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Case No: TLQ/12/0527

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 03/05/2013

Before :

MR JUSTICE CRANSTON

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Between :

John Yapp	**Claimant**
- and -	
Foreign and Commonwealth Office	**Defendant**

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- -

Jane McNeill QC and Katherine Howells (instructed by **Buss Murton**) for the **Claimant**
Alan Payne (instructed by **Treasury Solicitors**) for the **Defendant**

Hearing dates: 11-21 February and 11 March 2013

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Approved Judgment

I direct that pursuant to CPR PD 39A para 6.1 no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic.

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MR JUSTICE CRANSTON

Mr Justice Cranston:

I INTRODUCTION

1. In June 2008 the claimant, John Yapp, was removed from his position as HM High Commissioner to Belize. The decision was taken formally by Susan Le Jeune d'Allegeershecque, presently HM Ambassador to Austria, but at the time director of Human Resources at the Foreign and Commonwealth Office ("the FCO"). As will be seen Ms Le Jeune acted along with others, in particular Christopher Wood, at the time director of Americas at the FCO and until recently Minister and Deputy Head of Mission, British Embassy, Beijing. In this action the claimant's case is that his removal and what followed were in breach of his contract of employment and in breach of the FCO's duty of care to him. Consequent to the claimant's removal there was an inquiry, which considered allegations made against him of sexual misconduct and of the bullying and harassment of High Commission staff. The inquiry was conducted by Michael Gifford, at present HM Ambassador to North Korea. He acquitted the claimant of the allegations of sexual misconduct; these were baseless. However, he concluded that there had been some ill-treatment of staff. It is not my role to review the latter finding.

II BACKGROUND

The claimant and his appointment to Belize

2. The claimant joined the FCO in 1971 and made steady progress through the ranks, with a number of overseas postings. In his evidence, which I accept, the claimant spoke of his commitment to the FCO and to the core values of the Diplomatic Service, set out in its Code of Ethics: integrity, honesty, objectivity and impartiality. Along with the Code are the General Principles of Conduct for members of the diplomatic service, including the obligation to treat all colleagues with respect and not to subject any member of staff to harassment, bullying or victimisation.

3. In 1998 the claimant was appointed as High Commissioner in the Seychelles. An appraisal in 2001-2002 recounted that he had found the post in a state of drift but left it in 2002 in much better shape. During his tenure there the claimant dismissed two locally engaged staff, who complained. There was an inquiry which painted a picture of unsatisfactory management, with some instances of bullying behaviour and harassment. As a result, in early September 2001 the FCO wrote to the claimant strongly recommending that he attend management courses with a view to improving his performance. While not accepting the report's finding the claimant attended some courses. At the time the claimant's deputy, Jacqui Currie, defended the claimant against the complainants ("very supportive of local staff") and in evidence for this trial ("the two ladies…hid their own shortcomings behind their malicious accusations"). The countersigning officer to the 2001-2002 appraisal took this into account, as well as the difficulties the claimant inherited at post and the improvements he achieved there. He gave the claimant a strong C assessment and was positive about his future in the FCO.

4. After the Seychelles posting the claimant had a number of short term assignments. In early 2003 he agreed with "job options" assessment that his next posting might be his last and that he would like to run his own mission. In 2004 he became deputy head of

the South Asia group in the FCO. His appraisals during this period were positive, including his relationship with colleagues. He was specially praised for his handling of the investigation of a complaint by a locally engaged staff member against a High Commissioner and fostering of two staff members with particular problems. He had improved the office environment, taken steps to attract more diverse staff and been a conscientious manager, albeit that some staff found his listening skills and communication style difficult. The countersigning officer to the claimant's 2006 appraisal, Tom (later Sir Tom) Phillips, thought it right to highlight his conscientious and professional management skills and his unselfish working to bring on the team as a whole.

5. Against strong competition the claimant was appointed UK High Commissioner to Belize, taking up his appointment in August 2007. The Residence was being refurbished at the time so that the claimant had to live in temporary accommodation for the first four months. That hampered his introduction to Belize. Relations with the deputy High Commissioner, David Spires, were bad from the outset, although Mr Spires' tour in Belize was due to end in August 2008. The FCO was aware of the tension.

6. The claimant quickly established a good relationship with Belize politicians and the business community. In a witness statement for the trial, the Prime Minister of Belize, Hon. Dean Barrow, explained that he met the claimant shortly after his appointment as High Commissioner.

> "In my view based on my experiences during my time as Foreign Minister and as Prime Minister, the claimant was one of the best British High Commissioners we have had in Belize. I found [him] to be a consummate diplomat: intelligent, well-informed and an entertaining host."

Mr Barrow added that the Government of Belize had found the claimant a willing and committed partner in the promotion of good UK-Belize relations and that he was seen by the Belize Government as enhancing the image and reputation of the British in Belize. That positive view was echoed in a witness statement of Richard Price, a British citizen resident and doing business in Belize for over a quarter of a century, a founder member of the Belize – British Chamber of Commerce and a British High Commission consular warden. In his witness statement another consular warden, and a senior justice of the peace, James Jammohamed, was equally supportive of the claimant's role as High Commissioner.

The Evans Report

7. In late April 2008 Peter Evans visited the region and conducted a so-called pastoral visit to the High Commission in Belize, as well as the Consulate General in Miami and the Embassy in the Dominican Republic. Mr Evans has been the human resources manager for the FCO Directorate General for Defence and Intelligence (which includes the Americas) since July 2007. It was a routine visit and there was nothing in the feedback from the High Commission in Belize to cause particular concern, although there was an issue with the claimant's strained relationship with his deputy, Mr Spires. Before the visit Mr Evans spoke to Matthew Forbes and Dr Liz Kane. Mr

Forbes was the claimant's head of section, covering Mexico, Central America, Cuba and Hispaniola. Dr Kane was the claimant's immediate line manager.

8. Mr Evans' report, dated 7 May 2008, was marked "Personal. Staff in Confidence". It was sent to Ms Le Jeune, as director of Human Resources, and copied to the Director of Defence and Intelligence, to Mr Wood, as director of Americas, and to Mr Rankin, deputy director of Human Resources. In her evidence Ms Le Jeune very fairly accepted that the report gave an unbalanced picture, which she should have detected at the time. Despite the limited distribution Dr Kane obtained a copy of the report. The claimant was never given a copy until 24 July 2008, after he was removed as HM High Commissioner to Belize.

9. The report covered two pages. In accordance with his usual practice Mr Evans did not retain the notes he had made to write it. At the outset of the report was a summary: "Arrogant management style. Non communication with [Mr Spires]. Informal allegations of bullying. Next steps?" The details of the report gave attention to the relationship between the claimant and Mr Spires. It explained that under the previous High Commissioner Mr Spires had been permitted to run the post himself. The relationship with the claimant "had slipped into one of non-communication". In his evidence before me Mr Evans accepted that there was, in fact, partial communication between the two. The report continued that Mr Evans had encouraged the claimant to offer the olive branch and that meetings had taken place to find some common ground. Mr Evans told me that subsequent to his visit the relationship between the claimant and Mr Spires had improved.

10. As anticipated in the summary Mr Evans' report then asserted: "Local staff referred to his arrogant manner and to his "own agenda"." In the same paragraph there was a reference to the claimant having "apparently purloined" furniture destined for the executive assistant's house and the effective barring, on security grounds, of the International Women's Association from using the High Commission's club facilities. During his visit Mr Evans had given the claimant coaching on teamwork and managing staff and left him some basic material on both subjects.

11. In his evidence Mr Evans accepted that Mr Spires had briefed him about which staff to interview (although the claimant had suggested that he speak to staff at the Residence); that there were no curbs on what he could do during his visit; that none of the staff told him that they had been advised about what to tell him; that he could not recall precisely which staff he had interviewed; and that some staff were supportive of the claimant although he did not make a numerical count of which were critical and which supportive. Mr Evans also told me that he could not remember whether he had asked the claimant for his account of the furniture incident (which was that it was a mistake), and that he did not want to suggest that the claimant's decision about the International Women's Association was unreasonable.

12. The report then turned to the claimant's newly appointed, part time personal assistant ("PA"). She was a retired UK civil servant who had worked with a trade union and the Advisory, Conciliation and Arbitration Service (ACAS). She was on probation. "Fully aware of her rights, there are many aspects of [the claimant's] behaviour which cause her concern". Mr Evans then reported that, after his return to London, he had had a conversation with Mr Spires. Mr Spires had told him "in strict confidence" that the previous week the claimant had summoned his PA to the Residence where he told

her that she was to have no contact with the executive assistant's wife; she could not have a private meeting with the management reviewer (whose arrival was imminent); she should only portray him in a good light during the review; she should not have commented to Mr Evans on the claimant's slow drafting style; and if she broke any of these rules he, the claimant, would not confirm her appointment at the end of her probation period. Mr Evans wrote:

> "For fear of losing her job, she will not make a formal complaint. I have no reason to doubt her word. In my book this is bullying and harassment. I will continue to monitor the matter closely… We have a duty of care to all employees and if [the claimant] continues to treat staff in this fashion, and in view of the [FCO's] zero tolerance on bullying, we should consider possible next steps even if no formal complaint is forthcoming."

13. In his evidence at the trial Mr Evans explained that he had not contacted the claimant's PA to confirm what she was alleged to have said to Mr Spires; that the claimant's PA never raised these matters directly with him; that, if true, what the claimant was said to have done was evidence of, but not conclusive of, bullying and harassment; and that he had never sought the claimant's account of what, if anything, had happened. Mr Evans said that it was not his intention to suggest that he had reached any conclusion that the claimant was guilty of bullying or harassment. The "next steps" in the summary to the report were to monitor the situation to see if there were further complaints. His evidence was that no one raised any issue about the claimant behaving inappropriately with women.

The management review

14. In mid-May there was a management review of the High Commission in Belize. Its final report was not before the court. The review was conducted, in the main, by Karen Williams, at present deputy director of UK Trade and Investment in Dubai, and Mr Forbes, the claimant's head of section, who was involved in the later stages. There are records of interviews with seven High Commission staff and one external person, Lt Col Peter Germain, Commander, British Army Training Support Unit, Belize. These interviews were first produced to the claimant as annexes to the report of Mr Gifford's inquiry. Their contents were not discussed with him before then, although I accept that Ms Williams told the claimant that his PA would be difficult to manage. In fact the PA later made some highly implausible allegations to Mr Gifford about Ms Williams, for example that she had been brainwashed by the claimant.

15. Part of the management review was a "working in post survey". Almost three-quarters of those at the High Commission, 23 persons, responded to the survey. A number of questions provided for numerical scores, ranked from 1, the highest, to 6, the lowest. Eighteen persons answered the question about how much they enjoyed working in the post: 13 chose a score of 1, 5 a score of 2, 1 a score of 5. The average was 1.47. All but 1 of the 23 respondents rated morale at post, the average score being 2.9. Some of the written comments to this question identified management issues, in particular the differences between the claimant and his deputy, as a cause for concern. However, one comment was to the effect that, despite the differences, morale was perhaps on the mend. Another comment was that things were getting

better. Thirteen of 21 respondents were content with the handling of staff welfare. One respondent, obviously the claimant's PA, complained at having been rebuked for what she had told Mr Evans about the claimant even though she had been assured that anything said was to be in confidence. Another respondent expressed a fear of complaining because of possible retribution. Yet another respondent, clearly from security, complained about treatment by locally engaged, but not UK based, staff. Open ended questions on matters such as working practices produced a mixed response.

The informal warning

16. The upshot of the management review was that on 21 May 2008 Dr Kane, the claimant's line manager, spoke to him on the telephone. She recorded what was said in that telephone conversation in an email to the claimant of the same date. She explained that there had been "multiple allegations of bullying and harassment from internal and external stakeholders". (In evidence at the trial Dr Kane accepted that she was wrong and that there had been no such allegations from anyone external to the High Commission.) The email continued that the FCO did not believe that the allegations were malicious although there had been no formal complaint from those making them. She then gave the claimant this informal warning, which was approved by Mr Wood, director Americas.

> ""[B]ased 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's email then recorded that she had said that it was difficult to give specific examples of the behaviour because it would compromise the individuals concerned. The email recalled the claimant's astonishment at the allegations, that he had always been careful about his behaviour, the more so following Mr Evans' visit, and that he could not refute them because of the lack of detail.

17. Two days later the claimant sent Dr Kane an email. He said that he could understand the reason for withholding the evidence but it left him feeling awfully disadvantaged. He would try harder to make people feel differently. He thanked Dr Kane for the assurance "that this informal exchange will not be put on any file …" In the claimant's evidence at trial he asserted that he was also given an express assurance that the matter would not be taken further in the absence of a formal complaint. In her evidence Dr Kane stated that it was not within her gift to give such an assurance and she did not do so. I accept her account, which is consistent with the contemporaneous documents.

