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EMPLOYMENT TRIBUNALS

Claimant: **Dean Cowley**

Respondents: **Parkdean Resorts UK Limited**

Heard at: **East London Hearing Centre**

On: **9 & 10 August 2018**

Before: **Employment Judge Allen**

Representation

Claimant: Mr S Thakerar (counsel)

Respondent: Ms S Berry (counsel)

JUDGMENT

The judgment of the Tribunal is that the Claimant's claim for unfair dismissal is dismissed.

REASONS

1. By claim form presented on 22 March 2018, the Claimant brought a claim for unfair dismissal against the Respondent, his former employer.

2. The parties agreed at the outset that the correct legal name for the Respondent is Parkdean Resorts UK Limited.

3. The issues were identified at the outset as follows:

    a. What was the reason for dismissal and was it a potentially fair reason – the Respondent asserts that the reason was conduct?

b. If the reason was conduct:

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

ii. Were there reasonable grounds for that belief?

iii. When that belief was formed, had a reasonable investigation taken place?

c. Was dismissal a penalty within the range of reasonable responses?

4. In the event that the Claimant is successful in his claim for unfair dismissal, the Tribunal was asked to go on to determine whether his basic or compensatory award should be reduced to reflect conduct or contribution on his behalf. In addition we were asked to address *Polkey* arising from section 123(1) ERA 1996, mitigation and any ACAS uplift applicable.

5. The Tribunal heard evidence from the Claimant and on behalf of the Respondent from Nick McKernan, General Manager at Coopers Beach Holiday Park who in October 2017 had heard and upheld an appeal by the Claimant against a previous dismissal which had taken place on 2 October 2017; Jody Boxall, General Manager of St Margaret's Bay Holiday Park, the manager who dismissed the Claimant on 11 November 2017; and Danyl Fletcher, Regional Director for the South East, who heard and dismissed the Claimant's appeal against the dismissal by Ms Boxall.

6. The Tribunal was directed to an agreed bundle of documents running to page 195 and additional documents were produced during the hearing in the form of 3 emails or email chains. Written and oral submissions were received from both representatives, which the Tribunal took into account.

Findings of Fact

7. The Claimant was employed by the Respondent from 15 May 2015 until his summary dismissal on 11 November 2017.

8. The Respondent is the largest holiday park operator in the UK, operating over 70 holiday parks across the country. It sells chalets and caravans ('holiday homes') at these holiday parks to holiday makers along with a 'pitch licence' to occupy a pitch in the Holiday Park. It is a condition of the purchase and licence agreements that the owners may not live permanently in the holiday homes. The Respondent's Sales Policy makes it clear that "All sales transactions must be conducted in such a way that the customer is not misled . . . It is particularly important that the existing owners and new customers understand that occupancy is on a holiday basis and is not residential. This applies to all parks." Sales of this nature are regulated.

9. At the time of his dismissal, the Claimant was employed as a Holiday Home / Caravan Sales Advisor at the Respondent's Highfield Holiday Park in Clacton-on-Sea, Essex. He reported to the Sales Manager who reported

to the General Manager. He was one of between 4 and 6 Sales Advisors at Highfield. A substantial part of his salary was commission based. His evidence that he was very successful in his sales role was not challenged by the Respondent. The Claimant's contract of employment stated that his "normal place of work is Nodes Point Holiday Park, or any other place of business which the Company may reasonably require within the UK . . . it is a condition of employment that you are prepared, whenever applicable, to transfer to any other of our sites. . . . This mobility is essential to the smooth running of our business."

10. On 31 March 2017, following a disciplinary process, the Claimant was issued with a letter containing final written warning from Grant Wicks, General Manager Valley Farm Holiday Park for knowingly handling Council Tax bills which had been edited in order to validate sales; being instrumental in the private hiring of owners' caravans against company policy; and failing to follow company procedure within the holiday home sales policy and not supplying the correct information for each sale. The letter stated that "This warning will remain valid on your file for 12 months and should the company have cause to discipline you again for a similar matter, or one of an equally serious nature within this time, this will result in the next stage of the disciplinary procedure being implemented, which could lead to dismissal. If there is no re-occurrence of this, or any other offence within the twelve-month period, this warning will be disregarded. . . . In order to avoid any further disciplinary action in the future, which could lead to your dismissal you need to ensure compliance as follows:

    1. Ensure you only handle cash for caravan sales and rent ledger payments and these are immediately documented and banked as part company policy.

