



# EMPLOYMENT TRIBUNALS

**Claimant:** Mr G Faires

**Respondent:** Foreign & Commonwealth Office

## **CERTIFICATE OF CORRECTION** **Employment Tribunals Rules of Procedure 2013**

Under the provisions of Rule 69, the judgment with reasons sent to the parties on 9 December 2016 is corrected by removing the words “sexual” and “sexually” from paragraphs 102, 108, 109, 115, 121, 124 and 126 of the reasons.

Employment Judge Grewal  
10 February 2017

**Important note to parties:**

Any dates for the filing of appeals or reviews are not changed by this certificate of correction and corrected judgment. These time limits still run from the date of the original judgment, or original judgment with reasons, when appealing.



# EMPLOYMENT TRIBUNALS

**Claimant:** Mr G Faires

**Respondent:** Foreign and Commonwealth Office

**Heard at:** London Central

**On:** 8 Sept, 2, 3, 4 and  
7 Nov 2016  
29 Nov (in chambers)

**Before:** Employment Judge H Grewal  
Ms J Cameron and Ms R Dasey

## Representation

**Claimant:** Ms de Savornani, Counsel

**Respondent:** Mr R Hill, Counsel

# JUDGMENT

The unanimous judgment of the Tribunal is that:

- 1 The complaint of unfair dismissal is not well-founded;
- 2 The complaint of direct disability discrimination is not well-founded;
- 3 The complaints of discrimination arising in consequence of the Claimant's disability are not well-founded; and
- 4 The complaints of failure to make reasonable adjustments are not well-founded.

# CORRECTED REASONS

1 In a claim form presented on 28 March 2016 the Claimant complained of unfair dismissal and disability discrimination.

## The Issues

2 It was agreed at the outset of the hearing that the issues we had to determine were as follows.

### Unfair dismissal

2.1 What was the reason for the dismissal? The Respondent contended that it was a reason related to conduct or, in the alternative, some other substantial reason of a kind to justify dismissal;

2.2 If there was a potentially fair reason for the dismissal, whether the dismissal was fair;

### Disability discrimination

2.3 It was not in dispute that the Claimant was disabled at the material time by reason of his mental health condition, namely anxiety/depression and Tourette's Syndrome. There was, however, a dispute about the extent to which the Claimant's mental health issues affected his conduct.

### Direct discrimination

2.4 Whether the Respondent dismissed the Claimant because he had the mental health condition which he had;

### Discrimination arising from disability

2.5 Whether the Respondent treated the Claimant unfavourably by:

- (a) Refusing to postpone his disciplinary hearing until his mental health condition improved so that he could participate meaningfully in the hearing;
- (b) Dismissing him;

2.6 If it did, whether it did so because of something arising in consequence of the Claimant's disability, namely:

- (a) In relation to 2.5(a) the perceived erratic nature in the Claimant's mental health condition such that future improvement could not be predicted;
- (b) In relation to 2.5(b), the risk of physical harm and harassment to the Respondent's staff as a result of his disability.

2.7 If it did, whether the Respondent has shown that the treatment was a proportionate means of achieving a legitimate aim, namely:

- (a) In relation to 5.2(a), progressing the disciplinary process;
- (b) In relation to 5.2(b), ensuring compliance with the Respondent's professional code of conduct and ensuring the safety of its staff.

Failure to make reasonable adjustments

2.8 Whether the Respondent applied the following provision, criterion or practice ("PCP") to the Claimant:

- (a) Requiring him to take part in the disciplinary hearing on 11 November 2015;
- (b) Requiring him to comply with the Respondent's Code of Conduct;

2.9 Whether those requirements put the Claimant at the following substantial disadvantage in comparison with persons who were not disabled:

- (a) In relation to 2.8(a), the Claimant could not take meaningful part in the disciplinary hearing;
- (b) In relation to 2.8(b), the Claimant's disability impacted on his ability to control his actions and comply with the Respondent's Code of Conduct when suffering a relapse in his mental health condition.

2.10 If it did, whether it would have been reasonable to make adjustments, including the following:

- (a) In relation to 2.8(a), postponing the disciplinary hearing until the Claimant was well enough to participate meaningfully in the hearing;
- (b) In relation to 2.8(b):
  - (i) Obtaining medical evidence to establish whether the Claimant could be relied upon to comply with the Respondent's rules post rehabilitation with regular treatment; and, in any event
  - (ii) Moving the Claimant to another FCO site or to another part of the Civil Service where he would not come into contact with Gillian Owens.

The Law

3 Section 98 of the Employment Rights Act 1996 ("ERA 1996") provides,

- "(1) In determining ... whether the dismissal of an employee is fair or unfair, it is for the employer to show –*
- (a) The reason (or, if more than one, the principal reason) for the dismissal, and*
  - (b) That it is either a reason falling within subsection (2) or some other substantial reason of a kind such as to justify the dismissal of an employee holding the position which the employee held.*

(2) A reason falls within this subsection if it –

...

(b)relates to the conduct of the employee

...

(4) Where the employer has fulfilled the requirements of subsection (1), the determination of the question whether the dismissal is fair or unfair (having regard to the reason shown by the employer) –

(a)depends on whether in the circumstances (including the size and administrative resources of the employer’s undertaking) the employer acted reasonably or unreasonably in treating it as a sufficient reason for dismissing the employee, and

(b)shall be determined in accordance with equity and the substantial merits of the case.”

4 The reason for the dismissal is “the set of facts known to the employer or beliefs held by him which cause him to dismiss the employee.” The reason for the dismissal must be that which is “uppermost in the mind of the employer at the time of dismissal” – **Abernethy v Mott Hay and Anderson [1974] ICR 323, at 330.**

5 Arnold J set out in **British Home Stores Ltd v Burchell [1978] IRLR 379** what the Tribunal has to decide in a misconduct dismissal case. It is,

*“whether the employer who discharged the employee on the ground of the misconduct in question ... entertained a reasonable suspicion amounting to a belief in the guilt of the employee of that misconduct at that time. That is really stating shortly and compendiously what is in fact more than one element. First of all, there must be established by the employer the fact of that belief; that the employer did believe it. Secondly, that the employer had in his mind reasonable grounds upon which to sustain that belief. And thirdly, we think, that the employer, at the stage at which he formed that belief on those grounds ... had carried out as much investigation into the matter as was reasonable in all the circumstances of the case ... It is not relevant ... that the Tribunal would itself have shared that view in those circumstances ... The test, and the test all the way through, is reasonableness.”*

6 Section 13(1) of the Equality Act 2010 (“EA 2010”) provides,

*“A person (A) discriminates against another person (B) if, because of a protected characteristic, A treats B less favourably than A treats or would treat others.”*

Disability is a protected characteristic (section 4 EA 2010). On a comparison of cases for the purposes of section 13, there must be no material difference between the circumstances relating to each case. The circumstances relating to a case include a person’s abilities if the protected characteristic is disability (section 23(1) and(2)(a) EA 2010).

7 Section 15 EA 2010 provides,

*“A person (A) discriminates against a disabled person (B) if –*

*(a) A treats B unfavourably because of something arising in consequence of B’s disability, and*

(b) *A cannot show that the treatment is a proportionate means of achieving a legitimate aim.*"

8 Paragraph 4.31 of the of the Equality and Human Rights Commission: Code of Practice on Employment (2011) provides,

*"Although not defined by the Act, the term 'proportionate' is taken from EU Directives and its meaning has been clarified by decisions of the CJEU ... EU law views treatment as proportionate if it is an 'appropriate and necessary' means of achieving a legitimate aim. But 'necessary' does not mean that the provision, criterion or practice is the only possible way of achieving the legitimate aim; it is sufficient that the same aim could not be achieved by less discriminatory means."*

9 In **Chief Constable of West Yorkshire Police v Homer [2012] ICR 704** the Supreme Court considered, in the context of an indirect discrimination claim, what is required to establish that a particular measure is a proportionate means of achieving a legitimate aim. Baroness Hale, with whom the other Justices of the Supreme Court agreed, said at paragraphs 22-25,

*"To be proportionate, a measure has to be both an appropriate means of achieving the legitimate aim and (reasonably) necessary in order to do so. Some measures may simply be inappropriate to the aim in question... A measure may be appropriate to achieving the aim but go further than is (reasonably) necessary in order to do so and thus be disproportionate... Part of the assessment of whether the criterion can be justified entails a comparison of the impact of that criterion upon the affected group as against the importance of the aim to the employer... To some extent the answer depends upon whether there were non-discriminatory alternatives available."*

10 In **Hardy and Hansons plc v Lax [2005] IRLR 726** Pill LJ in the Court of Appeal stated,

*"The employer does not have to demonstrate that no other proposal is possible. The employer has to show that the proposal ... is justified objectively notwithstanding its discriminatory effect. The principle of proportionality requires the tribunal to take into account the reasonable needs of the business. But it has to make its own judgment, upon a fair and detailed analysis of the working practices and business considerations involved, as to whether the proposal is reasonably necessary."*

11 in **Burdett v Aviva Employment Services Ltd EAT/0439/13** Eady J, having quoted the above passage in **Hardy and Hansons**, said at paragraph 35,

*"As the use of the term "objective" makes plain, whether or not a measure is justified in this sense will not depend upon the subjective belief of the employer. Thus the test is not whether the employer considered other alternatives at the time of implementing the measure in question ... Neither will an objective justification be undermined because the employer's consideration of the issue was inadequate or procedurally flawed ... although, of course, that might – as a matter of fact – have meant that the employer had failed to appreciate that there were other, less discriminatory, alternatives available."*

12 Where a provision, criterion or practice of an employer puts a disabled person at a substantial disadvantage in relation to a relevant matter in comparison with persons who are not disabled, the employer is under a duty to take such steps as it is reasonable to have to take to avoid the disadvantage – section 20(1)-(3) EA 2010. However, the employer is not subject to a duty to make reasonable adjustments if he does not know, and could not reasonably be expected to know, that the disabled person has a disability and is likely to be placed at the disadvantage referred to in section 20(3)) – Schedule 8, paragraph 20(1) EA 2010.

