EMPLOYMENT TRIBUNALS

Claimant: Mr P Pronzynski

Respondent: 3663 Transport Limited

Heard at: Manchester **On:** 5 December 2018
13 December 2018
(in Chambers)

Before: Employment Judge Whittaker

REPRESENTATION:

Claimant: In person
Respondent: Mr S Britton, Solicitor

JUDGMENT

The judgment of the Tribunal is that:

1. The claimant was unfairly dismissed and the respondent is ordered to pay the claimant a basic award of £2,779.

2. The Tribunal declines to make any compensatory award in favour of the claimant.

REASONS

1. The claimant appeared in person. He did not call any witnesses. He gave evidence on oath by reference to a written witness statement comprised of some 11 paragraphs, which the claimant had signed on 3 November 2018. He submitted two written witness statements from witnesses who did not appear to give evidence. Those were the written statements of Mr Kapusta and Mr Zaganiaczyk. Those statements were received and considered by the Tribunal.

2. The respondent called two witnesses. The first witness was Mr Stewart. He took the decision to dismiss the claimant. He gave evidence on oath by reference to a written witness statement comprising some 26 paragraphs and signed and dated on 8 November 2018. The second witness was Mr Raby. He gave evidence on oath by reference to a written witness statement of 24 paragraphs which again he signed on 8 November 2018. The Tribunal was presented with a bundle comprising 96 pages.

Findings of Fact

3. After considering all the evidence and the relevant documents contained in the bundle of documents, the Tribunal made the following findings of fact:-

3.1 The claimant was at all material times an HGV lorry driver for the respondent company. His employment began on 4 September 2006 and at the date of his dismissal in May 2018 he had therefore been continuously employed for almost 12 years.

3.2 In early 2018 the respondent, after consultation with the relevant trade unions, installed a camera in the cab of the HGV lorries that it operated, including the lorries which were driven by the claimant. Photographs of the cameras which were installed were shown in photographs presented to the Tribunal and included in the bundle at pages 52 sand 53. There was no disagreement between the parties that this was the camera which was the focus of the events which led to the dismissal of the claimant. There was equally no disagreement between the parties as to the purpose of the cameras being installed. It was to protect the best interests of not only the respondent company but also the best interests of the drivers. The cameras could observe events which occurred outside the cab whilst at the same time observing events which occurred inside the cab, such as the behaviour of the drivers.

3.3 The respondent submitted two memos, one dated 8 February 2018 and the other dated 9 February 2018, and these appeared at pages 41 and 42 in the bundle. The respondent was adamant that these memos had been issued to all the drivers, including the claimant. The first memo at page 41 confirmed that the cameras had been fitted “to protect you and company property”. Furthermore, the first memo notified the drivers that they “must not tamper with any of the cameras i.e. covering the in-cab camera”. The drivers were notified that this specific conduct, covering the in-cab camera, would be deemed as gross misconduct and the drivers may face disciplinary action. The second memo, at page 42, dated the following day, 9 February, had a slightly different tone and emphasis to it. This memo indicated that it was “imperative that as responsible and professional drivers the CCTV equipment becomes part of your daily checks, both pre and post checks, to confirm the equipment is free from damage”. The memo goes on to say that, “any noticeable damage of vandalising of the equipment if you were the last reported driver in the vehicle then this could potentially lead to gross misconduct”. That memo equally goes on to refer to a previous email in January indicating that the equipment had been installed to protect not only the

staff but also to protect the business interests of the company. A copy of that email was not produced to the Tribunal. Thirdly, the respondent produced an email dated 4 April 2018 at page 43 in which the Nights Co-ordinator of the Transport Department, Mr Whyment, confirms that in his opinion that "all drivers have been issued with the attached memo as per my usual ritual of issuing all memos when giving drivers their paperwork for their daily workload". That email confirms that Mr Whyment regularly gives out memos and that he only keeps copies of them for himself. He concludes his email by saying "after checking with drivers this morning" that he can confirm that all of them have received the relevant CCTV memo. That memo was the memo dated 9 February 2018 as it refers to "the installation of CCTV cameras".

3.4 In his witness statement at paragraph 5, the claimant alleged that the first time that he had seen the second of the two memos, the one at page 42, was at the investigation meeting held on 20 April 2018. The claimant makes it clear that, "this is the date when they showed me the memo". The two witness statements which had been submitted for the claimant equally confirmed that they had never seen the memo at page 42, dated 9 February 2018, before it was shown to them by the claimant on 24 October 2018. That is some six months later. The claimant explained that he had shown that memo to each of the two drivers and that they had then completed the statements to indicate that they had never seen the document at page 42 prior to 24 October 2018. In his witness statement at paragraph 3 Mr Stewart, who dismissed the claimant, says simply that "memos were sent out by the Senior Transport Manager at the time, Lee Tyldesley". However, that is not strictly true. The email at page 43 indicates that the memos were not actually "sent out by" Lee Tyldesley. In fact the email from Mr Whyment indicates that in his position as the Nights Co-ordinator, that he was the person who issued the memos.

3.5 There was no evidence given to the Tribunal to indicate whether at the time that Mr Stewart took the decision to dismiss the claimant he was aware of the content of the email at page 43. Mr Stewart refers only to the content of the memos, presumably assuming that as they bore the name of Mr Tyldesley that he was the person who had issued them. There was no evidence produced to the Tribunal to indicate how or by whom or when the memo at page 41 had allegedly been issued to drivers. However, the claimant never denied having received the memo at page 41 but was adamant that he did not see the memo at page 42 until the date of the investigation meeting. The two witnesses who said that they had never received the memo at page 42 did not appear at the Tribunal to be cross examined or give evidence on oath. Mr Tyldesley did not give a witness statement and neither did he appear at the Tribunal to give evidence on oath. The evidence of Mr Stewart was that the memos had been "issued" by Mr Tyldesley. That was in conflict with the email from Mr Whyment at page 43. No steps had been taken by the respondent to check with Mr Whyment as to whether or not when he had

allegedly spoken to all the drivers as per his email on 4 April 2018 that those drivers included the claimant.

3.6 Taking all the evidence and uncertainties into account, the Tribunal was unable to be satisfied on the balance of probabilities that the memo at page 42 had been issued to or brought to the attention of the claimant prior to the investigation meeting which was held in April 2018. The Tribunal was however satisfied, in the absence of any disagreement, that the initial memo at page 41 had been issued to the claimant. In any event, what was obvious at all material times was that the claimant knew that the cameras had been installed in the vehicles that he had driven and that by the time of the alleged misconduct which led to his dismissal, they had been installed in vehicles driven and operated by the claimant for approximately two months. Furthermore, it was never denied by the claimant that he was unaware that the cameras were installed, and neither did he at any time seek to persuade the Tribunal that he disagreed with the view expressed by the respondent in the first memo at page 41, namely that the cameras had been installed "to protect you and company property". To use a phrase to which the Tribunal will return in due course, this was in any event in the opinion of the Tribunal an obvious matter of common sense. There have been a number of high profile and significant road accidents in recent years, some involving HGV drivers, where the evidence produced by cameras, often in-cab cameras, has been of significance. In the opinion of the Tribunal, it was indeed common sense to clearly understand the purpose for the cameras being installed, and the Tribunal was satisfied that by the memo at page 41 this had in any event been brought to the attention of the drivers, including the claimant.

