Case Number 1300522/2021
Type V

EMPLOYMENT TRIBUNALS

BETWEEN

Claimant	**AND**	**Respondent**
Mr M Hughes		**(1) Merlin Attractions Operations Limited** **(2) Merlin Entertainments Limited**

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

HELD AT Birmingham **ON** 13 & 14 September 2021

EMPLOYMENT JUDGE GASKELL

Representation
For the Claimant: **In Person**
For the Respondent: **Mr T Sadiq (Counsel)**

JUDGMENT

The Judgement of the tribunal is that:

1 The claimant was fairly dismissed by the 1st respondent. His claim for unfair dismissal is not well-founded and is dismissed.
2 The claim against the 2nd respondent is dismissed upon being withdrawn by the claimant.

REASONS

Introduction

1 The claimant in this case is Mr Martin Hughes who was employed by the 1st respondent, Merlin Attractions Operations Limited, from 9 June 2018 until 11 September 2020 when he was dismissed the reason given by the 1st respondent at the time of the claimant's dismissal was gross misconduct. The 2nd respondent, Merlin Entertainments Limited was named in the claim form because of uncertainty as to the correct identity of the claimant's employer – now established to be the 1st respondent. The claim against the 2nd respondent has therefore been dismissed upon being withdrawn by the claimant. Hereafter in these written reasons I refer to the 1st respondent simply as the respondent.

2 By a claim form presented to the tribunal 12 February 2021, the claimant claims that he was unfairly dismissed. In response to the claim, the respondent

maintains that the claimant was dismissed for a reason relating to his conduct and that the dismissal was fair.

3 The hearing was conducted over two days using CVP. All parties, witnesses and representatives were able to join the conference electronically and all had access to paper or electronic copies of the hearing bundle and witness statements. There were no technical difficulties. At the conclusion of the hearing, I delivered an oral judgement. These written reasons have been prepared in response to a request from the respondent.

The Evidence

4 I have evidence from three live witnesses in addition to which there is fourth witness who made a witness statement but was unable to attend. The witnesses for the respondent were Mr David Harris - the claimant's line manager at the time of his dismissal and who conducted an investigation into his conduct; and Mr Tom Pilling the Security and Medical Manager who conducted a disciplinary hearing and decided to dismiss the claimant. The witness statement to which I have referred was from Miss Marie Kennaway who heard the claimant's appeal. The claimant gave evidence on his own account.

5 In addition to this, I was provided with an agreed bundle of documents running to in excess of 400 pages. There was some CCTV footage taken from body cameras worn by the claimant and from a dash-cam in a vehicle driven by the claimant. It has been unnecessary for me to view the footage as there is no dispute between the parties as to what it shows and a number of stills from the footage are contained in the bundle.

6 I found the evidence of Mr Harris and Mr Pilling to be clear consistent and compelling. The evidence they gave was consistent with each other; with other evidence gathered during the course of Mr Harris's investigation; and with contemporaneous documents. Although Miss Kennaway did not give oral evidence and was not therefore subject to cross-examination, the reality is that everything which she says in evidence can be corroborated from other sources including Mr Harris, Mr Pilling, the CCTV footage, the contemporaneous documents and, most importantly, the claimant's own evidence. Accordingly, I accept Miss Kennaway's evidence as reliable.

7 The claimant was a less satisfactory witness. He was not a dishonest witness, but tended to avoid the issues, concentrating on peripheral matters, rather than accepting the consequences of his actions. Examples of his inconsistencies are as follows; these are merely examples:

(a) Firstly, when he performed the manoeuvre of reversing his vehicle, he did not say at the time that he was simply turning round. He gave other explanations including wanting to procure a vantage point whereby he could scrutinise the queue of traffic seeking to emerge on the outgoing lane. But in evidence given in the investigation and the disciplinary hearing he talks about being stationary for longer than that this. Even if he had simply been turning round, the claimant gave no explanation as to what he intended to do having turned round and agreed that he could simply have parked his vehicle in a safe place and awaited further instructions.

(b) Secondly, the claimant insists that he does not actually recall the collision with the Volkswagen Golf. I find this to be wholly inconsistent with the evidence: he remembers that his heart was racing and that he was feeling physically sick. During the investigation and disciplinary process, he accepted that the collision had been a violent impact and that the approaching vehicle was possibly travelling as fast as 50mph. His explanation now is that he knows these facts from having viewed the footage. But the footage would not tell him that his heart was racing or that he was feeling physically sick.