### **The Evidence**

13 The Claimant and John Housden (PCS) gave evidence in support of the claim. The following witnesses gave evidence on behalf of the Respondent – Samantha Croucher (Management Advice Service in the HR Directorate), Alison Blake (Investigation Manager), Anne Sherriff (Chairperson of the Disciplinary Panel) and John Rankin (Appeal Manager). Having considered all the oral and documentary evidence, the Tribunal makes the following findings of fact.

### **Findings of fact**

14 The Claimant commenced employment with the Respondent in September 1987.

15 On 16 Feb 2001 a woman who worked in the same building as the Claimant, but was not an employee of the Respondent, complained about him. She said that he had pestered her with emails between December 2000 and January 2001. She had complained to the police in early January 2001. They had given the Claimant an informal warning. He had sent her four further emails in early February after the warning. The Respondent interviewed the Claimant. There was a dispute between him and the woman about the nature of their relationship but the Claimant accepted that he had been given a warning by the police. The Claimant faced disciplinary action for harassing a workplace colleague by sending her a series of offensive emails from his work terminal. The Claimant said that what he had done was totally unacceptable and inexcusable and totally out of character for him. He said that his irrational behavior over the past few months might be explained by his experiences when working in the Consular Division abroad many years before. He said that he was ashamed and depressed by what he had done and it had destroyed him and left him feeling suicidal at times. He was given a disciplinary warning for harassment of a female colleague (non FCO).

16 Shortly after that he saw his GP and said that he was feeling very depressed. He said that it had been getting worse over the last few months and had thought about suicide. This was the first time that he had seen his doctor for depression. He was prescribed Citalopram 20mg. He saw his doctor again a fortnight later when it was noted that there had been a definite improvement. He did not see his doctor again for depression until 2009.

17 The Claimant visited his GP in March 2009 and complained of feeling low. He was diagnosed as suffering from depression and was prescribed 20 mg Citalopram again. He stopped taking the medication when he felt better, as a result of which there was a recurrence of the symptoms of depression. He saw his GP on 29 July 2009 and was started again on the Citalopram, still at 20 mg a day. He was also certified as being unfit to work. He returned to work on 7 September 2009 and on 21 September it was noted that he was feeling a lot better since he had started the medication again. He, therefore, continued taking the medication.

18 In 2013 the Claimant was working in the Crisis Management Department. In August 2013 Gillian Owens joined the Respondent on secondment from the Canadian Diplomatic Service. She was based in the Crisis Management Department. In about December 2013 she and the Claimant struck up a friendship based on their shared interest in running and they sometimes went running together at lunch time. After some time Ms Owens was injured and could no longer run but she and the Claimant continued to go to the park for lunch. The Claimant talked to her about mental health issues that affected him and his family. They had each other's telephone numbers.

19 At the end of August/beginning of September 2014 Ms Owens became concerned about the frequency and nature of contact from the Claimant. He commented on almost everything she posted on Facebook. At the end of August Ms Owens posted pictures on Facebook of her birthday party. The Claimant sent her several WhatsApp messages expressing his disappointment at not having been invited. Ms Owens explained that she had not invited anyone from work because she felt bad inviting some and not others. The Claimant responded that he was really upset by what she had said and that he thought that he was more than just someone from work. He concluded by sending her a message at 8.40 pm in which he said *"You know that you will always be a very dear friend to me and I care for you"*

20 On 5 September the Claimant sent Ms Owens messages that he needed to talk to her and that he had checked her calendar and had put in lunch with him on the Tuesday. Ms Owens, who was not in the office, said that she would check her calendar and let him know later. At 9.47 that evening the Claimant sent her a message asking her why she had marked the lunch as tentative in the diary. Ms Owens did not respond but the Claimant continued sending her messages. She finally sent him a message that she had fallen asleep on the bus and was going to bed as soon as she got home. Although she had made it clear that she did not want any further communication, the Claimant continued sending her messages until 10.50 pm

21 At 5.27 am the following morning the Claimant sent Ms Owens messages complaining about the fact that she had added someone from work as a friend on Facebook. He asked her to "unfriend" him if she truly valued their friendship and cared for him.

22 On 26 September, following the Claimant posting comments on Ms Owens' Facebook page about her going to a book launch in the evening on a day when she had been off sick from work, Ms Owens restricted his access to her Facebook account. That evening bet 10.40 and 11.29 pm the Claimant sent her six WhatsApp messages about her having restricted his access in spite of fact that she did not respond to any of them. The Claimant then tried to speak to her using Facetime twice



at almost midnight. Ms Owens sent him a text message that she was trying to sleep. The Claimant continued sending her messages after that.

23 The following morning the Claimant sent Ms Owens a WhatsApp message. She responded that she was trying to rest and that she would communicate with him the following day. Later that evening Ms Owens received notification about a comment that had been posted by the Claimant on one of her photos. The comment was “big eared cunt.” Ms Owens deleted the posting and blocked the Claimant’s access to her Facebook page. She then sent the Claimant a long email in which she said that she was shocked by what he had posted on her Facebook profile. She said that she was deeply offended and hurt and had blocked his access to her Facebook page. She said that she had wanted space and time because she had wanted to try to tell him gently that some of his recent conduct had not been appropriate, after which they might have gone back to normal. However, she could not do that after his last comment.

24 The Claimant responded “Don’t know what you are on about – I unfriended you earlier today.” He then said that he wanted all his presents back on Monday, she was no longer his friend and she had brought that upon herself. Although Ms Owens did not reply the Claimant continued sending her emails until 10.20 that night and sent one at 4 am. He then switched to sending messages on WhatsApp and sent her about seven messages bet 4.11 and 8 am.

25 Ms Owens had intended to raise the matter with HR when she went to work on Monday, 30 September. However, when she arrived at work she learnt that the Claimant was absent sick and was going to be off for a while as managers were looking for someone to cover a course that he had been arranging. Ms Owens offered to cover course and the Claimant sent her an email thanking her. He said that he had a doctor’s appointment later that day because he was not feeling too good and needed help. He suspected that he would be signed off for a while. In those circumstances, and because Ms Owens was due to take an exam soon, she decided not to raise the matter formally with HR but she raised informal concerns about his behaviour with her line manager, Nicola Monckton. She raised her concerns in general terms without providing any details. She made it clear that she did not want the matter to be raised with the Claimant or his line manager. It was agreed that she would update Ms Monckton if there were any further issues.

26 On 30 Sept 2014 the Claimant went to his doctor. He said that over the past 3-4 months he had felt tearful. He also said that he felt angry towards his co-workers but did not know why and that he wished them harm although he did not think that he would act on those thoughts. The doctor increased his dose of Citalopram from 20 mgs a day to 40 mg. He also certified him as being unfit to work for two weeks because of depression.

27 On 1 October the Claimant sent emails to Ms Owens in which he apologised for the things that he had said to her and said that he had realised that he needed help because of “all the horrible things” he had said to her. In an email on 3 October Ms Owens accepted his apology but said that she would prefer going forward for their relationship to be a professional one. The Claimant continued to send Ms Owens messages after that. The gist of most of them was that he hoped that they could be friends again.

28 By 14 October the Claimant's condition had not improved and his doctor certified him as unfit to work until 23 October and referred him to a psychiatrist.

29 The Claimant was referred to the Respondent's Occupation Health Service. An OH Adviser saw him on 22 October and reported on 24 October that he had had a recent exacerbation of depression and anxiety symptoms and that his medication had been increased. She advised a phased return to work when the Claimant returned to work on 24 October.

30 In October the Claimant tried to befriend on Facebook a close friend of Ms Owens whom he had never met before. On 20 October Ms Owens received notification that someone had tried to change her Facebook password, and there were attempts to hack her account on 21 and 26 October 2014.

31 On 22 and 23 October the Claimant sent Ms Owens messages saying "Sorry it has to be this way" and "But you give me no choice" twice. He viewed her LinkedIn account on a number of occasions. Ms Owens changed her Facebook email account from a gmail account to an AOL account.

32 31 October 2014 was the first day that Ms Owens and the Claimant were both in the office after he returned to work. He sent her an Instant Message ("IM") that morning that it would be good for them to have a chat when he got better. Ms Owens informed Nicola Monckton of this message. Later that evening Ms Owens was informed that someone had attempted to create a Facebook account using her old email address.

