GREAT BRITAIN

Court of Appeal

Yapp v Foreign & Commonwealth Office

Employment Contracts - Breach of Contract – Psychiatric Injury – Duty of Care

HEADNOTES

Facts

The facts and appellate history of this case were set out in paras 13 - 57 of the judgment of Underhill LJ, and can be summarised as follows.

In January 2007 the Claimant (Y) in these proceedings was appointed British High Commissioner in Belize, taking up the post in August that year. On 13 June 2008, following a series of allegations informally made against him to his superiors by a former member of the Belizean Government, now in opposition, he was withdrawn from that post on "operational" grounds with immediate effect and suspended pending investigation. The Foreign and Commonwealth Office ("FCO")'s disciplinary procedures were implemented. An initial fact finding investigation concluded 'that there were two cases of misconduct to answer: (1) "that [the Claimant] behaved inappropriately towards […] women on public social occasions and thus brought HMG into disrepute"; and (2) "that he bullied and harassed High Commission staff"' (paragraph 32).

Charges based on those findings were formally put to the Claimant on 24 July 2008. He was informed that if they were substantiated they would constitute level 2 misconduct. He was given a copy of the report and asked to attend a formal disciplinary interview with the same FCO official that had led the preliminary fact finding investigation on 7 August. While those charges were pending news of the Claimant's withdrawal as High Commissioner to Belize appeared in the British media, with articles published in the Mail on Sunday and The Daily Telegraph on 27 and 28 July 2008 respectively. The essence of the story was that the Claimant had behaved inappropriately towards women at official functions.

The disciplinary hearing took place on 7 August 2008 and found that the allegations of inappropriate behaviour towards women had not been established but that those of bullying the members of the staff had been. The Claimant was given a final written warning and there would be a recommendation that he should not be given another appointment as head of mission. The Claimant made some representations about penalty, and when the chair of the disciplinary hearing wrote on 11 August to confirm the outcome he said that the warning would only last for one year and that he had made no recommendation against a further posting as head of mission. The Claimant appealed but following a hearing on 3 October 2008 before a different senior FCO official, the appeal was dismissed.

Following the conclusion of the disciplinary process, Y's suspension was lifted but in the meantime he had developed a depressive illness, and also had to undergo heart

surgery, and he did not in fact receive any other appointment in the FCO until his retirement when he reached the age of 60 in January 2011. On 16 May 2011 the Claimant commenced proceedings against the FCO complaining both of his withdrawal from the post of High Commissioner and of the way in which the disciplinary process was conducted and its outcome. He said that the resulting stress had caused his depressive illness, which both constituted damage in itself and led, on account of his inability to return to work, to pecuniary loss over and above the loss of his enhanced earnings and allowances as High Commissioner.

Y pursued his claims in contact before the High Court, who found in his favour in *Yapp* v *Foreign and Commonwealth Office*, [2013] EWHC 1098 (QB) and concluded that the FCO acted in breach of contract and in breach of its duty of care to Y in withdrawing him from his post as High Commissioner without first assessing the veracity of the allegations made and discussing them with him. The FCO argument that Y could not recover damages for his psychiatric injury because of remoteness were rejected by the High Court as, per *Gogay v Hertfordshire Council* [2000] IRLR 703, it could reasonably be contemplated that depression would have been a not unlikely result of a knee-jerk withdrawal from the post (para 137 of the HC decision). The FCO appealed.

Decision

The appeal was allowed in part. The CA allowed the FCO's appeal on the issue of remoteness of the claim for psychiatric injury in both tort and contract, but dismissed the one against the findings of breach of contract and causation, Underhill LJ expressly opining at para. 133 of his judgment that

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

In paragraph 129 of the CA judgment, Underhill LJ narrowed down the relevance of *Gogey* holding that in that case 'this Court did no more than decline to interfere with the conclusion of the judge. We do not know on what basis that conclusion was established: in particular, there is no reason to suppose that it was not a case of known psychiatric vulnerability, and some reason to believe that it may have been'.

Law Applied

The claim and the appeal were brought in respect of breaches of express and implied terms of Y's contract of employment and also as claims in tort. More specifically in respect of the failure to operate the FCO's procedures in compliance with the implied term of mutual trust and confidence and the duty of care. These are two areas of English employment law that are predominantly, if not exclusively, shaped by common law precedents.

