Neutral Citation Number: [2023] EAT 17

Case No: EA-2022-000036-LA

EMPLOYMENT APPEAL TRIBUNAL

Rolls Building
Fetter Lane, London, EC4A 1NL

Date: 21 February 2023

Before :

HIS HONOUR JUDGE AUERBACH

- -

Between :

MR G MEAKER	**Appellant**
- and -	
CYXTERA TECHNOLOGY UK LIMITED	**Respondent**

- -
- -

Spencer Keen (instructed by Thompsons) for the **Appellant**
Anna Beale (instructed by CMS Cameron McKenna Nabarro Olswang LLP) for the **Respondent**

Hearing date: 5 January 2022

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JUDGMENT

SUMMARY

Unfair Dismissal; Jurisdictional / Time Points

The claimant was employed in a heavy manual night role. He suffered back injuries in August 2016 and November 2018. Following the second of these he was off work for an extended period. At a certain point it was agreed that limitations on his ability to do heavy work were likely to be permanent. An application for income protection payments, and an appeal in that regard, were unsuccessful. There followed a conversation with an HR manager in which the respondent indicated that it was considering terminating the claimant's employment, and the possibility of a settlement agreement was raised. On 20 January 2020 the claimant had a further conversation with the HR manager. The tribunal found that the claimant believed that further enquiries would thereafter be made about alternative employment, and the manager had not made it clear to him that they would not.

On 5 February 2020 the respondent sent the claimant a letter which he received by 7 February. This was headed "without prejudice". It opened by stating that it had been agreed that there would be a mutual termination of employment. It went on to state that the claimant's last day of employment would be 7 February, he would be paid up to that date, the amounts of holiday pay, and of the payment in lieu of notice he would receive, and that he would be sent his P45. The letter also offered a further ex gratia payment, conditional on the claimant signing an enclosed draft settlement agreement. The letter was followed by a payment on 14 February which the claimant was told reflected his payment in lieu of notice and holiday pay entitlement.

The tribunal found that the letter of 5 February was a dismissal letter, that the effective date of termination was 7 February 2020 and that the claimant's subsequent claim of unfair dismissal, was, on that basis, presented out of time. It declined to extend time. The claimant appealed.

Held:

(1) On the assumption that the tribunal was correct that the 5 February 2020 letter was a

termination letter, even if it was a repudiatory breach that was not accepted by the claimant at common law, the effective date of termination for the purposes of the unfair dismissal claim was the date of receipt of that letter. The tribunal had not erred in so deciding. **Robert Cort v Charman** [1981] ICR 816 and **Rabess v London Fire and Emergency Planning Authority** [2017] IRLR 147 considered and applied.

(2) The tribunal had also not erred in construing the letter of 5 February as a dismissal letter, notwithstanding that the opening paragraphs referred to what was said to have been an agreement that there would be a mutual termination, which agreement had not in fact been reached, and that the letter was headed "without prejudice". The tribunal properly concluded that the letter unambiguously communicated that the respondent had decided to proceed to unilaterally terminate the employment with effect on 7 February 2020, and that only the offer of an ex gratia payment was conditional upon the claimant signing a settlement agreement.

(3) The tribunal had also properly concluded that the claimant had not shown that it was not reasonably practicable to present his unfair dismissal complaint in time.

As all grounds of appeal failed, the appeal was dismissed.

HIS HONOUR JUDGE AUERBACH:

Introduction

1. This appeal raises issues as to the correct approach in law to the calculation of the effective date of termination of employment (EDT) for the purposes of a complaint of unfair dismissal. The pertinent parts of sections 95 and 97 **Employment Rights Act 1996** are as follows.

> **"95 Circumstances in which an employee is dismissed.**
>
> **(1) For the purposes of this Part an employee is dismissed by his employer if (and, subject to subsection (2) only if)—**
>
> **(a) the contract under which he is employed is terminated by the employer (whether with or without notice),**
>
> **(b) he is employed under a limited-term contract and that contract terminates by virtue of the limiting event without being renewed under the same contract, or**
>
> **(c) the employee terminates the contract under which he is employed (with or without notice) in circumstances in which he is entitled to terminate it without notice by reason of the employer's conduct.**
>
> **97 Effective date of termination.**
>
> **(1) Subject to the following provisions of this section, in this Part "the effective date of termination"—**
>
> **(a) in relation to an employee whose contract of employment is terminated by notice, whether given by his employer or by the employee, means the date on which the notice expires,**
>
> **(b) in relation to an employee whose contract of employment is terminated without notice, means the date on which the termination takes effect, and**
>
> **(c) in relation to an employee who is employed under a limited-term contract which terminates by virtue of the limiting event without being renewed under the same contract, means the date on which the termination takes effect."**

2. I will refer to the parties as they were in the employment tribunal, as claimant and respondent. This is the claimant's appeal. He presented a claim form complaining of unfair dismissal and disability discrimination. The respondent contended that the EDT was 7 February 2020. The claimant contended that it was 14 February 2020. It was common ground that if the respondent was right then the complaints were out of time, subject to the tribunal extending time. If the claimant was right, then the complaints were in time and no extension was required.

3. In a reserved decision arising from a preliminary hearing at Watford (held by CVP) Employment Judge Anderson decided that the EDT was 7 February 2020. She also found that the claimant had not shown that it was not reasonably practicable to present the unfair dismissal complaint in time, so that complaint was dismissed. Time was extended in respect of the disability discrimination complaint.

4. The appeal challenges the tribunal's conclusion as to the EDT. Alternatively, it is contended that the tribunal erred in concluding that it was reasonably practicable for the claimant to have presented the complaint of unfair dismissal in time. There has been no challenge to the extension of time in respect of the complaint of disability discrimination. As before the employment tribunal, Mr Keen of counsel appeared for the claimant and Ms Beale of counsel for the respondent.

The Facts

5. I take the facts from the employment tribunal's decision. The claimant was employed by the respondent as a Data Centre Operations Technician lone working on a night shift. This was a manual role that involved heavy lifting. He suffered back injuries in August 2016 and November 2018. Following the second of these he was signed off work. Following a series of occupational health assessments during the course of 2019 it was agreed that limitations on the claimant's ability to carry out work involving weight bearing and movement were likely to be permanent. An application for income protection payments was unsuccessful and an appeal was dismissed on 6 January 2020.