3.7 The only significance, in the opinion of the Tribunal, between the tone and content of the memo at page 41 and the second memo at page 42 was the reference to the drivers being required as part of their daily checks to confirm that the equipment is free from damage. The "damage" which led to the dismissal of the claimant was the fact that as shown in the photographs at pages 52 and 53 of the bundle, the lens of the camera had been covered by a black glove. This was not in any way a sophisticated attempt to interfere with the recording abilities of the camera. The discovery of the glove was not something which required sophisticated or careful examination of the camera or its operating functions by the claimant. It was, in the opinion of the Tribunal, again common sense that the camera would not operate whilst having its lens covered by a black glove. To discover that did not require any form of sophisticated check being carried out by the claimant.

3.8 The claimant drove the HGV that he was responsible for, with registration number SN63 RDX, on Friday 13 April and then on Tuesday 17 April 2018. He was responsible for the vehicle for eight hours 12 minutes on 13 April (page 55) and for ten hours 35 minutes on 17 April (page 56). This was not disputed by the claimant. This was a total of over 18½ hours over those two days. A picture of how the camera should

have looked without the glove covering the camera lens appeared in the bundle at page 54A. It was clear and obvious to the Tribunal that the camera was fixed above the passenger seat of the vehicle in question.

3.9 After the claimant returned the vehicle to the yard of the respondent at the end of his shift on 17 April 2018, the vehicle was then seen by the Transport Shift Manager, Mr Holt. He confirmed to the claimant at an investigation meeting which was held on 18 April 2018 (page 44) that when he had been "walking round the yard yesterday" (17 April) that he had noticed that a glove had been placed over the internal camera inside the cab of the vehicle which the claimant had been driving, and he confirmed that that was the registration number above. Furthermore, Mr Holt went on to confirm that he had also observed that vehicle on Thursday 12 April and that at that time the camera was not obscured with the glove. Mr Holt confirmed that since his observations that he had checked the recordings which had been made by the camera on Friday 13 April when the claimant had been driving the lorry only to find that as a result of the glove having been placed over the camera lens that the camera had not been working.

3.10 The claimant was asked whether he could explain the fact that the glove had been placed over the internal camera. The claimant, significantly, did not say to Mr Holt that he had no idea what Mr Holt was talking about. Instead, when being asked to explain the fact that the glove had been fixed to the camera lens, the claimant simply offered the explanation that he was unable to explain it. When Mr Holt then pointed out that he was aware that the recording ability of the camera had equally been concealed on Friday 13 February, and whether or not the claimant could offer any explanation for that, again the claimant indicated that he could not offer an explanation apart from the fact that he apparently knew who had fixed the glove over the camera lens. Again, significantly, the claimant did not deny that he was aware that the glove had been in place. He did, however, refuse to provide the name of the person that he said he knew was responsible for fixing the glove over the camera. He was adamant at the conclusion of that investigation meeting that he had not been responsible for fixing the glove over the lens.

3.11 A second investigation meeting then took place again with Mr Holt on Friday 20 April 2018. The claimant was specifically asked whether or not when he went to the vehicle on Friday 13 April that he had noticed that the glove was concealing the camera. The claimant immediately confirmed that he had seen that. The claimant was asked why he had not reported it and offered the rather bizarre explanation that in his opinion if he had not placed the glove over the lens that he should not be responsible for removing it. The claimant even went on to say that he had driven other vehicles where the camera lens had been obscured, but on none of those occasions had the claimant ever brought that to the attention of any of the management of the respondent company.

3.12 The claimant was then asked why he had not reported this when he had returned to work. The only explanation that was offered by the claimant was that there was no "camera defect" in the defect notification book which therefore, in the opinion of the claimant, did not afford him any ability to report this defect. It was, however, pointed out to the claimant that there was a box in which he could write comments about general defects. The claimant then went on to say that he did not know that he had to "defect a camera". The claimant was questioned as to whether he understood why the cameras had been in place, and he confirmed that he was aware of the reasons. The claimant then went on to suggest that he was unaware that it was his responsibility to check the CCTV cameras as part of his checks. He said that prior to the events of 13 and 17 April 2018 he was unaware that those checks were necessary, but that by the time of the second investigation interview on 20 April he was now aware. The claimant was then told that he was going to be suspended. However, he was not told the reason why he was being suspended and neither was he told the specific conduct which had led Mr Holt to suspend the claimant. He was, however, told that he would subsequently receive a letter confirming the suspension.

3.13 That letter of suspension was dated some five days later, 25 April 2018, and appeared at page 50 in the bundle. It had been sent by Lauren Fry, an HR Assistant. It alleged that the claimant had been suspended "pending an investigation into the allegations of gross misconduct, namely deliberate damage/interference to company property by covering up the camera in your vehicle". The letter went on to confirm that once the investigation into this specific allegation had been completed that the claimant would be advised of the outcome of that investigation. In the opinion of the Tribunal, the claimant was told very clearly in that letter that the allegation of gross misconduct was "deliberate damage/interference to company property". However, the letter went on to be more specific and confirmed to the claimant that what was being alleged against him was that he had been responsible for "covering up the camera in your vehicle". There was absolutely nothing said about failing to follow procedures, failing to carry out checks, or perhaps more importantly failing to remove the glove when he had seen it on the camera on 13 April, and then continuing to drive the vehicle with the camera obscured for some 18½ hours.

3.14 Approximately a week later by a letter dated 1 May 2018 Lauren Fry again sent a letter to the claimant requesting him to attend a disciplinary hearing. He was told in that letter that the "alleged gross misconduct" was "deliberate damage/interference with company property by covering up the camera in your vehicle". There was no evidence given to the Tribunal whatsoever to suggest what further investigation, if any, was carried out by any representative of the respondent between the second investigation meeting with Mr Holt on 20 April and the decision to require the claimant to attend a disciplinary hearing as set out in the letter dated 1 May.

3.15 The letter inviting the claimant to the disciplinary hearing on 1 May made no reference whatsoever to any information or documentation which was now being supplied to the claimant in advance of the disciplinary hearing in order to enable him to consider that documentation and to enable him to prepare his responses to that documentation and information.

3.16 The disciplinary hearing was conducted by Mr Stewart on 4 May 2018 and the Tribunal was presented with notes of that disciplinary hearing at pages 60-71 inclusive. Those notes were signed by all four persons present, including the claimant, as representing an accurate record of what was said. That included the record at page 71 which was completed by Mr Stewart in which he confirmed that the claimant was being dismissed for gross misconduct for "deliberate/damaging interference to corporate property". That was the single allegation/example of gross misconduct which Mr Stewart took into account when deciding to dismiss the claimant. At page 70, although one of the other examples in the list of disciplinary conduct was "failure to follow company procedures and policies", that was not the reason for dismissal and that was not identified or marked out by Mr Stewart during or at the conclusion of the disciplinary hearing.

3.17 The notes at page 60 confirm that Mr Holt opened the meeting by "explains the reasons – presents case". However, Mr Stewart did not include in his witness statement or in his evidence what Mr Holt had actually said and what was actually represented by the words "explains the reasons – presents case". The notes make reference only to the notes which were attached, which were the two investigation meetings to which the Tribunal has already referred, the route sheets which identified that the claimant had been driving the vehicle for 18½ hours on the Friday and the Monday in question, and that reference was now being made to the three photographs of the interior of the driver's cab to which the Tribunal has referred above. There was no evidence presented to the Tribunal, therefore, to indicate that there was any further investigation carried out by the respondent during the period of suspension of the claimant. The evidence produced to Mr Stewart at the disciplinary hearing comprised only the notes of the two investigation meetings which had been held with the claimant, and for the avoidance of doubt those notes appeared in the bundle at pages 44-46 and pages 47-49 inclusive.

