EMPLOYMENT TRIBUNALS

Claimant		**Respondent**
Syed Mukitur Rahman	**v**	**Bidvest Noonan (UK) Limited**

Heard at: London Central (by CVP)

On: 24 - 28 April;
1 May; 7- 8 August 2023
Chambers: 11 August 2023;
5 – 6 and 9 October 2023

Before: Employment Judge Lewis
Ms H Craik
Ms S Plummer

Representation

For the Claimant: Represented himself

For the Respondent: Ms G Rezaie, Counsel

RESERVED JUDGMENT

The unanimous decision of the employment tribunal is that:

1. The claim for unfair dismissal is not upheld.

2. The claimant was disabled. However, the claim that his dismissal was direct disability discrimination is not upheld.

3. The claim that his dismissal was discrimination arising from disability under section 15 is not upheld.

4. The tribunal claim form did not contain a claim for automatic unfair dismissal for whistleblowing and the tribunal did not give the claimant permission to amend his form to include such a claim.

REASONS

The claims

1. At the start of the hearing, the tribunal clarified with the claimant which claims he was bringing. There was no claim against The TCM Group, which was originally named as a second respondent. It had not been accepted by the tribunal because there was no ACAS certificate number on the claim form.

2. At paragraph 8.1 of his claim form, the claimant ticked boxes for notice pay and holiday pay. However, these have been paid and there is a judgment dismissing them on withdrawal.

3. The claimant also ticked unfair dismissal and disability discrimination at paragraph 8.1. The claimant confirmed there is no separate claim for wages.

4. The claimant says he had two disabilities: (1) anxiety/depressive disorder and (2) impaired kidney function. The respondent said it did not have enough evidence to be able to admit these were disabilities. The tribunal therefore needed to decide if these were disabilities as defined by the Equality Act 2010 at the time of the alleged discrimination.

5. The claimant said his dismissal was direct disability discrimination and/or discrimination under section 15, ie discrimination arising from his disability.

6. The claimant was ordered by EJ Khan on 14 July 2022 to provide further particulars by 22 September 2022 of the reasonable adjustments which the claimant says the respondent should have made. The claimant did not provide the particulars as requested. The claimant told us that his point was that the respondent gave no thought to adjustments after receiving the Occupational Health report. The tribunal told him that if he wanted to make a stand alone claim for failure to make reasonable adjustments, he needed to tell us what adjustments he had in mind. The claimant said that he did not want it to be a stand alone claim. He wanted the respondent's approach to form part of the evidence in support of the unfair dismissal, direct disability discrimination and discrimination arising from disability claims. The tribunal therefore proceeded on the basis that the claimant was making no independent claim for failure to make reasonable adjustments.

7. There was a dispute as to whether the claimant should be allowed to make a claim for automatic unfair dismissal for whistleblowing. The dispute consisted of (i) whether the whistleblowing claim was included in the claim form in the first place (ii) if not, whether permission to amend the claim form should be given, and (iii) either way, whether the claimant should be allowed to argue whistleblowing dismissal given that he had never provided the particulars regarding whistleblowing ordered by EJ Khan on 14 July 2022. Unfortunately the correct issues were not immediately clear because neither party had recognised prior to the start of the hearing that there was a potential amendment issue.

The application to bring a whistleblowing claim

8. The matter arose because the respondent applied to 'strike out' the whistleblowing claim because the claimant had not provided the particulars ordered by EJ Khan by 22 September 2022, and further because it had no reasonable prospect of success. As at the start of the full hearing on 24 April 2023, the respondent had no idea what the alleged protected disclosures were.

9. The tribunal's note in these Reasons of the applications is based on how they were presented to us by the parties at the start of the hearing. During the hearing itself, we did gain a greater understanding of what the claimant was talking about, but at the outset when we had to make a decision, the claimant was entirely unclear despite all our efforts. This was largely because the claimant was concentrating on the subject of his disclosures as opposed to the concept of whistleblowing law, which is that of being treated badly because you have made such disclosures.

10. The tribunal started by asking the claimant this question: 'You say you were dismissed because you were whistleblowing. What whistleblowing are you referring to?' The claimant said there were three things. The first was that the daily occurrence book could not be found and 7 log books were lost. The tribunal asked the claimant what protected disclosure he had made about this matter and when it took place. The claimant was unable to answer.

11. The second alleged disclosure was when the claimant reported to managers in an email dated 8 December 2020 that on-site CCTV monitoring was being carried out by a member of staff who did not hold a CCTV licence and also that the site did not have appropriate CCTV signage. This disclosure was in an email in the trial bundle at page 329-330. It referred to an incident in October / November 2019.

12. The third alleged disclosure was with reference to a letter written by the respondent about the claimant in 2016 which he says falsified information about him, and which he only saw some while later. The claimant said the protected disclosure was him telling the respondent that if he had let in the individual to whom he barred building access, he could be letting someone in with documents stolen from a law firm. He could not remember when he said this, except that it was some time in 2021.

13. After listening to what the respondent's representative and the claimant had to say, the tribunal adjourned to make a decision. The tribunal decided that it would allow the claimant to proceed with the second alleged disclosure because it was clearly contained in writing and had some coherence. The tribunal thought this matter was sufficiently small and self-contained for the respondent to be able to deal with it, even though it had not been identified prior to the start of the hearing.

14. The tribunal did not find the first and third alleged disclosures to be formulated clearly enough to be allowed at this late stage.

15. The tribunal added that the whistleblowing claims did not appear to be contained in the original claim form, so for the avoidance of doubt, we gave leave to amend.

16. The respondent then objected that it had not had an opportunity to address the tribunal about amendment and that the tribunal had not gone through the principles set out in the Selkent case. By a letter supplied early in the morning of 25 April 2023, the respondent applied for a revocation of the decision.

17. The tribunal accepted that it had not given the parties a chance to comment on amendment. This had happened because the respondent had put its application in terms of strike out. The tribunal had noticed that the claim was not there in the first place and had seen the necessity to amend. However, the tribunal recognised that we should have given the respondent the opportunity to oppose this, as the test on amendment is slightly different, and the tribunal accepted it was too hasty on this point.

18. After listening again to the claimant and the respondent, the tribunal made this decision:
    a. The original claim form did not contain any claim for automatic unfair dismissal because of whistleblowing.
    b. EJ Khan had not at the stage of the first preliminary hearing considered yet considered applied his mind to this and in any event, had not made any finding that the claim form did include such a claim. Asking for more details of what the claimant was alleging is not the same as accepting the claim was already contained on the form. We hasten to add that no criticism is intended of EJ Khan. We suspect that he was attempting first to get clarity as tgo what the claimant wished to claim.
    c. The amendment application was therefore necessary, but should be refused.

Our reasons were as follows.

Did the claim form contain any claim for automatic unfair dismissal for whistleblowing?

19. Our reading of the claim form was that it does not contain a claim of automatic unfair dismissal for whistleblowing. It does raise whistleblowing issues, but only in the context of setting out the respondent's breaches of data protection rules and its inaction when the claimant raised some of these. Box 10 is ticked but it is consistent with that assertion. 'Unfair dismissal' is ticked in box 8.1, but the claimant had brought an ordinary unfair dismissal claim, so that did not give any further indication that he was suggesting dismissal was because of whistleblowing. Also, the claimant did say 'I have not been treated fairly due to my mental disability', but he did not say 'due to the fact that I blew the whistle'.

Had EJ Khan already decided whether the claim form contained a claim for automatic unfair dismissal for whistleblowing?

20. EJ Khan's letter reflecting the discussion at the preliminary hearing does not address whether or not amendment is needed. At paragraph 3, it itemises the claims which EJ Khan identified as in the ET1 without referring to automatic unfair dismissal. It is theoretically possible that EJ Khan's words 'unfair dismissal' encompassed automatic unfair dismissal, but we would normally expect him to have added 'automatic unfair dismissal for whistleblowing' if that was what he had identified.

21. EJ Khan then set out a list of issues, although he said further particulars were required. The list referred to protected disclosures at paragraphs 8(6) and (7). There was reference to whether the reason for dismissal was the alleged protected disclosures. He left the protected disclosures to be particularised. Then EJ Khan made an order at 3.1b that by 22 September 2022, the claimant provide the tribunal and respondent with details of (i) the disclosures he relies on (ii) which of the six categories under s43B(1) the disclosure tends to show, and (iii) the person to whom he sent each disclosure.

22. As we have said, we do not consider the fact that EJ Khan sent the claimant away to supply particulars of his protected disclosures means EJ Khan had necessarily decided a whistleblowing claim was already contained in the claim form. When claimants provide further particulars, they often provide details of matters which were never in the claim form in the first place. If that happens, they need permission to amend the form. It is not unusual in preliminary hearings for an employment judge to establish what a claimant is trying to allege, before checking whether amendment is needed.

Should the tribunal allow amendment?

23. The claimant never complied with EJ Khan's order. On 22 September 2022, he sent 10 pages of various particulars including a section under the heading of 'whistleblowing'. But this never identified what disclosure he had made about the matters of concern, to whom and which of the categories under s43B(1) applied.

24. It was drawn to the claimant's attention that he had not answered EJ Khan's questions. In its amended grounds of resistance dated 20 October 2022, the respondent stated that the claimant had not provided adequate particulars of the whistleblowing claim. It may be that the claimant did not absorb this, buried as it was in the amended grounds. However, it was made clearer in the letter from the respondent's solicitor to the claimant dated 31 January 2023, which attached a copy of the draft list of issues, highlighting which questions needed answering.

25. The solicitors asked whether the claimant intended to pursue the whistleblowing (and reasonable adjustment) claims. If so, they asked when he would provide them with the details. They said they appreciated he was a litigant in person and that he had been unwell, but if they did not hear from him on that point in the next 7 days, they might need to apply for strike out or postponement. The letter went on, 'I appreciate you are a litigant in person and may not have

access to legal advice and, whilst I cannot advise you, I would be very happy to discuss this with you and explain the content further'.

26. The claimant replied that he would shortly be writing to the ICO with his data concerns including the whistleblowing 'so that we have clear understanding of my whistleblowing claims'.

27. Ms Rezaie relied heavily on Chandhok v Tirkey [2015] for the proposition that the ET1 should set out the essential case to which a respondent is required to respond and that it should be in writing.

28. We do not accept Ms Rezaie's argument that employment law is designed to be accessible to litigants in person. In any event, even if it is designed to be so, often it is not. The language of the legislation as to what makes a protected disclosure may be clear to lawyers but in our experience, can be difficult for lay individuals.

29. We do however agree that the respondent needs to understand the case it has to meet and that the amendment should be put in writing. It would not be difficult for the tribunal to put the proposed amendment in writing in such a straight-forward matter, once the tribunal had elicited from the claimant what he wants to say. We would have no difficulty doing this. For us, that was not the blockage. The issue which concerned us was whether it was just and equitable to do this as late as the start of the hearing.

30. We have considered the principles set out in the Selkent case. This is the case which gives the main guidance on whether tribunals should agree to allow an amendment. There are subsequent cases which say tribunals do not need to rigidly follow the Selkent checklist. But the general principles apply.

31. The requested amendment was not simply a 'relabelling'. The claimant had not set out the facts describing a claim for automatic unfair dismissal for whistleblowing. He did not for example say 'I complained about a data protection matter and as a result, I was dismissed'. It is also a new legal cause of action. Automatic unfair dismissal for whistleblowing is different from ordinary unfair dismissal. However, there is some overlap in the sense that both concern the reason for dismissal. A large part of the present case will involve looking in detail at why the claimant was dismissed, both for his unfair dismissal and for his discrimination claims. A whistleblowing dismissal claim covers similar ground. However, new factual enquiries are involved in looking at whether the disclosures legally amounted to a protected disclosure and whether there was any reason to believe that the respondent was specifically upset by the claimant raising such an issue to the extent that it might have been part of the reason for dismissal. Having read the witness statements and looked at some of the documents they refer to, we can also see that there is potential for the claimant to want to refer to wider inferential material.

32. As regards the timing of the application, this was now very late indeed. It was at the start of the full hearing. The claimant had known that he had to provide further details of his whistleblowing claim. On the one hand, the claimant did

provide ten pages of further particulars on 22 September 2020 including on whistleblowing. On the other hand, he did not answer the specific questions ordered by EJ Khan. When this was pointed out in the amended grounds of resistance and especially in the solicitors' letter of 31 January 2023, he did not engage with what was required. This was why the matter did not come to a head until the first day of the full hearing.

33. The claimant explained he has had difficulty focussing and preparing his case because of his anxiety/depression. We accept that can cause difficulties. However, we have not seen evidence that the claimant was completely unable to function throughout this period. He was for example able to write letters to the ICO.

34. Regarding the time-limits which would apply for this type of claim, these are the same as for unfair dismissal. The effective date of termination was 14 January 2022. ACAS was notified on 28 February 2022 and issued its certificate by email on 15 March 2022. The amendment application first arose on 24 April 2023, nearly a year out of time. The 3 month time-limit (extended by ACAS conciliation) can be extended under s111(2)(b) if it was not reasonably practicable for the complaint to be extended within time. The extension is for such further period as would be reasonable. We cannot say that it was not reasonably practicable to identify the whistleblowing claim at any point before the first day of the hearing. The claimant has not shown to us that he was unable to function throughout that period. Nor can the claimant show us that it was not reasonably practicable to have included the automatic unfair dismissal whistleblowing claim in his claim form or within the primary time-limit. The claimant need only to have said something to the effect of 'I raised data protection issues' or 'I complained about lack of CCTV signage' 'and therefore I was dismissed. Our overwhelming impression from what is in the claim form, reinforced by the way the claimant writes elsewhere and how he discussed matters in the tribunal, is that his concern was about the respondent's data protection breaches and the respondent lack of interest in investigating these when he raised matters. That is what he meant and still means by a 'whistleblowing complaint'.

