THE EMPLOYMENT TRIBUNALS

Between:

Claimant: **Mr J Kanyere**

Respondent: **Abellio London Limited**

Hearing at London South on 1 February 2019 before Employment Judge Baron

Appearances

For Claimant: **John Neckles**

For Respondent: **Tahira Patala**

JUDGMENT AT A PRELIMINARY HEARING

It is the judgment of the Tribunal that the claim is dismissed.

REASONS

1 It is agreed between the parties that the Claimant was employed as an Engineer from 23 January 2016 until he was dismissed with effect from 31 August 2017. Thus he had not been employed for two years. On 26 December 2017 he presented a claim to the Tribunal, having ticked the box in section 8.1 of the claim to indicate that he was making a claim of unfair dismissal. The presentation of the claim was made within the three month time limit, as extended by the ACAS early conciliation procedure. The details of the claim in section 8.2 were as follows:

> On 16 August 2017 I was suspended from work were not using a steering wheel cover on a bus. I was employed by Abellio London Limited Battersea depot as an engineer. My job description included inspection and carrying out mechanical work on buses. On the day in question I had finished inspection on a bus and removed the cover as I was ready to take the bus off the pit. I then saw some oil drops and suddenly I opened the engine door to see where it was coming from. By that time I had the cover in my hand. The manager (Mr Harvey) then appeared and asked me why the cover was not on the steering. I gave my explanation and then he left. Two hours later I was called into his office and he told me to go home. I was called in for a hearing of 31 August 2017 in which I was dismissed for gross misconduct.

2 In broad terms, the response by the Respondent confirms that factual summary.

3 It is not necessary to record every item of correspondence, but in short a judge ordered that the matter be listed for a preliminary hearing to consider whether the Tribunal had the jurisdiction to determine the claim of unfair

dismissal taking into account the short length of service of the Claimant. On 13 May 2018 Mr Neckles sent to the Tribunal a document headed 'Claimant's Further & Better Particulars.' It was the contention of Mr Neckles that that document did indeed only contain further information concerning a claim already made. In the alternative, Mr Neckles applied for leave to amend the existing claim.

4 In the document (as added to by Mr Neckles orally) there was reference to the claim being made under section 100(1)(a) and (e) of the Employment Rights Act 1996 (relating to health and safety matters), and also under section 104 (relating to the assertion of a statutory right). In respect of the latter provision it was said that the rights which had been asserted were the right under section 44 of not being subjected to a detriment in connection with health and safety matters, and the right not to suffer race discrimination under the Equality Act 2010. Critically, claims under those provisions do not require that there has been two years' continuous employment.

5 I was provided with some documents relating to the disciplinary procedure and I have noted that the matters referred to in the preceding paragraph were not mentioned at all in those documents.

6 I conclude that what the Claimant is now seeking to do through Mr Neckles is to add new causes of action arising out of the termination of his employment. I read the details transcribed above as being a straightforward claim by the Claimant that he had been unfairly dismissed within section 98(4) of the 1996 Act. That accords with the basis of his internal appeal as being that the sanction was too harsh. Claims that the dismissal had been automatically unfair are based on different statutory provisions in the 1996 Act. There is no hint of those provisions being relevant in the grounds of claim as originally set out.

7 Mr Neckles submitted that there was a common theme running through this case, which theme was health and safety. In my view it is too simplistic to use the phrase 'health and safety' as covering two entirely different sets of circumstances. Sections 44 and 100 are designed to protect employees who, in general terms, are seeking to enforce safety obligations. Here it is common ground that the dismissal of the Claimant was in connection with a breach of internal safety rules.

8 I conclude that therefore leave to amend the claim is required.

9 The Tribunal has a general discretion in the matter, which must of course be exercised judicially. One element to be taken into account is delay. The application was made over eight months after the employment ended. The Claimant did not attend to give evidence to seek to justify the delay, nor indeed to tell me what his intentions were when he presented the claim originally.

10 I agree with the submission by Miss Patala that while the further and better particulars document does contain reference to the statutory provisions which the Claimant now wishes to rely upon, what it does not do is set out the specific factual allegations relevant to those provisions. For example there is no mention of when and how the Claimant made any mention of

race discrimination. Mr Neckles volunteered that further details could be provided, but that is not good enough. If the Claimant were seeking to rely on a new head of claim, as is the case here, then it is incumbent on him to set out exactly how that claim is structured. That he has not done.

11 I conclude that there would be undue prejudice to the Respondent if leave to amend were granted. The proposed new claims do not have any factual allegations to support them. Costs would be incurred in seeking such further details. Most importantly, it appears to me that what is now sought to be done is to manufacture heads of claim not originally intended to be made, for the sole purpose of avoiding the requirement for there to have been two years' continuous employment. That is an inappropriate use of the Tribunal's procedure.

Employment Judge Baron

01 February 2019