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EMPLOYMENT TRIBUNALS

Claimant: Mr M Iqbal
Respondent: MJL Holdings Limited
Heard at: East London Hearing Centre
On: 6 September 2018
Before: Employment Judge Russell

Representation

Claimant: In person assisted by Mr H Hussain, Friend
Respondent: Mr M Luff, Director

JUDGMENT

The judgment of the Tribunal is that the effective date of termination was 26 April 2017.

REASONS

1 The Claimant was employed by the Respondent as a manager of its shop at Leytonstone Retailing Shoes. The Claimant commenced his employment on 21 January 1994. The contract of employment dated 23 October 1998 sets out the applicable tasks. These are provision for notice of termination of one week's notice for each complete year of service for a maximum of 12 weeks. A mobility clause by which the Respondent is entitled to transfer store managers to any of the employer's premises within reason and a redundancy procedure in the event of redundancy the procedure will apply and it includes

there will be no transferring of employees between the company locations unless agreed.

2 The parties appeared to have enjoyed a good and harmonious working relationship until the event surrounding the termination of the Claimant's contract. The facts are this.

3 On 18 February 2017 Mr Luff the Director of the Respondent wrote to the Claimant giving notice that the Leytonstone Store would close. It was anticipated around the middle of April 2017. The letter included the following.

"We therefore confirm when the store closes your contract with MJL Holdings Limited will be terminated... we will however be monitoring any vacancies within any other stores, and we are hopeful that a suitable position will become available, then we will be able to relocate you to another store."

The following paragraph reads that:

"According to the state of redundancy procedures please accept this letter as a notification as the start of your notice period. Please be advised that you are entitled to 12 weeks notice period and therefore should the store close before your entitled notice period has been completed but the remaining weeks you would be able to work to another store to ensure you receive the notice you are entitled to."

It goes on to provide that:

"Upon termination the redundancy payment would be £9,433.51 gross and that all outstanding monies including outstanding holiday pay would be paid to the bank account at the next payroll date after the shop closes complete with P45 and any other documentation."

4 In the course of preparing for the closure of the store it is said by the Respondent that it became aware of a substantial amount of unsaleable stock in the form of singles shoes. It regarded this potential gross misconduct on the part of the Claimant. It must be said at this stage that the Claimant strenuously and vigorously denies that these were either genuine concerns or alternatively that there was only substance for them. Be that as it may in due course the Respondent purported to commence a disciplinary procedure the Claimant did not attend and by a letter dated 24 April 2017 the Claimant was notified of his dismissal for purported gross misconduct. The timeline is as follows.

5 The Leytonstone Store in fact closed on 28 March 2017. The Claimant contends that read properly the notice of termination construed in line with his contractual provisions are such that the employment terminated on that date triggering his entitlement of redundancy payment and also to payment in lieu of the balance of his notice. The Respondent's position by contrast is that the contract remained in existence until the expiry of the notice period which would have been on 13 May 2017 it hope to reallocate the Claimant and onto assign him duties elsewhere but that if the Claimant did not accept those duties he would essentially be on garden leave for the balance of the notice period, the termination then being effective on 13 May.

6 I have had regard to some correspondence between the parties. On 27 February 2017 the Claimant wrote to Mr Luff indicating that he did not consent to transfer to another location for any part of his notice period. He relied upon Clause 9D of his contract of employment. There is a dispute between the parties as to whether or not there were attempts to relocate the Claimant in another capacity at the Barking Shop. I do not need to resolve that disputed fact today although it is likely to be relevant in due course as to whether or not the Respondent genuinely believed that there had been misconduct.

7 On 29 March 2017 the Claimant again wrote to Mr Luff indicating that there was no further work for him to do all work at Leytonstone having been fully completed and he was not contractually obliged to work at any other branch unless he consented. He therefore sought the outstanding payments.

