Amar Alwitry v The States Employment Board

Jurisdiction:	Jersey
Judge:	J. A. Clyde-Smith, Jurats Olsen, Grime
Judgment Date:	06 February 2019
Neutral Citation:	[2019] JRC 14
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Court:	Royal Court

Text

[2019] JRC 14

ROYAL COURT

(Samedi)

Before:

J. A. Clyde-Smith, **Esq., Commissioner, and** Jurats Olsen **and** Grime.

Between
Amar Alwitry
Plaintiff
and
The States Employment Board
Defendant

Advocate S. M. J. Chiddicks **for the Plaintiff**.

M. Temple, **Esq., Solicitor General for the Defendant**.

Authorities

Employment of States of Jersey Employees (Jersey) Law 2005.

Data Protection (Jersey) Law 2005.

Administrative Decisions Review (Jersey) Law 1982.

The Parish of St Helier v The Minister for Infrastructure [2017] JCA 027.

Regina v Hull University Visitor [1992] I.C.R. 67.

McClelland v Northern Ireland General Health Services Board [1957] 2 All ER 129.

Grove and Briscoe v Baker [2005] JLR 348.

Johnson v Unisys Limited [2001] 2 WLR 1076.

Edwards v Chesterfield Royal Hospital NHS Foundation Trust [2011] UKSC 58.

McDonald v Parish of St Helier [2005] JRC074.

Pothier Traite des Obligations (1821).

La Petite Croatie Limited v R.P. Ledo and A.K. Ledo [2009] JLR 116.

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Midland Bank Trust Company (Jersey) Limited v FPS [1995] JLR 352.

Persimmon Homes Limited & others v Ove Arup & Partners Ltd [2017] EWCA Civ 373.

Chitty on Contract, 33rd Edition.

Freeth v Burr [1878] LR 9 CP 209.

Malek v Bangor Credit and Commerce International (A) [1998] AC 20.

McDonald v Parish of St Helier [2005] JRC 074.

Neary v Dean of Westminster [1999] IRLR 228.

Briscoe v Lubrizol Ltd [2002] IRLR 607.

Omilaju v Waltham Forest London Borough Council [2005] I.C.R.481.

Human Rights (Jersey) Law 2000 (European Convention on Human Rights).

Employment (Jersey) Law 2003.

Employment Rights Act 1996.

Cobley v Forward Technology Industries plc [2003] WCA Civ 646.

Abernethy v Mott, Hay & Anderson [1974] ACR 323 at 330.

Perkin v St George's Health Care NHS Trust [2006] ICR 616 CA.

Ezsias v Northern Glamorgan NHS Trust [2011] IRLR 550 EAT.

Kerslake v North West London Hospital NHS Trust [2012] EWHC 1999 (QB).

Jeanne v Jersey Telecom Limited [2009] JCA 138.

Addis v Gramophone Co Limited [1909] AC 488.

Edwards v Chesterfield Royal Hospital NHS Foundation Trust and *Botham v Ministry of Defence* [2012] 2AC 22.

King v University Court of the University of St Andrews [2002] IRLR 252.

Rookes v Barnard [1964] AC 1129.

West v Lazard Brothers [1993] JLR 165.

Hayden-Taylor v Canopius Underwriting Limited and others [2014] JRC 221.

Employment — breach of contract.

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THE COMMISSIONER:

1 By his Order of Justice of 13 th January, 2017, the plaintiff (“Mr Alwitry”) brings claims of breach of contract, tortious conspiracy to and/or inducement to cause the defendant (“the SEB”) to breach his contract of employment and/or defamation of him, arising out of his employment by the SEB in 2012 and for which he claims punitive or exemplary damages.

2 On 20 th July, 2018, the Court ordered that the trial should be limited to the issue of liability and whether Mr Alwitry's claims in damages (estimated by him at just under £8M) come within what is known as the “Johnson Exclusion Area” and is therefore limited to the

contractual notice period, together with what is known as the “Gunton Extension”.

3 Shortly before the hearing, Mr Alwitry gave notice that the claim in defamation was to be limited to a single letter dated 15 th November, 2012, as pleaded in paragraph 93(b) of the Order of Justice, and withdrew the remaining claims in defamation.

4 The hearing took place between the 19 th September and the 2nd October 2018. On 27 th September, 2018, after evidence had closed, Mr Alwitry withdrew the remaining defamation claim and the claims relating to tortious inducement of breach of contract and tortious conspiracy, leaving extant only his claim in breach of contract and his claim for punitive/exemplary damages.

5 Before we go into detail of the events in question, it is helpful to set out a brief summary by way of overview of the facts which are not in dispute.

Factual overview up to dismissal

6 The SEB is a body corporate, established under the Employment of States of Jersey Employees (Jersey) Law 2005, whose function, *inter alia*, is to employ persons on behalf of the States of Jersey. Its functions in relation to employment of staff at the General Hospital had been delegated to the Health and Social Services Department (“the HSSD”). At the material time the chief executive officer of the HSSD was Ms Julie Garbutt.

7 At the material time the relevant persons holding management positions at the General Hospital comprised Mr Andrew McLaughlin, interim managing director, Mr Martyn Siodlak, an ENT surgeon and joint medical director, Dr Andrew Luksza, a senior physician and joint medical director, Mr Richard Downes, a consultant ophthalmologist and clinical director, Mr Anthony Riley, a human resources director of the HSSD (which includes the General Hospital) and Mrs Angela Body, the director of operations. Medical directors rank above clinical directors.

8 Mr Alwitry, who was brought up and educated in Jersey, is a consultant ophthalmologist and in 2012 was employed as a consultant ophthalmologist at Derby Hospitals NHS Foundation Trust (“the Derby Hospital”). He has four young children and his wife, a general practitioner, was employed at the East Leake Health Centre in Derby.

9 Mr Alwitry had undertaken locum cover in the Ophthalmic Department of the General Hospital in 2008 and 2009, and knew the two consultants in that department, namely Mr Downes and Mr Bartley McNeela. Mr Alwitry's father, now retired, had also been a consultant ophthalmologist working in that department.

10 In or around June 2012, the General Hospital advertised a vacancy for the permanent appointment of a third consultant ophthalmologist. Mr Alwitry was interviewed on 1 st August, 2012, and was the successful candidate. He was offered the post on 8 th August, 2012. Issues arose over the date upon which he would start work as a consultant, but on 15 th August, 2012, it was agreed that he would start work on 1 st December, 2012, on a part-time basis, three days a week, moving to full-time work on 11 th February, 2013.

11 He gave three months' notice of his resignation from his post at the Derby Hospital on 21 st August, 2012 and signed his contract of employment with the SEB on 24 th August, 2012. It is not in dispute that it came into force unconditionally.

12 Issues then arose over the agreement of Mr Alwitry's *"Job Plan",* which sets out the *"Programmed Activities"* or *"PAs"* for short, each lasting four hours, which he would undertake from 11 th February, 2013.

13 On 9 th October, 2012, Mr Downes e-mailed Mr Alwitry confirming that the Job Plan he had issued to Mr Alwitry on 24th September 2012 *"will be implemented"* and warning Mr Alwitry *"that making too many demands at this stage of your appointment is unlikely to bode well for your future relationships in the organisation!"*

14 Mr Alwitry telephoned Mr Downes the next day, 10 th October, 2012, verbally accepting the Job Plan, a conversation that Mr Downes cannot recollect, and on the same day, Mr Alwitry contacted the British Medical Association ("the BMA"), the doctors' trade union, for its advice, in particular over the number of PAs he had been given in the Job Plan, namely 11.5, when his contract stipulated he would have to work 10 PAs.

15 In late October 2012, Mr McLaughlin, through Mr Riley, sought legal advice from the Law Officers' Department as to the risks and consequences of withdrawing a job offer. That advice was that Mr Alwitry's maximum legal remedy would be limited to his salary over the three months' notice period and any incurred costs associated with his move to Jersey.

16 On Monday 12 th November, 2012, and at Mr Alwitry's request, the BMA contacted Mr Brian Jones, a medical staffing manager at the General Hospital, to discuss *"a delicate issue"* surrounding Mr Alwitry, who had *"run into a few problems with the consultant lead",* which he would like to apprise him of, for the purpose of *"avoiding any future conflict"*. On Tuesday 13 th November, 2012, a meeting took place at the General Hospital between Mr McLaughlin, Mr Siodlak, Dr Luksza and Mr Riley, in which it was agreed to withdraw Mr Alwitry's offer of employment. Mr Downes was not present at the meeting, because he was attending a conference in the United States.

17 Having referred the matter to the SEB for its support, Mr Riley wrote to Mr Alwitry on 22 nd

November, 2012, withdrawing what he described as the offer of employment and stating that any contractual relationship to the extent that it existed was to be treated as terminated.

18 It was agreed by the parties that an important part of the background to the contract of employment of Mr Alwitry, and which forms part of the matrix of facts, is the Verita report of January 2010, following the death of Elizabeth Rourke on 17 th October, 2006, as a result of a medical accident after a routine operation in the day surgery unit at the General Hospital. One of the findings of the report was that there was a long-standing culture of individual rather than teamwork at the General Hospital and a strong impression of senior practitioners working in relative isolation. A key recommendation was to strengthen the role of the clinical directors and leads in running the hospital so that there was a clear management structure, and a culture where openness and patient safety was encouraged. Mr McLaughlin had been employed as an interim managing director to implement the recommendations of the Verita report.

19 There is much flesh to be added to the bones of this brief overview, which we will do shortly, but it can be seen that Mr Alwitry's contract of employment was terminated by the SEB just over a week before he was due to start work at the General Hospital, and when he had resigned from his consultancy post with the Derby Hospital.

20 The case of the SEB is that Mr Alwitry's behaviour over the preceding period justified his summary dismissal. It alleges that his manner of interaction with his future colleagues and senior hospital management was such that it fundamentally undermined their trust and confidence in him.

Factual overview after dismissal

21 Following Mr Alwitry's dismissal, and as anticipated by the hospital management, the SEB came under pressure from Mr Alwitry, his family, Mr McNeela and many others to reinstate him.

22 All the members of the senior management, namely Ms Garbutt, Mr McLauglin, Mr Riley, Mr Siodlak, Dr Luksza, Mr Downes and Mrs Body attended a meeting of SEB on 18 th December, 2012, when it was decided by the SEB *inter alia*:-

> (i) That the post made vacant should be filled by the HSSD as soon as practicable, and
>
> (ii) Mr Riley should conduct a review of the recruitment process conducted by HSSD as soon as possible, and report his findings to the SEB.

23 On 8 th January, 2013, the SEB, having reflected on its decisions of 18 th December, 2012,

rescinded the instructions to Mr Riley, and decided to keep the post open until it had met later. On 18 th January, 2013, the SEB deferred launching an independent review in order to pursue a dispute resolution process.

24 On 14 th January, 2013, a letter was sent by the senior management to Senator Ian Gorst, the Chief Minister and chairman of SEB, signed by Mrs Garbutt, Mr McLaughlin, Mr Siodlak, Dr Luksza, Mr Downes, Mrs Body and Mr Riley, making it clear that they did not see re-engagement of Mr Alwitry as a way forward, and the grave and serious consequences to the hospital service if the medical leadership and the hospital directors were to be seen to be overruled and undermined.

25 Ms Michelle Haste of CMP Resolutions was appointed by the SEB to explore the potential for mediation to resolve the dispute between Mr Alwitry and the hospital managers and senior clinicians at the General Hospital. At a meeting of the SEB held on 21 st February, 2013, it was reported that she had indicated strongly that Mr Alwitry remained convinced that he had done nothing wrong and that the senior managers and clinicians remained clear that employment of Mr Alwitry could not be accepted for operational reasons. In those circumstances, she was clear that a successful outcome via mediation would be unlikely. It was proposed that Mr Riley should travel to the United Kingdom, accompanied by a specialist mediator, to meet with Mr Alwitry, in order to explain the position of the HSSD in *"clear and unambiguous terms"*. That meeting never took place.

26 In March 2013, the SEB commissioned a report from an independent HR consultant, Mr Paul Beal to review the robustness and integrity of the recruitment process and the decision making process from the offer stage until the decision to rescind the offer of employment. He issued his report on 8 th April, 2013, and whilst finding that the recruitment process was poor and not comprehensive and making a number of recommendations, on the key issue of the decision to dismiss he reached this conclusion:-

> *"The team have a wealth of experience on these matters; dealing with Consultants can be a challenge for senior managers in a Hospital setting.* The context of the service in Jersey has to be taken into consideration. The team have been on a journey in the last few years after the Verita report and have made great progress in taking the services forward and now have clinical engagement. The concerns around [Mr Alwitry'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 officers, 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 [Mr Alwitry] 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 [Mr Alwitry] has broken down and this was a reasonable response to the situation at the time.*

[Mr Alwitry] appears to lack insight into his part in this situation he now finds himself in, which is most unfortunate for him as a consultant."

27 On 8 th July, 2013, Mr Alwitry submitted a claim for unfair dismissal to the Jersey Employment Tribunal, from which it is clear that he was still seeking reinstatement. That application was withdrawn by letter dated 4 th December, 2014.

28 On 13 th September, 2013, and following claims submitted by Sinels, Advocates, on behalf of Mr Alwitry, the SEB commissioned a report from the then Solicitor General. He was asked to investigate the circumstances surrounding the recruitment of Mr Alwitry. In his report of 17 th February, 2014, he reached these conclusions:-

"2 I have reached the following conclusions:

3. On 1 st August 2012, Mr Amar Alwitry was offered the position of Consultant in Ophthalmology at Jersey General Hospital following a successful interview. Mr Alwitry was the best candidate and there is no doubt he possesses clinical skills that would be of great benefit to the Island. Mr Alwitry was due to start work on 1 st December 2012.

4. From 1 st August until 13 th November 2012, there were a series of discussions between Mr Alwitry and the Jersey hospital which were unusual and, from the hospital's point of view, extremely challenging.

5. On 13 th November 2012, the hospital management concluded that the relationship with Mr Alwitry had broken down and was dysfunctional. I agree that the relationship was dysfunctional by 13 th November.

6. Mr Alwitry's employment contract was terminated by letter dated 22 nd November 2012.

7. In the circumstances, it was reasonable for the hospital management to terminate the employment contract.

8. However, the procedural aspects of this case are unsatisfactory:

(a) There was a failure to investigate and properly understand an email the hospital received on 12 th November 2012. Instead, an assumption was made about the email and that assumption was a reason for the decision to terminate the contract.

(b) Although there was no legal obligation to do so, the hospital management should have provided Mr Alwitry with an opportunity to respond to the criticisms made of him prior to the termination of the contract.

(c) Mr Alwitry was notified of the decision to terminate extremely late in the day in a manner that does not reflect well on the hospital.

9. If an appropriate procedure had been followed, I have concluded that the outcome would have been the same in this case. A proper investigation of the 12 th November 2012 email would have provided confirmation of the dysfunctional relationship and revealed allegations of bad faith. I have interviewed Mr Alwitry over several hours. I have been unable to reconcile much of his testimony to the other evidence in the case. It was hard to detect any sign of an acceptance of responsibility for the events I describe below. Further allegations of bad faith have been made or raised for my consideration.

10. This is not a case where it is appropriate to consider reinstatement. As I have already indicated, the merits of the decision cannot be criticised and the continued pursuit of allegations of bad faith is not conducive to rebuilding a broken relationship.

11. I advise that the hospital management receive further training in respect of employment law and the importance of procedure."

29 On 29 th October, 2014, Mr Alwitry applied for disclosure orders against the SEB, pursuant to the Data Protection (Jersey) Law 2005, following the making of a number of previous requests. The application was resisted by the SEB, but orders for access to two classes of documentation were made by the Court on 25 th February, 2016.

30 On 16 th and 17 th March, 2016, the States Complaint Board ("the Complaints Board") sat to hear evidence in respect of a complaint made by Mr Alwitry pursuant to the Administrative Decisions Review (Jersey) Law 1982. We have not been shown the terms of reference, but it would seem that the board was considering only the issue of the procedure adopted when Mr Alwitry's contract of employment was terminated. The grounds for making the decision and patient safety issues were not to be addressed. Accordingly, the SEB relied on the evidence of Mr Riley, who was the only witness heard by the Complaints Board. Mr Alwitry did not attend, due to ill health.

31 Following a detailed forensic analysis of the documentation, the Complaints Board concluded that the action of the SEB in terminating the contract of employment with Mr Alwitry was unlawful, in that it represented a clear and fundamental breach of contract by the SEB. It was scathing in its criticism of the SEB:-

"8.4 The decision to 'withdraw' Dr Alwitry's contract of employment was contrary to law, unjust, oppressive, based on irrelevant considerations and misunderstandings as to the factual position and conclusions on alleged facts and law that could not have been reached by a reasonable body of persons properly directing themselves as to the facts and law, and was in breach of the fundamental principles of natural justice applicable to the circumstances of this case. Consequently we are unanimous in upholding the complaint in accordance with the provisions of Article 9(2) of the

Administrative Decisions (Review) (Jersey) Law 1982, namely that the decision –

> *(a) was contrary to law*;
>
> *(b) was unjust, oppressive or improperly discriminatory, or was in accordance with a provision of any enactment or practice which is or might be unjust, oppressive or improperly discriminatory*;
>
> *(c) was based wholly or partly on a mistake of law or fact;*
>
> *(d) could not have been made by a reasonable body of persons after proper consideration of all the facts; or*
>
> (e) was contrary to the generally accepted principles of natural justice.

8.5 There are many reasons for reaching that conclusion…They include, in no particular order of priority, the following:

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

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

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

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

8.6 The Board makes no finding as to whether, had there been a properly independent review of the claims made in respect of Dr Alwitry's behaviour, such review would have been likely to find in favour of the employer or the employee. That

was not within the terms of reference set out by the Board. It is however appropriate for us to make it clear that there was nothing produced to the Board during the hearing which could, in the Board's view, reasonably justify the summary termination of Dr Alwitry's contract of employment."

32 On 4 th October, 2016, the SEB published a detailed response to the findings of the States Complaint Board, rejecting its conclusions. Whilst it acknowledged that the procedure prior to the decision to withdraw the offer of employment could have been better, it stated that the General Hospital's overriding motivation in withdrawing the offer of employment was to prevent the creation of a dysfunctional Ophthalmic Department in the interests of the General Hospital and the Island overall, and because it had lost trust and confidence in Mr Alwitry.

33 The SEB complained that the Complaints Board had not conducted the hearing in accordance with its terms of reference, and that it had strayed into areas that it had specifically and repeatedly told the SEB and Mr Alwitry that it would not deal with, such as the reasonableness of the decision to withdraw Mr Alwitry's contract of employment.

34 Following the receipt of further written submissions from both Mr Alwitry and the SEB, a reply from the Complaints Board was presented to the States on 2 nd December, 2016, in which it rejected the SEB's response, describing it as *"deeply unsatisfactory",* and saying this *inter alia*:-

> *"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 three members.* The fact that the SEB and the Hospital apparently cannot grasp this basic point is deeply worrying. It is a matter for which they ought to be censured."

35 These proceedings were issued on 13 th January, 2017, and at the final hearing, the Court heard evidence from Mr Alwitry, Senator Gorst, Mr McNeela, Mrs Claudia Alwitry (Mr Alwitry's wife), Mr McLaughlin, Dr Luksza, Mr Downes, Mr Siodlak, Mrs Body and Mr Riley. It also had expert reports on the issue of patient safety.

Facts as shown by documentary evidence

Interview

36 Mr Alwitry was still in his post at the Derby Hospital in the period leading up to his contract of employment with the SEB being terminated, and the majority of his communications with the General Hospital were conducted via e-mail exchanges which tell much of the story. It is helpful, therefore, to track those e-mail exchanges before referring to the evidence of the witnesses.

37 Because Mr Alwitry had undertaken locums at the General Hospital previously, he and Mr Downes knew each other and there are e-mail exchanges between them in March, 2012 about the possible appointment of a third consultant to the Ophthalmic Department. For Mr Downes the appointment was urgent, and as he said in an internal e-mail to Mr Jones on 16 th May, 2012:-

> *"There is a real urgency in relation to this appointment, since we are not having much luck with locums, and waiting lists are going through the roof.*
>
> *I would suggest the job is advertised with immediate effect ….."*

38 The post was advertised in or around May 2012, with a closing date of Friday, 22 nd June, 2012. The advertisement read:-

> *"CONSULTANT IN OPHTHALMOLOGY (to commence Winter 2012)*
>
> *Applicants are invited for the post of Consultant in Ophthalmology; a special interest in a sub speciality is desirable.* This post is based at the General Hospital in Jersey. The postholder will work as part of a 1 in 4 rota.
>
> *The successful applicant will join a team with two Consultants and two middle grades in a Department that provides the sole eye care service to the population of Jersey and visitors to the Island.* The postholder will be expected to share in the case of eye patients through Out Patient and Theatre Sessions and contribute to the management of the Eye Department along with training, teaching and audit"

The applicants were invited to view the job description in a government website, which unfortunately is no longer available, although the Court was given a copy of the job description that was used later for Mr Alwitry's replacement, which we were told would have been in very similar terms.

39 Mr Alwitry submitted his application online on 18 th June, 2012. In the section dealing with his present post, he set out his job title, when he commenced work, the name of the hospital and its address, his final salary, the description of his responsibilities and his reason for leaving, where he wrote *"Moving home to Jersey"*. Under *"Notice Period",* he wrote *"Six months"*.

40 Interviews took place on 1 st August, 2012, with an interview panel comprising Mr McLaughlin, Mr Downes, Mr McNeela, Mr Oliver Leeming, a medical staffing officer, Dr Graham Prince, a consultant in anaesthetics, Dr Alan Thompson, also a consultant in anaesthetics, and a representative of the Royal College of Ophthalmologists.

41 Mr Alwitry acknowledged in evidence that his actual notice requirement with Derby

Hospital was three months, not six months, and it became clear during the hearing that three months is the established notice period for consultants within the NHS wishing to terminate their contracts. Mr Alwitry explained that he wrote down six months because this was the notice he required before taking up the post in Jersey, in particular to enable his wife, who is a general practitioner, and their four young children to be moved over to Jersey. His wife was required to give a minimum six months' notice of termination of her contact.

42 The issue of Mr Alwitry's start date and his notice period was not raised at the interview, either by any member of the panel or by Mr Alwitry, and Mr McLaughlin and Mr Downes had not picked up the reference to six months in Mr Alwitry's application form.

Start date

43 Shortly after the interview, Mr Downes telephoned Mr Alwitry to inform him that he had been the successful candidate. There was some discussion between them as to the start date, and the possibility of Mr Alwitry starting on a part-time basis. This is clear from the letter written by Mr Leeming to Mr Alwitry on 8 th August, 2012, enclosing a contract of employment and a number of other documents including in particular the job description, in which he said this:-

> *"Please kindly advise us of a definite start date.* I have put the start date as 12 th November 2012. If that needs to change please let me know. Richard Downes has indicated that you would like to start initially on a part time basis, 3 days a week to allow you to return to the UK to your family and help with childcare. From speaking to Richard I understand that you will be able to resume full time duties from around 4 th February 2013".

44 There followed an exchange of e-mails between Mr Alwitry and Mr Downes on 8 th and 9 th August 2012 in which Mr Alwitry raised the difficulties he would have in flying to and from the Island and his need to get back to Derby on a Thursday, in order to look after the children. He asked Mr Downes to stick with the original six months he had put in his application form: "I promise I did put it in the application form – please check with [Mr Leeming]". He planned to start on Monday 11 th February, 2013, acknowledging that this was not what Mr Downes had wanted, and suggesting that a locum be employed for that six month period.

45 Mr Alwitry received a congratulatory e-mail from the panel member Dr Thompson to which he responded on 10 th August, 2012:-

> *"Hi Alan. Just to let you know my planned start date is 11 th Feb. Would have liked to start sooner but logistics are impossible. No idea about timetable or when my lists will be. Just realised that if they dump Friday afternoon on me*

then it may fall on you too. Sorry. Looking forward to working with you. Cheers Amar."

46 The reference to dumping Friday afternoon on him is reference to his being allocated Friday operating, as part of his Job Plan. Mr Alwitry's resistance to Friday operating played a major role in the Job Planning process, which followed after his contract of employment had been signed.

47 Mr Alwitry's request to start on the 11 th February, 2013, led Mr McLaughlin to write a letter to him on the 10 th August, 2012, of a kind he said he had never written to a prospective consultant before, stating that the offer of employment would be withdrawn unless Mr Alwitry was able to confirm by 15 th August. 2012, that he would be in post in Jersey by 1 st December, 2012. That letter, which was sent by e-mail, was followed by a telephone conversation between Mr McLaughlin and Mr Alwitry. According to Mr McLaughlin, whose evidence we accept, it was a long telephone conversation in which he explained why it was necessary for Mr Alwitry to start on 1 st December, 2012, and in which he rejected the various options being put forward by Mr Alwitry.

48 Following that call, Mr Alwitry e-mailed Mr Leeming, asking him to inform Mr McLaughlin that there was no mention of a start date in any of the literature sent out. He then e-mailed Mr McLaughlin still pressing for a later start date notwithstanding his earlier conversation:-

> *"Thanks for the conversation today.* Have received your letter and fully understand the position. Sorry I've caused you and [Mr Downes] hassle. It was never my intention to be difficult. I have asked Med Personnel to check and there was never any mention of a November start date in anything sent out – I honestly am not trying to pull a fast one – not one person mentioned or discussed a start date until after the interview – all any of the literature said was Winter 2012 which I erroneously presumed was any time up to Spring 2013!
>
> *As previously discussed if I could start the three day a week thing on 1 st Jan and then start properly on Feb 11 th that would really help me out.* From Jan to Feb I'd have no problem doing 6 clinical sessions on the Monday to Wednesday – i.e. clinics and theatres to catch up for what I'd miss in Dec. If I started in December I'd end up taking leave anyway which defeats the object of attempting to catch up with activity."

49 On 13 th August, 2012, Mr Alwitry e-mailed Mr Downes, saying that the ultimatum from Mr McLaughlin had shaken him a bit, and "to be honest, if this is typical of the management style of the hospital, I am wondering if it is the sort of place I want to spend the rest of my life working in". He said he had spoken to the BMA and one of his "old school mates, who is an employment lawyer at Benest". Whilst Mr Downes had been understanding of his family circumstances, Mr Alwitry said "clearly management don't/won't listen to the clinicians. If I do decide to walk away, it is not a reflection on you and [Mr McNeela] —would have been a

pleasure working with you both." The impression was therefore given that even before the contract had been signed he was consulting with his union and taking legal advice.

50 In a further email that day to Mr Alwitry, Mr Downes explained the pressing need for a consultant to be in post as soon as possible and why a start date of February 2013 would not be acceptable:—

> *"The post was created principally to deal with patient throughput within the department, waiting list times were the principal driver.* Funding was made available to support an interim long term locum, a post which has proven impossible to fill (with the exception of the odd week here and there) for a variety of reasons, principally geographic. The waiting lists continue to rise hence the pressing need to have someone in post ASAP. There is no reason to believe we will be any more successful in locum recruitment for these next few months than previously.
>
> *A start date of February will not be acceptable for the above reasons, but the department could manage with a start date, and limited working conditions, as per my earlier email.* We are very keen to accommodate your situation as much as practicable but this cannot be at all costs, hence the compromise suggestion.
>
> *Please get back to me with your thoughts, specifically in relation to the above — clearly you need to be comfortable with working here*."

51 Mr Alwitry's response showed that he had been discussing the issue of his start date, and the stance taken by Mr McLaughlin, with a number of people within the General Hospital, including Mrs Body, Mr McNeela and Dr Luksza and, questioning why a start date earlier than February was really necessary, he gave this indication to Mr Downes of his approach to hospital management:—

> *"I want us to portray a united front (you and I at least) to the rest of the hospital and not be seen to be struggling through no fault of our own before we even begin.* This whole thing is embarrassing for us as a department and it could have been avoided if [Mr McLaughlin] had taken a balanced view. I made it clear on my application that I could not start for six months specifically to avoid this sort of problem.
>
> *[Mr McLaughlin's] threat to withdraw the job offer has upset [his wife] and got my back up too.* If I do end up coming still then I'm sure me and you will have many arguments with management over the years and I will be led by you in them however on this occasion [Mr McLaughlin's] intransigence is adversely affecting my whole family for no firm reason I can fathom.
>
> *I think he thinks that I want the job so much that I would come anyway regardless of what he says or does.* He's sadly mistaken.
>
> *I am asking him to reconsider and allow me my 11 th Feb start date.* We could

use the funds from my wages for those ten weeks to get extra sessions done to keep us afloat until I can start properly. If he still says no then I guess I take it up the ladder or walk away. I still am devoted to coming over and working with you and [Mr McNeela] (I think we'd make a great team!) but not at any cost particularly if that cost is to my family.

