



# THE EMPLOYMENT TRIBUNAL

**Claimant:** Mrs N. Kite  
**Respondent:** Club19 Limited  
**Heard at:** London South Employment Tribunal (by CVP)  
**On:** 12 September 2023  
**Before:** Employment Judge A. Beale

## **Representation**

**Claimant:** In Person  
**Respondent:** Mrs L. McBride (Director)

## **RESERVED JUDGMENT**

The Claimant's claim for wrongful dismissal fails and is dismissed.

## **REASONS**

### **Introduction**

1. The Claimant brings a claim for wrongful dismissal, arising from failure to pay her for her full contractual notice period. In her claim form, she also brought a claim for unfair dismissal but that was struck out by a judgment dated 21 April 2023, on the basis that the Claimant had insufficient service to bring the claim. The Respondent also raised an employer's breach of contract claim in its Grounds of Resistance, but that claim was rejected by letter dated 21 April 2023 on the basis that the claim was not in truth a claim for breach of contract but for defamation, in respect of which the Employment Tribunal had no jurisdiction. The Respondent made no response to that letter, so the only claim for determination is the Claimant's breach of contract claim.

### **Issues**

2. The issues before me to determine were:
- (a) to what period of notice was the Claimant contractually entitled;
  - (b) if that period was in excess of the notice received by the Claimant, was the employer entitled to terminate the contract summarily by reason of a repudiatory breach by the Claimant;
  - (c) if the Claimant was entitled to be paid additional notice, what sum is she owed?

3. I was provided with a bundle comprising 78 pages, which included witness statements from the Claimant (in the form of a commentary on the evidence) and four witness statements from the Respondent. The main witness statement from the Respondent, that of Mrs McBride, who is the owner of the business, was in the form of an attachment to the ET3. The bundle also contained documentary evidence.
4. I heard oral evidence from the Claimant, Mrs McBride and Mrs Emma Beers. Mr Oran Finnegan also attended to give evidence but was asked no questions. Both the Claimant and Mrs McBride made short oral submissions to me at the conclusion of the hearing. The hearing had been listed for three hours and the Claimant was unable to stay beyond that time, so it was agreed that I would provide my judgment and reasons in writing.
5. At the outset of the hearing, the Claimant agreed that the correct name for the Respondent (as recorded on Companies House) is now Club19 Ltd, and I have therefore changed the name in the header of this judgment and on the file.

## **Facts**

6. The Claimant was employed by the Respondent as a Personal Assistant to Mrs McBride. The Respondent is an aesthetics clinic offering beauty treatments to its clientele. The treatments offered include injectables, which can in rare cases have adverse side-effects requiring prompt treatment.
7. The Claimant's contract of employment gives a start date of 23 May 2022, but both parties agreed that the Claimant did not in fact start working until 6 June 2022 (the reason for this was not agreed and is not a matter I need to determine).
8. The contract provides for a probationary period of 6 months, and that employees will be notified in writing if and when they have successfully completed their probationary period. This clause further states:

“If your work performance is not up to the required standard we may extend your probationary period or terminate your employment. This does not prejudice our right to terminate your employment during the probationary period in accordance with the notice provisions of this contract, or without notice for reasons of gross misconduct.”
9. The contractual notice provisions state that employees with less than one month's service are not required to provide any notice, and employees with service of one month to two years are required to provide 4 weeks' notice. The Respondent is required to provide the same amount of notice in the absence of gross misconduct. The terms permit payment in lieu of notice.
10. The bundle contains a company handbook, which the Claimant said, and I accept, she had never seen, although I also accept that there was a copy available in the Respondent's place of business. The handbook is not referred to in connection with probation or notice, but it is referred to in the context of disciplinary and grievance procedures. The contract states, under the heading “Discipline”:

“Please not [sic] that apart from a potential reasons for dismissal for misconduct the handbook is not contractually binding.”