In paragraph 42 of his judgment Underhill LJ summarises the key precedents informing this are of English employment law in the following terms

> "As to that, and at the risk of spelling out the obvious:
> (1) The "implied term of mutual trust and confidence" is the term authoritatively established by the decision of the House of Lords in *Malik v Bank of Credit and Commerce International SA* [1998] AC 20. Lord Nicholls, at p. 34A, defined the term as being that the employer "would not, without reasonable and proper cause, conduct itself in a manner likely to destroy or seriously damage the relationship of confidence and trust between employer and employee."[1] I will refer to this for convenience as "the Malik term".
> (2) The "duty of care" to which the Judge refers is of course the so-called "common law duty of care" which every employer owes to his employees to take reasonable care for their safety. At para. 103 of his judgment the Judge sets out the classic exposition by *Swanwick J in Stokes v Guest Keen and Nettlefold (Bolts and Nuts) Ltd* [1968] 1 WLR 1776, at p. 1783, but I need not repeat it here. The duty tends to be regarded as primarily arising in tort, and in the discussion below I will generally refer to it as such; but it is well established, as the Judge noted, that it arises equally in contract – see *Matthews v Kuwait Bechtel Corp* [1959] QB 59."

JUDGMENT

Underhill LJ, with whom Davis LJ and Patten LJ agreed, delivered the following judgment.

(A) THE FCO's APPEAL

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

(1) BREACH

The Withdrawal Decision

59. The pleaded ground of appeal is that the Judge applied the wrong test to the question whether the FCO's discretion to withdraw the Claimant was fair. Borrowing language from the case-law on unfair dismissal, Mr Platt submitted that the Judge had failed to recognise that there was a "range of reasonable responses" available to the FCO in the circumstances in which it found itself after Mr Wood had spoken to Mr Courtenay, and that his decision that immediate withdrawal was unfair constituted the vice of "substitution" – that

is, of holding that the FCO's decision was unfair only because it was not the decision that he himself would have made. He also argued that it was wrong of the Judge to focus only on the withdrawal of the Claimant from his post, and that it was necessary to assess the fairness of his treatment as a whole: in particular, it was relevant that he subsequently went through a disciplinary process which the Judge found to be fair (save in one purely procedural respect) and that he benefited from the services of the FCO's Welfare Department.

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

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

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

63. I am prepared to accept all that, though I am bound to say that the gravity of the allegations and their alleged consequences seem to me, as they did to the Judge, rather overstated. But none of it meets the essential point that it was unnecessary for the FCO to act as precipitately as it did, without any further inquiries of any kind and without even putting the allegations to the Claimant.

It is indeed rather surprising to see the FCO making a decision of this gravity on the basis of a single telephone conversation with a politician in the host country: even apart from the question of fairness to the post-holder, one might have expected some consideration of whether the informant might have his own agenda or be otherwise unreliable.

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

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

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

whole panoply of a fact-finding investigation was required. He said only that the FCO should have made "some preliminary investigation" and exercised "some critical judgement".

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

Mr Gifford's Dual Role

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

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

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

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

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

(2) CAUSATION

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

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

73. I do not accept this. At paras. 122-123 of the judgment (see para. 46 (5) above) the Judge considered carefully what Ms Le Jeune and her colleagues would have decided if they had made the preliminary enquiries which he believed were necessary, and he gave reasons for concluding that if they had done so Mr Courtenay's allegations would have "taken on a quite different complexion" and the Claimant would not have been withdrawn. Those reasons have not been challenged as such, and in any event I can see nothing wrong with them. If they stand up, it seems to me no answer to say that Mr Gifford, considering a different question in different circumstances, concluded that there was a "case to answer". (I also note, though this is not of central importance, that as regards the allegations of the Claimant's behaviour towards women – which is what matters as regards the withdrawal decision – his conclusion was in fairly equivocal terms: see para. 32 above).

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

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

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

considers that his treatment by the media contributed significantly to his stress as did his suspension."

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

> "79. … [T]he learned Judge's conclusion that had the Respondent not been withdrawn from post "*he would never have been affected*" is inconsistent with the joint medical evidence to the effect that it was the later decision on the disciplinary investigation and not the withdrawal *per se* which caused his psychiatric injury … . The joint medical evidence made clear that had the Respondent been exonerated and found an alternative post he would not have developed depression, and that he did not develop depression (as opposed to stress) for at least 2 months after the decision to withdraw him (during which time many additional stressors accumulated).
> 80. Accordingly, there was no injury resultant from the identified breach of contract and the learned Judge should have so found."

