EMPLOYMENT TRIBUNALS

Claimant: N Ramluchumun

Respondent: University of Surrey

Heard at: Watford Employment Tribunal by CVP

On: 22 April 2022

Before: Employment Judge Murphy

Representation

Claimant: In person
Respondent: Mr S Allen, Solicitor

RESERVED JUDGMENT

The judgment of the Tribunal is that the claim for breach of contract is dismissed, the claimant having suffered no losses arising from his wrongful dismissal and having no entitlement to an award of damages.

REASONS

Introduction

1. The claimant brings a claim for breach of contract. A hearing took place remotely by video conferencing on 22 April 2022. The claimant was employed by the respondent university as Head of Service Transition from 6 April 2020 until he was dismissed on 5 October 2020.

2. The claimant provided further and better particulars of his claim on 25 May 2021 pursuant to an Order by Employment Judge Anstis dated 20 May 2021. He had been ordered to specify what term or terms of his contract had been breached by the respondent.

3. During the preliminaries, it was identified, having reviewed the claimant's response to the Order, that he relies upon the following asserted express terms of his employment contract:

(i) paragraph 13(f) of the Staff Handbook dated May 2018, sent to the claimant on 31 March 2020 which states (in a section headed 'Probation') "*Responsibility for monitoring the probationary period lies with the line manager*"

(ii) a paragraph, contained in an email from Brooke Kelsey, Human Resources Assistant, to the claimant dated 5 March 2020: "*Attached to this position is a 6 month period of probation, which all new staff are required to complete. As part of this you would agree a set of targets for completion and throughout this time you would be supported with your development into the role*".

4. The respondent made an application to amend its Grounds of Resistance in the light of the claimant's further and better particulars during the preliminaries. The claimant withdrew his previous written opposition to this application, and the amendment was permitted. I considered the overriding objective was served by allowing the respondent to clarify its position in light of the claimant's clarifications. The respondent denies that the provisions set out in the preceding paragraph gave rise to contractual obligations on its part or, alternatively, says that if they did so, the obligations were not breached.

5. The claimant confirmed during the preliminary discussion that he relies upon no other express or implied terms. He confirmed, in particular, that he does not contend that the respondent's Probationary Assessment Review Procedure formed part of his contractual terms and conditions of employment and does not seek to rely upon it.

6. The claimant advised that he contends that the Employment Staff Handbook dated May 2018, which was sent to him on 31 March 2020 formed part of his contractual terms and conditions. The respondent included in the joint bundle an amended version of the Handbook, dated 30 April 2020. The respondent's position is that the later version supersedes the version sent to the claimant and that it is the later version which governed the relationship. The claimant disputes this. Both versions contain the term the claimant asserts to be contractual and to have been breached set out at paragraph 3(i) above. The 2018 Handbook contains no clause reserving an entitlement to the respondent to dismiss employees on making a payment in lieu of notice (a PILON clause) whereas the 2020 version includes such a term.

7. I identified the following issues for determination:

   a. Did the provisions set out in paragraphs 3(i) and (ii) above form part of the claimant's contractual terms and conditions of employment?

   b. Did the respondent breach either or both of those terms?

   c. Were those breaches outstanding when the claimant's employment terminated?

d. Did the respondent have a contractual right to pay the claimant in lieu of notice?

e. If the respondent has breached the contract, what sum, if any, should be awarded in damages to the claimant?

8. Evidence was heard from the claimant and the respondent's Director of Service Delivery.

Facts

9. Having heard the evidence, I make the following findings of fact on the balance of probabilities.

10. The claimant was employed by the respondent from 6 April 2020 to 5 October 2020 as Head of Service Transition in the respondent's IT Department. His line manager was K Braim, the respondent's Director of Service Delivery.

