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THE EMPLOYMENT TRIBUNALS

Claimant: **Mr J Czermak**

Respondent: **British Engineering Services Ltd**

Heard at: **East London Hearing Centre**

On: **9 March 2018**

Before: **Employment Judge Allen**

Representation:

Claimant: **B Lewy (counsel)**

Respondent: **N Caiden (counsel)**

JUDGMENT

The judgment of the Tribunal is:

1. The claim of unfair dismissal fails and is dismissed.

2. **The claim of wrongful dismissal fails and is dismissed.**

REASONS

Claims and Issues

1. The Claimant was employed by the Respondent from 31 July 1989 until he was summarily dismissed with effect from 24 July 2017. By Claim Form presented on 20 November 2017, he brought a claim of unfair dismissal against the Respondent.

2. The Claimant had applied to amend his claim by letter dated 21 February 2018 to include a claim for wrongful dismissal and at the outset of the hearing, after hearing submissions from both parties, applying the *Selkent* principles and noting the relevant Presidential Guidance, I permitted that amendment for the following reasons which were given

orally at the time:

a. The Respondent's ET3 Grounds of Resistance at paragraph 2 specifically refer to the Claimant having been summarily dismissed;
b. The Respondent was aware that the Claimant did not have a copy of his original contract of employment (there is a file note to the Claimant from the Respondent in the bundle dated 19 May 2017 responding to his request for a copy of his contract by telling him that the contract isn't in his employee file);
c. The Claimant was acting in person until 13 February 2017. He pleaded the ET1 himself with some assistance from the CAB. Given that he did not have his contract, I accepted that he was unaware that he may have been entitled to notice (which would have been substantial, given that he had been employed for over 2 decades);
d. This is a new type of claim under a different jurisdiction and if presented today, it would be out of time. Those are relevant, although not determinative, considerations. I was not told by the Respondent that the witnesses present today could not give relevant evidence on wrongful dismissal as well as unfair dismissal;
e. The Respondent suggested that they might have made a counterclaim if they had been aware of a wrongful dismissal claim. However the Respondent did not articulate what that counterclaim might have been;
f. The Respondent is not prejudiced if the proposed amendment is allowed. The wrongful dismissal claim is based on the same facts as outlined in the ET1 and will largely refer to the same evidence. I permitted the Respondent to ask additional questions in chief of its witnesses if relevant to this issue.

3. The disputes in the claims were identified at the outset of the hearing as follows:

Unfair dismissal

a. What was the reason for dismissal? (The Respondent says misconduct)

b. Did the Respondent believe that the Claimant was guilty of misconduct?

c. If so, were there reasonable grounds for such a belief

d. When the decision to dismiss was made, had a reasonable investigation taken place?

e. Was dismissal within the band of reasonable sanctions?

f. If the Claimant was unfairly dismissed, what if any reduction to compensation would be appropriate given the principles in *Polkey* and / or conduct / contribution?

Wrongful dismissal

g. Did the Claimant breach his contract of employment in a manner that entitled the Respondent to dismiss him summarily?

4. I indicated at the outset of the hearing that detailed questions of calculation of remedy including mitigation would be dealt with at a subsequent remedy hearing, if the Claimant was successful.

The Hearing

5. I heard evidence from the Claimant and, on behalf of the Respondent, from Nick Owen, Unit Leader, who made the decision to dismiss and Peter Thorpe, Territory Manager who dealt with the appeal.

6. I was directed to specific pages in an agreed bundle of documents.

7. I had the benefit of oral and written submissions from both parties.

Findings of Fact

8. The Claimant (date of birth 25 May 1954) started working at the Respondent on 31 July 1989. At the time of his summary dismissal, he was an engineer surveyor and his job was to inspect lifting machinery around East London and Essex. He managed his own time and had to submit reports on the inspections that had taken place using a tablet computer with a 4G internet connection. He would usually conduct the inspections on Monday to Thursday and file reports on a Friday.

9. On 18 May 2017 his Unit Leader, George Morrow, told him that management wanted to speak to him regarding 'reporting times'. He was invited to a disciplinary meeting on 26 May 2017 by letter dated 19 May 2017 which stated "Following recent discussions during which you have been made aware about concerns relating to your conduct, I am writing to inform you that you are required to attend a disciplinary hearing . . . to discuss several concerns relating to your conduct which has called into question your suitability for the role of Engineer Surveyor . . . . Specifically it is alleged several discrepancies have been identified relating to your whereabouts and reporting times v actual reporting times claimed." The letter went on to warn that dismissal could be an outcome of the meeting and explained to the Claimant that he had the right to be accompanied to the meeting.

