EMPLOYMENT TRIBUNALS

Claimant: Mr C Burrows

Respondent: The Cambridge Building Society

Heard at: **Cambridge (via CVP)** **On:** **28 November 2022**

Before: **Employment Judge Varnam**

Representation
Claimant: Mr R Capek, consultant
Respondent: Ms V Filler, Head of People

RESERVED JUDGMENT

1. The Respondent breached the Claimant's contract of employment in respect of the amount of the payment in lieu of notice that it paid to him.

2. The Respondent is ordered to pay the gross sum of £2,893.15 to the Claimant as damages for the aforesaid breach of contract.

REASONS

1. This is my judgment in respect of the Claimant's claim for damages for breach of contract.

2. This matter was listed before me, sitting remotely, on 28 November 2022. On that day, I heard evidence from the Claimant, and from the following witnesses on behalf of the Respondent:

   (1) Miss Carole Charter, Chief Commercial Officer.
   (2) Mrs Lucy Crumplin, Chief Operating Officer.
   (3) Ms Victoria Filler, Head of People.

3. Ms Filler also acted as the Respondent's representative at the hearing. The Claimant was represented by Mr Rudi Capek, an employment law consultant. I am grateful to both for their assistance.

4. At the commencement of the hearing, I raised with the parties a particular issue, namely that I had, in January 2019 in the course of my practice as a barrister, acted for the Respondent in a property dispute. I explained that I had appeared for the Respondent at one short hearing, that none of the individuals involved in this case had featured in that matter, and that I had had no ongoing involvement or connection with the Respondent since January 2019. I gave both parties time to consider the matter and take instructions, and neither party objected to me proceeding to hear this case.

5. The hearing before me was listed at 2pm, for a period of two hours. This was a somewhat short listing, given the issues in the case and the fact that four witnesses were called between the parties, but by sitting until 5pm (with the agreement of both parties) we were able to complete the evidence.

6. By the conclusion of the hearing, it was clear that it would be necessary for me to reserve my judgment. Mr Capek expressed a preference for written submissions, while Ms Filler preferred to give oral submissions during the hearing. I resolved this by hearing oral submissions from Ms Filler, and directing that Mr Capek could file written submissions by 9 December 2022, with Ms Filler having the opportunity to respond to these by 16 December 2022. Both parties agreed to this approach.

7. I proceeded to hear oral submissions from Ms Filler, and subsequently received written submissions from Mr Capek on 7 December 2022, a written response from Ms Filler on 8 December 2022, and a further response from Mr Capek on 9 December 2022.

8. The promulgation of this judgment has regrettably taken longer than I had anticipated, and I apologise to both parties for this delay.

Findings of Fact

9. I now turn to set out my findings of fact. In the parties' written and oral evidence, and in the bundle of documents, a number of matters were referred to which are not addressed in detail below. In this judgment, I have limited myself to those findings of fact which are necessary in order for me to resolve the dispute between the parties.

10. The Claimant became employed by the Respondent on 5 July 2021, in the role of Head of Customer Strategy. This was a senior role, and the Claimant reported to the Respondent's Chief Commercial Officer, Miss Charter. The Claimant's basic salary was £66,000 per year. He received other benefits, including a workplace pension, private medical insurance, and death in service benefits.

11. Prior to the commencement of his employment, on 21 June 2021, the Claimant signed a written contract of employment. This contained the following relevant terms:

> ***1. Commencement of Employment***
>
> *1.1. Your employment under this contract will commence on 5th July 2021 and, subject to the terms of this contract, is for a*

fixed term continuing until it terminates, without the need for notice, on the earlier of 31st December 2022, unless previously terminated by you or us giving no less than 3 months written notice at any time. No period of employment with any previous employer counts as part of your period of continuous employment with the Employer.

[…]

3. Probationary Period

3.1. The first six months of your employment will be a probationary period (the Probationary Period), during which we will monitor your performance and conduct. Training, support and guidance will be given to help you become familiar with, and competent in performing your role. During the Probationary Period you will not be subject to the Society's disciplinary procedures, contained in the Staff Handbook, and the Society reserves the right to terminate your employment either during or at the end of the Probationary Period on one week's written notice. During the Probationary Period you will not be entitled to sick pay (other than Statutory Sick Pay).

3.2. If we are not satisfied with your performance or conduct during the Probationary Period, we may at out discretion extend the Probationary Period by a period of up to a further three months. If so, you will receive confirmation of the extension.

3.3. When you have completed your Probationary Period to our satisfaction, we will confirm your continued employment in writing.

[…]

16. Notice

16.1. The Society reserves the right, in its sole and absolute discretion, to pay salary in lieu of part or all of any period of notice should it so wish equal to your basic salary (as at the date of termination).

