EMPLOYMENT TRIBUNALS

Claimant		**Respondent**
Miss L Stock	**v**	Joanne White

Heard at: Norwich (by CVP) **On:** 01 December 2020

Before: Employment Judge O Dobbie

Appearances
For the Claimant: Mr A Stock (Lay Representative – Father)
For the Respondent: Mr G Sims (Counsel).

COVID-19 Statement on behalf of Sir Keith Lindblom, Senior President of Tribunals.
This has been a remote hearing on the papers which has not been objected to by the parties. The form of remote hearing was by Cloud Video Platform (V). A face to face hearing was not held because it was not practicable during the current pandemic and all issues could be determined in a remote hearing on the papers.

JUDGMENT

1. The Claimant's claim for holiday pay is dismissed upon withdrawal;

2. The Claimant's claim for wrongful dismissal (notice pay) succeeds; and

3. The Respondent shall pay the Claimant damages of £3,429.78.

REASONS

INTRODUCTION

1. On 8 May 2019, the Claimant presented claims for:

    (a) unpaid holiday pay; and

    (b) wrongful dismissal (notice pay).

2. At the outset of the full merits hearing on 1 December 2020, I drew the Claimant's attention to sums paid to her by the Respondent in respect of holiday pay. These payments were made more than a year after her employment ended. The Claimant confirmed that such sums satisfied the claim she brought for holiday pay. Therefore, I dismissed this claim upon withdrawal and the remaining claim was agreed to be for wrongful dismissal (notice pay) only.

3. In respect of the wrongful dismissal claim, the Claimant commenced employment with the Respondent on 23 October 2018 as a private live-out nanny working 36 hours per week (over 4 days) and her rate of pay was stipulated in the contract to be £11 net per hour.

4. The Claimant resigned by email dated 13 April 2019, giving 8 weeks' written notice as required under her contract (terms of which are set out below), to expire on 8 June 2019. On 15 or 16 April (there is a dispute of fact on the precise date) the Respondent dismissed the Claimant summarily for alleged gross misconduct. The Claimant was paid until 16 April 2019. She therefore claims for damages for the remainder of the notice period. The Respondent defends the claim, contending she was entitled to summarily dismiss the Claimant for actual gross misconduct and, in the alternative, in reliance on the following clause which appeared in the Claimant's contract:

> **"Ending the Employment without Notice**
> Your employment may be terminated without notice by the Employer in the event of a reasonable belief in any material breach of this agreement or serious or gross misconduct or wilful neglect by you in connection with or affecting your employment under this agreement or employment duties, including any conduct which in the reasonable opinion of the Employer brings you or the Employer/family into disrepute."

5. Mr Sims (for the Respondent) submitted that the relevant clause entitled the Respondent to dismiss the Claimant summarily in circumstances that may not have been serious enough to amount to actual gross misconduct (at common law) but which the Respondent reasonably believed to be serious enough to amount to such. Accordingly, Mr Sims argued that the clause was an express term giving the Respondent the right to summarily dismiss the Claimant in a broader range of circumstances than that which would apply at common law. He also argued that this contract term applied to both contractual and statutory notice, such that she would not be entitled to bare statutory notice if the Respondent showed it reasonably believed she had committed a material breach etc, even if it was found that she had not committed gross misconduct at common law.

6. Therefore, it is necessary to consider not only the law in respect of actual repudiatory breaches (in this case, said to be gross misconduct) but also the law pertaining to contractual interpretation in respect of the clause in question.

RELEVANT LAW
Repudiatory breach of contract

7. An employee may be summarily dismissed if he or she is guilty of a repudiatory breach of the contract of employment. There is no strict definition of what amounts to a repudiatory breach, or gross misconduct, which will very much depend on the circumstances of each case. Those circumstances include the nature of the work, the working environment and whether that type of conduct is listed in the employer's disciplinary policy or company handbook as amounting to gross misconduct. How particular behaviour is treated by the employer is also important. It is one thing to specify in a policy that behaviour of a particular kind is gross misconduct. However, if the employer ignores or acquiesces to such behaviour, then any express contract term can be varied by custom and practice.

8. The question of what level of misconduct is required to amount to a repudiatory breach is a question of fact for the tribunal. Following Laws v London Chronicle (Indicator Newspapers Ltd) [1959] 2 All ER 285, the relevant question is:

> "whether the conduct complained of is such as to show the servant to have disregarded the essential conditions of the contract of service" and that "the 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."

9. In Neary v Dean of Westminster [1999] IRLR 288 the following dicta from Laws v London Chronicle (Indicator Newspapers) Ltd [1959] 1 WLR 698 was cited with approval:

> "It follows that the question must be - if summary dismissal is claimed to be justified - whether the conduct complained of is such as to show the servant to have disregarded the essential conditions of the contract of service'. In *Sinclair v Neighbour [[1967] 2 QB 279],* Sellers LJ, at p.287F, said: 'The whole question is whether that conduct was of such a type that it was inconsistent, in a grave way - incompatible - with the employment in which he had been engaged as a manager'. Sachs LJ referred to the 'well established law that a servant can be instantly dismissed when his conduct is such that it not only amounts to a wrongful act inconsistent with his duty towards his master but is also inconsistent with the continuance of confidence between them'."

10. In Sandwell & West Birmingham Hospitals NHS Trust v Westwood UKEAT 0032/09 the EAT summarised the case law on what amounts to gross misconduct and stated that it involves either deliberate wrongdoing or gross negligence.

11. A repudiatory breach does not automatically terminate the employment contract. Following ordinary principles of contract law, if one party commits a repudiatory breach of contract, the innocent party has a choice about whether to accept the repudiation. If they do not do so swiftly after becoming aware of it, they may be deemed to have waived the breach and affirmed

the contract. The period of delay that might be held to amount to a waiver of breach will depend on the facts of each case.