33 On 6 November Ms Owens received a telephone call where the caller hung up when she answered the telephone. On 7 Nov the Claimant sent Ms Owens an email in the afternoon inviting her to an event that he was organising for his work colleagues. Ms Owens did not respond. Between 5.05 and 5.10 that afternoon she received eight calls in quick succession where the caller hung up when she answered her telephone.

34 Ms Owens informed Ms Monckton of this and they agreed that after her exam they would raise the matter with Ben Elliott, the Claimant's line manager. Ms Monckton discussed the matter with Craig Hannah, the home staff welfare officer and on 10 November relayed to Ms Owens what his advice had been. He had said that they should make it clear to the Claimant that if he contacted her in the workplace about anything other than work, when she had specifically asked him not to, that would be a disciplinary matter. His view was that any contact outside the workplace was a police matter.

35 The Claimant followed a friend of Ms Owens on Facebook and on Twitter, especially in relation to articles where she was mentioned. The friend blocked him on both Facebook and Twitter and removed any references to Ms Owens. On 12 November the Claimant sent Ms Owens an email that he missed talking to her.

36 On 25 Nov 2014 Nicola Monckton and Ms Owens met with Ben Elliott. Ms Monckton had asked Craig Hannah to be involved but he had advised that it would be more appropriate for MAS to be involved. Ms Monckton did not discuss the matter with anyone in MAS or ask them to be involved. Ms Owens verbally outlined in general terms the unwelcome conduct that she had had from the Claimant. They

agreed that Mr Elliott would inform the Claimant that Ms Owens had raised concerns about his interactions with her both inside and outside the office and that she had requested that the relationship be a professional one only. If the Claimant accepted that his behaviour had been unreasonable and agreed to stop they would keep situation under regular review.

37 On the following day Mr Elliott, Fleur Wilson (his line manager) and Ms Monckton met with the Claimant He acknowledged in part that he had acted inappropriately and said that his mental health issues were the cause of it. He agreed to stop contacting Ms Owens outside office completely and that inside the office he would contact her on work issues only. The managers and Ms Owens agreed that in those circumstances no further action was required at that stage but that they would keep the situation under review.

38 The Diplomatic Service Code and General Principles of Conduct set out the standards of behaviour expected of the Respondent's employees. These provide, inter alia,

*“you must treat your colleagues with respect. You must not subject any member of staff to harassment, bullying or victimisation on any grounds, including sex, race, disability, sexual orientation, religion, philosophical belief, marital status or age;*

...

*You must not fall short of the professional standard expected of members of the Diplomatic Service nor act in way which might bring discredit upon it; Your behaviour, action or inaction must not significantly disrupt or damage the performance or reputation of the Diplomatic Service.”*

39 The Respondent's Misconduct Procedure sets out the process to be followed if misconduct is alleged or suspected. Under the procedure, the first thing that the manager should do is to decide, in consultation with Management Advice Service (“MAS”) in HR, the level of seriousness of the alleged misconduct. This entails deciding whether the alleged misconduct amount to minor misconduct, serious misconduct or gross misconduct.

40 Guidance is given in a separate document on how to assess level of misconduct. Paragraph 6 of that guide sets out the factors that should be taken into account when deciding the level of misconduct. These include the degree of misconduct, the impact on others and the department, culpability and intent, breach of the Civil Service Code and whether the behaviour brings or risks bringing the FCO into disrepute. Examples are given in the guide as to the different levels of misconduct. Examples of minor misconduct include poor or persistent time keeping, minor safety violations and minor misuse of departmental assets such phone/email/internet. Examples of serious misconduct include serious misuse of departmental assets such as phone/email/internet, offensive personal behaviour, some breaches of the Civil Service Code and bullying, harassment and discrimination. Examples of gross misconduct include physical violence or threatening behaviour, including more serious cases of bullying, harassment and discrimination, certain instances of bringing the department into disrepute, for example posting defamatory comments on social media sites, significant or repeated breach of the Civil Service Code and very offensive behaviour.

41 In terms of how the matter is progressed once the level of misconduct has been assessed, the Misconduct Procedure provides,

*“20 Instances where minor misconduct is identified may not always require the manager to take formal action. The matter can be addressed quickly and informally through, for example, a discussion about expectations and standards of behavior or through training, coaching or mentoring.*

*21 However, if action is not taken, line managers must advise employees that any further alleged misconduct may lead to formal action being taken in the future. A note of all line management action should be kept securely either electronically or in hard copy and a copy given to the employee. As this is informal action, the note should not be placed on the employee’s INDIV file at this time.*

*22 In certain instances of minor misconduct, or where informal action has not stopped further minor misconduct from taking place, it may be necessary for the line manager to proceed to the formal process. In all cases of alleged serious or gross misconduct, the formal procedure must be followed.”*

42 It is clear that Ms Owens’ complaint towards the end of 2014 was not dealt with under the Respondent’s Misconduct Procedure. MAS was not involved, no attempt was made to assess the level of the misconduct, the Claimant was not warned that further misconduct might lead to formal action being taken and a copy of the note was not given to him. There is no evidence whatsoever that it was dealt with informally because it had been assessed to be minor misconduct under the Misconduct Procedure. All the evidence points to the Misconduct Procedure not having been followed.

43 Guidance is also given on how to decide a misconduct penalty. It is clear that there are no prescribed penalties for the different levels of misconduct. It provides,

*“8. Where misconduct has been proven, the Decision Manager should decide on a penalty consistent with the seriousness of the misconduct. Consistency does not necessarily mean that the same penalty must be applied in every instance of the same act of misconduct. Each case must be looked at on its own merits. Any relevant circumstances should be taken into account and the same procedure be applied in addressing similar instances of the same misconduct.*

*9. It is important that all penalties are decided on the basis of what is appropriate having taken into account the following:*

- The likely penalty for the particular level of misconduct, for example, minor, serious or gross*
- Where known, the decision made in similar cases – refer to the HR Management Advice Service (MAS) team for advice*
- The relation between the behavior of the employee and that of others, ensuring that the employee is not being unfairly singled out*
- Any live warnings*
- Whether the penalty is reasonable taking account of any mitigating factors.”*

Paragraph 7 provides,

*“Mitigation may take different forms and it is for the employee to put forward mitigating factors together with supporting evidence, if available. Such factors should always be considered before deciding the penalty. Typical examples may be (this list is not exhaustive):*

- *Cases of ill-health or conduct due to medication*
- *Issues relating to disability, for example, where the condition can influence behavior ...”*

44 After 26 November the Claimant did not contact Ms Owens outside work and did not attempt to make contact with her friends. Nor was there any contact with her at work that was not work-related.

45 Following the Claimant’s referral to a psychiatrist on 16 October, he was assessed by Enika Chasafara of the East Herts Wellbeing Team on 22 December 2014. She noted that his main presenting problem was an intense hatred he had developed of people he had once liked which was at that time being directed to a female work colleague. She considered that a further psychiatric assessment would be appropriate.

46 Professor Naomi Fineberg, Consultant Psychiatrist, saw the Claimant on 8 January 2016. He told her of his fear of his ongoing anger, hatred and vengeful thought and urges which were mainly, but not exclusively, directed against a female colleague. He was seeking treatment to take the thoughts and urges away because he was concerned that if he acted on them he would get into serious trouble. He told Professor Fineberg that after he had got to know and trust the female colleague, he had started to need to know exactly what she was doing as a way of controlling her. She had tried to limit contact with him and he had become verbally aggressive towards her. He had recently returned to work after a sickness absence of four weeks and was seeing the female colleague again. This had led to an increase in the intensity of the rumination and he was frightened by the ferocity of his aggressive thoughts towards her. He said that he was thinking a lot about harming her and thought about stabbing and decapitating her. Although he did not have any plans to do so at the time, he had various suitable implements in his shed such as saws that could be used if required.

46 Professor Fineberg diagnosed that he suffered from Tourette’s Syndrome which was characterised by multiple vocal and motor tics. She thought that that might partly explain his tendency to shout out epithets and react impulsively when slighted. She also thought that his perfectionist tendencies and need for things to be right and fair might be explained by obsessive compulsive personality disorder traits.

47 Professor Fineberg discussed with the Claimant the importance of the safe management of his impulses, and obtained his consent to inform the police of his thoughts and the name of his work colleague, having made him aware that the police might wish to contact her. Professor Fineberg contacted the police and referred the Claimant to a consultant forensic psychiatrist. The Claimant accepted her advice not to attend work for the time being.

48 On 9 January 2015 Professor Fienberg sent to the Claimant's GP, Dr Jain, a report of her consultation with him. She said that he was complaining of a recent and growing fear of his ongoing anger, hatred and vengeful thoughts and was seeking treatment to help take away the thoughts and urges. He appeared to show symptoms of tics, consistent with Tourette's syndrome. She said that she had referred him to a consultant forensic psychiatrist. She had prescribed a small dose of Risperidone which was effective for treating Tourette's Syndrome and might help him disengage from his violent thoughts. She thought that he might also benefit from an increase in his dosage of Citalopram to 60 mg a day if he had an ECG which was normal.