16.2. Nothing in this Agreement prevents the Society from terminating your employment summarily or without notice in the event of you committing an act of gross misconduct…

12. Much of the Claimant's work was concerned with the development of a business case for a new Customer Relationship Management ('CRM') system for the Respondent's business. The Claimant's witness statement provided substantial detail concerning the work that he undertook in this regard. However, by reason of a concession by the Respondent to which I

refer at paragraph 48 below, it is not necessary for me to undertake a detailed consideration of the Claimant's work.

13. What is apparent from the evidence is that not all of the Respondent's senior management were supportive of the proposed CRM system. In particular, it appears that the Chief Financial Officer, Mr Brockbank, was not supportive and that at a meeting on 16 September 2021 he declined to approve funding for the development of a full CRM system.

14. The Claimant subsequently met with Miss Charter for what was described as a 3-month probation review, albeit that it may have taken place as late as 4 November 2021, when the Claimant had been employed for four months (the precise date of the meeting was not clear from the evidence before me). I have seen notes taken by Miss Charter following the meeting. At the conclusion of those notes, Miss Charter wrote that:

> *I said I wanted to be honest with [the Claimant] at this point and say with the changing business priorities I did think it may become a challenge to continue to offer him the role and opportunities that we originally recruited him for during his contracted period. He said he didn't want to be somewhere if there wasn't a job for him.*

15. During November 2021 there were discussions between Miss Charter, Mrs Crumplin, and the Respondent's Chief Executive, Mr Peter Burrows (no relation of the Claimant), concerning a proposal to dismiss the Claimant. An e-mail from Mrs Crumplin to Miss Charter and Peter Burrows, dated 26 November 2021, refers to these discussions, and is clearly concerned with the approach to be taken to the Claimant's dismissal. It quotes from clauses 1.1 and 3.1 of the Claimant's contract of employment, which are set out above.

16. On 3 December 2021, the Claimant met with Miss Charter. During this meeting, Miss Charter told the Claimant that the Respondent had decided to terminate his contract of employment. I accept the Claimant's evidence that the reason that he was then given was that '*the world had moved on*' – this would appear to be consistent with the reference to '*changing business priorities*' in Miss Charter's note of the 3-month probation review. On 3 December, Miss Charter told the Claimant that while the Respondent's position was that it could dismiss the Claimant with one week's notice, it would be open to him remaining employed until the end of January 2022, in order to complete certain pieces of work. The Respondent did not, at this stage, give the Claimant notice of dismissal in writing.

17. On 17 December 2021, the Claimant went off sick from work with flu. At 14:30 that day Miss Charter e-mailed the Claimant, enclosing a letter. The letter included the following text:

> *Before I went on annual leave at the beginning of December, we discussed business priorities over the course of the next 12 months and on my return I shared feedback received from stakeholders across the business with regards to your performance. As a result, we have made a decision to end your*

fixed term contract early during your probation period, giving you one week's notice.

There are, however, objectives that we would like you to complete before leaving the business and to enable you to fairly complete these to a high standard, we would like to mutually agree an end date of Friday 28th January 2022. As you currently have 5 days holiday owed to you, your last day working with us will be on ***Friday 21st January 2022****.*

The letter goes on to detail the tasks that the Respondent wanted the Claimant to complete, before providing that:

Your final basic salary payment will be paid into your bank account on Tuesday 25th January 2022.

18. The Claimant and Miss Charter were due to meet again on 5 January 2022 for a scheduled one-to-one meeting. In the meantime, the Claimant had taken advice from Mr Capek, and on 4 January 2022 Mr Capek wrote a letter to Miss Charter, which was sent by e-mail to Miss Charter and Ms Filler. In his letter, Mr Capek argued that in the circumstances that pertained the Claimant could only be dismissed on three months' notice. His letter concluded as follows:

It seems to me that the correct way forward would be for you and [the Claimant] to meet as scheduled on 05.01.22 and to then reach a "mutual agreement" as follows.

- *He will agree that his employment will terminate three months from the date of the discussion (This will take him to an Effective Date of Termination of 04.04.22).*
- *He will agree to continue to attend at work until he has completed the objectives which you set out in your 17.12.21 email.*
- *Once he has achieved these objectives he then be placed on "garden leave" until the EDT is reached, or alternatively at that point, he could be released from the remaining part of his notice period by way of a "payment in lieu of notice" (PILON).*

(He would actually prefer the PILON option at this point since it would immediately leave him free to pursue other employment opportunities).

