EMPLOYMENT TRIBUNALS (SCOTLAND)

Case No: 4111486/2021

Held by Cloud Video Platform on 8, 9 and 10 February 2022

Employment Judge: Mrs M Kearns (sitting alone)

Mr M Allinson — **Claimant**
In Person

Solway Transport Limited — **Respondent**
Represented by:
Mr A Bryce
Solicitor

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

The Judgment of the Employment Tribunal was that the claimant was unfairly dismissed by the respondent and the respondent is ordered to pay to the claimant the sum of **£1,374 (One Thousand, Three Hundred and Seventy Four Pounds)** in compensation.

The Employment Protection (Recoupment of Jobseekers' Allowance & Income Support) Regulations 1996 do not apply to this award.

REASONS

1. The claimant who is aged 50 years was employed by the respondent as a lorry driver until his summary dismissal for gross misconduct on 21 June 2021. On 24 September 2021, having complied with the early conciliation requirements he presented an application to the Employment Tribunal in which he claimed that his dismissal was unfair.

Issues

2. The issues for the Tribunal were:-

    (i) Whether or not the respondent's dismissal of the claimant was fair;

    (ii) If it was unfair:

        a. the percentage or other chance that a fair procedure would have reached the same result;

        b. Whether the claimant contributed to his own dismissal to any extent;

        c. Whether the claimant took appropriate steps to mitigate his loss; and

        d. Remedy if appropriate.

The respondent admitted dismissal.

Evidence

3. The parties lodged a joint bundle of documents ("J") and referred to them by page number. The respondent called the following witnesses: Mr Paul Armstrong Wilson, their managing director and Ms Janet Kennedy, their operations/transport manager.

Findings in Fact

4. The following facts were admitted or found to be proved:-

5. The respondent is a company engaged in the haulage of live fish from fish farms and hatcheries around the country to commercial clients. This requires the use of specialist trailers. When fish are transported, the trailer tanks become dirty with foam, scales and other debris. It is therefore vital that the respondent's drivers

clean their tanks and trailers carefully and thoroughly after each use in order to prevent disease and/or parasites from spreading among the fish stocks being transported. Each of the respondent's trailers has six fish tanks and these must be cleaned after every use with heated pressure hoses and disinfectant. It is normally the responsibility of each driver to clean his or her trailer properly after use. However, there are occasions when a driver might be asked to clean a trailer used by a colleague, for example where a driver returns to the depot and is already at the end of their shift or permitted working hours, a colleague might be instructed to clean down their trailer.

6. As at the summer of 2021 the respondent had between ten and fifteen drivers. Some were full time, some were on zero hours contracts and some were sub-contractors.

7. The claimant was employed by the respondent as a lorry driver from 11 September 2017 until his summary dismissal for gross misconduct on 21 June 2021. He was an excellent driver and the respondent went to great lengths to retain his services. At his own request, the claimant initially worked under a zero hours contract which meant that the respondent was under no obligation to offer him work and that he was under no obligation to accept it. He normally worked for the respondent on a regular contract they had with a particular fish farm. The claimant rarely refused work when the respondent offered it.

8. The claimant was line managed by Janet Kennedy, the respondent's transport and operations manager. He had a very good working relationship with Ms Kennedy.

9. The respondent has a Disciplinary Policy (J35 – 40). This contains an informal and a formal disciplinary process. It states: "*Before starting the formal process, we'll always make sure that any issue has been fully investigated. The investigation might include inviting you to a meeting to talk about .* [sic].

You'll get a letter to invite you to a formal disciplinary meeting to talk about the issue. You'll always get at least 48 hours' notice in writing of any disciplinary

meeting... You can either have a work colleague or a trade union representative come along to any formal disciplinary meeting with you.

10. The respondent's Disciplinary Policy has a section entitled 'Gross misconduct'. It states: *"We normally consider the following to be gross misconduct:"* There follows a non-exhaustive list of examples, which includes: *"A serious failure to follow a reasonable request".*

11. On or about 15 March 2021, at his own request, the claimant arranged with Ms Kennedy that he would go from a zero hours contract onto a full time contract for a trial period of three months. The effect of this was that during the three month period from 15 March to 18 June 2021, the claimant was paid £620 gross per week irrespective of how much work he was given by the respondent. As the three month period from March to June was a quiet time for the respondent, the claimant spent much of the time at home on standby. In the final month of his three month trial he was only given six days' work out of a potential 28 days. The rest of the time he spent on standby at home.