49 On 9 January the police gave the Claimant a warning to refrain from any act which could amount to a threat or use of violence against Gillian Owens and he was served with a written warning to that effect.

50 On the same day the police also contacted Ms Owens at work. She was served with a notice of threat to her personal safety and was informed that it was a threat to her life. Ms Owens made senior managers at the Respondent, the Canadian High Commission and her managers in Ottawa aware of the matter. The diplomatic police subsequently informed Ms Owens that in a meeting with his psychiatrist the Claimant had disclosed thoughts of stabbing her. This led to Ms Owens temporarily changing her living arrangements and reviewing her security arrangements with the Canadian High Commission.

51 Samantha Croucher in HR instructed the Claimant by email not to come into the office and said that she would be in touch the following week to explain what other action might be necessary.

52 On 15 January Ms Croucher suspended the Claimant on full pay pending the outcome of a misconduct investigation into his inappropriate behaviour towards Gillian Owens. She said that she would appoint an independent person within the Respondent to conduct an investigation into whether there was a case of misconduct to answer. She warned him that harassment and threats to the safety of a work colleague would be a breach of Respondent's Code of Conduct and might be deemed gross misconduct. She sent him a copy of the Respondent's Misconduct Procedure.

53 The Claimant saw his doctor on 20 January and was certified as unfit to work because of depression from 12 January to 3 March 2015.

54 On 13 February 2015 the Claimant was seen by Dr Farag, Associate Specialist Psychiatrist. In a report to his GP on 16 March 2015 he said that the Claimant had reported feeling much better and had said that he had not had thought of harming his colleague since he had started taking Risperidone at the beg of January. He said the fact that he had not been working since January might have contributed to his improvement but that he believed that medication was the main factor. He said that his concentration was fine. He referred him to Dr Lippett for psychological therapy.

55 Elizabeth Younger, Head of Policy and Litigation in the National Security Directorate, was initially appointed to conduct the investigation. She interviewed Gillian Owens on 25 February 2015. Ms Owens gave a detailed account of the contact that she had with the Claimant between August and November 2014 and

provided a large quantity of documentary evidence in support of it. Her account included the matters set out at paragraphs 19-35 (above).

56 On 10 March the Claimant's doctor certified him as unfit to work because of depression from 3 March to 4 May 2015. The Claimant advised Ms Croucher of this by email on 11 March.

57 On 23 March Ms Croucher wrote to the Claimant that two months had passed since the start of the investigation and he was likely to remain unfit to work for the next two months. Such a delay to the misconduct process was not reasonable for all involved. With that in mind, she wanted to get his account of what had happened by 2 April. She said that a number of options were available to him - he could have a face to face interview, a telephone interview, provide a written statement or have a representative answer questions on his behalf. She also informed him that because of his long term absence the Respondent was going to recruit a substantive replacement for his position and that, if and when he was fit to return to work, he would be placed in the Corporate Pool initially while he bid for jobs in the usual way. The Respondent has a system whereby employees rotate in different roles, normally spending 2-3 years in each role. Being placed in the Corporate Pool and bidding for different roles was common.

58 The Claimant responded that he would prefer a face to face interview. On 31 March the Claimant informed Ms Croucher that he had an appointment with the Forensic Mental Health team on 2 April and would, therefore, not be able to attend an interview until after Easter. On 20 April Ms Croucher informed the Claimant that she was going to seek advice from Occupational Health ("OH") on the best way to run the meeting and whether any special arrangements might be helpful to him and subsequently she sought that advice.

59 On 28 April the Claimant was certified as being unfit to work until 31 May because of depression.

60 Dr Moore, the OH Doctor, had a consultation with the Claimant on 5 May 2015 and provided a report to the Respondent on the same day. She said that the Claimant had told her that he was being treated for depression and a mild form of Tourette's Syndrome. She had obtained his consent to approach his psychiatrist for a report. Her opinion was that *"his mental health issues have precipitated some of the behaviours that have given rise to concern. At the time of the concern being raised he was not receiving appropriate medication."* She said that he was on appropriate medication now but had still not received all the psychological treatment that he needed prior to return to work and to ensure that he was able to adopt behaviour that was appropriate for the environment. The timespan on that had yet to be determined. The condition was likely to be ongoing and might relapse. She said that a face to face interview was acceptable but that the Claimant must have a representative with him. She also recommended break every 45 mins.

61 On the same day Dr Moore asked Professor Fineberg for a report to indicate what her diagnosis was. In response to Professor Fineberg's concerns about the propriety of providing the information sought, Dr Moore made it clear that she was requesting a doctor to doctor report for which the Claimant had given his consent and that it would help the Claimant in his quest to maintain his employment. On 19 June Professor Fineberg responded that she not a suitable person to provide information

on the Claimant as she had only seen him once in January 2015 and he was no longer under her care. She suggested that Dr Moore seek the Claimant's permission to contact his treating clinicians.

62 On 21 May 2015 the Claimant was certified as unfit to work until 30 June because of depression.

63 On 11 June Kelly Evans (in Samantha Croucher's absence) informed the Claimant that the investigation would be conducted by Alison Blake. She had taken over from Elizabeth Younger who was due to commence maternity leave. Ms Evans asked the Claimant to confirm that he was still content to proceed with the interview and he confirmed that he was.

64 On 15 June 15 Dr Farag sent a report to the Claimant's GP, Dr Jain, having seen the Claimant on 4 June. He said that the Claimant had reported feeling much better and that he no longer had thoughts of harming his colleague. He thought that the medication had been effective but recognised that his absence from work for five months might have contributed to his improvement. That raised the question of whether the thoughts would come back as soon as he returned to work. The Claimant said that he had been moved to a different building, but there was always a chance of bumping into the colleague. He said that in the meantime he would blank her and not engage with her. The Claimant had reported that his energy and concentration were normal.

65 Dr Moore saw the Claimant on 17 June 2015. He told her that he was feeling much better and felt ready to return to work.

66 On 18 June Alison Blake invited the Claimant to a misconduct investigation interview on 2 July 2015. She informed him that she was investigating allegations of misconduct against him in relation to his behaviour toward Gillian Owens between September 2014 and January 2015. It was alleged that by his actions his behaviour towards Ms Owens had been inappropriate and had breached the Respondent's Principles of Conduct, specifically those requiring employees to treat colleagues with respect and not to subject them to harassment on any grounds, including sex, and not to act in any way which might bring discredit on the Respondent. She warned him that it could amount to gross misconduct. She advised him of his right to be accompanied.

67 On 18 June 2015 Dr Moore asked Dr Jain, the Claimant's GP, for a report from her records to indicate the present thoughts of the psychiatrists, their diagnoses, his current treatment and any future treatment plans.

68 On 19 June Dr Moore advised the Respondent that the Claimant had improved considerably and that he had said that his psychologist felt that he was now safe in his interactions with others. She said that he hoped to return to work once his current medical certificate expired at the end of that week. Once his suspension was lifted she recommended a phased return to work over a 4 week period. She said that she had been unable to get any information from his psychiatrist and would try and get it from his GP.

69 On 2 July 2015 the Claimant saw his GP. He told him that he could not be sure yet how he would react if he saw the colleague against whom he had violent



thoughts. The GP issued him with a further medical certificate that he was unfit to work from 30 June to 8 August 2015 because of depression.

70 Prior to the meeting with Alison Blake on 2 July, the Claimant sent her copies of the letter from Professor Fineberg to his GP dated 9 January 15, a letter dated 9 January 2015 from the East Herts Wellbeing team and a copy of the warning (notice of threat to personal safety) which the police had given him on 9 January. The letter from Erika Chasafara in the Wellbeing team said that she had assessed the Claimant for CBT on 22 December 14. His main presenting problem had been that he had developed an intense hatred of people whom he had once liked which was at that stage being directed to a female work colleague. She also said that Professor Fineberg had been extremely concerned by the Claimant's thoughts of killing his female work colleague and that with the Claimant's agreement she had contacted the police.

71 Alison Blake interviewed the Claimant on 2 July 2015. He was accompanied by John Housden, his trade union representative. The Claimant described how he and Gillian Owens had become friends around December 2013 and how he had come to regard her as a good friend and had felt comfortable talking to her about his mental health condition. His condition had deteriorated in the course of the year and due to that, combined with Tourettes Syndrome which had led to OCD, he had felt unable to control his actions, on occasion being compelled to do things that he did not want to do, and to be unaware of his actions. He accepted that he had sent Ms Owens messages outside work but denied that these had been excessive or offensive. In particular, he denied that he had put the offensive post on Ms Owen's Facebook account and claimed that that was the result of someone having hacked his Facebook account. He also denied having attempted to contact any of Ms Owens' friends on social media (in his evidence to us he accepted that he had done that) or making any silent calls to Ms Owens. Ms Blake asked him whether in light of what he had said about not being able to control his actions or being aware of what he was doing, it was possible that he had in fact done these things. The Claimant replied that it was not. He denied that she had asked him to cease social contact. He said that he had been very upset by her actions and that that had led to a further deterioration of his health and his having thoughts of inflicting serious harm on Ms Owens. After the meeting with his manager in November 2014 he had not made any further contact with Ms Owens. He said that he was receiving appropriate treatment and was heading in the right direction but still had some way to go with his recovery and was not yet fit to return to work.