35. Finally regarding the balance of hardship. The disclosure concerns an incident which was over 3 years prior to today. The disclosure itself was made 2 years 4 months ago. The incident and the disclosure all occurred under the respondent's predecessors and some witnesses may have left, although it does seem some managers transferred over under TUPE. It is true that many of the other issues in the case are over the same time-scales, but they are background issues. Whereas adding this whistleblowing complaint would require a more focussed fact-finding regarding historic events.

36. The respondent had three concerns. The first was having to gather evidence and prepare a defence at this late stage, even if the hearing was listed for 8 days. There could be additional documentation required on whether it was reasonable to believe the matters were a breach of legal obligation. The witnesses would certainly need to give extra oral evidence or different witnesses might potentially be necessary. Extra costs would be involved in

taking instructions and preparing a defence on this matter. We accept this is a valid concern. Although our initial thoughts had been that not a great deal of extra evidence would be required, having had the opportunity to read the witness statements and see some of the documents, we can see potential for the claim leading to related areas of enquiry, which would be brought into foreground as opposed to background focus.

37. The second concern was that they had no opportunity to apply for a deposit order and put the claimant on a costs risk. We did not find this particularly compelling. The claimant is still vulnerable to a costs order even without a deposit order.

38. The third concern was that decisions go on the public register and a serious allegation of whistleblowing dismissal had been made which could damage their business, but which had not been properly formulated at the outset. Our view on this is that respondents face serious allegations all the time. They are either proved or not. As long as the respondent has a proper opportunity to defend the allegation, the respondent is no worse off than had it been in the original claim form. If the respondent is able to defend the claim successfully, that will be equally clear to the public.

39. We then considered the hardship for the claimant if he was not allowed to add this extra claim. He would still have his unfair dismissal and disability discrimination claims, the latter which have no upper limit on compensation. Although the claimant feels strongly about data protection breaches, a tribunal deciding a claim for automatic unfair dismissal for whistleblowing does not need to decide whether or not the subject of the protected disclosure was in fact a breach of legal obligation. As we have said, our impression is that the matter closest to the claimant's heart is proving the respondent committed data protection breaches.

40. On balance, although we do not think there was any great hardship either way, we feel the hardship was more that of the respondent than the claimant, because the respondent would have to prepare to answer certain questions which it had not been expecting. Potentially it could open up other issues.

41. It is also a consideration on the balance of hardship that the claimant's chances of success on the whistleblowing dismissal claim seem very low. The law requires that this particular protected disclosure was the reason or principal reason for dismissal. But this disclosure was one complaint of a great many; it was not the complaint which the claimant focussed most on over the years; and indeed, when questioned in the tribunal as to whether he felt that was why he was dismissed, he only said 'partly'. Moreover, the disclosure was made in an email 14 months prior to the claimant's dismissal concerning an incident which had taken place more than one year before that. It seems very unlikely that the respondent would be concerned about it so long after the event.

42. Taking everything into account, we did not allow the amendment.

The issues

43. The issues standing at the start of the case were therefore as follows.

43.1 Was the discrimination claim in time? If not, should time be extended?

Disability

43.2 Was the claimant disabled under the Equality Act 2010 at all relevant times because of (1) anxiety with depressive disorder (2) impaired kidney function?

43.3 If so, did the respondent know – or could it reasonably have been expected to know – that the claimant was disabled at the relevant time?

Direct disability discrimination

43.4 Was the claimant's dismissal an act of less favourable treatment because of disability, ie did the respondent treat the claimant less favourably than it treated or would have treated others in not materially different circumstances?

Discrimination arising from disability – section 15 EqA 2010

43.5 Did the respondent treat the claimant unfavourably when it dismissed him on 14 January 2022 because of something arising in consequence of his disability? The claimant says the 'somethings' arising were

43.5.1 His disability-related sickness absence

43.5.2 His need to communicate repeatedly and in volume with management in order to obtain a response to his queries.

43.6 Can the respondent show such unfavourable treatment was a proportionate means of achieving a legitimate aim?

Unfair dismissal

43.7 What was the reason or principal reason for dismissal?

43.8 Was the reason potentially fair in accordance with sections 98(1) and (2) of the Employment Rights Act?

43.9 If so, was the dismissal fair or unfair under section 98(4) and in particular, did the respondent in all respects act within the band of reasonable responses?

Procedure

44 The tribunal heard from these witnesses: the claimant and, for the respondent from Jo Nicholson and Eddie Ingram. There was a witness statement bundle, a main trial bundle of 743 pages, a supplementary bundle of 90 pages, C1: An email from Mr Liddle dated 20 April 2023, C2: a letter from the Gower Street Practice dated 3 August 2023; the respondent's written submissions, a chronology and cast list.

45 Unfortunately one of the tribunal members broke her arm on 2 May 2023 and required an emergency operation on 3 May 2023. This meant the hearing could not be completed within the original dates listed. New dates were arranged as soon as everyone could attend.

Reasonable adjustments in the tribunal

46 The claimant was asked what would help him by way of reasonable adjustments. He said he would like matters to be re-explained to him if he had a brain blockage due to his anxiety. The tribunal reassured him that he only had to ask.

47 The claimant was asked whether extra short breaks would help. Both at the outset and during the hearing, the claimant tended to decline the extra breaks as he explained the evidence just swirled around in his head if there was a pause. Nevertheless, the tribunal continued to check at regular intervals and ensured that mid-morning and mid afternoon breaks were always given through periods when evidence was continuous. The tribunal also gave the claimant extra time at lunchtime when requested on day 3 in order to be able to do exercises for his back.

48 At the start of day 4, the claimant said he had not slept all night and was unable to go ahead at all that day. The claimant was visibly unwell and scarcely able to speak. The tribunal asked whether there was anything which could help, eg more breaks, a delayed start, possibly even answering cross-examination questions in writing. The claimant was unable to give thought to any of these suggestions at that point. The tribunal asked him whether he would prefer to come back the next day (Friday) or leave it until the next day fixed for the hearing (Wednesday next week). The claimant said he would like to try the next day. The tribunal recommended the claimant try to see his GP today for his own benefit, and if he did manage to get an emergency appointment, he should ask the GP what they thought might help for the hearing. However, we did not order the claimant to provide medical evidence since he said it was impossible to get emergency appointments with his own GP and we did not want to add to the claimant's stress at this point.

49 The claimant did give evidence on day 5 and the hearing was then adjourned on day 6 because of the member's accident. By the time we returned to the tribunal in August 2023, the claimant's kidney disease had become worse and as a result, his tiredness had increased. The tribunal asked whether it would be helpful to have further breaks during the day. The claimant said the most helpful thing was to have longer breaks. He would ask when needed. The

tribunal regularly checked with him and allowed breaks as he wished and for the length of time he wished.

Medical evidence for the purpose of proving disability

50 As we have said, the respondent was not willing to admit that the claimant had either of his alleged disabilities at the time of the alleged discrimination against him. The claimant therefore needed to prove this.

51 EJ Khan ordered the claimant to provide a disability impact statement with any helpful evidence attached by 10 November 2022. The respondent acknowledged receipt of the disability impact statement on 13 November 2022. On 31 January 2023, the respondent said that it was necessary to have more information about the impact of the claimant's conditions; that detailed medical evidence was necessary; and the respondent asked the claimant whether he would agree to getting a third party medical expert. This would cost around £600 'but may be necessary for the tribunal'. The same day, the respondent applied to the tribunal for an Order for a joint medical expert. It gave the impression that the claimant had delayed in providing any information about his disability, whereas the claimant had provided his impact statement on or shortly after the ordered date. When asked by the tribunal for the comments, the claimant stated on 14 February 2023 that he had been unable to respond due to a high level of anxiety. He agreed to being examined by a medical expert.

52 We observe here that the claimant, a litigant in person, had been given the impression by the respondent's solicitors that a medical expert was necessary and that it would cost him around £600.

53 On 22 February 2023 EJ Adkin made an Order. He had been given the impression by the respondent's solicitors that the claimant was not engaging with the process. The correspondence between the respondent and the claimant behind the scenes which we have now seen does not give us that impression. The claimant was clearly doing his best.

54 EJ Adkin ordered that the respondent provide a draft letter of instruction together with a list of proposed experts. The claimant should either agree this by 10 March 2023 or write to the tribunal stating why not.

55 On 22 February 2023, the respondent wrote to the claimant asking him to confirm that he would 'front the cost' of the medical examination. The claimant confirmed by return that he would.

56 On 3 March 2023, the respondent wrote to the claimant providing him with a number of names and quotes for the report and half day attendance in court, and said it may be necessary to get two separate reports as there were two different disabilities. The costs were generally around £4000 each and some were more. The claimant was told the quotes could change depending on volume of documentation and some of the experts would require payment up

front. The respondent asked that the claimant make payment to the expert on confirmation of the instruction.

57 We have to say we find the respondent's approach on this oppressive. The claimant was given the impression that a joint expert was necessary. His agreement was secured on the basis that it would be around £600 – a large enough sum for an unemployed individual. He was then asked to pay up front in the region of £4000, possibly double, ie for two different experts. There was not even a suggestion that costs be shared, which usually happens. There was documentation in the bundle which showed that the claimant had received counselling and prescribed medication for anxiety and depression over several years and that he was under a consultant for chronic kidney disease. He had been signed off work by his GP with anxiety and depression for several years. The chances of him not meeting the definition of disability were remote, even if the impact on day-to-day activities had to be drawn out of him.

58 In terms of a proportionate approach to expert medical evidence, it is worth reading City Facilities Management (UK) Ltd v Ling UKEAT/0396/13.

59 On 3 April 2023, EJ Adkin said it was too late for expert medical evidence. The burden of proof was on the claimant to prove he was disabled. He must address that in a witness statement and with his existing medical records if he has not already done so.

60 As set out below, there is in fact a great deal of documentary evidence relating to the claimant's anxiety, depression and kidney disease in the trial bundle.

61 The tribunal informed the respondent at the start of the hearing that it intended to ask the claimant some questions about his disabilities. We asked whether Miss Rezaie would prefer to cross-examine on the matter first or have the tribunal ask questions first. She wished to cross-examine first. We allowed this. However, time was rushed at the end of the day and we suggested that when we return, the tribunal ask its questions and then Miss Rezaie could ask further questions. This was agreed.

Data protection of documents in the trial bundle

62 The claimant objected to the tribunal looking at an email he had sent privately to Ms O'Connor after she had left the employment of YPML, which she had chosen to forward to YPML and YPML had chosen to forward to the respondent, who put it in the trial bundle. The claimant also objected to emails between him and Global Holdings / YPML being put into the trial bundle (eg at page 292). These matters came up during his cross-examination.

63 The documents were clearly relevant and the claimant did not make clear to us the legal basis for his objection for the use of such documents in legal proceedings. The claimant's grounds appeared to be that the documents had his name on them and had been obtained from third parties. With no further

legal representations, we cannot understand the legal basis for this objection. Indeed, having been passed the emails by YPML, the respondent was under a duty to disclose them in these proceedings. The claimant was also under a duty to disclose them as they were plainly relevant.

Fact findings

Disability

64 The claimant has brought disability discrimination claims. He relies on two disabilities: (1) anxiety with depressive disorder (2) impaired kidney function. We do not have any medical report prepared for the tribunal to help us decide if the claimant was disabled. We do have the claimant's own evidence and various fit notes and letters written at the time as well as one Occupational Health report.

Mental health

65 The claimant was in hospital from the end of December 2017 to the start of 2018 with septicaemia.

66 On 4 May 2018, the claimant was signed off sick with 'anxiety and depression'. He remained unable to work due to anxiety / depression for the remainder of his employment. There are a large number of fit notes in the trial bundle. The fit notes consistently refer to 'anxiety and depression'. A few fit notes are missing in the bundle but we find that the claimant was certified throughout on this basis. The fit notes dated 22 February 2021 and 24 May 2021 (up to 24 August 2021) identify a 'mixed anxiety and depressive disorder'. There is also reference to the claimant's kidney disease - on 27 February 2020, his GP issued a fit note up to 31 May 2020 which stated 'Anxiety with Depression. Under nephrology for investigation of haematuria'. A fit note of 26 May 2020 up to 31 August 2020 stated, 'Anxiety with Depression. Under nephrology for ongoing investigations'. A fit note of 25 August 2020 up to 30 November 2020 stated 'Anxiety with Depression. Under nephrology for kidney disease.'

67 The claimant was referred by his GP to iCope Psychological Therapies and Wellbeing Service on 23 May 2018. The iCope letter says that his PHQ9 and GAD7 scores at 20 July 2018 indicated 'most recently, severe symptoms of anxiety and depression'. The claimant had 6 sessions with the therapist. This was helpful at the time, although he remained on Citalopram. His mental health subsequently deteriorated again. He was seen once by a locum renal psychologist, which would have been in Spring 2020, but she left at the start of the pandemic. He also had some local NHS therapy around 2020, but we do not have precise dates or details.