12. The week beginning 13 June 2021 was the last week of the claimant's three month full time trial period. He spent the week on standby as the respondent had no work for him to do. However, he had been informed by Ms Kennedy that he would be doing a job for his usual customer on Monday 21 June. In the late morning of Friday 18 June 2021 the claimant went to the respondent's yard to inform Ms Kennedy that he would like to revert back to a zero hours contract with effect from Monday 21 June as his three month full time trial was due for review. He also wanted to check his trailer over for the following week's work. On arrival at the office the claimant was informed that Ms Kennedy was working from home (due to Covid). However, the respondent's managing director Mr Armstrong Wilson and the accounts assistant, Ms Catriona Kenny were there. In the absence of Ms Kennedy but in the presence of Ms Kenny, the claimant told Mr Armstrong Wilson that he wanted to end his trial period and go back to a zero hours contract. Mr Armstrong Wilson made no comment as it was not his sphere of the business. The claimant told Ms Kenny that this was what was happening and she passed the request on to Ms Kennedy whose role incorporated responsibility for drivers'

hours. The claimant's intention was that the change to zero hours would take effect from the following week. Had matters not been superseded by events, that was the arrangement he would have made with Ms Kennedy.

13. In or about the week beginning 13 June, all the respondent's drivers (including the claimant) had had a text from Ms Kennedy to say that she expected that the respondent would start to become busy again in around two weeks' time.

14. After his remarks to Mr Armstrong Wilson and Ms Kenny about his hours, the claimant went out to the respondent's yard to check over the trailer he had been allocated for the following week. The claimant took a pride in his job and he kept his own trailer scrupulously clean. However, the claimant's trailer had gone into the garage for a repair which was taking longer than expected, with the result that it was not going to be available for the job on 21 June. He had been allocated a replacement which had been returned to the yard by a colleague three weeks previously. Upon examination of the replacement trailer, the claimant was of the view that it did not meet his standards of cleanliness. He immediately telephoned Ms Kennedy to say that the driver who had last used the trailer had "*once again left a trailer practically unwashed*". Ms Kennedy telephoned Mr Armstrong Wilson and asked him to go and have a look at it.

15. Mr Armstrong Wilson went out to the yard and he and the claimant got up on top of the trailer. The trailer in question had been sitting in the yard for three weeks unused. Consequently, it had been three weeks since it was last washed down. Mr Armstrong Wilson noticed that there was algae growing on top of the trailer where it had been exposed to the elements and that it looked a bit scruffy. However, he considered that this was an ascetic thing and not a fish welfare matter. He did not, inspect the tanks at that point. The claimant said to Mr Armstrong Wilson that the trailer had clearly not been washed properly at all by the previous driver and that he would not take it out in that condition. Mr Armstrong Wilson said he thought the trailer looked ok to use. The claimant replied that if it was ok to use then he would use it to do the job on Mr Armstrong Wilson's say so and if the customer raised any concerns about the condition of the trailer, he would tell them that Mr Armstrong Wilson had told him to take it out

in that condition. Mr Armstrong Wilson said that if the claimant was unhappy with the condition of the trailer then he should wash it off. He instructed the claimant to give the trailer a clean. The claimant refused, saying that it was for the previous driver to do that. A robust discussion ensued during which the claimant said that he would not clean the trailer on principle as it was not his responsibility but the responsibility of the previous driver. The claimant also said that he did not need to do it as he was now on zero hours and would not expect to be paid for that day. The parties eventually reached a stalemate. The claimant made it clear that he was not willing to do as Mr Armstrong Wilson instructed and Mr Armstrong Wilson told the claimant that in that case, to '*take his stuff out of the trailer and fuck off*'. The claimant left. After the claimant had gone, Mr Armstrong Wilson inspected the fish tanks on the trailer. He was of the view that all bar the top of the trailer was fit for purpose.

