



EMPLOYMENT TRIBUNALS

Claimant: Mr A Depala

Respondent: Mitie Ltd

Heard at: Reading **On:** 9 & 10 June 2026

Before: Employment Judge Shastri-Hurst, Mr A Morgan, Mrs V Parsons

Representation

Claimant: in person

Respondent: Mr B Uduje (counsel)

JUDGMENT having been sent to the parties on 15 July 2026 and written reasons having been requested in accordance with Rule 60 of the Employment Tribunals Rules of Procedure, the following reasons are provided:

FULL REASONS

1. Firstly, the Tribunal apologises for the delay in providing these reasons. The Judge was on non-working days when the request for written reasons was sent on 16 July 2026 and returned to work on 4 September 2026.

Introduction

2. The claimant started work for the respondent on 11 March 2008 as a cleaner at Heathrow Terminal 5. This claim is about his dismissal from the respondent on 3 October 2023. The events leading to his dismissal occurred on 4 September 2023.
3. The claimant commenced and concluded the ACAS early conciliation process on 24 November 2023. He presented his first claim to the Tribunal on 28 November 2023, containing claims of unfair dismissal, disability discrimination and various pay claims. He presented a second claim form on 8 December 2023. The two claims were formally consolidated by Employment Judge Gumbiti-Zimuto on 17 July 2024 – [84].
4. The claims were the subject of a private preliminary hearing before Employment Judge Hawksworth on 29 July 2024 – [86]. The Judge produced a List of Issues at that hearing, as set out on [94] and set out below. The claimant's three claims were:

- 4.1. Unfair dismissal;
 - 4.2. Notice pay (breach of contract/wrongful dismissal);
 - 4.3. Discrimination arising from disability in relation to the claimant's dismissal.
5. The claimant relied on the condition of Type 2 Diabetes for his disability claim: the respondent conceded that the claimant was disabled at the time of the alleged discrimination. The claimant had mentioned other conditions in his Disability Impact Statement, such as low moods, dizziness, and anxiety and depressive order. However, he confirmed at the preliminary hearing that he only relied on Diabetes for his disability claim.
 6. We had the benefit of a bundle of 318 pages (including the index), as well as a witness statement from the claimant. For the respondent we had witness statements from:
 - 6.1. Marcin Gospodarek – dismissing officer, Terminal 5 Soft Services Manager (at the material time);
 - 6.2. Anouar Lazaar – appeal officer, Terminal 5 Operations Manager.
 7. Reference to page X in the bundle is recorded as [X]. Reference to paragraph Y of a witness statement is recorded as [AB/Y], where AB are the witness' initials.

Issues

8. The List of Issues is set out immediately below for completeness:

1. Unfair dismissal

- 1.1. What was the reason or principal reason for dismissal? The respondent says the reason was conduct. The Tribunal will need to decide whether the respondent genuinely believed the claimant had committed misconduct.
- 1.2. If the reason was misconduct, did the respondent act reasonably or unreasonably in all the circumstances, including the respondent's size and administrative resources, in treating that as a sufficient reason to dismiss the claimant? The Tribunal's determination whether the dismissal was fair or unfair must be in accordance with equity and the substantial merits of the case. It will usually decide, in particular, whether:
 - 1.2.1. there were reasonable grounds for that belief;
 - 1.2.2. at the time the belief was formed the respondent had carried out a reasonable investigation;
 - 1.2.3. the respondent otherwise acted in a procedurally fair manner;
 - 1.2.4. dismissal was within the range of reasonable responses.

2. Remedy for unfair dismissal

- 2.1. Does the claimant wish to be reinstated to their previous employment?

- 2.2. Does the claimant wish to be re-engaged to comparable employment or other suitable employment?
- 2.3. Should the Tribunal order reinstatement? The Tribunal will consider in particular whether reinstatement is practicable and, if the claimant caused or contributed to dismissal, whether it would be just.
- 2.4. Should the Tribunal order re-engagement? The Tribunal will consider in particular whether re-engagement is practicable and, if the claimant caused or contributed to dismissal, whether it would be just.
- 2.5. What should the terms of the re-engagement order be?
- 2.6. If there is a compensatory award, how much should it be? The Tribunal will decide:
 - 2.6.1. What financial losses has the dismissal caused the claimant?
 - 2.6.2. Has the claimant taken reasonable steps to replace their lost earnings, for example by looking for another job? If not, for what period of loss should the claimant be compensated?
 - 2.6.3. Is there a chance that the claimant would have been fairly dismissed anyway if a fair procedure had been followed, or for some other reason? If so, should the claimant's compensation be reduced? By how much?
 - 2.6.4. Did the ACAS Code of Practice on Disciplinary and Grievance Procedures apply? Did the respondent or the claimant unreasonably fail to comply with it? If so is it just and equitable to increase or decrease any award payable to the claimant? By what proportion, up to 25%?
 - 2.6.5. If the claimant was unfairly dismissed, did they cause or contribute to dismissal by blameworthy conduct? If so, would it be just and equitable to reduce the claimant's compensatory award? By what proportion?
 - 2.6.6. Does the statutory cap apply?
- 2.7. What basic award is payable to the claimant, if any?
- 2.8. Would it be just and equitable to reduce the basic award because of any conduct of the claimant before the dismissal? If so, to what extent?