11. The claimant applied for the post in response to an advertisement and was invited to an interview in or around late February 2020. The role was advertised as a senior role within IT services, responsible for the control and transition of new IT projects and changes into existing IT products into the University's IT Service Delivery departments. The job description for the role, provided with the recruitment pack indicated, among other elements of the role that "the post holder will be responsible and accountable for the management of all core service transition processes, people and tools". The advertised salary range was £51,034 to £60,905. Following the interview, he received an email from B Kelsey, HR Assistant, on 5 March 2020. The email was in the following terms:

> *I write further to your interview, and am delighted to advise that we would like to offer you the position of Head of Service Transition with effect from 01/05/2020 at a starting salary of £60905 per annum which is Level 6 of the Professional Services job Family. This is a permanent position based in Guilford.*
>
> *The offer is subject to us receiving satisfactory employment references and satisfactory Occupational Health report, which is standard for all new members of staff. I am attaching a pre-placement health questionnaire …*

Attached to this position is a 6 month period of probation, which all new staff are required to complete. As part of this you would agree a set of targets for completion and throughout this time you would be supported with your development into the role.

I attach a copy of our University Pay Scales for your information.

The hours of work are 36.00 hours per week and your annual leave entitlement would be 25 days per annum + 8 bank holidays + 7 university days … (pro rata for part time staff).

It is essential that at all times you hold valid documentation to prove your eligibility to work in the UK that meets the requirements of the UK visas and immigration.

I would be grateful if you could let me know if you have any questions in respect of this offer. In the meantime, we look forward to hearing back from you regarding whether or not you would like to accept.

Kind regards

12. The claimant replied the same day and asked whether the respondent was able to match his existing salary. Ms Kelsey replied later that day and advised she would have to refer this query to a senior manager. On 25 March 2020, Ms Kelsey emailed the claimant and told him: "*I can no* [sic] *confirm that we have now his final approval for the salary of £66,356*." On 26 March 2020, the claimant emailed back to say "*I confirm I'm accepting the offer and look forward to starting at Surrey soon*"**.** This figure exceeded the top end of the respondent's advertised salary range for the role.

13. On 31 March 2020, Ms Kelsey emailed the claimant again. She attached various documents to the email. It read, so far as relevant:

"*Please find attached a copy of your contract for the role of Head of Service transition.*

This is an unsigned version, please consider this email as confirmation."

14. One of the attachments to the email was a file named "Initial Contract Later" (*sic*). This was a letter to the claimant which included the following terms:

I am enclosing two copies of the Principal Statement which will apply to this appointment. I am also enclosing terms and

conditions of employment which govern your appointment (together with other additional, relevant information). Please read these carefully. Together with this letter they make up your contract of employment.

Any offer of employment is subject to the receipt, prior to commencing, of references and a medical report, all of which must be satisfactory to the University.

…

If you would like to accept this offer of appointment as set out in the Principal statement, please will you sign and return one copy … as soon as possible."

15. On the second page of the letter, the enclosures were listed as follows:

"Terms and Conditions of employment for Professional Services staff:
Staff Handbook
Principal statement
Additional Information:
Health and Safety Information
Pension Information
Relocation Information if relevant
Bank details
Single Pay Spine Pay Scales (if not already provided)
Job Purpose / Tole Profile (if not already provided)"

16. There was also a pdf file attached to the email named "Contract". It was headed "Principal Statement of Main Terms and Conditions of Appointment". It included the following terms, so far as relevant:

"…

Probation

Your appointment is subject to the satisfactory completion of a probationary period of 6 months ending 6 October 2020. Details of the probationary process are enclosed in the Staff Handbook.

…

Notice Period

For Information on your notice period, please refer to your Staff Handbook.

Terms and Conditions

The other Terms and Conditions of Service of the University of Surrey which will be applied to your appointment are contained in the Staff Handbook."

17. The claimant signed and returned a copy of the Principal Statement of Main Terms and Conditions of Appointment.

18. A further attachment to the email of 31 March was a pdf called 'staff-handbook-2018-Copy'. This file was a handbook stated on its cover to have been revised in May 2018. So far as relevant, it was in the following terms:

"INTRODUCTION

(a) This Handbook details terms and conditions of employment for all staff and should be read in conjunction with the portfolio of University employment policies and procedures, which are available on the Human resources (HR) Website. These policies and procedures do not form part of employees' terms and conditions.

…

10. NOTICE PERIOD

(a) On leaving the University the following Notice Periods apply.

