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.