**RM**

# EMPLOYMENT TRIBUNALS

**Claimant:** **Mr Mohammed Yusuf Ali**

**Respondent:** **Network Rail Limited**

**Heard at:** **East London Hearing Centre**

**On:** **8 February, 1, 2 and 3 March 2022 (via CVP)**
**17 June 2022 (in chambers)**

**Before:** **Employment Judge Barrett**
**Members:** **Mrs Legg**
**Dr Ukemenam**

**Representation**
Claimant: Ms Amanda Hart, Counsel
Respondent: Mr Matthew Sellwood, Counsel

# JUDGMENT

**The judgment of the Tribunal is that: -**

1. **The Claimant was fairly dismissed. His claim for unfair dismissal is not well-founded and is dismissed.**

2. **The Claimant was wrongfully dismissed in breach of his contractual entitlement to notice pay.**

3. **The Claimant's dismissal breached section 15 Equality Act 2010 and his claim for discrimination arising from disability is well-founded.**

4. **The Claimant's claim for failure to make reasonable adjustments is not well-founded and is dismissed.**

5. **A 3-hour remedy hearing will be listed for the first available date convenient to the parties and the Tribunal.**

# REASONS

## Introduction

1. The Claimant worked for the Respondent as a Senior Technical Officer from 6 September 2012 to 11 July 2019 when he was dismissed without notice for alleged gross misconduct, namely driving at excessive speed. The Claimant says that his driving was affected by his diabetes. After an early conciliation period from 29 July to 29 August 2019, on 10 October 2019 he presented a claim form making complaints of unfair dismissal, wrongful dismissal, failure to make reasonable adjustments and discrimination arising from disability.

## The hearing

2. The hearing was originally listed to be heard in May 2020 and postponed as a result of the coronavirus pandemic. A four-day hearing listed to commence on 8 February 2022 could not be fully accommodated due to judicial availability. After a discussion, the parties and the Tribunal agreed to use 8 February 2022 as a reading day with evidence and submissions to be heard on the relisted dates 1, 2 and 3 March 2022. Evidence and submissions were completed during that time, and the Tribunal reserved its decision. A day in chambers for deliberation was listed on 17 June 2022.

3. The Tribunal was presented with a bundle of 491 pages, together with a helpful agreed chronology, cast list and reading list. The Respondent added a further 9 pages which were admitted without objection.

4. The following witnesses gave evidence on behalf of the Claimant:

    4.1. The Claimant himself;

    4.2. Mr Russell Knott, who was the Claimant's trade union representative at the appeal stage.

5. The following witnesses gave evidence on behalf of the Respondent:

    5.1. Mr Brian Doolin, Workforce Health, Safety and Environment Advisor, who undertook a 'level 2' investigation into the Claimant's conduct;

    5.2. Mr Andrew Keane, Performance and Assurance Engineer, who undertook the disciplinary investigation into the Claimant's conduct;

    5.3. Mr Allan Bush, Infrastructure Maintenance Services Manager, who was the disciplinary decision-maker;

    5.4. Mr Gy Harness, Acting Infrastructure Maintenance Engineer, who heard the Claimant's appeal.

6. After the close of the evidence, Ms Hart provided written legal submissions, to which Mr Sellwood added an addendum. Each counsel agreed that the law as stated by the other was correct. Oral closing submissions were made on behalf of each party.

## The issues

7. The issues were discussed at a preliminary hearing on 2 March 2020 and contained in an agreed list of issues. One issue in that list (disability status) had been resolved by the time of a second preliminary hearing on 12 May 2020. Ms Hart clarified that the 'something arising' for the purposes of the claim for discrimination arising from disability was the Claimant's low blood sugar level which affected his driving, resulting in speeding for which he was dismissed. Mr Sellwood confirmed that the aim relied upon in defence to that claim was 'the safety of the Claimant, his colleagues and members of the public'. It was agreed that remedy issues other than *Polkey* contributory fault, would be decided at a further hearing if required. Subject to those changes, the list of issues for the Tribunal to determine was as follows:

*Unfair dismissal*

7.1. Was the Claimant dismissed for a potentially fair reason pursuant to section 98(2)(b) of the Employment Rights Act 1996 (ERA), namely misconduct?

7.2. Did the Respondent act reasonably in treating the Claimant's conduct as a sufficient reason for dismissing the Claimant, in that:

a) Did the Respondent form a genuine belief that the Claimant was guilty of misconduct?

b) Did the Respondent have reasonable grounds for that belief?

c) Did the Respondent form that belief based on a reasonable investigation in all the circumstances?

7.3. Was the dismissal of the Claimant fair in all the circumstances? In particular, was the dismissal within the band of reasonable responses available to the Respondent?

7.4. Did the Respondent treat the Claimant inconsistently in dismissing the Claimant when compared with other employees in the same or materially similar circumstances?

7.5. Did the Respondent follow a fair procedure when dismissing the Claimant? Did the Respondent follow the ACAS Code of Practice?

7.6. If the Claimant's dismissal is found to be unfair, did the Claimant's conduct cause or substantially contribute to his dismissal? If so, by what proportion would it be just and equitable to reduce the compensatory award?

7.7. If the Respondent failed to follow a fair procedure, can the Respondent show that following a fair procedure would have made no difference to the decision to dismiss? If so, by what proportion would it be just and equitable to reduce the compensatory award?

*Wrongful dismissal*

7.8. Was the Claimant dismissed for gross misconduct entitling the Respondent to terminate his contract without notice?

*Discrimination arising from disability*

7.9. Was the Claimant treated unfavourably? The Claimant states that the unfavourable treatment was his dismissal.

7.10. If so, what was the reason for that treatment? The Claimant states that the unfavourable treatment arose in consequence of his disability, namely his fluctuating blood sugar levels and difficulty in managing his condition which caused a speeding incident on 14 February 2018.

7.11. In treating the Claimant in that way what aim was the Respondent seeking to achieve? The Respondent says its aim was the safety of the Claimant, his colleagues and members of the public.

7.12. Was that aim legitimate?

7.13. Was the treatment a proportionate means of achieving that aim or was there a less discriminatory way of achieving it? The Claimant states that the Respondent should have issued a warning; trained him; and/or provided regular Occupational Health advice.

7.14. Was the Respondent aware that the Claimant was disabled (or could it have been reasonably expected to know)?

*Failure to make reasonable adjustments*

7.15. In respect of the Claimant's alleged disability, did the Respondent fail to comply with its duty to make reasonable adjustments under sections 20 and 21 of the Equality Act 2010? To determine this:

a) What is the provision, criterion or practice (PCP) relied upon? The Claimant states that this is the requirement for the Claimant to drive.

b) Was the PCP in fact imposed on the Claimant?

c) Did the PCP place the Claimant at a substantial disadvantage when compared with non-disabled employees? The Claimant states that he was placed at a substantial disadvantage because his condition can affect his driving ability and he struggles to cope with managing his disability which may impact on his ability to drive including through a lack of knowledge about managing his condition and driving.

7.16. Did the Respondent know or, if not, could it reasonably been expected to know, that the PCP alleged placed the Claimant at the substantial disadvantage?

7.17. If the Claimant was subject to a PCP that placed him at a substantial disadvantage when compared with non-disabled employees:

a) Did the Respondent make reasonable adjustments?

b) Were there any adjustments which: i. the Respondent ought reasonably to have made; and ii. they failed to make? The Claimant states that reasonable adjustments would have included training the Claimant in managing his condition; regular assessments by Occupational Health; and not dismissing the Claimant.

c) If so, what difference, if any, did the failure to make adjustments make?

*Jurisdiction*

7.18. Was the Claim submitted outside of the applicable time limit in respect of the Claimant's claims relating to events which took place on or before 10 June 2019?

7.19. If so, do all of the alleged acts or omissions which the Claimant refers to in the Claim form part of a chain of continuous conduct which ended within the applicable time limit of the Claim being submitted?

7.20. If not, would it be just and equitable for the Tribunal to extend time to hear that part of the Claim which relates to the alleged acts or omissions which occurred outside of the applicable time limit?

## Findings of fact

*The Claimant's job*

8. The Claimant's job role as a Senior Technical Officer was a safety critical role, and involved quality control activities in the office, on rail tracks and by the roadside. He had supervisory responsibilities and was responsible for the safety of his colleagues and equipment on site.

9. When the Claimant joined the Respondent, he disclosed that he had Type 1 diabetes. This was well-known to his line manager and colleagues. For example, he was not allocated "distant look-out" duties because he was known to be a Type 1 diabetic. He was allowed time to inject insulin when required. However, there was no formal discussion or agreed plan between the Respondent and the Claimant regarding what adjustments he might require for his diabetes. The Claimant drove regularly for work. He did not suggest to the Respondent that diabetes could affect his driving.

*The Respondent's policies*

10. The Respondent has a short policy document, 'Our Lifesaving Rules', which sets out essential safety rules. One of these is to "*Always obey the speed limit and wear a seat belt".*

11. That rule is supported by a longer policy document which sets out how a speeding breach should be dealt with, 'A Guide to lifesaving rule investigation: Always obey the speed limit'. The Guide provides that an investigation involves evaluating the available sources of evidence, identifying the unsafe act (usually *"driving in excess of the speed limit"*), and determining the *"behavioural cause"* of the act. In relation to the latter, the investigator is asked to consider whether the action was deliberate (in the sense that the driver was aware of the limit and intended to speed) and whether the act was *"well-intentioned",* which is defined as *"whether there was a perceived company benefit".* If not well-intentioned, the act may be categorised as a *"reckless contravention".* A table sets out the relevant factors for the investigator to consider, including the vehicle condition, and whether the driver was fatigued at the time.