3.18 The claimant was immediately adamant at the disciplinary hearing that he had not received the memo at page 42 and that on that basis he had never been aware that it was his responsibility to check the cameras. The claimant went on to suggest that he was somehow required to check the "hard drive" but he did not expand on how that would have been even possible for the claimant to carry out. The claimant alleged that he had never been trained to carry out checks and that if he had received the memo at page 42 that he would have known of his obligations and "responsibility to check cameras".

3.19 The claimant was asked whether he was aware that the vehicle was fitted with cameras. The claimant avoided answering this question but when it was repeated by Mr Stewart the claimant replied by saying "not saying I didn't know it was there". He complained, however, about the fact that he had not "been trained on it".

3.20 The claimant was specifically asked whether or not he had seen the fact that the glove was obscuring the camera lens and the claimant confirmed that he had "seen it through the day". He accepted that the presence of a glove covering the camera was "not normal". The claimant was then asked why he had not told the office about the presence of the glove, and he replied by saying "cos I did not know". However, he did not explain and Mr Stewart did not press him to explain what he allegedly "did not know". Mr Stewart went on to suggest to the claimant that it was "not normal" to drive with a glove hanging off the ceiling, and asked the claimant what he thought the glove was there for. The claimant replied by saying that he did not know, and he repeated this twice to Mr Stewart. The claimant sought to defend doing nothing about the fact that the glove was in place by indicating that any fault with the camera system "was not in the defect book". The claimant went on to confirm that he had carried out 25 drops "deliveries" with the glove in place without taking any steps to either report it or to remove it. The claimant confirmed on oath that there was present in the cab of his lorry at all times a fixed mobile phone which he could have used at any time during the 18½ hours that he was driving the lorry to contact the Transport Office to report the presence of the glove, and if the claimant was in any doubt as to what to do he had every opportunity to ask for advice having reported the presence of the glove. The claimant confirmed that at no stage did he make any such report by using the mobile telephone. The claimant in effect went on to seek to justify driving the lorry for 18½ hours with a glove covering the camera lens on the basis that he could not be expected to check the camera if there was no mention of the camera in the list of checks which the claimant was expected to carry out on his lorry at the beginning and end of each shift.

3.21 Importantly the claimant then went on to say, as has been confirmed to him in two specific letters sent to him by the HR Department of the respondent company, that he had been suspended "for covering camera" and he confirmed that he had not done that. The claimant also noticed that carefully each of the two letters had alleged that if he had not covered the lens himself that he had instead interfered or damaged the camera. Again the claimant pointed out that he had not caused any damage to the camera or interfered with it. The claimant equally, however, went on at page 64 in the bundle to confirm that he had driven "other wagons with a glove covering the cameras".

3.22 At the conclusion of the disciplinary hearing before Mr Stewart retired to consider his decision, the claimant alleged that Mr Holt had been told by another driver that Mr Holt was aware that this other driver had also driven a lorry with a glove covering the camera and that no disciplinary

steps had been taken against that driver, and he therefore alleged that he was being treated differently by Mr Holt by comparison to the other driver. He alleged that being treated more favourably was a deliberate act of favouritism on the part of Mr Holt. In fact the claimant went on to allege that he was in fact "being set up" by Mr Holt.

3.23 Despite the obvious and clear wording and reasoning for the suspension of the claimant and the equally clear reasoning for the claimant being called to a disciplinary hearing, and then the fact that the claimant had specifically at the top of page 64 of the notes of the disciplinary hearing confirmed very carefully his understanding of the content of those letters and the two possible acts of misconduct that were being alleged against him, Mr Stewart did nothing to explain or reassure the claimant that those letters were a mistake and that he was not being accused of either of those two specific acts of misconduct but that in fact he was instead being required to attend a disciplinary hearing to answer an allegation that he had driven the vehicle with the camera concealed by the glove and had failed to report that. Mr Stewart took no steps to persuade and convince the claimant that there were significant mistakes in those letters and that the claimant was acting on a misunderstanding. The only mention of any such potential misunderstanding was at the very conclusion of the disciplinary hearing, before Mr Stewart retired to consider his decision, when Mr Stewart said, "we are here because it's reasonable for us to know that there was a cover-up on the camera". That did not address the fact that the claimant had very clearly indicated that he understood from the two letters the two specific acts of misconduct/gross misconduct which were being alleged against him.

3.24 The notes at page 68 then confirmed that Mr Stewart retired for a period of initially 25 minutes but then a further 20 minutes, returning to announce his decision at 3.05pm. Mr Stewart then specifically came out after that period of consideration and review lasting 45 minutes, to tell the claimant that "we've made a decision". Mr Stewart went on to confirm that, "we think we have reasonable belief that you took a vehicle out with a camera covered". However, that was not the act/acts of misconduct for which the claimant had been suspended, and neither was it the act/acts of misconduct which the claimant had been required to attend and respond to at the disciplinary hearing. Not surprisingly, therefore, the claimant immediately said that in respect of that particular allegation that there was no "no proof". In the opinion of the Tribunal, the claimant was clearly answering the allegations which had been set out in the letters which had been sent to him. Mr Stewart again emphasised that in his opinion there was "reasonable belief", but he did not in any way specify to the claimant what he had reasonable belief in and what were in his opinion the reasonable grounds for the specific acts of misconduct which the claimant had been found guilty of. He did, however, then go on to say that he found that the claimant had taken out the vehicle with the camera covered and had not reported it.

3.25 However, Mr Stewart then specifically went on to confirm that the reason "I'm dismissing you" was "for deliberate interference with company property". He offered no explanation to the claimant as to what that "deliberate interference" was. He simply confirmed to the claimant that he now had the right of appeal. As the Tribunal has already confirmed, the claimant signed the notes of interview as accurate, and when asked at the end of the disciplinary hearing if he would like a copy of the notes the claimant confirmed that he would.

3.26 The Tribunal refers again to the document at page 71 which was completed by the claimant. It specified the gross misconduct which had led Mr Stewart to dismiss the claimant. The reason was marked as being "deliberate/damaging interference to corporate property". That was entirely consistent with what the claimant had been told by Mr Stewart when he had told the claimant that "I'm dismissing you", when he had quoted exactly those words by saying that the claimant was being dismissed for "deliberate interference with company property".

3.27 The claimant was then sent a letter confirming his dismissal dated 8 May 2018, and that letter appeared in the bundle at page 74. That letter was sent by Mr Stewart and his name appears at the foot of that letter. Mr Stewart confirmed when giving evidence that the letter had in fact been written for him by the HR Department, but he specifically confirmed that before signing and sending out the letter that he had read it and that he signed it. That letter confirmed that the disciplinary meeting "was held" to consider the allegations of gross misconduct, which again were carefully noted to be "deliberate damage/interference to company property by covering up the camera in your vehicle". Having confirmed that that was the allegation which Mr Stewart was considering at the disciplinary hearing, he went on to confirm in writing exactly what he had said to the claimant at the conclusion of the disciplinary hearing, namely that although the decision to dismiss him had been a difficult one, that Mr Stewart had dismissed the claimant for "interfering with company property by covering up the camera in your vehicle". As the Tribunal has just mentioned, Mr Stewart confirmed that he had read this letter himself before then signing it and agreeing that it should be sent to the claimant to confirm the outcome of the disciplinary hearing.