12. Following Mbubaegbu v Homerton University Hospital NHS Foundation Trust UKEAT/0218/17 it is plain that a series of acts of misconduct can, taken together, amount to gross misconduct in certain circumstances. At paragraph 32 in that case, the EAT stated:

> "It is quite possible for a series of acts demonstrating a pattern of conduct to be of sufficient seriousness to undermine the relationship of trust and confidence between employer and employee. That may be so even if the employer is unable to point to any particular act and identify that alone as amounting to gross misconduct. There is no authority to suggest that there must be a single act amounting to gross misconduct before summary dismissal would be justifiable or that it is impermissible to rely upon a series of acts, none of which would, by themselves, justify summary dismissal."

Contractual interpretation

13. Terms expressly agreed between the parties are paramount, unless overridden by law. However, the meaning of a term is a matter of fact and law for the tribunal to determine.

14. The relevant principles of contractual interpretation were summarised by Popplewell J. in *Lukoil Asia Pacific Pte Ltd v Ocean Tankers (Pte) Ltd (The "Ocean Neptune")*, in the context of a commercial contract, as follows:

> "The court's task is to ascertain the objective meaning of the language which the parties have chosen in which to express their agreement. The court must consider the language used and ascertain what a reasonable person, that is a person who has 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 have understood the parties to have meant. The court must consider the contract as a whole and, depending on the nature, formality and quality of drafting of the contract, give more or less weight to elements of the wider context in reaching its view as to the objective meaning of the language used. If there are two possible constructions, the court is entitled to prefer the construction which is consistent with business common sense and to reject the other. Interpretation is a unitary exercise; in striking a balance between the indications given by the language and the implications of the competing constructions, the court must consider the quality of drafting of the clause and it must also be alive to the possibility that one side may have agreed to something which with hindsight did not serve his interest; similarly, the court must not lose sight of the possibility that a provision may be a negotiated compromise or that the negotiators were not able to agree more precise terms. This unitary exercise involves an iterative process by which each suggested interpretation is checked against the provisions of the contract and its commercial consequences are investigated. It does not matter whether the more detailed analysis commences with the factual background and the implications of rival constructions or a close examination of the relevant language in the contract, so long as the court balances the indications given by each."

15. Just because conduct is listed as being gross misconduct in a contract does not mean that summary dismissal will necessarily be justified if the employee breaches that term. The tribunal will also consider whether the conduct is sufficiently serious to be repudiatory (British Bakeries Ltd v O'Brien UKEAT/1479/00). This point was emphasised in Robert Bates Wrekin Landscapes Ltd v Knight UKEAT/0164/13, where the EAT held that an employer was not entitled to rely on a contractual termination provision to dismiss an employee without notice for a minor and inadvertent breach of its customer's security requirements.

16. In Richards v IP Solutions Group Ltd [2016] EWHC 1835 (QB), the clause in question referred to a "material" breach. It was held that that word ("material") was intended to qualify the nature or severity of the breach of duty which could give rise to summary termination of employment.

FINDINGS OF FACT AND REASONS

17. I heard evidence from three witnesses for the Respondent, namely the Respondent herself, her husband, Mr White, and Rachael Knights, an employee of the company owned by Mr and Mrs White. For the Claimant, only the Claimant gave evidence. I received a bundle of documents running to 136 pages.

18. I also had written signed statements from Claire Kemp (the Respondent's cleaner/housekeeper), Jackie Ronie (the children's grandmother) and Sandra Williams (who described herself as a Paediatric Handling, Restraint and First Aid expert). None of those witnesses gave live evidence and therefore I considered the evidential weight of their statements to be very limited.

19. Based on all of the evidence received, I made the following findings and give the following reasons for my judgment:

20. At the outset of her employment, the two children the Claimant was employed to care for were aged 2 years (I shall call this child "D") and 10 months (I shall call this child "S"). The Respondent engaged the Claimant so as to enable her (the Respondent) to work. Accordingly, the Claimant's role was as a sole-charge, part-time nanny.

21. The Respondent had no real concerns with the Claimant's performance for the first four months of her employment, namely between 23 October 2018 and late February 2019 (see paragraphs 7-8 of the Respondent's statement, which was echoed in her oral evidence). From late February 2019 however, the Respondent stated that she and Mr White had concerns about the Claimant's performance, which they say they raised with her at breakfast in the morning in the nature of a daily briefing.

22. At paragraph 10 of her statement, the Respondent lists the matters she says were raised with the Claimant between late February 2019 and the Claimant's resignation in mid April 2019, namely:

a) Reheating cooked egg that had been left out for three hours;

b) Leaving her phone charger plugged in on the floor while the children played;

c) Lifting S up by one arm;

d) Getting S out of bed and failing to clean the child before putting a new nappy on;

e) Not cleaning the children's rooms despite being reminded at least five times;

f) Being on her phone excessively and reprimanding the children too harshly.

23. The Respondent and Mr White mentioned in both their statements and their oral evidence various other matters that gave them cause for concern. This includes:

f) On 12 March 2019, Mr White stated he had heard D crying on the monitor for an excessive period. Mr White stated it was in the region of 40 minutes and was sufficiently long that he was going to ask a colleague to take his place in the meeting so that he could return home;

h) The Whites were also concerned that D would occasionally grab them by the face, which they assumed the child must have observed and picked up from the Claimant;

i) Hygiene concerns raised by Jackie following a period of 4 days in late March 2019 when Mrs Ronie and the Claimant had sole charge of the children while the Whites were away;

j) Excessive phone use (including ignoring D crying whilst using her phone) and failing to pay proper attention to the children in a soft play area due to phone use;

k) Failing to provide varied meals (cooking scrambled eggs on multiple occasions); and

l) Letting the children nap for too long during the day time.