Level / Group	***Notice Period***
Level 5 – 7 (non-academic)	*3 Months (reduced to 1 month within probation)*

(b)….

(c) In the event that the University issues notice, the Statutory Notice Period will apply if it exceeds the contractual Notice Period.

(d) …

(e) The University reserves the right to require employees who have resigned with notice, or who have been given notice to terminate their contract, not to attend their place of work for all or part of the notice period.

…

13. PROBATION

(a) All appointments are subject to a probationary period. The following rules apply.

Academic Staff	*3 Years*
Teaching Fellows	*2 years*
All other Staff	*6 Months*

(b) These periods may be modified by the terms of individual contracts of employment.

(c) Appointments are to be confirmed in writing following the satisfactory completion of the probation period.

(d) In certain circumstances, it may be necessary to extend the period of probation.

(e) For posts of less than one year's duration, the probationary period may be reduced as appropriate.

(f) Responsibility for monitoring the probationary period lies with the Line Manager.

…

24. CONDUCT AND PRACTICE

(a) …

(b) …

For those members of staff without easy access to the internet, a list of policies referred to in this handbook can be obtained from their HR representative.

The University of Surrey reserves the right to amend this document in negotiation with staff and recognised trade unions."

19. The respondent also published on its intranet a document titled "Probationary Assessment Review Procedure". This was not sent to the claimant with the email of 31 March 2020 or at all either before or during his employment. On its front cover it was stated to have been updated in June 2015. In the introductory section it states: "*This policy and procedure does not form part of any employee's contract of employment. It may be amended from time to time with appropriate consultation with recognised trade union representatives*". The claimant did not access the document during his employment and his attention was not drawn to it by the respondent. The claimant requested and was provided with a copy after his employment terminated. The document sets out various recommendations regarding how probation should be managed including the setting of objectives and the holding of regular one to one meetings.

20. At some stage in April 2020, the respondent amended the terms of its Staff Handbook. This was prompted by changes in its understanding of legislation relating to taxation. The process by which the change was introduced was a short discussion with the respondent's recognised trade unions. The respondent did not consult with staff because it regarded the change as a minor one. It simply made the amendment and published the updated version on the staff intranet. It included the following addition to section 10 of the Handbook (Notice):

(f) The University reserves the right to pay an employee in lieu of notice (PILON). Further details can be found in the Leavers procedure.

21. The respondent did not communicate the change to the claimant or draw to his attention the fact that an amended version of the Handbook had been posted online.

22. The claimant's role was a senior one within the respondent's grading system and was the most senior position in the team reporting to Mr Braim. The remit was to deliver new IT infrastructure library processes. The claimant was a certified expert in IT infrastructure library processes. Due to the Covid 19 pandemic, the claimant worked from home for the duration of his employment. This arrangement was not the norm for the role and in other times the expectation would not have been that the claimant would fulfil the role by working remotely. In the first week of his employment, Mr Braim and the claimant discussed and agreed the

objectives for the first six months of employment, during which the claimant was subject to a probationary period.

23. In late September or early October 2020, Mr Braim made the decision to dismiss the claimant without notice because he had concerns about the claimant's performance in the role. Mr Braim raised with the claimant his concerns about the claimant's performance for the first time on or about 30 September 2020. A probationary review meeting was held online on this date, when the claimant was told his performance was unsatisfactory and that he had failed his probation. A further online meeting took place on 2 October 2020 with Mr Braim, when the claimant asked for an extension to the probationary period to allow him time to improve. Mr Braim declined the request. On 5 October 2020 a further online meeting took place. Mr Braim declined to reconsider his refusal of the extension and the HR Manager in attendance confirmed the claimant's dismissal with immediate effect during the meeting.

24. On 30 October 2020, the respondent paid to the claimant a sum equating to three months' salary less deductions for income tax and employee's national insurance contributions.

25. In the three-month period from 5 October 2020, the claimant made numerous applications for alternative employment. He was not successful in securing a role during this period and remained unemployed for approximately a year after his employment with the respondent terminated.