16. The claimant was in touch with Ms Kennedy over that weekend. He messaged her initially asking her to get someone else for the following week's work as he had been sacked. Ms Kennedy replied: "*????"* The claimant then telephoned her and discussed what had happened. Ms Kennedy telephoned Mr Armstrong Wilson after that. They discussed it and he said that he was of the view that the claimant had refused to carry out a reasonable request to wash the top of the trailer. He considered that this was gross misconduct in circumstances where the respondent's drivers frequently work on their own in remote locations, so that the respondent has to rely upon them to do as they are instructed. He considered that as the claimant was now back on a zero hours contract there was no compunction on the respondent to give him any work. He reached the settled intention not to give the claimant any work in the future as a result of the claimant's refusal to carry out his instruction to clean the trailer. Mr Armstrong Wilson considered that in the circumstances, the respondent's disciplinary policy did not apply because the claimant was zero hours and the respondent would simply not use him in future.

17. The effect of this decision was that the respondent did not follow its disciplinary policy. They did not write to the claimant setting out the charges against him.

They did not hold a disciplinary meeting with him. They did not give him a chance to state his case and any mitigation. They did not inform him of his right of appeal.

18. The job the claimant had been allocated for 21 June ended up being postponed by the customer for reasons unrelated to this case.

19. On Monday 21 June the claimant telephoned Mr Armstrong Wilson and left a message on his voicemail to say: "*Can you please get in touch with me to see if I've still got a job"*. At 19:23 on Monday 21 June 2021 Mr Armstrong Wilson sent the claimant a text in the following terms: "*Mark, I am sorry to lose you but as a matter of principle, as a businessman, I cannot pay someone a good wage for the last 28 days, they work 6 and then refuse as part of the team, to tidy a trailer up before taking it. There are a lot of unfair things in this life that perhaps may go against ones principles, but we just do it, I know I do every day, customers, employees, suppliers, but I have found that, just closing my mind and getting on with it, at the end of the day gets me what I ultimately want. I hope you prove me wrong and your principles make you rich and happy. Paul."*

20. On 30th June 2021 at 13:45 Mr. Armstrong Wilson sent the claimant an email (J56) in the following terms:

> "*Mark,*
>
> *Our procedure was followed:*
>
> ***Disciplinary Process***
>
> - *Summary dismissal*
>
> *if a colleague commits an act of gross misconduct (see the Disciplinary Policy for more information), they'll normally be summarily dismissed without notice or pay in lieu of notice.*
>
> ***Disciplinary Policy***
>
> *Gross misconduct*
>
> *We normally consider the following to be gross misconduct:*

- *A serious failure to follow a reasonable request*

  We are unavailable for the rest of this week because of the 2 day CPC course. Paul"

21. The claimant responded asking Mr. Armstrong Wilson if he was willing or not to discuss the situation informally before the claimant initiated his intention to make a claim. Mr Armstrong Wilson agreed to see him and they met on or about 6 July 2021. At that meeting, Mr Armstrong Wilson asked the claimant whether, given the same conditions, if it happened again, would he wash the trailer. The claimant said "no". Mr Armstrong Wilson concluded that they were accordingly at a stalemate and that the reason he did not want to use the claimant any more – that he had refused a reasonable instruction - was still there. Mr Armstrong Wilson reasoned that if the claimant had attended that meeting and had said: "*OK. I should have washed the trailer"* there could have been a discussion, but they never got to that point.

22. In the summer of 2021 there was a national shortage of truck drivers. Mr Armstrong Wilson had discussed the shortage with colleagues in the haulage industry and everyone was short of drivers at that time. At some point in the week beginning 21 June the claimant told Ms Kennedy in a text that he intended to take the summer off. However, the claimant later decided that this was not financially practicable. The claimant found a job beginning 9 August 2021.

