

States of Guernsey

**EMPLOYMENT & DISCRIMINATION TRIBUNAL****APPLICANT:** **Mr Raymond Le Poidevin**

Represented by: Advocate Elaine Gray

RESPONDENT: **The Constables of St Peter Port (including Mr B Cash, as an existing Constable and Mrs J Tasker, as a former Constable)**

Represented by: Mr Barry Cash and Mrs Jenny Tasker

Decision of the Tribunal Hearing held on 22, 23 and 24 November 2011

Tribunal Members: Ms Helen Martin
 Mr Norson Harris
 Ms Alison Girollet

DECISION

Having considered all the evidence presented and the representations of both parties and having due regard to all the circumstances, whether specifically referred to in this judgement or not, the Tribunal found that, under the provisions of the Employment Protection (Guernsey) Law, 1998, as amended, the Applicant was not unfairly dismissed.

The Tribunal determined that the Applicant was fairly dismissed under Section 6(2) a of "the Law", which relates to ".....the capability or qualifications of the employee for performing work of the kind which he was employed to do", with reference to Section 7 (a) of "the Law", which states " 'capability' means capability assessed by reference to skill, aptitude, health or any other physical or mental quality."

The Claim is, therefore, dismissed and no award made.

Ms Helen Martin

11 January 2012

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Signature of the Chairman

Date

NOTE: Any award made by a Tribunal may be liable to Income Tax
 Any costs relating to the recovery of this award are to be borne by the Employer

The Law referred to in this document is The Employment Protection (Guernsey) Law, 1998, as amended ("the Law")

Any Notice of an Appeal should be sent to the Secretary to the Tribunal within a period of one month beginning on the date of this written decision. The detailed reasons for the Tribunal's Decision are available on application to the Secretary to the Tribunal, Commerce and Employment, Raymond Falla House, PO Box 459, Longue Rue, St Martins, Guernsey, GY1 6AF.

1.0 Extended Reasons

1.1 On the ET1 (Application) Form, Advocate Gray claimed that Mr Le Poidevin was unfairly dismissed pursuant to Section 6 of “the Law” on the grounds of ‘capability’ due to ill health. Advocate Gray contended that whilst the Applicant was unwell at the time of the dismissal, medical evidence expressed certainty that the Applicant would be able to recover with appropriate treatment within weeks and that it was therefore ‘wholly unreasonable’ of the Respondents to dismiss the Applicant in these circumstances.

1.2 In addition to the purported lack of a proper basis for a dismissal under Section 6 of “the Law”, Advocate Gray claimed that the Respondent had failed to follow a fair and proper procedure with regard to the Applicant’s dismissal. Advocate Gray alleged that the procedure adopted by the Respondent in relation to the Applicant’s ill health was “wholly inadequate” and “grossly unfair” to the Applicant. Advocate Gray contended that the Respondent adopted an oppressive approach towards the Applicant and failed to follow a fair procedure despite being aware of the nature of the Applicant’s ill health and the factors which caused an exacerbation of his condition by:

- Imposing unrealistic deadlines for the Applicant to respond to demands for responses or requests to meetings;
- Requiring the Applicant to meet with both Respondents despite his concerns regarding the second Respondent;
- Proposing that the capability procedure be handled by the Douzaine Finance Committee and then reneging on this after the Applicant had accepted the proposal;
- Refusing to consider the Applicant’s concerns relating to the unsuitability of dealing with the matter on the basis of written representations;
- Failing to follow all medical advice obtained and instead substituting their own (non expert) judgement in relation to the resolution of the situation;
- Ignoring the 12 month contractual sick pay entitlement;
- Involving issues relating to the Applicant’s conduct in determining the decision to summarily dismiss the Applicant;
- Forcing the Applicant to set out concerns giving rise to his stress and then using these as the basis of concluding that the trust and confidence in the employment relationship had been broken.

1.3 On Form ET2, the Respondent denied that the Applicant was unfairly dismissed from his employment as Secretary to the Constables. The Respondent claimed that they dismissed the Applicant for a fair reason namely his ‘incapability’ to perform the duties of his employment by virtue of him being absent from work on long term indefinite absence due to illness and there being no realistic prospect of him being fit and able to return to work alongside the Constable, Mr Barry Cash. In addition, the Respondent alleged that the Applicant was dismissed by a fair and reasonable procedure, so that in all respects the Respondent acted reasonably in treating the Applicant’s reason for dismissal as a sufficient reason in the

circumstances, including having regard to the diminutive size and administrative resources of the Respondents.

1.4 In particular, the Respondent claimed:

- The Applicant had been on long term sickness absence on the grounds of stress purportedly caused by Mr Cash's interactions with the Applicant and an occupational health report obtained by the Respondent indicated that the Applicant would remain signed off work indefinitely unless his issues with Mr Cash could be overcome;
- The Respondent claimed that the Applicant obstructed the consultation exercise that they sought to follow to discuss his condition and prognosis, his issues at work, the practicalities of any phased return work, any other representations that he sought to make concerning his employment, and the other factors that the Respondents had to take into account from their own perspective and that of their small office;
- The Respondent alleged that they gave the Applicant prior warning that one of the potential outcomes of their review of his continued employment was the termination of his employment;
- The Respondent alleged that the Applicant refused to meet with the Respondents and that they acted reasonably in extending time limits and in accepting the Applicant's refusal to meet with them by agreeing to accept written representations from his Advocate instead;
- On the basis of the Applicant's unwillingness to meet Mr Barry Cash, the Respondents agreed that Mrs Jenny Tasker should undertake the review into the Applicant's continued employment;
- After due consideration by Mrs Jenny Tasker, the Applicant's employment was terminated on 17 December 2010 and he was given a right of appeal against his dismissal which he failed to exercise.

1.5 The Applicant was represented by Advocate Elaine Gray.

1.6 The Applicant gave witness testimony in person under oath.

1.7 Form ET1 and document bundle EE1, chronology referenced EE2 and closing statement referenced EE3 were presented as documentary evidence by the Applicant.

1.8 Dr Nick King gave written witness testimony for the Applicant. (EE 1, Tab 2, P52).

1.9 Mr Peter Le Cheminant gave written witness testimony for the Applicant. (EE1, Tab 2, P54).

1.10 Form ET2 and document bundle ER1, closing statement referenced ER2, excerpt on long term sickness referenced ER3 and legal authorities, referenced ER4, were presented as documentary evidence by the Respondent.