Relevant Law

26. The Employment Tribunal has jurisdiction to consider claims for recovery of damages for breach of contract pursuant to the Employment Tribunal Extension of Jurisdiction (England and Wales) Order 1994, SI 1994/1623. There are limits on the Tribunal's jurisdictions and certain types of claim are excluded, including claims for personal injury. The claim must arise or be outstanding on termination of the employment and the damages available are capped at £25,000.

27. When constructing a contract of employment between employer and employee, terms expressly agreed between the parties are paramount, unless overridden by statutory rights. In considering a situation where terms are said to emanate from more than one source, it will be necessary to consider the 'aptness' for incorporation into the contract of the particular provisions. What requires to be determined is whether the words are intended to confer a legal right. Sometimes it is clear that they don't because they are expressly non-contractual. However, even where a document like a handbook is expressly incorporated into a contract by general words, it is still necessary to consider in conjunction with the words of incorporation whether any particular part of that document is 'apt' to be a term of the contract; if it is 'inapt', the correct construction

may be that it is not a term of the contract (**Alexander v Standard Telephones and Cables Ltd** [1991] IRLR 228, per Hobhouse J).

28. To determine the aptness for incorporation, there is no single determining factor, but it is necessary to consider whether the provision in question was intended to give rise to a legally enforceable obligation or is merely a statement of aspiration or guidance / good practice. The subject matter may be indicative; clauses related to remuneration and benefits, for example, are relatively commonly determined to be apt for incorporation. The starting point is the language of the document or documents, and it is necessary to analyse the provision in the context of the documents as a whole. Factors which may be relevant include the level of detail; the certainty of the provision(s); and its 'workability', were it taken to be contractual (**Keeley v Fosroc International Ltd** [2006] EWCA Civ 1277).

29. Some contracts include a clause which reserves a right to the employer to terminate the contract without giving notice on making a payment in lieu of notice. This is often referred to as a PILON clause ('Payment In Lieu Of Notice'). In these situations, it would not be wrongful dismissal for the employer to end the contract by paying the specified amount in lieu as the employer is acting in accordance with the contractual provisions. In such circumstances, unless the clause expressly provides otherwise, there is no obligation on the employee to mitigate their loss and they do not have to give credit for sums earned elsewhere during what would have been the contractual notice period. If there is no PILON clause, summary dismissal accompanied by a payment in lieu of notice will be a wrongful dismissal (in the absence of gross misconduct by the employee). However, there may be no damages available where the employee has been paid an amount equivalent to the recoverable damages by the employer.

30. To identify the terms which bind the parties, in addition to considering the question of aptness, it may be necessary to consider whether the provision(s) relied upon have been communicated to the employee in question. In **Briscoe v Lubrizol Ltd** [2002] IRLR 607, the Court of Appeal gave some consideration to the question in the context of incorporating terms from a handbook which dealt with entitlement to a sickness benefit.

> *"… the court does not look favourably upon an employer who seeks to restrict his contractual obligations in reliance upon a document (whether by reference to a 'works notice' or an insurance policy) to which the employee is not party and to which his attention has not been specifically drawn, so as to limit a right or benefit which information given in the handbook has led the employee to expect"* [para 14]

31. In **Johnson v Unisys** [2001] IRLR 279, the House of Lords held that the implied term of mutual trust and confidence is not applicable to the manner of dismissal. The basis for the decision was that to apply the term in those circumstances would trespass on the statutory jurisdiction of unfair dismissal. However, if there have been pre-dismissal breaches that are outstanding on the termination of the employment, these may be actionable in damages (**Eastwood v Magnox Electric Plc, McCabe**

v Cornwall County Council [2004] UKHL 35). In that case, Lord Nicholls, who gave the leading judgment, acknowledged that deciding whether action fell inside or outside the so-called '**Johnson** exclusion zone' would be difficult. It was assumed that the exclusion zone applied to implied terms but it has since been confirmed by the Court of Appeal that the **Johnson** reasoning also applies to the express terms of the contract, in the form of contractually incorporated disciplinary procedures (**Edwards v Chesterfield Royal Hospital NHS Foundation Trust; Botham v Ministry of Defence** [2012] IRLR 129).