12. The Guide further provides that a speeding incident would ordinarily merit a 'level 1' investigation, except where the incident involved a speed 20 mph or above in

excess of the speed limit for the road, in which case a 'level 2' investigation must be undertaken. In relation to speeding incidents 20 mph or above in excess of the speed limit the Guide says:

***"20mph and above the speed limit***

*There are special arrangements for speeding incidents of 20mph or above the speed limit. For these incidents a slip in concentration or a lapse in judgement is not a reasonable conclusion for such an excessive breach and where there is no valid mitigating circumstance as shown in the table below then this will be deemed a 'reckless contravention'. We do not believe that any of us driving over 20 mph in excess of the speed limit would not know.*

*Drivers who have been identified as being involved in a speeding incident of 20mph or above the speed limit should be suspended from driving duties. It is the line manager's responsibility to do this and the lead investigator should check that this has been done.*

*…*

***Determining the behavioural cause for 20mph and over speeding incidents***

*It is not normally credible for drivers to claim they did not know they were speeding where the speed is this far over that permitted.*

*As a speed 20 mph or above over the speed limit significantly increases the risk of an accident and the severity of the consequences then this cannot normally be considered well intentioned, therefore without verified, mitigating circumstances the behavioural cause will normally be 'reckless contravention'.*

*Valid mitigating circumstances for 20 mph or above over the speed limit incidents are limited to mechanical failure of the vehicle leading to the individual not being able to control the speed (action is not deliberate) or where a perception of 'company benefit' can be evidenced (and therefore well intentioned).*

*This approach should* ***not*** *be confined to such extreme cases as 20mph and over the limit. Where there is evidence that the driver intended to break the lifesaving rule and there are no valid mitigating circumstances then the outcome should be the same, ie 'reckless contravention'."*

13. The final step is for the investigator to decide what action should be taken to mitigate the risk. Where there is a 'reckless contravention', the investigator's action will be to recommend the employee in question undergo a disciplinary investigation. By contrast, a mere contravention, slip, lapse or mistake would result in the employee being sent to a speed awareness course and risk assessed.

14. The Guide was updated in July 2018, but the guidance remained materially the same.

15. Throughout the time period relevant to this case, the Respondent's 'Principles of Fair Culture' policy applied to an alleged breach of a Lifesaving Rule. This meant that after the initial investigation (sometimes referred to as a 'fair culture investigation') the investigator's recommendation would be considered by an independent Fair Culture Panel. A 'Fair Culture Flowchart' sets out the matters

for the panel to consider: whether the action was deliberate, whether it was well intentioned, and whether it was a *"reckless contravention for personal benefit".*

16. So, a disciplinary investigation into a speeding offence would only commence if the initial investigator found there to have been a 'reckless contravention' and the independent panel made a recommendation to commence a disciplinary investigation. The Tribunal noted this made for a convoluted system with duplication of investigation.

17. The Respondent's Drivers Handbook provides:

"*Fair Culture will always apply, and everyone can expect a fair investigation that will identify the root cause of any lifesaving rule breach. There is no presumption of guilt and any mitigating circumstances will be taken into account. Where an investigation finds no valid mitigating circumstance for speeding offences of 20mph or more over the speed limit, a slip in concentration or a lapse in judgment is not a reasonable conclusion for such an excessive breach. The individual will have been aware of the speed at which they were travelling.*

*Such events will now be treated as a reckless contravention, may be considered gross misconduct and may lead to disciplinary action. A safe driving culture should be embedded; exceeding the speed limit is never safe. To support this, Network Rail will consider such 20 mph and over speeding incidents to be gross misconduct under the disciplinary process*."

18. The Respondent's disciplinary policy provides that examples of gross misconduct include "*Serious infringement of health and safety rules*" and "*Serous [sic] negligence which causes or might cause unacceptable loss, damage or injury*".

*The incident on 14 February 2018*

19. The Respondent accepts that the Claimant has given a truthful account of the events of the night of 13 to 14 February 2018.

20. On 13 February 2018, the Claimant started a night shift at 9.30pm. He did some paperwork in the office in Barking before travelling to a worksite at Southend East station with his colleague Mr Scott Smith. Mr Smith drove on the way there. They were using a rental van rather than the Claimant's usual vehicle. Unlike vehicles owned by the Respondent, it was not fitted with a speed limiter or a VTS tracker which would alert the driver to a speed limit breach. On the way, the Claimant and Mr Smith noted that there were roadworks on their usual route between the site and the depot (the A13).

21. At the site, the Claimant took the role of Controller of Site Safety ('COSS') which meant he was responsible for ensuring that the site and the people working on it were safe. He gave a safety briefing to the team before proceeding to work on the track with colleagues.

22. The Claimant began to feel some symptoms of low blood sugar while he was working on the track, including weakness in his legs and fatigue. He realised that he had forgotten his blood glucose monitor which he normally carried with him. He did have with him Lucozade energy tablets, which he would commonly use to boost his blood sugar levels when required. From experience, he knew that taking energy tablets would normally rectify a mild hypoglycaemic episode within 5

minutes. This had worked effectively each time he had used them in the past. He took some energy tablets while on the track. He did not tell his colleagues that he was suffering from symptoms of low blood sugar.

23. When the work was completed, the Claimant's team left the track. The Claimant and Mr Smith got back in their van to return to the depot. The Claimant could still feel the effects of low blood sugar. He attributed this to having taken insufficient energy tablets to counteract the effect of the physical effort he had expended working on the track. It was the Claimant's turn to drive. Mr Smith said he was tired. The Claimant did not tell Mr Smith that he had been suffering from symptoms of low blood sugar. He took another energy tablet when he got into the van, taking the driver's seat. He thought that his blood sugar level would quickly correct having taken the additional tablet. His decision-making was not at that point affected by low blood sugar; he made the decision to drive because he felt it was fair to do his share and he believed his condition would improve shortly. They set off at approximately 2am on 14 February 2018.

24. Because of the roadworks, the Claimant used the satnav on his phone to redirect his route. As a result, he drove back to the depot via the A127, a route which was unfamiliar to him. During the journey, the Claimant began to feel hot and opened the window. He looked across to ask Mr Smith if he felt warm and saw he had fallen asleep. The Claimant felt weakness in his legs and felt drowsy. He realised that the tablets he had taken already had not corrected his low blood sugar level and his condition was deteriorating. He took more energy tablets as he drove. By this point, his low blood sugar was affecting his decision-making ability and he was not thinking clearly enough to realise that he ought to drive to a safe stopping place and pull over.

25. The Claimant tried to concentrate on driving, but his concentration was adversely affected by his low blood sugar level. He was driving along a dual carriageway where the speed limit dropped from 60 mph to 40 mph. As a result of his impaired concentration, he did not see the sign that would have informed him of the need to reduce his speed. As the rental van did not have a VTS tracker, there was no 'dinging' noise to alert the Claimant either. A speed camera recorded him driving at 62 mph in a 40-mph area. Afterwards, he could not remember the latter part of the journey, or any speed camera flashing, suggesting that his focus had been severely impaired.

*Events following the speeding incident*

26. Following the incident, the Claimant attributed the problem to the energy tablets having been stale (the packet had been opened prior to the evening in question). He also later realised that the incident was the first indication that his blood glucose management was declining after a long period of stability. This realisation was prompted by him suffering further uncontrollable hypoglycaemic episodes. He asked his GP for a referral to a specialist diabetes clinic, having not been under specialist care since he graduated from his paediatric diabetes clinic. He was given a new insulin and blood glucose monitoring regime and subsequently attended a diabetes management course.

27. In March 2018, the Claimant received a letter from the police stating that he had exceeded the speed limit by driving at 62mph in a 40mph zone at 02:36 on 14

February 2018. He did not contest the matter and was fined £120 and issued 3 penalty points.

28. The Claimant reported the letter to his line manager on his next shift. He was suspended from driving the Respondent's vehicles pending a Fair Culture investigation. This was standard practice for any allegation of speeding above 20mph. He remained in his safety critical role with other colleagues taking over his usual driving responsibilities.

*The Fair Culture investigation*

29. Mr Brian Doolin was allocated to undertake the investigation into the Claimant's speeding incident. It was a 'level 2' investigation because the Claimant had exceeded the speed limit by over 20 mph. He interviewed the Claimant on 16 March 2018. Both parties agree that the minutes of that meeting are an accurate record.

30. The Claimant was accompanied by his trade union representative. He explained that he and Mr Smith had worked a night shift and attended a work site, that Mr Smith had driven there, and he had driven back. He told Mr Doolin that he had been unfamiliar with the route and using his phone satnav, and that the van did not have a VTS tracker to beep at the speed limit. When asked if he knew why he was going so fast, he replied, "*no I don't my diabetes makes me distracted at times*". He added, "*That night I had taken a Lucozade tablet to boost my energy levels up but I don't think they'd really kicked in*." He accepted he knew he was *"a bit low"* before the incident took place. He said he had not been in a rush or a hurry. He expressed remorse, saying *"I need to learn from this. It's no joke it's really not. I've lost friends due to Road Traffic Collisions so I should know better."*

31. Mr Smith was also interviewed, although the date of his interview was not recorded. He said he could not remember the journey, or the route taken, although he confirmed it was not the route they would normally take.

32. Mr Doolin completed his report on 3 May 2018. While otherwise thorough, the report contained two significant errors. First, it was recorded that the stretch of road concerned was a single carriage road when in fact it was a dual carriageway. That is relevant because it would have been more obvious there was a reduced speed limit on a single carriage road. Secondly, the report stated that "*The driver was familiar with the area and the road*" and that he *"knew the A127 was 40mph"*. This was incorrect; in fact, the Claimant had been driving on an unfamiliar route at the time and the route had a variable speed limit.