3. Notice pay (breach of contract/wrongful dismissal)

- 3.1. Was the claimant guilty of gross misconduct such that the respondent was entitled to dismiss without notice?
- 3.2. If not, how much is the claimant owed in damages for breach of contract in respect of notice?

4. Disability

- 4.1. The respondent accepts that the claimant had a disability as defined in section 6 of the Equality Act 2010 at the time of the events the claim is about, namely type 2 diabetes.

5. Discrimination arising from disability (Equality Act 2010 section 15)

5.1. Did the respondent treat the claimant unfavourably by:

5.1.1. Dismissing him.

5.2. Did the following things arise in consequence of the claimant's disability:

5.2.1. When his sugar levels are not controlled, he displays signs of distress or can become aggravated.

5.3. Did the respondent dismiss the claimant because of his distress and aggravation?

5.4. Was the treatment a proportionate means of achieving a legitimate aim? The respondent says its aim was:

5.4.1. Ensuring a safe and appropriate working environment for its employees.

5.5. The Tribunal will decide in particular:

5.5.1. Was the treatment an appropriate and reasonably necessary way to achieve those aims;

5.5.2. Could something less discriminatory have been done instead;

5.5.3. How should the needs of the claimant and the respondent be balanced?

5.6. Did the respondent know or could it reasonably have been expected to know that the claimant had the disability? From what date?

6. Remedy for discrimination

6.1. Should the Tribunal make a recommendation that the respondent take steps to reduce any adverse effect on the claimant? What should it recommend?

6.2. What financial losses has the discrimination caused the claimant?

6.3. Has the claimant taken reasonable steps to replace lost earnings, for example by looking for another job? If not, for what period of loss should the claimant be compensated?

6.4. What injury to feelings has the discrimination caused the claimant and how much compensation should be awarded for that?

6.5. Has the discrimination caused the claimant personal injury and how much compensation should be awarded for that?

6.6. Is there a chance that the claimant's employment would have ended in any event? Should their compensation be reduced as a result?

6.7. Did the ACAS Code of Practice on Disciplinary and Grievance Procedures apply? Did the respondent or the claimant unreasonably fail to comply with it? If so is it just and equitable to increase or decrease any award payable to the claimant? By what proportion, up to 25%?

6.8. Should interest be awarded? How much?

Findings of fact

9. The respondent contracts with Heathrow airport to provide cleaning services. The service agreement in place with the respondent and its client requires that any reported spillages are dealt with within five minutes, otherwise there is a risk of breaching health and safety regulations in respect of staff and passenger safety – [MG/11].
10. The cleaning operatives at Terminal 5 (“T5”), such as the claimant, are on the front line of the workforce. In the course of their role, they will be regularly contacted by their supervisors on mobile telephones – [AL/4]. We accept that, due to the requirement of fast reactive cleaning in line with the service agreement, for the benefit of staff and passenger health and safety, supervisors may make a number of calls to cleaning operatives during the course of a shift. This will be to redirect the operative’s attention to a different area, or to report a spillage that requires immediate attention, for example – [AL/21].
11. During the course of the appeal hearing it was agreed that, generally, Chitra Rai (the claimant’s supervisor) made six calls to the claimant per shift, which averages out at one per hour – [208/209]. We find that this is an acceptable level of calls, given the specific nature of an operative’s task being to respond immediately to spillages across various areas of T5.
12. In terms of its policies, the respondent has a zero-tolerance approach to bullying, harassment and abuse of authority (amongst other matters). This is clearly and explicitly set out in its Employee Handbook – [247].
13. We accept that Mr Lazaar had previously dismissed someone for directing inappropriate language towards another stakeholder. That individual had had ongoing personal issues which they presented as mitigation, however Mr Lazaar’s decision was that the appropriate sanction was dismissal – [AL/28].