3.28 It was put to Mr Stewart by the claimant that there was no evidence at all at any time to suggest that he had actually covered up the camera or that he had at any time interfered with it in any way. The claimant put to Mr Stewart that nevertheless that was the reason why he had been dismissed. Mr Stewart on re-examining the letter at page 74, the letter of dismissal, said that he had failed to look at the content of the letter sufficiently carefully. It was furthermore put to Mr Stewart that in paragraph 8 of his witness statement, which he had confirmed on oath was true, that "it was never alleged that the claimant had been responsible for covering up the in vehicle camera". The Tribunal examined the content of the notes of the two investigation meetings, and accepted that that specific allegation had never been put to the claimant

but that instead he had been asked on a number of occasions to explain why there was a glove covering the camera when it was observed by Mr Holt on 18 April. However, Mr Stewart equally accepted that at that stage Mr Holt did not know who was responsible for covering up the camera in that way, and that it might or might not have been the claimant. The identity of the person who had in fact put the glove over the camera was unknown at the time of the investigation meetings with the claimant. The claimant had indicated that he knew who had done it but he had steadfastly refused to provide any names to Mr Holt.

3.29 Mr Stewart pointed out that immediately prior to the disciplinary hearing which he had held with the claimant, he had in fact conducted and concluded a disciplinary hearing with another driver where the specific allegation against him was that the other driver had actually fixed the glove over the camera. Mr Stewart pointed out that that had been the disciplinary allegation against the other driver, and that prior to the disciplinary hearing with the claimant that Mr Stewart had found that driver guilty of gross misconduct and had dismissed him. Mr Stewart said therefore that he was not conducting the disciplinary hearing on the basis that the claimant had fixed the glove over the camera because by the time the disciplinary hearing began he knew who was responsible and had already dismissed that driver. However, the claimant was never told that that was the case. The claimant was never told, for example, at the beginning of his own disciplinary hearing that there was an obvious error in the two letters which had been sent to him and that Mr Stewart had just now dismissed the driver who had been responsible for covering the camera with the glove, and that the company was sorry for any confusion, but that the reason why the claimant was actually being required to attend a disciplinary hearing was for driving the vehicle with the camera covered and failing to do anything about it. That clarification was significantly and completely absent from any part of the disciplinary hearing held with the claimant.

3.30 The claimant put to Mr Stewart that there was no letter and no words which had been used towards him which had told him that what he was actually being accused of was driving with the camera covered. Mr Stewart disputed this, but when the order of events was actually pointed out to him at page 68 it was pointed out to Mr Stewart that the only possible mention that he had made of that was after he had come back after the 45 minute adjournment to tell the claimant that the company had a reasonable belief that the claimant “took a vehicle out with the camera covered”. The Tribunal found it important and directly relevant that the immediate response of the claimant to that was to say, “no proof”. In the opinion of the Tribunal it was very obvious that what the claimant understood by that, particularly in view of the content of the letters which he had been sent and the way in which the disciplinary and investigation hearings had been conducted, was that he was being dismissed for what he had been accused of in those letters, namely covering up the camera, particularly bearing in mind that the words

"camera covered" had just be used by Mr Stewart at the conclusion of that disciplinary hearing.

3.31 It was put to Mr Stewart by the claimant that at paragraph 18 of Mr Stewart's statement Mr Stewart had said that in his opinion the claimant "was not at any point" under the impression that he was being held responsible for having placed the glove over the vehicle camera. The claimant was adamant that that was in fact the exact allegation that had been put to him and that it had been confirmed to him very carefully in the two letters which had been sent to him at pages 50 and 51 of the bundle, when the claimant was suspended, and then subsequently invited to a disciplinary hearing. Mr Stewart was pressed about why he had used the words "not at any point". After pondering that question, Mr Stewart agreed that in the letters the claimant had very clearly been told that that was exactly the allegation that had been put to the claimant, and that that part of his witness statement at paragraph 18 was not true. Mr Stewart agreed that that was exactly what the claimant had been accused of.

3.32 The claimant also put to Mr Stewart that the document at page 71 gave him a long list of different potential reasons for holding a disciplinary hearing and for making a decision. The claimant pointed out that a quite different box used the words "failure to follow company procedures and policies". After questioning from the claimant, Mr Stewart conceded that that was a broader ground which he could have used, and he accepted that with hindsight he could have used that if he was indeed choosing to dismiss the claimant for failing to follow procedures by not removing the glove and by not reporting it to any representative of the Transport Management. Mr Stewart equally accepted that by not using those words and that box that the letter of dismissal which had been sent to the claimant was completely consistent with the exact wording which had been used in the two letters which had been sent to the claimant, and was equally consistent with the box which had been ticked by Mr Stewart on page 71. At the conclusion of the disciplinary hearing, therefore, there were four specific pieces of written evidence produced from the respondent which indicated that at the time of suspension, the time that the claimant was required to attend a disciplinary hearing and at the conclusion of the disciplinary hearing that the reason for the claimant being involved in the disciplinary process and then being dismissed was "deliberate damage/interference with company property by covering up the camera in your vehicle".

3.33 The claimant appealed against the decision to dismiss him. The Tribunal looked carefully at his letter of appeal, which was very short. It appeared at page 75 in the bundle. The claimant, following the wording which had been used on no fewer than four occasions now by the respondent company, appealed on the basis that he had "not deliberately interfered with company property, namely I have not covered up any camera in my vehicle".

3.34 Mr Raby when giving his evidence indicated that prior to conducting the appeal of the claimant that he deliberately took the decision not to read any of the notes or documents which had led to the dismissal of the claimant, other than to read the dismissal letter. The Tribunal found this to be troubling. Nevertheless, that meant that at the time that Mr Raby sat with the claimant to consider his appeal, the only information he had about the reasons for the claimant being dismissed were the reasons which were so clearly expressed by Mr Stewart in the letter of dismissal which he had sent to the claimant. Mr Raby had no other evidence available to him to indicate what the reasons for dismissal were.

3.35 At his appeal the claimant presented the document at pages 77 and 78. The claimant, not surprisingly, addressed his appeal to the reasons which he had been given for his dismissal. He began by saying, "It is not true that I have deliberate damage/interference to company property by covering up the camera in my vehicle". He went on to confirm that he had not covered up the camera and indeed that he knew by then that the company had proof of that and that the company was well aware that it had been covered up by somebody else. The claimant went on to say that he should not be punished for not taking the glove off or not reporting it, but that was not the reason which had been given to him by the respondent company for his dismissal. The claimant went on to allege that again he had been singled out in some way and that others had covered up cameras and had no action taken against them, and he went on to allege that he believed that the real reason for his dismissal was because he was being overworked beyond his reasonable capabilities. On the second page of his statement he set out a number of bullet points, the first of which was that in his opinion the employer had no reasonable ground for thinking that he was guilty (covering up the camera). Again, he went on to confirm that he did not believe that dismissal could be considered to be a reasonable response to the allegation/misconduct, but now the claimant did not refer to the specific allegation of covering up the camera but to a different allegation of driving with the camera covered up without knowledge of his responsibilities to the equipment. There was, in the opinion of the Tribunal, understandable and real confusion on the part of the claimant as to what he was being dismissed for, particularly bearing in mind that he knew by now that the respondent company had identified the person who had covered up the camera, and that he had been dismissed. The claimant therefore continued making his written representations by saying that the dismissal process was not fair because he was "still unclear" why he was dismissed. He went on to confirm that as far as he could see from what had been said to him in writing that it looked like the company believed that he had covered up the camera but he went on, reasonably, to demonstrate that there was real confusion on the basis that as well as that allegation which had been so clearly set out for him in writing, there had been discussions about him driving the vehicle with the glove in place and then not reporting it. He went on to say that this significant confusion in his opinion was "deliberate" in order to avoid him being able to focus on what the

allegation was, and that he was therefore unable to defend himself properly and effectively.

