of the situation in which he finds himself. He fails to accept any responsibility for his own role in this. As stated above, it is acknowledged that there were some deficiencies in the process by which Mr. Alwitry's contract was terminated but not about the decision itself. This decision has been the subject of two separate independent reviews and action has already been taken on the conclusions reached in those reports.

Two thorough investigations of this matter have reached the same view that there was no link at all between patient safety and the reasons for the termination of Mr. Alwitry's contract. The reasons for the decision related to Mr. Alwitry's challenging and inappropriate behaviour, which caused the complete breakdown in his relationship with the Health and Social Services Department. The Solicitor General noted in his report that the BMA advised Mr. Alwitry, at the time of these events, that this was not a case that merited intervention. We believe this speaks for itself."

The SEB's Closing Submissions were to the same effect. For example, paragraphs 17, 19 and 24 of SEB's Closing Submissions stated as follows –

"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.

19. It was [Mr. Riley's 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.

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 mad [sic] 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."

As will be apparent from the foregoing, the suggestions in the press releases issued by the Minister for Health and Social Services and SEB which are repeated (at length) in SEB's response, that somehow SEB was surprised that the Board looked at the facts leading up to termination, or that it had not had the opportunity to address such matters is not only wrong, it is disingenuous. It was SEB's positive case before us, argued with vigour and at length, that a detailed review of facts (particularly those recited in the former Solicitor General's report) led to the conclusion that Mr. Alwitry's conduct justified the termination of his employment, even if the procedure adopted to effect that might not have been perfect. The SEB consciously decided to support that case solely by relying on the oral evidence of Mr. Riley and the independent reports to which we have already referred including, in particular, the report of the former Solicitor General. In advancing that case, SEB was obviously trying to address the wrong question: it wanted the Board to take a view on the merits of the case rather than to focus on the procedural matters, presumably because it thought that this would lead to a conclusion (like that of the former Solicitor General) whereby the manifest procedural failings in the process would not be given any significance.

As is set out in the Board's Report, when it became apparent that the Board was less than impressed with both Mr. Riley's oral evidence and certain aspects of the former Solicitor General's report, SEB clearly realised that there was a real risk that the Board would make findings that were adverse to it and would undermine its ability to rely on the former Solicitor General's report. At that point, Advocate Ingrams, representing SEB, suggested that they wanted to call more witnesses on the very issues which had been at the heart of SEB's own case. In other words, it wanted to get a second bite at the forensic cherry. The fact that a party wishes to try to bolster its case when it fears it is losing is not, however, a good reason for granting an adjournment or extending a hearing to hear more witnesses. Further, as it set out in the Report, at all times the Board proceeded on the basis that <u>all</u> relevant evidence had been disclosed to it.

The SEB then sought to introduce further evidence (the Appendices to the former Solicitor General's Report containing notes of interviews with witnesses) in its closing submissions, some of which it repeats in the response. Although this had not been addressed at the hearing, the Board considered that evidence. There was nothing in it which altered our conclusions. We addressed the facts as they appeared in particular from the documentary evidence. It shows that, with respect to the former Solicitor General, the untested recollections of witnesses is not particularly helpful.

To give just one example, SEB sets out the recollection of Mr. McLaughlin in relation to the "negotiation" over the Mr. Alwitry's timetable. Unfortunately, Mr. McLaughlin was not actually involved in those discussions. As such, his evidence is hearsay. It is also factually incorrect in material respects. As we set out in Section I of our Report, as the relevant e-mails reveal, the actual position was that Mr. Alwitry was, in effect, told to try to discuss the possibility of changing theatre slots by Mr. Downes and spoke to various other members of the Hospital staff during a period where Mr. Downes was absent from Jersey. As such, Mr. McLaughlin's conclusion that "*Mr. Alwitry just either didn't understand or just didn't care about"* the staffing and other implications of switching his operating slots with those of another consultant – on which is based on his erroneous understanding as to what had happened – is not only misconceived, but is symptomatic of the very problem that underlies this wholly sorry saga, namely the willingness of senior staff at the Hospital hastily to form adverse but ill-founded opinions about Mr. Alwitry and his motivations, which is then used by the same individuals as a "fact" which justifies their treatment of him. The same point applies to

the extracts from Ms. Body's evidence on page 14 of the response and Mr. Downes' evidence on page 15 of the response. Further, the former Solicitor General does not appear to have analysed the actual correspondence or tested their assertions to the level of detail that we would have wished before we could be confident about relying on the evidence in question for our purposes. That illustrates the risks inherent in an inquisitorial approach to an investigation – it depends upon the extent to which the inquisitor tests the evidence in a meaningful way.

That brings us to the third reason for our confusion, namely SEB's continued reliance on the report from Mr. Beal and the Report of the former Solicitor General.

The SEB suggests that the Board ought to have placed reliance on the report of Mr. Beal and asserts that the Board "*does not explain why it dismisses the conclusions of Mr. Beal*". It is fair to say that we thought our reasons for rejecting the specific conclusions of Mr. Beal were quite clear: we said "*Indeed, we would go further and say that, on the evidence before us, it is impossible reasonably to reach those conclusions*" and we would suggest that anyone reading the many paragraphs of our Report which led up to that statement would have a reasonably clear understanding of why we reached the conclusions that we did.

Perhaps, however, we did not spell it out with sufficient clarity. In case that is the position, we clarify our reasoning as follows: we rejected certain key parts of Mr. Beal's report because, on the evidence that was presented to us, the report contained numerous factual errors, was not particularly penetrating and contained conclusions with which we disagreed, some of which (as we identified), were conclusions that no reasonable person could possibly have reached if they had properly understood the relevant facts. As such, we concluded that Mr. Beal's report was, effectively, of no value to us in resolving the issues before us. The fact that SEB *still* relies on such a report is a matter of concern.

Further, the assertion by SEB that Mr. Beal's review "*was an independent review*" on page 19 of the response is disingenuous if SEB intended to suggest that this somehow repaired or mitigated the fundamental procedural flaws in the process that led up to Mr. Alwitry's dismissal. The investigation by Mr. Beal was conducted after the event and, as SEB ought to be aware, could never be considered as equivalent to the independent review to which Mr. Alwitry was entitled by way of a contemporaneous appeal to an independent body against the decision to dismiss him.

The Board reiterates that it takes a different view to SEB as to the probative value of reviews carried out *after* the termination of Mr. Alwitry's Contract. In this context, as will be apparent from what we have already said, the views of the former Solicitor General were always unlikely to be of particular value to the Board in discharging its function. It was not concerned to review a decision that was based on the report and recommendations of the former Solicitor General. The Board was concerned with assessing for itself the primary facts, some of which were also considered by the former Solicitor General for the purposes of his report.

As will be apparent from what we have already said, the only reason the former Solicitor General's report was considered in such detail in the hearing before us was because, for whatever reason, SEB set such great store by it at that hearing: one of the principal planks of SEB's case was that the former Solicitor General had reached certain conclusions, and that the Board ought to place great weight on his report and (because

he had interviewed more witnesses than had been called to give evidence before us); ought, in effect, to accept the former Solicitor General's conclusions as correct. As we explained in our Report, the Board emphatically disagreed with that suggestion. Our task is and was to conduct an *independent* review of the matters relevant to the complaint that has been brought to us, assessing the primary evidence for ourselves.

Further, the former Solicitor General's Report sought to focus on whether the decision to terminate was the correct one, whereas the Board's findings concentrated on the fact that there was no independent review of the allegations against Mr. Alwitry ***before*** the decision was taken to terminate his Contract and the failure to allow him an appeal against that decision. The Board's consideration of both the circumstances leading up to the decision and the former Solicitor General's findings was not to determine whether the decision was correct or not; it was concerned with the process which should have been established and followed before any (final) decision was made, and which ought to have established a clear distinction between an allegation phase and a determination phase. These presumably are the "procedural failings" SEB acknowledges and brushes aside, but which the Board regards as a fundamental failure on the part of the employer and which prompted its findings and recommendations. As the Board has now indicated on a number of occasions, the procedural flaws in the present case are so fundamental and so stark that they can only be described as astoundingly glaring failures of an employer – any employer, let alone a public authority – to follow due process and do right by its staff.

SEB's response suggests that the Board somehow has misunderstood the role of the Solicitor General as a Crown Officer. With respect, we did not. We did not suggest that the former Solicitor General was not a proper Law Officer or somehow not constitutionally independent. We also did not suggest that he was not in fact trying to bring an independent mind to the task that he was charged with undertaking. We were simply stating what we thought and still think is obvious, namely that it is difficult to see how, in such circumstances of this case, an inquiry by the former Solicitor General into the circumstances of Dr. Alwitry's 'recruitment' could be *seen* to be independent by the Public in general. *If* it was the intention to conduct an independent, 'after the event' review, appointing a suitably qualified person other than one of the Officers of the Crown would have been more likely to have been seen by the Public generally to be genuinely independent in the circumstances of this particular case.

The foregoing is underlined by the fact that the former Solicitor General was provided with an embargoed copy of our Report (i.e. the Report was released to him during the period when its circulation to people other than the Parties and their representatives was expressly forbidden). When the Board raised this apparent breach of the embargo, it was informed that the former Solicitor General was now acting as legal adviser to SEB in relation to our Report. At some point, therefore, SEB's independent reviewer ceased to be independent and became its legal adviser. While acknowledging, of course, that he is no longer the Solicitor General, that is a remarkable state of affairs.

The Board cannot think of another occasion in their collective experience where this has happened. It should not have occurred. It certainly should not have occurred in circumstances where SEB was aware that the Board had identified a legitimate concern that the former Solicitor General might not be seen to have been acting independently in the past because he would be perceived, rightly or wrongly, as being too closely aligned with the political establishment. It reinforces the point we have made above, in this case, regardless of his actual independence, the former Solicitor General could

legitimately be regarded as too close to the senior States officials and politicians involved in this case for his investigation and report to be *seen* to be genuinely independent.

The Board would reiterate that in sensitive cases such as the present one, it would always be better to ensure that there is a genuinely independent investigation by a qualified person other than one of the Law Officers *if* the intention is to present the report as one that is free from any establishment influence. That is particularly where the process that is being adopted is an inquisitorial process – or a process where, as here, the Inquisitor is also the Judge – where, no matter how competent the Inquisitor may be, there can always be a doubt raised as to whether a particular line of enquiry was or was not pursued with sufficient vigour or was influenced by the Inquisitor's own (establishment) views. We would also add that the fact that the former Solicitor General had "*previously prosecuted a doctor at the Hospital for manslaughter and SEB for serious health and safety offences*" is no doubt interesting to know, but is not relevant to the issue that we are addressing. We are not doubting the former Solicitor General's general competence and ability, nor are we suggesting that he was not able properly to conduct prosecutions in the past. We are dealing with the 2 issues of whether his report in this case would be *seen* to be independent, and explaining why we were not prepared simply to accept his findings as SEB urged (and continues to urge) us to do.

The Board maintains its view that the former Solicitor General's report failed to deal adequately (for the Board's purposes) with some key parts of the evidential history. We do not repeat these points here. There is nothing in SEB's response that alters our conclusions. We are satisfied that, in the respects we have identified, the former Solicitor General's Report is not reliable or soundly-based. Indeed, we believe that a detailed review of the *relevant* evidence, as set out in the Board's Report, leads inexorably to that conclusion. Of course we were mindful of the fact that we had not heard from certain witnesses, but we were satisfied that the key and reliable evidence was to be found in the contemporaneous documents that were put before us.

Another example may help to illustrate the point. A number of the extracts from the evidence of Hospital personnel to the former Solicitor General is to the same effect as the evidence given by Mr. Riley that staff "*fed up with [Mr. Alwitry] pestering me by e-mails and telephone calls… I didn't want to be entering into myriads more e-mails until he got in post*" which is asserted by SEB in the response to be "*so exceptionally disruptive to the arrangements of the Hospital [that] there reasonable grounds to withdraw Mr. Alwitry's contract of employment before he occupied a permanent post where he would cause more disruption contrary to the interests of the Hospital and of patients*" (pages 15 to 16 of the Report).

An examination of the latter statement shows that it is a jumble of unfounded prejudice, *non sequiturs* and speculation, which is all based on an adverse assumption about the way Mr. Alwitry would behave. That was the problem that bedevilled the decision-making process back in 2012 and clearly still underlies SEB's thinking today. It illustrates why it is essential for proper procedural safeguards to be put in place (i.e. a fully-informed and fair decision in the first instance and an independent/fair appeal against an adverse decision). It is also clearly nonsense. Even if it is correct that a member of staff has made telephone calls and writes lots of e-mails to other members of staff which, although related to work matters, do not follow the formal chain of command, the thought that this would justify sacking him or her summarily, without

any attempt being made to address the behaviour or taking appropriate disciplinary steps or allowing the decision to be the subject of an appeal, is absurd.

If that is what SEB actually believes, it should be censured for it.

Further, the Board addressed the suggestion that there was a plethora of telephone calls and e-mails in its Report. We have the e-mail records. They are set out in detail in our Report. They speak for themselves. The numbers of e-mails and their contents do not come close to the sort of avalanche of inappropriate or unprofessional e-mails that some of the witnesses for SEB/Hospital have purported to describe. When properly analysed, the contents do not show Mr. Alwitry doing anything improper. We also addressed the suggestion that Mr. Alwitry was constantly bombarding members of staff with disruptive phone-calls. It is not consistent with the documentary evidence or, indeed, with the findings of the very people on whose reports SEB places such store (namely Mr. Beal and the former Solicitor General). As we noted, with limited exceptions –

- there were no references to such conversations in the documentary records presented to us;

- there were no telephone attendance notes or other written records of such conversations having taken place;

- there were limited references to such discussions in the former Solicitor General's report which identifies only 4 relevant telephone conversations which are said to have taken place prior to 23rd October 2012, namely – on 31st July 2012 with Mr. Downes; on 8th August 2012 with Mr. Leeming; on 10th August 2012 with Mr. McLaughlin; a very short telephone call with an undisclosed correspondent on 14th August 2012[1], all of which pre-dated the execution of the Contract of Employment; and one call with Mr. Downes on 10th October 2012;

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

- there were no reports of specific additional telephone conversations in the report of Ms. Haste.

As we said in our Report –

> *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*

[1] Paragraph 59.

> *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.*

In other words, either way, there were fundamental flaws in the process adopted by the Hospital. Again, SEB can and does repeat extracts from certain witnesses on whose evidence it relies to justify the substantive merits of the decision that was made, but that cannot alter the conclusion that the decision was procedurally flawed at almost every stage in the process. Further, we doubt very much that we are alone in being genuinely stunned that SEB would continue to seek to rely on the unrecorded, anecdotal evidence of people about telephone calls as justifying the summary dismissal.

On the positive side, the Board welcomes the fact that processes within the Hospital, as well as the function of SEB, have moved on. It is not, however, satisfied from the response that the circumstances which resulted in this complaint could not now be replicated, or there is not a more widespread problem at the Hospital in relation to the management of these types of decisions.

The Board notes with some concern, for example, the careful wording of the response that *"in the event that there was a future need to withdraw an offer of employment from a consultant before their commencement date there will be a meeting with that consultant to provide him of [sic] her with the opportunity to explain their version of events*". That would not satisfy the requirements of procedural fairness. If dismissal of an employee is contemplated, the employee is entitled to know the case that is being made against him or her and to be given the opportunity fairly to challenge that case and put forward their own case. The omission in the response of any reference to the person in question being allowed a right of appeal to an independent body who would hear the issue *de novo* is noted with considerable concern. If that omission is deliberate, and the intention would be to deprive such a person of a right of appeal; that would in general be wholly inappropriate.