1.11 The Respondents, the Constables of St Peter Port; Mrs Jenny Tasker and Mr Barry Cash represented themselves.

1.12 Mr Barry Cash and Mrs Jenny Tasker gave witness testimony in person under oath.

2.0 Facts Found

- 2.1 Mr Raymond Le Poidevin was employed as Secretary to the Constables of St Peter Port from 05 September, 2001 to 17 December, 2010.
- 2.2 The Applicant's employment was terminated with immediate effect on 17 December, 2010 by stated reason of 'incapability' due to ill health.
- 2.3 The Applicant received pay in lieu of his notice period of three month's salary.
- 2.4 The Constables of St Peter Port operate the parish duties from a small office in Lefebvre Street. Three employees were employed in the Constables office: Mr Le Poidevin as Secretary to the Constables, Jenny Bullock as Accounts administrator and Jean Weysom as part time Secretary.
- 2.5 The employees of the Constables' office are paid out of the rates received from the parishioners of St Peter Port.
- 2.6 Mr Barry Cash was appointed as Junior Constable for St Peter Port from January 2007 and succeeded Mrs Jenny Tasker as Senior Constable in January 2011. Mrs Jenny Tasker had been a Constable from January 2002. The role of Constable is essentially an honorary position and is unpaid.
- 2.7 Mr Le Poidevin was invited to attend a formal disciplinary meeting on Thursday 25 March, 2010 relating to a complaint made by a parishioner. The disciplinary meeting was subsequently cancelled and replaced by a "fact finding" meeting with Mr Cash on 25 March, 2010. Mr Le Poidevin was certified unfit for work, with a GP's diagnosis of "stress", from 25 March, 2010, immediately following the "fact finding" meeting with Mr Cash followed by three days of pre-arranged holiday. (EE1, 235-238). Mr Cash had a 'Back to Work' interview with Mr Le Poidevin on 07 April, 2010. (EE1, 239-242). Mr Le Poidevin received a letter on 07 April, 2010 from Mr Cash confirming the outcome of the "disciplinary meeting" that took place on 25 March, 2010. (EE1, 243-246). Mr Le Poidevin received a letter signed by Mr Cash dated 11 May, 2010 correcting the error, in referencing the meeting as "disciplinary" in nature, in his letter of 07 April, 2010. (EE1, 252-254).
- 2.8 Mr Le Poidevin received a letter from the Constables, dated 04 August 2010, regarding the proposed change in working hours (EE1, P263). Mr Le Poidevin responded to the Constables outlining his concerns about the proposed changes and handling of the matter, by letter dated 05 August, 2010 (EE1, P.267).
- 2.9 Mr Le Poidevin received a letter from the Constables dated 06 August, 2010 stating that they (the Constables) needed time to review the points in Mr Le Poidevin's letter dated 05 August, 2010 and that they would revert by 20 August, 2010. (EE1, P.270).
- 2.10 Mr Le Poidevin responded by letter dated 08 August, 2010 and stated that holiday absences meant that it would only be possible to meet on 13 September, 2010 unless the meeting took place on 08 or 09 August, 2010 (EE1, P.272).
- 2.11 The Constables sent a letter dated 10 August, 2010 and another dated 17 August, 2010 (EE1, P.279 and P.280) to Mr Le Poidevin stating that any further correspondence on contractual

matters would continue when he returned from annual leave on Monday 13 September, 2010.

- 2.12 Mr Le Poidevin was certified by his Doctor as unfit to work from 09 August, 2010 on the grounds of "stress." The Applicant remained absent on full sick pay until his employment was terminated by stated reason of incapability due to ill health on 17 December, 2010.
- 2.13 Mr Le Poidevin received a letter dated 12 October, 2010 from the Constables requesting that he saw an Occupational Health Doctor to assist with his return to work. (EE1, P281). A medical report, dated 21 October, 2010 was produced by Dr L Joslin, Mr Le Poidevin's GP, for input to the occupational health referral. (EE1, P284).
- 2.14 The Constables sent a letter to Mr Le Poidevin dated 05 November, 2010 requesting a meeting at either his home or the Constables office on 09 November, 2010 to discuss Mr Le Poidevin's gradual return to work. (EE1, P.287).
- 2.15 Mr Le Poidevin contacted Mrs Tasker by email on 08 November, 2010 to confirm his agreement to meet her but not the junior Constable, Mr Cash. (EE1, 288). Mrs Tasker replied by email stating that she (Mrs Tasker) did not understand the reasons for his request to meet with her solely and confirmed that the meeting would go ahead as originally planned with both Constables present, as his employers. (EE1, P.289). Mr Le Poidevin confirmed by email to Mrs Tasker on 08 November, 2010 his reasons for requesting the exclusion of Mr Cash from the meeting and stating that he would not be pressurised into an alternative arrangement (EE1, P.290).
- 2.16 Mrs Tasker cancelled the proposed meeting on 09 November, 2010 and the occupational health referral continued. Mr Le Poidevin attended the occupational health assessment by Dr Cook. Dr Cook sent a report addressed to Mrs Tasker and Mr Cash dated 16 November, 2010 (EE1, P.306).
- 2.17 The Constables sent a letter to Mr Le Poidevin dated 29 November, 2010 requesting a meeting with Mrs Tasker and excluding Mr Cash, to review his continued employment on 06 December 2010 (EE1 P.309 - 311). Mr Le Poidevin emailed Mrs Tasker on 03 December, 2010 stating that he had been unable to meet his Legal Adviser due to adverse weather and advised that the 06 December was not suitable (EE1, P.314). Mrs Tasker postponed the meeting until 09 December, 2010. Advocate Gray sent a letter to Mrs Tasker on 08 December, 2010 stating that she had requested an urgent medical report from Mr Le Poidevin's GP. The resulting letter from Dr King was issued on 08 December and confirmed that Mr Le Poidevin was not fit to attend the proposed meeting and that all communications should be directed through his legal representative (EE1, P319). Mrs Tasker responded by email offering two options: a face to face meeting at 1.00pm between herself and Mr Le Poidevin on 09 December, 2010 or written representations by 9.00am on 09 December, 2010. Mrs Tasker extended the deadline for representations to the close of business on 10 December, 2010. The Constables confirmed in a letter to Advocate Gray a further deadline extension for representations until 15 December, 2010 (ER1, Tab 58). Advocate Gray provided written representations in a letter dated 13 December, 2010 (EE1, P.328-332).
- 2.18 Following Mr Le Poidevin's dismissal from his employment on 17 December, 2010. (EE1, P.333 refers), Advocate Gray emailed Mrs Tasker on 21 December and advised that Mr Le Poidevin would not file an appeal against the decision to dismiss him. (EE1, P.340).

3.0 The Law

- 3.1 Section 5 (2) (a) of the Law states that an employee shall be treated as dismissed by his employer if “the contract under which he is employed by the employer is terminated by the employer, whether it is so terminated by notice or without notice.”
- 3.2 In determining whether the dismissal of an employee was fair or unfair, Section 6 (1) of the Law notes that “it shall be for the employer to show a) what was the reason (or, if there was more than one, the principal reason) for the dismissal: and b) that it was a reason falling within subsection (2)” and Section 6 (2) notes “For the purposes of subsection 1) (b), a reason falling within this sub section is a reason which – a) related to the capability or qualifications of the employee for performing work of the kind which he was employed by the employer to do;”
- 3.3 Section 6 (3) of “the Law” notes “Where the employer has fulfilled the requirements of subsection 1), then, subject to the provisions of section 8 to 14, the determination of the question whether the dismissal was fair or unfair, having regard for the reason shown by the employer, shall depend on whether in the circumstances (including the size and administrative resources of the employer’s undertaking) the employer acted reasonably or unreasonably in treating it as a sufficient reason for dismissing the employee; and that question shall be determined in accordance with equity and the substantial merits of the case.”
- 3.4 Section 7 (a) of “the Law” states “capability” means capability assessed by reference to skill, aptitude, health or any other physical or mental quality.