18. The following day, 23 May, the claimant left Belize on leave; he was not to return as High Commissioner. Before he left he confirmed his PA in post. There were no further complaints from staff at the High Commission about the claimant, additional to those mentioned to him by Dr Kane, until Mr Gifford's investigation.

The claimant's 2007-2008 appraisal

19. Dr Kane, as the claimant's line manager when he was in Belize, undertook the claimant's appraisal for the period September 2007 – March 2008. (That appraisal was completed before the claimant was withdrawn from post but not made available to him until January 2009. At the trial the FCO apologised for this). As reporting officer for the appraisal Dr Kane noted the mixed staff feedback on the claimant's agenda to improve the performance of the High Commission but thought that this was "not surprising". She noted that the claimant had established good contacts with both political parties in Belize and had reported well on the February 2008 election and his first meetings with the new government and Prime Minister. On the FCO's objectives Dr Kane considered that work still needed to be done, including on the issue of diversity. Feedback from staff, including on diversity issues, suggested that the claimant might need to pay more careful attention to his managerial style and promote an inclusive agenda so that he took his staff with him as he changed the working practices in the High Commission. (Dr Kane said in evidence that she had deleted the details of that staff feedback from her records). Under the heading "competences", Dr Kane reported that strategic thinking was a particular strength. There was an opportunity in the next reporting review for more engagement with the Caribbean Centre for Climate Change, based in Belize. The claimant could "deliver confidently the corporate messages on issues such as change management and diversity". No performance improvement or development needs were identified.

20. Mr Wood, as director, Americas, countersigned and endorsed the appraisal on 25 May 2008. In his view it balanced well the good areas (such as political reporting and analysis) with some justified criticism of the claimant's performance where improvement was needed. It was positive that the claimant had built a good relationship with the new Prime Minister. Most particularly, Mr Wood referred to the claimant's management style since it was evident from feedback that this was giving some cause for concern. The claimant needed to examine his management style in depth. He had taken on board the need for a much more inclusive style, with better communication and discussion with staff.

The Courtenay allegations

21. Eamon Courtenay, a lawyer in Belize, was the country's Minister for Foreign Affairs 2006-2007, and was a member of the Belizean team attempting to resolve the border dispute with Guatemala. By June 2008 he was no longer a parliamentarian and his party was in opposition following the elections earlier in the year.

22. In early June 2008 Mr Courtenay met Mr Spires, deputy High Commissioner in Belize, and made allegations about the claimant's behaviour. As a result Mr Spires telephoned Mr Evans in London on 5 June 2008, who emailed Susan Le Jeune the following day recording what he had been told ("the Evans email"). After summarising the allegations Mr Courtenay had made, the Evans email added that "this information is at present unsubstantiated but the omens are not good". Dr Kane commented in an internal communication that "if [Mr Courtenay] does get in touch with us, we might consider contacting [the claimant] to instruct him not to return to post at present".

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. What Mr Courtenay told Mr Wood coincided to an extent with the conversation with him related by Mr Spires to Mr Evans. However, allegations (3), (5), (6) and (7) in the Wood email were not in the Evans email of a few days earlier. Allegation (4) was in the Evans email, but there it was more significant, to the effect that members of the Opposition, not just Mr Courtenay, were boycotting events at the British High Commission and doing this generally, not just the ministerial visit by Meg Munn MP.

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.

Decision to withdraw and suspend

26. In the afternoon of 11 June 2008 there was a meeting between Ms Le Jeune, Mr Wood, Mr Evans, Dr Kane and Mr Rankin. No minutes were taken at the meeting.

At the trial Ms Le Jeune accepted that this was an error and that there should have been a minute taker in attendance. The only contemporaneous record of the meeting is an email sent later in the day by Mr Evans to Ms Le Jeune, copied to the others who had attended. Ms Le Jeune and Mr Wood accepted the accuracy of the email. It is clear, not least from the attachments to the email, that copies of Mr Evans' report and the management review were not available to all those attending the meeting. The substantive part of the email was as follows:

> "Although the local staff and Eamon Courtenay have made the allegations on a private and confidential basis and would not want their name disclosed, we decided that the evidence presented showed that [the claimant's] behaviour was completely unacceptable and was bringing the reputation of HMG into disrepute in Belize. We decided that you [i.e. Ms Le Jeune] had enough evidence to withdraw [the claimant] from post with immediate effect pending an investigation."

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.

27. The claimant was still on leave in the United Kingdom but due to return to Belize. On 12 June he received a telephone call asking him to attend a meeting at the FCO with Ms Le Jeune. He was not told the subject matter or that Mr Wood would be present. The meeting took place on Friday morning, 13 June. In a note for the file, prepared later that day, Ms Le Jeune recorded that she told the claimant that there were allegations against him which fell into two distinct groups. The first concerned his performance as a manager and the impact this was having on the High Commission and its staff. He had been described as a bully with an autocratic management style, he used sarcasm which staff read as being disrespectful, and he had reduced at least one female member of staff to tears. The second set of issues arose as a result of complaints from outside the High Commission alleging that the claimant had on a number of occasions displayed inappropriate behaviour towards women at social functions, including inappropriate touching. Members of the local community were so uncomfortable with his behaviour that some of them no longer attended High Commission events. In her evidence at the trial Ms Le Jeune accepted that there was only one complainant in this regard, Mr Courtenay. When the complainant pressed for names Ms Le Jeune refused to give them. She explained in her evidence that this was because of confidentiality. Mr Wood accepted that referring to "complaints" could mislead the complainant.

28. Ms Le Jeune then recorded in her file note that she told the claimant that their conclusion was that his position in Belize was no longer tenable. The combination of the effect on staff of his management style, and the risk of further reputational damage from his behaviour, meant that he was being withdrawn from post with immediate effect. (As well as withdrawing the claimant, on 13 June Ms Le Jeune also made the decision to suspend him.) High Commission staff would be told that he would not be returning to post. A senior office would conduct an independent

investigation into the allegations and he would have the chance to respond to them as part of that process.

29. As to the claimant's reaction, Ms Le Jeune recorded in her file note that he was initially subdued. He agreed that he did not see how he could return to post in the circumstances. (Mr Yapp denies putting it this way). He explained that there were many in Belize who held him in very high esteem, such as the Prime Minister, and he expressed shock at the allegations of inappropriate behaviour. He claimed that those who had gathered the evidence on his management style were out to get him. Ms Le Jeune then recorded that it had not been an easy interview and that the claimant was a long way from accepting any part of the blame for what had happened. She had offered her own support and referred him to someone in the Health and Welfare directorate if he needed assistance.

30. Formally the decision to withdraw the claimant was taken by Ms Le Jeune. I accept Ms Le Jeune's evidence that her decision was taken on the operational grounds in the FCO Guidance, set out later in this judgment. I also accept her evidence that it was the reputational damage arising from the allegations of inappropriate behaviour by the claimant to women, and separately to staff, which caused her to take the decision to withdraw him. In her evidence she very fairly accepted that, unintentionally, she may have thought that there had been additional complaints from staff after Dr Kane's informal warning. She also acknowledged that the decision was taken quickly, although not prematurely. In her evidence she said, not surprisingly, that she relied on Mr Wood's assessment of the reputational damage arising in Belize.

31. In a contemporaneous note which the claimant himself made of the meeting he recorded that Ms Le Jeune raised the issue of the Seychelles' allegations, with the implication that he was a repeat offender. In her evidence Ms Le Jeune could not recollect this, which is not surprising given the passage of time. I accept that the claimant's file note is accurate on this point and that the Seychelles allegations were raised. It is consistent with Mr Wood's evidence that ahead of the meeting of 13 June 2008 he was aware of a previous incident of some form relating to performance issues. In passing I note that the difference between Ms Le Jeune and the claimant about what was said regarding the feasibility of the claimant continuing in post is academic to the issues in the case.

32. In a letter to the claimant the same day of the meeting at the FCO, 13 June, Ms Le Jeune set out the essence of the matters recorded in her file note. In the letter she explained that the decision to withdraw him was not a disciplinary penalty. The FCO would now arrange for an independent fact-finding investigation to investigate the allegations. The claimant would have the opportunity to respond to the findings and to give his version of events. While the investigation was being carried out he should have no contact with post.

33. Ms Le Jeune's letter reached the claimant the following Tuesday, 17 June. He replied the same day. In his letter he said that he agreed that it would be difficult for him to continue for any length of time in Belize given that he evidently could not count on the support of Mr Wood, the Americas director. Moreover, it would be impossible for him to operate properly when he would have to keep looking over his shoulder for the next complaint. The letter continued that he had not quite understood that his withdrawal was deemed already to have taken effect. The claimant's letter then raised

a concern about Dr Kane's informal warning: he had been told that he was to be given the chance to adjust his behaviour but now there was to be an inquiry as if he had blatantly ignored it.

34. On 13 June the High Commission in Belize had been told, in a message from Mr Wood, that following the recent review of post and consultations in London it had been agreed that, for operational reasons, the claimant would remain in the United Kingdom for the foreseeable future. The same message was given to the government of Belize. Press lines agreed were that the claimant had been withdrawn as the High Commissioner to Belize for operational reasons and that it had not yet been decided whether he would be returning. The press lines continued: "Q. Is it true that he was withdrawn for misconduct? Unable to discuss personal staff issues further." However, on 18 June there was a news report in Belize that the claimant had been withdrawn for behaviour unbecoming to a High Commissioner. The FCO decided that the government of Belize should be told that the claimant would not be returning as High Commissioner.

The Gifford report

35. On 13 June Mr Gifford was appointed to conduct a fact finding inquiry into the claimant's behaviour. He had recently been HM Ambassador in Yemen. His inquiry was to be conducted under the misconduct procedure in the FCO Guidance. Usually, under that procedure, this type of inquiry would be undertaken by the claimant's line manager Dr Kane, but, in this case, the nature of the allegations meant that an independent investigator was appointed.

36. Mr Gifford travelled to Belize and was there 21-27 June 2008. On his return to the United Kingdom he explained to Ms Le Jeune that on arrival he had called all staff and UK-based spouses for a short meeting. After he explained who he was, he stressed the FCO's zero tolerance of bullying, mentioned his terms of reference, including the confidentiality of the process and the need for impartiality and fairness in the interests of both staff and the claimant. He told them that all staff, regardless of whether they were UK-based or locally engaged, driver or Ambassador, were entitled to be treated with respect in the workplace, and that they had an obligation to treat others similarly. His view was that because the claimant was not returning to Belize staff were helped to open up. Many staff at all levels were pleased and surprised that the FCO was taking their concerns seriously.

37. During the time he was in Belize Mr Gifford interviewed twenty members of the High Commission staff and one former member. Eighteen of them were locally engaged. He also interviewed the partner and wife respectively of the deputy High Commissioner and the executive officer. Mr Gifford did not interview the claimant's previous PA, who in evidence for the trial was very positive about him but critical of the behaviour of Mr Spires and certain of the locally engaged staff. Nor did Mr Gifford interview any of the women to whom the claimant was alleged to have behaved inappropriately. In his evidence at the trial Mr Gifford explained what he perceived to be the sensitivities of interviewing the wives of Belizean politicians. That did not explain why he did not interview members of the expatriate community towards whom the claimant was said to have acted incorrectly. During his time in Belize Mr Gifford received an email from Diana Nelson, the head of Health and

Welfare in the FCO, as to which persons the claimant wanted interviewed. In the main Mr Gifford interviewed them.

38. Mr Gifford returned from Belize on the weekend of 28-29 June 2008. On Monday, 30 June, he emailed Mr Wood, Ms Le Jeune and Diana Nelson (head of Health and Welfare at the FCO). He set out his view that, since the claimant's departure, morale at the High Commission had improved enormously. The email continued that, although he had not yet met the claimant, having talked about him all week he did not have any confidence in his ability to restrain himself from being very nasty to certain staff were he to return. Mr Gifford added that he had met Philip Priestley, the United Kingdom's last High Commissioner but one in Belize, in the lounge at Belize airport and that Mr Priestley had given Mr Gifford his views about staff at the High Commission. After referring to the generally positive picture painted by some staff, to be set against the extremely negative views of others, and his task of separating "the (numerous) poor performance aspects from the disciplinary ones", Mr Gifford concluded that, subject to his interviews with the claimant, he was "likely to conclude that there is a disciplinary case to answer both on his behaviour externally and within the mission".