Will keep you informed."

52 In an e-mail to Mrs Body on 14 th August, 2012, Mr Alwitry informed her that he was sending a formal response to Mr McLaughlin which had been checked by the BMA—no such formal response would appear to have been sent. He reiterated that his application form had stated clearly that he required six months' notice and if the 1 st December start date was so critical, it should have been raised either in the advert or in the job description or before or during the interview. He then asked if she could let him know what damage would occur with a February start versus a December start date, to help him understand the situation, but that *"really the decision is whether I come at all"*. He ended by offering to come over in December 2012 and do some free clinics for no pay if that would help.

53 That prompted this internal email comment by Mr McLaughlin:-

"Hmm. This really is not what I would have expected. If he doesn't want to come he doesn't have to. I need to speak to [Dr Luksza] and I think we should take advice from [Mr Riley] because, even if he does deign to grace us with his presence in December, this chap looks like trouble and if we can I think we should withdraw our offer and take the other candidate while he is still available."

54 Mr Downes commented, again in an internal e-mail, that:-

"This certainly requires careful managing: he has contacted both the BMA and a local employment lawyer as well as many other people on the Island. I expect that he will have already been in touch with [Ms Garbutt] and perhaps [Deputy] Anne Pryke.

[Mr Alwitry] was made aware at our informal discussions that I expected the new Consultant to start asap since we had had a miserable response to several adverts for a long term locum. I presumed that, as an established Consultant he would be aware of the usual 3 month start date; further that he would have *mentioned a proposed delay since it appears that there was never a plan to move before next July: the latter did not happen.* I am also confused. If he wants the post then he should accept it as offered. I am no longer sure that we know the complete picture but if this is an example of things to come then I agree with [Mr McLaughlin]."

55 On 15 th August, 2012, the deadline imposed by Mr McLaughlin, Mr Alwitry confirmed by e-

mail that he would start on 1 st December, 2012, saying that he would be sending a formal letter in the post with some queries and comments "about the way this whole situation has been handled….. The communication here has been sub optimal and a lot of difficulty and soul searching could have been avoided if someone/anyone (including me) had discussed a start date in advance of the interview." No formal letter was received. Notwithstanding this, he made a last ditch unsuccessful attempt to change the start date: "One last ditch attempt – if I'm starting on 1 st December and then taking leave over Xmas as agreed with [Mr Downes] that means that I am only working for 2 weeks before the start of Jan – would that two weeks make that much difference? Could I not make a fresh start 1st Jan? Worth a try".

56 On 21 st August, 2012, Mr Leeming sent Mr Alwitry a revised permanent full-time contract signed by him on behalf of SEB commencing on 3 rd December 2012 (the 1 st and 2 nd December being a weekend) with an addendum outlining the reduced working pattern that would be in effect until 11 th February, 2013, when he would move to a full-time timetable. On the same day, Mr Alwitry resigned his post at the Derby Hospital. The contract was signed by him on 24 th August, 2012, at which point it became binding and, for all purposes, unconditional.

Job Plan

57 We will come to the contract of employment in more detail later, but it recited at clause 6 that the parties had already agreed a prospective *"Job Plan"* which would have been contained in the job description, which is no longer available. Clause 7.1 stated that the Job Plan would contain ten PAs with a timetable value of four hours each.

58 Clause 6 provided that Mr Alwitry and his manager would review the Job Plan annually, in line with the provisions of schedule 3 of the *"Terms and Conditions of Service"* which form part of the contract. Schedule 3, which is entitled *"Job Planning"* sets out the general principles at paragraph 3.1.1:-

> *"3.1.1 Job Planning will be based on a partnership approach.* The manager and clinician will prepare a draft Job Plan, which will then be discussed and agreed with the consultant. Job Plans will list all the H&SS duties of the consultant, the *number of Programmed Activities for which the consultant is contracted and paid, the consultant's objectives and agreed supporting resources*."

59 Schedule 4 set out an appeals procedure where it had not been possible to agree a Job Plan in which Mr Alwitry or his manager could refer the matter to a panel, comprising a person nominated by the Chief Executive, a person nominated by the consultant and the medical director. If any problems were not resolved by the panel, then the matter would be forwarded to the Chief Executive for final resolution.

60 In early September 2012, Mr Alwitry and Mr Downes were in e-mail correspondence over Mr Alwitry's Job Plan for the initial period from 3rd December, 2012, to 11th February, 2013, when he would start working full-time. The Job Plan for this first period was resolved, but difficulties arose in relation to the Job Plan when he started full-time work. On 5th September, 2012, Mr Alwitry emailed Mr McNeela with some general observations about the Job Plan that must have been attached to the job description, expressing the wish that he should be able to go home for weekends when he was not on call, in order to see his children. His family were not due to come to the Island until July, 2013.

61 It is clear from Mr Alwitry's e-mail of 16th September, 2012, to Mr Downes that he had also been discussing his Job Plan with Ms Carol Hockenhull, the Eye Clinic sister, and Ms Judith Gindill, the theatre sister. He set out his wish list to Mr Downes in this way:-

> *"Essentially, if we can sort the timetable so that I have clinic Monday AM, theatre Monday PM, theatre Tuesday AM and Fridays my two sessions off in lieu of on-call I'll be happy – the rest I'm not fussed about.* Have spoken to [Mr McNeela] about this and he seems happy but obviously I need to make sure you're OK with it and it is workable/ok for the logistics of the department."

62 Mr Downes responded on 24th September, 2012:-

> *"Timetable now sorted – not all adhering to your wish list but it is the best I can do at present!"*

The timetable he set out showed Mr Alwitry doing a surgery unit and out-patient department on Thursday afternoon and main theatre surgery and out-patient department on Friday morning in alternate weeks. These were alternated with the Obstetrics and Gynaecology Department. Mr Downes said it *"may be possible to negotiate so that you do DSU [Day Surgery Unit] lists only – I have sown the seeds, but not taken it any further since you have stated a requirement for next day theatre availability."* It also showed Mr Alwitry doing 11.5 PAs, more than allowed for in the contract, which caused him to e-mail Mr Leeming on 24th September, 2012, asking for confirmation as to the contractual position. Mr Leeming confirmed that his contract was for 10 PAs, without giving an explanation as to the additional 1.5 (for which there is a simple explanation namely that every consultant was given an additional 1.5 PA to compensate for the free use of the General Hospital's operating facilities for their private practices).

63 Having received the timetable proposed by Mr Downes, Mr Alwitry e-mailed Ms Gindill on the 24th September, 2012, under the heading *"Theatre slots",* and raised the issue of alternating Friday morning theatres:-

> *"Been looking at the proposed timetable for me.*
>
> *The Friday morning alt main theatres I'm not happy about – 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 chance of getting back to see the missus and the four kids! – they aren't joining me till mid July".

64 She responded saying that he had been sent an old version of the Job Plan, and giving him what she hoped was the final version, which had no alternating main theatre surgery on the Friday. Mr Alwitry responded on 25 th September, 2012 saying he was *"really happy"* with this timetable, making this comment:-

> *"Also operating on a Friday when you have no junior staff on at the weekend to look after them if things don't go to plan produces significant clinical risks*."

65 However, Ms Gindill emailed again on the 25 th September, 2012, saying that having spoken to Mr Downes, Mr Alwitry would be having the alternating Friday main theatre surgery sessions. She added this:-

> *"I have taken 6 months to get all parties to agree to these timetable changes, and as you can imagine, I cannot go back now and make any other changes* ….".

66 Mr Alwitry came back to Ms Gindill on 29 th September, 2012, in an email not copied to Mr Downes, asking if she had had any joy speaking to Mr Akin Famoriyo, the consultant gynaecologist, about allowing Mr Alwitry to do every Thursday afternoon in the Day Surgery Unit, adding this:-

> *"Even if he could do it just until July when my family come over to join me that would be a great help……..* I would have hoped my senior colleagues could have sorted it for me but clearly the support isn't there."
>
> He then went on:-
>
> *"I am not trying to be difficult.* The need to get over to see my family is important to me but isn't the main thrust of this move to try and avoid Friday operating.
>
> *This Friday operating issue has been debated before and was the source of problems in the past.* I had understood that the arguments were made and that the lack of junior support at the weekend was an acknowledged reason for avoiding eye lists on a Friday. In fact [Mr Downes] argued vociferously against Friday operating when he first started – my dad thinks he still has scanned copies of those letters from [Mr Downes] so he's going to try and dig those out for me –should make interesting reading considering that now he suddenly thinks it's ok.
>
> *Anyway, I am unhappy operating on a Friday when we have no junior cover over the weekend.* What happens if I get complications and have to bring

people back? My glaucoma cataracts I like to bring back to check their eye pressures anyway as they are at risk of pressure spikes. We're a top heavy speciality without junior worker bees to look after patients at weekends. I will not compromise patient safety. If we had a junior who was there anyway and could do a ward round then it's fine but as it is I do not want to risk my patients.

He then went on to put forward a series of solutions as follows:-

"If I do keep the Friday operating slot I will need to secure agreement from all my colleagues that they will be happy seeing my post-ops on Saturday mornings for me. It would not be many but they would need to have pressure checks or more intervention if they are complicated cases. I would want assurance (written preferably) that the on-call person would be OK with that so that I can ensure my patients do not suffer clinical risk/suboptimal care by being operated upon just before the weekend.

OR

I get an extra PA for Saturday morning to do a post-op ward round? I'm not keen but if that is what we have to do I have no choice. I would want a nurse with me though so we can open clinic up.

OR

I simply ditch the alternate Friday morning operating. I am not entirely happy with this as it will mean I only get 1 $^{1}/_{2}$ lists per week and I would try and get another list somewhere sometime soon (by pestering you!). It would also be detrimental to the waiting lists which was one of the reasons for the third consultant appointment.

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.

If you can't secure the Thursday afternoons for me I'll have to make my arguments to [Mr Downes and Mr McNeela] and if I don't get any joy I'll have to take it up the ladder.

There is no rush. It's not till February anyway.

If you'd rather stay out of this or you're being pressurised in any direction then I'll just have to try and sort it when I'm over in Dec."

67 This e-mail refers to an earlier episode some years before when Mr Downes had first joined Mr Alwitry's father in the Ophthalmic Department, Mr Alwitry's father then being the sole ophthalmic consultant in the Ophthalmic Department. Mr Alwitry's e-mail to Ms Gindill of 29 th September, 2012, was forwarded to Mr McLaughlin, who forwarded it in turn to Mr

Downes on 3 rd October, 2012, with this comment:-

> *"Dear Richard*,
>
> *This is perhaps a portent ……"*

68 On 1 st October, 2012, Ms Hockenhull e-mailed Mr Alwitry, copied to Mr Downes (who was on annual leave) and Mr McNeela and others, saying that she could not see these alternate sessions working well, and that they would result in *"clerical chaos",* and would make staffing the clinics a nightmare. *"I am not sure why instead of alternate sessions, we could not have all day clinics Wednesday take away the Monday morning and alternate Friday clinic, then if you are not operating, you will have a long weekend?"* Mr Alwitry responded saying that he could see that his requests *"seem to have been ignored"* and suggesting that their e-mail discussion should be between the two of them for the moment. He said this about operating on Friday:-

> *"The operating on Fri am I'm not happy about – unless I have the agreement of all the on-call people to come and see some of my patients post-op then I'm not happy with doing intraocular surgery on a Friday for fear they will be left over the weekend without any care.* [Mr Downes] actually made the arguments against a Fri eye list when he started. My dad's going to dig out his letters from back then so should make interesting reading. I'm hoping we can sort out so I do DSU every Thurs PM but we'll see.
>
> *Don't really want to ditch Mondays completely as that is supposed to be my on-call day – [Mr Downes] wants Tues, [Mr McNeela] wants Wed, leaves Thurs or Monday – if I do Thurs I can't fly off until late Friday (silly flight times) to see the kids.* If I do Monday on-call it will mean that I can fly off Thursday evening if I'm not operating on the Friday. I have the two little ones all day Friday so it would work out well."

69 Mr Alwitry proposed his own clinic timetable commenting:-

> *"I'm trying to sort out timetable well in advance as if I do have to fly back to the Island on Sunday and can't leave till late Friday we need to try and find a nanny to help out with the kids which will take time*."

70 On 2 nd October, 2012, Mr Alwitry sent a further e-mail to Ms Hockenhull over the clinic timetable:-

> *"Spoke to [Mr McNeela] this evening.* He's really kindly agreed to do Mondays on call leaving the Wednesdays on-call for me. I'd thus like to take you up on your offer of clinic all day Wednesday. I'm in clinic Thursday morning too if that's ok. I do not want to do the alt Friday mornings which works for you too.
>
> *This means I'll be able to fly back to the Island Monday morning 1 st 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 to join me) much more bearable."

71 On 3 rd October, 2018, Ms Gindill confirmed to Mr Alwitry that the theatre timetable had been ratified the previous Friday, but not with Mr Alwitry having the permanent Thursday day surgery unit session, as Mr Famoriyo (the consultant gynaecologist) "was pretty adamant about keeping the alternating week arrangement. However I am sure once you are here, and you both have a face to face conversation there may be room for manoeuvre. These things are usually best done in person."

72 On 7 th October, 2012, on the eve of Mr Downes' return from leave, Mr Alwitry e-mailed him saying that whilst Mr Downes had been away, he had been *"seriously thrashing out the clinic timetable"* with Mr McNeela and Ms Hockenhull. He raised the query about the number of PAs he was being required to do over and above his contractual obligation. He raised the clinical necessity of having access to the theatre on the day following any trabeculectomies (complex glaucoma operations) he carried out in which he specialised. He then raised again the issue of Friday operating:-

> *"Friday operating – this is the exact same argument you had when you first started Richard and really the same points you made back then still stand.* I thought that the lack of junior support at the weekend was an acknowledged reason for avoiding eye lists on a Friday. What happens if you get complications and have to bring people back? My glaucoma cataracts I like to bring back to check their IOP as they can get big IOP spikes. We're a top heavy speciality without junior worker bees to look after patients at weekends. I think it introduces clinical risk and suboptimal care for patients. If we had a junior who was there anyway and could see post-op patients then it's fine but as it is I do not want to risk my patients floundering unattended over the weekend.

73 He then set out the same solutions as he had with Ms Gindill. He indicated he would be over in Jersey on 22 nd and 23 rd October, 2012, and would be happy to meet up and discuss this face to face with them both.

74 Having returned to the Island, Mr Downes sent Mr Alwitry this e-mail on 9 th October, 2012, copied to Mr McLaughlin, Miss Body, Dr Luksza, Mr Siodlak, Mr Famoriyo, Ms Gindill, Mr McNeela and Ms Hockenhull, which is worth setting out in full:-

> *"An awful lot of correspondence in my absence has arisen consequent upon this email.*
>
> *I feel it is important that you fully understand the position concerning your appointment and timetable so would make the following points for clarification.*
>
> *As a department and organisation we have made every effort to accommodate*

your interim requirements from Dec to Feb 11. This has not been the easiest exercise for many reasons not least of which is availability of theatre space.

The timetable below will be implemented for you from 11/2/13 which is the time that you agreed to commence your full time commitments.

As I have made clear we cannot provide you with what is not available – further you must understand that your requirements have to fit in with everyone else. I have tried my utmost using what influence I have to get the best possible arrangements for yourself but would remind you that 'last man in' must accept that compromise at this juncture is prudent.

I suggest you follow my advice (below) with regard to your theatre sessions on Thurs/Fri.

Just to clarify my position with regard to theatre allocation on taking up the post in Jersey about which you do not appear to have the full facts. Your father advised the appointments committee that I would only require a single operating session and suggested that a weekly Friday afternoon session would be adequate in spite of my protests at the time, sadly not supported by my future colleague. I started with this single session. It took me many months in post before I was able to make any inroads in addressing this wholly unsatisfactory arrangement.

If you have any further queries /questions/concerns in relation to the above please address them to either myself, [Mr McLaughlin or Mrs Body] rather than involving a myriad of different individuals which simply serves to confuse. I would finally advise/warn you that making too many demands at this stage of your appointment is unlikely to bode well for your future relationships within the organisation!

I hope to see you when you are next over later in the month."

75 Mr Alwitry said he was shocked by this e-mail, because it closed the door on any further discussions. He found it quite humiliating that it had been copied to everyone. Indeed, there were no further e-mail communications between Mr Alwitry and the General Hospital from then until his contract was terminated.

76 Mr Alwitry says he then telephoned Mr Downes on 10 th October, 2012, a call which his records show lasted 8 $^{1}/_{2}$ minutes, and in which he says he verbally agreed the Job Plan as proposed by Mr Downes and asked him to pass his apologies on to everybody, including Mr Siodlak and Dr Luksza, and to explain that he was just trying to keep his patients safe. Mr Downes has no memory of that call, but accepts that it took place. He did not pass on any apologies as requested.

77 Mr Alwitry was sufficiently concerned by the tone of Mr Downes' e-mail that he contacted

the BMA on the same day, saying that he was feeling *"helpless and quite distraught"*. From the notes kept by the BMA of his communications with them, it would seem that his principal concern related to the PAs, and the fact that he would be working 11.5 PAs, whilst only getting paid for 10. Mr Downes had not responded to his question in relation to this. He also explained to the BMA the problems that he had had trying to *"sort out"* his proper Job Plan, adding this:-

> *"I have also got a concern with the alternate Friday morning eye operating.* We have no junior cover over the weekend and I am concerned that if I get a complication or have to bring a patient back for a check there will be no-one to look after them. I think this represents a clinical risk and asked for assurance from my colleagues on the on-call rota that they would be ok with reviewing my patients on the weekend when required. I said that I would endeavour to be on-call myself when I was operating on a Friday but I could only cover one of the two and the other I wanted assurances about. This was clearly deemed to be another demand and sparked that email.
>
> *My father was a consultant in Jersey and he worked with Richard Downes.* They had a very stormy relationship and were hardly speaking by the time my father retired about 8 years ago. I was hoping that the relationship with my father would not have any bearing on how I was treated but it seems that that is not correct. The senior colleague he refers to when he mentions the difficulties he had when he first started was my father. It seems that the son is suffering for the sins of the father.
>
> *I have concerns about Friday operating without willing cover over the weekend.* I have issues that the timetable has too many clinical sessions which is not fair. I would also like clinics moved a bit so I can provide better and safer clinical *care for the patients which also has the support of the clinic sister and the other consultant.* Despite all this I have accepted my job plan to avoid any problems. I can also tailor my timetable to suit patient care as time goes by.
>
> *I do think that it's perfectly reasonable to discuss my timetable (as I did when I was appointed in Derby) so I did discuss it with the theatre sister and the clinic sister.* I guess things are done v differently in Jersey which is something I'm sure I'll get used to.
>
> *My current issue is the 11.5 PA thing*."

Termination of contract

78 We now move to the internal hospital communications that led to the termination of Mr Alwitry's contract. Mr Siodlak responded to Mr Downes' e-mail of 9 th October, 2012, "Richard, you can tell him that I [the medical director] do alternate Friday pm clinics and if he doesn't like it resign now!"

79 Mr Alwitry did come to Jersey on 22 nd and 23 rd October, 2012, but he did not seek out either Mr Downes or Mr McLaughlin or anyone else from the hospital management. He did, however, visit the hospital and spoke to Ms Gindill, who reported to Mrs Body that he was still raising the issue of operating on Fridays, which caused her to be nervous. Mrs Body referred this to Mr Siodlak, who wrote this e-mail on the afternoon of 23 rd October, 2012, to Mr Riley, copied to Mr McLaughlin, Dr Luksza, Mrs Body and Mr Downes:-

> *[Mrs Body] tells me that the newly appointed Eye consultant is getting even more demanding.* This appointment will be a disaster and we should withdraw his offer of a job before he gets here. Mark my words, he will make [a previous consultant who was the subject of the Verita report] seem like a walk in the park!"

80 Mr McLaughlin then e-mailed Mr Riley, copied to the same persons, but including Mr Leeming, saying:-

> *"I think it is fair to say we are all becoming increasingly concerned at the reports we are getting about our latest appointment … and he hasn't even started yet.* My experience has been that he will not accept anything he does not like without an argument and when he doesn't get 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. I suspect it will not be long *before either you, [Ms Garbutt] or the Minister hear from him and I feel it is most important that we all hold the same line, so I propose that any negotiations with him should be routed through me (or you if you would rather take this one on!)"*

81 On 24 th October, 2012, Mr Riley asked what these new demands referred to by Mrs Body were and how they differed from the offer and the contract of employment, to which Mr Downes replied:-

> *"General concerns that the timetable does not suit him and his needs.* Not happy/prepared to operate on a Friday. Feels PAs are in excess of his contract (has apparent confirmation from HR that this is the case). These are observations based on his discussions with other members of staff within and without Ophthalmology. He was visiting the Island on 22 and 23 Oct. but declined to discuss these concerns with myself, [Mr McLaughlin] or [Miss Body] even though this was suggested when I last emailed him with his definitive timetable.
>
> *He was advised at interview that the timetable was under review and that the job contract included 6 PAs of DCC [Day Care Clinic] (from memory since I do not have the contract to hand).*
>
> *He made no mention of his inability to commence the post in Nov.* So interim arrangements have been made until Feb 11 when his full time timetable will be

operative."

82 Mr Leeming added:-

> *"He was a bit of a nightmare at the start but once we agreed his reduced working hours and start date for Dec 3rd he hasn't mentioned anything else.*
>
> *He has signed his permanent contract and it has been agreed by [Mr Downes/Mrs Body] that he will start on 3rd Dec, working a 3 day week until February when he will go full time."*

83 It would seem that in October 2012 Mr Riley had started exploring the risks and consequences of withdrawing Mr Alwitry's job offer, with the start date now agreed and the contract of employment signed. This generic advice was received from the Law Officers on 30 th October, 2012:-

> *"What are the risks and consequences of withdrawing a job offer here in Jersey – with start date agreed and contract signed"?*
>
> *In the absence of local authority on the point, the position here would likely reflect the position in the UK because as a general rule Jersey adopts the same employment law principles as adopted in the UK.*
>
> *The salient points:*
>
> - *a contract of employment comes into force as soon as there has been an offer of employment and an unconditional acceptance of that offer (irrespective of whether a contract has been signed);*
> - *any withdrawal of an unconditional job offer will constitute a breach of contract'*
> - *the prospective employee would be entitled to sue for damages (an amount corresponding to payment for the period of notice to which the employee would have been entitled had he or she started work and then been dismissed).*
>
> *Additionally:*
>
> - *care should be taken with regard to the reason for subsequently wishing to withdraw; and*
> - *where there has been a conditional offer of employment (i.e. subject to satisfactory references), the contract has not been formed if the condition has not been satisfied and the employer is able to withdraw."*

84 Mr Riley responded to this advice:-

"Thanks—that's useful.

Of particular value is the quantum of risk – if it is ONLY the notice period that will be seen as a worthwhile risk I suspect. The other point of note is the word "unconditional" attached to the phrase about acceptance – I might be able to draft something about him placing unreasonable conditions"

85 The issue of unreasonable conditions was not taken further, but withdrawal of the job offer was now on the agenda as the headings to the internal e-mails "Withdrawal of offer" show. Mr Riley put the position this way in his e-mail of 30 th October, 2012, to Mr Siodlak, Dr Luksza, Mr Downes, Mr McLaughlin and Mrs Body, copied to Mr Jones:-

Advice from the [Law officers] is that to withdraw the job offer now creates a risk of litigation in the Royal Court – however the remedy would only be 3 months pay – this would be a cost pressure for the Ophthalmology Budget.

There are of course other 'risks'.

1. Strong chance that he (and family) will play this into the [Jersey evening Post].

2. Ditto with politicians – probably direct to the Minister if not higher.

3. Do we have an alternative candidate?

4. If not do we risk locum costs if we have protracted recruitment?

5. Do we have the appetite for this difficult decision????"

86 Following a discussion within the management, it would seem that a decision was taken that Mr Alwitry should first be written to, in that on 31 st October, 2012, Mr Downes sent Mr McLaughlin the Job Plan saying this:-

"As discussed he needs to confirm all of these arrangements and in particular his acceptance of 6 clinical sessions, mostly fixed but some flexible to fit in with sessions when theatre is not available to him i.e. once a month on Tues. mornings and certain Fri. mornings that will be taken by visiting surgeons. He must also agree to make up his on-call duties (approx 3 weekends) when in full time post and will be expected to cover on call the 2013 Xmas week as he previously volunteered to do.

If he remains unhappy he should be afforded every opportunity to seriously re-think his position. (In this unlikely event allow 5 working days for a response – if not forthcoming then we make the decision for him). If he remains unsure we would reluctantly (sic!) agree to his resignation even at this late stage with no financial penalty on either side.

Kindly also point out to him, if only to make my life bearable, that my actions and involvement are entirely in keeping with my required role as a [clinical director], and not in any way personal decisions designed to make life difficult; rather the reverse."

87 It was now four weeks before Mr Alwitry was due to start work, and preparations for his induction were in progress. This prompted him to contact the BMA on 6 th November, 2012, asking how he should play the induction process: "Do you want me to discuss my issues with them all, or keep my head down and speak to HR before raising issues?"

88 On 12 th November, 2012, he made it clear to the BMA that he did not want to cause problems, but he did not want to work 11.5 PAs, more than his fellow consultants who were on the same contract, when he was only being paid and contracted for 10 PAs: *"It's just not fair"*. The BMA advised that speaking to Mr Jones (medical staffing manager at the General Hospital) and seeing what he suggested would be a good way to proceed. This proposal proved to have fatal consequences in so far as Mr Alwitry's employment was concerned.

89 On Monday 12 th November, 2012, at 16:42, a BMA representative contacted Mr Jones in this way:-

"Dear Brian

I trust you are well.

Can I call you to discuss a delicate issue surrounding Dr Alwitry? Dr Alwitry is a newly appointed consultant and is due to start working full time in the new year and move to the Island. Dr Alwitry has run into a few problems with the consultant lead and I would like to appraise you of the situation for the purposes of avoiding any future conflict.

I am in my office on Wednesday. Can you let me know a good time when I can call you?"

90 This was forwarded by Mr Jones to Mr Riley, with the question *"Where are we with Mr Alwitry?"*, to which Mr Riley responded at 16:58:-

"I think everyone is agreed that we formally withdraw the job offer."

91 Mr Jones then e-mailed Mr McLaughlin, Dr Luksza, Mr Siodlak, Mr Downes and Mrs Body on 13 th November 2012 at 10:07:-

"Mr Alwitry has referred an unspecified matter to the BMA (see below) in relation to Richard Downes. I have not spoken to the BMA yet regarding this but this possibly strengthens our resolve to terminate the contract accepted by Mr Alwitry giving three months' notice.

Before I do this, I need to be sure we are all in agreement and fully understand there may be subsequent litigation that may incur the following penalties assessed by the lawyers as minimal and to include…

As briefed earlier there may also be media and politics related risks.

If we are in agreement to terminate the contract [Mr Riley] will need to brief [Ms Garbutt] and the Minister at the earliest opportunity."

92 Mr Riley then briefed Ms Garbutt, indicating that it had already been agreed to withdraw the job offer:-

"We have offered Amar Alwitry the post of consultant in Ophthalmology with a December start date.

His behaviour and attitude since accepting the post has been atrocious and the Medical Directors, Clinical Director, [Mr McLaughlin] [Mrs Body], me and my team are agreed to withdraw the job offer.

The financial consequences are minimal and deemed an acceptable risk.

The ability to appoint another quickly is very strong.

The risks are political – his Dad was a consultant here and still lives in Jersey and will probably play political cards.

The Medical and Hospital directors will probably give me the mission of persuading [Deputy Pryke] it is a risk worth taking/managing.

May need your advice/support."

93 A meeting took place, in the afternoon of 13 th November, 2012, attending by Mr McLaughlin, Mr Siodlak, Mr Riley and Dr Luksza. There was a brief note of the meeting, which was headed "Meeting to Discuss Mr A Alwitry", which read:-

"This meeting was held to discuss the appointment of Mr A Alwitry, Consultant Ophthalmologist:-

Mr Alwitry's communication, attitude and behaviour since his offer of employment was accepted with Health and Social Services was discussed, along with his subsequent reporting of Mr R Downes to the BMA.