6. I need to set out the next part of the tribunal's findings of fact in full.

> **"13. On 7 January 2020 a telephone conversation took place between the claimant and Mr Gaston in which it was discussed that the claimant could not return to his night shift role and the respondent had no day shifts available. There was a discussion about a possible settlement agreement and I find that Mr Gaston did state during this conversation that the respondent was considering terminating the claimant's employment.**
>
> **14. On 20 January 2020 a second telephone conversation took place between the**

claimant and Mr Gaston. The claimant told Mr Gaston that he would appeal the refusal of income protection payments to the Financial Ombudsman Service and initial figures relating to the termination of the claimant's employment were given by Mr Gaston to the claimant. The claimant says that he asked Mr Gaston to make further enquiries as to alternative roles and that it was his understanding that this work to identify alternative vacancies was still ongoing. Mr Gaston said he made it clear to the claimant in this conversation that he had exhausted all possibilities in terms of identifying alternative roles. On the evidence I find that Mr Gaston had not made it clear to the claimant that his search was at the end and the claimant believed that further enquiries would be made.

15. On 5 February 2020 the respondent sent the claimant a letter headed without prejudice and stating as follows:

'Dear Grant

This is to confirm your discussion last month with Ty Gaston, Cyxtera's VP, Global HR Operations when you agreed that it was no longer possible for you to contemplate a return to active employment with Cyxtera Technology UK Limited (the "Company") in light of your medical condition and your inability to manage your duties without exacerbating your back problem.

As a result, we have agreed that your employment with the Company will terminate by mutual agreement by reason of capability.

Your last day of employment will be 7/2/2020 and you will be paid up to that day in the usual way. In addition, you are entitled to a payment in respect of 230 hours' accrued but untaken holiday (£4,184).

You are entitled to 10 weeks' notice of the termination of your employment and we will make a payment in lieu of notice (£6,275.50), subject to applicable deductions.

Save as set out in this letter you have no other entitlements to salary or any other contractual or other benefits. Your P45 will be issued to you following your final payment from the company.

In addition, as a gesture of goodwill, we will offer you an ex gratia payment of £10,035 as compensation for the termination of your employment, subject to your signature of a settlement agreement accepting this sum in full settlement of all and any claims in connection with your employment or the termination of it.

I am attaching the settlement agreement on which you will need to take legal advice before you sign it.

I would like to thank you for the contribution you have made to the Company and want to take this opportunity to wish you all the best in the future.'

16. Attached to the letter were a settlement agreement and an Independent Legal Adviser's certificate. The claimant received these documents on 6 or 7 February 2020 by way of Docuserve, an online document service.

17. On 7 February 2020 he wrote to Mr Gaston and Mr Barnett author of the letter of 5 February 2020 querying the payment, rejecting the settlement offer and including the line 'I hereby reject this settlement offer and will not accept

> **this separation package provided to me. If Cyxtera is determined to terminate my employment I hope we could find a more reasonable settlement agreement offer.'**
>
> **18. On 14 February 2020 the respondent paid into the claimant's bank the sum of £8567.65. The claimant contacted Mr Gaston to ask him why he had received this payment. On 17 February 2020 Mr Gaston replied that the payment was a combination of notice pay and unpaid holiday.**
>
> **19. On 24 February 2020 Mr Gaston replied to the respondent's email of 7 February 2020 explaining why the respondent could not allow him to return to work and acknowledging his rejection of the settlement offer."**

The Employment Tribunal's Conclusions

7. After summarising the submissions on each side, and some further remarks, the tribunal's conclusions continued as follows.

> **"26. It was accepted between the parties that the communication of a termination must be in clear and unambiguous language. My attention was drawn to Stapp v Shaftesbury Society [1982] IRLR 326 in which a termination letter was deemed to be 'sufficiently clear that a reasonable employee receiving it would not have any real doubt about what it was telling him' and Chapman v Letheby and Christopher Ltd [1981] IRLR 440, EAT where it was said that the Tribunal's interpretation 'should not be a technical one but should reflect what an ordinary, reasonable employee… would understand by the words used' and 'the letter must be construed in the light of the facts known to the employee at the date he receives the letter'.**
>
> **27. I find that there was no mutual agreement to terminate. Whilst the claimant was aware that termination was likely, he had not understood, before he received the letter of 5 February 2020 that the respondent had finally decided upon termination. I also find that the Claimant, before he saw the letter of 5 February 2020, was expecting further communications regarding alternative roles. However, even where there was no mutual agreement, the termination is clear. I find that the language used is unequivocal in setting out that employment will be terminated on 7 February 2020 and there is no indication that this is a matter for discussion or negotiation. The closing paragraph emphasises that the employment is at an end. I find that the sections relating to the settlement agreement and those relating to termination are clearly demarcated, and that the wording of the letter makes it clear to the ordinary, reasonable employee that acceptance of, or negotiations on, a settlement agreement are a separate matter to the termination. I find that it was not reasonable for the claimant to have taken any view other than that his employment terminated on 7 February 2020 and this can only have been confirmed when he received payments into his bank account on 14 February, calculated on a termination date of 7 February 2020.**
>
> **28. As I have found that the effective date of termination was 7 February 2020, I find that the claim for unfair dismissal, having been filed on 19 June 2020, is out of time, as the last date for filing the claim was 13 June 2020. I have considered whether under s111 ERA96 it was not reasonably practicable for the claimant to file his claim by 13 June 2020. The claimant had received advice from his union**

> **since his most recent injury and I am told that he had legal advice from June 2019. The ACAS conciliation period ended on 23 March 2020. I find that it was reasonably practicable for the claimant to have filed his claim in time."**

8. The tribunal went on to give reasons for extending time in respect of the complaint of disability discrimination.

The Grounds of Appeal

9. The grounds of appeal were expressed as follows:

> **"GROUND ONE - The ET Failed to Consider the Relevant Contractual Termination**
>
> **16) In this case, the ET erred when it concluded that the February letter was effective to terminate the contract of employment. Section 95 ERA 1996 provides that an employee is dismissed only where the contract under which he is employed is terminated by the employer (whether with or without notice). This applies a common law contractual test for whether there has been a dismissal by the employer. That test is not modified by s.97(1), ERA 1996.**
>
> **17) Section 97(1), ERA 1996, affects the date upon which termination is deemed to occur for the purposes of calculating unfair dismissal time limits. A termination under s.97(1) can be deemed to occur on a different date to the date of contractual termination at common law (see *Rabess v London Fire and Emergency Planning Authority* [2017] IRLR 147, CA).**
>
> **18) However, s.97(1) ERA does not (and cannot) replace the requirement for a person's contract of employment to be terminated by the employer other than in accordance with the ordinary principles of contract law for the purposes of ss.95 and 98, ERA 1996 and the ET was required (and failed) to identify when the effective date of that act of contractual termination occurred.**
>
> **19) This error led to the ET concluding that the February Letter was an effective termination when in fact had no contractual effect and could not constitute the relevant termination for the purposes of s.95, ERA 1996 (see further Ground Two).**
>
> **GROUND TWO – No Contractual Termination Connected to 07 February 2020**
>
> **20) The February Letter was not properly capable of giving rise to an effective date of termination on 07 February 2020 because it did not lead to any actual contractual termination for the purposes of s.95, ERA 1996:**
>
> **a. the February Letter did not purport to terminate the contract *in accordance with the terms of the contract of employment*. It neither gave the contractually required notice in writing (Clause 15) nor made a payment in lieu of notice (Clause 24);**
>
> **b. if the February Letter was a termination without notice in breach of contract, that breach was never at any point accepted. It was not, therefore, capable of amounting to a dismissal for the purposes of s.95, ERA 1996. The ET**

did not consider this point, and its findings of fact show that there was no communication of any acceptance of a breach before the contract came to an end by other means.

