



# EMPLOYMENT TRIBUNALS

**Claimant:** P Duffy

**Respondent:** London North Eastern Railway Limited

**Heard at:** Newcastle

**On:** 11-15 August 2025

**Before:** Employment Judge Aspden  
P Curtis  
D Winter

## Appearances

For claimant: Mr John, counsel

For respondent: Mr Peacock, and (on 13 and 14 August) Mr Singh, solicitors

## REASONS

**JUDGMENT** having been sent to the parties on 8 October 2025 and written reasons having been requested on 10 October 2025 in accordance with the Employment Tribunal Procedure Rules 2024, the following reasons are provided:

### Claims and issues

1. The respondent employed the claimant from 2018 until it dismissed him without notice in July 2023, giving the reason as gross misconduct. In October 2023 the claimant presented a claim to the Tribunal in which he complained that his dismissal was:
  - 1.1. an act of disability discrimination falling within section 15 of the Equality Act 2010; and
  - 1.2. unfair, relying on section 98 of the Employment Rights Act 1996.
2. In his claim form the claimant also made other complaints which he subsequently withdrew. Specifically:
  - 2.1. In his unfair dismissal claim the claimant initially averred that he was dismissed because he had made a protected disclosure and that therefore his dismissal was automatically unfair by virtue of section 103A of the 1996 Act.
  - 2.2. The claimant also complained that the respondent had discriminated against him by failing to comply with a duty to make reasonable adjustments.
3. Therefore the only complaints remaining for us to determine were the complaints of ordinary unfair dismissal and the section 15 discrimination claim.

4. The parties had prepared what was said to be an agreed list of issues.
5. With regard to the claimant's complaint of disability discrimination, the claimant's case, as set out in the agreed list of issues, is that:
  - 5.1. he was dismissed because, on 7 May 2023, whilst working on 1S27, he removed two sausage rolls from the bin in the kitchen and then served them to customers; and
  - 5.2. that conduct of the claimant was something that arose in consequence of his disability of anxiety and depression (in that his actions were due to impaired concentration, poor focus and impaired decision-making and performance).
6. It is not in dispute that:
  - 6.1. the claimant was, at the material time, a disabled person in terms of section 6 of the Equality Act 2010 by reason of anxiety and depression; and
  - 6.2. at the time of dismissal the respondent knew the claimant had that disability.
7. The respondent does not accept that the claimant's conduct was something that arose in consequence of his anxiety and depression. Furthermore, the respondent avers that the claimant's dismissal was a proportionate means of achieving legitimate aims as set out at paragraph 41 of the amended Grounds of Resistance.
8. With regard to the unfair dismissal claim, the list of issues identified the following as issues for the tribunal to decide:
  - 8.1. the reason (or the principal reason) for dismissal and, in particular, whether that reason was (as averred by the respondent) that the claimant had removed two sausage rolls from the bin in the kitchen and then served them to customers on 7 May 2023 (or that the respondent believed the claimant had done so); and
  - 8.2. if that was the reason (or principal reason) for dismissal, whether the respondent had reasonable grounds for believing the claimant had conducted himself in this way.
9. In light of the way in which the section 15 claim was put, we asked Mr Johns at the outset of the hearing whether there really was any dispute as to the reason for dismissal. Mr Johns' response was that the claimant 'suspects there was another motive behind it.'
10. During the hearing, the claimant maintained that he did not recall the incident in question. When being cross-examined, whilst not resiling from that position, the claimant speculated that he may not in fact have plated up sausage rolls that he took out of the bin, suggesting that the sausage rolls he took out of the bin were not always visible in the CCTV footage of the incident. Then, when cross-examining the respondent's witnesses, Mr Johns put questions to them that were clearly aimed at casting doubt on the evidence that the claimant had removed sausage rolls from the bin and then plated them up to be served to customers and the respondent's decision-makers genuinely believed the claimant had done so.
11. Before we heard the parties' closing submissions, we reminded Mr Johns that the claimant's discrimination complaint could only succeed if we concluded that the claimant did in fact plate up for service to customers sausage rolls he had taken from the bin and the decision to dismiss the claimant was materially influenced by that conduct, whereas the claimant's position in respect of the unfair dismissal claim appeared to be that this was not the reason for dismissal (or at least not the principal reason). In his closing submissions Mr Johns said the claimant now concedes that

the reason (or principal) reason for dismissal was that the respondent's decision-makers believed the claimant had conducted himself in that way. Mr Johns also told us that the claimant now concedes that the respondent had reasonable grounds for that belief, although not for the belief that this conduct was culpable or blameworthy.

12. In the circumstances, we did not have to decide item numbered 4 in the parties' agreed list of issues ie whether there was a potentially fair reason for dismissal, the claimant having conceded that the respondent dismissed him for a reason related to his conduct, namely the fact that he had removed two sausage rolls from the bin in the kitchen and then served them to customers on 7 May 2023. The only issue for us to decide to determine liability in the unfair dismissal complaint was whether, having regard to that reason, 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 claimant.
13. As for the section 15 claim, the issues for us to decide were as follows:
  - 13.1. Was the following something that arose in consequence of the claimant's disability of anxiety and depression: the claimant's actions on 7 May 2023 in removing sausage rolls from the bin and plating them up for service to customers?
  - 13.2. If so, was the claimant's dismissal a proportionate means of achieving a legitimate aim as alleged by the respondent?

### **Relevant legal framework**

#### **Discrimination arising from disability**

14. It is unlawful for an employer to discriminate against an employee by dismissing them: section 39 of the Equality Act 2010.
15. A person discriminates against a disabled person if they treat that person unfavourably because of something arising in consequence of their disability and they cannot show either (a) that they did not know, and could not reasonably have been expected to know, that the employee had the disability; or (b) that the treatment was a proportionate means of achieving a legitimate aim: Equality Act 2010 s15.
16. Simler P in *Phaiser v NHS England* [2016] IRLR 170, EAT, gave the following guidance as to the correct approach to a claim under Equality Act 2010 s 15:
  - 16.1. 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.
  - 16.2. 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, just as it is in a direct discrimination case. Again, just as there may be more than one reason or cause for impugned treatment in a direct discrimination context, so too, there may be more than one reason in a s.15 case. 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.