33. In relation to 'underlying causes', Mr Dooling wrote that "*The driver has type 1 diabetes and considers this contributed to low blood sugars leading to a lack of concentration. The driver had not alerted his line manager or team leader or supervisor and did not request someone else to drive*." Following the Fair Culture approach, Mr Dooling considered whether the Claimant's action in speeding was deliberate and concluded that it was. He considered whether the action was 'well-intentioned' and concluded it was not, saying "*The driver's decision to exceed 20mph was a personal choice and the time gained would not have benefitted the company*". Mr Doolin stated in evidence that he had not considered the Claimant's diabetes to be a mitigating factor. He made no specific recommendation in his report, but it followed from his conclusion that the Fair

Culture Panel would consider referring the Claimant to a disciplinary investigation.

*Delay*

34. Following the completion of the level 2 investigation report on 3 May 2018, there was a delay of over 7 months before the Claimant's case was considered by a Fair Culture Panel. On 4 September 2018, the Claimant emailed Mr Doolin to ask for an update. He explained that the delay was causing him anxiety and stress. Not having received a response, the Claimant chased Mr Doolin by a further email of 16 November 2018, reiterating his concerns. Mr Doolin replied on 26 November 2018, signposting him to the Respondent's employee support helpline.

35. The Respondent's witnesses explained that the delay was caused by the Respondent having entered into trade union negotiations on whether speeding cases concerning speeds in excess of 20 mph above the speed limit should be dealt with in accordance with the policies described above, or whether the process should be changed. The Claimant's case was put on hold until the outcome of these discussions was known. This was not explained to the Claimant at the time. It has not been explained why a case in which the Fair Culture investigation had already been completed needed to be halted mid-way through the process. The outcome of the trade union discussions, we are told, was that speeding offences would no longer be dealt with under the Fair Culture process; this had no impact on the Claimant's case.

*The outcome of the Fair Culture process*

36. The Claimant's case was considered by a Fair Culture Panel on 18 December 2018. Their conclusion was there had been a 'reckless contravention', and that a disciplinary process should commence. However, the panel noted they believed it was a critical factor that no VTS tracker was fitted and raised questions over the Claimant's medical status.

*The disciplinary investigation*

37. Mr Andrew Keane was allocated to conduct the disciplinary investigation. He interviewed the Claimant on 30 January 2019. We are told that the time taken after the Fair Culture Panel to convene this meeting was caused by time taken to allocate an investigator. Both parties agree that the minutes of the disciplinary investigation meeting shown to the Tribunal were accurate.

38. At the disciplinary investigation meeting, the Claimant was asked if he was familiar with the route and knew the speed limit. The minutes record his response as follows:

> *"This was a route MA had not travelled often - maybe twice a year - but he was usually quite good at remembering a route if he had taken it before. They would have usually taken the A13 but one of his colleagues had seen that there was roadworks on that route. MA knew there was a 40mph speed limit on the A127."*

39. In evidence, the Claimant clarified "*I should have said also a 50 mph, 60 mph and national speed limit*"; ie. the route had different speed limits at different points. We do not read this part of the minutes as an admission by the Claimant that he knew the speed limit was 40 mph at the time when he was travelling at 62 mph.

40. Mr Keane asked the Claimant whether there were any extenuating reasons or special circumstances which led to him speeding on the night in question. His reply was recorded as follows:

"*MA is a type 1 diabetic (since childhood). Over the last year MA had found difficulty with fluctuating sugar levels and was not always aware when his blood sugar levels were dropping. He has had paramedics called out several times and sought medical advice. The advice was that he may no longer be as aware of his blood sugar levels due to natural changes that come with age. MA now carries a blood-sugar monitor, so he can check his blood sugar levels regularly and always carries glucose tablets on his person. On the date in question MA said he had taken some Dextrose tablets but that they did not work as quickly as normal. MA did not make his colleagues aware at the time that he felt his blood sugar levels could be low. MA noted that he now monitors his blood sugar levels regularly and has notified all his work colleagues how they can check his blood sugar levels should he black-out (this is done using the equipment and glucose tablets MA carries on his person)*."

41. Mr Keane asked the Claimant follow up questions by email on 11 February 2019, and the Claimant replied on the same day. Asked what time he took the energy tablets on the journey back to the depot, the Claimant replied he could not remember the exact times, but he had taken one as soon as he sat in the vehicle and a few more on the journey back to Barking. He confirmed that his passenger had been Mr Smith. Mr Keane contacted Mr Smith, who could not remember anything further about the night in question.

42. On 13 February 2019, Mr Keane requested a referral to Occupational Health ('OH'), via the Claimant's line manager Mr James Stannard. Mr Keane asked the OH Advisor to address the following questions:

"*1. Would Mohammed have been aware of low blood sugar levels at the time, thereby making it dangerous for him to drive?*

*2. Mohammed stated that he took a Dextrose tablet as he first sat in the vehicle and a few more along the journey but that they failed to work in time; are the tablets likely to have provided little to no benefit?*

*3. Is it likely Mohammed's condition could have led to him speeding at 62mph on a 40mph road?*

*4. Would other people have noticed a change in Mohammed's behaviour on the night?*"

43. A first OH report dated 26 February 2019 merely recommended that it would be necessary for an OH Physician to conduct a face-to-face interview with the Claimant. A follow-up report dated 28 February 2019 by Dr Colin Geoghegan, OH Physician, recommended that the Claimant was unfit for trackside duties as well as driving work vehicles. He requested further medical evidence be provided by the Claimant's GP, before he could address the questions posed by Mr Keane.

44. Following receipt of this report, over a year after the incident in question, the Claimant was moved from doing safety-critical trackside work and reallocated to undertake office duties. The Claimant described this in an email to his manager as *"disheartening"* and asked whether further advice could be sought as to

whether he could return to trackside work with a requirement to be accompanied (this was an adjustment in place for a colleague of his).

45. The Respondent took no steps to obtain further evidence from the Claimant's GP as Dr Geoghegan had requested. On 2 April 2019, Mr Keane was chased for an update by HR Business Partner Ms Vanessa Shields. He spoke to Mr Stannard and realised that by this time a further OH referral was needed. On 3 April 2019, Mr Keane wrote to the Claimant, "*I believe we are again waiting on OH Assist once more, but hopefully we can begin to progress soon*."

46. On 11 April 2019, Mr Stannard made the further referral to OH. The Claimant met a new OH Advisor, Ms Beverley Gates, on 18 April 2019 and provided her with his recent blood sugar readings and blood test results. Ms Gates produced a report on the same day. She asked the Claimant to attend a further review with an OH Physician, and responded to Mr Keane's questions on an interim basis as follows:

"*- 1. Would Mohammed have been aware of low blood sugar levels at the time, thereby making it dangerous for him to drive?*

*If Mr Ali is aware that his blood sugar is low, he should manage that appropriately before driving.*

*- 2. Mohammed stated that he took a Dextrose tablet as he first sat in the vehicle and a few more along the journey but that they failed to work in time; are the tablets likely to have provided little to no benefit?*

*Mr Ali, has confirmed this. If the case is that the dextrose tablets didn't work or not assist in the resolution of the low blood sugar, they could have been expired. Mr Ali is aware of the appropriate remedies that he should use since this episode and not rely on dextrose tablets in the future.*

*- 3. Is it likely Mohammed's condition could have led to him speeding at 62 mph on a 40 mph road?*

*I am not in a position to answer this question. The OHP that will review him will determine that decision. In my opinion, Mr Ali should remain on adjusted duties that are non safety critical and attend a face to face review with the assigned OHP in the next 1-2 weeks*."

47. Mr Keane did not see that interim report because it was not uploaded to the system he accessed the Claimant's personnel documents through, HR Direct.

48. The Claimant met with Dr Geoghegan again on 7 May 2019. Dr Geoghegan reiterated his advice that the Claimant was unfit for trackside duties and driving for work. At that time, the Claimant had been referred for and was waiting to attend the diabetes management course referred to at paragraph 26 above. Dr Geoghegan advised that the course was likely to help improve the Claimant's control of his diabetes and recommended a further review in 3 months' time. In relation to Mr Keane's questions, he provided the following answers:

*"1. Would Mohammed have been aware of low blood sugar levels at the time, thereby making it dangerous for him to drive?*

*Most people experience some warnings when the blood glucose is low (hypoglycemic symptoms) A low blood sugar level is usually below 4.0mmol/1.*

*With regard to to [sic] road speeding offence in February 2018, Mr Ali says he felt his blood glucose was low before starting this road journey as he started to experience particular symptoms which indicated to him that he was becoming hypoglycemic. He says he didn't have his meter with him to check his glucose level so it was not possible at the time for him to confirm that his blood glucose level was low. It was therefore not possible to confirm that he was hypoglycaemic and also what the exact level of his blood glucose was at the time.*

*Mr Ali says took a number of glucose tablets and then undertook the drive. He says he can't remember now many of the tablets he took before he started driving. He says he can't remember the time lapse between taking the glucose tablets and driving.*

*Mr Ali says he became aware while driving that the glucose tablets were not as effective as they usually are. He says he felt weakness in his legs and felt hot and felt his concentration was affected. He says he was on a dual carriageway and says this was the reason he didn't immediately stop driving. He says he took some more glucose tablets while driving but can't remember how many.*

*At the time of the driving offence in February 2018, Mr Ali says he was not fully aware of the DVLA advice regarding driving and insulin dependant drivers.*

