EMPLOYMENT TRIBUNALS

Claimant: Mr Luke Billings

Respondent: Nestle UK Ltd

On: 1, 2, 3 and 4 December 2025

Before: Employment Judge Ahmed

Members: Ms J Dean
Mr S Connor

At: Nottingham (Hybrid CVP)

Representation
Claimant: Ms Gates, Lay representative
Respondent: Mr Menon of counsel

JUDGMENT

JUDGMENT having been sent to the parties on 30 December 2025 and written reasons having been requested in accordance with Rule 60(4) of the Employment Tribunals Procedure Rules 2024, the following reasons are provided.

REASONS

1. In these proceedings the Claimant brings complaints of unfair dismissal and disability discrimination. The complaints of disability discrimination are of direct discrimination and discrimination arising from disability.

2. The Respondent accepts that the Claimant was at all material times a disabled person by reason of depression. There is no issue as to the Respondent's knowledge of disability during all relevant times.

3. The Claimant was employed by the Respondent as a Technical Operator from 6 August 2012 to 4th October 2023. He was dismissed for gross misconduct. The Claimant contends that the dismissal was both discriminatory and unfair.

4. On 11 October 2023 the fire alarm in the production factory where the Claimant worked was activated. All staff had to be evacuated. Production ceased until it was deemed safe to return. As a consequence there was disruption and lost production.

5. After reviewing CCTV footage and a detailed internal investigation the cause was found to be someone vaping in one of the toilets. Smoking or vaping on the premises is prohibited. After all the evidence had been gathered the conclusion was that the Claimant was vaping in the disabled toilets which triggered the alarm. The Claimant denied the allegation.

6. Following the investigation the Claimant was invited to a disciplinary hearing at which he was accompanied by a trade union representative. The Claimant maintained his position that he was not vaping in the toilets on the day in question. He said he did not vape so it could not be him. As the hearing progressed and as he was questioned about it further and he accepted that he did occasionally vape but only at weekends and only at home.

7. Having considered the evidence the evidence, Mr Nasr the disciplinary officer concluded that the Claimant was responsible for the alarm and moreover he was being untruthful. Mr Nasr decided it was appropriate to dismiss the Claimant. In arriving at his decision he considered the following. Firstly, he considered a breach of health and safety. Secondly, he lost trust and confidence in the Claimant because he believed he was lying. Thirdly, there was a loss of production to the business. He concluded that the Claimant having been employed for a long time in the business ought to have known better. The Claimant appealed but the appeal was dismissed.

8. Prior to the incident the Claimant had been off sick from June 2022 to August 2023 because of depression. He had only recently returned to work and was on a phased return. He was hoping to return to full time hours in a few months.

9. At the disciplinary hearing the Claimant referred to the conduct of another employee, Mr Marler, who was said to be in a comparable situation to the Claimant but was not dismissed. Mr Marler is not disabled. The Claimant argued that he was treated inconsistently.

10. Mr Nasr had also been the disciplinary manager in the incident involving Mr Marler so he was familiar with the circumstances. Mr Marler had taken his washbag of clothing and stored it in a housing area that is used to enclose a fire hose. He should have used the lockers instead. Mr Marler agreed that his conduct amounted to a health and safety risk. Mr Marler admitted his mistake and apologised. He was issued with a final written warning. In his evidence to the Tribunal Mr Nasr accepted that had the Claimant accepted his mistake and apologised, just like Mr Marler, he would not have been dismissed.

11. Mr Marler's disciplinary hearing took place before that of the Claimant. Mr Billings argues that this was done deliberately so as to place him at a disadvantage as the Respondent had already pre-determined the decision to dismiss him.

THE LAW

12. Section 13 of the Equality Act 2010 ("EA 2010") deals with direct discrimination and states:

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

13. Section 15 of EA 2010 is headed 'discrimination arising from disability' and states:

"(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."

14. Section 136 EA 2010 deals with the burden of proof and states:

"(1) This section applies to any proceedings relating to a contravention of this Act.

(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."

15. Sections 98(1)(2) and (4) of the Employment Rights Act 1996 ("ERA 1996") states:

"(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—

(b) relates to the conduct of the employee,

………..

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

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

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

16. In applying section 98(4) ERA 1996 we have borne in mind the guidance in **HSBC Bank plc v Madden** [2000] ICR 1283 where the Court of Appeal re-affirmed the guidance for tribunals originally set out in **Iceland Frozen Foods Limited v Jones** [1982] IRLR 439, namely that:-

"(1) The starting point should always be the words of section [98(4) ERA 1996] themselves.