23. The claimant's effective date of termination of employment was 21 June 2021. At that point he was on a zero hours contract at his own request and Mr Armstrong Wilson had formed the intention not to give him any more work. The respondent's business was quiet for the two weeks following 21 June, so that even if the claimant had still been harmoniously employed by the respondent on a zero hours contract, he would not have received any work from the respondent during those two weeks from 21 June to 5 July 2021. On or around 7 July the claimant secured a new permanent job with a start date on 9 August 2021. He took two weeks' holiday from 9 to 23 July 2021. He started work with his new employer on 9 August 2021. He was not in receipt of benefits.

24. As stated previously, at the time of his dismissal the claimant was on a zero hours contract at his own request. He had previously earned £620 per month gross and £466.95 net during his three month full time trial period. The respondent's dismissal of the claimant was their first conduct dismissal in 25 years.

Applicable Law

25. Section 98 of the Employment Rights Act 1996 indicates how a tribunal should approach the question of whether a dismissal is fair. There are two stages. The first stage is for the employer to show the reason for the dismissal and that it is a potentially fair reason. A reason relating to the conduct of the employee is a potentially fair reason under Section 98(2).

26. To establish that a dismissal was on the grounds of conduct, the employer must show that the person who made the decision to dismiss the claimant, (in this case, Mr Armstrong Wilson) believed that he was guilty of misconduct. Thereafter the Employment Tribunal must be satisfied that there were reasonable grounds for that belief and that at the time the dismissing officer reached that belief on those grounds the respondent had conducted an investigation that was within the range of reasonable investigations a reasonable employer might have conducted in the circumstances. The onus is neutral in relation to the grounds for the respondent's belief and the sufficiency of the investigation.

27. If the employer is successful in establishing the reason, the tribunal must then move on to the second stage and apply Section 98(4) which provides:

> *"…where the employer has fulfilled the requirements of subsection (1), the determination of the question whether the dismissal is fair or unfair (having regard to the reason shown by the employer) –*
>
> *(a) depends on whether in the circumstances (including the size and administrative resources of the employer's undertaking) the employer acted reasonably or unreasonably in treating it as a sufficient reason for dismissing the employee, and*

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

28. In applying that section the Tribunal must consider whether the procedure used by the respondent in coming to its decision was within the range of reasonable procedures a reasonable employer might have used.

29. Finally the Tribunal must consider whether dismissal as a sanction was within the band of reasonable responses a reasonable employer might have adopted to the conduct in question. The Employment Tribunal is not permitted to substitute its view on any of these issues for that of the employer. Instead it must consider whether the process and decisions of the respondent fell within the range of a reasonable employer.

Discussion and Decision

Reason for dismissal

30. I was satisfied that the respondent had shown that the claimant was dismissed for a reason relating to his conduct. It was clear from the evidence that Mr Armstrong Wilson believed that the claimant had refused to carry out a reasonable instruction. The claimant disputed that the instruction to clean the trailer was reasonable. His position was that it was not his responsibility to clean the trailer and that the driver who had returned the trailer three weeks previously should have been brought in to clean it as a matter of principle. The claimant accepted that he had refused to do it. That remained his position up to the point when he was asked to get his stuff and leave and beyond. Although it was common ground that it was the responsibility of the previous driver to leave his or her trailer in a clean condition, it was also common ground that there are occasions when drivers are instructed to clean trailers returned by other drivers. It was also common ground that the trailer had been lying in the yard for three weeks unused. In these circumstances I concluded that the instruction was a reasonable one. Accordingly, the claimant's admission that he had refused to clean the trailer, constituted reasonable grounds to support Mr Armstrong Wilson's belief that the claimant had refused to carry out a reasonable instruction.

31. I considered the relevance of the claimant's proposed change to zero hours, which he had expressed to Mr Armstrong Wilson and Ms Kenny just before the incident. The legal position is that the claimant had proposed a variation of his contract to zero hours that morning intending the change to take effect from the beginning of the following week. Mr Armstrong Wilson had not commented on the proposal as it was not his sphere of the business and Ms Kenny was referring it to Ms Kennedy. The claimant was a valued driver and the respondent had a history of agreeing to any demands he might make in relation to changing his hours of work in order to keep him. It was therefore extremely likely that his proposal to change his hours with effect from 21 June would have been agreed to by Ms Kennedy when it was relayed to her. However, at the point when he was given the instruction by Mr Armstrong Wilson to clean the trailer, the variation had not yet been agreed to by the respondent and consequently it had not yet taken effect. Accordingly, in my judgment, the claimant was - at that point - still a full time driver on standby who was required to carry out a reasonable instruction by his employer.