The Board remains firmly of the view that a 'right' decision follows a fair and defined process. The process adopted by SEB, the Hospital and HR can never be considered acceptable, reasonable, just or fair. The Board concluded that in terms of Article 9(2) of the Administrative Decisions (Review) (Jersey) Law 1982, the treatment of Mr. Alwitry was –

(b) unjust, oppressive or improperly discriminatory;
(c) 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; and,
(e) contrary to the generally accepted principles of natural justice.

Nothing in SEB's response refutes this conclusion. The Board does not accept that SEB's response to the Board's conclusions and recommendations in Section 9 of the Report is appropriate, or sufficiently detailed and responsive to be adequate. It repeats the matters set out in paragraphs 9.1 to 9.7.7.

APPENDIX

RESPONSE OF THE STATES EMPLOYMENT BOARD

TO THE FINDINGS OF THE COMPLAINTS BOARD

REGARDING THE WITHDRAWAL OF AN OFFER

OF EMPLOYMENT TO MR ALWITRY

Response by the States Employment Board to the findings of the Complaints Board (constituted under the Administrative Decisions (Review) (Jersey) Law 1982 (the "Law") to consider a complaint made by Mr A Alwitry regarding the offer of employment to the position of Consultant Ophthalmologist

Executive Summary

The SEB considers that the Complaints Board did not conduct the hearing in accordance with its own directions and that it strayed into areas that it had specifically and repeatedly told the SEB and the Complainant that it would not deal with such as the reasonableness of the decision to withdraw Mr Alwitry's contract of employment.

Whilst the SEB acknowledges that it is perhaps understandable, given the considerable delay there had been in arranging the hearing due to the objections raised by Mr Alwitry which eventually took place two years after the complaint was first lodged, that the Board was reluctant to adjourn the hearing any further, nevertheless the Board did not hear sufficient witness evidence relevant to the enlarged scope of the Board's review. The findings and recommendations of the Board fall considerably outside those terms and are not supported by the necessary evidence. It only heard from one witness, whose evidence on behalf of the SEB largely only went to the procedure followed in relation to the decision to withdraw the offer of employment to Mr Alwitry.

The SEB commissioned two reviews prior to the review of the Board, both of which concluded that the decision made was the correct one. Neither was cursory and both were independent. The SEB considers that the conclusions of Mr Beal and the former Solicitor General are reliable and soundly based. Unlike the Board, Mr Beal and the former Solicitor General had interviewed 18 and 11 witnesses respectively, including lengthy interviews with Mr Alwitry.

The SEB strongly disagrees that the decision to withdraw Mr Alwitry's employment was not one which a reasonable body of persons could make.

Whilst it is accepted that there could be improvements in the way the decision was taken, the SEB and the Hospital remain convinced that it was the correct decision in the best interests of the Hospital and of the Island of Jersey. There were procedural failings which the SEB has previously acknowledged. However, the SEB invites the Board to reconsider the remainder of its findings. The SEB notes that the Board recognises that "there may be exceptional circumstances that would justify a breach of contract if it were clearly in the public interest to do so". It is submitted by the SEB that there were such exceptional circumstances here.

It is accepted that in future, if a particular start date is required, this should be specifically stated in the advert. In addition, in the event that there was a future need to withdraw an offer of employment from a consultant before their commencement date there will be a meeting with that consultant to provide him of her with the opportunity to explain their version of events.

The SEB disagrees with the conclusion in respect of the motivation of the Hospital's senior management team, which was driven not by financial cost but by the importance of ensuring a harmonious working relationship within a small team of three consultants and by a loss of trust and confidence in Mr Alwitry. It accepts (and has accepted since November 2012) that a payment should be made to Mr Alwitry to reflect the absence of a period of notice and the offer of a procedure. This was a difficult decision and the easy option for the Hospital's senior management would have been not to withdraw the contract. The senior management team rightly chose not to take the easy option for the benefit of the Hospital.

Verbal and written feedback has been received from successful and unsuccessful candidates and Royal College representatives complimenting the Hospital on its recruitment process. The SEB has seen emails from ten Consultants commenting on the positive experience of the recruitment process in Jersey, including positive comparisons with the NHS recruitment process.

Finally, the management structure at the Hospital has been further strengthened since the appointment of the current Managing Director, who was not in post in 2012. There is an appropriate focus on clinical governance which is in line with structures in the NHS. The SEB are assured that improvements in relation to recruitment, particularly in relation to start dates and hours worked have been implemented.

Introduction

This response of the States Employment Board (the "SEB") follows the numbering and structure of the report (the "Report") of the Complaints Board (the "Board") constituted to consider a complaint by Mr A Alwitry[1] against the SEB following the hearings before the Board on 16 and 17 (a.m.) March 2016.

The SEB has endeavoured to provide the Board with a detailed response to its Report. However, in the time available the SEB has not been able to provide a specific response to every line of the Report, particularly as regards the details findings in Annex A. The fact that the SEB does not comment specifically on a section of the Report should not be interpreted as meaning that the SEB agrees with it.

A lengthy letter before action and draft Order of Justice has been received by the SEB on Friday 30 September 2016. The SEB has been unable to review the letter before action and draft Order of Justice before submitting this response to the Board and at this stage it is uncertain whether Mr Alwitry intends to persist with parallel proceedings before the Board and potentially in the Royal Court. Nothing in the response should be interpreted as being an

[1] The correct form of address for a surgeon is to refer to him or her as Mr or Mrs, not Dr. The States Employment Board therefore refers to Mr Alwitry throughout this document rather than referring to Dr Alwitry as the Complaints Board has done.

admission in relation to any future claim by Mr Alwitry and the SEB's position in relation thereto remains entirely reserved.

Paragraphs 1 to 7 (pages 1 to 68) of the Report - the hearings, evidence presented and submissions of the parties

The SEB notes that the Report does not set out the Terms of Reference of the Board.

The SEB refers to the emails of the Deputy Greffier of the States (which are set out below) containing directions concerning the procedure which the Board intended to follow - namely that they were reviewing the procedure followed in relation to the withdrawal of Mr Alwitry's employment to the position of Consultant Ophthalmologist and not whether the decision was reasonable. Whilst the SEB accepts that the Law provides that it is for the Board to regulate its own procedure, these directions were relied on by the SEB and led it to limit the evidence which it presented at the hearing to the evidence of Mr Riley.

Relevant procedural history

The Complainant filed his complaint in March 2014. Subsequently the complaint was adjourned by the Complainant to allow parallel Jersey Employment and Discrimination Tribunal proceedings to conclude.

Notwithstanding the adjournment, the Complainant withdrew the Tribunal proceedings on 6 December 2014 prior to the final hearing.

The complaint was listed by the Deputy Greffier of the States of Jersey to be heard on 14 April 2015, at 10.00am. Prior to the listed hearing formal submissions were filed and lists of witnesses who were to attend the hearing were confirmed to the Board on or about 9 March 2015.

Following correspondence from the Complainant, the Deputy Greffier wrote a letter to him on 1 April 2015[2], explaining the limitations of the powers of the Board.

Following a letter from Messrs Sinels (the Complainant's Advocates) to the Deputy Greffier on 8 April 2015[3], the Deputy Greffier emailed the Complainant and his legal representative the following day[4] and reiterated the basis upon which the Board would be considering the complaint. The email is written in clear terms and states -

> *"I must take this opportunity to remind you both that we are not an employment tribunal and will not consider whether the SEB had reasonable grounds for seeking to terminate the contract. The discussions over start date, job plan,*

[2] Appendix 1. Document 1
[3] Appendix 1. Document 2
[4] Appendix 1. Document 3

etc, are not therefore critical to the Board's deliberations. I note that Mr Alwitry has provided a list of people who will accompany him, but as the Board's deliberations will be confined to whether the SEB followed due process in terminating the contract, he may wish to rethink who he wishes to accompany him. The Board can only deal with the administration of the employment process and not drift into clinical considerations - this I not within its jurisdiction at all.

The Board is keen for Mr Alwitry to be given every opportunity to see the hearing of his own complaint, but has to respect its boundaries. The hearing is not a legal environment - it is an informal meeting at which both sides present their case and then the Board adjudicates."

On 30 April 2015, the Deputy Greffier emailed the Complainant once more[5]. The email confirmed a new date for the hearing and also repeated the basis upon which the Board would be hearing the complaint. Once again the email was written in clear and unambiguous terms and stated -

"I passed on your comments to the Chairman and members regarding the scope of the hearing and they are adamant that they will not be looking at the grounds on which SEB withdrew the contract, let alone the merits of those grounds. They will also not be looking at matters relating to patient safety or whistle-blower protection.

The decision that the panel will be considering (on which the Solicitor General has already admitted was unsatisfactory) involves the process resulting in the revocation of your contract."

The hearing did not take place in 2015, following various requests from the Complainant for the hearing to take place on alternative dates. During the various correspondence between the parties during 2015, the Board's terms of reference were called into question and on 3 June 2015 the Deputy Greffier reiterated, once again, to both parties the basis upon which the Board would be considering the complaint[6]. The following was stated -

"The decision that the Panel will be considering involves the process resulting in the revocation of Mr Alwitry's contract. It will not be looking at the grounds on which SEB withdrew the contract nor the merits of those grounds. They will also not be looking at matters relating to patient safety or whistle-blower protection.

[5] Appendix 1. Document 4
[6] Appendix 1. Document 5

The papers previously circulated for the hearing, which was deferred in April 2015, are the only papers which will be under consideration and the Panel will disregard any elements which are not pertinent to the issue under consideration (as aforementioned). No correspondence received subsequently has been forwarded to the Panel for consideration as part of the process."

Following further postponements, the Deputy Greffier listed the complaint to be heard on 1 March 2016.

Upon receipt of confirmation from the Complainant that he would be unavailable to attend the listed hearing, the hearing was relisted to 16 March 2016. This was the second occasion upon which the Complainant had sought a relisting of the hearing in order to ensure that he would be available to attend.

On 24 February 2016 (following a suggestion that the Complainant had attempted to introduce additional papers to those that should be before the Board), the Deputy Greffier confirmed the following[7] -

"I wish to confirm that the basis upon which the case will be heard is unchanged -

The decision that the Panel will be considering involves the process resulting in the revocation of Mr Alwitry's contract. It will not be looking at the grounds on which SEB withdrew the contract nor the merits of those grounds. They will also not be looking at matters relating to patient safety or whistle-blower protection.

The papers previously circulated are the only papers which will be under consideration and the Panel will disregard any elements which are not pertinent to the issue under consideration (as aforementioned)."

On 2 March 2016, the Deputy Greffier received an email from Messrs Sinels seeking a further postponement of the hearing on the basis of the recently handed down Royal Court judgment concerning the Complainant's application before the Royal Court under the Data Protection legislation.

On the same day, the Deputy Greffier emailed Messrs Sinels[8] confirming that the hearing would not be adjourned and will proceed on 16 March 2016, as previously listed. The email further stated the basis upon which the Board would hear the complaint as follows -

[7] Appendix 1. Document 6
[8] Appendix 1. Document 7

"The Chairman says -

We have informed the parties that we will limit our enquiry to the process by which the contract of employment was terminated/withdrawn, and not the ground upon which the decision was taken. I will expect any disclosure pursuant to the judgment would impact on the grounds rather than the process.

If, however, Mr Alwitry (or indeed the Board) during the course of our hearing believes that the consideration of the process would be assisted by having available data produced following the Court Order, then the hearing could be adjourned to allow the Board and the parties that newly available data.

I hope that this is an acceptable way forward."

Given all of the correspondence concerning the complaint, the SEB was left in no doubt that the hearing of the complaint would be restricted to examining the policies, procedures and process involved in the termination of Mr Alwitry's contract of employment. Furthermore, that the Board would not consider any other issues given the previous directions of the Deputy Greffier and the Chairman; nor any evidence on any other such issues.

It was reasonable for the SEB to expect the Complainant and/or his witnesses to appear in person at the hearing and for them to answer questions from both the Board and the SEB's representative. This would have allowed the Board to have access to first hand evidence about the events in question.

The Board acknowledges in its Report that the absence of the Complainant and his witnesses was unsatisfactory.

The SEB acknowledges that it is perhaps understandable, given the considerable delay there had been in arranging the hearing due to the objections raised by the Complainant which eventually took place two years after the complaint was first lodged, that the Board was reluctant to adjourn the hearing any further.

However, the absence of the additional witness evidence and the rejection of a request from both Mr Riley and the SEB's legal representative to call other witnesses, in circumstances where it was apparent that Mr Riley himself did not have first-hand evidence of many of the events (his evidence was in relation to the procedure which is admitted was deficient), leads the SEB to conclude that the Board did not have access to the evidence required to enable it to come to many of the findings it did; in particular those which concern the reasonableness of the decision and patient safety. The SEB therefore considers that a number of the Board's findings either cannot be relied upon or, at the very least, are materially diminished as a result.

This is in contrast to the investigation conducted by the former Solicitor General who interviewed 11 witnesses in depth during a period of over one month. Two witnesses (Mr Alwitry and Mr Downes) were interviewed twice. The transcripts of those interviews run

to over 1,000 pages and contain relevant and significant evidence concerning the reasons for the withdrawal of Mr Alwitry's contract or his dismissal from employment by the SEB. In this case the SEB considers that documentary evidence alone is not sufficient to understand the procedure followed in relation to Mr Alwitry's dismissal. Oral evidence should have been heard if the Board was deciding the reasonableness of the decision to withdraw Mr Alwitry's contract of employment and patient safety.

The transcripts of the former Solicitor General's interviews with the 11 witnesses were sent to the SEB after the hearing. However, they are not referred to in the Board's report. The SEB considers that this was a fundamental deficiency in the Board's report and it is a key reason why the SEB does not agree with most of the findings of the Board's report.

The SEB otherwise makes no comment on the summaries of the hearings, evidence presented and submissions of the parties set out in pages 1 to 68 of the Report.

In conclusion, the SEB considers that the Board conducted the hearing outside of its own terms of reference as set out in the Deputy Greffier's emailed directions and that the Board did not hear sufficient witness evidence relevant to the enlarged scope of the Board's review. The findings and recommendations fall considerably outside those terms and are not supported by witness evidence.

8 - The Board's findings (pages 68 - 70)

For ease of reference the Board's Findings are included before the SEB response and appear in italics. The SEB has grouped together responses to paragraphs where appropriate. The adoption of the language used in the Board's Report is made for convenience only and without any admissions.

Paragraph 8.1 - "*Mr Alwitry's contract of employment as a Consultant Ophthalmologist was entered into unconditionally in August 2012."*

SEB Response - This is agreed. The contract agreed was initially part time (three days a week) starting 3 December 2012 moving to full time in February 2013.

Equally however, once a binding contract was formed there were also obligations on Mr Alwitry, including an obligation to comply with the reasonable requests of the Hospital's senior management such as Mr McLaughlin and Mr Downes, as well as a duty of mutual trust and confidence between employer and employee. He did not comply with these requests and the relationship of trust and confidence between employer and employee broke down; consequently the SEB considers that the Hospital had reasonable grounds for withdrawing Mr Alwitry's contract.