24. There is little or no evidence other than the witnesses' testimony to support the allegations raised against the Claimant. The Claimant denied the majority of the acts alleged against her. She did however accept:

a) Having lifted S by one arm;

b) Sometimes using her phone during working time;

c) Storing an omelette with a view to reheating it the next day;

d) Failing to clean the children's rooms regularly; and

e) Lifting D up by one arm when rushing past the family geese (captured on CCTV).

25. Due to the Claimant's admissions in respect to these matters, I rejected Mr Sims' submission that her evidence portrayed an implausibly positive account of her performance. I found the Claimant to be broadly credible.

25. As to the incidents in question, I try to deal with these in chronological order, by the date the Respondent became aware of them, since she cannot have been expected to have done anything about them if she was not aware of them. Some matters happened earlier but were not discovered until mid April (such as the CCTV of 8 March 2019). However many were not specific allegations with dates/times and therefore exact sequencing is not possible.

26. As to the incident where the Claimant lifted S up by one arm, the Respondent and the Claimant had differing accounts of this incident. The Respondent stated in her live evidence (at around 12:10 on 1 December 2020) that this incident was before the incident with D on 8 March 2019 (captured on CCTV). On this prior occasion, the Respondent described that the Claimant lifted S up by one arm to move him from one part of the porch to another whilst the Respondent was rushing to get her boots on and get out of the house (for the Claimant to take the Respondent to work). S was not injured or hurt and there was no evidence that he demonstrated any distress or pain. The Respondent stated that she berated the Claimant with a stern tone for lifting him in that way. She then said that later that day "I spoke to my husband and agreed it was wrong and serious, but we were in a rush and I just thought it was a silly mistake so I did not take it further".

27. The Claimant agreed they were in a rush to leave the house to take the Respondent to work, but she states that she lifted S by the arm because he had wandered close to the open door of the porch and could have fallen out of the door onto a concrete surface below and injured himself. The Claimant refuted that the Respondent had addressed her over this at the time or at any time.

28. On balance, whilst I found the Respondent to be a broadly credible witness, I find that the Claimant's account of events is more likely than not to be correct on this occasion. This is because the Respondent was rushing and putting on boots at the time and was thus distracted. Therefore, she might have missed part of the incident and may have genuinely believed that the Claimant moved S in this way out of pure choice, rather than to avoid the risk of harm.

29. I also find that the Respondent did not address the Claimant about her handling of S at the time. I base this on the wording of the email sent to the Claimant on 15 April 2019 in which the Respondent stated:

> "I had concerns when you lifted [S] up by the arm and moved him, in the porch when we were going out. I have since spoken to a doctor and discovered that lifting children by the arm is very dangerous, as it puts them at risk of dislocating their elbow, and pulling ligaments (which are still developing). Someone with a paediatric first aid and a childcare qualification should have this knowledge." In a later email of the same day, the Respondent stated: "The email… was in response to incidents reported to me over the weekend and the knowledge that an act was dangerous. I had suspicions and I confirmed these over the weekend by speaking to various people, a GP and checking CCTV footage."

30. The wording of these emails suggests that the Respondent did not consider lifting a child by one arm to be particularly serious when she observed the Claimant lift S in the porch in early March 2019. It was not until after that time, upon speaking to a doctor on the weekend after the Claimant had resigned, that she formed this view. As such, I find that it is unlikely she admonished the Claimant at the time.

31. Further and in any event, neither the Respondent, nor Mr White deemed this serious enough to warrant dismissal or even a verbal warning or informal discussion at the time. They discussed it amongst themselves and decided to continue to employ her. They did not have a follow up conversation with the Claimant. Therefore, even if this could be described as a breach of contract, I find that the Respondent waived the breach and positively affirmed the contract by taking that decision.

32. In respect of Claire Kemp's statement (which described an incident when D was crying excessively while the Claimant ignored her due to being on her phone) I felt unable to place much weight on the statement given that she did not appear before the tribunal. Further, the Claimant stated that the only time Ms Kemp had driven up whilst she was outside with the children was the incident captured on the CCTV. This was not actively disputed.

33. I note that Ms Kemp describes the incident she refers to as having taken place "in the early days of her employment" and that when she pulled up, the Claimant had her back to her. The CCTV was on 8 March (which would have been the "early days" of Ms Kemp's employment, indeed within a week of it) and the Claimant does turn her back to the approaching car. Further, the Claimant stated that D was crying (having a tantrum) on that occasion. I therefore conclude that it is more likely than not that this is the same occasion Ms Kemp refers to. Otherwise, I would have expected her to mention in her statement that a similar incident happened twice, both in the "early days" of her employment and on 8 March 2019. She does not, because they are likely the same incident.

34. On reviewing the CCTV, I cannot see that the Claimant was on her phone at any time. Indeed, her hands were full almost throughout the incident, either carrying/holding children or carrying placing an object in the bottom

corner of the screen, before returning to D, holding her hand and guiding her away from the approaching car (Ms Kemp) with the Claimant's back turned in a protective way (shielding the child from the car that was pulling up to park). It then appears that the Claimant squats down to D's level and they hug. I therefore reject the allegation that the Claimant ignored D and was distracted on her phone while D was crying hysterically.

35. The Claimant does appear to walk away from D (who remained by the parked car obscured by the fence) whilst the Claimant (who was holding S) walked to place an item elsewhere, before returning to D. If D was still upset at that point in time, leaving her like that was not acceptable. This would be a performance or conduct issue. However, I note that Ms Kemp reported what she had witnessed to the Respondent on the same day. At paragraph 4 of her statement, Ms Kemp states she sent a text to the Respondent because the incident genuinely upset her. This text message was not produced to me. If it was sent, and if it was in terms similar to those expressed in the statement, the Respondent was aware of this from early March 2019 and did nothing about it until mid-April 2019 (approximately 6 weeks later). Therefore, I find that any breach was waived.