8 I started by considering the letter giving notice. In the second paragraph it states that the contract with MJL Holdings will be terminated on the closure of Leytonstone. If that is all the letter had said then I would have found for the Claimant that the termination of the contract occurred on 28 March 2017. However, the letter goes on to make clear that it triggers the start of the notice period and it anticipates that in the event of closure of the store prior to the expiry of the 12 weeks notice period for the remaining weeks the Claimant would be able to work at another store in order to receive his notice. I pause here to note that it is not a question of compelling him to do so that is consistent with the contract of employment providing that whilst a store manager could be transferred in the event of redundancy such a transfer must be agreed. In other words the Claimant was entitled to reviews as he did to transfer to another store. However, that refusal did not have the effect of terminating the contract at that point rather the Claimant was essentially on garden leave for the balance of his notice period. The contract does not provide any entitlement to a pay in lieu of notice. There is no obligation upon an employer to make a payment in lieu of notice it is obliged to pay the notice period in full in the ordinary course of events and in this case I accept Mr Luff's evidence that the company was ready and willing to do so had it not been for the intervening factors. On balance therefore I am satisfied that even after the closure of Leytonstone the contract of employment remained in place and would have done so until 13 May.

9 Mr Luff tells me that he made the decision to dismiss the Claimant at a disciplinary hearing on 21 April 2017. The Claimant did not attend that meeting. Mr Luff relies upon a

letter dated 24 April 2017 sent to Mr Iqbal, the Claimant notifying him of the decision to dismiss him summarily for gross misconduct. There is a dispute as to whether or not that letter was genuine and the circumstances in which it was said. Nevertheless it is clear from the Claimant's own correspondence that he received a letter on 26 April 2017 notifying him of the decision to dismiss him of gross misconduct. Applying the Supreme Court authority on the date of termination namely the date at which it is brought to the Claimant's attention I am satisfied that the date of termination in this case is therefore 26 April 2017. This is all relevant because the Respondent relies upon the provisions of Section 140 of the Employment Rights Act which provides that in the circumstances where an employee is serving out notice pending a redundancy and the Respondent in fact dismisses for an act of gross misconduct the entitlement to redundancy payment would be lost. It is clear that there is a significant dispute between the parties and it is right that that be heard and decided on the evidence.

10 Accordingly therefore the case will be set down for a one day hearing to decided whether or not the Claimant was guilty of gross misconduct. This misconduct arises out of what is said to be a exceptionally large number of single shoes oddments which were found as the Leytonstone Store was closed. The Claimant disputes both the fact that there were a significant or exceptionally large number and also that that is the reason for dismissal. The Claimant will rely upon the offer of alternative work at Barking or Edmonton as evidence that Mr Luff could not reasonably or genuinely have believed him to have acted in a way that amounted to gross misconduct. Mr Luff for the Respondent will rely upon the fact that until the disciplinary process had concluded it could make no finding of gross misconduct and was obliged to offer the Claimant an alternative work and that such work would be working alongside a manager rather than being a manager. As such Mr Luff will say that there is no inconsistency in the offer. Those are the issues

which will be determined.

11 At the beginning of the day I considered a detailed document from the Claimant requiring a considerable amount of specific disclosure. I took the opportunity to discuss with the Claimant the reason for his request under each category and their potential relevance and to obtain the Respondent's views. Having done so I was satisfied that it is appropriate to order disclosure of the audit reports and any area manager reports relating to the stock control in the three financial years proceeding dismissal. Furthermore and bearing in mind the Claimant's principal case is that the allegations of gross misconduct were a sham to avoid a redundancy payment and relying upon what he says is the Respondent's previous conduct. I decided that it was relevant and proportionate for the Respondent to provide the following information.

12 For the period from 2014 until 2017 it will identify firstly all stores that closed within that period. Secondly, the manager of the store in the months proceeding closure. Thirdly, what happened to the employment of that manager; were they redeployed; did they resign; were they dismissed; and fourthly, if they were dismissed for what reason. Fifthly, confirmation of the redundancy payment made. I am conscious of the confidentiality implications and financial information being provided and accordingly I would be satisfied if there is a confirmation of a redundancy payment being made rather than inclusion of a specific sum in fact paid.

13 The Respondent to provide its information to the Claimant within 14 days and the Claimant has leave to include within the bundle a maximum of 50 photographs which must be in colour and legible limited only to the issue of the single shoes and stock. Mr Luff on behalf of the Respondent will serve a signed witness statement setting out his attempts to obtain the documents in question upon which he may be cross-examined at the Tribunal.

In addition to the area manager reports and audits any other documents produced by the area manager during that period including iPod records if they still exist should also be disclosed.

Employment Judge Russell

26 September 2018