39. Mr Gifford interviewed the claimant at the Foreign Office on 2 July 2008. The interview lasted for 5 hours and covered a significant number of topics. For the first time the claimant was made aware of the details of the allegations against him. Asked to explain his relationship with his deputy, Mr Spires, the claimant gave examples of his difficulties, including what he regarded as disloyalty. However, he said that he had made a real effort to acknowledge his deputy publicly. The claimant had also explained that his information was that a couple of the locally engaged staff had caused difficulties with Mr Priestley when he was High Commissioner. The claimant then gave his account of the furniture incident and of his relations with members of staff, including those who had made allegations against him. (Allegations against the claimant by two members of staff were not put to him, although he was charged with the bullying and harassing of them. In his evidence before me Mr Gifford readily accepted that this was unfair). As to Mr Courtenay's allegations, the claimant said that they were a shock and that he thought that he and Mr Courtenay had a relaxed and friendly relationship with each other.

40. Mr Gifford's report was dated 17 July 2008. At the outset were his conclusions. First, there was a misconduct case to answer of the claimant behaving inappropriately towards Mrs Courtenay and other women on social occasions outside the High Commission. Those were what brought the reputation of the United Kingdom government into disrepute. The evidence was not strong but it had to be considered further. There was, secondly, a misconduct case to answer of bullying and harassing certain High Commission staff. There was reliable evidence that the claimant was respected by other members of staff but that did not set aside considerable negative evidence. Other incidents, such as those relating to the furniture and the International Women's Group, did not give rise to a specific disciplinary case to answer.

41. In the body of the report, Mr Gifford set out his methodology. He referred to chapter 22 of the FCO Guidance. He was mindful of the need for fairness to the claimant, in particular the need not to jump to conclusions; of the investigation being conducted against a backdrop of local speculation and gossip; and of the need to distinguish between issues of performance and misconduct.

42. With regard to the Courtenay allegations, Mr Gifford said in the report that they appeared to be made in good faith. Mr Courtenay's demeanour and approach when he was interviewed led Mr Gifford to judge that he was sincere. (That is a point Mr Gifford underlined in his evidence at trial). In his report, Mr Gifford then referred to the evidence from others which undermined Mr Courtenay's account. He was known to be one of the most over-sensitive persons in Belize. Mr Gifford reported that he had raised the issue of sexual misconduct with seven persons, both inside and outside the High Commission, and none had witnessed any of what Mr Courtenay had alleged. (In evidence before me Mr Gifford said that he had concluded that nonetheless there was a case to answer because there remained a doubt in his mind). As to Mr Courtenay's allegation of a superficial attitude to work, wrote Mr Gifford, in the report. the evidence was to the contrary. In any event Mr Courtenay would not know of the claimant's reporting and analysis. Mr Gifford concluded that the Courtenay allegation about the claimant's affairs with an official in the Ministry of Foreign Affairs was unreliable, not backed by any other source, unclear as to who was involved, second hand and based on gossip.

43. In reaching his conclusion on bullying and harassment, Mr Gifford referred in his report to the split between on the one hand the more junior staff (the drivers, residence staff and guards, but not the handyman-gardener), who almost universally praised the claimant as a caring, committed and involved manager, and on the other hand the office staff, with whom he had greater workplace dealings, and who were all critical, to a greater or lesser extent. Whatever the ultimate outcome, Mr Gifford concluded, the judgment that the claimant's position as High Commissioner was untenable was wholly correct, given the comments by staff about their perception of him.

44. Following the completion of the report Mr Gifford wrote to the claimant on 24 July 2008 setting out the two allegations identified in the summary of the report. If substantiated, the letter said, the allegations constitute level 2 misconduct under the FCO Guidance. Mr Gifford included a copy of his report and the interview records. He informed the claimant that there would be a disciplinary hearing.

<u>The Priestley email</u>

45. Mr Priestley, the last High Commissioner to Belize but one, had emailed Mr Wood on 7 July 2008. He had been in Belize and seen the Prime Minister, who had spoken well of the claimant and appeared not to understand why the claimant had been withdrawn. He had also seen Mr Gifford at the airport and told him what the Prime Minister had said. The email continued that Mr Priestley had informed Mr Gifford that the High Commission would never be a happy ship until the employment of two of the locally engaged staff was terminated, and that he regretted not having done that when he was High Commissioner. If Mr Courtenay were involved, the email ran, he was one of the most over-sensitive people in Belize. Mr Priestley mentioned in that regard an incident involving a member of the Royal family.

46. After he had seen the reference to the Priestley email in Mr Gifford's report, the claimant had asked for details. Mr Gifford had no objection to the email being released to the claimant. However, he recognized that Mr Priestley would have expected it to remain confidential and that, since it was Americas directorate business, Mr Wood should be consulted. Mr Wood noted internally that Mr Priestley's observations cast "a slightly different perspective" on matters. He commented that

some of the complaints of bullying behaviour in the mission came from newer arrivals than the two locally engaged staff Mr Priestley had mentioned. In fact, as Mr Wood accepted at the trial, there was only one such person, the claimant's PA.

47. The claimant was shown a redacted version of the email before his disciplinary hearing on 7 August 2008. The email was also read to him around this point, whether in whole or in part he cannot now recall. In the disclosure process in the current litigation a fully redacted version of Mr Priestley's email, and then a partly redacted version, were provided. The claimant's solicitors made an application for specific disclosure of the email and served a witness summons on Mr Priestley. The upshot was that on the eve of trial the FCO provided the email in an un-redacted form.

Disciplinary hearing

48. The disciplinary hearing occurred on 7 August 2008. It was conducted by Mr Gifford. Mr Gifford raised with an FCO conduct adviser "the inadvisability of having the same person conducting the fact-finding and the disciplinary interview". (FCO conduct advisers advise inter alia on the application of the FCO Guidance). After seeking advice herself she replied to Mr Gifford that there was no objection.

49. Accompanying the claimant at the disciplinary hearing was John Nichols, a solicitor by training, previously HM Ambassador to Hungary and about to take up his appointment as HM Ambassador to Switzerland. There was a note-taker as well. At the outset Mr Gifford explained that the allegations against the claimant fell into two parts, the Courtenay allegations and those relating to the bullying and harassment of staff at post, including the claimant's PA and others. The claimant began by saying that he only had a redacted version of the Priestley email and that he had not been given access to his "Firecrest" (computer) account to prepare his defence. (Before me Mr Gifford accepted that the claimant should have seen the Priestley email but that, having taken advice at the time, he had decided against its disclosure because of the sensitive material included in it. He did not understand how access to Firecrest would have assisted the claimant's case). Later at the hearing the claimant identified for Mr Gifford a large number of what he alleged were breaches of FCO procedure, including that he had not been asked to nominate specific persons for Mr Gifford to interview in Belize such as his former PA and the other women mentioned in the Courtenay allegations. That he had been withdrawn from post had placed a strain on his health and on his future prospects inside and outside the FCO.

50. Mr Nichols expressed surprise to Mr Gifford that the claimant had never been sent a minute following the Evans' Report, detailing the difficulties identified and the changes which needed to be made. Secondly, Mr Nichols pointed out that the claimant had not been given the chance by his line management to demonstrate that he could improve – in light of the allegations of bad management - but had been removed from post during his leave. Mr Nichols commented further that the claimant's withdrawal from post had prejudiced the process by leading staff to be more spiteful in their comments to Mr Gifford and to assume guilt. There had been trial by media and a complete public humiliation of the claimant. Mr Nichols noted that the agreement on 13 June had been that the post would be told that serious allegations had been made and that the claimant would not return until they were resolved. However, a few days later Mr Spires had told the press that the claimant would not be returning, which led to a feeding frenzy by staff and the press.

51. In response to Mr Nichols' comments Mr Gifford recognised that it had been a difficult and humiliating experience for the claimant. (Before me Mr Gifford accepted that he had a duty of care to the claimant). The FCO decision to withdraw him from post had been based on available information at the time and that his, Mr Gifford's, view was that it had been the correct one. In his opinion the misconduct was at the higher end of level 2 and could easily have been treated as gross misconduct, level 3.

52. The hearing turned to Mr Courtenay's allegations regarding the claimant's harassment of Mrs Courtenay. The claimant gave a number of reasons to support his submission that the allegation was politically motivated, including that the claimant had become a personal confidant of the Prime Minister, who had spoken in the claimant's defence without any obligation to do so. With respect to the allegations of bullying and harassment the claimant contended that his deputy had undermined him and that the staff making the complaints had conspired together. He had wanted to restructure the High Commission and some staff had considered that a threat. His PA's allegations were wrong, Karen Williams had warned him against her, and he had in any event confirmed her in post. He knew of only one member of staff, the handyman/gardener who had complained about his behaviour and had addressed that immediately.

53. After a break for lunch the hearing resumed. Mr Gifford explained that he had consulted the FCO conduct adviser and checked the FCO Guidance. The claimant's withdrawal from post was on operational grounds as defined in Chapter 5. Mr Gifford then said that he had concluded that there was sufficient doubt about the reliability of Mr Courtenay as a witness, and a lack of other evidence. Thus on the balance of probabilities the Courtenay allegations were not substantiated. However, Mr Gifford said that he found that the allegations of bullying and harassing staff constituted a case to be answered of serious misconduct. He referred to the definition of bullying in the FCO Guidance and the number of allegations. On the claimant's behalf Mr Nichols responded that the Courtenay allegations were the main reason the claimant had been withdrawn from post. As to the bullying allegations, the claimant had not known of their seriousness or been given the opportunity to improve.

54. As to penalty, Mr Gifford said that his conclusion was that he would issue a final written warning at level 2. It would remain on the claimant's record for two years since it would take more than a year for the claimant to address the issue. He would also recommend that the claimant not be given an appointment as another head of mission, since he needed closer line management. He explained that in reaching this latter conclusion he took into account the letter of 5 September 2001 in relation to the Seychelles. The claimant responded that he had been assured that that matter would not be disclosed. In his evidence Mr Gifford told me that he had been given the Seychelles letter by the conduct adviser a few days before the hearing.

55. After some five hours the disciplinary hearing was drawn to a close. The record of the disciplinary interview with the claimant was sent to the claimant, who made comments, all of which were incorporated into the final version. Mr Gifford wrote formally to the claimant on 11 August 2008 setting out his findings. In relation to bullying and harassment he reduced the penalty so that the period of warning would remain on the claimant's file for only a year. The recommendation as to future head of mission appointments was withdrawn. On 3 September the claimant sent the FCO a

lengthy critique of Mr Gifford's findings. As he was entitled to do under the FCO Guidance the claimant requested an independent review.

Appeal

56. A review hearing was held on 3 October 2008 and conducted by Colin Reynolds. By the time of the trial Mr Reynolds was HM Deputy Ambassador to Brazil. The claimant was accompanied to the review hearing by Antony Stokes, by the time of the hearing HM Ambassador to Vietnam. Dr Stokes had been the claimant's line manager and told Mr Reynolds that, in that capacity, he had observed the claimant handle conduct and management issues well. Both the claimant and Dr Stokes raised points at the disciplinary hearing relating to due process. Mr Reynolds confirmed his initial view that the relevant procedures had been followed, particularly given the seriousness of the allegations: in such cases the FCO Guidance allowed for the Human Resources director to act as she had done. The claimant then said that he felt that the investigation was prejudiced because he had been withdrawn from post, which had allowed staff to escalate their grumbles. He also said that he was at a disadvantage because he could not access his Firecrest account.

57. As regards Mr Gifford acting as investigator and adjudicator, Mr Reynolds said that he had taken advice from the employment law adviser in the FCO who had said that this was the correct procedure under the guidelines of the Advisory, Conciliation and Arbitration Service. In his evidence at the trial Mr Reynolds accepted that the procedure was subject to the requirement of fairness. At the conclusion of the review hearing, Mr Reynolds said that he recognized the personal impact of what had happened on the claimant, and thanked him for the calm and measured way the hearing had been conducted. In a letter of 7 October 2008 Mr Reynolds informed the claimant that he had concluded that the penalty set out in Mr Gifford's letter of 11 August 2008 was appropriate and should be upheld. In his evidence at the trial Mr Reynolds said that the penalty imposed by Mr Gifford was, if anything lenient, given previous disciplinary cases, even though it was the most severe penalty which could be imposed.

Media coverage

58. On the 18 June there was a story on Belize's Channel 5, and subsequently on the internet, that the claimant had been withdrawn for behaviour unbecoming a High Commissioner. The evidence about how Channel 5 obtained the story is thin and any conclusion about whether it was leaked by an employee of the High Commission would be speculation. The FCO press officer spoke to the claimant about potential interest by the British press and offered assistance. Then on 27 and 28 July respectively there were stories in the Mail on Sunday and The Daily Telegraph relating to how the claimant had behaved inappropriately with women at official functions. He had been door-stepped by the press and made a comment critical of the FCO. Martin Longden, chief press officer at the FCO, gave an off-the-record briefing to a journalist from the Mail on Sunday when it continued to pursue the story. He confirmed that it would not be correct to report that the claimant had been exonerated or that he would be returning to Belize. The Mail on Sunday did not respect the off-the-record basis of the conversation. By this time Belizean television had made the connection with Mr Courtenay, the latter telling Belize's Channel 5 on 5 August that his wife had made no complaint. There was a further report in the Mail on Sunday on

17 August and later that month on one of the Daily Mail websites. In her evidence Ms Le Jeune commented on the appetite of some parts of the British media for negative stories about members of the FCO.