Facts relating to 4 September

14. As mentioned above, the incident resulting in the claimant’s dismissal occurred on 4 September 2023. The majority of the pertinent facts of the incident that led to the claimant’s dismissal are agreed. We will make findings on other facts to the extent necessary to reach our conclusions.
15. On 4 September 2023, the claimant was on shift, reporting to Chitra Rai, his supervisor during the course of that shift.
16. The claimant alleges that Ms Rai had been harassing him, making numerous calls to him, asking where he was, on this day, and (at most) for three months prior.
17. We have already found that, on the agreed average of six calls per shift, which equates to about one an hour, this is not excessive, and we accept would be in line with the normal frequency of calls for an operative to receive.
18. We therefore do not accept that Ms Rai had acted inappropriately in the number of calls she had made to the claimant on 4 September 2023. In terms of the

nature of those calls, we find that asking the claimant for his location was appropriate in the course of Ms Rai's role of supervisor.

19. In terms of historic alleged harassment, there is no contemporaneous evidence to support this. The claimant was aware that Mr Gospodarek had an open-door policy and often went to talk to him. The claimant had also in July 2023 asked for adjustments to be made by the respondent, and had had a dialogue with it about obtaining medical evidence, which had led to adjustments being agreed. We therefore find that the claimant knew how to raise matters concerning him with those in his management chain, and yet he had not done that regarding Ms Rai's alleged behaviour. We therefore are not satisfied that Ms Rai was harassing the claimant for any period of time, or had acted in any way other than in keeping with her role on 4 September 2023.
20. Returning to 4 September 2023, following several missed calls from Ms Rai, the claimant returned the call: Kamal Pun picked up the telephone and put it on loud-speaker. The claimant made the call from the first-class passenger area, at which we accept there was the possibility of passengers being present, but also Heathrow staff; those staff members were ultimately the respondent's client. In this telephone call, the claimant said (on his own case as set out in the investigation meeting notes of 4 September 2023 at [154]):

“I swore and said bloody hell she makes me mad. In my language I said madhochute which translates as fucking bastard in Hindi”.

21. Ms Rai grabbed the phone from Mr Pun. At this point there is another dispute of fact as to whether Ms Rai swore at the claimant. We are not satisfied that she did swear. The evidence on this point comes from the claimant only; neither Mr Pun nor Ms Rai report that Ms Rai swore – see their investigation meeting notes on [151] and [155] respectively. We accept that Ms Rai may not volunteer that she had sworn at the claimant, but we find that there would be no reason for Mr Pun to cover up for her. The claimant suggests that they stuck together because they are both from Nepal, however there is no good evidence upon which to base that assertion, and we reject it.
22. Regardless of our finding on this point as to Ms Rai not swearing, we make it abundantly clear that, even if Ms Rai had sworn at the claimant after he swore at her, we find that this was not relevant to the disciplinary process that ensued. Both decision makers explained to us in evidence that, if Ms Rai had sworn at the claimant in retaliation, it would not have made a difference to the decision regarding the claimant's dismissal. We accept that evidence: we found both witnesses credible and there is no good evidence to undermine their explanations. We only make this finding that Ms Rai did not swear as it was an important point to the claimant, although we do not consider it relevant to the claims before us.
23. On this point regarding Ms Rai's alleged swearing, the claimant repeatedly told us that Vodaphone could provide a recording of the call to show that he was telling the truth. As we have said, even if this is correct, and there was a recording that showed Ms Rai swearing at the claimant in response to his swearing, we accept the respondent's evidence that this made no difference to the disciplinary process or outcome regarding the claimant. In any event, we consider it highly unlikely that Vodaphone records live telephone calls from Vodaphone mobile phones, or that it would retain that information for three

years after the event. We understood that the claimant was asking us to make a third-party disclosure order: we considered that any recording (if it existed) was not necessary for a fair hearing of this matter and so rejected that application.

Disciplinary process

24. Following the incident of the claimant swearing being formally reported to the respondent, a disciplinary process ensued. The process included an investigation meeting with the claimant, Mr Pun and Ms Rai – [153], [151] and [155] respectively. There then followed a disciplinary hearing chaired by Mr Gospodarek, the notes of which appear at [169]. Latterly there was also an appeal conducted by Mr Lazaar – notes at [197].

25. We find that the appropriate steps under the ACAS Code of Practice, and in line with the respondent's own disciplinary policy, were taken. In fact, the claimant made no particular assertion of any breaches of the ACAS Code or the respondent's internal process.

