EMPLOYMENT TRIBUNALS

Claimant		Respondent
Mrs W Costello	v	**Gossops Green Medical Centre**

HEARING

Heard at: Croydon **On: Monday 23 April 2018**

Before: Employment Judge Truscott QC

Appearances:

For the Claimant: **in person**
For the Respondent: **Mr B Beyzade of counsel**

JUDGMENT

1. The name of the respondent is amended to Gossops Green Medical Centre

2. The claimant was not unfairly dismissed and her claim is dismissed.

Reasons

Preliminary

1. The evidence for the respondent was provided by Dr. Raj Sinha a GP and senior partner in the respondent and Ms M Levendoglu, a GP nurse. The respondent also tendered a witness statement for Ms Vanessa White, a Health Care Assistant but as the witness was not called to give evidence, the contents of the statement were not taken into account in the decision-making process. The claimant gave evidence on her own behalf. There was a bundle of documents to which reference will be made where necessary. It was agreed that the name of the respondent should be amended to Gossops Green Medical Centre.

The Issues

2. These, taken shortly, were whether the claimant was unfairly dismissed.

Findings of fact

3. The claimant was employed as a practice nurse by the respondent from 28 May 2014 until 21 August 2017. The Employee Handbook apples to her [82-117]. The disciplinary procedure in the handbook contains provisions relating to gross misconduct [105, 106-7]. She has over 40 years of nursing experience having qualified in 1976 [124-126]. She worked 12.5 hours each week across two days. Her usual days of work were Tuesdays and Wednesdays and her hours were 8.30-1pm and 8.30-5.30pm respectively. These hours are reflected in her payslip [80]. Her duties included but were not limited to taking blood samples from patients, immunising children, undertaking routine smear tests and undertaking ECG procedures. She was responsible for correctly labelling samples taken from patients and keeping accurate records.

4. On 1 March, 2017, the claimant posted blood results from one patient (FH) on to another patient's records (MS) who was due to have a depo injection (long acting contraception). The patient who had received the injection (MS) had their name put on FH's blood sample. This error was identified because FH is a long-term patient at the surgery whose blood was being monitored and the staff were made aware of this situation. When MS's abnormal results came back, before MS was called to notify her of the issue, the results were intercepted and the mistake was uncovered. If this mistake had not come to light, there would have been unnecessary concerns as to the health of MS and the surgery would have had to provide an explanation for what had happened. Dr Sinha contacted the patient FH and explained to her what had happened and take another blood sample from her.

5. Dr Sinha aske the claimant for an explanation. The claimant was not sure why she made the mistake but she said she might have been rushing. She did not raise any issue with the labelling machine. The machine was used without any problem by Vanessa White, a Health Care Assistant. To minimise the risk of any recurrences, the claimant's template was changed to group the same type of tests/immunisations together and arranged for her to work in Room 6 which contains a fridge so that she no longer needed to go in and out of the nursing room to obtain vaccines.

6. On 27 July 2017, serious allegations concerning the claimant were brought to Dr Sinha by staff reports and by the Pathology Lab contacting him regarding mislabelled blood and a mislabelled ECG. The claimant was not due to return to work until the following week on 1 August 2017. The respondent removed the claimant's list of appointments for 1 and 2 August as a precautionary measure. Any patients requiring blood tests and ECG's were redistributed within the team. As not all of the claimant's appointments could be cancelled, she would still have a clinic. Once she had finished her clinic on 2 August, Dr Sinha discussed with her the allegations against her and explained that she was suspended on full pay pending further investigation.

7. On 3 August, whilst he was opening the post, Dr Sinha discovered that an incorrect smear test had been undertaken by the claimant. The reason given on the smear test report was "form received with a vial labelled with different patient's demographics unable to process and please repeat in 3 months."

8. On 7h August 2017, Dr Sinha asked Helen Hatcher, the Practice Manager to collect evidence from the members of staff who had notified him of the mistakes allegedly made by the claimant and how they had discovered them.

9. On 7 August 2017, Dr Sinha wrote to the claimant confirming she was suspended on full pay whilst the Centre undertook investigations into the allegations against her [43-44]. He enclosed a copy of the Disciplinary Procedure and Rules [43-44]. The reason given for the suspension was that a number of mistakes had been reported to him by Dr Aboud [48] and Ms Pilgrim [52, 57-59]. The Pathology Lab subsequently wrote a letter confirming that incorrectly labelled blood samples/forms had been sent through [53-56, 60]. The reasons were summarised in the letter.

10. The disciplinary hearing was held at 11.00 am on 16 August 2017 and was chaired by Dr. Sinha. Helen Hatcher was present to take notes [61-66]. The claimant chose not to be accompanied. Dr. Sinha went through each of the allegations against the claimant with her and ask her for her response to them.

Incorrect blood taking process

11. The first allegation was of her following an incorrect blood taking process in respect of patient MR whose blood sample was incorrectly labelled as that of SE. This blood test was ordered by Dr. Aboud who was looking out for the results to enable him to undertake a fast track referral of the patient to investigate and/or exclude suspected gastrointestinal cancer.