59. Once the disciplinary outcome was known the claimant requested the FCO to issue a statement confirming that he had been cleared of the sexual allegations which had interested the media. That was refused on the grounds that it might reignite further media interest (the claimant had not been exonerated of bullying and harassment) and it would be a breach of the FCO's policy of not commenting on individual cases. There had been an offer to assist with accommodation so that the claimant could avoid hounding by the press. There is a dispute as to when that was offered. To my mind that does not matter; it was an offer reasonably made even if limited in the manner the claimant suggests. The character of the press coverage was such that the claimant ultimately received damages for reputational loss from the Mail on Sunday when he pursued a defamation claim. That claim was separate from the claim for financial loss in the present action.

Claimant's post-withdrawal welfare

60. From 25 June 2008 the claimant was in regular contact with Ms Nelson, in her position as head of Health and Welfare in the FCO. Ms Nelson is someone with long experience in this field. On the whole, the claimant was complimentary about the assistance she provided to him over the following months. On 25 June she had a lengthy meeting with him. Later that day she told Ms Le Jeune, Mr Wood and Mr Gifford that the claimant was feeling very distressed. She arranged for counselling for him on 7 July 2008 and confirmed that further counselling would be paid for by the FCO.

61. In her evidence before me 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.[1]

[1] This was a reference to the cases of Craig Murray and Gerald Evans. Craig Murray was removed as HM Ambassador to Uzbekistan in 2004 having faced a number of allegations of misconduct. A passage in Mr Murray's book, *Murder in Samarkand* (2006), was before the court where he explains how he lost the desire to live because of "the viciousness and injustice of the allegations combined with not being allowed to fight them…" Gerald Evans prepared a witness statement for the trial. In it he explained that when he was the Vice-Consul and head of administration in the United Kingdom in Montevideo he was subject to a vendetta from a

62. Mr Gifford had noted that during his interview with the claimant for his report on 2 July 2008 the claimant was very distressed. Mr Gifford made reference to the claimant's feeling of continuing humiliation and that he was "evidently emotional, though he kept it firmly in check…" On 28 July 2008, Ms Nelson wrote to Mr Rankin, describing Mr Yapp as "distressed", "feeling increasingly besieged and isolated" and "wretchedly unhappy". She said: "Like others before him, he believes that the loss of his posting is a punishment delivered before any investigation has taken place. He believes that the FCO system goes against any notion of natural justice that one is innocent before proven guilty. He is not the first colleague to have commented on this and will not be the last".

63. At the disciplinary hearing on 7 August 2008, the claimant told Mr Gifford about the strain which his withdrawal from post had placed on his health. The following day Mr Gifford referred in an internal communication to the extreme pressures to which the claimant had been subject. At the review hearing the claimant explained to Mr Rankin that not being allowed to return to post to pack his personal belongings would cause him psychological damage. On 15 August 2008, one of the FCO's conduct advisers noted that the claimant needed to return to Belize for closure and for his own psychological health. In a letter to one of the FCO conduct advisers on 3 September 2008 the claimant referred to the very avoidable distressing and publicly humiliating national press attention to which he and his family had been subjected. In an email to Ms Nelson of 21 October 2008 the claimant wrote of his having been put through a drawn out trauma, which meant a due process was needed before he returned to work. He inquired whether Ms Nelson could inform Ms Le Jeune, while maintaining medical confidences. In her reply of 22 October 2008 Ms Nelson told him that she had informed Ms Le Jeune that he was unwell.

Firecrest, the claimant's belongings and return to Belize

64. As early as 25 June 2008, in his meeting with Ms Nelson, the claimant had raised the issue of not having access to his Firecrest account at home and the disadvantage to him. Firecrest is the computer system available to the FCO abroad. In his view information relevant to his defence was held in his Firecrest account, for example, documents evidencing his relationship with those who had complained about him and correspondence with those who visited Belize. It appears that Firecrest accounts were automatically closed at the end of a person's time in post and that by reason of technical limitations at the time were only accessible in post, not from the United Kingdom. There is some evidence that unsuccessful steps were taken to see whether the claimant's account could in any event be recreated.

65. The claimant was without his personal belongings for some four to five months. When they were returned they were damaged. The FCO says that there was initially confusion on arranging for the claimant's belongings to be returned. When it became

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staff member which eventually led to his being blamed. He began to suffer chronic stress but remained in post for ten months until he was replaced. His attempt to pursue the matter through the FCO's grievance procedures was unsuccessful.

clear in August that no progress had been made steps were taken to have the claimant's belongings professionally packed and returned by airfreight at the FCO's expense, although they were over the usual airfreight allowance.

66. The FCO refused to permit the claimant to return to Belize once he was withdrawn from post. That refusal continued after the outcome of the disciplinary process. The opportunity to return to pack his belongings and to say his goodbyes was of great importance to him. It had been recommended by his GP. In the claimant's view he only needed to visit the Residence and not the High Commission itself. Quite apart from anything else the FCO refused because it thought that it would be detrimental to staff morale and because there was a risk of media attention. Later it considered but declined to fund a visit on welfare grounds. In his evidence at the trial Dr Baggaley said he could understand the rationale behind such a trip but would not regard it as essential to the claimant's treatment. Dr Turner was of the view that there was no need for it.

Period until retirement and after

67. The claimant had been suspended, as well as withdrawn from post. There were no reviews of the suspension, as required under the FCO Guidance. On 20 October 2008 the claimant raised the issue of suspension. In a letter dated 3 November 2008 Ms Le Jeune lifted the suspension. On that day the claimant commenced a period of sick leave because of his depression. When Ms Le Jeune contacted the claimant in early November 2008 she confirmed that there were no restrictions on the type of job the claimant could apply for, including overseas postings. Her evidence at trial was that the claimant had an even chance of obtaining an overseas posting, but that there would be competition from the some 26 or 27 in the corporate pool. She would be reluctant to send him somewhere particularly arduous or remote. Another head of mission who had been withdrawn, had obtained another overseas posting.

68. On 12 April 2009 Ms Nelson wrote internally that it was important for the claimant's rehabilitation that the FCO invested the necessary energy in identifying a job that he could do for even a short while. Attempts had been made by the corporate pool manager in the FCO but he had reported that nothing was available. His evidence before the court was of various efforts to find the claimant something suitable. At the time the claimant expressed gratitude for what he had done. Ms Nelson's evidence before me was that at no stage did the claimant say that he did not wish to return to work. In her view, however, he had unrealistic expectations of what positions were available to him. She knew that he was a protected person under the Disability Discrimination Act 1995.

69. While on sick leave the claimant was diagnosed with coronary artery disease, which led to his undergoing triple bypass surgery on 29 April 2009. The claimant's evidence was that he recovered well 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.

70. The claimant's pay was reduced to half in May 2009. A senior occupational health physician used by the FCO, Dr Dipti Patel, saw the claimant on 22 October 2009. The following day she reported to Ms Nelson that the claimant's health was generally improving, and while he remained symptomatic he was fit to return to work in a restricted capacity. The claimant himself was anxious about returning to work in view of the circumstances of his absence and the way he felt he had been treated. Dr Patel added: "Therefore, the prognosis of an effective return to work must currently remain guarded." Dr Patel recommended that the claimant should have a graduated return to work, should initially work two shortened days of 5-6 hours, with the aim of being back to full time work within a 3 month period. She recommended that he should avoid travel during rush hour and should ideally start work mid morning, at least initially. In terms of work activities, he should be employed if possible on a discrete project, within a supportive team environment.

71. When the claimant's sick leave certificate expired on 2 November 2009 he was registered with the FCO's corporate pool. He remained in the pool without being deployed. At the trial Ms Bubbear, who at the time was in the FCO's Human Resources operations team and is now deputy head of mission in Hungary, gave evidence of her impression that the claimant did not believe he could return to work and that he would only be able to undertake limited tasks. She first saw him in December 2009. In her evidence she said that she was not aware that the claimant was a person protected by the Disability Discrimination Act 1995. It is likely that the claimant did raise with Ms Bubbear possible employment, for example, acting as a greeter at the FCO of foreign visitors. Possible jobs were available for which the claimant could apply. A position was identified in July 2010 but his treating doctors did not think he was fit for work. He went on sick leave again in August 2010, where he remained until his retirement, aged 60, on 31 March 2011.

72. Since his retirement the claimant has not been employed. Generally speaking, those who have been employed in the diplomatic service are encouraged to work after retirement. In her evidence at trial Ms Le Jeune accepted that this was what the claimant could have done. Her evidence was that about one half of Foreign Office employees work after retirement. She explained that there is a small group of people in the Human Relations directorate whose job it is to facilitate such post-departure employment.

Medical evidence

73. Prior to his withdrawal from post the claimant was in good health. The relevant GP records for the claimant begin on 10 July 2008, with a diagnosis of work stress, a diagnosis which continued over the following months. The claimant felt cut off from work colleagues and was sleeping poorly, tired during the day and had reduced motivation. On 21 July the GP recorded that sleep was still difficult, prescribed Zopiclone tablets and noted that "mood is OK in circ[umstances], nil suicidal ideation voiced". A month later, on 10 August 2008, the GP prescribed Zopiclone again and

noted: "[R]elapse. Feeling worse. Feels unable to get out of bed or chair. Chest feels tight." On 26 August the GP noted that the claimant's symptoms included "anxiety as procedures at work continue, sleep poor with anhedonism and low mood at times, no suicidal thoughts." The GP prescribed Citalopram Hydrobromide Tablets, 10mg, after discussing its use with the claimant, to aid anxiety and sleep. Citalopram is a drug for depression. When the GP saw the claimant three days later, on 29 August, and then early the next month, on 2 September, the Citalopram was not having side effects (except for a little dizziness) but there was no effect on the claimant's sleeping patterns. On 9 September 2008 the GP noted that the claimant had not consented to reports being made to the FCO about his situation.

74. The claimant then went on holiday in France and when he returned to the surgery on 24 September 2008 the GP noted that he had had a very good break and felt rested and relaxed. However, he was "apprehensive now re upcoming meetings with work over next few weeks. Sleep OK but energy levels generally down." A fortnight later, on 9 October, the GP recorded a beneficial response from the Citalopram, which was prescribed at a dose of 20mg. The claimant completed a simple test, with a score of 10/27, which indicated that he was depressed. The following week, on 14 October, the GP recorded that the claimant's appeal was still outstanding, he had felt very despondent since then and he had low mood but was not suicidal.

75. In April 2010 the claimant's GP referred him to Dr Paul McLaren, a consultant psychiatrist. In the referral letter the GP explained to Dr McLaren that he had been treating the claimant over the previous 20 months for a reactive depression. When he first saw him in July 2008, it seemed clear that he was struggling with the enforced isolation that this had entailed and that he had a poor sleep pattern with a lot of fatigue in the day and no motivation. The GP explained that he initially treated the claimant with a short course of sleeping tablets, and as this made no difference he commenced him on Citalopram. Dr McLaren saw the claimant on 28 April 2010 and wrote to the GP that he thought the claimant was suffering from a moderate depressive episode, which had only partially responded to treatment. When Dr McLaren saw the claimant again on 17 May 2010 he noted that he still struggled with a moderate depressive episode. He and the claimant had agreed that the claimant was unfit for work.

76. In September 2010 the claimant's GP wrote to Dr Patel, the occupational health physician used by the FCO, that he was continuing to treat the claimant for symptoms of anxiety and depression. He had referred the claimant to Dr McLaren, whose view was that the claimant was not currently fit for work. Therefore he, the GP, had once again certified the claimant as unfit for work from 19 August 2010. The reason for this was because of his ongoing depressive symptoms due to the effects of stress. Early the following month, 7 October 2010, Dr McLaren wrote to Dr Patel that the claimant would need active supervision if he were able to return to work, especially for the FCO, and would probably need to be involved in a close team, in a caring environment, flexibly working from home, without undue pressure. That would be difficult for him for the present and in any event would probably need to last rather more than three months.

77. When Dr McLaren saw the claimant on 6 July 2011 he reported that since he had last seen him the claimant's mood had fluctuated. On examination the claimant was open and reflective but he spoke with feeling about the difficulties he was having in reviewing the legal papers for this case and in re-living painful experiences. On

balance his depressive episode remained in remission. The following year, May 2012, Dr McLaren reported that the claimant's mood had dipped since he had last been examined.

