EMPLOYMENT TRIBUNALS

Claimant		**Respondent**
Mr I Sesay	v	Metroline West Limited

Heard at: Watford Tribunal **On**: 6 June 2022

Before: Employment Judge Smeaton, Mr Surrey, Mr Chapman

Appearances
For the Claimant: In person
For the Respondent: Ms Nicolaou (solicitor)

JUDGMENT having been sent to the parties on 24 June 2022 and written reasons having been requested in accordance with Rule 62(3) of the Employment Tribunals Rules of Procedure 2013, the following reasons are provided:

REASONS

Introduction

1. The Claimant, Mr Sesay, was employed by the Respondent, Metroline West Limited from September 2018 until his dismissal (with effect from 21 December 2020). He was employed as a bus driver.

2. By a claim form dated 4 February 2021, following a period of early conciliation from 18 December 2020 to 18 January 2021, Mr Sesay brings complaints of unfair dismissal (contrary to section 94(1) Employment Rights Act 1996 ("ERA 1996")), direct race discrimination (contrary to section 13 Equality Act 2010 ("EqA 2010") and victimisation (contrary to section 27 EqA 2010). Mr Sesay identifies as a black man.

Issues

3. The allegations centre on the period July 2020 to December 2020. The issues which fall to be determined by the Tribunal were discussed at a preliminary hearing before Employment Judge Bloom on 9 February 2022 and agreed at the outset of the final hearing as follows:

4. Unfair dismissal

   4.1 Was Mr Sesay dismissed for a potentially fair reason. The Respondent relies on the potentially fair reason of misconduct
   4.2 Did the Respondent genuinely believe that Mr Sesay was guilty of misconduct
   4.3 Was that belief based on reasonable grounds following a reasonable investigation
   4.4 Was dismissal within the range of reasonable responses open to the Respondent. Consideration of this issue will involve consideration of whether the final written warning ("FWW") imposed on Mr Sesay was issued in bad faith, was manifestly inappropriate and whether there were prima facie grounds of imposing it
   4.5 Did the Respondent follow a fair process
   4.6 If Mr Sesay's dismissal was procedurally unfair, should any award of compensation be reduced to reflect the fact that he would have been fairly dismissed had a fair procedure been followed
   4.7 Should any award of compensation be reduced to reflect any blameworthy conduct on Mr Sesay's part that contributed to his dismissal
   4.8 Should any award of compensation be adjusted to take into consideration a failure by either party to follow the ACAS Code of Practice

5. Direct race discrimination

   5.1 Did the Respondent do the following
      5.1.1 Impose a final written warning on Mr Sesay on 12 August 2020
      5.1.2 Warn Mr Sesay about his use of the Blink messaging service on or around 14 August 2020
      5.1.3 Dismiss Mr Sesay
   5.2 Has Mr Sesay shown facts from which the Tribunal could infer that the Respondent treated him less favourably than it treated or would treat a white colleague in the same or not materially different circumstances
      5.2.1 In respect of the allegations at 5.1.1 and 5.1.3 above, Mr Sesay relies on Mr Verity (driver/operator), Mr Dragos (driver) and Mr Wolfe (driver) as comparators, together with a hypothetical comparator
      5.2.2 In respect of the allegation at 5.1.2 above, Mr Sesay relies on Mr Heracleous (garage manager) as a comparator, together with a hypothetical comparator
   5.3 If so, has the Respondent shown a non-discriminatory reason for the treatment.

6. Victimisation

   6.1. It is accepted that Mr Sesay did a protected act for the purpose of section 27 EqA 2010 by raising grievances
   6.2. Did the Respondent subject Mr Sesay to a detriment by dismissing him
   6.3. Was the dismissal because Mr Sesay had done a protected act.

7. On the second day of the hearing, Mr Sesay indicated that he also considered the acts of suspension to be acts of direct discrimination. When the Tribunal indicated to him that suspension was not included in the list above, which had been agreed at the outset of the hearing, he was adamant that he had always intended that they be considered as acts of direct discrimination.

8. Having considered the position of both parties, we agreed that Mr Sesay had pleaded that the acts of suspension were acts of discrimination. Although the pleadings are not entirely clear, suspension is referenced in the telephone preliminary hearing before EJ Bloom as a potential issue. The Respondent ought to been aware, prior to the hearing, that it needed to address the issue of suspension and we proceeded to consider it accordingly, notwithstanding its absence from the list agreed at the outset of the hearing.

