# EMPLOYMENT TRIBUNALS

**Claimant:** Mr D Mohamuud Jimale

**Respondent:** Abellio London Ltd

**Heard at:** London South (by CVP) **On:** 2nd to 4th December 2020

**Before:** Employment Judge Tsamados
Miss E Rousou
Mr G Mann

**Representation**
Claimant: Mr J Neckles, Trade Union representative (through interpreter Mr Y Abukar)
Respondent: Ms R Jones, of Counsel

This has been a remote hearing which was not objected to by the parties. The form of remote hearing was video by Cloud Video Platform (CVP). A face to face hearing was not held because it was not practical because of the Covid-19 virus.

# RESERVED JUDGMENT

The **unanimous** Judgment of the Employment Tribunal is as follows:

1) the complaint of unfair dismissal fails and is dismissed;
2) the complaints of detriment and dismissal under section 12 Employment Relations Act fail and are dismissed;
3) the complaint of breach of section 10 of the Employment Relations Act succeeds in respect of the refusal of the right of accompaniment to the disciplinary hearing on 12 November 2018. There will be a separate remedy hearing at which to determine the award of compensation. The other elements of the complaint fail and are dismissed;
4) the complaint of wrongful dismissal fails and is dismissed.

# REASONS

## Claims and issues

1. By a Claim Form received by the Employment Tribunal on 3 March 2019, following a period of Early Conciliation between 18 January and 4 February 2019, the Claimant brought complaints of constructive unfair dismissal and breach of his statutory rights of accompaniment against his ex-employer, Abellio London Ltd, the Respondent. In its Response dated 20 May 2019, the Respondent denied the Claim in its entirety.

2. A Preliminary Hearing on Case Management was conducted on 17 September 2019 by Employment Judge (EJ) Webster. At that hearing, EJ Webster set the substantive hearing for 2nd to 4th December 2020, identified the complaints and the issues arising from the complaints, and made case management orders for preparation of the case to this hearing.

3. EJ Webster identified that the Claim arose from events relating to the Respondent's investigation and resultant disciplinary proceedings as to a complaint made by a passenger against the Claimant and its refusal to allow him to be represented at the investigation and disciplinary meetings by Mr John or Francis Neckles, of his Trade Union, PTSC. As a result of this and other alleged refusals to allow the Claimant to be accompanied by Messrs Neckles, the Claimant resigned. The Claimant alleges that the Respondent was in breach of an express term of his contract of employment, namely the right to be accompanied at a disciplinary investigation hearing. The Respondent denies that such a right existed.

4. EJ Webster identified the complaints as follows. Constructive unfair dismissal, wrongful dismissal, breach of the right to be accompanied under section 10 of the Employment Relations Act 1998 and being subjected to a detriment or dismissal under section 12 of that Act. She further identified that the Respondent denied the Claim although it accepted that it refused the Claimant's request to be accompanied by Mr Neckles, but not that it caused the Claimant any detriment.

5. At pages 2 to 4 of the Case Management Summary, EJ Webster set out the issues to be determined at the substantive hearing. This is at pages 105 to 108 of the joint bundle of documents. There is also a draft list of issues drafted by Mr Neckles which is at pages 32 to 35 of the bundle which is essentially the same. However, for the avoidance of doubt we indicated that we were relying on the list of issues set out by EJ Webster.

## The hearing

6. The hearing was conducted remotely by way of the Cloud Video Platform (CVP). The Claimant and Mr Neckles were together in what appeared to be Mr Neckles' office, whereas the other participants, including the Tribunal panel, Counsel and witnesses, took part from separate locations. At times there were technical issues affecting sound and/or vision, but we persevered and overcame these.

## Evidence

7. We heard evidence from the Claimant through a Somali/English interpreter by way of a written statement and in oral testimony. At the start of the hearing, we confirmed that we had received an amended version of the Claimant's witness statement containing page references at paragraph 11. Mr Neckles also gave evidence for the Claimant by way of a written statement and in oral testimony.

8. We heard evidence on behalf of the Respondent from Mr Martin Moran, Operations Manager, and from Mr Richard Teggart, Driver Manager, by way of written statements and in oral testimony.

9. The Respondent provided us with a joint bundle of documents which consisted of 175 pages including a two page index. During the hearing Mr Neckles provided us with some pages which had inadvertently been omitted from the bundle. These are numbered pages 89A to 89F.

10. Where necessary we refer to the bundle as "B" followed by the relevant page number. We indicated that we would not read the entire contents of the bundle but only those documents to which we were referred within the witness statements and those specifically drawn to our attention. The parties confirmed that there were no other documents that we needed to read beyond those referenced in the statements.

11. We adjourned to read the witness statements and referenced documents before commencing to hear evidence.

## Findings

12. I set out below the findings of fact the Tribunal considered relevant and necessary to determine the issues we were required to decide. I do not seek to set out each detail provided to the Tribunal, nor make findings on every matter in dispute between the parties. The Tribunal have, however, considered all the evidence provided to us and we have borne it all in mind.

13. Whilst the Claimant used an interpreter, which of course is his right, he indicated that he was able to understand and to speak English but had some difficulties with certain words and grammar. He told us that he was able to write in English as we could see from the incident report form which he completed with his son's assistance. His evidence was given through the Somali/English interpreter save as otherwise stated.

14. However, we were concerned because his witness statement was couched in very legalistic terms and included submissions as well as evidence. Mr Neckles confirmed that he had drafted the statement with the Claimant, then put it into formalised language. It was then translated into Somali and approved by the Claimant. Further, the Claimant confirmed in evidence that he had a copy of the witness statement in Somali which he had approved, read recently and was true to the best of his knowledge and belief.

15. The Claimant was employed by the Respondent as a PCV Bus Driver. He commenced employment on 20 April 2009 and was employed until his resignation on 19 November 2018.

16. The Respondent provides public transport services across central, south and west London and north Surrey. It operates over 700 buses, in excess of 40 routes and employs approximately 2500 staff from depots in Battersea, Beddington, Hayes, Twickenham, Southall and Walworth.

17. We were referred to the Claimant's original contract of employment with the Respondent's predecessors in title, National Express UK Ltd at B38-40. In particular we were referred to clause 20 at B39 which relates to the disciplinary and other rules. The last paragraph of this clause is as follows:

*"The Disciplinary Procedure (including details as to appeals) is available for you on request. The Disciplinary Procedure does not form part of your contract of employment. It provides guidance to you."*

18. We were referred to the Respondent's Disciplinary Procedure dated July 2018 at B41-51. We note in particular that the fourth paragraph at B42 states:

*"This policy does not form part of the terms and conditions of employment and may be varied from time to time."*

19. We also note the last paragraph on B45 which states:

*"Unlike the disciplinary and appeal meetings, which are considered formal meetings, there is* ***no statutory or contractual right for employees to be accompanied*** *or represented by a workplace colleague or certified Trade Union representative at fact-find or investigation meetings."*

20. In addition, we note the details of the right to be accompanied set out under clause 6 which is headed Formal Procedure at B46-47.