36. In respect of the allegation that the Claimant left her phone charger where the children could reach it, Mr White said (in his oral evidence) he raised with the Claimant "three to four times" before she heeded his request. The Claimant denies this and says it was raised for the very first time after she had resigned. I find that it is more likely than not that there was a discussion about where to charge her phone (so as to render it safe) but the Claimant did not realise the significance of the risk Mr White feared, and he did not press it upon her as forcefully as he now recalls. When asked why he had not formally disciplined the Claimant at any time, in his oral evidence, Mr White described how awkward that would be in the context of a nanny contract. I accept that the nanny – employer relationship is different from many employment relationships and needs very sensitive and careful handling. I suspect that Mr White's desire not to jeopardise the relationship led to him raising matters tentatively, such that it did not come across as an informal performance/conduct discussion. I also reject his suggestion that he had this discussion with her "three to four times" before she acted on it. I find that it was more likely raised once or twice.

37. All in all, the risk posed to children by phone chargers is not widely known and Mr White himself acknowledged that he was unaware of that risk until he looked it up online and found some disturbing pictures of injured children. Therefore, I find that leaving the charger in reach of the children at a time when one is unaware of the risk, is not misconduct. However, it can be described as a performance issue (for not being aware of this risk). Leaving the charger in reach of the children after being informed of the risk is misconduct and I find that the Claimant did do this on at least one occasion after being asked not to.

38. Notwithstanding this, the Respondent continued to employ the Claimant. Therefore, insofar as this was a breach of contract, I find that the Respondent waived the breach and affirmed the contract.

39. As to the Claimant's alleged failure to clean the children's rooms adequately, she acknowledged that she did not always have time to do this and that she prioritised the child care elements of her role over the housekeeping elements of her role and sometimes could not do all duties to the standard she might have wanted. I note that in her oral evidence, the Respondent described finding a thick layer of dust in S's room and that this was particularly harmful for him because he had previously had respiratory issues. I consider the evidence as to the uncleanliness of the children's rooms to be exaggerated. The Respondent engaged a part-time cleaner and whilst it is correct that the Claimant's contract required her to clean the children's rooms (such that the cleaner was asked not to) I find that the Respondent would not have allowed the room to get as dirty as she describes in those circumstances. It is more likely that she would have asked the cleaner to tend to the room on occasion (even though it was not meant to be the cleaner's task) rather than let it get to the state where she believed it posed a risk of health and safety to S.

40. I also note that the Claimant was employed on a 36-hour contract not a full-time contract. Some nanny contracts are for 50-60 hours a week. In such cases, failing to undertake the "housekeeping" elements of the role effectively would be more serious. But in the context of a part-time nanny caring for two young children, neither of which are attending any hours of nursery, I suspect that finding time to carry out all duties to a high standard is difficult. This is especially so where (as in this case) the employer requires the nanny to run errands such as placing grocery orders and driving her to and from work. Further, the Claimant was encouraged to undertake regular activities with the children outside the home and this takes up time in planning and time away from the house such that cleaning duties might suffer. Therefore, I find that whilst the Claimant did not always clean the rooms to a standard that she or the Respondent would have liked, it was not as bad as the Respondent suggested in her evidence. Further, there are good reasons why the Claimant may have failed to do this adequately. All in all this is a minor performance issue in my view.

41. In respect of the allegation that the Claimant would get S out of bed and put on a fresh nappy without cleaning him first, I was given no timescales for this matter nor any details of it or frequency of occurrence. Plainly, not cleaning a child what had defecated in their nappy would be very much more serious than failing to wipe a child that had simply urinated (of course neither is acceptable). I was given no details of this, hence I suspect that it was the latter, otherwise I would expect the Respondent to have raised this as a very serious issue. I also suspect it was infrequent rather than regular, otherwise the Respondent would no doubt have taken steps to dismiss her sooner. If it was regular, then continuing to employ the Claimant knowing she did this regularly, would amount to waiver of any breach of contract and affirmation

of that contract. On balance therefore, I find that even if this failure by the Claimant was regular, such conduct was waived by the Respondent.

42. In respect of the allegation on 12 March 2019, Mr White reported that he overheard D crying for 40 minutes on the monitor while he was at work. I find on balance of probabilities that D was crying, and that it continued for a period that was long enough to cause Mr White concern. However, I do not find that this was as much as 40 minutes and I consider the allegation to be exaggerated. I base this on the messages from the bundle which stated as follows:

> "12/03/2019, 15:39 - Ryan Db Beccles: Hi Laura, is Freya ok? I could see her screaming on the monitor and she's been in bed for hours!
>
> 12/03/2019, 15:47 - laurastock: Yes all fine now woke up I heard crying and went up thought was
>
> 12/03/2019, 15:48 - laurastock: Wills but was freya! Got her up book book time now Jo home wills still asleep!!! X
>
> 12/03/2019, 15:52 - Ryan Db Beccles: They've been asleep since 12:40 I'm worried they're sleeping too much! He's sleeping through at night also! Zzzzzzzzz
>
> 12/03/2019, 15:56 - laurastock: I think both having Grown spurt as he been having milk more and eating lots x"

43. I do not accept that D was crying for 40 minutes or anything close to that period, because Mr White would have intervened long before it had got to that stage. The noise from the monitor would have been distracting during the meeting he was participating in, and it would have been concerning for him. No doubt he would have messaged the Claimant much sooner.

44. Further, his message to the Claimant at 15:39 makes no mention of the duration of crying (which it most likely would have done if it had been as long, intense or abnormal as Mr White suggested). It does however refer to the duration of sleep. Accordingly, it is ever more peculiar not to mention the duration of intense crying, if indeed it had been as long and severe as Mr White suggested. Further still, when the Claimant replied to his message, indicating she had responded swiftly to D's crying, Mr White did not refute this in his subsequent message (at 15:52). Therefore, on balance, I find that Mr White may have felt the Claimant did not attend to D's needs as swiftly as he would have liked, but I do not find that this was as serious as has been described. I consider it to be a minor performance issue rather than a conduct issue (let alone a serious conduct issue). Even if it can be described as misconduct, I find that it is minor and that by continuing the Claimant's employment for more than a month after this, the Respondent waived any breach.

