EMPLOYMENT TRIBUNALS

Claimant: MR SALAM
Respondents: METROLINE TRAVEL LIMITED

Heard at: Watford (by Hybrid CVP) **On: 23, 24 and 25 May 2022**

Before: Employment Judge Skehan
Mr Kapur
Ms Sood

Appearances
For the claimant: Mr Papaloizou, counsel
For the respondent: Ms Nicolaou, solicitor

JUDGMENT

1. The claimant's claims for direct race discrimination or harassment related to race contrary to the Equality Act 2010 are unsuccessful and dismissed.

2. The claimant's claim for unfair dismissal contrary to S94 Employment Rights Act 1996 is not well-founded and is dismissed.

REASONS

1. This judgment and reasons were provided orally to the parties at the conclusion of the hearing on 25 May 2022. These written reasons are produced following a request from Mr Papaloizou.
2. We dealt with some administrative issues at the commencement of this hearing. The hearing had been listed in person but was converted to a hybrid CVP at the request of the claimant and Mr Papaloizou. Mr Papaloizou joined the hearing remotely and with all other participants in person, other than attendance to hear the judgment and oral reasons. Care was taken to ensure that the claimant could communicate with Papaloizou during the course of the hearing.
3. At the outset of the hearing, we revisited the list of issues. There was some discussion in respect of the issues relating to the discrimination claim. Mr Papaloizou confirmed that the pleaded discrimination claim related only to a claim for direct race discrimination and there was no application to amend the claim. The importance of the list of issues was stressed to the parties. The list of issues was agreed to be comprehensive and as recorded by employment Judge McNeil on 26 May 2021 as:

Unfair Dismissal

3.1. What was the principal reason for dismissal and was it a potentially fair one in accordance with sections 98(1) and (2) of the Employment Rights Act 1996 ("ERA")? The respondent asserts that it was a reason relating to the claimant's conduct namely that the claimant refused to return to work after periods of absence unless he was permitted to work part-time.

3.2. If the respondent proves that the reason for dismissal related to the claimant's conduct, was the dismissal fair or unfair in accordance with ERA section 98(4), and, in particular, did the respondent in all respects act within the so-called 'band of reasonable responses'?

3.3. The claimant relies upon the following matters in alleging that his dismissal was unfair:

3.3.1. the decision to dismiss the claimant was taken at a disciplinary hearing at which he was unable to attend by reason of ill-health and an emergency childcare issue.

3.3.2. This was the first and only disciplinary meeting that the claimant was required to attend.

3.3.3. There was no investigation made prior to the claimant's dismissal.

3.3.4. The manager assigned to hear any appeal that the claimant may have brought against his dismissal was Ms Olawo-Jerome who would not have been impartial in relation to the appeal.

3.3.5. The claimant appealed the decision to another manager but was not invited to an appeal hearing.

3.3.6. In deciding to dismiss the claimant, the respondent failed to give any reasonable consideration to the claimant's conditions of post-traumatic stress disorder and an ongoing eye condition.

3.3.7. The respondent failed to give the claimant a copy of any document evidencing the policies and procedures that were applied to him.

3.3.8. the claimant was at no time contacted by human resources of referred to occupational health prior to his dismissal.

3.3.9. Dismissal was outside the band of reasonable responses.

3.3.10. The claimant's race influenced the respondent's decision to dismiss him.

3.4. The respondent disputes that the dismissal was unfair

Direct discrimination because of race (section 13 Equality Act 2010)

3.5. The claimant relies upon the following treatment:

3.5.1. Delaying consideration of his request for part-time work until 8 July 2020;

3.5.2. Placing his request for part-time working in the respondent's amber category for considering requests for flexible working.

3.5.3. The branch manager (Ms Olawo-Jerome) making the decision on categorisation contrary to the respondent's practice or policy.

3.5.4. Failing to consider or to respond to the claimant's appeal notified on 16 July 2020 against the decision to place him in the amber category.

3.5.5. Failing by Ms Olawo-Jerome and /or Mr Hill to assist the claimant with a dilemma in relation to childcare and the need to work part-time in spite of polite requests made by him.

3.5.6. dismissing the claimant.

3.6. In all or any of the above ways, did the respondent treat the claimant as alleged less favourably than it treated or would have treated others ('comparators') in not materially different circumstances? In relation to the

manner in which he was treated in relation to his request for part-time work, the claimant relies upon the following named comparators (1) Ms Asamoah Agdley (Ms AA) and Mr Mamin (Mr M), neither of whom is of Moroccan nationality or ethnic origin. In addition and in relation to all this treatment, the claimant relies upon the hypothetical comparator.

3.7. If the claimant was subject to less favourable treatment was this because of his race

Harassment related to race (Section 26 Equality Act 2010):

3.8. The conduct relied upon the claimant in relation to his harassment claim is the treatment relied upon him within his direct discrimination claim.

3.9. If all any of the alleged conduct is made out, was that conduct unwanted?

3.10. Did the conduct have the purpose or (taking into account the claimant's perception, the other circumstances of the case and whether it is reasonable for the conduct to have that effect) the effect of violating the claimant's dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment for the for him.