26. The claimant was represented throughout the disciplinary and appeal hearings by Mr Phillips, his trade union representative. We will return to his involvement as and when necessary later in our findings.

Discrimination arising from disability

27. The first point to consider under this claim is whether the claimant's conduct on 4 September arose due to his diabetes: diabetes being the disability he relies upon in this claim.

28. The only evidence on this point comes from the claimant himself, and is equivocal.

29. He did not raise his diabetes at all in the investigation meeting - [154]. In fact, he did not even mention that he was feeling ill for any reason at the time of swearing on 4 September 2023.

30. The claimant in his disciplinary hearing said, as recorded at [170]:

I can't control it because of diabetic [sic]. 99% I can control but not in this situation.

31. He went on to say at [171], in answer to "on that day how [did] you feel?":

I was sweating, it was hot.

32. Further, in that meeting, his trade union representative said, at [172]:

It's his disability. He made a mistake... It [is] just his illness.

33. When asked the following question in that meeting at [171], the claimant answered that he was not sure:

Do you think diabetic can be allowed to use foul, disrespectful words?

34. In the appeal, the only mention of the claimant's diabetes, looking at the

minutes of that meeting, is in passing when Mr Phillips references the claimant's medical history, but he focuses on anxiety – [203].

35. The claimant also refers to the effects of his diabetes in his Disability Impact Statement. At [76], he says:

The effect of the illnesses on the claimant's day-to-day activities are: lethargy, lack of energy, low moods, irritability and agitation.

...

The claimant was unwell when he was called multiple times by the supervisor, Ms Rai. At this time, the claimant was feeling very hot and agitated and had possible low blood sugar.

36. However, we also note his comment at [77] in the same statement:

As a result, the claimant expresses that although it was wrong for him to swear, there was no consideration as to why he got frustrated in the first place.

37. This suggests to us that the claimant's primary position is that the reason for his conduct on 4 September was his frustration with Ms Rai rather than any effects of his diabetes.

38. The medical evidence that we have in the bundle does not support the claimant's contention that experiencing a period of low sugar levels can lead to agitation or distress. We also note that the claimant has not suggested that he ever experienced a drop in sugar levels other than on the occasion on 4 September, in his 15 years of working for the respondent. Further, the claimant had not raised any adjustments he needed in relation to his diabetes or low blood sugar, and the evidence that the respondent had on the medical evidence was that his condition was managed by medication.

39. In the appeal meeting, the claimant's trade union representative also seemed to rely primarily not on the claimant's diabetes but on his stress and anxiety. For example, at [203], he said:

His frustration is linked to the supervisor consistently calling him, and the supervisor asking where he was...the OH report, and risk assessment as well as being stressed, that is why he swore.

40. We are therefore not satisfied on the evidence before us that the claimant's diabetes led to the claimant experiencing more distress and heightened agitation. Therefore, the alleged "something arising from disability" we find did not in fact arise from disability. In other words, we are not satisfied that the claimant's diabetes (whether when experiencing low sugar levels or when experiencing any other sugar level) leads to the claimant showing signs of distress or becoming aggravated (Issue 5.2).

41. In any event, we are not satisfied that the claimant in fact experienced a drop in sugar levels on 4 September. The claimant's own case is, we find, uncertain and equivocal as to whether he was in fact experiencing low sugar on 4 September at all. In his disability impact statement, cited above, he only refers to "possible low blood sugar". We have no medical evidence to demonstrate that he did in fact experience a drop on this day. This is not supported by any medical evidence we have been taken to in the bundle.

42. As such, we find that the conduct for which the claimant was dismissed was not because of something arising in consequence of the claimant's diabetes.

Dismissal

43. It was common ground that the reason for dismissal was conduct, namely the claimant's admitted swearing at his supervisor on 4 September 2023. The specific wording of the allegation is set out at [160] in the invitation to the disciplinary hearing:

...it is alleged that on 4th September 2023 at 5.34pm during a phone call to your supervisor, you have called her "madhochute" in your native language, which means "fucking bastard".