Hearing and preliminary discussions

9. Mr Sesay represented himself at the hearing. The Respondent was represented by Ms Nicolaou (solicitor). At the outset of the hearing, the Tribunal took time to explain the procedure to Mr Sesay and to reassure him that, so far as possible, we would take steps to ensure that he was not disadvantaged by the lack of representation.

10. The hearing took place over three days. The Tribunal was provided with an agreed hearing bundle of 464 pages. Mr Sesay indicated that he did not have a full copy of the bundle. Ms Nicolaou indicated that it had been sent to him on a number of occasions. The Tribunal was able to provide Mr Sesay with a hard copy of the bundle. Mr Sesay sought to add two further emails to the bundle. One of those already appeared at page 342. The other was an email dated 20 July 2020 from Mr Sesay to Mr Heracleous, in response to an email from Mr Heracleous that appears at page 451 of the bundle. Ms Nicolaou confirmed she had no objections to that additional document being added to the bundle and the Tribunal agreed to add it (as page 465).

11. Mr Sesay initially sought to rely on CCTV footage of the incident leading to his dismissal. Ms Nicolaou indicated that she had the footage by email. She had no objections to the Respondent viewing it but maintained that it had no relevance to the issues the Tribunal had to decide.

12. Mr Sesay raised concerns about the lack of voice recording in respect of the same incident. Ms Nicolaou's position was that the audio recording (which had been played to Mr Sesay during the disciplinary process) had been deleted. This was reflected in the Respondent's witness evidence.

13. Overnight following the first day of the hearing, the Respondent was able to retrieve both the audio recording and some additional CCTV from the incident leading to the imposition of the FWW. At Mr Sesay's request, we watched that CCTV and listened to the audio of the incident leading to the dismissal. With the agreement of the parties, we did not watch the CCTV of the incident leading to dismissal. That incident was a telephone call and it was agreed that the CCTV would not add anything to the audio recording.

14. We did not find that the Respondent's credibility was in any way undermined by this subsequent retrieval of the CCTV or audio recordings, notwithstanding that its availability was in contradiction to the Respondent's evidence. As set out below, we found that both the CCTV and the audio undermined the Claimant's case and assisted the Respondent's case. We found there to be no reason why the Respondent would seek to hide that evidence and that the Respondent's evidence on this issue was genuine but mistaken.

15. Mr Sesay gave evidence on his own behalf. The Respondent called three witnesses.

16. At various points during the hearing Mr Sesay's questions of witnesses and answers under cross-examination lost focus. This is quite understandable given that Mr Sesay was a litigant-in-person and not an experienced advocate. The Tribunal sought to intervene where appropriate to assist Mr Sesay in reformulating his questions.

17. It was also necessary at times for the Tribunal to warn Mr Sesay about timing. He was given advance notification of how long he had left with the witnesses and this was extended as much as reasonably possible, within the time allowed for the hearing, to give him the opportunity to ask any relevant questions of the Respondent's witnesses.

18. At the end of the hearing, both parties made oral closing submissions. Ms Nicolaou also relied on written submissions. We adjourned to deliberate before giving our decision.

The law

(1) Unfair dismissal

19. The law relating to unfair dismissal is contained in s. 98 ERA 1996. In order to show that a dismissal was fair, the Respondent must prove that the dismissal was for a potentially fair reason (s.98(1) and (2) ERA 1996). Misconduct is a potentially fair reason (s.98(2)(b) ERA 1996). If the Tribunal is satisfied that the Claimant was dismissed for misconduct, it must then turn to consider the question of fairness, by reference to the matters set out in s.98(4) ERA 1996.

20. In considering the claim of alleged misconduct, the Tribunal must ask itself a series of questions as set out in British Home Stores v Burchell [1980] ICR 303, EAT:

20.1. was there a genuine belief that the Claimant was guilty of the misconduct as alleged;
20.2. was that belief based on reasonable grounds following a reasonable investigation
20.3. was dismissal within the range of reasonable responses open to the Respondent.

21. When considering a situation where, as here, the employee was dismissed in part in reliance on a live warning, the starting point should always be section 98(4) ERA 1996 and the question of whether it was reasonable for the employer to treat the conduct reason, taken together with the circumstances of the FWW, as sufficient to dismiss the employee.