78. At the trial there was evidence from two expert psychiatrists, Dr Baggaley, whose report was requested by the claimant and Dr Turner, whose report was requested by the FCO. Both agreed that the claimant has developed mild or moderate depression, which has fluctuated in severity over time. Both also agreed that by 11 August 2008 he was experiencing understandable stress but was not depressed. Had he been exonerated, and found another posting, he would not have become depressed. As to the onset of the claimant's depression, Dr Baggaley's evidence was that depression is a condition which develops over a period with a gradual build-up of symptoms. As he put it the 'hard stop' for its onset was on 26 August 2008, when the GP noted anhedonia and low mood, as well as sleeplessness and anxiety. The GP prescribed Citalopram, an anti-depressant. The claimant's withdrawal from post, in particular his sense of his treatment being unfair, contributed to the development of his depression. If he felt that he had been fairly treated his resilient personality meant he would not have developed depression. His depression predated the final outcome of the disciplinary process. His treatment by the media contributed significantly to his stress. One aspect of his sense of unfairness was that he felt that the account of others was being preferred over what he regarded as the true position.

79. Dr Turner dated the onset of the claimant's depression, as opposed to understandable stress, to the end of September, or early October 2008, although he agreed the process could be gradual. Given the prescription of Citalopram on 26 August there was a case that he was depressed at that point, but in his view the GP's notes suggested that this was first prescribed for anxiety and sleep disturbance, rather than depression. Dr Turner's view was that the cause of the depression was the outcome of formal investigation; this tipped the balance between stress and depression. In his evidence at trial he accepted that this was his conclusion on the premise that the claimant perceived the process as unfair. Given the GP's notes on 26 August, and what he informed Dr McLaren in September 2010, it seems to me that Dr Baggaley's opinion is to be preferred over that of Dr Turner.

III LEGAL FRAMEWORK

The contract of employment

80. The employer-employee relationship is governed, first, by any express contractual terms. In this case the express terms of the claimant's contract of employment were contained both in his letter of appointment as High Commissioner to Belize and in FCO Guidance. In closing Mr Payne accepted that the relevant provisions of the Guidance had contractual force. That precludes any need to canvass authorities such as Alexander v Standard Telephone and Cables Ltd (No. 2) [1991] IRLR 286 and Bristol City Council v Deadman [2007] IRLR 888, [17].

81. There is also the implied term of mutual trust and confidence between employer and employee, which imposes an obligation that an employer will not without reasonable and proper cause conduct itself in a manner calculated or likely to destroy or seriously damage that relationship: Malik v Bank of Credit and Commerce International SA [1998] AC 20; Edwards v Chesterfield Royal Hospital NHS Foundation Trust [2011]

UKSC 58; [2012] 2 AC 22, [1], per Lord Dyson JSC. In Mahmud Lord Nicholls posited that the test was whether the employer's conduct, looked at objectively, was likely to destroy or seriously damage the degree of trust and confidence the employee was reasonably entitled to have in his employer: 35C. Lord Steyn said that the motives of the employer could not be determinative, or even relevant. "If conduct objectively considered is likely to cause serious damage to the relationship between employer and employee a breach of the implied obligation may arise": 47G-H. A breach of the implied term of trust and confidence may consist of one act or a series of acts which cumulatively amount to its breach: Lewis v Motorworld Garages Ltd [1986] ICR 157,169F-G, per Glidewell LJ. The term may be broken even though the employer does not intend to bring the employment relationship to an end: Gogay v Hertfordshire County Council [2000] IRLR 703, [54].

(a) Letter of appointment

82. The letter appointing the claimant as High Commissioner in Belize dated 9 January 2007 contained various terms and conditions of a contractual character, including the following undertaking of fair treatment:

> "6. 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."

Fair treatment as a requirement is fact sensitive and its requirements turn very much on context: see MD Freedland, The Personal Employment Contract (Oxford, 2006), 188ff. Early in her evidence at the trial Ms Le Jeune quite properly accepted that under this paragraph a head of mission is entitled to fair treatment in relation to withdrawal from post and that fundamental to fair treatment is an entitlement to natural justice and an opportunity for the head of mission to put his or her side of the story. Indeed a golden thread through the case law on fair treatment is that those liable to be affected by a decision must be given prior notice of it so that they can make representations. A corollary is that any representations must be taken into account by the decision-maker. The greater detriment a decision is likely to cause the more demanding these duties. Where a decision-maker is entrusted with information in confidence relevant to the decision, he or she must balance the need for disclosure to the person affected against respecting the confidence. The law recognizes exceptions to the duty to disclose, such as the need for prompt action. When urgency demands a relaxation in the requirement of prior notice, the obligation of fair treatment requires the decision-maker to engage in an evaluative exercise as if the person affected had made representations. Another principle of fair treatment is that

against bias, real or apparent. It may not be appropriate for decision-makers to be involved in a determination reviewing what is effectively their earlier decision, not least because of the appearance of not bringing to it an open mind.

(b) FCO Guidance

83. The "FCO Guidance HR1" contains 27 chapters covering a wide range of matters from appointments through to departure.

(i) withdrawal

84. Chapter 5 is entitled "Appointments at home and overseas." Paragraph 39 of that chapter addresses early termination of a posting at public expense. This is said to be exceptional, and only to be considered where there is no alternative and the costs are justified. The paragraph then sets out a number of possible grounds for early termination – medical, pregnancy, welfare, security, misconduct, poor performance, operational and early retirement/redundancy. The misconduct ground reads in part:

> "Misconduct
>
> 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 …
>
> - 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."

The relevant aspect of the operational ground is as follows:

> "Operational
>
> An "operational" short tour must be approved by the HR Director and may be considered in the following circumstances;
>
> …
>
> - 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…"

(ii) performance improvement

85. Chapter 10 of the FCO Guidance HR1 addresses the performance improvement procedure. Paragraph 8 requires that line managers should explore possible causes of poor performance with the job holder so that the problem is properly understood before discussing remedial action. It continues that otherwise the action agreed may not be appropriate. There is then a checklist of factors set out which, it is said, may be helpful. Paragraph 9 distinguishes poor performance and misconduct.

> "9 PIP [Performance improvement procedure] runs in parallel with, but is not part of, the FCO Misconduct procedure. Poor performance resulting from lack of skill, competence (as defined in the FCO Core Competence Framework), or effort despite having received usual levels of training and support falls under PIP. A pattern of wilful inappropriate behaviour or serious negligence leading to or resulting in serious consequences for others or the FCO should be treated as misconduct."

Preliminary remedial action through feedback, coaching and support, is said to be the responsibility of the line manager (paragraph 12). Paragraph 13 underlines that the objective throughout is to help the job holder to reach an acceptable standard of performance.

(iii) dignity at work

86. Dignity at work is dealt with in chapter 15. The expectation is that FCO staff will be committed to the dignity at work policy and will treat colleagues with respect. Deliberate or persistent harassment or bullying will be treated as misconduct or gross misconduct and considered for formal action under chapter 22. The Guidance recognises that bullying can take many forms. Harassment is behaviour which is unwanted, unreasonable or offensive to the recipient.

(iv) misconduct procedure

87. The primary aim of the misconduct procedure in chapter 22 is said to be "to encourage an employee whose standard of work or conduct is unsatisfactory to improve". Paragraph 1 asserts that the misconduct procedure "helps staff and management keep the rules and help[s] managers to deal fairly with those who do not". The misconduct procedure is mandatory and said to be based on the Advisory, Conciliation and Arbitration Service (ACAS) model set out in their Code of Practice on Disciplinary and Grievance Procedures at Work (paragraph 3). Under the ACAS code in force at the time informal action was the first step with misconduct and only then was formal action to be taken. With formal action the ACAS code provided that the first step "is to let the employee know in writing what it is they are alleged to have done wrong."

88. Highlighted in the FCO Guidance are the following: "Take prompt action; Follow the procedure meticulously; Gather the facts. Be objective, firm and fair. Never prejudge." Paragraph 5 provides as follows:

> "5. No disciplinary allegation should be made formally until the facts have been established … Investigation of the facts should,

> where possible, include the individual's side of the story. In exceptional circumstances there may be genuine reasons why asking for this would put the rest of the investigation at risk. Such reasons should be put in writing as part of the investigation."

The individual may ask to be accompanied during a fact-finding interview although this is not a requirement (paragraph 6). Paragraphs 7 and 9 provide:

> "If a fact-finding shows there is a case to answer, the individual must be given full details of the allegation in writing and copies of any documents in support of it.
>
> …
>
> 9. The individual should be given every opportunity to answer any formal allegations against them before any conclusion is reached".

89. According to paragraph 14 of chapter 22 the misconduct procedure should be used in response to an act or persistent acts of misconduct. Under the heading "Preliminary management action" prompt action by means of informal advice and guidance is emphasised for instances of minor misconduct when first identified (para 15). Paragraph 16 provides as follows:

> "Serious cases of misconduct overseas (gross misconduct or serious cases of misconduct which have brought the FCO into disrepute) will automatically result in the officer being withdrawn from post…This would be after any appeal was heard and the misconduct upheld."

In paragraph 18 misconduct is divided into the less serious (level 1), and the more serious (level 2).

90. As foreshadowed earlier in the guidance, chapter 22 distinguishes misconduct and poor performance. As a guide, paragraph 19 reads, misconduct is generally an act or acts which have been committed wilfully. Gross misconduct, level 3, "breaches the bond of trust and confidence between the FCO and the office which underpins the contract of employment" (para 20). Cases of misconduct must always be referred to the conduct adviser or conduct and discipline adviser for advice, and they must agree to any decision not to deal with it formally (para 30). Level 1 misconduct leads to a written warning, level 2 to a final written warning and level 3 to dismissal or other appropriate penalty (para 35).

91. Suspension from duty is addressed in paragraphs 23-27. Suspension on full pay whilst an allegation of misconduct is being investigated should only be considered for cases where gross misconduct may be involved and, for example, the nature of the allegation is such that it would make it difficult for the staff member to continue working. The reasons for any suspension must be fully explained to the individual and it must be made clear that the suspension is not in itself disciplinary action (para

24). Any suspension must be regularly reviewed to ensure it is still necessary and that the period of suspension is not unnecessarily protracted (para 25).

92. Under the Guidance line managers usually handle allegations of misconduct, or countersigning officers, but if there is a genuine reason another person of the same or a higher grade may be substituted (paragraphs 28-29). Cases of misconduct should be referred to the conduct adviser for advice (paragraph 30). The process to be followed in investigating any alleged misconduct is governed by the principles to which earlier reference was made (para 37).

93. At Annex 22 A there is a checklist for conducting a fact finding investigation into misconduct. This includes the reminder that the aim of the investigation is to establish the facts rather than to decide whether a member of staff is guilty of the alleged misconduct (para 3). The checklist also refers to the need normally to inform the individual before the investigation begins that an allegation of possible misconduct has been made and is being investigated unless there is legitimate concern that disclosure would compromise the investigation. A checklist for conducting a misconduct interview contains due notice provisions and providing the opportunity for the person to put his or her case (Annexe 22 I). With gross misconduct the hearing will involve someone other than the person who conducted the fact finding investigation.

94. The appeal procedure in respect of levels 1 and 2 misconduct is governed by paragraph 72 of chapter 22 and chapter 23 of the Guidance. The purpose is not to rehear the case but to decide whether the decision reached was fair and reasonable and that the penalty is fair in the circumstances.

(v) reasonable adjustments

95. The FCO's legal duty under the Disability Discrimination Act 1995 (now the Equality Act 2010) is addressed in chapter 27, including the obligation to make reasonable adjustments where a practice places a disabled person at a substantial disadvantage.

Breach of contract

96. The right to bring a claim for the financial loss arising from a breach of the contract of employment is well-recognised. In Eastwood v Magnox Electric plc [2004] UKHL 35, [29], Lord Nicholls gave the examples of financial loss arising from a suspension or where an employee suffers financial loss from psychiatric illness caused by pre-dismissal unfair treatment. That analysis was approved by Lord Dyson JSC in Edwards v Chesterfield Royal Hospital NHS Foundation [2011] UKSC 58; [2012] 2 AC 22, [50]. The issue which has troubled the courts in cases such as Eastwood, Edwards, and the seminal decision of Johnson v Unisys Ltd [2003] 1 AC 518 concerns the impact of Parliament's imposition of a statutory cap on the damages which may be awarded for unfair dismissal. It has been held that damages are not recoverable for a breach of either an express or implied term of the employment contract concerning the procedures leading to dismissal (the so-called Johnson exclusion). That is not this case, which has nothing to do with dismissal.