44. During the internal process, the respondent investigated the mitigation put forward by the claimant and Mr Phillips. The claimant's main point was that he was provoked by Ms Rai's alleged harassing of him in terms of the number of calls she made to the claimant. Ultimately, at appeal, it was common ground that the claimant's allegation was that she made, on average, one call to him an hour.
45. The claimant argues that the respondent should have looked more into whether Ms Rai swore and her conduct towards him. We have covered the matter of her conduct, on the basis that it was agreed that the number of calls equated to her calling him up on average once an hour. In relation to Ms Rai swearing, both decision makers concluded that Ms Rai had not sworn on the basis of the three statements they had from the investigation stage. Moreover, the respondent told us, and we accept, that this would not have altered their decision in any event.
46. The other main point of mitigation that was advanced by the claimant and his representative was his health. In terms of the effects of the claimant's health conditions, the respondent had before it, by the time of appeal, all the internal medical documents available: an OH report at [143] and a Health and Safety Risk Assessment at [157]. The claimant's health was also a topic for discussion at both the disciplinary and appeal hearings.
47. Procedurally, we have not been taken to any particular points of criticism. In any event, we find that the respondent's procedure was in line with both the ACAS Code of Practice and the respondent's own disciplinary policy at [220].

Sanction

48. Within the respondent's Disciplinary Procedure is a non-exhaustive list of matters that may be deemed gross misconduct - [227]. That list includes:
- 48.1. "Serious insubordination – where you purposely go against your manager when he/she is making a reasonable request or behave inappropriately towards them;
 - 48.2. Aggressive or other unacceptable behaviour toward suppliers, clients or colleagues".
49. Within the dismissal letter at [183], Mr Gospodarek referenced his rationale for

deciding to dismiss the claimant:

- 49.1. The claimant's admission that he used the language within the allegation in public place;
- 49.2. Two witnesses confirmed his use of "highly abusive, disrespectful and foul language"; and,
- 49.3. The fact that, whilst this incident occurred, the claimant was wearing the respondent's logo and was its representative, and that passengers and stakeholders could have heard him.

50. The claimant raised various points in mitigation regarding the appropriate sanction:

- 50.1. Length of service – both decision makers told us that this was taken into account, but did not outweigh the seriousness of the conduct. We accept that evidence; it is mentioned in the dismissal letter at [183];
- 50.2. Apology/remorse – the claimant suggested that he had apologised and shown remorse during the internal process. The respondent's case is that in fact this was only put forward as a point of mitigation by Mr Phillips; in fact the claimant never apologised to Ms Rai. The claimant says this is because he did not have the opportunity and could not contact colleagues. We note however that the claimant did contact Ms Rai between the dismissal and appeal, in a manner which he later accepted she perceived to be threatening – [190/208]. Therefore, we find that he had the means to contact and therefore apologise to her and must have understood that he was not prevented from contacting her, at least at this latter stage of proceedings. We find that the claimant did not offer a genuine apology or show genuine remorse.
- 50.3. Clean record – the claimant said that this was the first time he had behaved in this way. The respondent accepted that, and did not take into account a previous final written warning that had expired in June 2022. We accept that the respondent did take into account the one-off nature of this event, but accept also that this factor did not outweigh their zero tolerance to such behaviour;
- 50.4. Provocation – the claimant's main point throughout the disciplinary process was that Ms Rai had provoked him by her multiple calls to him during the day in question. The information before the respondent was that the allegation of multiple calls from Ms Rai to the claimant meant on average one call an hour. The claimant's position was that the content or purpose of the call was to move the claimant around and to ask where he was.
- 50.5. Hot weather – this was raised in the disciplinary notes at [170]. The respondent did not accept that this was mitigation for the claimant's conduct.
- 50.6. The claimant raised that he suffered from stress and anxiety, and that his reaction to the calls by Ms Rai on the day was exacerbated by the anxiety that those calls had induced. At the appeal, Mr Lazaar dealt with this, taking into account all of the medical evidence before him, and concluded that there was nothing in that evidence that suggested stress

and anxiety would lead to the claimant being more agitated and being more inclined to swear.

- 50.7. Effects of diabetes – we have already dealt with this in relation to the claimant's discrimination claim above, and Mr Gospodarek's consideration of it is set out within the dismissal letter – [183].

51. We also remind ourselves of the following factors:

- 51.1. As we have already stated, we accept that the respondent has a zero-tolerance approach to bullying, harassment and abuse of authority. This is cited within the disciplinary decision - [183]. We also accept that the respondent classes aggressive or other unacceptable behaviour towards colleagues (amongst others) as gross misconduct, as well as serious insubordination – see Disciplinary Policy at [227].
- 51.2. We accept that the respondent was intolerant of swearing and such aggressive language particularly when this could be heard by either passengers or Heathrow staff, in light of the need to protect the respondent's reputation.