45. As to the suggestion the Claimant allowed them to sleep for too long, Mr White gave no time frame, dates or number of incidents in which this is said to have occurred. In the messages on 12 March 2019 (above) Mr White

complains that D has "been asleep for hours", but I note he does not suggest this is a recurrent or repeated issue that had arisen prior (nor that they had spoken about it prior). Further, when the Claimant replies (at 15:56) noting that S was still asleep and she believed both of them to be going through growth spurts, Mr White did not disagree or confront the Claimant that it was a repeated issue. Therefore, I find that it is more likely than not that this was the first occasion (and perhaps only occasion) when the children were allowed to sleep for a period which Mr White believed to be excessive. I also consider the tone of his text reply tends to indicate that he did not believe this to be a serious matter at all. I therefore consider his witness testimony to the tribunal to be somewhat exaggerated on this point.

46. Further, there was no evidence of there having been any agreed sleep routine. Some parents are very keen to follow strict schedules/routines for meals/naps etc. Other parents take the view that a child should nap until they wake naturally. There are many different, equally acceptable parenting approaches in this respect. In the present case, neither parent referred to there being any routine, nor was there any other evidence of such. I note in particular that on 26 March 2019, the Claimant reported that both children napped for three hours whilst under Ms Ronie's care and there was no suggestion in the messages that this was improper or in breach of routine. It was the Claimant herself that noted that such a long (and late) nap might affect the children's evening sleep (see message at 14:15). Neither parent commented on that or suggested it was a repeated or concerning matter. In absence of any sleep schedule, allowing the children to nap until they woke naturally seems perfectly acceptable in the context of these particular children and the specific working relationship.

47. As to the hygiene issues identified by Jackie Ronie, these are said to have been observed in or around 26 March 2019. Ms Ronie did not give evidence to the tribunal. I also note that Mr White himself described how she tended to "dramatize" matters (see messages on 26 March 2019 at 14:16). The Respondent and Mr White were not present at the time Ms Ronie is said to have observed the behaviours, because they were on a business trip (hence why the Claimant and Ms Ronie were caring for the children). The Claimant denied the matters, other than having stored an omelette to re-heat the next day. In evidence, she disputed that there was a health and safety issue in so doing. She stated that provided the omelette was reheated to a high temperature, there was nothing unhygienic about eating a day-old omelette that had been refrigerated. I accept the Claimant's evidence in respect of this. I agree that reheating an omelette may not be an ideal meal (a freshly-made one being preferable) but it is not dangerous given that the Claimant knew to reheat it sufficiently. I also noted the following exchange of messages between the Claimant and Respondent:

> "27/03/2019, 08:43 - laurastock: Jackie said shell bring kids dinner tonight but I plan to cook chicken and vegetables and freeze in bulk and they can have for dinner tomorrow or lunch too xx they had smoked salmon and broccoli omlette yesterday they loved it some left for today lunch cc

> 27/03/2019, 08:43 - laurastock: Btw Jackie knows I'm not in Friday doesn't she as at hospital? Xx
>
> 27/03/2019, 08:44 - Jo Mb Beccles: Oh brilliant! Yeah my mum and are here Thursday to cover Friday. I wouldn't give the omelette from yesterday as I don't think you can heat it up again a day later?! I think there's some chicken in the bottom drawer they could have instead? Xx
>
> 27/03/2019, 08:45 - laurastock: You can as long as piping hot but if u'd rather I didn't I'll give them the chicken and vegetables I'm going to make and freeze some x"

48. From this, it is plain to me that the Respondent did not consider re-heating an omelette to be a conduct issue, less still a serious one and I find that it is not. It is a minor performance issue.

49. As to the suggestion that the Claimant fed the children scrambled eggs too regularly, there is no evidence of this other than Mr White's testimony. He says (at paragraph 7 of his statement) that on at least five occasions the children were fed scrambled eggs for all three meals of the day. The Claimant denies this. On balance of probabilities, I find that the Claimant may have fed them eggs regularly (which is a quick, convenient and nutritious meal for a child) and it may have been more regularly than Mr White may have liked, but it was not as frequent as Mr White suggests. Firstly, I query how he could have observed this if he was at work for one or two of the children's daily meals. Further, if he had observed this (on the monitor) he would no doubt have sent a message (as was customary) to suggest a more varied diet. There is none. Indeed, there are numerous messages referring to a variety of meals and snacks enjoyed by the children. Even if the Claimant had fed the children scrambled eggs for more than one meal in any given day, I find that this is a performance issue, not a conduct issue (less still a serious conduct issue). Even if it is a conduct issue, the Respondent continued to employ the Claimant in the knowledge she had done this - on Mr White's account, overlooking it five times. Therefore, I find that the Respondent waived any breach that arose.

50. On the allegation that the Claimant used her phone excessively, the Respondent makes this as a broad/general allegation, but also made specific allegations in respect of the Claimant's behaviour: on 12 April 2019 when the Claimant was observed by Rachael Knights in Bugs café; and in early March 2019 when Claire Kemp arrived for work.

51. I note that the Claimant's contract of employment categorises "Using phone while children are being cared for" as misconduct. It is not listed under the offences categorised as gross misconduct.