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

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

78. I cannot accept this submission either. This was a claim for future loss of earnings. The conventional approach in such a case is to calculate, or assess, the earnings that would have been received over the period in question and then to discount for contingencies – that is, for the chance that the employee might not have received those earnings, in whole or in part, for some reason for which the defendant is not responsible.[2] Death or serious illness is the classic example of such a contingency. It is not necessary or appropriate for the Court to decide, applying the balance of probabilities, whether such a contingency will or will not occur: it is a matter of assessing the chances, which will of course generally have to be done on a very broad-brush basis. What the Judge was in practice being asked to do when it was submitted that the Claimant's illness "broke the chain of causation" was to find that there was

no realistic chance – that is, none that was sufficiently substantial to sound in damages – that he could have completed his posting in Belize or obtained another overseas posting (which is what produces the higher level of earnings); in other words, he was being asked to find as a fact that he would have been short-toured and also that he would have been unfit for a further overseas posting. Once that is understood, it is clear that the Judge's approach was correct. His finding that whether the Claimant would have been short-toured was "speculative" meant that he was not prepared to make a positive finding that it would have happened; and he went on to find that even if the Claimant would have been short-toured he had "a reasonable chance" of a further foreign posting once he had recovered. If the Judge had had in due course to assess damages he would have had to decide what discount was appropriate to reflect those findings; but that never occurred because the parties agreed quantum (see para. 4 above).

(3) REMOTENESS

The Submissions in Outline

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

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

81. *Tort*. As already discussed, Mr Platt submitted that the Judge had not made any finding that the FCO was in breach of its duty of care in tort, but for the reasons given at para. 56 above I would reject that submission. However, he also submitted that even if the test of remoteness in tort – i.e. whether the injury claimed for was reasonably foreseeable – fell to be applied the claim was still too remote. He relied on the guidance in the leading stress-at-work case of *Hatton v Sutherland* [2002] EWCA Civ 76, [2002] ICR 613, which I set out at para. 97 below. He made essentially the same points about pre-

existing vulnerability as he had made in relation to the claim in contract. But he also relied in particular on an observation in *Hatton* to the effect that an employer who offers his employees a confidential advice service, with referral to appropriate counselling or treatment services, is unlikely to be found in breach of duty as a result of exposing them to stress at work: he pointed out that the Claimant was offered, and took advantage of, precisely such a service (see para. 27 above). As I have already pointed out, if Mr Platt's submissions on this are right they not only go to quantum but undermine the claim itself in so far as it is based on the common law duty of care, since the duty to take reasonable steps to prevent psychiatric injury only arises if such injury is reasonably foreseeable.

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

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

The Case-Law

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

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

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

Bingham LJ said, at p. 319 E:

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

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

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

86. Ms McNeill also referred to *McLoughlin v Jones* [2002] QB 1312, where Brooke LJ contemplated that it might be held to be foreseeable – though he did not himself decide – that a defendant who was imprisoned following a wrongful conviction as a result of his solicitor's negligence might recover for a

psychiatric illness engendered by his "burning sense of injustice": see para. 43 (p. 1328 B-C).

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

Walker

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

Gogay

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

90. The council appealed against both the liability and the damages decisions. The appeal was dismissed in both respects. I need say nothing about the liability appeal, save to note that Hale LJ (who delivered the only substantive judgment) described the decision to suspend the claimant as a "knee-jerk reaction", which is evidently the origin of the Judge's use of that phrase in para. 137 of his judgment. As regards damages, the council argued that the Judge's decision was contrary to the principle, originating in *Addis v Gramophone Co. Ltd.* [1909] AC 488 and more recently enunciated in *Bliss v South East Thames Regional Health Authority* [1985] IRLR 308, that an employee cannot recover damages for distress or injured feelings arising from a breach of contract on the part of the employer. Hale LJ held that cases of that

kind must be distinguished from cases involving a recognised psychiatric illness and that psychiatric injury was not in principle different from physical injury: see paras. 62-65 (pp. 710-711). At para. 63 she notes that such damages were awarded in *Walker* and refers to Colman J's observation that the scope of the duties in tort and in contract is the same. She continues:

> "The duty in this case is owed purely in contract, rather than in tort, but there can be no more reason to distinguish between physical and psychiatric injury in this case than there is in the case of other breaches of an employer's duties."