Summary of the parties’ main submissions

4.0 Witness Testimony of Mr Barry Cash (ER 1, Tab A)

- 4.1 Mr Cash told the Tribunal that he had been a Constable for St Peter Port since January 2007. Mr Cash succeeded Mrs Jenny Tasker when she left office in January 2011 as Senior Constable. Mr Cash explained to the Tribunal that the position of Constable is essentially an honorary position in that it is unremunerated except for a small entitlement the Constables can claim each year, if they wish, through custom and practice. Mr Cash told the Tribunal that he had joint responsibility with Mrs Tasker for Mr Le Poidevin’s employment for the last four years of his employment.
- 4.2 Mr Cash told the Tribunal that the Constables are responsible for the running of the parish on behalf of the Douzaine and the parishioners, and are accountable in Law for certain matters. He explained that in St Peter Port the Constables often are Douzeniers as well as Constables and the Constables’ finances are governed by a Finance Committee which also advises and assists the Constables and Douzaine on Financial matters. The Constables run an office located in premises in Lefebvre Street, which is the place of work for all staff that were employed and where the Applicant, Mr Le Poidevin used to work.
- 4.3 Mr Le Poidevin had day to day responsibility for the work of the two support staff: Jenny Bullock and Jean Weyson but Mr Le Poidevin was not their employer and the responsibility for the overall operation of the office lay with Mrs Tasker and Mr Cash, as the Constables.

- 4.4 Mr Cash told the Tribunal that he believed that over time Mr Le Poidevin had increasingly seen his senior and longstanding role in the Constables office as one that justified him making decisions and directing the other staff as though he had overall responsibility for them and the office. Mr Cash claimed that it was the growing intervention of himself and Mrs Tasker in decision making and the management of employment issues that led to Mr Le Poidevin resenting the Constables and in particular himself.
- 4.5 Mr Cash referred the Tribunal to a historical matter relating to Health and Safety issue in the Constables Office that had been a source of disagreement between the Respondent and Mr Le Poidevin at the time. Mr Cash told the Tribunal that the Health and Safety Executive from Guernsey Electricity had agreed that the staff could continue to occupy the office whilst the work was carried out. Mr Cash said that the Applicant had noted in his ET1 Form his concerns about alleged unfavourable health and safety reports that he had received. Mr Cash said that as soon as Mr Le Poidevin had raised the issue, Mrs Tasker had agreed a plan with Guernsey Electricity that would rectify the matter.
- 4.6 Mr Cash told the Tribunal that a parishioner had complained that Mr Le Poidevin had been unforgivably rude to her in the Constables office in July 2009 concerning the arrears of her parish rates. (ER1, tab A, para 18). Mr Cash told the Tribunal that he had asked to speak to Mr Le Poidevin and advised him of his wish to investigate the complaint and that Mr Le Poidevin had responded by telling Mr Cash that he was “doing this all wrong” and that it was not the right way to carry out such an investigation into a complaint and that he did not have to answer anything.
- 4.7 Following this complaint, Mrs Tasker and Mr Cash recorded six other ‘conduct’ issues relating to Mr Le Poidevin’s interaction with others (ER1, Tab 3) between August and November 2009.
- 4.8 Mr Cash told the Tribunal that Mrs Tasker had received a complaint from a parishioner in February 2010 concerning the way that Mr Le Poidevin had spoken to him about a parking space that he rented (file note, ER1, Tab 4) and told the Tribunal that Mrs Tasker had emailed the parishioner to explain and apologise for Mr Le Poidevin’s handling of the matter (ER1, tab 5). Mr Cash spoke to the parishioner himself and made a file note of his apology on behalf of the Constables (ER1, tab 6).
- 4.9 After consulting with their external HR Advisers, Focus HR Solutions, the Constables followed the advice received that the issue should be treated as a disciplinary matter and over the ensuing weeks took advice about how to go about dealing with the situation appropriately; relying on their advisers to draft all the necessary correspondence and other documentation.
- 4.10 Mr Cash told the Tribunal that he received a letter from Mr Le Poidevin’s representative, Advocate Gray, inviting the Constables to cancel the disciplinary meeting the day before the meeting was scheduled to proceed. After a discussion between the external HR Advisers to the Constables and Advocate Gray, the formal disciplinary meeting was cancelled and replaced by an informal fact finding meeting with Mr Le Poidevin. This meeting took place on 25 March 2010 (ER1, tab 10 refers) and Mr Cash told the Tribunal that after hearing Mr Le Poidevin’s explanation he had told him not to worry and emphasised to him that “we really appreciated his contribution and that we did not want to lose him as an employee.” The meeting was recorded by Mr Cash in a file note (ER1, tab 10). Mr Cash told the Tribunal that Mr Le Poidevin was absent from work for a week after the meeting on the grounds of stress.

- 4.11 Following Mr Le Poidevin's return to work, Mr Cash told the Tribunal that Mr Le Poidevin had remarked that he felt let down in relation to the car parking space issue and the instigation of formal disciplinary proceedings and also expressed his concern about the delay in the drafting of new contracts of employment for the employees of the Constables Office. Mr Cash told the Tribunal that he had arranged for Mr Le Poidevin to meet with the Constables' external HR Advisers in September 2009, to discuss the proposed revisions to his contract of employment but that there were still matters outstanding which had not been addressed. Mr Cash told the Tribunal that during the meeting, Mr Le Poidevin had told him that he found it difficult to talk to him and that it was not doing his health any good. In response to Mr Cash's question concerning whether there was anything that could resolve the situation, Mr Cash claimed that Mr Le Poidevin suggested that the Constables contact Advocate Gray to propose an acceptable exit agreement. Mr Cash told the Tribunal that his response to Mr Le Poidevin's suggestion was to state that the Constables did not wish to lose him.
- 4.12 Mr Cash sought to close the investigation into the car parking space matter by liaising with his external HR Advisers to draft a letter confirming the matter was closed. Mr Cash told the Tribunal that the letter had referred to 'disciplinary meeting' erroneously (ER1, tab 13) and that he had signed the letter and handed it to Mr Le Poidevin. Mr Cash said that this had led to him receiving what he described as an overly "aggressive and intimidating" letter from Advocate Gray stating that Mr Le Poidevin considered that his trust and confidence in the employment relationship had been seriously damaged as a result of the letter and that her client was considering his position in relation to the continuation of his employment. Advocate Gray stated in the letter that Mr Le Poidevin considered an unequivocal apology was owed to him. In addition, he sought a contribution from the Constables to his legal fees to reflect the poor manner in which the matter had been handled and said that, as a result, his health had deteriorated.
- 4.13 Mr Cash asserted that the Constables were anxious to keep Mr Le Poidevin as an employee and liaised with their external HR Advisers to rectify the error in the letter by issuing another letter correcting the mistake to Mr Le Poidevin. (ER1, tab 15).
- 4.14 Mr Cash told the Tribunal that Advocate Gray responded by stating that Mr Le Poidevin was disappointed not to have received an unequivocal apology and that he ('Mr Le Poidevin') was seeking a contribution of £750 from the Constables towards his legal fees to demonstrate goodwill on their behalf.
- 4.15 Mr Cash told the Tribunal that he was determined to maintain good relations with Mr Le Poidevin and not to "succumb to pressure." He told the Tribunal that the Constables wrote to Advocate Gray to advise her that they did not regard it to be an appropriate use of parishioners' money to contribute towards Mr Le Poidevin's legal costs and that they wished to draw a line under the recent episode and move forward. (ER1, tab 17).
- 4.16 Advocate Gray responded by letter and advised that her client reserved his right to rely on the matters to date should there be any future issues or incidents in the workplace. (ER1, tab 18)
- 4.17 Mr Cash told the Tribunal that the Constables were not prepared to "pay him off" which is what they believed remained Mr Le Poidevin's objective and that they did not want to lose him as an employee in any case and therefore they sought to move forward "albeit treading on eggshells."
- 4.18 In response to the reference that was made in Mr Le Poidevin's ET1 form concerning the Constables proposal to change the working hours of the office staff, Mr Cash told the Tribunal