A negotiation of Mr Alwitry's timetable had already taken place between Mr Alwitry and his Clinical Director, Mr Downes, in September 2012 which had resulted in the timetable that was issued by Mr Downes in his email to Mr Alwitry of 24 September 2012. This had been

preceded by the "negotiation" which had taken place over his start date in August which had resulted in the letter from the Managing Director of the Hospital dated 10 August 2012 which, as set out below, Mr McLaughlin referred to as "*remarkable*" and "*unique*" in his experience, leading him and others to doubt in August 2012 whether Mr Alwitry should be engaged as an employee at all.

Following Mr Downes' email of 24 September 2012 Mr Alwitry then proceeded to contact a plethora of staff in the Hospital seeking to go behind it and rearrange the timetable set out in Mr Downes' email. This was unacceptable and resulted in Mr Downes' letter of 9 October 2012 which clearly indicated the behaviour expected of Mr Alwitry in the organisation. Mr Downes expected to meet Mr Alwitry to discuss his arrangements for starting work in December 2012 when he came to the Island on 22 and 23 October 2012 but Mr Alwitry did not make any effort to meet him, nor did he attempt to meet any other member of Hospital management. Instead, following disclosure of documentation that was subsequently obtained from the BMA, it transpires that he was in discussions with the BMA and it did not suit him tactically to meet with Mr Downes at that time.

Mr Downes was left in the dark as to whether Mr Alwitry was intending to start work or not at the Hospital which led him to contact a consultant ophthalmologist at Derby Hospital where Mr Alwitry was then working to ask whether Mr Alwitry was coming or not. Whilst he was told that Mr Alwitry was coming to Jersey it is remarkable that Mr Alwitry made no effort to contact Mr Downes, despite being told by the Derby colleague that Mr Downes had contacted him to ask this question.

The relationship of trust and confidence between Mr Downes and Mr Alwitry had broken down by this stage and there were already doubts with senior management as to whether Mr Alwitry should be employed at all as they did not want to have a dysfunctional team of consultants in the Ophthalmology Department. It was in this context it was learnt on 12 November that Mr Alwitry had instructed the BMA to contact the Hospital's HR Department in an email which stated as follows: "*Dr Alwitry has run into a few problems with the consultant lead*" - ie his Clinical Director Mr Downes. It is disputed as to whether this approach from the BMA was a complaint, an informal complaint, a negotiating lever, a clarification of the number of Mr Alwitry's PA's in his contract as against his timetable or something else[9], but it was seen by the senior management as consistent with the pattern of disruptive and unmanageable behaviour that Mr Alwitry had already amply demonstrated from August onward. This was the "last straw" for senior management causing the Hospital to decide that his contract should be revoked or that his employment should be terminated.

Following receipt of a letter from Mr Alwitry's wife senior management were prepared to re-consider this decision but it was then learnt that Derby Hospital were not willing to re-engage

[9] It is to be noted that Mr Alwitry subsequently pursued a grievance against Mr Downes to the General Medical Council which was dismissed by the GMC.

Mr Alwitry as a consultant, something which was also "extraordinary".[10] This confirmed to senior management that they had taken the correct decision.

Paragraph 8.2 - "*The action of the SEB in breaching the contract . . . on 22 November 2012 was unlawful in that it represented a clear and fundamental breach of the contract by the SEB".*

and

Paragraph 8.4 - "*The decision to 'withdraw' Mr 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.*

SEB Response - The SEB strongly disagrees that the decision to withdraw Mr Alwitry's employment was not one which a reasonable body of persons could make. The ability to work harmoniously with colleagues is fundamental to the employer/employee relationship and there were reasonable grounds for senior management at the Hospital to consider that Mr Alwitry would not work harmoniously within a small team based on his behaviour from August to November 2012. Further, that ability is particularly important in a Hospital where a lack of a harmonious relationship within teams can result in serious adverse consequences for patient safety and clinical governance.

Mr Alwitry's conduct between his interview on 1 August and the letter sent to him on 22 November 2012 withdrawing his contract of employment demonstrated to senior management at the Hospital that he was extremely difficult if not impossible to manage. The Hospital's senior management (in particular Mr McLaughlin, Mr Downes, Mr Siodlak and Mrs Body, none of whom were interviewed by the Board) had never encountered such behaviour previously and they therefore reluctantly concluded that they had to dismiss Mr Alwitry. It was a difficult decision but they took it in the greater interests of the Hospital and the Island. The SEB agrees with that decision.

For example, Mr McLaughlin (the Managing Director of the Hospital) commented as follows in his evidence to the former Solicitor General -

> "*Well I've never had to write a letter like that to a consultant ever, and I've appointed dozens and dozens of consultants over the years. I mean this was such a remarkably unusual process from the time that the job offer was made*

[10] Pages 89 of the Transcript of interview with Mr Downes dated 25 November 2013 and page 105 of Transcript of interview with Mr McLaughlin dated 22 November 2013.

to the time that the job offer was withdrawn, it, it frankly, it's quite remarkable; there's no other word for it."[11]

As regards the multiple discussions with Mr Alwitry over his start date Mr McLaughlin states this -

"*the fact that that was within, effectively a, a working week, certainly not much more, of the interview, is unheard of. I mean, I, I, I've just never had to do that ever before. This was, and I am incredibly …how can I put this word? You have to be incredibly patient and flexible when you are dealing with consultants, 'cause they expect to have access to the, the people running the organisation, when it suites them, frankly at no notice. And you get used to the, because they're very able, intelligent people, they're used to getting that access. So you can't stand on ceremony; you certainly can't say 'no', because if they've got to come and see you or have made the time to come and see you, I always make the time to, to let that conversation take place. But that doesn't mean that there isn't a job to be done and eventually that needs to come to an end you need to get on with doing it. So the fact that my patience had been tested to that degree within days of an appointments panel, is unique*."[12]

As regards the "negotiations" over Mr Alwitry's timetable once he was due to start work full time in February 2013 Mr McLaughlin says this -

"*The term 'high maintenance' springs to mind, that there was an enormous amount of work that was generated by this individual, who still hadn't actually started working in the organisation. And it, it, just to give you an example there, flipping a list from Akin Famoriyo on Thursday afternoon in day surgery unit isn't as simple as it sounds, because he's a consultant gynaecologist and the nursing staff, the theatre staff that would be there to support, and the anaesthetist that would be there to support his operating would not necessarily be the same staff that would be needed to support and ophthalmology list, and it's also the case that when you have an ophthalmology list there are, because the risk of cross-infection is very high when you are dealing with people's eye, there are certain things you don't want to have recovering in the recovery room immediately before or people arriving for. So, so there, it's not just a case of whether it suits Mr Suchandsuch to flip his list from morning till afternoon or from one day to another, there is a, a, a raft of implications in staffing related issues that Mr Alwitry just either didn't understand or just didn't care about. And because he was firing off in so many directions simultaneously, you know,*

[11] Page 20 of Mr McLaughlin's transcript of interview on 22 November 2013 commenting in relation to his letter to Mr Alwitry dated 10 August 2012.
[12] Page 24 of Mr McLaughlin's transcript of interview on 22 November 2013.

he talks about the fact, "I could speak to Mr Famoriyo," well there are probably examples, I'm not aware of them, where, but it wouldn't surprise me, where he called a consultant and said, "I understand you've got a day's surgery list on such and such an afternoon, would you mind swapping it to this?" And of course that sets all sorts of hares running, because staff have their own personal arrangements around the fact that they operate on a particular day, and I'm not talking about the consultants, I'm talking about the nursing staff or the, the other staff that support a theatre session; and when they hear that a consultant's moving a list from day to another day, potentially it means their operating day is going to be changed and their schedules are going to be changed. And there are often knock on effects for all of these things about access to ITU beds, about, you know, how many patients are going to be cancelled.."[13]

"*The idea that you, as a consultant, who hasn't even started working in the organisation yet, rings a member of staff who, whilst she is a very senior and experienced nurse, she is relatively junior in the hierarchy, and you put what this email includes, which is a raft of alternative suggestions about moving this to there, doing this, doing that, doing the other, "I can simply ditch …" This is something that is totally inappropriate and just shouldn't happen, and I can't think of an occasion where I've come across this before…*

And frankly it just gives you an indication that you cannot, we were having real difficulty pinning this individual down to agreeing to anything that enabled us to put our plans in place to make it work in practice. And it didn't matter how often we thought we had got agreement, the debate was then reopened, usually with a conversation with a relatively junior member of staff who would have been trying to help and trying to say what the art of the possible was, but with imperfect knowledge of the other conflicting factors that need to be considered."[14]

As regards the decision to withdraw Mr Alwitry's offer of employment following the contact made to the Hospital by the BMA, Mr McLaughlin illustrates the difficult nature of the decision as follows -

"*I think the 'final straw' comment is probably a good way to describe it. On its own it's just a very small insignificant thing, it's just a piece of straw, but it was the last thing, when it was added to everything else that happened before, that kind of just said, "Look, there isn't actually a way back on this individual, let's just go with the gut feel on this," however painful it's going to be, that this individual will be a nightmare in the organisation to manage, and, and we need*

[13] Pages 53 of transcript of interview with Mr McLaughlin.
[14] Page 54 of Transcript of interview with Mr McLaughlin

to do the right thing, not because there's any advantage to us in doing it, quite the reverse, it's going to be horribly painful to do it, but the alternative is that we land Jersey with a consultant, who is clearly unmanageable in governance terms, for the next 20 years, and, and that's not an appropriate way to do your duty. So we did the difficult thing even though there was no advantage for us in doing it, because we weren't going to be around to have to deal with the chap anyway. So if we'd just said, "Just appoint him," it's going to be our successors' problems, not our problem. Well that's an easy thing to do. Why would you go into the world of pain of withdrawing his contract, unless you had a really, really powerful feeling that that was the right thing for Jersey to do? That's exactly where we were and the BMA was just the final tipping point; it wasn't actually significant. If it hadn't have been there, would we have come to the same decision? Yes, is my view. So it, it looks as if it was the final tipping point, but was it in and of its own right massively significant? No, it was just symptomatic of everything that had gone before."[15]

As regards the importance of harmonious relationships in teams within the Hospital and patient safety Mr McLaughlin states this -

"*when I first arrived I was brought in specifically to deal with a number of issues, one of which was the relationship issue, which had broken down between the consultants in obs and gynae, and that related to the, to the tragic death of Mrs Rourke during a routine procedure a number of years ago, which had led to police investigations and other investigations, GMC enquiries, the lot. There was a difficult relationship between the consultants in that department and it needed mediation to sort out, and part of what I was doing when I first came in was actually conducting that mediation between the consultants in that department. I can think of at least three other departments where there were multiple BMA complaints raised by consultants against their consultant colleagues, very poor relationships, and that compromises potentially, potentially compromises patient care. Now there was, so there is a very clear link between behaviours of consultants and the relationships between consultants within the department and their ability to deliver safe care ultimately to patients*."[16]

This is highly relevant and significant evidence from a hugely experienced hospital director who has previously successfully managed large NHS trusts in the United Kingdom. A myriad of similar comments were provided in evidence by other members of the senior management team such as Mr Downes, Mr Siodlak and Mrs Body and some of that evidence is set out later

[15] Page 92 of Transcript of interview with Mr McLaughlin
[16] Page 97 of Transcript of interview with Mr McLaughlin

in this response. Unfortunately, their evidence appears to have been wholly ignored by the Board in its Report.

Whilst it is entirely accepted that there could be improvements in the way this was handled, the SEB and the Hospital remain convinced that it was the correct decision in the best interests of the Hospital and of the Island of Jersey. There were procedural failings which the SEB had previously acknowledged. However, the SEB strongly invites the Board to reconsider the remainder of its findings.

Paragraph 8.3 - "*It is for the States Assembly to consider whether it is acceptable general policy 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*"

SEB Response - The SEB notes that the Board recognises that *"there may be exceptional circumstances that would justify a breach of contract if it were clearly in the public interest to do so".* It is submitted by the SEB that there were such exceptional circumstances here.

The general interests of the Hospital and the Island of Jersey in this case have already been referred to in the evidence of Mr McLaughlin. Mrs Body (the Director of Operations of the Hospital) comments on the wider considerations as follows -

> "*…is that the way you act as a team? You're coming in to a new hospital and you're saying, "Well, by the way, that gynae lot can have my Friday list, 'cause I don't want it." You know, and, and ophthalmology is largely a day, a day procedure. Patients come in the morning and go home at night, and we do have complications and Mr Alwitry's quite right, but he's got, for patients that are, are deemed to be complex and, and you can't always tell when something goes wrong, but you can put those complex cases on the Tuesday list that he had. Gynae patients invariably stay in for three or four days and so we steer away from trying to do gynae operating. We do have to do it and, and Mr Famoriyo had to take a Friday morning, but you try and steer away from it, so that you put those cases on the beginning of the week so that they can recover and go home by the end of the week. It's much better, it's safer and it's better use of, of all resources and it's much nicer for the patient. So but the, just the, the team spirit of saying, "Oh, let that lot have it 'cause I don't want it," is, is not right. But what was frustrating is you've now got everybody 'cause, 'cause he was having conversation with the theatre manager, the, the clinic nurse, you know, Bartley, Richard, even myself, not much with myself, when I first copied in, I could see, you know, what was happening. Nobody knew where, where they were going. You didn't know what you were going to set up and, and the time is going on, and it takes a while to set up your profiles and, and, and to get the right systems in place. And so, you know, I've been in, in*

quite a few appointments and sometimes closer than this one, and, and sometimes more distant, but I've never experienced this."[17]

She also states -

"…*I would hope there was an organisation strong enough to say, "Hang on a minute," you know, "It isn't just about whether you are very good clinically, it is whether you are right for the hospital, for the benefit of the healthcare service," 'cause we do need consultants to be managers. We need them to make big important decisions with managers in the interests of, of patient care, and direct clinical care as well. And my worry is this sort of thing will make managers in the future, "Phhh, I don't think I'll go there*."[18]

Similarly, Mr Downes' evidence (Mr Downes was the Clinical Director for Ophthalmology and Mr Alwitry's future direct line manager) was follows -

"*Because within the organisation you need to work within a team, you need to work within a hospital structure and you need to be able to relate with your colleagues without perhaps causing all sorts of problems before you've even started in post. The theatre is just one example, with Mr Famoriyo; you know, Bartley wasn't prepared to change his timetable right from the outset. All he was prepared to do ever was to change his, his on call, which didn't really make much difference one way or the other. The, the, the way in which the department runs, it has to be, you've got to have an overview with regard to what the rest of the staff are doing, what the rest of the facilities are and what the nursing staff are doing. And the overview fits with this timetable, and that's the timetable that he was going to be taking up. That was it, that was the timetable that's organised for him, that was the definitive timetable that was arranged, and that is the one that I expected him to, to adhere to….*

I spoke with Judith as well about this. Judith said, "I don't want to hear from that man [ie Mr Alwitry] again. I am completely fed up with him pestering me by emails and telephone calls, expecting me to do things which I have told him I can't alter. Andrew has, was, in the meantime, saying, you know, he was getting other discussions of not a dissimilar thing from other people including Mr Famoriyo and one of the anaesthetists. So he was probably aware of a wider hospital wide problem. And my feeling was, at this stage enough was enough, Amar [Alwitry] needed to understand that we had done what we could and I didn't really want to be entering into myriads more of emails until he got into post. When he was in post, when he knew things would be able to change, that's the time to do things, if indeed we were able to do that. But, you know, that was the best we

[17] Page 22 of Transcript of interview with Mrs Body on 15 November 2013.
[18] Page 57 of Transcript of interview with Mrs Body on 15 November 2013.

could do. There was no point in him continuing to badger everybody, different individuals; if he doesn't get the answer he wants from one person, he goes to another, doesn't get it from that person, he goes to another. If he doesn't do that, he tries to undermine other people's authority and also their recommendations with regard to things like, you know, the timetable and working conditions."[19]

In circumstances where Mr Alwitry's behaviour was so exceptionally disruptive to the arrangements of the Hospital there were reasonable grounds to withdraw Mr Alwitry's contract of employment before he occupied a permanent post as a consultant where he would cause more disruption contrary to the interests of the Hospital and of patients.