- 16.3. 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. In other words, more than one relevant consequence of the disability may require consideration, and it will be a question of fact assessed robustly in each case whether something can properly be said to arise in consequence of disability.
17. This case is concerned with the last of these points. A tribunal must objectively assess whether the 'something' arose in consequence of the disability. In making that assessment it is immaterial whether the employer was aware that the 'something' arose from the disability and a tribunal is entitled to consider evidence which was not available to the employer: *City of York Council v Grosset* [2018] EWCA Civ 1105.
18. In the case of *Connor v Chief Constable of South Yorkshire Police* 2024 EAT 175 the EAT addressed the relevance of expert evidence in determining the question of whether it is more likely than not that the 'something' arose in consequence of a disability, saying: '...where a report is prepared by a qualified person, which deals with issues that a tribunal are required to resolve, due regard ought to be paid to the conclusions. An employment tribunal is not bound to accept the conclusions of a medical expert but rejection requires substantive reasoning, not simply reference to the purpose for which a report was prepared.' The EAT also held: 'In the absence of contrary evidence where a medical practitioner states in a report something "appears" to be connected to a disability that is likely to meet the balance of probabilities test.'
19. The burden of proof in relation to allegations of discrimination is dealt with in section 136 of the 2010 Act as follows:

*'136 Burden of proof*

...

*(2) If there are facts from which the court could decide, in the absence of any other explanation, that a person (A) contravened the provision concerned, the court must hold that the contravention occurred.*

*(3) But subsection (2) does not apply if A shows that A did not contravene the provision....'*
20. Section 136 provides a two-stage test. At the first stage, the claimant has to prove facts from which the tribunal could infer that discrimination has taken place. It is only if such facts have been made out (on the balance of probabilities) that the second stage is engaged. At the second stage the burden shifts to the respondent to prove (on the balance of probabilities) that the treatment in question was 'in no sense whatsoever' because of the prohibited reason: *Igen Ltd v Wong* [2005] EWCA Civ 142; [2005] ICR 931 CA.
21. In respect of justification, the burden of proof is squarely on the employer. For an employer to show that the treatment in question is justified as a proportionate means of achieving a legitimate aim, the legitimate aim being relied upon must in

fact be pursued by the treatment. In light of our conclusions below it is unnecessary to say any more about this.

### Unfair dismissal

22. An employee has the right under section 94 of the Employment Rights Act 1996 not to be unfairly dismissed.
23. When a complaint of unfair dismissal is made, it is for the employer to show the reason (or, if more than one, the principal reason) for the dismissal, and that it is either a reason falling within section 98(2) of the 1996 Act or some other substantial reason of a kind such as to justify the dismissal of an employee holding the position which the employee held: ERA section 98(1).
24. If the respondent shows that it dismissed the employee for a potentially fair reason the Tribunal must decide if the employer acted reasonably in dismissing the employee for that reason applying the test in section 98(4) of the Employment Rights Act 1996.
25. Section 98(4) of ERA 1996 provides that:

*‘... 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.’*
26. In assessing reasonableness, the Tribunal must not substitute its view for that of the employer: the test is an objective one and the Tribunal must not fall into the substitution mindset warned against by Mummery LJ in *London Ambulance Service NHS Trust v Small* [2009] EWCA Civ 220, [2009] IRLR 563.
27. The objective approach requires the Tribunal to decide whether the employer’s actions fell within the range of reasonable responses that a reasonable employer in those circumstances and in that business might have adopted (*Iceland Frozen Foods Ltd v Jones* [1982] IRLR 439). This ‘range of reasonable responses’ test applies just as much to the procedure by which the decision to dismiss is reached as it does to the decision itself (*Sainsbury’s Supermarkets Ltd v Hitt* [2003] IRLR 23).
28. The Employment Appeal Tribunal (EAT) set out guidelines as to how the reasonableness test should be applied to cases of alleged misconduct in the case of *British Home Stores Ltd v Burchell* [1980] ICR 303. The EAT stated there that what the Tribunal should decide is whether the employer had reasonable grounds for believing the employee had committed the misconduct alleged and had carried out as much investigation into the matter as was reasonable in all the circumstances of the case.
29. In that case the EAT also made clear that, in deciding whether an employer had reasonable grounds for believing that the employee had committed the misconduct alleged, the test is not whether the material on which the employer based its belief was such that, objectively considered, it could lead to the employer being ‘sure’ of the employee’s guilt. What is needed is a reasonable suspicion amounting to a belief and that the employer had in his or her mind reasonable grounds upon which

to sustain that belief. If the employer's decision was reached his or her conclusion of guilt on the balance of probabilities that will be reasonable.

30. The concept of a reasonable investigation can encompass a number of aspects, including: making proper enquiries to determine the facts; informing the employee of the basis of the problem; giving the employee an opportunity to make representations on allegations made against them and put their case in response; and allowing a right of appeal.
31. The Tribunal must take into account relevant provisions of the In ACAS Code of Practice on Disciplinary and Grievance Procedures when assessing the reasonableness of a dismissal on the grounds of conduct: Trade Union and Labour Relations Consolidation Act 1992 s207 and 207A. This requirement applies to the Code of Practice itself, not the guidance that accompanies it.
32. Even if procedural safeguards are not strictly observed, the dismissal may be fair. This will be the case where the specific procedural defect is not intrinsically unfair and the procedures overall are fair (Fuller v Lloyd's Bank [1991] IRLR 336, EAT). Furthermore, defects in the initial disciplinary hearing may be remedied on appeal if, in all the circumstances, the later stages of a procedure are sufficient to cure any earlier unfairness (Taylor v OCS Group Ltd [2006] IRLR 613).
33. In applying section 98(4) the Tribunal must also ask itself whether dismissal was a fair sanction for the employer to apply in the circumstances ie one falling within the range of reasonable responses open to a reasonable employer. As noted above, it is not for the Tribunal to substitute its view for that of the employer.

### **Evidence and Facts**

34. We heard evidence from Mr Duffy. For the respondent we heard evidence from the following individuals:
  - 34.1. Ms Mason who took the decision to dismiss Mr Duffy.
  - 34.2. Mr Cunningham, who dealt with Mr Duffy's appeal against dismissal.
  - 34.3. Ms Bullock, who dealt with a grievance raised by Mr Duffy.
35. We were also shown some CCTV footage and referred to a number of documents which we took into account.
36. We deal first with the facts relevant to the unfair dismissal claim. We make the following findings of fact.
37. On 7 or 8 May 2023, a member of train crew reported to the respondent's on train skills and competence manager that they believed kitchen crew working in first class on a particular train on 7 May had served food retrieved from a bin to customers. The person making the report said:

'...on departure from York two sausage rolls were requested for two passengers in Coach K. Myself and a host from standard class had been in the kitchen to get ourselves food when the host who was cooking told us the sausage rolls had just gone in the bin. I made my pasta and went and sat in Coat MC4. After the kitchen door closed there was lots of laughing so I opened the kitchen door to remind the crew there was a passenger in Coach M, the kitchen door closed again. A couple of minutes later one of the hosts from first class took the sausage rolls to Coach K. After I had finished my food I took my rubbish to the bin in the kitchen and

this is when noticed the bins were empty and there were no sausage rolls in the bin. This raised my suspicions but I couldn't be sure as to where the sausage rolls had gone. However I do believe these have been served to passengers by the crew working in first class.'