19. I observe in passing that this letter appears to make proposals to resolve a dispute between the parties, and that as such it might have attracted without prejudice privilege. However, both parties referred to the letter in their evidence, which is likely to amount to a waiver of any privilege that may have existed, and neither sought to suggest that I should not have regard to the letter.

20. At 13:19 on 5 January 2022, before the Claimant had met with Miss Charter, Ms Filler e-mailed the Claimant, copying in Miss Charter and Mrs Crumplin. The e-mail begins with the words '*yesterday we received a letter from a Mr*

Rudolph Capek confirming that your preference is to leave the Society with immediate effect. As such, please find attached your letter of termination'.

21. The attached termination letter, which is signed by Miss Charter, contains the following text:

> *This letter confirms our decision to terminate your employment during your probationary period. This is as a result of your performance and conduct, and changes to our programme of work, which I have explained to you previously.*
>
> *In accordance with clause 3.1 of your contract of employment the Cambridge Building Society ("the Society") has the right to terminate your employment on one week's notice during your probationary period. We had previously discussed the option of a longer notice period (until the end of January 2022), as a gesture of goodwill to you and to enable you to complete some outstanding objectives, however we understand that you would prefer to leave the Society sooner and we no longer require you to remain with the Society until the end of January 2022.*
>
> *At clause 16.1 of your contract of employment, the Society has the right to terminate your employment with immediate effect by making a payment to you in lieu of your notice period.*
>
> *I hereby confirm the Society has decided to terminate your employment with immediate effect and make a payment in lieu of your salary in respect of your one week notice period entitlement, and this letter constitutes written confirmation of that fact. The date of termination of your employment is therefore today, 5 January 2022.*

22. From this letter, it is plain that (i) the Respondent considered that it was entitled to terminate the Claimant's employment on one week's notice, on the basis that his probationary period was continuing, and (ii) that the Respondent was relying on clause 16.1 of the Claimant's contract of employment (which I have quoted above) to terminate the employment immediately with a payment in lieu of notice.

23. While the letter refers to the Claimant's 'performance and conduct', I was provided with no evidence to suggest that the Claimant had committed any form of misconduct, and I find that he had neither committed misconduct, nor was he suspected of doing so.

24. Although the Claimant was offered the opportunity to appeal, he elected not to do so.

25. The Claimant was subsequently paid a final salary payment which included his pay up to 12 January 2022.

26. The Claimant's position, set out in a letter from Mr Capek to Miss Charter dated 5 January 2022, was that the Respondent could only dismiss him on three months' notice, and that he should have been paid a sum equivalent

to three months' wages, together with the employer pension contributions that he would have received up to 4 April 2022.

27. Between 6 January 2022 and 17 January 2022 the parties underwent ACAS early conciliation. The Claimant's ET1 was received at the Tribunal on 31 January 2022 and the Respondent's ET3 was received on 21 July 2022.

28. The Claimant fortunately obtained new employment from 30 January 2022, at a higher rate of pay than he enjoyed with the Respondent.

Relevant Law: Contractual Interpretation

29. Many of the arguments that I have heard ultimately turn on the interpretation of the Claimant's contract of employment. In this regard, it is helpful to set out some of the key principles of contractual interpretation that I will apply in resolving this case.

30. First, the most fundamental tenet of contractual interpretation is that the Tribunal considers what a reasonable person, having all the background knowledge which would reasonably have been available to the parties in the situation in which they were at the time of the contract, would think that the parties had intended by their contract. However, previous negotiations between the parties, and the parties' subjective views as to the meaning of the contract, are not admissible. For these propositions, see the seminal statement of the law by Lord Hoffman in ***Investors Compensation Scheme v West Bromwich Building Society*** [1998] 1 WLR 896, at 912-913.

31. Second, in construing a contract, the contract should be considered as a whole: see Lewison, *The Interpretation of Contracts*, 7th edition ('Lewison'), 7.07ff. In other words, it is incorrect to simply isolate certain parts of the contract and read those on their own – they must be considered against the background of the rest of the contract. As a corollary to this, the Tribunal should seek to give effect to all parts of the contract where possible: see Lewison, 7.24-7.36.

32. Third, where a contract contains general provisions and specific provisions, the specific provisions will be given greater weight than the general provisions where the facts to which the contract is to be applied fall within the scope of the specific provisions: see Lewison, 7.46-7.52.

33. Fourth, where a term of a contract is ambiguous it is construed *contra proferentem* – i.e. in the manner less favourable to the party which produced the agreement. Here, the Respondent produced the contract of employment, so any ambiguity in the contract must be construed against the Respondent. This is a point on which Mr Capek relied in his submissions. It is, however, important to note that the doctrine of *contra proferentem* only arises where there is genuine ambiguity or inconsistency within the contract.