68 The claimant was assessed by Occupational Health (Ms Barrington) on 26 May 2021 having been referred by the respondent's HR. Her report is in the trial bundle. In relation to his mental health, the claimant reported low mood, irritability, shortness of breath, palpitations, reduced appetite and variable

sleep. Ms Barrington assessed the claimant as not fit for work and she was unable to advise on if or when he was likely to return. She did not particularly distinguish between the claimant's mental health and his physical health issues in her report, but the general tenor placed most weight on mental health. Having said that, she did also refer to poor kidney function and being under the care of a Specialist Renal Unit and Urologist for kidney function. The report also said the claimant was limited by his underlying health conditions. Ms Barrington said she considered it was likely that the claimant's case would fall under the provisions of the Equality Act, although she said (correctly) that ultimately this is a legal decision.

69 In about June 2021, the claimant was referred by a consultant nephrologist, who he was seeing for his kidney difficulties, to the renal health clinical psychology department at the Royal Free, He had 6 counselling sessions with this department, starting on 1 July 2021, and which were completed in January 2022. The Consultant Psychologist's initial report back to the GP on 14 July 2021 is in the trial bundle. It notes that 'Mr Rahman's problems with low mood appear to have started in 2018 following his illness and then him having stopped working, him having been prescribed Citalopram back then which he continues to take. He has had some psychological therapy with his local NHS psychology service around 2020 and then was seen once by our locum renal psychologist, Ms.. which unfortunately coincided with the start of the COVID-19 pandemic and with Ms … having left a short while thereafter. My impression at this stage is that Mr Rahman has been deeply affected by the loss of his working role and has felt very let down by the company whom he has been working for some 18 years. He felt unfairly criticised by them and has had a lack of support, but is still hopeful of redressing some of his grievances with them, especially given that they have now been taken over by a new company.'

70 The claimant self-referred to iCope in January 2022, but they recommended a 6 month break from psychological support while he put into practice what he had learnt from the Royal Free sessions.

71 On 10 February 2022, Camden Primary Care Mental Health Network wrote to the claimant's GP having had the claimant referred by her. The letter is in the trial bundle. It noted that the claimant had an established diagnosis of recurrent depressive disorder with prominent generalised anxiety symptoms. This had all started following his bout of septicaemia. It said that, notwithstanding medication and counselling in the past, the claimant ' still reports residual intermittent insomnia, negative thoughts, low energy, low mood, irritability and generalised anxiety'. The assessment recommended gradually replacing Citalopram with Venlaxafine. The claimant says this was because he felt the effectiveness of Citalopram had diminished, having been on it continuously since May 2018. He was prescribed Venlafaxine instead in February 2022. The claimant has continued to be prescribed Venlaxafine since then. When the tribunal asked the claimant if he knew what his mental health would have been like had he not been taking medication, he said he 'did not want to think about it'. We understood that to mean he believed it would have been very bad indeed.

72 The claimant told the tribunal at the resumed hearing in August 2023 that he now thinks his tendency towards depression and anxiety may have started in around 2015, although he did not recognise or give a name to his feelings at the time. We accept the claimant genuinely believes this. We cannot say whether he is correct. He is thinking back a long way and he gave no specifics. Previously, the claimant told us he believed his mental health issues started with his septicaemia, late 2017/ early 2018, but he also believes prior stress, which was partly caused by a demonstrator attacking him in the building, may have indirectly led to the septicaemia. What we can say from the evidence is that by mid 2018, he had severe symptoms of anxiety and depression, which have been controlled to some extent by anti-depressant medication ever since, but which have never completely gone away, which have been sufficiently severe to keep him off work since that date, and which from time to time have become particularly acute. The evidence suggests that a combination of factors may have led to an increase in his depression and anxiety (including his physical ill-health), which then became compounded by his anxiety about matters at work, including the grievance against him, and then finding himself off work.

73 The claimant told the tribunal that his anxiety and depression affected his sleep and his ability to concentrate. Matters would go round and round in his head. We accepted this evidence. It was consistent with the other evidence. He told the respondent's Counsel he recognised his writing so many letters was 'not normal'.

Impaired kidney function

74 In 2018, the claimant was diagnosed with poor kidney function secondary to septicaemia. The fit note of 27 February 2020 is talking about kidney-related investigations. The 25 August 2020 fit note refers to kidney disease. We know that he had seen a renal psychologist at the start of the pandemic. The GP's letter of 3 August 2023 says that the claimant was diagnosed with chronic kidney disease stage 3 on 4 October 2018. This is mild to moderate damage. The letter refers to 'diabetic renal disease' on 11 February 2021 and 'acute kidney injury' on 3 September 2022.

75 In his grievance note of 10 December 2020, the claimant said that his kidney function was 72% in March 2018 and as of two months previously (early October 2020), had decreased to 35%. Whenever he became overanxious, he ended up with haematuria. He also had sleep problems.

76 The claimant explained in his evidence that his kidney disease has gradually become worse, from first diagnosis to stage 3 to acute injury. It is now functioning at 20 – 26%. From the outset, the claimant has been on medication to control his blood pressure (as that can contribute to the kidney damage). He is now on three different types of blood pressure medication. Intermittently since 2018/9, he has experienced blurry eyes and ringing in his ears when standing up. This has got much worse recently and it has been identified as caused by hypertension. The impaired kidney function has

always caused him fatigue. From the end of 2018, it was painful and he could not maintain a sleep timetable. It's got to the point now when he needs to sleep all the time, on and off. He takes two naps / day and also gets palpitations. The blood pressure medication (Doxazosin and Losartan) has side effects such as regular abdomen pain, swollen feet, nausea, diarrhoea and headaches.

77 There is a Royal Free table in the bundle which identifies the claimant as having 'diabetic kidney disease'. His eGFR scores on kidney functions have steadily worsened over time with only minor fluctuation. By 13 January 2020, they had dipped below 40 (37), on 10 May 2021 the score was 30 and on 3 June 2021 it was 25, dipping to 22 on 7 December 2021 and 4 April 2022. In November 2022, it was slightly up at 26. As his kidney disease was described as 'acute' in September 2022, when the score was presumably in the 22-26 range, then at the time of dismissal (January 2022), when the score looks steady at 22, it must also have been 'acute'.

78 We have no direct medical evidence regarding whether, at the relevant times, it was 'likely' that his kidney disease would get worse in this way.

The claimant's employment

79 The respondent is a facilities management company. It provides security and cleaning services to commercial businesses across the UK. The respondent had a high-value and important contract with Yorke Property Management Limited ('YPML'). YPML was a real estate management company which, amongst other things, oversaw the running of Lynton House in London. Lynton House let office space to a variety of businesses.

80 The claimant had been employed by the respondent and its predecessors since October 1999. The current respondent, Bidvest Noonan (UK) Limited, took over from Axis Security Limited on a TUPE transfer on 1 August 2021.

81 The claimant started as a security guard and was promoted to security supervisor in about 2010. He was based throughout at Lynton House. In 2016, he was supervising a team of about 7 people. As at December 2016, the claimant had never had issues with line management and no formal complaints had been made about any difficulty with his working relationship with colleagues.

The 10 December 2016 entry incident

82 An incident took place on 10 December 2016, when the claimant refused entry to Lynton House to the daughter of a CEO of one of the tenants of the building (Skills for Health) because the access card she used was not registered to her. The claimant blocked her card and arranged for her to be escorted from the building. He notified the building manager, Teresa O'Connor.

83 The CEO of the tenant (ie the father), Mr Rogers, complained about the matter to Axis and YPML, and was invited to put his complaint in writing, which he did, attached to an email dated 16 February 2017.

84 Internal emails show Axis were worried about the complaint. Mr Belding of YPML emailed the Axis account manager that they had lost the moral high ground once it emerged that this was not the first time the daughter had been to the building and that a security officer working with the claimant knew her. Mr Belding went on, 'Ultimately he is looking for lessons learned and for our AIs to address events like this … He is also looking for an apology from yourselves and ideally from Syed, then this will hopefully go away'.

85 On 27 February 2017, Axis wrote to Ms O'Connor saying that it took this type of incident very seriously. Axis said it did not appear to have received any prior notification from the tenant's CEO that his daughter would be attending the premises and in that respect, the claimant had followed procedures correctly. Their primary responsibility was the security of the building. However, Axis accepted more could have been done to clarify the daughter's identity. In hindsight there was no reason for the claimant to have refused the daughter's suggestion to speak to someone on the phone and while that would not have enabled verification of identity, possibly emails or other avenues could have been pursued. Axis said it had put in more robust procedures and it would put the claimant onto a customer service course and coach the team on how to proactively resolve this kind of issue. It concluded, 'I would like to apologise on behalf of Axis and the officers on duty, as the incident was not managed in a way which we would have expected, especially given the distress to [the daughter] experienced on the day of the incident.'

86 The claimant did not see this letter or even know about it until 2 May 2018. No formal or informal action was taken against him and he was not sent on any training course. No one told him he had done anything wrong.

87 Reading the letter overall, our impression is that it provides the necessary apology that the situation required given the commercial sensitivities, but it does between the lines stand up for the claimant to a reasonable degree, noting that he had followed procedures correctly. What upsets the claimant is that a letter was sent out referring to him and criticising his actions when he feels he had done nothing wrong, and that he had not ever seen the letter or even known of its existence.

88 The claimant says he did not even know Mr Rogers had made a formal complaint. However, he must have known some kind of complaint had been made because the correspondence shows he spoke to Mr Rogers at the time and there is also an email from Ms O'Connor saying that 'Syed is very stressed'.

89 The claimant found out about the letter on 2 May 2018 when Mr Eltayib referred to it at a meeting ostensibly to discuss site improvement. The claimant first made a complaint about the letter in an email dated 22 November 2018 (see below).

Fisher grievance against the claimant

90 On 3 May 2018, a security guard (Ms Fisher) submitted a written grievance against the claimant to Benjamin Bishop, the claimant's line manager at Axis, having first complained verbally. She copied in Ms O'Connor at YPML. The complaint was that the claimant had made spiteful personal remarks about her psoriasis. At the end, she said that the claimant had seen her email on her computer (which he accepts he had) and was begging her not to send it, as he would lose his job.

91 On 4 May 2018, the claimant went off sick. He remained off sick with anxiety and depression until he was dismissed several years later.

92 The claimant told the tribunal that this grievance was the straw that broke the camel's back. He says he had been suffering from high anxiety and depression because of his physical health.

93 On 28 June 2018, the claimant popped in to Lynton House unannounced to say hello to the team. He was still on sick leave, but the building was close to his home, and on his doctor's advice, he used to walk around his neighbourhood. Someone reported this to the building manager, who viewed the CCTV footage and then reported the matter to Axis.

94 The claimant subsequently discovered from a colleague that staff had been asked about his visit on 28 June and that CCTV had been used to view his visit.

95 The claimant already knew that there was a CCTV on site. He had not previously raised any written concerns about the lack of CCTV signage. His concern on this occasion was that he felt he had attended - and therefore was being viewed - in a personal capacity, like a member of the public, as opposed to in a work capacity. He referred to this incident at the time as 'the CCTV incident' and we shall also call it that for shorthand.

96 By letter dated 26 September 2018, Mr Belding at YPML asked for the claimant to be removed from Lynton House and not to be assigned to any building in the YPML portfolio. The letter was written to the account manager, Mr Evans. The reason given was that other issues (in addition to the Fisher grievance) had emerged while the claimant was off sick in relation to the claimant's attitude towards work colleagues, fellow service-providers and occupiers of the building. There was now a more harmonious atmosphere in the security team.

97 The claimant feels that YPML should never have known about the Fisher grievance. He feels it was gross misconduct for Ms Fisher to have copied her grievance to YPML, who he considered a third party, before a grievance hearing had even taken place. The claimant still feels that action should have been taken against Ms Fisher for this, and he would not have felt his grievances were satisfied if it had not been.

98 The claimant is also concerned that John Fitzpatrick, the London Operations Director, helped Mr Belding write the 28 September 2018 letter. He feels that showed Mr Fitzpatrick had agreed to move him even though there had not yet been an investigation.

99 In the event, the grievance never was investigated and the claimant never was moved. We assume these matters never progressed because the claimant remained off sick.

100 The reason the claimant has the impression that Mr Fitzpatrick had already agreed to move him was because of correspondence between Mr Fitzpatrick and Mr Belding. On 18 September 2018, Mr Fitzpatrick emailed Mr Belding, attaching the respondent's template for third party removal, as the claimant was potentially due to return to work (according to his latest fit note) after 30 September. This email clearly follows a conversation and it reads as if the respondent has already accepted the decision: 'Once received we will need to write back asking you to reconsider but you stick to your reasons for the removal and we can then act accordingly it is a necessary precaution to protect our positions'. In other words, they were planning a sham process. Mr Fitzpatrick attached a draft email for Mr Belding to send to Mr Evans. The draft is similar to what was ultimately sent on 26 September.

101 The claimant would not have seen this correspondence at the time it was written.

Return to work meetings and Evans investigation

102 On 22 November 2018, the claimant emailed Mr Bishop with four concerns / queries: (1) asking for a copy of the letter sent to the tenant's CEO regarding the December 2016 entry incident as he was the subject of that letter; (2) stating that Mr Bishop had ignored his several requests to look into the CCTV incident and asking whether an incident report was created, whether it was logged in the DOB (daily occurrence book – also known as a log book), whether there was an official request made by the landlord, and whether he needed to refer the matter to the SIA (Security Industry Authority – the regulatory body); (3) asking whether bonuses had been paid to selective colleagues in June/July 2018 and if that was based on race, gender or favouritism; (4) stating that he had received no acknowledgement of the SMS text message he sent on 17 November 2018 stating that he would like to resume work from 27 November 2018.