38. The on train skills and competence manager conducted an initial 'close call investigation' which included reviewing the on train CCTV footage. She identified that the crew in question working in the kitchen at the relevant time were the claimant and a Ms Walker. She believed the CCTV footage supported the concern raised and decided the matter should be progressed to a formal investigation.
39. Ms Gray, project manager, carried out the formal investigation. It began with her reviewing the CCTV footage. Having done that a decision was taken to suspend the claimant and Ms Walker.
40. The claimant had been expecting to have a meeting with Ms Bromley on 17 May to discuss concerns the claimant had regarding his line manager. When the claimant arrived for that meeting, however, Ms Bromley told him that that meeting would not be going ahead and instead there was to be an investigatory meeting with Ms Gray. Ms Bromley then left the claimant with Ms Gray. Also present was a note taker.
41. Before the meeting began the claimant was asked if he wanted an impartial observer to attend and the claimant declined. He was asked again that question at the start of the meeting and declined again. Ms Gray then said 'if you would like to adjourn the interview at any point please let me know and we can stop the interview and then restart after an agreed time.' She asked the claimant if he was okay to proceed and he said he was.
42. At this meeting the following occurred:
  - 42.1. Ms Gray explained what she had been asked to investigate and said she wanted to ask the claimant some questions so that she could establish the key facts. She went on to ask a series of questions. One of the early questions she asked was 'did you on this service retrieve from a bin waste food and plate and serve it to customers?' The claimant replied that he had not. Ms Gray then told the claimant that CCTV footage had been retrieved and that the footage appeared to show that items of food that were disposed of in a bin were retrieved by the claimant in the presence of Ms Walker and plated and re-heated by the claimant and subsequently served to customers by Ms Walker. She asked the claimant if he would like to respond. The claimant responded by asking 'were they in foil?'. Ms Gray said they were. The claimant said 'that is not something I would normally do but if it was foiled...'
  - 42.2. Ms Gray then showed the claimant stills from the CCTV footage and asked him some more questions. In answer to her questions the claimant said at various points, 'I can't remember retrieving anything out of the bin'. He was shown still images taken from the CCTV footage that showed him and Ms Walker laughing and said he could not remember what they were laughing at but that it was certainly not taking the sausage rolls out of the bin and he said that Ms Walker laughed all the time.
  - 42.3. The claimant said on a number of occasions in this meeting that the sausage rolls removed from the bin were wrapped in foil. When Ms Gray said the CCTV showed they weren't, or were not completely wrapped, the claimant said 'I'm sure they were.'

- 42.4. When Ms Gray asked the claimant if he thought it was acceptable to serve food from the bin the claimant replied 'no, we ran out of food, there was no rubbish in there.' When Ms Gray said it was not the case there was no rubbish in the bin the claimant said 'I can see where you are coming from but I am a person who goes over and beyond for the customer. The sausage rolls were in foil.' Ms Gray then pointed out that the footage showed rubbish had been put in the bin and the claimant said 'I can't argue with that, I'm an honest person. I clearly took them out as there were none left for people in first class but they were wrapped in foil.' Shortly after making that comment the claimant said 'we had totally ran out, I have just gone too far for the customer in my mind, I'm a bit all over as I am on 20mg of Naproxen and I was stressed with work. That was me trying to do the best for the customer which I am well known for.'
- 42.5. The claimant then, after a short break, said that he didn't think it was correct that the food was plated up for the customer and he couldn't remember plating up food for a customer. Ms Gray asked him if wanted to view the CCTV. He said 'no its fine.' After another short break Ms Gray asked the claimant if there was anything else he wanted to add and he said 'Just about my medication Paroxetine 20mg. It has had an effect on loads of things at the minute and I really think this has affected me.' Ms Gray then told the claimant he was suspended pending an investigation. The claimant said during this meeting that he wanted a different manager to report to.
43. The claimant's evidence is that Ms Gray was rude, patronising, intimidating and generally unprofessional during the meeting. That is not supported by the notes of the meeting. All the questions asked were appropriate.
44. On 17 May Ms Gray also met with Ms Walker who was also the subject of a disciplinary investigation and she too was suspended. In that meeting Ms Walker said the claimant would never have retrieved food from a bin and served it and he was the most customer focused person she knew. She also said that if CCTV showed the claimant taking sausage rolls out of the bin she had been unaware because she had turned away from him at that point and she was positive there were still sausage rolls left and she was sure they were under the microwave. When asked if she knew what they were laughing at on the CCTV footage Ms Walker said 'yes I had passed wind and we were laughing at that but I laugh all the time.'
45. The claimant subsequently complained to HR about the fact that this meeting took place when he had been expecting a different type of meeting. The claimant described it as an 'ambush'. He also complained about the way he claimed Ms Gray had conducted the meeting. He asked for the investigating officer to be changed and referred to his mental health. In a long email the claimant gave an account of his history of anxiety and depression and described how he said his mental health had been adversely affected by work in the previous years, and the previous two months in particular. He said the past six weeks had been the worst six weeks of his career and that he had increased his anxiety medication to 40mg per day.
46. Ms Bullock asked that the claimant allow the investigation to take its course and offered to meet with him to discuss it.
47. On 26 May there was a further investigation meeting between the claimant and Ms Gray at the claimant's request. This time the claimant had a union rep in attendance Mr McLeary. At this meeting the following occurred.

47.1. The claimant referred to what he termed his 'mental health journey.' He said he had been under a lot of pressure at work. He also said he had 'raised issues with management and senior management and this has impacted me massively over six weeks.' He said he had 'mental health issues' and had had 'some horrendous experiences with the north management team which has impacted on me.'