52. In respect of Ms Knights' evidence, I found her to be a credible witness. She did not appear prone to exaggeration. In her statement, Ms Knights described attending the same café as the Claimant at 11am on 12 April 2019. She described how the Claimant was distracted on her phone and generally failed to engage with the children to the level she might have

expected from a childminder in her employment. In her live evidence at approximately 11:30 on 1 December 2020, she clarified that the Claimant had been on her phone for "a period of a couple of minutes with no interaction with D" when D walked around the net of part of the soft play area in the café. She said "it was a good three minutes" that the Claimant was distracted on her phone. It was accepted that the area was small and enclosed, such that a child could not wander off the premises, but Ms Knights described that parents buy hot drinks and have them on tables in the café which D could have wandered over to and injured herself.

53. I note that there are four picture messages and one text message from the Claimant to the Respondent at 11:40 on 12 April 2019. In the Claimant's oral evidence at 14:10 on 1 December 2020, she accepted that she might have been on her phone for approximately 2 minutes before Ms Knights approached her. She stated she could not specifically recall what she was doing on her phone, but that she often sends pictures and updates to the Whites during the work day, as was expected of her. It was suggested that the Claimant should not have pictures/messages at the time of the event, but only once the children were asleep. In her oral evidence, the Claimant replied "I might have been on my phone and I apologise but I've never been told not to take pictures or send texts to them".

54. I find that the Whites must have known that pictures and messages sent in the past were done whilst the children were awake and active due to the timing of the messages and content of them. I am not aware that they ever admonished her for so doing. Indeed, Whats'app appeared to be the accepted method of keeping up to date throughout the day.

55. At around 15:45 on 1 December 2020, in questions from myself, the Claimant accepted that she sometimes messages her other family (that she worked for when she was not working for the Respondent) and uses her phone for occasional personal use, but she tried to limit that to when D and S were sleeping. The Claimant also explained that her role sometimes required her to check things online (opening times for activities and placing food orders).

56. In all the circumstances, I find that the Claimant did use her phone for a matter of two to three minutes at around 11:40 on 12 April 2019 and that something in the region of 1-2 minutes would have been sending the messages to the Whites. The remainder of any time on her phone might have been for a work reason or personal and hence, improper. I do not find that this amounts to serious misconduct in the context of the working relationship. The Claimant was plainly encouraged to use Whats'app to send messages and pictures and she had never been told that this clause in the contract was to be very strictly adhered to. By custom and practice therefore, it had become acceptable to use her phone for work purposes during caring for the children. Any personal use was minor (a minute or so) and the children were not at any serious risk of severe harm. Ms Knights herself did not put it any higher than that it was not the standard of care she would expect of a childminder. The Respondent did not witness this incident,

only Ms Knights and the Claimant did. All in all, I find that this was substandard performance, or at most, minor misconduct.

57. As to lifting D up by the arm (captured on the CCTV dated 8 March 2019, but discovered in mid April 2019) I suspect this was the "final straw" for the Respondent. She says that after the Claimant resigned on 13 April 2019, she decided to investigate the concerns she had in respect of her conduct and telephoned Claire Kemp and made other enquiries, including viewing the CCTV footage on 14 and 15 April 2019.

58. The Claimant argued that the Respondent effectively sought out material to justify dismissing her without notice simply to avoid paying her notice after her resignation. Even if that were the case, this does not affect the legal test. Following Williams v Leeds United Football Club [2015] EWHC 376 (QB) even where the employer specifically seeks evidence of gross misconduct with a view to avoiding paying notice, if they do find such evidence, they are entitled to treat it as repudiatory.

59. The CCTV footage of 8 March 2019 was received in evidence and I watched it several times myself before the hearing and we viewed it several times during the hearing. Witnesses were asked questions about what they saw and what happened. I have watched it again a few times since.

60. The Claimant's description to the tribunal of what happened was broadly consistent with what she had previously reported to her father (in an email in December 2019) that she had told OFSTED. In that email, she said:

> "I was by the geese and chicken enclosure with [D and S]… [D] is terrified of the geese as they hiss and rush towards the wire fence area which is low so they are able to stick their heads over the top. I was holding [S]… as we had just checked for eggs. We were returning back to the house when the geese ran to the fence I was holding [S] who is heavy and could not also pick up [D] so I took her hand and said come on let's run and in the process off fell her shoe so she cried. I made mum and dad aware of this event that evening they simply laughed and nothing more was said. Ofsted said my statement matched what they could see on the video footage and they could not see how I was holding her hand as was blocked by further fencing around the play area, however mum told them I had dragged her along."

61. The Respondent's interpretation of the CCTV footage was that the Claimant had dragged D along and placed her at serious risk of harm. The statement of Sandra Williams, relied upon by the Respondent, portrays the matter as a very serious wrong.

62. I do not accept the Respondent's characterisation of what is shown in the footage. I also do not accept the statement from Sandra Williams which dramatises what can be seen in the video. I note that even the Respondent's counsel (sensibly) described the footage in more moderate terms, stating "her feet may not have been off the ground but they were barely touching it" and that when the Claimant moved her around the corner, she was "lifted

slightly off her feet and you can see that". I consider Counsel's description as more accurate and appropriate than the Respondent's.

63. I do find that the Claimant should not have lifted D up by one arm. The Claimant herself acknowledged this was not appropriate. I also accept that there are better ways to manage a toddler having a tantrum than to lift them up in a way which could pose risk of injury (if the lift is sufficiently sudden (a "yank") or hard). However, I accept the Claimant's account of what happened and upon viewing the footage, it can be seen that the child is holding the Claimant's hand and walking for the majority of the relevant section of footage. Only when they turn the corner of the fence, is it plain that the Claimant raises her arm (one can see her right elbow raising) higher, and I find that this is when the Claimant briefly lifted D off the floor and placed her down around the corner. If the Claimant already had D raised off the floor such that her feet were not touching it before this point, she would not have had to have raised her elbow further when she turned the corner.