Paragraph 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*".

And paragraph 8.5.2 - "*Dr Alwitry was allowed no right of appeal, notwithstanding that a right of appeal was clearly set out in his employment contract."*

And paragraph 8.5.3 - "*The persons raising the charges brought against Mr 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.*"

And paragraph 8.5.4 - "*At no time was Dr Alwitry given a fair hearing, or indeed a hearing at all*."

SEB Response: - It is accepted that the decision to withdraw the offer of employment was procedurally deficient in that he was not allowed an opportunity to answer the charges against him at a hearing or a right of appeal. However, it is not entirely correct to state that the persons raising the charges against him were the same as those who took the decision in that Mr Luksza and Mr Siodlak had not been materially involved in the events leading to the decision to withdraw the offer. Further, Mr Downes who was a person *"raising the charges brought against Mr Alwitry*" was not present at the meeting on 12 November 2012 at which the decision was taken as he was away in the United States and unaware of the meeting or the decision. The advice from Mr Riley of the Hospital's HR Department to senior management (Mr Riley was present at the meeting of senior management on 12 November 2012) was to proceed with the decision without giving a hearing or right of appeal to Mr Alwitry based on his experience of withdrawing contracts in the NHS in the United Kingdom. Further, the decision was subsequently checked with Mrs Garbutt, the Chief Executive of the Health and Social Services who was not present at the meeting on 12 November 2012 who decided to brief the then Minister for Health concerning it. Nevertheless, in the event that there was a future need to withdraw an offer of employment from a consultant before their commencement

[19] Page 51 of transcript of interview with Mr Downes on 25 November 2013.

date there will be a meeting with that consultant to provide him or her with the opportunity to explain their version of events.

Paragraph 8.5.3 - "*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*."

And paragraph 8.5.4 - "*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*".

The decision to recruit and dismiss employees lies with the relevant Chief Officers in line with the general scheme of delegation agreed by the SEB and in accordance with the Employment of States of Jersey Employees (Jersey) Law 2005 and accompanying Regulations. The Director of Human Resources for Health and Social Services alerted the Chief Executive for Health and Social Services about this case on 13 November 2012. The Chief Executive of Health and Social Services briefed the then Minister for Health and Social Services on or about 14 or 15 November 2012 as it was recognised that this was an unusual situation concerning a senior clinician.

The Chief Executive (of Health and Social Services) foresaw the likelihood that Mr Alwitry would seek to engage politicians and the media in an attempt to bring pressure to bear on the Department and for that reason members of the SEB were advised about this case before Mr Alwitry was informed of the decision to withdraw the offer of employment. The Chief Executive of Health and Social Services and the Minister received letters and emails from a variety of people, including members of Mr Alwitry's family challenging the decision from 29 November 2012. Mr Alwitry's letter to the Chief Minister dated 18 December 2012 was not received by the Chief Minister until after the SEB's meeting on 18 December 2012.

It is accepted that the meeting of the SEB on 18 December 2012 was attended by seven members of Hospital staff and also by the then Minister for Health. The attendance of Hospital staff at part of the SEB meeting gave SEB members the opportunity to question them directly, although equally Mr Alwitry was not present at this meeting.

The SEB is the body which employs all States of Jersey employees. It is the body which might be sued and/or criticised in the Assembly notwithstanding any powers delegated to officers. It was right therefore for the SEB to be briefed about this case.

The SEB`s delegation of authority to the Chief Executive and onwards to the Chief Officers of Departments properly ensures that the decisions for the recruitment and termination of contract together with the application of policies which support Human Resource Management are taken at the appropriate level. In the event that decisions or outcomes need to be

challenged, then clearly defined appeal or grievance processes exist. The position has been further clarified by P.60/2015, amending the Employment of States of Jersey Employees (Jersey) Law 2005, and the development of appropriate Codes of Practice.

As for the Board's finding that the SEB "*seemed concerned only that the decision should not attract the attention of the Health, Social Security and Housing Scrutiny Panel [Scrutiny Panel*]." Presumably this finding was made on the basis of the minute of the meeting on 18 December 2012 having heard no evidence from any of the members of the SEB who were present at the meeting on 18 December 2012. However, the minute of the meeting on 18 December 2012 also refers to Standing Order 136 of the States of Jersey and to the Code of Practice for Scrutiny Panels. Standing Order 136 sets out the terms of reference for scrutiny panels and this issue could only potentially have fallen within *"(a) to hold reviews into such issues and matters of public importance as it, after consultation with the chairmen's committee, may decide*".

Firstly, it is at least questionable whether the withdrawal of Mr Alwitry's contract of employment is a matter of public importance or a private law issue for which the jurisdiction and remedy prescribed by statute is the Court or Tribunal as provided by the Employment (Jersey) Law 2003 [and in Mr Alwitry's contract of employment]. It is noted that in a Record of Meeting of the Health, Social Security and Housing Scrutiny Panel dated 11 November 2013, the Panel was advised that this emanated from a grievance matter (which Scrutiny was not permitted to undertake reviews into) and that the Panel agreed that if it were to undertake a review it would not include any personal matters relating to the grievance case. Clearly, Scrutiny Panels have independent status - determination of their business is a matter for them within the statutory framework and Codes within which they operate. Secondly, even if this was a matter of public importance there had been no consultation with the chairmen's committee as at 18 December 2012 as required by Standing Order 136, which is a requirement to ensure that Scrutiny Panel's valuable resources are properly allocated. In these circumstances it was appropriate for the SEB to seek clarification of how the Panel's interest would accord with the terms of Standing Order 136.

Thirdly, as regards the Board's finding that the SEB meeting on 18 December 2012 "ratified" the Hospital management's decision the SEB decided that the Director of Human Resources should conduct a review of the recruitment process as soon as possible and report his findings to the Board. At the meeting of the SEB on 4 March 2012 the SEB clarified that the H&SS was only able to proceed to appoint a locum to the Ophthalmology Department. Only after the independent review by Mr Beal had been completed would a decision on the way ahead be made. The SEB submits that this this does not amount to a ratification of the Hospital's decision.

Finally, the SEB does not accept that the notion of "ratification" is appropriate in the context of the decision-making process. Whilst individual members of the SEB were consulted prior to the actual decision being taken, the SEB's role was to maintain an appropriate level of political oversight and not to interfere with operational issues.

Paragraph 8.6 - "*The Board makes no finding as to whether, had there been a properly independent review of the claims made in respect of Mr Alwitry's behaviour, such review would have been likely to find in favour of the employer or the employee….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 [sic] the summary termination of Mr Alwitry's contract of employment.*"

SEB Response - Mr Beal's review was an independent review.[20] Mr Beal is an experienced external HR Consultant based in the UK without connections to the Island. Mr Beal interviewed 18 witnesses including Mr Alwitry. Mr Beal's conclusions were in summary form as follows -

> *''. . . this was a measured and reasonable response from the SMT in the HSSD to rescind this offer of employment to this Consultant."*
>
> *"The process was not robust and lacked objectivity and integrity as outlined in the report"*
>
> *"The concerns around AA's attitude and behaviour before taking up his post rightly concerned the senior team"*
>
> *"The team took a reasoned and well thought through approach, taking soundings on the matter from the law office, informed SEB of their view and took the 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.''*

The Board's Report does not explain why it dismisses the conclusions of Mr Beal, which is the consequence of its finding in paragraph 8.6

The former Solicitor General's report was also an independent review. The former Solicitor General also concluded in briefest summary that it was reasonable for the Hospital to terminate Mr Alwitry's contract. The Board's comments on the former Solicitor General (later in the Report) betray a fundamental misunderstanding of the role of Crown Officers who are independent of the States of Jersey and appointed by Letters Patent. The former Solicitor General has previously prosecuted a doctor at the Hospital for manslaughter and the SEB for

[20] Appendix 1 Document 41

serious health and safety offences. If he was sufficiently independent to do that, the former Solicitor General was equally independent to conduct an employment law enquiry into a group of professionals at the Hospital with whom he had had no prior contact or knowledge.

The Board's findings stand in stark contrast to the findings of Mr Beal and the former Solicitor General, both of whom had interviewed many witnesses, including Mr Alwitry, unlike the Board. The SEB therefore considers that the conclusions of Mr Beal and the former Solicitor General are reliable and soundly based.

The Board's Recommendations (pages 70 to 74 of the report)

For ease of reference the Board's Recommendations are included before the SEB response.

R9.1 *On a personal level the decision to terminate Mr 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. Mr 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.*

A9.1 The decision to withdraw the contract of employment was not one which was taken lightly. The SEB disagrees with the unqualified conclusions set out in this paragraph. The Board describes Mr Alwitry in the next recommendation as "*a young, highly regarded and motivated consultant with a particular specialism in glaucoma".* A surgeon with those skills should be able to gain a suitable position with relative ease.

The SEB profoundly disagrees with the conclusion in respect of the motivation of the Hospital's senior management team, which was driven not by financial cost but by ensuring a harmonious working relationship within a small team of three consultants and not creating a dysfunctional Ophthalmology Department, with consequential risks to patient safety. The easy option for the members of the Hospital's senior management team would have been not to withdraw Mr Alwitry's contract but they declined to take the easy option in the interests of the Hospital overall and of the Island

The former Solicitor General found that Mr Alwitry's behaviour was a legitimate cause for concern at the conclusion of his investigation, as did Mr Beal.

The inappropriate use of patient safety in an attempt to change a timetable and persistent and unfounded allegations made by Mr Alwitry thereafter made it

impossible, in the view of the former Solicitor General, for Mr Alwitry to work in the Ophthalmology Department of the hospital.

Mr Alwitry was not prepared to abide by a decision made by a member of the hospital management when it was given to him. He was prepared to seek out the views of other managers or junior staff in order to obtain a different answer or in order to put pressure on the original decision maker to reconsider.

Mr Alwitry's communications with management were a concern in terms of the accuracy of the information he provided. His evidence to the former Solicitor General in interview was poor and as noted above, he was and remains prepared to persist in pursuing serious allegations that have no merit. For example, he persisted with a complaint against Mr Downes to the General Medical Council which was dismissed by the GMC in 2015, and where no evidence was identified by the GMC in relation to six specific allegations.

By 10 October 2012, Mr Alwitry had effectively ceased communication with the individual who would become his line manager and with the senior management team at the Hospital. His relationship with his future line manager had become dysfunctional at this stage. He declined to meet with his future manager on or around the 23 October 2012 even though he had offered to do so. This would have given Mr Alwitry an opportunity to discuss his concerns in person.. Mr Alwitry maintained this communication style even when Mr Downes sought to reach out via a mutual acquaintance.

R9.2 *Based on the comments after his interview and the independent references that we have seen, as a result of the unlawful termination of Mr 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 Mr 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.*

A9.2 The SEB respectfully disagrees. The Hospital has since appointed three young highly regarded and motivated consultants with complementary specialisms to work in the ophthalmology department. In total the Hospital has successfully recruited 21 Consultants since 2012 using revised processes which were not all in place during the period covered by the Complaints Board. Indeed verbal and written feedback has been received from successful and unsuccessful candidates and Royal College representatives complimenting the Hospital on its recruitment process. Included in the appendix are emails from ten Consultants commenting on the positive experience of

the recruitment process in Jersey, including positive comparisons with the NHS recruitment process[21].

R9.3 *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 Mr 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 Mr 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.*

A9.3 The Hospital now has a full complement of ophthalmologists and, for the avoidance of doubt, the SEB will not reinstate Mr Alwitry.

R9.4 *The Board acknowledges that this is probably not going to happen. We are now nearly 4 years on from the time that Mr Alwitry was offered the job and over $3^{1}/_{2}$ 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 Mr 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.*

A9.4 See answer to Paragraph A9.3

R9.5 *The best alternative that the Board is able to recommend is that the Chief Minister and the Minister for Health and Social Services give Mr 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.*

A9.5 The SEB acknowledges that the withdrawal of Mr Alwitry's contract constituted a termination of his contract. This was not done lightly, however it was Mr Alwitry's conduct and behaviour alone which led to this step being taken

The SEB accepts that the withdrawal of the contract did not provide Mr Alwitry with a period of notice nor offer a procedure (such as a right of appeal). It accepts (and has accepted since November 2012) that a payment should be made to Mr Alwitry to reflect the absence of a period of notice and the offer of a procedure.

[21] Appendix 1. Document 8

In matters of employment law, it is necessary to consider whether an employer has acted reasonably. That is to say there is, in any employment situation, likely to be a range of reasonable decisions that might be taken by an employer. The issue for a Tribunal is to consider whether the decision taken by the employer fell within that band of reasonableness. Clearly, this is a materially different test from a Tribunal deciding whether it would have taken the same decision were the Tribunal in the employer's position.

In certain employment matters, a dismissal may be justified when the integrity or competence of the employee is not in issue but where the cause for concern is personality and the inability of the employee to build and maintain essential working relationships with others in the workplace. In Perkins v St Georges Healthcare NHS Trust [2005] EWCA Civ 1174, the English Court of Appeal considered the appeal of an employee who had been dismissed because they were unable to work harmoniously with other colleagues, which was an essential part of the role. The English Court of Appeal confirmed that such an issue in the workplace can justify dismissal. The employee's response to the criticism made of him by his employer was to launch a sustained and manifestly ill-founded attack upon the honesty and integrity of his colleagues. These allegations made it impossible for the employee to continue in his employment and due to their nature and persistence, they were found to corroborate the original concern; that the employee was near-impossible to work with.

Employment Tribunals in both England and Jersey frequently hear unfair dismissal cases whereby an employer has good grounds to dismiss an employee but has failed to follow a fair procedure before taking the decision to dismiss. In such circumstances, Tribunals are highly likely to make a finding of unfair dismissal, awarding a measure of compensation to the employee. However, if it is found that the decision to dismiss had merit, this may be a relevant factor in assessing the level of compensation awarded. In these circumstances, the employee's conduct would be a relevant consideration and Tribunals have been known to reduce an award to zero, based on the employee's conduct.

In the context of this case, it is also important to acknowledge that it is not uncommon for employers to decide that the situation with an employee is such that it would be better to terminate the contract and make a payment to the employee equal to the compensatory award that may be due. This is in order to draw a line under the matter and quickly move on, should that be in the best interests of the company or organisation. Clearly such a decision should only be taken only after very careful thought, however the SEB does not regard such action as extraordinary or rare as the Board appears to suggest.