*Drivers with insulin treated diabetes are advised to take the following precautions by the DVLA:*

- *A driver should always carry their glucose meter and blood glucose strips with them. They should check their blood glucose no more than 2 hours before the start of the first journey and every two hours whilst they are driving. If driving multiple short journeys, they do not necessarily need to test before each additional journey as long as they test every 2 hours while driving.*

- *In each case if the blood glucose is 5.0mmol/I or less, eat a snack. If it is less than 4.0mmol/I or if the person feels hypoglycaemic, do not drive.*

- *If hypoglycemia develops while driving, stop the vehicle safely as soon as possible.*

- *The person should switch off the engine, remove the keys from the ignition and move from the driver's seat.*

- *The person should not start driving again until 45 minutes after blood glucose has returned to normal (at least 5 mmol/l), confirmed by measuring blood glucose. It takes up to 45 minutes for the brain to recover fully.*

- *Always keep an emergency supply of fast-acting carbohydrate such as glucose tablets or sweets within easy reach in the vehicle.*

*3. Is it likely Mohammed's condition could have led to him speeding at 62mph on a 40mph road?*

*A diabetic, who has a fall in their blood glucose level to below the normal range, can experience hypoglycemic symptoms related to a low glucose level.*

*Symptoms can include sweating, feeling weak, feeling hungry, difficulty concentrating, confusion and disorientation. However I do not have sufficient information as to advise whether his speeding while driving in February 2018 could be as a result of him having had a low blood glucose level at the time. If management wishes for additional advice on this, this is likely to be best sought by arranging an assessment with a Consultant Diabetologist.*

*2. Mohammed stated that he took a Dextrose tablet as he first sat in the vehicle and a few more along the journey but that they failed to work in time; are the tablets likely to have provided little to no benefit?*

*When a diabetic develops hypoglycemic symptoms, immediate dextrose tablets or a glucose drink can usually raise the blood glucose level so that the hypoglycaemic symptoms resolve. Taking a snack at the time can also help to raise the blood glucose level.*

*The quantity of glucose required to deal with a hypoglycaemic episode depends on the severity of the hypoglycaemic symptoms and level of the blood glucose level. A number of dextrose tablets or other carbohydrate and a snack can be required before the blood glucose level returns to within the normal range.*

*Mr Ali says when he started to feel unwell in February 2018 with symptoms he associated with hypoglycemia, he took a number of glucose tablets and then undertook the drive. Mr Ali says he became aware while driving that he was again experiencing symptoms associated with hypoglycemia. This suggests that his blood glucose level was still low. Due to ongoing symptoms he says he took some more glucose tablets while driving but can't remember now many."*

49. On 20 May 2019, the Claimant emailed Mr Stannard his line manager, explaining that he had been reviewed by a diabetes consultant and referred for a diabetes management course, which the OH doctor wanted him to attend before he could be assessed again for fitness to return to trackside work. He also described his new blood glucose monitoring regime.

50. Mr Keane's disciplinary investigation report was completed on 3 June 2019. In his report, he wrote that "*M. Ali confirmed he was aware of the 40mph speed limit on the section being driven*". As we have found at paragraphs 38 to 39 above, this was a misunderstanding – the Claimant had not said he was aware of the 40-mph limit on the particular stretch of the road where he had been caught speeding.

51. Mr Keane further recorded that "*The OH GP was unable to confirm whether low blood sugar levels were a factor on the day*". Mr Keane did personally consider the Claimant's diabetes to have been relevant to the speeding incident but did not give it weight as a mitigating factor in his investigation report. He understood, on discussing the matter with the Respondent's HR team, that if he referred the matter for a disciplinary hearing, the disciplinary decision-maker could consider diabetes as a mitigating factor at that stage. He concluded there had been a breach of a Lifesaving Rule, which potentially amounted to gross misconduct, and recommended that the matter proceed to formal action.

*The disciplinary hearing*

52. The Claimant was invited to attend a disciplinary hearing by a letter dated 26 June 2019. The letter stated the allegation against him was: "*Breach of Life Saving Rule: Always obey the speed limit. Specifically, on 14th February 2018, speeding at 62mph on a 40mph Road - Arterial Road*."

53. The disciplinary hearing was conducted on 11 July 2019 by Mr Alan Bush. The Claimant attended with a trade union representative. The notes record (and the Claimant does not disputed) that when asked about the events of 14 February 2018, he said:

"*It was a long time ago, we were at southend [sic] east station structure gauging. Scott and I arrived, Scott drove there, me back. I felt my sugar levels drop and I didn't have my machine, the symptoms were fatigue, weakness in my legs, sweating and agitated, I decided better to be high than low so took a Lucozade tablet which are quick acting, not as quick as fluids. Loaded van can't remember what route to depot, road works on A13 so took A127. I realised it was taking a long time for the tablets to kick in, so I took another one. Scott was saying he was pretty tired; don't believe he was awake in car. I carried on driving I didn't see any flash from camera, I was unaware of this till it came through*."

54. Mr Bush asked the Claimant why he had not asked Mr Smith to drive. The Claimant replied it was because Mr Smith had told him that he was tired, and he felt it was his responsibility to drive back. He accepted in hindsight that he ought to have asked his colleague to drive. He went on to comment, in relation to his OH referral:

"*This went to OH assist and referred to diabetic specialist re control of diabetes, I am now on a course for 1 week starting 25th July. They said I wasn't managing my diabetes correctly as I'm type 1 and was using a very old method which wasn't controlled. I was taking a lot more than I needed too. I had 2 attacks last year, first ones in 15 years*."

55. Mr Bush adjourned the meeting for an hour and a half to consider his decision. His conclusion, which he read aloud at the meeting, was as follows:

"*a) You knowingly drove the vehicle with what you considered as low blood sugar, which consisted of shaking of the legs, lack of concentration, sweating and feeling uncomfortable and you could have asked Scott to drive. Furthermore, you still felt the symptoms when you were driving and chose not to stop and either take a break until the symptoms eased or to ask Scott to assume the driving duties*

*b) As a diabetic for 15 years, I believe there to be insufficient duly of care that night with no machine available for testing.*

*c) You not only put the life of yourself and Scott and [sic] risk but also other road users by driving at more than 20mph over the speed limit*

*Therefore, my decision is summary dismissal with immediate effect*."

56. Mr Bush sent a follow-up letter confirming the decision to dismiss and setting out the same reasoning on 15 July 2019. He explained in evidence that he had not considered the Claimant's diabetes to be a mitigating factor because the Claimant had not asked for help when he realised he was suffering from the symptoms of low blood sugar.

57. Mr Bush did not take into account the Claimant's prior disciplinary record. The Claimant had previously received a one-year final written warning for an unrelated disciplinary matter which had expired in May 2019. We mention this as a relevant fact because the Respondent's delay in proceeding with the Claimant's speeding disciplinary had the consequence that by the time the disciplinary hearing was convened, the Claimant had no live warning on his record.

*The appeal*

58. The Claimant appealed his dismissal on 23 July 2019. His grounds of appeal were "*misinterpretation of facts, the severity of the decision and the time taken for this case to be handled*".

59. The appeal was conducted by Gy Harness. At the appeal meeting on 16 August 2019, the Claimant described again the events of 13 to 14 February 2019. He emphasised that his diabetes management had since improved, but that at the time his symptoms were changing. Mr Harness asked him why he had not called the on-call manager for help, given that he was suffering from low blood sugar and Mr Smith was fatigued. The Claimant replied that he would not have thought that made sense at the time, that he would be expected to solve a problem if he could before contacting the on-call manager. He argued that the absence of his usual VTS tracker had not been taken into account.

60. Mr Knott also raised the issue of consistency, telling Mr Harness that in other cases he had been involved in, the sanction had been less severe, and the individuals concerned had been referred for speed awareness courses. Mr Knott offered to provide more details, which offer Mr Harness refused.

61. Mr Harness adjourned the meeting for 25 minutes before returning with his decision.

62. In relation to delay, he attributed this to the national issue which was not the fault of the managers involved. The minutes record the reasons he gave as follow:

> "*Thank you for waiting, unfortunately, my decision today is to uphold the decision and I will tell you the reasons why. The main reason is the precedent is set for the company for final written warnings, now we don't know the full details for the cases your representative had referred to.*
>
> [Mr Knott intervened to say he could get them.]
>
> *This can be appealed through civil. You knew you were medically unfit, you took the decision to drive when you know you should not have done. You endangered yourself, other road users as well as your colleague. You mention in your previous interviews that you did not bring your meter with you, knowing you're going on track and possibly driving that was your responsibility*."

63. The appeal outcome was confirmed in a letter of 27 August 2019, which gave further reasoning:

> "*The evidence presented at your appeal was not sufficient to mitigate changing the original decision of summary dismissal. Whilst there are examples of similar speeding disciplinaries ending with a final written warning, your case was further*

*complicated by your knowledge of a medical condition which impaired your driving ability.*

*Whilst acknowledging that the time taken to bring this case to disciplinary was lengthy, this was caused by a national dispute between Network Rail the RMT regarding & speeding and the life saving rules. There was a further delay at disciplinary investigation stage whilst Network Rail sought medical opinion around the mitigation you provided regarding your diabetes. It was no fault of the investigation or hearing manager.*"

64. The Claimant was sent a copy of the minutes of the appeal meeting and he replied on 16 September 2019 stating that he believed the minutes were incomplete.

*Comparator cases*

65. Before the tribunal, but not before Mr Harness at the appeal hearing, were documents relating to cases where other of the Respondent's employees had been investigated for speeding offences. The Claimant relied on 8 cases and the Respondent provided a further 4 cases which post-dated the Claimant's incident.