34. I emphasise that the above paragraphs do not purport to summarise every principle of contractual interpretation, but they identify those that may be of particular assistance in resolving the issues before me.

35. Given that clause 1.1 of the contract of employment provides that Mr Burrows shall be entitled to a three-month notice period '*subject to the terms of this contract*', and that Mr Capek's written submissions devoted a considerable amount of space to an analysis of what these words might mean, it is also appropriate to quote the words of Mr Justice Foxton in the commercial case of ***Apache North Sea Ltd v Ineos FPS Ltd*** [2020] EWHC 2081 (Comm), at paragraph 23:

> *The need to construe a particular clause in the context of the agreement as a whole is not excluded merely because…some or all of the principal provisions include the drafting reflex "subject to the terms of this agreement". While the parties will sometimes use language to make it clear that one term is to be qualified by another (e.g. by using language such as "subject to clause 2 below"), these more general words are unlikely to have any appreciable impact on the application of the conventional principles of construction. In a real sense, any contractual provision takes effect subject to the terms of the contract in which it appears.*

Relevant Law: Notice of Dismissal

36. Another of the points that I will need to resolve is when the Respondent first gave the Claimant notice of dismissal. As I will set out below, Mr Capek's argument was that no clear notice of dismissal was given prior to the letter of 5 January 2022.

37. Two points in particular arise in respect of these issues:

    (1) First, if an employee is being dismissed, then the words used by the employer in dismissing must be sufficiently clear to convey to the employee that they are being dismissed. In the event that the words used are ambiguous, then the Tribunal will consider whether a reasonable reader would have construed the words as words of dismissal: see the commentary in *Harvey on Industrial Relations and Employment Law*, Division DI, paragraph [230].

    (2) Second, a notice of dismissal will only be effective if it specifies when the employee's employment is to come to an end, or at least provides sufficient information to enable that date to be ascertained. A mere declaration that the employment will be terminated at some point in the future does not amount to notice of dismissal: ***Morton Sundour Fabrics Limited v Shaw*** (1966) 2 ITR 84.

Analysis and Conclusions

38. The key issue between the parties is ultimately a simple one: was the Respondent entitled to terminate the Claimant's employment on 5 January 2022, with the payment of one week's pay in lieu of notice, or was the Claimant entitled to more notice, or at least more pay in lieu? If I conclude that the Claimant was entitled to more notice or more pay in lieu, then I must

consider what sum he is entitled to receive as damages for breach of contract.

39. The matter is not quite as straightforward as simply looking at the position on 5 January 2022, however, because the questions before me are affected by the communications about the termination of the Claimant's employment in December 2021. These provide the background against which the Claimant's entitlement as at 5 January 2022 is to be assessed.

40. On 3 December 2021, the Respondent orally informed the Claimant that he was to be dismissed. While the Respondent asserted a right to dismiss on one week's notice, it in fact indicated that it would be amenable to the Claimant remaining employed until the end of January 2022. At that point, however, the Respondent did not communicate the notice of dismissal in writing, and the contract provides that written notice is required in order to bring the contract of employment to an end, whether on three months' notice pursuant to clause 1.1, or on one week's notice pursuant to clause 3.1. I do not, therefore, regard the oral communication on 3 December 2021 as sufficient to amount to a valid notice of termination under the contract of employment.

41. On 17 December 2021, however, the Respondent set out its position in writing. I consider that the 17 December 2021 letter did amount to notice of termination under the contract of employment, for the following reasons:

    (1) The letter, in my view, provides sufficiently clear and unambiguous notice of dismissal. While the letter referred to a desire to '*mutually agree an end date*', which might, viewed in isolation, suggest that the purpose of the letter was to seek to agree a termination rather than imposing one unilaterally, these words must be read in the context of the letter as a whole. Reading the letter as a whole, I do not consider that there can be any doubt that the Respondent was informing the Claimant that his employment was going to be terminated by dismissal. Nothing in the letter leaves any doubt that the Claimant's employment would end by no later than 28 January 2022. This is plainly also how it was taken by the Claimant and, in due course, Mr Capek. I note that Mr Capek's letter of 4 January 2022 states that the Respondent '*emailed [the Claimant] on 17.12.21 stating that [the Respondent] planned to terminate [the Claimant's] employment on 28.01.22*'. This plainly reflects an understanding – which I find is the only reasonable understanding one could take from the 17 December letter – that the Claimant was being dismissed.

    (2) Mr Capek argued that there was not a sufficiently clear termination date for the 17 December letter to amount to a valid notice of dismissal. I disagree. Again, when the letter is read in its entirety, it makes quite clear that employment will end on 28 January 2022. Not only is this date given in the letter, but the letter also spells out a last working day before holiday is taken, and a date for payment of final salary, which are consistent with 28 January being the termination date. Mr Capek's letter of 4 January specifically refers to termination taking effect on 28 January (see the previous subparagraph). I do not consider that the reference to '*mutually [agreeing] an end date of Friday 28th January*' alters this.

