Case No: A2/2013/1698

Neutral Citation Number: [2014] EWCA Civ 1512
IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM The High Court, Queen's Bench Division
Mr Justice Cranston
[2013] EWHC 1098 (QB)

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 21/11/2014

Before :

LORD JUSTICE PATTEN
LORD JUSTICE DAVIS
and
LORD JUSTICE UNDERHILL

- -

Between :

YAPP	**Respondent**
- and -	
FOREIGN AND COMMONWEALTH OFFICE	**Appellant**

- -
- -

David Platt QC and Alan Payne (instructed by **Treasury Solicitor**) for the **Appellant**
Jane McNeill QC and Katherine Howells (instructed by **Buss Murton Law LLP**) for the **Respondent**

Hearing dates: 15th-17th July 2014

- -

Judgment

Lord Justice Underhill :

INTRODUCTION

1. In January 2007 the Claimant in these proceedings, the Respondent before us, was appointed British High Commissioner in Belize. He took up his post in August that year. On 13 June 2008 he was withdrawn from that post on "operational" grounds with immediate effect and suspended pending investigation of allegations of misconduct. The Foreign and Commonwealth Office ("FCO")'s disciplinary procedures were implemented; some, though not all, of the allegations against him were found to have been established, and he received a written warning. His suspension was lifted but he had developed a depressive illness, and also had to undergo heart surgery, and he did not in fact receive any other appointment in the FCO until his retirement when he reached the age of 60 in January 2011.

2. On 16 May 2011 the Claimant commenced proceedings against the FCO complaining both of his withdrawal from the post of High Commissioner and of the way in which the disciplinary process was conducted and its outcome. He said that the resulting stress had caused his depressive illness, which both constituted damage in itself and led, on account of his inability to return to work, to pecuniary loss over and above the loss of his enhanced earnings and allowances as High Commissioner.

3. The issue of liability was tried by Cranston J over a number of days in February and March 2013. By a judgment handed down on 3 May 2013 he found that the withdrawal of the Claimant from his post was both a breach of contract and a breach of the duty of care which the FCO owed him at common law; but he dismissed the claims relating to the disciplinary process.

4. In the course of his judgment Cranston J made a number of findings relevant to the assessment of damages, including a finding that the Claimant was entitled in principle to recover for the depressive illness which he had developed and its consequences. On the basis of those findings the parties were able to agree damages in the sum of £320,000. It was also agreed that that sum should be paid to the Claimant's solicitors and held by them pending the outcome of a proposed appeal by the FCO. They were, however, unable to agree about whether the FCO should pay interest on that sum. At a hearing on 4 June 2013 Cranston J resolved that issue in the Claimant's favour, holding that the FCO should pay interest at a rate representing the difference between the judgment rate of 8% and such rate as the Claimant's solicitors were able to obtain on the sums held.

5. What is before us is as follows:

   (A) *The FCO's appeal*. The FCO appeals against Cranston J's finding that the Claimant's withdrawal from his post in Belize constituted a breach. But it also contends that even if that finding stands the Claimant is not entitled to recover damages for his depression and its consequences, on grounds of remoteness and/or causation.

   (B) *The Claimant's Respondent's Notice*. The Respondent's Notice raises what are said to be additional grounds for upholding the Judge's order. The issues

raised by these are broadly distinct from those raised by the FCO's appeal and were treated as such in the oral submissions.

(C) *Interest*. The FCO appeals against the interest decision.

Reflecting the shape of the submissions before us, I will consider each in turn, though some of the points raised under the Respondent's Notice overlap with those in the main appeal.

6. The Claimant was represented before us by Ms Jane McNeill QC and Miss Katherine Howells, who both appeared below, and the FCO by Mr David Platt QC and Mr Alan Payne: before the Judge Mr Payne appeared unled. The interest appeal was argued by the juniors.

THE CONTRACTUAL BACKGROUND

7. The contractual documents relevant to the issue before us consisted of (a) the letter appointing the Claimant as High Commissioner in Belize; and (b) the relevant parts of the FCO's internal HR guidance document HR1 ("the Guidance"), which it was common ground had contractual force. I take them in turn.

THE APPOINTMENT LETTER

8. The appointment letter is dated 9 January 2007. It says that the posting is for a period of three years with the option of a fourth year. The posting was initially to begin in December 2007, though in the event it was brought forward.

9. The only passage which I need to set out is para. 6, which deals with withdrawal. It reads as follows:

> "You should be aware that your appointment is not on salaried tenure terms and that the FCO retains discretion (through the Selection Boards and usual performance management processes, and where it is deemed necessary for operational reasons) to withdraw any Head of Mission from his/her post if he/she falls short of acceptable levels of performance and delivery. Our selection procedures are robust and we should not expect that this will have to be the case very often. As Head of Mission you are, of course, entitled to fair treatment accompanied by the same principles of effective performance management that we expect to be applied elsewhere in the organisation."

Although the drafting is poor, it was common ground before us that withdrawal "for operational reasons" is not as such a disciplinary matter and may occur for reasons which do not involve poor performance or misconduct on the part of the post-holder. That is confirmed by the terms of the Guidance which I consider below.

THE GUIDANCE

10. We are concerned with two aspects of the Guidance – the provisions relating to withdrawal of a post-holder before the expiry of the term of his posting and those relating to misconduct.

11. The provisions relating to withdrawal appear at paragraph 39 of the Guidance under the heading "Early termination of a posting at public expense". The paragraph begins:

> "This is exceptional and should only be considered where there is no alternative and the costs are justified. The following are the possible grounds: …"

The grounds that follow include "misconduct" and "operational". "Misconduct" is glossed as follows (so far as material):

> An officer will be withdrawn from a posting at public expense where:
>
> - he/she is suspended whilst an allegation of gross misconduct is being investigated …
>
> - he/she has to return to the UK to attend a hearing before a disciplinary panel, and the outcome of that hearing, and any appeal, is dismissal
>
> - Director HR considers that, regardless of the outcome of the investigation into allegations of misconduct, it would be untenable in the circumstances of the case for the officer to remain in post."

As for the "operational" ground, various circumstances are set out in which an operational "short tour" may be considered. These include where:

> … the position of one or more officers at post has become untenable such that HR Director considers it necessary for the continued efficient functioning of that post that an officer or officers are withdrawn, e.g. due to a serious breakdown in working relationships within the post or with the host government or local community, or any other circumstance which in the opinion of the HR Director is serious enough to warrant such a withdrawal…

12. The FCO's misconduct procedures are set out in chapter 22 of the Guidance. The drafting is diffuse, but for present purposes I need only note the following points:

(1) The procedure distinguishes between three kinds of misconduct – level 1, which is "less serious"; level 2, which is "more serious"; and level 3, or "gross" misconduct, which is reserved for cases where the misconduct if proved would "[breach] the bond of trust and confidence between the FCO and the officer" and which is accordingly liable to result in dismissal.

(2) The procedure for dealing with alleged misconduct falls into two stages. The first stage is a fact-finding investigation. If that discloses a case to answer, full details of the misconduct in question must be provided to the employee in writing: I will refer to this as the "charge", though that term is not in fact used. There will then be what is described as a "disciplinary interview" – in effect, a hearing – following which a decision will be made. The procedures are more elaborate in level 3 cases.

(3) The maximum penalty for level 1 misconduct is a written warning; for level 2 it is a final written warning.

(4) There is a right of appeal in all cases.

(5) Para. 23 of ch. 22 gives the FCO the right to suspend an employee on full pay "whilst an allegation of misconduct is being investigated". Read literally, that applies only to the first stage; but I assume that it is intended to cover the second stage also if the employee is charged. Paras. 23-25 read as follows:

> "23. Suspension on full pay whilst an allegation of misconduct is being investigated should be a last resort. It should only be considered for cases where gross misconduct may be involved and either:
>
> - there is a breakdown in trust which cannot be resolved until the disciplinary process has run its course or
> - the nature of the allegation is such that it would make it difficult for the staff member to continue working or
> - there is a risk to other people or
> - there is a risk that evidence might be tampered with or
> - there is a risk of unauthorised disclosure of official information or
> - there is a risk to FCO property or
> - to allow a short cooling-off period while consideration is given to the next steps.
>
> 24. The reasons for any suspension must be fully explained to the individual. It must be made clear that the suspension is not in itself disciplinary action and that no judgement has been made regarding the allegation/s against them. A letter confirming suspension must be given to the individual or, if this is not possible, sent to them within three working days.
>
> 25. Any suspension must be regularly reviewed to ensure it is still necessary and that the period of suspension is not unnecessarily protracted."

THE FACTS IN OUTLINE

13. I will give here only an abbreviated summary of the facts, sufficient to introduce my consideration of the issues which we have to decide. This inevitably involves

omitting some detail and other nuances to which the parties drew our attention by way of background. Those interested in the full story can find it clearly set out at paras. 2-79 of Cranston J's judgment.

(1) THE EVENTS LEADING TO THE CLAIMANT'S WITHDRAWAL

14. As I have said, the Claimant took up his post in August 2007. The High Commission is based in Belmopan, which is the centre of government in Belize, though not its principal city. There were two other UK-based staff – the Deputy High Commissioner, David Spires, who had already been in post for over two years and who had apparently been given a fairly free hand by the previous High Commissioner; and Paul Lane, the Registrar. There were thirty locally-engaged staff. Relations between the Claimant and Mr Spires were poor from the outset. From shortly after his appointment the Claimant's immediate line manager was Dr Liz Kane, the Head of the Central America, Mexico and Caribbean team ("CAMCAT"). She reported to Mr Christopher Wood, whose title was Director, Americas. Matthew Forbes was Head of Section for CAMCAT.

15. In late April 2008 Mr Peter Evans, the HR Manager for the FCO Directorate General for Defence and Intelligence (which includes the Americas), paid a routine visit to Belmopan. On 7 May he circulated a report which was critical of the Claimant's management style, which he described as "arrogant". He also reported a call which he had just (i.e. since his visit) received from Mr Spires in which he had recounted allegations made to him by the Claimant's PA, Jane Beard, of bullying behaviour towards her, though she was said not to be prepared to make a formal complaint. He said that he would monitor the situation.

16. In mid-May 2008 there was a routine management review of the High Commission by Mr Forbes and a Ms Karen Williams. The final report was not before the Court but the materials produced in the course of the review were. These incorporated the results of a staff survey, which included a number of adverse comments about staff morale, attributed by some to the poor relationship between the Claimant and Mr Spires. One respondent – evidently (though the comments were unattributed) Ms Beard – complained that she had been rebuked for making critical comments about the Claimant to Mr Evans.

17. Following the review Dr Kane spoke to the Claimant and followed up the conversation in an e-mail dated 21 May 2008. This began:

> "As I explained earlier, we have received multiple allegations about bullying and harassment from internal and external stakeholders. This had been collected both before and during the Review process. We do not believe that these allegations are malicious. We have not received any formal complaint. But, based on the weight of this evidence, I rang this afternoon to give you an informal warning that such behaviour would not be tolerated by an FCO officer. If I received any further complaints, I would be obliged to start a formal investigation."

Dr Kane explained that it was difficult to provide specific examples because to do so would compromise the individuals concerned; but there was a reference to

"inappropriate comments and questions about individuals' private lives" and to the Claimant's behaviour at the Christmas party at the Belize Ministry of Foreign Affairs.

18. The Claimant replied on 23 May 2008 saying that he was at a disadvantage in responding because of the lack of specificity in the criticisms made; that he did not believe that he had done anything amiss; but that if he had inadvertently upset anyone he would wish to apologise to them. He went on leave the following day.

19. In late May 2008 Dr Kane completed the Claimant's appraisal for the period to March 2008. It contained positive comments about various aspects of his work, but there were also critical observations both from Dr Kane and from Mr Wood as counter-signing officer about his management style and relationships with staff. The appraisal was not sent to him at the time, owing to his withdrawal and suspension shortly afterwards.

20. On 5 June 2008, while the Claimant was still on leave, Mr Spires telephoned Mr Evans to tell him of a conversation which he said that he had recently had with a former Belizean Minister for Foreign Affairs, Eamon Courtenay. Mr Courtenay was no longer in Parliament and his party was in opposition. Mr Courtenay had made serious allegations about the Claimant, which Mr Evans set out (as recounted to him by Mr Spires) in an e-mail to Susan Le Jeune d'Allegeershecque, the Director of Human Resources at the FCO dated 6 June. I need not set out the contents here.

21. As a result of that e-mail it was arranged for Mr Wood to speak to Mr Courtenay as a matter of urgency. He did so, and he set out what Mr Courtenay had told him in an e-mail to Ms Le Jeune and Mr Evans (copied to Dr Kane and also to John Rankin, an Assistant Director in the Human Resources Directorate) dated 10 June 2008. The Judge summarised the contents of the e-mail, together with Mr Wood's evidence about it, at paras. 23 and 25 of his judgment, which read as follows:

> "23. Mr Wood spoke to Mr Courtenay on the telephone on 10 June. (Mr Courtenay had declined to speak to Dr Kane since he did not regard her as sufficiently senior.) Mr Wood summarised what Mr Courtenay had told him in an email ("the Wood email") which he sent the same day to Ms Le Jeune, Mr Evans, Dr Kane and Mr Rankin. In the Wood email the claimant's behaviour, and its consequences, were as follows: (1) at private events the claimant had acted inappropriately with women, including touching Mrs Denise Courtenay's bottom, and so people were no longer prepared to invite him to events; (2) the claimant was having a relationship with a member of staff at the Ministry of Foreign Affairs of Belize and, consequently, was held in little respect there; (3) the claimant was not joining in diplomatic events in Belize and thus the wider diplomatic community was developing a negative view of him; (4) he, Mr Courtenay, had declined to attend events at the High Commission during the visit of an FCO Minister, Meg Munn MP; (5) that the claimant had adopted an inappropriate tone with the Belizean Prime Minister, seeming to summon him to an event; (6) Mr Courtenay was "picking up messages" that the claimant was treating staff in the High Commission

> appallingly; his colonial approach was not appropriate to the modern world; and (7) he, Mr Courtenay, thought that the claimant's approach to work was superficial, he was simply not seen about town and he was not known to be building contacts. Mr Courtenay commented that the sooner the claimant left Belize the better. For his part he would not be inviting the claimant to future events.
>
> 24. ....
>
> 25. As recorded in the Wood email, Mr Courtenay professed that he was a friend of the United Kingdom and concerned with the impact on its reputation in Belize of the claimant's behaviour. UK-Belize relations were not "in a good place", an assessment which Mr Wood accepted in his evidence at trial was a judgement which was not justified. Mr Wood told Mr Courtenay that the FCO would be considering how it could best deal with this state of affairs, which it had already been concerned about before his approach. The email then read:
>
> > "His [Mr Courtenay's] views chime very much with the general messages that we are getting and confirms to me that we need to take steps – in line with our procedures – to remove [the claimant] from post … I conclude that we are now suffering real reputational damage from the claimant's behaviour and that we must now bring this to a head."
>
> In his evidence Mr Wood made clear that his concern here was with the allegations about the claimant's sexual misconduct, not with his treatment of High Commission staff."