10. The letter of 19 May 2017 was accompanied by a 14 page spreadsheet setting out reporting times over a four month period.

11. At the disciplinary meeting on 26 May 2017 the Claimant was questioned about discrepancies between the times that the tablet had logged him as working on each case and the times that he had submitted online. The Claimant explained that he wrote out the reports and then went online and typed them up, which could take up to three hours and that the 4G

signal where he lives is very weak and he had to make repeated attempts to submit reports and sometimes submitted the reports from the client's site if there was a better connection.

12. Steven Haigh, Unit Leader heard the disciplinary and by letter dated 1 June 2017 issued the Claimant with a final written warning live for 12 months and told the Claimant that a Performance Improvement Plan was to be put in place. The letter warned the Claimant that "any further disciplinary acts of any kind within the [12 months] is likely to result in further disciplinary action under the Disciplinary Procedure which could lead to your dismissal." The Claimant was given a right of appeal which he did not exercise.

13. On that same day, Thursday 1 June 2017, the Claimant was visiting a client site to inspect some machinery on a farm. He sprained his left ankle on alighting from a tractor. The claimant informed the Respondent by email that day, blaming stress placed on surveyors by the Respondent. On Friday 2 June 2017, he was due to be writing up reports. The Claimant called his GP to book an appointment. The earliest appointment he was offered was 9 June 2017.

14. On Monday 5 June 2017 the Claimant called the office to say that because of his ankle he was unable to drive long distances or attend site visits.

15. On Friday 9 June 2017 the Claimant visited his GP who issued him with a 28 day medical certificate stating "severe left ankle injury 01/06/17 in course of work".

16. The Claimant said that in light of this injury and advice from his union representative not to appeal, he did not appeal the final written warning.

17. On 15 June 2017 the Claimant attended hospital for an X-Ray. The report notes that "Soft tissue swelling is noted over the mid malleolus, however no bony injuries are seen. A small joint effusion is present." The Claimant says that he did not feel able to return to work at this point.

18. On Monday 19 June 2017, although still not attending work due to his ankle injury, the Claimant went to his golf club (Maylands Golf Club). He says that he was intending to do some putting practice but that he saw two men that he knew from the golf club, Brian Critchell and Mick Savill and that they informed him that there was a minor competition on at the club, the Waterloo Cup, which was being held largely to enable club members the opportunity to keep their golf handicaps active (which requires participation in at least 3 competitions per year).

19. I am not familiar with the rules or culture of the game of golf. The Claimant explained to me that it is normal at his golf club to 'put a card in' meaning that a player will enter a minor competition and enter a made-up score card in order to keep a handicap active, the player having been credited with having played a game, even if they have not in fact played

it. The Claimant said in his witness statement that "it looks dishonest". That is because it is dishonest. The Claimant eventually (somewhat reluctantly) admitted this in oral evidence. However cheating at the rules or regulations of a game (if that is what the Claimant did) is not directly relevant to a person's employment. I noted that there was no burning need for the Claimant to have 'put a card in' at that competition on that date.

20. On 19 June 2017 the Claimant says that he attempted to play in the competition with his friends but at the first hole, he realised that his ankle hurt too much and then he just sat in the golf buggy (which he told me was driven around by one of his friends) and watched his friends play but 'put a card in' at the end of the game. After that date, the Claimant says that he did return to the golf course a few times to practise putting and chipping but did not enter any other competitions. The results of the competition on 19 June 2017 were posted on the Maylands Golf Club website recording that the Claimant was the overall runner up out of 7 participants.

21. On 26 June 2017, a Canada Life report recorded a conversation with the Claimant on 22 June 2017 and suggested that the Respondent consider alternative duties for a period of recuperation.

22. On 7 July 2017 the Claimant submitted a new medical certificate for 30 days which merely stated "Other ankle injury". Having been contacted by Mr Morrow from the Respondent, he agreed to meet on 13 July 2017.

23. At the meeting on 13 July 2017, Mr Morrow asked the Claimant if he could undertake light duties and the Claimant said that this wasn't possible as he had been advised to keep his foot elevated and follow 'RICE' guidelines (rest, ice, compression and elevation). Mr Morrow asked the Claimant if he could undertake home based duties (potentially planning and scheduling) but the Claimant said that this was also not possible as he did not feel that there was any suitable home based work for him to do. The Claimant told me that other surveyors who have recently been off sick were not asked to do light duties. Mr Morrow then asked the Claimant if he had been playing golf and the Claimant said no. This was untrue. The Claimant told me that he was defensive and guarded because of his previous disciplinary – which he had considered unfair; and that he considered that the Respondent was looking for a reason to get rid of him. Mr Morrow then told the Claimant that they had evidence in the form of a scorecard, at which point the Claimant again denied it, then said that it might have been him and then said that he had 'put a card in'. Later that afternoon, Mr Morrow called the Claimant to ask him to attend a disciplinary meeting on Monday 17 July 2017 and a formal invitation letter was then sent stating "We have reason to doubt the integrity of your recent sickness absence from work (01/06/17 to present day). Specifically, evidence has come to light that you have engaged in golfing activities during this time." The invitation letter told the Claimant that an outcome of the hearing could be dismissal and he was advised of his right to be accompanied and he was told that if he failed to