3.11. It was common ground that there were no limitation issues for the tribunal to consider

The Facts

4. We heard evidence from the claimant and Mr Belaci on behalf of the claimant. We heard evidence from Ms Olawo-Jerome, Ms Yesufu, Mr Hill and Mr Rogers on behalf of the respondent. All witnesses gave evidence under oath or affirmation and all were cross-examined. As is not unusual in these cases the parties have referred in evidence to a wider range of issues than we deal with in our findings. Where we fail to deal with any issue raised by a party, or deal with it in the detail in which we heard, it is not an oversight or an omission but reflects the extent to which that point was of assistance. We only set out our principal findings of fact. We make findings on the balance of probability taking into account all witness evidence and considering its consistency or otherwise considered alongside the contemporaneous documents.
5. The claimant is Moroccan. He commenced employment with the respondent as a bus driver from 11 July 2016 until his summary dismissal on 24 July 2020. The respondent is a large bus company with approximately 4000 employees in the UK. Prior to the issues set out within this judgement there was no relevance disciplinary background.
6. The claimant's contract of employment dated 28 June 2016 contains the following relevant provisions:
   6.1. minimum standard working week will be 38 hours spread over five days out of seven….
   6.2. The company sick pay is at management's discretion but will not be unreasonably withheld.
   6.3. Your attention is drawn to the disciplinary…. procedures applicable to your employment copies of which are in the employee handbook.
7. The respondent's flexible working policy contains the following relevant provisions:
   7.1. The policy contains a detailed history in respect of flexible working requirements. It acknowledges that in order to handle large volumes of existing

and anticipated future requests the respondent set up a categorisation process. Flexible working requests are granted for a fixed time. The categories are defined as 'red', 'amber' or green' and prioritise the twin factors of need and urgency.

7.2. The procedure set out in the policy is that::

7.2.1. The employee completes a flexible working application form and sends it to the line manager. The line manager may be able to agree the proposal without the need for a hearing if there is an immediate availability for the period you require the flexible working pattern.

7.2.2. A hearing is provided for if the request cannot immediately be granted.

7.2.3. Following the hearing manager will notify the employee of the decision, normally within 14 days

7.2.4. If the request is rejected, you have the right to appeal.

8. The respondent's disciplinary policy and procedures provides the following relevant provisions in addition to the normal procedural requirements:

8.1. In setting out the principles and summarising the requirements of an employee, the first requirement is 'attendance for specified working hours'.

8.2. The examples of gross misconduct include 'absence from duty without prior notification or authorisation i.e. whether authorisation has not been sought or has been sought but refused.

8.3. …'4.2…. Metroline reserves the right to dispense with an investigatory interview and proceed directly to a formal disciplinary hearing (particularly but not limited to situations where an employee absent without leave or contact and/or where the employee admits the conduct alleged)

8.4. 4.6 … In cases where an employee is absent without leave, the same manager may conduct an investigation (which may be limited to the fact of the absence and any reason provided by the employee) and impose any appropriate sanction.

9. On 2 March 2020, the Claimant messaged his garage manager, Ms Olawo-Jerome, and requested part time hours. Ms Olawo-Jerome responded that same day stating that there were no current vacancies for part-time drivers at Holloway. He was advised to complete a flexible working application in order to be placed on the waiting list in accordance with the respondent's policy. No further action was taken by the claimant at that time.

10. On 2 June 2020 the Claimant submitted his flexible working application in which he requested to work 2 or 3 days per week including Saturday and Sunday for childcare reasons. The Claimant's application stated that if this was not possible he would take unpaid leave.

11. Ms Olawo-Jerome told the tribunal that it was not possible for the claimant to take unpaid leave, as any employee on unpaid leave was counted within the respondent's headcount, preventing them from recruiting to fill the vacancy. The respondent refers to its obligations to and contractual commitments to TfL In the event that they failed to operate effectively, they lose routes to other bus companies. They say that they cannot as a business tolerate employees who refused to come to work unless and until they get the hours they want to work. The claimant's absence would place pressure for existing drivers to undertake overtime in circumstances where drivers were stretched due to large numbers of drivers on

furlough leave for reasons such as their requirements to shield or where they were outside the UK due to border controls imposed during the pandemic.