I should add that Mr Wood recorded at the start of his e-mail that Mr Courtenay had made clear that he was speaking "on a confidential basis" and that he had responded that he "would not play back his comments directly to [the Claimant]".

22. Three points need to be noted about that evidence:

(1) Mr Courtenay's allegations about the Claimant's conduct were of two kinds. The first – contained in points (1)-(2), (5) and (7) in the Judge's summary – related to the Claimant's alleged behaviour outside the Commission and in his external work as High Commissioner, of which the most damaging allegations were no doubt those about his sexual behaviour. The second – point (6) – related to his treatment of his own staff.

(2) The concern which led Mr Wood to recommend the Claimant's removal was based on the former not the latter. That is unsurprising: the Claimant's treatment of Commission staff was not likely to have such a direct and immediate impact on the UK's reputation and influence in Belize, as to justify so drastic a step, and in any event it had only very recently been addressed by giving him an informal warning.

(3) Mr Courtenay's allegations about the treatment of staff were extremely general and of course second-hand: he had been "picking up messages". The FCO had its own, more direct, information derived from Mr Evans's visit and the management review.

I should also record that there are some differences between what Mr Courtenay told Mr Wood, as recorded in his e-mail, and what he is said to have told Mr Spires, as recorded in Mr Evans's earlier e-mail.

23. On 11 June 2008 there was a meeting between Ms Le Jeune, Mr Wood, Mr Evans, Dr Kane and Mr Rankin to discuss the allegations against the Claimant. No minutes were taken but Mr Evans sent an e-mail to the other participants following the meeting giving a summary of what had occurred. The e-mail starts by referring to his own visit in April and the management review in May and to what were said to be "several allegations against [the Claimant] of bullying and harassment". It then refers to the allegations made by Mr Courtenay "that [the Claimant] had, among other things, sexually harassed the wives of Belizean officials". It concludes:

> "Although the local staff and Eamon Courtney [*sic*] have made the allegations on a private and confidential basis and would not want their names disclosed, we decided that the evidence presented showed that John's behaviour was completely unacceptable and was bringing the reputation of HMG into disrepute in Belize. We decided that you had enough evidence to withdraw John from post with immediate effect pending an investigation.
>
> John is at present on leave. We will make efforts to obtain a contact telephone number for you. Failing that, you or Chris Wood would contact him on his return to Belmopan to instruct him to return to London immediately."

The Judge heard evidence about the meeting from all the participants. They accepted the accuracy of Mr Evans's summary, but the Judge noted, at para. 26 of his judgment:

> "It is not recorded in the email, but I accept the evidence of those attending the meeting, that consideration was given to alternatives to withdrawing the claimant from post. However, no support is given by the others at the meeting to Mr Rankin's recollection that they also discussed the impact of a withdrawal on the claimant personally."

24. Although Mr Evans's e-mail refers equally to the allegations about the Claimant's treatment of staff and of sexual harassment, the evidence at trial was that it was the latter which led to the decision that he had to be withdrawn, for the reasons I have already noted (see para. 22 (2) above).

25. The Claimant was still on leave and in England, though due to return to Belize shortly. On 12 June 2008 he was asked to come in to a meeting with Ms Le Jeune the next day: he was not told why. At that meeting he was told that allegations had been

made both about his bullying and autocratic management style and about inappropriate behaviour towards women at social functions. He was told that it had been decided that these allegations made his position untenable and that he was being withdrawn from post with immediate effect. He was also suspended pending a disciplinary investigation. Ms Le Jeune emphasised that the investigation would be independent and based on evidence, and that the outcome had not been pre-judged; she undertook to help the Claimant secure another posting if he were absolved.

26. Ms Le Jeune wrote to the Claimant on the same day to confirm what had occurred. Among other things she reiterated that the withdrawal itself was not a disciplinary step and that the allegations against him would be fairly and objectively investigated. She also made a file note of the meeting. The Claimant made his own note and also on 17 June replied to Ms Le Jeune's letter. There are, inevitably, some discrepancies in their accounts but none that are material for our purposes.

27. Both at the meeting and in her letter Ms Le Jeune offered the Claimant support from the FCO's Health and Welfare department. He accepted that offer and had a long session with the Head of Health and Welfare, Diana Nelson, on 25 June 2008. She arranged for him to have access to an independent counsellor, at the FCO's expense. She also made contact with Mr Gifford and passed on the Claimant's concerns about the disciplinary process. Ms Nelson remained closely involved with the Claimant's case throughout, and in his evidence at the trial he was complimentary about the help that she gave him: from the material which I have seen those compliments seem to me to have been well deserved.

(2) THE DISCIPLINARY PROCESS

28. On 13 June 2008, i.e. on the same day as Ms Le Jeune's meeting with the Claimant, Mike Gifford, who had recently returned from a posting as HM Ambassador to Yemen, was appointed to conduct a fact-finding investigation into the allegations which had led to his withdrawal and suspension.

29. Mr Gifford visited Belize from 21-27 June 2008. On his arrival he assembled the staff at the High Commission and explained why he was there: he made it clear that the Claimant would not be returning. He proceeded to interview twenty members of the staff (and one former member), and also Mr Spires's partner and Mr Lane's wife. He also had meetings with some members of the expatriate community. He did not, however, seek to interview any of the alleged victims of the Claimant's sexual harassment. At this stage I need only note that the reports he received about the Claimant were mixed. The more junior staff tended to speak well of him, as did two of the expatriates; but some more senior staff were highly critical. He also had an interview with Mr Courtenay, who described again the incidents which he had described to Mr Wood and his wider complaints (described by him as "more fundamental") about the Claimant's performance in his role. Mr Gifford judged the complaints to be made sincerely and in good faith. He asked Mr Courtenay if he was "happy for an account of our conversation to be given to [the Claimant], in the interests of transparency". He said that he was.

30. At the airport on the way back from his visit Mr Gifford met by chance the Claimant's predecessor-but-one as High Commissioner, Philip Priestley, who was no longer in the Foreign Office. Mr Priestley was aware of the Claimant's withdrawal, which by

that stage had been publicly announced, and had discussed it informally with the Prime Minister. He told Mr Gifford that the Prime Minister had spoken well of the Claimant. He also said that he regarded two of the locally-engaged staff at the Commission as very disruptive influences. He confirmed this in an e-mail dated 7 July to Mr Wood. He added in the e-mail that he had heard on the grapevine about the involvement of Mr Courtenay. He described him as "one of the most over-sensitive people in Belize where there is a perceived … slight, let alone a real one" and referred to a report which he had had to make to the FCO when Mr Courtenay had taken umbrage during a royal visit.

31. On 2 July 2008 Mr Gifford conducted a lengthy interview with the Claimant and put the allegations to him. He sent a note of the meeting to the Claimant, who offered some corrections and further comments.

32. Mr Gifford produced a fact-finding report dated 17 July 2008. It runs to ten pages and is supported by a number of annexes including the records of his interviews. His conclusion was that there were two cases of misconduct to answer: (1) "that [the Claimant] behaved inappropriately towards Eamon Courtenay's wife and other women on public social occasions and thus brought HMG into disrepute"; and (2) "that he bullied and harassed High Commission staff". As regards the first of these allegations Mr Gifford noted:

> "[These] allegations, though serious, are based only on Mr Courtenay's account, and there is mitigating evidence to suggest that John behaved properly and correctly in public. So the evidence against John is not strong, but needs to be considered further."

33. Charges based on those findings were formally put to the Claimant on 24 July 2008: he was told that if they were substantiated they would constitute level 2 misconduct. He was given a copy of the report. He was asked to attend a formal disciplinary interview with Mr Gifford on 7 August. Mr Gifford had asked the FCO's "conduct adviser" whether it was appropriate that the person who had conducted the fact-finding investigation should also be responsible for the second stage; he was advised that in the present case it made sense for him to perform both roles.

34. While those charges were pending news of the Claimant's withdrawal as High Commissioner to Belize appeared in the British press. There had been a story on Belizean television very shortly after the withdrawal, but it was picked up in the *Mail on Sunday* and *The Daily Telegraph* on 27 and 28 July 2008 respectively. The essence of the story was that the Claimant had behaved inappropriately towards women at official functions. He was door-stepped by journalists at his home. The story rumbled on into August. On 5 August Mr Courtenay told Belizean television – somewhat surprisingly in view of what he had previously said to Mr Spires, Mr Wood and Mr Gifford – that his wife had made no complaint about the Claimant's conduct towards her.

35. The disciplinary hearing duly took place on 7 August 2008. It lasted over four hours. The Claimant was represented by a colleague. At the conclusion of the hearing Mr Gifford announced that he would find that the allegations of inappropriate behaviour towards women had not been established but that those of bullying the members of

the staff had been. The Claimant would be given a final written warning which would remain on his record for two years and there would be a recommendation that he should not be given another appointment as head of mission. The Claimant made some representations about penalty, and when Mr Gifford wrote on 11 August to confirm the outcome he said that the warning would only last for one year and that he had made no recommendation against a further posting as head of mission.

36. The Claimant appealed but following a hearing on 3 October 2008 before Colin Reynolds, a senior FCO official, the appeal was dismissed.

37. Throughout the disciplinary process the Claimant was, understandably, anxious and very distressed. Ms Nelson described him on 28 July 2008 as "wretchedly unhappy". He saw his GP on numerous occasions. On 21 July, although his mood was noted as "OK in circumstances" he was prescribed sleeping tablets. On 26 August he was prescribed citalopram, which is an anti-depressant: the Judge found that he was suffering from depression from that date. The Claimant did not consent to his GP communicating with the FCO.

(3) EVENTS FOLLOWING THE CONCLUSION OF THE DISCIPLINARY PROCESS

38. On 20 October 2008, following the dismissal of the Claimant's appeal, Ms Le Jeune wrote to him suggesting a meeting to discuss his return to work. They met on 29 October. On 3 November she wrote to confirm the discussion at the meeting, which included a formal notification that his suspension was lifted. She noted that he was not currently well enough to return to work. That was confirmed by an occupational health report and he remained on sick leave. In the meantime he was diagnosed with coronary artery disease, for which he underwent bypass surgery on 29 April 2009. He was in due course certified as fit to return to work, but no appropriate job was identified. He was again certified unfit to work, as a result of depression, in August 2010; and he remained on sick leave until his retirement. For much of this period he was on either half pay or, latterly, no pay.

39. On 27 January 2010 the Claimant wrote to Sir Peter Ricketts, the Permanent Under Secretary at the FCO. The letter sets out with evident sincerity the Claimant's account of what he believed was the very unfair way that he had been treated. He said that he had been told that no further internal appeal was open to him and that he had "engaged lawyers to take whatever action proves necessary to ensure my rights are restored and justice is properly served". He asked Sir Peter to see that his case was "processed promptly and correctly" and that he received a fair deal. Sir Peter consulted Ms Le Jeune and replied on 29 January 2010. His letter is courteous but brief. He noted that the Claimant had instructed solicitors. He said that he did not accept that he was unfairly treated by the FCO, or not properly supported, and that he looked forward to the Claimant's return to work.

THE JUDGE'S DECISION AND REASONS

STRUCTURE

40. The Judge's reasoning and conclusions are under two headings – "Breach of Contract" and "Breach of Duty" – at paras. 110-140 and 141-149 of his judgment respectively; though they need to be read in the light of the immediately preceding

section (paras. 80-109) in which he sets out the applicable legal principles in some detail, with reference to a number of authorities which I shall have to consider in due course.

41. Under the first heading he considers the claims advanced by the Claimant as breaches of specific express terms of his contract of employment – i.e. those governing withdrawal and the disciplinary procedure (see paras. 8-12 above): these include the duty of "fair treatment" with regard to the exercise of the power of withdrawal which is expressly acknowledged in the appointment letter (though such a duty would no doubt have been implied in any event: see *Chhabra v West London Mental Health NHS Trust* [2013] UKSC 80, [2014] ICR 194, *per* Lord Hodge at para. 37 (p. 207A)).

42. Under the second heading he considers claims advanced as breaches of "the duty … derived from the implied term of mutual trust and confidence or from the duty of care which the FCO owed as an employer" (see para. 141, which I set out in full at para. 54 below). As to that, and at the risk of spelling out the obvious:

    (1) The "implied term of mutual trust and confidence" is the term authoritatively established by the decision of the House of Lords in *Malik v Bank of Credit and Commerce International SA* [1998] AC 20. Lord Nicholls, at p. 34A, defined the term as being that the employer "would not, without reasonable and proper cause, conduct itself in a manner likely to destroy or seriously damage the relationship of confidence and trust between employer and employee."[1] I will refer to this for convenience as "the *Malik* term".

    (2) The "duty of care" to which the Judge refers is of course the so-called "common law duty of care" which every employer owes to his employees to take reasonable care for their safety. At para. 103 of his judgment the Judge sets out the classic exposition by Swanwick J in *Stokes v Guest Keen and Nettlefold (Bolts and Nuts) Ltd* [1968] 1 WLR 1776, at p. 1783, but I need not repeat it here. The duty tends to be regarded as primarily arising in tort, and in the discussion below I will generally refer to it as such; but it is well established, as the Judge noted, that it arises equally in contract – see *Matthews v Kuwait Bechtel Corp* [1959] QB 59.

43. The distinction between the "breach of contract" and "breach of duty" claims no doubt reflects the way the parties framed their submissions. I am not sure that I would have included the *Malik* term under the "breach of duty" head, since it is a purely contractual term and the obligations which arise under it are not co-extensive, though they may often overlap, with those arising under the common law duty of care; also, in the circumstances of the present case it is hard to see any real difference between it and the obligation to act fairly which is put under the "breach of contract" head. But which heading the claims are put under does not ultimately matter as long as we keep in mind what obligations are being referred to.

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[1] I prefer Lord Nicholls' formulation to that of Lord Steyn (at p. 45 F-G), which tends to be more often cited. Lord Steyn uses the phrase "*calculated and* likely to [destroy etc]", but the phrase "calculated to" is potentially ambiguous: see *Amnesty International v Ahmed*, UKEAT 0447/08, [2009] ICR 1450, at n. 12 (p. 1485).