(2) In applying the above section the Tribunal must consider the reasonableness of the employer's conduct, not simply whether the Tribunal would have done the same thing.

(3) The Tribunal must not substitute it's decision as to what was the right course to adopt.

(4) In many cases there is a band of reasonable responses to the employee's conduct within which one employer might reasonably take one view another employer quite reasonably take another.

(5) The function of the Employment Tribunal as an industrial jury is to determine whether in the particular circumstances of each case the decision to dismiss the employee fell within the band of reasonable responses which a reasonable employer might have adopted. If the dismissal falls within the band, the dismissal is fair; if the dismissal falls outside the band it is unfair."

17. In **London Ambulance Service NHS Trust v Small** [2009] EWCA Civ 220, the Court of Appeal reminded tribunals of the importance of not substituting their views for that of the employer. We have been conscious of the importance of not doing so.

18. It is now well established that the band of reasonable responses test also applies equally to the investigation (see **Sainsbury's Supermarket Ltd v Hitt** [2003] IRLR 23)

<u>THE ISSUES</u>

19. The issues are as follows:

<u>Unfair Dismissal</u>

19.1 Did the Respondent genuinely believe that the Claimant had committed an act of misconduct, namely vaping in the toilets? Was this the principal reason for the Claimant's dismissal?

19.2 In the circumstances did the Respondent act reasonably in treating this reason
as a sufficient reason for dismissing the Claimant,

19.3 Did the Respondent carry out a reasonable investigation into the alleged misconduct?

19.4 Did the Respondent have reasonable grounds for believing the Claimant had committed the alleged misconduct?

19.5 Did the Respondent follow a fair procedure?

19.6 Was the decision to dismiss within the band of reasonable responses which a reasonable employer might have adopted?

<u>Direct discrimination</u>

19.7 The Claimant alleges that the Respondent did the following things which constituted direct disability discrimination:

19.7.1 Chose to impose a sanction of dismissal, rather than a sanction of lesser severity;

19.1.2 Held the Claimant's disciplinary hearing prior to his comparator's; and

19.8 Did the Respondent treat the Claimant less favourably than it treated Mr Marler and/or a hypothetical comparator?

Discrimination arising from disability

19.9 Did the Respondent treat the Claimant unfavourably by dismissing him rather than giving him a lower sanction?

19.20 Did the Respondent dismiss the Claimant rather than give a lower sanction because of that sickness absence?

CONCLUSIONS

20. We shall deal firstly with the direct disability discrimination complaint.

21. We accept Mr Marler is an appropriate comparator. He was in materially similar circumstances. There was an allegation of potential gross misconduct for a health and safety matter which was considered as a potential act of gross misconduct. Mr Marler is not disabled. He was not dismissed. There was thus less favourable treatment between the Claimant and Mr Marler.

22. We do not however find that the reason for the less favourable treatment was because of the Claimant's disability. The reason for the different treatment was that Mr Marler admitted in misconduct and apologised. The Claimant did not admit his misconduct nor did he apologise. The less favourable treatment was not because of the Claimant's disability but because he did not admit his culpability and/or apologise.

23. In relation to the allegation that Mr Marler's disciplinary hearing took place prior the Claimant, we find that there was no collusion in doing so and it would have made no difference.

24. The complaint of direct discrimination is therefore dismissed.

25. Turning to the complaint of discrimination arising from disability the sole allegation of unfavourable treatment is that the Claimant was dismissed.

26. Whilst dismissal amounts to unfavourable treatment, we do not find that it arose in consequence of the Claimant's disability. It arose because the Claimant was found to have been vaping in the toilets, which was considered an act of gross misconduct. The reason for dismissal had nothing to do with the Claimant's disability.

27. The complaint of discrimination arising from a disability is therefore also dismissed.

28. We now turn to the complaint of unfair dismissal. We accept that the Respondent has discharged its obligation in establishing a potentially fair reason for dismissal, namely 'conduct'. Conduct is a potentially fair reason for dismissal under section 98 ERA 1996.

29. We accept that the Respondent had an honest and genuine belief in the Claimant's misconduct, namely that the Claimant was vaping in the toilets. There were reasonable grounds for holding that view.

30. We also accept that that the investigation fell within the range of reasonable responses open to a reasonable employer. All of the relevant witnesses were interviewed. There was detailed consideration of the CCTV evidence.