Breach of contract

52. We have made our findings above as to what in fact happened on 4 September 2023. We accept that the claimant acted in a manner which amounts to a fundamental breach of his contract of employment, in other words it amounts to gross misconduct. This finding is supported by the respondent's own definition of gross misconduct in its Disciplinary Policy, which sets out that such behaviour "will normally lead to summary dismissal" - [227]. We find that the respondent had therefore made clear to its employees that such behaviour would be considered as serious enough to amount to a repudiatory breach of contract.

53. As such, we find that the claimant fundamentally breached his contract of employment by his actions on 4 September.

Legal framework

Discrimination arising from disability

54. S15 EqA provides:

- “(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.

Unfavourable treatment

55. Under this section, no comparator is required. The question is simply whether unfavourable treatment was suffered by the claimant. In this context, unfavourable treatment requires the Tribunal to consider whether a claimant has been disadvantaged. This requires an assessment against “an objective sense of that which is adverse as compared to that which is beneficial” - T-System Ltd v Lewis UKEAT/0042/15.

Because of something arising in consequence

56. First, it is necessary for the Tribunal to identify the “something” that is said to be the cause of the alleged unfavourable treatment. Second, it is necessary for that “something” to have arisen in consequence of the claimant’s disability. These are the two causal steps required by s15 EqA.

57. The Tribunal must determine what, consciously or unconsciously, acted on the mind of the alleged perpetrator. The relevant test is whether the “something” had a significant influence, or was an effective cause, of the unfavourable treatment – Pnaiser v NHS England [2016] IRLR 170. Motive is irrelevant under s15.

Justification

58. If discrimination is established, then a respondent can still defend a s15 claim on the basis that the unfavourable treatment was a proportionate means of achieving a legitimate aim.

59. In Hensman v Ministry of Defence UKEAT/0067/14, Singh J held that:

“the Employment Tribunal must reach its own judgment upon a fair and detailed analysis of the working practices and business considerations involved. In particular, it must have regard to the business needs of the employer.”

Unfair dismissal

60. The relevant legislation is found at s98(1), (2) and (4) Employment Rights Act 1996 (“ERA”):

“(1) 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.

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

- (a) Relates to the capability or qualifications of the employee for performing work of the kind which he was employed by the employer to do,
- (b) Relates to the conduct of the employee,
- (c) Is that the employee was redundant, or

(d) Is that the employee could not continue to work in the position which he held without contravention (either on his part or on that of his employer) of a duty or restriction imposed by or under an enactment.

(3) ...

(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".

Reason for dismissal

61. The reason for dismissal is the "set of facts known to the employer, or it may be of beliefs held by him, which cause him to dismiss the employee" - Abernethy v Mott, Hay and Anderson 1974 ICR 323.

62. It is for the employer to show the reason for dismissal and that it is a potentially fair one, such as conduct: this is not a high threshold for a respondent. In Gilham and Ors v Kent County Council (No2) 1985 ICR 233, the Court of Appeal held as follows:

"The hurdle over which the employer has to jump at this stage of an inquiry into an unfair dismissal complaint is designed to deter employers from dismissing employees for some trivial or unworthy reason. If he does so, the dismissal is deemed unfair without the need to look further into its merits. But if on the face of it the reason could justify the dismissal, then it passes as a substantial reason, and the inquiry moves on to [s98(4)] and the question of reasonableness."

Fairness

63. When applying s98 ERA, the Tribunal has been cautioned about attaching labels such as "gross misconduct". In Hope v BMA [2022] IRLR, it was held at paragraphs 26-27:

"26. Whether or not dismissal by reason of conduct is fair or unfair within the meaning of s98(4) depends not on the label attached to or characterisation of the conduct as gross misconduct, but 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. It is equally well-established that the determination of that question involves, in a case where the reason for dismissal is said to be the employee's misconduct, the following four-stage analysis, as pithily summarised by Langstaff J in JJ Food Service Ltd v Kefil (2013) UKEAT/0320/12, [2013] IRLR 850:

'8. In approaching what was a dismissal purportedly for misconduct, the Tribunal took the familiar four-stage analysis. Thus it asked whether the employer had a genuine belief in the misconduct, secondly whether it had reached that belief on reasonable grounds, thirdly whether that was following a reasonable investigation and, fourthly whether the dismissal of the Claimant fell within the range of reasonable responses in the light of that misconduct.'

27 There is no requirement in that four-stage analysis to determine whether conduct amounts to 'gross misconduct', which involves a separate contractual concept. That was made clear by Langstaff J in *West v Percy*...