103 Although in the event, the claimant never returned to work from sickness, the account manager, Dilwyn Evans, held two return to work meetings with the claimant on 3 December 2018 and 15 January 2019 when various issues were discussed.

104 At the 3 December 2018 meeting, the claimant said the issues mentioned in his email to Mr Bishop on 22 November 2018 continued to affect his condition. He indicated that he continued to feel anxious and depressed and

he would need resolution to his concerns in order to feel able to return to work. They also discussed the GDPR and the claimant's right to review his personal data. Mr Evans explained how to make the request. Mr Evans said he would investigate. This was all confirmed in subsequent letters to the claimant.

105 The claimant had to chase Mr Evans for his findings in emails dated 7 January 2019 (stating also that he had received no payslip that month) and 15 January 2019 (stating that he had just received an email from NEYBER saying he was no longer employed by Axis). The claimant copied HR and Mr Fitzpatrick into the latter email.

106 Mr Fitzpatrick seems to have inadvertently pressed 'reply all' on his email to Mr Evans of 15 January 2019 which says 'Dilwyn, you are giving him unnecessary ammunition here please respond and copy me in'. This caused the claimant to lose confidence in Mr Fitzpatrick. The claimant felt that he was being seen as an enemy and outsider. We have sympathy with the claimant's reaction to this. We would similarly interpret the email as indicating he was seen as a problem.

107 Mr Evans emailed the claimant that evening to suggest they arrange a return to work meeting early the next week, when he could update the claimant with his findings. He said he did not understand the NEYBER email and had instructed HR to investigate. He said NEYBER were a third party supplier - 'Please be assured you are an active full time employee of Axis Security, with all your certified absence being registered accordingly'.

108 The claimant responded the next day (16 January 2019), saying he would like to see Mr Evans' insight into the investigation in writing before they met. He added that Mr Evans had also not given a reason for not being sent a payslip, which was consistent with the information from NEYBER that he was no longer employed.

109 The claimant emailed Jonathan Levine on 31 January 2019 with a copy to Mr Fitzpatrick, Mr Evans and HR. Mr Levine was the CEO of Axis, and Mr Fitzpatrick's line manager. The claimant said he had been trying to resolve issues with the company which had caused him anxiety and depression which were now worsening. 'From the very little communication I am receiving from our management and Human Resources I am beginning to question the integrity and impartiality at this instance'. He asked Mr Levine to urgently look into the matter.

110 On 7 February 2019, Mr Evans telephoned the claimant to invite him to a meeting on the Monday. He wanted to give his findings so that they could continue the resumed return to work meeting. He wanted to discuss the claimant's outstanding concerns face-to-face, but the claimant did not want to do so. Mr Evans followed up with an email the same day. He said he was eager to bring the claimant's concerns to a close and get him back to work. He would try to answer the remaining concerns in writing by 11 February 2019. Mr Evans attached the formal Grievance Policy. He said that at the

moment, they were not following any grievance process, but it would be good to get some structure. If the claimant raised a formal grievance, then he would be invited to a formal meeting where he could go through his concerns one by one.

111 The claimant replied that they had already had a meeting over the matter, when Mr Evans said he would investigate and get back to him. That had not happened for over two months and Mr Evans was now seeking to lengthen the process by sending a so-called grievance policy. As stated previously, until he had written findings of the investigation, he was unwilling to attend a meeting. Mr Evans replied to explain that he was confident they could resolve the claimant's issues informally, but if they could not, this was the formal procedure to be used.

112 Mr Evans wrote at length to the claimant on 11 February 2019, carefully addressing the each concern which the claimant had raised in his letter and at their discussion.

113 Regarding the CCTV incident, Mr Evans said Axis employees should not be entering client's premises outside working hours, and further, the claimant was certified unfit at the relevant time. That meant the claimant was uninsured to be on the premises. Ms O'Connor had been told of the claimant's visit by one of his colleagues on site. The next day, Ms O'Connor, who was CCTV data controller for Lynton House, made a written request to Ms Fisher, who was SIA CCTV licence operative, to locate images for the site visit. Ms O'Connor said that she had to be sure the claimant's health and safety was not compromised while he was on site. The CCTV footage was not downloaded or archived. Mr Evans concluded that he was happy the request to review the CCTV was legal as it related to health and safety matters requested by the data controller to a fully licensed operative. He stated that this part of the claimant's concerns was therefore resolved.

114 Regarding the December 2016 incident, when they met, Mr Evans had shown the claimant the 27 February 2017 letter from the claimant's then line manager, Mr Lowe, to Ms O'Connor at YPML. The letter had supported the claimant's actions in not authorising site access to Mr Rogers' daughter, but had said lessons could be learnt. Mr Lowe had said that out of hours procedures had been reviewed and the claimant would be given customer service training. Mr Lowe had been terminally ill at the time of the claimant's meeting with Mr Evans and had since passed away, so his intentions could not be checked. However, as part of the new contractual agreement with YPML, all employees would be attending a customer service training course and all security supervisors would attend a two-day supervisor skill course. On the claimant's return to work, training would be implemented. Due to the time that had passed since the original incident, Mr Evans could only provide this limited understanding of the matter.

115 The final issue, which differed from that in the 22 November letter, was headed by Mr Evans 'The non-issue of payslips following cessation of SSP payments to you.' Mr Evans investigated with the Axis's finance team and

explained that payslips were not issued to employees who have no earnings for a particular month, the claimant's SSP entitlement having been exhausted. He said NEYBER were a third party organisation contracted by Axis to provide beneficial information to employees, and any relationship between the claimant and NEYBER was private. However, Mr Evans could confirm that, as previously stated, the claimant remained 'an active full-time employee of Axis' with certified medical absence.

116 Mr Evans finished by wishing the claimant a speedy recovery and hoping that his investigation into the claimant's concerns would be helpful and support his return to work. If the claimant was ready to return (his current medical certificate had expired), they would have a further return to work meeting on 14 February 2019.

117 The claimant told the tribunal that he did not take up the offer to meet again in person because he had lost trust in Mr Evans. The claimant considered the 27 February 2017 letter regarding the December 2016 incident to be a 'total fabrication' and that 'brushing it aside' was 'a biased stand'. He felt Mr Evans was not willing to look into the matter and was protecting colleagues. The claimant was, and still is, particularly upset at the suggestion that he could have escalated the entry matter within Axis or Yorke, when he says that is exactly what he did, having telephoned Ms O'Connor at the time, and he says he had phone records proving that.

118 The claimant replied to Mr Evans (copied to Ms Farrelly in HR and Mr Fitzpatrick) on 12 February 2019. Regarding the CCTV incident, he said he had visited Lynton House as a member of the public, not in a work capacity. He said that for any CCTV to be viewed, a visible CCTV sign must be put up and the reasons for it. The claimant also referred to an SMS text from Mr Bishop which 'clearly shows that he either lied to me or was not aware of the CCTV incident. So it is indicative the incident report did not actually exist and was later created to cover up'.

119 We have seen the exchange of WhatsApp messages between the claimant and Mr Bishop regarding the CCTV incident. It starts with the claimant's message, 'Have you had the chance to query the CCTV issue as discussed last week?'. The claimant's chaser message one month later starts, 'It is very interesting that you decided to either ignore or collude regarding the CCTV incident I raised with you'. Mr Bishop says he is unsure what the claimant means by the 'CCTV incident'. The claimant responds, 'So, now you are denying the conversation we had from your last phonecall in September … I am sure you could have asked then about your so called no-knowledge of it'. Mr Bishop replied, 'Syed, I am not denying we spoke. What I am saying is I am unsure what you are talking about when you say an issue with CCTV…' The claimant then set out again his complaint that his visit to his colleagues had been viewed on CCTV, with no entry in the DOB.

120 Regarding the December 2016 incident, the claimant said in his 12 February 2019 letter that he had only ever communicated with Mr Bishop over the matter, even if Mr Lowe had written or signed the letter to Mr Rogers. The

claimant said the accusation in the letter that he had not communicated or escalated with Axis or YPML was 'completely fabricated'. The claimant said he had sent an incident report email to Mr Bishop and Ms O'Connor on 10 December 2016 along with the existing log entries; he also had his mobile bill as evidence of his call to Ms O'Connor. The claimant felt aggrieved this had not properly been investigated. He said he did not need a customer service course as mentioned by Mr Lowe because he had handled the matter with utmost professionalism. Any training now required as a result of the 2018 agreement with YPML was an unconnected matter, He concluded, 'Axis decided to hide this letter from me until I asked for it as it would clearly show the lies. This letter was clearly fabricated to appease the client and in doing so, their tenant too.'

121 Regarding the pay-slip issue, the claimant said that by using such a title ('non-issue of payslips'), Mr Evans had 'decided to belittle my concern …. If this was a non-issue, you would have responded immediately to the reason instead of keeping me hanging on for a response.' We interject here that, as Mr Evans identified and explained in his reply, the claimant had unfortunately misunderstood the heading. He had thought Mr Evans was saying the lack of payslips was a 'non issue' ie not of any importance. Whereas in fact Mr Evans meant 'payslips which had not been issued'.

122 The claimant ended, 'In fact it is rather pathetic to say that it has taken you over two months to come up with nonsensical response without any proof or evidence to support. Therefore, you have not resolved the main points and I suggest you make an effort to do so. I will not be attending any meetings until a professional, unbiased, non-nepotistic approach is conducted for a valid investigation'.

123 Mr Evans replied on 25 February 2019. He said he had reviewed his original outcome letter and was satisfied with its contents. Regarding the CCTV incident, he said he saw no malice in the claimant's actions – both the claimant and his colleagues said he was just passing by and wanted to say hello – but nevertheless, he should not have been on site – he was uninsured and he was not taking reasonable care of his own well-being. The CCTV system at Lynton House is operated and managed by YPML and Ms O'Connor had no obligation to advise Axis of the local review of CCTV images. Mr Evans said the act was perfectly legal because it related to health and safety. Regarding visible CCTV signage, that matter had been escalated to YPML head office and would be addressed at the upcoming monthly review meeting. If the claimant continued to believe the premises fell short of GDPR regulation, he had the right to report his concern to the ICO.

124 Regarding the 27 February 2017 letter to Mr Rogers, the tenant's CEO, Mr Evans had looked at all the paperwork and interviewed Mr Bishop and Mr Pacey, the two assistant account managers to Mr Lowe at the time. Mr Lowe's letter supported the claimant's actions in not authorising access and did not mention any communication escalation failings by the claimant. Mr Lowe did state additional training would be provided to the claimant, as Mr Rogers had raised concerns about the level of customer service he and his daughter had

experienced during the event. No disciplinary investigation was logged with HR, with Mr Lowe believing training and mentoring would further develop the claimant's role.

125 Mr Evans explained that the claimant had misunderstood the title 'non-issue of payslips'.

126 Mr Evans said he would not be responding to any further emails on these matters. If the clamant wished to appeal, he could do so by following the procedure set out in section 8 of the attached grievance policy within 7 days and addressing his letter to Mr Fitzpatrick.

127 The claimant felt that he had never invoked a grievance and that the grievance procedure was forced upon him.

128 The claimant did not appeal.

129 On 4 March 2019, Mr Evans emailed the claimant asking him to agree to an Occupational Health referral and enclosing consent forms. The claimant says he intentionally ignored the email. He did not trust Mr Evans, because he felt Mr Evans had not dealt with his grievance properly. He was not prepared to deal with someone who did not recognise criminal activities.

<u>The 18 December 2019 grievance</u>

130 On 18 December 2019, the claimant emailed Mr Levine, Mr Fitzpatrick and HR to say he had further insight into the dismissal of his grievance / concerns. The claimant had been making subject access requests ('SAR') and contacting the ICO.

131 The claimant went back to the issues of the 10 December 2016 incident and the 28 June 2018 CCTV incident. On the former, he said he had contacted Global Holdings (the parent company of YPML) and obtained documents which showed Axis had simply copied and pasted what YPML asked. The claimant attached his phone records showing his call to Ms O'Connor at the time of the December 2016 incident. He suggested the emails had either been deleted to hide evidence or ignored by Axis in the hope that the claimant would not have access to them.

132 The claimant went on to say that on 2 May 2018, Mr Eltayib and Mr Bishop had called him in to Head Office under the false pretence of 'Discussion of Site Improvement'. He said Mr Eltayib told him he would have sacked him on the spot for this letter if he was around, and had accused the claimant of being arrogant, and said he would watch his every move. As mentioned above, it was on this occasion that the claimant first discovered a letter had been written to YPML in relation to the claimant's actions on 10 December 2016.

133 The claimant's 18 December 2019 email was the first time he had complained of the incident on 2 May 2018 and said he was bullied and intimidated by Mr Eltayib.

134 Regarding the 28 June 2018 CCTV incident, the claimant said he had sent complaints to the ICO and that the data controller did not comply with their data protection obligations. He said he would now be discussing with SIA the role of their approved contractor Axis, to establish more facts.

135 The claimant went on to set out what he called, 'My To-do List (subject to change)'. This comprised (1) legally challenging YPML's non compliance with data protection obligations; (2) informing Skills for Health about the truth by providing material evidence (Skills for Health was the tenant involved in the December 2016 incident); (3) communicating with SIA regarding the legality of the CCTV issue with their approved contractor. The claimant asked the respondent to let him know within 7 days whether they wished to investigate this thoroughly again or not. If he received no response, he would 'have to explore other avenues'. The claimant then asked for the email address of the respondent's stakeholder/shareholders 'as I need to ask a few questions about business ethics'.