The claimant accepted that she had made the error. She blamed the labelling machine. She said she had typed the patient name into the labeller, printed it and then did not diligently check to make sure if it was correct. She also referred to the labeller being independent and not linked to the records machine. Her view was that had it been linked t would have eradicated the need for her to type and print the label.

Incorrect Smear taking process

12. The claimant again blamed the labelling machine. She did accept that she made mistakes and admitted a previous mistake. She said “I picked up the wrong bottle and later realised the smear bottle I had done ..had not been sent off as I picked up the wrong bottle, an unlabelled bottle had been sent [64-65]” In addition to the error itself, the claimant had failed to inform Dr Sinha or the Practice Manager around 14 February 2017 when the incident occurred. The respondent undertook an audit of the smear tests undertaken by the claimant in the previous 12 months and discovered that a properly taken smear had been binned and an empty bottle had been sent to the Lab instead.

13. The claimant did not disclose the error to the patient concerned or provide the patient with the reason why the smear test had to be repeated in 3 months’ time. The claimant said the patient did not ask or question why it would have to be repeated and so she did not disclose her error. Dr Sinha considered this behaviour to be unacceptable, there was a delay in the patient having the result of a test for 3 months before knowing if there are any health concerns that require treatment. The claimant agreed she understood the severity of the situation, the risks to the health and safety of the patient due to delayed diagnosis and/or treatment, risk of complaints disrepute of the Centre and possible CQC intervention.

14. The claimant in evidence said that an audit of smear tests is undertaken to check competency levels. The percentage should be above 93%. The claimant's result was 94%.

Incorrectly labelled ECG

15. The ECG for a patient did not have any patient identification. The claimant said "I honestly cannot remember why I did not write the name on." [65]. When she was asked whether she would know if this was definitely the correct ECG for this patient, the claimant responded "I wouldn't know" [65]. Dr Sinha asked the claimant "is there anything happening or going on outside of work that may make you make this mistake/" she replied "I feel comfortable and I am not sure why I made this mistake… maybe I was rushing."

16. In evidence, the claimant pointed out that she took the sample to the duty doctor who signed it off.

17. Dr Sinha could not find anything to support the claim that the claimant did not have time or was rushing. The rota generally shows that from March 2017 the claimant started seeing patients from 8.40 am and had a catch up slot half way through and her last patient is booked in at 12.40pm. There were a number of "Did not attend" slots in each morning or afternoon sessions. The other nurses or healthcare professionals who cove the claimant's work say there is sufficient time to complete the work. On 26 July when the mistakes were made in relation to blood and ECG, there were four ten-minute appointments at 10am, 11am, 11.30amand 12.30pm and a catch-up slot at 10.30am.

18. After the disciplinary hearing, Dr Sinha took to the decision that the claimant's actions constituted negligence amounting to gross misconduct. He wrote to her in these terms on 21 August 2017 [67-71]. He set out the reasons for his conclusions and informed her of her right of appeal.

19. The claimant did not exercise her right of appeal. She said that this was because the appeal was to a more junior doctor.

20. The claimant did not seek employment thereafter.

Submissions

21. There were brief oral submissions

Law

Dismissal for Gross Misconduct

22. In common law, gross misconduct is conduct by an employee which fundamentally repudiates his contract of employment and justifies summary dismissal. There are several authorities *inter alia* **Laws v. London Chronicle Ltd** [159] 1 WLR 698 and **Wilson v. Racher** [1974] IRLR 114 which confirm that gross misconduct is misconduct of such a nature that it fundamentally breaches the contract of

employment. In the case involving the organist of Westminster Abbey, **Neary v. The Dean of Westminster** [1999] IRLR 288, who was summarily dismissed for gross misconduct, the Queen's Special Commissioner, Lord Jauncey, at paragraph 22 stated that:

> "…conduct amounting to gross misconduct justifying dismissal must so undermine the trust and confidence which is inherent in the particular contract of employment that the master should no longer be required to retain the servant in his employment."

23. This test for gross misconduct or repudiation was endorsed by the Court of Appeal in **Briscoe v. Lubrizol Ltd** [2002] IRLR 607. In this case, Mr Briscoe was in breach of his duty to obey a lawful instruction to attend upon his employer to discuss his long-term sickness and in breach of an instruction to return the employer's calls to rearrange that appointment. Further, his continuing absence from work was unexplained by a current medical report. As Lord Justice Ward pointed out at paragraph 14 of his judgment in this case: *"…the duties of trust and confidence are mutual."* Mr Briscoe had so undermined these duties that Lubrizol was no longer required to retain him in employment.

24. To summarise, a test of whether gross misconduct can be said to have occurred is for the employer to ask himself, 'Because of the employee's action, and after considering the results of my investigation of it and of the explanation (if any) offered when I gave him the opportunity to do so, is it reasonable for me to conclude that I can no longer tolerate his continued presence at the place of work?' If the answer to this is 'yes' the employer is in effect saying that the employee's action was sufficiently repudiatory to constitute gross misconduct. If the answer is 'no' or if the employer is uncertain, the misconduct will not have been 'gross' by the application of this criterion, and it may merit either a formal warning that repetition of misconduct may lead to a decision to dismiss the employee. If inclining towards a conclusion that the employee's misconduct was so serious that summary dismissal is the right course, a question for the employer then to ask himself is whether in the circumstances a reasonable employer would dismiss this employee for that misconduct as the tribunal will ask, 'Have the employers acted reasonably in using the established reason for dismissal as a sufficient one?' (**Laws Stores Ltd v. Oliphant** [1978] IRLR 251).