(c) Thirdly, the suggestion from the claimant that he was somehow put in this position by following Mr Handley's instructions. Mr Handley's instructions had been that he should proceed to the gate and give support. It is absurd to suggest that Mr Handley's instructions included positioning his vehicle such that the collision took place, still less giving chase to the escaping vehicle onto the public highway.

8 In the light of this inconsistent approach on the claimant's part, where there is a conflict between the evidence given by Mr Harris or Mr Pilling and that given by the claimant, I prefer the evidence of Mr Harris and Mr Pilling. But the reality is, that little by way of significant contradiction emerges.

The Facts

9 the respondent is the proprietor of the well-known leisure resort Alton Towers. The claimant was employed at Alton Towers as a Security Officer from 2018 until his dismissal in 2020. The claimant had a good disciplinary record which went beyond the fact that he had not previously been guilty of disciplinary misconduct, he was held out as a role model and used as a mentor for less experienced staff.

10 On 16 August 2020, an incident occurred whereby individuals were suspected of theft from one of the respondent's retail outlets. The claimant was called to give assistant at the incident. In the Plaza, where the incident occurred there is no criticism of the claimant’s conduct. The suspected offenders got into a Volkswagen Golf motor vehicle and departed the scene clearly intending to leave

the site. Mr David Handley, the manager in charge of the incident, gave instructions to security personnel including the claimant to attend the Farley Gate. Mr Handley had blocked off the exit lanes at the gate hoping to prevent the suspect vehicle from leaving. It was believed that the vehicle was probably in the queue of traffic waiting to exit using the outgoing lane. The claimant attended the gate in his vehicle; to bypass the queue of outgoing traffic he drove along the incoming lane; and then, at the head of the queue, he positioned his vehicle across the incoming lane. The suspect vehicle, determined to leave the site, proceeded along the incoming lane at speed and collided with the claimant's vehicle before exiting the site onto the public highway. The claimant's vehicle was badly damaged as a result of the collision and clearly should not have been driven on the public highway. But, without checking the state of his vehicle, the claimant went in pursuit of the Volkswagen driving an unsafe vehicle; and the respondents believe that he was driving without using his seatbelt.

11 The following day, having given an initial account to Mr Harris, the claimant was suspended from duty pending an investigation. Mr Harris interviewed all relevant witnesses, including two interviews with the claimant. At the conclusion of his investigation, Mr Harris recommended that there was a case for disciplinary action. The claimant was first told of the decision for disciplinary action in a letter dated 25 August 2020. On 3 September 2020, the disciplinary charge was refined and broken down into four separate offences: dangerous and unsafe behaviour whilst driving; the use of emergency lighting on the security vehicle on a public highway; the use of a mobile phone whilst driving a company vehicle on a public highway; and not wearing a seatbelt whilst driving the company vehicle both on the resort and on the public highway. In my judgement, there was no unfairness in developing the offences in this way as each and every one of them could have been encompassed in the very first charge of inappropriate and unsafe behaviour.

12 The disciplinary hearing went ahead on the 11 September 2020, the charges against the claimant were upheld and he was summarily dismissed. The outcome of the hearing was confirmed to the claimant in a letter dated 14 September 2020. The claimant was advised of his right to appeal. He pursued an appeal which was heard by Miss Kennaway on 29 September 2020. Miss Kennaway concluded that the disciplinary charge of using emergency lighting whilst on the public road was not in fact made out. But she upheld the remaining charges and concluded that the sanction of summary dismissal was appropriate. The outcome was communicated to the claimant in a letter dated 12 October 2020.

13 The following fact are relevant to the disciplinary process: -

(a) On 17 August 2020, the claimant completed a medical information form with Ms Linda Baines of the Alton Towers Medical Centre. On the 1st page of the form, it is clearly indicated that the claimant informed Ms Baines that no seatbelt was worn during the incident. The 2nd page of the form shows the claimant's signature. Despite both pages of the form being contained within the trial bundle, it was not until the claimant was cross-examining Mr Pilling that the claimant suggested firstly that only the first page of the document had been disclosed at the disciplinary hearing, and secondly that the signature was not his. In any event, the entry regarding the seatbelt was clearly recorded on the first page of the document and its accuracy was not challenged before Mr Pilling or Miss Kennaway.

(b) At the appeal hearing, the claimant stated that he could not remember whether he was wearing a seatbelt.