The Hospital's overriding motivation in withdrawing Mr Alwitry's contract of employment was because it had lost trust and confidence in him and to ensure a

harmonious working relationship within a small team of consultant ophthalmologists in the interests of patients.

R9.6 *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.*

A9.6 To the extent that the issue is not resolved by agreement with Mr Alwitry, the question of the appropriate amount of compensation payable to Mr Alwitry will be determined ultimately by the Royal Court. The SEB will not conduct negotiations involving public money via the Board.

R9.7 *As far as the Hospital is concerned, the Board has a number of recommendations. These include -*

R9.7.1 *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.*

A9.7.1 The SEB does not accept the finding that there is a need for *"a comprehensive and independent review of the management structure and practices for recruitment and disciplinary matters."* This is an extra-ordinary recommendation extrapolated from a limited evidential base. Further, there are now specific recruitment processes for Consultant appointments which are in line with those followed by the NHS. The SEB refers to the aforementioned correspondence attached from a number of doctors complimenting the Hospital on the Recruitment process followed[22].

[22] Appendix 1. Document 8

The disciplinary process for Consultants is the "Policy for the Handling of Concerns and Disciplinary Procedures relating to the Conduct and Performance of Doctors and Dentists".[23] If disciplinary action is required then the SEB approved policy is adhered to. This was updated in 2014. The SEB remains satisfied that these are fit for purpose.

Recruitment and disciplinary decisions in relation to Consultants are not taken by senior clinicians acting alone; they are always taken in conjunction with the Managing Director and the Medical Director.

Clinical leadership is essential in the effective management of hospital services. All specialities have a clinical lead and all Consultant recruitment involves several Consultants. Jersey would be an outlier amongst its peers if it did not involve clinicians in management decisions.

The decision making process in respect of recruitment and disciplinary matters is distinct from the process followed in agreeing operating timetables. It is commonplace for the Clinical Director to be responsible for agreeing timetables with their Consultant colleagues.

The Management Structure at the Hospital has been further strengthened since the appointment of Helen O'Shea, the Managing Director, in 2013. Attached is a chart which shows the current structure[24]. There is an appropriate focus on clinical governance which is in line with structures in the NHS.

R9.7.2 *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 Mr 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;*
- *Mr 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*

[23] Appendix 1. Document 40
[24] Appendix 1. Document 41

(for which he would be compensated by being permitted to pursue his private practice).

A9.7.2 The Hospital took the relatively unusual step of including an indicative time frame within the advert. The job description, which did not include a start date, was approved by the Royal College of Ophthalmologists. It is the SEB's understanding and the evidence provided to the former Solicitor General that in the NHS, it is not unusual for advertisements for Consultant posts to have no start date. As the inclusion of a start date is not the norm, it should have alerted potential applicants to the need to explore this further but Mr Alwitry did not raise this in his pre-interview meetings or at interview.

Mr McLaughlin (who chaired the interviews of candidates for the position) commented as follows in relation to the start date -

> "*it's very unusual for it to be anything other than that expected position, and that expected position is that a consultant appointment, if they're resigning from an appointment to take up a new appointment, they would be expected to give a maximum of three months' notice. Everybody works on three months' notice in my experience and I've been working in hospitals for, for many, many years….*
>
> *it's, it is very unusual that there would be a six month delay between an appointment and a start date. But that's' why it's, it's unusual that when we had the interview itself, or the interviews, that there was absolutely no, it just wasn't raised*."[25] Nevertheless, it is accepted that in future, if a particular start date is required, this should be specifically stated.

Mr Alwitry was provided with the contract of employment and the Code of Conduct for Private Practice. If Mr Alwitry had decided not to undertake any privately paid work then he would only have had to work the hours set out in his contract of employment; namely to undertake 40 hours of work with public patients, but he had informed Mr Downes and Mr McNeela that he wanted to carry out private patient work..

R9.7.3 *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 Mr 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 Mr Alwitry had no appeal rights under his executed contract or employment because he had not physically started work, was not subject to any*

[25] Pages 13 and 14 of Transcripts of interview with Mr McLaughlin dated 22 November 2013.

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.

A9.7.3 The SEB are assured that improvements in relation to recruitment, particularly in relation to start dates and hours worked have been implemented. There is a formal disciplinary process in place as referred to above. The SEB commissioned two reviews, both of which concluded that the decision made was correct. Neither was cursory and both were independent.

R9.7.4 *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 Mr 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.*

A9.7.4 There were many email exchanges with Mr Alwitry which recorded key conversations which had taken place, all of which are available. An example of the volume of email traffic is that over 3 days there were thirteen emails from Mr Alwitry to and from a variety of staff at the Hospital.

It is accepted that phone calls and meetings were not documented which should have been; however it is not realistic to expect that contemporaneous notes of all conversations can be or should be made by Hospital staff. In hindsight, once concerns started to accumulate about Mr Alwitry, those involved should have kept comprehensive records of their telephone calls and meetings.

R9.7.5 *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.

A9.7.5 As soon as a manager becomes aware of the possibility of a matter leading to disciplinary or other formal proceedings, they are fully aware of the requirement to make appropriate records. Should a manager be concerned about potential disciplinary action, they are expected to seek advice from Human Resources who are able to offer advice about a range of issues, including appropriate record keeping.

This is an issue that is routinely addressed as part of managerial training and development.

R9.7.6 *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 Mr Alwitry's contract, although there is no record of the basis of their consideration of the matter. The letter to Mr 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 Mr Alwitry had been notified of the termination) the Board failed to do anything other than limit what they saw as political fall-out.*

A9.7.6 See response to paragraph 8.5.3 above.

It is not correct to suggest that the SEB did not take this matter seriously or seek appropriate assurances about the actions of the Health and Social Services Department. It is for this reason that the SEB commissioned the Beal Report and the investigation by the former Solicitor General. The investigations were thorough and wide ranging. The former Solicitor General interviewed 11 witnesses over a one month period, two of whom were interviewed twice, including Mr Alwitry. Mr Beal interviewed 18 witnesses, including Mr Alwitry.

R9.7.7 *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.*

A9.7.7 The SEB has received detailed and comprehensive evidence of improvements made since 2012. This recommendation is an unnecessary and disproportionate response to an employment law dispute with one individual. Any process failings which have been identified have now been rectified.

There is no evidence to suggest this is systemic or widespread. The SEB refers to the paragraph above where information is provided regarding the successful recruitment of many outstanding candidates across many specialities since 2012.

ANNEX A - DETAILED FINDINGS

A. Summary (pages 75 to 78 of the report)

The SEB responds to the detailed findings below rather than in response to the Summary.

B. Preliminary matters

i. The duty of candour and open dealing with the Complaints Board (pages 78 - 79)

The SEB notes the Board's comments in relation to the open basis upon which material has been provided to it.

ii The obligation to provide complete evidence to the Complaints Board (79 - 80)

Please see comments earlier which set out the extensive correspondence regarding the terms of reference which unequivocally stated that patient safety issues would not be considered.

iii The former Solicitor General's report (pages 81 - 84)

On 5 September 2013, the former Solicitor General was asked by the SEB to investigate this case with the primary focus being to ascertain the true reasons for the decision taken. In particular, he was to determine if there was any truth in the allegations being made by Mr Alwitry that the decision had been taken in bad faith.

The former Solicitor General was a Law Officer appointed by Letters Patent. During his time in office, he previously prosecuted a doctor at the hospital for manslaughter

and the SEB for serious health and safety offences. Given that he was sufficiently independent to prosecute a doctor for manslaughter and the SEB for other criminal offences, it is respectfully submitted that he was equally sufficiently independent to conduct an employment law inquiry into a group of professionals at a hospital with whom he had had no prior contact or knowledge.

As the Board itself acknowledges, the Law Officers' Department had not given advice as to the merits of the decision to terminate or the procedure to be followed prior to the decision taken by the hospital on 13 November 2012 but had merely provided limited advice as to the potential financial consequences were a decision to withdraw the contract taken. That advice was disclosed as part of the interview bundle. It did not matter whether it was right or wrong (the Board appears to accept it was correct); the former Solicitor General was not investigating its accuracy.

The former Solicitor General's objective was to ascertain the true reasons for a decision that had already been taken; on the 13 November 2013.

The SEB is advised by the former Solicitor General that he would have corrected any previous advice had it been required to do so, and that there is precedent for such correction, including on one occasion by a previous Attorney General.

Mr Alwitry was provided with a draft of the former Solicitor General's report and given a full opportunity to respond.

Whilst employment law investigations often preclude lawyers from having any involvement at all in an investigation, Mr Alwitry's lawyer was permitted to attend the interviews and to make submissions on receipt of the draft report.

The findings of fact of the former Solicitor General are primarily based on what was admitted by Mr Alwitry in interview when considered with relevant documentary evidence. The former Solicitor General tried to avoid reaching conclusions based solely on the Hospital's evidence. Indeed, he preferred Mr Alwitry's evidence to Mr Downes' on an important point relating to likely glaucoma patient numbers, when it later transpired that he was incorrect to do so.

In comparative terms, the observation that the former Solicitor General's involvement and conclusions are "unusual" is not made out. Employment Tribunals frequently find that employers have reached a correct decision, thereby preferring the evidence of the employer on this aspect of the case, using an incorrect procedure, thereby accepting that dismissal was unfair and preferring the employee's evidence on that point.

It is noted that the Board agrees with the former Solicitor General on a number of matters. As to the matters on which there is disagreement, very few of the findings are in fact described as unreasonable in the Board's report.

iv Mr Riley's evidence (pages 84 - 85)

It is submitted that it was not appropriate for the Board to come to any conclusions about the reasonableness of the decision to dismiss without hearing first hand evidence from those involved at the time, including Mr Alwitry but also the Hospital's senior management who took the decision. Mr Riley could not do this alone as his evidence largely went to procedural matters.

Furthermore, it submitted that it was not possible or appropriate for the Board to make recommendations about improvements required without hearing evidence about the current systems and procedures in place at the Hospital. In any event, the events analysed in the Report took place four years ago and there have many improvements and changes made by the Hospital in the intervening period.

v. Mr Alwitry (pages 85 - 89)

The Board did not hear evidence from Mr Alwitry. However, Mr McLaughlin, the Managing Director of the Hospital who had enormous experience of dealing with consultants in NHS hospitals in the United Kingdom, commented vividly on attempting to manage Mr Alwitry in his evidence to the former Solicitor General as follows -

> "*when you, when you're having a conversation with him it's a bit like somebody who's playing you as a piano, to, to press as many notes as they can and then they find one of the notes that actually gets a response and they, they play on that one as hard as they can, but some of the ones where they've played and they don't get the right response, they don't get tapped again. So there, there, there's, it's, it's a very subtle exploration of where the potential routes in, routes out ways of negotiating are, and it frankly is immensely tiring when you are just trying to run a hospital, to have to deal with somebody who is that wrapped up as they are in, in every detail of every aspect of what they're going to be doing when they come."* [26]

It is submitted that the explanations of his behaviour which Mr Alwitry gave to the former Solicitor General as recorded in the transcript of the two interviews with him are consistent with the comments of Mr McLaughlin set out above and were not credible. This is particularly the case in relation to inconsistencies in the evidence he gave in relation to his dealings with the BMA in his two interviews, the second of which took place after receipt of disclosure of documentation from the BMA.[27]

Mr Alwitry's references were considered by the former Solicitor General when preparing his report.

The SEB notes the Board's comments that not hearing evidence from Mr Alwitry constituted a disadvantage. The former Solicitor General interviewed Mr Alwitry at length on two occasions (as well as other witnesses).

The extent of such interviews and the fact that the former Solicitor General interviewed 11 witnesses explains why the former Solicitor General and the Board have reached different conclusions. Although the Board was provided with the former Solicitor General's report and the transcripts of the witness interviews, there is no reference to the content of those interviews in the Board's Report.

The SEB disputes the notion that Mr Alwitry's overriding concern was patient safety at the relevant time and agrees with the conclusion of the former Solicitor General that

[26] Page 109 of Transcript of interview with Mr McLaughlin on 22 November 2013.
[27] See pages 24 to 69 of the Transcript of interview with Mr Alwitry on 16 December 2013.

Mr Alwitry's predominant concern was his family. Mr Alwitry wrote to the Minister for Health and Social Services on 29 November 2012[28] and the Medical Director of the Hospital on 30 November 2012[29]stating to the Medical Director that he had allowed family concerns to cloud his judgement.

Mr Alwitry was very troubled by the prospect of being separated from his family for long periods of time before they were able to move to Jersey in July 2013. This is not a criticism of Mr Alwitry but it does help to explain why a doctor with good references might start to engage in inappropriate conduct. In the view of the former Solicitor General, Mr Alwitry's primary objective from the outset was to start full time work in Jersey in February 2013 with a view to arranging a timetable that would enable him to maximize his time in the United Kingdom until July 2013 at which time his family would move to Jersey. The SEB does not accept the Board's apparent suggestion that family was just a factor in this case. In the SEB's view, and as supported by the former Solicitor General's investigation, it was the dominant factor and obviously so from consideration of both the evidence given by Mr Alwitry and the documentation.

There were two main disputes that resulted in the decision to terminate the contract. One related to Mr Alwitry's start date. The other concerned his timetable which required him to be at the Hospital every Friday morning and to operate every second Friday (and thereby potentially prevent a return to the UK at the weekend).

Start date

An indicative start date was included in the advert. The job description, which did not include a start date, was approved by the Royal College[30]. The SEB understands in the NHS that it is not unusual for advertisements for Consultant posts not to have a start date.

It is however accepted that if there is a particular need for a Consultant to start on or by a particular date this should be stated in the advert. It is accepted that this should have occurred both pre- interview and post-interview. That is now the procedure in place at the Hospital.

The issues about start date in August 2012 were driven by Mr Alwitry's desire to spend as much time as possible in the United Kingdom with his family until July 2013 when they planned to move to Jersey.