66. The cases selected by the Claimant had the following features:

    66.1. An employee driving at 84 mph, 24 mph in excess of a 60-mph speed limit, was issued a final written warning. The employee had not been informed that the type of van he was driving was classified as a goods vehicle and therefore had a lower, 60 mph speed limit in 70 mph areas.

    66.2. An employee was issued with a final written warning for taking a call on his mobile phone when driving.

    66.3. An employee who drove at 97 mph, 27 mph over the speed limit, because his speed limiter was faulty, was issued with a final written warning. He had believed he could not exceed the speed limit with the speed limiter fitted.

    66.4. An employee drove at 69 mph in 50 mph area because his positioning between 2 lorries meant that he did not see a road sign for a temporary speed restriction due to roadworks. In that case, no further action was taken and no disciplinary sanction applied.

    66.5. An employee's action in driving at 41 mph in 30 mph area was attributed to fatigue and treated as a slip or lapse under the Respondent's policy, meaning no disciplinary process was instigated.

    66.6. An employee was dismissed for taking a work vehicle for private use and driving it at 56 mph in a 40-mph zone.

    66.7. An employee who had been caught speeding twice (at 67 mph in a 50-mph zone and then 60 mph in a 50-mph zone) was not subject to any disciplinary action. He committed the second offence before being informed of the first, and so they were treated as a single matter. It was noted that he was remorseful and has done a speed awareness course.

66.8. Another employee who had been caught speeding twice (at 86 mph in 70-mph zone and 71 mph in a 50-mph zone), received a first written warning. In relation to the first instance, he had been rushing to work. In the second, he had not seen signage warning of a variable speed restriction.

67. The Respondent relied on the following cases:

67.1. An employee who was dismissed for speeding and making personal use of a company vehicle for a 250-mile round trip.

67.2. The dismissal of an employee who had driven at 112 mph while suffering from an emerging mental health condition.

67.3. An employee who was dismissed for speeding over 20 miles above the speed limit and who had gone absent without leave, taking a work vehicle for personal use.

67.4. An employee dismissed for being caught speeding at 93 mph in a 70-mph zone.

**Submissions**

68. The following is a summary of the submissions made; we have given careful consideration to the full argument.

69. For the Respondent, Mr Sellwood accepted that the Claimant's evidence was honest and straightforward, and his narrative of what happened on the night of 14 February 2018 were not disputed.

69.1. In relation to unfair dismissal: there was little difficulty in establishing that the Respondent's managers had a genuine belief there had been misconduct and reasonable grounds for belief. As for the investigation, the Tribunal was not to apply a counsel of perfection. There had been two investigation managers who had been confronted with obvious facts which justified progressing the case to a disciplinary hearing, at which stage the Claimant's mitigation could be considered. There was delay, but it had not prejudiced the Claimant and made no difference to the outcome. The dismissal decision was in the range of reasonable responses; the Claimant had driven a van with a colleague in the passenger seat when he was aware that he was suffering from hypoglycaemia, resulting in him driving in an "*utterly distracted*" state and speeding 22mph above the speed limit. Although he took steps to ameliorate his condition, he had no assurance they had worked and drove anyway. This could have led to disaster. None of the comparator cases relied on by the Claimant were substantially similar enough to be relevant.

69.2. The Claimant's actions also amounted to gross misconduct, and he was not entitled to notice.

69.3. In relation to the reasonable adjustments claim, Mr Sellwood said the pleaded PCP had not been applied to the Claimant. He had not been required to drive but had chosen to. As the Claimant had in fact been forbidden to drive since the incident, this claim was long out of time. The

Respondent had not known and could not have been expected to know that driving put the Claimant at a substantial disadvantage.

69.4. As for the s.15 claim, Mr Sellwood accepted that the Claimant was treated unfavourably by being dismissed and that the speeding arose from low blood sugar caused by the Claimant's disability (although the Claimant's evidence was that the decision to get in the car and drive was not affected by his blood sugar level). The s.15 claim came down to the Respondent's objective justification defence. The Respondent had a legitimate aim to protect the safety of the Claimant, his colleagues and members of the public. The Claimant was a safety critical employee. Although not the reasoning of the decision-makers at the time, the Respondent relied in part on the justification that the speeding offence showed that the Claimant's judgment could not be relied on in future in a safety-critical environment. The importance of the aim meant it must weigh heavily in the Tribunal's balancing exercise and there was no more proportionate step than dismissal available to achieve the aim.

69.5. In relation to remedy issues, Mr Sellwood said that any compensation for unfair dismissal ought to be reduced by 100% to reflect the *Polkey* principle and the Claimant's contributory fault. In relation to compensation for discrimination, Mr Sellwood argued that the principle in *Chagger* applied: because the Claimant admitted his decision to drive did not arise from his disability, and that decision was in itself misconduct, there was a 50% chance of the Claimant being dismissed for that alone, even had the decision-maker disregarded the disability-related speeding offence. He did not argue that if the dismissal was discriminatory the compensation should be reduced to reflect contributory negligence.

70. Ms Hart agreed that witness credibility would play little role in the Tribunal's decision-making as the central facts were not in dispute. She submitted on behalf of the Claimant:

70.1. The dismissal was procedurally unfair because of the excessive delay from the incident in February 2018 to the dismissal in July 2019, in circumstances where the Respondent's decision to pause the Claimant's case while awaiting the outcome of a union discussion was unreasonable. The delay caused stress and impacted on the integrity of the evidence collected. The investigation process was flawed. Mr Doolin mistakenly concluded that the Claimant sped on a single carriageway (where the speed limit could be assumed to be lower) and in the face of evidence to the contrary maintained that the Claimant would have been familiar with the route. He disregarded the Claimant's clear remorse and never took seriously the Claimant's explanation that his diabetes was the underlying cause why the speeding occurred. His investigation report was never corrected and was considered at each subsequent stage of the disciplinary process. Mr Keane, the disciplinary investigator, referred the matter for a disciplinary hearing on the assurance that the Claimant's mitigation would be further investigated at that stage, but this never happened. The Respondent's case was that the Claimant's decision to drive and continue driving was reckless; this reflected the flawed investigation which did not take seriously the Claimant's explanation that he had not been aware of

the change in his condition and reasonably expected taking glucose tablets to solve the problem (as had been the case in the past). There had also been a failure to investigate inconsistency of treatment when the Claimant's representative raised comparator cases at the appeal stage. In relation to sanction, the Respondent had considered the Claimant's diabetes to be an aggravating factor when it also ought to have been weighed in the balance as a mitigating factor. The decision-maker had wrongly started from the assumption that summary dismissal was the default sanction for speeding at that level; this was shown to be wrong by the comparator cases. The Claimant had taken steps to ensure the problem would never happen again, and these had not been taken into account.

70.2. The Claimant had been wrongfully dismissed. The speeding offence was not a repudiatory breach of contract and as the Claimant had not been suspended and continued to work for another 17 months, if there had been a breach it was waived by the Respondent.

70.3. In relation to discrimination arising from disability, it was not disputed that the Respondent had a legitimate aim, but dismissal was not a proportionate measure to achieve that aim. There were alternative actions short of dismissal that could have been taken. This was a first offence, the Claimant had shown remorse, he had engaged with the medical profession to address his changing condition and improve his diabetes management so there was nothing to suggest the offence would be repeated. The Respondent's retrospective justification that the Claimant was a safety critical employee did not suffice as there were no wider safety concerns; the Claimant did not work alone and had shown he learned from the speeding incident.

70.4. On the reasonable adjustments claim it was accepted that the PCP was no longer applied after February 2018, but the Tribunal was invited to find that there was a continuing act linking the failure to make reasonable adjustments to later events. The PCP was applied because the Claimant was required to drive as part of his job. The Claimant had not told the Respondent about the substantial disadvantage, but the Respondent had constructive knowledge; knowing the Claimant was diabetic, he ought to have been under OH monitoring which would have identified the change in his condition and potential driving risk before the incident occurred. It would have been reasonable to provide OH monitoring, training, and not to have dismissed the Claimant.

70.5. In relation to deductions, had the wider flaws in the investigation (not just delay) have been rectified, it could not be said that the Claimant would have been likely to be dismissed. The Claimant's contribution to his own dismissal was relatively minor because he had taken steps to solve his low blood sugar which normally worked. The Respondent's *Chagger* argument was said to be flawed because the Claimant's decision to drive was only said to amount to misconduct because he suffered from low blood sugar at the time, which in itself was something arising from his disability.

**The law**

*Unfair dismissal*

71. Section 94 ERA provides that an employee with sufficient qualifying service has the right not to be unfairly dismissed by her employer.