32. In relation to whether sufficient investigation had been carried out into the matter, the fact of the refusal was admitted. As Mr Bryce submitted where the conduct is admitted, little purpose is served by an investigation RSPB v Croucher 1984 ICR 604.

33. In all the circumstances, I am satisfied that the respondent has shown that the claimant was dismissed for a reason relating to his conduct. That is a potentially fair reason for the purposes of Section 98(2) of the Employment Rights Act 1996 (ERA).

Reasonableness

34. I turned to consider the application of Section 98(4) to the facts of this case. In the context of the reason for dismissal I considered the procedure adopted by the respondent in reaching its decision. The respondent did not follow its disciplinary policy at all in this case. As the claimant submits, the respondent completely failed to hold a disciplinary meeting; to inform him of his right to be accompanied

at said meeting; to allow him to state his case and any mitigation; and to give him a right of appeal. In these circumstances the dismissal is procedurally unfair.

35. As I understood him, Mr Bryce submitted with reference to the case of Polkey v A E Dayton Services Ltd 1988 ICR 142 HL that it would have been futile to carry out the required procedure. At paragraph 28 of Polkey, Lord Bridge said this:

> "*But an employer having prima facie grounds to dismiss for* [a potentially fair reason] *will in the great majority of cases not act reasonably in treating the reason as a sufficient reason for dismissal unless and until he has taken the steps, conveniently classified in most of the authorities as 'procedural', which are necessary in the circumstances of the case to justify that course of action….in the case of misconduct, the employer will not normally act reasonably unless he investigates the complaint of misconduct fully and fairly and hears whatever the employee wishes to say in his defence or in explanation or mitigation;….If an employer has failed to take the appropriate procedural steps in any particular case, the one question the Industrial Tribunal is not permitted to ask in applying the test of reasonableness posed by s.*[98(4)] *is the hypothetical question whether it would have made any difference to the outcome if the appropriate procedural steps had been taken. On the true construction of s*[98(4)] *this question is simply irrelevant. It is quite a different matter if the Tribunal is able to conclude that the employer himself, at the time of the dismissal, acted reasonably in taking the view that, in the exceptional circumstances of the particular case, the procedural steps normally appropriate would have been futile, could not have altered the decision to dismiss and therefore could be dispensed with. In such a case the test of reasonableness under s*[98(4)] *may be satisfied."* (My emphasis).

36. I did not accept that the futility exception to Polkey applied to this case for the following reasons: I did not conclude from his evidence that - at the time of dismissal or during the weekend which preceded his confirmation text - Mr Armstrong Wilson had reflected on the procedural steps that would normally be appropriate and reached a conclusion that adopting them would be futile, could not alter the decision to dismiss and could therefore be dispensed with. My

impression of his evidence on the point was that he thought a disciplinary procedure was not required because the claimant was on zero hours. I also concluded that the circumstances of this case were not exceptional in the manner referred to by Lord Bridge. On balance, therefore, I concluded that the exception in Polkey did not apply. Thus, even allowing for the size and administrative resources of the respondent, their failure to accord the claimant the usual features of a fair procedure (as set out in the ACAS Code of Practice on Disciplinary and Grievance Procedures 2015 ("the ACAS Code")) rendered the dismissal unfair under section 98(4) ERA. In particular, the claimant did not receive notice of a disciplinary meeting. He was not told that he was in danger of dismissal. He was not given an opportunity to prepare and state his case or to put forward any mitigating circumstances before the decision to terminate his employment was taken. He was not given a right of appeal. In these circumstances, it follows that the dismissal was procedurally unfair.

Remedy

Basic award

37. The claimant is entitled to a basic award. As set out in his Schedule of Loss (J41) for the purposes of calculating the basic award, the claimant's basic gross weekly pay is capped at £544. The claimant had completed three years employment with the respondent and had been over the age of 41 for the whole of that time. Accordingly, an age factor of 1.5 is applied. The basic award is: 3 x £544 x 1.5 = £2,448.