21) In this case, the only relevant contractual termination, for the purposes of s.95, ERA 1996, took place a few days later, on 14 February 2020. On that date, the Respondent made a payment in lieu of notice and terminated the contract in accordance with Clause 24.1. The correct question for the ET was to ask, applying s.97(1) ERA 1996, what the estimated date of *that termination* was. In the circumstances of this case, the answer to that question was the same whether one applied s.97, ERA 1996 or common law contractual principles – it was the 14 February 2020.

22) Accordingly, the ET erred in law when it concluded that the February Letter constituted an unambiguous, unilateral effective termination on 07 February 2020 rather than asking what was the effective date (in the sense envisaged by s.97, ERA 1996) of the actual termination of the contract under s.95, ERA 1996.

GROUND THREE – Failure of Construction to Consider Relevant Circumstances

23) The ET also erred in the construction it gave to the February Letter. It failed properly to take into account all the relevant circumstances when it held that a reasonable employee could not have had any real doubt whether that letter was terminating his contract:

a. it failed to have regard to the correct contractual context (see Grounds One and Two)

b. it wrongly concluded that the without prejudice terms of the purported mutual termination could be "demarcated" from the "termination paragraphs":

i. this was not consistent with the nature of without prejudice privilege; and

ii. the termination paragraphs were expressly part of the terms of confirmation of the mutual agreement (which the Respondent erroneously believed had been reached) and could not be construed otherwise.

24) Accordingly, the ET also erred in its assessment that:

a. a reasonable employee in the position of the Claimant having received a letter headed without prejudice, in those terms, while on sick leave, and having denied a prior/rejected the proffered mutual agreement, would have no real doubt about whether the letter was dismissing him; and /or

b. it was reasonably practicable for the Claimant to submit his claim. This is particularly the case in circumstances where his common-law contract was undoubtedly continuing and where Mr Gaston himself appeared to have misunderstood the effect of the letter that he had drafted."

10. The clauses of the claimant's contract to which ground 2 referred were clause 15 and clause 24. In particular clause 15.1 provided that in the event of termination by the respondent, the

claimant was entitled to receive "the following notice", being one week's notice if continuously employed for three months, one calendar month's notice if continuously employed for less than four years but more than three months, and thereafter one week's notice per complete year of continuous employment up to a maximum of twelve weeks' notice. Clause 24.1 provided, materially:

> "**As an alternative to serving notice under section 15.1 … the Company may, in its absolute discretion, make a payment in lieu of the basic salary to which you would have been entitled during the period of notice of termination provided under section 15.1.**"

Arguments, Discussion, Conclusions

11. There are, in substance, three strands to the challenges mounted by the grounds of appeal. Grounds 1 and 2 together raise issues about the correct approach in law to the provisions of sections 95 and 97, contending that, even if it was correctly construed as a letter of termination, receipt of the letter of 5 February 2020 did not, in law, give rise to an EDT of 7 February 2020. The first part of ground 3 contends, in the alternative, that the tribunal erred in construing the letter of 5 February 2020 as a letter of termination. The second part of ground 3 contends, in the alternative, that the tribunal erred by not extending time. I will take each of these challenges in turn.

Grounds 1 and 2

12. A narrative section of the notice of appeal summarised the challenge mounted by grounds 1 and 2, at paragraphs 6 and 7, in this way:

> **"6) The principal ground upon which this appeal is brought is that the ET erred in law when it struck out the Claimant's unfair dismissal claim for want of jurisdiction. The ET wrongly determined the Claimant's effective date of termination under s.97, ERA 1996 without reference to the contractual mechanism that led to the actual termination of the contract under s.95 ERA 1996. Although the effective date of termination under s.97(1) ERA 1996 is not required to coincide with the date of contractual termination under the common law, a contractual termination under s.95, ERA 1996 is still required.**
>
> **7) This appeal concerns a novel point of law. It concerns the interaction of the principle that the termination of a contract does not arise automatically from a breach of contract (set out in authorities such as *Geys v Société Générale, London Branch* [2012] UKSC 63, [2013] ICR 117, [2013] IRLR 122 and *Sunrise Brokers LLP v Rodgers* [2013] EWHC 2633) and the principle that the identification of the estimated date of termination under s.97 ERA 1996 is untrammelled by contract**

> **laws (set out in cases such as *Rabess v London Fire and Emergency Planning Authority* [2017] IRLR 147, CA and *Radecki v Kirklees MBC* [2009] EWCA Civ 298, [2009] I.C.R. 1244, [2009] 4 WLUK 233)."**

13. The grounds themselves give the principal points of Mr Keen's arguments in support of them.

14. The respondent's position on these grounds was concisely stated in its Answer by, in summary, the following propositions: (a) that the principal point raised by the appeal was a new point, which had not been run below, and should not be permitted to be argued for the first time on appeal; (b) that in determining the EDT under section 97 the tribunal was not required to determine or apply the contractual common law date of termination, whether by virtue of section 95 or otherwise; and (c) that there is settled law on the interaction between the principle that at common law termination does not arise automatically from a repudiatory breach and the principle that the EDT under section 97 is untrammelled by common law – citing **Robert Cort & Son Limited v Charman** and **Rabess v London Fire and Emergency Planning Authority** (both discussed below).

15. Mr Keen did not accept that these grounds raised a new point which was not argued before the tribunal, and I heard some argument about that. I can see that there is a passage in Mr Keen's skeleton argument below, which hints at this point, but it does not seem to have been spelled out or developed before the tribunal in the way that it was in the EAT. However, the substantive challenge was in any event fully argued on both sides before me, and indeed the major parts of the skeleton and oral arguments were devoted to it, and I have concluded that I ought to decide it on its merits.