Those present agreed that, although regrettable, a withdrawal of employment was required.

This issue had already been raised at Ministerial level.

The decision was taken not to discuss the withdrawal of the offer of employment

to Mr Alwitry with Mr B McNeela at this stage."

Mr Riley then raised the matter with Mr Christopher Stephenson, a director in the Human Resources Department at the SEB, seeking the SEB's support for the proposed course of action.

94 It is not known whether Mr Jones responded to the BMA's inquiry on Wednesday 14 th November, 2012, as the BMA representative had suggested to ascertain what it was they wished to discuss, but it can be seen that the e-mail received from the BMA on 12 th November, 2012, had been interpreted by the hospital management as a complaint by Mr Alwitry against Mr Downes, who as a clinical director was his immediate line manager.

95 Subsequently on 30 th November, 2012, and after Mr Alwitry's employment had been terminated, the BMA e-mailed him confirming the purpose of their approach to Mr Jones as follows:-

> *"I am sorry you are unhappy with the situation that has arisen*.
>
> *I can assure you that we are also surprised by it.* I can confirm that at no stage did you instruct us to report or formally take up any case against any individual or Jersey HSSD. In communicating with the BMA you clearly indicated that you did not wish to cause any problems and our informal discussions related to the Job Planning process itself. You asked us to advise you as to the way the process worked and how best to negotiate the Job Plan itself.
>
> *The discussion our Employment Adviser, Sheila Chandler, attempted with HR in Jersey was by way of an informal chat and in no way should it have been construed as a formal complaint or initiation of any formal process*."

This letter from the BMA is somewhat inconsistent with the evidence of Mr Alwitry that he had only wanted the BMA to raise the issue of his PAs and suggests that the Job Planning issue was still alive.

96 It is noteworthy that Mr Downes was not present at the meeting on the 13 th November, 2012, because he was out of the Island, but on his return and having learnt of the approach from the BMA, he supported the decision to withdraw the job offer. Mr Riley confirmed this to Ms Garbutt on 19 th November, 2012:-

> *"Richard supports the solution we agreed last week – indeed Richard's position is that any other solution would lead to HIS resignation as CD*.
>
> *I am now awaiting SEB 'approval' —if this is forthcoming we will work with Law Officers and action the plan – if it is NOT then we may have to move to Plan B which is the sort of letter [Mr McLaughlin] was proposing to send*."

It can be assumed from this that if the SEB had not approved the withdrawal of the offer, the

hospital would revert to Mr Alwitry being sent a letter seeking the confirmations over the Job Plan suggested by Mr Downes.

97 On 15 th November, 2012, Mr Riley dispatched a letter for the SEB in these terms:-

> *"I write to confirm our exchange regarding the planned withdrawal of a job offer and hence termination of the contract of a consultant surgeon who is about to take up employment with us in the next couple of weeks*.
>
> *Although an excellent candidate with a strong CV, excellent references and an impressive interview performance, his behaviour and attitude since receiving the offer has been consistently adversarial, aggressive, inappropriate, duplicitous, uncooperative and frankly unacceptable.* This behaviour has been directed at senior managers, senior doctors, HR staff and other clinical professionals in other services. He has now engaged the BMA to support a formal complaint about the Clinical Director [CD] – even before he has started in post!! The CD, not altogether unreasonably, has indicated that he would feel obliged to resign as CD if the offer is not withdrawn.
>
> *We are content that this behaviour constitutes a loss of trust and confidence so fundamental as to undermine the contract of employment*.
>
> *This proposed course of action has some risks and consequences [outlined below] but these would have to be managed and in reality would have a relatively short shelf life*.
>
> *The alternative is to commit to tenure and endure 30 years of trying to manage a disruptive, dysfunctional, high maintenance medic – [the States of Jersey] has experienced this more than once in recent years and to invite repetition is not considered desirable*.
>
> *Following discussions with the Law Office the litigation risk is deemed to be acceptable.* The maximum legal remedy would be 3 months' notice and any incurred costs associated with a move to Jersey – we believe these to be nil or de minimis at this point.
>
> *The real risk is that he was born and brought up in Jersey – first generation rather than old Jersey blood – but he and his father [a retired… consultant] claim to be well connected to the politicians and media here and in fact he has used this as a threat already.* This story will therefore play out for a period with politicians and the JEP.
>
> *The Clinical Director, Medical Directors, Hospital Director, CEO, myself and the 3 members of the Ministerial team are all of a view that 30 years of a dysfunctional ophthalmology department is the greater risk – hence our intention to terminate*.
>
> *In recognition that HSSD is not technically the employer it is accepted that you*

may wish to discuss this situation as necessary with SEB colleagues to clear the way for this decision to be enacted. There is a need for some urgency as the start date is very imminent."

98 Senator Gorst said it was unusual for the board to be written to in this way. The SEB's powers in relation to these employment matters had been formally delegated to HSSD, and it was not for the board to make the decision. It had been referred to the SEB because HSSD were concerned it might become political. Members of the board signified their concurrence with the proposed plan of action by separate e-mails. Bearing in mind the trenchant terms of Mr Riley's letter, it is not surprising to us that they did so.

99 On 22 nd November, 2012, Mr Riley wrote to Mr Alwitry just over a week before he was due to start work in these terms:-

"I write to inform you that after careful consideration we have decided to withdraw the offer of the post of Consultant in Ophthalmology made on 21 st August 2012, and to formally notify you that any contractual relationship between us (to the extent that it may exist) is to be treated as terminated.

The decision has not been reached lightly. It has been informed by:

- *The attitude and behaviour displayed in relation to multiple aspects of the role;*
- *Demonstrable evidence of a dysfunctional relationship with the Clinical Director and other senior medical and management staff; and*
- *Loss of trust and confidence between the respective parties, resulting in any employment relationship being irreparably damaged*.

We appreciate that the above places both parties in a difficult position.

On a without prejudice basis, we are amenable to giving sympathetic consideration in respect of any direct and irrecoverable losses incurred to date. In this regard I would be grateful if you would furnish me with appropriate copy receipts within 14 days of this letter."

100 The effect of this summary termination of his contract on Mr Alwitry was understandably severe. We quote from paragraph 320 of his affidavit of 13 th July, 2018:-

"I was completely taken aback by the letter and confused. It made me physically sick. I just couldn't understand what was behind it all. I vomited for two days and did not sleep. I had to have emergency medical care in the form of strong sedatives and antidepressants. I felt suicidal as I felt I had let my family down. I was left jobless with four small children to support. My career which had been unblemished was in ruins. I had now long since resigned from Derby and was

> only a week away from taking up my post. I had already moved my belongings over to the Island and my house was just about to go on the market. My son had already passed his entrance exam to Victoria College and I had paid his first term fees. I struggled to comprehend the letter and I was worried sick as to what I was going to say to my wife and my children, who had been so excited about the prospect of life in Jersey. Everyone knew I was moving to the Island. To date I still get people saying to me 'I thought you went home to Jersey'. I cannot face people at the national meetings as they will be talking about this. My appointment to the Island was advertised to every ophthalmologist in the UK via the Royal College of Ophthalmologists newsletter. They know I was stopped from taking up my post. How can I face them at interview and what do I say if asked about it? I feel sick even contemplating that now and am still taking propranolol tablets to mitigate my anxiety."

101 The issue then became whether Mr Alwitry should be reinstated, to which the management were as of one in their opposition. We have summarised earlier the events that followed, but the issue for the Court is whether, as at 22 nd November, 2012, the contract of employment was lawfully terminated.

102 Reading the e-mail exchanges between Mr Alwitry and the hospital management, it is easy to see how the Complaints Board was so critical of the hospital management in their report, in that the e-mails from Mr Alwitry were polite and raised patient safety concerns which on their face seemed reasonable. However, the Complaints Board only heard evidence from Mr Riley in an inquiry that was intended to deal with procedure only, and had not heard from the hospital directors and consultants. We have heard their evidence, and there is another side to the story. We start, however, with the evidence of Mr Alwitry.

Evidence of witnesses

Mr Alwitry

103 We found Mr Alwitry somewhat argumentative under cross-examination, and given to a degree of flippancy, verbosity and conceit about his capabilities. He displayed much pent-up anger, perhaps understandably in view what had occurred. We bore in mind, however, the effect that these events had upon him and this poignant evidence from his wife: "These events took a part of him away, and he has not been the same since".

104 Mr Alwitry had been brought up in Jersey, where his father was a consultant ophthalmologist at the hospital, and it had always been a desire of his to come back to Jersey together with his family. He made a point of building a network at the hospital by working as a locum, and becoming friends with Mr Downes and Mr McNeela, the other consultant ophthalmologist. He made it known that he wanted to return to the Island, and would be interested in a consultant ophthalmology position at the hospital, should one ever come up.

105 In March 2012, Mr Downes had e-mailed him about the possibility of a third consultant appointment at the General Hospital and they met in England at the College of Ophthalmologists, where he was encouraged to apply. He could not recollect being told that the appointment was urgent. He accepted that three months was the standard notice period for consultant contracts in the NHS and was the notice required under his contract with the Derby Hospital.

106 On 6 th June, 2012, Mr Downes' medical secretary e-mailed him to tell him that there was an advertisement for the consultant ophthalmologist post. In the advertisement there was reference to the role commencing in *"Winter 2012",* but nothing more specific was mentioned; nor indeed, was there any reference to the appointment being an urgent one. It was a brand new post, and usually that meant that there was flexibility regarding a start date. His understanding of *"Winter 2012"* was that it extended from December 2012 to March 2013, so the post need not be taken up until as late as February or March 2013.

107 He stated in his application form that his notice period was six months. His wife was contractually bound to give her own employer six months' notice, with a courtesy obligation to try and give nine months' notice, to give time to recruit a replacement. He also had four young children. When you are a registrar with no commitments, you can start work in three months, but he had never known any consultant moving their substantive post in three months.

108 As part of the preparation for the interview, he was given a copy of the Verita report, with its recommendations for an open culture and focus on patient safety, which he found encouraging, as patient safety was one of his passions.

109 The interview went well, and Mr Downes telephoned him on 1 st August, 2012, to say that he was the successful candidate. At no stage during the pre-interview visit or in the formal interview was the issue of the start date discussed with him. He believed that everybody on the panel would have read the application form, and would know that his notice period was six months.

110 On or around 8 th August, 2012, he had a call from Mr Downes, who had indicated to him that the hospital management were looking to an earlier start date of November 2012. He could not commit to this, and wanted to look at other options, but he suggested a part-time arrangement, to enable him to return to his young family in the UK. He said the weekends were the critical period regarding caring for the children and he felt anyone with any compassion would understand that to leave his wife looking after four young children alone for the whole weekend was unfair; he was a father and had obligations to his children. He said Mr Downes seemed sympathetic, but told him that Mr McLaughlin was adamant about the start date. On the same day, 8 th August, he received the letter from Mr Leeming with the formal offer, which proposed a start date of 12 th November, 2012, on a part-time basis.

111 Mr Alwitry sent two e-mails to Mr Downes on 9 th August 2012, explaining the difficulty he was having in sorting out the logistics for the move over. His plan then was to look after his children in England on Thursdays. He proposed that a locum be taken on until he could take up the post, suggesting the candidate who was the runner up. He also drew Mr Downes' attention to the fact that his application form clearly stated that six months' notice was required.

112 On 10 th August, 2012, he received Mr McLaughlin's letter, giving him a deadline of the 15 th August 2012 to commit to a start date of 1 st December, 2012. He was upset by Mr McLaughlin's letter, and found the tone and stance to be wholly unreasonable. He had a short but not difficult telephone conversation with Mr McLaughlin that day and followed it up with an e-mail to him, repeating the fact that no one had ever discussed the start date until after the interview, and that the job indicated *"Winter 2012*" only. He proposed that he started on a part-time basis on 1 st January, 2013, moving to full-time on 11 th February, 2013. His understanding was that Mr McLaughlin was going to consider this with the others and revert.

113 On 13 th August, 2012, he e-mailed Mr Downes, in what he described as a personal e-mail, to say he was a little shaken by Mr McLaughlin's approach. He was upfront with Mr Downes about the fact that he had spoken to the BMA, and a lawyer friend, as he simply could not understand the hostile approach. As he stated to Mr Downes in his e-mail, they too could not really understand or believe Mr McLaughlin's stance. He accepts that he was being critical of Mr McLaughlin, because he had never seen a letter like that for what was a new post, and in his view it was not an appropriate way to manage people. He clarified that he had not engaged an employment lawyer, but had been introduced to one on a social occasion, and had asked him if there was something about Jersey law which was different in relation to start dates.

114 In any event in his view being critical of Mr McLaughlin was not a problem in terms of their ongoing relationship, because Mr McLaughlin was leaving the hospital shortly. He said there was always tension between managers and clinicians with the former being concerned about money and the latter with patient care, but he did not have a problem with managers, unless it involved patient safety.

115 In his e-mail exchanges with Mr Downes, the latter had made it clear that a February 2013 start date was not workable, and that an earlier start date was necessary because of waiting lists and an inability to fill the appropriate locum post. Mr Alwitry did not understand the real need for an early start date which did not seem to accord with what he had heard from others, such as Mrs Body, Mr McNeela and Dr Luksza to whom he had spoken.

116 Being aware of the deadline unilaterally imposed by Mr McLaughlin of 15 th August, 2012, he reluctantly confirmed his agreement to the proposed date of 1 st December, 2012, for a

three day week until 11 th February, 2013. He was shocked and deeply saddened, following discovery, to see the responses of both Mr McLaughlin and Mr Downes in their internal emails of 14 th August, 2012.

117 The suggestion that it was usual for consultants to take up new posts within three months was complete nonsense in his view. He had sat on interview panels and they had always waited for the correct candidate. Furthermore, Mr Downes appeared to suggest there was something wrong with his having spoken to the BMA, his trade union, and an employment lawyer. He had no idea that Mr Downes was already expressing concerns about him, which was completely contrary to the supportive stance he was taking on the telephone and in email communications. He pointed out that during this time, Mr Downes was also discussing the possibility of Mr Alwitry joining him in his private practice.

118 The waiting times disclosed by the SEB for 2010 to 2013 showed that there had been quite a dramatic reduction in waiting times in 2012, so that three months' delay was not going to sink the ship. As he said in the email to Mr Downes of 14 th August, 2012, Mrs Body had told him the situation "…. wasn't that bad. In fact her [Mrs Body] and I had a discussion about whether we *needed a third consultant at all!*". He did not therefore understand the urgency and concluded that this was just an exercise of power by the hospital management tantamount to bullying. The suggestion of an interim locum cover was highly sensible, and something which warranted proper consideration. Ultimately, he wanted the position, and to return to Jersey, and so he compromised.

119 Under the part-time arrangements, he proposed to work six clinical sessions (i.e. the same number of clinical sessions as his fellow consultants under their full-time contracts) over three days for 60% of the pay. He would also be paying for his own flights back and forth. He was happy to do this, as it would allow him to help his wife with the children, and also fulfil his duties to his new department. He thought he was demonstrating that he was a team player, and that this would be appreciated.

120 On or around 21 st August, 2012, he received the revised contract, which had been signed by Mr Leeming for and on behalf of the SEB, which he countersigned on 24 th August, 2012, and returned. He handed in his resignation to the Derby Hospital on 21 st August, 2012, in the full expectation that he would be allowed to take up his post at the General Hospital.

121 Towards the end of August 2012, he visited Jersey and met up with Mr Downes and Mr McNeela. Mr Downes and he discussed the possibility of him joining his private practice, but the terms Mr Downes was proposing were not attractive. Essentially, he said Mr Downes wanted him to contribute 20% of his private practice earnings to Mr Downes for his life, even after he retired from private practice, which was likely to be within a few years. He also met with Mr McNeela, to discuss the possibility of him hiring a room in the same premises used by Mr McNeela and sharing the use of Mr McNeela's equipment, perhaps

purchasing the same upon his retirement. He did not formalise any agreement in respect of this, but in his view, Mr McNeela was clearly the front runner. He told Mr Downes that he would not be joining him in private practice, although he still held open the possibility of negotiating to do so.

122 He was keen to negotiate his Job Plan as the start date was only a couple of months away, and he needed to sort out his plans, including travel plans to come back to the UK to visit his family who would not be moving to Jersey until July 2013. It would be useful for him to know his timetable particularly so he could book flights early to take advantage of any price differential for being early.

123 In his e-mail to Mr Downes of 16 th September, 2012, he made it clear that he had been speaking to Ms Hockenhull, Mr McNeela and Ms Gindill, about his Job Plan proposals. The more complex glaucoma surgery in which he specialised was, he said, best carried out early in the week, with the more straightforward cataract surgery being left to later lists, provided there was adequate care on the first post-operative day. It was desirable for both types of surgery to take place in day surgery unit, because this was much more cost effective than using the main theatre which required the use of a bed. He was contractually and professionally obliged to make the most effective use of hospital resources, so running a high volume of more straightforward cataract surgery lists as in-patients in the main theatre made no sense at all.

124 He essentially had two issues with the Job Plan prepared by Mr Downes:-

(i) He was scheduled to operate on a Friday, without specialist ophthalmic care available at the weekend.

(ii) He was not scheduled to have a clinic on Wednesdays, which was the day after his Tuesday theatre list. The effect of this was that he was unable to bring his glaucoma surgery patients back for review on the day following their surgery.

125 The Friday (less complex) cataract surgery list would create a serious problem, because there are no ophthalmologists or indeed any eye trained staff in the General Hospital on Saturdays. The team was very small in Jersey, consisting of three consultants, (namely Mr Downes, Mr McNeela and prior to his dismissal, himself) and two middle grade doctors. There were no junior doctors with ophthalmic expertise in Jersey, no junior ophthalmic specialists/trainees and no weekend staffed emergency service. The consultant contracts do not require them to work at weekends. The net effect was that there was no adequate care available at weekends for patients operated upon on Fridays. If the patients ran into complications, then assuming that they themselves identified that they had a problem in good time, they would need to contact their GP or go to Accident and Emergency, who would then have to contact the ophthalmologist on call, which could take hours, in which time visual loss could occur.

126 He referred to the 2010 cataract surgery guidelines issued by the Royal College of Ophthalmologists, which in fact indicated that first day post-operative review was no longer in widespread use, with most departments having replaced a patient visit with a telephone call by a trained nurse or a call by the patient to a trained nurse if necessary. It does, however, stipulate that robust arrangements need to be in place to ensure that patients who are not reviewed the next day have easy access to advice and assessment, and that post-operative complications can be quickly identified and managed.

127 In his view, the General Hospital did not have robust arrangements in place for dealing with any post-operative complications quickly. He was not saying that he refused to work on Fridays, but if there was no option but to operate on a Friday, then he wanted in place robust processes for those patients to keep themselves safe as per the options he set out in his e-mail to Ms Gindill of 29 th September, 2012, in which he went so far as to volunteer working on Saturdays when the contract of employment expressly provided that he did not have to work on Saturdays, and could refuse to do so without any detriment.

128 As for the Wednesday clinic, neither Mr Downes nor Mr McNeela had the necessary specialism or training to follow up on his more complex glaucoma surgery. Prior to his appointment, patients requiring this kind of complex surgery had to be flown to Southampton or London, and he was bringing this specialisation to the Island for the first time. This meant that he personally needed to have a clinic available on the day following his glaucoma surgery, so that he could review the post-operative patients.

129 In the light of what he described as *"these obvious problems",* he sought to find a solution. In his e-mail of 24 th September, 2012, setting out the proposed Job Plan, Mr Downes had copied in Ms Gindill, the theatre sister, who Mr Alwitry knew from his time previously working as a locum in the General Hospital. Mr Downes had left for annual leave, and he said it was nonsense to suggest that in emailing Ms Gindill he was going behind Mr Downes' back in some way. His *"GMC mandated obligation"* was to attempt to rectify the patient safety concerns if possible. The GMC (General Medical Council) controls and maintains the register of medical practitioners. The revised timetable sent to him by Ms Gindill avoided any theatre lists on the Friday, so obviating the patient safety risks caused by operating on a Friday without adequate Saturday cover, and he was therefore happy with that timetable.

130 However, in her e-mail of 25 th September, 2012, Ms Gindill informed him that Mr Downes had reverted to alternative Thursday afternoons and Friday mornings theatre, creating precisely the risks that had prompted him to contact Ms Gindill in the first place. He could not understand why Mr Downes had wanted to impose a timetable which created these avoidable risks to patient safety. He sent the further e-mail to Ms Gindill on 29 th September, 2012, in which he set out his concerns about the Friday operating risk, which Mr Downes was insisting upon, referring to the fact that Mr Downes had vociferously argued against Friday operating when he first started as a consultant with his father, and told her that if he was to keep the Friday surgery list, then he wanted an agreement from his

ophthalmology colleagues that they would be happy to see his post-op cataract surgery and glaucoma cataract surgery patients on the Saturday mornings for him when they were on call. He also provided other options to try and mitigate the patient safety risks:-

(i) That he would come to the hospital every Saturday morning after his Friday operating list and open a clinic and receive an extra PA for the Saturday morning, despite the fact that his contract expressly said he did not have to work on Saturdays.

(ii) That he did not use the Friday morning operating list, but instead filled in and undertook surgery whenever he could. He did not really like this option, because one of the reasons for appointing him was to try to reduce waiting lists.

(iii) That he could use a Friday theatre list just to perform lid surgery where a next day follow-up review was not required.

131 He accepted that in his e-mail to Ms Gindill of 29 th September, 2012, he was questioning Mr Downes' judgment, but if he could get Ms Gindill on his side, that would help. It was his job to speak up and it was good to get her on side on patient safety issues. He could then present Mr Downes with rational conclusions which should be welcome. It meant he came to Mr Downes with a solution. It is not good enough just to say you do not agree. Patient issues comes first, and you mustn't be scared to raise patient safety issues, even if it upsets colleagues. On the face of it, Mr Downes was deliberately putting patient safety at risk. He agreed that the foundation of a contract of employment is trust and confidence, but in his view that is overridden by patient safety.

132 He did not receive any response from Ms Gindill but at no stage did she suggest that there was anything improper in his discussing theatre availability with her. On 3 rd October, 2012, he sent a further e-mail to Ms Gindill in relation to the next day theatre issue, suggesting that when Mr Downes was off on a Monday afternoon, that he could jump in and use his theatre list to undertake another theatre session for glaucoma surgery. This, he said, would allow him to use his theatre list on a Tuesday to take the patients back to theatre if needed. This showed he was a team player, offering to do extra work for no extra pay. She had no objection to this but informed him that the theatre time table had been ratified that Friday, but not with him having the permanent Thursday operating sessions as Mr Famoriyo was pretty adamant about keeping the alternating week theatre arrangement.

133 It was Ms Hockenhull, the Eye Clinic sister, who contacted him on 1 st October, 2012, in response to Mr Downes' e-mail of 24 th September, 2012, as she had herself identified problems with the alternate Thursday/Friday sessions, which she said would result in clinical chaos, and was proposing an all-day clinic on Wednesday instead, which would have solved his patient safety concerns. He had two options, either to engage with her and sort out his patient safety concerns, or to ignore her. He said he had the right to liaise with the Eye Clinic sister about the issues of patient safety, and the logistics of patient care, and it would have been rude of him not to have replied to her e-mail.

134 In his response to Ms Hockenhull of 2 nd October, 2012, he said that he wanted to accept the Wednesday all day clinic and set out the timetable he was proposing which, in his view, would solve his patient safety concerns. In addition to providing for a Wednesday all day clinic, it provided no fixed operating sessions for Friday. He could make sure that his patients were OK on a Friday morning before flying home on a Friday afternoon, to spend the weekend with his family if he wasn't on call. He accepted that this arrangement would also have helped with his family commitments during this interim period until his family moved over and he started full time, but he said this was not his motivation, and indeed, some of his own proposals for avoiding or mitigating risks to patient safety would actually have seen him sacrificing more weekends in order to prioritise his patients' safety. He accepted that in his email to Ms Hockenhull he was openly questioning Mr Downes' judgment, but he said this was not destructive language as once again he was duty bound to raise patient safety concerns under the GMC guidelines.

135 Ms Hockenhull's suggestion received support from Ms Jackie Tardivel, the acting lead nurse for ambulatory care, who e-mailed her on the 5 th October, 2012, copied to Mr Alwitry, saying this was a much better plan all round “as it provides a more consistent approach to patient care and should avoid the need for cancelling clinics at the last minute on a Monday in the event of delayed or cancelled flights.” Mr Alwitry responded, under copy to Mr Downes, saying “Thank you, let's get the nod from [Mr Downes] and start booking patients in.”

136 Mr Alwitry then e-mailed Mr Downes on 7 th October, 2012, essentially filling him in on the things that had been going on whilst he had been on leave. He thought Mr Downes would praise them for their efforts in his absence. He set out his concerns and potential solutions regarding the Friday operating issue. He also mentioned that he was concerned about his PAs. Mr Leeming had confirmed to him that he should only be working 10 PAs. Mr Downes never responded to his query about this.

137 He then received Mr Downes' e-mail of 9 th October, 2012, in which he commented that there had been *“an awful lot of correspondence in my absence”* and stating that his timetable of 24 th September, 2012, *“will be implemented”*. Mr Alwitry was shocked by this e-mail, and thought it closed the door on any further discussions. Mr Downes had completely ignored his patient safety concerns, and it seemed to him that some of the decisions/changes made by Mr Downes actively put his patients in the way of harm. By blocking a clinic on the Wednesday, after his Tuesday theatre list, and moving his theatre sessions to the Friday, he actively increased risk of harm to his patients. In short, despite the collaborative discussions between him, Mr McNeela, Ms Hockenhull and Ms Gindill in Mr Downes' absence, the same 24 th September, 2012, timetable was imposed without even attempting to address the patient safety concerns which he had raised, and which they, as a team, had shown to be completely avoidable. Indeed, Mr Downes warned him against *“making demands”* as he saw them, and effectively pulled rank. Furthermore, this e-mail was copied to a significant number of hospital management and staff, which he

considered unnecessary and embarrassing. He considered Mr Downes' e-mail to have been well over the top, stamping down his authority and with the purpose of intimidating him. Nevertheless, he chose to accept the proposed Job Plan and resigned himself to coming in on Saturdays himself to see his patients from the day before, even though he was contractually not obliged to, and to suffer no detriment for not doing so.

138 He telephoned Mr Downes on 10 th October, 2012, in a telephone conversation which he said lasted 8 1/2 minutes. Mr Alwitry was able to recall some of the contents of that telephone call as follows:-

> *"I said, 'Hi Richard.* I, I know you're busy. Sorry about all this stuff, I, I didn't mean anything by it. I am happy with the job, Job Plan and I 'You know' I just want to move, more forward.' He said 'Oh, okay, that that's fine'. He asked me about Little Grove and whether I was moving into there, and I said, 'Yeah, for the, for the moment I am'. And he said something about, 'Fair enough, you have decided which camp to be in, which team to be in' or something like that, and then that was it, end of the conversation. But he said, I think, 'Okay, I'll see you later on in the month' or something like that. So it was, it was pleasant, but he was, he was nice'."

139 On the same day, Mr Alwitry contacted the BMA. At that point there were no longer any patient safety concerns, as they had been dealt with by his accepting the Job Plan. He didn't want the BMA involved in patient safety issues in any event, as that upped the ante. The only issue he wanted them to discuss with the hospital management was the PAs, which Mr Alwitry had sought to clarify on two separate occasions but which had been ignored by the hospital management. He said it was the BMA's suggestion that they could discuss this issue with Mr Jones, a medical staffing officer at the hospital, because they had a good relationship with him and considered him pragmatic and able to help. The reference in the file note of the BMA of 10 th October, 2012, to the stormy relationship between Mr Downes and his father and the comment "It seems that the son is suffering from the sins of the father" were made in confidence, and whilst he felt bullied, he did not believe that he had a dysfunctional relationship with Mr Downes, and was still very much prepared to work with him. It was a one off comment in private to the BMA, simply expressing discontent with the way he felt he had been treated.

140 He came over to Jersey on 22 nd and 23 rd October, 2012, as planned, but did not see Mr Downes or Mr McNeela or Mr McLaughlin because he felt had been instructed not to contact the hospital management by Mr Downes in his e-mail of 9 th October, 2012. He did see Mr Famoriyo and Ms Hockenhull.