Mr Alwitry told the former Solicitor General that he gave serious thought to declining the offer of employment once he knew he was expected to start on 1 December 2012 rather than 1 February 2013: "*because I was thinking that I was going to struggle to*

[28] Appendix 1. Document 9
[29] Appendix 1. Document 10
[30] Appendix 1. Document 11

come over here and leave my family and four small kids when they really needed me. Then I was wondering well do I wait until the next post comes up…or do I jump ship and leave my family to struggle" Mr Alwitry said that he had been 'soul searching' at this time and the former Solicitor General understood that to be his genuine description as to his state of mind. He gave serious consideration to declining the job offer once he realised that a February 2013 start was not achievable. In August 2012, Mr Alwitry raised the prospect with the Hospital of working part-time until July 2013, when his family was scheduled to move to Jersey. He ruled out working a three-day week once he realised that the mid-week travel arrangements would make it difficult for him to "*be back on Wednesday evening for the kids on Thursday*"[31]. This supports the view of how important the family issue was.

vi Patient safety (pages 89 - 92)

It appears that the Board accepts that Mr Alwitry did not wish to operate on a Friday for family reasons: Board's report paragraph 148.1. That is obviously correct having regard to Mr Alwitry's strength of feeling over his family and a reading of the other evidence in the case that includes the following -

Date	**Emails from Mr Alwitry**
10.08.12[32]	*Just realised that if they dump Friday afternoon on me then it may fall on you too. Sorry*
03.09.12[33]	*Looking at the timetable it looks like that will shunt my two sessions off in lieu to Fridays which is great as that will mean that when I'm not on call I can come back to the mainland on Friday morning to see the wife and the kids for the weekend.*
05.09.12[34]	*As you know [Mr Alwitry's wife] and the Kids will not be joining me until July so I am planning on booking flights up back and forth at the weekends*
24.09.12[35]	*I tend to bring back patients for review on day one which obviously wouldn't work on a Saturday, Besides that it also messes up my chance of getting back to see the misses and the 4 kids!*
29.09.12[36]	*Did you have any joy speaking to [redacted name] for me about allowing me to do every Thursday afternoon in DSU?*

[31] Appendix 1. Document 12
[32] Appendix 1. Document 13
[33] Appendix 1. Document 14
[34] Appendix 1. Document 15
[35] Appendix 1. Document 16
[36] Appendix 1. Document 17

	Even if he could do it just until July when my family come over to join me that would be a great help
01.10.12[37]	*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 Friday so it would work out well* *The timetable is too heavy anyway….. so I'll definitely be ditching Friday alt morning clinic*
02.10.12[38]	*I do not want to do the alt Friday mornings…This means I'll be able to fly back to the Island Monday morning 1st thing which means I get all day Sunday with the family. I'm over the moon as it will make the period till the end of the school year (when they'll all come over and join me) much more bearable*

An indicative timetable, included in the job description sent to Mr Alwitry, was approved by the Royal College: Board's report paragraph 5.1. This is part of the usual process followed in Jersey and in England before a Consultant post is advertised.

It is accepted practice that this is an indicative timetable and that there are may be minor revisions to the timetable. Royal College approval is not required to amend the timetable.

On 24 September 2012, Mr Alwitry was provided with a final timetable by Mr Downes [39]that required him to work full time from 1 February 2013 and to operate on alternate Fridays Mr Downes had previously discussed the indicative timetable with Mr Alwitry and in the revised timetable he sought to take account of Mr Alwitry's wishes balanced against the wider constraints of the Hospital such as theatre and clinic availabilities. Mr Alwitry received the timetable at 11:57am on the 24 September. At 1:24pm the same day[40], Mr Alwitry emailed the Theatre Sister about the "proposed" timetable in order to ascertain if he could move his Friday operating slot. Mr Downes, his line manager who had produced the final report, was not copied into this email. Mr Alwitry's justification to the Theatre Sister for seeking a change was as follows -

> *I'm not keen on operating the day before a weekend when we have no junior cover to review the patients if there are any complications and also I tend to bring back patients for review on day one which obviously wouldn't work on a Saturday. Besides that it also messes up my*

[37] Appendix 1. Document 18
[38] Appendix 1. Document 19
[39] Appendix 1. Document 20
[40] Appendix 1. Document 16

chance of getting back to see the misses and the four kids! - they aren't joining me till mid-July.

(emphasis added)

Mr Alwitry put forward two reasons for his desire to move the Friday slot: (a) patient safety and (b) personal family reasons. There can be no doubt that Mr Alwitry wished to move his Friday slot for family reasons and, as already noted, the Board accepts this. The issue that arose to determine in the former Solicitor General's investigation was whether the Friday slot also happened to raise genuine patient safety issues that required further consideration or whether the issue was being raised as a means to manipulate the timetable.

The former Solicitor General concluded in his original report that those patient safety concerns were without merit and that in truth, Mr Alwitry wished to avoid Friday operating to keep his weekends clear and had raised patient safety as a means to achieve that change to the timetable.

The Board strongly disagrees with that view but, strikingly and in somewhat contradictory terms, also admits that it is not "*in a position to judge the precise merits of the concerns raised*": page 87, paragraph 39.

The General Medical Council rejected Mr Alwitry's complaint relating to patient safety issues in August 2015[41].

The patient safety concern raised by Mr Alwitry can be summarised thus: if a doctor operates on a glaucoma patient on day one then that patient should receive follow up care from the doctor on day two. The former Solicitor General accepted that this proposition was correct in his original report: see paragraph 94.

The Board suggests that the former Solicitor General should have obtained expert evidence on this general principle. This is surprising, given that the former Solicitor General had accepted Mr Alwitry's evidence on the point: see Board's Report at paragraph 42 and note the contrast with paragraph 94 of his report.

Moreover, it does not automatically follow that the acceptance of a general principle means that a safety issue arose for consideration on the facts of the particular case. It is necessary to apply the principle to the facts and, in doing so, two issues in particular arise. The first issue is whether Mr Alwitry would have such a vast number of glaucoma patients that Friday surgery for such patients would be unavoidable. Mr Alwitry had eight surgery slots during his four-week timetable, only two of which were scheduled for a Friday morning. Mr Alwitry was required to be on call one

[41] Appendix 1. Document 21

weekend in four, therefore there would only be one Friday operating list per month when he would not be available for follow up checks on a Saturday. The second issue is whether, were Friday surgery unavoidable for such patients, Mr Alwitry would be able to attend on the Saturday to provide cover if necessary?

As to the first issue, the former Solicitor General had assumed in Mr Alwitry's favour in his original report; that alternative Friday operating was inevitable. Mr Alwitry had told the former Solicitor General in interview that 30% to 40% of all ophthalmology is glaucoma and so "*my clinics are going to be 'chocca' with glaucoma*".

The former Solicitor General proceeded on this basis in Mr Alwitry's favour notwithstanding the fact that Mr Downes had provided the following evidence during the course of his investigation -

> *"the sort of surgery that he is talking about is glaucoma surgery, he's probably not going to be doing more than maybe 20 or 30 of these a year at the outset, and they can all be done on his Tuesday list, so, you know, the Friday list, this was just, I thought this guy is being very disingenuous and really trying to manipulate the system here."*[42]

This is an example of an important dispute of fact that the former Solicitor General resolved in Mr Alwitry's favour in his original report.

Subsequently, the Ophthalmology Department has provided the following information: the total annual public surgical procedures for Ophthalmology Department average 871. Of these, 2.6% were in-patients. 97.4% were day cases. In respect of trabuculectomies (complex glaucoma cases), the maximum number of such operations in any one year in Jersey has been eight. The number of cataract cases with a recorded co-morbidity of glaucoma averages 65 per year. The number of all procedures with a recorded co-morbidity of glaucoma averages 68 per year. Even assuming that Mr Alwitry were to undertake all of these cases, then he would only have to operate on around 1-2 per working week of the year. The SEB understands that the average theatre session in ophthalmology has five cases in each list, therefore undertaking these more complex cases on the Tuesday or even the alternate Thursday list would have been possible and would not have introduced a patient safety risk at all.

In light of this evidence, there would be no need for Mr Alwitry to operate on a glaucoma patient during his alternate Friday list and therefore his patient safety issue of Saturday cover did not arise on <u>the facts of this case.</u>

[42] Page 46 of the Transcript of interview with Mr Downes dated 25 November 2013.

Mr Alwitry worked as a locum at the Hospital on three previous occasions prior to August 2012 and it is reasonable to conclude that he obtained at least some knowledge and insight of the workings of the Ophthalmology Department. A careful review of other parts of Mr Alwitry's evidence in interview suggests that he was aware that the patients who might genuinely require follow up care would be limited in number -

> *But it doesn't take away from the fact that some patients on a Saturday would have glaucoma, they would need their pressure check the next day. There is nobody available to check the pressure apart from the ophthalmologist. Now, that was going to be me after July when, when I wasn't flying away, but I was going to be flying away, so I didn't have anybody to do it for me. In my email I said, "Look, I will try and be on call, definitely, for most of my list, but is there a chance that you could just see the odd patient? It won't happen frequently but is there a chance you could just see the odd patient just to keep them safe?"*[43]
>
> *Emphasis added*

Mr Alwitry emailed the Theatre Sister on 3 October [44]to suggest that he could conduct his glaucoma list on Monday afternoon when Mr Downes was on leave -

> *Had a mini brain wave. As you know I had an issue about needing lists on consecutive days so I could take my glaucoma cases back to theatre if they needed it. How would you feel about my taking Richard's Monday afternoon list when he's away on holiday and putting my glaucoma surgeries on there. This would only be once in a while and by arrangement well in advance. I'd identify cases that needed doing and then see when RND is next on leave, speak to you to make sure you are happy with me jumping onto that Monday afternoon and then book them on and do the list".*

The reference to the glaucoma list is in the singular and its infrequent nature is suggestive of an appreciation on Mr Alwitry's part as to the likely numbers of glaucoma patients he might be required to treat. The Theatre Sister responded on 3 October - [45]

> *"I certainly don't have an issue with you taking Richard's Monday DSU list when he is on leave. The one thing I absolutely hate is free lists which I work very hard at avoiding so that plan will work fine".*

On 4 October, Mr Alwitry contacted a nurse in the Ophthalmology Department in order to commence a different negotiation about his timetable, stating that "*I'm hoping to do*

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[43] Page [ ] of Transcript of interview with Mr Alwitry on [ ] 2013.
[44] Appendix 1. Document 22
[45] Appendix 1. Document 23

glaucoma surgeries on my Tuesday AM list"[46]. Once again, Mr Alwitry appears to refer to a single list per week for his glaucoma patients.

When Mr Alwitry emailed his line manager on 7 October[47], the message was materially different. Mr Alwitry asserted that he would need to operate on his glaucoma patients during his alternative Friday slot and therefore went on to suggest that the need to provide cover on a Saturday raised patient safety issues given the lack of "*junior worker bees to look after patients at weekends*". Mr Downes was asked, against the background of patient safety, to revisit the timetable and move the Friday slot to Thursday.

When Mr Downes replied by email on 9 October[48] confirming that the timetable stood, Mr Alwitry contacted his trade union. The BMA asked to see "*a copy of your email to the Clinical Director and a copy of his response[49]*". This was a direct and obvious request to see Mr Alwitry's email of 7 October and the 9 October reply from Mr Downes. Mr Alwitry did not provide the 7 October email to the BMA. Instead he choose to provide his own trade union with (a) an earlier email he had sent to Mr Downes on 24 September [50]that simply said "*I have some issues with the proposed timetable which I'll discuss direct with you.*." and (b) Mr Downes' "reply" of 9 October.

It is difficult to avoid the conclusion that Mr Alwitry chose to provide his Union with incomplete and misleading information.

Mr Alwitry wrote to two States Members[51] and to the Medical Director [52]following the withdrawal of the job offer. In both cases he did not raise patient safety as an issue, only family reasons. This was his opportunity to 'wave the red flag of patient safety' to the Medical Director, whose role it is to respond to such issues. It was also his intention, as stated in the letter, to give the politicians the facts - however patient safety was not mentioned.

A doctor who has genuine patient safety concerns has a duty to report those concerns. The BMA did not spot any patient safety issue in their conversations with Mr Alwitry during October 2012 and instead suggested to Mr Alwitry that they need not get involved. Given the Board's description of Mr Alwitry as being tenacious and demanding in seeking platinum standard for patient care at paragraph 30 of its report, it is nothing short of remarkable that he declined his contractual right to appeal his job plan and failed to press patient safety with his own trade union, if such issues were a genuine concern. Mr Alwitry did not lodge a formal complaint about patient safety with

[46] Appendix 1. Document 24
[47] Appendix 1. Document 25
[48] Appendix 1. Document 26
[49] Appendix 1. Document 27
[50] Appendix 1. Document 28
[51] Appendix 1. Document 9 and Document 9A
[52] Appendix 1. Document 10

senior management at the hospital and indeed barely raised the issue at all. In short, Mr Alwitry did the very opposite of what one would expect of a doctor raising genuine patient concerns until his belated 2015 complaint to the GMC that was then rejected on the basis that there was no evidence to support it[53]. The Board do not comment on these aspects of the case.

It is the SEB's view that there is no patient safety issue in respect of the alternate Friday operating slot on the particular facts of the case and that Mr Alwitry's limited attempts to raise such concerns with the hospital in 2012 and then his much later formal complaint to the GMC in 2015 were and remain without justification. The SEB is of the view that these matters were raised in order to secure a timetable that better suited his family circumstances.

It is axiomatic that patient safety issues are of central importance to the running of a hospital. If one doctor decides to seek to manipulate safety issues for personal gain then the inevitable result is that the employer will become concerned about the working relationship with that doctor. This conduct raised issues about Mr Alwitry's integrity. What is particularly troubling is that Mr Alwitry chose to lodge his complaint to the GMC after the former Solicitor General had concluded that his allegations had no evidential basis. His persistence in pursuing these allegations is a further cause for concern.

The former Solicitor General observed in his original report that Mr Alwitry was entitled to ask questions about his contract and the number of hours he was required to work compared to his timetable. This was a conversation that should have taken place with the Hospital and been resolved without great difficulty. The SEB presumes that this is the reason that Mr Alwitry told that the former Solicitor General that he accepted that it would have been reasonable for the hospital to require him to provide Saturday cover, if required.

These issues were a separate matter and cannot be used to justify the attempt to use patient safety issue concerns in order to force a revision of the timetable. Sensible conversations about the issue would have resulted in Mr Alwitry being provided with the usual concessions relevant to his private practice arrangements.

Mr Alwitry raised patient safety issues only in an attempt to secure a more favourable timetable. In 2014, the former Solicitor General rejected Mr Alwitry's allegations that Mr Downes had put patient safety at risk. The General Medical Council rejected the same allegation in 2015[54], finding no evidence to support it. Mr Alwitry has persisted in making this same allegation to the Board who notably record in their decision that they do not feel able to assess its "precise merits": page 87, paragraph 39. Mr Alwitry has persisted in other unsupported allegations of bad faith. Mr Downes would have

[53] Appendix 1. Document 21
[54] Appendix 1. Document 21

been Mr Alwitry's line manager at the hospital had he been allowed to take up his appointment.

Whilst it is accepted that it would be valid to raise a patient safety issue regarding operating on complex cases on a Friday, the suggested timetable enabled Mr Alwitry to plan his work to avoid operating on such cases on a Friday. Therefore, the patient safety argument had no basis.

On the contrary, the decision taken to dismiss Mr Alwitry was in significant part driven by the interests of patient safety and good clinical governance. The concerns regarding the patient safety risks arising from dysfunctional teams expressed by Mr McLaughlin, Mr Downes and Mrs Body have already been set out above. Mr Siodlak, the surgical Medical Director of the Hospital commented in his interview with the former Solicitor General as follows -

> "*Because this had been going on since August and he was becoming more and more difficult to deal with, and whenever anyone said one thing to him, he just went to somebody else and it kept going round and round. And we had to have some sort of governance within the organisation that shows that, you know, if, if people had just been difficult and appear to want to just do stuff for themselves and don't, won't play in a team, it makes it difficult….*
>
> *. . . the conduct was just out of, extraordinary out of anything that I've ever seen before. Most people have a bit of a discussion about how their timetable will run. Nobody really wants to work Friday but most people have to work Friday and then they accept it when they say, "Well, this is how it will be, do you want to come or not?" and then they accept the status quo and come, and then when they get in, they try to influence things once they are in. But he was continually, from my conversations with other people in the management group, continually, when he was told, "You can't do that by one person", he would go to another person, and say, "Can I do…? Can I …"? the same thing to try and get a different answer, to try and undermine what I was going on within the management group…*
>
> *. . . I mean, it's called clinical governance, it's called looking to see what's going on within the hospital to make sure that people are doing their job properly and safely… and to always improve what we are trying to do for the patients. And if some doctors feel that they can operate outside that, it's sometimes very difficult to control them*."[55]

[55] Pages 8, 10, and 13 of the Transcripts of interview with Mr Siodlak on 14 November 2013.