attend the meeting it may go ahead and a decision made in his absence.

24. The meeting was rescheduled at the Claimant's request for 21 July 2017. The Respondent sent to the Claimant a screen shot of a website showing that he had signed up for a golf competition in August. In fact the information on that website was from 2015 and the Respondent had misunderstood the date.

25. The Claimant supplied a supportive handwritten letter from his friends, Brian Critchell and Mick Savill stating that on 19 June 2017, the Claimant had played the first hole only and the "He drove around in a buggie for the next 17 holes" but that they had completed his score card for him anyway.

26. The disciplinary hearing took place on 21 July 2017. The Claimant did not attend. He told me that he felt very stressed and that his psoriatic arthritis was flaring up. His union representative, Douglas Gilligan, attended on his behalf and the Claimant emailed the Respondent at 8am on the morning of the hearing to say that he would not be attending. He did not expressly ask for a postponement but stated "I will attend this meeting when I am mentally and physically fit to." The Respondent's note of the hearing records that Mr Gilligan told the hearing that he had spoken to the Claimant on the telephone and advised him that it was in his best interests to attend and that he could attend by telephone – which the Claimant refused. Mr Gilligan is also reported to have said that the Claimant could not indicate when he would be fit to attend and to have told the Claimant that the company could proceed in his absence.

27. After taking advice from HR and hearing what Mr Gilligan had to say, the Respondent held the meeting in the Claimant's absence. Mr Morrow attended to present the case against the Claimant and the decision maker was Nick Owen, a different unit leader. Mr Morrow went through the questions that he would have asked the Claimant if he had been present and Mr Gilligan did his best to answer them. Mr Gilligan is reported as saying that on 19 June 2017 the Claimant's "intention was to dupe the golf club by submitting a scorecard to keep his handicap" and that it was a "façade to submit a scorecard to keep his handicap". Mr Morrow said that the Respondent intended to contact the golf club to ask for confirmation of the account given by the Claimant's friends. The incorrect website screen shot for the August 2015 competition was discussed and Mr Gilligan having pointed out the error, Mr Morrow agreed that this was not relevant.

28. The Claimant was summarily dismissed by letter dated 24 July 2017 which set out the respondent's reasons for proceeding in the Claimant's absence and stated Mr Owen's conclusions that the Claimant had played in the Waterloo Cup game on 19 June 2017 and that he had initially denied this – his story changing over time. Mr Owen found it implausible that the Claimant only entered the competition to maintain his handicap and that he would have chosen to cheat to such a degree that he came 2nd overall in the competition. Therefore he found that the Claimant had

been dishonest, including dishonest about the extent of his ankle injury. The timing of the injury so soon after the final written warning also aroused suspicions. He cited the Respondent's absence policy which stated "Refrain from undertaking activities when off sick that may delay your recovery or return to work" and he referred to the Claimant having said on 13 July 2017 that he could not do light duties or home duties – but that he still felt able to go to the golf course when off sick on 19 June 2017.

29. Mr Owen concluded that the Claimant was guilty of gross misconduct given the dishonesty about the events of 19 June 2017 and during the attempt to conceal the matter during the disciplinary process. He stated that he considered alternative sanctions but considered that the Claimant's actions had resulted in a complete breakdown of trust and confidence which was particularly important given that his role involved working remotely and with little direct supervision. He went on to state that if he had not summarily dismissed the Claimant, he would have dismissed him (presumably on notice) given the final written warning on his record.

30. The Claimant was offered a right of appeal which he exercised. Mr Thorpe, Territory Manager, conducted the appeal hearing on 3 August 2017. The Claimant attended. The Claimant set out his account of what had happened on 19 June 2017 (as set out to me and summarised above). Mr Thorpe explored the Claimant's activity in putting in a false card after the game. When asked about driving the buggy, the Claimant is recorded as saying initially that he didn't drive the buggy – then when challenged on the basis of the handwritten letter from his friends, he said that "Well I might have drove the buggy for a few holes".