64. As set out above there are therefore four questions for the Tribunal to consider when determining whether a conduct dismissal is fair, originating from the case of British Home Stores Ltd v Burchell [1978] IRLR 379:

64.1. Did the Respondent have a genuine belief that the Claimant was guilty of the misconduct alleged by the Respondent?

64.2. If so, were there reasonable grounds for the Respondent in reaching that genuine belief? and,

64.3. Was this following an investigation that was reasonable in all the circumstances?

64.4. Was the sanction of dismissal within the band of reasonable responses open to a reasonable employer?

65. In all aspects of such a case, including consideration of sanction, in deciding whether an employer has acted reasonably or unreasonably within s98(4) ERA, the tribunal must decide whether the employer acted within the band of reasonable responses open to an employer in the circumstances. Whether the Tribunal would have dealt with the matter in the same way or otherwise is irrelevant, and the tribunal must not substitute its view for that of a reasonable employer – Iceland Frozen Foods Ltd v Jones [1982] IRLR 439, Sainsbury's Supermarkets Ltd v Hitt [2003] IRLR 23, London Ambulance Service NHS Trust v Small [2009] IRLR 563.

66. Following the case of Polkey v AE Dayton Services Ltd [1988] ICR 142, it is well established that fairness in procedure is a vital part of the test for reasonableness under s98(4) ERA. It is not relevant at this (the liability) stage to consider whether any procedural unfairness would have made a difference to the outcome: that is a matter for remedy.

67. Regarding dismissal for conduct issues, the reasonableness of the procedure is closely tied to the reasonableness of the investigation, and the provision of opportunity for the employee to make his position, explanation and mitigation heard and understood.

68. Procedural and substantive fairness do not stand as separate tests to be dealt with in isolation. In Taylor v OCS Group Ltd [2006] ICR 1602, Smith LJ held at paragraph 47:

“...it may appear that we are suggesting that employment tribunals should consider procedural fairness separately from other issues arising. We are not; indeed, it is trite law that section 98(4) of the Employment Rights Act 1996 requires the employment tribunal to approach its task broadly as an industrial jury. That means that it should consider the procedural issues together with the reason for the dismissal, as it has found it to be. The two impact upon each other and the employment tribunal's task is to decide whether, in all the circumstances of the case, the employer acted reasonably in treating the reason it has found as a sufficient reason to dismiss. So,

for example, where the misconduct which founds the reason for the dismissal is serious, an employment tribunal might well decide (after considering equity and the substantial merits of the case) that, notwithstanding some procedural imperfections, the employer acted reasonably in treating the reason as a sufficient reason to dismiss the employee. Where the misconduct was of a less serious nature, so that the decision to dismiss was nearer to the borderline, the employment tribunal might well conclude that a procedural deficiency had such impact that the employer did not act reasonably in dismissing the employee.”

69. An appeal hearing may be sufficiently comprehensive, thorough and effective such that it is capable of curing any preceding deficiencies in the disciplinary process: Khan v Stripestart Ltd UKEATS/0022/15/SM.

70. In terms of cases of gross misconduct, it is not the case that dismissals for such reason will be fair by default. It is necessary to take into account when considering the band of reasonable responses whether any mitigating factors render the dismissal unfair, rather than skipping from a finding that the reason for dismissal was gross misconduct to a finding that the dismissal was fair – Brito-Babpulle v Ealing Hospital NHS Trust 2013 IRLR 854, EAT, East of England Ambulance Services NHS Trust v Sanders EAT 0319/15.

Breach of contract – notice pay

71. The key for the Tribunal under this claim is to determine what the claimant did and whether it amounted to a repudiatory breach of contract: namely a breach so serious that the employer is entitled to consider itself released from its contractual obligations.

72. The test is not necessarily whether the claimant was guilty of gross misconduct, but it may be that it is a helpful term within the employment contract to identify conduct or behaviour which will justify summary dismissal (and therefore equate to a repudiatory breach).

73. Whether there has been repudiatory conduct is a question of fact for the Tribunal, considering all the relevant circumstances of the case.

Conclusions

Discrimination arising from disability

74. We refer to our findings at paragraphs 40 to 42 above. We are not satisfied that the claimant's conduct on the 4 September was because of his diabetes (or any related low sugar levels). We therefore find that the alleged “something arising from disability” did in fact arise from the claimant's disability.

75. We therefore conclude that the necessary causal link required under 15 EqA is not made out on the facts. As such, the claim of discrimination arising from disability fails.

Unfair dismissal

Reason for dismissal

76. As we have set out above, it was common ground that the reason for dismissal was conduct. In light of the claimant's admission set out at paragraph 44 above, we consider that the respondent had reasonable grounds for their genuine belief that the claimant was guilty of that conduct.