    2. Should you become aware of any malpractice that contravenes the company sales policy or the ethics of Parkdean resorts trading you were duty-bound to raise your concerns. On this basis please feel free to contact myself directly in the first instance . . .". The Claimant was offered a right of appeal which he did not exercise.

11. Prior to the events giving rise to his 11 November 2017 dismissal, the Claimant had previously been dismissed on 2 October 2017 following allegations that he had entered into an agreement with owners, Mr and Mrs Holt, to undertake works to their holiday home at a cost of £500 (essentially circumventing the Respondent), that he had failed to follow proper procedures and that he was dishonest. The investigation into those allegations was carried out by Marie Waters, Park Services Manager (who was in charge of the maintenance team who were involved in the alleged circumvention of the Respondent). The Claimant's name did come up during the investigation and therefore it was reasonable to have looked at whether he was culpable. However, one important piece of evidence presented by Ms Waters was her record of a statement made to her by Mr and Mrs Holt, which implicated the Claimant and which ultimately proved to be unreliable. The decision to dismiss was made by Darren Clarke, General Manager at Highfield. Mr McKernan, a General Manager at another holiday park, was asked to deal with the appeal. The Claimant presented Mr McKernan with a statement from Mr and Mrs Holt to the

effect that Ms Water's record of their statement was not accurate and that the Claimant did not have anything to do with the arrangements made for the works to their property and that they had pointed out inaccuracies in her record to Ms Waters but that she had done nothing about it. At the appeal hearing, the Claimant passionately raised the contention that Ms Waters was trying to get rid of him. On the basis that Mr and Mrs' Holt's new account did not implicate the Claimant, Mr McKernan was satisfied that he should overturn the dismissal. Mr McKernan wrote to the Claimant on 31 October 2017 telling him that he was to be reinstated, but that "I believe it would be more beneficial if you are reinstated at Valley Farm rather than Highfield. This is to overcome the problems you have raised regarding the working relationship you have with the Park Services Manager." The Valley Farm Holiday Park is also in Clacton-on-Sea, less than 2 miles from the Highfield Holiday Park, however the Claimant was dissatisfied as he felt that he would suffer from being moved away from the contacts and the sales pipeline that he had established at Highfield over a 2 year period, thereby having an impact on his potential commission. Mr McKernan accepted that, before telling the Claimant about the decision to relocate him, he spoke to Mr Fletcher because Mr Fletcher's authority was required to authorise a transfer. Mr Fletcher accepted that he is a friend of Ms Waters and has been on holiday with her 6 to 8 times in the last 10 years. The Tribunal accepted Mr McKernan and Mr Fletcher's account that the decision to move the Claimant to another site was made by Mr McKernan and that Mr Fletcher's input was merely to approve it.

12. The Claimant brought a grievance on 2 November 2017 alleging "personal victimisation" by Ms Waters and complaining about the transfer to Valley Farm. After the Claimant's dismissal, that grievance was heard by Dave Hunter, General Manager Martello Beach Holiday Park, on 17 November 2017. It had originally been suggested that Grant Wicks hear the grievance but when the Claimant objected, Mr Hunter was put in place instead. Aside from the statement she took from Mr and Mrs Holt, Claimant did not give much detail about the specifics of Ms Water's alleged mistreatment of him. By letter dated 20 November 2017, Mr Hunter informed the Claimant that his grievance was dismissed.

13. On the same day that he was reinstated (31 October 2017) the Claimant was suspended, pending a new investigation into fresh charges against him of mis-selling and inappropriate text messages following an accusation from an owner, Caroline Collins (aka Conner) dated 31 October 2017. Ms Collins had stated that when she and her daughter were being taken through the sales process, the Claimant had told her that she could reside at Highfield Holiday Park all year round as long as she provided a permanent address – and that when Ms Collins put forward her son's girlfriend's address in Australia, with documentary proof, the Claimant had agreed that this would be enough (even though it was not Ms Collins' permanent address as required by the Respondent's practice). Ms Collins also disclosed a number of texts between her and the Claimant indicating that she was complaining to him in July 2017 and wanted out of the purchase agreement that she had signed on 31 May 2017. Although she did not complain about them, the texts disclosed included two responses from the Claimant to Ms Collins that were sexually explicit. The

Claimant and Ms Collins had engaged in a sexual relationship which began very shortly after she arrived at the Holiday Park and which had ended prior to the disciplinary investigation. Ms Collins did not complain about this or the nature of the texts.