31. In Mr Thorpe's outcome letter dated 8 August 2017 he told the Claimant that he was not upholding the appeal. His reasons were that the Claimant had not sought immediate medical attention (e.g. by going to A&E rather than waiting for a GP appointment) (Mr Thorpe accepted under cross examination that he had incorrectly expressed the number of days in his appeal outcome letter); the Claimant had told Mr Morrow on 13 July 2017 that he could not undertake light duties but yet the Golf Club website recorded that he had come 2nd in the Waterloo Cup competition on 19 June 2017 which called into question the extent of the injury; that this did not indicate that the Claimant was acting in line with the Respondent's policy to "avoid undertaking activities to delay your recovery"; that different accounts of the Claimant's activities on 19 June 2017 had been given during the disciplinary process, including an initial denial to Mr Morrow on 13 July 2017; that the explanation given about 'putting a card in' was "highly improbable". Mr Thorpe found that the Claimant had been dishonest about his activities on 19 June 2017 and dishonest about the extent of his ankle injury and that he was guilty of gross misconduct. Mr Thorpe also made reference to the final written warning given on 1 June 2017 which would have led to dismissal even if this hadn't been regarded as gross misconduct. He stated that he considered whether any alternatives to dismissal were possible but in

view of the Claimant being a remote worker and the breakdown in trust and confidence, he considered that dismissal was appropriate.

32. It was clear from Mr Thorpe's appeal outcome letter, from the note of the appeal hearing and from his witness statement and oral evidence that Mr Thorpe took a dim view of the Claimant's explanation (that he had 'put a card in') and that Mr Thorpe viewed that as a dishonest act (if it had happened) and that Mr Thorpe viewed the Claimant's assertion that he had done this previously as an indication of dishonesty.

The Law

Unfair Dismissal

33. The following sections of the Employment Rights Act 1996 (ERA 1996) are relevant:

94 The right

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

98 General

(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—

. . .

(b) relates to the conduct of the employee,

. . .

(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.

122 Basic award: reductions

…

(2) Where the tribunal considers that any conduct of the complainant before the dismissal (or, where the dismissal was with notice, before the notice was given) was such that it would be just and equitable to reduce or further reduce the amount of the basic award to any extent, the tribunal shall reduce or further reduce that amount accordingly.

123 Compensatory award

(1) Subject to the provisions of this section and sections 124[, 124A and 126], the amount of the compensatory award shall be such amount as the tribunal considers just and equitable in all the circumstances having regard to the loss sustained by the complainant in consequence of the dismissal in so far as that loss is attributable to action taken by the employer.

…

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

34. Both counsel supplied me with helpful oral and written submissions for which I am grateful.

35. Misconduct is one of the potentially fair reasons for dismissal listed in s98(2)(b) ERA 1996.

36. My primary guide to the question of fairness was the wording of s98(4) ERA 1996. I am reminded that it is not for me to substitute my judgment for that of the Respondent.

Conclusions

Unfair Dismissal

Reason for Dismissal

37. The reason for dismissal was clearly misconduct. The Respondent put the Claimant through a disciplinary process and arrived at a conclusion that he was guilty of gross misconduct based upon the information gathered during that process.

Fairness

38. I accepted the evidence of Mr Owen (and Mr Thorpe) which is consistent with the documentary evidence, that the decision makers believed that the Claimant was guilty of dishonesty in relation to playing a round of golf on 19 June 2017; and as to the extent of his injury.

39. The Respondent had reasonable grounds for coming to this conclusion in that the Golf Club website indicated that the Claimant had come 2nd in the Waterloo Cup – played on 19 June 2017 and that it reasonably considered that the Claimant's answers had been initially untruthful (in that he initially denied playing golf to Mr Morrow on 13 June 2017) and then that his story developed over time. The Respondent had reasonable grounds for rejecting the Claimant's alternative explanation – which in its ultimate form was that he initially went to the golf club to practise putting, then attempted to play a round of golf, abandoning that attempt at the first hole due to his ankle injury and then 'put a card in' falsely stating that he had played when he had not. This account could be true and the handwritten letter from the Claimant's friends leant it some weight, but it was not unreasonable for the Respondent to consider the Claimant's account implausible and in any event, even on the Claimant's account, he had gone to the golf club (and ultimately attempted to play a round of golf) at a time when he was asserting that he could not work, even on light duties or home duties. In light of the Respondent's initial finding that he had played the round of golf, as the club website suggested, it was reasonable to conclude that he was exaggerating the extent of his injury in saying that he could not work as a result of the injury. I did not

consider it unreasonable for the Respondent not to have asked for further medical evidence before coming to this conclusion and the GP certificates would not have prevented such a conclusion.