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

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

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

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

Johnson v Unisys

93. In *Johnson v Unisys Ltd* [2001] UKHL 13, [2003] 1 AC 518, the claimant brought a claim in the County Court for psychiatric injury caused by his unfair dismissal, which he characterised as involving both a breach of the *Malik* term and breach of a duty of care owed in tort. The essential unfairness of which he

complained was his dismissal without a proper opportunity to rebut the case against him. There is obviously some parallel with the present case.

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

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

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

Hatton/Barber

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

" (1) There are no special control mechanisms applying to claims for psychiatric (or physical) illness or injury arising from the stress of doing the work the employee is required to do (para 22). The ordinary principles of employer's liability apply (para 20).
(2) The threshold question is whether this kind of harm to this particular employee was reasonably foreseeable (para 23): this has two components (a) an injury to health (as distinct from occupational stress) which (b) is attributable to stress at work (as distinct from other factors) (para 25).
(3) Foreseeability depends upon what the employer knows (or ought reasonably to know) about the individual employee. Because of the nature of mental disorder, it is harder to foresee than physical injury, but may be easier to foresee in a known individual than in the population at large (para 23). An employer is usually entitled to assume that the employee can withstand the normal pressures of the job unless he knows of some particular problem or vulnerability (para 29).
(4)-(10) ...
(11) An employer who offers a confidential advice service, with referral to appropriate counselling or treatment services, is unlikely to be found in breach of duty (paras 17 and 33).
(12)-(16) ..."

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

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

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

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

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

require compensation if it arises. Bingham LJ made this point in *Attia* (see at p. 319 D-E).

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

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

Croft

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

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

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

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

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

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

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

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

104. The significance of *Croft* is that it explicitly applies what I may call the *Hatton* approach in a case which was not concerned with "the normal pressures of the job" but with the imposition of an unfair disciplinary sanction: that is, the Court was not prepared to find that psychiatric injury was a foreseeable consequence of the claimant's unfair treatment in the absence of evidence of some pre-existing vulnerability. It is true that the judgments do not articulate any justification for extending the reach of *Hatton* in this way, but there is no doubt that it is central to the reasoning of the Court. In any event it does not seem to me unreasonable. In the first place, I can see serious difficulties in applying in the real world a distinction between cases of continuous pressures on the one hand and one-off events on the other: an illness might, for example, be precipitated by a single "last straw" event

against a background of longer-term pressure. Further, while there is obviously a factual difference between a continuing stressful situation and a one-off traumatic event, I am not convinced that they should be approached with different assumptions as to the potential for psychiatric injury. It is a normal characteristic of the employment relationship that employees may be criticised by the employer and sometimes face disciplinary action or other such procedures. And in an imperfect world it is not uncommon for such criticism or disciplinary process to be flawed to some extent: there will be a spectrum from minor procedural flaws to gross unfairness. The message of *Croft* is that it is not usually foreseeable that even disciplinary action which is quite seriously unfair will lead the employee to develop a psychiatric illness unless there are signs of pre-existing vulnerability. This is of course consistent with the approach of this Court and of Lord Steyn in *Johnson.*

105. The way in which the Court in *Croft* effectively side-lined the claim for breach of the *Malik* term means that the decision gives no guidance on the approach to be taken to a purely contractual claim. I do not think it can be taken as deciding that there is no difference at all between a claim for breach of the common law duty of care and a claim for breach of the *Malik* term. If the council in *Croft* had been found to have acted in breach of contract the claimant should have succeeded on liability and would have been entitled at least to nominal damages, with issues as to the recoverability of damages for psychiatric injury arising in the context of quantum (as they did in *Gogay*); and to the extent that they did arise they would be governed by the contractual, rather than the tortious, test of remoteness (as occurred in *Deadman* – see paras. 111-113 below). But the Court seems to have thought that those formal differences were not of practical significance in the case before it; and no doubt that was right.