Although the letter, in this respect, uses the language of consensus, it is plain that there was no possibility of employment continuing past 28 January. It might have been open to the Claimant to seek to agree an earlier termination date, but in the absence of such agreement the letter clearly suffices to bring employment to an end on 28 January.

42. If I found that the letter was sufficiently clear to give notice of termination on 28 January 2022, Mr Capek then argued that this was insufficient notice, because, he said, clause 1.1 of the contract of employment required the giving of three months' notice. Of course, clause 3.1 says that one week's notice could be given during the probationary period (and there was no dispute that the probationary period was still running on 17 December 2021). But Mr Capek argued that the Respondent was not, on 17 December, entitled to dismiss the Claimant with only one week's notice. He put his argument on two bases:

    (1) First, it was said that there was inconsistency or ambiguity between clauses 1.1 and 3.1, and that in light of this ambiguity the contract of employment should be construed *contra proferentem* against the Respondent, with the result that the longer notice period provided for by clause 1.1 took precedence over the shorter notice period in clause 3.1.

    (2) If I was against Mr Capek on that argument, he contended that the true effect of clause 3.1 was that the Respondent could only invoke clause 3.1, and terminate on one week's notice (or less than three months' notice) if there were genuine concerns about the Claimant's performance and conduct. Mr Capek contended that there were no such concerns on 17 December 2021.

43. I reject both arguments. Dealing with the first, I do not find that clauses 1.1 and 3.1 were inconsistent or that they created ambiguity in the contract. In my view, they were dealing with different situations. Clause 3.1 (and, in particular, the third sentence of that clause) dealt with the right to notice during the probationary period, and provided that only one week's notice was required during that period. Clause 1.1 dealt with the right to notice in all other circumstances,[1] and provided that outside the probationary period, the Claimant was entitled to three months' notice. I find, however, that on a correct reading of the contract as a whole the notice provisions in clause 1.1 have no application during the probationary period.

44. I reach this conclusion for the following reasons:

    (1) At the outset, I observe that clause 1.1 is expressly stated to be '*subject to the terms of this contract*'. However, as the extract from ***Apache North Sea Ltd v Ineos FPS Ltd*** at paragraph 35 above makes clear, this does not generally mean more than that the clause should be construed in light of the contract as a whole, which is the case for any clause. While it is helpful to be reminded of this fact, I do not consider

[1] Save where the gross misconduct had been committed, when pursuant to clause 16.2 and the general law the Claimant would have no entitlement to notice, whether or not he was within his probationary period. But there was no suggestion that the Claimant had committed misconduct, gross or otherwise, so this point does not arise.

that the words '*subject to the terms of this contract*' give much guidance as to the interplay between clauses 1.1 and 3.1.

(2) What gives me more assistance is the canon of construction described at paragraph 32 above, namely that a specific provision will override a general provision in the circumstances to which the specific provision applies. The notice provision in clause 1.1 is of general application. By contrast, the notice provision in clause 3.1 is specifically directed to the amount of notice entitlement during the probationary period. Applying the canon of construction to which I have referred, it seems to me that clause 3.1 was intended to take precedence over clause 1.1 when determining notice entitlement during the probationary period.

(3) I also observe that, if Mr Capek's argument were correct, the words '*the Society reserves the right to terminate your employment either during or at the end of the Probationary Period on one week's written notice*' would be without contractual effect. As set out at paragraph 31 above, effect should, where possible, be given to all the words in a contract. This militates against Mr Capek's interpretation of the contract. By contrast, the interpretation of the contract which I have found to be correct gives effect to all the words relating to notice period, whether in clause 1.1 or in clause 3.1.

(4) I have also taken a step back, and engaged in a more broad-brush analysis of considering what the contract would mean to the hypothetical reasonable observer posited by Lord Hoffman in ***Investors Compensation Scheme v West Bromwich Building Society*** (see paragraph 30 above). For the reasons set out in the two preceding subparagraphs, I cannot see how a reasonable observer would reach a conclusion other than the one that I have reached.

(5) In these circumstances, I find that clauses 1.1 and 3.1 both apply, and both apply in different circumstances according to whether or not the Claimant was within his probationary period. It follows that there is no inconsistency between them, and they create no ambiguity. As such, the *contra proferentem* rule has no application.