32. In an assessment of damages, the contract breaker is to be taken as having performed his obligations in the least onerous way possible. The calculation of damages in a wrongful dismissal is usually limited to the amount of money the employee would have earned during his or her notice period or until the expiry of a fixed term. Where an employer's breach consists of a failure to follow a contractual procedure, damages may extend to a further sum to compensate the additional period which would have had to elapse had the employer honoured the contractual procedure (**Gunton v Richmond on Thames Borough Council** [1980] IRLR 321). This is sometimes known as the **Gunton** extension. However, the likely outcome of the contractual procedure is irrelevant to the question of damages. In other words, an employee cannot usually claim for the loss of a chance he would have remained in employment with the employer had a contractual procedure been followed (**Janciuk v Winente** [1998] IRLR 63, **Edwards v Chesterfield Royal Hospital NHS Foundation Trust** [2012] IRLR 129, **Focsa Services (UK) Ltd v Birkett** [1996] IRLR 325). Nor can an employee claim damages for the loss of the chance he would have acquired the qualifying service to claim unfair dismissal as a result of an alleged failure to follow a contractual procedure (**Harper v Virgin Net** [2004] IRLR 390).

Discussion and decision

33. Both the claimant and the respondent's representative gave an oral submission. I have not attempted to summarize these here, but refer to the submissions made in the context of the discussion of the issues for determination. The claimant is a litigant in person. Where I have referred to any omission in his submission regarding any matter, no criticism should be inferred. As identified in the preceding section, the law in this area is not without complexity. The claimant conducted the proceedings in an able, helpful and professional manner.

34. The first issue to be determined is whether the provisions identified in paragraph 3 above form part of the claimant's legally enforceable terms and conditions of employment.

Asserted Express Term (1): Section 13 (f) of Handbook

35. The claimant did not address me in his submissions on why the provisions identified in paragraph 13(f) of the handbook should be regarded as contractual. He did make submissions which appeared to rely on other asserted terms. These were not foreshadowed by his response to EJ

Anstis's Order or in the preliminary discussion on the day of the hearing. They are discussed further below under a separate heading.

36. On the matter of section 13(f) of the handbook, Mr Allen submitted that, as a matter of contract law, terms must be certain and drafted with the intention to create legal relations. The sentence: "*Responsibility for monitoring the probationary period lies with the line manager",* did not, said Mr Allen, confer an obligation to manage the claimant in a specific way or, if it did, that obligation was discharged.

37. The paragraph appears in a handbook which expressly states it details the terms and conditions of employment for staff. It refers to policies and procedures which it distinguishes as not forming part of the terms and conditions of employment. That is consistent with the information in the offer letter dated 31 March 2021 and the headings under which the enclosures are listed. On the subject of probationary periods, the handbook is supplemented by the document called Probationary Assessment Review Procedure which, though not referenced in the handbook itself, was published on the respondent's intranet. That procedure is expressly non contractual. It sets out various recommendations regarding how probation should be managed including the setting of objectives and the holding of regular one to one meetings.

38. Although paragraph 13(f) appears in a document which purports to be contractual, that is not inevitably determinative of the question. It remains to consider the aptness of the provision for incorporation in the claimant's employment contract. Is it suggestive of an intention to create legal relations? In considering this question, I have regard both to the context of the sentence within the documentation as a whole and its language. Read literally, it is concerned with the monitoring of the probationary *period* (my emphasis); it does not refer to monitoring the probationary employee or the employee's performance. Viewed in the overall context of the documentation, I consider this literal interpretation of section 13(f) of the handbook to be the correct one. It is concerned with nothing more than a statement of where the responsibility sits for monitoring probationary periods in the sense ensuring their expiry dates are not missed. That responsibility sits, according to the provision, with the line managers for their direct reports as opposed, perhaps, to a centralized HR function.