11. The Handbook states that during or at the end of the probation period the contractual notice period required by either party to terminate the employment is one week's statutory notice.
12. The Claimant's contractual hours were 30 per week. She initially worked on Wednesdays, Thursdays and Fridays, but it was then agreed that she would take 6 hours out of those 30 which would be deemed as phone cover on Mondays and Tuesdays. The Claimant had charge of the business's mobile phone from home between 9 a.m. and 7 p.m. on Mondays and Tuesdays, but Mrs McBride said, and I accept, that on average she was only engaged in speaking to clients for around 45 minutes per day. The mobile phone is the point of contact for customers for all queries, but importantly, for cases where customers are suffering side-effects from the treatments, which could potentially be a medical emergency.
13. Both parties gave evidence of "niggles" in the relationship prior to the events which resulted in the termination of the Claimant's employment. However, from the employer's perspective at least, these appear to have been minor and at the point of the Claimant gave notice of her resignation, it is agreed that there had been no formal (or indeed informal) warnings or disciplinary meetings. Mrs McBride said the Claimant had left the workplace after becoming upset on two occasions (which the Claimant did not dispute) but this did not appear to have caused significant difficulties in the relationship prior to November 2022.
14. On 16 November 2022, after taking two weeks' annual leave to move house, the Claimant emailed Mrs McBride to give her notice. She explained that this was because she needed to seek full-time employment. There had also been some discussion of the Claimant taking over a role at Mrs McBride's other business, Definition Aesthetics Academy, and the Claimant wanted to inform Mrs McBride of her intentions before steps were taken in relation to that role. The email is positive in tone towards Mrs McBride. The Claimant wrote:

"I'm happy to work more than my notice and stay until Xmas and obviously if you'd like me to I will work alongside or train anyone else that you bring into my role."
15. The following day (17 November), the Claimant and Mrs McBride had a conversation. I broadly accept the account of this conversation given in Mrs McBride's Grounds of Resistance, namely that she did not commit to agreeing to the Claimant working until Christmas (which would be beyond the 4 week notice period referred to in her contract), but said she would need to discuss this with her business partner in the other business. I accept this because the role for which the Claimant had been considered was in the other business and would have required Mrs McBride's business partner's input. I also accept (as did the Claimant) that Mrs McBride told the Claimant she would happily accept one week's notice. However, I do not accept, as Mrs McBride put in cross-examination, that the Claimant said if she had known that she would only have given one week's notice. This comment is not included in Mrs McBride's Grounds of Resistance and based on the other evidence available to me, I think it unlikely that the Claimant would have said this.
16. Mrs McBride alleges that after this point, the Claimant began to behave in a way which indicated dissatisfaction with the business. I deal with these points briefly below.

17. There is no dispute that the Claimant attended work late on 18 November 2022 (a Friday), having informed another employee (Mrs Beers) that her dog was unwell. The Claimant did not inform Mrs McBride of her lateness; she says she was not aware that she had to, but I consider that unlikely given that Mrs McBride was her line manager. I accept Mrs Beers' evidence that the Claimant also left the business early that day, without notifying anyone.

18. On Monday 21 November 2022, the Claimant attended the Academy as a model for some demonstrations. Mrs McBride gives evidence that, whilst there, the Claimant expressed dissatisfaction with the business to an employee of the Academy, who was leaving the business, and said that the other employee was "lucky" to be leaving earlier. This employee later reported the conversation to Mrs McBride. The Claimant denies that this conversation took place. Whilst I am not able to make a finding as to the particular words used, based on the Claimant's own evidence that she did not like Mrs McBride's management style, I consider it likely that the Claimant did express dissatisfaction to other members of staff after giving notice.

19. In view of these incidents, Mrs McBride decided that having the Claimant remain until Christmas as she had said she would do, whilst helpful to cover the departing employee, could be disruptive to the business. She therefore emailed the Claimant on the evening of 21 November 2022 at 21:31, including the following paragraphs.

"I have found a plan of action to support the business best which would mean accepting a statutory notice period of one week as opposed to 5 weeks which you were so kind to offer.

I am more than happy if you can work until the end of Wednesday as a last day. Offering a goodwill gesture to honour gardening leave with a full payment till the end of this week and Wednesday to tie up any loose admin ends with regards to timesheets and a handover etc between us."

20. The email concluded by wishing the Claimant well for the future.

21. The Claimant responded at 22:00 pointing out that her contract stated her notice period to be 4 weeks regardless of whether she was on her probationary period. She continued:

"I gave extra notice as I didn't want to leave you up the creek without a paddle and didn't want to let anyone down or leave anyone in the lurch, this will leave me financially screwed to be quite honest and I'm really shocked and upset that you've sent this email to me."