141 He was aware that on 30 th October, 2012 Mr Downes had telephoned a consultant colleague in the Derby Hospital, asking if he was still coming to Jersey. His colleague assured Mr Downes that he was looking forward to it. Mr Alwitry had no idea why Mr Downes had called his colleague. It was bizarre that he should have made this call. He had

Mr Alwitry's number, and could have spoken to him direct, but following the e-mail of 9 th October, 2012, he wasn't going to question him.

142 Mr Alwitry had no further communication with the hospital management after the 10 th October, 2012 and on 22 nd November, 2012, just over a week before he was about to start work, and completely out of the blue, he received the termination letter from Mr Riley. He wished the BMA had never called Mr Jones, as he would have come over and started work.

143 In response to criticism about the amount of email traffic he had generated before he had even started work, he pointed out that he wasn't on the Island and able to speak to colleagues; that is why there were so many e-mails. His e-mails were always friendly and polite, and always aimed at protecting patients.

144 In evidence he described Mr Downes as a firm manager, but pleasant in person. He thought Mr Downes was busy, and didn't have time to sit down and do the Job Plan properly, and he therefore made inquiries so as to tell him what could be done. Friday operating is not unsafe per se but by putting him down to operate on Friday with no access to care the next day, Mr Downes was making an error, and he didn't know if it was deliberate. His approach was to go and find a solution before going back to him. He wasn't aware of the States of Jersey whistleblowing policy at the time, but even if he had, he would not have read it, as he didn't think it would apply to him.

Mr McLaughlin

145 We found Mr McLaughlin a calm, measured and confident witness. He was a pilot in the RAF for 21 years before commencing a long career in hospital management with the NHS. The prelude to his move to Jersey was the Verita report in 2010 concerning the death of the patient Elizabeth Rourke during a routine gynaecological operation. The report had recommended the appointment of an experienced hospital director, which is the post he was appointed to as an interim executive and a key part of his role was to ensure the recommendations of the Verita report were implemented. The authors of the report had found that the consultants in the Obstetrics and Gynaecology Department worked as individuals, rather than as a team. The report had also made criticisms of the senior management team and management structures. The important part of addressing these criticisms was that the senior management team had to make clear what was and was not acceptable behaviour amongst consultants, grow a culture accordingly and develop peer pressure amongst consultants to maintain appropriate behaviour. In his experience, gaining support from the clinical consultants has been by far the most effective way of achieving lasting change in hospitals.

146 Mr Alwitry, in his interactions with the hospital after his appointment, seemed to Mr McLaughlin to be a throwback to a very different form of consultant behaviour. He seemed to have a view that consultants could behave as they wished to suit their personal

circumstances without considering the needs of patients or the wider interests of the organisation.

147 A third consultant was being appointed because of the waiting list pressures that had built up in the Ophthalmic Department. This was discussed in the interview. In his view, Mr Alwitry could have been in no doubt that the appointment needed to be made as soon as possible, and whilst he accepted that it was regrettable that the reference to six months' notice was not picked up by anyone at the interview, three months was the standard notice period for consultants in NHS hospitals, and he would have expected Mr Alwitry to have raised the fact that he needed a longer notice period.

148 Mr Alwitry's request to start work in February 2013 was not acceptable to Mr McLaughlin, and the purpose of his letter of 10 th August, 2012, was intended by him to draw a clear line in the sand so that he had to start on 1 st December, 2012. That was the rationale for the creation of the post of a third consultant. Immediately after sending that letter, Mr Alwitry phoned him and tried to persuade him of various other options that would allow him to start in 2013, to suit his personal circumstances, such as his wife's notice period at her GP practice and his children's educational arrangements. Mr McLaughlin described it as a long telephone call, and he explained at length why he was needed to start on 1 st December, 2012, as set out in his letter. That telephone call was followed very shortly by the e-mail in which Mr Alwitry requested further consideration to be given to a start date of 1 st January, 2013, and it was concerning to Mr McLaughlin to see that he then involved others, such as Mr Leeming, Mrs Body, Mr McNeela and Dr Luksza, to attempt to get their support for this later start date, in his view to suit his personal circumstances. That caused him to make the comment in his e-mail of 14 th August, 2012, that *"This chap looks like trouble"*.

149 As for the Job Planning process, in the NHS and in Jersey, he said it is the case that the last person in has to accept the timetable given to them. It is not normal practice for a new consultant to spend months going back and forth to various persons seeking to engineer changes to their Job Plan before they have even started work, and in Mr McLaughlin's experience, Mr Alwitry was quite unique both in the amount of senior management time he absorbed and his persistent unwillingness to accept anything other than his preferred outcome. He also considered that the manner in which Mr Alwitry sought to secure that outcome circumventing the established lines of hospital authority, was calculated to cause upset and mistrust.

150 Mr McLaughlin rejected the suggestion that Mr Alwitry had been dismissed because he had raised patient safety issues or that patient safety was the primary motivation for his continued efforts to seek changes to his Job Plan. In Mr McLaughlin's firm view, it was not about patient safety, but about Mr Alwitry's own personal circumstances. The baseline assumption should be that if you operate on a patient then you will be available for them as required, even if this responsibility extends beyond your contracted working hours. Mr Alwitry's issue was that he did not want to be in Jersey at the weekend, and if he was not timetabled to work then, he did not want to be liable to be called back to the hospital in

order to review one of his patients. This is not the culture in Jersey, where it is normal practice for consultants to offer the highest level of care and routinely come into the hospital to review their patients if required following surgery, out of hours or during the weekend. In his view, it is the professional duty and responsibility of the surgeon to ensure that any risks are mitigated, such as by scheduling operations early in the day or in the week, if there are concerns over the risks which might require the patient to remain in hospital. In general, he said only operations with a low chance of complications were usually scheduled on Friday afternoons.

151 The patient safety concerns Mr Alwitry raised were hypothetical. The consultant is responsible for his patients, and if cover could not be provided on a Saturday, and his colleagues would not help out, then the operation would be cancelled. He described this as part of the day job, and done every day of the week in the NHS and Jersey. His safety concerns would never have occurred in any hospital Mr McLaughlin had worked in. The BMA would not allow the Hospital management to sweep patient safety concerns under the carpet – that, he said, would be absurd. If they attempted to do so, it would not end there, and it would unravel significantly. There was just no possibility of stifling patient safety concerns, and there were a whole series of measures in place for whistleblowing.

152 There is nothing magical about a Friday, as every hospital operates on a Friday. It is all about cover for patients' needs, and the requirement to make arrangements for cover. Mr Downes knew this, and he would not plan something for Mr Alwitry that could not be managed – that was his job, as clinical director. At that point, Mr Alwitry had no patients. The timetable was for February the next year, and he would have started in December, with time to deal with any issues of patient risks with his colleagues.

153 Mr McLaughlin explained that theatres are shared assets and timetables are very difficult to arrange, as they have to take account of the myriad of departments and staff requirements. All correspondence concerning the scheduling of theatres and out-patient clinics should be via the lead clinician for that speciality, in this case, Mr Downes, but Mr Alwitry was deliberately corresponding without involving him. He corresponded over his Job Plan with Ms Gindill, who is head of nursing for theatres, and Ms Hockenhull, the nurse in charge of the eye clinic, asking Ms Gindill to ask Mr Famoriyo, a consultant in the Obstetrics and Gynaecology Department, to swop a day surgery unit until his family came over in July 2013. In Mr McLaughlin's view, this was completely inappropriate and the hospital cannot be run in this way. Suggesting that Mr Alwitry's father would dig out Mr Downes' correspondence, which “should make interesting reading considering now he suddenly thinks it is OK” was hardly collegiate behaviour from someone who had not even started work in the organisation. Hence his comment to Mr Downes, in confidence on 3 rd October, 2012, *“This is perhaps a portent”*.

154 Mr McLaughlin said he was getting feedback from sources saying that Mr Alwitry was having conversations across the hospital so that there were many threads running in parallel. He had to damp down the fires. It was inappropriate for relatively junior members,

such as nurses, to receive e-mails from consultants, as it was difficult for them to say no.

155 He pointed out that the e-mail correspondence does not show the full story, in that the management had weekly discussions in a frank forum, in which total confidentiality had to be maintained, and so no records were kept to prevent leaks. Mr Alwitry would have been discussed, but he did not flag up any patient issues with any of the management as no operating was going on. Once the theatre timetable had been formally agreed by Mr Alwitry, then it would have been circulated, and if Mrs Body had concerns, she would have flagged them up, but Mr Alwitry had to agree to the Job Plan first before it could be circulated.

156 On receipt of Mr Downes' e-mail of 31 st October, 2012, for the need, following discussion, for a letter to be sent to Mr Alwitry to confirm his acceptance of the Job Plan, he may have prepared the text of a letter, but they had reached a point where there would be no good resolution. He said they were worried about another round of e-mails being about to start if such a letter was sent. His preference was that Mr Alwitry should start and do the work for which he had been contracted, but having seen what had happened before with the round of e-mails over the start date and then the round of e-mails over the Job Plan, another deadline would have given rise to yet another round of e-mails and might have encouraged other consultants to behave in a similar way. He described this all as incredible. He had never had more than simple exchanges with new consultants in the past and here there were what he described as *"books of e-mails"*.

157 Mr McLaughlin needed legal advice on the options, but if it was possible to terminate, then he was minded that they needed *"to make that argument",* but it was a big step, and because Mr Alwitry was well connected in Jersey, they could anticipate e-mail correspondence and adverse publicity and no hospital likes bad publicity. They were at the point, however, when the risks of continuing with his appointment were greater than the adverse consequences that might flow from termination.

158 The intervention of the BMA of 12 th November,2012, he said, provoked the meeting that took place on 13 th November, 2012, and it was the last straw, in the sense that it brought the matter to a head. When Mr Alwitry had come to Jersey on the 22 nd and 23 rd October, 2012, he had not seen any of the management, as expected, and realising he would not get the answer he wanted, was now trying another route through the BMA.

159 Mr McLaughlin said that they had reached the point where they were not prepared to trust Mr Alwitry going forward. They had come to the end of their tether. His behaviour was not conducive to patient care, which was their sole motivation. In his view, Mr Alwitry would have been impossible to manage, and this could result in poor behaviour by others.

Mr Downes

160 Mr Downes also impressed as a calm and measured witness. Like Mr McLaughlin, he also had served in the Royal Air Force in the past, and we formed the impression of a skilled and competent professional. He took up the post of Ophthalmology Consultant in July/August 2000, working initially with Mr Alwitry's father, who retired in 2003 and was replaced by Mr McNeela. There were two consultants, himself and Mr McNeela and one associate specialist, Mr Asim Shami. Mr Downes became the clinical director for ophthalmology in or around 2004/5 and in that capacity, was Mr Alwitry's (and Mr McNeela's) direct line manager. He was also the clinical director for all surgery. He welcomed the formal management structure brought in by Mr McLaughlin, which was similar to that of the NHS, which increased accountability and the safeguarding of patients.

161 In 2012, the waiting lists were excessive, and this was the main driver behind the bid for the appointment of a third ophthalmology consultant. He received funding for an interim locum consultant in December 2011, but whilst this helped to control the figures to some degree, for a variety of reasons (principally geographic) it was impossible to fill this role save for the odd weeks here and there, and there was a pressing requirement for a full-time post, particularly as the year on year trends were a cause for concern. He believed they were looking for a generalist consultant with a complementary specialist interest to those of the existing consultants. By far the most important quality was that the person should fit in with a small team.

162 Mr Alwitry was aware that the post was coming up before it was advertised, as Mr Downes spoke to Mr Alwitry about it in or around April/May 2012 at a meeting of the Royal College of Ophthalmology. He told Mr Alwitry that they needed someone to start as soon as possible, and certainly by Christmas 2012 at the latest. Mr Downes was on the interview panel. He probably skim read the papers, and didn't notice the reference to six months' notice. Mr Downes had taken up his post after four months, but for special reasons which had been agreed with the hospital management. Mr Siodlak had started after three to four months. Mr McNeela required a later start, and he was accommodated with a locum who was in post.

163 He could not recall the start date being mentioned at the interview, although it was customary for consultants to be in post within three months of being appointed. If the panel had known that Mr Alwitry had a difficulty in starting until sometime in 2013, that would have impacted on who got the post. The second choice candidate was not an option as a locum as he was working until September 2012, when he had been offered a post in Cambridge, starting that October. He was therefore not available. A locum is not the same as a full-time consultant for a variety of reasons, including continuity, commitment and finance. It meant going back through an agency, with the locum usually earning twice the salary paid to a consultant, on top of which you have the interview fees, the cost of accommodation, weekends off etc. with the locum effectively working part-time. The second choice candidate was only working four days a week.

164 Mr Alwitry was hired as a consultant to provide general ophthalmology services with a specialist focus on medical retina operations. He was not hired as a glaucoma specialist,

but his experience in glaucoma was an added bonus.

165 In his e-mail of 10 th August, 2012, to Mr Alwitry, Mr McLaughlin had made it clear that he had to be in post by 1 st December, 2012, and he was given a short deadline to 15 th August, 2012, to confirm his agreement to start on that date. As he said to Mr Alwitry in his e-mail of 15 th August, 2012, he thought he had made it quite clear prior to the interview that there was a pressing need for this appointment to be taken up as soon as possible and by Christmas at the latest. It was of concern to Mr Downes that Mr Alwitry said in his e-mail of 13 th August, 2012, that he had spoken to the BMA and a local employment lawyer in relation to Mr McLaughlin's letter of 10 th August, 2012.

166 He said it was absurd for Mr Alwitry to suggest, as he did in his e-mail of 14 th August, 2012, that Mrs Body had said the waiting lists were not so bad and questioned whether a third consultant was needed at all, as Mrs Body was heavily involved with Mr Downes in developing the business case for a third consultant. Mr Downes was not convinced that the waiting list figures provided by SEB were correct.

167 He was becoming concerned with Mr Alwitry and agreed with Mr McLaughlin that if the offer was not accepted by the 15 th August, 2012, it should be withdrawn and the post offered to the second choice candidate. However, the following day, 15 th August, 2012, Mr Alwitry agreed to start work on 1 st December, 2012, for three days a week.

168 Mr Downes then had difficulties with Mr Alwitry over the Job Plan. Originally, he said there were no operating sessions for this post at all, due to lack of theatre availability, and he had to work hard to free up theatre slots for Mr Alwitry, such as taking Tuesday morning sessions from the dentistry team and negotiating with the theatres to get a combination of two sessions per month day surgery unit and two main theatre sessions. He said consultants can always re-visit timetables and look at changing when in post, but the timetable has to fit around theatre availability. The timetable he had negotiated for Mr Alwitry was set out in his e-mail to him of 24 th September, 2012.

169 In Mr Downes' view, complicated eye operations such as glaucomas do not have to be performed on a Friday if the consultant wishes to avoid that. The timetable allowed for six out of eight theatre lists to be between Tuesday and Thursday, so complex operations could be performed on Mr Alwitry's Tuesday or Thursday lists, with availability the following day; likewise, one of the two Friday sessions, could be used for glaucoma operations as Mr Alwitry would have been on call that weekend. Day care or straightforward cases could then be scheduled for the remaining one Friday each month. Mr Alwitry had referred to his glaucoma operations, but on average, he would be very unlikely to perform more than two of these a month. If he had concerns over the weekend cover, then, as the majority of surgery is elective, the operations could easily be scheduled for his slots earlier in the week, or for a Friday, when he was due to be on call that weekend. In any event, one of the

other consultants would be on call and could assist for emergency cover, if the performing surgeon was not in the Island during the weekend. In his view, Mr Alwitry did not really raise patient safety concerns, and he felt the more likely explanation for these Job Plan concerns was trying to engineer a timetable to suit his personal circumstances.

170 It was clear, he said, from the correspondence throughout that Mr Alwitry's concern was to have Fridays off so that he could travel back to the United Kingdom to spend time with his family, as illustrated by Mr Alwitry's e-mails to him of 9 th August, 2012, and Mr Alwitry's e-mail to Mr McNeela of 5 th September, 2012, where he said: "To be honest, I am not fussed as to whether these two sessions are on the Monday or the Friday. In either case, it would allow me to go home for the weekends to see the kids when I am not on call." In his e-mail to Ms Gindill of 24 th September, 2012, he said "Besides that, it also messes up my chances of getting back to see the misses (sic) and the four kids! – they aren't joining me until mid July." In his e-mail to Ms Hockenhull of 1 st October, 2012, he said:-

> *"Don't really want to ditch Mondays completely as that is supposed to be my on-call day – Richard wants Tues, Bartley wants Wed, leaves Thurs or Monday – if I do Thurs I can't fly off until late Friday (silly flight times) to see the kids.* If I do Monday on-call it will mean that I can fly off Thursday evening if I'm not operating on the Friday. I have the two little one all day Friday so it would work out well."

171 In his e-mail to Ms Hockenhull on 2 nd October, 2012, he said this:-

> *"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 to join me) much more bearable."

172 The original Job Plan for Mr Alwitry, which was included in the job description sent to him by Mr Leeming, would have received approval, as was normal, from the Royal College of Ophthalmologists. That original Job Plan, which according to the contract of employment Mr Alwitry had agreed, actually had him down to operate every Friday morning, which was later amended to alternative Fridays at his request. The college made no adverse comment regarding the possibility of Mr Alwitry operating every Friday morning. A college adviser was also on the interview panel, and made no comment regarding operating on Fridays.

173 Mr Downes was astounded by Mr Alwitry's approach of e-mailing others within the General Hospital without informing him and re-writing the timetable he had been given. As the clinical lead, Mr Downes had a duty to ensure the Job Plan worked best for everyone, not just one individual. After several weeks of e-mails regarding the Job Plan to others, such as the theatre sister, Ms Gindill, and the clinic sister, Ms Hockenhull, Mr Downes sent Mr Alwitry an e-mail on 9 th October, 2012, confirming his Job Plan, and in a pleasant fashion warning him about making too many demands and offering him the opportunity to

meet when he was over at the end of the month. However, Mr Alwitry did not arrange to meet him, or either of the medical directors when he was over, despite visiting the hospital, and meeting others.

174 Mr Downes and the other senior managers from Mr McLaughlin downwards were becoming very concerned at Mr Alwitry's behaviour. Going behind Mr Downes' back was the wrong way of doing it. Mr Downes said that the e-mails do not cover the entire picture, as they do not include telephone conversations.

175 Mr Downes explained there was a difference between seeing patients routinely for follow-up and seeing them on an urgent basis. There had never been any issue with any patients who experienced complications and needed post-operative follow-up from having access to the on-call doctor. What Mr Alwitry was essentially asking for was that one of Mr Downes or Mr McNeela or the middle grade doctor could carry out routine *"ward round"* follow-up on any of his patients he operated on the Friday, and where he was not around on-call himself the next day. This was not necessary, because if a patient experienced problems, they could contact their GP or admit themselves to Accident and Emergency and would be referred to the on-call ophthalmology doctor. Mr Alwitry had previously worked as a locum at the hospital, and would be aware of the on-call service.

176 If one of Mr Alwitry's patients needed to go back to theatre, the lists of all the other consultants will be put back to accommodate this. This is not, he said, a 9 – 5 contract. Just because you have fixed PAs, does not mean you do not have additional activities. A small unit has to be flexible – this is not a big hospital where there are lots of people who can be pulled in. If Mr Alwitry did operate on a Friday, knowing there was no support the next day, that would be inappropriate, but it would be of his own making. Glaucoma operations should take place on a day in which he could see the patient the next day. The patient safety concerns were therefore hypothetical.

177 It was also worth putting the matter into context in that only two of the seven or eight operating sessions given to Mr Alwitry per month would have been on a Friday and within that, he would have been on-call the weekend following one of his operating Fridays. If he had general concerns over seeing his patients on the next day following that one Friday per month, he could schedule his operations accordingly, and only carry out the low risk operations on that Friday. He had a duty of care to his patients and therefore would need to plan his lists accordingly. If he had concerns over any patients he operated on a Friday, or indeed any day of the week, and if he was unable to see the patient within the next day or two, then what consultants do is speak to the on-call consultant and alert him to the issue.

178 It was disingenuous, he said, for Mr Alwitry to suggest that securing next day follow up for all patients is that all that is needed to optimise your patients' post operative care, as problems do not always manifest themselves within the first 12 – 24 hours. The Royal College of Ophthalmologists does not consider that cataract patients need to be seen the next day, but usually within a week, but some units were not even doing this now. As for the

issues Mr Downes had with Mr Alwitry's father, when he first began working with him, the issue he faced was that the only operating session given to him was on a Friday afternoon.

179 The hospital management didn't want Mr Alwitry doing complicated glaucoma operations on a Friday and then just leaving the Island, but if at any time complications arose, they would always deal with them out of hours. The principle, however, is that the consultant has responsibility for the patients under his care and it would not have been appropriate for Mr Downes and Mr McNeela to routinely cover his patients.

180 Mr Alwitry was creating an artificial situation to raise concerns, but no one was suggesting unsafe operations being carried out on a Friday. Mr Downes had set the timetable, but it was up to Mr Alwitry how he would use it. You have to be responsible for your own lists. Mr Alwitry puts the patients on his operating list, no one else.

181 Mr Downes could not remember Mr Alwitry's call on 10 th October, 2012, following his e-mail of 9 th October, 2012. He accepts that there had been a call, because his partner had remembered it. He had no recollection of Mr Alwitry accepting the Job Plan. As for his private practice, the allegation that Mr Downes was asking for 20% of Mr Alwitry's profits for his life was a fabrication. There were two components of a sale of his private practice, firstly, taking over the lease of the surgery premises and secondly, paying for the expensive equipment which he expected Mr Alwitry to purchase at the going rate.

182 His e-mail to Mr Riley of 24 th October, 2012, listing the general concerns about Mr Alwitry was the first communication he had had with Mr Riley. There had been a short meeting with Mr McLaughlin (and Mr Siodlak and Dr Lukska) before he sent him his e-mail of 31 st October, 2012, about a letter being sent to Mr Alwitry, and it was his understanding that such a letter would be sent before he went to the US. Mr Downes was not in Jersey on 13 th November, 2012, when the decision to withdraw the job offer was taken, returning on either the 14 th or 15 th November, 2012.

183 Mr Downes did call a colleague at the Derby Hospital, as he didn't know if Mr Alwitry was coming. The colleague, Mr Lee Stephenson, is someone that Mr Downes knew and was one of Mr Alwitry's referees. He did this because Mr Alwitry had not come to see him in October, and hadn't called him to say he was coming.

184 On his return from the US, he was told that Mr Alwitry had reported him to the BMA. The representative from the BMA had gone sick, and no one knew what had been said, but he was led to believe that there was a direct complaint about him. Prior to going to the US, he still thought the situation could be rectified, although when he was in the US, he had spoken to a colleague in Nottingham, who told him that Mr Alwitry had gone through the same process over his Job Plan at the Derby Hospital, which set alarm bells ringing.

185 Following the termination letter, he had received this e-mail from Mr Alwitry on the 26th November, 2012:-

> *"Hi Richard*
>
> *Tried to call you over the weekend.* Managed to get hold of [Mr McNeela] who had no idea about this letter.
>
> What's happened? I am completely confused as to what's gone on.
>
> *They've put in the letter that I have a dysfunctional relationship with the clinical director but that's you*.
>
> *Could you fill me in as to what has gone on so we can hopefully get it resolved?*
>
> *Many thanks*."

186 Mr Downes' response was as follows:-

> "Hello Amar,
>
> *Regrettably I am in agreement with the executive decision*.
>
> *The decision to exclude [Mr McNeela] from the decision will be fully explained to him by the hospital director*.
>
> *I suggest you reflect carefully on all the previous correspondence with regard to many aspects, virtually all of the post and timetable that you found unacceptable and questioned from the outset and in particular your decision to report your manager i.e. me to the BMA (both surprising and extremely disappointing, bearing in mind all the time and effort I put into trying to organise the best possible timetable under the circumstances of major organisational constraints) in order to find the answers to your email*."

187 Mr Downes explained that the referral to the BMA was not the main reason for the termination; it was a culmination of factors. It was the final straw, rather than the main factor. Prior to going to the US he hadn't been wholly supportive of Mr Alwitry being employed, but was prepared to work through it, but in his absence the senior board had reached its decision which he respected.

188 We found Mr Downes to be a forceful witness. We felt he could have been more helpful to Mr Alwitry, for example, by explaining the reason for the extra 1.5 PAs, but as against that, he was very honest in accepting that he had still felt that he could have been able to work with Mr Alwitry up to the end of October 2012 when he left the Island for the USA.

Mr McNeela

189 Mr McNeela did not hold a management position within the hospital and therefore had no involvement in the decision to terminate Mr Alwitry's employment. He was on the panel when Mr Alwitry was interviewed. Whilst he agreed that there was a need for a third consultant ophthalmologist, he did not think there was a major problem with the waiting lists and did not agree with Mr Downes' suggestion that they were *"through the roof"*. He recalled seeing Mr Alwitry's reference to needing six months' notice, but he had no issue with this, as it seemed to fit in with the commencement date of *"Winter 2012"*. Mr Alwitry had the strongest CV by far, and interviewed very well. He was the outstanding candidate and the panel unanimously agreed that he should be offered the post.

190 At no time during the interview was the issue of start date discussed; indeed, it was not discussed with any of the other applicants either. He understood that the likely start date was February 2013, which was acceptable to him. The paramount need was for the hospital to get the best consultant ophthalmologist possible.

191 Mr McNeela believes he would have spoken to Mr Alwitry over the start date issues, and the prospect of him starting in December on a part-time basis. He did not think the hospital should have pressed him for an earlier start date and was worried about the practicalities of the three day working week for a consultant ophthalmologist, but whilst not ideal, the prospect of starting earlier on a part-time basis meant the hospital got Mr Alwitry. He expressed his sympathy to Mr Alwitry regarding his position, as he felt the hospital management, including Mr Downes, were not fair or reasonable in respect of the start date.

192 In August/September 2012, Mr Alwitry had come to discuss with Mr McNeela the possibility of private practice. It was a question of sharing resources, but there was no notion of partnership, and nothing was concluded.

193 Mr Alwitry e-mailed Mr Downes and Mr McNeela on 5 th September, 2012, over the proposed Job Plan. Mr McNeela did not respond, as it was for Mr Downes, as clinical director, to deal with it. Mr McNeela understood that Mr Alwitry may ask favours of Mr McNeela to swop on-call duties or similar, so that he could be more flexible, and have more opportunity to spend time with his family in the UK. Mr McNeela was sympathetic to this, and understood that the situation, whilst an inconvenience, was temporary.

194 He was copied in to Mr Downes' e-mail of 24 th September 2012, setting out the proposed Job Plan for Mr Alwitry, as were several of the hospital staff members. He believed he had a conversation with Mr Alwitry around this time about his Job Plan, possibly using some of his theatre lists when he was on leave to do operations on his glaucoma patients. Mr Downes was on annual leave, and Mr Alwitry was aware that he needed the approval of Mr Downes if there were to be any changes, but for Mr McNeela's part, he was okay with Mr Alwitry's proposed changes to the timetable, and was willing to help where he could to assist. It was normal, he said, for consultants to negotiate their Job Plan, and there is flexibility to change theatre times, but he probably told him that it was a lot easier to do once

you are in post, and *"on the ground",* so that Mr Alwitry should not worry too much about trying to change matters beforehand, particularly as Mr McNeela knew Mr Downes could be difficult.

195 In Mr Alwitry's e-mail of 7 th October, 2012, sent to Mr Downes and Mr McNeela, Mr Alwitry raised some patient safety issues with Mr Downes' proposed timetable, and then proceeded to set out ways to avoid or mitigate those risks. He thought Mr Alwitry's e-mail and the proposals he made were very sensible, and that he had correctly appreciated the risk to patient safety to which Mr Downes' proposed timetable gave rise. His proposals were a proportionate response to those risks.

196 In his view, the e-mail Mr Downes sent Mr Alwitry on 9 th October, 2012, in which he complained about the email correspondence that had taken place in his absence, stated that as Mr Alwitry was the last man in, he must accept compromises in his Job Plan, and warned Mr Alwitry that "making too many demands at this stage of your appointment is unlikely to bode well for future relationships within the organisation!" was aggressive in tone and not warranted. In his view that e-mail was a total over-reaction, and completely unreasonable. It is normal for a consultant to query the Job Plan given and to seek changes whether for professional or personal reasons, and it is part of management's role to deal with those requests. In his view, Mr Downes' reaction was disproportionate and wrong.