22. It is not for the Tribunal to reopen the FWW and consider whether it was legally valid or a nullity. The questions of whether the warning was issued in good faith, whether there were prima facie grounds for imposing it, and whether it was manifestly inappropriate, are all relevant to the question of whether the dismissal was reasonable, having regard, amongst other things, to the circumstances of the warning. Only rarely will it be legitimate for a tribunal to 'go behind' a FWW given before dismissal (Davies v Sandwell Metropolitan Borough Council [2013] IRLR 374, CA).

23. The term 'manifestly inappropriate' indicates a higher threshold than the test of reasonableness of a dismissal. Manifest inappropriateness will, accordingly, not be easily established (Simmonds v Milford Club [2013] ICR D14, EAT).

24. In reaching its decision, the Tribunal must not put itself in the position of the employer and consider how it would have responded to the allegations of misconduct. It is not open to the Tribunal to substitute its own decision for that of the Respondent. That means that, even if the Tribunal finds that it would have reached a different decision, it will not necessarily mean that the dismissal was unfair. The dismissal will be unfair if the Tribunal finds that there was no genuine belief in the misconduct, or that the belief was not a reasonable one based on a reasonable investigation, or that summary dismissal fell outside of the range of reasonable responses open to the Respondent.

25. The dismissal may, additionally, be unfair if there has been a breach of procedure which the Tribunal considers sufficient to render the decision to dismiss unreasonable. In considering this question, the Tribunal must have regard to the ACAS Code of Practice on Disciplinary and Grievance Procedures. If there is a defect sufficient to render dismissal unfair, the Tribunal must then, pursuant to the case of Polkey v A E Dayton Services Ltd [1998] ICT 142 determine whether and, if so, to what degree of likelihood, the Claimant would still have been dismissed had a proper procedure been followed. This is a matter relevant to remedy only.

(2) Direct discrimination

26. Direct discrimination is defined at s.13(1) EqA 2010 as:

(a) less favourable treatment than an actual or a hypothetical comparator;
(b) which was done because of (here) the employee's race.

27. The burden is on the employee to establish facts from which the Tribunal could infer, on the balance of probabilities and absent any explanation, that the alleged discrimination occurred. If the employee is able to do so, the burden will shift to the employer to provide a non-discriminatory reason for the treatment (Efobi v Royal Mail Group Limited [2021] ICR 1263, SC). The burden is not shifted simply by showing that the employee has suffered less favourable treatment and has a protected characteristic.

28. In considering whether the employee has established a prima facie case, the Tribunal must examine all the evidence provided by the parties (Madarassy v Nomura International Plc [2006] IRLR 246).

(3) Victimisation (s.27 EqA 2010)

29. S.27(1) EqA 2010 provides that a person (A) victimises another person (B) if A subjects B to a detriment because (a) B does a protected act, or (b) A believes that B has done, or may do, a protected act. There is no dispute here that Mr Sesay did do a protected act.

30. The essential question in determining the reason for the Claimant's treatment is what, consciously or subconsciously, motivated the Respondent to subject the Claimant to the detriment. A 'but for' causative link is not sufficient (Chief Constable of West Yorkshire Police v Khan [2001] ICR 1065, HL; Chief Constable of Greater Manchester Police v Bailey; JJ Food Service Ltd v Mohamud EAT 0310/15).

31. If the Claimant can establish sufficient facts which, in the absence of any other explanation, point to a breach of s.27 having occurred, the burden will shift to the Respondent to show that no victimisation has occurred. However, as with other provisions of the EqA 2010, the burden of proof is not shifted simply by showing that the Claimant has suffered a detriment and that he has done a protected act (Greater Manchester Police v Bailey [2017] EWCA Civ 425). The protected act itself must be a significant influence on the employer's decision-making.

Findings

32. We start by stating that, in general we found all the witnesses who gave evidence to be credible in the sense that there were no deliberate lies or falsification.

33. For the reasons set out below, however, we have rejected much of Mr Sesay's evidence in respect of how he behaved during certain incidents. We find as a fact that Mr Sesay genuinely but mistakenly believes that he did not behave inappropriately or aggressively towards others in respect of either of the incidents in issue. In our view, Mr Sesay has a lack of insight into how his behaviour is perceived by others. This view is based on a combination of how others have characterised his behaviour, the CCTV we have viewed and the audio we have listened to. We unanimously concluded that in both the CCTV and audio, Mr Sesay came across in an aggressive and intimidatory manner. That may not have been

his intention, but was the effect of his actions. Mr Sesay himself accepted that, in respect of one of the incidents we will come on to discuss (leading to the FWW), an objective bystander on the street, watching his behaviour, could have seen it as confrontational "*if they had not known what was going on"*.