45. Turning to Mr Capek's second proposition, namely that clause 3.1 only permits the giving of one week's notice if there are genuine concerns about the Claimant's performance and/or conduct, I do not consider this to be the correct reading of clause 3.1, for the following reasons:

(1) I begin by reading the relevant provision in isolation. The relevant part of the third sentence of clause 3.1 clearly provides for termination on a week's notice, and there is nothing in that sentence to suggest any restriction on this power of termination of the kind that Mr Capek asserts. I would expect such a restriction to have been made explicit, if it existed.

(2) Of course, the contract must be construed as a whole. Mr Capek emphasised the juxtaposition of the third sentence of clause 3.1 with the first sentence, which provides that '*the first six months of your employment will be a probationary period…during which we will monitor your performance and conduct*'. It is clear that the monitoring of

performance and conduct is the primary purpose for which a probationary period was agreed. However, I do not consider that, from that fact, one can reasonably read into the third sentence of clause 3.1 a provision to the effect that the *prima facie* unfettered power of dismissal on a week's notice is to be limited as Mr Capek contends. Rather, the first sentence of clause 3.1 explains the broad rationale for the probationary period, but it does not govern or restrict the plain wording of the particular provisions that govern how the employment contract is to work during the probationary period.

(3) I draw support from my conclusion that the first sentence of clause 3.1 has a purely explanatory purpose, rather than affecting the interpretation of subsequent provisions, from a consideration of the fourth sentence of clause 3.1 ('*during the Probationary Period you will not be entitled to sick pay (other than Statutory Sick Pay)*'). The payment of sick pay is not a matter commonly connected to performance or conduct, but nonetheless this sentence restricts the Claimant's entitlement to sick pay during the probationary period. This supports my view that the restrictions on the Claimant's entitlements (whether to sick pay or to notice) during the probationary period are unaffected by the existence or non-existence of concerns about his performance or conduct. In a similar vein, clause 11.1 of the contract provides that the Claimant could participate in the Respondent's private medical insurance scheme upon successful completion of his probationary period. Again, this illustrates that the Claimant's entitlements generally were intended to be less during his probationary period than subsequently, irrespective of his performance or conduct.

(4) If Mr Capek's interpretation of clause 3.1 were correct, substantial complexities could potentially be introduced. For example, there would be the scope for what might often be detailed and arid arguments about whether concerns strictly related to performance and/or conduct. The fact that a particular interpretation of a contract would give rise to complex consequences does not mean that it is wrong, but given that one of the general purposes of a probationary period is to provide for quick and simple termination of the employment relationship in its early stages, I do not consider that a reasonable observer would think that the parties had chosen to make an agreement which led to these potential complexities.

(5) Moreover, if Mr Capek's construction of clause 3.1 were correct, other issues would arise. For example, it would be necessary to consider whether the Respondent could dismiss on one week's notice during the probationary period merely because it had a genuine belief that there had been poor performance or conduct, or whether it had to have a reasonable belief, or whether it was necessary for the Respondent to prove that the Claimant's conduct and/or performance was indeed poor (and, if so, how poor). None of this is provided for in the contract. In my view, that reflects the fact that the intention of the parties, objectively assessed, was that these issues did not need to be provided for. They did not need to be provided for, because they would not arise, which was in turn because the contract was intended to provide simply for

termination for any reason (or none) on a week's notice during the probationary period.

46. I add that Mr Capek devoted some of his argument to showing that the possibility of dismissal if the CRM programme was not progressed was not discussed with the Claimant during his job interview. While Miss Charter, who conducted the interview, accepted that no such discussion took place, this takes the Claimant's case no further. Not only are pre-contractual discussions inadmissible in construing the contract, but in any event the wording of the contract itself is clear as to the notice period during the probationary period. I find that the contract clearly provides for a one-week notice period during the probationary period, and the Claimant agreed to this by signing the contract. The fact that he had not previously discussed this during his interview is irrelevant.

47. Overall, I am satisfied that the effect of the third sentence of clause 3.1 is that during the probationary period the Respondent could dismiss on one week's written notice, for any reason or for no reason at all.

48. I note in passing that, had I concluded otherwise, Ms Filler on behalf of the Respondent confirmed at the outset of the hearing that she would not pursue an argument that the dismissal was for performance or conduct reasons. I have not, therefore, addressed the reasons for dismissal in detail in my findings of fact. I do observe, however, that if there were serious concerns about the Claimant's performance then it is surprising that he was asked to stay until the end of January to complete work. As to conduct, I have set out at paragraph 23 above my finding that the Claimant had neither committed, nor was suspected of having committed, any form of misconduct.