31. We do however find that the decision to dismiss fell outside the range of reasonable responses open to a reasonable employer. We arrive at that conclusion for the following reasons:

31.1 We have focussed on the principal reason for the dismissal. It is clear from the evidence of Mr Nasr that the Claimant was dismissed principally for failing to apologise and to accept responsibility. Mr Nasr made it clear in his evidence that had the Claimant accepted he had been vaping in the toilet, and apologised, he would not have been dismissed. In other words, health and safety and loss of production were not the principal reasons. They played a lesser part in the decision to dismiss because they were not determinative. What was determinative was the failure to accept responsibility. Failing to apologise or to accept responsibility is not misconduct.

31.2 We also find that dismissal in the circumstances was disproportionate. This was a single isolated act in another unblemished career. There was no or insufficient credit for the fact that there had been no prior misconduct.

31.3 There is no clear rule or warning that vaping in the toilets will be deemed an act of gross misconduct. A reasonable employer would have made it clear that such conduct will be deemed gross misconduct.

31.4 The Respondent took the view that as the Claimant had been employed for so long he should have known better. A reasonable employer would consider length of service as a mitigating factor, not a disadvantage.

32. Applying the provisions of section 98(4) ERA 1996 we find the dismissal was unfair.

33. We do not find any procedural unfairness. In particular we do not find any breach of the ACAS Code.

34. We have considered the issue of contributory conduct. We do find that that the Claimant has contributed to his dismissal. The Claimant would have known that vaping was not permitted even if he did not know that it could result in dismissal for gross misconduct. The whole episode originated from his conduct. We have gone on to consider how far his compensation should be reduced as a result.

35. In **Hollier v Plysu Ltd** [1983] IRLR 260, it was held that tribunals should broadly assess employee contribution to dismissal in 25% increments (25%, 50%, 75%, 100%). It went on to say that the standard categories for reduction of compensation should generally be as follows: slightly to blame (25%), equally to blame (50%), largely to blame (75%) and wholly to blame (100%).

36. We conclude that it is appropriate to reduce the Claimant's compensation by 50%. We find that he was equally to blame for the dismissal.

37. We recognise that there are slightly different considerations that apply to the reduction of the basic award as opposed to the compensatory awards but we

consider that in the circumstances it is appropriate to make the same percentage reduction for both. The Claimant's basic and compensatory awards shall therefore be reduced by 50%.

38. The Claimant does not seek reinstatement or re-engagement. We went on to assess compensation. We are satisfied the Claimant was keen to return to work full time after his phased return. Anything else is mere speculation unsupported by evidence. Given his past service he is likely to have remained in employment but for the unfair dismissal.

39. The effective date of termination was 4 October 2023.

40. The Claimant was earning £38,000.00 per annum or £730.77 per week gross.

41. The basic award is agreed at £7,073.00.

42. The Claimant's phased return would have ended around the end of November 2023. He has therefore suffered loss of earnings for that period of 8 weeks at £366.00 per week net totalling £2,928.00

43. The Claimant found alternative employment with Marley on 30 September 2024. The Respondent does not take issue with the Claimant in relation to any failure to mitigate until September 2024.

44. The role with Marley was only temporary. The Claimant found permanent employment with Bullivant on 20 January 2025. We consider that the chain of causation is not broken until the job with Bullivant.

45. The Claimant suffered loss of pension rights. The Claimant had valuable pension benefits with the Respondent which he has lost. The employer's contributions were £108.88 per week. We assess loss of pension rights of 56 weeks at £108.88 per week totalling £6,097.28. We use this opportunity to correct an error in the original decision which described some of the loss of earnings as loss of pension.

46. The Claimant is also entitled to the usual loss of statutory rights.

47. A summary of the compensation awarded is as follows:

Basic award…………………………………………………….£7,073.00

Compensatory award

Loss of earnings:

(£366 x 8 weeks) ………………………………………..........£2,928.00

Further loss of earnings
(£576.92 x 48 weeks)…………………………………………….£27,692.16

Loss of pension
(£108.88 x 56 weeks)…………………………………………… £6,097.28

Loss of statutory rights…………………………………………….£643.00

Total compensatory award……………………………………….£44,433.44

Less 50% reduction for contributory conduct…………………..£22,216.72

Total award……………………………………………..……....£22,216.72

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Employment Judge Ahmed

Date: 19 February 2026

JUDGMENT SENT TO THE PARTIES ON

...23 February 2026 ....

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