22. Mrs McBride responded within two minutes to say:

"Let's have a chat tomorrow about it and gain some clarity and work out the best way forward.

Try not to overthink and I'll drop you a line when I get a morning break and we can have a chat."

23. The Claimant's subsequent emails indicated that she would be willing to speak the next day, but expressed further upset that Mrs McBride had, in her view, "screwed her over" and reiterated her right to four weeks' notice and that her last working

day would be 15<sup>th</sup> December. At 23:41, Mrs McBride acknowledged the “emotional” responses, said that this was “by no means a method of ‘screwing you over’” and said she would catch up with the Claimant the next day to discuss. The Claimant responded at 23:55 as follows:

“Under the circumstances I would prefer that you put anything you’d like to say in an email to me as opposed to a discussion tomorrow. My expectation is entitlement to 4 weeks notice as per my employment contract.”

24. Mrs McBride gave evidence that at some point during the evening the Claimant had telephoned a client of the business and made disparaging remarks about Mrs McBride akin to those in the emails. That client did not give evidence and there was no documentary evidence in support of this (e.g. telephone records). The Claimant denied ever having telephoned the client, and on the balance of probabilities, I am not able to accept that this happened.

25. At 06:56 on Tuesday 22 November 2022, Mrs McBride messaged the Claimant on WhatsApp (the business’s normal method of communication with staff) to ask her to take her three hours of flexi-working as a paid day off until things were calm and resolved. She asked the Claimant to drop the business phone off at opening time, or offered to have it collected via Mrs Beers. She asked the Claimant to spare as much notice as possible to organise and minimise any disruption to the business.

26. The Claimant responded, at 07:03:

“Of course the return of the phone will be organised but first their [sic] needs to be a resolution to my situation. That would be greatly appreciated. Please only now contact me via email so I can keep all written communication in one place.”

27. There is no dispute that the Claimant then blocked Mrs McBride on WhatsApp. At some point after receiving Mrs McBride’s first email on 21 November 2022 (either that evening or during the following day), I find that the Claimant also left the WhatsApp group that Mrs McBride used to communicate with staff collectively, and blocked several of the Respondent’s staff members, including Mrs Beers, on social media.

28. Mrs McBride emailed the Claimant at 08:28, noting that she had been blocked on WhatsApp. She reiterated her WhatsApp message regarding paid leave for the Claimant’s flexi hours, and asked for the phone to be returned “this morning before midday”. She also asked the Claimant to attend a meeting on Thursday morning at 09:15 to resolve the issue. Mrs McBride then blocked the Claimant’s access to the Respondent’s systems, she says, and I accept, because she was concerned that the Claimant would cause disruption to the business whilst the situation remained unresolved. In her response at 09:42, the Claimant reiterated that she wanted all communication to be via email, and that she had blocked Mrs McBride because she could see she was ignoring this request. The Claimant noted that her access to the system had been disabled and said the phone would be returned by 1 p.m. (which was 1 hour later than Mrs McBride had requested). The Claimant said that Mrs McBride’s “attempt to breach our employment contract has now damaged our working relationship beyond repair” and reiterated her right to 4 weeks’ notice. She said again “my last working day and payments to include the 15<sup>th</sup> December”.

29. In her response at 09:54 Mrs McBride confirmed she had removed the Claimant's access because it was in everyone's best interests for the Claimant to take some paid time out. She again offered to speak to the Claimant and asked her to confirm that she would be attending work the next day, and the planned discussion on Thursday. She denied attempting to breach the Claimant's contract, and said "If you [sic] refusing to only speak to me and not attend work or have a discussion with me would only make what can be a civil discussion escalate".
30. The Claimant responded to say she did not feel comfortable attending a verbal meeting with Mrs McBride as her words could not be trusted. She said she would seek legal advice and notify Mrs McBride if she would be attending the salon in due course (at 10:06).
31. Mrs McBride's evidence was that the Claimant left the business phone on the unattended desk in the salon between 1 and 2 p.m. on 22 November. The Claimant said she did not know what time she had left the phone, and I accept it was probably between 1 and 2 p.m. The Claimant said, and I accept, that the phone was left behind the desk. She did not give the phone to anyone. I accept that the phone was switched off when she left it, but I also accept that the salon is open to the public, and that the phone contained sensitive data relating to clients.
32. At 15:43, the Claimant notified Mrs McBride via email that she would attend the salon the next day. Mrs McBride asked if she would attend for her normal working hours and if she could attend the meeting on Thursday. The Claimant confirmed she would be working her normal working hours, but said she would not attend the meeting. She said:

"You have advised in writing that tomorrow is my last working day, you are in breach of contract. I expect to receive payment in full upto and including the 15<sup>th</sup> December. I have sought independent legal advice today and now have nothing more to say to you on the matter. Please confirm on what date I will receive payment in full."
33. After receiving this email, and having taken advice from ACAS, Mrs McBride took the view that the Claimant had committed acts of gross misconduct. At 18:37 she wrote to the Claimant terminating her employment with immediate effect, citing the Claimant's refusal to meet the reasonable demand to meet with her as a breach of contract meaning it was not feasible to progress with a notice period. She also referred to the Claimant's tone in emails, blocking Mrs McBride on WhatsApp and removing colleagues and leaving groups on social media whilst still employed, which had led staff to have concerns about working with her the next day. In the email she stated that the offer of a week's notice

"was not a final offer but implied a start to a conversation as per your previous email the week before mentioning you giving notice. We have never set a concrete exit date and were left to explore the options and my email stated I would speak to you happily this morning and seek a suitable resolution that worked for everybody."
34. The email confirmed that the Claimant would be paid up to 22 November 2022. On 14 December 2022 Mrs McBride wrote to the Claimant enclosing her P45 and final payslip, including outstanding holiday pay. There is no dispute that, if the Claimant was not entitled to notice beyond that date, she has been paid the wages and other monies to which she was entitled.

## The Law

35. The burden of proof in respect of claims for breach of contract lies on the Claimant.
36. In *Laws v London Chronicle (Indicator Newspapers) Ltd* [1959] 1 WLR 698 at p. 700 – 1, Lord Evershed M.R. explained the circumstances in which an employee’s breach of contract will be repudiatory, justifying summary termination, as follows:

“... since a contract of service is but an example of contracts in general, so that the general law of contract would be applicable, it follows that the question must be — if summary dismissal is claimed to be just viable — whether the conduct complained of is such as to show the servant to have disregarded the essential conditions of the contract of service. It is, no doubt, therefore generally true that wilful disobedience of an order will justify summary dismissal, since wilful disobedience of a lawful and reasonable order shows a disregard — a complete disregard — of a condition essential to the contract of service, namely, the condition that the servant must obey the proper orders of the masters, and that unless he does so the relationship is, so to speak, struck at fundamentally.

...

I think it is not right to say that one act of disobedience, to justify dismissal, must be of a grave and serious nature. I do, however, think ... that one act of disobedience or misconduct can justify dismissal only if it is of a nature which goes to show (in effect) that the servant is repudiating the contract, or one or its essential conditions; and for that reason, therefore, I think that you find in the passages I have read that disobedience must at least have the quality that it is “wilful”: it does (in other words) connote a deliberate flouting of the essential contractual conditions.”

37. In *Palmeri and others v Charles Stanley & Co Ltd* [2021] IRLR 563, the High Court held, at paragraph 95, that the fact that the company had been poised to deny a self-employed associate his notice period, which presaged the conduct by the associate which amounted to a repudiatory breach on his part, did not affect its entitlement to rely on that conduct in summarily terminating his engagement.

## Conclusions

### ***To what period of notice was the Claimant contractually entitled?***

38. The Claimant’s case is that she was entitled to 4 weeks’ notice as set out in her contract of employment. Mrs McBride did not seriously dispute this, and I have no hesitation in agreeing with the Claimant. The contract is clear that employees with one month’s to two years’ service are entitled to 4 weeks notice and there is no separate provision in respect of the probationary period. The contract states (as set out above) that save in respect of the matters listed as gross misconduct, the Handbook is not contractually binding. The provision as to notice in the Handbook therefore cannot displace that clearly set out in the contract of employment.