16. Mr Keen's contention was that the tribunal must proceed in two stages. First it must determine what he called the "contractual termination" for the purposes of section 95. This requires

a consideration of the mode of termination, applying ordinary contract law principles. Only having determined the "contractual termination" could the tribunal then turn to decide the effective date of that termination for the purposes of section 97. Mr Keen accepted that the authorities indicate that determination of the EDT for the purposes of section 97 is not governed by the application of ordinary contract law principles. But he contended that the analysis of the "contractual termination" for the purposes of section 95 was a distinct and necessary prior process.

17. In this case, argued Mr Keen, even if the 5 February letter was correctly construed as a letter of termination, it was a purported termination in breach of contract. It did not give the notice required by clause 15 of the contract, nor did clause 24 apply, because there was, at that point, no payment in lieu of notice made. Accordingly, as the modern authorities have confirmed that what lawyers call the acceptance or elective view, and not the unilateral or automatic view, applies to contracts of employment, that letter was, by itself, of no effect, unless or until there was acceptance by the claimant, which, in fact, never occurred. Accordingly, at this point there was no termination at all, and so nothing on which section 97 could bite. It was only when the payment in lieu of notice was made on 14 February 2020 that there was a termination in compliance with the contract pursuant to clause 24. Accordingly, the EDT could not, on any view, have been earlier than the latter date.

18. Ms Beale's contention, boiled down, was that the authorities are clear that the determination of the EDT is not governed by contractual principles, and that, where an employee is dismissed in breach of contract, the EDT is the date on which the dismissal is communicated, regardless of whether he accepts it. The two-stage process contended for by Mr Keen was not supported by any authority, and was in fact contrary to authority. For various reasons, Ms Beale did not accept that the tribunal would have been bound to treat the 5 February letter as a repudiatory breach. But even if, at common law, receipt of the letter of 5 February would not have been effective unless or until the termination notified by it was accepted by the claimant, that had no bearing on the

determination of the EDT, and the tribunal had therefore not erred by failing to consider that question, nor in its conclusion.

19. I turn to the key authorities, taking them in chronological order.

20. **Robert Cort & Son Ltd v Charman** [1981] ICR 816 is a decision of the EAT presided over by Browne-Wilkinson J which considered provisions of the then applicable statute, the **Employment Protection (Consolidation) Act 1978**. Section 55(4) of the **1978 Act** was the predecessor of section 97(1) of the **1976 Act** and was in materially the same terms. The employee's contract entitled him to four weeks' notice, but he was summarily dismissed and given a payment in lieu of notice. The industrial tribunal held that the employee had not accepted the breach, and that his employment had continued for a further four weeks. At 818H to 819A the EAT said this:

> "**The reasons given by the industrial tribunal do not in terms refer to this definition. Moreover, the attention of the industrial tribunal does not seem to have been drawn to authorities which indicate that for the purposes of section 55(4) and its statutory predecessors it does not matter whether or not the notice of dismissal (if there is a notice) or the dismissal without notice constituted a breach of contract. These authorities indicate that Section 55(4) operates irrespective of whether, as a matter of contract, the employer ought to have given some notice or a longer notice."**

21. The EAT went on to discuss the authorities and noted that there was a difference of view among them as to how repudiation affects a contract of employment: some supported the "unilateral view", that the repudiation of a contract of employment puts an end to the contract at once without the need for acceptance by the other party; and others "the acceptance view", that the general law of contract applies, and acceptance is necessary to put an end to the contract. It was still not established which was the correct view. At 820E to 822A the EAT said this:

> "**We will assume (without deciding) that the acceptance view is correct and that, where an employer dismisses an employee without giving the length of notice required by the contract, the contract itself is not thereby determined but will only be determined when the employee accepts the repudiation. Even on that assumption, we think that the effective date of termination for the purposes of Section 55(4) is the date of the dismissal and not a later date. We reach this conclusion for the following reasons:**

(1) The decision of the Court of Appeal in the *Dedman* case is the only decision concerned directly with Section 55(4) of the Act. In the other decisions, Section 55(4) is not, so far as we can see, referred to.

(2) The Act seems to have been drafted on the footing that the unilateral view is correct, i.e. a dismissal even without the contractually required notice terminates the contract. Thus, in Section 55(4)(a) (dealing with the case of termination by notice) it is the date of the expiry of the notice served which is the effective date of termination: nothing in the subsection suggests that this is so only where the length of notice served complies with the contractual obligation. Again, Section 49 of the Act lays down certain minimum periods of notice which have to be given. Section 55(5) provides that where either no notice or notice shorter than that required by Section 49 is given, the effective date of termination is the date on which the notice required by Section 49 would have expired. Such provision would have been unnecessary if the draftsman had considered that the con act would not otherwise have been terminated by an unlawful notice.

(3) Section 55(4)(b) defines the effective date of termination as being the date on which "the termination takes effect". The word "termination" plainly refers back to the termination of the contract. But the draftsman of the section does not refer simply to the date of the termination of the contract, but to the date on which the termination "takes effect". As we have pointed out, even on the acceptance view the status of employer and employee comes to an end at the moment of dismissal, even if the contract may for some purposes thereafter continue. When dismissed without the appropriate contractual notice, the employee cannot insist on being further employed: as from the moment of dismissal, his sole right is a right to damages and he is bound to mitigate his damages by looking for other employment. We therefore consider it to be a legitimate use of words to say, in the context of Section 55, that the termination of the contract of employment "takes effect" at the date of dismissal, since on that date the employee's rights under the contract are transformed from the right to be employed into a right to damages. This view receives support from the remarks of Winn L.J. in *Marriott v. Oxford Co-operative Society* [1970] 1 Q.B. 186 at p.193 E-F. After pointing out that the statutory definition of "the relevant date" for redundancy payment purposes (now Section 90(a)(b) of the Act) is the date of the expiry of the notice or (if there is no notice) the date on which the termination takes effect, Winn L.J. says this:
'That is consistent with the whole concept that a contract of employment for the purposes of the statute is brought to an end, i.e. it is terminated, when it is so broken that no further <u>full</u> performance of its terms will occur' (<u>our emphasis</u>).
This indicates that the date of the final termination of the contract is not necessarily 'the effective date of termination' or 'the relevant date': if, as in the case of repudiation, further <u>full</u> performance becomes impossible, that will be the relevant date.