21. In cross-examination, Mr Moran, who was subsequently appointed as the disciplinary officer with regard to the passenger complaint against the Claimant, confirmed that this was the procedure that was in force at the time, the previous one having contained a fast track procedure, and it was the one that he applied to the proceedings.

22. We were also referred to the Abellio London & Surrey Disciplinary Procedure dated February 2013 at B96-104. The Claimant's position is that this was the Disciplinary Procedure in force at the time of the investigation/disciplinary action into the passenger complaint about him. The Respondent denied that this was the operative procedure and relied upon the Disciplinary Procedure dated July 2018.

23. The Claimant relies upon February 2013 Disciplinary Procedure as extending the right of accompaniment to the fact-finding/investigation stage of disciplinary action and gives him a contractual right to this.

24. He referred us to clause 4 headed Principles at B98 which states:

*"Informal action will be considered, where appropriate, to resolve problems. This will be by way of informal discussions/counselling to encourage the necessary improvement.*

*Any such informal action will not form part of any subsequent formal disciplinary procedure.*

*No disciplinary action will be taken against an employee until the matter has been fully investigated.*

*For formal action the employee will be advised in writing of the nature of the complaint against him or her and will be given the opportunity to state his or her case before any decision is made at a disciplinary.*

*Employees will be provided, where appropriate, with written copies of evidence and relevant witness statements in advance of the disciplinary meeting.*

*At all stages of the formal procedure, the employee will have the right to be accompanied by a trade union representative or a work colleague…"*

25. The Claimant's evidence is that he was unaware of the July 2018 Disciplinary Procedure and as far as he was aware the February 2013 Disciplinary Procedure was the operative one. He also relies upon this procedure as being followed by way of custom and practice. This is based on documents within the bundle as to the previous investigation meetings at which the Respondent's employees were allowed the right of accompaniment by Trade Union officials, at B136-172. In oral evidence, the Claimant said that he only became aware of these matters after his resignation. Mr Neckles also stated in written evidence that he had accompanied members of PTSC Union at investigation hearings conducted by the Respondent in December 2014 and was aware of other employees who are members of Unite the Union who were afforded contractual right of representation such hearings, again by reference to B136-172.

26. Mr Moran and Mr Taggert, who undertook the investigation into the allegations against the Claimant, both said in evidence that the applicable procedure was the one from July 2018. Mr Moran gave evidence that this procedure was available to all staff on the Respondent's intranet and hard copies were available at all of its depots. In addition, he stated that a copy of this procedure was sent to the Claimant with the disciplinary invite letter at B71-72. The Claimant said in evidence that nothing was attached with this letter although he did not query this. At that time, he was being advised by Mr Neckles but there is no indication that Mr Neckles took this matter up on his behalf.

27. Mr Neckles asserted in his evidence that the February 2013 procedure was incorporated by collective bargaining between the Respondent and Unite the Union into the individual employees' contracts of employment. It would appear that the Respondent has a recognition agreement with Unite the Union and not with PTSC Union. However, we were not provided with any evidence as to the collective bargaining process between Unite the Union and the Respondent and in particular were not provided with any evidence as to the status of the Disciplinary Procedure under this process beyond the documents we have identified above.

28. We note that there is nothing within either of the two procedures indicating that they are contractual. The July 2018 document expressly states that it is not contractual. Page 2 of the February 2013 document is missing from the bundle and we note from the index at B97 that it contains section 2 which deals with purpose and scope. Whilst it uses mandatory terms such as "will" on occasion, we cannot take the matter any further.

29. However, from the evidence that we heard we find on balance of probability that the 2018 procedure was the one in force at the relevant time. In any event neither disciplinary procedure allows the right of accompaniment at the investigatory/fact-finding stage. The 2018 expressly does not and we formed the view that the 2013 document whilst clumsily written, makes a distinction between informal action and formal action. Formal action is clearly defined as action under the disciplinary process as distinct from the investigatory stage. The right of accompaniment is defined as only applicable to the formal procedure. We reject the custom and practice argument on the basis that the previous incidents at which representation at investigatory meetings was allowed all predate the 2018 document.

30. On 29th October 2018, the Respondent received a complaint from one of its employees that on 28th October 2018 he had been assaulted by another employee as he attempted to board a bus as a passenger. The Respondent ascertained that the driver in question was the Claimant.

31. We were referred to the complaint form at B58-61. In essence, the complaint is that the driver had refused to allow the complainant to board his bus, had closed the doors on him two times as he tried to enter, the doors had squeezed him and finally the driver opened the doors, started to drive away and the complainant fell down onto the curb, suffering injuries.

32. We were also referred to an Official's Report Form dated 28th October 2018 at B2-53. This is the Claimant's report of an incident on 28th October 2018 (although the form erroneously gives the date as being 28th January 2018) in which he complains of an assault by a work colleague whilst he was waiting in his bus and the subsequent police attendance.

33. In addition, we were referred to an Irregularity, Occurrence and Lost Mileage Report dated 28 October 2018 in which the Claimant set out details of the complaint. This is handwritten by the Claimant's son. The gist of it is as follows. A work colleague came onto his bus without permission whilst it was parked at a bus stand and would not leave when the Claimant asked him to. The Claimant saw a policeman and asked him to assist. The policeman intervened and the colleague then left the bus. At a subsequent bus stop, the colleague was waiting and attempted to get on the bus. The Claimant told him he was not prepared to let him on the bus and when he closed the doors, the colleague stuck his hand out and threw himself on the ground. The Claimant offered to help him up, the colleague refused, the Claimant saw a police van on the opposite side of the street, he spoke to them and told them what happened. The Claimant has witnesses and the "CAT numbers" of the two policemen.

34. The Respondent commenced an investigation into the incident, although it was not clear to us whether it was the colleague's complaint or the Claimant's complaint or both which had prompted this. The Respondent appointed Mr Teggart to conduct the investigation.

35. Mr Teggart held investigation meetings with the Claimant on 29th October and 7th November 2018, the later one after he had obtained a copy of the CCTV footage from the Claimant's bus.

36. We were referred to typed minutes of the two meetings at B62-67. Both Mr Teggart and the Claimant accepted in evidence that they understood each other and there were no language communication issues. Mr Teggart said that he knew the Claimant and his English was good. The Claimant said that he had no difficulties understanding what was said at internal meetings and he further stated that he did not need an interpreter in such meetings because they were not like court proceedings where you need one because of the terminology used.