34. Mr Sesay had been employed by the Respondent for a little over two years at the date of his dismissal.

35. Although there were no concerns about his driving standards or absence record, he did not have an unblemished disciplinary record. In July 2019, he was given an oral warning after refusing to allow passengers to board his bus. In November 2019, he was given a further oral warning about remonstrating with a car driver. In January 2020, he received an oral warning in part because of his behaviour. Two months later, he was issued with advice and guidance for poor attitude and conduct. Mr Sesay does not accept that all of these warnings were imposed fairly on him. For the purpose of this hearing, it is not necessary for us to reach a conclusion on the appropriateness of those earlier warnings. We make clear, for the avoidance of doubt, that we have not taken into account a warning imposed in April 2019, which was overturned on appeal.

36. On 11 July 2020 an Official Report was made by a Service Controller in respect of Mr Sesay's attitude and demeanour and he was suspended pending investigation.

37. It was alleged that, earlier that day, he had verbally abused a fellow bus driver, calling him a "cunt", had behaved aggressively towards both the bus driver and a passenger and had shouted and sworn on the upper deck of the bus whilst travelling as a passenger. Mr Sesay was travelling in uniform, although he was not wearing a company jacket and it would not have been immediately obvious from his uniform alone that he was an employee of the Respondent. Mr Sesay was suspended an hour or two after the incident by Mr Proverbs, the Service Controller at Uxbridge.

38. Mr Sesay maintains that the decision to instigate disciplinary proceedings and to suspend him in response to this incident were acts of less favourable treatment because of his race.

39. It is not in dispute that an altercation occurred between Mr Sesay and Mr Verity. Mr Sesay denies, however, that he behaved inappropriately in any way.

40. Following an investigation by Mr Sihra, an Operations Manager, Mr Sesay was invited to a disciplinary hearing chaired by Mr McLeod, also an Operations Manager. He attended accompanied by a Trade Union representative. He denied the allegations. At the conclusion of that hearing part of the allegation was found to be proven and Mr Sesay was given a Final Written Warning ("FWW") which was to remain live on his file for a period of 12 months. Mr McLeod did not find Mr Sesay's alleged use of the word 'cunt' to be proven.

41. Mr Sesay alleges that the FWW was an act of less favourable treatment because of his race. He does not make an allegation of discrimination against Mr McCleod

himself. He maintains that Mr McCleod was instructed by Mr Heracleous to impose the FWW.

42. Having viewed the CCTV of the incident and having considered the reports made at the time by Mr Proverbs, Mr Verity and the member of the public involved, we have no doubt that the Respondent acted entirely appropriately both in instigating disciplinary action and in suspending Mr Sesay. On the CCTV, Mr Sesay is clearly seen behaving in an intimidating and aggressive manner towards Mr Verity and a member of the public. The CCTV is entirely consistent with the accounts given in writing. Mr Sesay accepted in evidence that he was asked by Mr Proverbs to move away and that he kept returning to continue engaging with Mr Verity and the member of the public. That was completely inappropriate, aggressive and intimidating.

43. In our view, any responsible employer would have taken the action the Respondent did.

44. Mr Sesay alleged that Mr Proverbs knew his decision to suspend was wrong because he tried to make contact with Mr Sesay through his union representation and took advice from Mr Heracleous. There is nothing about that which supports Mr Sesay's claim. Mr Proverbs was on probation at the time, so it is not surprising that he sought advice and input from others. That also explains why Mr Sesay was not suspended immediately, but an hour or so later.

45. We accept that the FWW was issued in good faith by Mr McLeod. There is nothing to suggest that he was acting at Mr Heracleous' behest. Mr Sesay suggested that Mr McCleod had not approached the matter with an open mind because he had been warned in advance by other members of staff that Mr Sesay was aggressive. However, far from accepting what others said about the Claimant and approaching the matter with a closed mind, Mr McLeod spoke to Mr Sesay about where he was from, querying whether what was viewed by others as aggressive behaviour might in fact just be an underlying racial bias.