Bonser

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

Hartman

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

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

108. Ms McNeill picked up on that final observation and relied in particular on the Court's decision in the *Melville* appeal. In that case the claimant was a healthcare officer in a prison. Among his duties was the recovery of the bodies of prisoners who had committed suicide. The County Court Judge found that he had suffered a stress-related psychiatric illness following a particularly distressing episode of this kind. Both he and, on appeal to the High Court, Jack J held that it was reasonably foreseeable that he might suffer such an illness as a result of his work. They relied in particular on a number of Home Office documents expressly recognising that risk and requiring procedures to be put in place to mitigate it. Those procedures were not followed and the Home Office was held liable.

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

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

submissions amounted to saying that what was in fact foreseen was not foreseeable."

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

Deadman

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

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

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

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

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

"Since, as the court observed, the threshold question is whether *this* kind of harm to *this* particular employee

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

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

113. Ms McNeill submitted that *Deadman* was of no real help in the present case because the breaches relied on were so trivial. That is certainly true about the claim based on the composition of the panel, and perhaps also about the way in which the claimant was notified of the resumption of the investigation. But we are not ultimately concerned with the facts but with the principles applied by the Court. What is significant about *Deadman* is that, in the context of a claim based on the allegedly unreasonable conduct of a disciplinary procedure, Moore-Bick LJ regarded it as decisive that there was nothing in the claimant's history to suggest that he would be unable to cope with the impact of such conduct: in other words, he took a *Hatton* approach. It is true that the processes in question were part of a procedure for investigating a complaint by another employee rather than of a disciplinary procedure, but that cannot make a real difference – in both types of case the impact on the employee is that he is suspected of misconduct.

Dickins

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

The Post-Johnson Cases

115. We were taken to the two further cases in the House of Lords and the Supreme Court which consider the implications of *Johnson v Unisys*, namely *Eastwood v Magnox Electric plc* [2004] UKHL 35, [2005] 1 AC 503, and *Edwards v Chesterfield Royal Hospital NHS Foundation Trust*[2011]

UKSC 58, [2012] 2 AC 22. In *Eastwood* both Lord Nicholls and Lord Steyn referred to *Gogay* in the course of discussing the unfortunate consequences of *Johnson*, and Lady Hale did the same in *Edwards.* But they did so simply as an example of a successful claim by an employee for damages for a psychiatric injury suffered as a result of an unfair suspension; those references add nothing on the issue of remoteness.

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

Rothwell/Grieves

117. I should refer to one other case to which we were not taken in oral argument but to which Ms McNeill referred in her skeleton argument. *Grieves v F T Everard & Sons Ltd* is one of a quartet of cases in the House of Lords, reported as *Rothwell v Chemical & Insulating Co Ltd* [2007] UKHL 39, [2008] 1 AC 281, which concerned claimants who had developed pleural plaques as a result of negligent exposure to asbestos. It was held that the development of such plaques did not in itself constitute an injury; but Mr Grieves had suffered depression as a result of learning of his condition, which it was accepted did constitute an injury, and the question arose whether that was a foreseeable consequence of the defendants' negligence. Lord Hoffmann in his speech (with which the other members of the House agreed, though all also delivered speeches of their own) said that the relevant principles were to be found in *Hatton*, observing that although that case was concerned with psychiatric injury as a result of occupational stress "the general principles are in my opinion applicable to psychiatric injury caused by any breach of duty on the part of the employer" (see para. 24, at p. 294B). He held that it appeared from those principles that in the absence of some particular known problem or vulnerability an employer "is entitled to assume that his employees are persons of ordinary fortitude" (para. 25, at p. 294 D-E). He referred to the passage from the judgment of Lord Bridge in *McLoughlin v O'Brian* cited by Dillon LJ in *Attia* (above) and observed:

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

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

> "The general rule … requires one to decide whether it was reasonably foreseeable that the event which actually happened … would cause psychiatric illness to a person of reasonable fortitude. I think that the

Court of Appeal was right to say that there was no basis for such a finding."

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

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

Summary

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

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

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

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

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

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

120. As appears from *Croft,* and indeed from the present case, it will often be possible for the same conduct on the part of an employer to constitute both a breach of the common law duty of care and a breach of another contractual

duty – most obviously the *Malik* term but perhaps also an express term. This overlap can lead to a regrettable complexity in the formal analysis. It may be that further thought needs to be given to whether the *Malik* term really has any separate role to play in this area: the Court in *Croft* seemed to think not. But it may be that the problem does not matter much in practice. Where a breach of the common law duty of care can be established it is not clear what the employee gains by formulating a distinct contractual claim.