39. A number of factors incline me to this view. If the requirement to monitor probationary period were to be read more widely and the words stretched to an obligation to monitor the probationary employee's progress during that period (as opposed, merely, to the time period itself), then this would appear to overlap with the subject matter of the Probationary Review Assessment Procedure which is expressly non-contractual. Further, if it were intended to give rise to an enforceable obligation to monitor progress, then that obligation is problematically vague and imprecise. There is no certainty regarding the frequency of progress reviews necessary to discharge an obligation to 'monitor'. Even if the wider interpretation were accepted, the provision notably makes no reference to appraising or warning the employee but is limited to 'monitoring'. That omission seems consistent with the interpretation that the 'monitoring' in question is limited to the probation period in the sense of its length, as opposed to any broader interpretation of that phrase. If that reading is

correct, then it doesn't appear suggestive of an intention to create a legally enforceable right on the part of the employee.

40. I agree, on balance, that the sentence at section 13(f) of the Handbook is not apt for incorporation in the claimant's contract. Alternatively, if I am wrong and the provision is indeed apt for incorporation, I accept Mr Allen's submission that the respondent has not breached it. Mr Braim did monitor the period in that he kept an eye on the expiry date and reviewed the position before the 6-month period ended. The provision, even if contractual, does not confer an obligation to appraise or provide feedback to the employee. If the provision conferred any contractual obligation, I find that the action Mr Braim took sufficed to discharge it.

Asserted Express Term (2): Probation paragraph in email of 5 March '20

41. The other contractual term the claimant asserts is a paragraph in Ms Kelsey's email of 5 March 2020:

> "*Attached to this position is a 6 month period of probation, which all new staff are required to complete. As part of this you would agree a set of targets for completion and throughout this time you would be supported with your development into the role",*

42. The claimant did not give submissions on why the provisions identified in the respondent's email of 5 March 2020 should be regarded as contractual. In his response to EJ Anstis's Order, he stated simply that "The HR offer letter … also constitutes the contract of employment" (para 18). The claimant accepts that he discussed and agreed a set of targets with Mr Braim for completion in the probationary period during the first week of his employment. Therefore, I have focussed primarily on the part relied upon (*…throughout this time you would be supported with your development into the role)*, without ignoring the overall context of the sentence. Mr Allen submitted that there is a lack of certainty in those words which did not confer an obligation to support the claimant in a specific way. He referred to the use of the conditional tense "would" as opposed to "will" and suggested this indicated a lack of intention to create legal relations. Alternatively, if the Tribunal were to find that the paragraph did confer enforceable rights, Mr Allen said the rights had not been breached.

43. The email from Ms Kelsey on 5 March was the first email containing an offer to the claimant of the position. It is relatively brief and does not purport to set out in full the terms and conditions of the employment. It was not immediately accepted but the claimant responded by making a counteroffer, seeking a higher level of remuneration than that originally offered. A contract is created when there has been an unqualified acceptance by one party of an offer made by another. On 25 March 2021, Ms Kelsey confirmed the higher figure and on 26th March 2021, the claimant wrote to accept the offer. I accept that it was implied when the claimant accepted Ms Kelsey's offer on 26 March 2021 that he was accepting an offer on the same terms as that contained in her email of 5 March 2020, save with respect to the increased salary. A contract was

formed on that date. Some key terms had been established including a start date, a salary, a job title, and a place of work. However, other important terms had not yet been agreed. For example, no terms had been agreed with regard to notice, or pension benefits or sick pay entitlement in the correspondence which had passed between the claimant and Ms Kelsey.

44. On 31 March, the claimant was sent, for the first time, a document purporting to be his 'Principal Statement of Terms and Conditions' and a Handbook which said it detailed the 'terms and conditions of employment'. He was also sent a document which purported to be an 'offer letter'. The offer letter of 31 March said, "If you would like to accept this offer of appointment *as set out in the Principal Statement* (my emphasis) please will you sign and return one copy". The claimant did so. The Principal Statement included a clause which said: "The other Terms and Conditions of Service of the University of Surrey which will be applied to your appointment are contained in the Staff Handbook". There was no supersession clause or 'entire agreement' clause in the Principal Statement or Handbook and Mr Allen advanced no argument that the terms in the email of 5 March 2021 had been superseded by the documentation of 31 March 2021. I proceed on the basis that they had not, except where there was inconsistency, in which case the Principal Statement prevailed. The start date, for example, was changed in the Principal Statement and the employment, in fact, began on the amended start date.