49. For the reasons set out above, I find that on 17 December 2021 the Respondent was entitled to dismiss on one week's notice. By its letter of that date it in fact gave more than one week's notice, but this did not invalidate the notice given – a party is entitled to give more than the minimum amount of notice required.[2] The letter of 17 December gave valid and lawful notice to terminate the contract on 28 January 2022.

50. After 17 December, so long as the Claimant remained within his probationary period, clause 3.1 of the contract of employment continued to apply. As such, the Respondent was, while the probationary period lasted, entitled to bring the termination date forward, by giving one week's notice under clause 3.1 (or by paying a week's pay in lieu of notice, pursuant to clause 16.1). But unless it did so, or unless the parties agreed an earlier termination date, the Claimant's employment would continue until 28 January 2022.

[2] Mr Capek contended that the giving of more than one week's notice was '*more in accordance with Section 1 of [the Claimant's] contract than it was in accordance with Section 3*', and that on this basis the Claimant was entitled to three months' notice. I do not agree with the basic premise for this argument – the giving of more notice than is required by clause 3 but less than is required by clause 1 seems to me more in accordance with clause 3 than with clause 1, since it is compliant with clause 3 but not with clause 1. But more importantly, as of 17 December 2021 it was clause 3 that governed the extent of the Claimant's notice entitlement, not clause 1, and so I must assess compliance with clause 3 not clause 1. Clause 1 does not become applicable merely because more than the minimum notice provided for by clause 3 was given.

51. By Miss Charter's letter of 5 January 2022, the Respondent purported to do what I have described, and bring the termination date forward, with a payment of one week's pay in lieu of notice. Was the Respondent entitled to do this on 5 January?

52. I do not find the Respondent's action in dismissing the Claimant on 5 January 2022 to have been in itself unlawful. Clause 16.1 of the contract of employment expressly provides that the Respondent may choose to make a payment of basic salary in lieu of some or all of the Claimant's notice period. The 5 January letter expressly invokes this clause. In my view, the effect of clause 16.1 is that the Respondent was entitled to bring the contract to an end on 5 January. This was, accordingly, not a wrongful dismissal.

53. However, the effect of terminating on 5 January in accordance with clause 16.1 was to create a debt payable by the Respondent to the Claimant in the amount of the sum due for the (remainder of) the Claimant's notice period. The fundamental issue in this case is whether that debt was limited to a week's pay.

54. The answer to this question depends upon whether, on 5 January, the Respondent was still entitled to dismiss the Claimant with one week's notice (or pay in lieu) pursuant to clause 3.1. For the Respondent, Ms Filler contended that it was so entitled, for the following reasons:

    (1) Clause 3.1 provides that the Claimant may be dismissed on one week's notice '*either during or at the end of the Probationary Period*'.

    (2) Ms Filler accepted that the probationary period ran from 5 July 2021 to 4 January 2022. However, she contended that 5 January 2022 was nonetheless 'at the end of' the probationary period, and that as such clause 3.1 continued to apply.

    (3) Ms Filler further relied on clause 3.3, which provides that once the Claimant had satisfactorily completed his probationary period, his continued employment would be confirmed in writing. According to Ms Filler, that meant that the probationary period continued until a letter confirming its completion was issued to the Claimant.

55. I reject these arguments for the following reasons:

    (1) When the term 'the Probationary Period' is used in the contract, it is a defined term. It is defined in the first sentence of clause 3.1, as '*the first six months of your employment'*. When used during the remainder of the contract, that is what the words 'the Probationary Period' mean.

    (2) Ms Filler was right to concede that on this basis, the probationary period had ended on 4 January 2022. It was a six-month period, beginning on 5 July 2021. It plainly ended on 4 January 2022, being the last day of that six-month period.

    (3) It follows that anything occurring after (at the latest) the stroke of midnight when 4 January 2022 became 5 January 2022 was after the

conclusion of the probationary period. The dismissal letter was e-mailed to the Claimant more than thirteen hours later, at 13:19. I reject the contention that this was 'at the end of' the probationary period. It was in fact after the end of the probationary period. It follows that clause 3.1 had ceased to apply.

(4) I do not consider that anything in clause 3.3 changes this. As I have explained, the expression 'the Probationary Period', when used in the contract of employment is a defined term with the specific meaning of '*the first six months of [the Claimant's] employment'*. There is nothing, in either clause 3.1 or clause 3.3, to suggest that the true meaning of 'the Probationary Period' is '*the first six months of the Claimant's employment, and continuing thereafter until written confirmation pursuant to clause 3.3 is sent to the Claimant'*, or anything similar. Such a construction would do violence to the clear language of clause 3.1, and if such a construction were intended it would be clearly spelled out. In my view, there is nothing in clause 3.3 which has the effect that, merely because the Claimant's continued employment had not been confirmed, he was still within his probationary period on 5 January 2022.