14. The Claimant was interviewed on 6 November 2017 by Paul Harvey, General Manager, as part of the disciplinary investigation. The Claimant said that he had had a relationship with Ms Collins but that he had ended it. He denied any inappropriate behaviour during the sales process and he denied that he had misled her about permanent residence. He denied that he was involved with signing paperwork. He said that Ms Collins had formed a relationship with another owner at the Holiday Park.

15. On 8 November, Grant Wicks, now General Manager at Highfield Holiday Park, sent an emailed account of a meeting with different potential owners, Mr and Mrs Farrell, who he said had been misled by the Claimant into thinking that they could live at the site permanently. Mr Wicks said that he had had to tell them that the sale could not proceed and he referred them to a different type of residential park, where they purchased a dwelling that could be lived in permanently.

16. On 8 November 2017 the Claimant was invited to a disciplinary hearing on 10 November 2017 in relation to allegations that he had advised Ms Collins and Mr and Mrs Farrell that they could permanently live at the park; and that he had behaved unprofessionally and sent explicit text messages to Ms Collins. He was warned that the circumstances could amount to gross misconduct and if substantiated could lead to dismissal. The letter included a pack of documents including a copy of Ms Collins' Home Purchase Agreement and Pitch Licence Agreement. The Agreements make it clear in a number of places that the holiday home must not be used as a permanent residence. They were signed on behalf of the Respondents by (or on behalf of) the General Manager and the Sales Manager. They were not signed by the Claimant.

17. At the disciplinary hearing on 10 November 2017, Ms Boxall took the Claimant through the accusations against him and the Claimant set out his position – that he had always told any potential buyer that they could not permanently live at the holiday park; that Ms Collins was making up her story in order to get her money back so that she could move to Spain with the other owner at the holiday park that she was now in a relationship with; that when she made her complaint, Ms Collins would have thought that she could safely blame the Claimant as she would have thought that he had been dismissed (without knowing that he was to be reinstated); that the statement from Grant Wicks about Mr and Mrs Farrell was inaccurate (in the way that the statement taken by Ms Waters from Mr and Mrs Hope had been inaccurate); and that the texts and the sexual relationship with Ms Collins were private matters and that these sorts of things went on between staff and owners at all holiday parks.

18. At the tribunal the Claimant accepted that he gathered the information which was put into the Respondent's Alchemy computer system, which then generated the contractual documents that were later signed.

19. On 11 November 2017, in an email from the Respondent's HR, the Claimant was asked if he had any questions which he wanted them to ask particular individuals. He did not put forward any such questions.

20. Ms Boxall did not know the Claimant and had not met him prior to the disciplinary hearing. There was no evidence that Ms Waters was involved in any way in the investigation or decision making in relation to this matter. Ms Boxall understood the points that the Claimant was making and she weighed them against the documentary evidence before her. She did not speak to Ms Collins or to the Sales Manager or General Manager or to Mr and Mrs Farrell. She did not make further enquiries into how the sales and administration process operated in Highfield in particular, having made assumptions based on her experience of the process elsewhere. The Tribunal accepted her evidence that she had not taken into account anything to do with the October 2017 allegations and dismissal and that it was the matters concerning telling people that they could live permanently on the site that caused her most concern rather than an allegedly inappropriate relationship or the explicit texts. The tribunal accepted that she did take into account the fact that the Claimant was already on a final written warning for matters including breaches of the sales policy. She regarded the information contained in Ms Collins' Agreements to have been taken from information obtained by the Claimant. She concluded that, in breach of the sales policy, the Claimant had told Ms Collins that she could permanently reside at the holiday park and that he had agreed that it was sufficient to provide the address of her son's girlfriend; and that he had told Mr and Mrs Farrell that they could reside at the park permanently; and that he had had an unprofessional relationship with an owner and sent explicit texts to her and failed to respond properly to her statements that she was unhappy with her caravan. She wrote to the Claimant on 11 November 2017 setting out her conclusions and informing him that it was her decision that he be summarily dismissed for gross misconduct.