46. There were plainly prima facie grounds for imposing the FWW given the behaviour demonstrated.

47. Finally, we accept that the FWW was not manifestly inappropriate. To the contrary, we consider that it would not have been unreasonable to dismiss Mr Sesay for this incident. The fact that he was not dismissed suggests that Mr McLeod was more than fair to Mr Sesay. Mr Sesay suggested in evidence that a FWW could not be imposed for a first offence. This was not a first offence but, in any event, that submission is based on a misunderstanding of the Respondent's disciplinary policy. A FWW can be imposed for a first offence where, as we accept was the case here, the offence is sufficiently serious.

48. Mr Sesay relies on Mr Verity as an actual comparator in respect of his allegation that the decision to discipline him was an act of discrimination. He says that Mr

Verity was in the same or not materially different circumstances to him, but was not disciplined.[1]

49. We do not accept that there is no material difference between the circumstances relating to each case. At its highest, Mr Verity made a gesture when Mr Sesay got off the bus to suggest that Mr Sesay was crazy. Whilst inappropriate, that cannot on any sensible basis be said to be comparable to Mr Sesay's behaviour. It is clear from the CCTV (which Mr Sesay asked us to view) that in the altercation that followed it was Mr Sesay who was the aggressor. Mr Verity's body language is completely different. He was not engaging aggressively at all with the member of the public.

50. Mr Sesay relies on Mr Verity, Mr Dragos and Mr Wolfe as actual comparators in respect of the allegation of suspension.

51. For the reasons set out above, we do not accept that Mr Verity was in the same or not materially different circumstances as Mr Sesay. It would not have been appropriate to suspend Mr Verity in the circumstances.

52. Mr Dragos is an employee who, during a call with a controller on 4 September 2020, used abusive and offensive language, telling the controller to "fuck off". We do not accept that Mr Dragos was in the same or not materially different circumstances to Mr Sesay. Mr Sesay was not suspended simply for using the word 'cunt' as he alleges. He was suspended because of the entire situation. That is evident in Mr Proverbs report of suspension.

53. We note here that Mr Sesay made much of the fact that, in his statement, Mr Faichney, the Area Operations Director, said that if Mr McLeod had found that Mr Sesay had used the word 'cunt' he would likely have been dismissed. This, Mr Sesay says, shows an obvious difference in treatment between him and Mr Dragos. We do not accept that. It is clear that Mr Faichney is saying that if, in addition to the matters Mr McLeod did accept occurred, he had found Mr Sesay to have also used the word 'cunt', dismissal would have been likely. He is not saying that the use of the world 'cunt', devoid of any context or other circumstances, would have led to suspension and/or the imposition of a FWW.

54. There are obvious and material differences between telling a controller to "fuck off" over the telephone and engaging in a lengthy and public altercation and displaying aggressive and intimidating behaviour towards a driver and a member of public in person.

55. Mr Wolfe is an employee who sent a message on the Respondent's messaging service, 'Blink' with a picture of chewing gum on a bus saying "whoever stuck your chewing gum here you are a rotten scumbag". Again, we do not accept that Mr Wolfe was in the same or not materially different circumstances to Mr Sesay. Mr

[1] The decision to commence disciplinary proceedings was not put forward by Mr Sesay at the hearing as an act of discrimination but, for completeness, and given that the Case Management Order identifying the issues appears to refer to it as a potential issue, we have addressed it. This is also the case in respect of the decision to commence disciplinary proceedings on the second occasion, leading to his dismissal.

Sesay was not suspended simply for using an offensive word. In any event, there is a clear difference in the nature of the words 'cunt' and 'scumbag'. The first, the Tribunals finds, is of a much more offensive nature.

56. Mr Sesay relies on Mr Verity, Mr Dragos and Mr Wolfe as actual comparators in respect of the imposition of a FWW.

57. For the reasons set out above, we do not accept that Mr Verity was in the same or not materially different circumstances as Mr Sesay. His actions would not have warranted a FWW.

58. For the reasons set out above, we also do not accept that Mr Dragos was in the same or not material different circumstances as Mr Sesay. Furthermore, at the investigation and disciplinary hearings, Mr Dragos showed genuine remorse, apologising, accepting that his actions were wrong and reassuring the decision-maker that he would not repeat them. The same was not true of Mr Sesay who, to this day, denies behaving inappropriately in any way at all.

59. For the reasons set out above, we also do not accept that Mr Wolfe was in the same or not materially different circumstances as Mr Sesay. His actions did perhaps warrant the advice and guidance given to him but clearly not a FWW. For the avoidance of doubt, we do not accept that the advice and guidance letter produced by the Respondent for Mr Wolfe was falsified as alleged by Mr Sesay. The reference to a different individual, we accept, is more likely to be a typographical error.