(4) We consider it a matter of the greatest importance that there should be no doubt or uncertainty as to the date which is the "effective date of termination". An employee's rights either to complain of unfair dismissal or to claim redundancy are dependent upon his taking proceedings within three months of the effective date of termination (or in the case of redundancy payments "the relevant date"). These time limits are rigorously enforced. If the identification of the effective date of termination depends upon the subtle legalities of the law of repudiation and acceptance of repudiation, the ordinary employee will be unable to understand the position. The *Dedman* rule fixed the

> **effective date of termination at what most employees would understand to be the date of termination, i.e. the date on which he ceases to attend his place of employment.**
>
> **For these reasons we hold that, where an employer dismisses an employee summarily and without giving the period of notice required by the contract, for the purposes of Section 55(4) the effective date of termination is the date of the summary dismissal whether or not the employer makes a payment in lieu of notice."**

22. **Kirklees Metropolitan Council v Radecki** [2009] EWCA Civ 298, [2009] ICR 1244 is an authority to which I will return when considering the challenge to the tribunal's construction of the letter of 5 February. For now I will note that, while the members of the Court of Appeal were divided on their reading of the employment tribunal's decision, all of them took their analysis of the law from **Robert Cort** and authorities to the same effect. Rix LJ summarised the position in this way:

> **"The jurisprudence cited by Rimer LJ indicates that the effective date of termination should be freed of the niceties and uncertainties of contract law and its general requirement that, where there is a repudiatory breach, the contract nevertheless continues until that breach is accepted: see the discussion at *Chitty on Contracts, 30th ed, 2008, Vol II,* at paras 39-185 and 39-213/4. Thus, the effective date of termination will be the date of summary dismissal, as long as that is known to the employee."**

23. In **Gisda Cyf v Barratt** [2010] UKSC 41, [2010] ICR 45 the employee was summarily dismissed by a letter which was dated 29 November 2006, and delivered to her home on 30 November. However, she was away then, returning late on the evening of 3 December, and only saw it on 4 December, when her son, who had taken receipt of it, showed it to her. The Supreme Court upheld the tribunal's decision that the EDT was 4 December. It affirmed the principle enunciated in earlier authorities that, where a dismissal is communicated by letter, it does not take effect when the employer decides upon it, or sends it, but only when the employee has actually read the letter or had a reasonable opportunity to read it. The court's approach is encapsulated in the following paragraph.

> **"41. The essential underpinning of the appellant's case, that conventional principles of contract law should come into play in the interpretation of section**

> **97, must therefore be rejected. The construction and application of that provision must be guided principally by the underlying purpose of the statute *viz* the protection of the employee's rights. Viewed through that particular prism, it is not difficult to conclude that the well-established rule that an employee is entitled either to be informed or at least to have the reasonable chance of finding out that he has been dismissed before time begins to run against him is firmly anchored to the overall objective of the legislation."**

24. **Geys v Société Générale, London Branch** [2012] UKSC 63, [2013] ICR 117 concerned a pure contract-law dispute as to the date on which the contract terminated. The Supreme Court (Lord Sumption dissenting) held that the general principle of contract law, that a repudiatory breach is not effective to terminate the contract, unless or until it is accepted by the other party, applies to employment contracts. The unilateral or automatic theory was rejected.

25. Next comes **Rabess v London Fire and Emergency Planning Authority** [2016] EWCA Civ 1017; [2017] IRLR 147. The employee was summarily dismissed for gross misconduct on 24 August 2012. His appeal was heard on 9 January 2013. The decision to dismiss was upheld, but the finding of gross misconduct was downgraded to misconduct, triggering entitlement to a payment in lieu of notice. The claim form had been presented shortly before the appeal hearing, on 3 January 2013. The EAT and Court of Appeal upheld the tribunal's conclusion that the EDT was 24 August 2012. Laws LJ (King and Lindblom LJJ concurring) said this at [20] – [25].

> **"20. Moreover, it is clear, in my judgment, that the conclusion of the tribunals below was entirely correct given the law as it stands. Robert Cort [1981] ICR 816, a decision of the EAT, is, as Rimer LJ stated in Kirklees v Radecki [2009] ICCR 1244 at paragraph 37:**
>
> > **'authority for the proposition that where an employee is dismissed summarily the EDT of his employment for the purposes of what is now section 111 of the 1996 Act is the date of the summary dismissal and it makes no difference that the dismissal might have amounted to a repudiatory breach of the employment contract such that the employee might be entitled to bring a claim for damages in respect of such dismissal.'**
>
> **21. Robert Cort was approved by this court in Stapp [1982] IRLR 326 as well as in Radecki. Substantial passages of the judgment of Browne-Wilkinson J (as he then was) presiding over the EAT in Cort are set out by Judge Richardson in the EAT in the present case at paragraph 26. I will not, with respect, repeat them at this stage. Robert Cort precisely covers this case and it has stood, as I have said, with this court's approval since it was decided.**

> **22. This aspect of course engages Mr Williams' second ground of appeal, namely that the Appellant's contract was revived by the internal appeal with the consequence that the EDT is postponed. Gisda Cyf does not drive such a result. Mr Williams says that the result of the Cort decision is that employees' rights are denied. I cannot see that that is so, certainly on the present facts. The identification of the EDT is a question of fact. It did not in the circumstances of this case shift by reason of anything that occurred on the internal appeal; quite the contrary.**
>
> **23. Mr Williams has suggested that the Supreme Court decisions in Gisda Cyf and Geys show that Robert Cort was wrongly decided or that issues have arisen such that we are not obliged to follow it, but Gisda Cyf is wholly consonant with Robert Cort. It leaves the interpretation of section 97 as an autonomous issue unchallenged by the conventional or general principles of law of contract. It allowed for the possibility that the date of an employment contract's termination for the purpose of a common law wrongful dismissal claim might be different in some circumstances from the EDT under section 97.**
>
> **24. Geys was wholly concerned with common law contractual questions. There was no issue there as to the application of the EDT under section 97; indeed, no issue under the Employment Rights Act 1996 at all. Robert Cort was simply not considered. That was so in Geys where the Supreme Court held that a repudiatory breach of an employment contract would not terminate the contract unless and until the innocent party elected to accept the repudiation. This does not bear at all on the interpretation of statutory rights arising under the 1996 Act.**
>
> **25. We should therefore, in my judgment, follow the reasoning in Robert Cort, given not least its approval in this court. In those circumstances, it seems to me inevitable that given the result of the internal appeal 24 August 2012 remains the EDT for the purposes of the Appellant's tribunal claim."**

26. Further on Laws LJ continued:

> **"30. I turn to what I have called the Appellant's second position and Mr Williams' third ground. As I have indicated, the proposition here is that even if this was a dismissal without notice still the EDT should be taken as the date when the Appellant accepted the employer's repudiatory breach of contract by taking the payment in lieu.**
>
> **31. But this argument too falls foul of the Robert Cort decision. Browne-Wilkinson J in that case proceeded in terms on the assumption that what he called the "acceptance" view of an employment contract's termination was correct. Even so, he held that the EDT in a section 97(1)(b) case (in fact he was dealing with the predecessor statute) was the date of actual dismissal. He said this: …"**

27. He then cited part of the passage in **Robert Cort** that I have set out at [21] above, and observed of it at [32] **"I have seen nothing from first to last to show that this is in the least**

erroneous"; and this further ground was also dismissed.