### ***Was the Respondent entitled summarily to terminate the Claimant’s contract of employment by reason of a repudiatory breach by the Claimant?***

39. I have not found this issue entirely straightforward to determine, hence the fairly lengthy recital of the facts as set out above.
40. As I have already found, the Claimant was entitled under her contract to 4 weeks’ notice. That was clearly the basis for her email dated 16 November 2022, in which she offered to work beyond that notice period to assist Mrs McBride in any

difficulties she might have owing to the imminent departure of a member of staff at the Academy, and the unexpected nature of the Claimant's departure.

41. I have accepted Mrs McBride's evidence that in her conversation with the Claimant on 17 November, Mrs McBride did not commit to that longer period of notice. She wanted to discuss the position with the co-owner of the Academy before deciding what to do. I find (and Mrs McBride frankly admitted) that over the following days she became concerned about the Claimant's conduct as reported to her by other employees, and felt that the Claimant no longer wanted to be part of the business. She therefore put in place arrangements that would enable the Claimant to depart with only one week's notice, as provided for in the Handbook, which was less than either party was obliged to give.
42. Although this was Mrs McBride's proposal, I do not find that she expressed it in concluded terms in her email to the Claimant on 21 November 2022. The wording of Mrs McBride's email made it clear that the suggestion of one week's notice plus gardening leave to the end of the week was an initial proposal which was open for discussion (for example, she said "I am more than happy if you can work until the end of Wednesday as a last day" rather than stating in bald terms that Wednesday would be the Claimant's last day). Even if this was not clear from the initial email, it was clarified less than two minutes after the Claimant's distressed response, when Mrs McBride said "let's have a chat tomorrow about it and gain some clarity and work out the best way forward". Although in the email Mrs McBride was clearly suggesting that the Claimant take less than her contractual notice period (1) I accept that she did so because she thought it the best way forward for both parties, and (2) the email is not a clear dismissal of the Claimant, nor even does it evince a clear intention to breach the Claimant's contract.
43. Unfortunately, the Claimant took the position that Mrs McBride had "screwed her over" and, although she initially expressed willingness to meet, became more entrenched as the evening went on. By the end of the evening she had refused to meet with Mrs McBride as requested, and had told her that all communication must be by email. The following morning, she told Mrs McBride by WhatsApp that she would return the business's phone only once a resolution of her situation had been reached. She then blocked Mrs McBride on WhatsApp, which was the business's normal mode of communication, and (either before or after this message) removed herself from the business group WhatsApp. She did subsequently return the phone (later than requested), but on either her or Mrs McBride's account, did so in such a way as to leave it potentially open to theft, which placed clients' sensitive data at risk. She then again refused to meet Mrs McBride for a meeting on 24 November (having already refused to speak to her that morning), but said she would attend work with colleagues she had blocked on social media the following day.
44. In the circumstances, I find that the Claimant did, in her actions from the evening of 21 November 2022 onwards, act in repudiatory breach of contract. By refusing to speak with her manager, declining a reasonable request for a meeting, blocking her manager from communicating with her in the usual way, and placing sensitive data at risk, the Claimant showed she was no longer willing to be bound by the essential conditions of the contract of employment. To put it another way, she had



undermined the trust and confidence which was inherent in the contract of employment.

45. The Claimant's position was essentially that she was merely acting on Mrs McBride's clear statement that Wednesday 23 November would be her last day of employment; thus she was not required to attend a meeting on Thursday 24<sup>th</sup>. I cannot accept that position. As I have found above, Mrs McBride had not dismissed the Claimant from 23 November, nor had she evinced a clear intention to do so. When I questioned the Claimant about this, she said that having had previous discussions with Mrs McBride, she knew she could be intimidating and was worried she would talk the Claimant into accepting something less than she was entitled to, hence her unwillingness to meet. Whilst I accept the Claimant was genuinely concerned about this, it does not mean it was correct or reasonable for her to have interpreted Mrs McBride's email as a dismissal with effect from 23 November and to have acted as she did in response.
46. Even had Mrs McBride evinced an intention to breach the Claimant's contract, *Palmeri* suggests that she would nevertheless have been able to rely on the Claimant's subsequent conduct as a repudiatory breach.
47. For these reasons, I have concluded that the Claimant did act in repudiatory breach of contract on 21 and 22 November 2022, and Mrs McBride was therefore entitled to terminate her contract without notice from the latter date. On that basis, no further sums are owing to the Claimant and her claim is dismissed.

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Employment Judge A Beale  
Date: 13 September 2023