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EMPLOYMENT TRIBUNALS

Claimant: Mr N Kendall

Respondent: West Ham United FC Limited

Heard at: East London Hearing Centre

On: 8th February 2019

Before: Employment Judge McLaren (sitting alone)

Representation

Claimant: Mr Perry Counsel

Respondent: Mr Ogg Counsel

JUDGMENT ON PRELIMINARY HEARING

The claimant's effective date of termination is not extended by virtue of section 97(2) of the Employment Rights Act. The effective date of termination is 31 May 2018.

CASE MANAGEMENT DISCUSSION

Background

1 The claimant was initially employed as Concessions Manager and moved to the position of player liaison in October 2017. His employment was ended on 31st May 2018. The respondent is a premier league football club

The issues

2 The matter had been listed for one day including remedy. The parties had agreed a list of issues as follows:

- 2.1 At the effective date of termination, did the claimant have sufficient qualifying service (section 108 (1) Employee Rights Act 1996) to raise a claim for unfair dismissal?

- 2.2 Does section 97(2) of the ERA extend the effective date of termination to 7th of June 2018?
- 2.3 If not, did the provisions of the Transfer of Undertakings (Protection of Employment) Regulations 2006 applied to the claimant's move from Elior to the respondent, on 6 June 2016?
- 2.4 Was the claimant dismissed from his role as concessions manager or acting player liaison officer?
- 2.5 What was the reason for the dismissal of the claimant and was that a potentially fair reason under section 98(2) ERA:
 - 2.5.1 redundancy? or
 - 2.5.2 some other substantial reason?
- 2.6 Was the dismissal fair under section 98(4) ERA?
- 2.7 In the circumstances (including the size and administrative resources of the respondent's undertaking), did the respondent act reasonably or unreasonably in treating redundancy or some other substantial reason other sufficient reason for dismissing the claimant?
- 2.8 Was the dismissal fair with regards to equity and the substantial merits of the case?
- 2.9 If the claimant's dismissal was unfair, what compensatory award would be just and equitable in all the circumstances of the case having regard to the loss sustained by the claimant in consequence of the dismissal insofar as that loss is attributable to actions taken by the respondent?
- 2.10 What, if any, compensatory or basic awards is the claimant entitled to, including consideration of mitigation issues?
- 2.11 Did the claimant adequately attempt to mitigate his loss under section 123(4) ERA between the date of dismissal and the date of the hearing?
- 2.12 If not, should any award be reduced as a result?
- 2.13 If the dismissal was procedurally unfair, would the claimant have been dismissed in any case? In particular, would he have been (or may have been) fairly dismissed in any event for redundancy or some other substantial reason? If so, what *Polkey* reduction should be made to any compensatory award?

3 Issues 1 and 2 go to jurisdiction. The first arose as to whether the claimant's length of employment could be extended to 6 June 2018 beyond what appeared to be the termination date of 31 May 2018. It was agreed between the parties that this was a

stand-alone point and was argued separately from any TUPE question. This assumed that the claimant's employment for continuous purposes started only in 2016. It was agreed that this matter would be dealt with as an initial stand-alone point.

Relevant law on the preliminary issue of length of service

4 The parties agreed that the relevant law is as follows. Sections 92(7) and 97(2) of the ERA 1996 have effect where the employer terminates the contract, and the application of the normal principles for determining the EDT (in accordance with s 97(1)) would mean that it is at a date earlier than it would have been if the employer had given the statutory minimum notice period required by ERA 1996 s.86, the EDT will be extended and will be deemed to be when the statutory notice would have expired. This, however, is only for certain purposes. They are:

- 4.1 Calculating the qualifying period needed for the employee to be able to request a written statement of reason for dismissal,
- 4.2 Calculating the qualifying period needed for an unfair dismissal claim,
- 4.3 Calculating the qualifying period for the purposes of the basic award.

5 I was referred to *Secretary of State for Employment v Staffordshire County Council* [1989] IRLR 117, [1989] ICR 664, and Harvey's commentary on this point which states that "the court of appeal had to consider the question whether the statutory legislative extension applies where an employee has waived his right to notice or has accepted wages in lieu. The court, reversing the decision of the EAT, held that it did. The waiver of the right to notice or accepting payment in lieu, was material only to the employee's contractual rights and not his statutory rights."

6 The parties agreed that the effect of this authority is that any payment in lieu of notice is irrelevant when considering whether or not service can be extended under section 97(2).