97. Damages for loss in respect of breach of the employment contract, apart from dismissal, are to be calculated according to ordinary principles of the law of contract:

see Hugh Collins, "Compensation for Dismissal: In Search of Principle" (2012) 41 Indus LJ 208, 227. A claimant's loss must be caused by the breach and not too remote. The breach must be the effective or dominant cause of the loss and that is said to be a matter of common sense: Galoo v Bright Grahame Murray [1994] 1 WLR 1360. There may be an intervening event which breaks the chain of causation. In the ordinary way remoteness is determined at the time the contract is made and, assuming the parties foresaw the actual breach, turns on whether the type of loss suffered was within the reasonable contemplation of the parties as a not unlikely result of the breach occurring. There might also be a principle which limits liability for the type of loss which was not unlikely to occur in the usual course of things in situations where the defendant cannot be regarded as having assumed responsibility for it: Koufas v C Czarnikow Ltd (The Heron II) [1969] 1 AC 350; Transfield Shipping Inc v Mercator Shipping Inc (The Achilleas) [2008] UKHL 48; [2009] 1 AC 61. As ever, a claimant is under a duty to mitigate and so cannot recover for a loss which could have been avoided by taking reasonable steps.

98. Illustrations of how these principles are applied in the employment context are provided by Malik v Bank of Credit and Commerce International S A [1998] A.C. 20, Gogay v Hertfordshire CC [2000] I.R.L.R. 703, and the Court of Appeal judgment in Edwards v Chesterfield [2010] EWCA Civ 571; [2011] QB 339. Malik recognized that so-called stigma damages could be recoverable for loss of employment prospects through the employer's breach of contract. In that case the House of Lords held that it was reasonably foreseeable that in consequence of the employer conducting a corrupt business – and thus being in breach of the implied obligation to the employee not to engage in conduct likely to undermine trust and confidence - there was a serious possibility that an employee's future employment prospects could be adversely affected: 37A- C, per Lord Nicholls, 49H, 53 D-E, per Lord Steyn. In the course of his speech in Malik Lord Steyn warned that the limiting principles to damages in contract of causation, remoteness and mitigation presented formidable practical obstacles to claims for stigma damages succeeding: 53D. Indeed when the matter went back for trial, the employees were unable to prove, on a balance of probabilities, that the employer bank's breach of the implied term of trust and confidence was a cause of their failure to obtain future employment: see Bank of Credit and Commerce International Sa v Ali (No2) [2002] EWCA Civ 82; [2002] I.C.R. 1258.

99. In Gogay the County Court judge had awarded the claimant damages for breach of her employment contract including loss of earnings and in respect of the psychiatric illness she had suffered. The Court of Appeal upheld the award. The claimant, a care worker in one of the Council's residential homes, had been suspended following what one of the children had said during therapy sessions. The Council launched an inquiry under section 47(1)(b) of the Children Act 1989, which empowers a Council to do that when it has a reasonable suspicion that a child is suffering, of is likely to suffer, significant harm. On appeal Hale LJ (with whom May LJ and Peter Gibson LJ agreed) held that the courts should be slow to interfere with a Council's exercise of that discretion: [50].

100. However, Hale LJ said that the real issue in the case was not the decision to conduct the statutory inquiry but the decision to suspend the claimant in the way it did during the inquiry. She held that in the circumstances the decision to suspend was in breach of the implied term of confidence and trust. First, here were the reasons given for the

suspension, "an allegation of sexual abuse". Before so serious an accusation were made there should have been a close reading of the records, coupled with further inquiries: [55]-[56]). Secondly, there was a failure to consider other ways of dealing with the claimant, apart from suspension, while inquiries were being made: [57]). "[T]he employee is entitled to something better than the "knee-jerk" reaction which occurred in this case": [59]. The reference to a "knee-jerk" reaction of employers in suspending employees was invoked in *obiter* remarks of Elias LJ in Crawford v Suffolk Mental Health Partnership [2012] EWCA Civ 138; [2012] IRLR 402.

101. Edwards v Chesterfield [2011] UKSC 58; [2012] 2 AC 22 involved a claim for damages for loss suffered by an NHS consultant surgeon as a result of findings of misconduct leading to his dismissal and loss of professional status. It was contended that the employee had been dismissed in breach of contractual disciplinary procedures and that the findings would not otherwise have been made. The Court of Appeal held that if the claim could be established damages fell to be assessed under ordinary contractual principles, for example, the claimant would be entitled to damages for the loss of the opportunity to hold another full-time appointment with the NHS: [2011] QB 339, [36], [50]. The Supreme Court allowed the appeal on the ground that the Court of Appeal had been wrong in holding that the claim did not fall within the Johnson exclusion.

102. Psychiatric injury in Gogay was caused by a breach of the implied term of mutual trust and confidence. The Court of Appeal was not prepared to interfere with the finding of the trial judge that in that case psychiatric injury was reasonably foreseeable: [70]. However, in Deadman v Bristol City Council [2007] EWCA Civ 822; [2007] I.R.L.R. 888 Moore-Bick LJ (with whom Hallett and Carnwath LJJ agreed) held that it was not reasonably foreseeable that a breach of the employment contract could cause stress sufficient to lead to psychiatric injury: [44]-[46]. There the Council had appointed a panel to investigate possible harassment, but in breach of its procedures, and thus in breach of the employment contract, the panel consisted of two, rather than three members. Moore-Bick LJ cited Chitty on Contracts, 29th ed., v.1, para. 26–047 (now 31st ed., v.1, para 26-108 (HG Beale)) that a type or kind of loss is not too remote a consequence of a breach of contract if, at the time of contracting, and on the assumption that the parties actually foresaw the breach in question, it was within their reasonable contemplation as a not unlikely result of that breach. Moore-Bick LJ then said: "If one had asked either of the parties at that time [when the procedures became part of the contract of employment] whether they thought it at all likely that an error of that kind in convening a panel to investigate a complaint of sexual harassment would result in psychiatric harm to one or other of those involved, I think they would have been astonished": [46].

Duty of care

103. At common law an employer is under a duty of care to employees. The duty is treated as both contractual and tortious: Chitty on Contracts, 31st ed., v.2, para 39-100 (MR Freedland); Munkman on Employer's Liability, 15th ed, 2009, ch 15 (Langstaff J). It is a continuing duty throughout the employment relationship. In Barber v Somerset County Council [2004] 1 WLR 1089 Lord Walker (with whom Lords Bingham, Steyn and Rodger agreed) said (at [65]) that the best statement of general principle remained what Swanwick J had laid down in Stokes v Guest, Keen and Nettleford (Bolts and Nuts) Ltd [1968] 1 WLR 1776, 1783:

> "[T]he overall test is still the conduct of the reasonable and prudent employer, taking positive thought for the safety of his workers in the light of what he knows or ought to know; where there is a recognised and general practice, which has been followed for a substantial period in similar circumstances without mishap, he is entitled to follow it, unless in the light of common sense or newer knowledge it is clearly bad; but, where there is developing knowledge, he must keep reasonably abreast of it and not be too slow to apply it; and where he has in fact greater than average knowledge of the risks, he may be thereby obliged to take more than the average or standard precautions. He must weigh up the risk in terms of the likelihood of injury occurring and the potential consequences if it does; and he must balance against this the probable effectiveness of the precautions that can be taken to meet it, and the expense and inconvenience they involve. If he is found to have fallen below the standard to be properly expected of a reasonable and prudent employer in these respects, he is negligent".

104. Liability on the part of an employer for psychiatric injury sustained by reason of the particular stresses to which an employee has been exposed turns on whether the employer was in breach of the duty of care and whether the injury was caused by the breach and reasonably foreseeable. Typically the authorities use the test in tort for what is reasonably foreseeable. As for the issue of breach of duty, Barber recognized that an employer may need to take steps to determine both the risk of work-related ill-health to an employee and what could be taken to ease it: [67].

105. In relation to forseeability, in Sutherland v Hatton [2002] EWCA Civ 76; [2002] ICR 613 Hale LJ (who gave the judgment of the court) said that it may be easier to satisfy the test in a known individual than in the population as a whole: [23]. Foreseeability depended upon the inter-relationship between the particular characteristics of the employee concerned and the particular demands which the employer cast upon him. Citing McLoughlin v Jones [2001] EWCA Civ 1743; [2002] QB 1312, Hale LJ said that expert evidence may be helpful although it can never be determinative of what a reasonable employer should have foreseen. She continued that a number of factors are likely to be relevant. More important than the nature and extent of the work itself were signs from the employee. It was necessary to distinguish between signs of stress and those of impending harm to health; stress was merely the mechanism which may, but usually did not, lead to damage to health: [27]. Moreover, an employer did not necessarily have to make searching or intrusive enquiries and could take things at face value: [29].

106. Another proposition which Hale LJ advanced was this: "To trigger a duty to take steps, the indications of impending harm to health arising from stress at work must be plain enough for any reasonable employer to realise that he should do something about it": [31]; [43(7)]. The proposition quoted was cited with approval by Dyson LJ (with whom Wall LJ and Lord Phillips MR agreed) in Hone v Six Continents Retail Ltd [2005] EWCA Civ 922; [2006] IRLR 49, [15]. In Barber (which was an appeal on one of the Sutherland cases) Lord Walker said the propositions in the Court of Appeal's judgment were only by way of guidance and were not propositions of law: [65].

107. Provided some injury is foreseeable the claimant may recover for the full extent of any injury, whether or not that was foreseeable: Page v Smith [1996] AC 155. In Hartman v South Essex Mental Health and Community Care NHS Trust [2005]

EWCA Civ 6; [2005] ICR 782 the court heard a number of appeals involving claims by employees suffering psychiatric injury. In giving the court's judgment Scott Baker LJ held that where an employer foresees that employees exposed to certain conduct might suffer psychiatric injury, and as a result a particular employee who has shown no impending signs suffers such injury, foreseeability will be established without having to inquire whether the employer could reasonably have foreseen that the risk of injury to the particular employee might cause such harm: [131]-[133]. So, too, where an employer is aware that an employee has demonstrated signs of impending ill-health, foreseeability will be made out: Dickins v O2 plc [2008] EWCA Civ 1144; [2009] IRLR 58, [23]-[25].

108. But the authorities contain limits on what is expected of employers. In Hartman Scott Baker LJ cited Croft v Broadstairs Town Council [2003] EWCA Civ 676, where Potter LJ referred to the position of employers who were entitled to expect ordinary robustness on the part of employees, including when exposed to disciplinary proceedings to which they had never previously been exposed. A similar point was made by Laffoy J in the Irish High Court in the context of employees being moved against their will to a different position in the organisation: Shortt v Royal Liverpool Assurance Ltd [2008] IEHC 332. In Hartman itself Scott Baker LJ said it did not follow that because a claimant suffers stress at work, and the employer is in some way in breach of duty in allowing it to occur, a claimant is able to establish a claim in negligence. Scott Baker LJ approved a statement of Simon Brown LJ in Garrett v Camden LBC [2001] EWCA Civ 395, at [63], that unless there is a real risk of breakdown which the claimant's employers ought reasonably to have foreseen, and which they ought properly to have averted, there can be no liability.

109. However, Scott Baker LJ rejected the proposition that unless an employer knows of some particular problem or vulnerability it is entitled to assume that the employee is up to the pressure of the job. Such knowledge is relevant to cases where an employer has not foreseen the risk of psychiatric injury and the employee's workload would not ordinarily carry a foreseeable risk of such injury: [133]. In the context of Mrs Hartman's case Scott Baker LJ held that there was no basis upon which the judge could properly conclude that the employer was fixed with the knowledge of the confidential information disclosed by Mrs Hartman to its occupational health department: [35]; see also Sayers v Cambridgeshire County Council [2006] EWHC 2029; [2007] IRLR 29, [171]. Scott Baker LJ also made the point that the mere fact that the employer offers an occupational health service should not lead to the conclusion that it has foreseen the risk of psychiatric injury due to stress at work to any individual or group: [137]. In Daw v Intel Corporation [2007] EWCA Civ 70; [2007] ICR 1326 Pill LJ, with whom Wall and Richards LJJ agreed, referred to the passage in Hatton at [41(11)], that 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. Pill LJ said that that did not mean that such services are a panacea by which employers can discharge their duty of care in all cases: [45]; see also Dickens v O2 plc [200] EWCA Civ 1144; [2009] IRLR 658, [26]-[28].

IV BREACH OF CONTRACT

110. The first prong of the claimant's case is for loss resulting from the FCO's breach of the contract of employment. On his case he suffered financial loss, which is not personal injury dependent, as a result of (1) his unlawful withdrawal from the position

of High Commissioner in Belize and his associated suspension from duty and (2), the disciplinary investigation pursued against him. He also submits that he sustained psychiatric injury, with consequent financial loss, as a result of the FCO's breach of contract. A related issue concerns the steps taken by the FCO to identify a suitable post for the claimant once he was away from work and the impact on his health. During the trial the FCO sought to exclude the claimant's right to pursue his claim for damages for breach of contract, except insofar as the damages claimed were consequent upon personal injury. In my judgment a breach of contract in a wider sense claim was plain on the pleadings and I need say nothing more about the FCO's position on the matter.