3.36 Importantly and significantly, in the opinion of the Tribunal, Mr Raby did not arrange for any notes of the appeal hearing whatsoever to be taken. This was despite the fact that he accepted that the appeal hearing lasted for almost 3½ hours. He accepted that he had never been given any advice or training about the importance of taking notes at such meetings, and therefore the only notes which were available were the brief handwritten notes of Mr Raby which appeared at page 80. Significantly, those notes were headed to indicate that Mr Raby was aware that the reason for the dismissal of the claimant, as expressed in the letter of dismissal which was the only document that Mr Raby had read, was "deliberate damage/interference to company property by covering up the camera in your vehicle". Mr Raby told the Tribunal that those were the only notes which he made prior to the appeal, and in the opinion of the Tribunal that was not surprising bearing in mind that the only document that Mr Raby read was the letter of dismissal.

3.37 Despite not making any arrangements at all for notes to be taken of the appeal hearing, notes were nevertheless arranged to be taken of a subsequent interview which Mr Raby held with Mr Holt as a result of the allegations which the claimant had made about being singled out and treated differently and unfairly by comparison to other drivers in relation to the cameras in the cabs. During that interview Mr Holt confirmed the observations which he had made of the vehicle which had been driven by the claimant in relation to the glove covering the camera, and also touched on the investigations which Mr Holt had then carried out to successfully identify the driver who had actually placed the camera over the lens. In summary Mr Holt denied any allegations of favouritism and any allegations of different treatment, and he confirmed the details of checks which he had carried out on other vehicles and could not find any other instances of cameras being covered despite what had been alleged by the claimant. What was accepted was that the claimant had never, prior to his suspension, reported any such incidents or allegations to any member of the respondent's management.

3.38 Mr Raby then sent a summary of his conclusions to a representative of HR, Jamie Thompson-Hoadley, and a written summary of those observations and conclusion appeared at page 86 in the email which Mr Raby sent. In the fifth of the six relevant bullet points Mr Raby points out that the claimant had admitted that he had driven the vehicle for four days knowing that the camera was covered with a glove. Factually, that was completely inaccurate. Mr Raby accepted that under cross examination as being factually inaccurate. The glove might well have been covering the camera for five (not four) days, but there was no evidence whatsoever to indicate that the claimant had driven it for four days. The glove was certainly in place at the end of the working day on Tuesday 17th, and there was evidence to suggest that it had been in place from Friday to Tuesday inclusive, five days. However, the

respondent accepted that the vehicle had not been driven by anybody on Saturday or Sunday or Monday, and therefore Mr Raby was reporting a factual inaccuracy to HR in his summary in which he was asking for the advice and opinions of HR.

3.39 The claimant was invited back to a second appeal meeting but did not attend. By then the claimant had found suitable alternative employment.

3.40 Mr Raby therefore wrote to the claimant concluding his appeal on 18 June 2018. Mr Raby confirmed his reasoning and decision in a letter of that date. Despite the obvious and real confusion which the claimant had highlighted in the written documentation which he had submitted to Mr Raby as part of his appeal., Mr Raby confirmed in the second paragraph of his letter (page 89) that the meeting had been held to consider his appeal against the decision to dismiss him for interfering with company property by covering up the camera. At no stage did Mr Raby make an effort at all to clarify even in this letter that that was allegedly a significant misunderstanding on the part of the claimant, and that in fact mistakes, significant mistakes, had been made by the respondent in the documentation and meetings which had preceded the appeal. Instead Mr Raby went on to address that very allegation by confirming that he was well aware that the main point of appeal lodged by the claimant was that he had not covered up the camera. Mr Raby then went on in his reasoning to address a completely different factual allegation, namely driving the vehicle with the camera covered. He went on to again repeat the factual mistake that he had failed to report it and deliberately driven the vehicle with the camera covered for four days.

3.41 As the Tribunal has indicated, that was a significant factual mistake on the part of Mr Raby. Mr Raby addressed the issues of unfair treatment but concluded by telling the claimant that Mr Raby believed that he had deliberately driven the vehicle whilst the camera was covered, and that although he “may” not have covered the camera himself, he still believed that driving the vehicle with the camera covered was interference with company property. However, everything which had gone before had clearly indicated to the claimant that the interference with company property was not driving the vehicle in that way but was covering up the camera, and that remained the factual and written allegation against the claimant as recorded by Mr Raby in the very first of the notes which he made in preparation for the appeal of the claimant. There were no steps taken during the appeal hearing or the subsequent appeal process to explain to the claimant that there had indeed been a genuine and very significant error on the part of the claimant about the specific allegation of misconduct, and neither was there any indication given at any stage that any of the letters which had been sent to him were a mistake, and neither was any apology or explanation for those alleged mistakes made to the claimant at any stage, even at the conclusion and rejection of his appeal.

The Law

4. The law relating to the claims and issues to be determined by the Tribunal is well-known and of long standing. It is, however, overwhelmingly governed by the specific wording of section 98(4) of the Employment Rights Act 1996. This requires the respondent to identify the reason, and if more than one the principal reason, for the dismissal of the claimant by the respondent.

5. At the conclusion of the hearing, in addition to the evidence, the Tribunal received written representations from both the claimant and from the solicitor for the respondent. In his written representations the solicitor for the respondent sought to argue, in detail, that the real reason for the dismissal of the claimant was actually driving the vehicle with the camera covered and failing to do anything about it, including failing to report it to any member of the management of the respondent company.

Conclusion

6. The Tribunal, therefore first of all had to identify the potentially fair reason under section 98. There was no dispute about that. It was at all times clear and obvious, namely conduct. However, the Tribunal then had to go on to make a finding of fact as to what it found was the actual misconduct of the claimant which led to his dismissal. The claimant was adamant that it was clear and obvious that the conduct in question was as had been identified repeatedly in the documents which had been prepared by the respondent company and which had been sent to him, which included all the letters which had been sent. They had repeatedly indicated that the reason was “covering up the camera in your vehicle”. In the opinion of the Tribunal, those words should be given their ordinary and obvious meaning. The Tribunal concluded that a reasonable employee would conclude that the reasoning and direction of the disciplinary process which led to the dismissal of the claimant was that he had been accused of actually covering up the camera in the vehicle and not that the identified misconduct was that he had driven the vehicle and failed to do anything about it. The Tribunal was particularly persuaded that that was the case, not only by the letters which were sent to the claimant prior to the disciplinary hearing but by the notes of the disciplinary hearing which had been prepared and maintained by Mr Stewart and the note prepared by Mr Raby prior to the appeal Those notes, particularly at pages 69 and 71 carefully referred to deliberate/damaging interference to corporate property.

7. The respondent then prepared a letter of dismissal, and that was read by Mr Stewart and then signed by him authorising its issue. That again confirmed that the act of gross misconduct was “covering up the camera in your vehicle”. The Tribunal was asked to accept that all the letters and words which had at any time indicated that that was the reason for dismissal were all an innocent mistake on the part of the respondent and the Tribunal ought to infer, obviously, that that was not the reason why the claimant was dismissed, and that all the evidence pointed, obviously, to the fact that the real reason for dismissal was the fact that the claimant had driven the vehicle with the camera lens covered and done nothing about it. The Tribunal rejected that representation made for and on behalf of the respondent. The Tribunal accepted the clear and written evidence of the respondent’s witnesses, including the clear and obvious content of the relevant documentation. The Tribunal was further persuaded that this was the reason by the complete failure on the part of Mr Raby to acknowledge or even recognise the obvious confusion on the part of the claimant which he

expressed so clearly in his letter of appeal. Mr Raby had made a note that he understood the reason for dismissal, but then failed completely at any time to clarify the obvious confusion on the part of the claimant which was expressed so clearly in his letter of appeal. Importantly, in the view of the Tribunal, Mr Raby had the opportunity to consider all the background written information relating to the dismissal but he chose not to do so. In his mind, therefore, at the time that the claimant was dismissed he made a written note to the effect that in his opinion the reason for dismissal was indeed covering up the camera. If he was in any way at any time confused about that then he had an obligation to raise that with the claimant and if necessary, to postpone the appeal to allow the claimant the opportunity to reflect on what the respondent might have then said was a genuine and real confusion, and prepare for a different allegation of misconduct. No such attempt was made at any stage by Mr Raby, and neither at any stage was any apology offered to the claimant for the obvious and real confusion which had been caused, which the claimant expressed so clearly and forcefully in his written statement and in his short letter of appeal.