that this issue arose due to the need to keep the office open during lunch hours to provide a better level of service to parishioners. Mr Cash met with Mr Le Poidevin on 30 July, 2010 to explain and consult with him over the Constables proposals and confirmed the proposals in writing (ER1, tab 19). Mr Cash said that Mr Le Poidevin wrote to him in response to set out his concerns and disappointment that he had been excluded from discussions which had taken place with the other two support staff. In this letter (ER1, tab 20), Mr Cash told the Tribunal that Mr Le Poidevin stated that he was employed to manage these staff as their line manager and that the Constables had undermined his position.

- 4.19 Mr Cash told the Tribunal that Mr Le Poidevin was not employed to manage Jean Weyson and Jenny Bullock and advised the Tribunal that their contracts of employment did not state that he was. Mr Cash told the Tribunal that Mr Le Poidevin's role was to oversee the day to day operation of the Constables office.
- 4.20 The Constables agreed to Mr Le Poidevin's first preferred option, namely for him to have a 30 minute lunch break and finish work at 4.30pm each day but this was not communicated to Mr Le Poidevin immediately.
- 4.21 Mr Cash asserted that Mr Le Poidevin had not liked taking "lawful" instructions from him and had resented not "getting his own way" in the office and had resented receiving adverse feedback regarding the performance of his employment when circumstances called for it, and that he would react in an "obstructive and petulant manner" as a result.
- 4.22 Mr Cash advised the Tribunal that Mr Le Poidevin was absent due to illness on the grounds of stress from 09 August, 2010. On the basis of the advice received from Prime Recruitment, the new HR Advisers to the Constables, a letter was sent to Mr Le Poidevin advising him that consideration of the matter of the potential change in his working hours would continue on his return from absence. No mention was made about his illness on the advice of the HR Advisers.
- 4.23 After receipt of notification that Mr Le Poidevin would remain signed off work on the grounds of stress for a further month until 12 October, 2010, Mr Cash told the Tribunal that he consulted with their HR Advisers who recommended that Mr Le Poidevin was referred for an occupational assessment for which his agreement would be needed. Mr Cash said that they decided to delay sending the referral form and draft covering letter to Mr Le Poidevin until after the 12 October, 2010 in case he returned to work.
- 4.24 Mr Cash told the Tribunal that the letter and referral form was sent to Mr Le Poidevin on 15 October, 2010 (ER1, tab 28). Following a call from the Occupational Health Service stating that Mr Le Poidevin was not aware of the reason for the referral, the Constables invited him to attend a meeting on 09 November, 2010 at either the office or his home in order to discuss his gradual return to work (ER1, tab 29). Mr Le Poidevin responded by email to Mrs Tasker to say that he had no problem meeting with her but did not wish the junior constable, Mr Cash to participate "for obvious reasons." (ER1, tab 30).
- 4.25 Mr Cash told the Tribunal that neither Mrs Tasker nor he had understood what Mr Le Poidevin meant by stating "for obvious reasons" and Mrs Tasker had replied by email explaining that they did not understand the comment "for obvious reasons" and both looked forward to seeing him the following day (ER1, tab 31).
- 4.26 Mr Cash said that Mr Le Poidevin responded by email to Mrs Tasker alone, advising her that he had serious reservations in relation to Mr Cash's dealings with him and that had impacted

his health and that he would not be pressurised into any alternative arrangement. Following advice from Prime Recruitment, the Constables jointly emailed Mr Le Poidevin to cancel the meeting on 09 November and to enable his referral to the Occupational Health Service to continue. Mr Le Poidevin replied by email to Mrs Tasker alone that he was sorry that the meeting had been cancelled and that the offer to meet with her remained open should she wish to reconsider (ER1, tab 34).

- 4.27 Mr Cash told the Tribunal that their HR Advisers contacted Mr Le Poidevin to discuss the referral to the Occupational Health Service and that Mr Le Poidevin had agreed to this on the basis of he received written assurance that the report would only be read by the Constables in the first instance. Mr Cash said that the Constables responded by joint email giving that reassurance but that Mr Le Poidevin responded to Mrs Tasker alone that he required that the report not be divulged to any other person without his prior written consent (ER1, tab 38). Mr Cash agreed to the terms requested jointly with Mrs Tasker because he felt that it was important to ensure that the assessment and report were undertaken.
- 4.28 The occupational health report from Dr Cook was sent to Mrs Tasker's home address for the personal attention of both Mrs Tasker and Mr Cash, as Constables (ER1, tab 42 refers). Mr Cash told the Tribunal that Dr Cook could not advise when Mr Le Poidevin was likely to be fit for work although he anticipated that it would be some weeks before he recovered sufficiently to begin a phased return to work programme on recuperative duties. Also noted was that if the difficulties that Mr Le Poidevin reported he had with Mr Cash were not addressed then he (Dr Cook) was likely to continue to sign him off work. Mr Cash told the Tribunal that Dr Cook had recommended the use of an external mediator to address the problems that Mr Le Poidevin reported. Both Mr Cash and Mrs Tasker had reservations about the potential effectiveness of mediation as the objection that Mr Le Poidevin had against Mr Cash was a personality-based one and that he had recently refused to meet or even correspond with Mr Cash. In addition, Mr Le Poidevin had stated that he could not 'bear' to be in the same room as Mr Cash. Mr Cash said that he could not simply stand down as an elected Constable or keep away from the office to satisfy Mr Le Poidevin. Both Mr Cash and Mrs Tasker were reluctant to engage in what could be a lengthy and costly mediation process only for it not to resolve anything so that "we would be back to square one several months down the line and Raymond (Mr Le Poidevin) would have remained signed off work indefinitely on full pay in the meantime." The Constables also had concerns about the use of parish finances not just to pay for mediation, in the light of their reservations about it, but also to continue to pay Mr Le Poidevin's sick pay. Mr Cash said that Mr Le Poidevin had a key role in the Constables office with specialised knowledge of parish affairs and that during his absence his workload had been undertaken by Jean Weyson, Jenny Bullock and the Constables who were performing the role as best they could in the circumstances but under increasing pressure.
- 4.29 Mr Cash told the Tribunal that the Constables wrote to Mr Le Poidevin on 29 November, 2010 in order to confirm that they were in receipt of the report and that they remained sympathetic about his health and were concerned that a resolution to the issues concerning his health may be insurmountable. They made a proposal to meet with him at 10.00am on Monday 06 December 2010 at a mutually agreeable location, to which he could be accompanied, in order to discuss his condition and prognosis, his issues at work and the practicalities of any phased return to work. In addition, any other representations Mr Le Poidevin wished to make about his employment and the other factors that the Constables had to take into account from their own perspective and that of the Constables' office before carrying out a review into his continued employment would be considered. The Constables

warned Mr Le Poidevin in this letter that the termination of his employment was one of the options to be considered (ER1, tab 43 refers).