60. Accordingly, we do not accept that Mr Sesay has shown facts from which the Tribunal could infer that the Respondent committed discrimination in respect of the first disciplinary process in issue. Accordingly, the burden of proof does not shift to the Respondent. Even if it did, we accept that the Respondent has shown non-discriminatory reasons for disciplining, suspending and imposing a FWW on Mr Sesay (namely Mr Sesay's more serious misconduct and lack of acceptance or remorse).

61. Following the disciplinary hearing, Mr Sesay submitted a number of grievances against Mr Proverbs, Mr Sihra, an Operations Manager and Mr Kavalikas, also an Operations Manager. The Respondent accepts that these grievances amount to protected acts within the meaning of section 27 EqA 2010. We do not need to deal with the investigation of those grievances in any detail for the purpose of this claim.

62. Mr Sesay appealed against the FWW. On 8 September 2020 he was told that his grievances would be dealt with as part of the appeal hearing on the basis that the complaints raised were about the disciplinary hearing. In our view that was an entirely appropriate way of dealing with them given that the matters clearly overlapped.

63. On 14 August 2020, before the appeal hearing took place, Mr Sesay posted a message on the Blink messaging service. The message itself was not inherently offensive. It was motivational-type message. In response, Mr Kavalikis sent a response saying "*Once again, Blink is a workplace tool and should be treated as*

such. I respect all opinions and ideas, just this platform has not been designed for this purpose. Thanks".

64. Mr Sesay relies on this as a further act of discrimination. He relies on Mr Heracleous, who posted a similar message but did not receive a response from Mr Kavalikis, as a comparator.

65. We do not accept that Mr Sesay and Mr Heracleous are in the same or not materially different circumstances. Mr Heracleous is a manager and we accept Mr Faichney's evidence that such managers are encouraged to post motivational quotes on Blink for the benefit of all staff.

66. In any event, there is nothing to suggest that any difference in treatment was because of race. The message from Mr Kavalikas was not rude. It was an entirely appropriate reminder from management about the use of a workplace tool. We do not accept that Mr Sesay has shown facts from which the Tribunal could infer that discrimination had taken place. Accordingly, the burden of proof does not shift to the Respondent. Even if it did, we accept that the Respondent has shown a non-discriminatory reason for any difference in treatment (namely that managers were encouraged to post motivational quotes on Blink and drivers were not).

67. Mr Sesay attended the appeal hearing against the FWW which was chaired by Mr Heracleous, a Garage Manager. Again Mr Sesay was accompanied by a Trade Union representative. His grievances were dealt with as part of that appeal hearing.

68. During the hearing, Mr Sesay alleged that the allegations in respect of 11 July 2020 had been fabricated because of his race. The suggestion was made, without any explanation, that the allegations were fabricated "*in conjunction with the death of George Floyd and the black lives matter movement"*. Alternatively, it was alleged that Mr Proverbs had fabricated the allegations because of his previous dealings with Mr Sesay.

69. As above, we have found no evidence to suggest that the allegations were fabricated or, further, that anyone was motivated to make the allegations because of Mr Sesay's race. The initial allegation was made by Mr Verity, recorded by Mr Proverbs and corroborated by the account of a passenger who was unknown to Mr Sesay. Any discrepancies between the accounts given about the account were, we find, minor and reflective of the fact that the witnesses were honest and truthful and had not put their heads together to concoct a false narrative.

70. Following the appeal hearing, the FWW was upheld.

71. On 26 November 2020, whilst still on a FWW, Mr Sesay was at work driving a bus when he received a text message from a controller, Mr Wicks, which was sent to him and all other drivers on low frequency routes. These are routes where buses do not frequently run. That makes the need to be on time all the more important as passengers who miss a bus have to wait longer for the next one. The message asked drivers to "*please be on time (0.00) at timing points"*.

72. Mr Sesay took objection to the message. In the hearing he said he was stressed because Mr Wicks had been sending him texts every 15 minutes but there is no evidence to suggest that he made this allegation at any point during the disciplinary process and we do not accept that Mr Wicks had been doing so.