37. The minutes of the meeting 28th October 2018 set out the Claimant's explanation of what happened on the day of the incident in response to questions from Mr Teggart.

38. In oral evidence, Mr Teggart stated that it was his normal practice to have a transcriber present at such meetings, typing the minutes of the meeting as they went along. He also stated that a copy of the typed minutes was then given to the employee after the meeting.

39. In oral evidence, the Claimant disputed the accuracy of the minutes of this meeting in that he states that he requested the right of the right of accompaniment by Mr John and Mr Francis Neckles at the start of the meeting and told Mr Teggart that they were waiting outside the Respondent's premises in the street. Mr Teggart said in oral evidence that he did not recall the Claimant saying this to him.

40. The Claimant had not disputed the accuracy of these minutes until he gave evidence during our hearing. He also said in oral evidence that he was not given a copy of the typed minutes after the meeting although he did accept that he did receive them at some later point. We further note that the subsequent disciplinary invite letter at B71-72 states that a copy of the investigation report and all of the evidence which may be referred to during the disciplinary hearing is included with the letter.

41. On balance of probability, we find that the Claimant had received these minutes at least by the time he received the disciplinary invite letter. We further accept Mr Teggart's evidence as to the transcription of the minutes of the meeting and, given the Claimant's failure to challenge their accuracy and that he was at that stage represented by his union, we find on balance of probability that the minutes are accurate.

42. What the minutes record is that the Claimant only raised the issue of whether the meeting was a formal one on 29th October 2018, after a break between 12.31 and 13.00 hours. This is set out at B65 as follows:

*"DJ: can I just ask if this meeting is a formal hearing?*
*RT: no this is just a fact find to establish what the facts are regarding the incident.*
*DJ: why am I being treated like it's a formal hearing?*
*RT: we just need to get all the facts to make sure were not missing anything."*

43. The meeting is concluded to allow Mr Teggart to obtain the CCTV footage of the incident so that both he and the Claimant can view it. Mr Teggart advised the Claimant that he is now going to interview the complainant to acquire his version of events and thereafter a decision will be made as to how to proceed. Mr Teggart also advised the Claimant that because the investigation is ongoing and to prevent any further altercations, he is suspending the Claimant from his duties as of immediate effect until the matter is concluded.

44. On 29th October 2018, Mr Teggart wrote to the Claimant confirming his suspension from work pending conclusion of his investigation into the incident in question and as to further possible disciplinary action. This letter is at B69-70.

45. At the subsequent investigation meeting held on 7th November 2018, the minutes of which are at B65-68, the CCTV footage was available. At the start of the meeting the Claimant does ask if he can call his Union to attend the meeting. Mr Teggart replies that the Claimant cannot at present but if it goes to a disciplinary stage then he can (at B65-66). The Claimant then asks if he can call his Union to let them know that the fact-finding interview is not finished and that after viewing the CCTV Mr Teggart is going to ask him some more questions. Mr Teggart responds "Yes, that is fine". The Claimant then states, "I'm willing to see the CCTV" and thereafter they both view the footage and Mr Teggart asks the Claimant some further questions. In oral evidence, the Claimant stated that whilst he asked if he could call his Union and was told that he could, he did not do so.

46. After viewing the CCTV footage, Mr Teggart put a number of matters to the Claimant arising from it. These are set out at B67-68. The Claimant was then given the opportunity to respond. The meeting then ended with Mr Teggart stating that the investigation is still ongoing, and he will write to inform the Claimant of what the next stage will be.

47. On balance of probability, we accept the accuracy of the minutes of this meeting. They were transcribed, the Claimant did not challenge their accuracy at the time and was assisted by his Trade Union and in fact he does not dispute their accuracy in evidence.

48. In his written evidence, Mr Teggart explained that after the second investigatory meeting he decided that due to the seriousness of the allegations disciplinary action should be taken against the Claimant.

49. On 8th November 2018, Mr Teggart wrote to the Claimant advising him of the outcome of his investigation. We refer to the letter at B71-72. The letter told the Claimant that he had concluded that there was a disciplinary case to answer in respect of the incident involving him and fellow colleague. It set out allegations of gross misconduct as follows:

    - *Action likely to threaten health and safety of yourself, fellow employees, **customers or members of the public**;*
    - *Deliberate or grossly negligent contravention of company rules or procedures.*

50. The letter notified the Claimant of a disciplinary hearing scheduled for 12th November 2018, enclosed a copy of the investigation report and all of the

evidence which may be referred to during the hearing. It also advised the Claimant that if the allegations of gross misconduct were proven, he may be issued with a sanction up to and including summary dismissal. The letter also attached a copy of the Disciplinary Procedure.

51. In addition, the letter advised the Claimant of his right to be accompanied to the hearing by a Trade Union representative or workplace colleague and asked him on receipt of the letter to confirm his attendance and, if he chose to be accompanied, the details of the person he wishes to bring with him. The letter then specifically said the following:

**"Please note, that where your preferred union representative is not an employee of Abellio, certain conditions may apply, and they may not therefore, be entitled to accompany you to any meetings. For the avoidance of doubt, please discuss this with your representative as soon as possible, or call a member of the HR team, will be pleased to clarify."**

52. The disciplinary hearing was scheduled to take place in front of Mr Moran on 12 November 2018. However, whilst Mr Moran and the Claimant met on that date it is apparent that the hearing did not actually commence.

53. In written evidence and by reference to his contemporaneous note of the meeting, which is at B73, Mr Moran's position is as follows. The Claimant attended the meeting, attempted to record it on his mobile telephone and when Mr Moran objected, the Claimant asked to leave the meeting to speak to his representative. He returned 34 minutes later with a pre-written statement regarding his right to have Mr Neckles attend the meeting with him. He read this out to Mr Moran but did not provide him with a copy of it. Mr Moran advised the Claimant that the Neckles brothers were not allowed on the Respondent's premises to accompany any employee to discipline appeal hearings. He explained that this was due to adverse findings against them both in and, where they were both found to be dishonest and complicit in fraud. As the Claimant did not have another PTSC Union representative present, Mr Moran advised that the hearing would be rescheduled, and he would confirm this in writing. Mr Moran advised the Claimant that as the hearing had been rescheduled, it would go ahead in his absence on the day should he fail to attend or have a representative available. In oral evidence, Mr Moran stated that the disciplinary hearing never really started and that he did explain to the Claimant that the Neckles brothers were not allowed to enter the Respondent's premises on HR advice as to previous court hearings. He also stated that whilst he made a contemporaneous record of the meeting, he did not send this to the Claimant.