44. I take the Judge's two headings in turn.

"BREACH OF CONTRACT"

45. The Judge considers separately (a) "the decision to withdraw/suspend" (paras. 111-125); (b) "the investigation/disciplinary process" (paras. 126-131); and (c) "damages for breach" (paras. 132-140).

(a) "The Decision to Withdraw/Suspend"

46. The Judge's reasoning can be summarised as follows:

(1) The FCO had in principle, under ch. 39 of the Guidance, a contractual power to withdraw the Claimant for "operational reasons" in response to Mr Courtenay's allegations, irrespective of whether those allegations justified disciplinary action for misconduct (paras. 111-113). The Judge recognised that the FCO might in certain circumstances have to act "quickly and without the delay of an investigation".

(2) However any such power had to be exercised fairly: the Judge referred, as I have said, not only to the language of the appointment letter but also to the obligations that would be implied in any event. He said, at para. 117:

> "Fair treatment in this case obliged the FCO to conduct some preliminary investigation of the allegations which Mr Courtenay had levelled against the claimant before taking the decision to withdraw. In addition, fair treatment obliged the FCO to inform the claimant of the allegations and to take into account his critique of them."

(3) There had been no such preliminary investigation, and the allegations had not been put to the Claimant: the purpose of Ms Le Jeune's meeting with him on 13 June 2008 had been to inform him of a decision which had already been taken.

(4) There was no sufficient reason for those omissions. In particular, the Judge rejected the argument that the FCO was obliged to maintain the confidentiality of Mr Courtenay as its informant. He said, at para. 118:

> "Fair treatment in this case trumped confidentiality, which could not override the very important right of the claimant to know what was alleged against him and to have his responses fairly evaluated before a judgment was made. In any event any politician like Mr Courtenay prepared to make this type of allegation would appreciate that ultimately the source would become known more widely, as indeed it did within a few weeks."

Nor did he accept that in the circumstances of this case a decision was required so urgently that fairness had to be dispensed with. He said, at para. 121:

> "If, indeed, speed was of the essence the FCO should have exercised some critical judgment about the content of the

> allegations and their source. Fair treatment, at the very least, demanded this. A preliminary check of Mr Courtenay's allegations of sexual misconduct would have cast a shadow over them. These were the allegations which Mr Wood perceived as damaging the United Kingdom's reputation, not the treatment of staff within the High Commission. In my view, however, while there was a need for speed, disclosing the nature and source of the Courtenay allegations to the claimant would not have slowed down the process in any significant way. The claimant was not due back in Belize until 17 June 2008 and there was no reason why his leave could not have been extended for a few days."

(5) If a preliminary investigation had occurred, and the allegations had been put to the Claimant, it would very soon have transpired that Mr Courtenay's allegations were suspect. At paras. 122-123 the Judge gave full reasons why that was so. I need not set them out in detail, because they were not challenged as such, but they include: the discrepancies between Mr Courtenay's allegations as made to Mr Spires and to Mr Wood; his self-evidently over-stated allegations about the poor state of relations between the UK and Belize; the fact that the allegations about his conduct with women were stale and had not been made by anyone in the course of Mr Evans's visit or the management review, even though the Claimant had been criticised in other respects. All of those points, and others, the Judge said, should have encouraged "a healthy scepticism". He also noted that enquiries with third parties, including "maybe" the Prime Minister, would have dispelled the picture that UK-Belizean relations were seriously at risk. And he pointed out that the FCO's own files would have shown that Mr Courtenay "had form" for over-reacting to perceived slights (see para. 30 above). He concluded, at para. 123:

> "In my view elementary investigation would have demonstrated that some of the less serious allegations were untrue, and that some of the more serious could be discounted. The reputational damage supposedly being suffered by the United Kingdom was significantly overblown."

(6) His conclusion, as recorded by way of anticipation at para. 117, was that:

> "If the FCO had afforded the claimant the fair treatment he was entitled to under his contract of employment with the FCO the allegations would have taken on a quite different complexion and he would have never have been withdrawn from post."

47. At para. 125 the Judge summarised his overall conclusion on the decision to withdraw the Claimant as follows:

> "Thus before the decision to withdraw the claimant from post there should have been some basic analysis of Mr Courtenay's allegations, including some discussion with the claimant. The failure to do this was a breach of the obligation of fair treatment which the FCO owed him under his contract of employment. In

> my judgment if the FCO had complied with its contractual obligations there would have been no basis for the withdrawal decision."

48. The Judge acknowledged that even if the Claimant had not been withdrawn a disciplinary investigation might have been necessary. But he said that if the FCO had acted made some preliminary enquiries and put the allegations to the Claimant the shape of any such investigation would have been different. It would have been apparent that Mr Courtenay's allegations about the treatment of the Commission staff added nothing to what was already known and which had been dealt with only weeks previously by giving him an informal warning: no investigation would have been required or undertaken. The only alleged misconduct potentially requiring a disciplinary investigation would be Mr Courtenay's allegations about the Claimant's behaviour towards women. Any such investigation would have been much less substantial than that which Mr Gifford in fact carried out.

(b) "The Investigation/Disciplinary Process"

49. At paras. 126-128 of his judgment the Judge summarised the criticisms which Ms McNeill had made of both stages of the disciplinary process under three heads – (i) that the investigation was methodologically flawed; (ii) that there had been various specific unfairnesses in the process; and (iii) that Mr Gifford should not on the evidence that he heard have found that there was a case to answer on either Mr Courtenay's allegations of sexual misconduct or the allegations of bullying and harassing the staff – and, as regards the latter, that he should not in any event have made a finding of misconduct.

50. At paras. 129-130 of his judgment the Judge rejected those criticisms. Overall, he found that Mr Gifford had acted fairly and conscientiously, and he rejected the complaints summarised as (i)-(iii) above. He did however find, at para. 131, that it was "a breach of a basic principle of natural justice" for Mr Gifford to conduct both the fact-finding investigation and the disciplinary hearing.

(c) Damages

51. Under this head the Judge considered first whether the two breaches of contract which he had found – that is, the wrongful withdrawal of the Claimant from his post in Belize; and the fact that Mr Gifford had conducted both the investigation and the disciplinary hearing – had caused all or any of the loss and damage claimed for; and, secondly, whether, to the extent that they had, the damage in question was too remote to be recoverable.

52. As regards causation, the Judge's findings can be summarised as follows:

(1) The Claimant's withdrawal from the post of High Commissioner plainly caused, subject to (3) below, the loss of the enhanced remuneration and allowances that he would have received in that post. This is uncontroversial.

(2) His depressive illness was caused by the withdrawal. As the Judge put it at para. 132:

> "The depression he began to suffer is also attributable to the decision to withdraw; if he had not been removed from his position as High Commissioner to Belize he would never have been affected."

(3) His cardiac illness in early 2009 did not break the chain of causation. In making that finding, at para. 132, the Judge refers back to a passage in his factual findings, at para. 69, where he says:

> "The claimant's evidence was that he recovered well [from his surgery] and would have returned to post within a reasonable period. At the trial Ms Le Jeune's evidence was that, had the claimant still been in post, he would have been short-toured at that point on medical grounds. Ms Le Jeune's evidence is careful and considered, referring to the variety of factors she would have taken into account. Very fairly, she concedes that her assessment is necessarily speculative. That is my view as well. In any event, if the claimant had been short-toured there is no reason to suppose that he would not have resumed his career if the withdrawal from post and subsequent disciplinary process had not taken place. Whether he would have served in further postings overseas is a more difficult question. At the time there were some 27 persons in the corporate pool at the claimant's level and the evidence is that he would have faced tough competition for an overseas posting. Given his success against strong competition in 2007, it seems to me he had a reasonable chance of a further foreign posting at that point."

(4) Mr Gifford's conducting both stages of the process caused no loss, since the conclusion which he reached was "almost inevitable" given the facts found on the investigation: see para. 133. Accordingly:

> "The claimant's case for damages for breach of contract rests on the decision to withdraw him from post alone."

53. As regards remoteness, the Judge's findings were:

(1) The Claimant's financial losses – that is, the loss of remuneration and allowances as High Commissioner – were not too remote: see para. 134. This too is not controversial.

(2) As regards his depressive illness, and thus also its pecuniary consequences, Mr Payne had argued that the Claimant had over the course of his career shown himself robust, referring in particular to his reaction to an episode in 2001 when on a posting in the Seychelles he had been found to have bullied some subordinate staff: he had taken the criticism well. He had submitted that it was not reasonably foreseeable at the date of his appointment to Belize that a subsequent unfair withdrawal would lead to him developing a psychiatric illness.

(3) The Judge rejected that argument. At para. 137, having distinguished the case of *Bristol City Council v Deadman* (see paras. 111-113 below) on which Mr Payne had relied, he said:

> " ... The circumstances of this case are much more analogous to *Gogay v Hertfordshire County Council* [2000] IRLR 703, where it was held that it was reasonably foreseeable that a knee-jerk reaction by employers in the implementation of disciplinary procedures, carried out without any proper analysis and leading to serious adverse consequences for an employee, might cause psychological damage. The claimant had an ostensible robustness but the events in the Seychelles were far removed from what happened in Belize. To my mind it could reasonably be contemplated when the claimant was appointed as High Commissioner in 2007 that depression would be a not unlikely result of a knee-jerk withdrawal from post."

"BREACH OF DUTY"

54. The Judge introduced this part of his judgment, at para. 141, as follows:

> "Breach of duty to the claimant was the second prong to Ms McNeill QC's submission on damages. The duty was derived from the implied term of mutual trust and confidence or from the duty of care which the FCO owed as employer. Given my findings on breach of contract there is no need for me to reach a final conclusion on all aspects of the parties' submissions relating to it. In Ms McNeill QC's submission there were a series of matters additional to withdrawing the claimant from post and the disciplinary inquiry which meant that the FCO's conduct constituted a breach of its duty to the claimant. Moreover, the FCO did not take adequate steps to minimise the risk of the claimant developing depression."

55. At para. 142 of his judgment the Judge identified the particular respects in which the FCO was said to have fallen short of the duty identified in the final sentence of para. 141 – that is, to take adequate steps to minimise the risk of the Claimant developing depression. I need not summarise them here. At para. 143 he upheld those criticisms in one respect. He said:

> "In my judgment the FCO was in breach of its duty to the claimant in withdrawing him from post without informing him of the case against him. It was only at the interview with Mr Gifford in early July that he became aware of the details of the allegations against him. This is not the way an employer concerned with an employee's welfare would act. Causation and remoteness in relation to this track my earlier findings."

However he rejected the remainder of the allegations of breach, holding at para. 144 that the FCO had behaved reasonably in each of the other respects complained of. I need not give any details, save to note that he relied among other things on the support given to the Claimant by Ms Nelson. That was sufficient to dispose of the

claims under this head. However, he went on, at paras. 145-146, to consider the issue of remoteness if any breach were established. Although the paragraphs do not contain a wholly unequivocal finding, their intended effect is plainly that it was not reasonably foreseeable that breaches of the kind alleged would cause a depressive illness. That finding was of course academic in the light of his earlier findings under the breach of contract head.

56. It is convenient to deal here with a submission made by Mr Platt to the effect that the Judge did not in this part of his judgment make any finding of "breach of duty" at all. He relied on the Judge's observation in the third sentence of para. 141 that in the light of his findings on the breach of contract claim there was no need for him to reach a final conclusion on all aspects of the parties' submissions about breach of duty. But in my view it is clear that para. 143 is a finding that the unfair withdrawal of the Claimant from his posting was a breach of duty – that is, following his structure, both a breach of the *Malik* term and a breach of the common law duty of care. The Judge may not, as he said, have needed to make such a finding; but he did.

SUMMARY

57. The Judge summarised his overall conclusion at para. 147 of his judgment, as follows:

> "The FCO acted in breach of contract and in breach of its duty of care in withdrawing the claimant from his post as High Commissioner to Belize in 2008 without affording him fair treatment."

That formulation involves the rejection of the Claimant's case based on his treatment in the subsequent period.

(A) THE FCO's APPEAL

58. I take first the FCO's challenge to the Judge's finding that its treatment of the Claimant was unfair, to which I will refer for convenience as his finding of breach. I will then take in turn the issues of causation and remoteness of loss. This classification is strictly inaccurate as regards the common law duty of care because if the risk of psychiatric injury is too remote no duty to take steps to avoid it will arise, and there can thus be no question of breach; but that refinement can be ignored for present purposes.

(1) BREACH

The Withdrawal Decision

59. The pleaded ground of appeal is that the Judge applied the wrong test to the question whether the FCO's discretion to withdraw the Claimant was fair. Borrowing language from the case-law on unfair dismissal, Mr Platt submitted that the Judge had failed to recognise that there was a "range of reasonable responses" available to the FCO in the circumstances in which it found itself after Mr Wood had spoken to Mr Courtenay, and that his decision that immediate withdrawal was unfair constituted the vice of "substitution" – that is, of holding that the FCO's decision was unfair only because it was not the decision that he himself would have made. He also argued that

it was wrong of the Judge to focus only on the withdrawal of the Claimant from his post, and that it was necessary to assess the fairness of his treatment as a whole: in particular, it was relevant that he subsequently went through a disciplinary process which the Judge found to be fair (save in one purely procedural respect) and that he benefited from the services of the FCO's Welfare Department.

60. I do not accept that the Judge misdirected himself in any way. He recognised explicitly that the FCO enjoyed a broad discretion whether to withdraw a post-holder for operational reasons and that sometimes speed would be important and might preclude any effective investigation. But that is not in any way inconsistent with his finding that the way that that discretion was exercised in the particular circumstances of the Claimant's case was unfair: indeed that finding could be expressed as a finding that the Claimant's immediate withdrawal, without any chance to rebut the allegations made, was "outside the range of reasonable responses". In judging the question of fairness it was irrelevant that the Claimant may have been treated fairly in the subsequent disciplinary proceedings: his definitive withdrawal from his current post was a distinct and complete act. The truth is that the FCO's real case on this point is simply that the Judge's decision that it had acted unfairly was wrong.

61. Since the hearing the FCO has drawn to our attention the decision of this Court, handed down on 7 October 2014, in *Coventry University v Mian* [2014] EWCA Civ 1275, which, like the present case, involved a claim that an employer had acted in breach of its duty of care to the employee in bringing disciplinary proceedings without any sufficient basis. It was common ground that the correct test in deciding whether the duty had been breached was "whether the decision to instigate disciplinary proceedings was outside the range of reasonable decisions open to an employer in the circumstances": see para. 31. But that does not help the FCO in this case since I believe that that is in substance the test which the Judge applied.