73. Mr Sesay telephoned Mr Wicks and said words including:

- "*Why are you trying to stress me out?"*
- "*I know who you are and what you are trying to do"*
- *"Do your job and stop stressing me out"*
- *"I will leave the bus here and you will have to come and get it"*

74. Mr Sesay alleges that Mr Wicks was deliberately targeting him because he had raised complaints about him as recently as the day before. We accept the evidence that Mr Sesay had raised complaints about Mr Wicks but, having considered the evidence, we do not accept that Mr Wicks was targeting Mr Sesay in any way. We accept that the message was sent to all drivers and that it was an appropriate message to send notwithstanding that Mr Sesay was in fact on time.

75. We were asked by Mr Sesay to listen to the audio recording of the exchange. We had also been provided with a transcript which we accept was accurate. On the audio, Mr Sesay is clearly heard talking in a rude and aggressive manner to Mr Wicks who responds entirely professionally. He does not engage negatively and tells Mr Sesay to raise any concerns with his manager. Mr Sesay does not accept that there was anything wrong with his behaviour on that call.

76. Following that altercation, Mr Wicks raised an Official Report in which he says Mr Sesay was aggressive and intimidatory. A disciplinary investigation was instituted by Mr Sihra.

77. Mr Sesay maintained that this was a further act of discrimination because of his race.[2] In our view, it was entirely appropriate for the Respondent to institute a disciplinary investigation in response to the incident. There is nothing to suggest this was an act of discrimination.

78. Mr Sesay relies on Mr Dragos as a comparator. Mr Dragos, having been accused of similar behaviour to a controller, was also subject to a disciplinary investigation. Accordingly there is no difference in treatment.

79. Mr Sesay was not suspended immediately. He was suspended on 2 December 2020, at the investigation meeting. Mr Sesay relies on the suspension as a further act of discrimination. He again relies on Mr Dragos as a comparator.

80. He maintains that he was only suspended once Mr Faichney got involved and that Mr Sihra suspended him at Mr Faichney's direction. We do not accept that. There is insufficient evidence to support that allegation. Mr Sesay asked us to draw an adverse inference from the fact that Mr Faichney hasn't produced his notes of telephone calls between himself and Mr Sesay which he said he passed onto Mr

[2] See previous footnote

Sihra. We decline to do so. It was not clear from the pleadings that Mr Faichney was being accused in this way. Although it is arguable that they ought to have formed part of standard disclosure, we have found nothing in that omission to support a claim of discrimination given our positive findings of fact.

81. We find that the suspension was entirely appropriate. Aggressive and intimidatory conduct towards an employee is potentially gross misconduct and would justify suspension.

82. We do not accept that Mr Dragos was in the same or not materially different circumstances at this point. Mr Dragos was also not suspended before the investigation meeting. At the investigation meeting, however, he acknowledged wrongdoing and asked to proceed directly to a disciplinary hearing. He was given a written warning, after which there was no need for suspension. He was told, however, that "*due to the severity of the allegation, you could have been suspended until the matter was further investigated. Had you been suspended from duty and the matter been investigated formally there is a strong possibility that you would be looking at summary dismissal for Gross Misconduct."* This suggests that Mr Dragos' behaviour was considered equally seriously to Mr Sesay. He was not suspended simply because he admitted wrongdoing, proceeded directly to a disciplinary hearing, and was given a warning.

83. Mr Sesay also relies on Mr Wolfe as a comparator. For the reasons already given, we do not accept that Mr Wolfe was in the same or not materially different circumstance to Mr Sesay. His words were not aimed at an individual, were not aggressive or intimidatory and were of a completely different nature.

84. We do not accept that Mr Sesay has shown facts from which we could infer that the Respondent discriminated against him by instituting disciplinary proceedings or suspending him in November/December 2020. Accordingly, the burden of proof does not shift to the Respondent. Even if it did, we accept that the Respondent has shown non-discriminatory reasons for any difference in treatment, namely Mr Sesay's more serious misconduct and lack of acceptance or remorse.

85. Mr Sesay attended an investigation meeting chaired by Mr Sihra on 2 December 2020. He was accompanied by his trade union representative. Following that meeting he was invited to a disciplinary hearing chaired by Mr Ricketts, an Operations Manager, on 4 December 2020.

86. At the disciplinary hearing, which Mr Sesay also attended accompanied by a trade union representative, Mr Sesay complained that he had been given inadequate notice of the hearing. The Respondent's disciplinary policy provides for a minimum of three days notice. Having heard Mr Sesay's concerns about lack of time to prepare, Mr Ricketts decided to adjourn the hearing until 7 December 2020.