8. In summary, therefore, the Tribunal concluded that the reason for the dismissal of the claimant was that the claimant had covered up the camera in his vehicle by being the person who covered up the camera. The Tribunal did not accept that the reason was that the claimant had driven the vehicle in that condition and had failed to report it and/or take any steps to remove it.

9. The Tribunal also noted that it was not provided with any of the notes or documents relating to the dismissal of the person who the Tribunal was told had been dismissed for actually covering up the camera. The Tribunal therefore had no evidence at all available to it as to what that person had admitted or denied, or indeed what the specific allegation was against that driver. There was no information available to the Tribunal as to the dates in question or even the vehicle in question. All that information could have been disclosed and put before the Tribunal but none of it was. The Tribunal therefore was completely in the dark about the reasons to dismiss the unidentified other driver, and equally in the dark about the specific reasons for dismissal. There was therefore no evidence available to the Tribunal, other than Mr Stewart indicating that he had dismissed the person in question for covering up the camera, to suggest that as a result of dismissing that individual any doubt about the claimant having been responsible had disappeared completely by the time that Mr Stewart began the disciplinary hearing of the claimant. The Tribunal particularly noted that at the start of the disciplinary hearing no such clarification or explanations were offered to the claimant to indicate that the person who had covered up the camera had just been dismissed and that the claimant therefore ought to know that what was now being considered was him actually driving with the camera covered. No such explanation or clarification was ever offered to the claimant at any time, and most importantly was never offered to the claimant prior to or during the disciplinary hearing and before the decision to dismiss the claimant was taken by Mr Stewart.

10. Having decided, therefore, that he conduct for which the claimant was dismissed was the act of covering up the camera with the glove, the Tribunal then had to consider whether or not the claimant, in accordance with the **Burchell** guidelines, had carried out a reasonable investigation and then honestly and reasonably believed in the guilt of the claimant for that act of misconduct. The Tribunal quickly concluded

that there were no reasonable grounds at all for concluding that the claimant had been the person who had actually covered up the camera. Indeed Mr Stewart told the Tribunal that he had dismissed somebody else for doing that, even though there were no details about that included in the bundle or provided to the Tribunal other than that broad assertion by Mr Stewart. The respondent therefore produced no evidence at all to indicate that the claimant was responsible for actually covering the camera lens with the glove. In short, therefore, the respondent did not believe on reasonable grounds, or after any reasonable or proper investigation, that the claimant was guilty of the act/acts of misconduct for which he was actually dismissed, and on that basis the decision of the Tribunal is that the claimant was unfairly dismissed.

11. The Tribunal also took into account the principles of the relevant Code of Practice governing disciplinary procedures. The Tribunal noted that the Code indicates that it sets out "basic principles of fairness". The Code emphasises the need for fairness and transparency. The size and resources of the employer should also be taken into account. It was clear from the evidence of the respondent that they were a company of significant size and significant resources. They had available to them an HR department with HR expertise. The Code emphasises that the employer should "inform an employee of the basis of the problem". The respondent did that but on the case that they presented to the Tribunal, that being one of mistake, they presented the entirely wrong basis altogether. They presented to the claimant that he was accused of covering up the camera with the glove and yet sought to persuade the Tribunal that the genuine reason for the dismissal of the claimant was not that act of misconduct at all. However, having found that that was in fact the reason for the dismissal of the claimant, the Tribunal found that in the correspondence which was sent to him, he was indeed told the basis of the problem very clearly. However, the Code goes on to say that the employee should be provided with "sufficient information about the alleged misconduct". The Tribunal finds that the respondent failed almost completely to do that because they never presented any evidence at all to substantiate an allegation that it was the claimant who had actually covered up the camera. The information which is supplied to an employee should be sufficient to enable the employee to respond. Apart from the broad allegation that that was the act of misconduct, the claimant was not provided with any evidence to enable him to sufficiently respond other than to simply deny it, which he did repeatedly and steadfastly.

12. The Code also indicates that the employer should "explain the complaint against the employee". The allegation of covering up the camera is, in the opinion of the Tribunal, plain and obvious. However, if the genuine complaint against the claimant was driving with the lens covered up and failing to do anything about it, then there was obvious and real confusion. There was an obvious obligation on the part of the respondent to identify the specific complaint and then to ensure that they provided evidence and information relating to that complaint. An employee must be given the opportunity to answer the allegations which have been made. The claimant did that. He answered the allegation that he had covered the camera and he denied it, and the Tribunal finds that there was no evidence to substantiate that allegation. Furthermore, the claimant should be told in a letter of dismissal the reasons for dismissal, and the Tribunal again finds that the respondent complied with that obligation but the failure on the part of the respondent is to have had any evidence to substantiate that allegation of conduct. It failed to carry out any reasonable or proper investigation into that specific allegation, and at the conclusion of the disciplinary hearing had no

evidence to substantiate the allegation for which the claimant was dismissed. The dismissal of the claimant was therefore unfair on the basis that the respondent failed to have any proper or reasonable grounds for concluding that the claimant was responsible for covering the camera, and they failed to follow the reasonable procedure of a reasonable employer. There was no real investigation at all into that specific allegation, and the claimant was never presented with any evidence of any such investigation or any evidence to suggest that he was guilty of responsible for the act of misconduct for which he was dismissed, namely covering the camera with a glove.

13. Having found that the claimant was unfairly dismissed, the Tribunal then turned to consider two issues which it had alerted the parties to prior to receipt of their written submissions, namely potential contributory conduct on the part of the claimant in respect of any possible basic or compensatory award for unfair dismissal, and the application of the **Polkey** principles. The claimant confirmed very clearly indeed that he had researched and was aware of what was meant by the "**Polkey** principles" and declined any invitation from the Tribunal to explain those to him prior to both parties being given the opportunity to submit written representations before the Tribunal sat to consider this judgment as a Reserved Judgment on 13 December.

14. The Tribunal reminded itself that the principles for deductions from a basic and compensatory award are expressed differently in the relevant statute. The principles relating to deduction from a basic award are set out at section 122(2). That section reads:

> "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."

15. So far as any reduction for contributory conduct in connection with a compensatory award is concerned, that is covered by section 123(6), and that reads:

> "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."

16. The difference in the two sections is that the conduct in connection with any potential reduction to a compensatory award has to be in connection with conduct which "to any extent caused or contributed to" the dismissal. By contrast, that limitation is not placed on contributory conduct deductions relevant to the basic award.

17. The claimant had submitted a Schedule of Loss. The effective date of termination of his employment was 4 May 2018. He was 31 years of age as at that date and he had 11 complete years of service. At the time of his dismissal the maximum value of a week's pay was £508 and he therefore invited the Tribunal to make a basic award in the sum of £5,588.