- 4.30 Mr Cash told the Tribunal that the letter had stated that the decision about Mr Le Poidevin's continued employment would be taken by the Constables in consultation with the Finance Committee.
- 4.31 Mr Cash told the Tribunal that Mr Le Poidevin, in an email to Mrs Tasker, had communicated that due to the adverse weather conditions that had prevailed that week he had been unable to meet with his legal adviser and therefore he would not be in a position to attend the proposed meeting on 06 December, 2010. (ER1, tab 47 refers). Mr Cash told the Tribunal that the Constables were concerned that Mr Le Poidevin was being obstructive in trying to delay the meeting at the last minute when he had been given a weeks' notice of it and that he appeared unapologetic and almost nonchalant about his non-attendance as though he was in the "driving seat" dictating when and if a meeting would take place at his own convenience and on his own terms. Mr Cash said that Mrs Tasker sent a joint email to Mr Le Poidevin advising him that the meeting would now take place on 09 December, 2010 at a location of his choice and that if he failed to attend the meeting a decision as to his future employment would be taken in his absence and that if he preferred to make written representations instead of attending the meeting he should provide them by 9.00am on the morning of the meeting. (ER1, tab 49 refers).
- 4.32 Mr Cash said that on the afternoon of 08 December, 2010 the Constables had received an email and letter from Advocate Gray saying that Mr Le Poidevin's Doctor had confirmed that he was not fit to attend a meeting and that further communication with him should be routed through herself. Advocate Gray requested in the same email a further delay to enable her to make representations and sought confirmation that the meeting on 09 December would not proceed. (ER1, tab 50).
- 4.33 Mr Cash told the Tribunal that whilst the Constables remained concerned about Mr Le Poidevin's health, they were concerned that he was "bullying" them into delaying or cancelling the meeting again and "doing things his own way." The Constables decided that they would enable Mr Le Poidevin to have the opportunity to make written representations, to be required by 9.00am the next day; if he was unable to attend a face to face meeting.
- 4.34 Mr Cash said that the Constables received a letter from Dr King stating that a meeting would be detrimental to Mr Le Poidevin's on-going health and that all communications should go through Advocate Gray (ER1, tab 52). Advocate Gray requested a postponement to the meeting as it would not be possible for her to prepare Mr Le Poidevin's written representations by the deadline of 9.00am the following morning.
- 4.35 The Constables decided to delay the meeting a further two days to the close of business on 10 December, 2010 which effectively represented a two-day extension to the deadline they had previously imposed and would have allowed 11 days in which to respond to the matters raised in the Constables letter of 29 November, 2010. Advocate Gray advised that she was not able to meet the new deadline due to work commitments and Mr Cash told the Tribunal that the Constables, having already accommodated two extensions to the deadline at her request, further extended the deadline until 9.00am on 15 December, 2010. (ER1, tab 57 refers).
- 4.36 Mr Cash said that the written representations from Advocate Gray were received on 13 December, 2010 addressed to Mrs Tasker and copied to Mr Cash, enclosing a medical report from Dr Joslin dated 21 October, 2010 (ER1, tab 58 refers). Mr Cash told the Tribunal that he

strongly refuted claims in the letter that he had a “bullying approach” and that he had at all times treated Mr Le Poidevin fairly and respectfully albeit that he had had to adopt an increasingly firm approach towards Mr Le Poidevin as a result of his “obstructive and petulant nature.” In the same letter, Advocate Gray made a representation that it would be ‘wholly inappropriate’ for Mr Cash to be involved in the process regarding Mr Le Poidevin’s future employment. Mr Cash told the Tribunal that he decided to remove himself from the process at this point.

- 4.37 Mr Cash told the Tribunal that on further review the Constables decided that it would be sensible for the Finance Committee to remain independent of the review and decision making process as far as possible which would allow it to conduct any appeal of whatever decision was made into Mr Le Poidevin’s employment.
- 4.38 Mr Cash said that he was not part of the decision making process but that he could not see any other alternative to the decision made by Mrs Tasker. In Mr Cash’s view, Mr Le Poidevin never had any intention of reaching a resolution at mediation and returning to work as long as he (Mr Cash) remained a Constable and therefore would have remained off work due to alleged incapacity indefinitely.

5.0 Witness Testimony of Mrs Jenny Tasker (ER1, tab B)

- 5.1 Mrs Tasker told the Tribunal that she had been a Constable for the parish since 2002 and that she left office on 31 December, 2010 when Mr Cash succeeded her as Senior Constable.
- 5.2 Mrs Tasker told the Tribunal that the Health and Safety issue relating to the electrical work to be undertaken at the Constables’ office was a good example of the difficulties that she and Mr Cash had experienced with Mr Le Poidevin and which they had tried to work through as best as they could and move on for the benefit of everyone concerned.
- 5.3 Mrs Tasker said that soon after she took up office she became aware that Mr Le Poidevin was resolute about doing things in his own way and resented the then Constable, Mr Barnaby, “looking over his shoulder” or checking papers. Mrs Tasker said that she had tried not to upset Mr Le Poidevin in this way but that it appeared that he thought he was in charge of the Constables Office and the affairs of the parish, rather than the Constables of the time. Mrs Tasker said that Mr Le Poidevin’s ways were generally accommodated because this did not lead to ‘conflict.’ Mrs Tasker told the Tribunal that Mr Le Poidevin’s “dictatorial nature” gradually got worse and he became difficult and uncooperative if he did not get his own way or he did not agree with things he had been asked to do. Mrs Tasker told the Tribunal that Mrs Weyson and Mrs Bullock found Mr Le Poidevin intimidating and had become scared of him.
- 5.4 Mrs Tasker said that Mr Cash had tried to manage Mr Le Poidevin by ensuring that matters were dealt with in a firm but fair manner and that she had increasingly adopted a similar approach in order to prevent Mr Le Poidevin from undermining the Constables’ authority. Mrs Tasker said that she believed that it was because Mr Cash tried to manage Mr Le Poidevin that Mr Le Poidevin came to resent Mr Cash personally and his authority as a Constable. Mrs Tasker said that she was satisfied from her own observations that Mr Cash’s interactions with Mr Le Poidevin were appropriate and even handed.
- 5.5 Mrs Tasker told the Tribunal that although it was evident to her that Mr Le Poidevin resented Mr Cash, he had never formally complained about Mr Cash. There was no deterioration in Mr Le Poidevin’s work as a result and she had initially thought the resentment would pass.