56. In summary, by 5 January 2022 the probationary period had ended, and the provisions of clause 3.3 had ceased to apply. It follows that, absent gross misconduct, the Respondent could only terminate on three months' notice. Given that, as set out above, the Claimant's employment was due to lawfully terminate on 28 January 2022, that means that if the Respondent opted to terminate the Claimant's employment early pursuant to clause 16.1, it was obliged to pay the Claimant the sums that he would have earned up to 28 January.

57. The Respondent has sought to rely on Mr Capek's letter of 4 January 2022, and in particular, the words *'[the Claimant] would actually prefer the PILON option at this point since it would immediately leave him free to pursue other employment opportunities'*. Insofar as the Respondent argues that the Claimant was thereby, through Mr Capek, inviting it to dismiss him with a payment of a week's pay, that argument is hopeless. On any reasonable reading of Mr Capek's letter (the material part of which is quoted at paragraph 18 above), Mr Capek was asserting that the Claimant was entitled to remain employed until 4 April 2022, and any reference to 'the PILON option' has to be read in light of that assertion as meaning that Mr Capek was asking that the Claimant be paid a sum covering his salary up to 4 April. While I have not agreed with Mr Capek that the Claimant was entitled to be paid up to 4 April 2022, I do not think that his letter can be read as waiving any notice entitlement that the Claimant would, but for Mr Capek's letter, have had.

58. Having regard to my analysis above, my conclusions are as follows:

(1) On 17 December 2021, the Respondent gave a valid and lawful notice to terminate the Claimant's employment on 28 January 2022.

(2) On 5 January 2022 the Respondent elected to terminate the Claimant's employment immediately. This immediate termination was lawful, by reason of clause 16.1 in the contract of employment.

(3) However, the Respondent wrongly believed that the only payment in lieu of notice to which the Claimant was entitled was one week's pay. The Respondent had lost the power to terminate on one week's notice at the end of 4 January 2022.

(4) The sum that the Respondent was in fact required to pay in lieu of notice was the amount that the Claimant would have earned had he remained employed until the termination of his lawfully-given notice – i.e until 28 January 2022. By failing to pay this amount, the Respondent was in breach of contract.

59. I now turn to consider the amount of damages to which the Claimant is entitled. The Claimant will certainly be entitled to damages representing the basic salary that he would have earned between 13 and 28 January 2022.

60. The Claimant has sought to recover other sums, including in particular loss of employer's pension contributions during the period after 12 January 2022, and also nominal sums in respect of lost private medical insurance payments and lost death in service benefit. But in my view these are not recoverable, because clause 16.1 permits the Respondent to pay a payment in lieu of notice consisting of basic salary only. Although the Respondent did not pay the correct amount of PILON, that does not change the fact that where clause 16.1 applies there is no right to a payment of more than basic salary.

61. Mr Capek's closing submissions sought an uplift to any award, pursuant to section 207A of the **Trade Union and Labour Relations (Consolidation) Act 1992**, on the basis that the Respondent had, in dismissing the Claimant, breached the ACAS *Code of Practice on disciplinary and grievance procedures* ('the *Code'*). I do not consider that the power to award an uplift under section 207A arises, because the Claimant was not subject to disciplinary action, and (notwithstanding the Respondent's unfortunate use of the word 'conduct' in its 5 January 2022 dismissal letter) there was nothing before me to suggest that the Claimant had, or was believed to have, engaged in culpable conduct that should or could properly have resulted in disciplinary action. Indeed, I positively find that conduct was not the reason for dismissal (see paragraph 23 above). As such, the *Code* is inapplicable, because it only applies to dismissals for conduct reasons: see ***Holmes v Qinetiq Ltd*** [2016] IRLR 664. Moreover, in his written submissions, Mr Capek wrote that '*effectively this was a redundancy situation*', by which I take him to be arguing that redundancy was the reason for the Claimant's dismissal. If this were right, then I observe that the foreword to the *Code* expressly provides that it is inapplicable to redundancy dismissals, which would provide a further reason why the *Code* did not apply here. But, irrespective of whether the reason for dismissal was properly classified as redundancy, the fact that it was not conduct is sufficient to disapply the *Code*.

62. It follows that, in my view, the Claimant's damages are limited to the amount of basic pay that he would have received between 13 January and 28 January 2022. Mr Capek's closing submissions calculated this as £2,893.15

gross. This was not disputed by Ms Filler, and accordingly it is this sum that I will award.

Employment Judge **Varnam**

Date: 26 February 2023

RESERVED JUDGMENT & REASONS SENT TO THE PARTIES ON

27 February 2023

FOR EMPLOYMENT TRIBUNALS