62. Turning, therefore, to the real question – that is, whether the Judge's decision was wrong – Mr Platt submitted that the FCO was entitled to take the view that the Claimant's immediate withdrawal was necessary. He contended that the misconduct alleged by Mr Courtenay was very grave; that on the basis of what he had told Mr Wood serious damage had already been done to UK-Belize relations; that Mr Courtenay, despite being in opposition, remained a key figure in the negotiations to end the long-running border dispute with Guatemala; and that the damage to the Claimant's role if the allegations surfaced would render his position untenable. And all this was exacerbated by the clear evidence that the High Commission was not a happy ship.

63. I am prepared to accept all that, though I am bound to say that the gravity of the allegations and their alleged consequences seem to me, as they did to the Judge, rather overstated. But none of it meets the essential point that it was unnecessary for the FCO to act as precipitately as it did, without any further inquiries of any kind and without even putting the allegations to the Claimant. It is indeed rather surprising to see the FCO making a decision of this gravity on the basis of a single telephone conversation with a politician in the host country: even apart from the question of fairness to the post-holder, one might have expected some consideration of whether the informant might have his own agenda or be otherwise unreliable.

64. Mr Platt's principal answer to this fundamental difficulty in his case depended on Mr Wood's promise to Mr Courtenay that he would not "play back" his allegations directly to the Claimant. That promise, he submitted, in practice precluded those allegations being put to the Claimant in any useful way. (He made essentially the same point about the allegations by the staff; but that is not of real significance, since, as already noted, the FCO accepted that it was not those which led to the Claimant's withdrawal.)

65. I should start by observing that the concern that putting Mr Courtenay's allegations to the Claimant would involve a breach of confidence could only be a partial answer to the unfairness case: it does not address the failure to make any other enquiries. But I am not persuaded that it is a good point in any event. The Judge's observation at para. 118 of his judgment that "fairness trumps confidentiality" may be rather too broadly expressed, but he was entitled to take the view in this case that if the FCO was going to take so drastic a step it should have found a way of dealing with the confidentiality issue. One possibility would have been to disclose the content of Mr Courtenay's allegations without revealing their source. But the more direct course was to seek Mr Courtenay's consent to disclosure. As the Judge pointed out, Mr Courtenay was bound to appreciate that if any action were to be taken on his allegations his identity would have to emerge; and he made no demur when Mr Gifford asked him to go on the record only a couple of weeks later: see para. 29 above.

66. Mr Platt also emphasised that this was a withdrawal for operational reasons, which did not depend on the Claimant being guilty of misconduct and need have no adverse effect on his career. The Judge's requirement that the FCO conduct a "preliminary investigation" before making such a decision was an inappropriate inhibition on an operational decision and involved importing a process appropriate only to misconduct proceedings. Such a submission might be appropriate in some circumstances, but it has no force on the facts of this case. I accept that the decision could be classified as operational, because the FCO, at least arguably, proceeded on the basis that the making of the allegations by Mr Courtenay made the Claimant's position untenable irrespective of whether the truth of those allegations had yet been established. But "misconduct" and "operational" cannot be so neatly differentiated. Even if the withdrawal was classified as operational the Claimant would not have been withdrawn unless the FCO had believed that the allegations against him were *potentially* reliable, which in practice meant that it was committed to a misconduct investigation. And the impact on the Claimant would be the same: he would be losing his post, in advance of any disciplinary process and whatever the outcome of that process, because serious allegations of misconduct had been made against him. The requirements of fairness cannot be evaded simply by the use of a different label. The Judge did not say that the whole panoply of a fact-finding investigation was required. He said only that the FCO should have made "some preliminary investigation" and exercised "some critical judgement".

67. I would for those reasons dismiss the FCO's challenge to the Judge's finding that the Claimant's withdrawal, carried out in the way that it was, was unfair.

Mr Gifford's Dual Role

68. Cranston J's finding at para. 131 of his judgment that it was unfair for Mr Gifford to act as both fact-finder and disciplinary decision-taker has no practical consequences, for the reasons given at para. 52 (4) above. However, I should say that I respectfully disagree with that finding. In the circumstances I need give my reasons only briefly.

69. I acknowledge that in the more elaborate forms of disciplinary procedure which provide for distinct investigatory and decision-making stages it is commonly stipulated that the decision-taker should be someone who has not been involved at the investigatory stage. That is now also what ACAS recommends. Its Code of Practice on Disciplinary and Grievance Procedures published in April 2009 says, at para. 6:

> "In misconduct cases, where practicable, different people should carry out the investigation and disciplinary hearing."

But I cannot agree that that represents "a basic principle of natural justice". I note that earlier editions of the ACAS Code contained no such recommendation. No doubt there is a risk that the process of investigating the primary facts may make it more difficult for the person responsible for the ultimate decision to step back from his work and take an objective view of the evidence produced; and splitting the two roles enhances "transparency". It also approximates to the conduct of criminal proceedings, with the separate roles of prosecutor and Judge. But there can also be disadvantages, particularly where (unlike in Court proceedings) the decision-taker does not himself or herself see the witnesses and is reliant on the investigator's assessment of them. In any event disciplinary proceedings in an employment law context are of a fundamentally different nature from criminal, or civil, proceedings in the Courts: see the observations of Elias LJ in *Mattu v University Hospitals Coventry and Warwickshire NHS Trust* [2012] EWCA Civ 641, [2013] ICR 270, at para. 101 (p. 299) and *Christou v Haringey London Borough Council* [2013] EWCA Civ 178, [2014] QB 131, at para. 48 (pp. 142-3). I would regard the process now recommended by ACAS as representing good practice but not as a requirement of fairness in every case.

70. In the present case a considered view was taken by the FCO's conduct adviser that Mr Gifford's knowledge of the detail and his experience of having interviewed the witnesses was an important advantage which justified him taking the role of decision-taker. I can see nothing wrong in that.

(2) CAUSATION

71. Mr Platt made four distinct points under this head. I take them in turn.

72. First, he submitted that Mr Gifford carried out, within two or three weeks of the withdrawal decision, the very investigation which the Judge said should have occurred before that decision and found that there was a case to answer on both of the matters that led to his withdrawal; and that it followed that if the FCO had done what the Judge said that fairness required the decision would have been the same.

73. I do not accept this. At paras. 122-123 of the judgment (see para. 46 (5) above) the Judge considered carefully what Ms Le Jeune and her colleagues would have decided

if they had made the preliminary enquiries which he believed were necessary, and he gave reasons for concluding that if they had done so Mr Courtenay's allegations would have "taken on a quite different complexion" and the Claimant would not have been withdrawn. Those reasons have not been challenged as such, and in any event I can see nothing wrong with them. If they stand up, it seems to me no answer to say that Mr Gifford, considering a different question in different circumstances, concluded that there was a "case to answer". (I also note, though this is not of central importance, that as regards the allegations of the Claimant's behaviour towards women – which is what matters as regards the withdrawal decision – his conclusion was in fairly equivocal terms: see para. 32 above).

74. Secondly, Mr Platt submitted that Mr Gifford's finding of bullying behaviour towards the Commission staff meant that the Claimant would have been withdrawn at that stage if he had not been withdrawn already. But that comes up against essentially the same difficulty as the previous submission. The Judge found in terms that if the FCO had acted fairly the allegations about the Claimant's conduct towards Commission staff would not have been made the subject of a disciplinary process (see para. 48 above); thus there would have been no misconduct finding against him. That reflects the reality of the matter: the FCO had only weeks previously dealt with essentially the same allegations by means of an informal warning, and nothing had changed since then.

75. Thirdly, he challenged the Judge's finding that if the Claimant had not been withdrawn he would never have been affected by depression. He referred to the joint report which was before the Court from two psychiatrists, Dr Stuart Turner and Dr Martin Baggaley. They were asked what was the cause of the Claimant's depression. Their answer reads as follows:

> "In this case, Dr Turner believes the cause of the clinical depression was the outcome of the formal investigation, with its findings of misconduct and the final written warning.
>
> Dr Baggaley considers that several factors had a cumulative impact in causing the depression although he accepts that had the Claimant been exonerated in August 2008, and found another suitable posting, he would probably not have become depressed. Dr Baggaley considers that of particular importance was Mr Yapp's sense of injustice and a perceived failure by his employers to follow due process. Dr Baggaley considers that his treatment by the media contributed significantly to his stress as did his suspension."

Mr Platt's submission is encapsulated at paras. 79-80 of the FCO's skeleton argument, as follows:

> "79. … [T]he learned Judge's conclusion that had the Respondent not been withdrawn from post "*he would never have been affected*" is inconsistent with the joint medical evidence to the effect that it was the later decision on the disciplinary investigation and not the withdrawal *per se* which caused his psychiatric injury … . The joint medical evidence

> made clear that had the Respondent been exonerated and found an alternative post he would not have developed depression, and that he did not develop depression (as opposed to stress) for at least 2 months after the decision to withdraw him (during which time many additional stressors accumulated).
>
> 80. Accordingly, there was no injury resultant from the identified breach of contract and the learned Judge should have so found."

76. I do not accept this. The Judge evidently accepted Dr Baggaley's opinion that several factors accumulated to cause the Claimant's illness and that one of those factors was his unfair treatment at the start of the story (which was plainly a, if not the, major component in his sense of injustice and his perception that he had been denied due process). He was entitled to accept that evidence. The fact that depression did not develop straightaway does not preclude such a conclusion. Nor does Dr Baggaley's opinion that if the Claimant had been promptly exonerated and had been found another post he would not have developed depression mean that the fact that that did not happen was the sole cause of his illness.

77. Fourthly, he argued that the Judge was wrong to find that the Claimant's cardiac illness did not break the chain of causation. Ms Le Jeune's evidence had been that if the Claimant had still been in post in Belize when that illness occurred he would have had to be "short-toured". She had given reasons for that evidence which the Judge had described as "cogent and considered", and there was no basis on which he could have rejected it. It was no answer to say that it was "speculative": any evidence about the future necessarily is.

78. I cannot accept this submission either. This was a claim for future loss of earnings. The conventional approach in such a case is to calculate, or assess, the earnings that would have been received over the period in question and then to discount for contingencies – that is, for the chance that the employee might not have received those earnings, in whole or in part, for some reason for which the defendant is not responsible.[2] Death or serious illness is the classic example of such a contingency. It is not necessary or appropriate for the Court to decide, applying the balance of probabilities, whether such a contingency will or will not occur: it is a matter of assessing the chances, which will of course generally have to be done on a very broad-brush basis. What the Judge was in practice being asked to do when it was submitted that the Claimant's illness "broke the chain of causation" was to find that there was no realistic chance – that is, none that was sufficiently substantial to sound in damages – that he could have completed his posting in Belize or obtained another overseas posting (which is what produces the higher level of earnings); in other words, he was being asked to find as a fact that he would have been short-toured and also that he would have been unfit for a further overseas posting. Once that is understood, it is clear that the Judge's approach was correct. His finding that whether the Claimant would have been short-toured was "speculative" meant that he was not prepared to make a positive finding that it would have happened; and he went on to

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[2] This is of course an over-simplified account, addressed simply to the issue with which we are concerned here.

find that even if the Claimant would have been short-toured he had "a reasonable chance" of a further foreign posting once he had recovered. If the Judge had had in due course to assess damages he would have had to decide what discount was appropriate to reflect those findings; but that never occurred because the parties agreed quantum (see para. 4 above).

(3) REMOTENESS

The Submissions in Outline

79. The issue here is whether the Judge was entitled to award the Claimant damages for his depressive illness, and thus also for the pecuniary losses that flowed from it. It is the FCO's case that even if that illness was caused by any of the breaches[3] which the Judge found it was too remote a consequence to sound in damages. Mr Platt addressed the position separately in contract and in tort.

80. *Contract.* Mr Platt's primary case was advanced on the basis that the claims on which the Claimant had succeeded (ignoring the claim based on Mr Gifford conducting both stages of the procedure, where he had succeeded on breach but lost on causation) were purely contractual in character and that accordingly the relevant rules as to remoteness were those applying to breaches of contract. He submitted that as a matter of law damages for psychiatric illness were irrecoverable in contract where the claim could not succeed in tort. But he submitted in the alternative that the claim should in any event have been held to be too remote on the facts of the present case. There was nothing in the Claimant's history or the medical evidence to suggest that he was vulnerable to developing a psychiatric illness if treated unfairly in the way that (on the Judge's findings) he was; and in those circumstances there was no basis for a finding that it was "not unlikely" that he would do so. On the contrary, it was indeed unlikely: stress and upset were one thing, but clinical depression was another.

81. *Tort*. As already discussed, Mr Platt submitted that the Judge had not made any finding that the FCO was in breach of its duty of care in tort, but for the reasons given at para. 56 above I would reject that submission. However, he also submitted that even if the test of remoteness in tort – i.e. whether the injury claimed for was reasonably foreseeable – fell to be applied the claim was still too remote. He relied on the guidance in the leading stress-at-work case of *Hatton v Sutherland* [2002] EWCA Civ 76, [2002] ICR 613, which I set out at para. 97 below. He made essentially the same points about pre-existing vulnerability as he had made in relation to the claim in contract. But he also relied in particular on an observation in *Hatton* to the effect that an employer who offers his employees a confidential advice service, with referral to appropriate counselling or treatment services, is unlikely to be found in breach of duty as a result of exposing them to stress at work: he pointed out that the Claimant was offered, and took advantage of, precisely such a service (see para. 27 above). As I have already pointed out, if Mr Platt's submissions on this are right they not only go to quantum but undermine the claim itself in so far as it is based on the

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[3] Strictly, the word "breaches" begs the question as regards the common law duty of care, since, as already noted, the duty to take reasonable steps to prevent psychiatric injury will not arise unless such injury is reasonably foreseeable.

common law duty of care, since the duty to take reasonable steps to prevent psychiatric injury only arises if such injury is reasonably foreseeable.

82. In response Ms McNeill pointed out that, contrary to Mr Platt's assertion, the Judge had found that the Claimant could recover in tort for his unfair withdrawal. But she submitted that in any event, whether applying the contractual or the tortious test of remoteness, the Judge had been amply entitled to find that it was not unlikely, or was reasonably foreseeable, that the Claimant would develop a depressive illness as a result of being withdrawn from his post unfairly. She submitted that this case was of a very different character from *Hatton* and the other stress-at-work cases. It was not a case of an employer failing to protect an employee from the effect of the normal pressures of his job. Rather, it was a case of a one-off act of serious and career-threatening unfairness: it was in no way surprising that it should have had such an impact on him as to cause a depressive illness. The Judge had been right to see a close analogy with the decision in *Gogay*, where an employee had recovered damages for a psychiatric illness caused by a "knee-jerk" disciplinary suspension. Ms McNeill referred us to the judgment of Elias LJ in *Crawford v Suffolk Mental Health Partnership NHS Trust* [2012] EWCA Civ 138, [2012] IRLR 402, where he observed that suspension "can be psychologically very damaging": see para. 73 (p. 409). What happened to the Claimant in the present case was indeed liable to be more damaging than an ordinary disciplinary suspension, because his withdrawal from post was permanent: the situation was closer to that of an unfair dismissal.