12. On 3 June the Claimant messaged Ms Olawo-Jerome and requested 3 months' unpaid leave if his request for flexible working could not be accommodated. On 4 June 2020 Ms Olawo-Jerome informed the Claimant that it was not possible to offer him 3 months unpaid leave, and the Claimant told Ms Olawo-Jerome that he would have to resign otherwise.
13. On 8 June 2020 Ms Olawo-Jerome conducted a flexible working interview on the telephone with the Claimant. The Claimant said that his wife had returned to work after a period of furlough and that his in laws, who had been helping with childcare wished to return to France. the claimant said he could work one day during the week and weekends, and that he could move to another garage if required.
14. On 29 June 2020 the Claimant informed Ms Olawo-Jerome that he would not be able to attend work from the following week. Ms Olawo-Jerome informed the Claimant that he would need to make alternative arrangement for childcare because there were currently no part time vacancies at Holloway.
15. On 2 July the Claimant informed Ms Olawo-Jerome that his private union had advised him not to resign but to "go off work" until he had sorted out his childcare and that he would be off work from Monday [6 July]. Ms Olawo-Jerome advised the Claimant that if he did so his absence would be marked as unauthorised.
16. On 9 July the Claimant called in sick, citing a swollen eye and blurry symptoms. Ms Olawo-Jerome did not believe the claimant's illness to be genuine and decided that the claimant would be paid statutory sick pay only rather than company sick pay. The claimant self certified his sickness absence as required by the respondent's policy. He was not asked for and did not provide any medical evidence relating to this period of sickness absence. There is medical evidence within the tribunal bundle from Moorfields Eye Hospital showing that the claimant's illness was genuine as he has claimed.
17. We can see from the documentation provided by the respondent that the claimant's colleague Mrs S also submitted a flexible working request on the same day as the claimant. The bundle contains an email from Ms Yesufu to Ms Olawo-Jerome forwarding the outcome of the claimant's flexible working application. Ms Yesufu states:

    17.1. … please find attached [the claimant's] outcome letter. I have prepared [Mrs S's], but I have not attached it to this email because I would like to see supporting documentation concerning the brother's disability. I would like to give her a red, please would you ask her to provide this information to you. As soon as she has provided this, I will send you her letter.

18. We can see that the respondent dealt with the claimant's and Mrs S' request for flexible working within the same time frame. This was outside the 14 day time period envisaged within their policy. The respondent points to an unusually high workload at the time caused by the pandemic.
19. On 10 July Ms Yesufu wrote to the Claimant to confirm she had categorised the Claimant's request as 'amber' and he would be placed on the waiting list. The Claimant was informed that should a vacancy arise at another garage he would be advised if he was at the top of the waiting list for that particular working pattern. Ms Yesufu was unaware of the claimant's race or ethnic origin.

20. On 14 July the Claimant informed Mr Rogers that he was fit to return to work but would not do so because he had not been paid company sick pay during his absence.
21. On 16 July the Claimant sent an email to Mr Hill appealing against the decision to put him in the amber category. Mr Hill was receiving large volumes of emails at this time and has no recollection of receiving the claimant's appeal or taking any action in respect of it. We conclude that the claimant's email was overlooked and not seen or dealt with by Mr Hill by reason of human error on Mr Hill's part. The claimant received no response to his appeal. We conclude, by reference to Ms S's outcome and the other information referred to below relating to colleagues part-time working requests that even if the claimant's request had been categorised as 'red', he was likely to have a significant wait for his desired working pattern to become available.
22. On 20 July the Claimant informed Mr Rogers that due to childcare issues he would not attend work until September, unless he was given 3 days per week or unpaid leave. The claimant was informed that should he not attend work it would be treated as a refusal of duty by the respondent and dealt with formally. There was dispute between the parties in relation to the claimant's stated ability to attend a meeting. Mr Rogers notes that the claimant said he was unable to attend between Monday and Friday. The claimant says that he asked for the meeting to be rescheduled for Saturday, as he had childcare at the weekend and could attend. Mr Rogers has no recollection of this request. Mr Rogers says that had he been asked to conduct a meeting on Saturday he would have complied. We conclude that this is likely to be a miscommunication between the parties. We conclude the balance of probability that the claimant did not ask Mr Rogers for any subsequent meeting to be held on a Saturday. We conclude that the claimant believed he had implicitly indicated that he could attend on a Saturday. Mr Rogers had only noted nonavailability as stated by the claimant.
23. Mr Rogers subsequently wrote to the Claimant on 20 July to invite him to a disciplinary hearing on 24 July. The conduct is described as 'unauthorised absence from 15 July to 20 July 2020. The claimant made no attempt to change the date of this meeting following receipt of the letter. Mr Rogers told the tribunal that he believed that the claimant's position was clear and the claimant had already set out his position both to Ms Olawo-Jerome and to him. Mr Rogers did not believe that anything further would be gained by holding an additional fact find or investigation. The claimant was asked what he considered would have been uncovered should the respondent have held a separate investigation meeting. He said that had he received better treatment from the respondent he would have resigned. Other than granting his request for part time work or unpaid leave, the claimant was unable to identify an alternative solution.
24. On 21 July Ms Olawo-Jerome sent an internal email checking for any part time vacancies at other garages, for the Claimant highlighting that the claimant was willing to move garages. She was told that there were not any vacancies but that the claimant was 'next in line' for flexible hours at the Cricklewood garage. Mr Rogers was copied into this email.
25. The claimant in his witness statement said that he was railroaded into a meeting which he did not really understand and did not have any time to prepare for. He said he had no idea what the meeting was about of what he was alleged to have done and the meeting was unexpected as they had not been any preliminary meetings before this disciplinary meeting. We conclude that while it is the case that

there had not been any preliminary meeting before the disciplinary meeting, the claimant was aware both from his discussions with the respondent and the disciplinary invite letter that the disciplinary meeting was to consider his unauthorised absence between 15 and 20 July.