- 5.6 Mrs Tasker told the Tribunal that it was only after his 'Back to Work' interview with Mr Le Poidevin on 07 April, 2010 that Mrs Tasker said Mr Le Poidevin had mentioned to Mr Cash that he found it difficult to talk to Mr Cash and that it was doing his health no good. Under cross examination, Mrs Tasker said that Mr Le Poidevin had told her that "he did not want to sit next to him (Mr Cash) or by him" at Douzaine meetings.
- 5.7 Mrs Tasker told the Tribunal that it was only in Mr Le Poidevin's email dated 08 November, 2010 (ER1, tab 32 refers) that she became aware that Mr Le Poidevin alleged that Mr Cash's dealings with him had impacted his health.
- 5.8 Referring to her decision to dismiss Mr Le Poidevin, Mrs Tasker told the Tribunal that she had sought legal advice on how to go about the review and that it had been emphasised to her that she had to make an employment decision and not a medical decision. She was not obliged to follow the recommendations of Mr Le Poidevin's medical advisers and she could take into account other issues besides Mr Le Poidevin's medical condition and his own representations and perspective. Mrs Tasker said that she had been reminded that Mr Le Poidevin's medical advisers only had the benefit of hearing his account of events and his feelings and that she should therefore bear this in mind when considering their recommendations.
- 5.9 Mrs Tasker told the Tribunal that she had been advised that, if her decision was to dismiss Mr Le Poidevin on the grounds of his long term sickness, clause 9 of his contract of employment did not prevent the Constables from dismissing him before that entitlement had been used up. Mrs Tasker said that the entitlement was 6 months sick pay at full rate and 6 months sick pay at half rate and that she did not understand why the then Constables had employed Mr Le Poidevin under such generous terms.
- 5.10 Mrs Tasker said that she reviewed the medical evidence provided to the Constables on behalf of Mr Le Poidevin by Advocate Gray. (ER1, tab 58, 42 and 52) and Mr Le Poidevin's representations from Advocate Gray (ER1, tab 58 refers).
- 5.11 Mrs Tasker told the Tribunal that as far as Mr Le Poidevin's condition and prognosis was concerned it was clear that his medical advisers considered that his current condition was caused by his interactions with Mr Cash and that his prognosis in relation to his return to work was uncertain and dependent on whether his issues with Mr Cash could be resolved. Mrs Tasker asserted that Mr Le Poidevin's condition and the stress at work that he reported to his doctors was not brought on by any inappropriate conduct of Mr Cash or anyone else at work but by his own temperament and his own personal antipathy towards Mr Cash which could not be altered by anyone but Mr Le Poidevin.
- 5.12 Mrs Tasker told the Tribunal that she had no confidence that external mediation would result in a resolution of Mr Le Poidevin's issues with Mr Cash. Mrs Tasker said that she felt that if Mr Le Poidevin was unable to face Mr Cash then, and it would have been detrimental to his health to do so, that she could have no confidence that he would be able to face Mr Cash at mediation in a matter of weeks' time or that it would be good for his health to do so. Mrs Tasker said that the observations and recommendations of Mr Le Poidevin's medical advisers and the representations of Advocate Gray concerning his apparent unfitness and apprehension to meet or even correspond with Mr Cash and her during the previous week, versus his apparent fitness to meet with Mr Cash at a mediation in a few weeks' time, presented a contradiction that had not been satisfactorily resolved from her perspective. Mrs Tasker told the Tribunal of her concern about justifying the cost of external mediation and the

time it would take up, particularly when there was a realistic possibility that it would have to take place over an extensive period of time throughout which Mr Le Poidevin would remain on sick pay. Mrs Tasker told the Tribunal that she took into consideration that she could envisage the Constables going down a costly and extensive mediation process only for it not to resolve anything. She therefore ruled out mediation as being an appropriate option for the Constables to pursue.

- 5.13 Mrs Tasker concluded that Mr Le Poidevin's continued long term sickness absence from work whilst Mr Cash remained a Constable was unsustainable and outlined to the Tribunal the various factors from the Constables' perspective that she had had to take into account in making her decision. Mrs Weyson and Mrs Bullock and the Constables had been put under a huge strain that was unsustainable and it would have been unfair to put her successor, Dennis Le Moignan, under such pressure as soon as he took up office upon her imminent departure. Mrs Tasker told the Tribunal that the specialised knowledge which Mr Le Poidevin's role entailed meant that Mrs Weyson and Mrs Bullock found it difficult to undertake his role in his absence and that as a result the role was not being performed adequately while he remained off work on long term sick leave. Mrs Tasker said that it was not economically viable for the parishioners, and not supportable, that Mr Le Poidevin continued indefinitely on sick leave on full pay, regardless of the sick pay provisions in his contract of employment. As a result, the engagement of a temporary replacement clerk was neither economically viable nor practical whilst employing Mr Le Poidevin on full sick pay. Mrs Tasker told the Tribunal that there was no alternative employment that Mr Le Poidevin could undertake at the Constables office which would not involve him interacting with Mr Cash.
- 5.14 Mrs Tasker told the Tribunal that she had concluded that as Mr Cash was an elected Constable who had a duty to serve his parishioners for the duration of his office, his stepping down in order for Mr Le Poidevin to return to work was not an option. In addition, Mrs Tasker said that she decided that, as Mr Cash was alleged to be a contributory factor towards the stress condition Mr Le Poidevin had reported to his medical advisers, that the Constables had a duty to mitigate this factor as far as reasonably practical in the interests of both Mr Le Poidevin's health and the Constables' liability.

6.0 Witness Testimony of Raymond Le Poidevin

- 6.1 Mr Le Poidevin told the Tribunal that he had commenced working as Secretary to the Constables in 2001 following his retirement from the Guernsey police force with over 26 years of service.
- 6.2 Mr Le Poidevin told the Tribunal that his role included responsibility for parish business, maintenance of parish records and finances, oversight of the occupiers rates, supervising the maintenance of parish property including health and safety, supervising the collection and disposal of refuse, preparation of reports for the consideration of the Royal Court, bornements, stream and hedge inspections, inspections of quarries, assisting with elections and other associated matters. The role included day to day responsibility for the management of the Constables Office, insurance, IT, accounts, banking and investments and outside contractors and tenants. Mr Le Poidevin oversaw all parochial expenditure including works relating to the Town Church and Rectory.
- 6.3 Mr Le Poidevin told the Tribunal that he had enjoyed a very happy working relationship with the Constables, staff and Douzaine and that together they had identified and implemented numerous initiatives which significantly reduced the tax burden to parishioners. Mr Le

Poidevin said that two support staff, Mrs Jean Weyson and Mrs Jenny Bullock, reported to him and that he was responsible for them on a day to day basis.