72 On 9 July 15 Dr Farag asked Dr Jag Singh, Consultant Forensic Psychiatrist, to assess the Claimant for his "*growing fear of his ongoing anger, hatred and vengeful thoughts mainly, but not exclusively directed against a female work colleague.*"

73 Dr Moore saw the Claimant on 14 July 2015. In a report dated 16 July she informed the Respondent that he had told her that he had been quite shocked by some of the allegations at the investigatory interview and that that had impacted on his well-being.

74 On 16 July Alison Blake interviewed Ben Elliott, the Claimant's line manager. He said that at the meeting on 25 November 2014 he had understood the broad nature of the Claimant's exchange with Gillian Owens but that she had shared little detail with him. He knew that there had been contact via Instant Messaging,

Facebook and WhatsApp but not exactly what had been said. He confirmed that he had spoken to the Claimant about this the following day and had told him that all contact outside work had to stop and that contact in office was to be only about work, and that the Claimant had agreed to that.

75 Alison Blake produced her investigation report on 29 July 2014. She concluded that the Claimant's and Gillian Owens' accounts differed markedly about the extent and tone/nature of the Claimant's communications in September and October 2014. She said that Ms Owens' record of events between August and November 2014 provided strong corroborating evidence of a pattern of frequent inappropriate messages and on the balance of probabilities it was reasonable to assume that the Claimant was responsible for the matters included in her record. That included the matters which the Claimant had denied. She concluded that there was a case of misconduct to answer because there was strong evidence that the Claimant's behaviour towards Gillian Owens between 29 August 2015 and 9 January 2016 was on a number of occasions inappropriate, unacceptable and unwelcome and could constitute a pattern of harassment. She said that the person conducting the disciplinary hearing would want to consider the degree to which the strong evidence that the Claimant's behaviour towards Ms Owens was the result of and affected by his deteriorating mental condition was relevant.

76 The Claimant saw his GP on 4 August. His doctor noted that the Claimant had tried to stop Risperidone but the harmful thoughts had returned, and so he had restarted it and the thoughts had settled. He was given a further medical certificate that he was unfit to work until 13 September 2015.

77 Dr Flury (Clinical Psychologist) assessed the Claimant around August 2015. In a report dated 6 August 2015 (which was copied to the Claimant's GP) she said that the Claimant thought that he could have acted on his negative thoughts of harming Ms Owens if he had continued to have contact with her. Dr Flury concluded that there was nothing to suggest that the Claimant would not experience similar hostile thoughts in the future and it was not possible to know who would be the focus of such thoughts. He had a fairly limited set of coping mechanisms but there was nothing to suggest that he would act on the thoughts in the future and his aversion to the consequences made it highly unlikely that he would.

78 On 6 August Kelly Evans (Head of MAS) sought advice from OH as to whether the Respondent could proceed with the misconduct process and whether any specific conditions needed to be put in place. Dr Moore responded on 10 August that she did not see any particular reason to delay and considered it appropriate to proceed with the next step. The only condition that she advised should be put in place was that the Claimant should be accompanied by a representative and should not attend any meeting on his own.

79 On 25 Aug 2015 Samantha Croucher wrote to the Claimant that the investigation had concluded and there was a case of gross misconduct to answer. The allegations against him were that he had subjected a work colleague to inappropriate behaviour amounting to harassment via email, telephone and social media, and that in doing so he had fallen short of the professional standard of conduct expected of employees and risked bringing the FCO into disrepute. She attached to her letter a copy of Alison Blake's report and asked the Claimant for a written response within 7 days. In particular, he was asked to state whether he

admitted or denied the allegations. She said that further consideration would be given to his response before a final decision was made as to whether or not the case should proceed to a disciplinary hearing.

80 On 28 August 2015 Dr Moore advised that the Claimant could participate in a meeting to discuss the outcome of the investigation and that she was happy for that to go forward.

81 On 7 Sept the Claimant's GP certified him as unfit to work until 7 October 2015 because of depression.

82 On 10 September 2015 the Claimant responded in writing to Ms Croucher. He said that if he was being judged against normal behaviour he admitted the allegation. However, there was clear evidence that he been seriously unwell and his actions were clearly the result of his ill health. Had he been well, he would not have behaved the way in which he had. He denied that he had attempted to hack Gillian Owens' Facebook account, had used a Gary F LinkedIn account (he admitted in evidence before us that he had used that account) or that he had made any silent phone calls.

83 On 16 Sept 2015 Anne Sheriff, Head of the International Department, in HRD, invited the Claimant to attend a formal gross misconduct panel hearing on 29 September 2015. She informed him that the panel would comprise her (as chairperson), Nat Dawbarn and Chris Halliday. She noted that he had admitted some of the allegations but not others. She advised him that the allegations, if substantiated, would amount to gross misconduct. She warned him that the hearing might lead to his dismissal without notice and that other lesser penalties could also be considered. She advised him of his right to be accompanied.

84 On 18 September the Claimant sent Ms Croucher an email that he was disappointed that he was expected to attend a disciplinary hearing when he had done nothing wrong apart from being seriously ill with mental health issues. He concluded that because he was signed off sick until 7 October he was not in a position to go before a disciplinary panel and to answer questions or respond as he would wish to be able to do so.

85 Ms Croucher responded on 22 September that he could raise all the points about his mental health at the disciplinary hearing and assured him that no decision had been made at that stage about his behaviour or the potential sanction if upheld. She said that the last OH report had confirmed that he was in a position to participate in the disciplinary process. However, as he was due to be reviewed by OH in early October, they would postpone the hearing on 29 September pending that review. If the OH view remained that he could take part in the process it would be rescheduled. She suggested alternatives to the Claimant attending the meeting – he could participate by telephone, provide a detailed written statement or have his trade union representative speak on his behalf.

86 On 25 September 2015 the Claimant's GP, Dr Jain, responded to Dr Moore's request for information about the Claimant and the view of his psychiatrists. She enclosed in her letter Dr Farag's reports of 16 March 2015 and 15 June 2015. She set out the medication that the Claimant was on at the time – citalopram 40 mgs and risperidone 500 mg twice a day. She said that in the last few months his symptoms appeared to have improved and that he reported that the harmful thoughts appeared

to settle whilst he was on medication but that they might recur if he tried to stop the risperidone. She concluded that while he was away from work and on medication it appeared that the harmful thoughts were under control but that it was difficult to say what might happen if he encountered the colleague towards whom they had originally been directed.

87 The Claimant saw his GP on 1 October 2015. He told his doctor that he had been doing well but had heard in last couple of weeks that he was to be subjected to a disciplinary hearing at work for harassing a work colleague. He said that he was seeing his psychologist who would write a letter to say that he was not well enough to engage. The Claimant's GP certified him as unfit to work from 1 October to 30 Nov 2015.

88 On 7 October 2015 Dr Moore advised the Respondent that she had received the Claimant's GP's report and that there were no contraindications to a disciplinary hearing taking place and that her advice was that it be scheduled as soon as convenient. She said that that would be helpful for the Claimant as well as the others concerned.

89 On 8 October the Claimant sent HR his latest medical certificate and a very short letter dated 29 September 2015 from Andrew Nicholls, the Consultant Clinical Psychologist treating him. Dr Nicholls wrote,

*"Mr Faires has asked me to write to you in relation to the disciplinary procedure which he is subject to at work. As you are aware he is currently unwell and signed off from work. It is my opinion that he is indeed not well enough to work at present and therefore unable to properly present himself at a disciplinary procedure."*

90 Samantha Croucher sent those two documents to Dr Moore, who was due to review the Claimant very shortly, and asked her whether her assessment of his fitness to attend the disciplinary hearing remained the same as before or it had changed since August and whether she concurred with his psychologist.

91 On 19 October 2015 Dr Farag wrote to the Claimant's GP, having seen the Claimant on 8 October. He said that the Claimant had reported that his sleep and concentration were fine and there was no evidence of poor concentration. The Claimant had also reported that since he had learnt in the last two weeks that a disciplinary hearing been arranged for some time in October the thoughts of harming his colleague had returned. The Claimant had told him that he would not attend disciplinary hearing because he was signed off sick.

92 The Claimant was seen by Dr Moore on 27 October. He told her, among other things, that he had been thinking of revenge on persons at work and that he had developed a loss of trust in the psychologist because he had informed the police of this.

93 On 29 October 2015 Dr Moore advised the Respondent that the Claimant's condition had deteriorated since she had last seen him. She said that he had given her permission to disclose some of his clinical information to the Respondent. She said that he had Tourette's syndrome and had been troubled with obsessive thoughts which were often aggressive and violent in nature. His mood had become lower and

he had been undertaking reclusive behaviour. She advised that if the Claimant were to be asked to engage in a meeting situation, a safe and controlled response could not be guaranteed. She, therefore, advised against a face to face meeting. She said that she had discussed with the Claimant that a written statement might be of greater benefit. He had said that that he did not feel that he was in a position to think sufficiently clearly to write such a statement and she had advised him to seek the advice of his psychologist to see if assistance could be provided to help him formulate such a statement.