47.2. Ms Gray said her remit was to investigate the incident on 7 May 2023 and asked 'Do you have anything you would like to add about the day? Was your medication affecting you? You said in your email you had to up your medication. Did you raise this with anyone?' The claimant replied 'no.' Ms Gray said 'When did you increase your medication?' The claimant said 'about three weeks before this happened.' Ms Gray asked 'Did it have any adverse effects?' The claimant replied 'No'. Ms Gray asked if the claimant had felt fully fit for duty on 7 May. The claimant said 'yes'. Ms Gray asked 'When you are on medication does it affect your actions?' The claimant said 'When I am on medication my actions may be different which I think is relevant.' He went on to say 'Do you look at my character and all the work I do when considering this?' Ms Gray replied 'I look at factual evidence, witnesses' reports and notes.' The claimant said 'My mental health does have a factor in this' and Ms Gray said 'It has been recorded and it does have relevance.' Ms Gray asked the claimant again if he wanted to see the CCTV footage and the claimant said 'I would find it difficult to watch because of my high level of service.' Ms Gray asked him 'Have you remembered any more about the day since the first interview that you would like to add?' The claimant said 'I had jet lag. I remember laughing with Claire and Sophie and Jack were working. I was confident that there were sausage rolls under the microwave but I don't want to watch the CCTV. Are you sure they were taken out of the bin?' The claimant said he couldn't remember the circumstances around taking sausage rolls out of the bin and that he couldn't remember taking the order off a colleague. The claimant said 'I can't understand why this has happened. My mind has been everywhere. I should have gone on the sick.' He then referred to his anxiety being high when the first investigation meeting was arranged.

48. Subsequently Ms Gray completed an investigation report on 2 June. On 8 June the claimant was sent a request to attend a disciplinary hearing to take place on 19 June. The allegations were set out as follows:

*'On 7 May 2023 whilst working on 1S27 you removed two sausage rolls from the bin and the kitchen and then served to customers. This contravenes both SMS18.1 food safety policy which states LNER is committed to ensuring the highest standard of food safety and hygiene in respect of the purchase, storage, preparation and handling and serving of food and drink and SMS18.02 food safety standard which states it is the objective of the business to ensure the higher standards of hygiene and food safety in respect of the purchase, storage, preparation handling and serving of food and drink products in its catering provision. This matter is considered gross misconduct.'*

*Further the actions stated above had potential to cause serious reputational damage if the incident was observed or discovered by a customer or member of the public. In accordance with the company handbook you must not bring the company into disrepute by anything you say or do when on or off duty. This matter is considered to be gross misconduct.'*

49. The disciplinary hearing took place on 19 June. It was conducted by Ms Mason. Before the meeting the claimant spoke to somebody from occupational health who confirmed he was fit to attend the disciplinary meeting. Ahead of the disciplinary hearing the claimant had sent Ms Mason a number of emails and she read all of those emails before the disciplinary hearing took place.
50. The claimant attended the disciplinary hearing with Mr McLeary the union rep. At this hearing the following occurred.
- 50.1. The claimant and a union rep had prepared a statement in advance which Mr McLeary read out. That statement included the following:
- 'Firstly Peter does not dispute that he carried out the said actions, the case we will present will be based on the following:*
- Peter's impeccable professional standards away from this case which demonstrates that this is completely out of character.*
- Peter's mental health diagnosis and the impact on him and how this has been increased by senior managers who have constantly bullied, intimidated and harassed him both in his role and when he was seconded as a manager. We will argue that on the day he suffered from a recognised condition brought on by this.*
- Investigation being of a poor standard and not interviewing all witnesses on board.'*
- 50.2. The claimant brought with him to the hearing a pack of supporting documents including a number of documents that showed he had received praise from customers, colleagues and others for the service he had provided and for his performance. The claimant highlighted particular examples during the hearing. Mr McLeary described the claimant as a 'model employee.'
- 50.3. Dealing with the claimant's mental health, Mr McLeary said 'We argue that the strain, stress and anxiety that Peter had been under leading up to this incident led him to do something so out of character, no one with compassion can deny it is instrumental in his actions that night.' Mr McLeary also said 'We additionally argue that Peter had suffered from a recognised condition that day, a condition known as transient global amnesia.' Mr McLeary went on to say 'Peter's increased stress on the day of the incident caused him to suffer this recognised condition on the day. He became confused.'
- 50.4. The claimant and/or Mr McLeary gave Ms Mason a document containing information about that condition which said
- 'TGA is an episode of confusion that comes on suddenly in a person who is otherwise alert. You may not remember anything about what is happening right now. Signs are sudden onset of confusion that includes memory loss. Causes are being emotionally upset perhaps by bad news, conflict or over work. Clearer risk factors are people over 50.'*
- 50.5. The claimant also included in the pack various documents which he considered evidenced the stresses he was under going back more than two years including evidence of his history of unhappiness with his line manager. He went through the documents in the disciplinary hearing. That information included information about more recent developments and issues which included but were not limited to the following:

- 50.5.1. The claimant being upset at the beginning of April about something he considered to have been a breach of confidentiality and that he believed it would alert people to his mental health problems.
- 50.5.2. A reference to the claimant, on the day of the incident, being anxious because he had been included on a list for some training that he had already completed.
- 50.6. The claimant also said he had included in his evidence pack evidence of the pressure they were under in the kitchen.
- 50.7. The notes of the disciplinary meeting record Mr McLeary as having said 'We do not seek to argue that the incident happened.' We think it more likely than not that what Mr McLeary actually said, or at least intended to say, was they did not seek to claim that the incident did not happen. He went on to say 'we do argue that it happened because Peter was displaying cognitive issues arising from his mental health that has been solely brought about by the behaviours of the Newcastle management team. We argue this led to the episode of transient global amnesia, he was overworked, he experienced conflict constantly.'
- 50.8. Ms Mason asked if the claimant had a diagnosis of transient global amnesia. Mr McLeary said another union rep had suggested it as a possible explanation.
51. The hearing then adjourned. Subsequently, on 22 June, the claimant emailed Ms Mason a statement from Mr Paul, customer experience host. Ms Mason read the statement and took it into account when reaching her decision. In that statement Mr Paul said the claimant had incredibly high standards in work, that he (Mr Paul) had noticed a change recently and that the claimant seemed flat, and that on 7 May the claimant and he had had a chat and the claimant had told him he had been dealing with severe anxiety for a long time and had recently been upping his medication. Mr Paul said the claimant had referred to recent stressors.
52. The disciplinary hearing was reconvened on 23 June because Ms Mason decided she would like advice from Occupational Health. The claimant agreed to an occupational health referral and the claimant, his union rep and Ms Mason agreed the questions that would be referred to occupational health.
53. During this meeting the claimant asked to speak to Ms Mason outside the meeting in confidence on their own. They had an adjournment so they could do this and the claimant told her he (along with colleagues) had made a complaint to the DFT anonymously about various matters involving the respondent and had subsequently had a meeting with the DFT to discuss the issues had been stressed about this.
54. On 28 June the claimant had a face to face consultation with an occupational health advisor which resulted in a report being produced. We note the following:
- 54.1. One of the questions asked of the OH adviser was 'Was the incident caused by or contributed to by a medical condition?' The response from the OH advisor was:
- 'Mr Duffy has suffered from ongoing anxiety for over 10 years which he has managed. Over the last two years his condition has been exacerbated due to work related stress which was ongoing prior to the recent incident. On the week leading to the day of the incident he had been exposed to additional stresses as well as on the day of the incident. The condition and related stresses could have impacted his concentration and focus and performance.'*