83. Those submissions involved extensive reference to authority, and before considering them I shall have to review in some detail the cases to which we were taken.

The Case-Law

84. There was no dispute before us as to the general principles governing remoteness in contract and in tort and we were not taken to *The Heron II* [1969] 1 AC 350 or *The Wagon Mound (no. 2)* [1967] AC 617, though both were piously included in the bundle of authorities. It was accepted that the essential question in contract is whether the damage in question was of a kind which was "not unlikely" to result[4] and that in tort it is whether the damage was reasonably foreseeable; and that the former test requires a higher degree of likelihood of damage occurring than the latter.

85. We were, however, referred by Ms McNeill to the decision of this Court in *Attia v British Gas plc* [1988] QB 304, as a statement of the correct approach to the question of the foreseeability of psychiatric illness in claims brought in tort. In that case the plaintiff suffered a psychiatric illness as a result of seeing her house seriously damaged by a fire caused by the defendant's negligence. One of the issues was whether such a reaction was reasonably foreseeable. As to that, Dillon LJ said, at p. 312 F-H:

> "Whether it was reasonably foreseeable to the reasonable man – whether a reasonable onlooker, or, in the context of the present case, a reasonable gas fitter employed by the defendants

[4] This is admittedly a shorthand, but there is no need to enter here into the debate about how best to encapsulate the test enunciated in *The Heron II*.

> to work in the plaintiff's house – is to be decided, not on the evidence of psychiatrists as to the degree of probability that the particular cause would produce the particular effect in a person of normal disposition or customary phlegm, but by the judge, relying on his own opinion of the operation of cause and effect in psychiatric medicine, treating himself as the reasonable man, and forming his own view from the primary facts as to whether the chain of cause and effect was reasonably foreseeable: see per Lord Bridge in *McLoughlin v. O'Brian* [1983] 1 AC 410, 432C–D. The good sense of the judge is, it would seem, to be enlightened by progressive awareness of mental illness: per Lord Bridge at p. 443D."

Bingham LJ said, at p. 319 E:

> "So the question in any case such as this, applying the ordinary test of remoteness in tort, is whether the defendant should reasonably have contemplated psychiatric damage to the plaintiff as a real, even if unlikely, result of careless conduct on his part."

One of the issues in the appeal was whether damages could be recovered for "nervous shock" caused by witnessing damage to property rather than some physical injury (as in cases like *Bourhill v Young* [1943] AC 42). In discussing that argument Bingham LJ gave two examples to which Ms McNeill attached some importance. He said, at p. 320 E-F:

> "Suppose, for example, that a scholar's life's work of research or composition were destroyed before his eyes as a result of a defendant's careless conduct, causing the scholar to suffer reasonably foreseeable psychiatric damage. Or suppose that a householder returned home to find that his most cherished possessions had been destroyed through the carelessness of an intruder in starting a fire or leaving a tap running, causing reasonably foreseeable psychiatric damage to the owner. I do not think a legal principle which forbade recovery in these circumstances could be supported."

86. Ms McNeill also referred to *McLoughlin v Jones* [2002] QB 1312, where Brooke LJ contemplated that it might be held to be foreseeable – though he did not himself decide – that a defendant who was imprisoned following a wrongful conviction as a result of his solicitor's negligence might recover for a psychiatric illness engendered by his "burning sense of injustice": see para. 43 (p. 1328 B-C).

87. The remaining authorities to which we were referred all concerned claims for damages for psychiatric illness brought by employees against their employers. I take them in chronological order.

Walker

88. In *Walker v Northumberland County Council* [1995] ICR 702 the plaintiff was a council employee who had suffered a nervous breakdown[5] as a result of an excessive workload. He returned to work after a time but no adjustments were made to his workload and he suffered a further breakdown. Colman J held that as a matter of principle an employer owed his employees a duty of care to prevent not only physical but also psychiatric injury where the risk of such injury was reasonably foreseeable. He held that no such risk was foreseeable prior to the plaintiff's first breakdown; but the position changed once that breakdown had occurred, and he found the council liable for the consequences of the second breakdown because it had not taken reasonable steps to reduce the risk. I should note that, although the claim appears to have been formulated in tort, Colman J pointed out (at p. 721A) that "the scope of the duty of care owed to an employee to take reasonable steps to provide a safe system of work is co-extensive with the scope of the implied term as to the employee's safety in the contract of employment".

Gogay

89. In *Gogay v Hertfordshire County Council* [2000] IRLR 703 the claimant was a care worker in a council children's home who was suspended and made the subject of a disciplinary investigation following an allegation that she had sexually abused one of the children in the home. There were no reasonable grounds for allegation or the suspension. She developed a depressive illness in consequence. In the County Court the council was held liable for breach of contract, on the basis that the claimant's unjustified suspension was a breach of the *Malik* term: no breach of the common law duty of care was alleged. At a subsequent remedy hearing she was awarded damages for personal injury, i.e. her psychiatric illness, and for the loss of earnings which she had suffered in consequence.

90. The council appealed against both the liability and the damages decisions. The appeal was dismissed in both respects. I need say nothing about the liability appeal, save to note that Hale LJ (who delivered the only substantive judgment) described the decision to suspend the claimant as a "knee-jerk reaction", which is evidently the origin of the Judge's use of that phrase in para. 137 of his judgment. As regards damages, the council argued that the Judge's decision was contrary to the principle, originating in *Addis v Gramophone Co. Ltd.* [1909] AC 488 and more recently enunciated in *Bliss v South East Thames Regional Health Authority* [1985] IRLR 308, that an employee cannot recover damages for distress or injured feelings arising from a breach of contract on the part of the employer. Hale LJ held that cases of that kind must be distinguished from cases involving a recognised psychiatric illness and that psychiatric injury was not in principle different from physical injury: see paras. 62-65 (pp. 710-711). At para. 63 she notes that such damages were awarded in *Walker* and refers to Colman J's observation that the scope of the duties in tort and in contract is the same. She continues:

> "The duty in this case is owed purely in contract, rather than in tort, but there can be no more reason to distinguish between

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5 This is rather old-fashioned terminology, but it clearly referred to a depressive illness.

> physical and psychiatric injury in this case than there is in the case of other breaches of an employer's duties."

91. *Gogay* is thus clear authority for the proposition that there is no bar in principle to an employee recovering damages for psychiatric injury caused by a breach of the *Malik* term. It is accordingly a complete answer to Mr Platt's submission (see para. 80 above) that such damages are irrecoverable in principle.

92. Beyond that, however, Ms McNeill relied on *Gogay* as an example of a case where the claimant recovered damages for psychiatric injury as a result of a one-off act of unfairness without, so far as appears, any need to prove a known vulnerability of the type that was decisive in *Walker* and which was treated, later, in *Hatton* as (usually) a pre-requisite of liability. But it is important to appreciate that *Gogay* gives no real guidance about the approach to remoteness in cases of this kind. The issue did apparently arise, but all that Hale LJ says about it, at para. 70 of the judgment, is:

> "Finally, [counsel for the employer] sought to argue that such losses were not foreseeable at the time the contract was made. To that extent, of course, there is a difference between breach of duty in tort and breach of duty in contract. However, the judge made a clear finding that they were foreseeable at the relevant time, and that is a finding of fact with which this court will not interfere."

We do not have the first-instance judgment on damages, so we do not know on what basis the Judge resolved the issue of "foreseeability" in the claimant's favour.[6] It is, however, worth noting that it appears from the recitation of the history in the judgment (see para. 10) there had been an episode a few months previously when the claimant had been so stressed by the behaviour of the child whom she was subsequently suspected of abusing that she had had to take a week off work; and her manager had sent her a letter of support. There may therefore have been a reason why the employer should have been aware that she was peculiarly vulnerable.

Johnson v Unisys

93. In *Johnson v Unisys Ltd* [2001] UKHL 13, [2003] 1 AC 518, the claimant brought a claim in the County Court for psychiatric injury caused by his unfair dismissal, which he characterised as involving both a breach of the *Malik* term and breach of a duty of care owed in tort. The essential unfairness of which he complained was his dismissal without a proper opportunity to rebut the case against him. There is obviously some parallel with the present case.

94. The House of Lords upheld the decision of the judge that the claim should be struck out. The majority did so on the basis that such a claim was inconsistent with the unfair dismissal regime under the Employment Rights Act 1996. But the basis of Lord Steyn's reasoning was that the claim was too remote. At para. 29 of his opinion (p. 537 E-H) he recited the claimant's pleaded case that he had a previous history of work-related stress, of which the employers were aware; but he held that the

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6 On the face of it, the claim being in contract, the question should have been not whether the injury was foreseeable but whether it was "not unlikely". But weight cannot be placed on a passing reference of this kind.

allegations of knowledge were inadequate and the episode relied on was too long ago for psychiatric injury to be considered sufficiently likely.

95. Lord Steyn's reasoning is very abbreviated, though it can be supplemented to a limited extent by reference to the decision of the Court of Appeal, which also (albeit *obiter*) held the claim to be too remote: Lord Steyn expressly approved the reasoning of Lord Woolf MR at [1999] ICR 809, at p. 817 C-E. Nevertheless, it is clear that his *ratio* necessarily assumes that the claimant's allegation that he lost his job as a result of unfair treatment was not by itself enough to support a finding that he was sufficiently likely to suffer psychiatric injury, and that evidence of some known pre-existing vulnerability was required. It seems probable that Lord Steyn had in mind the decision in *Walker*, to which he had referred earlier in his opinion (see para. 19, at p. 532 C-D). The other members of the House did not address this aspect.

96. It is right to say that Ms McNeill drew our attention to the fact that Lord Steyn referred to *Gogay*, and with evident approval: again, see para. 19 of his opinion. But that does not advance the argument. It is clear that he referred to *Gogay* simply as an example of a successful claim for psychiatric injury in the employment field, coupling it with *Walker*: the context required no consideration of the remoteness issue.

Hatton/Barber

97. In *Hatton v Sutherland* [2002] EWCA Civ 76, [2002] ICR 613, this Court heard four appeals concerning claims for damages for psychiatric illness caused by over-work or other kinds of inability to cope with pressure at work – i.e. cases of a similar character to *Walker*. The judgment of the Court was delivered by Hale LJ. It begins at paras. 3-17 (pp. 617-622) with a discussion of some of the features of stress at work claims. At paras. 18-42 (pp. 622-631) there is a review of the applicable law: among other things the Court confirmed, upholding *Walker*, "that the ordinary principles of employers' liability [apply] to a claim for psychiatric illness arising from employment" (see paras. 19-22 (pp. 623-4)). (Strictly, this did not fall for decision, since the employers did not argue to the contrary. But the Court believed that it was already the subject of binding authority, referring to *Petch v Customs and Excise Commissioners* [1993] ICR 789 and *Garrett v Camden London Borough Council* [2001] EWCA Civ 395.) This is followed at para. 43 (pp. 631-2) by a summary stating sixteen "practical propositions". I need only set out the following:

> " (1) There are no special control mechanisms applying to claims for psychiatric (or physical) illness or injury arising from the stress of doing the work the employee is required to do (para 22). The ordinary principles of employer's liability apply (para 20).
>
> (2) The threshold question is whether this kind of harm to this particular employee was reasonably foreseeable (para 23): this has two components (a) an injury to health (as distinct from occupational stress) which (b) is attributable to stress at work (as distinct from other factors) (para 25).
>
> (3) Foreseeability depends upon what the employer knows (or ought reasonably to know) about the individual employee.

> Because of the nature of mental disorder, it is harder to foresee than physical injury, but may be easier to foresee in a known individual than in the population at large (para 23). An employer is usually entitled to assume that the employee can withstand the normal pressures of the job unless he knows of some particular problem or vulnerability (para 29).
>
> (4)-(10) ...
>
> (11) An employer who offers a confidential advice service, with referral to appropriate counselling or treatment services, is unlikely to be found in breach of duty (paras 17 and 33).
>
> (12)-(16) ..."

It is proposition (3) on which Mr Platt primarily relies, and specifically on the point that psychiatric injury will not (usually) be foreseeable by an employer unless he is aware of some previous problem or vulnerability. But he also relies on proposition (11).

98. The Court then proceeded to consider the individual claims. In three cases the employer's appeal was allowed. One of those three cases was the subject of a further appeal to the House of Lords – see *Barber v Somerset County Council* [2004] UKHL 13, [2004] 1 WLR 1089. The appeal was allowed. Lord Walker, who gave the principal opinion for the majority, referred to the Court of Appeal's "propositions" at para. 63 (p. 1109 A-C) as giving "useful practical guidance"; but he added that:

> "... [they] must be read as that, and not as having anything like statutory force. Every case will depend on its own facts."

99. I should make three particular points about *Hatton*:

(1) As a matter of formal analysis, the issues which were before the Court were only concerned with liability. The Court was concerned with the foreseeability of psychiatric injury in the context of whether a duty arose to take steps to protect an employee from such injury; and remoteness of damage was not discussed at all. But, at the risk of spelling out the obvious, the test of foreseeability in that context must be the same when it comes to damages: if the risk of psychiatric injury is sufficiently foreseeable to require reasonable steps to be taken to mitigate it it must also be sufficiently foreseeable to require compensation if it arises. Bingham LJ made this point in *Attia* (see at p. 319 D-E).

(2) Ms McNeill is clearly right to say that the factual context in which the Court was considering foreseeability was that of employees who became ill as a result of what is referred to in proposition (3) as "the normal pressures of the job". It was not concerned as such with the foreseeability of an employee suffering a psychiatric illness as a result of a particular traumatic event in the workplace. However, as discussed below, the case-law has moved on in that respect.

(3) The Court in *Hatton* throughout uses the language of tort. But it was certainly aware that the duty of care in question arose in contract as well. At para. 21 it identified various different categories of cases giving rise to claims of psychiatric injury: the third category is described as "contractual claims by primary victims" and it is said to include the claims which it was considering, together with the other reported cases of claims by employees – *Petch*, *Walker* and *Garrett* (see at p. 624 B-C).

Croft

100. In *Croft v Broadstairs & St Peter's Town Council* [2003] EWCA Civ 676 the claimant, who was employed by the council as its town clerk, was given a formal warning for alleged misconduct. The warning was both unjustified, because there was no sufficient reason to believe that she had committed the misconduct in question, and unfair because she had been given no opportunity to respond to the allegations: the first she heard of them was when she received the letter containing the warning. As a result she suffered a severe depressive illness. The claimant brought proceedings in the County Court alleging both a breach of the *Malik* duty and a breach of the common law duty of care. The Judge's self-direction as to the applicable law was based on *Hatton* (see paras. 8 and 9 of the judgment in this Court), but when he came to make his finding of liability he did so on the basis of a breach of the *Malik* duty, without any express reference to the duty of care (see para. 25). He found that the claimant's illness was a foreseeable consequence of the breach which he had found, and he awarded damages accordingly. The council appealed.