197 In November 2012, everyone was working on the basis that Mr Alwitry would be taking up his post. Mr McNeela was then telephoned by Mr Alwitry on 24 th November, 2012, who was very distressed having received the letter of termination from Mr Riley. Mr McNeela was not aware of anything that Mr Alwitry had done which warranted any type of disciplinary action, let alone dismissal. He could not understand why this decision had been made, and made behind his back, considering that he was on the appointment panel. He telephoned Mr Downes, who confirmed that he knew about the decision, saying that he could not go into detail. On 26 th November, 2012, Mr McNeela wrote to Mr McLaughlin regarding the decision, as it was clear to him that the hospital's approach was entirely wrong. He completely dissociated himself from the decision, and felt that Mr Alwitry had been treated *"in an appallingly shabby manner"*.

198 Mr McNeela explained that Mr Downes' management role over surgery was limited to ophthalmics, ENT, general surgery, maxillo facial surgery and dental surgery. In the Ophthalmic Department, the consultants had specialities His speciality was retinal work and Mr Downes' speciality was ocular plastics. Mr Alwitry brought a new speciality, namely glaucoma surgery. They were all generalists to some degree when patients came through the door, but when it came to surgery, they would cross refer to each other, or send to the UK. Consultants didn't always get their wish lists on the Job Plan, but a consultant is still a manager and has to fight his corner. He is a specialist in his field, and therefore has to be assertive in the interests of his patients, but ultimately has to accept the decision of the clinical director. It wasn't a hierarchal system in the sense that the clinical director has authority over clinical decisions of doctors below him.

Dr Luksza

199 Dr Luksza was a general physician at the hospital, and at the material time joint medical director, along with Mr Siodlak. He retired in March 2013, having worked at the hospital for eight years. He met Mr Alwitry, and the other candidates at the pre-interview stage, but was not available for the interviews. He could not recall the starting date being the major issue, but was aware of problems over the Job Plan. Mr Alwitry had tried to contact different members of the hospital management to try and alter his Job Plan before he started, which he said was done in “a calculated way …. to play members of the management team off against one another.” The way he acted showed a lack of insight. As far as he was aware, Mr Alwitry had not queried his Job Plan at the pre-interview or interview stages. Dr Luksza had been copied in to occasional e-mails, but didn't directly discuss Mr Alwitry's Job Plan with him. In his experience, it was rather unique and surprising for a consultant who had been offered a post to try and change his role before taking office.

200 Mr Alwitry did not want to operate at all on Fridays, but for the optimum running of any department in the hospital, particularly given the availability of theatres, nursing support, anaesthetists and equipment, they did require Fridays as operating days. He considered Mr Alwitry's attitude to be rather arrogant, as it is usual for consultants to start with the Job Plan they are given. They have the opportunity to review and amend the Job Plan later. Mr Alwitry's approach in trying to engineer a work arrangement to suit his convenience was highly undermining of the clinical director's role and authority.

201 Because Mr Siodlak was the surgical joint medical director, whereas he was the physician representative, Mr Siodlak took the lead in relation to the problems with Mr Alwitry. Dr Luksza recalled an initial meeting with Mr McLaughlin, where it was agreed they would write to Mr Alwitry to give him an ultimatum over his behaviour, but could not recall if the letter was ever sent.

202 The decision to terminate was taken unanimously at a meeting he attended on 13 th November, 2012. At that meeting, they were made aware that Mr Alwitry had referred Mr Downes to the BMA. Dr Luksza went with the majority, because they were dealing with him as a surgical appointee, and he showed solidarity to his colleagues. He couldn't remember how long the meeting took. He assumed that Mr Alwitry had made a complaint about Mr Downes to the BMA, but he didn't have any detail and there were good reasons to withdraw the offer in any event. The BMA was an additional factor, but there was no change to the position on the ground. He had received verbal feedback from Mrs Body, Mr Siodlak and Mr Downes that there was a loss of trust and he supported the consensus. He still didn't know the outcome of the BMA, but they were going down the path of termination irrespective of BMA. He accepted it was Mr Alwitry's prerogative to contact the BMA, with whom the hospital management had regular contact over a number of matters, but in his experience it was rarely used in this way. Mr McNeela was excluded from the process because he is not in management.

203 On the question of patient safety, he said the risk of Friday operating was removed if it was used by Mr Alwitry for day surgery, where patients are discharged that day. Most consultants would do post-operative ward rounds the next day without being paid. He told us that the GMC is concerned about dysfunctional departments. Where trust has broken down to a point where you cannot work together, then you have risk. Bypassing the clinical director undermines him. He regarded Mr Downes' response of 9 th October, 2012, as appropriate as it was unusual to question the timetable on appointment. Mr Downes was clearly exasperated, but he didn't sense that Mr Downes had reached the end of his tether.

204 Patient safety issues had been raised by Mr Alwitry in order to justify his actions but they were a red herring – they didn't exist. Dr Luksza had been a medical director for many years and Mr Alwitry's behaviour was *"abhorrent"* compared to the norm. Most consultants are pleased to be offered a consultancy post and accept the Job Plan with a view to building relationships. To make such a meal of it beforehand was unique in his view.

205 Dr Luksza did accept in evidence that Mr Alwitry should have been given a chance to respond to the charges against him before his contract was terminated.

Mr Siodlak

206 Mr Siodlak is a consultant ENT surgeon, and was the joint medical director of the General Hospital, with Dr Luksza at the material time. He impressed as an open and honest witness who was very plain speaking in evidence. He had never met Mr Alwitry, and was not involved in his recruitment. He was aware that there was severe pressure on the waiting lists in the Ophthalmic Department, thus necessitating the recruitment of a third consultant. He was not involved in the difficulties over Mr Alwitry's start date, but he had regular, almost daily, meetings with Mrs Body, the operations director, and Mr McLaughlin, and was aware of them.

207 He was copied in to various e-mails in relation to the Job Plan and Mrs Body made him aware that Mr Alwitry was proving to be very problematic. If he did not get the answer he wanted regarding his Job Plan, he would go to another person or having made an agreement with one person, he would then try to secure a more favourable agreement by going to another. Mr Alwitry even went as far as to suggest to Ms Gindill, the theatre sister, that the clinical lead of Obstretrics and Gynaecology should move his operating theatre to Fridays to accommodate Mr Alwitry on a Thursday. He said it was normal for consultants not to have their ideal theatre slots when starting a new post, but someone has to operate on a Friday.

208 In his view, the behaviour of Mr Alwitry in going behind people's backs and undermining lines of management raised concerns over his suitability for the post. Making statements such as "I would have hoped my senior colleagues could have sorted it out for me, but

clearly the support isn't there" in his e-mail of 29 th September, 2012, to Mrs Body, painted a picture of someone who would be impossible to manage. This behaviour before he even arrived at the hospital was extreme, and not something he had ever witnessed in all his years of working with other consultants. These events led him to express the opinion in an e-mail of 13 th October, 2012, addressed to Mrs Body and Mr McLaughlin that "I think we should sack this bloke before he even gets here". He felt he could see problems that were going to arise if Mr Alwitry took up his post, and that he would be difficult to manage and resistant to working arrangements which he felt did not suit him.

209 In evidence he said he regretted using the expression *"sack this bloke"*. His email was sent on a Saturday, when he was doing his Saturday e-mail catch up, having been away for some weeks. He knew there had been difficulties, and there had been a heated discussion between Mrs Body and Ms Gindill about the timetable for Mr Alwitry, but he had come back to find the e-mail from Mr Downes of 9 th October, 2012, which he described as forthright but accurate. He was frustrated with how long the issue had taken and how many e-mails had been written. He apologised for using such language, something he commented would have been okay if said at a meeting rather than written.

210 His e-mail of 23 rd October, 2012, addressed to Mr Riley, saying that the appointment would be a disaster, and make a previous consultant the subject of a Verita report seem like *"a walk in the park"* followed Mr Alwitry's visit to the hospital on 22 nd and 23 rd October, when Mrs Body told him Mr Alwitry had been even more demanding of the staff.

211 At around the end of October 2012, he met with Mrs Body, Mr McLaughlin and Mr Downes to discuss Mr Alwitry and it was agreed that no one would communicate with Mr Alwitry other than Mr McLaughlin, so that there was a clear line of communication and there would no longer be any e-mails to different members of staff. It was agreed that Mr McLaughlin would write to Mr Alwitry to advise him about his behaviour, but before that letter was sent, they were informed by Mr Jones that Mr Alwitry had made a complaint to the BMA regarding Mr Downes.

212 He met with Mr Riley, Mr McLaughlin and Dr Luksza on 13 th November, 2012, and it was agreed that Mr Alwitry's Contract of employment should be terminated. At the meeting he was told a complaint had been made by Mr Alwitry about Mr Downes to the BMA. He did not know how it had gone from the proposed warning letter to this, but he was very clear that there had been no decision to terminate his employment prior to that meeting. Mr Jones came into the meeting and confirmed there had been a complaint about Mr Downes, which Mr Siodlak found shocking. Mr Jones gave the impression that he had spoken to the BMA that day. He was only there for a short time, and that is why the minutes do not refer to him being present. The BMA issue was the last straw. It was extraordinary to report your employer before starting work.

213 If Mr Alwitry had genuine patient safety concerns, then Mr Siodlak would have expected

him to have raised them with either himself or Dr Luksza during the course of his negotiations over his Job Plan, but he did not do so. In his experience, when someone has a genuine patient safety concern, he raises it clearly in correspondence and does not bury it in e-mails or conflate it with other issues. The decision to terminate the Contract of employment was not because of Mr Alwitry's reported concerns over operating on a Friday, but it was his divisive and argumentative attitude, which would seriously have undermined the clinical governance structure of the hospital, and led to significant dysfunction within the Ophthalmic Department. Indeed, there was a real risk, he said, of Mr Downes resigning, given the way Mr Alwitry had conducted himself towards him.

214 If Mr Alwitry had concerns about carrying out surgeries, such as glaucoma operations, on a Friday, when he knew he would not be available on-call the following day, then the simple solution would be to schedule such operations earlier in the week, so that he could provide next day follow-up. On any view, if a surgeon needs to see a patient the following day, then he or she does so, regardless of whether or not he or she is on-call or scheduled to be in the hospital.

215 Furthermore there were no patient safety concerns, because Mr Alwitry knew how to address them as he did in his e-mail to Miss Gindill of 29 th September, 2012. Of the four options that Mr Alwitry had put forward, the option of him doing an extra paid PA was not acceptable in his view, but the others were.

216 All of the consultants in the General Hospital would come in on a Saturday to see patients, if they had operated on a Friday. There was no extra money for this – it was part of the job, and it was iniquitous for him to ask for more money. He came back with his own Job Plan, allowing him to leave the Island on Thursday night, but who would look after his patients on the Friday? It was, in fact, more difficult for others to stand in during the week, because everyone is so busy with their own clinics and theatre lists, and it is easier to stand in over the weekend, when you are the on-call doctor and ready to attend.

217 He described Mr Alwitry's conduct as selfish and divisive, and disruptive for the surgical division. If he did have patient safety concerns, he should have raised them with him and Dr Luksza. The Job Plan had alternate Friday operating, so that's two in every month, and he would have been on call the next day for one of them in any event. He would have plenty of ocular/cataract operations to keep the list on Friday full. There are always consultants on-call, and indeed the on-call arrangements in Jersey were, in his view, safer than they were in England.

218 Mr Siodlak agreed that genuine patient safety issues should always be raised, but there were no patient safety concerns here. However, on reflection he felt that the hospital should have responded in writing to the options Mr Alwitry had put forward to mitigate the concerns he had raised, making it clear which of those option were acceptable to the hospital management and that the hospital would never do anything to jeopardise patient safety.

219 He had received an e-mail from Mr Alwitry addressed to him and Dr Luksza on 27 th November, 2012, about the termination of his contract. It was a lengthy e-mail but he noted that it did not raise any patient safety issues. Mr Alwitry wrote him a letter on 30 th November, 2012, asking for him to be given a chance, but again it raised no patient safety issues. Mr Siodlak agreed that if people raise patient safety concerns, they have to be listened to, but in his experience doctors often raise such concerns when they want something. He himself had done the same thing. Sometimes such concerns turn out to be *"having to work hard"* issues.

220 Mr Siodlak accepted that they should have investigated the BMA matter more, and he didn't know why they didn't think about it more deeply. It was, he said, one thing on top of another. He frankly accepted that Mr Alwitry was free to speak to his trade union.

221 With reference to Mr Riley's letter of 15 th November, 2012, sent to SEB, in which he described Mr Alwitry as having been "consistently adversarial, aggressive, inappropriate, uncooperative and frankly unacceptable", Mr Siodlak agreed with those descriptions of Mr Alwitry's conduct, save for the word *"aggressive"*.

222 Mr Siodlak was asked why, in view of these criticisms, a decision to terminate Mr Alwitry's employment had not been made earlier, but he said for him it was mainly about the BMA complaint, which brought it to a head.

223 After the termination letter, Mr Siodlak told us that he did have second thoughts about the decision, following communications he had received from Mr Alwitry and his wife, but the lawyers had instructed the hospital management not to communicate with Mr Alwitry, advice which in retrospect he felt they should have ignored. He said he could have questioned matters then, but *'tunnel vision had set in'* and *'he had become the bad guy, and we were the good guys and probably it was a bit more grey than that.'*

Mrs Body

224 Mrs Body, is a general nurse and midwife who joined the hospital in 1979, holding various roles, and ultimately the role of director of operations, from which she retired in December 2013. She was clear and composed in her evidence and unshaken in cross-examination.

225 She met Mr Alwitry during the pre-interview stage, and recalled showing him the waiting lists. She had not previously worked with Mr Alwitry, but knew his father. She was not on the interview panel. Mr Alwitry had commented that in his view, the waiting lists did not look too bad, but the actual context, which he did not appear to appreciate, was that they were managing them because of the locum cover they had put in place to alleviate the pressure on the lists. So whilst on paper they may not appear to be too difficult, it was because of the

locum cover, which was expensive and impracticable, and it was a necessity to have a third ophthalmology consultant in post without delay.

226 Mr Alwitry alleged in an e-mail to Mr Downes of 14 th August, 2012, that she had said the situation regarding the waiting lists and the pressing need for a third consultant to be in post "…. wasn't that bad. In fact her [Mrs Body] and I had a discussion about whether we needed a third consultant at all!" She was disappointed to learn of this. She didn't recognise the waiting list figures produced by the SEB for the years 2010 – 2013. She did not think there had been a fall in ophthalmic waiting lists. The waiting lists had been well managed, however, through the use of locums, so were not going up. The hospital management had seen the waiting lists, and were concerned about an ageing population, and they could not, therefore, allow this to get worse. There were other issues, such as a concern for people over 80 being looked after in their homes, with an unknown demand for 2013, and so they were quite determined *"not to take the foot off the pedal."* She did not say to Mr Alwitry that the waiting lists were *"not that bad",* and that there was no need for a third consultant at all. The business plan for a third consultant had to be very robust and to show a real need. The two existing consultants were retiring at around the same time, and therefore they needed a sustainable plan which had been thoroughly scrutinised and passed.

227 In her experience, start dates are generally flexible to some extent, but it is the standard practice for consultants to begin work within three months of being appointed. She had been copied in on various e-mails and in particular, the e-mail from Mr McLaughlin on 10 th August, 2012, giving Mr Alwitry until 15 th August to agree a start date of 1 st December, 2012, otherwise the offer of employment would have to be withdrawn. She was in e-mail correspondence with Mr Alwitry on 14 th August, 2012, and on 15 th August, 2012, he sent her an e-mail confirming that he would start on 1 st December, 2012, although he made *"one last ditch attempt"* to have a later starting date. On 16 th August, 2012, she e-mailed Mr Riley, Mr McLaughlin and Ms Karina Ward, a medical staffing officer, asking this question:-

> "Although we are concerned, are we going ahead with [Mr Alwitry's] recruitment as he has come to the table?"

She could not recall receiving a response to this, but was aware that Mr Alwitry was sent a revised contract on 21 st August, 2012.

228 Mrs Body was not directly involved in the communications with Mr Alwitry over his Job Plan, but was aware of his e-mail correspondence with Ms Gindill, Ms Hockenhull and others. Ms Gindill, the theatre sister, brought to her attention his e-mail of 24 th September, 2012, asking if "Would/Could the gynae lot do every Friday am instead of alternating?". The majority of gynaecology patients require post-operative care, and an overnight stay or longer, so the policy would be to put major patients on at the start of the week, whereas less risky operations could be put on the Thursday, if just one night stay over is required. Putting gynaecology patients on a Friday would severely disrupt the service, giving the implications of overnight stays going into the weekend, whereas by contrast, for

ophthalmology, most cases are day cases, such as cataract surgery. Patients can be discharged on the same day, particularly where good written post operative instructions are issued to the patient, regarding any common issues which might arise on specific concerns the clinician or patient might have. More significant operations, such as retinal detachment could have been put on Mr Alwitry's Tuesday list, because the patient might, in those cases, have required a one or two nights' stay. Accordingly, the majority of ophthalmology operations can be scheduled without any issue at the end of the week. Patient safety is all about managing each patient on a case by case basis. If a person is likely to require an overnight stay, then he is scheduled for earlier in the week.

229 By saying *"Would/could the gynae lot do every Friday?"* Mr Alwitry demonstrated, in her view, a lack of understanding of the clinical needs of other departments. In the light of the historic events that led to the Verita report and its recommendations, it was essential for consultants to be team players, and to work with each other and management, rather than looking out for their own interests and showing a lack of respect to their clinical director and colleagues in other departments. For these reasons, she was personally adamant that there should not be any move towards gynaecology operations being put back on a Friday, even on an alternate basis, given the risk to improving patient outcomes which could occur.

230 The reality is that new consultants have to fit in with the hospital's existing resource and capacity. Timetables take time to create, and have to take into account the availability of surgeons, theatres, equipment, nurses and other support, and it takes a lot to get to the point where you have a timetable that works. To have an individual going round and negotiating swops with a theatre sister is not something that she had ever heard of before. To seek changes to your timetable, you have to go through the proper channels, not through the back door, and Mr Alwitry's behaviour gave her and others concerns that they had a bit of a loose cannon on their hands. Mrs Body was off work on 13 th November, 2012, when the decision to terminate Mr Alwitry's employment was taken, but Mr McLaughlin knew of her concerns.

231 The hospital management were expecting Mr Alwitry to start on 12 th November, 2012. The 1 st December, 2012, was not okay with her, and she was not happy with the proposal of the three day week. They were dealing with the recruiting of another consultant at that time, and he was in post in three months. It all worked very smoothly, but this application did not go smoothly. Since 2006, she had been involved in the recruitment of six consultants, and said that she had never had an issue with the start date. They simply sat round a table and agreed the date, and informed Human Resources.

232 If Mr Alwitry had been told he only had a Friday theatre list, then he would have concerns, but he had an operating list on the Tuesday as well, and could put his more high risk operations with overnight stay to then. Friday was a day surgery unit, and mainly for cataract work, and she remembered being told that only one in a thousand cataract operations created problems. For day surgery, the patients would have a local anaesthetic, and be sent to the Portelet Ward for tea, and then left to go home with written instructions as

to how to contact the ward if there were any problems. The ward would then direct the matter to the appropriate specialist. All the nurses were skilled in caring for ophthalmic patients, even though they may not have been specialist trained. They were the same nurses who did the Tuesday theatre work.

233 With reference to Mr Siodlak's e-mail to Mr Riley of 23 rd October, 2012, she confirmed that she had told him that Mr Alwitry was getting even more demanding following his visit on 22 nd and 23 rd October 2012. In the preceding weeks, he had been in contact with Ms Hockenhull and Ms Gindill. When he came over, he had more conversations with Ms Gindill which had made her more nervous. It was not normal for new consultants to have conversations with theatre sisters before starting about changing their Job Plan. Mrs Body referred these concerns to Mr Siodlak.

Mr Riley

234 Mr Riley was a Human Resources director with responsibility for HSSD including the General Hospital. He came across in evidence as somewhat hard-nosed. He had extensive previous experience of hospital management, having served as the Human Resources director of several large foundation trusts in the NHS before coming to Jersey and taking up his role in 2011.

235 He was not involved in the recruitment of Mr Alwitry, nor was he on the interview panel. He would meet with Mrs Body and Mr McLaughlin (whose offices were next door to each other) frequently to discuss staff matters, and he was made aware of the difficulties with Mr Alwitry and his behaviour regarding his start date. He was copied in on some of the e-mails, and was taken aback by the attitude of Mr Alwitry. He would also characterise Mr Alwitry's behaviour as trying to play Mrs Body, Mr Downes and Mr McLaughlin off against one another. Mrs Body had been deeply upset that Mr Alwitry had misrepresented her over the issue of the waiting lists. He described this kind of behaviour as *"atrocious",* which undermines the reputation, authority and integrity of Mrs Body and the strong team ethic which is required in all health organisations. Mr Alwitry evidenced behaviour which in his view demonstrated that he would be an unacceptable appointment from the management and cultural perspective.

236 As difficulties arose with Mr Alwitry over his Job Plan, members of the hospital management began to question whether or not recruiting Mr Alwitry had been a mistake. Between himself, the medical directors, Mrs Body and Mr McLaughlin they had experience of hundreds of consultant appointments, many of them very challenging, but had never experienced anything quite like what Mr Alwitry was doing. His experience working for the NHS was that Job Plans would normally be signed off in writing, and he was not sure that the Job Plan had ever been formally agreed by Mr Alwitry.

237 Theatre schedules are difficult in all hospitals and consultants, particularly new ones,

have to accept that they have to fit in and work with their colleagues as opposed to trying to bully and harass their way to the perfect timetable. Hospitals nowadays are meant to be patient centric, and not doctor centric. It was particularly astonishing to him that Mr Alwitry should suggest that the clinical director of Obstetrics and Gynaecology could switch his Thursday theatre list to accommodate Mr Alwitry, and give Mr Alwitry his day off on a Friday.

238 All of these factors led to a decision that the outcome with the least risk would be to dismiss Mr Alwitry, and this decision had been taken in principle by November 2012, as evidenced by his e-mail of 12 th November, 2012, where he said “I think everyone is agreed that we formally withdraw the job offer.” The information that Mr Alwitry had also made a complaint to the BMA involving Mr Downes led them to call an urgent meeting. The e-mail from the BMA to Mr Jones certainly implied that there was a complaint made against Mr Downes, even though after the event the BMA back-tracked somewhat.

239 The relationship between Mr Alwitry and the hospital management had fundamentally broken down by this point and everybody was exasperated and seriously concerned at his unacceptable attitude and behaviour, leading to the conclusion at the meeting of 13 th November, 2012, that the best course of action would be to terminate his contract.

240 He was aware that Mr Alwitry was seeking to advance a case that he was dismissed for raising genuine patient safety concerns, but his recollection was that Mr Alwitry only ever raised patient safety concerns in an oblique manner by raising them within the context of long e-mails, where he also made clear his desire to keep Fridays free for personal reasons. Furthermore, he also raised these issues initially with Ms Gindill and Ms Hockenhull, as opposed to his clinical director, Mr Downes, or either of the medical directors, which is inappropriate. The clinicians were confident that there were no patient safety issues regarding operating on a Friday, and in his experience, there was nothing unusual in surgery taking place on a Friday, particularly for a discipline such as ophthalmology, where the majority of patients are discharged on the same day, and do not require an overnight stay.

241 He said Mr Alwitry was dismissed because, since being appointed in August 2012, he had repeatedly conducted himself towards his colleagues in a way which fundamentally eroded their trust and confidence in him, and their willingness to work alongside him. The consequence of allowing this dysfunctional state of affairs to continue would have been to undermine the governance structure of the hospital, and the delivery of safe patient care. The alleged patient safety issues raised by Mr Alwitry in connection with operating on Fridays, regardless of his underlying motivation for raising them, were wholly irrelevant in terms of why they made the decision they did.

242 His e-mail of 12 th November, 2012, “I think everyone has agreed that we formally withdraw the job offer” shows that he was confident this was the position of everyone,

having spoken to Mr McLaughlin, Mr Siodlak and Mr Downes when he was there. They clearly wanted to withdraw the offer, but this was two weeks after the final warning letter was supposed to have been sent out, and events had moved on.

243 He told us that if he hadn't made up his mind about Mr Alwitry before the BMA intervention, he certainly had after it. He had already taken legal advice, but the BMA *"put the nail in it"*. Whilst there had been a discussion about writing to Mr Alwitry, there had been no decision to do so, and by 13 th November, 2012, he had already briefed the ministers. That the BMA intervention had reinforced the view of the medical directors was a strong factor for the ministers. However, the termination would have happened without the BMA intervention. He had no doubt about that, because of Mr Alwitry's outlandish and unacceptable behaviour. The BMA was one small example of a list of reasons why they terminated the contract.

244 He stood by his description in his e-mail to Ms Garbut of 13 th November, 2012, of Mr Alwitry's behaviour and attitude as *"atrocious"*. Following the meeting of 13 th November, 2012, he had spoken to Mr Downes on his return and, having learnt of the BMA intervention, Mr Downes supported the decision saying he would resign if it was not implemented. He described the breakdown of the relationship between Mr Alwitry and Mr Downes as very significant. Mr McNeela had been properly excluded from the process, because he was not involved in management.

245 Patient safety had not been discussed at the meeting on 13 th November 2012, as it was not an issue. In paragraph 10 of his affidavit of 19 th June 2018, he had described Mr Alwitry's conduct as appearing *"calculated"* to undermine the strong governance of the hospital. He said in evidence that his conduct may not have been deliberate, but that was the effect. The patient safety issues were *de minimis*, as it was all about his family, and working patterns he wanted. He raised patient safety issues falsely. Complex glaucoma operations would be very few in number, and in any event, Mr Alwitry controlled the list and who he operated on.

246 Mr Riley was referred to his description of Mr Alwitry's behaviour and attitude in his letter to the SEB of 15 th November 2012, as "consistently adversarial, aggressive, inappropriate, duplicitous, uncooperative and frankly unacceptable". He stood by all of these descriptions. The hospital management had been involved in hundreds of appointments and none of them had experienced this attitude and behaviour. This description reflected the words used by the others in the hospital management, and he simply captured the essence of the language they had used. It is aggressive to threaten legal action within weeks. He recalled Mr McLaughlin saying that Mr Alwitry had done this, although Mr McLaughlin gave no evidence to this effect. Mr Alwitry had referred to being familiar with a high level local employment lawyer, and even named the firm, suggesting that he might have recourse to them. Yes, it was his right to consult a lawyer, but it is for the victim to feel aggression, and Mr McLaughlin clearly felt it.

247 No clarification was sought from the BMA following its intervention, but there would be no reason to do so after the decision had been taken. The importance of the BMA intervention was being exaggerated by Mr Alwitry, in his view, as it was clear that Mr Alwitry was dissatisfied with Mr Downes' management of the Job Planning process, so no clarification was required. They thought there had been a complaint, and knew that Mr Downes was threatening to resign.

248 It was suggested to Mr Riley that he was trying to paint Mr Alwitry in a terrible light and failed to present a fair and balanced view, in particular to the SEB. He said it was the countless e-mails and calls which were *"relentless"*. Mr Alwitry dominated the lives of the management for the summer and autumn. They had never encountered this kind of behaviour before. He accepted there were lessons to be learnt such as keeping a record of meetings and telephone calls with new consultants, but they had never had or felt the need to do so before.

249 Mr Riley denied that he had some personal motive to secure Mr Alwitry's dismissal and was confident of the opinions he had expressed about him. He accepted that the hospital management were purposely avoiding disciplinary proceedings and appeals, as they were withdrawing the offer before he had actually started. The disciplinary process would normally take three months to carry out, and it could not have been done in the short time between 13 th November, 2012, and the December start date.

250 In internal e-mails following the termination of Mr Alwitry's contract, Mr Riley had referred to the making of a *"pre-emptive strike"*, a phrase Ms Garbut subsequently queried. In a further email between Mr Riley and the States' Employment Relations director, Mr Riley asked for all emails that used the phrase *"pre-emptive strike"* to be deleted. He could not remember why he asked for the emails to be deleted and suggested it was because Ms Garbutt had a dislike of the phrase as it was *"militaristic language"*. In any event he was clear that the strategy was to prevent Mr Alwitry taking up his post, so that no disciplinary procedure or appeal could follow. The intention was not to employ him at all, and thus to withdraw the offer. The HSSD had the delegated power to dismiss him, but the matter was referred to the SEB, to give it the opportunity of intervening if it wished.

251 He had procured advice from the Law Officers' Department, and a medical staffing officer had calculated the cost of termination to the General Hospital, both with and without deductions, given his claims would be limited to three months' notice. He agreed that the limited financial implications of the termination were a factor that was taken into account and that he always carried out a risk analysis of any action that was proposed to be taken.