94 On receipt of that, Ms Croucher sent the Claimant an email that, having reviewed the latest OH report and the case generally, they had decided to proceed with the disciplinary hearing on 11 November 2015. She said that they could not reasonably delay the misconduct process any longer. However, on the basis of the OH advice, it was not deemed appropriate for him to attend the hearing in person. He had the option to attend by telephone, send in a written statement or to ask his trade union representative to attend and present his case on his behalf. On the same day Anne Sheriff wrote to the Claimant formally inviting him to a disciplinary hearing on 11 November 2015.

95 Dr Farag saw the Claimant on 30 October and in a report dated 3 November he told the Claimant's GP that there was no evidence of any severe or significant depression and that the Claimant's concentration was fine. He said that the Claimant had informed him that for a while his anger and the thoughts of beheading his work colleague had almost disappeared but that they had been reignited by learning that a disciplinary hearing been scheduled for 11 November. He had said that as he was signed off sick he was not likely to attend hearing that day.

96 On 4 November the Claimant sent Ms Croucher a document setting out his objections to the hearing taking place while he was unfit to work and unable to represent himself properly at the hearing, which he claimed amounted to disability discrimination, and his defence to the allegations. He said that what he did was totally out of character and was due to the fact that he was suffering from mental illness. He asked the panel to take into account that he suffered from Tourette's syndrome and Obsessive Compulsive Disorder and set out what the latter condition entailed. He said that the investigation had been flawed because it had failed to conclude that he had been culpable, in a sense of acting wilfully in a negligent way. His mental impairment had affected his ability to control his actions. He had worked for the Respondent for 28 years and in all that time he had adhered to the Respondent's Code of Conduct. There would never have been an investigation had he not done the right thing and brought matters to the attention of his psychiatrist. If, despite his objections, the Respondent decided to proceed with the hearing, John Housden, his trade union representative, would represent him.

97 Ms Croucher responded that the hearing would go ahead and again gave the Claimant the opportunity to participate in the ways she had previously suggested. On 9 November she sent the Claimant a sheet with his previous career history, which included the warning that he had been given in February 2001. She informed him that the panel would only see that if it had concluded that misconduct had occurred and at the stage it was considering the sanction.

98 The disciplinary hearing took place on 11 November 2015. The Claimant did not attend but Mr Housden attended to represent him. At the outset of the hearing Mr

Housden expressed his unhappiness about the matter proceeding at a time when the Claimant was certified as not fit to work and was not well enough to attend. He also questioned whether it should be considered as misconduct in circumstances where it was questionable whether the Claimant could be held responsible for his actions given his mental health. Ms Sherriff explained why the Respondent had decided that the matter should proceed – it had already been postponed once to take account of the Claimant's health, there had already been very long delays because of the Claimant's continuing poor health, the lack of prognosis as to when the Claimant would be fit to return to work, the continuing impact any further delay would have both on the Claimant and Gillian Owens and the fact that the Claimant had been offered a number of possible adjustments to ensure that he had a full opportunity to present his case.

99 The panel members asked John Housden two questions – whether the Claimant's mental health could affect his behaviour and was responsible for any discrepancies and memory loss and whether there was a way to check if the Claimant's Facebook account had been hacked as claimed by him. Mr Housden responded that he could not answer those questions and that the Claimant needed to answer them. He did not have any evidence to present in relation to those matters.

100 The panel then withdrew to consider its decision. It considered first whether the Claimant had done the acts that he was alleged to have done and whether the acts which it found that he had done amounted to serious misconduct or gross misconduct. The panel divided the material before it into three categories – the acts which the Claimant had admitted he had done, those which he had denied and the police report about the Claimant having thoughts of stabbing Ms Owens.

101 The panel considered first the acts which the Claimant had admitted. The panel members agreed that those amounted to substantial harassment of Gillian Owens and to gross misconduct. They looked at the medical evidence which they had about the Claimant's mental health (Dr Fineberg's letter of 9 January 2015 to Dr Jain, the OH report of 5 May 2015, Dr Jain's letter of 25 September, Dr Nicholls' letter of 29 September 2015 and the OH report of 29 October) and the representations made by him and his trade union representative as to his responsibility for his actions. They concluded that, while some of the Claimant's actions might have been the result of his mental health condition (his depression, Tourette's syndrome and his OCD), that did not absolve him of all responsibility for all his actions; he had a level of responsibility for some of them too. That conclusion was based on the Claimant's evidence that he had been aware that what he was doing was inappropriate and that he had been able to stop it when he had been asked to in November 2014. The panel also noted that the Claimant's actions had resulted in significant worry and distress to Gillian Owens, especially following the police report to her of the Claimant's thoughts of harming her. Having decided that the admitted acts amounted to harassment and gross misconduct, the panel did not consider it necessary to consider the acts that were disputed.

102 Having informed Mr Housden of its decision to that effect the panel then considered what the appropriate sanction was. At this stage the panel was given the Claimant's career sheet which showed that the Claimant had been given a disciplinary warning for harassment of a female colleague (non-FCO) in March 2001. The panel did not have the details of that harassment which we had. In considering the appropriate sanction the panel took into account the seriousness of the gross

misconduct which the Claimant had admitted, the fact that some of his actions might have been the result of his mental health, his length of service, the fact that he had previously been given a warning for a similar matter (harassing a female colleague), the level of risk of recurrence of harassment (including physical harm) of Gillian Owens and others and whether any such risk could be mitigated if the Claimant continued to be employed by the Respondent. The panel concluded that there were no steps that it could take to mitigate the risk and that the risk of repeat behaviour and foreseeable harm was too great and unacceptable to the organisation. Having taken into account all the above the panel concluded that dismissal was the appropriate sanction for the misconduct which the Claimant had admitted. The panel decided that in light of the fact that the Claimant admitted that some of his conduct had had a negative impact on Ms Owens and had made efforts to address the issues by seeking medical help and treatment, it would be appropriate to dismiss the Claimant with notice. The panel gave its decision verbally to Mr Housden on the day and Anne Sherriff confirmed it in writing on 17 November.

103 The Claimant appealed on 20 November 2015. There were three main grounds of appeal. These were that (i) he had been required to attend an investigatory interview and disciplinary hearing at a time when he certified as unfit to work; (ii) the panel had failed to take into account that his actions had been the result of his mental health illness and that he had, therefore, not been culpable in the sense of acting wilfully or in a negligent way; and (iii) the panel's conclusion about there being a risk of recurrence and of physical harm was not based on any evidence and amounted to disability discrimination. The Claimant attached three documents in support of his appeal – his medical certificate of 1 October 2015, Dr Nicholls' letter of 29 Sept 15 and a letter from Drs Nicholls and Farag dated 24 Nov 2015. The last of these stated that between January and the date of the letter the Claimant 's mental state and condition had fluctuated and that he had sometimes been experiencing thoughts and feelings which had been out of the ordinary for him.

104 On 1 December 2015 John Rankin invited the Claimant to the appeal hearing on 14 December. He informed him that on OH advice his physical presence would not be considered appropriate at the hearing and that he could attend by telephone or have his trade union representative attend on his behalf. He also advised him that the purpose of the hearing was to review the decision making process and to determine whether it had been reasonable; it would not be a full re-hearing of the case.

105 The appeal was heard by John Rankin on 14 December 2015. The Claimant participated in the hearing by telephone and Mr Housden attended in person. At the hearing the Claimant expanded on the points made in his grounds of appeal. He said that there was no medical evidence to support the statement that he was a risk to anyone and that, although at the time of the allegations he had expressed views on harming, these had only been thoughts and he had not harmed anyone. The Claimant explained that he was now on the right medication, had a good support network with regular visits to his psychiatrist and was not a risk anymore. He said that he could provide a letter from his GP and his psychiatrist to back that up. The Claimant also said that he had Tourette's, which was linked to his underlying OCD, which meant that he could not control his actions. The disciplinary panel had not taken that into consideration.

106 On 16 December 2015 Mr Rankin wrote to the Claimant to inform him that his appeal had not been upheld. He concluded that the disciplinary panel had carefully considered the points raised by the Claimant, that it had been entitled to reach the conclusions that it did and that its conclusions were reasonable.

107 On 9 Sept 2016 Drs Nicholls and Farag responded to two questions asked by the Claimant's solicitors. They were asked, firstly, whether they believed that the Claimant would have presented as a risk to Gillian Owens and/or other colleagues if he had returned to work in December 2015/January 2016. They responded that their concern about risk at his place of employment was solely in relation to Gill Owens and did not involve other colleagues. They had been considerably unsure of whether or not he would pose risk to Ms Owens but their risk management plan had included disclosure to the authorities. The second question was whether or not it was likely that the Claimant could suffer a relapse of his mental health condition following the medication prescribed and treatment and support that he had received in 2015. Their response was that in December 2015/January 2016 the Claimant's prognosis had still been unclear and they had not been in any position to be certain of how things might progress.