(c) The vehicle used by the claimant was subsequently inspected by a vehicle technician, Mr Dan Wickers, and found to be unroadworthy after the incident. It is the claimant's case that this document was not provided to him in advance of the disciplinary hearing. However, the contents of the document were discussed with him, clearly with the document in front of him, during the investigatory meeting with Mr Harris on 24 August 2020.

(d) During the investigatory meeting on 24 August 2020, the claimant confirmed that, if there had been such an impact on his own car, he would not have driven off without checking. He also confirmed that he was aware that there were children travelling in the suspect vehicle.

(e) The claimant admitted that CCTV footage clearly established that he was driving with his left hand on the steering wheel whilst holding his mobile phone in his right. He denied that he had made a call; and also denied that he had sent a text. He admitted that whilst driving he had received a text - and could offer no explanation for holding the phone other than that he must have been reading the text. During the hearing before me, the claimant was at pains to point out that at the time of the incident the state of the relevant legislation was that it was only a criminal offence to use a mobile phone to make or receive an actual call (the law has since been changed).

(f) The claimant produced to the disciplinary hearing a copy of an A&E discharge letter indicating the possibility that he had suffered mild concussion as a result of the collision. At the appeal, the claimant relied on generic information downloaded from the Internet relating to the possible effects of concussion which the claimant claims may have accounted for his unacceptable behaviour immediately following the collision.

The Law

14 **Employment Rights Act 1996 (ERA)**

Section 94: The right not to be unfairly dismissed

(1) An employee has the right not to be unfairly dismissed by his employer.

Section 98: General Fairness

(1) In determining for the purposes of this Part whether the dismissal of an employee is fair or unfair, it is for the employer to show—

(a) the reason (or, if more than one, the principal reason) for the dismissal, and
(b) that it is either a reason falling within subsection (2) or some other substantial reason of a kind such as to justify the dismissal of an employee holding the position which the employee held.

(2) A reason falls within this subsection if it—

(a) relates to the capability or qualifications of the employee for performing work of the kind which he was employed by the employer to do,
(b) relates to the conduct of the employee,
(c) is that the employee was redundant, or
(d) is that the employee could not continue to work in the position which he held without contravention (either on his part or on that of his employer) of a duty or restriction imposed by or under an enactment.

(4) ……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.

15 **Cases on Unfair dismissal**

British Homes Stores v Burchell **[1978] IRLR 379 (EAT)**

In a case where an employee is dismissed because the employer suspects or believes that he or she has committed an act of misconduct, in determining whether that dismissal is unfair an employment tribunal has to decide whether the employer who discharged the employee on the ground of the misconduct in question entertained a reasonable suspicion amounting to a belief in the guilt of the employee of that misconduct at that time. This involves three elements. First, there must be established by the employer the fact of that belief. Second, it must be shown that the employer had in his mind reasonable grounds upon which to sustain that belief. And third, the employer at the stage at which he formed that belief on those grounds, must have carried out as much investigation into the matter as was reasonable in all the circumstances of the case.

Iceland Frozen Foods v Jones **[1982] IRLR 439 (EAT)**
Post Office –v- Foley & HSBC Bank plc –v- Madden **[2000] IRLR 827 (CA)**

It is not for the tribunal to substitute its own view but to consider whether the respondent's decision came within a range of reasonable responses by a reasonable employer acting reasonably.

Sainsbury's Supermarkets Limited –v- Hitt **[2003] IRLR 23 (CA)**

The objective standards of the reasonable employer must be applied to all aspects of the question whether an employee was fairly and reasonably dismissed.

16 **Cases on Consistency**

The Post Office –v- Fennell **[1981] IRLR 221 (CA)**

The word *equity* in the phrase *having regard to equity and the substantial merits of the case* as found in Section 98(4) ERA suggests that employees who behave in much the same way, should have meted out to them much the same punishment. An Employment Tribunal is entitled to say that where that is not done, and that one man is penalised more heavily than others who have committed similar offences in the past. The employer has not acted reasonably in treating the offence as sufficient reason for dismissal.