C - The basis on which the Respondent conducted the appeal (pages 93 to 94)

See comments earlier about the terms of reference of the Board.

D - The job description and draft terms and conditions of appointment (pages 94 - 97)

Paragraph 51.3. The schedule of the Consultant Terms and Conditions document makes provision for Consultants working outside normal working hours and would have applied to Mr Alwitry. He would have received one full day off as time in lieu for working outside normal working hours and received payment for covering when one of his team was on leave.

Paragraph 53 (page 95). "*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."*

It appears that the Board has misunderstood this aspect of the Consultant Contract (Jersey) 2004. A Consultant cannot be paid twice for the same period of time. If the States of Jersey remunerate a Consultant for being present in theatre for a whole session yet that Consultant operates on a private patient who pays a fee to the Consultant, the Consultant is being paid twice. The additional 1.5 PAs in Mr Alwitry's timetable were in recognition of the fact that he intended to operate on private patients in States funded periods of time, in the operating theatre. He would therefore be obliged to 'pay back' this time to his public hours of work, the 40 hours he is contracted to provide for public patient activity. In doing so, he would not be working 'for free'.

E - Mr Alwitry's Application and the start date (pages 97 - 100)

And

F - 8 to 15 August 2012 (pages 100 - 109)

It is common ground that Mr Alwitry had requested a delay of six months to his start date on his application form. This issue was not raised at the interview process and it should have been. However, the failure to raise the issue of start date at interview has to be put in its proper context and considered against all the evidence in the case.

Mr Alwitry's interview took place on 1 August 2012.

(a) Mr Alwitry accepts that at the pre-interview meeting on 31 July 2012, Mr Downes, informed him that the "*we had a pressing need for a variety of reasons for the appointment to be taken up ASAP"*. He was provided with the waiting lists at around this time by Mrs. Body.

(b) The Board concluded that by the end of the 1 August interview process, "*we think it likely that Mr 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 negotiations over the precise date": paragraph 69.

(c) The Board also reached the view that Mr Alwitry's email exchange with Mr Downes' medical secretary on 1 August[56] shortly after his interview proves that Mr Alwitry realised he was "*expecting at least some pressure on him to come earlier than February 2013*": paragraph 69. That email exchange expressly raised the prospect of Mr Alwitry being in Jersey in time for the Christmas Party.

(d) Mr Alwitry was emailed the day after his interview on 2 August at 10:08 by one of the doctors who had interviewed him- Mr Alan Thompson. Mr Thompson's tone was of genuine congratulations: "very impressive interview". Mr Thompson then asked: "*I assume that you have to work your notice back home in the UK and so your arrival will be around October/November*". Mr Alwitry replied by email the same day but his answer was extremely vague. He did not mention a delayed February 2013 start and nor did he rule out an October/November start.

There does not appear to be any serious dispute that by 2 August, Mr Alwitry had learned from two members of his interview panel (Mr Downes and Mr Thompson[57]) that he was required to start 'ASAP' and that the assumption was that he would be starting in October/November. On the basis of the findings of the former Solicitor General, which the Board only disputes "on balance", Mr Alwitry had also been told by Mr Downes that he needed to start by Christmas at the latest.

The Board accepted that the evidence is "*consistent with him [Mr Alwitry] expecting at least some pressure on him to come earlier than February 2013*" paragraph 69. However, when that "*pressure*" came in the form of Mr Downes requesting a start date of 1 December, the Board goes on to express the view that *". . . Having failed to make these matters clear to Mr Alwitry either before or during the interview, it was equally inappropriate retrospectively to seek to impose on him [Mr Alwitry] a different commencement date to the one that he reasonably anticipated . . .*": paragraph 82. The Board also states that the hospital was "*rewriting the job offer*".

Even on the Board's findings of fact, Mr Alwitry was fully aware that he was going to face some pressure to start earlier than February 2013. The SEB does not view the subsequent request to start on 1 December 2012, as opposed to 1 February 2013, as anything other than the Hospital seeking to secure an earlier start date as was reasonably anticipated by Mr Alwitry on the Board's own findings.

Moreover, the Hospital cannot reasonably be accused of rewriting the job offer given the Board's express finding of fact that Mr Alwitry knew that start date was still to be negotiated

[56] Appendix 1. Document 29
[57] Appendix 1. Document 30

and that this was communicated to him at the time he was told that he was the successful candidate. By definition, a term that is to be negotiated has not yet been written and therefore there was nothing to rewrite. Mr Alwitry knew that a start date prior to Christmas was to be proposed by the Hospital and indeed it was.

If a hospital has a genuine need for a doctor to be in post by a certain time in order to address a problem such as growing waiting lists, then it must be open to that hospital to identify any mistake made at interview and quickly remedy it so that a doctor is appointed within the required timeframe, as the Hospital did in this case. The Hospital's overriding concern was to reduce patient waiting lists for both surgery and clinics as it is not acceptable to have patients waiting for more than 3 months to have, for example, a cataract operation.

In the view of the SEB, the Hospital was not fixed by or stuck with the mistake made at the interview stage. It was entitled to say to an interviewee "*we are sorry this was not made clear earlier to you (if it be the case) but our particular requirements are x because of these demands on our services*".

The Hospital's decision to inform Mr Alwitry that they needed him to start work by 1 December was a decision that was reasonably open to them. All the evidence points towards the management of the Hospital seeking to appoint a new consultant quickly, principally because waiting lists were "through the roof".

The Hospital was also entitled to decide that the negotiations should have a limited timeframe, not least because if the answer from Mr Alwitry was ultimately "no", then there may have been a need to quickly approach another doctor.

Although the error at interview is embarrassing for the Hospital, it is also easy to lose sight of the fact that Mr Alwitry gained a considerable advantage from this mistake. Were Mr Alwitry to have been asked at interview when he was able to start, it is assumed that his answer would have been "February 2013", consistent with his application form. That answer may well have led to the interview panel rejecting his application in favour of another candidate who was able to start full time in November 2012. Instead, Mr Alwitry had from 2 until 15 August to consider if he wanted the job, having regard to the Hospital's requirements.

The SEB is unimpressed by Mr Alwitry's repeated protestations to management in mid-August that he had no idea that the Hospital wanted a pre-Christmas start given Mr Thompson's email about an October start[58] that he had acknowledged on 2 August [59]and the Board's own finding that he knew he would face pressure to start earlier than he wanted to.

There are further aspects of Mr Alwitry's behaviour that also remain a concern.

[58] Appendix 1. Document 30
[59] Appendix 1. Document 31

Mr Alwitry response to his telephone conversation with Mr Downes on 8 August, and on learning of the 1 December start requirement, was to contact Mr Leeming in the Hospital's HR Department[60]. He contacted Mr Leeming without Mr Downes' knowledge and he did so in an attempt to secure an employment contract with more favourable terms than had been proposed by Mr Downes at that stage. On any view, Mr Leeming is a more junior member of staff. The Board do not challenge any of the former Solicitor General's findings in respect of this incident: paragraph 77. The Board is right to observe that the attempt failed. This was an example of Mr Alwitry receiving an answer from his line manager that was not to his liking and then seeking a different answer from an alternative member of staff. The attempt failed only because Mr Leeming contacted Mr Downes before taking any action.

The initial conversations between Mr Downes and Mr Alwitry had been amicable on 8 August but what then followed was (a) the attempt to get a better answer from Mr Leeming and (b) a refusal to come earlier than February 2013 once it became apparent that mid-week travel did not suit Mr Alwitry's family arrangements. In the view of the SEB, the Managing Director, Andrew McLaughlin, was entitled to commit the Hospital's position on start date to writing at this stage not least so as to ensure there was only one conversation between the Hospital and Mr Alwitry on the issue.

It was for the Hospital and not Mr Alwitry to determine what start date was appropriate having regard to patient needs. The error at interview meant that Mr Downes was extremely diplomatic in his earlier conversations with Mr Alwitry on 8 August but by the 10 August the nature of conversation had materially changed. Mr Alwitry was now refusing to come other than on his terms. The Hospital was entitled to say, as any employer in this situation would be, that the appointment was to be on their terms. It therefore did so.

In the view of the SEB, it follows that the Board's conclusion at paragraph 83 onwards, that the 10 August 2012 letter by Mr McLaughlin[61] reflected an inappropriate culture that required 'blind obedience' from its consultants, constitutes a significant misunderstanding of the position. The purpose of the letter of 10 August was not to require Mr Alwitry to obey orders without question. The employer was entitled to set out what start date it felt was appropriate.

After the 10 August letter was sent, there was a period between 10 August and 14 August when the Hospital management agreed to reconsider Mr Alwitry's request for a delayed start beyond 1 December. This is inconsistent with the Board's view that management was demanding slavish obedience.

During this short period, Mr Alwitry engaged in behaviour that raised further issues of trust and confidence.

[60] Appendix 1. Document 32
[61] Appendix 1. Document 33

Within about an hour of Mr McLaughlin's letter being sent Mr Alwitry was on the telephone and his evidence concerning that conversation was as follows -

> "*So I said I'd take the call and I went into my office and I think we were on the phone for at least 40 minutes and it might even have been longer. And it was exactly what I had described before, where, you know, "I want 'X'," "No, no, no, can I offer you 'Y'?" "No, we can't have 'Y' because …" "Well can I offer you 'Z'?" "No, no, we can't have 'Z' because …" And all the time I was trying to be flexible in terms of, "Could you do this, could you extend, why can't you do this?" You know, why, I, I was trying to understand what it was that was stopping him working compressed hours, three day weeks and starting from the 1st of December. Because frankly that seemed a very reasonable compromise, and he was talking about starting fulltime, I believe, in the end of January, early February time, so we were only talking about two months, and then he was saying, "Oh, well actually you've got Christmas and New Year, so that's two weeks after that, so why don't I just not start until January, well call it the second week in January, I'll tell you what, why I just start on the 1st of Feb?" And, "Look, you're not understanding this, we've got staffed theatre sessions, we've got a backlog of patients that we have to clear, we can't go, the only person that is out there that is available to do a locum is the candidate we turned down to appoint you to this post." So it would be awkward, to put it mildly, to go to a candidate you had turned down to perform the job because the candidate you appointed, it's not convenient for them to come and start at the date that everybody expected that they're be there in post. And I, I gave him a lot of time. I, I explained my reasoning and I explained the needs of the organisation and I was quite careful to be as accommodating as I could whilst maintaining a firm like that we expected him be in the organisation and working by the 1st of December. Because we had already experienced the fact that you could put something down as a line in the sand, and then following our conversation you'd, you'd, you'd give on one area on the basis that something else was going to come instead. And then you found in the next conversation that the thing you had given was assumed into the baseline position, but the thing that had been offered in exchange for that now wasn't on the table. And, and it was a very frustrating negotiation process. So I had decided that the line in the sand was the 1st of December and I was prepared to be as flexible as I could be in virtually every other aspect to get something that was agreeable to him so that he could start work on clearing the backlog on the waiting list from the 1st of December. And when we got to the end of the conversation, where he'd said, "Okay, so I'll start on the 1st of December and I'll work a compressed three day week until …" blah-blah-blah, he then went back again and said, "But*

why can't …" And you just thought, "Oh gosh," you know, here we go, I, I don't want to go round this buoy one more time. "[62]

After speaking to the Managing Director of the Hospital on 10 August 2012 Mr Alwitry then proceeded to contact various other members of staff to try to get his way on his start date.

In the Report of the former Solicitor General, he concluded that Mr Alwitry had made a number of statements about Angela Body and the status of the waiting lists which were deemed to be unfair and inaccurate. The Board states in its report that it is not in a position to assess his conclusion: paragraph 91. The SEB supports the view that Mr Alwitry played down the significance of the waiting lists and misquoted Ms. Body in order, he hoped, to secure an outcome that better suited his family circumstances. The Board does not express any view about this conduct. However, Mrs Body's evidence to the former Solicitor General on this point was clear and was as follows -

"*there's another email where I totally refute that . . .*

I'm very disappointed 'cause I worked with Mr Alwitry and I was …watching events that were happening throughout the course of the days, you know 9 o'clock, it was still going on at 5 o'clock, the next day, ditto, about what the start dates were...

There is no way I would have said, "We don't need a third consultant," and if we did, we needn't have gone to advert for this post anyway.

And we should not have patients waiting over three months for a cataract operation and, and we did, so I certainly didn't say anything."

The SEB is of the view that if a doctor is prepared to make inaccurate statements about a patient care issue to benefit their personal circumstances, then that is a legitimate cause for concern.

Mr Alwitry also contacted other members of senior management in order to obtain their support against the clear line being taken by the Managing Director. He even wrote to Mr Downes on 14 August[63] openly criticising the line taken by the Managing Director and raising the prospect of further disagreements with the management in the future. This conduct raised obvious issues about how Mr Alwitry and management were going to work constructively together in the future.

Mr Downes' evidence concerning Mr Alwitry's email to him of 14 August 2012 was as follows -

[62] Page 27 of the Transcript of interview with Mr McLaughlin on 22 November 2013.
[63] Appendix 1. Document 34

"*I thought, well, you know, that perhaps indicates his lack of understanding of my role within the department of the organisation at that stage. He knew I was the clinical director, he knows what clinical directors are supposed to be doing and that they have a managerial responsibility. It also made, you know, there were further, alarm bells were starting to really ring by this stage. You know, this is someone that is, you know, has really bucked up against management, obviously, in the past.*

The alarm bells is that someone is, is feeling that they need, it, it almost is going to be essential to be confrontational with management to get anything done, and, you know, that is just so, so twentieth century it's untrue. You know, you can't get anything done by upsetting management, you know, you have to work together, you know, that, that's the whole, the whole point of the new management structure, that's the reason for having doctors in management, and that's the reason why he wouldn't have ever had to have had any arguments with management, because in my role as the clinical director I would have protected him from a lot of that.

I found that really, you know, pretty, pretty unacceptable and particularly saying, "I'll be led by you in them," and I thought well I'm not quite sure about that, I must say."[64]

On the 14 August, the Hospital informed Mr Alwitry that they were unable to accommodate his requests and that the 1 December start date had to stand[65]. Mr Alwitry then put forward yet further proposals. The Board is critical of the Hospital for failing to reconsider its position in light of these further suggestions. It is the SEB's view that the Hospital was not obliged to engage in endless dialogue with Mr Alwitry until it gave in to his demands. It was entitled to conclude the negotiations on 14 August having spent four days considering the position and a total of six days in conversation with Mr Alwitry. There is no obligation on any employer to engage in unlimited negotiations until or unless the employee secures what they wish.

G - The Contract of Employment is agreed (pages 109 - 110)

The SEB agrees that a binding contract was formed once an offer was sent to Mr Alwitry and agreed on 21 August 2012.

H - The discussions in September/October 2012 about clinics and surgery times (page 110)

There is common ground regarding the expectation that a newly appointed Consultant will agree their final timetable with their new employer. It is normal practice that this negotiation

[64] Page 35 of Transcript of interview with Mr Downes on 25 November 2013.
[65] Appendix 1. Document 35

and agreement takes place with the relevant Clinical Director for the service, this can be seen in most current recruitment packs.