Conduct before the dismissal

38. Mr Bryce submitted that in the event that the claimant's dismissal was found to be unfair the basic award should be reduced to reflect the claimant's misconduct. Section 122(2) of ERA provides as follows:

> *"(2) Where the tribunal considers that any conduct of the complainant before the dismissal (or, where the dismissal was with notice, before the notice was given) was such that it would be just and equitable to reduce or further*

reduce the amount of the basic award to any extent, the tribunal shall reduce or further reduce that amount accordingly."

39. In view of the admitted conduct of the claimant in this case before the dismissal, I consider that it would be just and equitable to reduce the basic award by 50%. The claimant testified that in his opinion, the trailer was too dirty to take on the job the following week. He accepted that despite this, he had refused to wash it when instructed by his employer to do so. It appeared to me that irrespective of the usual arrangements for washing trailers, the instruction by Mr Armstrong Wilson to wash it was a reasonable instruction. All the more so in circumstances where the claimant had been paid all week to be on standby and this was the first and only thing he had been instructed to do in return for his week's pay. The basic award is accordingly reduced to £1,224.

Compensatory award

40. Section 123(1) ERA provides that the compensatory award shall be such amount as the tribunal considers just and equitable in all the circumstances, having regard to the loss sustained by the claimant in consequence of the dismissal in so far as that loss is attributable to action taken by the employer.

41. The claimant's loss must be seen in the context that he had indicated to the respondent that his full time trial period had come to an end and that he would be going onto zero hours. His intention was that this would start from the beginning of the following week (Monday 21 June 2021). Mr Armstrong Wilson had told him to speak to Ms Kennedy about it. Ms Kennedy had historically agreed to whatever changes the claimant proposed. In any event, the claimant's agreement with Ms Kennedy in March 2021 had been that the full time contract would be for a trial period of three months from 15 March. For both these reasons, I consider that had the claimant remained in employment, the respondent would have agreed to the variation and claimant would have been on zero hours at his own request with effect from 21 June. In these circumstances, the respondent was not required to give him any work and Mr Armstrong Wilson testified (and I accepted) that his intention, following the altercation was not to do so. In any event, there *was* no

work for the first two weeks after 21 June. The job the claimant had been allocated for 21 June ended up being postponed and the claimant was on holiday for two weeks between 9 and 23 July. The purpose of compensation is to put the person into the position he would have been in had it not been for the unfair dismissal. On the evidence before this tribunal, I concluded that following the change to zero hours and the argument with Mr Armstrong Wilson, the claimant would not have earned an ongoing wage from the respondent. He would, however be entitled to a sum - assessed at £500 - for loss of statutory rights. Before adjustments, the compensatory award would therefore amount to £500.

The chance that a fair dismissal would have occurred in any event (Polkey)

42. In determining what sum would be just and equitable in the circumstances under section 123(1) Mr Bryce submits that I must consider the likelihood that the claimant might have been fairly dismissed in any event pursuant to Polkey. In Software 2000 Ltd –v- Andrews [2007] IRLR 568 the EAT said this: "*in determining the loss sustained, it is plainly material for a Tribunal to consider what would have happened had no dismissal occurred. Sometimes that might be a matter of fact, such as where the workplace closed shortly after the dismissal making everyone redundant….. In most cases, however, it involves a prediction by the Tribunal as to what would be likely to have occurred had employment continued*". The question is "*not whether the Tribunal can predict with confidence all that would have occurred; rather it is whether it can make any assessment with sufficient confidence about what is likely to have happened, using its common sense, experience and sense of justice.*"