45. Although both the Principal Statement and Handbook included provisions on probation, nothing in either document conflicted with the terms of Ms Kelsey's email of 5 March on that subject. Nevertheless, the question remains whether the paragraph relied upon in that email was apt for incorporation in the claimant's contract. The provisions must be considered in the context of the documentation as a whole.

46. The subject matter of Ms Kelsey's paragraph overlapped with the contents of the non-contractual Probationary Assessment Review Procedure (PARP) which contains various recommendations on how the process should operate. The PARP did not supersede Ms Kelsey's email, even in the event of conflict, since it is expressly non-contractual and was not specifically drawn to the claimant's attention or sent to him during his employment. Nonetheless, it was among the published policies available on the respondent's intranet and its existence, overlapping subject matter and expressly non-contractual status provide relevant context (and nothing more) to a consideration of the language of the email itself.

47. With reference to the 6-month period, it says *throughout this time you would be supported with your development into the role*. In this regard, I agree with Mr Allen's there is a vagueness and lack of precision in the words. This points away from an intention to create legal relations. It brings a lack of certainty regarding how it might be interpreted in general, but in particular, with respect to a senior and highly qualified role such as the claimant's. Identifying the practical implications of a purported obligation to "support development" poses significant challenges where the post in question of its nature entails ultimate responsibility and

accountability for the transition processes with which it is concerned. I also agree that the use of the conditional tense tends towards the view that Ms Kelsey's words are to be read as aspirational rather than legally binding. On balance, I accept that the provision in the email is not apt for incorporation into the claimant's contract.

48. That being so, it does not confer a legally enforceable right upon the claimant which is actionable in damages.

49. If I am wrong in that, I find that the claimant is, in any event, prevented from relying upon the contested paragraph in the way he attempts to do because such a claim falls within the **Johnson** exclusion zone. It is tolerably clear, reading the claimant's ET1 and particulars of claim as a whole, that the complaint is about his dismissal. He describes his complaint as one of wrongful dismissal. He says in the paper apart to his claim after narrating the history of the matter, "I believe my dismissal was wrong and my contract was ended without going through a fair dismissal process as per the contract of employment." Likewise at paragraphs 22, 23 and 24 of his further particulars, he says the dismissal was "unfair" and "wrongful". The claim does not give notice that it is for any specified pre-existing cause of action said to arise from the alleged right to be "supported with [his] development" distinct from the dismissal itself. The claimant has not quantified any losses asserted to arise from a pre-dismissal breach but has referred in the proceedings only to losses and stress arising from the dismissal. A claim of the sort which has been advanced encroaches upon the territory of the unfair dismissal jurisdiction which Parliament has chosen to restrict to those employees with two years' service. The Court of Appeal has confirmed that the **Johnson** reasoning also applies to the express terms of the contract (**Edward**).

Possible Additional Term referred to in Submissions (1): Probationary Assessment Review Procedure

50. The claimant referred in his submissions to the respondent's Probationary Assessment Review Procedure which he said was not followed. The claimant has specifically confirmed during the preliminaries that he does not seek to rely upon the terms in that document or assert them to be contractual. The respondent's adherence or otherwise to the PARP is not material to the issues for determination.

*Additional Term suggested in Submissions (2): **White** implied term*

51. The claimant cited two cases during his submissions, namely: **White v London Transport Executive** [1981] IRLR 261, EAT and **The Post Office v P A Mughal** [1977] IRLR 178.

52. The **Mughal** case is not relevant to the present claim as it concerns an unfair dismissal claim on the grounds of capability and the application of a 'reasonableness' test to the dismissal of a probationer, in the context of that statutory complaint. It is not a breach of contract claim. It was determined at a time when there was jurisdiction to bring a complaint of unfair dismissal with just 6 months' qualifying service. Ms Mughal was, therefore, able to bring this type of complaint when she was dismissed at the end of a year long probationary period.