Procedural Aspects

25. Although not having to prove that he had acted as a reasonable employer in the circumstances of a particular dismissal, an employer can expect a tribunal to want to hear evidence about his handling of the matter. Guidelines on this were offered by the Employment Appeal Tribunal in **Whitbread and Co plc v. Mills** [1988] IRLR 501 when, quoting from **Polkey v. A E Dayton Services Ltd** [1987] IRLR 503 HL, the Employment Appeal Tribunal said that an employer will normally not be acting as a reasonable employer unless, in the case of dismissal for misconduct, he investigates the complaint of misconduct fully and fairly and hears whatever the employee wishes to say in his defence or in explanation or mitigation

26. A dismissal is unfair if the employer unreasonably treats his real reason as a sufficient reason to dismiss the employee either when he makes his original decision to dismiss or when he maintains that decision at the conclusion of an internal appeal. Whilst there was some suggestion that the 'range of reasonable responses' test

applies only to the decision to dismiss, not to the procedure adopted, this has been rejected by the Court of Appeal in **Sainsbury's Supermarkets Ltd v. Hitt** [2003] IRLR 23. The Court of Appeal held in this case (at paragraph 30) that the 'range of reasonable responses' - or the need to apply the objective standards of the reasonable employer - applies:

> "…as much to the question of whether the investigation into the suspected misconduct was reasonable in the circumstances as it does to the reasonableness of the decision to dismiss for the conduct reason."

Tests of the Employers' Reasonableness

27. The statutory reasonableness test which tribunals must apply when deciding unfair dismissal complaints requires that where the employer has fulfilled the requirements of subsection (1) of section 98 of the Employment Rights Act 1996, then, subject to sections 99 to 106 of the Employment Rights Act (which have no applicability in this case) the determination of the question whether the dismissal was fair or unfair, is established in accordance with section 98(4) of the Employment Rights Act, which states:

> (4) Where the employer has fulfilled the requirements of subsection (1), the determination of the question whether the dismissal is fair or unfair (having regard to the reason shown by the employer)—
>
> (*a*) depends on whether in the circumstances (including the size and administrative resources of the employer's undertaking) the employer acted reasonably or unreasonably in treating it as a sufficient reason for dismissing the employee, and
>
> (*b*) shall be determined in accordance with equity and the substantial merits of the case.

28. In considering reasonableness in the context of a misconduct dismissal, **British Home Stores Ltd v. Burchall** [1978] IRLR 379 contained guidelines, cited in most tribunal cases involving dismissal for misconduct.

29. The Employment Appeal Tribunal in **Iceland Frozen Foods Ltd v. Jones** [1982] IRLR 439 summarised the way in which tribunals should approach the statutory question, saying at paragraph 24:

> "(1) The starting point should always be the words of section 57(3) themselves;
>
> (2) In applying the section, an industrial [employment] tribunal must consider the reasonableness of the employer's conduct, not simply whether they (the members of the employment tribunal) consider the dismissal to be fair;
>
> (3) In judging the reasonableness of the employer's conduct, an employment tribunal must not substitute its decision as to what was the right course to adopt for that of the employer;

> (4) In many (though not all) cases there is a band of reasonable responses to the employee's conduct within which one employer might reasonably take one view, another quite reasonably take another;
>
> (5) The function of the industrial [employment] tribunal, as an industrial jury, is to determine whether in the particular circumstances of each case the decision to dismiss the employee fell within the band of reasonable responses which a reasonable employer might have adopted. If the dismissal falls within the band, the dismissal is fair: if the dismissal falls outside the band, it is unfair."

Discussion and Decision

30. The claimant accepted that she had made the mistakes identified in the disciplinary procedure. She told the Tribunal that she apologised for making these mistakes but that is not apparent from the notes of the meeting. It is not so much the question of apology but insight into the cause of the risks with which the Centre was concerned. The claimant did not seem to understand how substantial the errors were and were considered to be considered to be by the respondent. The reasons she put forward, being in a rush or incorrect use of the labelling machine did not and could not allay their concerns for the future.

31. The procedure adopted was fair, the investigation was thorough, the disciplinary meeting was detailed and was the opportunity for the claimant to seriously address the problems. The decision not to appeal because the appeal was to a junior partner does not impact on fairness. The claimant did not know what steps the Centre would take to ensure fairness in the appeal. The categorisation of the misconduct as gross is appropriate and the Tribunal considered that such a dismissal fell within the range of reasonable responses.

32. As the evidence of the claimant was that she did not seek employment after her dismissal, even if the dismissal was held to be fair no compensatory award would have been made.

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Employment Judge Truscott QC

Date 4 May 2018.