64. It is notable that the geese do rush over to the fence and I consider it highly plausible that D may have been frightened by this and reluctant to walk past, such that the Claimant's attempt to get her to run past them was understandable. I note also that Ms Kemp's statement refers to the Claimant informing her (also in early March, which I have found was the same occasion) that D was terrified of the geese (per paragraph 3 of her statement).

65. I cannot see anything on the footage which appears to be aggressive or rough treatment of the children. I see a nanny with her hands literally full, trying to get D (who the Claimant says was unhappy and scared) to the end of the fence. If the CCTV had audio, or allowed one to zoom in, it might have been possible to ascertain the tone of the discussion or non-verbal gestures the Claimant exhibited. In absence of that, I accept the Claimant's account of the incident. She was the only person present throughout that incident, and the only person present to have given evidence to the tribunal. She has provided an explanation which is consistent with the CCTV footage.

66. As to the seriousness of the lifting D off the floor, I do find that this was improper and posed a risk of injury. However, many parents lift their children up by the arms as an act of play and the risk of a pulled joint to young children in lifting them this way is not widely known. The Claimant has various childcare qualifications and experience and should have known and most likely did know that this was not appropriate. The matter was reported to OFSTED and the Police and no further action was taken.

67. All in all, I find that this was an act of misconduct, but not gross misconduct. The Claimant does not appear to yank the child or pull her hard, it is not aggressive and it is a momentary lift off the floor. Therefore whilst it is improper, it is not so serious as to amount to gross misconduct.

68. As to D developing the habit of grabbing people by the face, I note from the Respondent's statement at paragraph 11, it was acknowledged that this was observed only after the Claimant had left. Further, in the Respondent's live evidence she accepted that the Claimant was never seen doing this and it was therefore mere speculation that D picked up this behaviour from the Claimant. The Claimant denies it. On balance of probabilities, I find that the Claimant did not grab the children's faces in any inappropriate way.

69. The Claimant resigned by way of an email dated 13 April 2019 in which she gave 8 weeks' written notice and explained that her decision to resign was due to her desire to undertake further training to pursue a career as a maternity nurse.

70. On 15 April 2019, the Respondent replied to the Claimant's email asking her to take a day's leave to enable the Respondent to investigate concerns that are said to have been drawn to her attention that weekend. She detailed some of the matters that were the subject of the litigation (discussed above). The email stated (amongst other things):

> "Some of these are incidents of gross misconduct and others mean you are in material breach of the contract (as stated in the employment contract). I'm sure you can appreciate the fact that there would be no repairing this contractual relationship and I have to put the well-being of my children first. …You are welcome to have a meeting with me on Thursday at 9am (or a time that suits you) to discuss the issues. You are also welcomed to bring someone to the meeting with you."

71. The Claimant replied stating (amongst other matters):

> "… please note that I have had no previous verbal warnings from you on any of these matters previously which would precede any written warnings or disciplinary meeting. It is important for me to 100% state to you that I do not accept any of these events and any breaches of my employment contract with you or of any event during my employment with you being of gross misconduct and I strongly dispute these claims… All these accusations you are now making I strongly disagree with and object to…"

72. Also on 15 April, the Respondent replied:

> "Despite the gross misconduct I wanted to follow a fair procedure to and arrange a meeting to hear what you have to say and to give you a reasonable amount of time before the meeting…However, the evidence far outweighs the need for me to continue your employment. It's a safeguarding issue and because children are involved I don't see how employment can continue. I do not want to come home to a one-year-old with a dislocated arm and the risk is too high for me to continue your employment. 1. Can you explain why you lifted William up by one arm to move him? When you should have to know how dangerous this is from your training and qualifications. 2. And can you provide evidence that you do not use your phone during the working day? Do you deny the fact you were on your phone when Freya was in tears outside? This was brought to our attention by someone coming to the house who witnessed it. If you fail to see how wrong this is I will have to report you to Ofsted and DBS."

73. The Claimant replied stating (amongst other things):

> "I originally refused to immediately attend a disciplinary meeting on Thursday this week as I did not understand how I could already be subject to be disciplined prior to the results of an investigation having taking place which is a complete contradiction. The purpose of an Investigation is to fully understand the situation and to decide whether discipline is indeed required. Of course if I am required by Employment Law to attend a meeting with you then I will agree to come and would like to take up your offer of bringing a witness with me once I fully understand what I am actually being asked to attend and we agree a date and time for this."

74. On 16 April 2019, the Respondent replied stating:

> "I just called you to discuss it but no answer. It's got quite serious quite quickly and I don't want you to be stressed. I was really upset to hear about everything and because they're my children, of course I am going to be upset. I spent time yesterday going over everything and have decided to let you go for the reasons stated and based on the contract terms. You haven't answered my questions about the incidents, and I called you to talk about it but you didn't answer. I will pay you normal pay for today and encourage you to spend the time researching courses to learn about correct handling and food hygiene. I will not report you as I don't want you to be upset or affect any future career. But please do some training as suggested. Children should not be picked up by the arm and cooked food should not be stored the way it was. I have to go now, to look after the children. Please can you return any keys and the payment card by post and will pay for this cost with your final wages."

Conclusions on claim:

75. In respect of each discrete allegation, I have made findings above as to whether it took place and if so, whether it amounts to misconduct. I have also made findings in respect of waiver of specific matters. I find that none of the matters found to have taken place is serious enough, in and of itself, to amount to gross misconduct.

76. I now consider the cumulative effect of the matters that I have found to have occurred. I find that even taken together, cumulatively, the matters which I have found against the Claimant are not so serious as to aggregate to a finding of repudiatory breach of contract. Even if they did, I find that the Respondent waived all breaches for matters she was aware of more than two weeks prior to the decision to dismiss the Claimant summarily. This is because the Respondent continued to employ the Claimant in knowledge of those matters, entrusting her children to the Claimant's care over two weeks and was even discussing matters such as taking the Claimant on holiday with the family or hiring a separate lease car for her to use (thus indicating the Respondent's belief that the employment relationship would continue for some period).