28. My conclusions in relation to grounds 1 and 2 are as follows.

29. First, when **Robert Cort** was decided, it remained uncertain whether, as a matter of contract law, the automatic theory or the elective theory applies to a repudiatory breach of an employment contract. But the EAT reached its decision expressly on the assumption that the elective theory applied. I therefore agree with Ms Beale that, in principle, the fact that the Supreme Court in **Geys** decided that the elective theory does indeed apply, does not, as such, affect the continued applicability of the reasoning in **Robert Cort** to the question of the determination of the EDT under section 97.

30. Mr Keen, however, contended that, post-**Geys**, the analysis in **Robert Cort** no longer holds good. His principal lines of argument appear to me to have been as follows.

31. First, he sought to draw some support from the speech of Rimer LJ in **Geys** in the Court of Appeal [2011] EWCA Civ 307; [2011] IRLR 482. The relevant paragraphs are [19], [27] and [39]:

> **"19. Whilst I agree that this court is bound to hold that its unaccepted repudiatory dismissal of Mr Geys on 29 November 2007 did not terminate his employment contract, I consider that such dismissal would at least have constituted the 'effective date of termination' ('the EDT') of his employment for the purposes of section 97(1) of the Employment Rights Act 1996 and so would (among other things) have triggered the running of the three-month time limit within which Mr Geys might have brought a claim for unfair dismissal before an employment tribunal (section 111(2)): see *Dedman v. British Building & Engineering Appliances Ltd* [1974] ICR 53; and *Robert Cort & Son Ltd v. Charman* [1981] ICR 816. That, however, is not in point for present purposes, the appeal raising the different question of when according to the principles of the general law of contract Mr Geys's employment contract terminated. I would dismiss Ground 1 of the Bank's appeal.**
>
> **27. Mr Cavender also submitted in his written argument (but did not develop the point orally) that unless paragraph 8.3 was struck out as conflicting with clause 13, it could result in Mr Geys being deprived of his statutory rights to seek compensation for unfair dismissal. With respect, I do not follow that. If the contract was terminated by three months' notice under clause 13, any claim for unfair dismissal could be made within three months of the expiry of the notice, which would be the EDT. If the contract was terminated by a payment under paragraph 8.3, any such claim could be made within three months of that date,**

> **which would *prima facie* be the EDT (or perhaps within three months from when he first learnt of such payment or had a reasonable opportunity of finding it out: I return to this qualification in paragraph [39] below). In the present case, the EDT was in fact on 29 November 2007, and Mr Geys's three month period ran from *then.***
>
> **39. I should revert to the Supreme Court's decision in *Gisda Cyf.* That case was all about the need for an employee to know, or have a reasonable opportunity of discovering, the EDT of his employment, from which date the short three-month time limit for bringing an unfair dismissal claim begins to run (section 111(2)) and the even shorter seven-day period for applying to the tribunal for interim relief begins to run (section 128). Had the Bank *not* summarily dismissed Mr Geys on 29 November 2007 (which was the EDT of his employment), it may perhaps be – but the point does not arise in this case, and I express no decided view on it – that even though (as I consider) Mr Geys's employment contract was terminated with immediate effect on 18 December 2007, the EDT for the purposes of the Employment Rights Act 1996 would only be when (if later) he actually learnt, or had a reasonable opportunity of learning, of such termination, and would be so notwithstanding the terms of section 97(1)(b) of the Employment Rights Act 1996. Lord Kerr makes it clear that the EDT is not a term deriving from contract law but a statutory construct specifically defined for the purposes of a legislative scheme of employment rights."**

32. Mr Keen submitted that at [27] Rimer LJ initially speculated that, where there is a repudiatory breach, the EDT will be the date of the breach, but that at [27] and [39] he acknowledged that the EDT is "tied to the contractual termination."

33. Next Mr Keen argued that the notion that a summary dismissal marks the end of the employment relationship was effectively rejected by Lord Wilson in **Geys**. He referred to the discussion by Lord Wilson of authorities in which employees have kept the contract alive, in order to enforce rights under it which are not merely collateral to it, such as to require a contractual disciplinary procedure to be followed, or to secure a right to wages.

34. Mr Keen argued that if there could be two different dates of termination, one for contractual purposes and one for statutory purposes, this would have undesirable consequences. It would be a recipe for uncertainty which could be to the detriment of employees; and it is a constant theme of the authorities, including **Gisda Cyf**, that, in approaching issues of construction, it must be borne in mind that the statute confers rights intended to protect the vulnerable. For example, an employee who received notice in breach, but then took steps to keep the contract on foot for contractual

purposes, could run afoul of the statutory time limit in section 111 if the situation was not resolved within the three months stipulated there. These, and other, difficulties would, he argued, be largely avoided by interpreting the statutory provisions in a consistent and straightforward way.

35. Mr Keen contended that in all cases the starting point must be to ascertain, for the purposes of section 95, whether, and if so, how, the contract had been terminated, which was a contractual question. If a termination in breach was accepted, then the EDT was determined, as a practical, rather than a contractual question, under section 97. But if it was not accepted, then there was no termination at all. In both **Robert Cort** and **Geys** the repudiation was accepted by the employee. The correctness of this analysis was not, he argued, affected by **Robert Cort**, **Rabess**, or any other authority.

36. However, in my judgment, none of these lines of argument lands home.

37. First, what Rimer LJ said in **Geys** at [19] is not speculative. It is a statement of his considered view, applying **Robert Cort**, that the date of the repudiatory dismissal was the EDT for section 97 purposes. What he said at [27] is not at odds with that analysis. The propositions that, in the case of a dismissal with notice, the EDT is the date on which the notice takes effect, and in the case of a dismissal without notice, by the making of a permitted payment in lieu, it is the date of payment, are statements of the application of the words of section 97. The words in brackets at the end of that paragraph, and paragraph [39], reflect the principle in **Gisda Cyf**, but that is a different point, concerned with when the dismissal is taken to have been properly communicated at all. The words "it may perhaps be" in the middle of paragraph [39] also govern what follows them, not what comes before. I conclude that these passages lend no support to Mr Keen's case; and, though *obiter*, they, are an example of another senior judge unhesitatingly affirming the **Robert Cort** approach.