Reasonable belief and reasonable investigation

77. The next issue to consider is whether there had been reasonable grounds for that genuine belief, following a reasonable investigation.

78. The fact that the claimant admitted swearing at Ms Rai is sufficient, we conclude, to amount to reasonable grounds for the respondent's genuine belief.

79. In light of that admission, we consider that the respondent's duty to investigate was limited as to the conduct itself, but that there was a need to undertake a reasonable investigation regarding the mitigation put forward.

80. During the investigation and disciplinary process, the main point of mitigation was the claimant's allegation that he had been provoked by Ms Rai. By the appeal hearing the frequency of calls by Ms Rai to the claimant was agreed. The claimant made no specific allegation against Ms Rai other than the frequency of the calls. The respondent, we conclude, reasonably investigated this line of mitigation. There was no further reasonable investigation that the respondent should have done into the claimant's assertion of Ms Rai's alleged provocation. Given that all witnesses were interviewed, and the basic facts agreed, we conclude that the investigation into the alleged provocation was within the band of reasonable responses.

81. In terms of the claimant's mitigation regarding his health, we have set out in our findings what evidence the respondent had in front of it when deciding the matter. In terms of documentation, the respondent had the OH report and the Health and Safety report. As we have set out above, the claimant had the opportunity to discuss any matters relating to his health during the disciplinary process. We conclude that the respondent acted reasonably in terms of investigating the claimant's points about the effects of his health conditions on his behaviour. This part of the investigation fell within the band of reasonable responses open to a reasonable employer.

82. We conclude that the respondent conducted a reasonable investigation that fell within the band of reasonable responses available to a reasonable employer, given all the circumstances of the matter.

Procedural fairness

83. As set out at paragraph 47 above, no specific criticism of the process was made by the claimant, and we have found that the respondent did not breach the ACAS Code, or its own Disciplinary Policy. Therefore there was nothing within the procedure of this disciplinary process that is capable of rendering the dismissal unfair.

Sanction

84. We therefore turn to sanction. We remind ourselves that we must not substitute our own decision, but must consider whether the respondent's decision fell

within the band of reasonable responses. Another way of looking at it is to ask whether no reasonable employer would have dismissed the claimant in the same circumstances.

85. We accept that swearing directly at a supervisor in the manner that the claimant accepted he did could reasonably fall within the definition of gross misconduct set out within the respondent's Disciplinary Policy. We further accept that the claimant's alleged mitigation was taken into account but that the respondent reasonably concluded that such mitigation was not sufficient to outweigh the conduct in the circumstances. Taking the specific factors we have set out at paragraph 50 above:

85.1. We have accepted that the respondent did take into account the claimant's length of service;

85.2. We accept that the respondent was reasonable in concluding that the claimant had not shown remorse and had not apologised, but instead this was a point put forward by his trade union representative on his behalf;

85.3. We accept that the respondent did take into account the one-off nature of this event, but accept also that this factor did not outweigh their zero tolerance to such behaviour;

85.4. We accept that the respondent was reasonable in finding that Ms Rai had not acted inappropriately on the information provided to them by the claimant. It was reasonable of the respondent to find that these calls were in line with Ms Rai's role as the claimant's supervisor. It follows that we consider it reasonable that any argument that the claimant was provoked failed.

85.5. We conclude that this was a reasonable conclusion to reach on the evidence in front of them, in which there was nothing to suggest that the claimant had any particular intolerance to heat compared to any other individual.

85.6. Regarding the claimant's stress and anxiety, the respondent found that this did not impact his conduct on 4 September. We accept that this was a reasonable conclusion to reach on the medical evidence available to him.

85.7. On the evidence before the respondent, we conclude that it was reasonable for it to conclude that the claimant's conduct on 4 September was not related to his diabetes.

86. On the basis of all the circumstances of this case, we accept that the sanction of dismissal was within the band of reasonable responses available to a reasonable employer in the same circumstances.

87. The claim for unfair dismissal therefore fails.

Breach of contract

88. In light of our finding above that the claimant was in repudiatory breach of his contract, it follows that we conclude that the respondent was entitled to treat

itself as dismissed from the obligation to abide by the claimant's contract of employment. In other words, we conclude that the lack of payment of notice pay was not a breach of contract by the respondent.

89. This claim therefore fails.

Approved by:

Employment Judge Shastri-Hurst

12 September 2026

JUDGMENT SENT TO THE PARTIES
ON 28 September 2026

FOR THE TRIBUNAL OFFICE