252 Mr Riley was cross-examined on the process following the termination of Mr Alwitry's contract of employment but he denied being motivated by malice towards him. He had never met or spoken to him. His role was to give the best possible support to the medical team and the Law Officers' Department to find a way to achieve the right decision. The

language he had used accurately reflected the language used by them.

253 We have not summarised the evidence of Senator Gorst because it was concerned principally with the events after Mr Alwitry's contract of employment was terminated and was not therefore relevant to the substantive issues before us. Having summarised the evidence as given by the witnesses which was relevant to the issues before us, it is now convenient to set out the provisions of Mr Alwitry's contract of employment in more detail.

Contract of employment

254 Mr Alwitry's contract of employment was headed:-

> *"Consultant Contract of Employment*
>
> *(Permanent Appointment)"*

255 Under clause 1, the contract is described as *"the permanent contract"* between the SEB, *"the Employer"* and Mr Alwitry, *"the Employee"* which under clause 2 *"will become effective"* from 3 rd December, 2012.

256 Clause 3 sets out general mutual obligations, upon which the SEB placed particular reliance:-

> *"3. General Mutual Obligations*
>
> *Whilst it is necessary to set out formal employment arrangements in this contract, the Employer also recognises that the Employee is a senior and professional member of staff who will usually work unsupervised and frequently have the responsibility for making important judgments and decisions.* It is essential therefore that the Employee and the Employer work in a spirit of mutual trust and confidence. The Employee and Employer agree to the following mutual obligations in order to achieve the best for patients and to ensure the efficient running of the service:
>
> - *To co-operate with each other*
> - *To maintain goodwill*
> - *To carry out their respective obligations in agreeing and operating a Job Plan*
> - *To carry out their respective obligations in accordance with appraisal arrangements*
> - *To carry out their respective obligations in devising, reviewing, revising and following the organisation's policies, objectives, rules, working*

practices and protocols."

257 Under clause 10 headed *"Registration Requirements",* it was provided that the Employee must at all times work by the principles and values set out in the General Medical Council's Good Medical Practice, a copy of which was then available online, but which the parties were unable to provide to the Court.

258 The Grievance Procedures and Disciplinary Matters were set out in clauses 16 and 17 as follows:-

We were not shown a document headed "Consultant Disciplinary Code", but were given a copy of the States of Jersey publication *"Policy for the handling of concerns and disciplinary procedures relating to the conduct and performance of doctors and dentists"*.

"16 Grievance Procedures

The grievance procedures, which apply to this employment are set out in the Medical Staff Grievance Procedure (current policy attached).

17 Disciplinary Matters

Wherever possible, any issues relating to conduct, competence and behaviour should be identified and resolved without recourse to formal procedures. However, should the Employer consider that the Employee's conduct of behaviour may be in breach of the Consultant Disciplinary Code, or find that the Employee's professional competence has been called into question, the Employer will resolve the matter through the disciplinary procedures, subject to the appeal arrangements set out in those procedures (current policy attached)."

259 Clause 29 provided for termination in this way:-

And finally, Clause 30 provided as follows:-

"29 Termination of Employment

Provisions governing termination of employment are set out in Schedule 18 of the Terms and Conditions of Service.

"30 Entire Terms

This contract and associated Terms and Conditions contain the entire terms and conditions of the Employee's employment with the States Employment Board, such that all previous agreements, practices and understandings between the Employee and the Employer (if any) are superseded and of no effect. Where any external term is incorporated by reference such incorporation is only to the extent so stated and not

further otherwise."

260 Turning to the Terms and Conditions, the full title of which is "Terms and Conditions of Service Consultant Medical and Dental Staff", Schedule 2 headed *"Associated Duties & Responsibilities"* imposed these duties and responsibilities on the Employee (referred to as a *"consultant"):-*

> *"2.1 A consultant has continuing clinical and professional responsibility for patients admitted under his or her care or, (for consultants in public health medicine) for a local population.* It is also the duty of a consultant to:
>
> …..;
>
> …..;
>
> • *Maintain professional standards and obligations as set out from time to time by the General Medical Council (GMC) and comply in particular with the GMC's guidance on 'Good Medical Practice' as amended or substituted from time to time;*
>
> ……"

261 The GMC's guidance in force at the time provided at paragraph 7:-

> *"Duty to raise concerns*
>
> *7 All doctors have a duty to raise concerns where they believe that patient safety or care is being compromised by the practice of colleagues or the systems, policies and procedures in the organisations in which they work.* They must also encourage and support a culture in which staff can raise concerns openly and safely."

262 We have already referred to Schedules 3 and 4 of the Terms and Conditions relating to Job Planning and appeals in relation thereto. There is a further schedule that is relevant. Schedule 12 reads thus in relation to confidentiality and disclosure:-

The local procedures for disclosure of information are set out in the States of Jersey whistleblowing policy, which provides under paragraph 7.1.1 that employees should initially raise their concern with their immediate line manager if at all possible. If that was not possible, the employee should contact the *"designated person"*, the designated person in this case being the Comptroller and Auditor General.

> *"12.6.1 Confidentiality*
>
> *A consultant has an obligation not to disclose any information of a confidential nature concerning patients, employees, contractors or the confidential business of the*

organisation.

12.7.1 Public Interest Disclosure

Should a consultant have cause for genuine concern about an issue (including one that would normally be subject to the above paragraph) and believes that disclosure would be in the public interest, he or she should have a right to speak out and be afforded protection and should follow local procedures for disclosure of information."

263 The policy statement is set out in paragraph 2 as follows:-

"2.1 The States of Jersey is committed to the highest possible standards of openness, probity and accountability. It is the duty of every employee to speak up about genuine concerns in relation to criminal activity, breach of a legal obligation (including negligence, breach of contract) miscarriage of justice, danger to health and safety or the environment and the cover up of any of these in the workplace. This duty applies whether or not the information is confidential.

2.2 The States of Jersey is committed to ensuring that any concerns of this nature will be taken seriously and investigated. Individuals who raise concerns reasonably and responsibly will not be penalised in any way. The States of Jersey will not tolerate the harassment or victimisation of anyone raising a concern."

264 Under paragraph 5.4, managers are responsible for ensuring that:

- *the policy is applied fairly and consistently in their own Department*;
- *their employees are aware of and understand the policy;*
- *concerns are investigated in a sensitive, positive and timely fashion;*
- *they are alert to the possibility that attempts could be made to intimidate or deter employees from raising concerns."*

265 Whilst not providing an exhaustive list, examples of incidents which may constitute a concern were set out in paragraph 6.2 as follows:-

- conduct which is an offence or a breach of law;
- miscarriage of justice;
- improper or unauthorised use of public or other funds;
- fraud and corruption;

• financial irregularity;

• dishonesty;

• malpractice;

• bribery;

• danger to health or safety of any individual or the environment;

• the deliberate concealing of information about the above.”

266 Going back to the Terms and Conditions of Mr Alwitry's contract of employment, Schedule 18 dealt with termination, and this needs to be set out in full:-

“Termination of Employment

18.1 Period of Notice

The employer and employee will proved [sic] minimum periods of notice in accordance with the following table:-

Shorter or longer notice may apply where agreed between both parties in writing and signed by both.

18.2 Grounds for Termination of Employment

18.2.1 A consultant's employment may be terminated for the following reasons:

• *Conduct*

• *Capability*

• *Redundancy*

• *Failure to hold or maintain a requisite qualification, registration or licence to practice*

• *In order to comply with statute or other statutory regulation*

• *Where there is some other substantial reason to do so in a particular case.*

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

18.2.3 In cases where employment is terminated, a consultant may be required to work his or her notice, or, if the employer considers it more

appropriate, a consultant may be paid in lieu of notice, or paid through the notice period but not be required to attend work.

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

18.3. Termination of Employment by Redundancy

18.3.1 Where possible, redundancy will be avoided. However, if as a last resort the Consultant is to be made redundant, individual consideration will be given to the terms of redundancy. The above conditions of service may be varied at any time by the Policy and Resources Committee or the States."

Notice by Employer

Period of Continuous Employment	*Notice*
Less than 5 years' service	*3 months*
5 years or more but less than 10 years	*3 months*
10 years or more but less than 15 years	*3 months*
15 years or more	*4 months*

Notice by Employee

Throughout the period of employment	*3 months*

Construction of contract of employment

267 The principles applicable to the construction of documents, which we apply in this case, were summarised in the Court of Appeal decision in *The Parish of St Helier v The Minister for Infrastructure* [2017] JCA 027 at paragraph 12 as follows:-

> ***"12 The Royal Court set out extensively the principles applicable to the construction of documents, primarily by reference to the decisions of this Court in*** *Trilogy Management v YT charitable Foundation (International) Ltd* [2012] JCA 152 ***and*** *La Petite Croatie Ltd v Ledo* [2009] JCA 221. ***Those principles, which are well known, may be stated as follows:-***
>
> > ***(1) the aim is to establish the presumed intention of the makers of the document from the words used;***

(2) the words must be construed against the background of the surrounding circumstances or matrix of facts existing at the time of execution of the document;

(3) the circumstances relevant and admissible for this purpose are those that must be taken to have been known to the makers of all parties to the document at the time, and include anything which would have affected the way in which the language of the document would have been understood by a reasonable man;

(4) Evidence of subjective intention, drafts, negotiations and other matters extrinsic to the document in question is inadmissible as an aid to construction, but may be admitted to resolve a latent ambiguity (that is to say, an ambiguity that only becomes apparent when otherwise clear words are related to the surrounding circumstances);

(5) evidence of events subsequent to the making of the document is inadmissible as an aid to construing the original meaning of the document;

(6) words must be read in the context of the document as a whole;

(7) words should so far as possible be given their ordinary meaning; and if the language is unambiguous the Court must apply it unless the result is commercially absurd;

(8) if the words used are ambiguous, in the sense of being capable of more than one construction, the court should adopt the construction that appears most likely to give effect to the commercial purpose of the agreement and to be consistent with business common sense; but there is a correlation between the degree of ambiguity and the persuasiveness of a common sense construction, so that the greater the ambiguity the more likely it is that the court will adopt a construction based on business common sense, and vice versa ."

268 A number of immediate observations can be made about the contract of employment:-

(i) Whilst Schedule 18.1 provides for minimum periods of notice, the only reference thereafter to notice is in Schedule 18.2.4 which states that notice of termination is not required in cases of gross misconduct, gross negligence and loss of registration.

(ii) There is no express provision giving the employer the right to terminate the contract without cause.

(iii) There is no express provision giving the employee the right to terminate the contract of employment.

(iv) There is a right of appeal under Schedule 18.2.2, but only after disciplinary or capability procedures result in a decision by the employer to terminate.

269 It is Mr Alwitry's case that under the provisions of Schedule 18, the SEB could only terminate his contract of employment for cause, namely for any of the reasons set out in Schedule 18.2.1, there being no allegation in this case of gross misconduct or gross negligence on his part.

270 Advocate Chiddicks's argument in favour of this construction was as follows:-

(i) The use of the word *"permanent"* to describe the contract distinguishes the contract from any temporary, probationary or fixed term appointments.

(ii) Although Schedule 18.2 is headed *"Grounds for Termination of Employment",* it states under Schedule 18.2.1 that *"A consultant's employment may be terminated for the following reasons:"* and lists six grounds. The very fact that there is a clause headed *"Grounds for Termination"* suggests that grounds are necessary. If there were no need to have any grounds for termination, then there would be absolutely no need for clause 18.2, nor for this heading.

(iii) Two points can be made about the list of grounds for termination:-

(a) They encompass all of the circumstances in which the General Hospital might possibly need to dismiss a consultant ranging from conduct to redundancy. It will therefore protect the hospital's position as an employer, whilst offering sufficient security to entice good consultants to move from the UK and devote their careers to the service of the General Hospital, in the knowledge that they cannot be dismissed for no reason. As such, it represents a commercially sensible bargain as between the parties.

(b) The last of those grounds "Where there is some other substantial reason to do so in a particular case" is important, as it enables the hospital to dismiss a consultant where it has some other substantial reason, but it underscores the parties' intentions that there must be a *"substantial reason"* for dismissing a consultant. It is flatly contrary to the suggestion that the General Hospital could dismiss a permanent consultant for no reason at all.

(iv) Schedule 18.1 and 18.2 plainly operate together, with Schedule 18.2 setting out the grounds upon which the employer may terminate the employment and 18.1 setting out the notice period to be given if it does so. Without Schedule 18.2, Schedule 18.1 makes no sense. By contrast, Schedule 18.2.4 sets out the circumstances in which the hospital may dismiss without notice, namely instances of gross misconduct, gross negligence or where a consultant's registration as a medical practitioner has been removed or lapsed without good reason. Since this clause sets out where the consultant may be dismissed without notice, it follows that dismissal under other circumstances, i.e. those in Schedule 18.2.1 must be done on notice. It is obvious that

the relevant period of notice to be given is that in Schedule 18.1.

(v) If the SEB is correct that it can terminate upon notice for no reason at all, what does Schedule 18.2 add to the contract at all? The answer is nothing. The SEB would be entitled to dismiss on notice for no reason and there would be no point in identifying grounds for termination.

(vi) The Solicitor General argues that the language of Schedule 18.2 is permissive (i.e. “may” not “must”). This is a bad point says Advocate Chiddicks, because it is obvious that the SEB does not have to sack someone who does any of the things in Schedule 18.2 – it is not compelled to do so, but it may do so.

(vii) There is every reason why a permanent consultant's position should be a job for the rest of his or her working life. It is important that consultants are able to plan for the long-term development of the hospital and their particular departments, and that they have sufficient security of employment in order to feel able to champion patient safety, even if it means having difficult conversations which might irritate management.

(viii) Finally, in so far as there is ambiguity as to the meaning of Schedule 18, it should be construed against the employer by application of the contra proferentem rule.

271 The Solicitor General argues that there is nothing in the wording of Schedule 18 to indicate that the right of either party to terminate on notice was intended to be fettered. Consistent with this reading, he noted that the wording of Schedule 18.2.1 is expressed in permissive language. If its right to terminate the contract was to be restricted to those matters set out in Schedule 18.2.1, the provision would have said so with the words “A consultant's employment may only be terminated for the following reasons. ….”. This is to be contrasted, he said, with the mandatory language of Schedule 18.1 *“will proved (sic)”* and 18.3 *“will be avoided”* and *“will be given”*.

272 The Solicitor General said a similar argument as to construction arose in the case of *Regina v Hull University Visitor* [1992] I.C.R. 67 where a University lecturer's employment was terminable in accordance with his letter of appointment on three months' notice without cause and in accordance with the University's statutes for cause. In dismissing the lecturer without cause in accordance with his letter of appointment, it was held that the University had not exceeded its powers and the dismissal was valid, despite policy arguments to the contrary. The case is of little assistance to us because in Mr Alwitry's contract of employment there is no express provision for termination without cause; nor have we been given any policy arguments as to why a provision for termination without cause should be implied.

273 The Solicitor General submitted that, in any event, a more convincing reading of Schedule 18 is that SEB's power to terminate on notice was unfettered.

274 The Terms and Conditions were not negotiated between the SEB and Mr Alwitry in the normal sense, in that they are standard terms incorporated into the contract, which follow closely those used in the NHS and which resulted, we assume, from negotiation with the relevant representative bodies. We have heard no evidence as to this aspect of the matrix of facts. Whilst we had evidence that the standard practice in the NHS was for consultants to be able to terminate their contracts for any reason on the giving of three months' notice, we had no evidence as to whether it was standard practice for NHS hospitals or the General Hospital to be able to terminate consultant's contracts for no cause.

275 Little weight can be placed on the description *"permanent"* in the contract of employment, which in our view, is to distinguish the appointment from a locum appointment on a temporary basis. As Lord Keith said in the House of Lords decision of *McClelland v Northern Ireland General Health Services Board* [1957] 2 All ER 129 at page 136:-

> ***"A mere statement that a person holds a permanent and pensionable post is very imprecise.*** It contains no indication of the degree of permanence or the nature and conditions of pension ."
>
> In the same case, Lord Evershed said at page 140:-
>
> ***"I do not for my part think that, in a contract of service, use of the word 'permanent' would be of itself sufficient to import the notion of a life appointment.*** The word is clearly capable, according to the context, of many shades of meaning; and it seems to me of considerable importance, in interpreting its use in a contract of service, that such a contract cannot be specifically enforced ."

276 The leading Jersey case on implied terms is *Grove and Briscoe v Baker* [2005] JLR 348, where it was held that a party seeking to persuade the Court that a term should be implied into a contract, must show either that the term is customarily included in contracts of the kind in question or that it is necessary to imply the term in order to ensure that the contract is not futile, inefficacious or absurd.

277 We had no evidence, and it was not contended by the SEB, that the right of an employer to terminate the contract of an employee without cause is customarily included in contracts of this kind in Jersey. Although Schedule 18 is silent as to the right of the employee to terminate the contract, it is accepted by the parties that he must, by necessary implication, have the right to do so without cause, by giving three months' notice under Schedule 18.1, the standard notice provision for consultants in the NHS. It would be futile and absurd to suggest that Mr Alwitry was tied into his contract with the General Hospital for his working life.

278 Should it be implied that the SEB can also give three months' notice of termination without cause? The position here contrasts with that in the cases of *Johnson v Unisys*

Limited [2001] 2 WLR 1076 and *Edwards v Chesterfield Royal Hospital NHS Foundation Trust* [2011] UKSC 58, to which we will come in more detail later. The contracts in those cases expressly provided that both the employer and the employee could terminate the contract without cause.

279 In *McClelland v Northern Ireland General Health Services Board*, the House of Lords declined to interpret a contract of employment as necessarily subject to the right of a master at common law to terminate his servant's engagement, because in that case, the contractual terms were to be found exclusively in conditions (referred to as "the September conditions") which were held to be comprehensive, and, in regard to termination, exhaustive. The right to terminate the contract could only be exercised on the grounds provided for in the September conditions.

280 That common law right of a master to terminate his servant's engagement at will and without cause is recognised in Jersey customary law (see *McDonald v Parish of St Helier* [2005] JRC074 at paragraph 15), but in the case of Mr Alwitry's contract of employment, the contractual terms and in particular in regards to termination, are to be found in the contract of employment, as made clear in clause 30 ("Entire Terms") which we have set out above: *"This contract and the associated Terms and Conditions contain the entire terms and conditions of the Employee's employment…such that all previous agreements, practices and understandings…are superseded and of no effect"*. We conclude that the contractual terms in this case are to be found exclusively in the contract of employment.

281 We were shown the Terms and Conditions for Consultants (England) 2003 upon which we understand the Terms and Conditions attached to Mr Alwitry's contract of employment were based. Schedule 19, headed "Termination of Employment", is in very similar terms to Schedule 18 of the Terms and Conditions in Mr Alwitry's contract, save that Schedule 19.1, headed "Periods of Notice" is in these terms:-

> *"Periods of notice*
>
> > *(1) Where termination of employment is necessary, an employing organisation will give a consultant three months' notice, in writing.*
> >
> > *(2) Consultants are required to give their employing organisation three months written notice if they wish to terminate their employment.*
> >
> > *(3) Shorter or longer notice may apply where agreed between both parties in writing and signed by both."*

The grounds for termination of employment under paragraph 4 of Schedule 19 are in identical terms to Schedule 18.2.1 of Mr Alwitry's contract of employment.

282 Two points arise from this:-

(i) It is made clear in Schedule 19 of the English Terms and Conditions that the consultant can terminate his or her contract by the giving of three months' notice, as surely Schedule 18 of Mr Alwitry's Terms and Conditions should have made clear.

(ii) In England termination by the employing organisation is only where it is "necessary", so that the right of the employer to terminate is arguably restricted to the same grounds as set out in Schedule 18.2.1 (or where there is gross misconduct, gross negligence or loss of registration).

283 We prefer the arguments put forward by Advocate Chiddicks that the proper construction of Schedule 18 is that the employer's right to terminate is restricted (absent gross misconduct, gross negligence or loss of registration) to the admittedly wide set of circumstances set out in Schedule 18.2.1, a list which ends with the *"other substantial reason,"* which we agree protects the interests of the employer, whilst giving the consultant some security that his or her contract cannot be terminated arbitrarily. In other words, termination has to be for cause. It is not necessary to imply a right of the employer to terminate without cause as Schedule 18 is perfectly efficacious or effective without it. Such a right would require clear words and would sit very uneasily with Schedule 18.2.1.

284 Other than praying in aid the *contra proferentem* rule, Advocate Chiddicks did not elaborate on its applicability or cite any authority for its use, bearing in mind no reference was made to it as a rule of construction by the Court of Appeal in *The Parish of St Helier v The Minister for Infrastructure*. The rule as enunciated by *Pothier* was referred to by the Royal Court in *La Petite Croatie Limited v R.P. Ledo and A.K. Ledo* [2009] JLR 116 at paragraph 8:-

"8. The Court has been assisted in the past by the observations of Pothier concerning the interpretation of agreements. In his Traité des Obligations, (1821) Tome 1 Article VII he sets out a number of rules for interpretation of agreements, the following of which would appear to be relevant:-

"Première Règle

On doit, dans les conventions, rechercher quelle a été la commune intention des parties contractantes, plus que le sens grammatical des termes .

Troisième Règle

Lorsque dans un contrat des termes sont susceptibles de deux sens, on doit les entendre dans le sens qui convient le plus à la nature du contrat .

Sixième Règle

Dans le doute, une clause doit s'interpréter contre celui qui a stipulé quelque chose, et à la décharge de celui qui a contracté l'obligation ."

285 However the Court cautioned against the use of these rules in interpreting deeds concerning immovable property:-

> ***"9. As explained by the Court of Appeal in*** *Haas v Duquemin* [2002] JLR 27, ***caution must be exercised in applying these principles to the interpretation of deeds concerning immoveable property:—***
>
> ***"While I recognize that Pothier's rules on the construction of contracts may be useful in some circumstances as an assistance in the interpretation of deeds which confer real rights of property (see*** *Le Pennec v Romeril*), ***I think that care is required in their application.*** Pothier, in setting out those rules, was addressing the law of obligations where the intentions of the contracting parties are the prime consideration. In the law of property, however, a deed sets out real rights which affect others than the initial parties to the deed, and there are special rules, such as the presumption for freedom in relation to servitudes, which I will mention shortly."

286 No reference to the *contra proferentem* rule was made in the Court of Appeal decision in the same case *La Petite Croatie Limited v R.P. Ledo and A.K. Ledo* [2009] JCA 221, and, as we have said, by the Court of Appeal in *The Parish of St Helier v The Minister* for Infrastructure, a case which was also concerned with immovable property. We are aware of its use under Jersey law in interpreting exculpatory clauses—see *Midland Bank Trust Company (Jersey) Limited v FPS* [1995] JLR 352, which applied the rule to an exculpatory clause in a trust deed and this following English law, although we note that under English law the rule now has a very limited role in commercial contracts—see *Persimmon Homes Limited & others v Ove Arup & Partners Ltd* [2017] EWCA Civ 373. We have no need to consider these issues any further, however, as we have been able to interpret the contract of employment in this case by applying the principles of construction summarised by the Court of Appeal in *The Parish of St Helier v The Minister for Infrastructure* without recourse to the *contra proferentem* rule.

287 We therefore conclude that the SEB did not have the right to terminate Mr Alwitry's contract of employment without cause. The next question is whether, notwithstanding this conclusion, Mr Alwitry repudiated his contract of employment allowing the SEB to terminate it, which is SEB's case.

Did Mr Alwitry repudiate his contract of employment?

288 Under Jersey law, it is the remedy of résolution that allows a party to treat a contract as having been terminated. The law was summarised by Sir Philip Bailhache, then Bailiff, in *Grove and Briscoe v Baker* [2005] JLR 348 at paragraph 14:-

> ***"14 In*** *Hamon v Webster* ***(1), the court determined that a contract could be terminated (résolu) without an application to the court.*** It did not decide that the right to treat a contract as terminated followed the English model or was to

be considered in accordance with English law. In fact, the law relating to resolution is not dissimilar to the English remedy of rescission. Nonetheless, there is at least one important distinction, in that the remedy of résolution in Jersey law is available at the discretion of the court wherever the failure to comply with an obligation can be said to be sufficiently serious to justify a cancellation of the contract. A trivial or insignificant failure to comply with an obligation would not be sufficient. The failure must go 'to the root of the contract' (*Hamon v. Webster and New Guar. Trust Fin Ltd v Birbeck (4)* ***[1977 JJ at 83]), or involve 'a breach of a fundamental condition'*** *Hanby v Moss* ***(2() or be 'sufficiently serious to justify the termination of a contract'*** *Hotel de France (Jersey) Ltd v Chartered Institute of Bankers* ***(3).*** These are the principles to be applied to the first submission of counsel for the plaintiffs that the failure to pay interest at the due time was a fundamental breach of the contract of loan which entitled the plaintiffs to terminate the contract."

289 We were not provided with any other authority from this jurisdiction. Chitty on Contract, 33rd Edition defines repudiation or renunciation at paragraph 24–018 in this way:— "A renunciation of a contract occurs when one party by words or conduct evinces an intention not to perform, or expressly declares that he is or will be unable to perform, his obligations under the contract in some essential respect… Short of such an express refusal or declaration, however, the test is to ascertain whether the action or actions of the party in default are such as to lead a reasonable person to conclude that he no longer intends to be bound by its provisions".

290 The classic jurisprudential statement of English law in relation to repudiatory breach is in the case of *Freeth v Burr* [1878] LR 9 CP 209 at 213:-

> ***"It is not a mere refusal or omission of one of the contracting parties to do something which he ought to do, that will justify the other in repudiating the contract; but there must be an absolute refusal to perform his side of the contract*** ."

291 It was not in dispute that in every contract of employment there is an implied term of mutual trust and confidence, the loss of which would go to the root of the contract. As Lord Nicholls said in *Malek v Bangor Credit and Commerce International (A)* [1998] AC 20 at page 13, there is a general obligation not to engage in conduct likely to undermine the trust and confidence required if the employment relationship is to continue in a manner the employment contract implicitly envisages. He made clear that the conduct must be looked at objectively in all of the circumstances. Lord Millett in the House of Lords decision of *Johnson v Unisys Ltd* said at paragraph 78 that the implied term of trust and confidence is now generally imported into the contract of employment, usually expressed "as an obligation binding on both parties not to do anything which would damage or destroy the relationship of trust and confidence which should exist" between employer and employee.

292 That implied term has been recognised under Jersey law in the case of *McDonald v*

Parish of St Helier [2005] JRC 074 at paragraph 28. That term is expressly recognised in clause 3 of the contract of employment: "It is essential therefore that the Employee and the Employer work in a spirit of mutual trust and confidence."

293 The test for repudiation in this context is that set out in *Neary v Dean of Westminster* [1999] IRLR 228, namely that the conduct of the employee must so undermine the trust and confidence which is inherent in the particular contract of employment that the employer should no longer be required to retain the employee in his employment. It is that loss of trust and confidence that the SEB relied upon in its letter of termination dated 22 nd November, 2012. The burden is upon the SEB to prove on the balance of probabilities that, viewed objectively, as at the 22 nd November, 2012 Mr Alwitry had conducted himself in such a way as to so undermine the trust and confidence which is inherent in his contract of employment with the SEB, that the SEB was entitled to terminate his contract of employment. Put another way had the employment relationship of trust and confidence been irreparably damaged by his conduct?

294 The degree of misconduct on the part of an employee that would justify summary dismissal was considered by Lord Jauncey in *Neary v Dean* of Westminster at paragraph 22:-

> ***"I have already referred to the statement by Lord James of Hereford in*** *Clouston & Co Ltd v Corry*. ***That case was applied in*** *Laws v London Chronicle (Indicator Newspapers) Ltd* [1959] 1 WLR 698, ***where Lord Evershed MR, at p.700, said: "It follows that the question must be —if summary dismissal is claimed to be justified – whether the conduct complained of is such as to show the servant to have disregarded the essential conditions of the contract of service."*** In *Sinclair v Neighbour*, ***Sellars LJ, at p. 287F, said: "The whole question is whether that conduct was of such a type that it was inconsistent, in a grave way – incompatible – with the employment in which he had been engaged as a manager."*** Sach LJ referred to the "well established law that a servant can be instantly dismissed when his conduct is such that it not only amounts to a wrongful act inconsistent with his duty towards his master but is also inconsistent with the continuance of confidence between them". In *Lewis v Motorworld Garages Ltd* [1985] IRLR 465, ***Glidewell LJ, at 469, 38, stated the question as whether the conduct of the employer "constituted a breach of the implied obligation of trust and confidence of sufficient gravity to justify the employee in leaving his employment… and claiming that he had been dismissed."*** This test could equally be applied to a breach by an employee. There are no doubt many other cases which could be cited on the matter, but the above four cases demonstrate clearly that conduct amounting to gross misconduct justifying dismissal must so undermine the trust and confidence which is inherent in the particular contract of employment that the master should no longer be required to retain the servant in his employment."