Hadjioannou –v- Coral Casinos Limited **[1981] IRLR 352 (EAT)**

The emphasis in Section 98(4) ERA is on the particular circumstances of the individual employee's case. An argument by a dismissed employee that the treatment he received was inconsistent with that meted out in other incidents is relevant in determining the fairness of the dismissal in only three sets of circumstances. First, it may be relevant if there is evidence that employees have been led by an employer to believe that certain categories of conduct will be either overlooked, or at least will not be dealt with by the sanction of dismissal. Second, there may be cases where evidence in relation to other cases supports an inference that the purported reason stated by the employer is not the real or genuine reason for dismissal. Third, evidence as to decisions made by an employer in truly parallel circumstances may be sufficient to support an argument, in a particular case, that it was not reasonable on the part of the employer to dismiss the particular employee and that some lesser penalty would have been appropriate in the circumstances. Employment Tribunals should scrutinise arguments based on disparity with particular care and there will not be many cases in which the evidence supports the proposition that there are other cases which are truly similar or sufficiently similar to afford an adequate basis for argument. It is of the highest importance that flexibility should be retained and employers and tribunals should not be encouraged to think that a tariff approach to industrial misconduct is appropriate.

Cain –v- Leeds Western Health Authority **[1990] IRLR 168 (EAT)**

Consistency must be consistency as between all employees of the employer. It is no answer to a complaint of inconsistency to say that different cases were considered by different members of management.

Procter –v- British Gypsum Limited **[1992] IRLR 7 (EAT)**

The requirement that employers must act consistently between all employees means that, before reaching a decision to dismiss, an employer should consider truly comparable cases of which he knew or ought reasonably to have known. The overriding principle must be, however, that each case must be considered on its own facts and with freedom to consider mitigating aspects.

Paul –v- East Surrey District Healthy Authority **[1995] IRLR 305 (CA)**

Where arguments based on disparity are raised, Employment Tribunals should heed the warning in ***Hadjioannou*** and scrutinise them with particular care. Ultimately, the question for the employer is whether, in that particular case, dismissal is a reasonable response to the misconduct. If the employer has an established policy applied for such misconduct it would not be fair to change the

policy without warning. If the employer has no established policy but has on other occasions dealt differently with misconduct properly regarded as similar, fairness demands that he should consider whether, in all the circumstances, including the degree of misconduct proved, more serious disciplinary action is justified. However, an employer is entitled to take into account not only the nature of conduct and the surrounding facts but also any mitigating circumstances personal to the employee concerned.

General Mills (Berwick) Limited –v- Glowacki **UKEAT/0139/11**

The question of whether or not any circumstances prevailing in relation to a particular case justify a departure from the employer's practice in other similar cases is a decision for the employer to be to make and should be judged by reference to the familiar *range of reasonable responses* test.

17 **The ACAS Code**

I considered section 207A of the Trade Union and Labour Relations (Consolidation) Act 1992, and in particular section 207A(2), and the ACAS Code of Practice 1 on Disciplinary and Grievance Procedures 2015 ("the ACAS Code").

The Claimant's case

18 The claimant's case is that the dismissal was unfair on a number of grounds:

(a) He does not accept that it has been established by evidence that he failed to wear his seatbelt.
(b) He claims that he was unaware of the dangerous condition of the vehicle and therefore should not be held accountable for having driven it in such condition.
(c) He says that the investigation against him was unfair principally this being on the basis of previous disagreements between him and Mr Harris.
(d) He says that it was unfair that the vehicle inspector's report was not disclosed to him that during the course of the internal process.
(e) The claimant also believes that the dismissal was unfair because of a failure to take account of mitigating circumstances - including the potential for injuries suffered by him on the day of the incident to have accounted for his conduct.
(f) It is the claimant's case that he was treated inconsistently as compared to other employees in previous incidents - namely RJ and NJ.

The Respondent's Case

19 The respondent's case is that the case is extremely simple. The claimant behaved in an extreme and disproportionate manner. It was dangerous; the claimant exposed both himself and other people to an unnecessary risk of injury; and risked substantial reputational damage to the respondent by driving illegally in the sense that the vehicle was unfit to drive, he did not have his seatbelt on, and he was using his mobile phone.

Discission & Conclusions

The Reason for the Dismissal

20 I have no doubt that the sole reason for the claimant's dismissal related to the claimant's conduct. Namely that he had driven dangerously in an unsafe vehicle; using a mobile phone whilst driving; and failing to wear his seatbelt. All whilst driving on the public highway. Therefore, I find that this is potentially a fair dismissal pursuant to Section 98(1) and (2) ERA.