101. The leading judgment in this Court was given by Potter LJ. He noted the apparent mismatch between the Judge's self-direction as to the basis of the claim and the actual finding made; but he observed that "nothing here turned on that point in this appeal, the matter being approached by the Judge overall as set out at paragraphs 8 and 9 above [that is, on the basis of *Hatton*]" – see para. 26 of his judgment. The remainder of the judgment treats the claim as one to which the guidance in *Hatton* applies, albeit one where the breach consisted not of an excessive workload but of the giving of the unfair warning (see para. 9). Potter LJ held that there had been no evidence on which the Judge could have found that the Council was aware of any "psychiatric vulnerability" on the claimant's part. He continued, at para. 73:

> "That left the council in the position of employers who were entitled to expect ordinary robustness in the claimant in an employment context, including disciplinary matters, in which she had certainly never been involved before."

He referred to evidence from a psychiatrist that "in a person of ordinary robustness … a nervous breakdown would not, medically at least, be a foreseeable result of a reprimand as to her conduct". He noted that one of the councillors was aware that the claimant had had counselling, but he said that that

> "… was plainly insufficient to import knowledge on the council's part sufficient to demonstrate the likelihood of feelings of rejection and distress so strong as to trigger a nervous breakdown on receipt of the letter. Such a breakdown was not the reasonably foreseeable product of the conduct

> concerned, and therefore the council are entitled to succeed in the appeal."

102. Tuckey LJ agreed. He said, at para. 76:

> "I have great sympathy for the claimant. The council's letter … and some of their subsequent conduct were unfair and hurtful, but that did not give the claimant a good claim of the kind made on her behalf unless she could show that the council were aware that she was a psychiatrically vulnerable person and that it was foreseeable that their letter and subsequent conduct might cause her to have a nervous breakdown. I think the judge's sympathy for the claimant and his outrage at what had happened led him to make findings on these two issues in favour of the claimant which were not open to him on the evidence for the reasons given by Potter LJ. This case illustrates the need for judges to guard against allowing sympathy and outrage to lead them astray."

103. The appeal was accordingly allowed. Since the claim was treated as being for breach of the common law duty of care, the result of the finding as to recoverable loss meant that the claimant had failed to establish liability, and the claim was dismissed.

104. The significance of *Croft* is that it explicitly applies what I may call the *Hatton* approach in a case which was not concerned with "the normal pressures of the job" but with the imposition of an unfair disciplinary sanction: that is, the Court was not prepared to find that psychiatric injury was a foreseeable consequence of the claimant's unfair treatment in the absence of evidence of some pre-existing vulnerability. It is true that the judgments do not articulate any justification for extending the reach of *Hatton* in this way, but there is no doubt that it is central to the reasoning of the Court. In any event it does not seem to me unreasonable. In the first place, I can see serious difficulties in applying in the real world a distinction between cases of continuous pressures on the one hand and one-off events on the other: an illness might, for example, be precipitated by a single "last straw" event against a background of longer-term pressure. Further, while there is obviously a factual difference between a continuing stressful situation and a one-off traumatic event, I am not convinced that they should be approached with different assumptions as to the potential for psychiatric injury. It is a normal characteristic of the employment relationship that employees may be criticised by the employer and sometimes face disciplinary action or other such procedures. And in an imperfect world it is not uncommon for such criticism or disciplinary process to be flawed to some extent: there will be a spectrum from minor procedural flaws to gross unfairness. The message of *Croft* is that it is not usually foreseeable that even disciplinary action which is quite seriously unfair will lead the employee to develop a psychiatric illness unless there are signs of pre-existing vulnerability. This is of course consistent with the approach of this Court and of Lord Steyn in *Johnson.*

105. The way in which the Court in *Croft* effectively side-lined the claim for breach of the *Malik* term means that the decision gives no guidance on the approach to be taken to a purely contractual claim. I do not think it can be taken as deciding that there is no difference at all between a claim for breach of the common law duty of care and a

claim for breach of the *Malik* term. If the council in *Croft* had been found to have acted in breach of contract the claimant should have succeeded on liability and would have been entitled at least to nominal damages, with issues as to the recoverability of damages for psychiatric injury arising in the context of quantum (as they did in *Gogay*); and to the extent that they did arise they would be governed by the contractual, rather than the tortious, test of remoteness (as occurred in *Deadman* – see paras. 111-113 below). But the Court seems to have thought that those formal differences were not of practical significance in the case before it; and no doubt that was right.

Bonser

106. In *Bonser v RJB Mining (UK) Ltd.* [2003] EWCA Civ 1296, [2003] IRLR 164, this Court allowed the employer's appeal in a case based on a claim that the employee had been subjected to an excessive workload. The case establishes no new principle, but it emphasises that it is not enough in a case of the *Hatton* type that it should be foreseeable that the claimant should be upset, or suffer stress, as a result of being unfairly overworked. What has to be foreseeable is that he or she will suffer a psychiatric illness: see *per* Ward LJ at paras. 26-27 and Simon Brown LJ at para. 31 (p. 167).

Hartman

107. In *Hartman v South Essex Mental Health and Community Care NHS Trust* [2005] EWCA Civ 6, [2005] ICR 782, this Court heard six appeals in cases where an employee had suffered a psychiatric injury at work: one of the appeals was *Melville v Home Office*. The appeals had been brought following *Hatton* but stayed pending the decision of the House of Lords in *Barber*. They too raise no new point of principle. Scott Baker LJ, giving the judgment of the Court, reviewed the case-law since *Hatton* (including *Croft*), and concluded, at para. 16 (p. 794 A-B):

> "In our judgment, none of these cases detracts from the utility of the guidance Hale LJ gave in *Hatton* and summarised in the sixteen propositions we have cited. On the other hand, what was said in *Hatton* was not intended to cover all the infinitely variable facts that are likely to arise in stress at work cases. The general principles are to be found in *Hatton* but we emphasise they need care in their application to the particular facts under consideration. For instance, while each appeal in *Hatton* involved an employee who had suffered ongoing stress in day-to-day work, the case of *Melville*, and to some extent *Hartman*, (see below) involved stress caused by specific traumas."

108. Ms McNeill picked up on that final observation and relied in particular on the Court's decision in the *Melville* appeal. In that case the claimant was a healthcare officer in a prison. Among his duties was the recovery of the bodies of prisoners who had committed suicide. The County Court Judge found that he had suffered a stress-related psychiatric illness following a particularly distressing episode of this kind. Both he and, on appeal to the High Court, Jack J held that it was reasonably foreseeable that he might suffer such an illness as a result of his work. They relied in particular on a number of Home Office documents expressly recognising that risk and

requiring procedures to be put in place to mitigate it. Those procedures were not followed and the Home Office was held liable.

109. On the further appeal to this Court the Home Office argued that the decisions below had failed to follow *Hatton* because it was common ground that the claimant had shown no signs of any relevant vulnerability. That submission was rejected. Scott Baker LJ said, at paras. 133-4 (p. 817 D-F):

> "133. … As is apparent from the way in which the judgment in *Hatton* is expressed and as Lord Walker pointed out in *Barber* the guidance must be read as such and not as anything like a statute. Each case will depend on its own facts. Those parts of the *Hatton* judgment relied on by [counsel for the Home Office] were primarily intended to help judges resolve the issue as to whether an employer ought to have foreseen the risk of psychiatric injury attributable to stress at work. The guidance recognises that such injury is more difficult to foresee than physical injury. The question of whether the particular employee has shown indications of impending harm to health is a very relevant question when considering a situation where the employer has not in fact foreseen the risk of psychiatric injury and the employee's workload would not ordinarily carry a foreseeable risk of such injury.
>
> 134. But that is not this case. Here, on the only evidence before the court, the employer plainly did foresee that employees who were exposed to particular traumatic incidents might suffer psychiatric injury. There was only one answer to the simple question which the judges asked themselves. [Counsel's] submissions amounted to saying that what was in fact foreseen was not foreseeable."

110. I can understand why Ms McNeill places some weight on *Melville* because the Home Office was indeed found liable without any evidence of the claimant having demonstrated a pre-existing vulnerability. But the assistance which she gets from it is limited because the reasoning of the Court turned on the fact that the employer had in fact foreseen the very risk which had eventuated.

Deadman

111. In *Bristol City Council v Deadman* [2007] EWCA Civ 822, [2007] IRLR 888, a colleague at work complained that the claimant had sexually harassed her, and that complaint was the subject of a formal investigation by the employer. The complaint was upheld by a panel convened under its harassment procedures, but that decision was quashed in response to a grievance brought by the claimant. The employer then decided to commence the investigation afresh: this was communicated to the claimant by leaving a letter on his desk at work. He developed a depressive illness. In the County Court his claim that the employer had acted in breach of the common law duty of care was dismissed, but the Judge upheld a claim for breach of contract on two bases – (a) that it was insensitive of the council to notify the claimant of its decision to resume the investigation merely by leaving a letter on his desk; and (b)

under the applicable procedures the original harassment panel should have consisted of three members but had in fact comprised only two. It was held that his injury was caused by those breaches and he was awarded damages accordingly.

112. This Court allowed the employer's appeal. I should draw attention to three elements in the reasoning of Moore-Bick LJ, who gave the leading judgment:

(1) At para. 12 (p. 890) he considered the relationship between the *Malik* term and the common law duty of care. He concluded that the two:

> "… [cover] broadly the same ground as the employer's duty of care under the general common law, so that in practice it is usually a matter of indifference whether the employee who has suffered injury at work sues in contract or tort: see the comments of Clarke LJ in *Martin v Lancashire County Council* [2001] ICR 197.[7]"

(2) At paras. 20-23 (pp. 891-2) he considered the claim that the council was in breach of its common law duty of care. He referred to *Hatton* and continued, at para. 22:

> "Since, as the court observed, the threshold question is whether *this* kind of harm to *this* particular employee was reasonably foreseeable, it is necessary to bear in mind that to all appearances Mr. Deadman was a person of robust good health. He had worked for the Council for over thirty years and had an excellent attendance record, having been absent from work for only five days during that period due to ill health. There is nothing in the judge's findings to suggest that the Council should have been aware that he was liable to be severely adversely affected by the ordinary operation of its procedure for investigating complaints of harassment."

(3) At paras. 43-47 (p. 894) he considered the issue of remoteness in the context of the purely contractual claim that the council had been in breach of its procedures by having two members on the panel instead of three. Applying the contractual test deriving from *The Heron II*, he held – unsurprisingly – that even if causation were established it was outside the reasonable contemplation of the parties that it was likely that a minor procedural breach of that kind would result in the claimant suffering a psychiatric illness.

113. Ms McNeill submitted that *Deadman* was of no real help in the present case because the breaches relied on were so trivial. That is certainly true about the claim based on the composition of the panel, and perhaps also about the way in which the claimant

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[7] The reference is to paras. 55-56 of the judgment of Clarke LJ (at pp. 214-5). In fact, Clarke LJ was not addressing the relationship between the *Malik* term and the common law duty of care but making the point that the latter is owed both in contract and in tort: his observations are based on *Matthews v Kuwait Bechtel* (see para. 42 (2) above). That is not quite the same point, but nothing turns on this for present purposes.

was notified of the resumption of the investigation. But we are not ultimately concerned with the facts but with the principles applied by the Court. What is significant about *Deadman* is that, in the context of a claim based on the allegedly unreasonable conduct of a disciplinary procedure, Moore-Bick LJ regarded it as decisive that there was nothing in the claimant's history to suggest that he would be unable to cope with the impact of such conduct: in other words, he took a *Hatton* approach. It is true that the processes in question were part of a procedure for investigating a complaint by another employee rather than of a disciplinary procedure, but that cannot make a real difference – in both types of case the impact on the employee is that he is suspected of misconduct.

Dickins

114. *Dickins v O2 plc* [2008] EWCA Civ 1144, [2009] IRLR 58, is another case of the *Hatton* type. It was cited to us only because of an observation (picking up an earlier statement to the same effect in *Daw v Intel Corp* [2007] EWCA Civ 70, [2007] IRLR 355) that "proposition (11)" in *Hatton* does not mean that an employer can discharge his duty of care in every case by providing a counselling service.

The Post-Johnson Cases

115. We were taken to the two further cases in the House of Lords and the Supreme Court which consider the implications of *Johnson v Unisys*, namely *Eastwood v Magnox Electric plc* [2004] UKHL 35, [2005] 1 AC 503, and *Edwards v Chesterfield Royal Hospital NHS Foundation Trust* [2011] UKSC 58, [2012] 2 AC 22. In *Eastwood* both Lord Nicholls and Lord Steyn referred to *Gogay* in the course of discussing the unfortunate consequences of *Johnson*, and Lady Hale did the same in *Edwards*. But they did so simply as an example of a successful claim by an employee for damages for a psychiatric injury suffered as a result of an unfair suspension; those references add nothing on the issue of remoteness.

116. Otherwise, these cases are of interest only as further illustrations of the kinds of circumstance in which claims for psychiatric injury may arise. In that context it is worth noting that in *Eastwood* the case as pleaded was that the two employees had been the victims of a sustained malicious campaign by their employer, involving the manipulation of the disciplinary procedure, deliberately in order to procure their dismissal.

Rothwell/Grieves

117. I should refer to one other case to which we were not taken in oral argument but to which Ms McNeill referred in her skeleton argument. *Grieves v F T Everard & Sons Ltd* is one of a quartet of cases in the House of Lords, reported as *Rothwell v Chemical & Insulating Co Ltd* [2007] UKHL 39, [2008] 1 AC 281, which concerned claimants who had developed pleural plaques as a result of negligent exposure to asbestos. It was held that the development of such plaques did not in itself constitute an injury; but Mr Grieves had suffered depression as a result of learning of his condition, which it was accepted did constitute an injury, and the question arose whether that was a foreseeable consequence of the defendants' negligence. Lord Hoffmann in his speech (with which the other members of the House agreed, though all also delivered speeches of their own) said that the relevant principles were to be

found in *Hatton*, observing that although that case was concerned with psychiatric injury as a result of occupational stress "the general principles are in my opinion applicable to psychiatric injury caused by any breach of duty on the part of the employer" (see para. 24, at p. 294B). He held that it appeared from those principles that in the absence of some particular known problem or vulnerability an employer "is entitled to assume that his employees are persons of ordinary fortitude" (para. 25, at p. 294 D-E). He referred to the passage from the judgment of Lord Bridge in *McLoughlin v O'Brian* cited by Dillon LJ in *Attia* (above) and observed:

> "[T]his test restricts rather than enlarges the foreseeability of psychiatric illness. It allows for the fact that expert knowledge of cause and effect may not be available to the educated layman. It does not mean that the judge should give effect to speculation or urban legends unsupported by evidence."