## **Conclusions**

### **Unfair dismissal**

108 We considered first what the reason or principal reason for the dismissal was or, to put it another way, why the Respondent dismissed the Claimant. We concluded that the reason that it dismissed the Claimant was that it believed that he had harassed Gillian Owens between August and November 2014 and that there was a risk of recurrence of harassment, which could include physical harm, to Ms Owens and other female colleagues. We considered the argument that the real reason for the dismissal was the fact that the Claimant had thoughts of harming Ms Owens, and not the harassment, because the Respondent had been aware of the harassment in November 2014 and had not taken any disciplinary action against him. We concluded, however, that the reason no action had been taken in November 2014 was that the managers involved had not known the full details of the harassment (and thus not appreciated its seriousness) and had not involved MAS in HR as they should have done. They had dealt with it outside the Respondent's procedures. We accept that the matter might not have come to the attention of HR and been investigated properly if the Respondent had not become aware of the Claimant's thoughts of harming Ms Owens. However, we were satisfied that once the matter had been investigated, the disciplinary panel dismissed the Claimant because it believed that he had harassed Ms Owens, the harassment was serious and that there was a risk of it recurring with possibly serious consequences.

109 We then considered whether that was a reason related to conduct or some other substantial reason of a kind such as to justify dismissal of the Claimant. There was a divergence of views on the part of the Tribunal in respect of this issue. The majority took the view that as the concerns about further harassment and, in particular, physical harm did not relate to anything which the Claimant had done, it would not be appropriate to label the Respondent's reason as relating to conduct and



it would be more appropriate to label it as some other substantial reason. The minority (the Employment Judge) took the view that as the reason related to what the Claimant had done and concerns about repeat behavior, which could be even more serious than what had happened in the past, it is properly labelled as a reason related to conduct. The reference to conduct in section 98(2)(b) ERA 1996 is in general terms and the conduct in question does not have to amount to gross misconduct, in the sense of being deliberate wrongdoing or gross negligence. The blameworthiness or culpability of the employee is not relevant in determining whether the reason for the dismissal was related to conduct of the employee although it is, of course, relevant when determining whether the employer acted reasonably in dismissing the employee for that conduct.

110 We then considered whether the Respondent acted reasonably, in all the circumstances of this case, in treating the reason set out in paragraph 108 (above) as a sufficient reason for dismissing the Claimant. It was submitted on behalf of the Claimant that the dismissal was unfair for the following reasons:

- (a) It was unfair to pursue disciplinary action against the Claimant for conduct which had already been dealt with informally as minor misconduct;
- (b) The Respondent failed to take into account culpability and intent when determining the seriousness of the Claimant's conduct;
- (c) There were no reasonable grounds to conclude that the conduct in question amounted to gross misconduct;
- (d) The Respondent failed to obtain medical evidence as to the risk posed by the Claimant;
- (e) It failed to warn the Claimant that his risk to the FCO was an issue that could lead to his dismissal;
- (f) It refused to postpone the disciplinary hearing; and
- (g) Dismissal was outside the range of reasonable responses.

111 It is clear from our findings of fact (see paragraph 42 above) that we do not accept that the Claimant's conduct was assessed as minor misconduct and dealt with under the Respondent's Misconduct Procedure in November 2014. Our finding is that HR was not involved and it was not dealt with under the Respondent's Misconduct Procedure as it should have been. The matter was never investigated and, in those circumstances, we do not consider that by investigating it and, more importantly, taking disciplinary action in light of what the investigation revealed, the Respondent acted unreasonably.

112 We are satisfied that the Respondent considered the issue of culpability and the extent to which the Claimant was responsible for his actions prior to making the decision to dismiss him. The Claimant's complaint appears to be that this was done at the penalty stage rather than at the stage where the panel was assessing whether the misconduct in question was serious or gross misconduct. It was submitted on behalf of the Claimant that this was significant because the penalty of dismissal is not available in cases of serious misconduct. The Respondent's Misconduct Procedure

does not state that dismissal is only available in cases of gross misconduct. It indicates in advice given to employees that dismissal might be appropriate when an act of misconduct has taken place during the live period of a final written warning or for gross misconduct, but it does not limit dismissal to only those circumstances. It is clear from the Guidance on how to decide a misconduct penalty that there are no prescribed penalties for the different levels of misconduct and that a number of factors have to be taken into account, one of which is the likely penalty for the particular level of misconduct. We do not consider that it makes a difference at what stage it was considered prior to dismissal. In any event, we have found that it was considered initially at the stage when the panel considered the level of misconduct and whether it amounted to gross misconduct. It might well be that it was considered in more detail at the second stage.

113 We then considered whether the Respondent could reasonably have concluded that the Claimant bore some level of responsibility for his actions and was to some extent culpable for them. This was relevant to the issues of whether the Respondent could have reasonably concluded that the Claimant's admitted misconduct amounted to gross misconduct and, more importantly from our point of view, whether the Respondent acted reasonably in treating that as a sufficient reason for dismissing the Claimant. The Claimant's defence, in essence, was that he was unaware of and unable to control his actions and was, therefore, not responsible for them. His assertion of his lack of awareness was contradicted by the fact that he was very clear that he had not done some of the things that he was alleged to have done. That suggested that he had a level of awareness of what he had done and what he had not done. The Claimant's evidence that he was not able to control his actions was inconsistent with the fact that after his line manager spoke to him about his contact with Ms Owens on 26 November 2014 he ceased all social contact with her, directly and indirectly. There was very little support in the medical evidence before the panel to support the Claimant's defence. Professor Fineberg's report of 9 January 2015 dealt with the Claimant's recent fear of his hatred and vengeful thoughts and symptoms of tics consistent with Tourette's Syndrome. The OH report of 5 May 2015 referred to the Claimant being treated for depression and a mild form of Tourette's Syndrome and opined that his mental health issues had precipitated some of the behaviours that had given rise to concern. All the other medical evidence dealt with the harmful thoughts that the Claimant had been having and to what extent, if any, that had improved. In those circumstances it was open to the disciplinary panel to conclude that the Claimant had some level of responsibility for the conduct that he had admitted and was, therefore, culpable to some extent.

114 It is noteworthy that if the panel had not concluded that that conduct amounted to gross misconduct it would have gone on to consider the allegations which the Claimant denied. Some of those the Claimant admitted before us – he admitted to following Ms Owens' friends on social media and to following her on LinkedIn and social media. Had the panel considered the disputed matters, we think it is extremely likely that it would have concluded on the balance of probabilities, for the same reasons that Alison Blake did, that the Claimant did those acts too. Having regard to the circumstances in which the offensive post appeared on Ms Owens' Facebook page (see paragraphs 22 and 23 above), the most obvious and only logical conclusion is that the Claimant was the person who posted it. In light of the fact that the Claimant was denying that conduct and not attributing it to his medical condition, the panel would have had no difficulty in concluding both that he had done it and that it amounted to gross misconduct.

115 We then considered whether the process had been unfair because the Claimant had not been made aware that any risk that he might pose could be a relevant issue in the disciplinary process. The Claimant was aware that as soon as his thoughts of harming Ms Owens had been brought to the Respondent's attention he had been suspended and an investigation had been launched into his inappropriate behaviour towards Ms Owens. He had clearly thought the matter relevant to the investigation because, prior to his interview, he had sent Ms Blake documents that related to his harmful thoughts towards Ms Owens (see paragraph 70 above). It must have been apparent to the Claimant that if the panel concluded that he had harassed Ms Owens, one of the issues that it would consider when deciding sanction would be what impact his return to work was likely to have on her and that an important feature of that would be whether there was a risk of physical harm to her.

116 If we are wrong in concluding that it must have been obvious to the Claimant that it would be relevant to sanction and that he would need to address it, he knew by the time that he appealed that it was a relevant issue and addressed it. It was one of his three grounds of appeal. Notwithstanding that, he did not disclose any medical evidence to indicate that there was no risk of physical harm to Ms Owens or anyone else. All that the letter from Drs Nicholls and Farag stated was that his mental state and condition had fluctuated between January that year and the time of writing the letter in November 2015. The Claimant said in the appeal hearing that he was not a risk anymore and could provide medical evidence to that effect. The reason that he did not provide any medical evidence to support that was because there wasn't any.

117 We then considered whether it was reasonable for the Respondent to conclude on the medical evidence that it had that there was a risk of physical harm to Ms Owens and others if the Claimant returned to work and whether it should have obtained further medical evidence on the issue. On 11 November 2015 the disciplinary panel had a letter from the Claimant's GP dated 25 September which, in turn, was based on reports she had received from the mental health specialists treating the Claimant. Her conclusion was that while the Claimant was away from work and on medication, the harmful thoughts were under control, but it was difficult to say what might happen if he encountered Ms Owens. It also had the OH report of 25 October 2015 which stated that the Claimant had been troubled with obsessive thoughts which were often aggressive and violent in nature, his condition had deteriorated since she had last seen him and that it was inadvisable to have a face to face meeting with him because a safe and controlled response could not be guaranteed. By this stage the Claimant had been absent from work for 10 months. In those circumstances, it was reasonable for the Respondent to conclude that there was a risk of physical harm if the Claimant returned to work.

