EMPLOYMENT TRIBUNALS

Claimant		**Respondent**
	v	
Mr G Meaker		Cyxtera Technologies UK Limited

Heard at: Watford by CVP **On**: 15 November 2021
Before: Employment Judge Anderson

Appearances
For the Claimant: Mr Keen (counsel)
For the Respondent: Ms Beale (counsel)

JUDGMENT

The judgment of the tribunal after a preliminary hearing to determine the effective date of termination of the claimant's employment and whether or not his claims of unfair dismissal and disability discrimination were brought in time is:

1. The effective date of termination of the claimant's employment was 7 February 2020.
2. The claimant's claim for unfair dismissal was not presented in time and the claimant was not able to show that it was not reasonably practicable for the claim to have been presented in time, in accordance with s111(2)(b) Employment Rights Act 1996.
3. The claimant's claim of disability discrimination was not presented in time but the tribunal found that it was just and equitable to extend time for the filing of the claim to 14 February 2020 in accordance with s123(1)(b) Equality Act 2010.

REASONS

Claim and Issues

1. The claimant brings a claim of unfair dismissal and disability discrimination against the respondent. The respondent says the claimant was dismissed on 7 February 2020. The claimant claims that dismissal was on 14 February 2020. The claim was presented on 19 June 2020 following a period of ACAS conciliation commencing on 14 February 2020 and ending on 23 March 2020. If the effective date of the termination of the claimant's employment

was 7 February 2020, the last date for presentation of his claim was 13 June 2020. If the effective date of termination of the claimant's employment was 14 February 2020 then the last date for presentation of the claim was 20 June 2020.

2. The respondent applied to the tribunal on 26 November 2020 for a preliminary hearing to be listed to determine the issue of whether or not the tribunal has jurisdiction to hear the claim. The application was heard on 11 January 2021 and Employment Judge Laidler granted the application listing a preliminary hearing to determine :
    a. *The effective date of termination.*
    b. *Whether the claimant's complaint of unfair dismissal was received in time and whether the Tribunal has jurisdiction to determine it having regard to the time limits contained in s.111 of the Employment Rights Act 1996,*
    c. *(iii) whether the complaints of disability discrimination have been received in time within s.123 of the Equality Act 2010. It will be a matter for the Tribunal hearing the open preliminary hearing whether it feels it proportionate to determine this particular issue depending on its conclusion on point (a).*

The hearing

3. I was provided with an agreed bundle of documents of 137 pages, a witness statement from the claimant, Mr Meaker, and a witness statement from Mr Gaston of the respondent. In addition, I received skeleton arguments and authorities from both counsel. Each of the witnesses attended the hearing and gave oral evidence.

Relevant findings of fact

4. The claimant was employed by the respondent, a global data centre organisation, from 8 October 2010 as a Data Centre Operations Technician, lone working on night shift. This was a manual role that involved heavy lifting.

5. On 8 August 2016 the claimant injured his back at work and was signed off work. He underwent surgery for the injury in March 2017 and returned to work shortly afterwards.

6. On 23rd November 2018 the claimant again injured his back at work. On 30 November 2018 the claimant was signed off work until 3 December 2018 by his GP as a result of the injury sustained on 23 November 2018.

7. The claimant continued to be signed off work by his GP during December 2018 and January 2019. On 21 January 2019 an occupational health assessment carried out by the respondent's occupational health suppliers assessed the claimant as unfit for work at that time.

8. On 4 March 2019 the claimant's GP produced a sick note indicating that he was able to return to work.

9. On 15 April 2019 a further occupational health report concluded that the claimant could return to work on a phased return and would be able to return to lone working after a period of time.

10. The claimant attended a third occupational health assessment on 23 September 2019. The claimant continued to have limitations to the work he could carry out in relation to weight bearing and movement, and it was agreed between the parties that these limitations were likely to be permanent.

11. As a result of the report from that assessment Ty Gaston, the Respondent's Vice President of Global HR Operations, emailed the claimant on 21 October 2019 and advised that *'we are not able to bring you back to the night shift working alone.*'

12. The respondent had in 2019 made an application to its provider for income protection payments for the claimant. This application was unsuccessful and the respondent appealed the decision. On 6 January 2020 the Claimant was notified that the appeal was dismissed.

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 5th 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.