He went on to distinguish *Page v Smith* [1996] AC 155 and concluded by stating the applicable test as follows:

> "The general rule … requires one to decide whether it was reasonably foreseeable that the event which actually happened … would cause psychiatric illness to a person of reasonable fortitude. I think that the Court of Appeal was right to say that there was no basis for such a finding."

Applying that test, he held that Mr Grieves's illness was not a reasonably foreseeable result of the defendants' breach of duty.

118. *Grieves* does not state any new principle, but it is of value in this case as confirming that the principles stated in *Hatton* are not limited to the particular situations with which the Court was concerned but apply generally to cases in which psychiatric injury is said to have been caused to an employee by his employer's breach of duty.

Summary

119. With regard to the issues of foreseeability and remoteness the following propositions can be established from that review of the cases:

(1) In considering, in the context of the common law duty of care, whether it is reasonably foreseeable that the acts or omissions of the employer may cause an employee to suffer a psychiatric injury, such an injury will not usually be foreseeable unless there were indications, of which the employer was or should have been aware, of some problem or psychological vulnerability on the part of the employee – *Hatton.*

(2) That approach is not limited to cases of the *Hatton* type but extends to cases where the employer has committed a one-off act of unfairness such as the imposition of a disciplinary sanction – *Croft* and *Deadman* (also *Grieves*).

(3) However, in neither kind of case should that be regarded as an absolute rule: *Hatton* contains no more than guidance, and each case must turn on its own facts – *Hatton* itself, but reinforced by *Barber* and *Hartman*.

(4) In claims for breach of the common law duty of care it is immaterial that the duty arises in contract as well as tort: they are in substance treated as covered by tortious rules[8] – *Walker, Hatton*. In order to establish whether the duty is broken it will be necessary to establish, as above, whether psychiatric injury was reasonably foreseeable; and if that is established no issue as to remoteness can arise when such injury eventuates.

(5) In claims for breach of the *Malik* duty, or of any other express contractual term, the contractual test of remoteness will be applicable – *Deadman*.

120. As appears from *Croft,* and indeed from the present case, it will often be possible for the same conduct on the part of an employer to constitute both a breach of the common law duty of care and a breach of another contractual duty – most obviously the *Malik* term but perhaps also an express term. This overlap can lead to a regrettable complexity in the formal analysis. It may be that further thought needs to be given to whether the *Malik* term really has any separate role to play in this area: the Court in *Croft* seemed to think not. But it may be that the problem does not matter much in practice. Where a breach of the common law duty of care can be established it is not clear what the employee gains by formulating a distinct contractual claim.

Discussion and Conclusion

121. Although the Judge considered the breach of contract claim first, we are here concerned only with remoteness, and it makes more sense to start with the claim for breach of the common law duty of care since the tortious test of remoteness is more favourable to claimants.

122. The Judge dealt with the breach of duty claim only briefly in the judgment – understandably so, because he had already upheld the breach of contract claim. He said only, at para. 143, that an employer concerned with the Claimant's welfare would not have withdrawn him from his post without (previously) informing him of the case against him; and that "causation and remoteness track my earlier findings". The latter reference must be to para. 137, where he addresses remoteness in the context of the breach of contract claim: I have set this out at para. 53 (3) above. As will be seen, the dispositive reasoning is very short. The Judge acknowledged that the Claimant was "ostensibly robust" but concluded simply that "to my mind it could reasonably be contemplated … that depression would be a not unlikely result of a knee-jerk withdrawal from post". That uses the language of the contractual test, which he was

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[8] The approach taken by the courts in this regard is at odds with the view expressed in some of the books – though not yet supported by authority – that where there is concurrent liability in tort and in contract arising out of a contractual relationship claims under either head should be governed by the contractual rather than the tortious rule as to remoteness. This is said to be because the parties are not strangers, and if either wishes the other to be responsible for consequences of a breach which are foreseeable but not likely he is in a position to stipulate for that. This view is expressed both in *McGregor on Damages* (19th ed), at para 22-009, and in Burrows *Remedies for Torts and Breach of Contract,* 3rd ed., at pp. 88-94 (recently elaborated in Professor Burrows' essay "Comparing Compensatory Damages in Contract and Tort: Some Problematic Issues" in *Torts in Commercial Law* (ed. Degeling and others) at pp 3-7); see also the discussion by Nugee J in *Wellesley Partners PPL v Withers LLP* [2014] EWHC 556, at paras. 209-214. But as regards the common law duty of care owed to employees the position seems to be the opposite.

there considering; but his conclusion would of course apply *a fortiori* to the claim in tort. He did not rely on any medical evidence: in view of the passage from the judgment of Dillon LJ in *Attia* quoted at para. 85 above he did not need to do so. Nor did he rely on any peculiar features either of the way that the Claimant was treated or of his personality. His reasoning was evidently based on a straightforward judgment, based on his own experience and assessment of human nature, that the gravity, and the unfairness, of what happened to the Claimant was such that it could be regarded as sufficiently likely that he would suffer an illness as a result.

123. It follows from my summary of the authorities that, while it was certainly important that there was no reason for the FCO to believe that the Claimant had some special vulnerability (points (1) and (2)), the Judge was entitled not to treat that fact as decisive (point (3)). Each case depends on its own facts, and in principle the employer's conduct in a particular case might be so devastating that it was foreseeable that even a person of ordinary robustness might develop a depressive illness as a result: that was the point of Ms McNeill's reference to Bingham LJ's examples in *Attia* (see para. 85 above). The question is whether this is such a case. I have already summarised Ms McNeill's reasons for contending that it is.

124. I have not found this issue easy, but in the end I have come to the conclusion that the Judge was wrong to find that it was reasonably foreseeable that the FCO's conduct in withdrawing the Claimant from his post without having had the opportunity to state his case might lead him to develop psychiatric illness. My reasons are as follows.

125. I start from the position that it will in my view be exceptional that an apparently robust employee, with no history of any psychiatric ill-health, will develop a depressive illness as a result even of a very serious setback at work. That is, inevitably, based to some extent on my own assessment of human nature, but it also reflects the message of *Croft*, as discussed at para. 104 above.

126. That approach is supported, in the circumstances of the present case by the evidence of Ms Nelson which the Judge recorded at para. 61 of his judgment, as follows:

> "Ms Nelson explained that the offer of counselling was not because she saw the claimant as particularly vulnerable or depressed but because the proceedings were likely to take some time. In later meetings with Mr Nelson the claimant expressed his feelings of anger and distress. He told her about his health, first, that he had been prescribed sleeping tablets and later, that he had been diagnosed with depression. Ms Nelson's evidence at trial was that in her position she saw many unhappy people, some more distressed than the claimant. The passing reference to sleeping tablets was nothing unusual. She said that the claimant's reactions were not an unusual response to investigations and disciplinary proceedings. She said that many people exhibited similar responses and that the vast majority did not develop depression. She knew of only two instances of psychiatric illness in her fifteen years in Health and Welfare at the FCO and they were different."

The Judge summarised in a footnote the facts of the two cases referred to in the final sentence, about which he had been given some material, but he did not dispute Ms Nelson's evidence that their cases were different from the Claimant's, and it seems clear that they were; nor did he comment adversely on her evidence generally. Ms McNeill in her Respondent's Notice said that the Judge should have treated these two examples as positively supporting her case on foreseeability because they should have alerted the FCO to the effects on the mental health of senior employees of denying them natural justice. But it is the generality of Ms Nelson's experience that matters, and the evidence that many employees who had received similar setbacks were distressed and angry but that none had developed depression in my view supports the exceptionality of the Claimant's reaction. Ms Nelson was peculiarly well-placed to give evidence of this kind, given the length of her experience in the FCO and the sympathy with the Claimant's predicament which is evident from what she wrote at the time.

127. Against that background I have come to the conclusion that there was nothing about the circumstances of the present case sufficiently egregious to render it foreseeable that the Claimant's withdrawal from his post would cause him a psychiatric injury. I fully acknowledge that his withdrawal was a major setback to his career and was bound to cause distress and anger, exacerbated by the unfairness which the Judge found. But it was not tantamount to dismissal. Nor was it a disciplinary sanction or based on any established misconduct, as Ms Le Jeune made clear to him: he was being withdrawn because the making of the allegations made his position operationally untenable, not because they were being treated as established, which was to be the subject of a proper investigation. Ms Le Jeune told him that if he was exonerated by the investigation she would do her best to find him another posting. The FCO was evidently attempting to follow due process, notwithstanding the particular unfairness which the Judge found. This was not a case of some gross and arbitrary injustice of the kind alleged, for example, in *Eastwood*. In all those circumstances – and bearing in mind in particular Ms Nelson's evidence which I have set out above – I do not believe that the FCO should have foreseen, in the absence of any sign of special vulnerability, that the Claimant might develop a psychiatric illness as a result of its decision.

128. That view gets some support from the medical evidence. The experts were asked whether, prior to June 2008, "it was reasonably foreseeable that the Claimant would develop a psychiatric disorder, and in particular depression". Dr Turner's response was straightforwardly that it was not. Dr Baggaley said that there were no factors to suggest prior vulnerability – "and therefore it follows that it was not reasonably foreseeable"; but he added that he thought that this was an issue for the Court. Having said that, I would not wish to treat that evidence as in any way decisive. The experts were entitled to say that there was nothing in the Claimant's history to suggest special vulnerability; but the question whether, on the findings of fact made, the FCO's conduct was such that it was nevertheless foreseeable that he might suffer psychiatric injury could only, as Dr Baggaley said, be decided by the Court.

129. I have considered carefully whether this is a case where, although I might myself have reached a different conclusion, I can fairly say that the Judge's decision was wrong. But his decision was not one of primary fact, or indeed one of fact at all. Rather, it was a judgment – based, as I have said, inevitably on his own experience rather than

on any medical or other evidence – as to the degree of likelihood that the Claimant would develop a depressive illness. This Court is as well placed to make that judgment as he was; and, having reached a different conclusion I am, I think, obliged to give effect to it. I am in fact the less reluctant to differ from the Judge because I think, with all respect, that he may have treated the decision in *Gogay* as having more authority, as regards this issue, than it does; and that is material because he clearly attached particular weight to that decision. In para. 137 of his judgment he describes this Court in *Gogay* as having held "that it was reasonably foreseeable that a knee-jerk reaction by employers in the implementation of disciplinary procedures, … might cause psychological damage". That was indeed the finding in the County Court (though I am uneasy about the equation of "psychological" with "psychiatric"); but, as I have shown above, this Court did no more than decline to interfere with the conclusion of the judge. We do not know on what basis that conclusion was established: in particular, there is no reason to suppose that it was not a case of known psychiatric vulnerability, and some reason to believe that it may have been.

130. Although I have come to this conclusion squarely on the facts of the present case it is in line with the outcomes in *Croft* and *Deadman* and with the views of the Court of Appeal and of Lord Steyn in *Johnson v Unisys* – in all of which the claim for psychiatric injury failed because of the absence of any evidence of vulnerability on the part of the claimant. It true that in neither *Croft* nor (particularly) *Deadman* was the action taken as grave as that taken by the FCO in this case; but in *Johnson* the employee had been dismissed.

131. I have not in reaching this conclusion attached weight to the fact that the Claimant was offered the support of the FCO's Health and Welfare Department following his withdrawal and during the disciplinary investigation. Such support is relevant in cases where the issue is whether employers should have foreseen the risk of psychiatric injury as a result of "ordinary" stress at work, but I doubt if it is material in a case of the present kind.

132. I ought to mention for completeness that Ms McNeill in her oral submissions floated the suggestion that *Bliss v South East Thames Regional Health Authority*, to which I refer at para. 90 above, is no longer good law following the treatment of *Addis v The Gramophone Company* in *Johnson v Unisys.* In this connection she referred us to the decision of the Supreme Court of Canada in *Honda Canada Inc v Keays* [2008] SCC 39. But when pressed she disavowed any submission (which had not been raised in the Respondent's Notice) that if the Claimant's claim for damages for psychiatric injury failed on the grounds of remoteness he might recover damages for distress; and in those circumstances the point goes nowhere.

133. I would accordingly hold that the Judge should have held that the losses attributable to the Claimant's psychiatric injury were not reasonably foreseeable and cannot accordingly found a claim for breach of the common law duty of care. It follows that they are also too remote to be recoverable in his claim for breach of contract, where the test of remoteness is more favourable to defendants. I would allow the FCO's appeal to that extent and remit the case to the High Court to decide quantum if the parties are unable to agree.

(B) THE RESPONDENT'S NOTICE

134. The Respondent's Notice challenges the Judge's reasoning under three headings. I take them in turn.

(1) THE RIGHT TO WITHDRAW ON OPERATIONAL GROUNDS

135. The point as pleaded in the Respondent's Notice appears to be that on the true construction of the appointment letter withdrawal is only possible on grounds of poor performance. That would make very little sense, and I do not think that it is a fair construction of the terms of the letter: poorly drafted though it is, there is a clear reference to operational withdrawal as something separate from withdrawal following "the usual performance management processes". And the position is put beyond doubt by the terms of the Guidance. In her skeleton argument Ms McNeill put it rather differently. She argued that the withdrawal of the Claimant from his post on "operational" grounds was in breach of contract not only because it was unfair but also because the effect of the relevant contractual provisions was that an officer should only be withdrawn as a result of allegations of misconduct if those allegations had been considered under the disciplinary procedure and the misconduct had been established: it was impermissible in such a case to circumvent the contractual processes by labelling the withdrawal "operational".

136. Since I would uphold the Judge's finding that the withdrawal was in breach of contract because it was unfair, this point is academic. However, since the point could conceivably arise in another case, I should say that I do not believe that Ms McNeill's submission is well-founded. I have set out at para. 11 above the provisions in paragraph 39 of the Guidance covering "misconduct" cases. These are clumsily drafted, and it is not entirely clear whether the bullets are cumulative or to be read separately. If the latter, then the third bullet precisely covers the present case: Ms Le Jeune had clearly formed the view that "regardless of the outcome of the investigation into allegations of misconduct, it would be untenable … for [the Claimant] to remain in post". But even if that has to be read as subject to the reference in the first bullet to "gross" misconduct (and assuming that it was already clear that any charges in the present case would only be at level 2), I do not believe that it follows that an operational withdrawal, under the provisions which I have also set out, is precluded: if the officer's position is untenable or there are other circumstances "sufficiently serious to warrant withdrawal" I do not think that it should make any difference that that is as a result of allegations of misconduct. That would be an unnecessarily legalistic reading of a working document, and of a provision which is plainly and understandably intended to preserve a wide power to withdraw officers from postings where that is judged necessary.