54. The Claimant denies that the meeting took place in the way set out by Mr Moran. The Claimant's position in evidence is that when he went into the meeting, he read out a note in which he asserted his right of accompaniment by John and Frances Neckles who were waiting outside the building and that Mr Moran refused him his right and did not give any reasons for this. Mr Moran denies that the meeting took place in the way set out by the Claimant.

55. We were not given any evidence as to the actual contents of the note referred to. However, we did find a copy of an email dated 12th November 2018 from the Claimant via Mr John Neckles' email address to the Respondent's HR and to Mr Teggart at B110-111. This at least refers to the scheduled meeting

and to what are described as the Claimant's contractual and statutory rights of accompaniment and representation by the Neckles brothers in accordance with "the applicable Disciplinary procedure and section 10 Employment Relations Act 1999". We had no evidence on this matter either from the Claimant or from the Respondent. But it does appear likely to be the note referred to.

56. In his written evidence the Claimant accepted that the meeting was rescheduled to allow him the opportunity to find alternative PTSC Union representation. In oral evidence he appeared to resile from this, although in the end we formed the view that his objection was not so much to his own witness evidence but to what he took to be a suggestion that the Respondent had the right to deny him his right to representation by Mr John or Francis Neckles in this way.

57. On balance of probability, we accept Mr Moran's evidence as to what occurred at the meeting. His note of the meeting sets out with clear timings the sequence of events and this rings true with the explanation of what happened and is not inconsistent with the position alleged by the Claimant beyond the point at which he raised the matter and whether reasons were given to him for the Neckles' ban. We also find on balance of probability that it is unlikely that Mr Moran would have stated that the Neckles brothers were not allowed on the Respondent's premises without explaining why. We are strengthened in our view given the subsequent letter sent to the Claimant that same day which we deal with below.

58. On 12th November 2018, Mr Teggart wrote to the Claimant advising him of the date of the rescheduled disciplinary hearing in substantially the same terms as his letter of 8th November 2018. This letter is at B74-75. The only difference in the letter is as to the paragraph in bold relating to the choice of any accompanying representative and the impact of lack of attendance at the meeting:

***"As you and your trade union are aware, the company's stance regarding John or Frances Neckles accompanying employees to disciplinary or appeal hearings is that they are not permitted due to adverse findings against them in an Employment Tribunal, against the company, where they were both found to be dishonest and complicit in fraud.***

***As this hearing has been rescheduled there will be no further opportunity to reschedule and the hearing will take place in your absence should you not attend. If you are unable to attend you can request a workplace colleague or Union representative to attend on your behalf, again this is your responsibility to arrange.***

***I will also accept written mitigations from you prior to the hearing commencing these will be taken into account at the hearing."***

59. Clearly on receipt of this letter, the Claimant would not have been in any doubt as to why the Respondent was not prepared to allow him representation by the Neckles brothers even if he disagreed with it.

60. In oral evidence, the Claimant was asked if he took any action to contact HR as to the position regarding his choice of representatives, as directed within both of the disciplinary invite letters. The Claimant stated that he did not, but he contacted his Union. He was also asked if there were other Union

representatives available and his eventual response was no. His position was that he did not want anyone else, he wanted Mr John or Francis Neckles.

61. Ultimately, the disciplinary hearing was rescheduled at the Claimant's request. We were referred to the request at B76 and the Respondent's letter to the Claimant dated 15th November at B77-78 rescheduling the hearing for 19th November, but otherwise in the same terms as the previous invite letter of 12th November 2018, save for reference to the further rescheduling of the meeting and the following paragraph at B78:

*"This hearing has once again been rescheduled as you state you received the recorded delivery invite of today's hearing only yesterday - the hearing on 12th November 2018 was rescheduled as you did not have Union representation with you. I note that you have requested the hearing to take place on 27th November 2018 as per your email received yesterday evening. Please note that this date is not reasonable and falls outside the five-day window of today's hearing date."*

62. The Claimant attended the disciplinary hearing on 19th November 2018. Before the hearing commenced, the Claimant informed Mr Moran that as his preferred representative was not allowed on the premises he was resigning from the company. Mr Moran asked the Claimant to confirm this in writing and he gave the Claimant his business card containing his contact details. Mr Moran did not take any notes of the meeting because the hearing had not commenced. The Claimant does not disagree with this evidence but added that he read out a statement which he has reproduced in his witness statement at paragraph 7 (iii):

*"Since you have denied me my contractual and legal rights of accompaniment at my Investigation & Disciplinary Hearings by an Official from the PTSC Union of which I am a member. I can't continue with this hearing without my chosen Companion for fear of prejudicing my defence against the allegations made against me. I am now tendering my resignation forthwith without notice which I will send to you in writing also."*

63. This was put to Mr Moran in cross examination. Mr Moran did not have a copy of the Claimant's witness statement in front of him and so the words were read aloud to him. He did not dispute that the Claimant had said this to him at the time.

64. On 19th November 2018, the Claimant sent an email to Mr Moran confirming his resignation. This is at B112-113. However, Mr Moran did not receive this email because it was sent to an incorrect email address. This was not disputed by either party. Given that it was not received it seems to us to be unnecessary to comment on the contents. However, we would note that it is written in very stylised and legalistic terms, quoting case law relating to constructive dismissal. It has clearly been drafted by the Claimant's Trade Union. Whilst the Claimant was unfamiliar with the legal terms of his constructive dismissal, he was clear when asked in evidence that he had resigned because he was denied the right of representation by the person of his choice.

65. By letter dated 27th November 2018, Mr Moran wrote to the Claimant, from which it is clear that he had not received confirmation of the Claimant's resignation as requested. This letter is at B 79. The letter offered the Claimant the opportunity to attend a further disciplinary hearing scheduled for 30th November 2018. The letter concluded with the following paragraph:

*"In the event that we fail to hear from you by this date or you should fail to attend the meeting, your resignation will be deemed as accepted, effective from 19 November 2018. We trust this will not be the case and you are encouraged to attend the meeting with another member of the PTSC or work colleague. The content of our previous invitation letter is relied upon and reiterated save the above meeting particulars."*

66. We would note that as resignation is a unilateral act it was not open to being accepted by the Respondent. Further, the Respondent did not need to offer the Claimant the chance to attend another rescheduled disciplinary hearing. However, that is not to say that it was not a gracious act in the circumstances.

67. Following the letter of 27th November 2018, the Claimant did not make any further contact with the Respondent and as a result the Respondent processed the Claimant's resignation. Both parties accepted that the Claimant's employment terminated on 19 November 2018.

68. Mr Moran's evidence is that the ban in relation to the Neckles brothers relates to all formal hearings of all staff and is as a result of threatening behaviour to the Respondent's staff and dishonesty following serious adverse findings of an Employment Judge in a Claim in which it was a Respondent. In answer to our question as to whether he considered to conduct meetings on neutral premises he said that he had been advised not to although he could not recall why.