136 Axis decided that, as the claimant had never appealed Mr Evans' decision (not having accepted he had made a grievance in the first place), it was best to treat the 18 December 2019 letter as a fresh grievance. On 20 December 2019, Axis therefore invited the claimant to a grievance hearing with Mr Fitzpatrick on 7 January 2020. The claimant was told that the meeting with Mr Fitzpatrick would allow him to go through his complaints one by one. After the meeting, Mr Fitzpatrick would investigate the complaints and come back to the claimant with an outcome. If the claimant was not satisfied with the outcome, he would have the right of appeal.

137 Also on 20 December 2019, the claimant made a Subject Access Request to Axis for the 10 December 2016 log page from site 7013 Duty Officer Book. On 17 January 2020, the GDPR team at Axis told the claimant that they had been unable to locate any DOB books from Lynton House, and they were not in the usual archive location. They believed contractors may have accidentally destroyed the books as the room where they were stored on the client's premises had recently been renovated. The GDPR team would continue to investigate that possibility. The claimant replied, 'Could it be that an individual or collective effort has been made to hide data from being made available to save from embarrassing situation?' Ms Farrelly of HR replied that 'we are still conducting an investigation into where these might be… and will advise you of the outcome'. She said the claimant's allegations of them hiding data was conjecture and without substance. Why would they want to hide a DOB book? The claimant answered, 'That was a question. Please respond once you have read something properly.' He added, 'When you say 'we', you as HR should remain unbiased.' The claimant copied in Mr Sephton, Mr Fitzpatrick, Mr Levine and Naomi Austen.

138 On 10 February 2020, Ms Farrelly wrote to the claimant that an independent investigation had been carried out. They believed that the client had destroyed log books more than 3 years old as they incorrectly thought that was the period they should be kept for, Nevertheless, it was still appropriate for the claimant to attend meeting about his grievance, and she proposed 18 February 2020. She also reminded the claimant of the escalation process and not to copy in numerous people unnecessarily. She said Mr Fitzpatrick was both a shareholder and a senior director at Axis who had full authority to handle the claimant's grievance.

139 The claimant replied that he would have to get back with a more suitable date for a meeting due to the deterioration of his health. He said it was Axis's responsibility to ensure the DOBs were kept securely and they were not YPML's to destroy. The claimant said he saw it as a right and obligation to keep Mr Levine informed and if he wished not to be copied in, Mr Levine could easily drop the claimant a one-line email.

140 Ms Farrelly replied, reiterating that it was unnecessary and not in line with escalation procedures to copy in Mr Levine. She said it was regrettable they did not have the DOB which the claimant wanted, but they would try to support him by understanding why it was important. She pointed out that it was the claimant's grievance and they had been trying to arrange a meeting for some while to discuss it, but he was not cooperating, which is what had happened previously with Mr Evans.

141 Ms Farrelly said she was sorry to hear about the deterioration in the claimant's health and his line manager would be in touch in the next few days to arrange a meeting as they did for all long-term sick employees. She said they needed to understand if there was any support they could provide to facilitate a return to work and they might also suggest an Occupational Health referral. The claimant replied that he had all the professional support he needed and it would not be necessary from Axis.

142 The claimant said he had copied in Mr Levine because of Mr Fitzpatrick's response in the past (he meant the 'ammunition' comment) and because Mr Fitzpatrick had showed very little interest. Ms Farrelly said it would be really good if the claimant came in to discuss his complaints thoroughly with Mr Fitzpatrick so he could try to resolve them for the claimant. Regarding the sickness case review meeting, the line manager was Mr Evans, but if the claimant preferred, they could get an independent manager to conduct the meeting. The claimant did not cooperate.

143 On 4 March 2020, the claimant made a SAR/GDPR request to Global Holdings and YPML. He said Axis had told him that YPML had destroyed DOBs which were older than three years, and he asked them to 'verify the attached redacted email from Axis Security of the authenticity of their claim'. YPML replied on 10 March 2020 that they had made an exhaustive search for the DOB from which he had requested an extract, but could not find it. They said, 'We can certainly say it was not destroyed because we misunderstood

the retention requirement. It is however possible it was destroyed during works at the building.' They said they were therefore unable to assist further.

144 On 10 March 2020, the claimant emailed Mr Levine attaching the response from YPML (Global Holdings), which he said contradicted what Axis had told him. He said, 'I have totally lost faith in HR Management and Security Management team to carry out any true investigation.' As Mr Levine was ultimately responsible for the company, he asked to hear from him as a matter of urgency.

145 On 16 March 2020, the claimant emailed Mr Levine again to say it was a week since he had heard from him and he had not even acknowledged receipt. He went on, 'Once you have answered the email from last week, there are plenty more concerns that need to be addressed. If I have not received anything by the end of the week, I will assume you have no interest in the matters to hand. I will therefore have no other options left apart from seeking lawful/legal means going forward.'

146 The claimant emailed the same day with a list of six matters he wanted looked into, saying there were also sub-categories of the above issues. The 6 categories were:

1) 'The falsified letter to the client and their tenant … please provide all details used to investigate this'.
2) The claimant's treatment by Mr Eltayib and Mr Bishop in the 2 May 2018 meeting.
3) 'The falsified SMS from Ben Bishop regarding CCTV viewing'
4) How did Mr Evans investigate and how did he conclude that 3 of the 4 issues were resolved?
5) 'CCTV reviewing – unlawfully viewed as per ICO'
6) Axis had said that YPML destroyed the logbook. YPML said they did not. Axis now said that contractors had destroyed it. Where was the consistency?

147 The claimant repeated his request for information about all the shareholders. He said Mr Fitzpatrick had been involved from the beginning but had shown no interest. He queried where the good faith was for all this. He stated the matter had gone far beyond the capacity of Ms Farrelly and Mr Fitzpatrick, and he believed Ms Farrelly had a conflict of interest. If Mr Levine did not want to deal with this, please ask him to drop the claimant a one-liner.

148 On 16 March 2020, Ms Farrelly emailed the claimant to say that Mr Levine was CEO of Axis and would not be responding to his emails. They would appoint another senior Director (the same level as Mr Fitzpatrick) outside of the London region to hear the grievance.

149 There was then a delay in dealing with the grievance because of the onset of the Covid pandemic.

150 On 30 November 2020, Naomi Austen emailed the claimant to introduce herself as a member of the Board of Directors for Axis, the Group HR & Leaning Director and designated whistleblowing officer. She said she had

appointed John Sephton to investigate. Mr Sephton, Account Director, was senior to Mr Bishop and Mr Evans. She had also appointed a different HR Manager (Anna Knight) as the claimant did not want Ms Farrelly to continue to be involved.

151 The claimant did not want Mr Sephton to be involved either, so Ms Austen appointed Mr Mavroudis, Director Designate, Cleaning South, to hear the grievance instead.

152 On 8 December 2020, the claimant emailed Mr Sephton, the Account Director, 'in strict confidentiality' to say he had serious concerns. He said, 'There have been several instances of CCTV viewing by a site supervisor while not holding a CCTV licence and the site not having appropriate signage. One incident occurred when the CCTV was viewed in October/November 2019 of a security officer. This has been conducted with support from HR and Account management. Due to the seriousness of this matter, I am not going to provide you with any other details but rather leave it for your capable investigation through enquiring with all officers on site. If that is something you do not wish to investigate please do let me know. I can then contact Crimestoppers and/or SIA for their independent investigation.'

153 Mr Sephton emailed the claimant on 11 December 2020 to say he would ask the team on site and on14 December 2020 to say he had reached out to everyone on site, but no one had anything they wished to discuss. The matter of CCTV footage was with the client to review their requirements, but there was signage outside the building that conformed with requirements. He ended 'As such this matter has now been closed.'

154 Meanwhile, on 9 December 2020, Mr Mavroudis wrote to the claimant introducing himself and sending a zoom link for the grievance meeting. He listed the eight items which he understood to be the subject of grievance (with potential sub-issues), ie (in summary):
1) The falsified letter to the client and tenant, and details of how the matter was investigated.
2) The treatment by Mr Eltayib and Mr Bishop in a meeting on 2 May 2018.
3) The falsified SMS from Mr Bishop regarding CCTV viewing.
4) The nature of Mr Evans' investigation and how he came to conclude that 3 out of 4 issues were resolved.
5) CCTV reviewing – unlawfully viewed as per ICO.
6) Re the log book on 10 December 2016, saying the client had destroyed it when the client said they had not; then saying the contractors had destroyed it. DOBs should be kept for 3 years.
7) Where is the information from shareholders which the claimant had requested multiple times.
8) Mr Fitzpatrick had been involved from the beginning but showed no interest. From lower to upper tier of management, all had failed in undertaking their responsibilities. Ms Farrelly had a conflict of interest and the matter should go to Mr Levene.

155 The next day, the claimant emailed his grievance which added a further six numbered paragraphs, ie

9) After he left hospital in January 2018, he was not allowed to use his lunch hour to take intravenous injections for two weeks but had to take the time as annual leave.

10) The claimant was diagnosed with Septicaemia and diabetes at the end of December 2017 / start 2018. His stress affects his blood pressure and sugar levels, which damages his kidneys, which were already partially destroyed by the Septicaemia. His kidney function 2 months ago had decreased to 35% and he got hematuria whenever he was overly anxious. He is also short of sleep.

11) Being unable to work has had a serious effect on the claimant's finances, eg he cannot afford the dentist and his wife was unable to travel to Bangladesh to see her father before he passed away on 30 October 2020 because of the financial effect on the claimant of being unable to work.

12) He had in the past, before getting Septicaemia, been subjected to physical abuse by protestors at work. The only support offered to him was to take up the matter with the police himself. It was soon after this that his symptoms of anxiety and depression started which caused sleeplessness and spots on his forehead. (He believes the broken skin caused by spots led to his Septicaemia.)

13) In early 2018, he was sexually assaulted by a contractor of the client. The building manager said she would deal with it, but nothing ever happened and the contractor continued to come in to Lynton house.

14) Why had it taken 7 months for Ms Farrelly to pass on the claimant's case to Ms Austen?

156 The grievance meeting took place on 21 December 2020. Other than the return to work meeting on 3 December 2018, it was the only meeting which the claimant agreed to attend to resolve his concerns.

157 At the end of the grievance meeting, Mr Mavroudis asked the claimant what he would like to be the result of the grievance. The claimant said loss of income since May 2018; his health condition had been affected and therefore his ability to work in the future – he would provide medical documents; and 'any criminal activity that comes out of it will have to be dealt with in criminal court'.

158 The claimant did not provide any medical documents at that point.

159 Mr Mavroudis investigated the grievance. On 6 January 2021, Mr Mavroudis emailed the claimant to update him and to say he hoped to provide a response in the week starting 18 January 2021. The claimant replied the same day saying he also had queries regarding various Axis policies and the related actions of Axis which stemmed from his most recent GDPR request. He asked Mr Mavroudis to advise him of the policies regarding (a) violation of human rights; (b) defamation of character; (c) gross misconduct; (d) threatening behaviour; (e) breach of confidentiality; (f) criminal activities; (g) treating staff as a 3rd party; (h) how matters are investigated including verifying information. He added that he may still come back with more on the company's policies.

160 Mr Mavroudis said he would look into these matters, but his priority was completing the grievance. The claimant said the matters were linked to his grievance and would help him understand how laws are taken into consideration in the policies and how the company comes into any conclusions. Mr Mavroudis asked if the claimant wanted to add the points to his original grievance because if so, it could cause delay to the outcome. The claimant replied that he did not wish for delay and his request should be treated as separate to the grievance.

161 Mr Mavroudis spoke to people identified by the claimant, ie Ms Austen, Ms Farrelly, Mr Sephton, Mr Eltayib, Mr Evans, Mr Fitzpatrick and Mr Bishop. On 2 February 2021, Mr Mavroudis wrote to the claimant with the outcome of his grievance. He said he had investigated Ms Farrelly, Mr Bishop, Mr Evans, Mr Sephton, Mr Fitzgerald, Ms Austen and Mr Eltayib. The letter addressed each of the 14 issues. The claimant's grievance in its entirety was not upheld and the claimant was told of his right of appeal.

162 The claimant appealed the same day to the Operations Director, Mr Jemson. He said he found the investigation totally biased. He attached his comments on each finding by Mr Mavroudis. A few hours later, he emailed Mr Jemson again to say that everyone involved in making decisions and coming to conclusions in the investigation was 'liable and likely to be complicit in all the actions'.

163 On 3 February 2021, the claimant emailed Ms Austen, copying in, amongst others, Mr Fitzpatrick and Mr Levine, attaching a 'separate set of GDPR/SAR requests in addition to my communications with Mr Jemson'. Seven matters were listed. On 5 February 2021, the claimant emailed the same recipients to ask two further items to be added to his list.

164 Ms Heeley, a new person had been appointed from HR to support Mr Jemson due to the claimant's complaints about other members of HR.

165 On 18 February 2021, Mr Jemson wrote to the claimant setting out his detailed responses to the nine GDPR/SAR questions and he then addressed the claimant's grievance appeal points. He invited the claimant to attend a grievance appeal meeting on 25 February 2021 to discuss one item – item 15. Mr Jemson said he was concerned that Mr Sephton had informed colleagues that the message was from the claimant when the claimant had marked it strictly confidential. As for the other matters, his responses were final and would not be open for discussion at that meeting.