26. The claimant says in his form ET1 that he did not attend the disciplinary hearing due to ill health and emergency childcare issues. He does not mention ill-health within his witness statement as a reason for non attendance at the disciplinary hearing. When asked during his oral evidence he said he was not 100% well, he had an argument with his wife, who told him that he did not look well and advised him to go to the GP. There is no suggestion that the claimant informed the respondent that he could not attend the meeting for any reason connected with his health. The claimant's communication with the respondent was that he was recovered from his previous eye condition and fit to return to work. We conclude that the claimant's health was not the reason for the claimant's non attendance.
27. Within his witness statement the claimant refers to suffering a serious road accident in September 2017 and thereafter suffering post-traumatic stress disorder. There is was no evidence before the tribunal (either witness evidence or documentation) to suggest that there was any connection between the claimant's previous accident and/or PTSD to any of the issues that give rise to or are considered during this litigation.
28. The claimant's childcare situation would not be classed as an emergency scenario in the sense that is understood normally i.e. where a pre-existing childcare collapses for an unforeseen reason and a relatively short period of time is needed to be taken to a range of alternative childcare. The claimant's childcare issue was a long term one that he expected to last until September. The claimant said that (in the absence of this part time work request being met) he would not be able to attend work until September 2020.
29. On 24 July the Claimant informed Mr Rogers that he would not attend the hearing and requested a decision in writing.
30. Mr Rogers conducted the disciplinary hearing in the Claimant's absence and the Claimant was summarily dismissed for unauthorised absence.
31. The respondent's communication with the claimant was by way of the respondent's internal Blink platform. Access to this platform was removed from the claimant on his dismissal. The respondent states that the policies were contained on the Blink platform and further that the claimant received a copy of the handbook on commencing his employment. There was a suggestion, that was vague that paper copies of the handbook were contained within the garages. We conclude that the claimant had access to the relevant policies on the Blink system up to the termination date only. The dismissal letter stated that the claimant had a right to appeal and any appeal should be sent to Ms Olawo-Jerome within seven days. The respondent refers to its policy and states that the claimant should have known that the appeal was received by Mr Ms Olawo-Jerome would be sent to an independent panel of two managers. However at this point, the claimant did not have access to the respondent's policy on Blink to check, should he be minded to do so and only had the information provided within the dismissal letter.
32. On 5 August, outside the 7 day time to appeal notified within the dismissal letter, the Claimant contacted another garage manager, Mr Webley, and requested an appeal. This letter was not accepted by the respondent as an appeal, but Ms Olawo-Jerome wrote to the claimant by email dated 5 August 2020 asking the

claimant to explain why he had sent the Appeal to Mr Webley and why it was late. No response was sent by the claimant and no further correspondence was entered into between the parties.

33. We heard evidence from Mr Belaci on behalf of the claimant. Mr Belaci is also a driver for the respondent. He states that he was wrongly placed in the amber group when making a previous part-time working request. He says that other drivers (Ms AA and Mr M) applied at the same time of the claimant and were granted their request whereas the claimant was not. Mr Belaci suggests that they were favoured by Ms Olawo-Jerome as they are black African and the claimant is not. Mr Belaci also refers to Ms S who he believes has been granted part-time working when the claimant was not and suggests that Ms Olawo-Jerome is biased against the claimant when deciding whether to grant his request help him. Mr Belaci considers that the claimant's treatment as the similar to his own experience. Mr Belaci says that he does not consider this to be an isolated event and refers to a colleague named Phyllis, who was white Polish and was treated badly by Ms Olawo-Jerome.

34. During the course of giving his evidence Mr Belaci conceded that he was Algerian, not Moroccan but believed he had been treated in a similar fashion to the claimant. During the course of re-examination Mr Belaci told the tribunal that he believed those of North African heritage were treated less favourably than those of South African heritage by Ms Olawo-Jerome. He acknowledged that his evidence in relation to Phyllis did not fit with his example.

35. We find the following in respect of the claimant colleagues who made flexible working requests and potential comparators:

    35.1. Mrs S submitted her request the same day as the claimant and received her response at the same time as the claimant. Both requests were dealt with by Ms Yesufu. Mrs S flexible working request was categorised as 'red'. Her request for flexible working was not granted immediately and she waited until October 2020 to commence the flexible working pattern. Mrs S was required to continue with her existing working pattern and until that time. The distinguishing features identified within this application was that she had caring responsibilities for her disabled brother.

    35.2. Mr M is identified as being British of Somali origin he made a flexible working request in September 2018. This was classified as red. The distinguishing features were that Mr M's father lived with Mr M and his family. Mr M's father was very ill and serious safeguarding issues were raised in relation to Mr M's children relating to Mr M father's medical conditions. Mr M's request was not granted immediately as he waited until March 2019 to commence his altered flexible working pattern. Mr M continued with his existing contractual hours until the agreed to change became effective.