69. Mr Moran's further evidence is that in his opinion this ban was fair, and that the Claimant was offered many opportunities to seek an alternative representative having been told the reasons why he was unable to be accompanied by one of the Neckles brothers.

70. The reference to the serious adverse findings relates to the Employment Tribunal Claims brought by Mr Frances Neckles in the London South Tribunals against the Respondent. We were provided with a copy of this Judgment after the hearing as we explain below: Mr F Neckles v Abellio London Ltd UKET 2344649/2013 & 2360882/2013.

71. The Judgment was made by EJ Lambe following a preliminary hearing held on 16 December 2014. This hearing was to determine whether Mr Francis Neckles' claims against the Respondent should be struck out because of his vexatious conduct, specifically attempting to deliberately mislead the Employment Tribunal in the course of the proceedings. Mr Francis Neckles had previously been represented by his brother John. Mr Francis Neckles did not attend the hearing and was not represented. The hearing continued in his absence. In essence, EJ Lambe found that both Mr Francis and John Neckles were involved in misconduct in that they had falsified documents as to the date of their creation this being evidenced by the metadata contained within the electronic versions of those documents. The reasons for this are set out in some detail within the Judgment. As a result, EJ Lambe struck out Mr Francis Neckles' claim.

72. We were also provided with a copy of a witness statement from a Mr Ben Wakerley, the Respondent's Operations Director in another claim. Mr Wakeley at that hearing. This is the case of London South Tribunals' case Gnahoua v Abellio UKET 2303661/2015, involving complaints under section 10 and 12 Employment Relations Act 1999 and the denial of the right of

accompaniment by the Neckles brothers. His statement is at B83-89F. We were also provided with a copy of the Judgment of EJ Fowell in Gnahoua at B126-134. Mr John Neckles represented the Claimant in those proceedings.

73. Paragraphs 15 to 18 of the Gnahoua Judgment at B130 set out the reasons for the history of your feeling between the Respondent and Mr John and Frances Neckles taken from Mr Wakeley's witness statement. We have reproduced these findings below:

> *"15. The reasons for the history of ill feeling between the company and Mr. John and Francis Neckles were described in Mr. Wakerley's witness statement and are largely a matter of record. Mr. Francis Neckles used to be an employee of the company but was dismissed for harassment and intimidation of another member of staff, Mr Mustafa, who was a shop steward for Unite. The incident which led to his dismissal that took place at a disciplinary hearing in which Mr. Mostafa was a witness and Mr. Francis Neckles was accompanying the employee in question. The questions put by Mr. Nichols to Mr. Mostafa were considered to be an attack on his character and to amount to bullying and harassment.*
>
> *16. Mr. Francis Neckles was dismissed on 20 August 2013. Shortly before this decision was confirmed, and while he was suspended, he went to the company's Walworth depot a number of times to speak to drivers. He was banned from the premises and Mr. Wakerley, who had just joined but was aware of the situation, went to speak to him. He asked him to leave and this request was refused. Mr. Wakerley found his behaviour intimidating and called the police, who eventually came and Mr. Neckles agreed to leave.*
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> *17. There were further developments. Mr. Francis Neckles then brought an employment tribunal claim against the company for unfair dismissal in which he was represented by his brother John. Those claims were struck out in their entirety at a preliminary hearing on 16 December 2014 on the basis of vexatious conduct. In addition, Judge Lamb took the very serious step of awarding £10,000 in costs against the two brothers jointly. The vexatious conduct in question involved falsifying the date on which a witness statement was prepared, and the judge made clear that both brothers must have been complicit in this misconduct.*
>
> *18. The company therefore took the view that they had attempted to obtain substantial compensation from the company using dishonest means, and as a result from that point on neither of them were permitted to represent employees at disciplinary or grievance hearings."*

74. We were also referred to the London South Tribunals' Judgment in Hasan v Abellio London Ltd UKET 2303655/2015. This is also a claim of breach of section 10 Employment Relations Act 1999. At paragraph 7 of the findings, reference is made to the Judgment of Gnahoua and in particular paragraphs 15-18 and it summarises the reasons why the Respondent did not want Messrs Neckles to accompany the claimant. We would add that there are matters within the Hasan Judgment that might be relevant to remedy but are not relevant at this stage to our consideration to liability.

75. Mr Neckles' position in written evidence is that the allegations that the Respondent had made against him and his brother were factually incorrect so as to be "intentionally misleading for duplicitous, nefarious, wicked, immoral, despicable and reprehensible purposes" so as to support "its cosy relationship with Unite the Union and its members". He amplified this in his oral evidence. He said in his witness statement that they arose from Mr Wakeley's untrue evidence to the Gnahoua Employment Tribunal as to his him and his brother's conduct and which in fact he had got Mr Wakeley to retract in cross examination. He further stated that he knew that these allegations were untrue because he was there at the time. Our position is that whether or not what Mr Neckles' asserts is correct, it clearly goes behind the Judgment of Gnahoua and we cannot reopen those proceedings or behind the facts that were found.

76. In addition, he stated that he was able to prove this from evidence given by Mr Cecil Marland, a PCV Bus Operator in another case against the Respondent, that of Andrews v Abellio. Mr Marland's witness statement is at B90-95 and refers to the events of 2013 involving Mr Neckles, his brother and Mr Wakeley. However, Mr Marland did not give evidence at our hearing and we were not provided with a copy of Judgment in that claim, assuming there was one. We therefore decided that in the circumstances and in as far as Mr Neckles attempted to take us behind the findings in Gnahoua it was not proper of us to have regard to its contents.

77. Mr Neckles was cross examined as to the serious allegations that had been made against him and his brother in Gnahoua. He stressed that EJ Lambe had reached those conclusions in his and his brother's absence and without offering them any right of reply. He said that he has sought to challenge the decision through the legal process but had been unsuccessful. He went on to state that it is his belief that this Judgment was given to assist the Respondent and that EJ Lambe and the Respondent had some sort of link between them. He further stated that he believes this because he has a letter to the Respondent's Managing Director as to allegations of discrimination and that the Respondent had sought an independent review by an Employment Judge of the London South region, another it did not state which Judge this was. That is why he believes it was EJ Lambe because EJ Lambe did not give him or his brother the chance to respond to the allegations of fraud. I stopped Mr Neckles and reminded him that this case involved Mr Jimale and is not the forum at which to fight the battle between him and Abellio. I said that I did not see how this assisted as it goes beyond the matters we need to consider.

78. We heard submissions from both parties and were provided with copies of various authorities by Mr Neckles. We have taken all of these submissions into account in reaching our decision.