166 On 22 February 2021, Sam Heely in HR emailed the claimant to seek the claimant's confirmation whether he wished to attend the appeal meeting the coming Thursday to discuss point 15 of his appeal. She added that, further to their request that he stop sending correspondence regarding his grievance / appeal to other managers or directors from elsewhere, she understood he had now received a response from Mr Ingram reminding him again to stay within the procedure outlined in the Grievance Policy. The claimant replied on 23 February 2021 that until Axis showed him evidence that section 6.2 of the

grievance policy had been followed, the meeting would be on hold. He added, 'The reasons for me contacting directors from elsewhere is that your investigation has not been valid and you have shown disregard to your own company policy, which in itself is gross misconduct'.

167 Ms Heeley replied that the claimant had already received a response on that point and he must seek advice externally if he was unhappy with the decision. In relation to the appeal, they were now operating under section 8, and would the claimant please confirm whether he wished to attend. The claimant replied, 'Grievance policy from your end has not been followed by everyone at Axis including you and Mr Jemson, therefore the decisions you have made do not stand. If you cannot see that, then that is your prerogative …. You are doing what you want from your end and again that is your prerogative. With that being said, do not waste my time as it has been so far by Axis since December 2018. If you want a full on discussion rather than being narrow-minded and biased, we can arrange that. I have neither agreed or disagreed to a meeting. On the balance of your behaviour you cannot be trusted with carrying out anything with prejudice…'

168 More correspondence continued in this vein, and the claimant made it clear he was not going to attend the meeting until the procedures had been rectified and did not agree to a decision in his absence.

169 The appeal hearing was held in the claimant's absence. On 1 March 2021, Mr Jemson provided the claimant with his outcome letter. Mr Jemson upheld the claimant's grievance on the point that Mr Sephton had breached confidentiality by revealing the claimant's name in a memo he sent to other staff on 11 December 2020 requesting information about the incident which the claimant had asked him to investigate that took place around October/November 2019. Mr Jemson said that Mr Sephton had not acted maliciously – he was trying to clarify details because the claimant had been vague – but he should have checked with the claimant first.

170 Mr Jemson told the claimant that the grievance process was complete and he had no further right of appeal.

<u>Occupational Health</u>

171 In May 2021, Riz Sayed gained the claimant's consent for a referral to Occupational Health ('OH'). The claimant was assessed by telephone on 26 May 2021 by Ms Barrington, a Registered General Nurse. The report is referred to in more detail in our section headed 'mental health'. The OH report said the claimant told Ms Barrington that 'he experiences low mood and irritability as well as symptoms relating to anxiety including shortness of breath and palpitations. He also reports that his appetite has reduced and sleep is variable. Syed tells me he attributes his mental health symptoms to work-related issues that he discussed with me; issues briefly detailed in your referral. He denies any personal factors. Syed reports he has been diagnosed with poor kidney function, secondary to septicaemia in 2018. He is also diagnosed with Type 2 diabetes controlled with both insulin and oral

medication … Syed is also diagnosed with high blood pressure. He states he suffers with fatigue, particularly due to his poor kidney function. Syed is prescribed medication for his depression and anxiety and has previously accessed psychotherapy. He remains under the care of a Specialist Renal Unit and Urologist for his kidney function and his GP for diabetic management…' The report assessed the claimant as unfit to return to work. She was unable to advise if or when he was likely to return. 'He feels he is limited by his underlying health conditions and continues to experience mental health symptoms that he attributes to work-related issues.' She concluded 'It is likely that Syed's case would fall under the provisions of the Equality Act 2010 but this is ultimately a legal and not medical decision.'

172 Mr Sayed wanted to hold a health review meeting with the claimant to discuss the OH report. However, the claimant emailed Ms Taylor on 9 June 2021 to say that he would much rather the ongoing issues were reviewed and resolved first. This was agreed.

<u>The Bidvest acquisition and Independent review by TCM</u>

173 The respondent (Bidvest) had acquired the business from Axis in February 2021. The claimant's employment transferred under TUPE. There was a gradual handover, with Axis managers continuing to manage staff until they left, and formally ending their involvement in August 2021.

174 Bidvest's acquisition was announced to all employees on 4 February 2021 and then Eddie Ingram emailed the claimant to introduce himself as the Managing Director of Security Solutions at Bidvest, to say terms would not be affected and he hoped to have the opportunity to meet soon. Mr Ingram was responsible for managing the security business across Great Britain. The claimant responded within 10 minutes, thanking him for his email introduction and stating 'Just to inform you that I have been on long term sickness leave. I have an ongoing grievance case which more than likely will end up in criminal court. I am keeping you informed as a duty from my part of being transparent and would hope that Axis security will do the same.'

175 On 22 April 2021, the claimant emailed Mr Jemson, Ms Austen and Mr Syed to say 'Can you ensure that the following staff no longer have direct access to any of my information: John Sefton, Michelle Farrelly, Benjamin Bishop; Dilwyn Evans; John Fitzpatrick.'

176 On 27 May 2021, the claimant emailed Ms O'Connor – 'just filling you in'. She had by now left YPML. He said he wanted to tell his side of the story and she need not respond. He set out his side of the events in 2018. Ms O'Connor immediately passed the email on to Mr Belding, and Mr Belding forwarded it to Mr Bishop at the respondent.

177 On 7 June 2021, the claimant emailed Declan Doyle, who was the CEO of Bidvest. He had not met Mr Doyle previously. He started:
'I am writing this email regardless of your awareness of the corrupt nature of the Security division of your company.

I have hit brick walls trying to get through to all levels of management.
I have been ganged up on, lied to, lied about, breached my confidentiality, my human rights have been violated, defamation of character to name a few.
There is constant nepotism within the management, protecting each other without remorse or regard for the law of the land.'

The claimant went on to refer in detail to his complaints going back to 2018.

178 Jo Nicholson was an HR Director for the respondent and was heavily involved in the transfer. Ms Farrelly briefed her on the historic situation with the claimant and the ongoing grievance. Ms Nicholson spoke to her colleague, Ms Taylor, and they agreed the entire process should be looked at independently. They thought that Bidvest taking over might provide a chance to reset. As the claimant clearly distrusted everyone he had engaged with at Axis, they decided it would be appropriate to ask a third party to carry out an independent review of the grievance process. The idea was not to revisit the content of the grievances, but to consider whether the grievance process had been fair.

179 Tracy Taylor, Bidvest HR Business Partner, emailed the claimant on 8 June 2021, acknowledging the email to Mr Doyle, She said that although the grievance procedure has been exhausted, 'we would like to arrange an independent review of your concerns raised'. The claimant replied, 'Thank you for the acknowledgement letter but you started this with a wrong impression. No proper grievance has taken place as per the company procedure is concerned. To say it has been exhausted is absolutely exaggerated. Perhaps you would like to word it better before making such a claim. The acknowledgement in itself is wrong.'

180 In August 2021, the respondent appointed a company called TCM. The matter was assigned to Andi Hargreaves, a resolution consultant with TCM. Ms Hargreaves met with the claimant on 22 October 2021 and 12 January 2022. In the event, as we describe below, matters deteriorated to the extent that the respondent decided it had to dismiss the claimant without waiting for the TCM report.

Subject Access Requests and client contact

181 In late June 2021, the claimant had submitted a SAR for all Axis communications from May 2018- 2021. Ultimately this turned out to be over 9000 pages. There was some delay in providing the documents because of their sheer number and because the company was also going through the acquisition in that period.

182 On 3 September 2021, the claimant emailed Mr Doyle (copying in Mr Ingram and others) to complain about the delay in providing documents under his SAR. He said, '… There seems to be huge disrespect and dishonesty' and 'If your leadership team members put you in a situation like this, I should think it would be quite embarrassing for you professionally and personally'.

183 When the claimant eventually received the information in September 2021, he used it to make follow up queries to the respondent and to YPML.

184 The claimant emailed Mr Doyle on 14 September 2021 to say he had come across many disturbing issues in the documents including the point of his current email, which was a letter addressed to Mr Evans by YPML, which he said was defamation. The claimant was referring back to the previous issues related to the site.

185 On 14 September 2021, the claimant emailed Ms Taylor and told her that he had emailed the parent company of YPML the previous day regarding 'their involvement of the same letter and other concerns that are directly to do with them.'

186 On 15 September 2021, the respondent's legal Counsel, Una Ni Mhurchu, emailed the claimant to say it had been brought to her attention as Data Protection Officer for Bidvest, that he had disclosed information given to him 'on foot of a subject access request' to third parties. She said this was in breach of the duty of confidentiality as an employee and the Company's data protection policy and confidentiality policy. She said the company would be self-reporting to the ICO its own disclosure of unredacted third party data. She now needed his confirmation that the claimant would not disclose any information to third parties, particularly personal data belonging to third parties. She said that if the claimant improperly contacted third parties in breach of the said policies, she would advise the company that it was gross misconduct which could lead to dismissal.

187 This email was prompted by the claimant telling Ms Taylor that he had emailed YPML's holding company. The contact information for the holding company was at the foot of a letter which had been disclosed to the respondent in one of his SAR requests, and which the respondent had omitted to redact.

188 The claimant emailed Mr Doyle on 15 September 2021 to say that he had just been 'threatened' by Ms Mhurchu for communicating with a 3rd party in respect of his personal data. This was information which the respondent had failed to provide. If he received any further threats from anyone at Bidvest, he would contact law enforcement. However, on this occasion he would accept their apology.

189 The claimant also responded to Ms Mhurchu. He said he had only shared with the client what they had sent, and the questions he had asked YPML were relevant to his personal business. He said he would continue to engage with YPML and its parent company, Global Holdings, as and when he felt it was a personal matter. He concluded that he was not going to apologise and 'You need to apologise for not doing your homework and sending a reactive response'. In a further exchange, he said 'If you are not going to explain everything and apologise for this despicable misunderstanding on your part, I am willing to go to the top of the tree at Johannesburg.' He later referred to her 'poor personal judgment'. On 17 September 2021, the claimant emailed

Ms Mhurchu to say 'Just to let you know, YPML emailed me last night and I responded accordingly'.

190 The claimant continued to correspond in a similar way, and copying in board members between September 2021 and January 2022. For example, on 6 December 2021, the claimant emailed Ms Taylor (copying in Ms Nicholson, Mr Doyle, Mr Ingram, Mr Kennedy and Ms Hargreaves) with a subject access request for all communications including meeting minutes concerning him from May to December 2021. He followed up on 6 January 2022 (copying everyone in) saying, 'I am writing to advise you of Bidvest's failure to respond within 30 calendar days. I am not interested in whether it is due to arrogance, ignorance, internal politics or otherwise'.

191 Further SAR documents were provided by Bidvest's data protection team on 7 and/or 11 January 2022. On 11 January 2022, the claimant emailed Mr Elton at Bidvest to ask 'under which part of privacy law, Bidvest is sharing my information with Alan Belding (client). This information is in the latest segment of my SAR request. Seems like the Managing Director is involved too. He is also bound by law to adhere, not help break it.' This was copied to Mr Doyle, Mr Kennedy, Ms Nicholson, Ms Taylor and Ms Hargreaves. 40 minutes later, the claimant sent a further chasing email to the same people and adding Mr Ingram - 'Any of you can answer my question here. Why shouldn't I just write to client to warn them requesting information about me or having information about me provided by my employer is unlawful. I could also copy in Declan Doyle and Eddie Ingram'.

192 The next day, 12 January 2022, the claimant emailed Mr Elton, copying in everyone again. 'Dear Mark, You do not seem to be very responsive. Nothing from your end to even acknowledge emails. Anyway I have decided that I will communicate with client directly either in the evening or tomorrow morning if I do not hear anything from you by end of play today.'

Dismissal: 14 January 2022

193 The respondent considered the situation with the claimant had become increasingly unsustainable. He was sending numerous emails, sometimes as many as 10 a day, and insisting on copying in the CEO and various directors. The tone of the emails was frequently aggressive, demanding and rude. The HR team, and particularly Ms Taylor, who was now the first line of contact, was becoming very stressed. Several members of the HR team did not want to attend work for fear of receiving rude or multiple emails from the claimant. For example, in December 2021, the claimant engaged in a terse, rude and badgering exchange of emails with HR about some pay issues.

194 The decision to dismiss was taken by Mr Ingram. He had several meetings and conversations with other members of senior management and HR including the CEO, Mr Doyle, in late 2021 about the claimant's behaviour, which was seen as increasingly erratic and hostile. As Mr Ingram was a senior manager but had not yet had any significant dealings with the claimant, it was

decided that he was the best person to review the situation and decided on next steps.

195 Mr Ingram was briefed on the history by Mr Fitzpatrick and Mr Giles (former Axis management) and on more recent events by Ms Nicholson and Ms Taylor. He also looked at documents including those relating to the claimant's grievances and the detailed outcome letters, plus the other formal outcome letters. In addition, he was informed about the claimant's sickness absence, and the May 2021 Occupational Health report.

196 Mr Ingram decided to dismiss the claimant. Normally he would not dismiss an employee without holding a prior meeting to discuss the issues with him. However, Mr Ingram felt the claimant's behaviour to date showed a meeting would be completely futile. He also felt there was a real risk that, if invited to a meeting, the claimant would react in a way which posed a further risk to the company's commercial interests.

197 On 14 January 2022, Mr Ingram wrote to the claimant telling him that he was dismissed with immediate effect. This was because he considered there was a fundamental and irreparable breakdown in trust and confidence between the claimant and the company, and because he felt dismissal was necessary for protection of the company's business.