295 In *Briscoe v Lubrizol Ltd* [2002] IRLR 607 it was held by the English Court of Appeal that to draw a distinction between gross misconduct and repudiatory conduct evincing an intention no longer to be bound by the contract would be to make a distinction without a real difference. In this case the SEB has not alleged gross misconduct on the part of Mr Alwitry, but it must prove conduct on his part of such gravity as to justify the termination of his contract of employment a week or so before he was due to start work. That will always be a question of fact.

296 Reviewing the history of this relationship, it was regrettable that Mr Alwitry's reference to requiring six months' notice was not picked up by the members of the panel (apart from Mr McNeela who did not raise it with the panel), and that the issue of the start date was not aired at the interview. The reference in the advert to *"Winter 2012"* was also unhelpfully ambiguous. As against that, all of the witnesses agreed that the standard period of notice for consultants within the NHS was three months, and it was assumed by the hospital management, rightly, that three months was the notice required for Mr Alwitry to terminate his contract with the Derby Hospital.

297 Furthermore, in our view, the notice period asked for in the application form clearly related in context to the notice required to terminate Mr Alwitry's employment, not the notice he required before taking up the post in Jersey. In our view it was somewhat disingenuous of Mr Alwitry to have answered *"six months"* to a question that was clearly directed to the period of notice he had to give the Derby Hospital.

298 We accept the evidence of Mr Downes that he had explained to Mr Alwitry when they met in England prior to the interviews the pressure upon the Ophthalmic Department, and the need for the appointment to start as soon as possible. The need for real urgency in the appointment of a third consultant can be seen from his e-mail of 16 th May, 2012, and in our view, that urgency would have been communicated to Mr Alwitry when they met. Mr Alwitry must, therefore, take some responsibility for the confusion that thereafter arose over the start date. That led to Mr McLaughlin's letter of 10 th August, 2012, and the imposition of a short deadline for him to accept the post. It was undermining of Mr McLaughlin's position as managing director of the hospital that Mr Alwitry immediately raised the issue with Mr Downes, Mrs Body, Mr McNeela and Dr Luksza trying to build the case for a later start date.

299 The issue of the start date having been resolved, Mr Alwitry displayed similar conduct in relation to the Job Plan issued by Mr Downes on 24 th September, 2012, a document which we accept would have been the result of both a great deal of preparatory work and a willingness on the part of the hospital management to accommodate Mr Alwitry as far as it could, bearing in mind that he could have been held to the Job Plan sent to him by Mr Leeming, and which the contract said he had agreed. Although we do not have a copy of that Job Plan, we understand that it provided for Friday operating.

300 In the absence of Mr Downes, Mr Alwitry then sought to build support for his preferred Job

Plan with Ms Gindill and Ms Hockenhull to whom he made critical comments about Mr Downes' position over Friday operating, which were undermining of Mr Downes (the reference to his father digging out correspondence on the subject when Mr Downes was appointed a consultant). This led to Mr Downes' e-mail of 9 th October, 2012, requiring Mr Alwitry to address any further questions to Mr Downes, Mr McLaughlin or Mrs Body, and giving him this warning:-

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

301 The e-mail served its purpose, in that Mr Alwitry said he telephoned Mr Downes the next day, accepting the Job Plan, a conversation which Mr Downes could not remember, although Mr Alwitry did not confirm that acceptance in writing. On the same day, he took advice from the BMA and its letter of 30 th November, 2012, sent after the termination, confirmed that one of the matters he was discussing with them was indeed the Job Planning process. We think there is some force in Mr McLaughlin's view that Mr Alwitry had not given up on the Job Planning issue. Certainly Mr Downes seemed to be unaware that he had accepted the Job Plan, because that was the issue he wanted Mr Alwitry to confirm in the letter that was to be sent to him by Mr McLaughlin, as the email from Mr Downes to Mr McLaughlin of the 31 st October, 2012 makes clear.

302 We accept the evidence of Mr McLaughlin that there was genuine concern about the conduct of Mr Alwitry, which, in his experience, and other members of the hospital management, was unprecedented from a newly appointed consultant who had yet to take up his post. That concern was such that he took legal advice, through Mr Riley, from the Law Officers' Department, as to the options open to the General Hospital. In doing so, we find that he was genuinely motivated by the long-term interests of the General Hospital.

303 The position of the hospital management became very entrenched immediately after the contract was terminated and when the issue of Mr Alwitry's possible reinstatement was being explored by the SEB, but we think it is important that we analyse the position as at the time the contract was terminated and separate out the strong feelings on the part of the hospital management about his reinstatement which would have overruled their decision, undermined their leadership and led to resignations. As at the 22 nd November, 2012, had the employment relationship of trust and confidence been irreparably damaged by his conduct?

304 We find that as at the 31 st October, 2012, there had been no decision by the hospital management to terminate Mr Alwitry's contract of employment. The proposal which had been discussed (at a meeting attended by at least Mr McLauglin, Mr Downes, Mr Siodlak and Dr Luksza) was for him to be written to so that he could confirm his acceptance of the Job Plan. It was only if he remained unhappy with it that he was to be given five days to re-think before his contract would be terminated for him. It is implicit that if Mr Alwitry had given

that confirmation, the hospital management accepted that he could have taken up the post and that Mr Downes, and indeed the hospital management, were prepared to work with him. It follows that as at the 31 st October, 2012, the employment relationship of trust and confidence had not been irreparably damaged by his conduct.

305 Mr McLauglin did not send out that letter because he said *"they"* were worried about it starting another round of emails and accordingly they were *"going down the road of termination"*, but there is no evidence of any discussion within management about this and, in any event, *"going down the road"* towards a decision is not the same as a decision being taken.

306 Although Mr Riley said in his e-mail of 12 th November, 2012, having heard of the e-mail from the BMA, that he thought everyone was agreed to withdraw the offer of employment, it is notable that he only *"thought"* that this was so, which is a strong indication that no decision to that effect had been taken at that stage. Prior to the receipt of the BMA email, individual members of the hospital management (notably Mr McLaughlin and Mr Riley) may have reached the point at which they wished to terminate Mr Alwitry's contract of employment, but there had been no management decision to that effect; on the contrary preparations were on foot for Mr Alwitry's induction. Mr Siodlak, despite his forthright e-mails on the issue, was clear that there had been no such decision and we accept his evidence that this was the case. Mr Downes told us very candidly that despite the issues over the start date and the Job Plan, at the point he left the Island for the US after sending Mr McLaughlin his e-mail of 31 st October, 2012, he was still prepared to work with Mr Alwitry.

307 The fact is that nothing happened in terms of the employment relationship with Mr Alwitry between the 31 st October, 2012, when it was proposed he should be written to and the receipt of the e-mail from the BMA on the 12 th November, 2012. We therefore further find that up to the receipt of the BMA email the relationship between Mr Alwitry and the hospital management remained viable. t was that email that galvanized the hospital management into an urgent meeting the next day in the absence of Mr Downes and without waiting one further day to see what it was that the BMA wanted to discuss.

308 The e-mail from the BMA was described by Mr McLaughlin as *"the last straw"* and by Mr Siodlak as *"shocking"* and *"extraordinary"*. Mr Riley said it *"put the nail in it"* and that if he hadn't made up his mind before the BMA intervention, he certainly had after it. We think there is no escaping the conclusion that the intervention of the BMA was causative of the decision that was taken very hurriedly the next day. That is clear from the note of the meeting:-

> "Mr Alwitry's communication, attitude and behaviour since his offer of employment was accepted with Health and Social Services was discussed, along with the subsequent reporting of Mr Downes to the BMA". (our emphasis)

The BMA email was seen as a significant development, raising the possibility that Mr Alwitry would start work with a live formal complaint about his line manager.

309 When Mr Downes returned to the Island, his hearing of the BMA intervention was a major factor in his changing his position and supporting the decision that had been taken in his absence. Quoting again from his email of the 26 th November, 2012, to Mr Alwitry explaining why he supported the decision to terminate his contract of employment: "and in particular your decision to *report your manager i.e. me to the BMA (both surprising and extremely disappointing, bearing in mind all the time and effort I put into trying to organise the best possible timetable under the circumstances of major organisational constraints)…."*

310 The Solicitor General referred us to the English Court of Appeal decision of *Omilaju v Waltham Forest London Borough Council* [2005] I.C.R.481, where an alleged breach of the implied obligation of trust and confidence consisted of a series of acts, the last act or final straw which led (in that case) to the employee terminating the employment relationship and which, viewed in isolation, might not be unreasonable or blameworthy. Its essential quality was that it was the last in a series of acts the cumulative effect of which, viewed in the round, was such as to amount to a breach of the implied term. It would not amount to a *"last straw"* if the final act, objectively viewed, was entirely innocuous. The case concerned an appeal against a decision of the Employment Appeal Tribunal in which the last straw complained of by the employee was the refusal of the employer to pay wages for days in July and August when he was attending the Employment Tribunal. The employer was not in breach of contract for so doing. Dyson LJ, giving the judgment of the Court of Appeal, analysed the quality of a last straw in this way:-

He then went on to say at paragraph 21:-

> ***"21 if the final straw is not capable of contributing to a series of earlier acts which cumulatively amount to a breach of the implied term of trust and confidence, there is no need to examine the earlier history to see whether the alleged final straw does in fact have that effect.*** Suppose that an employer has committed a series of acts which amount to a breach of the implied term of trust and confidence, but the employee does not resign his employment. Instead, he soldiers on and affirms the contract. He cannot subsequently rely on these acts to justify a constructive dismissal unless he can point to a later act which enables him to do so. If the later act on which he seeks to rely is entirely innocuous, it is not necessary to examine the earlier conduct in order to determine that the later act does not permit the employee to invoke the final straw principle ."

At paragraph 22, Dyson LJ then went on to confirm that the test of whether the employee's trust and confidence had been undermined is objective.

> ***"19 The question specifically raised by this appeal is: what is the necessary quality of a final straw if it is to be successfully relied on by the employee as a repudiation of the contract?*** When Glidewell LJ said that it need not itself be a

breach of contract, he must have had in mind, amongst others, the kind of case mentioned in the Woods case at p 671f-g where Browne-Wilkinson J referred to the employer who, stopping short of a breach of contract, 'squeezes out' an employee by making the employee's life so uncomfortable that he resigns. A final straw, not itself a breach of contract, may result in a breach of the implied term of trust and confidence. The quality that the final straw must have is that it should be an act in a series whose cumulative effect is to amount to a breach of the implied term. I do not use the phrase 'an act in a series' in a precise or technical sense. The act does not have to be of the same character as the earlier acts. Its essential quality is that, when taken in conjunction with the earlier acts on which the employee relies, it amounts to a breach of the implied term of trust and confidence. It must contribute something to that breach, although what it adds may be relatively insignificant .

20 I see no need to characterise the final straw as 'unreasonable' or 'blameworthy' conduct. It may be true that an act which is the last in series of acts which, taken together, amounts to a breach of the implied term of trust and confidence will usually be unreasonable and, perhaps, even blameworthy. But, viewed in isolation, the final straw may not always be unreasonable, still ***less blameworthy.*** Nor do I see any reason why it should be. The only question is whether the final straw is the last in a series of acts or incidents which cumulatively amount to a repudiation of the contract by the employer. The last straw must contribute, however slightly, to the breach of the implied term of trust and confidence. Some unreasonable behaviour may be so unrelated to the obligation of trust and confidence that it lacks the essential quality to which I have referred ."

311 The BMA is Mr Alwitry's trade union and he has an undoubted right to consult it at any time (the right to join a trade union is protected under Article 11 of the European Convention On Human Rights). The BMA representative had asked Mr Jones to discuss the matter when she returned to her office on Wednesday 14 th November, 2012, but the decision to terminate Mr Alwitry's employment was taken the day before, without the hospital management ascertaining precisely what the BMA wished to discuss. The meeting of 13 th November, 2012, proceeded on the assumption that Mr Alwitry had made a formal complaint against Mr Downes, which was not the case. The statement made by Mr Riley in his letter of the 15 th November, 2012, to the SEB that Mr Alwitry had engaged the BMA to support a formal complaint about Mr Downes was incorrect and could not be supported from what we understand the hospital management knew about the BMA intervention at that point. It was a statement that must have been a material factor in the SEB giving its support to the decision of the hospital management.

312 Whilst we can understand the reaction of the hospital management to what it had (wrongly) assumed had been a formal complaint about Mr Downes to the BMA, as a matter of policy we do not think that an employer receiving a request from an employee's trade union for contact could ever contribute to a breach by the employee of the implied term of trust and confidence. Consequently we find that this last straw was not capable of contributing to a series of earlier acts which cumulatively amount to a breach of the implied

term of trust and confidence. As we have found, up to the point of that email, the hospital management were prepared to *"soldier on"* with preparations for Mr Alwitry's induction proceeding apace. Following *Omilaju v Waltham Forest London Borough Council* there would be no need to examine the earlier history, although we have done so.

313 We can see that the conduct of an employee may be so serious as to irreparably damage the relationship with the employer without further ado, e.g. in the case of dishonesty, but in a case like this we are dealing with a course of behaviour over a period of time conducted in the main through e-mails, which on their face were couched in civil language, by someone who had yet to start work. We struggle somewhat with the notion that conducting himself in the way Mr Alwitry did over the start date and Job Plan can fairly be described, as it was by Mr Riley, as *"atrocious"* and *"consistently adversarial, aggressive, inappropriate, duplicitous, uncooperative and frankly unacceptable"*. This stretches the description of his conduct to the boundaries of what the facts can support.

314 The most serious charge against Mr Alwitry is that over the start date and Job Plan, he involved more junior members of the General Hospital in a way which undermined the hospital management, conduct which we can see might well justify disciplinary action, but we are not persuaded that looked at objectively, his conduct during this period, albeit difficult and at times exasperating to the hospital management, was of sufficient gravity to justify summary dismissal. In any event we have found as a matter of fact that despite those difficulties, the relationship between Mr Alwitry and the hospital management up to the point when the BMA intervened was not irreparably damaged by his conduct. As we have stated above, that intervention by his trade union, the catalyst for the termination of his contract, could not contribute to a breach of the implied term of trust and confidence.

315 In essence the fear on the part of the hospital management was that Mr Alwitry would be difficult, if not very difficult, to manage and would not fit in with the new culture they were endeavouring to foster following the Verita report. Rather than allowing him to start work, they decided upon *"a pre-emptive strike"* to withdraw the offer, so as to avoid the disciplinary and appeal processes contained in the contract of employment. Without that pre-emptive strike they feared what Mr Riley described to the SEB as thirty years of a dysfunctional department. They did so knowing that the SEB could be held to be in breach of contract, but took the risk because of the advice they had received as to the minimal damages that could be claimed.

316 There are two sides to any relationship and we also question whether an employer can properly say that the relationship has been irreparably damaged by a course of conduct by an employee over which it has never made any substantive complaint; the absence of any complaint would suggest an intention *"to soldier on"*. The most Mr Downes did was to warn Mr Alwitry on the 9 th October, 2012 that making too many demands *"at this stage of your appointment is unlikely to bode well for your future relationships within the organisation!"*. Mr Alwitry had no indication that he had conducted himself in such a way that the hospital management were already taking legal advice on terminating his contract before he had

even started work. Even in the letter it was proposed should be sent to Mr Alwitry on the 31 st October. 2012, asking for his confirmation of the Job Plan, it was not suggested by Mr Downes that any complaint should be made to Mr Alwitry about his conduct, or that he should be given any kind of warning as to how precarious his position had become. As a matter of procedure, it was, of course, grossly unjust to Mr Alwitry for him not to be told of the charges against him and how precarious his employment was, as the Complaints Board has made so very clear.

317 As against that Mr Alwitry must have been aware that there were difficulties, although not the extent of those difficulties, in that:-

(i) He had received the ultimatum from Mr McLaughlin of 10 th August, 2012, giving him three working days to commit to a starting date of 1 st December, 2012, an ultimatum which was unusual in the context of a consultant appointment;

(ii) He had received Mr Downes' e-mail of 9 th October, 2012, in relation to the Job Plan and the warning about making too many demands;

(iii) He had himself consulted his trade union, the BMA, and had agreed that they should contact Mr Jones within the hospital management over the PAs issue.

(iv) He had avoided meeting Mr Downes, Mrs Body or Mr McLaughlin when he visited the Island on 22 nd and 23 rd October, 2012, because he knew there were unresolved issues.

318 Even so it cannot be said that Mr Alwitry's conduct amounted to an express refusal, or any kind of refusal, to perform his side of the contract. As Advocate Chiddicks said, from Mr Alwitry's point of view he was about as far from repudiating or renouncing his contractual obligations as it is possible to be. He had resigned from his post at the Derby Hospital, engaged fully (the SEB would say too fully) in the Job Planning process, booked and paid for his flights to and from Jersey for many months ahead and had made all the arrangements involved in such a move. We found it particularly poignant that Mr Alwitry's son had taken, and passed, his entrance examination into Victoria College. This was not a case like *Briscoe v Lubrizol Ltd* where the employee had failed to attend a meeting to discuss his position under a long term disability scheme without explanation and who had thereafter failed to reply to the managements requests to contact them. The case against Mr Alwitry is not that he expressly refused to perform his side of the contract, but that by his conduct over the start date and the Job Plan he had so undermined the trust and confidence which is inherent in his contract of employment with the SEB that the SEB were entitled to summarily terminate his contract of employment.

319 We have considerable sympathy with the position of the hospital management, who we find were acting in good faith and motivated by the best long-term interests of the General Hospital and we further find that its concerns over the conduct of Mr Alwitry were genuinely

held. Viewed objectively, however, and for the reasons set out above, we conclude that as at 22 nd November, 2012, Mr Alwitry had not conducted himself in such a way as to so undermine the trust and confidence which is inherent in his contract of employment with the SEB, that the SEB was entitled to terminate his contract of employment summarily. He had not by his conduct repudiated his contract of employment.

Whistleblowing

320 It is convenient at this stage to address Mr Alwitry's contention that his contract of employment was terminated because he had raised issues of patient safety; a contention which was gone into in considerable detail. Schedule 12.7.1 allowed him to speak out in the public interest if he had genuine concerns about an issue, and to suffer no detriment for doing so. This is a contractual obligation, it was submitted, the breach of which sounds in damages, which do not come within the Johnson Exclusion Area or the unfair dismissal legislation. For the reasons set out below, it is not necessary to set out the interesting arguments put forward by Advocate Chiddicks as to why this was the case.

321 The parties had appointed experts on the issue of patient safety, namely Mr T D Matthews, a consultant neuro-ophthalmologist and ophthalmic surgeon, on behalf of Mr Alwitry and Mr John L Brookes, a consultant ophthalmic surgeon on the part of the SEB. They were not called, as they had reached agreement over the questions put to them, in essence that the patient safety concerns put forward by Mr Alwitry in relation to his Job Plan were reasonable on the face of it. They could not opine on his motives for raising these concerns, but the key point they made, echoed by the other consultant witnesses we heard, was that it is the consultant who decides which patients he will operate on and who is responsible for ensuring their post-operative care.

322 The experts put the position succinctly at paragraph 28 of their joint report dated 24 th September, 2018:-

> *"We strongly agree that it is the responsibility of the operating surgeon to ensure robust procedures are in place for their patients.* The surgeon has the ultimate responsibility for the patients they operate on. We also strongly believe that operating lists should be organised by the operating surgeon to take account of all the possible variations between patients, in relation to complexity, need for early review, training and teaching cases, organising patients on a list when the operating surgeon is available for post-operative review etc."

323 There was never any question of Mr Alwitry being required by the hospital management to undertake any operation on any patient. The operating lists would be his. He would decide who he would operate on and it would be his responsibility to ensure that there were robust arrangements for their post-operative care being in place. If they were not in place it was his responsibility not to operate. What was being negotiated in the Job Planning discussion was who should provide that post-operative care. There was never

any question of a patient being operated on without such post-operative care being in place, so that it is right to say that the issue of the safety of any actual patient was entirely hypothetical.

324 The experts informed us at paragraph 20 of their joint report that there were approximately 10,000 complex glaucoma operations performed per year in the United Kingdom in the NHS, which, assuming a population of just over 65 million would amount to 15 persons per 100,000 population per year. Equating that to Jersey, it would mean that Mr Alwitry would only be carrying out the more complex glaucoma operations on some 15 persons per year, which could easily have been accommodated within his Tuesday operating list.

325 As for Friday operating, it was proposed that he would operate on a Friday twice a month, and on one of those Fridays, he would be on call in any event in the ensuing weekend to provide post-operative care, so that they were only discussing one Friday operating list per month when Mr Alwitry would not be on call the ensuing weekend. He wished to return to see his young family at weekends, an entirely proper desire on his part, and so it was a question of whether, as he made clear to Ms Gindill in his e-mail to her of 29 th September, 2012, on that one Friday per month:-

One can see that the options put forward by him would not be attractive to the hospital management and we note they omit the option of his providing cover for his own patients following that one Friday.

(i) his colleagues covered for him on the Saturday morning; or

(ii) he was paid for an additional PA for that Saturday morning; or

(iii) he ditched Friday operating on one Friday a month; or

(iv) he limited himself on that one Friday a month to extra-ocular surgery.

326 In purporting to raise these issues, and setting out his proposed solutions to them, we find that Mr Alwitry was, in reality, negotiating for a timetable that would enable him to return home at the weekends, while his family was still in England. We see nothing improper in his seeking to negotiate such an outcome, but in our judgment it was quite inappropriate to use patient safety concerns for this purpose. There was never any question of any patient's safety being put at risk. In his opening address to us, Advocate Chiddicks submitted that a small body of consultants had taken against Mr Alwitry because he had chosen to speak up about patient safety. We find that this was simply not the case. In short, this was not a case, pursuant to Schedule 12.7.1, of Mr Alwitry wishing to speak out in the public interest, because of a genuine concern about a patient safety issue; indeed he did not think that the States of Jersey whistleblowing policy, which he had not read, applied to him.

327 Furthermore, Mr Alwitry was conducting this negotiation with a fellow consultant, who was just as aware as he was of patient safety issues in the field of ophthalmics, on a

"partnership approach" (Schedule 3.1.1 of his contract of employment) in which the Job Plan had to be agreed by him. In the end he accepted the Job Plan and agreed in evidence that having done so, no patient issues arose; they would not arise because he was responsible for the safety of the patients he operated on. If his contract had not been terminated he would have started work on the basis of that Job Plan. This was simply not a case of whistleblowing or of his contract being terminated because he was a whistle blower.

328 Our finding is that Mr Alwitry's contract was terminated by the SEB not because he had raised patient safety issues, but because of the way he had conducted himself with the hospital management over the start date and Job Planning issues.

329 Mr Chiddicks also argued that the professional standards and obligations as set out by the General Medical Council and in its guidance in *"Good medical practice",* in addition to being binding upon consultants, pursuant to Schedule 2.1 (as set out above), is also, by implication, binding upon the hospital management. We see no need to address this issue, because we see no breach of these guidelines in relation to patients' safety, for the reasons set out above.

Was the SEB entitled to terminate Mr Alwitry's contract of employment for cause under Schedule 18.2.1?

330 In the event of the SEB failing in its primary argument as to repudiation, it argued that it was, in any event, entitled to terminate Mr Alwitry's contract of employment for cause under Schedule 18.2.1, relying on there being *"some other substantial reason to do so"* namely a fundamental breakdown in working relationships between the parties. The phrase *"some other substantial reason"* appears to be derived from the statutory provision detailing the categories of potentially fair reasons for dismissal within Article 64(1)(b) of the Employment (Jersey) Law 2003 ("the Jersey Employment Law") and the equivalent provision in section 98(1)(b) of the Employment Rights Act 1996 ("the Employment Rights Act"). It is therefore relevant to look at the way that this phrase had been considered in Employment Tribunal case law.

331 Under Article 64 of the Jersey Employment Law, there is a two-stage process (as there is under the Employment Rights Act), firstly under Article 64(1) – (3) to ascertain the reason for the dismissal and secondly, under Article 64(4) to ascertain whether the dismissal was fair or unfair. The first is a purely factual question (see *Cobley v Forward Technology Industries plc* [2003] WCA Civ 646 at paragraph 18). As was said by Cairns LJ in *Abernethy v Mott, Hay & Anderson* [1974] ACR 323 at 330:-

> ***"A reason for a dismissal of an employee is a set of facts known to the employer, or it may be beliefs held by him, which cause him to dismiss the employee"*** .

332 A frequent instance of dismissal for *"some other substantial reason"* in unfair dismissal proceedings arises where there has been a fundamental breakdown in working relationships between the parties. This recognises the pragmatic requirement that co-employees must be able to function in a harmonious and co-operative manner as one of the essential facets of the employment relationship and one which fundamentally distinguishes it from arms-length commercial relationships. As Lord Steyn said in *Johnson v Unisys* at paragraph 20 ***"It is no longer right to equate a contract of employment with commercial contracts.*** One possible way of describing a contract of employment in modern terms is as a relational contract"

333 In *Perkin v St George's Health Care NHS Trust* [2006] ICR 616 CA, a tribunal held that the reason for the dismissal of a senior executive whose manner and attitude towards colleagues had led to a breakdown in the employer's confidence in him and rendered it impossible for the senior executives to work together as a team, was for *"conduct* [or] *some other substantial reason"*. On appeal, the Court of Appeal had held that the tribunal had not erred, even though, in the Court of Appeal's view, it would have been preferable, if the tribunal had analysed the dismissal as being for some other substantial reason, rather than for conduct.

334 In *Ezsias v Northern Glamorgan NHS Trust* [2011] IRLR 550 EAT, it was held that whilst the conduct of the employee in that case, an oral and maxillo-facial surgeon, had been responsible for the total breakdown in the relationships between him and senior staff within the department, with significant effects on the service provision and the quality of care provided to patients, it was the fact of the breakdown which was the reason for his dismissal, on the grounds of *"some other substantial reason"*. Central to the consultant's complaint of unfair dismissal was an assertion that he was contractually entitled to the benefit of certain disciplinary procedures, and that the failure of his employer to observe the same rendered his dismissal unfair.

335 The Employment Appeal Tribunal held that the contractual disciplinary procedures only apply to issues of conduct or competence (as in the case before us) not to allegations of a breakdown in working relationships. Quoting from the headnote:-

> ***"Those procedures do not apply to cases where, even though the employee's conduct caused the breakdown of their relationship, the employee's role in the events which led up to that breakdown was not the reason why action was taken against him.*** Employment tribunals will, however be on the lookout, in cases of this kind, to see whether an employer is using the rubric of "some other substantial reason" as a pretext to conceal the real reason for the employee's dismissal ."

336 Keith J said at paragraph 53:-

> ***"523 It is apparent … that the tribunal was alive to the refined but important distinction between dismissing Mr Ezsias for his conduct in causing the***

breakdown of relationships, and dismissing him for the fact that those relationships had broken down. In these circumstances, the only fair reading of the tribunal's finding at paragraph 541 about the reason for Mr Ezsias' dismissal is that although as a matter of history it was Mr Ezsias' conduct which had in the main been responsible for the breakdown of the relationships, ***it was the fact of the breakdown which was the reason for his dismissal (his responsibility for that being incidental)*** ."