72. Section 98 ERA provides so far as relevant:

> **In determining for the purposes of this Part whether the dismissal of an employee is fair or unfair, it is for the employer to show –**
>
> > **(a) the reason (or, if more than one, the principal reason) for the dismissal, and**
> >
> > **(b) that it is either a reason falling within subsection (2) or some other substantial reason of a kind such as to justify the dismissal of an employee holding the position which the employee held.**
>
> **A reason falls within this subsection if it—**
>
> > **…**
> >
> > **(b) relates to the conduct of the employee ... ...**
>
> **(4) ... where the employer has fulfilled the requirements of subsection (1), the determination of the question whether the dismissal is fair or unfair (having regard to the reason shown by the employer) –**
>
> > **(a) depends on whether in the circumstances (including the size and administrative resources of the employer's undertaking) the employer acted reasonably or unreasonably in treating it as a sufficient reason for dismissing the employee, and**
> >
> > **(b) shall be determined in accordance with equity and the substantial merits of the case.**

73. The starting-point in misconduct cases is the well-known guidance in *Burchell v British Home Stores* [1980] ICR 303 at 304:

> **'What the tribunal have to decide every time is, broadly expressed, whether the employer who discharged the employee on the ground of the misconduct in question (usually, though not necessarily, dishonest conduct) entertained a reasonable suspicion amounting to a belief in the guilt of the employee of that misconduct at that time. That is really stating shortly and compendiously what is in fact more than one element. First of all, there must be established by the employer the fact of that belief; that the employer did believe it. Secondly, that the employer had in his mind reasonable grounds upon which to sustain that belief. And thirdly, we think, that the employer, at the stage at which he formed that belief on those grounds, at any rate at the final stage at which he formed that belief**

> **on those grounds, had carried out as much investigation into the matter as was reasonable in all the circumstances of the case'.**

74. In *Turner v East Midlands Trains Ltd* [2013] ICR 525, Elias LJ (at paras 16–17) held:

> **'… the band of reasonable responses test does not simply apply to the question whether the sanction of dismissal was permissible; it bears upon all aspects of the dismissal process. This includes whether the procedures adopted by the employer were adequate: see Whitbread plc (trading as Whitbread Medway Inns) v Hall [2001] ICR 699; and whether the pre-dismissal investigation was fair and appropriate: see J Sainsbury plc v Hitt [2003] ICR 111.'**

75. In looking at whether dismissal was an appropriate sanction, the question is not whether some lesser sanction would, in the Tribunal's view, have been appropriate, but rather whether dismissal was within the band of reasonable responses. The fact that other employers might reasonably have been more lenient is irrelevant (*British Leyland (UK) Ltd v Swift* [1981] IRLR 91).

76. A Tribunal should only find that a dismissal is unfair for inconsistency if the two cases in question were 'truly similar' (*Hadjioannou v Coral Casinos Ltd* [1981] IRLR 352 at para 25). The EAT in that case enjoined Tribunals 'to scrutinize arguments based upon disparity with particular care'.

77. In cases where there is a procedural defect, the question that remains to be answered is whether the employer's procedure constituted a fair process. A dismissal will be held unfair either where there was a defect of such seriousness that the procedure itself was unfair or where the results of the defect taken overall were unfair (*Fuller v Lloyds Bank plc* [1991] IRLR 336; see also *Slater v Leicestershire Health Authority* [1989] IRLR 16).

78. An dismissal may be unfair where the employer has unreasonably delayed dismissal procedures, even where the delay has not prejudiced the employee (*RSPCA v Cruden* [1986] ICR 205). It is necessary to consider both the length of the delay and the reason for it (*Secretary of State for Justice v Mansfield* UKEAT/0539/09).

79. Procedural defects in the initial disciplinary hearing may be remedied on appeal provided that in all the circumstances the later stages of a procedure are sufficient to cure any earlier unfairness, according to the decision of the Court of Appeal in *Taylor v OCS Group Ltd* [2006] IRLR 613.

80. Where the Tribunal finds that the dismissal was to any extent caused or contributed to by any action of the complainant, it will reduce the amount of the basic and compensatory awards by such proportion as it considers just and equitable having regard to that finding (s.123(6) ERA). In order for a deduction to be made, the conduct in question must be culpable or blameworthy in the sense that, whether or not it amounted to a breach of contract or tort, it was foolish or perverse or unreasonable in the circumstances (*Nelson v BBC (No.2)* [1980] ICR 110).

81. Where a Tribunal finds that a dismissal was unfair, it must go on to consider the chance that the employment would have terminated in any event, had there been no unfairness (the *Polkey* issue).

82. In *Hill v Governing Body of Great Tey Primary School* [2013] IRLR 274 the EAT (Langstaff P presiding) noted that a *Polkey* reduction has the following features:

> **'First, the assessment of it is predictive: could the employer fairly have dismissed and, if so, what were the chances that the employer would have done so? The chances may be at the extreme (certainty that it would have dismissed, or certainty it would not) though more usually will fall somewhere on a spectrum between the two extremes. This is to recognise the uncertainties. A Tribunal is not called upon to decide the question on balance. It is not answering the question what it would have done if it were the employer: it is assessing the chances of what another person (the actual employer would have done) … The Tribunal has to consider not a hypothetical fair employer, but has to assess the actions of the employer who is before the Tribunal, on the assumption that the employer would this time have acted fairly though it did not do so beforehand.'**

*Wrongful dismissal*

83. For an employer to be entitled to summarily dismiss an employee, that is dismiss him without notice, the employee's conduct must amount to gross misconduct. A definition of gross misconduct is found in [22] of *Neary v Dean of Westminster* [1999] IRLR 288:

> **'…conduct amounting to gross misconduct justifying dismissal must so undermine the trust and confidence which is inherent in the particular contract of employment that the master should no longer be required to retain the servant in his employment.'**

84. Unlike in a claim for unfair dismissal, where the Tribunal will not substitute its own view for the employer's, the question for the Tribunal here is whether the Claimant is guilty on the facts of the gross misconduct alleged.

85. As regards the type of conduct justifying summary dismissal, and the effect that the passage of time can have where prompt and effective action is not taken by the employer in respect of any alleged repudiatory conduct. See *McCormack v Hamilton Academical Football Club Ltd* [2012] IRLR 108 at [8] per Lord Emslie:

> **'Summary dismissal…is... a remedy which must normally be exercised as soon as a sufficiently serious episode or course of misconduct comes to the employer's attention. Delay and inaction at that point carry with them an obvious risk that the employer will be held to have passed from his option to accept the repudiation and, conditionally or otherwise, to have affirmed the contract instead…'**

*Discrimination arising from disability*

86. Section 15 EqA provides that:

> **(1) A person (A) discriminates against a disabled person (B) if—**

> **(a) A treats B unfavourably because of something arising in consequence of B's disability, and**
>
> **(b) A cannot show that the treatment is a proportionate means of achieving a legitimate aim.**
>
> **(2) Subsection (1) does not apply if A shows that A did not know, and could not reasonably have been expected to know, that B had the disability.**

87. In *Pnaiser v NHS England* [2016] IRLR 170 at [31], Simler P summarised the proper approach to a s.15 EqA claim as follows:

> **(a) A Tribunal must first identify whether there was unfavourable treatment and by whom: in other words, it must ask whether A treated B unfavourably in the respects relied on by B. No question of comparison arises.**
>
> **(b) The Tribunal must determine what caused the impugned treatment, or what was the reason for it. The focus at this stage is on the reason in the mind of A. An examination of the conscious or unconscious thought processes of A is likely to be required... The 'something' that causes the unfavourable treatment need not be the main or sole reason, but must have at least a significant (or more than trivial) influence on the unfavourable treatment, and so amount to an effective reason for or cause of it.**
>
> **(c) Motives are irrelevant...**
>
> **(d) The Tribunal must determine whether the reason/cause (or, if more than one), a reason or cause, is "something arising in consequence of B's disability". That expression 'arising in consequence of' could describe a range of causal links... the causal link between the something that causes unfavourable treatment and the disability may include more than one link...**
>
> **(e) ... However, the more links in the chain there are between the disability and the reason for the impugned treatment, the harder it is likely to be to establish the requisite connection as a matter of fact.**
>
> **(f) This stage of the causation test involves an objective question and does not depend on the thought processes of the alleged discriminator.**
>
> **(g) ...Weerasinghe ... highlights the difference between the two stages — the 'because of' stage involving A's explanation for the treatment (and conscious or unconscious reasons for it) and the 'something arising in consequence' stage involving consideration of whether (as a matter of fact rather than belief) the 'something' was a consequence of the disability.**
>
> **... (i) ... it does not matter precisely in which order these questions are addressed. Depending on the facts, a Tribunal might ask why A**

> **treated the claimant in the unfavourable way alleged in order to answer the question whether it was because of "something arising in consequence of the claimant's disability". Alternatively, it might ask whether the disability has a particular consequence for a claimant that leads to 'something' that caused the unfavourable treatment.**

88. If the two-stage test is satisfied by the Claimant, the Respondent may raise a defence by showing that the treatment is a proportionate means of achieving a legitimate aim. Determining whether the treatment is a proportionate means of achieving a given aim "*requires an objective balance between the discriminatory effect of the condition and the reasonable needs of the party who applies the condition*": *per* Balcombe LJ in *Hampson v Department of Education and Science* [1989] ICR 179. The Tribunal must conduct the balancing exercise for itself. In *City of York Council v Grosset* [2018] ICR 1492, the Court of Appeal held at [54]:

> '**there is no inconsistency between the ET's rejection of the claimant's claim of unfair dismissal and its upholding his claim under section 15 EqA in respect of his dismissal. This is because the test in relation to unfair dismissal proceeds by reference to whether dismissal was within the range of reasonable responses available to an employer, thereby allowing a significant latitude of judgment for the employer itself. By contrast, the test under section 15(1)(b) EqA is an objective one, according to which the ET must make its own assessment…'**

*Failure to make reasonable adjustments*

89. Section 20 EqA provides as relevant:

> **(1) Where this Act imposes a duty to make reasonable adjustments on a person, this section, sections 21 and 22 and the applicable Schedule apply; and for those purposes, a person on whom the duty is imposed is referred to as A.**
>
> **(2) The duty comprises the following three requirements.**
>
> **(3) The first requirement is a requirement, where a provision, criterion or practice of A's puts a disabled person at a substantial disadvantage in relation to a relevant matter in comparison with persons who are not disabled, to take such steps as it is reasonable to have to take to avoid the disadvantage.**
>
> **(4) The second requirement is a requirement, where a physical feature puts a disabled person at a substantial disadvantage in relation to a relevant matter in comparison with persons who are not disabled, to take such steps as it is reasonable to have to take to avoid the disadvantage.**
>
> **(5) The third requirement is a requirement, where a disabled person would, but for the provision of an auxiliary aid, be put at a substantial disadvantage in relation to a relevant matter in comparison with persons who are not disabled, to take such steps as it is reasonable to have to take to provide the auxiliary aid.**

90. Section 21 EqA provides as relevant:

> **(1) A failure to comply with the first, second or third requirement is a failure to comply with a duty to make reasonable adjustments.**
>
> **(2) A discriminates against a disabled person if A fails to comply with that duty in relation to that person.**
>
> **…**

91. The Equality and Human Rights Commission *Code of Practice on Employment (2011)* ('the Code of Practice') at para 6.16 emphasises that the purpose of the comparison with persons who are not disabled is to determine whether the disadvantage arises because of the disability and that, unlike direct or indirect discrimination, there is no requirement to identify a comparator or comparator group whose circumstances are the same or nearly the same as the disabled person's.