198 Mr Ingram took into account the claimant's health and the stress which grievance procedures can place on individuals, but he had severe concerns about the claimant's future conduct towards both colleagues and clients.

199 Mr Ingram said the claimant had quite rightly taken up grievance processes when he had concerns. The problem was that the claimant refused to accept the outcomes, even after the company went above and beyond its usual processes and policies. Mr Ingram was satisfied that the company had adopted a fair and reasonable approach in the management of both the claimant's sickness absence and his grievances. It had varied its regular procedures in an attempt to resolve the claimant's concerns. But unfortunately, the claimant's conduct led him to believe that the claimant would never accept his grievance had been concluded and that this would continue to be an issue which could not be resolved to the claimant's satisfaction. Even Ms Hargreaves had complained that the claimant had been insulting to her.

200 There was also the claimant's repeated and wilful refusal to comply with the company's reasonable management instructions not to contact colleagues and clients. The claimant had directly emailed the board despite being told by HR on numerous occasions not to do so. He had also been given clear instructions not to contact clients, but continued to say he would do so. A client had even threatened to terminate its contract with Bidvest if the claimant continued to harass them with emails about his grievances. Mr Ingram would not even name the client for fear that the claimant would contact them again.

201 The claimant had also harassed the HR team, often sending numerous emails in a day.

202 The claimant had refused to permit medical reports in the past and had linked matters to a 'satisfactory' conclusion of his grievances. Even after the recent Occupational Health report which the claimant did agree to, the claimant had declined to meet Mr Sayed to discuss the report while his concerns were outstanding. This had been unhelpful for the company in understanding any extra steps they should take.

203 The company had exhausted extensive grievance procedures, and it was clear from the correspondence that the claimant had distrust and disregard for the most senior executives in the company, and that there had been a breakdown in trust and confidence.

204 Mr Ingram felt there was no basis to believe the claimant would change his behaviour and the company had therefore also lost trust and confidence in him.

205 Mr Ingram concluded that he found 'the relationship and the underlying term of trust and confidence between you and the company to be fundamentally and irreparably broken. Accordingly I would be making the decision to terminate your employment on this ground alone.'

206 Mr Ingram said he had also to consider protection of the business. As he had said, he had no confidence that the claimant would stop contacting Bidvest clients and that had resulted in an actual threat from a client to cancel its contract with the company. Mr Ingram felt it was necessary to dismiss the claimant to safeguard client relationships.

207 Mr Ingram said he would usually invite someone to attend a hearing before reaching a decision to dismiss, but the circumstances of this case were unique. Over the years, the company had arranged numerous meetings to resolve these issues, but it was very clear that the claimant's position was firm and entrenched. A further meeting would not change anything or have any benefit. Also there was the risk to the business of the claimant contacting clients direct, contrary to instructions. Therefore he felt it necessary to terminate the claimant's employment with immediate effect and without prior warning to safeguard against further approaches. Mr Ingram expressed his regret at the decision

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Law

<u>Unfair dismissal</u>

208 The test for unfair dismissal is set out in section 98 of the Employment Rights Act 1996. Under section 98(1), it is for the employer to show the reason (or, if more than one, the principal reason) for the dismissal, and that it is either a reason falling within subsection (2), eg conduct, or some other

substantial reason of a kind such as to justify the dismissal of an employee holding the position which the employee held.

209 The reason for dismissal is 'a set of facts known to the employer, or it may be beliefs held by him, which cause him to dismiss the employee'. (Abernethy v Mott Hay and Anderson [1974] ICR 323, CA.)

210 Under s98(4) '… the determination of the question whether the dismissal is fair or unfair (having regard to the reason shown by the employer) 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 shall be determined in accordance with equity and the substantial merits of the case.'

211 We have reminded ourselves that the question is whether dismissal was within the band of reasonable responses open to a reasonable employer. It is not for us to substitute my own decision.

212 The range of reasonable responses test (or, to put it another way, the need to apply the objective standards of the reasonable employer) applies as much to the question of whether an investigation into suspected misconduct was reasonable in all the circumstances as it does to other procedural and substantive aspects of the decision to dismiss a person from his employment for a conduct reason. The objective standards of the reasonable employer must be applied to all aspects of the question whether an employee was fairly and reasonably dismissed. (Sainsbury's Supermarkets Ltd v Hitt [2003] IRLR 23, CA)

213 In Polkey, Lord Bridge said that a dismissal can be fair even though no consultation has taken place '… if the tribunal is able to conclude that the employer himself, at the time of dismissal, acted reasonably in taking the view that, in the exceptional circumstances of the particular case, the procedural steps normally appropriate would have been futile, could not have altered the decision to dismiss, and therefore could be dispensed with'.

214 'The test is an objective one: could a reasonable employer in the light of the facts known to him at the time have dismissed the employee without consultation? ….. Lord Bridge was not intending to impose a requirement upon an employer actually to direct his mind to the question of consultation.' Duffy v Yeomans & Partners Ltd [1993] IRLR 368, EAT

Disability

215 The protection against disability discrimination is contained in the Equality Act 2010. There is also 'Guidance on matters to be taken into account in determining questions relating to the definition of a disability'. This Guidance must be taken into account if relevant, but it does not impose any legal obligations in itself and it is not an authoritative statement of the law.

216 A person has a disability if he has a physical or mental impairment which has a substantial and long-term adverse effect on his ability to carry out normal day-to-day activities. 'Substantial' means more than minor or trivial (s212).

217 By virtue of Sch 1 para 5, an impairment is to be treated as having a substantial adverse effect on the claimant's ability to carry out normal day-to-day activities if measures are being taken to treat or correct it, and but for that, it would be likely to have that effect. 'Likely' means 'could well happen'. (Guidance, para C3; SCA Packaging Ltd v Boyle [2009] IRLR 746, HL.)

218 In J v DLA Piper UK LLP [2010] ICR 1052, EAT provides a useful discussion of the difficult boundary between when depression is and is not a disability, and the need to look behind labels such as 'depression', 'anxiety' and 'stress'. We also note its advice regarding flexibility over the order in which the stages of the definition can be addressed by a tribunal, although each stage must be addressed. The fact that the adverse effects have lasted at least a year tends to indicate there is a disability, but not necessarily. An entrenched attitude towards work is not a disability if there is no adverse impact on day-to-day activities. That is not to say that work-related stresses cannot cause a real mental impairment. (Herry v Dudley Metropolitan Council UKEAT/0100-1/16)

219 The EAT in Herry v Dudley Metropolitan Council referred to a class of case where a reaction to circumstances perceived as adverse can become entrenched; where the person concerned will not give way or compromise over an issue at work, and refuses to return to work, yet in other respects suffers no or little apparent adverse effect on normal day-to-day activities….A tendency to nurse grievances, a refusal to compromise .. are not of themselves mental impairments'. There must be evidence of adverse effect over and above an unwillingness to return to work.

220 B6 of the Guidance notes that a person may have more than one impairment, any one of which alone would not have a substantial effect. In such a case, account should be taken of whether the impairments together have a substantial effect overall on the person's ability to carry out normal day-to-day activities

221 Under s13(1) of the Equality Act 2010 direct discrimination takes place where, because of disability, a person treats the claimant less favourably than that person treats or would treat others. Under s23(1), when a comparison is made, there must be no material difference between the circumstances relating to each case. Under s23(2), where the protected characteristic is disability, the circumstances relating to a case include a person's abilities.

222 Section 15 of the Equality Act 2010 prohibits discrimination arising from disability. This occurs if the respondents treated the claimant unfavourably because of something arising in consequence of the claimant's disability. The respondent has a defence if it can show such treatment was a proportionate means of achieving a legitimate aim.

223 The tribunal must decide (1) whether the claimant was treated unfavourably and by whom; (2) what caused that treatment — focusing on the reason in the mind of the alleged discriminator (consciously or unconsciously); (3) whether the reason was 'something arising in consequence of the claimant's disability'. This only needs to be a loose connection and might involve a number of causal links. At this stage, it is an objective question which does not depend on the thought processes of the alleged discriminator. (Pnaiser v NHS England and anor [2016] IRLR 170)

224 The 'something, must be more than a trivial part of the reason for the unfavourable treatment. (Sheikholeslami v University of Edinburgh [2018] IRLR 1090, EAT.)

225 The respondent will not be liable under section 15 if it shows that it did not know, and could not reasonably have been expected to know, that the claimant had the disability.

226 In relation to the law, we also took into account the cases referred to in the respondent's written closing submissions.

Conclusions

Unfair dismissal

227 The respondent's reason for dismissal was (1) a fundamental and irreparable breakdown of trust and confidence between the claimant and the company (this reason would be enough on its own); and (2) in order to protect the company's business. The respondent believed the claimant had lost confidence in the company and its officers over a period of time, and the company had lost confidence in the claimant's willingness to let issues go and to move forward. These two reasons, taken alone or together, amounted to 'some other substantial reason' of a kind which can potentially justify dismissal.

228 The next question for the tribunal is whether the dismissal was in fact unfair, applying the band of reasonable responses test.

229 We find that the dismissal was not unfair. A reasonable employer could have dismissed the claimant for those reasons, taken alone or together. We will now explain why.

230 The fundamental problem was that the claimant had lost confidence in the good faith and competence of company management and HR. As a result, he became unmanageable. He would not accept the outcome of investigations into his complaints or appeal outcomes. He was unable to let old issues go. He came back to them time and time again. When his employer investigated and gave him answers, he responded with more questions and challenges. Many of the matters he kept raising had taken place two or three

years previously. The relationship became worse and worse over time, with increasing numbers of hostile emails from the claimant going over the same ground

231 In addition to that, the claimant constantly expressed his distrust of the variety of managers who tried to resolve the issues. For example in January 2019, the claimant emailed the CEO of Axis to say 'From the very little communication I am receiving from our management and Human Resources I am beginning to question the integrity and impartiality at this instance'. The claimant did not take up Mr Evans' offer to meet in person to discuss the findings in February 2019 into the claimant's concerns because he had lost trust in him. On 12 February 2019, the claimant told Mr Evans that Mr Bishop had either 'lied' to him or was unaware of the CCTV incident. He went on to suggest the letter to Mr Rogers was 'fabricated' to appease the client. The claimant told Mr Evans it was 'pathetic' for him to have taken 2 months to come up with a 'nonsensical' response. He intentionally ignored Mr Evans' letter seeking an Occupational Health referral. On 10 March 2020, the claimant told Mr Levine that he had 'totally lost faith' in HR and the Security Management team to carry out any true investigation into the matter of the missing DOB. When appealing the rejection of his grievance in February 2021, the claimant said the investigation was 'totally biased' and everyone making decisions and coming to conclusions in the investigation was likely to be 'complicit' in all the actions. In February 2021, when Ms Heeley contacted him in relation to the grievance appeal, the claimant said the grievance procedure hadn't been properly followed and 'do not waste my time as it has been so far by Axis since December 2018. If you want a full on discussion rather than being narrow-minded and biased, we can arrange that. … On the balance of your behaviour you cannot be trusted with carrying out anything with prejudice'. On 22 April 2021, the claimant asked that John Sefton, Michelle Farrelly, Benjamin Bishop; Dilwyn Evans; John Fitzpatrick no longer be given access to his information. On 7 June 2021, the claimant emailed the new CEO of Bidvest to say the security division was corrupt and that he had been 'ganged up on, lied to, lied about, breached my confidentiality, my human rights have been violated, defamation of character to name a few. There is constant nepotism within the management, protecting each other without remorse or regard for the law of the land.' In September 2021, the claimant referred to Ms Mhurchi's 'poor personal judgment'.

232 These were not isolated expressions of frustration. Virtually every interaction with virtually every manager or HR person designated to deal with the claimant's case eventually led to distrust.

233 The claimant's tone, including to managers very senior to him, was repeatedly challenging, unconciliatory and simply rude. The tone and quantity of his emails became oppressive for the HR team. The claimant deliberately disregarded reasonable instructions not to continually email senior management and clients.

234 The claimant's mental health was badly affected by his preoccupation with these issues, but the matter had become circular. He would not return to work

and he would not even attend meetings (with few exceptions) to discuss his health until his work concerns were resolved. But unfortunately, this would have meant agreeing with the claimant's position on everything.

235 In turn, the respondent eventually lost trust and confidence in the employment relationship. Resolution was not possible because the claimant would not attempt to understand his employer's point of view or let things go.

236 The respondent had on numerous occasions tried to ascertain the claimant's concerns, investigate, talk them through with the claimant, and give him explanations. None of this worked. The claimant just identified more perceived failings. It is not possible for an employment relationship to work in these circumstances and there was no realistic likelihood that matters would improve. On the ground of trust and confidence alone, a reasonable employer could have therefore have dismissed the claimant.

237 Further, a reasonable employer could have dismissed the claimant because of the potential damage to its business. The claimant was contacting YPML and seeking to contact its shareholders. He was told not to do so. He would not listen to reason and he announced his determination to contact whoever he wanted. There came a point where a client told the company that its contract was at risk because it did not want to have these badgering emails from the claimant

238 We have thought very carefully about the fact that there was no meeting before dismissal. That did concern us. However, we find that the Mr Ingram, in the light of the facts known to him at the time, acted reasonably in taking the view that, in the exceptional circumstances of this particular case, the procedural steps normally considered appropriate would have been futile, could not have altered the decision to dismiss, and therefore could be dispensed with.