79. At the end of submissions, we indicated that given the reliance placed on EJ Lambe's Judgment and assertions the made by Mr Neckles about EJ Lambe's conduct in reaching that Judgment without any evidence in support, we believed it was appropriate to look at his Judgment and any appeal. These are matters of public record and it may be that having looked at them they have no further assistance to what we have already heard here before us. Mr Neckles initially refused but on reconsideration withdrew his objections although he asked us to note that EJ Lambe reached his decision in the absence of him or his brother and also without the expert to the metadata contained within electronic documents that the Respondent relied upon being present at the hearing.

80. Ms Jones kindly offered to provide us with a copy of the Judgment of Mr Lambe as she believed it predated the online of Employment Tribunal decisions. She said that she would send this to us and to Mr Neckles this afternoon.

81. We subsequently received a copy of that Judgment and having considered it we determined that it did not take matters any further than the evidence that had already been presented to us.

82. In view of the limited time left on the last day of the hearing, we reserved Judgment.

## Relevant Law

83. Section 95 Employment Rights Act 1996:

> *"(1)For the purposes of this Part an employee is dismissed by his employer if (and, subject to subsection (2) …, only if)-*
> *(a) the contract under which he is employed is terminated by the employer (whether with or without notice),*
> *[(b) he is employed under a limited-term contract and that contract terminates by virtue of the limiting event without being renewed under the same contract, or]*
> *(c) the employee terminates the contract under which he is employed (with or without notice) in circumstances in which he is entitled to terminate it without notice by reason of the employer's conduct..."*

84. Employment Relations Act 1998:

> *"10. Right to be accompanied*
>
> *(1) This section applies where a worker-*
> *(a) is required or invited by his employer to attend a disciplinary or grievance hearing, and*
> *(b) reasonably requests to be accompanied at the hearing.*
>
> *(2) Where this section applies the employer must permit the worker to be accompanied at the hearing by a single companion who-*
> *(a) is chosen by the worker and is within subsection (3),*
> *(b) is to be permitted to address the hearing (but not to answer questions on behalf of the worker), and*
> *(c) is to be permitted to confer with the worker during the hearing.*
>
> *(3) A person is within this subsection if he is-*
> *(a) employed by a trade union of which he is an official [etc.] …*
>
> *12. Detriment and dismissal*
>
> *(1) A worker has the right not to be subjected to any detriment by any act, or any deliberate failure to act, by his employer done on the ground that he-*
> *(a) exercised or sought to exercise the right under section 10(2) or (4), or*
> *(b) accompanied or sought to accompany another worker (whether of the same employer or not) pursuant to a request under that section.*
>
> *(2) Section 48 of the Employment Rights Act 1996 [detriments] shall apply in relation to contraventions of subsection (1) above as it applies in relation to contraventions of certain sections of that Act."*

## Conclusions

Constructive unfair dismissal

87. For the purposes of a complaint of unfair dismissal there of course has to be a dismissal. This has to fall within section 95 ERA 1996. A termination of the contract of employment between the parties by the employee will constitute a dismissal within section 95(1)(c) if s/he is entitled to so terminate it because of the employer's conduct. This is colloquially and widely known as a 'constructive dismissal'.

88. The leading case is Western Excavating (ECC) Ltd v Sharp [1978] IRLR 27, CA. As Lord Denning indicated an employee is entitled to treat himself or

herself as constructively dismissed if the employer is guilty of conduct which is a significant breach going to the root of the contract of employment; or which shows that the employer no longer intends to be bound by one or more of the essential terms of the contract. The employee in those circumstances is entitled to leave without notice or to give notice, but the conduct in either case must be sufficiently serious to entitle him to leave at once. Moreover, the employee must make up his mind soon after the conduct of which he complains. If he continues for any length of time without leaving, he will be regarded as having elected to affirm the contract and will lose his right to treat himself as discharged.

89. Thus, in order for an employee to be able to claim constructive dismissal, four conditions must be met:

89.1 There must be a breach of contract by the employer. This may be either an actual breach or an anticipatory breach.

89.2 That breach must be sufficiently important to justify the employee resigning, or else it must be the last in a series of incidents which justify his/her leaving.

89.3 S/he must leave in response to the breach and not for some other, unconnected reason. S/he must not delay too long in terminating the contract in response to the employer's breach, otherwise he may be deemed to have waived the breach and agreed to vary the contract.

90. If an employee leaves in circumstances where these conditions are not met, s/he will simply have resigned and there will be no dismissal within the meaning of ERA 1996 and so there can be no claim of unfair dismissal.

91. Sometimes, an employee relies on a breach of the implied term mutual trust and confidence in view of his/her employer's behaviour towards him/her. The House of Lords in Mahmud v Bank of Credit and Commerce International SA [1997] ICR 606, [1997] IRLR 462 defined this as follows:

*"The employer shall not without reasonable and proper cause conduct itself in a manner calculated and (or) likely to destroy or seriously damage the relationship of confidence and trust between employer and employee.'*

92. The Claimant is relying on both a breach of the implied term of mutual trust and confidence between the parties and the breach of an express term of his contract of employment as set out at paragraphs 5.2 and 5.3 of the list of issues at B106 as follows:

*"5.2 Has the Respondent breached an express term of the Claimant's Contract of Employment namely the right to be accompanied at a disciplinary investigation hearing? (The parties dispute whether the right to be accompanied at an investigation hearing was a contractual entitlement).*

*5.3 The Claimant claims the following repudiatory breaches-*

*(i) Denial of the contractual right of accompaniment at a Disciplinary Investigation/Fact-find Enquiry by a Trade Union Official of the Claimant's choice on the 29th October 2018 and 7th November 2018;*

*(ii) Denial of the statutory right of accompaniment between the 8th & 12th and 12th and 19th November 2018 having been invited to attend a Disciplinary Hearing scheduled for determination on the 12th and 19th November 2018;*

*(iii) The right to receive consistency and equal treatment in regards to the contractual and statutory rights of accompaniment at a Disciplinary Investigation/Fact-find Enquiry and Disciplinary Hearing;*

*(iv) A fundamental breach of the implied term of trust and confidence."*

93. With regard to paragraph 5.2 we do not accept that there was any contractual right to be accompanied to a disciplinary or an investigation hearing as our findings above as to the contractual position and the operative disciplinary procedure indicate. The Respondent was acting within the contractual terms and conditions and within the disciplinary procedure which did not allow the right of accompaniment to and investigation meeting. The Respondent did not deny the Claimant of the right of accompaniment to the disciplinary hearing it simply objected to his choice of companion and rescheduled the hearing so as to allow the Claimant the opportunity to find alternative representatives, but he took no action to do so.

94. With regard to paragraph 5.3 (i) as we have said we do not accept that such a contractual right existed at the two investigation/fact-finding meetings.