Decision to withdraw/suspend

111. The claimant's case is that the FCO had no contractual or other right to withdraw him from post summarily as it did. First, Ms McNeill QC submitted that the FCO was in breach of contract characterising his withdrawal as operational. In circumstances which were properly characterised as involving suspected misconduct, the FCO could not circumvent the terms of the misconduct procedure laid down in the FCO Guidance by purporting to withdraw him on operational grounds. The basis for the claimant's withdrawal from post was Mr Courtenay's allegations of sexual misconduct, which clearly fell within the misconduct procedure. In Ms McNeill QC's submission the FCO was obliged to afford the claimant the benefits and protections of that procedure. In particular the power to withdraw an officer from post in a misconduct case is circumscribed in paragraph 16 of chapter 22 of the FCO Guidance, which provides that in serious cases of misconduct overseas withdrawal from post follows after an appeal is conducted and the finding of misconduct upheld.

112. In my view this misinterprets the power to withdraw set out in paragraph 39 of Chapter 5 of the FCO Guidance. That paragraph provides for different grounds for withdrawing an officer from post, including operational and misconduct grounds. Withdrawal on either of these grounds is permissible; irrespective of any misconduct investigation which may occur. Paragraph 16 of the misconduct procedures is an alternative process, where someone has been found guilty of misconduct and, as part of the sanction imposed is withdrawn from post. Under the FCO Guidance misconduct issues do not need to be determined before a decision to withdraw. Similarly, there is no requirement under the FCO Guidance to have completed the performance improvement procedure before withdrawing a person on operational grounds.

113. The breadth of discretion afforded in paragraph 39 of chapter 5 for withdrawal on operational grounds reflects the need for flexibility. The FCO may need to take operational decisions quickly and without the delay of an investigation. For example, there may be a need to minimise reputational damage which would inhibit the FCO's ability to influence issues of national interest or diplomatic relationships. Indeed the claimant accepted in evidence that where it no longer remained in the best interests of the United Kingdom for a High Commissioner or an Ambassador to remain in post it would, in principle, be perfectly proper for him or her to be withdrawn on operational grounds, subject to consultation and fair process.

114. Given that in my view the FCO was entitled to treat the matter as falling under the operational head for withdrawal in Chapter 5, the issue then becomes whether its

exercise of discretion under it was justified in the circumstances of this case. For the claimant Ms McNeill QC submitted that the FCO acted in breach of paragraph 39 in withdrawing him on operational grounds, in that it could not reasonably conclude at the time the decision was made that his position had become so untenable that it was necessary for the continued efficient functioning of the post. Under the terms of paragraph 39 early termination of a posting is exceptional and a decision cannot lawfully be made without first considering whether there is any alternative and whether the cost is justified.

115. In powerful submissions on behalf of the FCO Mr Payne defended the rationality of the decision to withdraw within the terms of paragraph 39. It was based on the information available at the time, was taken due to a reasonable perception that an urgent operational decision was needed before the claimant returned to post on 15 June 2008, and there was no alternative. Mr Payne referred to what he contended was the potential risk to the United Kingdom's interests in the claimant being allowed to return to post, he having accepted in evidence that he was facing "incredibly serious allegations" of inappropriate sexual conduct. The likelihood of adverse press coverage in Belize during any investigation would mean the claimant's ability to function effectively as High Commissioner would be severely hampered. The FCO view was that Mr Courtenay, the source of the allegations, was not only one of the top three persons in the Belizean Opposition but also a key figure in the negotiations over the Belize/Guatemala border dispute, the number one political issue for the United Kingdom and the High Commission. Thus the High Commissioner needed to have the trust of Mr Courtenay. Yet Mr Courtenay had made it clear that he would have nothing further to do with the claimant. There was no reason to doubt this sentiment. In these exceptional circumstances, the claimant's removal from post on operational grounds was plainly reasonable. Irrespective of whether the claimant was to blame for Mr Courtenay's views, in Mr Payne's submission there was a real risk that he would be unable to discharge an important part of his duties as High Commissioner. The FCO was therefore reasonably entitled to conclude that the claimant's continuing presence in Belize was not in the interests of the UK.

116. Moreover, Mr Payne submitted, this conclusion was reinforced by the evidence of a breakdown in relations within the High Commission, which raised serious question marks as to its effective functioning and the risk of adverse publicity in Belize. The claimant confirmed in evidence that at the meeting on 13 June he had reminded Ms Le Jeune that he was not getting on with Mr Spires, that everybody knew about the problems he had with him and a few of the office staff, that it was not functioning as well as he would have liked, and that the High Commission was not a happy place. Moreover, his continuing to act as High Commissioner would have given the impression that internal complaints were not being taken seriously. Had the claimant been exonerated there was the risk of giving the impression of a whitewash and of undermining his standing. If, on the other hand, any of the allegations were established, that would inevitably cause significant reputational damage.

117. In my view these submissions fall down because they overlook the claimant's right to fair treatment. That was an express term of his contract of employment, although the duty of fair treatment can also be derived from the implied term of trust and confidence in the employer-employee relationship. 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. 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.

118. That never happened. When the claimant met Ms Le Jeune and Mr Wood on the 13 June he was told of the allegations regarding misconduct to women but was not told about their nature or that their source was Mr Courtenay. In fact he was not informed about this until almost three weeks later, in early July, when Mr Gifford interviewed him as part of his fact finding investigation. Moreover, the claimant was mistakenly told on 13 June that there was more than one source for these allegations. 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. As for the bullying accusations by staff, he had some idea about what they entailed, but did not have either the Evans Report or the management review and so did not know the details.

119. But whatever the claimant was told on 13 June was to no avail in meeting the obligation of fair treatment since, crucially in my judgment, the decision to withdraw had already been made. That is evident from the email summarising what was decided at the 11 June meeting, Ms Le Jeune's file note of the 13 June meeting with the claimant and the evidence of those attending the 11 June meeting. In no way could the 13 June interview with the claimant meet the FCO's contractual obligation of fair treatment. Fair treatment in the way I have described was a mandatory requirement before the decision was made.

120. Mr Payne submitted that there was no obligation to investigate or to consult the claimant on the merits of the allegations prior to reaching the decision to withdraw beyond determining whether the prima facie evidence was serious enough to warrant an independent investigation. That was particularly so in a situation where, as in this case, the decision was made against the background of Mr Courtenay having made the allegations, as opposed to their merits; the existence of evidence suggesting a breakdown within post, as opposed to who was at fault for the situation; and the concerns as to whether the claimant could continue to represent United Kingdom's interests effectively. Further, Mr Payne submitted, the option of a preliminary investigation was not available for the most serious aspects of Mr Courtenay's complaint, that the claimant had acted inappropriately with Mr Courtenay's own wife and other women, and had treated staff within the High Commission badly. Those allegations, on Mr Payne's submissions, could only be determined by interviewing Mr Courtenay and the staff and the timescale for that was inconsistent with the need to take the withdrawal decision.

121. The withdrawal decision must be evaluated, I accept, in the light of the state of knowledge at the time, and without the benefit of the FCO's later investigation which concluded that Mr Courtenay's allegations lacked credibility and, it might be added, without knowing of Mr Courtenay's later attempt on Belizean television to distance

himself from them. There was also the obvious need for expedition, given that the allegations were of the type which could easily be picked up by the media. (Later Mr Courtenay told Mr Gifford that he was thinking of leaking them to the media.) 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.

122. The preliminary investigation of the Courtenay allegations which the contractual duty of fair treatment required would have thrown up the discrepancies between what Mr Courtenay had told Mr Spires and the account he gave to Mr Wood. In the Spires account members of the Opposition were actively boycotting events at the British High Commission and the Opposition had not attended the cocktail in honour of Meg Munn MP because of the claimant, but to Mr Wood it was only Mr Courtenay himself who was engaged in a boycott. Further, some of the allegations were inconsistent with the FCO's own knowledge, such as those relating to the claimant's relationship with the Prime Minister, his approach to his work and his failure to make contacts. Mr Wood knew that the claimant had built a good relationship with the Prime Minister and was building contacts because he commented on these positively in the claimant's appraisal just two weeks previously. Mr Wood engaged with Mr Courtenay in a conversation about United Kingdom-Belize relations not being "in a good place", something which Mr Wood realistically accepted in his evidence at trial was a broader judgment than was justified. Given the evidence now before the court from Prime Minister Barrow what Mr Courtenay said on this topic was, in fact, nonsense. As to the allegation of sexual misconduct with women, these came out of the blue. Although the incidents were supposed to go back several months no one had ever mentioned the matter before, for example Mr Spires or those interviewed during the course of Mr Evans' visit or the management review. With that as background the allegations should have been treated with a healthy scepticism.

123. If the FCO had disclosed the allegations and their source to the claimant – what should have happened under the duty of fair treatment – he could have suggested that inquiries be made of the consular wardens; of some of the women with whom he had come into contact who later defended him against the allegations; of friendly members of the diplomatic community in Belize such as the United States Ambassador; and maybe of the Prime Minister himself. (Mr Gifford properly accepted in evidence that if he had spoken to the Prime Minister it would have influenced his views.) As the claimant later told Mr Gifford, he would have said that he had had a good relationship with Mr Courtenay until then, but that there must have been a motivation behind these allegations, perhaps because he had an excellent relationship with new Prime Minister and government. Furthermore, checks could have been made on Mr Courtenay's reliability since, as the Priestley email revealed, he had form. Yet Mr Wood confirmed in his evidence, as set out in his email of 10 June 2008, that in his opinion the United Kingdom was already suffering real

reputational damage from the claimant's behaviour. 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.

124. As for the allegation regarding staff in the High Commission, disclosure to the claimant would have allowed him to underline that he had not been given a copy of the Evans Report or Management Review. Importantly, Dr Kane had given him an opportunity to address the concerns about his management style on his return from leave. Moreover, he could have made the point that Mr Courtenay's reference to "picking up messages" about the treatment of staff could not have been construed as evidence that Dr Kane's informal warning had not had the desired effect since he had left on leave within two days of it being given. Ms Le Jeune's mistaken impression to the contrary would have been corrected. The only reasonable inference would have been that Mr Courtenay had been passed such information from within the High Commission and that this was therefore a repetition of the matters already raised for the Evans report and at the time of the management review. It added nothing to what the FCO already knew.

125. 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. Moreover, any inquiry would not have proceeded the way it did. The focus would have been on Mr Courtenay's allegations, such as remained after the analysis outlined a moment ago. Certainly the FCO owed a duty of care to all staff, but the issue of the claimant's treatment of High Commission staff was unlikely to have been pursued through a misconduct enquiry. An informal warning had only recently been given and the claimant had left Belize a few days after. There had been no new complaints, certainly no formal complaints, about his behaviour. Mr Courtenay's allegation of "picking up messages" that the claimant was mistreating staff could in no way be regarded as corroborative of earlier information, as Mr Wood at one point mistakenly suggested. Nor, given its timing, did Mr Courtenay's "picking up messages" constitute a new complaint. Thus Mr Gifford's fact finding enquiry was far more extensive than it needed to be and took far longer.

The investigation/disciplinary process

126. In broad terms the claimant's complaints about Mr Gifford's fact finding enquiry fall under three heads – the methodology he employed, whether he applied fair process, and whether his decisions were reasonably and lawfully reached. As to methodology, it is said that he interviewed persons at the High Commission who had not raised issues about the claimant's behaviour. Ms McNeill QC characterised this as a trawl for evidence which would be adverse to the claimant rather than an investigation of the matters alleged against him. There were, it was said, too many leading questions. Moreover, Ms McNeill QC contended that Mr Gifford did not adopt a proper approach to the evidence. For example, he should have adopted a more critical stance to the evidence such as that of the claimant's PA given her wild accusations regarding Ms William during the management review. Moreover, parts of her evidence were

contradicted by what some of the other High Commission employees told Mr Gifford and parts by the very fact that the claimant had confirmed her in post.

127. As regards fairness, Ms McNeill QC submitted that the claimant was not given a copy of the Priestley email, nor was he given notice of the specific matters being investigated before he was interviewed on 2 July. He should have been provided with information about who had accused him of bullying and harassment so that he had a chance to refute the allegations. The same applied to the allegations made by Mr Courtenay. Moreover, Mr Gifford should have appreciated that since the High Commission staff had been informed that the claimant was not returning to post that would cause some of them, whether consciously or otherwise, to believe that the FCO considered him to be guilty of what was alleged and therefore would wish to support the FCO view. Nor did Mr Gifford interview all those who could potentially give evidence about the claimant's behaviour, including his former PA and at least one member of the expatriate community towards whom he was alleged to have behaved inappropriately. Mr Gifford did not enquire of the claimant if there was anyone he thought should be interviewed and the claimant had to raise this himself, through Ms Nelson.