- 54.2. The next question was 'Does Peter have or has he had the condition transient global amnesia?' The occupational health advisor said the claimant had not 'declared that condition'. Their understanding was the claimant had not received a diagnosis and they said they could not comment further.
- 54.3. The next question was 'Could this condition or any condition Peter has directly or indirectly caused the behaviour seen? Provide information if so.' In response to that the OH advisor said '  
  
'Mr Duffy's mental health condition can cause symptoms of impaired concentration or focus and impaired decision making and performance. It can also impact short term memory.'
- 54.4. There was then a question about the likelihood of that happening again and anything that could be done to prevent it. In response the advisor said '  
  
'Mr Duffy does not declare previous similar episodes of total episodic memory loss. However his current symptoms relating to anxiety may well recur in the future and require treatment.'
- 54.5. One of the questions was 'The representative states that it happened because Peter was displaying cognitive issues arising from his mental health. What is the likelihood of this?' The occupational health advisor simply said: 'Please refer to the above re how the condition can affect his cognitive function.'
55. Ms Mason considered that report before reaching her decision on the disciplinary matter.
56. The claimant was asked to attend a disciplinary outcome meeting. He asked instead for the decision to be given in writing. Ms Mason's decision was that the claimant's employment should be terminated without notice. Ms Mason explained her conclusion and the reasons for it in a long letter dated 13 July. The claimant was told that his employment was terminated summarily with effect from the following day 14 July.
57. We make the following findings as to the reason Ms Mason decided to dismiss the claimant.
- 57.1. Ms Mason dismissed the claimant because she believed the claimant had removed from a bin two sausages rolls, plated them up and heated them up for them to be served to customers.
- 57.2. Ms Mason considered whether the conduct was blameworthy or culpable or whether it was explained or excused by the claimant's mental state. She concluded that the conduct was a deliberate decision and was blameworthy and did not arise from the claimant's mental ill health. We are satisfied that in reaching that decision Ms Mason considered, genuinely and carefully, whether the claimant's mental health impacted upon his behaviour on the day in question. She deferred making the decision until she had had further advice from occupational health and took that advice into account. She considered what the claimant and his union rep said, and the information they had provided (including Mr Paul's statement) about the claimant's previous good record and reputation, the praise he had received, his mental health history and the stresses he had been under and what he had said about that increasing his anxiety.
- 57.3. Ms Mason also weighed in the balance that she considered the claimant had been managing his mental health in the past and that he had not taken time

off work. She also watched the CCTV footage and, from that, formed an impression as to the claimant's demeanour at the time of the event. In addition she took into account what the claimant had said in his meetings with Ms Gray.

57.4. One of the factors taken into account by Ms Mason was that the claimant and Ms Walker could be seen (on the CCTV footage) laughing at the material time. Ms Mason formed the belief that the cause of the laughter was that they were amused that they were taking food out of the bin and serving it to customers from first class. In her letter explaining her decision Ms Mason said the claimant had provided 'no other plausible explanation' for the laughter. Mr Simon submitted that the reference to this was evidence that Ms Mason had not read Ms Walker's statement, or had not heeded it, given that Ms Walker had said they were laughing because she had broken wind. Taking into account all of the evidence, including Ms Mason's answers on cross-examination, we find it more likely than not that Ms Mason did have regard to what Ms Walker had said but simply did not accept it was the reason for all the laughter. That is not inconsistent with what Ms Mason said in her letter. We find that Ms Walker simply found it more likely, having viewed the CCTV, that the claimant and Ms Walker were laughing at what was being done with the food.

57.5. Ms Mason believed that the claimant's actions amounted to gross misconduct because they were a serious breach of the policies on food handling that the claimant was aware of and the claimant's conduct had the potential to cause harm or serious adverse effects for customers because of the risk of cross-contamination. On that issue Ms Mason believed the CCTV footage showed that the sausage rolls were not entirely covered by foil when they were taken out of the bin. Ms Mason also believed the claimant's actions had the potential to cause serious reputational damage if they became known by the public.

58. The claimant appealed the decision to dismiss him on 14 July in a lengthy document. His grounds of appeal were summarised in bullet points and then the email went into detail of those grounds. The claimant also put together some observations on the disciplinary outcome letter and forwarded those.

59. The appeal was dealt with by Mr Cunningham who wanted to meet with the claimant. He reviewed all the documents the claimant sent in and the CCTV footage. The claimant sent detailed written submissions on 26 July which Mr Cunningham reviewed. The claimant also sent a letter he'd got from his GP dated 10 July which referred to the claimant's long-standing history of depression and medication. The GP said the claimant's mental health can be quite vulnerable, especially when challenged by significant stress. The GP also said:

*'When under significant duress we know that people with a history of depression can lose concentration and can think irrationally. I do believe this has happened to Mr Duffy. Since this episode he has remained in vulnerable mental health and I am seeing him regularly for this and he is currently signed unfit to work due to this reason. I hope this information is of use.'*

60. An appeal meeting was arranged to take place on 31 July. The claimant chose not to attend so Mr Cunningham considered matters in the claimant's absence. Mr Cunningham considered his role as being to review the fairness of the original decision. In doing that however we find that he considered all the submissions made by the claimant including what he'd said about his mental ill health and the effect the claimant said it had on his behaviour. He also considered the occupational health

report and the GP report and the other documents submitted by the claimant in the pack including his history of being praised for his customer service record, what he had said about his increased stress and anxiety and what Mr Paul had said. Mr Cunningham formed his own view as to whether the claimant's mental ill health, stress and anxiety had affected his behaviours on the day in question in any relevant way.