Discussion and Conclusion

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

122. The Judge dealt with the breach of duty claim only briefly in the judgment – understandably so, because he had already upheld the breach of contract claim. He said only, at para. 143, that an employer concerned with the Claimant's welfare would not have withdrawn him from his post without (previously) informing him of the case against him; and that "causation and remoteness track my earlier findings". The latter reference must be to para. 137, where he addresses remoteness in the context of the breach of contract claim: I have set this out at para. 53 (3) above. As will be seen, the dispositive reasoning is very short. The Judge acknowledged that the Claimant was "ostensibly robust" but concluded simply that "to my mind it could reasonably be contemplated … that depression would be a not unlikely result of a knee-jerk withdrawal from post". That uses the language of the contractual test, which he was there considering; but his conclusion would of course apply *a fortiori* to the claim in tort. He did not rely on any medical evidence: in view of the passage from the judgment of Dillon LJ in *Attia* quoted at para. 85 above he did not need to do so. Nor did he rely on any peculiar features either of the way that the Claimant was treated or of his personality. His reasoning was evidently based on a straightforward judgment, based on his own experience and assessment of human nature, that the gravity, and the unfairness, of what happened to the Claimant was such that it could be regarded as sufficiently likely that he would suffer an illness as a result.

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

124. I have not found this issue easy, but in the end I have come to the conclusion that the Judge was wrong to find that it was reasonably foreseeable

that the FCO's conduct in withdrawing the Claimant from his post without having had the opportunity to state his case might lead him to develop psychiatric illness. My reasons are as follows.

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

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

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

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

127. Against that background I have come to the conclusion that there was nothing about the circumstances of the present case sufficiently egregious to render it foreseeable that the Claimant's withdrawal from his post would cause

him a psychiatric injury. I fully acknowledge that his withdrawal was a major setback to his career and was bound to cause distress and anger, exacerbated by the unfairness which the Judge found. But it was not tantamount to dismissal. Nor was it a disciplinary sanction or based on any established misconduct, as Ms Le Jeune made clear to him: he was being withdrawn because the making of the allegations made his position operationally untenable, not because they were being treated as established, which was to be the subject of a proper investigation. Ms Le Jeune told him that if he was exonerated by the investigation she would do her best to find him another posting. The FCO was evidently attempting to follow due process, notwithstanding the particular unfairness which the Judge found. This was not a case of some gross and arbitrary injustice of the kind alleged, for example, in *Eastwood*. In all those circumstances – and bearing in mind in particular Ms Nelson's evidence which I have set out above – I do not believe that the FCO should have foreseen, in the absence of any sign of special vulnerability, that the Claimant might develop a psychiatric illness as a result of its decision.

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

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

no reason to suppose that it was not a case of known psychiatric vulnerability, and some reason to believe that it may have been.

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

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

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

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

(B) THE RESPONDENT'S NOTICE

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

(1) THE RIGHT TO WITHDRAW ON OPERATIONAL GROUNDS

135. The point as pleaded in the Respondent's Notice appears to be that on the true construction of the appointment letter withdrawal is only possible on grounds of poor performance. That would make very little sense, and I do not

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

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

(2) "MR GIFFORD'S INVESTIGATION"

137. Although this section is headed "Mr Gifford's Investigation" it consists of three distinct paragraphs only one of which is in fact concerned with that investigation. What the three paragraphs have in common is that they challenge the Judge's refusal to find that the FCO's treatment of the Claimant subsequent to his withdrawal constituted a breach of contract or a breach of duty. Very broadly, what is said is that if Mr Gifford had carried out a better investigation and/or assessed its results properly he would have concluded that there was no case to answer on the sexual misconduct allegations, so that they would have failed at the first stage rather than the second (para. 3); (2) that the FCO's attitude to the Claimant over the whole history of the allegations against him – evinced partly but not only in the handling of the disciplinary process – was not impartial (para. 4); and (3) that Sir Peter Ricketts should

have given substantive consideration to the Claimant's letter of 27 January 2010 (para. 5).