- 6.4 Mr Le Poidevin told the Tribunal that health and safety matters affecting the Constables' office had caused repeated issues to arise between him and the Constables. Mr Le Poidevin arranged for an independent safety risk assessment of the Constables office to be undertaken and had spoken to the Constables' insurance broker because he was concerned that insurance cover may be withdrawn. Mr Le Poidevin felt that the staff and public should be removed from the building until thorough inspections and remedial works had been undertaken but the Constables had refused to allow this. Mr Le Poidevin told the Tribunal that he felt that Mr Cash developed a grudge against him after he spoke out at a Douzaine meeting about the health and safety issues and that he found the Constables were often abrupt with him and seemed to have "hidden agendas." Mr Le Poidevin told the Tribunal that he felt that the whole issue relating to safety and the office seemed to have created a "fault line" in the relationship between the staff and the Constables.
- 6.5 Mr Le Poidevin stated that he had felt undermined in August 2009 when Mr Cash had written a letter of apology to a parishioner who had complained about how Mr Le Poidevin had dealt with discussing her arrears of rates with her, without discussing the matter with him (Mr Le Poidevin) first.
- 6.6 Mr Le Poidevin told the Tribunal that the way that the Constables had handled the complaint from a parishioner in connection with a car parking issue by instigating a formal disciplinary process, which was subsequently withdrawn after consultation with Advocate Gray, had upset him very much. Mr Le Poidevin said that he felt that Mr Cash had not understood the level of upset that had been caused by his "heavy handed approach." Mr Le Poidevin told the Tribunal that he felt that he had been misled when he received the letter making specific reference to the "disciplinary meeting" that he had attended and that this was not resolved by the next letter from Mr Cash acknowledging that there had been an "unfortunate error" in referencing 'disciplinary' in the letter.
- 6.7 Mr Le Poidevin told the Tribunal that the proposed drafting of new contracts for the office staff had, in the way the communication had been handled by the Constables, caused him to feel "seriously undermined" and that he was "very anxious and suspicious about the Constables' motives" for treating the office staff differently and had requested a meeting to discuss his concerns. The meeting was delayed because the Constables said that they needed time to review the points Mr Le Poidevin had raised. On 09 August, 2010, Mr Le Poidevin said that he consulted with his Doctor and was signed off work suffering from stress. Mr Le Poidevin told the Tribunal that at no time whilst he was off sick did either the staff or Constables enquire after him and that as a result, he had felt "isolated and excluded" and the stress and depression that he was suffering had got worse.
- 6.8 Mr Le Poidevin described to the Tribunal receiving the referral request to occupational Health for assessment and said that he had viewed this as "a concerning development." In addition, Mr Le Poidevin told the Tribunal that the prospect of having to meet Mr Cash on 09 November to discuss the occupational health referral had upset him and he did not feel that he could cope with this at that point in time. Mr Le Poidevin declined to attend the meeting and offered to meet with Mrs Tasker alone, as senior Constable, at his home. Mrs Tasker had responded that the referral to occupational health would continue and that occupational health would be informed that Mr Le Poidevin had refused to see both Constables to discuss his referral.

- 6.9 Mr Le Poidevin stated that he attended occupational health and was examined by Dr Cook on 15 November, 2010.
- 6.10 Mr Le Poidevin said that he received a letter from the Constables on 29 November advising him of their intention to carry out a review into his continued employment and proposing a meeting on 06 December, 2010.
- 6.11 Mr Le Poidevin had responded by email to Mrs Tasker seeking clarification as to why the option of external mediation had been ignored and further asking who would be 'inappropriate' to accompany him to the meeting. Mrs Tasker had replied that his legal representative would be considered inappropriate to accompany him and that any matters relating to the occupational health report would be discussed at the meeting. Mr Le Poidevin said that his GP had confirmed that he should not attend a meeting at that time for health reasons and that this was communicated to the Constables who insisted on proceeding by extending the deadline. Advocate Gray wrote to the Constables on 13 December (EE1, p328) stressing how committed Mr Le Poidevin was to resolve matters and expressed concern at the unrealistic timeframe that she said had been imposed and that saying a phased return to work was regarded by the medical experts as possible and reasonable and therefore a dismissal would be outside the band of reasonable responses.
- 6.12 Mr Le Poidevin asserted that the events that he had described to the Tribunal had caused him tremendous upset and that it was clear to him, looking back, that the Constables had decided that they wanted to get rid of him and took every opportunity to further that goal.

7.0 The Conclusion

- 7.1 The Tribunal heard considerable oral evidence during the Hearing and considered all the written evidence before it, whether specifically referenced in this judgement or not.
- 7.2 The burden of proof rested with the Respondent to prove that there was a fair reason for dismissal and that a fair procedure had been followed.
- 7.3 Advocate Gray in both her opening and closing statements (EE3) argued strongly that the dismissal was not based on a fair or genuine reason and, moreover, that the procedure followed by the Respondent was fundamentally flawed.
- 7.4 Considerable evidence was put before the Tribunal, from both parties, concerning background issues that revealed to the Tribunal that there had been significant difficulties experienced in the working relationship between Mr Cash and Mr Le Poidevin in particular over many months leading up to Mr Le Poidevin's absence due to ill health, on the grounds of stress. It was apparent to the Tribunal that problems had arisen from the Constables' increasingly firm direction and involvement in the management of the Constables Office and that there had been an unfortunate confusion concerning who had overall responsibility for the management of the office support staff, Mrs Bullock and Mrs Weyson, and working practices that had been established over time. The Tribunal noted that the Constables had clearly valued the specialised knowledge and experience that Mr Le Poidevin brought to his role as Secretary to the Constables and that, once there was awareness of the difficulties in the interpersonal relationships, they had sought to utilise professional intermediaries to guide them in their liaison and communication with the Applicant. In this regard, the Tribunal took the view that the Constables were responsible for all decisions and actions taken relating to their employment of Mr Le Poidevin; whatever the advice and guidance received from external professionals.

- 7.5 The Tribunal noted that Mr Le Poidevin had not formally complained about either of the Constables at any time and that his representative, Advocate Gray, had documented in her letter of 13 December, 2010 (EE1, P. 332) that Mr Le Poidevin did not wish to pursue a formal complaint at that time either. In addition, the Tribunal noted that Mr Le Poidevin had not appealed against the decision to dismiss him, in spite of being given the right of appeal to the Finance Committee.
- 7.6 The Tribunal was persuaded that the Constables wished to retain Mr Le Poidevin in his role, if at all possible, and this was illustrated by Mrs Tasker stating under cross examination that Mr Le Poidevin was “a great employee and an asset to the parish.” The Tribunal was not persuaded that the Constables had sought to end the Applicant’s employment in the period leading up to his absence due to ill health on the grounds of “stress.” The Tribunal found that there was no evidence to suggest that the Constables had wilfully caused Mr Le Poidevin’s illness or that the Constables had acted in such a way that they ought to have appreciated that the likely consequence of their actions would lead to psychiatric illness. It appeared to the Tribunal that the Constables were very mindful of the requirement to take care in their communication with the staff of the office, and in particular Mr Le Poidevin, in response to his stated concerns and this was illustrated by their engagement of external HR Advisers to guide and support them with employment related issues.
- 7.7 Very careful consideration was given to the extensive evidence that was put before the Tribunal by both parties and the Tribunal concluded that the Respondent genuinely believed that the Applicant’s incapacity would be prolonged and that there was no realistic prospect of him being fit and able to return to work alongside Mr Barry Cash. As a result, the Tribunal was persuaded that the Respondent had a genuine belief that the facts on which it acted to dismiss the Applicant constituted ‘incapability due to ill health.’ The Tribunal declined to consider the alleged background issues relating to ‘conduct’ matters and the resulting difficulties in interpersonal relationships.
- 7.8 In determining whether the Respondent acted in accordance with a fair procedure, the Tribunal gave careful consideration as to what could be deemed within the band of reasonable responses for a small employer in the circumstances.
- 7.9 With regard to the deadlines that the Constables imposed, the Tribunal felt that the imposition of these had initially appeared somewhat impractical, but noted that the Constables continued to extend the deadline in accordance with Advocate Gray’s request to do so and therefore the Tribunal’s overall assessment was that the eventual deadline was acceptable. Importantly, the Tribunal found it was not possible to conclude that the deadlines fell outside the band of reasonable responses open to an employer (‘the Constables’) of such a small size and limited resources, although they were notably towards the lower end of the band of what the Tribunal considered reasonable. The fact that the Constables eventually withdrew the requirement to meet with Mr Cash, as Mr Le Poidevin’s co-employer, spoke well of the genuineness of their attempts to consult with Mr Le Poidevin about his employment and their concern for the impact on his health. Importantly, the Tribunal took the view that Constables had made several genuine attempts to meet with Mr Le Poidevin and consult with him prior to making any decision about his employment. The Tribunal considered all the necessary and relevant facts and concluded that this case was exceptional regarding the matter of consultation with the Applicant prior to the decision taken because Mr Le Poidevin had refused to meet Mr Cash. The fact that face to face consultation with Mr Le Poidevin had not proved possible did not in itself render the process followed unfair.