    35.3. Mrs AA said to the British, born in Ghana. Mrs AA had fibromyalgia and provided evidence of her medical condition. Her flexible working request was categorised as red. Mrs AA made her request in 2018 but had to wait until March 2019 for it to be granted. Mrs AA continued to work out normal contractual hours prior to the agreed change becoming effective

The Law

36. In a claim of unfair dismissal, it is for the respondent to show a genuinely held reason for the dismissal and that it is a reason which is characterised by section 98(1) and (2) of the Employment Rights Act 1996 ("the ERA") as a potentially fair reason. The respondent relies upon 'conduct'. If the respondent shows such a reason, then the next question, where the burden of proof is neutral, is whether the respondent acted reasonably or unreasonably in all the circumstances in treating the reason for dismissal as a sufficient reason for dismissing the claimant, the question having been resolved in accordance with the equity and substantive merits of the case. It is not for the Employment Tribunal to decide whether the respondent employer got it right or wrong. This is not a further stage in an appeal.

37. In a case where the respondent shows the reason for the dismissal was conduct, it is appropriate to have regard to the criteria described in the well-known case of *Burchell v BHS [1978] IRLR 379*. The factors to be taken into account are firstly whether the respondent had reasonable grounds for its finding that the claimant was guilty of the alleged conduct; secondly whether the respondent carried out such an investigation as was reasonable in the circumstances; thirdly whether the respondent adopted a fair procedure in relation to the dismissal and finally whether the sanction of dismissal was a sanction which was appropriate, proportionate and, in a word, fair. In relation to each of these factors, it is important to remember at all times that the test to be applied is the test of reasonable response.

38. The claimant raises issues of direct discrimination that are pleaded in the alternative as harassment. We note the provisions of section 212(1) of the Equality Act 2010 providing that harassment and direct discrimination claims are mutually exclusive. Direct discrimination is provided for within section 13 Equality Act 2010. The question for direct discrimination is whether, because of the protected characteristic the respondent has treated the claimant less favourably than it has treated or would treat others. For the purposes of direct discrimination, the employment tribunal needs to consider a comparator and we have, in the absence of any actual comparator, considered a hypothetical comparator in materially similar circumstances to the claimant as set out below. Section 26 of the Equality Act 2010 sets out the definition of harassment as conduct related to the protected characteristic which has the purpose or effect of violating the claimant's dignity or creating an intimidating hostile degrading humiliating or offensive environment for the claimant. In deciding whether the conduct has this effect, the tribunal will take into account the perception of the claimant the other circumstances of the case and whether it is reasonable for the conduct to have had that effect.

Deliberations

39. We have carefully considered the entirety of the evidence that has been presented to us. Our findings are made on a unanimous basis.

40. We have considered the claimant's claim for unfair dismissal. Taking into account the entirety of the evidence heard we conclude that the respondent has shown that the sole reason for the claimant's dismissal was his conduct, in particular his unauthorised absence.

41. We have considered the relevance of the period between 9 and 14 July 2020. It is common ground that the claimant was absent during this time on sick leave. The respondent notes the company sick pay scheme being discretionary in nature and Ms Olawo-Jerome decided not to pay sick leave to the claimant during this time.

Ms Olawo-Jerome wrongly considered the claimant's sickness absence not to be genuine. We note however that the claimant had expressly informed Ms Olawo-Jerome prior to this period that he would not be attending work and therefore we conclude that Ms Olawo-Jerome had reasonable grounds for her suspicion, even though she was wrong. There is no claim within this litigation arising from this period of sick leave. The respondent has throughout the internal process and this litigation expressly stated the conduct relied upon to be the claimant's unauthorised absence was between 15 and 20 July and have excluded the claimant's stated sick leave period from the conduct concerns that led to the claimant's dismissal. Mr Rogers was clear in his oral evidence that the claimant's period of sick leave played no part in his decision to dismiss. We conclude that the claimant's sickness absence between 9 and 14 July played no part in the respondent's decision to terminate the claimant's employment.

42. The respondent has established that the reason for the claimant's dismissal was his conduct, in particular that he was absent from work without leave between 15 and July 2020. The respondent had a genuine belief that the claimant had not attended work as alleged, and the claimant concedes that he did not attend work during this time as alleged. Other than the allegations relating to discrimination dealt with elsewhere, neither party has suggested any other reason for the claimant's dismissal.

43. This is a case where there has been no separate investigation stage of the process. In most scenarios before a tribunal, this would be likely in itself to render any subsequent dismissal unfair. However, the claimant's circumstances are unusual in that:

    43.1. The claimant told the respondent that, in the absence of granting his request for part-time work, the claimant would not be attending work until September. The claimant was warned that should he not attend work in these circumstances his absence would be considered unauthorised. The claimant had not attended work thereafter between 15 and 20 July 2020 to complete his contractual hours.