92. In relation to the employer's actual or constructive knowledge of the employee's disability, and of the disadvantage, sch.8, Part 3, para 20(1)(b) EqA provides that:

> **(1) A is not subject to a duty to make reasonable adjustments if A does not know, and could not reasonably be expected to know—**
>
> **…**
>
> **(b) in any case referred to in Part 2 of this Schedule, that an interested disabled person has a disability and is likely to be placed at the disadvantage referred to in the first, second or third requirement.**

93. The correct approach for the Tribunal in determining a reasonable adjustments claim is set out in *Environment Agency v Rowan* [2008] ICR 218 at [27] (the reference to sections are to sections of the Disability Discrimination Act 1995 "DDA"):

> **'In our opinion an employment tribunal considering a claim that an employer has discriminated against an employee pursuant to section 3A(2) of the Act by failing to comply with the section 4A duty must identify: (a) the provision, criterion or practice applied by or on behalf of an employer, or (b) the physical feature of premises occupied by the employer, (c) the identity of non-disabled comparators (where appropriate) and (d) the nature and extent of the substantial disadvantage suffered by the claimant. ... Unless the employment tribunal has identified the four matters we have set out above it cannot go on to judge if any proposed adjustment is reasonable. It is simply unable to say what adjustments were reasonable to prevent the provision, criterion or practice, or feature, placing the disabled person concerned at a substantial disadvantage.'**

94. The burden is on the Claimant to show the PCP, to demonstrate substantial disadvantage, and to make out a *prima facie* case that there is some apparently reasonable adjustment which could have been made (and that, on the face of it,

there has been a breach of the duty): *Project Management Institute v Latif* [2007] IRLR 579 at [45] and [54]. If the PCP contended for was not actually applied, the claim falls at the first fence: *Brangwyn v South Warwickshire NHS Foundation Trust* [2018] EWCA Civ 2235 at 40.

95. A one-off act may be a PCP, but only if it is capable of being applied to others. 'Practice' connotes some form of continuum in the sense that it is the way in which things generally are or will be done; it is not necessary for it to have been applied to anyone else in fact (*Ishola v Transport for London* [2020] IRLR 368 CA *per* Simler LJ at [36-38]):

> **'The function of the PCP in a reasonable adjustment context is to identify what it is about the employer's management of the employee or its operation that causes substantial disadvantage to the disabled employee […] the act of discrimination that must be justified is not the disadvantage which a claimant suffers […] but the practice, process, rule (or other PCP) under, by or in consequence of which the disadvantageous act is done. To test whether the PCP is discriminatory or not it must be capable of being applied to others because the comparison of disadvantage caused by it has to be made by reference to a comparator to whom the alleged PCP would also apply. I accept of course […] that the comparator can be a hypothetical comparator to whom the alleged PCP could or would apply.**

96. The reasonableness of an adjustment falls to be assessed objectively by the Tribunal: *Morse v Wiltshire County Council* [1998] IRLR 352. The focus is on practical outcomes: *per* Langstaff P in *Royal Bank of Scotland v Ashton* [2011] ICR 632 at para 24:

> **'The focus is upon the practical result of the measures which can be taken. It is not – and it is an error – for the focus to be upon the process of reasoning by which a possible adjustment was considered. As the cases indicate, and as a careful reading of the statute would show, it is irrelevant to consider the employer's thought processes or other processes leading to the making or failure to make a reasonable adjustment. It is an adjustment which objectively is reasonable, not one for the making of which, or the failure to make which, the employer had (or did not have) good reason.'**

*Relationship between claims for unfair dismissal and discrimination*

97. The Tribunal will apply the different legal tests in relation to unfair dismissal and disability discrimination separately and the outcome in one type of claim does not necessarily determine the outcome in the other (as noted in *Grosset,* above). However, "*a dismissal which is unjustified and disproportionate is unlikely to fall within the band of reasonable responses open to a reasonable employer*": *Northumberland Tyne and Wear NHS Foundation Trust v Ward* UKEAT/0249/18/DA at [73].

*Adjustments to compensation for discrimination*

98. Any award of compensation for discrimination will be assessed under tortious principles (see s124(6) and s119(2) EqA). The sum is not determined by what the tribunal considers just and equitable in the circumstances as is the case for an unfair dismissal award (*Hurley v Mustoe (No 2)* [1983] ICR 422). The aim of compensation is to put the claimant in the position, so far as is reasonable, that she would have been had the tort not occurred. This may include a reduction to reflect the chance that the Claimant would have incurred the same losses (for example loss of earnings following a dismissal) had the discrimination not occurred. As explained in *Chagger v Abbey National plc* [2010] IRLR 47 at [57-59], the Tribunal will:

> **'determine what, in fact, were the chances that dismissal would have occurred had there been no unlawful discrimination. It focuses on what the employer would have done, not what he could lawfully have done.'**

## Conclusions

*Unfair dismissal*

99. The Tribunal unanimously finds that the Claimant was dismissed for a potentially fair reason pursuant to section 98(2)(b) ERA, namely misconduct. There has been no suggestion that there was any other reason for dismissal than the Claimant's conduct in driving at excess speed on 14 February 2018.

100. We next consider the three limbs of the *Burchell* test. The Tribunal unanimously finds as follows.

100.1. The Respondent formed a genuine belief that the Claimant was guilty of misconduct. In particular, Mr Bush, the dismissing manager, genuinely believed that the Claimant's speeding offence amounted to misconduct.

100.2. The Respondent had reasonable grounds for believing that the Claimant had committed misconduct. The Claimant admitted both that he had exceeded the speed limit, and that he had committed a lapse in judgment by deciding to drive when he knew that he felt unwell.

100.3. The Respondent's investigation into the conduct was reasonable in the circumstances. We consider that there were flaws in the investigation process. Mr Doolin made mistakes by wrongly recording that the road in question had a single carriageway, and by failing to record that the Claimant said (corroborated by Mr Smith) that he was he was unfamiliar with the route. Mr Keane failed to obtain advice from the Claimant's GP, or to ask the Claimant or his line manager to obtain that advice, as requested by the OH Physician. We consider it would have been better practice for Mr Harness to have looked into the comparator cases raised by Mr Knott at the appeal hearing. However, we bear in mind that we are to apply a test of reasonableness and not a counsel of perfection. In circumstances where there was no significant dispute over the relevant circumstances of the offence, the Respondent's investigation was reasonably sufficient. The Claimant had a fair opportunity to put his side of the case at each stage.

101. We are asked to consider whether the dismissal was unfair because the Respondent treated the Claimant inconsistently in dismissing the Claimant when compared with other employees in the same or materially similar circumstances. We conclude unanimously that none of the compactor cases to which we were taken were sufficiently like the Claimant's case to be 'truly similar' within the meaning in *Hadjioannou v Coral Casinos Ltd.* We considered that the closest comparator was that of an employee who drove at 112 mph when suffering from a mental health crisis. That employee was dismissed.

102. The overarching question is whether it was fair in all the circumstances for the Respondent to have treated the Claimant's speeding incident as sufficiently serious misconduct to warrant dismissal; was the dismissal within the band of reasonable responses available to the Respondent? By a majority, comprising the Employment Judge and Mrs Legg, the Tribunal concludes that dismissal was a fair outcome. We consider that the Respondent operates a safety critical business and places great weight on its Lifesaving Rules. The Respondent was entitled to take into account that Claimant worked in a safety critical environment, that he knew the importance of working safely, including driving safely, that he knew he felt unwell and that he chose to drive. As the Claimant has openly accepted throughout the internal process and the Tribunal hearing, this was a serious mistake which could have had grave consequences. While other employers may well have chosen to issue a warning rather than dismiss in light of the Claimant's diabetes, which is a potentially significant mitigating factor, we cannot say that it lay outside the range of reasonable responses open to the Respondent to elect for dismissal.

103. Dr Ukemenam concludes that it was not within the range of reasonable responses to dismiss because the Respondent gave insufficient weight to the Claimant's disability, which was a causal factor in his speeding. The Claimant had made a mistake in choosing to drive but did so in the belief – based on past experience – that taking energy tablets would fix the problem. Dr Ukemenam considers that the Respondent's approach was to treat the Claimant's disability as an aggravating factor when it ought to have been treated as a mitigating factor. This was a fundamental error of approach which rendered the dismissal unfair.