61. Mr Cunningham was aware that by this stage the claimant had raised concerns that were being dealt with as a grievance and he delayed finalising his decision until that grievance investigation was completed. The grievance was dealt with by Ms Bullock who issued her outcome letter on 16 August. She did not uphold the grievance.
62. Mr Cunningham reviewed the grievance outcome. It did not cause him to question or change the conclusions he had provisionally reached already based on the information previously available to him. He decided the dismissal decision had been fair. In reaching that decision, although he accepted the claimant suffered from mental ill health, he agreed with the conclusion of Ms Mason that the claimant's mental ill did not impact on his decision making in relation to the incident on 7 May and did not cause him to act in the manner that he did. In reaching that decision, Mr Cunningham took a slightly different view from Ms Mason of the fact that the claimant was seen laughing on the CCTV footage. Mr Cunningham thought the laughter showed the atmosphere was jovial, but he did not go so far as to form a view as to what the cause of the laughter was.
63. Mr Cunningham confirmed his decision in writing.

#### **Conclusions on the unfair dismissal claim**

64. The decision to dismiss the claimant was taken by Ms Mason.
65. Ms Mason dismissed the claimant because she believed the claimant had removed from a bin two sausages rolls, plated them up and heated them up for them to be served to customers. She believed that the conduct was a deliberate decision and was blameworthy and did not arise from the claimant's mental ill health.
66. The issue for us to decide to determine liability in the unfair dismissal complaint is whether, having regard to that reason, in the circumstances (including the size and administrative resources of the employer's undertaking) the respondent acted reasonably or unreasonably in treating it as a sufficient reason for dismissing the claimant.
67. Looking at whether there were reasonable grounds for the belief in the misconduct, there are two elements to that in this case:
  - 67.1. First the belief that the claimant had removed from the bin two sausage rolls, plated them up, heated them for them to be served.
  - 67.2. Second, the belief that the claimant's conduct was blameworthy or culpable in that it was not caused or contributed to by mental ill health.
68. As recorded above, the first of those two elements was conceded by Mr Johns in closing submissions.
69. As for the second element, we have found as a fact that Ms Mason considered, genuinely and carefully, whether the claimant's mental health impacted upon his behaviour on the day in question (as did Mr Cunningham when he dealt with the appeal that followed). We are satisfied that Ms Mason had reasonable grounds for her decision, those grounds being set out at length in her decision letter.

70. In his closing submissions, Mr Simon appeared critical of Ms Mason and Mr Cunningham for forming a view of the claimant's mental ill health and its impact on his actions, suggesting that, as lay people, this is a matter that was outside their field of knowledge. We reject that criticism. It was Ms Mason's responsibility to consider this issue because the claimant had raised it. She had to engage with that issue and form a view of the matter. In particular it was not unreasonable for Ms Mason and subsequently Mr Cunningham to consider their impressions of the claimant's demeanour looking at what was on CCTV. Nor was it outside the range of reasonable approaches for Ms Mason (and subsequently Mr Cunningham) to take account of the fact that the claimant had been managing his mental health in the past and he had not taken time off work. That was a relevant part of the history.
71. We are satisfied that Ms Mason had reasonable grounds for concluding that the claimant's relevant behaviour on the day in question was not caused or contributed to by his mental state and the anxiety he had been experiencing. That was a conclusion that was open to a reasonable employer acting reasonably, based on the available evidence.
72. As for whether that conclusion was based on as much investigation as was reasonable, in the grounds of claim the claimant avers that 'the Respondent relied on the CCTV footage only, which does not have audio sound, and did not interview any other staff members onboard on 7 May 2023, other than the Claimant and his colleague who served the sausage rolls. None of his colleagues were asked about how the Claimant was that day.'
73. We do not accept that the respondent considered only the CCTV footage. Ms Mason (and Mr Cunningham) considered all the other evidence placed before them and weighed that evidence in the balance, that included Ms Walker's statement, Mr Paul's statement, the occupational health report, all of the information provided by the claimant and (on appeal) the GP letter.
74. As far as speaking with the claimant's colleagues was concerned, both Ms Mason and subsequently Mr Cunningham took into account what Mr Paul said about the claimant being under stress and being 'flat' and Ms Walker having observed that the claimant would not have done what was alleged. Given that the respondent had obtained occupational health advice and took into account what the claimant himself said about his mood and stressors we do not consider that the respondent acted unreasonably in not seeking views from others as to how they perceived the claimant to be on the day in question.
75. In the grounds of claim the claimant says 'The Respondent failed to investigate the medical opinion, provided by its own occupational health report, that the Claimant's mental health condition could cause symptoms of impaired concentration, poor focus & impaired decision making and performance. This assessment was provided and no further question were asked about whether this impact could have been an explanation for the Claimant's actions on 7 May 2023.'
76. We have found as a fact that, contrary to that submission, Ms Mason (and Mr Cunningham) did take full account of the Occupational Health report. All relevant questions were asked in the referral. Mr John submits that the respondent should have inferred from the report that the OH adviser was of the opinion that the claimant's actions were caused by his impairments. In so far as Mr John suggests that is the only interpretation open to a reasonable employer we have no hesitation in rejecting it. Nor do we consider the respondent acted unreasonably in not going back to the OH adviser to ask, again, whether the adviser was of the opinion that the

claimant's actions had been affected by his impairment. The OH adviser had been asked the question already and the an obvious inference to be drawn from the failure to express an opinion one way or another was that the OH adviser did not feel able to form a view on the matter.

77. We are satisfied that Ms Mason (and Mr Cunningham) carried out as much investigation as was reasonable before concluding that the claimant's relevant behaviour on the day in question was culpable and not caused or contributed to by his mental state and the anxiety he had been experiencing.
78. We considered whether a fair procedure was followed in other respects. The main criticism from the claimant (other than in relation to the investigation issues dealt above) concerns the first interview which was described as an 'ambush.' We do not agree with that criticism. It is common practice for employers not to give advance notice of investigation meetings and that was the normal practice of this respondent. That the claimant had been expecting a different kind of meeting does not take the respondent's approach outside the range of what would have been reasonable. We have not found that the claimant was tricked or misled when the meeting was arranged; circumstances had simply moved on. Furthermore, the claimant was advised at the start of the meeting what it was about. He was offered the opportunity to have somebody present or even an adjournment. We do not accept the criticisms made of that meeting. Nor was it unreasonable for the respondent to rely on what the claimant said in that meeting in reaching its decision.
79. Having reached the reasonable conclusion that the claimant's actions had not been influenced by mental ill health, we must consider whether dismissal was within the range of reasonable responses open to a reasonable employer.
80. It has been suggested on behalf of the claimant that there were no reasonable grounds for concluding this matter was serious and no reasonable grounds for concluding that there was a risk of cross-contamination or reputational damage. We reject the claimant's submissions. There were clearly reasonable grounds for those beliefs. That the claimant's actions were a serious breach of the respondent's policies is obvious: the claimant took food out of a bin to serve to customers. It was reasonable for Ms Mason to conclude that there was a cross-contamination risk, particularly in light of her (reasonable) belief that the CCTV showed the sausage rolls were not entirely covered by foil when they were taken out of the bin and that a number of other items had been put in the bin. As for reputational damage, the respondent's conclusion was that there was potential for such damage and clearly there was if the claimant's actions became known to the wider public. We are satisfied that the sanction of summary dismissal was one which fell squarely within the range of reasonable sanctions available to the respondent, notwithstanding the claimant's past good record and reputation.
81. We find that, in all the circumstances, the respondent acted reasonably in deciding to dismiss the claimant for the reasons that it did. Therefore the claim of unfair dismissal is not well founded and it fails.