    43.2. Even now, with the benefit of hindsight, the claimant did not during the course of the hearing identify any potential relevant information that could have been uncovered, that could have altered the position in any way, had an investigation being carried out. The claimant felt badly treated by the respondent, and had he felt better treated by the respondent, he would have resigned.

    43.3. The respondent genuinely looked for part-time working vacancies to meet the claimant's requests. There were none available. The claimant is required to wait for a suitable vacancy to arise but was unwilling to do so. Even if the claimant's flexible working request had been categorised as 'red', the claimant will have to wait for a vacancy to arise. He was unwilling to do so.

    43.4. The respondent had genuinely considered the possibility of unpaid leave and rejected it for operational reasons.

    43.5. The respondent's disciplinary policy that has been adopted within a unionised workforce expresses at the outset, the fundamental requirement for staff to attend for their specified working hours. Unauthorised absence from work is expressly identified as an example of potential gross misconduct

43.6. The respondent's disciplinary policy envisages that the investigation stage may be cut short in cases of unauthorised absence from work. The respondent has complied with its own internal policies.

44. Taking the entirety of the evidence into account we conclude that Mr Rogers decision not to have a separate investigation stage within this process falls within the band of reasonable responses from a reasonable employer. Further if we are wrong, in light of the evidence provided by the parties, we conclude that had a separate investigation step being carried out by the respondent it would have made no material difference to the subsequent information available to the person tasked with making a decision within the subsequent disciplinary matter.

45. We now turn to the organisation of the disciplinary hearing. It transpired during the tribunal hearing that there was miscommunication between the parties in relation to the claimant's availability. However the claimant did not expressly request that the meeting be conducted on Saturday. Further following this discussion and following receipt of a formal invite to the disciplinary meeting, the claimant wrote to Mr Rogers on 21 July 2020, 'I'm afraid I'm not attending and you can send me the decision in writing…….'. There was no request made by the claimant to change the date of the disciplinary hearing. Further the claimant's correspondence indicated that the claimant wished for the hearing to proceed in his absence and for the claimant to be informed of the decision in writing.

46. At no time did the claimant tell the respondent or in any way indicate that he could not attend the hearing by reason of ill-health. The claimant does not address ill-health within his witness statement and his oral evidence in relation to ill-health playing any part in his reason for not attending the disciplinary hearing was vague as set out above and confined to a comment from the claimant's wife to the claimant that 'he did not look well'. We conclude that claimant was not prevented from attending the disciplinary hearing by reason of ill-health.

47. The claimant alleges that he was unable to attend the disciplinary hearing by reason of an emergency childcare issue. The normal understanding of an emergency childcare issue is where existing childcare arrangements have failed for unexpected reasons, often a poorly child or unexpected issues with a childcare provider or school. This is not the case in the claimant's case, where the childcare issues referred to were expected to last until September. We conclude that the claimant was not unable to attend the disciplinary meeting by reason related to an emergency childcare issue.

48. Taking the entirety of the evidence into account we conclude that Mr Roger's decision to proceed with the disciplinary meeting in the claimant's absence was one which falls within the band of a reasonable response from a reasonable employer.

49. It is common ground that at no time during the matters giving rise to this litigation, did the respondent refer the claimant to occupational health. The claimant's genuine absence in respect of an eye condition between 10 and 14 is noted and the evidence provided by the claimant at the time was that he was fit and able to return to work 15 July 2020. There is no further indication from the claimant to the respondent at the time that his eye condition had had not resolved. there is no reference from any party to any issue relating to this matter causing or contributing in any way to the claimant's absence from work between 15 and 20 July 2020 or envisaged continued absence in any way. The claimant's references to his previous accident and subsequent PTSD is also noted yet there is no reference

from any party to any issue relating to this matter or causing or contributing in any way to the claimant's absence from work between 15 and 20 July 2020 or his envisaged absence thereafter. At no stage either during the disciplinary proceedings or indeed during the hearing was it alleged that the claimant's unauthorised absence between 15 and 20 July was in any way connected with ill-health. In the circumstances we are unable to identify any reason why the claimant would or should have been referred to occupational health or why the respondent would or should have considered the claimant's alleged eye condition or PTSD within the context of this particular conduct related disciplinary matter. In the circumstances and consider that the respondent's failure to refer the claimant to occupational health or consider the health conditions further within the disciplinary process to fall within the band of reasonable responses from a reasonable employer.

50. Turning to the decision to dismiss. At the time Mr Rogers made his decision:

50.1. it was common ground that the claimant had not attended work between 15 and 20 July. The claimant had requested leave but it had not been granted by the respondent.

50.2. The claimant had stated that in the absence of his flexible working request been granted he would not attend work until September 2020 and had not done so between 15 and 20 July.

50.3. The respondent had checked and was aware that there were no current vacancies available to allow the claimant to commence his flexible working pattern as requested. The claimant was on the respondent's waiting list for flexible working.