Genuine Belief

21 There is no doubt that Mr Pilling and subsequently Miss Kennaway genuinely believed that the claimant had committed those acts of misconduct and indeed it is not suggested by the claimant that there was any other reason for his dismissal.

Reasonable Belief

22 There is also no doubt in my judgement that the respondents had a perfectly reasonable basis for reaching the conclusions they did. Most of it is clear from the CCTV footage which is not disputed. Even now, it is not in dispute that the vehicle was too badly damaged to be safely driven on the road. It is only latterly that the claimant has suggested that he wasn't aware of that. When he was under investigation, he described the impact of the collision with the Volkswagen Golf as being a violent collision; of being on the basis of the golf approaching at 50 mph; that the vehicle was badly damaged and should not be driven; he drove in pursuit of the Volkswagen without even checking. The CCTV shows the claimant at least holding his mobile phone whilst steering single-handedly. The claimant himself informed Ms Baines that he was not wearing a seatbelt, and this was the belief of the respondents officers based on CCTV footage.

Adequate Investigation

23 So far as the investigation is concerned the claimant repeatedly claims that the investigation was unfair because Mr Harris was the wrong person. He didn't make that point at the time: he didn't suggest this either to Mr Harrison or to Mr Pilling. I repeatedly asked the claimant to explain to me any examples of unfairness in the investigation and what did Mr Harris do or failed to do because of potential bias against the claimant. The claimant had no specific answers at all: he made generalised allegations such as "*his line of questioning*". I have read the investigation notes and I can find nothing objectionable but, even if there were some inappropriate questions, the claimant had every opportunity at the disciplinary meeting to point those out - he had union representation with him, but nothing was pointed out. At the end of the disciplinary and the appeal meetings the claimant and his union representative commented that the procedure adopted had been fair and that he had been listened to.

24 In my judgement, there was a genuine belief in the claimant's misconduct; reached on reasonable grounds; which emerged from a thorough fair and impartial investigation.

25 Regarding the claimant's specific points on unfairness my findings are as follows: -

(a) There was clear and sufficient evidence that the claimant was not wearing his seatbelt. This is what he told Ms Baines. He did not suggest otherwise at any stage during the internal process; and, at the appeal, he said he could not remember. I am satisfied that Mr Harris and Mr Pilling believed that, in addition, this was established from the CCTV footage.
(b) The evidence available to the respondent clearly suggested that the claimant was aware that the vehicle had been involved in a significant collision. If he was not actually aware of the damage; at very least, he acknowledged, that he should have checked for damage before driving the vehicle onto the highway.
(c) There is no basis articulated by the claimant, or evident to me on the evidence, to conclude that Mr Harris was biased against the claimant.
(d) I am satisfied that Mr Pilling and Miss Kennaway considered the medical evidence provided by the claimant but did not find it to be relevant. I agree with their conclusions. At most, it raises the possibility that the claimant suffered mild concussion. The download provided by the claimant simply shows that, in some cases, there is evidence of uncharacteristic behaviour in cases of concussion. There was no evidence specific to the claimant to suggest that this was in play on 16 August 2020. And, in my judgement, there was no proper basis upon which the respondents needed to investigate further.

(f) Miss Kennaway investigated the incidents involving RJ and NJ. They were found to be quite dissimilar not least because all of the driving took place on the respondent's private premises and not on the public highway. The claimant did not challenge Miss Kennaway's findings as to the facts of those cases. In my judgement, the principles of ***Hadjioannou*** are not engaged at all.

Sanction

26 The claimant accepts that a final written warning would have been a fair outcome. If that would have been a fair outcome, the respondent submits it must follow that the next step above or below that would likely be within the range of what was reasonable. In my judgement, it clearly was within the range of reasonable responses for the claimant to be summarily dismissed. The respondent employed the claimant in a security position where confrontation and stressful situations were likely to arise. Such incidents are what he was employed to deal. The claimant's response on this occasion of driving so dangerously; so unnecessarily; without regard for his own safety or that of other people, clearly and reasonably undermined the respondent's confidence in his ability to do is job in the future.

Procedural Fairness

27 In terms of the procedure as a whole, in my judgement, it was conspicuously fair and followed the ACAS Code. At every stage the claimant was given the opportunity to give his explanations of what happened, and he was represented and his union representative who never made any suggestion of unfairness.

28 Accordingly, I find claimant was fairly dismissed. His claim for unfair dismissal is not well-founded and is therefore dismissed.

Employment Judge Gaskell
8 November 2021