337 In *Kerslake v North West London Hospital NHS Trust* [2012] EWHC 1999 (QB) a consultant obstetrician and gynaecologist sought injunctions against her employer as she was fearful that a procedure set in train in order to deal with differences which were said to have arisen between her and her colleagues at work might, if allowed to continue, result in her being dismissed in breach of the terms of her contract of employment. It was not an unfair dismissal case. Having confirmed that it is well established that a dismissal by reason of an irretrievable breakdown in working relationships is capable of providing ***"some other substantial reason"*** for terminating an employment contract fairly for the purposes of the Employment Rights Act, Curran JA at paragraphs 182 to 184 considered dismissal for ***"some other substantial reason"*** where the real ground is ***"conduct or capability":-***

"182. The Trust is not permitted to dismiss under the guise of 'some other substantial reason' if the real reason for dismissal is capability or conduct. This has been referred to as 'sidestepping' by Mr Forde QC in this case. It would be an impermissible circumvention of the procedures contained in MHPS. In *Lauffer v Barking, Havering and Redbridge University Hospitals NHS Trust* [2009] EWHC 2360 (QB): [2010] Med. L.R. 68, ***a consultant general surgeon applied for an interim injunction against the respondent NHS Trust who were seeking to dismiss him. Following a number of serious untoward incidents he had been suspended from practice. The respondent Trust's disciplinary policy provided a detailed procedure for dealing with capability issues which states that the aim was to resolve such issues through ongoing assessment and support. Another contractual provision provided that the Trust could dismiss the applicant for 'some other substantial reason'. They decided to proceed to a hearing on conduct grounds. That was postponed when the applicant contended that the capability procedure should have been followed. He was later invited to a meeting at which he was given a letter dismissing him on the basis of a loss of trust and confidence. It stated that a payment would be given in lieu of notice and that the dismissal was not by reason of misconduct or capability. The applicant submitted that most of the matters alleged by the Trust to have given rise to concern about him fell within the ambit of concerns about capability and that, as provided for in the disciplinary policy, attempts should have been made to resolve capability issues through local action before holding a hearing. The respondent Trust contended that the applicant had been dismissed for 'some other substantial reason,' and in those circumstances, the disciplinary procedure was not engaged***.

> ***183. Holroyde J. granted the application. Although the contract provided for termination on three months' notice, it could not have been intended that the Trust could simply ignore the express provisions concerning the disciplinary process. A loss of trust could be sufficient "other substantial reason" to justify the termination of a contract of employment:*** *Turner v Vestric…* ***However, the judge said that a common theme which emerged from some of the witness statements was that it was the applicant's lack of judgment and insight which gave rise to the concern about him. It was strongly arguable that a lack of judgment and insight went to his capability to perform his role as a surgeon and what was relied upon as the intelligible and proper cause for the loss of trust and confidence was actually an adverse view of the applicant's capability***.
>
> ***184. The judge said that the contractual provision relating to "some other substantial reason" was a residual category for cases where there was no misconduct or capability issue. The fact that the Trust regarded the disciplinary route as applicable initially was important, and they had been unable to provide a satisfactory explanation as to why what began as a matter of capability suddenly ceased to be viewed as such. By missing out on the disciplinary procedure to which he claimed to be entitled, the applicant was entitled to submit that he had lost the opportunity to clear his name and to avoid dismissal. That was something that could not be compensated for adequately by damages. What the injunction would achieve was a restoration of the position where the prehearing process to consider his capability would be available to him. There was a serious issue to be tried, damages would not be an adequate remedy if an injunction was refused*** ."

338 Curran JA distinguished the facts in the case before him from those in *Lauffer v Barking, Havering and Redbridge University Hospitals NHS Trust* and the application for an injunction failed, but Advocate Chiddicks submitted that in the case before us, if the hospital management had concerns about Mr Alwitry's conduct and behaviour (there were no concerns about his competence), it had to resolve them by application of its disciplinary and appeals procedures as set out in clause 17 of the contract of employment and it was not open to the SEB to attempt to sidestep its disciplinary procedures by seeking to classify Mr Alwitry's dismissal as being *"for some other substantial reason"* and citing a breakdown in trust and confidence. We think there is some force in this submission, in that Mr Riley accepted in evidence that in terminating Mr Alwitry's contract of employment summarily a week before he started work, the hospital management was purposely avoiding the disciplinary procedures under that contract. If those procedures had been followed, Mr Alwitry would have had the opportunity to clear his name and avoid dismissal.

339 We are not concerned here with whether Mr Alwitry's conduct had irreparably damaged the employment relationship of trust and confidence as we were under the section dealing with repudiation. Under Schedule 18.2.1 *"conduct"* is a quite separate ground for termination than *"some other substantial reason"* and the SEB has not sought to rely on it. If it had done so, the disciplinary procedures and appeals under the contract of employment,

which it sought to avoid, would have come into play. We are concerned here with whether, as a matter of fact, and viewed objectively, as at the 22 nd November, 2012, there had been a fundamental breakdown in working relationships between the parties, Mr Alwitry's responsibility for that breakdown being incidental. Again the burden of proof is upon the SEB.

340 The emphasis here is on working relationships between the parties and as the SEB is a corporate entity that can only mean Mr Alwitry's working relationships with his co-employees. It might be thought to be stretching it somewhat to talk in terms of Mr Alwitry's working relationships when his contract was terminated before he had started work at the General Hospital at all and before his contract had become effective (clause 2).

341 The email from the BMA stands to be treated in the same way as when we were dealing with repudiation, namely something which could not contribute to any asserted breakdown in Mr Alwitry's working relationships with his co-employees. We have already found that as at the 22 nd November, 2012, the employment relationship between the co-employees concerned in the hospital management and Mr Alwitry had not been irreparably damaged by his conduct (in reality the only co-employees with whom he had any real contact) and it must follow that his working relationships with them had not fundamentally broken down. Mr McNeela had always been happy to work with him and there is no evidence that working relationships with other members of staff employed at the General Hospital had fundamentally broken down.

342 We find that as at the 22 nd November, 2012, there had not been a fundamental breakdown in the working relationships between the parties and accordingly that the SEB did not have *"some other substantial reason"* under Schedule 18.2.1 for terminating Mr Alwitry's contract of employment.

Summary on liability

343 The position we have reached is as follows:-

(i) The SEB did not have the right to terminate Mr Alwitry's contract of employment without cause.

(ii) Mr Alwitry had not repudiated his contract of employment, entitling the SEB to terminate it.

(iii) The SEB did not have the right to terminate Mr Alwitry's contract of employment under Schedule 18.2.1 *"for some other substantial reason"*.

344 The purported termination of Mr Alwitry's contract of employment was therefore invalid. A key factor in the hospital management proceeding in the way they did was the advice they

had received from the Law Officers' Department that the SEB's liability would be limited to the notice period under Schedule 18.1 of three months. We now turn to the issue of whether its liability is so limited.

The Johnson Exclusion Area

345 In matters relating to damages for breach of contract and, in particular, contracts of employment, the Courts in Jersey have traditionally looked to English law for guidance (see paragraph 15 of *McDonald v Parish of St Helier* [2005] JRC 074 and paragraph 23 of the judgment of the Court of Appeal in *Jeanne v Jersey Telecom Limited* [2009] JCA 138). Neither counsel suggested that any principles of Norman or French law were of assistance.

346 The starting point is the House of Lords decision in *Addis v Gramophone Co Limited* [1909] AC 488, in which Mr Addis had been employed as the manager of the employer's business in Calcutta, under a contract of employment in which he could be dismissed by six months' notice without cause. The employer gave him six months' notice but replaced him immediately, without waiting for the six months' notice period to expire. It was held that Mr Addis could not recover damages for injured feelings, mental distress or damage to his reputation arising out of the manner of his dismissal or the loss he may sustain from the fact that the dismissal of itself makes it more difficult for him to obtain fresh employment. He was entitled to the salary for the six months' period, together with the commission that he would have earned had he been allowed to manage the business himself during this period.

347 In *Johnson v Unisys Limited* the employee had been dismissed without a fair hearing. The issue was whether the implied term of trust and confidence applied to his dismissal when the employer's right to dismiss the employee was strongly defended by the terms of the contract, which stipulated that the employer could terminate the employee's employment on four weeks' notice without cause. There were two reasons for the House of Lords declining to apply this implied term to dismissal, quoting from the judgment of Lord Hoffmann at paragraph 37:-

> ***"37 The problem lies in extending or adapting any of these implied terms to dismissal.*** There are two reasons why dismissal presents special problems. The first is that any terms which the courts imply onto a contract must be consistent with the express term. Implied terms may supplement the express terms of the contract but cannot contradict them. Only Parliament may actually override what the parties have agreed. The second reason is that judges, in developing the law, must have regard to the policies expressed by Parliament in legislation. Employment law requires a balancing of the interests of employers and employees, with proper regard not only to the individual dignity and worth of the employees but also to the general economic interest. Subject to observance of fundamental human rights, the point at which this balance should be struck is a matter for democratic decision. The development of the common law by the judges plays a subsidiary role. Their traditional function is to adapt and modernise the common law. But such developments must be consistent with

legislative policy as expressed in statutes. The courts may proceed in harmony with Parliament but there should be no discord ."

348 Dealing with the effect of such an express term, he said this at paragraphs 39–42:-

"39 The effect of such a provision at common law was stated with great clarity by McLachlin J of the Supreme Court of Canada in *Wallace v United Grain Growers Ltd* (1997) 152 DLR (4th) 1, 39:-

'The action for wrongful dismissal is based on an implied obligation in the employment contract to give reasonable notice of an intention to terminate the relationship (or pay in lieu thereof) in the absence of just cause for dismissal … A 'wrongful dismissal' action is not concerned with the wrongness or rightness of the dismissal itself. Far from making dismissal a wrong, the law entitled both employer and employee to terminate the employment relationship without cause. A wrong arises only if the employer breaches the contract by failing to give the dismissed employee reasonable notice of termination. The remedy for this breach of contract is an award of damages based on the period of notice which should have been given .'

49 Likewise in *Malloch v Aberdeen Corpn* [1971] 1 WLR 1578, ***1581 Lord Reid said:***

'At common law a master is not bound to hear his servant before he dismisses him. He can act unreasonably or capriciously if he so chooses but the dismissal is valid. The servant has no remedy unless the dismissal is in ***breach of contract and then the servant's only remedy is damages for breach of contract*** .'

41 The action for wrongful dismissal could therefore yield no more than the salary which should have been paid during the contractual period of notice. In the present case Mr Johnson's letter of engagement referred to terms and conditions of employment contained in the company's employee handbook, which stipulated expressly that 'The company reserves the right to make payment in lieu of notice'. Unisys exercised that right .

42 My Lords, in the face of this express provision that Unisys was entitled to terminate Mr Johnson's employment on four weeks' notice without any reason, I think it is very difficult to imply a term that the company should not do so except for some good cause and after giving him a reasonable opportunity to demonstrate that no such cause existed ."

349 Having summarised the statutory system established in England dealing with unfair dismissal, he concluded in paragraphs 56 – 58:-

"56 Part X of the Employment Rights act 1996 therefore gives a remedy for

exactly the conduct of which Mr Johnson complains. But Parliament had restricted that remedy to a maximum of £11,000, whereas Mr Johnson wants to claim a good deal more. The question is whether the courts should develop the common law to give a parallel remedy which is not subject to any such limit .

57 My Lords, I do not think that it is a proper exercise of the judicial function of the House to take such a step. Judge Ansell, to whose unreserved judgment I would pay respectful tribute, went in my opinion to the heart of the matter when he said:

'There is not one hint in the authorities that the … tens of thousands of people that appear before the tribunals can have, as it were, a possible second bite in common law and I ask myself, if this is the situation, why on earth do we have this special statutory framework? What is the point of it if it can be circumvented in this way? …. It would mean that effectively the statutory limit on compensation for unfair dismissal would disappear;'

58 I can see no answer to these questions. For the judiciary to construct a general common law remedy for unfair circumstances attending ***dismissal would be to go contrary to the evident intention of Parliament that there should be such a remedy but that it should be limited in application and extent*** ."

350 Lord Hoffmann then went on to consider obiter the consequences if the disciplinary procedures were express terms of the contract, concluding at paragraph 66:-

"66 My Lords, given this background up to the disciplinary procedures, I find it impossible to believe that Parliament, when it provided in section 3(1) of the 1996 Act that the statement of particulars of employment was to contain a note of any applicable disciplinary rules, or the parties themselves, intended that the inclusion of those rules should give rise to a common law action in damages which would create the means of circumventing the restrictions and limits which Parliament had imposed on compensation for unfair dismissal. The whole of the reasoning which led me to the conclusion that the courts should not imply a term which has this result also in my opinion supports the view that the disciplinary procedures do not do so either. It is I suppose possible that they may have contractual effect in determining whether the employer can dismiss summarily in the sense of not having to give four week's notice or payment in lieu. But I do not think that they can have been intended to qualify the employer's common law power to dismiss without cause on giving such notice, or to create contractual duties which are independently actionable ."

351 These established principles were confirmed as part of the law of Jersey by the Court in *McDonald v St Helier*, where Sir Michael Birt, then Deputy Bailiff, summarised the position at paragraph 15 in this way:-

"15 Under the established law, damages for dismissal in breach of

contract are limited to the amount the employee would have earned had he been given proper notice as provided for in the contract. The reason for this is that the employer has an unfettered freedom to dismiss an employee at will, with or without reason, provided that the contractual notice period is given. The employer can act unreasonably or capriciously if he so chooses but the dismissal is valid (per Lord Reid in *Malloch v Aberdeen Corporation* [1971] 2 All ER 1278 ***at 1282).*** To any claim by an employee that he has been dismissed without the proper notice or otherwise in breach of contract and that he should have damages for loss of earnings extending beyond the notice period, the employer can reply that he has the legal right to dismiss on notice at any time (with or without reason or without having to give any reason) so that the ***employee cannot prove on the balance of probabilities that his employment would have continued beyond the notice period.*** On the contrary, given that, by definition, the employer has decided to dismiss the employee, the high probability is that the employer does not wish the employment to continue and would therefore exercise his right to dismiss on notice if this were necessary ."

352 However, he went on to make this observation at paragraph 20:-

"The unfettered right of the employer to dismiss on notice, however capriciously, is of course subject to any other provision of the contract. For example, it would theoretically be possible for a contract to provide expressly that an employee could not be dismissed in any circumstances, even on notice, unless a disputes panel agreed to the decision. In that event the normal unfettered right of the employer to dismiss on notice would by agreement have been fettered to the extent provided in the contract. That would in turn affect consideration of the measure of damages in the event of a breach by the employer ."

353 In *Eastwood v Magnox Electric Plc* and *McCabe v Cornwall County Council* [2005] 1 AC 503, two appeals involving employees whose employment was terminable on notice without cause, Lord Nicholls gave this overview of the decision in *Johnson v Unisys*:-

"12 This development of the common law, however desirable it may be, faces one overriding difficulty. Further development of the common law along these lines cannot co-exist satisfactorily with the statutory code regarding unfair dismissal. A common law obligation having the effect that an employer will not dismiss an employee in an unfair way would be more than a major development of the common law of this country. Crucially, it would cover the same ground as the statutory right not to be dismissed unfairly, and it would do so in a manner inconsistent with the statutory provisions. In the statutory code, Parliament has addressed the highly sensitive and controversial issue of what compensation should be paid to employees who are dismissed unfairly. This code is now an established and central part of this country's

employment law. The code has limited the amount payable as compensation. In 1971 the limit was £4,160. Reflecting inflation, this limit was raised periodically up to £12,000 in 1998. In the following year (Employment Relations Act 1999, section 34 (4)) the statutory maximum was raised in one bound to £50,000. From there it has risen to the present figure of £55,000 .

13 In fixing these limits on the amount of compensatory awards Parliament has expressed its view on how the interests of employers and employees, and the social and economic interests of the country as a whole, are best balanced in cases of unfair dismissal. It is not for the courts to extend further a common law implied term when this would depart significantly from the balance set by the legislature. To treat the statutory code as prescribing a floor and not a ceiling would do just that. A common law action for breach of an implied term not to be dismissed unfairly would be inconsistent with the purpose Parliament sought to achieve by imposing limits on the amount of compensatory awards payable in respect of unfair dismissal. It would also be inconsistent with the statutory exclusion of the statutory right where an employee had not been employed for a qualifying period or had reached normal retiring age or the age of 65 and, further, with the parliamentary intention that questions of unfair dismissal should be dealt with by specialised tribunals and not the ordinary courts of law .

14. I recognise that, by establishing a statutory code for unfair dismissal, Parliament did not evince an intention to circumscribe an employee's rights in respect of wrongful dismissal. But Parliament has occupied the field relating to unfair dismissal. It is not for the courts now to expand a common law principle into the same field and produce an inconsistent outcome. To do so would, incidentally, have the ironic consequence that an implied term fashioned by the courts to enable employees to obtain redress under the statutory code would end up supplanting part of that code ."

354 He then referred at paragraph 15 to the demarcation problems that the decision in *Johnson v Unisys Limited* gave rise to:-

"15 As was to be expected, the decision in *Johnson v Unisys Ltd* [2003] 1 AC 518 ***has given rise to demarcation and other problems.*** These were bound to arise. Dismissal is normally the culmination of a process. Events leading up to a dismissal decision take place during the subsistence of an employment relationship. If an implied term to act fairly, or a term to that effect, applies to events leading up to dismissal but not to dismissal itself unsatisfactory results become inevitable ."

355 He then gave this guidance in relation to identifying the boundary of what he described as ***"the Johnson Exclusion Area":-***

27 Identifying the boundary of the 'Johnson exclusion area', as it has been called, is comparatively straightforward. The statutory code provides remedies for

infringement of the statutory right not to be dismissed unfairly. An employee's remedy for unfair dismissal, whether actual or constructive, is the remedy provided by statute. If before his dismissal, whether actual or constructive, an employee has acquired a cause of action at law, for breach of contract or otherwise, that cause of action remains unimpaired by his subsequent unfair dismissal and the statutory rights flowing therefrom. By definition, in law such a cause of action exists independently of the dismissal .

28 In the ordinary course, suspension apart, an employer's failure to act fairly in the steps leading to dismissal does not of itself cause the employee financial loss. The loss arises when the employee is dismissed and it arises by reason of his dismissal. Then the resultant claim for loss falls squarely within the Johnson exclusion area .

356 In *Edwards v Chesterfield Royal Hospital NHS Foundation Trust* and *Botham v Ministry of Defence* [2012] 2AC 22, the Supreme Court considered whether the reasoning in *Johnson v Unisys* precludes the recovery of damages for loss arising from the unfair manner of a dismissal in breach of an express term of an employment contract, holding that it did so. The express terms in respect of both employees related to a disciplinary procedure under contracts which were terminable by the employer without cause. The case is helpful for the obiter comments made about contracts which can only be terminated for cause.

357 Baroness Hale, in her dissenting judgment, recognised at paragraph 112 that the great majority of contracts of employment gave both the employer and the employee the right to terminate their relationship on giving the prescribed period of notice:-

"113 But let us suppose a contract of employment where the employer is only entitled to dismiss the employee for good cause. Rightly or wrongly, most university teachers employed under the contracts of employment which were current in the 1960s believed that they could only be dismissed for cause. If judges, instead of being office holders, were employed under contracts of employment, they could only be dismissed for cause. Under such a contract, if the employer dismisses the employee without good cause, the employee is entitled to be compensated for the consequences of the loss of the job. Obviously, the calculation of damages will have to take account of contingencies such as the possibility of good cause arising in the future. This is the application of the ordinary principles of the law contract ."

358 She then went on at paragraph 121:-

121 We have seen how the 'Johnson exclusion area' has been productive of anomalies and difficulties. There is no reason at all to extend it any further than the ratio of that case. As the Court of Appeal held in this case, it should be limited to the consequences of dismissal in breach of the implied term of trust and confidence. The

House of Lords was persuaded that the common law implied term, developed for a different purpose, should not be extended to cover the territory which Parliament had occupied. In fact, the territory which Parliament had occupied was the lack of a remedy for loss of a job to which the employee had no contractual right beyond the contractual notice period. Parliament occupied that territory by requiring employers to act fairly when they dismissed their employees. But there was and is nothing in the legislation to take away the existing contractual rights of employees. There was and is nothing to suggest that Parliament intended to limit the entitlement of those few employees who did and do have a contractual right to the job, the right not to be dismissed without cause. It is for that reason that I am afraid that I cannot agree that the key distinction is between the consequences of dismissal and the consequences of other breaches. The key distinction must be between cases which must rely on the implied term to complain about the dismissal and cases which can rely on an express term .

122 I am uncertain as to how the majority would regard the case of an employee with the contractual right only to be dismissed for cause. Like Lord Kerr JSC, I am puzzled as to how it can be possible for an employee with a contractual right to a particular disciplinary process to enforce that right in advance by injunction but not possible for him to claim damages for its breach after the event. And I am also puzzled why it should make a difference if the right to claim damages is expressly spelled out in the contract .

359 Lord Mance made reference at paragraph 96 to the first instance decision of *King v University Court of the University of St Andrews* [2002] IRLR 252 where the claimant's contract could only be terminated ***"for good cause shown"***. Distinguishing *Johnson v Unysis*, it was held that before any dismissal a prior hearing and investigation should have been conducted. What damages could be recovered was not discussed, causing Lord Mance to comment:—

"In any event, the decision, at first instance on a preliminary issue, concerned a contract very different to the present, in particular a contract containing an express term which was treated as involving an obligation not to dismiss save for good cause shown. The decision does not assist on the issues now before the Supreme Court ."

360 Lord Mance then went on at paragraph 105 to address the position where there was such a contract:—

"The case of an employee with an express contractual right not to be dismissed save for cause is not before us, and gives rise to different issues to those which are. Damages for wrongful dismissal in breach of such a contract would on the face of it be measured on the basis that the contract would have continued unless and until the employee left, retired or gave cause for dismissal (in relation to the prospects of all of which an assessment would have to be made), but questions would no doubt also arise as to whether the

employee had accepted or had to accept the dismissal and/or had to mitigate or had mitigated his or her loss" .

361 For completeness, we should make reference to what is known as the Gunton extension, explained by Lord Dyson in *Edwards v Chesterfield* at paragraph 47 in this way:-

> ***"48** Gunton v Richmond-upon-Thames London Borough council* [1981] Ch 448 ***was a wrongful dismissal case.*** The claimant was employed under a contract of service terminable on one month's notice. Regulations prescribing a procedure for the dismissal of an employee on disciplinary grounds were incorporated into his contract. The employer gave one month's notice of termination, but without first having followed the prescribed disciplinary procedure in all respects. It was held by the Court of Appeal by a majority that the employee could not lawfully be dismissed on a disciplinary ground until the procedure had been properly carried out and that his dismissal was accordingly wrongful. The measure of damages for wrongful dismissal was loss of wages up to the date on which the contract could properly have been determined by the employer (on an application of the 'least onerous' principle: see McGregor on Damages, 18th ed (2009), para 8–094). It was held that the period by reference to which the damages were to be assessed was a reasonable period for carrying out the disciplinary process plus one month: see per Buckley LJ, at p. 470, and per Brightman LJ, at p 474 ."

362 The rationale underlying this established case law is that where the employer has the contractual right to dismiss the employee without cause, damages for such dismissal are limited to the amount the employee would have earned had he been given proper notice, as provided for in the contract. As Baroness Hale said in *Edwards v Chesterfield*, the majority of contracts of employment give both the employer and the employee the right to terminate the relationship without cause on giving the prescribed period of notice, and that was the position in *Addis, Johnson v Unisys*, *Eastwood v Magnox* and *Edwards v Chesterfield*. Any issues as to the fairness of those dismissals are governed by the unfair dismissal employment legislation, in England the Employment Rights Act and in Jersey the Jersey Employment Law.

363 However, none of these cases address the position where the employer's right to terminate the relationship has been contractually fettered, so that as here, the SEB could only terminate Mr Alwitry's employment for the reasons set out in Schedule 18.2, namely for cause. The SEB had no cause to terminate Mr Alwitry's employment. His purported dismissal was therefore invalid and there is no notice period to act as a restraint on damages, as acknowledged by Lord Mance in *Edwards v Chesterfield*, and by Sir Michael Birt in *McDonald v Parish* of St Helier.

364 We are not concerned here with the fairness of Mr Alwitry's dismissal, but with its validity, and having found it to be invalid, there is no basis that we can see upon which we can properly restrict damages to the notice period required for a valid dismissal for cause. The

SEB cannot claim that it had the right to dismiss Mr Alwitry without cause on notice, the contractual position that underlies the Johnson Exclusion Area. It had no such right and Mr Alwitry, having proved his dismissal invalid, can claim for the loss of his employment.

365 We therefore conclude that damages in this case do not come within the Johnson Exclusion Area and are not limited to any period of contractual notice or any *Gunton* extension.

366 We turn finally to the issue of whether Mr Alwitry can recover punitive or exemplary damages for this breach of contract.

Exemplary or punitive damages

367 We agree with the Complaints Board that procedurally Mr Alwitry has been treated most unfairly. He was given no opportunity to answer the charges against him or indeed given any indication that the hospital management had reached the point where it was considering terminating his employment before he had even started work and he was denied any right to appeal. There is some force in this written submission from Advocate Chiddicks:-

> *"The absence of any due process, and the deliberate avoidance of any disciplinary procedure by Mr Riley's 'pre-emptive strike', has meant that matters which might well have been explained, clarified and resolved at the time have instead accumulated in the minds of those whose opinions of Mr Alwitry deteriorated from 'charming' and 'outstanding' at interview to 'atrocious' and even 'aggressive' by the point of dismissal.* As Mr Siodlak put it at the close of his evidence, 'tunnel vision had set in' and 'he had become the bad guy, and we were the good guys and probably it was a bit more grey than that.'

368 There is also some force in the criticism made by Advocate Chiddicks of Mr Riley, namely that there are always two sides to any story, as any human resources director would know. For this reason, Mr Alwitry's side should have been heard before describing his behaviour as *"atrocious"* or *"aggressive"* or *"duplicitous"* and procuring his dismissal without notice. We can only agree that due process matters.

369 That said, Advocate Chiddicks was unable to find any authority from this jurisdiction for the award of exemplary or punitive damages in cases of breach of contract. He cited the House of Lords decision in *Rookes v Barnard* [1964] AC 1129, where the House of Lords held that exemplary damages could be awarded in two circumstances, namely:-

> (i) Cases of ***"oppressive, arbitrary or unconstitutional action by the servants of the governments"*** and

(ii) Cases in which ***"the defendant's conduct has been calculated by him to make a profit for himself which may well exceed the compensation payable to [the claimant]***.

370 That case, however, concerned an action in the tort of intimidation and Mr Alwitry has withdrawn all of his claims in tort. Lord Devlin explained at page 1221:-

> ***"Exemplary damages are essentially different from ordinary damages.*** The object of damages in the usual sense of the term is to compensate. The object of exemplary damages is to punish and deter. It may well be thought that this confuses the civil and criminal functions of the law; and indeed, so far as I know, the idea of exemplary damages is peculiar to English law ."

He went on to say at page 1127:-

> ***"Exemplary damages can properly be awarded whenever it is necessary to teach a wrongdoer that tort does not pay*** ."

371 On the contrary, it is long established that damages in English common law are not available to compensate for the manner of an employee's dismissal. As Lord Atkinson said in *Addis v Gramophone Company* at page 4:-

> ***"I have always understood that damages for breach of contract were in the nature of compensation, not punishment, and that the general rule of law applicable to such cases was that in effect stated by Cockburn CJ in*** *Engel v Fitch* ***in these words:***
>
> ***'By the law of England as a general rule a vendor who from whatever cause fails to perform his contract is bound, as was said by Lord Wensleydale in the case referred to, to place the purchaser, so far as money will do it, in the position he would have been in if the contract had been performed.*** If a man sells a cargo of goods not yet come to hand, but which he believes to have been consigned to him from abroad, then the goods fail to arrive, it will be no answer to the intended purchaser to say that a third party who had engaged to consign the goods to the seller has deceived or disappointed him. The purchaser will be entitled to the difference between the contract price and the market price'

In *Sikes v Wild Lord Blackburn* says:

> ***'I do not see how the existence of misconduct can alter the rule of law by which damages for breach of contract are to be assessed.*** It may render the contract voidable on the ground of fraud or give a cause of action for deceit, but surely it cannot alter the effect of the contract itself; '"

Exemplary damages were refused in that case.

372 The award of exemplary or punitive damages in tortious claims following *Rookes v Barnard* was recognised in this jurisdiction in *West v Lazard Brothers* [1993] JLR 165, and *Hayden-Taylor v Canopius Underwriting Limited and others* [2014] JRC 221, but there is no authority for the award of such damages in cases of breach of contract, let alone employment contracts. In our view, damages for breach of contract in this jurisdiction are in the nature of compensation, not punishment, and exemplary or punitive damages will not be awarded in this case.

373 We would add that even if we had the jurisdiction to award exemplary or punitive damages, we would have declined to do so because of our finding that the hospital management acted in good faith in the interests of the General Hospital.

Conclusion

374 In conclusion we find that the SEB's termination of Mr Alwitry's contract of employment was invalid and that the damages to be awarded to him are not limited by the Johnson Exclusion Area. Those damages are to be assessed on the basis of compensation, not punishment.