104. Lastly in relation to unfair dismissal, the Tribunal considers whether or not the dismissal was procedurally unfair because of the lengthy delay in the process. We consider there was an unjustifiably long delay which caused the Claimant stress. However, the process followed was not changed or undermined by the delay. We unanimously conclude that while the delay was regrettable it did not render the overall procedure unfair.

105. Therefore, by a majority, we conclude that the Claimant was fairly dismissed. Questions of deductions under the *Polkey* principle and for contributory fault therefore do not arise.

*Wrongful dismissal*

106. The next issue is whether the Claimant was dismissed in breach of his contractual entitlement to notice pay. The Tribunal unanimously concludes that given the length of delay between the misconduct on 14 February 2018 and the dismissal on 11 July 2019, which included at least 7 months of delay not spent investigating or conducting a disciplinary process, the Respondent affirmed the Claimant's

contract of employment (*McCormack v Hamilton Academical Football Club Ltd*). The Respondent was not entitled therefore to dismiss the Claimant summarily and the Claimant was entitled to his notice pay.

107. By a majority (the Employment Judge and Dr Ukemenam) the Tribunal would also have found that the Claimant's misconduct, while serious, was not sufficiently grave to amount to a repudiatory breach of contract within the meaning in *Neary v Dean of Westminster.* Mrs Legg would have found that his conduct demonstrated seriously flawed judgment and disregard for safety which did amount to gross misconduct. However, that is not a necessary part of the reasoning by which the Tribunal concludes the Claimant was wrongfully dismissed.

*Discrimination arising from disability*

108. There is no dispute between the parties that:

    108.1. The Claimant was disabled by reason of his type 1 diabetes and the Respondent knew this at all relevant times.

    108.2. The Claimant was treated unfavourably by his dismissal.

    108.3. The dismissal was because of the speeding incident on 14 February 2018.

    108.4. The speeding incident was caused by the Claimant's loss of concentration due to fluctuating blood sugar levels and difficulty in controlling his diabetic condition on the night in question. (However, the Tribunal notes there was more than one cause; the Claimant's decision to drive after noticing symptoms of low blood sugar was not a consequence of his disability and was also a cause of the speeding incident.)

    108.5. The fluctuating blood sugar levels and uncontrollable symptoms were caused by the Claimant's disability.

    108.6. In dismissing the Claimant, the Respondent sought to pursue a legitimate aim, namely the safety of the Claimant, his colleagues and members of the public.

109. The only issue for the Tribunal to determine is whether dismissal was a proportionate means of achieving that aim. The Claimant argues that the Respondent could have achieved the aim by less discriminatory measures, namely by issuing a warning; training him; and/or providing regular OH advice.

110. Again, the Tribunal is split. A majority (the Employment Judge and Dr Ukemenam) conclude that dismissal was not a proportionate means of achieving the stated aim. The Claimant was remorseful for the mistake he had made in choosing to drive on the night of 14 February 2018. He had taken steps to improve his diabetic control by seeking a specialist review, implementing a new insulin and blood glucose monitoring regime and attending a diabetes management course. The advice of the OH Physician was to review the Claimant to re-assess whether he could be reassigned to trackside and driving duties after he attended the diabetes management course. Depending on the outcome of that

review, the Respondent might sensibly have imposed a 'no lone working' restriction on the Claimant, as was in place for a colleague of his. The prospects that the Claimant would in future ignore warning signs or fail to monitor his blood glucose levels again were, in the view of the majority, slim. The Respondent's safety aim properly included issuing appropriate sanctions for speeding to protect its 'Lifesaving Rules' and deter future breaches. However, that aspect of the aim could also have been achieved by imposing a final written warning. The comparator cases are relevant to our consideration in this regard because, although no case is precisely like the Claimant's, they demonstrate that the Respondent can issue a warning for speeding offences in excess of 20 mph above the relevant limit where there are mitigating circumstances. While the Claimant had made a poor choice to drive when unwell, he did so at a time when he himself did not fully appreciate that his condition was changing and that the energy tablets would not work as they had for him in the past. Once he commenced driving, his conduct both in speeding and in failing to stop were the result of the impact of low blood sugar on his concentration and decision-making abilities. Considering the *"objective balance"* that must be struck *"between the discriminatory effect of the condition and the reasonable needs of the party who applies the condition*", we consider that the discriminatory effect of dismissing the Claimant because of conduct caused by something arising from his disability, was not proportionate in relation to the Respondent's safety aim, which might have been achieved instead by issuing a final written warning and taking OH advice on the Claimant's duties in future.

111. Mrs Legg considers that dismissal was a proportionate means of achieving a legitimate aim. She reasons that the Claimant's action in choosing to drive after knowing he was suffering from the effects of low blood sugar amounted to serious misconduct. He could have asked his colleague to drive or called a duty manager for help but failed to do so. The Claimant stated his decision to drive was not affected by the impact of low blood sugar. He took a chance by assuming his glucose tablets would work, when he did not have his blood glucose monitor with him to check that he was safe to drive. Despite this, he undertook a long (some 30 miles) journey from Southend to Barking with a passenger in the early hours of the morning. His conduct in this regard demonstrated poor judgment and a lack of concern for the safety of his passenger and other road users. It resulted in him suffering a hypoglycaemic episode while driving and speeding at over 20 mph above the speed limit. The Respondent was entitled to impose the sanction of dismissal in order to uphold its high standards of safety behaviour. Further, in the Claimant's role he was responsible for others' health and safety in a senior and supervisory capacity. The Respondent could no longer have confidence in his judgement in that safety critical role in future. Although the Claimant's judgement in future was not the reason for dismissal relied on at the time, it is a proper matter to take into account when considering the justification balancing exercise. Additionally, Mrs Legg considers that while the Claimant had been able to work without undertaking driving duties between March 2018 and July 2019, there was insufficient evidence from which to conclude either that the Claimant could have returned to driving or that a non-driving role could have been accommodated in the longer term.

112. Given that the Employment Judge (alone amongst the three members of the Tribunal) has concluded both that the dismissal was fair and that it was disproportionate for the purposes of s.15 EqA, it is appropriate to explain why this

distinction has been drawn. The guidance from the EAT tells us that "*a dismissal which is unjustified and disproportionate is unlikely to fall within the band of reasonable responses open to a reasonable employer*": *Northumberland Tyne and Wear NHS Foundation Trust v Ward.* Nonetheless, the legal tests which apply in the two claims are different. In relation to unfair dismissal, the Tribunal must be careful not to substitute its own view but rather to consider whether the decision to dismiss falls within the band of reasonableness. There will often be a range of potential outcomes which might all be reasonable, and the availability of a lesser alternative sanction does not mean dismissal will be unreasonable. In relation to a s.15 claim, there is an objective balance to be struck. The decision to dismiss must be assessed by balancing the discriminatory effect of the dismissal against the needs of the employer. The Tribunal must reach its own view as to where that balance lies (*Grosset*). In this case, in the view of the Employment Judge, one outcome that fell within the range of reasonable responses was to dismiss the Claimant. Another possible outcome which also fell within the range of reasonable responses was to issue the Claimant with a final written warning and address the risks arising from his diabetes by following OH advice. The conduct for which the Claimant was disciplined was caused in large part, although not solely, by his disability. The EqA imposes additional obligations on employers where the protected characteristic of disability is concerned. In the view of the Employment Judge, on application of the objective test for justification, and bearing in mind the causal link with disability, the proportionate response would have been to issue a final written warning rather than to dismiss. However, that is not to say that dismissal fell outside the range of reasonable responses.

113. The Tribunal unanimously rejects the Respondent's argument based on *Chagger.* It is not possible to conclude that had the disciplinary process looked at the Claimant's decision to drive in isolation from his speeding offence, there would be a chance he would have been dismissed in any event. The two aspects are not separable. The Claimant was dismissed because he drove in excess of the speed limit, and that was inextricably causally linked to the symptoms arising from his diabetes, as well as his own poor decision to drive.

*Failure to make reasonable adjustments*

114. In relation to his claim for failure to make reasonable adjustments, the Claimant says the requirement for him to drive was a PCP imposed by the Respondent. We find that the Respondent imposed this PCP until the Claimant was suspended from driving duties in March 2018.

115. The Claimant states that he was placed at a substantial disadvantage by the PCP because his condition may impact on his ability to drive, including through a lack of knowledge about managing his condition and driving. The Tribunal finds this disadvantage only arose on one occasion, 14 February 2018. Before that time, the Claimant did not realise his condition might adversely affect his ability to drive and had not experienced any incidents where it had done so. After that time, the Claimant did know about the problem and was able to take steps to improve his blood glucose monitoring, so his driving was not adversely impacted again. Soon afterwards, the PCP was no longer applied to the Claimant in any event as he had been suspended from driving duties.

116. We find that the Respondent did not know and could not reasonably have been expected to know that the PCP placed the Claimant at the substantial

disadvantage. The Claimant himself did not realise that his diabetes might adversely affect his driving until 14 February 2018. He had not therefore ever suggested to the Respondent that this might be a problem. He had discussed other aspects of his diabetes with his manager and colleagues at the Respondent, resulting in informal arrangements being made that he would not be assigned to distant look out duties and was allowed time to inject insulin. The Respondent was not put on notice of any matter which related to driving.

117. We therefore unanimously conclude that the Respondent was not under any duty to make an adjustment to the PCP prior to learning of the Claimant's speeding incident; at which point, the Claimant was suspended from driving duties and the PCP no longer applied.

*Jurisdiction*

118. The Tribunal has not upheld any claim arising from events which took place on or before 10 June 2019, and therefore no jurisdictional issue arises.

*Apology*

119. I apologise to the parties for the length of time it has taken to issue this judgment.

**Employment Judge Barrett**

**6 October 2022**