Finding of facts

7 I was taken to the letter at page 78 which is dated 21 May 2018 and is a letter from the respondent to the claimant headed notice of redundancy. On behalf of the claimant Mr Perry argued that this was not giving the claimant notice but simply telling him that notice would be given from 31 May. As his employment was terminated on 31 May, he had therefore not been given notice and would fall within the ambit of section 97(1) so that he would get the benefit of section 97(2) and have his employment extended by one week, thereby giving him the continuity of service to have the right to bring a claim for unfair dismissal before the employment tribunal.

8 In support of this interpretation, Mr Perry relied upon the fact that the payment in lieu of notice was stated to be from 31 May and that clearly the respondent is giving notice on 31 May and then choosing to pay in lieu instead.

9 Mr Ogg on behalf of the respondent, argued that the letter is headed notice of redundancy. It states that employment will cease on 31 May. The claimant is put on

garden leave from the date of the letter until 31 May which is normal where someone is working out notice. He also referred to the fact the letter states that the payment in lieu of notice is equivalent to 12 weeks' pay rather than being 12 weeks' pay.

10 The letter states that the final salary will be paid on 31st of May and calculates outstanding holiday up to that date. If they were intending to give notice of 31 May and pay in lieu in my view that would also include some holiday pay calculation.

11 On balance therefore, I prefer the respondent's interpretation and find that the claimant was given notice on 21 May and therefore does not benefit from the effects section 97(2).

Application for an adjournment

12 Having given this decision, the parties then discussed whether or not the preliminary point on TUPE could also be addressed at today's hearing.

13 In discussion with the parties, it was identified that the claimant's position was that his employment had transferred to the respondent from Elinor and the basis of that claim was that the service provision contract had been fragmented. Many of the duties either ceased or were transferred to another third party but was accepted that all the staff who had been employed by Elinor to do that were made redundant. It was put by the claimant that his duties had transferred to the respondent and therefore there had been a fragmentation of the original service provision contract into two.

14 Mr Perry's preference was that we continue today and he expressed the view that the respondent should have been aware of the way in which the claimant raises the point since it is agreed that no other staff were taken on when the contract with Elinor ended. He accepted that it was not expressly called out in the pleadings or in the claimant's witness statement.

15 On behalf of the respondent, Mr Ogg argued that they were not in a position to deal with this matter today since they were not clear exactly how the claimant was putting his case. He said that this was not raised in the ET1 or the claimant's witness statement. The two paragraphs which address that do not put it in this way. They also have no evidence of what the claimant's duties were with the prior employer and therefore how they relate to what he did for the respondent.

16 Having considered the matter, I accepted Mr Ogg's point of view that the respondent was not in a position to respond to this point today as it was not clear from the face of the pleading so far that this was the way in which the claimant relied upon the transfer provisions.

17 Having made that decision, both parties agreed that further orders need to be made which I accordingly did.

ORDERS

1 By agreeing with the parties, I made the following orders.

2 The claimant will provide particulars of the basis of his claim that his employment transferred under the Transfer of Undertakings Regulations by **22 February 2019**.

3 The respondent has leave to amend its response by **8 March 2019**.

4 The parties will provide witness statements setting out the basis on which the claimant says that his employment was transferred to the respondent, addressing what his role was for the respondent and the respondent will set out its contrary case by **22 March 2019**.

5 The claimant will produce all documents that he has in his possession, custody or control which relates to the duties he carried out for Elinor.

6 The matter is listed for two days on the **27th and 28th of June 2019**.

7 **Other matters**

7.1 Public access to employment tribunal decisions

All judgments and reasons for the judgments are published, in full, online at www.gov.uk/employment-tribunal-decisions shortly after a copy has been sent to the claimant(s) and respondent(s) in a case.

7.2 Any person who without reasonable excuse fails to comply with an Order to which section 7(4) of the Employment Tribunals Act 1996 applies shall be liable on summary conviction to a fine of £1,000.00.

7.3 Under rule 6, if this Order is not complied with, the Tribunal may take such action as it considers just which may include (a) waiving or varying the requirement; (b) striking out the claim or the response, in whole or in part, in accordance with rule 37; (c) barring or restricting a party's participation in the proceedings; and/or (d) awarding costs in accordance with rule 74-84.

7.4 You may apply under rule 29 for this Order to be varied, suspended or set aside.

Employment Judge McLaren

21 February 2019