The SEB notes that it is not good practice to negotiate a job plan and surgery times with multiple persons behind the back of Mr Alwitry's future Line Manager and Clinical Director.

I - The discussions over the permanent timetable (pages 110 to 135 of the report)

The major issue over timetable related to operating on a Friday.

In January 2010, Verita, an independent consultancy firm based in London, provided the Health and Social Services Minister of Jersey with an independent investigation into the care, treatment and management of Mrs Elizabeth Rourke who had died during routine day care surgery at Jersey General Hospital on 17 October 2006. The report was produced with the assistance of Mr Julian Woolfson, Consultant Obstetrician and Gynaecologist adviser at the Royal College of Obstetricians and Gynaecologists. Verita made a number of findings about the wider management issues at the hospital and concluded at page 14 of its report, *inter alia*, that -

> *The distant senior management team did not engage well with senior medical staff or provide sufficient leadership to the organisation.*
>
> *Managerial focus on the day-to-day operation of the hospital was under-developed and clarity about accountabilities, for example the identity of the manager to whom consultant medical staff reported, was lacking. The medical management structures were relatively unsophisticated. For example, appraisal and job planning for consultants had barely taken root by this point.*

Verita described a lack of involvement on the part of the hospital's Clinical Directors in management meetings as a major management weakness (page 196). There was a need for the Clinical Directors to take on more of leading role. Following this report the role of Hospital Managing Director was created.

In the view of the SEB, the Hospital management should take the lead in determining timetables for surgery in order to maximise the use of the operating theatres, having regard to the overall available staff and resources required to effectively and safely operate and run these facilities. It cannot be that the Hospital management are required to accept whatever suits the particular Consultant or be presented with 'swaps' negotiated by doctors in private without any thought as to the consequences for the Hospital or its patients. The job planning process requires discussion between manager and doctor, not the doctor and a wide range of hospital staff. Mr McLaughlin's evidence to the former Solicitor General was very clear about this in the context of this particular case -

> *"The lead clinician is Richard Downes; Richard Downes has taken his views into account, had given him a timetable that was the best compromise he could*

> *come up with as the lead clinician in that department. The idea that you, as a consultant, who hasn't even started working in the organisation yet, rings a member of staff who, whilst she is a very senior and experienced nurse, she is relatively junior in the hierarchy, and you put what this email includes, which is a raft of alternative suggestions about moving this to there, doing this, doing that, doing the other, "I can simply ditch ..." This is something that is totally inappropriate and just shouldn't happen, and I can't think of an occasion where I've come across this before".*[66]

The SEB is wholly unpersuaded by the Board's conclusion that it was acceptable for Mr Alwitry to run, in parallel, three lines of negotiation in respect of his timetable with (a) Mr Downes (his line manager) (b) Judith Gindill (Head of Nursing & Divisional Lead, Theatre Sister) and (c) Carol Hockenhull (clinic Sister). Mr Alwitry's contract expressly provides for job planning with his manager and not the 'myriad of individuals' who became involved in discussions about his timetable in this case. That is perhaps why Mr Alwitry commented to Ms. Gindill "*if you'd rather stay out of this*[67]" or why Ms. Hockenhull was invited by him to "*keep this email discussion just between us*"[68]. It also perhaps further explains why Mr Alwitry did not disclose his 7 October [69]email to his own trade union when asked by the BMA to do so.

The Board do not comment on Mr Alwitry's criticisms of Mr Downes made to the Theatre Sister during these discussions "*I would have hoped my senior colleagues could have sorted it for me but clearly the support isn't there*". It is the SEB's view that these remarks were not conducive in maintaining a working relationship with his new line manager nor were they the first or last time that Mr Alwitry would make or circulate similar comments about Mr Downes and other members of management.

The SEB refers to paragraph 113 onwards of the Board's report concerning an email from the Theatre Sister sent on 25 September[70]. The Board cites this document to support the view that Mr Downes had given Mr Alwitry his approval to try and swap his alternative Friday shifts. The weight of evidence is that he did not.

The relevant part of the email from the Head of Nursing reads -

> *As far as I understand and 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 and Thursday am is Bartley and you will to alternative Thursday pm and alternate Friday am in mains - if you and [redacted name] agree to change this then that is OK with me.*

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[66] Transcript of interview with Mr McLaughlin on 22 November 2013.
[67] Appendix 1. Document 36
[68] Appendix 1. Document 37
[69] Appendix 1. Document 25
[70] Appendix 1. Document 38

The background to the telephone call referred to in the email is that the Theatre Sister had telephoned Mr Downes to clarify the position in terms of the timetable. The SEB supports the view that the Theatre Sister's reference to the conversation with Mr Downes ended with the word "mains" and her own views start with the use of "if" in the final sentence. The use of the phrase "OK with me" in the final sentence is rather key here and "me" is a rather obvious reference to the Theatre Sister who wrote the email rather than Mr Downes who is referred to as "he" in this email.

In any event, Mr Alwitry did not suggest in interview that he thought Mr Downes had authorised these attempts to change his timetable, which is a much better guide to the correct interpretation of the 25 September email[71]. Rather he justified his conduct on the basis of patient safety issues -

> "*Q Mr Downes has sent you an email on the 24 of September. He's part of management and I presume you understand that the management need to fix an overall timetable at the hospital which takes into account everybody, not just yours. . .*
>
> *AA: Absolutely. Yeah, absolutely.*
>
> *Q: .Why are you emailing Mrs Gindill on your own volition on the 29th of September and trying, in effect, to change the timetable that Mr Downes has given you, without going straight back to Mr Downes, and say . . .*
>
> *AA: Because I didn't want to cause problems with, with Mr Downes, because he said that he had done the best he could. He said that he had put in the groundwork for the, for the Thursday afternoon and so I presumed that it, it was something that was almost done, and I had patient safety concerns. And Judith was, was very, very friendly, very, very nice, very, very welcoming and she said, "If you have any concerns or any, any worries or do you want to chat about anything, please contact me." So I thought if it was a simple matter to get it sorted out and that it was already done in, in her timetable version of (inaudible) which you have seen, and then it was changed back again, that it would be a very simple matter for her to change it, the, the, the other, other way round and I would save Richard a job, effectively.*
>
> *Q: You would save him a job?*
>
> *AA: Yeah, absolutely.*
>
> *Q: another view about this is that this is another example of you not liking the management decision and then shopping around for a different answer. What*

[71] Appendix 1. Document 38

do you say to that?

AA: I, I think that there's kind of a bit of validity to that comment, because I had patient safety concerns and if the management decision hadn't really gone into them enough and sorted out a proper solution, then I thought that it was entirely reasonable to speak to the theatre sister and see if I could sort them out."[72]

(emphasis added)

The Board heard evidence from Tony Riley, HR Director at the Hospital and places heavy reliance on his comments that a *'certain amount of horse trading*' was usual in respect of theatre slots (paragraph 4.20). However, no context is provided to this comment and it would appear that Mr Riley was not invited by the Board to directly comment on whether Mr Alwitry's negotiations were within his usual experience of what is acceptable. On this point, Mr Alwitry did not seek to justify his behaviour to the former Solicitor General.

The SEB supports the view that the Hospital cannot and should not be run on the basis that the Hospital management spend considerable time and effort setting down a final timetable, to be seen only as a starting point or springboard from which further negotiations can take place between individual doctors and other staff.

When Mr Downes emailed Mr Alwitry on 9 October 2012[73], he did so in firm terms. It was clear that he was unimpressed that conversations about the timetable had gone on behind his back.

The former Solicitor General concluded in his original report that Mr Downes' primary intention with this email was to re-establish that any conversations about timetable were to be with him or senior management only: "*if you have any further queries questions concerns in relation to the above please address them to myself Andrew or Angela rather than involving a myriad of different individuals which simply serves to confuse*".

The Board concluded that it was not reasonable for the former Solicitor General to reach that conclusion and that the email was intended to be a stern warning to 'toe the line' and to signal the end of the negotiations about timetable (paragraph 131).

Mr Alwitry's response was to telephone Mr Downes on the 10 October and there was a conversation between the two men that lasted some eight minutes. This conversation was followed by Mr Alwitry immediately contacting his trade union to inform the BMA that he was "*feeling helpless and quite distraught*."

J - The involvement of the BMA (pages 122 to 124 of the report)

[72] Pages 48 to 49 of Transcript of interview with Mr Alwitry on 18 November 2013.
[73] Appendix 1. Document 26

The SEB notes that Mr Alwitry did not supply the BMA with Mr Downes' email which the BMA had specifically requested[74].

The former Solicitor General concluded in his original report that Mr Alwitry broke off all communications with Mr Downes and the hospital management on 10 October. He did not take the opportunity to speak to Mr Downes during his visit in late October and ignored Mr Downes' subsequent attempt to reach out through a mutual colleague at Derby Hospital. The former Solicitor General expressed the view that Mr Alwitry did all of this because he was waiting for the BMA to intervene on his behalf and speak to the Medical Staff at the Hospital. The former Solicitor General also observed that Mr Alwitry failed to provide any of this information to him in his first interview. It was only upon receipt of the BMA records that he disclosed that the former Solicitor General finally understood why he had maintained a silence from 10 October onwards. The Board do not challenge these conclusions.

There is no doubt from the BMA records that Mr Alwitry had attended the hospital on 23 October and spoken to staff, but not management, about the timetable. This coincided with Mr Downes confirmation that he had received reports from staff that Mr Alwitry was unhappy with his timetable and a range of other matters.. At this time, the Hospital Managing Director summarized the ongoing concern from the hospital's point of view[75] -

> *. . . he [Mr Alwitry] will not accept anything he does not like without an argument and when he doesn't get the 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 . . .*

Although it is not material, the Board may have misread paragraph 135 of the former Solicitor General's original report where he expresses the view that the BMA did not share Mr Alwitry's opinion that the son was suffering for the sins of his father - an allegation of bad faith directed towards Mr Downes. The BMA instead suggested to Mr Alwitry that they should not become involved, hence the conclusion that the BMA did not see Mr Downes' conduct in the same light.

Mr Downes summarised the fact of the involvement of the BMA and its relative insignificance in the decision taken to terminate Mr Alwitry's contract of employment as follows -

> "*That wasn't the reason the contract was terminated, that was one of several reasons the contract was terminated. You will see Tony [Riley] had written down here, it, he doesn't, he said one of the four things relates to the BMA; it's not all the rest. I mean, the contract was terminated because this just illustrated, yet again, the rather, sort of, bizarre way that Mr Alwitry went around doing things, his complete disregard for anything and anybody, including management and,*

[74] Appendix 1. Document 27
[75] Appendix 1. Document 39

you know, myself. I, I just, I, I just find, that's, I found it absolutely extraordinary, when I got back, that he had decided to report me to the BMA, that, I just, you know, I just can't say anymore. I just found it quite extraordinary. And that was yet another factor to take into account with regard to whether this was an individual that we wanted to work within the organisation. It wasn't the only factor, it wasn't the precipitating factor, but it was the final factor that made people sit round and think, "Well, you know, what on earth is this guy playing at, what on earth is going on here?"[76]

K - The senior staff at the Hospital decide to sack Mr Alwitry (pages 124 to 143 of the report)

Whilst the SEB accepts there were procedural deficiencies, the motivation for the withdrawal of the contract of employment was ensuring a harmonious working relationship within a small team of three consultants.

Whilst it does not feature in the Board's Report after the decision to terminate Mr Alwitry's employment on 13 November 2012 but before sending the letter of termination on 22 November 2012, the Hospital's senior management received information that Mr Alwitry's current hospital were not willing to take him back as a consultant as they were not legally obliged to do so.

Mr Downes heard personally from the clinical director at Derby hospital and

similar information was received from a nurse at Loughborough hospital.[77]

Mr McLaughlin commented in relation to the information that Derby hospital as follows -

"…*Because one of the things that we were looking at was if, if, if have a consultant that has resigned in the hospital, the first thing you do is, you go to the consultants and say, "Why are you resigning? Is there anything we can do to stop you resigning?" Because you're going to have a break in service, you're usually losing a valued staff member and the last thing you want is for them to leave, and you have that discussion. If, at that point, they say, "No, it's my ideal job, it's back where I was born, I've got all my friends and relatives there, we're going to move back with the family, and, you know, it's my ideal," you can say, "Okay, it's not ideal for us, but we can see that it's, it's the right thing for the individual and you then begin the process of filling that vacancy or potential vacancy to minimalise the break in service, because it takes about six to nine months to appoint a consultant from initial notification, and normally they're only on a three month notice period, so you're going to have a gap in*

[76] Page 85 of the Transcript of interview with Mr Downes dated 25 November 2013.
[77] Page 89 of Transcript of interview with Mr Downes on 25 November 2013

service, so you have to move quite quickly. If at any point before you have stuck the advert out, a consultant that's resigned says, "Oh actually, you know, on reflection I don't think I want to go and do this, you just breathe a sigh of relief and say, "Thank heaven for that, come back, you know, you start Monday, you're back in your old rota and, and, and carry on as you were." The idea that you wouldn't take a consultant back that you've had on your books, just, frankly, is, isn't credible. So the idea that by having the job offer withdrawn here, Mr Alwitry wasn't then going to just go, "Oops," and put his weight back into the hospital he was in previously and carry on as he had been until the next appointment came up, just, you know, that only emerged later really, that there was no way he was going to be accepted back by that hospital, which I can only assume was because of the behaviours he evidenced while he worked at that hospital."[78]

L - The States Employment Board (pages 143 to 146 of the report)

The SEB has commented on its role in this case earlier in this response.

M - The reports commissioned by the Director of Human Resources for the States Employment Board (pages 146 to 148 of the report)

The SEB notes the credentials of Miss Haste and Mr Beal, and that they interviewed witnesses (including Mr Alwitry).

N - Private practice (pages 148 to 149 of the report)

Paragraph 213 - the SEB notes that the Board makes no findings in relation to Mr Alwitry's allegations about private practice in relation to Mr Downes.

Paragraph 214 - "*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."*

The SEB accepts that the private practice arrangements in Jersey differ from those generally experienced when working in the NHS. The composition of the interview panel, who are the decision makers regarding appointments, is intended to ensure that there are panel members who would not and could not have a conflict of interest regarding private practice. Each

[78] Page 105 of Transcript of interview with Mr McLaughlin on 22 November 2013.

Consultant, within a specialty that attracts private practice, is potentially in competition with their specialty colleagues, this is unavoidable. Potential candidates for Consultant position are now informed of the private practice landscape at pre-interview meetings with the Medical Director, the Hospital Managing Director and the Medical Staffing lead. If a candidate choses to explore business options out with the hospital they are perfectly at liberty to do so and it is not within the jurisdiction of the HSSD team to intervene.

Although this has not affected the outcome of this case practice in this respect has been changed in the period since 2012.

O - Conclusion on the procedure leading to the deliberate breach of Mr Alwitry's contract (pages 149 to 150 of the report)

The SEB acknowledges that the procedure prior to the decision to withdraw the offer of employment could have been better. However, the Hospital's overriding motivation in withdrawing the offer of employment was to prevent the creation of a dysfunctional Ophthalmology Department in the interests of the Hospital and the Island overall and because it had lost trust and confidence in Mr Alwitry.

States Employment Board

4 October 2016