50.4. Mr Papaloizou argued that the dismissal was substantially unfair because the respondent's, under their own flexible working policy had an obligation to provide the claimant with his requested working hours immediately on a temporary basis. Mr Papaloizou's reading of this policy had been questioned by the tribunal during the course of the hearing as we wished to understand the claimant's case. We highlighted the issue to Mr Papaloizou during the hearing and submissions. We have carefully revisited this point and conclude that this is a misreading of the policy on Mr Papaloizou's part. The respondent's policy does not in any way oblige it to provide a temporary flexible working arrangements as requested by the claimant and to do so would undermine the entire basis of the respondent's flexible working policy.

50.5. The respondent had considered the possibility of the claimant taking unpaid leave but rejected it on the basis of operational need at that time due mainly to large volumes of staff absence.

50.6. The claimant had created a scenario whereby he had refused to attend work in the absence of agreement to his requests. The respondent is a large bus company with contractual commitments to TfL In the event that they failed to operate effectively, they lose routes to other bus companies. They would have difficulty covering the claimant's work should he remain within the headcount and cannot as a business tolerate employees who refused to come to work unless and until they get the hours they want to work.

51. When examining the decision made by Mr Rogers we have reminded ourselves that we must not substitute what this tribunal may have decided or done in the circumstances. We acknowledge that the claimant is in fundamental breach of his contract of employment in that he has failed to attend work as contractually

obliged. This is causing significant operational difficulties for the respondent. The claimant's actions also have potential consequences outside of his personal scenario. We note that all of the other flexible working requests brought to the tribunal's attention during the course of this litigation involved an element of waiting time for the individual employee. We conclude that a very large proportion of employees who request flexible working within the respondent are required in accordance with the respondent's policy to wait for a suitable vacancy to arise. Should it be the case that employees refuse to work until their preferred flexible pattern is available, this would undermine the respondents flexible working policies and creating unmanageable scenarios that would have an obvious detrimental effect on the respondent's ability to meet its contractual obligations to TfL. In the circumstances we consider that while this tribunal or other employers may have dealt with matters differently, Mr Roger's decision to dismiss the claimant falls within the band of reasonable responses of a reasonable employer.

52. Turning to issues relating to the appeal, note that the claimant had access to the respondent's policies through the Blink platform up to the date of his dismissal. The claimant did not have access to the policies following this time. However the claimant was informed within his dismissal letter that any appeal should be submitted within seven days. This corresponds with the respondent's internal policy. While the claimant submitted an appeal to an alternative manager he did so outside the seven days' time limit. While some employers may well choose to accept the appeal outside the specified time limit, we consider it within the band of reasonable responses for an employer to question why such an appeal was submitted late and thereafter the onus is on the employee to reply. It appears to us that when the respondent specifies a time limit for the submission of any appeal, communicate this time limit to the claimant and receives an appeal outside that time limit and receives the no response when this matter is raised with the employee, it is within the band of reasonable responses for that employer not to consider the appeal further.

53. We note the claimant's point in respect of the identity of the person carrying out the appeal and the obvious inappropriateness for Ms Olawo-Jerome to do so. It is common within disciplinary processes for appeals to be allocated to specific employees to deal with once they have been received by the employer. Ms Olawo-Jerome was not assigned to deal with the claimant's appeal but to receive it. We note that the respondent did correspond with the claimant when he submitted his appeal and requested further input from the claimant. We consider that in circumstances where the appeal has been submitted outside the instructions communicated to the claimant (in this case stated within the dismissal letter), there is an onus on the claimant to respond to the respondent's correspondence. We consider the issue of potential bias is one that is open to the claimant to raise during the course of the appeal, but it does not negate the claimant's decision not to engage with the respondent's reasonable correspondence. Where the claimant has failed to engage with the employer's correspondence in these circumstances, while other employers may take a different tack, we conclude that it is within the band of reasonable responses for an employer to take no further action.

54. We also note that, even if we are wrong and the absence of an appeal renders the dismissal unfair, examining the email sent to Mr Webley and considering all of the information that the claimant has, even with the benefit of hindsight and legal assistance, placed before the tribunal during this hearing, no information has been identified that changes the circumstances as identified by Mr Rogers above. This

appears to be a scenario where, had an appeal been progressed, it was most unlikely to have resulted in a reversal of the decision to dismiss on the part of the respondent.

55. We turn to the claimant's race discrimination claim. The claimant was represented by Mr Papaloizou at the preliminary hearing in front of EJ McNeil on 26 May 2021. Within the case management summary it is stated, 'the purposes of his race discrimination claim, the claimant defines his race as Moroccan'. The comparator's as set out within the list of issues are described as those not of Moroccan nationality or ethnic origin. During the course of submissions Mr Papaloizou stated that the claimant's race discrimination claim should be looked at in a wider context substituting North African for Moroccan with the comparators being of British Caribbean origin.. Further the matter should be viewed as a claim on the basis of discrimination against the claimant on the grounds that he was white when the comparators are black. None of these alternative bases for the race discrimination claim were raised by Mr Papaloizou prior to submissions. We heard no evidence and the respondent had not prepared evidence on the basis of any other formulation of the race claim outside the claimant's Moroccan ethnic origin. None of these matters were put to the respondent's witnesses. The submissions appear to arise from the evidence provided in re-examination by Mr Belaci. It is not possible for Mr Papaloizou to expand the claimant's claim at this late stage and we consider that the claim for race discrimination is properly understood to be brought on the basis of his Moroccan ethnic origin as previously stated by the claimant at the preliminary hearing and at all times up to submissions. In any event, we note our findings of fact below and note that even if the basis of the claimant's race discrimination claim was extended as submitted, it would make no difference to the outcome of this matter.