40. I considered whether a reasonable investigation had taken place. I considered that it was reasonable for Mr Morrow to conduct the investigation and I reject the Claimant's contention that he should not have done so because of his involvement in the separate earlier disciplinary matter. I considered that it was reasonable for Mr Morrow to have raised the golfing query at the meeting on 13 July 2017. There is no need to flag such matters up in advance at an investigation stage of the process. I accepted the Respondent's evidence that the 2015 matter was not ultimately relevant to the decision to dismiss. Three matters did give me a reason to pause:

    a. The first was the Claimant's absence from the disciplinary hearing. However the Claimant had been warned that the hearing could go ahead in his absence; he was represented at the hearing; and the appeal hearing conducted by Mr Thorpe did permit him to set out his account in full.

    b. The second was that Mr Morrow said at the disciplinary hearing that the respondent was going to contact the Golf Club – although this did not ultimately happen. The assistance that might have been provided by the Golf Club was not immediately obvious. Its position was clearly as displayed on its website, i.e. that the Claimant had at least purported to play a round of golf on 19 June 2017. The Golf Club could have issued a statement which would have assisted with how plausible it was that the Claimant had 'put a card in' without playing a round – but even this would have only got the Claimant so far given that he still went to the golf club, still attempted to play and had still lied about this when initially confronted by Mr Morrow.

    c. The third was the emphasis placed (primarily by Mr Thorpe) on the dishonesty of 'putting a card in' – which although disreputable is an offence against the rules and regulations of golf and not relevant to the Claimant's employment. Although Mr Thorpe placed greater emphasis on this than I would have done (albeit that that is not the relevant test in any event) – it did not infect his core decision which was that the Claimant *had* played a round of golf that day and that he had been dishonest about it when asked by the Respondent.

41. On balance and taking into account the investigation as a whole, I did not consider that these factors placed the Respondent's investigation outside the band of reasonable responses.

42. Dismissal was within the band of reasonable sanctions, even taking into account the Claimant's considerable 27 years of service. The Respondent had found that the Claimant had been dishonest in relation to playing in a golf competition when off sick due to his ankle injury and

therefore that he had been dishonest about the extent of that injury. That dishonesty was directed to his employer. It was reasonable to place a considerable emphasis on the breakdown of trust and confidence that resulted from these findings.

43. Having considered those various elements of fairness individually before I then took an overview and asking myself whether in all the circumstances the Respondent acted reasonably in dismissing the Claimant. I concluded that it had acted reasonably.

44. It is also clear that the Claimant would have been dismissed in any event, given the final written warning on his record, which he had not appealed. Even on the Claimant's account, he had initially been dishonest when asked about golf by Mr Morrow. Such a dismissal would have been on notice.

45. I did not consider that it was necessary for me to investigate the appropriateness of the earlier final written warning, which the Claimant hadn't appealed, given that the Claimant was fairly summarily dismissed by Mr Owen for gross misconduct (dishonesty). Mr Owen did not take it into account as a reason for dismissal – referring only to the timing of the absence as having started on the day when the final written warning was issued; and at the end of his dismissal letter mentioning that it would have led to the Claimant's dismissal in any event. The sanction issued on 1 June 2017 did not in any event appear to me to be one which 'plainly ought not to be imposed'.

Polkey, Conduct and Contribution

46. It is not necessary for me to address these matters in detail given my findings as to unfair dismissal above, however if the dismissal had been unfair, I would have reduced both the Claimant's basic award and compensatory award by 100% given that on balance of probabilities, he had clearly committed misconduct by playing golf when he was off work due to an ankle injury, and then lied about it - thereby contributing to his dismissal.

Wrongful Dismissal

47. On balance, I find that the Claimant did play a round of golf on 17 June 2017, as recorded on the Golf Club website and that he was dishonest about having done so and that therefore he was dishonestly exaggerating the extent of his injuries when he asserted that he could not work in any capacity. I read and listened to the Claimant's account and I could not be sure hat he was not telling the truth, but on balance, taking into account his suspicious initial denial to Mr Morrow, which the Claimant admitted to the tribunal (and had admitted to the Respondent during the disciplinary process), and taking in to account that it was unnecessary for the Claimant to have 'put a card in' on that particular day, I did not accept his evidence on this point. Dishonesty to one's employer is a breach of contract which entitles the employer to terminate

the contract of employment summarily. The Claimant was not entitled to notice pay.

Summary Conclusion

48. Therefore the Claimant's claims for unfair dismissal and wrongful dismissal fail and are dismissed.

Employment Judge Allen

23 April 2018