118 In light of the medical evidence available to the Respondent, it was not incumbent upon it to seek further medical evidence on the point. It was always open to the Claimant to put forward evidence to challenge or contradict that evidence. The only medical evidence that he did put forward on appeal supported the conclusion reached by the Respondent. The Respondent's Guidance on Misconduct Penalty makes it clear that it is for the employee to put forward mitigating factors with supporting evidence in such circumstances. We reiterate that the Claimant did not put forward any medical evidence that there was no risk of physical harm to Ms Owens because there wasn't any such evidence. Had the Respondent sought further

medical evidence, it would only have served to support the conclusion that it had already reached – On 19 October 2015 Dr Farag wrote that the thoughts of harming his colleague had returned, on 27 October 2015 the Claimant told Dr Moore (OH) that he had been thinking of revenge on persons at work, on 3 November 2015 Dr Farag wrote that the Claimant's anger and thoughts of beheading his work colleague had been re-ignited when he learnt of the disciplinary hearing and in the letter written by Drs Farag and Nicholls in September this year they said that they had been considerably unsure whether the Claimant would pose a risk to Ms Owens if he returned to work in December 2015/January 2016 and their risk management plan had included disclosure to the authorities.

119 Finally, we considered whether the failure to postpone the disciplinary hearing on 11 November 2015 rendered the dismissal unfair. In determining that issue, we took into account the following – the Claimant was dismissed only for the misconduct which he admitted, hence there was no factual evidence to be given in respect of those matters, the issue of the extent to which the Claimant was unaware of and/or unable to control his actions was primarily a medical issue and would have to be addressed by medical evidence and there was nothing to prevent the Claimant from putting that medical evidence before the panel, the Claimant had been given the opportunity to participate in the hearing by telephone and in other ways, there was no medical evidence that his mental health problems prevented him from participating by telephone, Dr Farag's view when he saw him on two occasions in October 2015 was that his concentration was fine, the Claimant's view and that of Dr Nicholls appeared to be that because he was certified as unfit to work he was not well enough to take part in the disciplinary hearing (the one does not automatically follow the other), the Claimant put in a written statement and John Housden represented him at the hearing, the allegations related to matters that had taken place a year before, any further delay would have an impact on both the Claimant and Ms Owens, there was no prognosis of when the Claimant would be fit to return to work and all the evidence indicated that the prospect of the disciplinary hearing led to a deterioration of the Claimant's condition. Having taken into account all those matters, we concluded that the Respondent acted reasonably in proceeding with the disciplinary hearing and that it did not cause any unfairness to the Claimant.

120 We do not accept that dismissal was outside the range of reasonable responses open to a reasonable employer in the circumstances of this case. Having considered all the above matters, we concluded that in the circumstances of this case the Respondent acted reasonably in treating the reason set out in paragraph 108 (above) as a sufficient reason for dismissing the Claimant and that the dismissal was fair.

#### Direct Disability Discrimination

121 We have found that the Respondent dismissed the Claimant because it believed that he had harassed Gillian Owens between August and November 2014 and that there was a risk of recurrence of harassment, which could include physical harm, to Ms Owens and other female colleagues. It did not dismiss him because he had the mental conditions which he did. He was dismissed because of what he did (his conduct) and the Respondent's concerns about what he might do if he returned to work (his future conduct). Therefore, the claim of direct disability discrimination is not made out.

Discrimination because of something arising in consequence of disability

122 For the reasons set out at paragraph 119 (above) we do not accept that, in the circumstances of this case, the Respondent's failure to postpone the hearing amounted to unfavourable treatment of the Claimant. It did not cause any disadvantage to the Claimant. It did not prevent him from putting forward anything in his defence which he wanted to advance. The Claimant has not been able to point to anything which he would have put forward if the hearing had taken place some time later. If, however, we are wrong in that conclusion, and it did amount to unfavourable treatment, we accept that he was treated unfavourably because he could not attend the hearing and that that was because of his mental health conditions.

123 We then considered whether the Respondent had satisfied us that it was a proportionate means of achieving a legitimate aim. The legitimate aim relied upon by the Respondent is progressing the disciplinary process without any unnecessary delays to ensure that such matters are fully and fairly investigated and resolved quickly. We are satisfied for the reasons set out in paragraph 119 (above) that proceeding with the disciplinary hearing on 11 November 2015, while affording the Claimant the opportunity to participate in a number of ways, was a proportionate means of achieving that legitimate aim.

124 We then considered whether the Claimant was dismissed because of something arising in consequence of his disability. We accept that part of the reason for the Claimant's dismissal was the risk of the recurrence of harassment, which could include physical harm, to Ms Owens and other female colleagues and that that was as a result of the Claimant's mental health condition.

125 The legitimate aim relied upon by the Respondent was ensuring compliance with its professional Code of Conduct and the safety of its staff. It was not in dispute that that was a legitimate aim. We considered whether the Respondent had shown that dismissing the Claimant was a proportionate means of achieving that legitimate aim. Our task in considering that is to scrutinise the means chosen by the Respondent as against such other alternatives that (on the evidence) were available to achieve the aim in question. We are required to consider whether the same aim could have been achieved by some alternative less discriminatory measure.

126 We took into account that the means chosen by the Respondent brought about the end of the Claimant's 28 years of employment with the Respondent. The impact of that upon him cannot be underestimated. We considered whether there was some other way that the Respondent could have alleviated the risk of further recurrence of harassment and/or physical harm to Gillian Owens and others. It is important to emphasise that the risk of recurrence of harassment was not only in relation to Gillian Owens but to female staff in general. This was the second occasion on which the Claimant was found to have harassed a woman he had met while at work. We accept that that there was a time gap of 13 years between the two incidents but there was a striking similarity in the Claimant's conduct. That risk of a recurrence of harassment would remain wherever the Claimant went to work. Nor do we accept that the risk of physical harm as a result of the Claimant's mental health condition was limited to Gillian Owens. He had had similar thoughts about his nephew. Dr Flury's view was that there was nothing to suggest that the Claimant would not experience similar thoughts in the future and that it was not possible to know who would be the focus of such thoughts. On 27 October the Claimant told Dr Moore (OH) that he had been thinking of revenge on persons at work and she

advised against a face to face meeting with him because a safe and controlled response could not be guaranteed. In those circumstances, we do not consider that moving the Claimant to another FCO site would have achieved the Respondent's legitimate aim and avoided the risk of further harassment and/or physical harm. In view of the fact that the Claimant had by that stage been absent sick for about 10 months and there had been no sustained improvement in his condition (it had fluctuated) and there was no prognosis that the condition would improve within a particular timescale, we do not consider that postponing the disciplinary hearing and continuing the Claimant's employment until his health improved was an acceptable alternative way of achieving the legitimate aim. Having considered the alternatives suggested by the Claimant we do not consider that there was any alternative to dismissal for the Respondent to achieve its legitimate aim.

#### Failure to make reasonable adjustments

127 It is not in dispute that the Respondent applied a provision, criterion or practice that the disciplinary hearing had to take place on 11 November 2015. It is equally not in dispute that, because of the advice given by OH, the Claimant could not be present at the hearing. We have not found, and do not accept that the Claimant was unable to participate in the disciplinary hearing (in one of the ways suggested by the Respondent) because of his mental health conditions (see paragraph 119 above). We accept that the meeting proceeding on that day put the Claimant at a substantial disadvantage in comparison with a non-disabled person, because that person could have attended the hearing and the Claimant could not. We have also found that the Respondent made a number of adjustments to alleviate that disadvantage – the Claimant was permitted to participate in the hearing by telephone, to make written representations, to present any evidence that he wanted and to have his trade union representative attend and make representations on his behalf. We do not consider that the adjustment proposed by the Claimant, namely to adjourn the hearing until he was well enough to be able physically to attend the hearing, is reasonable. The matters giving rise to the hearing had occurred over a year before, the Claimant had been suspended for 10 months, they had an impact on Ms Owens who continued to be employed by the Respondent, there was no indication of when the Claimant was going to be better and the evidence indicated that the prospect of the disciplinary hearing had caused his health to deteriorate.

128 It is not in dispute that the Respondent applied a provision, criterion or practice that the Claimant had to comply with its Code of Conduct and that that put the Claimant at a substantial disadvantage in comparison with a non-disabled person because he could not do so. For the reasons set out at paragraph 126 (above) we do not consider that moving the Claimant to another FCO site or to another part of the Civil Service would have been a reasonable adjustment.

129 A second possible reasonable adjustment identified in the list of issues was that the Respondent should have obtained medical evidence to establish whether the Claimant would be able to comply with the Respondent's Code of Conduct after treatment and post rehabilitation. In the closing submission this was put forward as an adjustment to alleviate the disadvantage of the PCP set out at paragraph 127 (above). It is not entirely clear to us how the Claimant puts his case in respect of this. Regardless of how it is put, we do not consider that obtaining a further medical evidence would have been a reasonable step for the Respondent to take. It was clear from the medical evidence that was available to the Respondent that although the

Claimant had been having treatment since January 2015 there had been no sustained improvement in his condition and that in October and November 2015 he was still having thoughts of harming Ms Owens. There was nothing in the medical evidence available to indicate that the Claimant's health would improve in the foreseeable future. Having regard to the amount of time that had lapsed since the start of the disciplinary process, it was not reasonable to delay it any longer. In any event, the letter from Drs Farag and Nicholls obtained in September 2016, makes clear that had they been asked that question in December 2015/January 2016 their response would have been that the prognosis was unclear at that stage and they were not certain of how things might progress.

Employment Judge Grewal  
10 February 2017