**Further findings of fact relevant to disability discrimination claim**

82. Notwithstanding the claimant's speculation at this hearing that he may not have plated for service the sausage rolls he took out of the bin on 7 May 2023, it is not (now) in dispute that he both removed sausage rolls from the bin and then plated them up for service to customers. Therefore, the first question for us to decide to

determine this claim is whether, as a matter of objective fact, the claimant's actions were something that arose in consequence of his disability.

83. The documents we took into account included a report from a Dr J Thorp, Consultant Forensic Psychiatrist, dated 3 April 2024. Dr Thorp set out her qualifications and experience in the first paragraph of her report and we had no reason to doubt her expertise in the diagnosis and treatment of mental illness. She said she had been asked by the claimant's solicitors to complete a medical report 'in assessing his prospects' in respect of the claims he has made. Dr Thorp set out the specific questions she had been asked to address. They included questions directed at the issue of whether the claimant's actions that resulted in his dismissal arose in consequence of his mental impairment. Before preparing her report Dr Thorp met with the claimant twice. She had access to various documents, including what was described as 'Mr Duffy's file of evidence' and the respondent's grounds of resistance, as well as the claimant's GP records. There is no reference in the report to the CCTV footage of the incident that led to the claimant's dismissal and we infer Dr Thorp was not provided with a copy.

84. We make the following findings of fact.

84.1. The claimant has suffered from anxiety and depression for 14 years. That was a mental health condition which, it is not disputed, amounted to a disability under the definition in section 6 of the Equality Act. Throughout this period the claimant took 20mg of an anti-depressant medication daily but (as recorded below) there was a period when he increased that dosage to 40mg per day, albeit without recourse to his GP. The claimant had accessed CBT, counselling and hypnotherapy to try to manage his conditions.

84.2. The claimant experienced increased anxiety in the two years or so leading up to 7 May 2023. The claimant had a telephone assessment on 23 February 2023 with the Mental Health Service.

84.3. In the couple of months before the incident in question there were other matters that caused an increase in the claimant's anxiety. He had ongoing unhappiness with his line manager; that state of affairs had existed for some time and was continuing. On 3 April 2023 there was what the claimant considered to be a data breach involving information being circulated about the shifts he was working. The claimant was unhappy and anxious about that because he was anxious about what people might think of him or be saying about him amongst other things. The claimant had concerns about various other issues at work and he was involved with some colleagues in writing an anonymous letter, raising these matters externally on 10 April 2023. The claimant had increased anxiety about the matters they raised and also about having taken the step of raising them externally and maintaining his anonymity.

84.4. In April 2023 the claimant increased his anti-depressant medication from 20 to 40mg daily on a temporary basis. We find it more likely than not that he did this six weeks before the incident ie at the start of April, around about the time of the data breach that caused him anxiety. That is what the psychiatrist report we have been referred to said and is consistent with the claimant's evidence when questioned at this hearing. We find he increased his medication for a period of two to three weeks: that was the claimant's evidence to us. So he was not on the increased dose at the time of his actions that led to his dismissal.

- 84.5. Two days before the incident in question, the claimant had a meeting with somebody at the Department for Transport about the matters that he and colleagues had raised anonymously. He learned then that the anonymous communication had been provided to the respondent. The claimant was anxious about that.
- 84.6. On the day of the incident the claimant experienced heightened anxiety because he learned he was rostered to do training on 9 May that he had already attended a few days earlier. He found that confusing and was concerned about the ramifications of this and that his manager might criticise him.
- 84.7. On the day of the incident the claimant spoke to his colleague Mr Paul about matters that he was anxious about. At that time it was Mr Paul's perception that there had been a recent change in the claimant's mood or demeanour in that the claimant seemed to be 'flat'. We note Mr Paul did not say he noticed any other change in the claimant's performance or behaviour.
- 84.8. As explained by Dr Thorp (and to some extent the occupational health adviser) anxiety can cause the following symptoms: difficulty concentrating, memory loss, distractibility, poor problem solving, poor decision-making and difficulties focusing attention on a task. Depression can also cause poor concentration, memory loss and poor attention. People with anxiety and depression can suffer from sleep deprivation which can lead to further difficulties with concentration, attention and memory. The type of medication the claimant was taking can cause confusion, impaired concentration and memory loss.
- 84.9. The claimant had been recognised and praised by a number of people in the past for his high levels of customer service and attentiveness. Mr Paul, for example, said 'I've worked with him loads over the years and have always found him to be incredibly proud in his role with incredibly high standards towards his role in all aspects. He is always immaculate, hard working, conscientious and very caring and attentive to the customers.'
- 84.10. The claimant knew there were CCTV cameras operating in the kitchen.
85. Those are facts that support the claimant's case that his actions arose in consequence of his disability.
86. As noted above, Dr Thorp was asked questions directed at the issue of whether the claimant's actions that resulted in his dismissal arose in consequence of his mental impairment. Whilst we have given weight to this report on matters of how, in the general population, depression and anxiety (and the medication the claimant was taking) can affect an individual, we do not consider it carries any real weight beyond that. We say that for the following reasons.
- 86.1. Dr Thorp equivocates between saying (at various points of the report) that it is 'entirely possible' that the claimant's behaviour at the time was affected by his mental impairment, and then saying that it is not just 'possible' but 'likely' and 'probable' that the claimant's mental conditions and medication affected his actions at the time of the incident. Dr Thorp does not explain in any meaningful way why she considers this to have been probable or likely rather than simply possible.
- 86.2. Dr Thorp says 'it is likely that most people will have experienced periods of increased stress and anxiety whereby they may have acted out of character without full awareness of what is going on around them and with poor decision

making. In my opinion this is what happened to Mr Duffy.’ That part of the report is unclear and ambiguous. Dr Thorp seems to be saying that these matters can arise regardless of any underlying disability. It is not clear why she formed the opinion that is what had happened to Mr Duffy. Furthermore, although Dr Thorp seems to be suggesting the claimant was unaware of what ‘was going on around him’ we note that later in the report she says ‘I’m not of the opinion that Mr Duffy was unaware of his actions at the time’.