53. The case of **White v London Transport Executive**, on the other hand, raises a distinct argument that there is a special implied contractual term which applies in the circumstances of a probationary period. **White** concerned a complaint of constructive unfair dismissal, and in that context, the EAT held that there was an implied term in the contracts of employment of probationary employees imposing an obligation on employers to take reasonable steps to maintain an appraisal of a probationer during a trial period, giving guidance by advice or warning where necessary. My understanding of the claimant's submission, having had the opportunity after the hearing to locate a copy of the authority which was not supplied to the Tribunal or to Mr Allen, is that he says the implied term applied to him and that the respondent breached it.

54. The claimant was ordered by EJ Anstis to provide details of the term or terms he claimed had been breached. He did not mention that he proposed to rely on any implied term with reference to the **White** case or otherwise. In the preliminary discussion on the day of the hearing, the claimant confirmed he relied only on the asserted express terms in paragraph 3.

55. I am mindful, however, that the claimant, a litigant in person, may not have appreciated the importance of explaining his reliance on the **White** term at an earlier stage. In any event, given the claimant's complaint is essentially that his dismissal was in breach of contract, I find that an argument based on the implied term mentioned in **White** falls within the **Johnson** exclusion zone. The House of Lords decided **Johnson v Unisys** approximately 20 years after the EAT gave its decision in **White**. In light of **Johnson**, I do not consider the **White** implied term can safely be relied upon, at least in a case like the one here advanced, where it is the dismissal which is said to have occurred in breach of the term. Parliament has set up a statutory system for dealing with unfair dismissals and elected not to build on the common law by creating a statutory implied term. The matters complained of are in the jurisdiction conferred by Part X of the Employment Rights Act 1996 (the right not to be unfairly dismissed). As discussed above, this is not a claim for a pre-existing cause of action, distinct from the dismissal. The claimant has made no claim for any specified measure of damages to compensate an additional period (over and above the notice period) which he says would have had to elapse before dismissal if the respondent had complied with the **White** term. That is, there is no claim for a so-called **Gunton** extension**.**

56. I therefore find that the claim advanced in reliance on the **White** implied term also fails.

Did the respondent have a contractual right to pay the claimant in lieu of notice?

57. The question arises whether the respondent can rely upon the PILON clause in the Handbook revised in April 2020 in circumstances where the claimant was not provided with a copy of the updated version or informed of that an amended version was in place. I find that he cannot, applying the approach of the Court of Appeal in **Briscoe v Lubrizol Ltd.** The respondent here seeks to expand its contractual entitlement to include an entitlement to dismiss summarily on the payment of a sum in lieu of the contractually owed notice period. It does so by seeking to rely on a document (the amended handbook) to which the claimant's attention was not drawn. The PILON clause in the more recent version arguably limits a right which the previous version of the handbook led the claimant to be entitled to expect, namely his continued employment during the notice period.

58. I do not accept any suggestion that the requirement to communicate the change to the claimant was met or removed by the reservation at the end of the Handbook of the right to amend the document in negotiation with staff and recognised trade unions. A reserved right to amend does not exclude the requirement to communicate the amendment particularly where, as here, staff were not in fact consulted before the change was published. It follows from this finding that the respondent dismissed the claimant in breach of contract in circumstances where it was not contractually entitled to do so summarily on making a payment in lieu of notice.

If the respondent has breached the contract, what sum, if any, should be awarded un damages?

59. The measure of the claimant's damages was his entitlement to pay during the notice period. The claimant discharged his duty to mitigate his losses by using reasonable endeavours during the three-month period to find alternative employment. However, the respondent paid the claimant a sum equivalent to three months' pay on 30 October 2020. The claimant, therefore, has no loss arising from the respondent's breach of contract and no entitlement to an award in damages.

60. The Tribunal's jurisdiction is restricted to claims for recovery of damages for breach of contract and extends to no other remedy. Accordingly, in the absence of any damages being due, the claim falls to be dismissed.

Employment Judge Murphy (Scotland), acting as an Employment Judge (England and Wales)

Date 13 May 2022

JUDGMENT SENT TO THE PARTIES ON

26 May 2022

FOR THE TRIBUNAL OFFICE

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