43. In this case, the claimant met with the respondent on 6 July and was asked whether - given the same conditions again – he would wash the trailer. The claimant said "no". Mr Bryce submitted that a fair procedure would have made no difference in these circumstances. I asked the claimant about this. His position was that if the respondent had followed its own disciplinary policy he would have been made aware that his job was in jeopardy and might have backed down. He said that he fully expected to be disciplined for his insubordination, but that he

thought he would have been given a warning. It was a fair point that he had not been warned that his job was at risk if his insubordination continued and that he had not been given the opportunity to attend a disciplinary meeting, state his case, put forward mitigation and/or apologise before the decision was made. Taking this into account, I concluded that the claimant might have apologised and saved his job if the policy had been followed. There was, in my assessment a 50% chance that the claimant might have been dismissed fairly in any event, even had the policy been followed. Dismissal as a sanction would in my view have been within the band of reasonable responses a reasonable employer might have adopted to the conduct in question in the absence of an apology by the claimant and an assurance that it would not happen again.

Increase in award for failure to comply with the ACAS Code

44. Section 207A of the Trade Union and Labour Reform (Consolidation) Act 1992 provides for an uplift in the award of up to 25% if it appears to the employment tribunal that: (i) the ACAS Code applies to the case before it; (ii) the employer failed to comply with the Code; (iii) the failure was unreasonable and (iv) it is just and equitable in all the circumstances to increase the award. With regard to (i), Schedule A2 of the 1992 Act includes unfair dismissal on the list of proceedings to which the Code applies. (ii) The respondent clearly failed to comply with the Code in a number of respects. (iii) The Code states that employees should be notified in writing if there is a disciplinary case to answer against them; the notification should contain sufficient information about the misconduct and (crucially in this case) inform the employee of the possible consequences, especially where dismissal is being considered. A disciplinary meeting should be held to which the employee has the right to be accompanied and at which he should be given an opportunity to set out his case and answer any allegations made. The employer should give the employee a right of appeal. The respondent's failure to honour these basic requirements was, in my view unreasonable. (iv) it is therefore just and equitable in all the circumstances to increase the award. The procedures were ignored altogether. The respondent was aware of its Disciplinary Policy (which appears to be modelled on the Code) and deliberately decided not to follow it. On the other hand, the reason for this

decision appeared to be that the respondent was under the mistaken impression that if an employee is on zero hours, it is not necessary to follow the Code/ Disciplinary Policy. The respondent is also a relatively small employer and this was its first conduct dismissal in 25 years. In the circumstances I concluded that it would be just and equitable to increase the award by 20%.

Contributory Fault

45. Section 123(6) of ERA provides that:
"(6) Where the tribunal finds that the dismissal was to any extent caused or contributed to by any action of the complainant, it shall reduce the amount of the compensatory award by such proportion as it considers just and equitable having regard to that finding."

46. The factors to be considered are (1) the relevant action must be culpable or blameworthy; (2) it must have caused or contributed to the dismissal; and (3) it must be just and equitable to reduce compensation by the amount fixed. (Nelson v BBC (No 2) 1980 ICR 110). I considered that although the claimant was unfairly dismissed, his action in refusing to carry out a reasonable instruction was culpable and blameworthy and that it clearly contributed to his dismissal. I consider that it is just and equitable to reduce compensation to reflect this.

47. In Hollier v Plysu Ltd [1983] IRLR 260 the EAT gave the following guidelines on the broad contribution categories:

Where the employee is wholly to blame - 100%;

Largely to blame – 75%;

Employer and employee equally to blame – 50%;

Employee slightly to blame – 25%

48. I assess the claimant's contribution to the unfair dismissal at 50%. He was at fault in his insubordination. However, the respondent was at fault in failing to carry out a fair disciplinary procedure. The parties are equally to blame.

49. I have applied the adjustments to the compensatory award in the required order:

Polkey reduction:	£500 – 50% = £250
s. 207A increase by 20%:	£250 + 20% = £300
reduction for contributory fault:	£300 – 50% = £150.

50. The compensatory award is accordingly £150. The basic award is £1,224. Total compensation for unfair dismissal is £1,374. The benefits recoupment regulations do not apply in this case.

Employment Judge: **M Kearns**
Date of Judgment: **18 February 2022**
Entered in register: **21 February 2022**
and copied to parties

I confirm that this is my Judgment in the case of Mr M Allinson v Solway Transport Ltd 4111486/2021 and that I have signed the Note by electronic signature.