95. With regard to paragraph 5.3 (ii), whilst we find that the Claimant was denied the statutory right to be accompanied to the two disciplinary hearings, we would note that the second meeting did not really start because the Claimant resigned immediately at the outset of the meeting. In any event we do not accept that this amounts to a repudiatory a breach under Western Excavating or BCCI. The Respondent had reasonable and proper cause to refuse the right of accompaniment by the Neckles brothers as our findings indicate, the Claimant was offered the opportunity to find alternative companions but took no action to do so. Whilst Mr Moran said that he had been advised that he could not conduct meetings on neutral premise but could not recall why, it did occur to us that this would not actually have got round the Respondent's concerns as to the Neckles brothers' behaviour.

96. With regard to paragraph 5.3 (iii), there was no evidence of inconsistency or unequal treatment. Whilst Mr Neckles referred to one hearing that he had participated in and documentary evidence of previous investigatory meetings (at B145-165) at which the Respondent's employees were afforded the right of accompaniment, these all predated the existence of the operative Disciplinary Procedure which did not allow such a right. The evidence from both of the Respondent's witnesses was that to their knowledge no one was given the right of accompaniment at investigatory meetings. Mr Neckles' evidence may have pointed to a previous history of accompaniment but on the evidence that we heard this was not the case at the time of the action taken against the Claimant. The Claimant was unable to give any direct evidence on the matter.

97. With regard to paragraph 5.3 (iv), as we have said the matters relied upon do not amount to a fundamental breach of the implied term of trust and confidence.

98. We therefore find that the Claimant was not dismissed as required by section 95 ERA and as a result his complaint of unfair dismissal fails and is dismissed.

Complaints under Employment Relations Act 1999

99. Where a worker is invited or required to attend a disciplinary or grievance hearing and reasonably requests to be accompanied at the hearing, the employer must allow the worker to choose a trade union representative or another of the employer's workers to accompany him/her (under section 10). The choice of companion is up to the worker, not the employer, and provided the companion falls within the relevant categories, need not be a reasonable choice (Toal & Hughes v GB Oils Ltd UKEAT/0569/12 and Roberts v GB Oils Ltd UKEAT/0177/13). This companion may address the hearing and confer with the worker during the hearing. The companion may put and sum up the worker's case and may respond on the worker's behalf to any view expressed at the hearing, but s/he may not answer questions on behalf of the worker (under section 10 (2B) & (2C)).

100. A worker can complain to an ET if the statutory right is denied. The ET can award compensation of up to two weeks' pay (under section 11).

101. A worker must not be subjected to any detriment because s/he has tried to exercise this right or has accompanied another worker. It would also be automatically unfair dismissal to dismiss an employee for this reason (under section 12).

102. In Toal, an ET found that the employer had acted in breach of section 10 by refusing the two claimants the right to be accompanied to a grievance hearing by a particular Trade Union official. On appeal, the Employment Appeal Tribunal (EAT) found that section 10 does not require the worker's choice of companion to be reasonable (simply the request to be reasonable – this is amplified by paragraphs 14 and 15 of the ACAS Code of Practice on disciplinary and grievance procedures (2015). The EAT held that Parliament had legislated for the choice to be that of the worker, subject only to the safeguards as to the categories of person capable of being a companion. The EAT also held that compensation under section 11(3) is not a penalty or a fine but to recompense for a loss or detriment suffered. It found that the wording of the section suggests that an ET does not have the right to order that no compensation should be payable and held that in a case in which it is satisfied that no loss or detriment has been suffered by an employee, the ET may well feel constrained (and in our view should feel constrained) to make an award of nominal compensation only, either in the traditional sum now replacing 40 shillings - £2 - or in some other small sum of that order (at paragraph 32).

103. In Roberts another division of the EAT agreed with the decision in Toal in a case involving refusal of the right of accompaniment by the same companion. However, the EAT expressed some reservations as to the implications of a worker having a free choice of companion, although it accepted reassurances from Mr Robert's Counsel that the safeguard for an employer against wanton selection of a companion lies in the limited classes of companion to which the right applies and in appropriate consideration of compensation (at paragraph 25).

104. We felt that it was more logical to deal with out conclusions with regard to section 10 first of all followed by section 12.

Breach of section 10(2A) & (2B) Employment Relations Act 1999 contrary to section 11(1))(a) Employment Relations Act 1999

105. The Claimant's complaint is set out at paragraph 7 of the list of issues at B107. Dealing with each element of this in turn.

106. At paragraph 7.1, did the Claimant assert his statutory rights of to a be accompanied and represented by his Trade Union. The Claimant contends that he asserted the right to be accompanied by either John or Francis Neckles between 8th and 12th and also between 12th and 19th November 2018. From our findings we have indicated that we found that the Claimant asserted his right of accompaniment on 12th November 2018.

107. At paragraph 7.2, did the Claimant's Trade Union Official/Representative meet the requirements of section 10(3)(a) or (b) Employment Relations Act? This was not a live issue between the parties and in any event, there were documents within the bundle which indicated that this requirement was met (at B80, 135 &173). So, the answer is yes.

108. At paragraph 7.3, did the Respondent deny the Claimant his asserted statutory rights of accompaniment and if yes, what dates? From our above findings we have found that the Respondent did deny the Claimant his right of accompaniment on 12th November 2018.

109. At paragraph 7.4, what is the appropriate remedy under section 11(3) Employment Relations Act? The issue of remedy will b dealt with at a separate hearing.

110. At paragraph 7.5, does the Respondent have a propensity/tradition of behaviour in denying its employees their statutory rights of accompaniment if they are members of the PTSC Union where the Official is John or Francis Neckles? The Respondent does not deny refusing the Claimant accompaniment by Mr Neckles but states that they were justified in doing so having regard to the findings made in several earlier tribunal claims including Hassan v Abellio and that the Claimant suffered no detriment as a result. Whilst this is included within the list of issues, we reached the conclusion that we can only judge liability on the facts we have found. Whilst the previous Employment Tribunal decisions assisted in understanding the reasons for the Respondent's ban on the Neckles brother and the Claimant's challenge, this is an issue which is more a matter relevant to remedy, if at all.

111. At paragraph 7.6, is the Claimant entitled to an uplift in compensation for the alleged breaches referred to in accordance with section 207A of the Trade Union & Labour Relations (Consolidation) Act 1992? We considered section 207A and the complaints to which it applies which are listed in Schedule A2 to the 1992 Act. As a result, we found that section 207A does not extend to rights under section 10 Employment Relations Act and so the Tribunal has no jurisdiction to make such an award.

112. In summary we have found that the Claimant was denied the asserted right of accompaniment to the disciplinary hearing on 12 November 2018.