86.3. With regard to the claimant’s actions being affected by medication, Dr Thorp puts this down to the claimant having increased his usual dose of medication. However, we have found as a fact that the claimant was not on an increased dose of medication at the time of the incident in question.

86.4. Dr Thorp’s evidence has not been tested by cross-examination.

87. In addition, Dr Thorp did not have the benefit of watching the CCTV footage.

88. The Occupational Health adviser said ‘Mr Duffy’s mental health condition can cause symptoms of impaired concentration or focus and impaired decision making performance. It can also impact short term memory.’ Mr Simon suggested we should infer that what the occupational health advisor meant was that the claimant’s condition did in fact affect the claimant in that way. We do not agree that is an appropriate inference to draw from the occupational health adviser’s letter. The questions asked were specific. It seems likely to us that if the OH adviser had felt able to form an opinion as to whether or not the claimant’s actions were caused by his mental health impairment, the adviser would have said so and answered the questions asked. We find it more likely than not that the fact that the OH adviser did not express an opinion on the matter was because the OH adviser did not feel able to form an opinion.

89. The claimant also relies on the fact that Ms Walker said, when interviewed, that what the claimant was being accused of was not something he would do. However, we do not consider this evidence, untested by cross-examination, to be compelling or to carry any real weight given that Ms Walker was implicated in the events in question and it was in her own personal interest to say what she did when faced with the possible loss of her job. Furthermore, on our assessment of the evidence, it is more likely than not that, contrary to what Ms Walker said in her interview, she saw and knew the claimant was serving sausage rolls that he had taken out of the bin. There is no suggestion that she intervened and questioned what the claimant was doing and we have found her statement to be self serving.

90. Mr Simon also submitted that the CCTV footage supported the claimant’s case in that it showed him laughing and being constantly active which the claimant posited was evidence of ‘manic’ behaviour. We do not agree that the claimant’s actions captured on the CCTV footage are suggestive of him having some kind of manic episode or mania; it simply shows that the claimant appeared busy and that he and Ms Walker found something amusing.

91. There are a number of factors that weigh against the claimant.

91.1. There is no suggestion or evidence that at any other times in this shift the claimant experienced any distractibility, poor concentration, lack of focus, exercised poor judgment or made poor decisions. Nor is there any suggestion or evidence that in any earlier shift or any subsequent shifts in this stressful period the claimant experienced any distractibility, poor concentration or lack of

focus, exercised poor judgment, or made poor decisions. The only occasion this is said to have manifested itself is in relation to this one incident.

91.2. Dr Thorp said in her report 'it is possible that colleagues would have been aware of Mr Duffy's distractibility, poor concentration or lack of focus.' However Mr Paul did not identify any of those features (distractibility, poor concentration, lack of focus) in his statement and nor did he say he saw anything that suggested the claimant's judgment was impaired. Nor did Ms Walker say she witnessed any of those behaviours on the part of the claimant.

91.3. The claimant himself does not explain in regard to that incident where the confusion or lack of focus arose. We are left to speculate about that because the claimant claims he has no memory of the situation. Was it that the claimant did not realise he was removing items from the bin? Or was it that he took items of the bin for another purpose and then inadvertently served them to customers? Was it an error of judgment in that the claimant felt in that moment that if the food was wrapped it would be acceptable to serve the sausage rolls, forgetting or disregarding everything he knew about cross-contamination etc?

91.4. Although the claimant's evidence before us was that he has no recollection of the incident, and that has been the claimant's position since the second disciplinary interview, we do not consider that his memory of events has been affected in the way that he claims. We say that based on the answers the claimant gave the first time he was interviewed, which strongly suggest the claimant did have some recollection of the incident in question. We acknowledge that the claimant was taken by surprise by that meeting but we do not consider it is necessary or appropriate to disregard what he said in that meeting. We note that Dr Thorp expressed the opinion that the claimant's memory had been or may have been affected by an increase in medication but we have found as a fact that the claimant was not taking an increased dosage at the time in question.

91.5. We have considered the context in which this behaviour occurred and what the CCTV shows. The background to this we find is that the claimant was told a customer or customers had asked for sausage rolls. We found that the claimant took a series of deliberate actions in response to that request. The claimant received an order for sausage rolls; there were no cooked sausage rolls immediately available; there were uncooked sausage rolls in the fridge but they would have required cooking, which would have taken more time; the claimant knew there were sausage rolls in the bin that were cooked because he had very recently put them in there himself; after being told a customer wanted sausage rolls he took those out of the bin, plated them up and re-heated them on and then gave them to Ms Walker to deliver to customers. There is nothing in the CCTV footage that suggests to us that the claimant was behaving in an absent minded way or was distracted or lacking focus or concentration. Indeed he seems engaged with his task and surroundings, with tasks generally and communicating with his colleague.

92. The claimant's case is that it was so out of character for him to act in the way he did that we should infer that it is more likely that not that his actions arose in consequence of his mental impairment. The claimant's work ethic and customer service had led to him being praised by a number of people. As recorded above, we accept that is a factor that weighs in favour of the claimant's case. However, it seems to us that few of the individuals who praised the claimant's past performance will have seen the claimant operating in the kitchen environment. Colleagues may have

done but they would not have seen him all the time. Ms Walker would have been closest to the claimant but we found her evidence of what she said in the interview to be unreliable as being likely to be self-serving.

93. Weighing all of the relevant factors we find it more likely than not that the claimant's actions in taking sausage rolls out of a bin and plating and heating them up to be served to customers were not actions that arose in consequence of the claimant's disability at all. We have found that those actions did not occur because the claimant was confused, distracted or lacked focus or because his judgment and decision making was impaired in consequence of his impairments (or any medication he was taking for those impairments). We find it more likely that the claimant acted as he did simply because he had an order from a customer and that was his way of fulfilling it as quickly as he could. That was undoubtedly a poor decision, but, we find, it did not come about in consequence of the claimant's disability.

**Conclusion on disability discrimination claim**

94. The respondent dismissed the claimant because of the claimant's actions in taking sausage rolls out of the bin and plating and heating them up to be served to customers. Those actions were not something that arose in consequence of the claimant's disability. In the circumstances the claim of disability discrimination under section 15 of the act is not well founded and that claim fails.

Employment Judge Aspden

13 November 2025