- 7.10 With regard to the withdrawal of the Finance Committee from the decision making process, the Tribunal did not consider this to be “wilful reneging” of a former decision to involve them but rather a genuine attempt by the Constables to do their best in the circumstances and to retain the Finance Committees’ independence in the event of an appeal into any decision relating to Mr Le Poidevin’s employment.
- 7.11 The Tribunal did not regard the written representations as unsuitable in the circumstances of this case, bearing in mind the medical opinion that Mr Le Poidevin should not meet with Mrs Tasker at that time, the refusal to meet Mr Cash previously and the requirement that all communication should be directed via his Advocate. The Tribunal considered this element of the process at length and concluded that it was within the band of reasonable responses open to a small employer. A key factor for the Tribunal in determining that the written representations were fair in the special circumstances of this case were based on Mrs Tasker’s genuine belief that there was no prospect of a return to work alongside Mr Cash, resulting in consultation being pointless, particularly in circumstances where Mr Le Poidevin blamed his work environment for his illness.
- 7.12 With regard to the refusal to follow the recommendation of the medical advisers to pursue mediation as a potential way forward, the Tribunal sought not to supplant personal views of the benefits of such a process but rather was persuaded that Mrs Tasker had a genuine belief that the process would be both expensive and unlikely to work in these particular circumstances. Furthermore in the Tribunal’s view, she had every right not to pursue the recommendation, having given it careful consideration. In addition, the Tribunal formed the view that it was not the function of the employer or Tribunal to become a ‘medical appeal body’ to review the advice and opinions received.
- 7.13 The Tribunal was satisfied that the contractual sick pay in Mr Le Poidevin’s contract was a separate matter and should not be confused with the managerial decision to dismiss that Mrs Tasker determined that she had to take, having weighed up all the circumstances. Importantly, the contractual right to sick pay for one year did not in itself render the decision to dismiss as unfair.
- 7.14 The Tribunal did not take the view that ‘conduct’ issues had been involved in the decision to dismiss the Applicant. Also, having determined that the dismissal was for a genuine reason; on the grounds of the incapability of the Applicant, the Tribunal was mindful that it was not appropriate to consider any alleged ‘conduct’ issues which were put forward in witness testimony, or the way they were handled by the Constables, or alternatively, to have regard to such background matters.
- 7.15 With regard to the assertion that Mr Le Poidevin was “forced” to provide reasons for the stress that he was suffering which were then used as evidence to support the view that there had been a breakdown in trust and confidence, the Tribunal felt that the Constables had a right to seek an independent medical report as the employer, providing that Mr Le Poidevin actively consented to it, and he (Mr Le Poidevin) had done this. As a corollary, Mrs Tasker was entitled to use in her ultimate decision whatever she may have gleaned from such report.
- 7.16 Advocate Gray, in her closing submission, referred the Tribunal to the case of D B Schenker Rail (UK) Ltd V Doolan, EAT, 13.4.11 (0053/09). The EAT set out a test which should have been applied by the Tribunal in determining whether or not Mr Doolan’s dismissal was fair:
- whether the employer believed in its stated reason;
 - whether it was a reason formed after a reasonable investigation;

- whether the employer had reasonable grounds to conclude as it did.

- 7.17 In considering these tests, the Tribunal was satisfied that Mrs Tasker had a genuine belief in the stated reason for dismissal and that this had been formed on the basis of a reasonable investigation which had involved, due to the exceptional circumstances of this case, written representations from Advocate Gray. The Tribunal took the view that Mrs Tasker had reasonable grounds to conclude as she did. In reviewing the *D B Schenker Rail (UK) Ltd V Doolan*, EAT, 13.4.11 (0053/09) case in full, the Tribunal took guidance that the EAT determined that the duty to ascertain the true medical position in a capability dismissal case simply requires the employer to carry out a reasonable investigation and that *“the decision to dismiss is a managerial one, not a medical one.”* Importantly, the EAT was satisfied that it was open to the company to conclude that they had been put on notice that there was a risk that Mr Doolan would have a relapse and therefore to take this factor into consideration in making a decision about his employment.
- 7.18 The Tribunal felt it was reasonable in the circumstances of this case for Mrs Tasker not to take assurance from the wording in the letter from Advocate Gray of 13 December 2010, when she had surmised that Mr Le Poidevin’s condition... ‘might be resolved in the relatively near term and mediation should help to achieve this and if matters can be addressed through mediation Mr Le Poidevin can see no difficulty in returning to work in the relatively near future.’ (EE1, P.338). The Tribunal was persuaded that Mrs Tasker had a genuine belief that there was no realistic prospect of Mr Le Poidevin being fit and able to work alongside Mr Cash and that she had undertaken a thorough review of all relevant factors in consideration of her decision to dismiss Mr Le Poidevin. In making the managerial decision to dismiss Mr Le Poidevin, the Tribunal noted the factors that Mrs Tasker had to consider, including those peculiar to this case, relating to her duty of care to the other support staff in the office who had been operating for four months under increasing pressure and the use of parish funds to fund Mr Le Poidevin’s sick pay; that made it economically unviable as well as impractical to find a temporary replacement. Given the exceptional combination of circumstances that prevailed, the Tribunal was persuaded that Mrs Tasker could not be expected to wait any longer for Mr Le Poidevin to return to work and, in the light of Mr Le Poidevin’s assertion that working alongside Mr Cash had a negative impact on his health, supported by medical opinion, that she was justified in concluding as she did. The Tribunal further took the view that no reasonable employer would risk exposing Mr Le Poidevin to continuing ill health in such circumstances or risk potential litigation against itself as a result.
- 7.19 In conclusion, the Tribunal felt that ‘incapacity’ on the grounds of ill health was a complex matter, particularly given the need to balance conflicting priorities but that it was for Mrs Tasker to balance the Constables’ needs, with those of Mr Le Poidevin’s and that on the balance of probabilities, based on the evidence put before it, the Tribunal determined that Mrs Tasker had reasonable grounds to conclude as she did. The Tribunal determined that the process followed was just and equitable in the circumstances.

8.0 The Decision

- 8.1 The decision takes into account the relevant Law and the Guernsey and UK authorities cited by the parties.
- 8.2 Having considered all the evidence presented and the representations of both parties and having due regard to all the circumstances, whether specifically referenced to in this judgement or not, the Tribunal found that, under the provisions of the Employment Protection (Guernsey) Law, 1998, as amended, the Applicant was not unfairly dismissed. The Tribunal determined that he was dismissed for the potentially fair reason under “the Law” (Section 6 (2) a) “related to the capability or qualifications of the employee for performing work of the kind which he was employed to do” and Section 7 (a) of “the Law”, which states **‘capability’** means capability assessed by reference to skill, aptitude, health or any other physical or mental quality.”

Ms Helen Martin
Signature of the Chairman

11 January 2012
Date