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

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

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

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

(see para. 30 above). The Claimant was not initially told about the e-mail, but it was referred to in Mr Gifford's report of 17 July and he asked to see a copy. Mr Gifford was willing to show it to him but Mr Wood thought that this would be a breach of Mr Priestley's confidence and prior to the hearing of 7 August he was given only a redacted copy. The email was read to him at the hearing: he was unable to say whether it was read in full or in part. In the litigation the FCO declined to disclose an unredacted copy until shortly before the trial, after a witness summons had been served on Mr Priestley. While describing the FCO's refusal to disclose the e-mail as troubling, the Judge declined to treat the episode as impugning Mr Gifford's impartiality: see para. 130 of his judgment. I see nothing wrong in that conclusion. As he pointed out, Mr Gifford was himself willing to let the Claimant have a full copy, and the Claimant was given a full account of the evidence underlying the allegations against him. Even if the FCO is to be criticised for its subsequent reluctance to make full disclosure that has no bearing on the conduct of the process itself. That point apart, I need only say that none of the other particular incidents pleaded seems to me to demonstrate any lack of impartiality on the part of the decision-makers, and in particular of Mr Gifford.

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

(3) FORESEEABILITY AND BREACH OF DUTY OF CARE

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

(C) THE INTEREST APPEAL

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

145. The FCO's pleaded grounds of appeal proceeded on the basis that the Judge's award was made under section 17 (1) of the Judgments Act 1838, which provides for payment at 8% "until the [judgment debt] shall be satisfied"; but that such an award was not open to him because payment to the

Claimant's solicitors would satisfy the judgment debt. The Claimant's response was (a) that the FCO had conceded before the Judge that he had a discretion as to what rate to award, from which it should not be allowed to resile; but in any event that (b) the judgment debt had not been satisfied and that accordingly the judgment rate was payable, alternatively (c) that the Judge had a discretion as to what rate to award, which he had exercised properly.

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

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

CONCLUSION AND DISPOSAL

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

ANNOTATIONS

Yapp is an important decision of the English Court of Appeal for restating the law on psychiatric injury in employment. Lord Justice Underhill, giving the lead judgment, sets out five 'propositions' 'with regards to the issues of foreseeability and remoteness' (paragraph 119). The language of 'propositions' notably is reminiscent of Lady Justice Hale's similarly titled 'propositions' previously in *Hatton v Sutherland* ([2002] EWCA Civ 76, [2002] IRLR 263), also at Court of Appeal level. Hale LJ's sixteen propositions were indeed repeated so often subsequently that Lord Walker in *Barber v Somerset County Council* ([2004] UKHL 13, [2004] IRLR 475) had to remind courts that these propositions did not have 'statutory force' (paragraph 65).

The claim in *Yapp* was brought both in contract and tort. Although the majority of the judgment of the Court of Appeal focuses on issues of tort law ('since the tortious test of remoteness is more favourable to claimants': paragraph 21), it is also significant to note the reasoning of the earlier High Court ([2013] EWHC 1098 (QB), [2013] IRLR 616) in *Yapp* on contract. Mr Justice Cranston in the High Court had found that there were two breaches of contract (first, unlawful withdrawal and, second, unlawful application of the disciplinary procedure). Admittedly, the Court of Appeal only upheld one of those findings of breach of contract: the first, unlawful withdrawal (as discussed at paragraphs 57-67). But the Court of Appeal did not disagree with the characterisation by Cranston J that the claimant had a contractual right to 'fair treatment' by his employer. This was as a result of an express term (Mr Yapp's letter of appointment, perhaps rather unusually, explicitly stated that 'As Head of Mission you are, of course, entitled to fair treatment…': paragraph 82 of the High Court's decision), but also and potentially of wider importance for employees generally, seemingly arose as a term implied in law. Cranston J had stated that the 'duty of fair treatment can also be derived from the implied term of trust and confidence in the employer-employee relationship' (paragraph 117 of the High Court's decision). The implied term of mutual trust and confidence is, of course, itself a term implied by law (i.e. a 'default' term: *Malik v BCCI SA* [1997] IRLR 462, paragraph 53), with the effect that if the implied term of fair treatment is derived from it, surely the implied term of fair treatment will also be of the same 'default' character. When the case reached the Court of Appeal, Underhill LJ did not disagree that there was an implied right to fair treatment: simply commenting in parenthesis 'though such a duty would no doubt have been implied in any event' (paragraph 41). This may be important if subsequent cases pick up on and develop the observations by the High Court in *Yapp* equating 'fair treatment' with principles of 'natural justice' (paragraphs 82 and 131).