87. Mr Sesay made much of this in the hearing. He maintained that by breaching the disciplinary policy the dismissal was unfair. That is not an accurate understanding of the law. The question for the Tribunal is whether the process and, ultimately the dismissal, was fair. The fact that the policy has been breached is potentially

indicative of unfairness but the focus must be on the effect of that breach on the dismissal.

88. Mr Sesay was asked to identify what effect the breach had on the fairness of the dismissal and was only able to say that it increased his stress and pressure. Given that the hearing was adjourned and Mr Sesay was given further time to prepare, we do not consider that there was any relevant unfairness arising as a result of the initial breach.

89. At the conclusion of the disciplinary hearing Mr Ricketts concluded that the first charge (improper and threatening behaviour) was proven. The second charge (bringing the company into disrepute) was not because the conversation took place over the telephone from inside Mr Sesay's driver's cab.

90. Having reviewed the evidence and having heard from Mr Ricketts, we accept that the reason for Mr Sesay's dismissal was misconduct and that Mr Ricketts genuinely believed that Mr Sesay was guilty of the misconduct.

91. We also accept that that belief was based on reasonable grounds following a reasonable investigation. Mr Ricketts had the transcript of the audio and had heard what Mr Sesay said about it.

92. We also accept that dismissal was, in the particular circumstances of this case, a reasonable sanction. Mr Sesay was on a FWW which had been imposed only two months or so earlier. Any further acts of misconduct, whether similar or not to that for which the FWW was imposed, committed whilst that FWW was live, were likely to lead to dismissal. Mr Sesay had been given ample warning about his behaviour and had failed to improve despite being on a FWW. Mr Sesay had not taken any accountability for his actions, had shown no remorse and had given no reassurance to Mr Ricketts that similar behaviour would not occur again in the future.

93. Mr Sesay relies on his dismissal as a further act of discrimination. He relies on Mr Dragos and Mr Wolfe as comparators. For the reasons set out above, we do not accept that they are in the same or not materially different circumstances as Mr Sesay. We do not accept that Mr Sesay has shown facts from which the Tribunal could infer that discrimination had occurred. Alternatively, we accept that there are non-discriminatory reasons for any difference in treatment. Mr Dragos was guilty of a first offence. He showed genuine remorse and reassured the Respondent that he would not re-offend. Mr Wolfe's misconduct was of an entirely different (and much less serious) nature.

94. Mr Sesay also alleges that his dismissal was an act of victimisation. On the basis of our findings above, we do not accept that. Mr Sesay was dismissed because of misconduct alone. There was nothing to support the allegation of victimisation.

95. Following his dismissal, Mr Sesay appealed. His appeal was heard by Mr Wright, a garage manager, and the dismissal was upheld in a letter dated 11 January 2021.

96. We find that the process followed by the Respondent in dismissing Mr Sesay was appropriate, reasonable and fair.

97. Following his dismissal, Mr Sesay's grievances were looked into again by Mr Faichney who, in March 2021, provided a comprehensive letter reviewing all of the incidents and relevant dealings with Mr Sesay. Although not strictly relevant to the matters before us, the contents of that letter provide support for the conclusions we have reached that Mr Sesay was not dismissed unfairly or discriminated against.

Conclusions

98. Applying those findings of fact to the law as set out above, we conclude that:

    (1) Mr Sesay was dismissed for a potentially fair reason, namely misconduct. The Respondent genuinely believed he was guilty of misconduct, that belief was based on reasonable grounds following a reasonable investigation and dismissal was within the range of reasonable responses open to the Respondent. The Respondent followed a fair procedure in dismissing him.

    (2) The Respondent did not discriminate against the Claimant because of his race in suspending him or imposing a FWW on 12 August 2020[3], warning him about his use of the Blink messaging service on or around 14 August 2020 or suspending him again and dismissing him on 4 December 2020[4].

    (3) Mr Sesay was not dismissed because he had done a protected act.

99. For those reasons, all claims are not well founded and are dismissed.

Employment Judge Smeaton

Date: 7 July 2022

Sent to the parties on: 15 September 2022

GDJ
For the Tribunal Office

[3] As above, for completeness, we also found, as a fact, that the decision to institute disciplinary proceedings was not an act of discrimination

[4] Again, for completeness, we also found, as a fact, that the decision to institute disciplinary proceedings here was not an act of discrimination

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