(2) "MR GIFFORD'S INVESTIGATION"

137. Although this section is headed "Mr Gifford's Investigation" it consists of three distinct paragraphs only one of which is in fact concerned with that investigation. What the three paragraphs have in common is that they challenge the Judge's refusal to find that the FCO's treatment of the Claimant subsequent to his withdrawal constituted a breach of contract or a breach of duty. Very broadly, what is said is that if Mr Gifford had carried out a better investigation and/or assessed its results properly he would have concluded that there was no case to answer on the sexual misconduct

allegations, so that they would have failed at the first stage rather than the second (para. 3); (2) that the FCO's attitude to the Claimant over the whole history of the allegations against him – evinced partly but not only in the handling of the disciplinary process – was not impartial (para. 4); and (3) that Sir Peter Ricketts should have given substantive consideration to the Claimant's letter of 27 January 2010 (para. 5).

138. It is necessary to consider how those criticisms could affect the outcome of this appeal. They could, in principle, plainly do so if this Court were to uphold the FCO's appeal against the finding that the withdrawal itself was unfair: they would constitute a separate basis on which the claim might succeed. But if My Lords agree that that aspect of the FCO's appeal fails, their only other potential relevance is to foreseeability: what is contended under the third heading in the Respondent's Notice is that the FCO's various post-withdrawal breaches (or failings which cumulatively comprise a breach) reinforce the case that it was foreseeable that the Claimant would suffer a psychiatric injury. However, I cannot accept that the matters sought to be raised could affect the outcome of the appeal in that regard. If, as I would hold, it was not foreseeable that the Claimant's unfair withdrawal from his post as High Commissioner would cause him a psychiatric injury, it is unreal to suggest that these further alleged breaches could lead to a different result. It was, plainly, the loss of his job that was the substantial blow to the Claimant: the other alleged unfairnesses – such as having the sexual misconduct allegations dismissed at the second stage of the process rather than the first – are of their nature secondary.

139. It follows that the points which the Claimant seeks to raise under this head are academic. I do not think that I would be justified in lengthening this already lengthy judgment by dealing with them in any detail. However, in deference to Ms McNeill's submissions I will state my conclusions on them very shortly.

140. As for para. 3, which concerned Mr Gifford's investigation, I would endorse the Judge's finding, at para. 129 of his judgment, that overall Mr Gifford's fact-finding report showed both diligence and thoroughness. There may be room for criticism of particular steps that he took or did not take, but only in a very exceptional case would I be prepared to find that good faith misjudgments by an investigator about how to proceed with an investigation could by themselves amount to breaches of the *Malik* term or any cognate term, or of the common law duty of care. Even if they were such as to render an eventual disciplinary decision unfair, it would be that decision that constituted the breach. Here of course the eventual decision was to dismiss the charge of sexual misconduct; and I do not think that it can constitute a breach that that occurred at the second stage of the process rather than the first.

141. In support of the allegation of lack of impartiality in para. 4, the Notice not only refers to the matters complained of in the previous paragraph about Mr Gifford's investigation but raises a large number of other "incidents of inaccuracy, untruth and often admitted unfairness" between the date of Mr Evans' first report and his eventual retirement. Save for one point, Ms McNeill did not develop this aspect in her oral submissions, saying that she relied on her skeleton argument (which simply reproduces the contents of the Respondent's Notice). The one point which she developed concerned the FCO's conduct in relation to Mr Priestley's e-mail to Mr Wood of 7 July 2008 (see para. 30 above). The Claimant was not initially told about the e-mail, but it was referred to in Mr Gifford's report of 17 July and he asked to see

a copy. Mr Gifford was willing to show it to him but Mr Wood thought that this would be a breach of Mr Priestley's confidence and prior to the hearing of 7 August he was given only a redacted copy. The email was read to him at the hearing: he was unable to say whether it was read in full or in part. In the litigation the FCO declined to disclose an unredacted copy until shortly before the trial, after a witness summons had been served on Mr Priestley. While describing the FCO's refusal to disclose the e-mail as troubling, the Judge declined to treat the episode as impugning Mr Gifford's impartiality: see para. 130 of his judgment. I see nothing wrong in that conclusion. As he pointed out, Mr Gifford was himself willing to let the Claimant have a full copy, and the Claimant was given a full account of the evidence underlying the allegations against him. Even if the FCO is to be criticised for its subsequent reluctance to make full disclosure that has no bearing on the conduct of the process itself. That point apart, I need only say that none of the other particular incidents pleaded seems to me to demonstrate any lack of impartiality on the part of the decision-makers, and in particular of Mr Gifford.

142. As for para. 5, in the Amended Particulars of Claim Sir Peter's failure "to give fair and proper consideration to the Claimant's [letter of 27 January 2010]" is pleaded as one of some forty matters which are said cumulatively to constitute a breach of the *Malik* term (see para. 87 (ii)). The Judge does not address this complaint in his judgment. What is said in the Respondent's Notice is that if he had done so he would have been obliged to conclude that Sir Peter's failure to reply substantively (taken, it seems, with the shortcomings in the Gifford investigation pleaded at para. 3) constituted a breach of contract. I need only say that I can see nothing wrong in an employer, in circumstances where all formal procedures have been exhausted, declining to enter into further substantial correspondence with an employee who has instructed lawyers to obtain redress for him.

(3) FORESEEABILITY AND BREACH OF DUTY OF CARE

143. I have already dealt with the points raised in this paragraph: see para. 138 above.

(C) THE INTEREST APPEAL

144. I set out the background at para. 4 above. Cranston J's reasons for awarding interest at 8% (less the rate obtainable by the Claimant's solicitors) are brief. He did not refer to any statutory provisions or authority but said simply that the effect of the arrangement under which the agreed award was to be held by his solicitors pending the outcome of any appeal deprived him of the use of his money.

145. The FCO's pleaded grounds of appeal proceeded on the basis that the Judge's award was made under section 17 (1) of the Judgments Act 1838, which provides for payment at 8% "until the [judgment debt] shall be satisfied"; but that such an award was not open to him because payment to the Claimant's solicitors would satisfy the judgment debt. The Claimant's response was (a) that the FCO had conceded before the Judge that he had a discretion as to what rate to award, from which it should not be allowed to resile; but in any event that (b) the judgment debt had not been satisfied and that accordingly the judgment rate was payable, alternatively (c) that the Judge had a discretion as to what rate to award, which he had exercised properly.

146. We were taken through the notes of the argument about interest before Cranston J, but I do not find it necessary to decide whether Mr Payne made the concession alleged since even if he did I do not think that it would be right to hold the FCO to it. The real question is whether the payment to the Claimant's solicitors constituted a satisfaction of the FCO's judgment debt. In my view it is plain that it did not. They did not hold the money to his order: on the contrary, they were bound not to release it to him pending the outcome of the appeal. The arrangement under which the payment was made was in substance an agreed form of stay of execution, reflecting the fact that the Claimant was not able to satisfy the FCO that if the appeal were successful he would be able to repay the damages awarded if they had been paid to him in the meantime. If the Claimant had been intransigent and the FCO had had to seek, and had obtained, a stay from the Court he would have been entitled to interest at the judgment rate if the appeal failed and the payment fell to be made at that point. It would be extraordinary if the sensible arrangement in fact made produced any different outcome.

147. Once that point is reached it does not much matter whether the Judge's order was made under the 1838 Act or in the exercise of some distinct discretion: even if the latter were the case his exercise of his discretion was plainly unimpeachable. But in my view the former analysis is correct: in substance what he was deciding was that the agreed arrangement did not constitute satisfaction of the judgment debt, with the consequence that the judgment rate applied as of right. It was argued that that was inconsistent with the reduction of the rate to reflect any interest earned while the money was held by the solicitors: we were referred to authority to the effect that there is no jurisdiction to vary the judgment rate since it is set by statute. I am not sure that there is any substantive inconsistency: the arrangement could be one whereby the FCO paid the judgment rate but had a separate entitlement to be paid interest received. But the point does not need to be definitively resolved since there was no cross-appeal by the Claimant.

CONCLUSION AND DISPOSAL

148. I would dismiss the FCO's appeal against the findings of breach of contract and against the Judge's findings on causation. But I would allow its appeal on the issue of the remoteness of the claim for psychiatric injury and thus also against the finding of breach of the common law duty of care. I would remit the case to the Judge to decide quantum, in relation to the contractual claims, accordingly (unless it can be agreed in the meantime). I would dismiss the interest appeal.

Lord Justice Davis:

149. I agree with the judgment of Underhill LJ. I add a few observations of my own out of respect for the careful arguments of counsel and in view of the evident importance of the case to the parties themselves.

150. I have considerable sympathy for the Claimant (and his family). The summary withdrawal of him from post as High Commissioner by the FCO had a profound effect on his career and personal situation. At the same time it is right to say that the FCO was, on one view, itself placed in a position of some difficulty. I am not sure I would myself style its conduct in summarily withdrawing the Claimant from post as

being a "knee-jerk" reaction. But it has been shown to be precipitate – an over-reaction, if you like.

151. However, this ultimately is labelling. The question, as the judge identified, is whether the summary withdrawal of the Claimant was, in the circumstances, fair. The difficult position in which the FCO found itself did not discharge it from its duty – putting it in shorthand – to behave fairly towards the Claimant (objectively speaking). I think that the judge was entitled to find on the facts that it failed to discharge its duty to the Claimant. I for myself find it particularly disconcerting that the FCO acted so speedily in withdrawing the Claimant from post even if on asserted "operational" grounds. In doing so it was in reality acting irrevocably; and in doing so it was effectively giving some credence to Mr Courtenay's allegations of sexual harassment: which allegations at that time (and indeed subsequently) could be seen to have some doubtful attendant circumstances, as well as being entirely uncorroborated. Mrs Courtenay, moreover, had not herself been approached for her own observations (albeit I can see the sensitivities). Nor was Mr Courtenay at that time asked to waive confidence: confidence being the main reason advanced by the FCO for justifying the position it adopted at the time. Further, had Mr Courtenay refused at that stage to waive confidence that in itself might have set alarm bells ringing as to whether immediate withdrawal from post was justified.

152. As to the finding by the judge of unfairness in Mr Gifford conducting both the investigatory proceedings and the final disciplinary proceedings, the judge recognised that, on the facts as found, that would have made no difference to the outcome in causative terms. However I should record my own view that there was no unfairness or any other breach of duty in this regard. It is not, I think, so much a question of "natural justice"; it is perhaps more a question of applying principles relating to impartiality (no one, of course, suggests actual bias) or predetermination. But assessing the position from the viewpoint of the hypothetical objective and informed bystander, no conclusion of apparent partiality or predetermination can possibly be drawn. Given the circumstances, there was no legal or other objection to Mr Gifford conducting both stages of the process. The advice given at the time that he may do so was justified.

153. To me, in many ways the more difficult issues arising in this case are those of causation. I was particularly troubled, in the light of Ms Le Jeune's evidence, by the point that the Claimant's coronary heart disease would, as it was said, have resulted in him being short-toured anyway. But causation issues are a matter for the trial judge on the facts. On the whole I think that the judge was, on the evidence, entitled to reach the conclusions that he did on the various causation issues.

154. On the issue of remoteness, however, I agree that the judge's conclusion cannot be sustained.

155. I have the greatest difficulty in seeing how the judge's conclusion on this issue can be drawn from the evidence: not least that of the two doctors and of Ms Nelson. It seems to me that the facts of this case clearly bring it within the principles laid down and exemplified, in the employment context, in cases such as *Hatton, Croft* and *Deadman* and in the speech of Lord Steyn in *Johnson* (the decision in *Gogay* is, I think, to be explained on its own facts, as Underhill LJ has identified). In the absence of the FCO having any prior awareness, or reason to be aware, of any particular susceptibility to

stress or other relevant vulnerability on the part of the Claimant it is not enough, in my view, to assert that the exercise of the power of summary withdrawal from post in itself was such as to render psychiatric injury reasonably foreseeable. And an employer, in a context such as the present, is, after all, entitled to assume that an employee is of "reasonable fortitude" (as the cases put it) in the absence of knowledge, actual or constructive, indicating the contrary.

156. I was in some ways attracted to the view that, in the context of a breach of duty of care (whether contractual or tortious) of the present kind in an employment context which is said to have resulted in psychiatric injury, any such injury is *always* to be regarded as not reasonably foreseeable/too remote unless the employer was, or should have been, already aware of some relevant susceptibility or vulnerability on the part of the employee. However I think that would be too absolutist an approach. Questions of remoteness are questions requiring a factual assessment and evaluative judgment on the part of a trial judge in the particular circumstances of a particular case. I do not think one can or should exclude the possibility, on appropriately special facts, whereby psychiatric injury resulting from a breach of duty by an employer can be assessed as reasonably foreseeable, even if there was no awareness of a prior relevant susceptibility or vulnerability on the part of the employee. Indeed *Melville* can be taken as such a case (where, in fact, the risk of psychiatric injury had actually been foreseen by reason of the particular nature of the employment). It may be that the examples given by Bingham LJ in *Attia* also suggest other possibilities. Moreover, Hale LJ in *Hatton* was careful in formulating the third proposition to refer to what the position "usually" is. Be that as it may, I incline to think that such cases are indeed likely to be very unusual. At all events in the present case I do not consider, whatever sympathy one may have for the Claimant, that the summary withdrawal of the Claimant from post was a sufficiently extreme action such as, on the facts, to justify a departure from the general approach indicated in *Hatton* and *Croft*.

157. On the interest point, I agree with Underhill LJ that the FCO's argument is untenable. In effect, the (sensibly agreed) arrangement amounted to a stay on the judgment pending appeal. In consequence, the Claimant had no right to the money held by his solicitors pursuant to their undertaking. It is well understood that a court generally may grant a stay of execution on such terms as it thinks just. I would myself, perhaps differing from the ultimate analysis of Underhill LJ on this point, be inclined in the present case to ascribe the judge's approach to the exercise of his discretion by reference to what was just, rather than to the application of the 1838 Act. But it matters not. He was certainly entitled, in the circumstances, to have regard to the position under the 1838 Act if he was exercising discretion with regard to what was a de facto stay on the judgment. There is, whichever way one approaches it, no basis for interfering with his decision as to interest.

Lord Justice Patten:

158. I agree with the judgment of Underhill LJ.