56. We address each of the allegations of less favourable treatment:

    56.1. The claimant submitted his application for flexible working on 20 June 2020. This is an unusual situation whereby another colleague submitted and flexible working application on the same day. We can see that both applications were dealt with within the same timescale, taking longer than the 14 days envisaged within the respondent's flexible working procedure. The respondent has noted that the applications for flexible working were submitted at a time when the human resources department was extremely busy dealing with the consequences of the Covid 19 lockdown. We conclude that Ms Yesufu dealt with the categorization of both applications and was unaware of the claimant's ethnic origin as she has stated. We do not consider that the claimant has raised a prima facie case of direct discrimination on this matter and in any event, we conclude that the respondent has shown that it has dealt with the claimant's application without reference to or knowledge of his race or ethnic origin in any way.

    56.2. The claimant questions the respondent's placing of his request for part-time work in the respondent amber category. We note that Ms Yesufu was unaware of the claimant's nationality or ethnic origin when she made the determination. Further, the respondent has provided evidence in relation to the distinguishing factors of potential comparators that it determined warranted 'red' status. The claimant's requirements were based upon his childcare needs. All of the comparators identified have complicating elements for consideration either relating to disability or illness, that in blunt terms provide 'something more' than the 'normal' childcare requirements that arise with many working

parents. For this reason, we do not consider the comparators listed within the list of issues are mentioned above to be proper comparators for the purposes of the direct discrimination claim. We consider the correct comparator in the circumstances is an employee who is not Moroccan who have made a request for flexible working based on difficulties in obtaining childcare without reference to any additional disability or illness. In such cases we consider that Ms Yesufu would have made a similar amber categorisation of the hypothetical comparator. We do not consider that the claimant has made out a prima facie case in respect of this allegation. In any event conclude that the respondent has shown by reference to those particular circumstances assessed to warrant a 'red' classification that the reason for the respondent's classification of the claimant's flexible working request as 'amber' was its genuine determination of the matter in accordance with its policy without reference to the claimant's Moroccan origin or any other matter relating to the claimant's race.

56.3. We conclude as a matter of fact, by reference to the witness evidence supported by contemporaneous emails that the claimant's flexible working application was determined by Ms Yesufu, not Ms Olawo-Jerome as alleged by the claimant.

56.4. It is the case that the claimant's appeal was ignored by Mr Hill. The respondent has shown that this was human error on the part of Mr Hill, he missed this email from the claimant and did not see the claimant's appeal. This was the reason it was not progressed. The claimant has not made out a prima facie case in this matter and in any event the respondent has shown that Mr Hill did not see the claimant's appeal. The claimant's ethnic origin played no part whatsoever in respect in this error.

56.5. The claimant alleges that the respondent in particular Ms Olawo-Jerome and Mr Hill did not assist him with his dilemma relating to childcare due to his race and or ethnic origin. The claimant was clear in his communication that the assistance he required from the respondent was either the granting of part-time hours as requested without delay or agreement to take unpaid leave. All of the potential comparators referred to during the course of the litigation regardless of the categorisation of their request were required to wait for a suitable vacancy to arise prior to changing their working hours and continue with their original working pattern until there requested flexible working pattern was agreed to come into effect. We do not consider that the claimant has shown a prima facie case of discrimination on the grounds of his race or ethnic origin. We conclude that the respondent has shown on the balance of probability that a vacancy for a driver to work the hours that he had requested did not exist within the respondent organisation as of the date of the claimant's dismissal. The respondent had also demonstrated that the claimant's requests to unpaid leave was also refused for genuine operational reasons. The respondent's inability to assist the claimant did not relate in any way to his race or ethnic origin.

56.6. We refer to our findings in respect of the claimant's dismissal and conclude that the respondent has demonstrated that the claimant was dismissed for reasons relating to his conduct and that this was unconnected to the claimant's race or ethnic origin in any way.

57. We have considered the claimant's claim for unlawful harassment and repeat our findings made above in relation to the direct discrimination claim. We conclude for the reasons set out above that the respondent's treatment of the claimant alleged

to be unlawful harassment was in no way 'related to' the protected characteristic of race and for that reason the harassment claim is unsuccessful.

Conclusions

58. For the reasons set out above we conclude that:

58.1. the claimant's claim for unfair dismissal is not well-founded and is dismissed.

58.2. The claimant's claim for direct race discrimination or in the alternative, harassment related to his race are unsuccessful and dismissed.

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Employment Judge Skehan

21 June 2022
Sent to the parties on:

8/7/2022

For the Tribunal:

N Gotecha