239 The respondent had already tried to discuss matters with the claimant on a great many occasions. Each time, his reaction was to express distrust of managers who did not agree with him. Sometimes he challenged the process. At other times, he would not come in to meetings. He frequently expanded his grievances as the answers came back. The complaints never came to an end.

240 The respondent had allowed the claimant's request to have different managers and HR deal with his case when he distrusted the original suggestion. That did not help. We do take into account Mr Fitzpatrick's unprofessional email, accidentally copied to the claimant, talking about Mr Evans giving the claimant 'ammunition'. We can see why the claimant did not want Mr Fitzpatrick to be the person looking into his grievance. But that request was adhered to and the issue with Mr Fitzpatrick was far from an isolated problem.

241 By January 2022, and in fact long before, the claimant was completely convinced that most if not all of his managers and HR were biased, corrupt and incompetent. Mr Ingram could reasonably take the view that there was no

point waiting for the independent Hargreaves report as there was nothing it could say which would change the claimant's view of his employer and whether he trusted his managers, or change his behaviour. In any case, the claimant did not want to know whether fair grievance procedures had been followed, which was the Hargreaves brief. He wanted to be vindicated on his substantive complaints, which he was adding to all the time.

242 The claimant's conduct had deteriorated even further in the few months leading up to the dismissal, even though he knew an independent report had been commissioned. He was also escalating his attempts and threats to contact the client and its shareholders. There was also the client complaint which Mr Ingram had received. Just 2 days prior to the dismissal, the claimant had emailed Mr Elton to say that if he did not hear anything from hm by the end of the day, he would immediately communicate directly with the client. A reasonable employer could take the view that, as the claimant was blatantly disregarding instructions not to communicate with the client, as he was using the possibility as a threat if he did not receive instant answers to his emails, and as the client had made a complaint, meeting the claimant was pointless, would almost certainly have made things worse, and dismissal was the only option. It would not stop the claimant pestering the client (and it did not in fact do so), but it would at least mean the respondent could tell the client it had taken action.

243 For the same reasons, we find it reasonable to have considered that it would have been utterly futile to have offered the claimant any appeal.

244 We thought about the fact that the claimant had mental health difficulties, which a reasonable employer should have taken into account to some extent. However, Mr Ingram did take this into account. Unfortunately the claimant had been unwilling to meet to discuss the Occupational Health report which he had belatedly agreed to, until his concerns were resolved. Which brought matters full circle again. In any event, given the claimant's pattern of behaviour over several years, Mr Ingram could reasonably take the view that there was still this insoluble problem of the breakdown of trust and confidence and everything that flowed from that.

245 For all these reasons, we find the dismissal was unfair.

Disability

246 We find that the claimant had the disability of 'anxiety /depressive disorder'. Although the claimant did not obtain a medical report specifically for the tribunal, the documents we do have are strongly supportive of the claimant's evidence.

247 His impairment was 'anxiety with depression'. His GP was using the word 'disorder' on fit notes from February 2021, having referred to 'anxiety with depression' prior to that. The Camden Primary Care letter in February 2022 says the claimant has an established diagnosis of 'recurrent depressive disorder'.

248 Regarding the impact on day-to-day activities, the claimant has been unable to work since 2018. He has been prescribed anti-depressant medication since 2018. He was referred for counselling on several occasions by his GP or treating kidney consultants. The iCope letter in 20 July 2018 had carried out tests which identified 'severe symptoms' 'recently'. The claimant consistently reported tiredness. The substantially affected day-to-day activities were, as a minimum, ability to work, ability to concentrate, and ability to sleep. These were referred to in several of the contemporaneous letters and confirmed by the claimant in his oral evidence. All this was with the benefit of medication and counselling (although we take account of the possibility that medication may also have created its own difficulties).

249 This substantial adverse impact of the claimant's anxiety / depressive disorder was long-term. It lasted more than a year, ie from at least May 2018. Although the degree of severity was worse at some times than others, eg when he was referred for counselling, he remained unable to work and he remained on medication.

250 We considered whether, as the respondent argued, this was a situation such as in Herry v Dudley Metropolitan Council. In our view, it is not. The claimant certainly did have entrenched attitudes about work, but he had an impairment beyond this. The doctors did not simply refer to 'stress'. They referred to 'anxiety and depression' and 'depressive disorder'. The claimant referred to a number of factors which he considered had led to his anxiety and depression, and we find it credible that these were contributing factors, in particular his physical health problems (septicaemia and kidney disease), and possibly also the prior attack by a demonstrator entering the building. All of this preceded the work events about which he became entrenched in 2018 (accepting of course that his absence was triggered by the May 2018 grievance).

251 We have been careful to reach a view regarding the impact on the claimant at the time of his dismissal and also at the time of the matters leading to his dismissal (essentially throughout his employment) as opposed to the impact now. The claimant told us in the tribunal about his current state of health, and we also saw for ourselves at certain times when the claimant was visibly shaking. However, we have put this out of our head.

252 As regards the impaired kidney function, this was an impairment. The key question is whether it had a substantial (non-trivial) adverse effect on his ability to carry out day-to-day activities at the relevant time. The adverse effect which the claimant described was tiredness.

253 Certainly by now, the claimant's kidney disease has a substantial adverse effect in that the claimant needs to sleep all the time. However, this is some time later. We can make some inferences from the Royal Free table. The claimant's kidney disease was diagnosed as acute in September 2022, when he was in the 22-26 range. The claimant says his kidneys are now functioning at 20 – 26%, which is consistent with the table. At present, the claimant says it

means he needs to sleep irregularly and all the time, requiring two naps / day. We accept this evidence. At the termination date, the claimant's kidneys were also at 20 – 26. It is therefore likely and credible that he was also very tired at that point. The claimant had told us that from the end of 2018, his kidney disease was painful and interfering with his sleep timetable. We did think about the fact that the claimant was able to send out a large number of emails and analyse documents at this time and indeed in previous months. We do not think this in itself means he cannot have been tired. The claimant was driven by his obsession with what he felt was mistreatment at work and breach of data protection.

254 The claimant has been on medication to control his blood pressure from the outset. He says that his kidneys would be further damaged had he not been taking such medication. This may be right, but we do not have any medical evidence that this would have happened in the claimant's case. Therefore we do not make that assumption. We will assess the adverse impact of his kidney impairment on the claimant as it was, while taking the medication, and not any deemed more severe effect without medication.

255 The claimant said in his impact statement that the blood pressure medication (Doxazosin and Losartan) has side effects such as regular abdomen pain, swollen feet, nausea, diarrhoea and headaches. This is bound to have affected his ability to carry out day-to-day activities but he did not give any further detail or spell out affected activities, so we do not rely on that. The only matter which the claimant emphasised was his sleep and constant tiredness.

256 If the claimant's kidney disease did not have substantial adverse impact at any relevant time, the question is whether it was likely to go on to do so in the future. Although we can see a deterioration in kidney function, we have no medical evidence at all as to whether it will get any worse. Therefore we cannot make this finding, and do not rely on that.

257 On the balance of probabilities, we find that the claimant's impaired kidney function was a disability at the time of his dismissal and from the end of 2018. It had a non-trivial effect, either taken alone, or together with his anxiety and depression on his sleep patterns and he was tired all the time. This lasted more than 12 months.

258 The claimant's impaired kidney function was therefore also a disability.

259 Finally on this we would say that even if the two impairments did not individually have substantial adverse effects, jointly they did.

<u>Knowledge: did the respondent know – or ought it reasonably to have known – that the claimant had the disability of anxiety and depression?</u>

260 The respondent knew or ought to have known at the relevant time that the claimant was disabled both with an anxiety/depressive disorder and with impaired kidney function.

261 The respondent was aware that the claimant had been continuously certified as unfit for work by his GP from May 2018 by reason of 'anxiety and depression', and from 22 February 2021 the word 'disorder' had been used. In May 2021, the OH report said it was 'likely' that the claimant fell under the Equality Act (ie she was referring to meeting the definition of disability). The report also refers to poor kidney function and being under the care of a Specialist Renal Unit and Urologist for kidney function The report says the claimant is limited by his underlying health conditions and continues to experience mental health symptoms. At this point, the claimant had been signed off sick for nearly three years and the respondent should most certainly have known that he was disabled.

262 By the time of the decision to dismiss in January 2022, Mr Ingram knew the claimant had been off sick with anxiety / depression for nearly 4 years; that his GP had used the word 'disorder' from February 2021; that he was also under the care of a Specialist Renal Unit and Urologist regarding his kidney function; and that Occupational Health had said he was limited by underlying health conditions, continued to experience mental health symptoms, that there was no foreseeable return date for these reasons and it was likely that he fell under the Equality Act although strictly-speaking that was a legal decision. We were surprised at Mr Ingram's assertion in evidence that he had 'no evidence that he might be disabled' at the point of dismissal and that the OH report did not suggest to him that there was any disability. We find that Mr Ingram did know the claimant was disabled. Alternatively, if he did not know, he ought reasonably to have known.

263 Mr Ingram told us, when asked, that he had been on training regarding disability discrimination in about 2019. We question what that training comprised. We do not find credible his assertion that the OH report did not even suggest to him that there was any disability.

Direct discrimination

264 We find that the dismissal of the claimant was not direct disability discrimination. There is no evidence at all that he was dismissed because of his anxiety / depressive disorder or because of his impaired kidney function. If someone who was not disabled had behaved in the same way, ie refusing to accept the outcome of grievances, expressing constant distrust and disapproval of management and HR, disregarding instructions not to copy in the board, disregarding instructions not to keep contacting the client, writing numerous emails in an accusatory and rude tone, the respondent would still have dismissed them in the same way. There is no evidence at all to suggest otherwise.

Discrimination arising from disability

265 The claimant says he was dismissed either because of his sickness absence record or because of his need to communicate repeatedly and in volume with management. He says each of these reasons was something

arising from his disability and therefore unlawful under section 15 unless the respondent can justify the dismissal.

(1) Sickness absence record

266 We find that the claimant's absence record by the time of the dismissal was due to his disability. The reason was his anxiety / depressive disorder, at times combined with his impaired kidney function.

267 However, the claimant was not dismissed because of his sickness absence record. He was dismissed for the reasons we have already set out, ie the fundamental and irretrievable breakdown of trust and confidence between him and the company, and also because of the risk to the company's commercial relationships.

(2) *The need to communicate repeatedly and in volume with management*

268 Was the claimant dismissed because of his need to communicate repeatedly and in volume with management? We would say that was only a small part of the reason. The fundamental reason was that trust and confidence had broken down; that he would not accept the grievance outcomes and move on; that he would not obey reasonable management instructions; that he was rude and disrespectful; that he was copying in board members when told not to; he was upsetting the client; and harassing the HR department. The aspect of repeated and voluminous correspondence might apply to the emails to HR.

269 Was the claimant's need to communicate repeatedly and in volume with management to obtain a response to his queries something arising in consequence of his disability? We do not have any medical evidence to support this. The Occupational Health report does not refer to any need as a result of anxiety to send voluminous correspondence. It does refer to the claimant's anxiety relating to work rather than personal issues. We think it is possible that the claimant's large number of emails was a result of that anxiety. But it is equally possible that they were the result of a rigid state of mind whereby he could not bring himself to accept what he perceived as injustice or wrongdoing, and was determined to challenge his employer and prove he was right. That state of mind might in turn have caused the anxiety as opposed to being the result of it. Without the help of some level of evidence, even a GP letter, we cannot find that the voluminous correspondence arose in consequence of his anxiety/depressive disorder. The rude and accusatory tone in the emails does not obviously strike us, in the absence of medical evidence, as necessarily the result of anxiety, as opposed to the claimant simply believing he was right.

270 Even if we did consider that the claimant was substantially dismissed because of something arising from his disability, the something being the voluminous correspondence, the claim would fail, because the respondent proved to the tribunal that dismissal was a proportionate means of achieving a legitimate aim. This is the most important point.

271 The respondent's aims were protecting its commercial relationship with clients; preventing harassment of HR staff, managers, senior employees, shareholders and clients; ensuring a safe and appropriate working environment for its employees; and smooth operation of its business functions. These were all legitimate aims.

272 The question then is whether it was proportionate to dismiss the claimant in order to achieve those aims. Unfortunately we find that it was. We appreciate that the impact on the claimant of losing his job was severe. He cared about his job, and staying at home without working was bad for his mental health. However, the claimant was not listening when he was told matters were closed; he was ignoring requests and then instructions not to copy in senior management and not to contact clients; he was sending numerous accusatory and rude emails, often in quick succession, and often with threats or ultimatums. He could not be dissuaded from this. For a long time he had resisted an Occupational Health referral and more than a couple of welfare meetings, wanting to sort out his work issues first. Even when he belatedly agreed to an Occupational Health referral, he would not discuss the report afterwards until his work issues were resolved. But there was no prospect of his work issues ever being resolved because he would not accept any answers, would not let things go, and kept delving further and adding more questions and complaints. He had become completely unmanageable. The company's aims were important. It had already been threatened with a loss of one contract. HR employees were getting stressed. Senior employees including the CEO were being harangued. The claimant ended up expressing his distrust for virtually all managers and HR people who tried to resolve matters. We cannot see any other way in which the respondent could realistically have achieved its legitimate aims, and dismissal was certainly proportionate.

273 For these reasons, the section 15 disability discrimination claim is not upheld.

274 As the discrimination claims have failed, we do not need to consider any issue of time-limits.

Employment Judge Lewis – 9th October 2023

Sent to the parties on:

09/10/2023

For the Tribunals Office