18. The respondent invited the Tribunal to make a deduction of 100% against the claimant relating to the conduct of the claimant. The conduct of the claimant related to him driving the vehicle in question for 18½ hours on Friday 13 and Tuesday 17 April 2018 whilst the inboard camera was obscured completely by a glove. The claimant had accepted that he was aware that the glove was in place, and the Tribunal was invited by the respondent to acknowledge that it was "common sense" that any driver seeing that glove in that position would know that it prevented the camera from carrying out the purpose for which it had been installed, and that either the glove should be removed (which the respondent said was obvious common sense) or in the event of any uncertainty on the part of the driver then a request should be made via the mobile telephone in the cab as to what steps should be taken and at the very least the fact should be reported to the Transport management. Instead the claimant had taken no steps to remove the glove, even though he knew it was in place, for either all or the majority of those 18½ working hours over two days. Furthermore, the claimant had not made any report about it being in place when he returned to the depot at the end of his working day on 13 April, and furthermore had made no steps to then ask for guidance from the Transport Department when he got back into the vehicle on the morning of 17 April and then drove the vehicle for over ten hours with the glove in place throughout 17 April. The glove only came to the attention of the respondent when it was noted by Mr Holt.

19. The Tribunal reminded itself that in order to make a reduction that the conduct should be "culpable or blameworthy". It was for the Tribunal to identify the conduct which is said to give rise to possible contributory fault, then decide whether that conduct is culpable or blameworthy, and then decide whether it is just and equitable to reduce the amount of the basic award, and if so to what extent.

20. The Tribunal was satisfied that the conduct which it has just described above on the part of the claimant in connection with driving whilst the camera lens was concealed and failing to do anything about it on either 13 or 17 April was the conduct which it should consider. The Tribunal therefore considered whether that conduct, as identified, was culpable or blameworthy, and in the view of the Tribunal it was both culpable and blameworthy. The Tribunal accepts the representations of the respondent when they say that it was simple common sense that having understood the reasons for the cameras being installed that to then drive an HGV out on the roads for over 18 hours with the camera being deliberately obscured was real, obvious and culpable and blameworthy conduct.

21. The Tribunal then had to decide whether it was just and equitable to reduce the amount and if so by what percentage. The Tribunal considered that it was indeed just and equitable for the basic award to be reduced on the basis of the extent of the conduct and the fact that the claimant had provided no satisfactory explanation for driving the vehicle in that way. The only explanation which the claimant had offered was that he had not been trained about how to carry out checks on the system, and that there was nowhere in the company's paperwork for a defect with the camera system to be recorded. The Tribunal rejects as being in any way reasonable either of those explanations. If the claimant was in any way confused about what to do then he had available to him at all times the opportunity to ask members of the management of the respondent company. He even failed to report the existence of the glove when he returned to the depot on 13 April, and then when he came to take the vehicle out

again on 17 April and notice that the glove was still in place he did absolutely nothing about it then either and continued to drive the vehicle throughout that day. He then failed to report the existence of the glove when he returned to the depot on 17 April.

22. The Tribunal does not accept that any driver would need to be instructed that to obscure the camera in such an obvious way required instruction from anyone. It was clear and obvious that the glove should have been removed, and equally clear and obvious, in the opinion of the Tribunal, that the existence of the glove should have been reported by the claimant to the management, and that should have been reported to them during 13 April at the very latest. The subsequent conduct of the claimant then was both culpable and blameworthy.

23. However, the Tribunal then considered what deduction was just and equitable. It was equally culpable and blameworthy on the part of the respondent to have failed to conduct a disciplinary process which had in clear and obvious terms outlined to the claimant that the respondent also had in mind, as well as what they stated was the reason for dismissal, the fact that the claimant had behaved in the way described above by driving with the camera lens concealed and at the same time failing to do anything about it for two days. Mr Raby had failed to take any reasonable notice of what the claimant had said in his appeal when, in the opinion of the Tribunal, it was clear and obvious to any reasonable person conducting an appeal hearing that there was obvious confusion and misunderstanding on the part of the claimant, which Mr Raby did absolutely nothing whatsoever to clarify. The claimant had therefore been put through a disciplinary and appeal process which had clearly caused him real and obvious confusion and uncertainty.

24. It is a central principle of any disciplinary process, particularly one which might lead to the dismissal of an employee who has worked for an employer for nearly 12 years, that the reason for the disciplinary process is clear and obvious. The Tribunal has already found that that reason was clear and obvious. If there was confusion and inaccuracy as suggested by the Respondent to the Tribunal no attempts were made whatsoever to clarify that to the Claimant. The obvious opportunity for doing that fell on the shoulders of Mr Raby. He ought to have recognised the real and obvious confusion on the part of the claimant, and he should have taken steps to clarify it and, if necessary, re-hear the disciplinary meeting and re-visit the disciplinary reasoning. He could have either done that himself by way of complete re-hearing or alternatively he could have required a fresh disciplinary hearing to be held once the issues which the respondent sought to rely upon, had been clearly and obviously set out and explained to the claimant. No such steps were taken. In the opinion of the Tribunal, no employee should be put through a process of such real and obvious confusion in circumstances where their employment is at risk andwhere they are being accused of gross misconduct.The Code of Practice makes that clear, as does a very long line of case law.

25. The conclusion of the Tribunal was that there was real and obvious, culpable and blameworthy conduct on both the part of the claimant and on the part of Mr Stewart, but particularly on the part of Mr Raby. In those circumstances the Tribunal considers that it is just and equitable to reflect the conduct of the claimant and the conduct of the respondent by reducing the basic award of the claimant by 50%. It is the decision of the Tribunal that such a reduction is just and equitable after considering

all the relevant evidence and taking into account the relevant legal principles. The respondent is therefore ordered to pay the claimant a basic award of £2,779.

26. The Tribunal then went on to consider whether a compensatory award should be made to the claimant, and if so in what amount. The claimant again had submitted calculations by way of a Schedule of Loss. It was pointed out to the claimant that he was entitled to claim direct loss of earnings and that he was entitled to claim loss of statutory rights, and indeed relatively small amounts of ongoing loss of earnings bearing in mind that the claimant had successfully mitigated his losses. The claimant, however, asked the Tribunal to award him payment in lieu of notice in the sum of £6,333 representing 11 weeks' loss of earnings, but the Tribunal pointed out that the claimant was not entitled to be awarded that sum bearing in mind that very quickly he had successfully mitigated his losses by finding suitable alternative employment. The Tribunal explained that it did not consider that it was just or equitable to award that sum as a stand alone sum. The Tribunal indicated that it would consider the past and future loss of earnings of the claimant by reference to his earnings in his new job. The Tribunal also confirmed that it would be appropriate to consider an award for loss of statutory rights.

27. Continuing it's deliberations in respect of contributory conduct, the Tribunal considered whether the conduct of the claimant which it has identified above as being culpable and blameworthy was conduct which caused or contributed to the dismissal of the claimant. The Tribunal was satisfied that it did not cause the dismissal of the claimant, but it was satisfied that it nevertheless contributed to the dismissal of the claimant. Section 98 of the Employment Rights Act 1996 reminds the Tribunal that they must identify the reason, and if more than one the principal reason for dismissal. Whilst that is directed towards the different reasons for dismissal set out in section 98 the Tribunal also found this to be of use for guidance in this particular case. The Tribunal was satisfied, for the reasons which it has expressed, that the principal and central reason for the dismissal of the claimant was the allegation that he had covered up the camera with the glove. However, there is clear evidence to indicate that there were other concerns about the conduct of the claimant relating to driving with the camera obscured and failing to report it, and failing to do anything to remove the glove. The Tribunal believes and finds that this conduct on the part of the claimant contributed to his dismissal, but it did not cause his dismissal. The statutory wording is "caused or contributed". These are therefore to be considered in the alternative.