Detriment and dismissal pursuant to section 12(1)(a) and 12(3)(a) of the Employment Relations Act 1999

113. These complaints are set out at paragraph 6 of the list of issues at B106-107. We will deal with these in order.

114. At paragraph 6.1, did the Claimant assert his statutory rights of accompaniment? From our findings we accept that the Claimant did assert his right of statutory accompaniment at the meeting on 12th November 2018. However, we have found that he did not exercise or seek to exercise his right of accompaniment at the meeting on 19th November 2018, he simply resigned before the disciplinary hearing started.

115. At paragraph 6.2, did the Claimant suffer any detriment on the grounds that he exercised or sought to exercise his right to be accompanied by his Trade Union at his disciplinary hearing? Dealing with each of the alleged detriments in turn. At sub-paragraphs (i) and (iii), was he denied his choice of accompaniment and was his Trade Union representative denied to address the disciplinary hearing in order to put the Claimant's case, some up that case, respond on the Claimants behalf to any view expressed at hearing and confer with the Claimant during the hearing? The Claimant's complaint is specifically that he was denied the right of accompaniment by Mr John or Mr Francis Neckles.

116. We were assisted by the analysis of Toal and Roberts at paragraphs 20 to 27 by EJ Fowell in Gnahoua v Abellio at B130-134. In particular we accepted the rationale set out at paragraphs 26 and 27 with regard to detriment under section 12.

117. In effect the Claimant in our case is complaining of detriments arising from having to attend the disciplinary hearing unaccompanied by his chosen companions. However, this is not what section 12 extends to. It extends to detriments arising from the rights under section 10. The Claimant was not denied the right to accompaniment per se. Further, because he was unaccompanied as a result of the imposition of the ban against accompaniment by the Neckles brothers, the disciplinary hearing was adjourned and rescheduled. At that further hearing, as we have found, the Claimant did not exercise or seek to exercise his right of accompaniment under section 10, but simply resigned before the hearing had even got off the ground. Whilst of course we have found that the Claimant exercised his right of accompaniment at the first disciplinary hearing, we agree with EJ Fowell that the detriment under section 12 has to be something more than the exercise of the right under section 10.

118. We also agree with his analysis that following Toal this has to be construed not as a request for a particular representative but the exercise of the right generally. This protects workers from reprisals, for example, by a bad employer, who wishes to avoid having Trade Unions involved in the disciplinary process. We agree that some particular detriment or detriments

nevertheless has to be identified, over and above the fact that the worker did not have a companion. Like EJ Fowell, we were also strengthened in this view by the terms of section 12(3) Employment Relations Act 1999 which provides that an employee who is dismissed for exercising the right of accompaniment is regarded as automatically unfairly dismissed, the provision mirroring those which protect against detriment or dismissal in whistleblowing cases.

119. In the absence of any specific detriment, over and above the lack of representation, we therefore find that the Claimant did not suffer any of the detriments as claimed.

120. With regard to paragraph (iii), at B107, as we have found, the Claimant was not dismissed in law but resigned.

121. We therefore find that the Claimant's complaint under section 12 of the Employment Relations Act fails and is dismissed.

Wrongful dismissal

122. This is set out at paragraph 8 of the list of issues at B108. As we have found that the Claimant was not dismissed in law but resigned with immediate effect on 19 November 2018, no entitlement to notice arises. His complaint of wrongful dismissal therefore fails and is dismissed.

**Further disposal**

123. It was unfortunate that we had insufficient time to give judgement and reasons on the day. As a result, we have not had any submissions as to remedy. We therefore direct that the case will be listed for a one day remedy hearing on the first available date after allowing the parties the opportunity to resolve this matter between themselves. The party should let the Employment Tribunal know whether they require a remedy hearing by 26 March 2021.

**Comment**

The witness statement and letter of resignation

124. We would like to take the opportunity to comment on the way in which the Claimant's witness statement and letter of resignation were drafted.

125. We had concerns as to the way in which the Claimant's witness statement and resignation letter were drafted. Both were set out in very formal English and used legalistic terms. The Claimant's witness statement in particular read more like a High Court affidavit. The resignation letter quoted case law relating to constructive dismissal.

126. Whilst the Claimant adopted the witness statement as his evidence there were times at which he struggled to answer questions, some of which were simply intended to confirm what he had said in that document. Indeed, at the start of the hearing, having read the witness statement, we had cause for concern as to whether it was his evidence and whether he truly understood

what he had sworn to be his evidence. This was because of the formal and legalist wording used and his lack of understanding on a number of occasions of what particular paragraphs meant.

127. We would point out that a witness statement is intended to be a narrative document setting out the relevant facts relied upon and cross-referencing where appropriate to documents within the bundle. It should ideally be written in such a way that reflects the words used and understood by the witness and should not contain legal submissions. It is the witness's evidence on which they will be questioned, they are swearing to its truth and they need to understand it, particularly if they are the claimant or respondent to the proceedings.

128. Resignation, particularly from long-standing employment is a very serious step for anyone to take, particularly in the circumstances before us involving a reliance on constructive dismissal. It is vital that a claimant, especially one who does not speak English as a first language, clearly understands what they are doing and why, and again ideally a resignation letter whilst hitting the necessary constructive dismissal points should be written in words that they would be use and understand.

129. To rely on a witness statement or a resignation letter in the format we were given would create particular difficulties for witnesses who do not speak English as a first language more so through an interpreter.

130. We would hasten to add that we were able resolve our concerns as to the Claimant's evidence, although there were a number of occasions where it took some time to arrive at his confirmation of matters set out within his witness statement and on at least one occasion he did not accept what he had said in his witness statement. Nevertheless, the Claimant did come up to proof and understood the essential elements of his case.

131. We would also hasten to add that despite our concerns about the wording of the resignation letter, the Claimant had no difficulty in explaining to us that he had resigned because the Respondent would not let him have a representative of his choice.

Mr Neckles' testimony

132. We would also express our very serious concerns about assertions made by Mr Neckles during his own evidence as to his belief as to why EJ Lambe made adverse findings against him and his brother in his brother's Employment Tribunal claim. In essence, Mr Neckles made unsupported allegations that Mr Lambe was in cahoots with the Respondent. Whilst Mr Neckles indicated that this was his own personal view, we did feel it was inappropriate of him to make these comments, was not relevant to the Claimant's case or the matters we had to decide and was unsupported by evidence. We further note that the Judgment in Gnahoua has not been overturned and it stands.

Right of accompaniment

133. There is the ongoing general issue as to the right of accompaniment of the Respondent's employees particularly by John and Francis Neckles. Whilst this is a matter outside our remit, we see this as an unsatisfactory situation for the Respondent's employees who are PTSC Union members and we urge the parties to seek an acceptable solution to this for their sake.

Employment Judge Tsamados
Dated: 20 January 2021