77. All matters occurring (or discovered) in the last two weeks of employment are not sufficiently serious individually or cumulatively to amount to a repudiatory breach, as stated above. Therefore, I find there was no

repudiatory breach of contract at common law, entitling the Respondent to dismiss the Claimant without notice.

78. As to the express clause permitting the Respondent to summarily dismiss the Claimant where there is no actual repudiatory breach, but merely a reasonable belief in the existence of a "material" breach, it is void insofar as it purports to exclude statutory rights, due to ss.86(3) and 203 Employment Rights Act 1996. Therefore, statutory minimum notice is due.

79. As to contractual notice, the right to dismiss without paying the full contractual notice (i.e. only paying statutory) depends on the express contract term relied upon (extracted above). I have carefully considered the relevant clause. I note that it requires the Respondent to have a "reasonable" belief of a "material" breach or of serious or gross misconduct. Hence, not only must the Respondent's belief that breaches occurred be reasonable, but further, her belief that such breach was "material" "serious" or amounted to "gross misconduct" must also be reasonable.

80. In Richards v IP Solutions Group Ltd [2016] EWHC 1835 (QB), the clause in question referred to a "material" breach. It was held that that word "material" was intended to qualify the nature or severity of the breach of duty which could give rise to summary termination of employment.

81. Based on the above findings, I find that the Respondent did not actually believe the matters were serious enough to amount to material breaches or to be serious or gross misconduct. This is because she did nothing about them at the time. Both parents are plainly dedicated and involved parents. They were aware of the majority of the matters at the time they happened. They are sophisticated people who own their own business, employing staff and applying employment policies. Yet, they did nothing (formal or informal) to address these matters at the material time.

82. At no time did the Respondent take steps to formally discuss performance or conduct issues with the Claimant (until after her resignation). There was no probation review (despite there being the power to review the Claimant's employment after three months as stipulated in the contract). Whilst I did not consider the absence of any such formal processes to be as significant in the present case as it would be in the case of say an office worker (due to the context of the close working relationship that a family needs to have with a nanny) I do still consider it significant. Whilst the sensitivity of such a relationship, and the fact that the nanny is entrusted with the family's children could make it very awkward to undertake these sorts of formal steps, if a parent genuinely believed their nanny to be guilty of gross misconduct, they would not continue to entrust their children to her care just to avoid awkwardness.

83. Mr and Mrs White did say that at breakfast they would chat to the Claimant about the day and raise various matters with her then. However, the Claimant disputed this and said that all feedback was positive. At paragraph 9 of her statement, the Respondent stated that "we did mention a few things

we would like to change". I find that the tentative nature of how the Respondent has expressed this in her statement is most likely the more accurate description of matters being raised, as opposed to the "daily briefing" the Whites referred to in their oral evidence, which tended to sound more formal and regular. Therefore, I find that whilst some matters "a few" (to adopt the Respondent's words) were raised with the Claimant, she never appreciated this was their subtle attempt to have an informal discussion about perceived shortcomings in her performance. Further, addressing the issues in this way suggests that the Respondent did not believe they were "serious", "material" or amounted to "gross misconduct".

84. Therefore, I find that the Respondent did not *actually* believe the Claimant to be guilty of material breaches, or serious or gross misconduct.

85. Further and in any event, I do not find that any such belief could have been reasonable. This is in the context of there being no interview or discussion with the Claimant about the allegations. The Claimant denied them in her email replies, but the Respondent never heard her explanations for the matters before she decided to summarily dismiss her. On that basis, only having had one side of the story, I do not see how any belief (even one which is genuinely held) could be "reasonable".

86. Accordingly, I find that the Claimant was entitled to be paid for 8 weeks' notice and her claim for wrongful dismissal therefore succeeds.

Remedy

87. An employee who has been wrongfully dismissed is under a duty to mitigate their loss by seeking alternative income. Any income received during the notice period that the employee would not have been earning otherwise will reduce the loss suffered, and hence the liability for damages. The obligation to mitigate is simply to reasonably mitigate and ought not to be treated as imposing too heavy an obligation upon them. The burden of proving a failure to reasonably mitigate is on the employer (Fyfe v Scientific Furnishings Ltd [1989] ICR 648). The only income which the Claimant received during her notice period which she would not otherwise have earned was the sum of £199.85 net. The Claimant was paid by the Respondent until 16 April 2019. Therefore, she is entitled to 8 weeks' pay less the sum for 16 April 2019 (she was not contracted to work on 15 April), less the £199.85 earned. I calculate this as follows:

8 weeks x (36 hours x £11 net per hour) =	£3,168.00
Less pay for 16.04.19 of (10 hours x £11 net per hour) =	[£110.00]
Less other income received =	[£199.85]
TOTAL:	£2,858.15

88. The Respondent failed to follow the ACAS Code when dismissing the Claimant. Whilst there was a suggestion that the Claimant attend a discussion to consider the issues raised in the emails of 15 April 2019, and there was some investigation, C was not given details of the allegations, nor was she given adequate time to prepare to attend any such meeting. Most critically, the Claimant did not have an opportunity to put her case before the Respondent took the decision to dismiss her. The Claimant initially refused to participate in any such discussion that was offered but later said she would attend a meeting. On balance, I consider her refusal to attend to be reasonable because it was on such short notice and with scant details of the allegations. Therefore, I find that the Claimant did not act unreasonably but the Respondent unreasonably failed to comply with much of the ACAS Code. I would therefore apply an uplift on the Claimant's damages of 20%, namely an additional £571.63, taking the total due to the Claimant to £3,429.78.

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Employment Judge O Dobbie

Date: 27 December 2020

Sent to the parties on: 30/12/2020....
T Henry-Yeo

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For the Tribunal Office