38. Secondly, I agree with Ms Beale that there is no sign at all in the discussion in **Robert Cort** that, where there is a repudiatory breach, the date of the breach is the date of the EDT only if the termination has come about by the breach having subsequently been accepted. That is not said, nor is there anything in the reasoning which would support such an inference; and the concluding statement of principle is not qualified in that way. I also agree with her that there is no sign in any of the other authorities, that it was considered that the EDT would only be the date of a repudiatory breach if the contract had in fact been brought to an end by the employee accepting that breach.

39. Thirdly, while it is true that if the EDT, in cases of repudiatory dismissal, falls on the date of the repudiation, then that will be earlier in point of time than it might be were the law otherwise, the arguments about the dangers of confusion or uncertainty do not all point in one direction. As Ms Beale noted in her submissions, the EAT in **Robert Cort** specifically considered this, at point (4) of its analysis, stating that it was "of the greatest importance that there should be no doubt or uncertainty" as to the EDT; and it concluded for reasons that it set out there, that the rule it propounded would best chime with the practicalities of what the "ordinary employee" would take to be the position.

40. I see some force in Mr Keen's contention that some of the more recent authorities, such as were discussed by Lord Wilson in the passage in **Geys** to which he referred, show that the ramifications of the contract remaining alive in a case where the employee has not accepted a repudiatory breach, may be more wide-ranging and significant than was contemplated by the EAT in 1981. The proposition in **Robert Cort** that the employee's rights are transformed by the breach "from the right to be employed into a right to damages" now perhaps requires some qualification, for example. But this insight does not make good Mr Keen's case, for a number of reasons.

41. First, it remains the case that **Geys** was purely concerned with contractual rights, and the position in contract law, as applied to employees. The authorities in question may have contributed

to its conclusion that contracts of employment ought not to, and do not, fall outside the general rules of contract law, because of the real importance which the ability to keep the contract alive can sometimes have for some employees. But the reasoning in that line of authorities does not require the law relating to the EDT for the purposes of statutory employment protection rights to be revisited.

42. Secondly, the underpinning point made in the key passage in the reasoning in **Robert Cort**, is that, where there has been a repudiatory breach "further *full* performance becomes impossible". Some employees in some walks of life may be able to benefit from the ability to insist on the particular safeguards and stages of a contractual disciplinary procedure being adhered to, or the employment being maintained until a milestone triggering a right to further remuneration or termination payments has passed. But for most employees a summary dismissal will mark for all practical and meaningful purposes the clear end of the relationship, as such. For most employees the insights of the EAT in **Robert Cort**, on which approach will best serve certainty and clarity, continue to hold good.

43. Thirdly, the Court of Appeal has, in any event, considered what, if any, effect **Geys** has had on the **Robert Cort** approach, in **Rabess**. Once again, I agree with Ms Beale that the foregoing passages in **Rabess** are decisive. They in terms endorse **Robert Cort**. They explain that **Gisda Cyf** is "wholly consonant" with it. They note that **Geys** was "wholly concerned" with common law contractual questions, and they reproduce and endorse the reasoning in **Robert Cort** as still holding good. I cannot see any way that Mr Keen's argument can steer around the rock of **Rabess**. There is no hint or suggestion that the section 97 analysis was dependent upon a prior analysis of whether the termination occurred by the employer's fundamental breach being accepted in contract law. The emphatic and unconditional endorsement of **Robert Cort** is to the contrary effect. It is the rock on which these grounds founder.

Ground 3 – Part I

44. I turn, then, to the second strand of the challenge advanced by this appeal, which is to the tribunal's conclusion that the letter of 5 February did amount to a dismissal letter. This was, in my view, potentially the strongest ground of challenge, and it has given me some pause. But ultimately I conclude that it too fails. I will explain why.

45. I start with some basic principles. Whether a document (or other communication) amounts to a dismissal is a matter for objective determination by the tribunal. It must, however, be construed in the context of the circumstances and matters known to the parties at the time. It must, as a minimum, clearly communicate that the writer is terminating the employment, with effect on an identified date, or one which is unambiguously ascertainable. Mr Keen emphasised that a communication of dismissal must be clear and unambiguous, because of the particular importance of the parties knowing where they stand. He referred to the discussion of this point by Baroness Hale of Richmond JSC in **Geys** at [57] – [60]. However, these principles are long established, and the tribunal, at [26], correctly directed itself in accordance with earlier authorities such as **Stapp v Shaftesbury Society** [1982] IRLR 326 and **Chapman v Letheby and Christopher Limited** [1981] IRLR 440.

46. Mr Keen, relying on a dictum in **Birch and Humber v University of Liverpool** [1985] ICR 470 (CA), argued that the question of whether the letter of 5 February amounted to a letter of termination, was a pure question of law, and that the tribunal's construction of it was wrong. Alternatively, it was perverse. The context was that the letter came out of the blue. It set out the terms of a purported mutual agreement to terminate; but the tribunal found as a fact that there had been no such agreement reached in the most recent previous discussion, being the telephone conversation on 20 January. It was marked "without prejudice" and enclosed a draft settlement agreement, setting out terms providing for a mutual termination. Accordingly, it either conveyed a

mistaken understanding that a mutual termination had been agreed – in fact it hadn't – or it was a proposal for a mutual termination. But it could not properly or reasonably be construed as a unilateral act of termination. The tribunal's purported demarcation of the letter into the part that effected such a termination, and the part that related to a distinct settlement proposal, was untenable.

47. The respondent had relied in the tribunal on **Radecki**, but Mr Keen argued that it assisted his own case. At this point I therefore need to consider that authority in more detail. In **Radecki**, in summary, the employee was suspended and there then followed a protracted period of negotiation, conducted through his union representative, over the terms of a possible settlement. During the course of October 2006 it was envisaged that a settlement, if agreed, would take effect on 31 October. Settlement was not agreed by then, but the employer stopped paying the employee after October. After rejecting the latest version of the settlement agreement in February 2007 the employee asked to be paid, but was told that the employer considered that his employment had ended on 31 October by mutual agreement. He thereafter presented a tribunal claim.

48. The employer ran two alternative cases before the tribunal: that the employee had agreed to a termination effective on 31 October 2006, or that, by ceasing to pay the employee, and in all the surrounding circumstances, it had unilaterally repudiated the contract and brought it to an end with effect from 31 October or 1 November 2006 (applying the **Robert Cort** approach). Rimer LJ rejected the mutual-termination analysis. As to unilateral termination, the determination of whether that had occurred did not require any further findings of primary fact. But whether it should be inferred from the primary facts, that the employer had unequivocally evinced an intention not to be bound by the contract, was a task which had fallen to the tribunal. On his reading, it had not actually decided the point, and so the matter would have to be remitted. However, Rix LJ disagreed on that final point. His reading of the overall decision was that the tribunal *had* made the "critical

findings" that the employer had brought the employment to an end by ceasing to pay the employee after 31 October 2006, which the tribunal had found that the employee in fact knew had happened. There was therefore no need for remission. Toulson LJ agreed with Rix LJ.