Submissions

20. Mr Keen, for the claimant, said that the respondent had been seeking to achieve crystallisation of a termination by mutual agreement and that could not be by unilateral agreement. He said that a termination must be express and unambiguous, and this termination letter was ambiguous. Mr Keen relied on the case of *Asamoah v Walter Rodney Housing Association [2001] EWCA Civ 851* in which it was found that there was no termination as the purported termination was negotiated by mutual agreement and the claimant had not agreed to the terms. He noted that the letter of 5 February 2020 was marked 'without prejudice' and was therefore not a formal letter of termination and that it was clear that the intention of the claimant was only to let go of employment if he received the right offer. Termination took effect on 14 February 2020 when the respondent paid the claimant in lieu of notice.

21. Mr Keen said that if the tribunal did find that the termination date was 7 February 2020, the claimant had set out in evidence why he took the view that termination took place on 14 February 2020 and this view was perfectly reasonable. He said it was not reasonably practical for the claimant to predict the date and his only practical way of proceeding was to put in a claim three months from the date on which he understood his employment to have been terminated.

22. On whether it was just an equitable to extend time Mr Keen said but there is a balance of prejudice to consider, and it must be considered whether a fair trial is still possible. He said that memories of witnesses would not be affected by a seven-day delay and the balance of prejudice was in the claimant's favour. The claimant had been confused by the dates. He had lost pay, in terms of receiving statutory sick pay, as well as losing work, where on his case adjustments could have been made which would have allowed him to go back to work, and therefore it was just that he be able to pursue his claim.

23. For the respondent Ms Beale said that although the dismissal letter dated 5 February 2020 was headed 'without prejudice' it was clearly intended to be read severally and the parts of the letter dealing with termination were not without prejudice. Ms Beale said that the letter was an unambiguous termination of employment. The respondent relied on the cases of *Willoughby v CF Capital plc UKEAT/503/09* and *Kirklees Metropolitan Council v Radecki [2009] EWCA Civ 298.* Ms Beale said that it was not determinative that the claimant may not have agreed to the termination as he was clearly told that his employment would end. She said this case was different to that of *Asamoah v Walter Rodney Housing Association [2001] EWCA Civ 851* in which there was no concluded statement from either party. Here it was clear that employment ended on 7 February 2020. Ms Beale said that even if the letter of 5 February 2020 was ambiguous, which the respondent did not admit, the test in *Chapman v Letheby and Christopher Ltd [1981] IRLR 440, EAT* was made out. The respondent's letter of 5 February 2020 was clearer than that of the letter in the case of *Stapp v Shaftesbury Society [1982] IRLR 326* in that it stated the date upon which the claimant's employment would end.

Decision and Reasons:

24. The tribunal must decide whether the effective date of termination is 7 February 2020, the date given in the respondent's letter of 5 February 2020 for termination of the employment, or 14 February 2020, the date on which the claimant received payment in lieu of notice. The respondent says that its letter of 5 February 202 is unambiguous and there is a clear demarcation between the termination paragraphs which are not part of an offer but a notification of termination of employment, and the paragraphs relating to the settlement offer, which was still open to discussion. The claimant states that the letter is ambiguous and furthermore as the respondent states that the termination was by mutual agreement, if the claimant does not agree to the termination, then employment cannot be terminated on that basis. The claimant says that termination happened on 14 February when payment in lieu of notice was given, thus triggering a clause in his employment contract which allowed for payment in lieu of notice.

25. I was directed to various authorities by the parties including *Asamoah v Walter Rodney Housing Association [2001]EWCA Civ 851, Willoughby v CF Capital plc UKEAT/503/09* and *Kirklees Metropolitan Council v Radecki [2009] EWCA Civ 298* all of which concerned facts that were similar in some way to this case, but not in others, and which I have had regard to in reaching my decision.

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.

29. Having heard from both representatives and after hearing evidence from the claimant it is my decision that it is just and equitable to extend time for the filing of the claimant's claim of disability discrimination under s123 (1)(b) Equality Act 2010. The delay in filing was short, being a matter of six days. The claimant gave evidence that I accept, that he was concerned about the dates, that he was trying to contact solicitors, and had difficulty in doing so during these relatively early days of the pandemic. It is clear that the claimant relied on the advice of his legal representatives, and for those reasons the claimant should have the opportunity to bring his claim.

30. I do not accept that the respondent is prejudiced by an extension of the filing date by six days. However, I note that there has been a further delay in arriving at this hearing, and this was partly due to the time it took for this hearing to be listed by the Tribunal. On balance my decision is that any prejudice to the claimant in the refusal of an extension of time would be greater than the prejudice to the respondent in responding to this claim, despite it not having been brought within the three-month time limit.

31. I extend time for the filing of the claimant's claim of disability discrimination to 14 February 2020.

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Employment Judge Anderson

Date: 24 November 2021

Sent to the parties on:

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For the Tribunal Office