128. Thirdly, Ms McNeill QC contended that Mr Gifford reached unreasonable conclusions in the light of the evidence he collected. In concluding that there was a case to answer in relation to Mr Courtenay's sexual misconduct allegations, Mr Gifford was in error when there was no evidence from the women towards whom the claimant was alleged to have acted inappropriately, and those whom he had interviewed, and had seen the claimant on social occasions, had never witnessed this type of misconduct. Moreover, Mr Priestley's email cast light on Mr Courtenay's sensitive nature and tendency readily to take offence. Taking such matters together, if Mr Gifford had acted objectively and impartially he could not fairly have reached the decision he did. As far as the bullying and harassment allegations were concerned, Mr Gifford could not reasonably have reached the conclusion that there was a case to answer when, properly analysed, the complaints were either dated or did not reach an appropriate level of seriousness. Finally, Mr Gifford's conclusions were in breach of the procedural rules in that there was no finding, as there should have been, that the claimant's behaviour was wilful.

129. In my view Mr Gifford gave credible evidence at trial that he was conscious of the need not to prejudge the investigation and took steps to ensure that he knew the proper procedures and approached his fact finding with an open mind. His report of the investigation demonstrates, in my view, both diligence and thoroughness. Overall the fact finding represented a case to answer on the part of the claimant. The report contained reference to both positive and negative material regarding the claimant's treatment of staff. None of this is to say that a different investigator would have approached the task in the same manner as did Mr Gifford or reached exactly the same conclusions. For example, another investigator may have taken a more sceptical approach to what some of those interviewed told him. In my judgment, however, Mr Gifford's fact finding investigation cannot be said to have been methodologically flawed, unfair, or to have reached conclusions which were not open to him.

130. That High Commission staff were informed that the claimant would not be returning does not seem to have resulted in significantly different allegations from those contained in the Evans report or the management review. The claimant's stance at

trial, refuting many of the allegations made to Mr Gifford by staff, means that his concern really reduced to Mr Gifford's favouring their evidence over his. As to Mr Gifford's interview with the claimant, in his evidence at trial the claimant himself said that he was given a fair chance to express his views. After the interview the claimant had the opportunity of amending the record, making submissions and submitting evidence. The FCO's refusal to disclose the Priestley email is troubling. However, Mr Gifford himself took the view that it could be given to the claimant and it was elsewhere in the FCO that a different view was taken. After his interview the claimant was sent the detailed report, Mr Gifford's account of the evidence and the reasons that it had been decided to pursue some of the allegations. The claimant was therefore informed about the case he had to answer at a disciplinary hearing and which matters had been abandoned. Mr Gifford's fairness is also demonstrated by his ultimate finding at the disciplinary stage that the Courtenay allegations were not credible, that only some of the bullying and harassment matters should be upheld and by his later review of penalty.

131. However, where matters did go wrong was when Mr Gifford conducted that disciplinary hearing and when, at the appeal, Mr Reynolds approved this. Fair treatment in the circumstances of this case demanded that a different person conduct the disciplinary hearing. For in his email of 30 June 2008, before he interviewed the claimant, Mr Gifford had expressed conclusions about the claimant's likely behaviour towards staff were he to return to post and said that he was likely to conclude that there was a disciplinary case to answer both on the claimant's external behaviour and within the High Commission. Moreover, in his fact finding report, Mr Gifford strayed beyond his terms of reference and commented that the decision that the claimant's position as High Commissioner was untenable was wholly correct. Mr Gifford was clearly troubled by being asked to conduct the disciplinary hearing, a point he referred to in his email to the conduct adviser on 8 August. No blame can attach to Mr Gifford (or Mr Reynolds) since they took advice and were informed that it was acceptable under FCO procedure, which indeed it was. It was only in April 2009 that ACAS introduced a qualified recommendation that where practicable different persons should carry out an investigation and a disciplinary hearing. However, what happened was in breach of a basic principle of natural justice. The point is underlined since in Mr Gifford's view the misconduct was at the higher end of level 2 and could easily have been treated as level 3 misconduct. Under the FCO guidance a hearing in a gross misconduct case would be conducted by someone other than the person who undertook the fact finding investigation.

Damages for breach

132. To obtain damages to compensate him for his losses the claimant must establish causation and that his losses are not as a matter of law too remote. As regards causation the claimant must establish on the balance of probabilities that the losses alleged result from the two breaches of contract identified above, namely, his unlawful withdrawal from post and the unlawful application of the disciplinary procedure. The withdrawal from post clearly caused financial loss in that the claimant was no longer the High Commissioner to Belize. 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. For the FCO Mr Payne contends that the chain of causation was broken by the claimant's

heart surgery in April 2009. That would have led him to have been withdrawn from post in any event. For the reasons I gave earlier when considering the matter I am not persuaded by Mr Payne's submission.

133. Causation with respect to Mr Gifford conducting the disciplinary procedure falls into a different category. It did not feature at all prominently in the catalogue of concerns which both the claimant and Mr Nichols, who accompanied him to the disciplinary hearing, had about Mr Gifford's inquiry. Further, adopting a common sense approach it is difficult to see how, in the light of the facts found by Mr Gifford, someone else conducting the disciplinary hearing would have reached a different conclusion as regards the treatment of some staff at the High Commission. Despite Ms McNeill QC's submissions tempting me to review the evidence from staff, that is not my role. As I have said, Mr Gifford's fact finding was thorough and compelling, even if another fact finder might have reached different conclusions. Even omitting the mistake, which Mr Gifford readily conceded, in charging the claimant with bullying two members of the High Commission staff when he had not canvassed the matter with the claimant in interview, it seems to me that it would have made no difference who conducted the disciplinary hearing. The conclusion Mr Gifford reached on the facts he established about treatment of staff was almost inevitable. Thus in my view the claimant's case for damages for breach of contract rests on the decision to withdraw him from post alone.

134. That leads to a consideration of remoteness. In relation to the consequent financial losses not dependent on proof of personal injury, it seems to me that there can be no issue of remoteness. Applying ordinary principles it would have been reasonably contemplated as a not unlikely result that a head of mission would suffer loss of income and allowances should he be withdrawn from post in breach of contract. There is an issue about the rental income which he and his wife (then his partner) would have obtained from their properties in this country had he remained in Belize. In my view he is entitled to rental income from one of the properties. The evidence suggests that the other would have been retained unoccupied for use on visits here. Any losses associated with the sale of those properties and the purchase of another property is too remote.

135. In the event that he had not been withdrawn from post, Ms McNeill QC contends that the claimant's career would have followed its normal trajectory and he would have proceeded to work normally up to retirement. That, in general terms, I accept. In my judgment he would have continued as High Commissioner for the three year period, extendable for a fourth year. That would have taken him to around the age of 60. In early 2003 he had envisaged a last, foreign posting in the diplomatic service. In his evidence he asserts he would have worked until the age of 63. This is a matter of some difficulty. However, it seems to me that he would not have obtained another foreign posting, not least because of the glut of those of the same level in the corporate pool. It also seems to me that he would not have been content with a desk bound job in the FCO for more than, perhaps, a year or eighteen months. Rather he would have sought employment elsewhere, a topic dealt with below.

136. As regards the losses flowing from the claimant's depression, Mr Payne submits that these are too remote. He refers to the Court of Appeal decision in Deadman v Bristol City Council [2007] EWCA Civ 822; [2007] IRLR 888. The court was not prepared to find that the psychiatric injury the claimant suffered, following a breach of the

procedures in convening the disciplinary panel, was reasonably foreseeable. Foreseeability, he contends, faces similar difficulties here. When the claimant was appointed to the position of High Commissioner in Belize he had exhibited a robustness in a variety of roles, in particular enabling him to surmount the difficulties he faced when as High Commissioner in the Seychelles he had been accused of bullying.

137. But Deadman was a quite different case, what was effectively a minor breach in the disciplinary procedure. 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.

138. As to the claimant's return to work, that turned partly on his ability to do so. The claimant was first signed on by his GP as fit to return to work in November 2009. Attempts were made to identify a suitable post for him but there were medical restrictions on the nature of work he could do as indicated in Dr Patel's report. There were suggestions that he might work in the press office, where he had previous experience, but which would seem to be too strenuous. He raised the role of greeter but this seemed not to be available. The difficulty for the FCO was that there was a surfeit of officers at the claimant's level in the corporate pool. What I regard as on the whole the genuine attempts to identify a suitable position for the claimant, and acceptable to him, came to nought. In addition, the evidence is that the doctors treating him did not think that he was not fit to return for ordinary work. When a post was identified in July 2010 he said that his treating doctors were of the view that he was unfit for ordinary work.

139. The claimant claims that he would have worked post-retirement until the age of 70 as a consultant, non-executive director or the like and that he should be entitled to loss of future earnings in that regard. Particularly in the light of Ms Le Jeune's evidence, that that is the career path for about half of ex-diplomats, it seems to me that that is plausible. So far I accept that he has not returned to work because of his health, albeit that his depression has fluctuated. However, the medical evidence is that the claimant's depression should be behind him within twelve months of the end of these proceedings. That operates as a limit on his financial losses after that point.

140. The claimant's wife gave evidence of the care she had provided to him. In the light of the medical evidence, and her evidence that her care had been unaffected whether or not he was in remission, it seems to me that the care she has given cannot be a loss attributable to his depression.

IV BREACH OF DUTY

141. 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.

142. Thus the FCO was not helpful when the claimant attracted the media's attention, it did not facilitate his access to his Firecrest account so he could respond to the allegations, and it delayed the return of his personal belongings from the Residence in Belize, causing him further grief. Moreover, Ms McNeill QC contended, the FCO was aware of numerous indications of the claimant's impending ill-health in the period before 22 October 2008. It knew through Ms Nelson and because the FCO officials, including Mr Gifford, Ms Le Jeune and Mr Wood, were told about his mental state, which constituted a clear signpost as to his ill-health. At that point in October he had been diagnosed with depression and he permitted Ms Nelson to inform Ms Le Jeune about it. From that point the FCO clearly knew about it. Further, after November 2009 the FCO, in breach of duty, took inadequate steps to identify a suitable post which the claimant would have been willing and able to occupy within the FCO to get him back to work.

143. 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.

144. Beyond that I am less convinced. Partly that is because of the steps the FCO took in fulfilment of its duty in relation to some of the matters. The head of Health and Welfare, Ms Nelson, established a good rapport with the claimant and on the whole he valued her support. The FCO press office offered him assistance after the report in the Belizean media. It is difficult to think what the FCO could have done once the British media had him in their sights. The refusal to publish a press release of the outcome of the inquiry seems not unreasonable, especially where it had not exonerated the claimant from all of the allegations involving ill-treatment of staff. There seem to have been unsuccessful steps to deal with the claimant's concerns about Firecrest. Initially there appears to have been an indifference, or worse, regarding the claimant's belongings, but later the FCO had them professionally packed and returned by airfreight. As to the damaged state in which some of them arrived in the United Kingdom, the FCO paid for professional packers and a reputable carrier to pack and transport them and the subject of any complaint must be those businesses, not the FCO. As to the claimant's desire to return to Belize, it seems to me that the FCO's decision that this was not in either its or the claimant's interests was not unreasonable. Later it considered funding his return on an exceptional basis but reached the conclusion not to do so.

145. Moreover, there is the issue of reasonable foreseeability as regards some of those matters were they to constitute a breach of duty and be causative. I accept that there was no need for any prior vulnerability on his part in order for psychiatric injury to be reasonably foreseeable. I also accept that his is not the sort of work-related stress

claim in which the duty of care can be met by the provision of welfare and counselling. I further accept that what Ms Nelson was told, although she was in Health and Welfare, can be attributable to the FCO as a whole. There was no duty of confidence about his general health and welfare and she was in regular contact with others in the FCO about the claimant. If an employer were able to avoid liability for psychiatric injury by assigning its welfare duties to a particular individual, and then claiming it had no knowledge of what that individual was told, an employee's entitlement to be treated in accordance with the employer's duty of care would be severely curtailed.

146. However, the claimant himself said in evidence at the trial that he was able to respond calmly and rationally during his interview with Ms Le Jeune, Mr Wood, Mr Wood, Mr Evans and Dr Kane on the 13 June; with Mr Gifford on 2 July; and at the disciplinary hearing and appeal. There was no doubt that he was upset, distressed, and angry, all understandably so in the light of the failure of the FCO to act fairly. Ms Nelson's evidence was that this type of emotional reaction is common from people undergoing disciplinary proceedings. The reference to the claimant taking sleeping tablets in July 2008, a month before he developed depression, provided no clear indication of impending harm to his mental health. The cases of Craig Murray and Gerald Evans, advanced by Ms McNeill QC, are quite different on the facts to the claimant's and were in no way sign posts for the FCO in his case.

V CONCLUSION

147. 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. He is entitled to damages to compensate him for the losses which flowed from this. In the course of the judgment there are a number of findings which narrow the issues as to quantum and I would hope the parties can reach a final settlement on this.