21. The Claimant accepted in his evidence to the tribunal that if true the accusations against him amounted to a breach of the sales policy and a disciplinary matter. He agreed that there was no reason that he was aware of for Mr Wicks to have wanted to get rid of him – particularly as he was such a successful sales advisor. He agreed that there was no evidence of a connection between Ms Waters and the accusations either directly from Ms Collins or those relating to Mr and Mrs Farrell reported by Mr Wicks.

22. The Claimant was offered the right of appeal, which he exercised. Danyl Fletcher heard the appeal on 5 December 2017. The Claimant repeated his case as previously outlined and also raised his perception of Ms Waters' behaviour in relation to the October 2017 matter. By letter dated 8 December 2017, Mr Fletcher informed the Claimant that his appeal was being dismissed.

The Law

23. The relevant law on unfair dismissal is set out in the following parts of sections 94 and 98 of the Employment Rights Act 1996.

94 The right

(1) An employee has the right not to be unfairly dismissed by his employer.
(2) Subsection (1) has effect subject to the following provisions of this Part (in particular sections 108 to 110) and to the provisions of the Trade Union and Labour Relations (Consolidation) Act 1992 (in particular sections 237 to 239).

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—

(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.

…

24. The Tribunal was referred to the cases of *BHS v Burchell* and *Shrestha v Genesis Housing Association Limited [2015]* EWCA Civ 94.

Conclusions

Unfair Dismissal – reason

24. The reason for dismissal was clearly conduct. The Respondent received complaints about the Claimant's conduct and put the Claimant through a disciplinary process and the Tribunal accept that this was the reason in the mind of Ms Boxall when she arrived at the decision to dismiss.

Unfair Dismissal – fairness

25. The Tribunal reminded itself that it was not for it to step into the shoes of the employer. In determining whether the Claimant was unfairly dismissed or not, it is not for the Tribunal to determine questions such as whether Ms Collins had made up her account of mis-selling. The test for unfair dismissal does not requires the Tribunal to consider whether it may have come to a different conclusion, based on the case ably put forward by Mr Thakerar at the tribunal hearing.

26. The Tribunal accepted Ms Boxall's evidence that she was sufficiently independent and that having understood and listened to the Claimant's case, she had genuinely formed the belief that he was guilty of the conduct alleged.

27. There were reasonable grounds for coming to that conclusion. Ms Collins had made an allegation of a breach of the sales policy directly. Mr Wicks had reported a similar concern raised by Mr and Mrs Farrell. The Claimant was on a final written warning for a different but relevant breach of the sales policy. There had been a relationship between the Claimant and Ms Collins.

28. The process followed by the Respondent was not exemplary. In particular Ms Boxall (or Mr Harvey who conducted the disciplinary investigation) could have spoken directly to Ms Collins or Mr and Mrs Farrell. Whilst the hand of Ms Waters could not be detected in this disciplinary process, the Respondent had accepted on appeal that it had failed to conduct the previous October 2017 disciplinary process adequately. It would have been sensible to have learned from that process but no such learning was evident. On the other hand, the Claimant did not supply information when asked if there were any questions that he wished to have put to specific individuals. Although not asked about Mr and Mrs Farrell at his investigatory interview (because the information about them had not yet come into existence), the Claimant was informed about the issue concerning the, prior to the disciplinary hearing and given the account obtained by Mr Wicks and Ms Boxall did give the Claimant an opportunity to challenge the account put forward relating to Mr and Mrs Farrell. It was not unreasonable to take into account he fact of the final written warning given for a similar (although not identical) breach of the sales policy. It was not unreasonable in the circumstances of this case to continue the disciplinary process even after the Claimant had initiated a grievance about the previous process and its outcome. The disciplinary process must be looked at as a whole and it is not unreasonable to fail to investigate in detail each line of defence put forward. On balance, the Tribunal could not conclude that taking the investigation as a whole, the Respondent's acts or omissions took it outside the range of reasonable investigation processes.

29. The allegation in relation to the unprofessional relationship and the explicit text messages would not in itself have been sufficient to have dismissed the Claimant. However, once the mis-selling accusations were considered to be made out, dismissal was within the band of reasonable penalties. This is a regulated industry and the rule about non permanent residence

was an important rule, which the Claimant recognised in his oral evidence.

30. It follows that the Claimant was not unfairly dismissed.

31. Had the Tribunal concluded that the Claimant had not been fairly summarily dismissed for gross misconduct, it would have been fair to dismiss the Claimant on notice – given the final written warning.

Employment Judge Allen

30 August 2018