28. It would be very unusual for there to be a different percentage deduction for contributory conduct in a decision of the Employment Tribunal by reference to a basic award and a compensatory award. It is, however, permitted that there should be such differences. In these circumstances, however, the Tribunal does not believe that there is any reason to differentiate between the deduction for contributory fault in respect of the basic award by comparison to that of the compensatory award, and the decision of the Tribunal therefore is that the compensatory award of the claimant would be reduced by the same percentage, namely 50%, for reasons expressed above. The Tribunal believes that identical reasoning applies to the basic and compensatory awards.

29. The Tribunal then went on to consider the **Polkey** principles. The Tribunal has already highlighted in its reasoning how the procedures followed by the respondent

company were grossly inadequate and led to real, obvious and understandable confusion on the part of the claimant. Whilst the Tribunal has made it clear what its findings are in respect of the principal grounds for finding misconduct/gross misconduct on the part of the claimant, it would have been open to the respondent, particularly Mr Raby, to have identified the obvious confusion which had been caused and to have then restarted the disciplinary process by sending out letters identifying that the conduct in question had nothing to do with actually covering up the camera but was everything to do with driving the vehicle for approximately 18½ hours with the camera concealed and doing absolutely nothing about it, something which the Tribunal found was conduct which offended common sense. The appropriate step, in the opinion of the Tribunal, would have been for Mr Raby to either carry out a complete re-hearing of the while disciplinary process which took place from the moment that the claimant was suspended, and either do that himself by adjourning the appeal hearing and explaining to the claimant that that was what he was going to do, or alternatively cancelling the dismissal and restarting the disciplinary process again by nominating a different person to carry out a disciplinary hearing with the claimant in place of Mr Stewart. The allegations then against the claimant would have been that he had driven the vehicle for two days with the camera obscured, and that he had done absolutely nothing about it, including failure to remove the glove from camera and failure to report it in any way whatsoever to any member of the Transport Management of the respondent company. If that had clearly been expressed to be the acts of misconduct, and if those had been the acts of misconduct which had been considered during the course of a fair and reasonable disciplinary hearing and disciplinary process, then the very clear view of the Tribunal is that the claimant would have been dismissed for gross misconduct.

30. The explanations offered by the claimant were, in the opinion of the Tribunal, completely inadequate. The driver of an HGV is very well aware that when he takes the vehicle out on the road that it is his responsibility. The driver of an HGV does not, in the opinion of the Tribunal, need a checklist to enable him to know that driving a vehicle with the camera obscured is a very serious matter indeed. It was absolutely no defence for the claimant to say that he had not been trained what to do, or that there was no part on any form which he could complete. All that the claimant needed to do was telephone the depot and ask for advice. Alternatively, he could have written somewhere on the defect sheet about what he had seen. He could and should have reported what had happened when he got back to the depot on 13 April, but astonishingly he then got in the vehicle the following Tuesday and then drove the vehicle for over ten hours with the glove still in place without again saying anything about it to anybody. The Tribunal agrees with the respondent that to behave in that way offends common sense. The Tribunal does not believe that anybody with the responsibilities of an HGV driver needed to be told anything about it being wrong to cover the camera with a glove, and neither did the claimant need to be told anything about what to do with it. The obvious thing to do was to remove the glove, and if there was any uncertainty then the equally obvious thing to do was to contact the Transport Depot, point out what he had observed and then ask what to do about it. There is no doubt whatsoever in the mind of the Tribunal that the claimant would then have been told to remove the glove, to retain it as evidence and then to carry on with his responsibilities.

31. The claimant was asked during the course of his evidence what difference it would have made if he had been aware from the outset that that was the central allegation of misconduct which was being made against him and what, if anything, he would have done or said differently in a disciplinary hearing which was centred on that misconduct. In his written representations the claimant addressed that point. The claimant said that he would have pointed out that there was no evidence that he had received the memos and that in those circumstances the employer should have recognised that it was reasonable for him to do nothing about it without having received specific instructions that he was expected to carry out checks on the camera system as part of his normal duties. The claimant in his written representations, however, accepted that he regrets not having" thought this through" and he says that if he had received the memos that he would have spent some time thinking about it and would have done things differently. The Tribunal does not accept that the claimant needed any training or any memos to understand that covering a camera lens with a glove was obviously wrong and obviously required the claimant to do something about it immediately by either removing the glove or contracting the Transport Depot for advice.

32. The claimant also indicated in his written representations that he would have asked the company to take into account the fact that he had been working for them for almost 12 years and that they had been "mostly" happy with his performance. There was no evidence to indicate that the respondent had not taken that into account, but on the other side of the scales the respondent would have been entitled to weigh in the balance the significant misconduct on the part of the claimant, particularly the fact that he had driven the vehicle not once but twice without reporting anything to anybody. The Tribunal considered that to have failed to report the matter when he came back to the depot on 13 April and then to have taken the vehicle out in exactly the same circumstances without saying anything to anybody, either at the beginning or end of the day on 17 April, was a real and obvious act of gross misconduct. Even giving the claimant credit for his years of service, the Tribunal finds that the reasonable decision of a reasonable employer, having followed a reasonable process and having followed the principles of the relevant Code of Practice, could and would have dismissed the claimant fairly and reasonably for gross misconduct without any payment of notice. The Tribunal believes that that would have been the real and obvious conclusion and decision of any reasonable employer who had correctly identified the conduct of the claimant which was under scrutiny and who had then followed a process which had concentrated only on that conduct and not on other aspects of the lorry being driven with the camera lens obscured.

33. The opinion of the Tribunal therefore is that the appropriate percentage of deduction to reflect the percentage chance that the claimant would have been dismissed if the correct misconduct had been identified and if the correct and fair procedures had been followed is 100%, because the Tribunal is 100% satisfied that if the employer had behaved in that way that it would have been the reasonable response of a reasonable employer to dismiss the claimant for gross misconduct.

34. In all the circumstances, therefore, the respondent is not ordered to pay any compensatory award to the claimant at all as a result of the combined decisions relating to contributory conduct and the principles of **Polkey**.

35. In summary, therefore, the claimant was unfairly dismissed and the respondent is ordered to pay the claimant a basic award of £2,779.

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Employment Judge Whittaker

Date____12th January 2019

RESERVED JUDGMENT AND REASONS
SENT TO THE PARTIES ON

22nd January 2019

FOR THE TRIBUNAL OFFICE

NOTICE

THE EMPLOYMENT TRIBUNALS (INTEREST) ORDER 1990

Tribunal case number(s): **2413742/2018**

Name of case(s): **Mr P Pronzynski** v **3663 Transport Limited**

The Employment Tribunals (Interest) Order 1990 provides that sums of money payable as a result of a judgment of an Employment Tribunal (excluding sums representing costs or expenses), shall carry interest where the full amount is not paid within 14 days after the day that the document containing the tribunal's written judgment is recorded as having been sent to parties. That day is known as "*the relevant decision day*". The date from which interest starts to accrue is called "*the calculation day*" and is the day immediately following the relevant decision day.

The rate of interest payable is that specified in section 17 of the Judgments Act 1838 on the relevant decision day. This is known as "the stipulated rate of interest" and the rate applicable in your case is set out below.

The following information in respect of this case is provided by the Secretary of the Tribunals in accordance with the requirements of Article 12 of the Order:-

"the relevant decision day" is: **22nd January 2019**

"the calculation day" is: **23rd January 2019**

"the stipulated rate of interest" is: **8%**

MR J HANSON
For the Employment Tribunal Office