49. Mr Keen relied on **Radecki** as an illustration of the proposition that an assertion that there has been an agreement to terminate is of no effect, if in fact it is not true. So, in the present case, that assertion in the 5 February letter had no effect. Similarly, proposing a termination date in a settlement agreement had no effect, because the proposed settlement agreement was never concluded.

50. My starting point is that, in principle, it fell to the tribunal to construe the letter of 5 February objectively in all the factual circumstances as found by it, so that (as it did not apply the wrong legal test) its conclusion on that question can only be successfully challenged if it was one that no reasonable tribunal could reach. That is the approach I would have taken without any guidance from prior authority; further, I agree with Ms Beale that **Radecki** supports it, because all three members of the Court of Appeal agreed that this task fell to the tribunal; they only disagreed as to whether it had completed it. Although that was a case where what had to be evaluated was the employer's conduct, and the present case concerns a written communication, nevertheless, the salient point is that the task of evaluating it in the relevant factual context found by the tribunal, also fell to the tribunal.

51. Mr Keen's perversity case does get some *potential* traction from the opening words of the 5 February letter, referring to an agreement that the employment will terminate by mutual agreement, and from the fact that the enclosed settlement agreement contained a provision referring to termination by mutual agreement. These do *potentially* provide some support for the construction that, if not referring to a termination agreement that had already been reached, what the letter conveyed was no more than a proposal for an agreed termination. But these features were not

bound, by themselves, to oblige the tribunal to conclude that the letter, read as a whole, did not amount to a letter of dismissal. That is because the matter is one of construction not of one or more features considered in isolation, but of the letter read as a whole, and in all its parts.

52. I have come to the conclusion that the employment tribunal's construction of the letter was properly open to it, and not perverse, for the following reasons. First, on the facts found, the letter did not come wholly out of the blue. While the tribunal found that, at the conclusion of the 20 January discussion, the claimant and Mr Gaston had different understandings about whether the end of the road had been reached on the question of alternative roles, the wider factual context was one in which it had been agreed that the limitations on the work the claimant could carry out were likely to be permanent, the respondent had concluded that he could not return to his existing role, and termination of the employment, and a possible settlement, had been contemplated and discussed. That provided relevant context when considering whether the letter communicated that the respondent had now decided to proceed with a termination, whatever point had been reached in the discussions thus far.

53. Secondly, the fact that the letter was headed "without prejudice", does not necessarily indicate that the tribunal's construction of it was perverse. Even though it may be safer, to avoid possible confusion, to convey open and without prejudice communications in separate documents, it is not impossible for a single letter to contain both content that is open and of legal effect, and distinct content that is without prejudice and amounts to a settlement proposal; and whether that has occurred must depend on a reading of the substantive content of the document as a whole.

54. In this case the tribunal was entitled to read the letter as falling into two distinct parts, being the part that dealt with the termination, and the payments that would arise from that, as a matter of legal entitlement, and the part that made a proposal for a further payment, to which the claimant was not entitled, and which would only be made if he agreed the settlement agreement, and thereby

waived his statutory claims. That is having regard in particular to the fact that there are three paragraphs which set out the last day of employment, payments to which the claimant is entitled, and will receive, the proposition that he is not entitled to any other payments, and the fact that his P45 will be issued following his final payment, all without any mention of the settlement agreement. The next paragraph then states that "[i]n addition" a further payment is being offered "as a gesture of goodwill", which is "ex gratia" and which is specifically subject to the claimant signing the attached settlement agreement. This clearly conveys that the settlement offer relates only to that extra payment.

55. This leaves what was, potentially, the most finely balanced point: whether the opening words, of the letter, referring to it having been agreed that the claimant's employment "will terminate by mutual agreement", meant that the letter as a whole was rendered, at best for the respondent, ambiguous; and meant that it was certainly not clear enough to amount to a letter of dismissal.

56. However, the paragraph that followed began, in terms, with the statement that the claimant's last day of employment "will be 7/02/2020", and that he "will be paid up to that day in the usual way". This was followed by a figure for accrued but unused holiday pay, the statement that "you are entitled to 10 weeks' notice", and "we will make a payment in lieu of notice", and the amount. It then stated that the claimant had no other entitlements to salary or benefits, and that his P45 "will be issued to you following your final payment." The tribunal was certainly entitled to treat that whole passage, as such, as clearly communicating a termination on the stated date, which was not dependent or contingent on anything else happening. In particular, the sentence that followed only made the additional ex gratia payment conditional upon signing the settlement agreement. The non-contingent nature of the termination itself was also reinforced by the words of the final sentence.

57. Given all of that the tribunal was entitled to take the view, as it did, that, "even where there

was no mutual agreement, the termination [by the 5 February letter] is clear". It was not bound to consider that the opening two paragraphs undermined or confused the clear meaning of the three paragraphs that followed. I agree with Ms Beale that the language of this letter was similar to, and at least as clear as, that of the letter in **Willoughby v CF Capital plc** [2011] EWCA Civ 1115, [2012] ICR 1038, which the Court of Appeal considered, at [9] and [10] "on the face of it" terminated the employment on an identified last day. Nor was the present tribunal bound to conclude that the meaning of the letter was rendered ambiguous by the fact that the opening paragraph of the settlement agreement referred to termination being effected by mutual agreement, given that the settlement agreement would not and could not itself be of any legal effect unless or until it was completed.

58. I therefore conclude that the tribunal's construction of the 5 February letter was not wrong in law, nor perverse, and it did not err by treating it as a letter of dismissal.

Ground 3 – Part II

59. I come to the final strand of challenge, by the second part of ground 3, to the tribunal's decision that it was not the case that it was not reasonably practicable to have presented the claim in time. I can take this shortly. In light of its view of the 5 February letter, the tribunal found in terms that it was not reasonable for the claimant to have taken any other view than that his employment terminated on 7 February 2020. It also found that this "can only have been confirmed" when he received payments calculated by reference to that date; and it referred to his access to both trade union and legal advice.

60. Even if the claimant considered that he had a good argument that the EDT was later, he plainly, on the tribunal's findings, knew that the respondent considered that the EDT was 7 February 2020, and that he was at risk of being ruled out of time if he did not present his claim within the time limit calculated from that date, and then lost that argument. There was no

suggestion that it was, for any other reason, not practicable for him to do so. There was therefore no error in the tribunal concluding that this test was not satisfied.

Outcome

61. As all strands of the three grounds of appeal have failed, the appeal is dismissed.