The bulk of the judgment of the Court of Appeal deals with the separate issue as to whether it was 'reasonably foreseeable' that the claimant would develop a psychiatric illness. Remoteness was dealt with under the heading of 'damages for breach' by the High Court. However, as noted by the Court of Appeal, remoteness and foreseeability were important at the earlier stage of liability (thereby reflecting the difference if concentrating on the claim in contract or in tort): 'because if the risk of psychiatric injury is too remote no duty to take steps to avoid it will arise, and there can thus be no question of breach' (paragraph 58). Unlike the High Court, the Court of Appeal finds that it was not reasonably foreseeable that the claimant would react in the way he did, developing a depressive illness. Underhill LJ states '… it is exceptional that an

apparently robust employee, with no history of any psychiatric ill health, will develop a depressive illness as a result even of a very serious setback at work' (paragraph 125). In stark comparison, Cranston J had found '[t]he claimant had an ostensible robustness but... 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' (paragraph 137). Although not in itself foreseeable before the event, as an example of the experience Mr Yapp had endured, Cranston J also referred to adverse media coverage of his withdrawal (paragraph 58).

Brodie has commented on the decision in *Yapp* ('Risk Allocation and Psychiatric Harm: *Yapp v Foreign and Commonwealth Office*' (2015) 44 Industrial Law Journal 270-280), observing that the Court of Appeal draws together two different lines of cases: first, on (continuing) occupational stress and, second, on 'one-off act[s] of serious and career-threatening unfairness' (page 275). This is as a result of Underhill LJ's five 'propositions' drawing upon cases such as *Hatton* and *Barber* (occupational stress cases) at proposition one as well as '*Croft* and *Deadman* (also *Grieves*)' at proposition two ('one-off act of unfairness such as the unfair imposition of a disciplinary sanction'): paragraph 119. Brodie criticises this assimilation, as one set of cases (*Hatton* and occupational stress) are 'premised on the basis that some things are no one's fault' whereas, the other set of cases, 'badly handled disciplinary processes are properly the subject of criticism and arguably should lead to liability' (page 275).

In his discussion of the previous cases, Underhill LJ refers to the 'principle' that 'in the absence of some particular known problem or vulnerability an employer is entitled to assume that his employees are persons of ordinary fortitude' (paragraph 117). Then when reversing the trial judge's decision on foreseeability, Underhill LJ stresses the need, 'usually', for a 'sign of special vulnerability' (paragraph 127, but also paragraph 123, paragraph 128 and proposition one at paragraph 119) before an employer will be held be liable for psychiatric illness caused in employment. (Indeed, in a shorter concurring judgment, Davis LJ states 'I was in some ways attracted to the view that, in the context of a breach of duty of care (whether contractual or tortious) of the present kind in an employment context which is said to have resulted in psychiatric injury, any such injury is *always* to be regarded as not reasonably foreseeable/too remote unless the employer was, or should have been, already aware of some relevant susceptibility or vulnerability on the part of the employee': paragraph 154 and emphasis in original). One possible line of subsequent enquiry might be to question whether the judicial perception of an employee of 'ordinary fortitude' needs updating, if medically diagnosed incidents of depression at work in the contemporary workplace are on the increase. Alternatively, perhaps the Court of Appeal overstepped its boundaries by interfering with Cranston J's findings on this question essentially of fact (see Davis LJ at paragraph 156: 'Questions of remoteness are questions requiring a factual assessment and evaluative judgment on the part of a trial judge in the particular circumstances of a particular case' and also Underhill LJ at paragraph 122).

In an often quoted passage from *Spring v Guardian Assurance* [1994] IRLR 460, Lord Slynn commented that 'it is relevant to consider the changes which have taken place in the employer/employee relationship, with far greater duties imposed on the employer than in the past, whether by statute or by judicial decision, to care for the physical, financial and even psychological welfare of the employee' (paragraph 86). From the perspective of tort law and its development of protection of the

'psychological welfare' of employees, the Court of Appeal's decision in *Yapp* may be seen as somewhat of a disappointment. In comparison, the High Court's decision in *Yapp* on contract law may be seen as a more promising development for employees generally, subject to what extent this too has been cut back by the Court of Appeal.

A more detailed analysis of the decision by the Court of Appeal in *Yapp* can be found at: Douglas Brodie, 'Risk Allocation and Psychiatric Harm: *Yapp v Foreign and Commonwealth Office*' (2015) 44 Industrial Law Journal 270-280.