EMPLOYMENT TRIBUNALS

Claimant: **Miss B Wright**

Respondents: **(1) Dr A Arnott**
(2) Dr V Lucas
(3) Dr K Tamber
(4) Dr A Carboo
(5) Dr H Lawal
(a partnership practising as Globe Town Surgery)

Heard at: **East London Hearing Centre** **On:** **5th January 2021**

Before: **Employment Judge Reid**

Representation

Claimant: In person
Respondent: Mr Hines, Peninsular

This has been a remote hearing which has not been objected to by the parties. The form of remote hearing was video (V) (fully remote) (CVP). A face to face hearing was not held because it was not practicable and all issues could be determined in a remote hearing. The documents before the Tribunal were the parties' witness statements and the electronic bundle to page 133.

JUDGMENT (Reserved)

1. **The Claimant was not unfairly dismissed by the Respondent contrary to s 94(1) Employment Rights Act 1996. Her claim for unfair dismissal is therefore dismissed.**

2. **The Claimant was wrongfully dismissed by the Respondent. She is therefore entitled to four weeks net pay.**

3. **The Claimant withdrew her claim for holiday pay (which was in fact a claim for wages she thought had not been paid to her in her December 2019, being pay for two pre-booked holidays booked for 24th and 31st December 2019). That claim is therefore dismissed on withdrawal.**

REASONS

Background and claim

1. The Claimant was employed as a receptionist/ administrator by the Respondents, the partners in a GP practice (in partnership together), from 14th November 2016 to 7th February 2020 when she was dismissed without notice because of an incident on 23rd December 2019 when she verbally abused a colleague, Mr Sabry (Business Manager).

2. The Claimant presented her claim form on 29th April 2020 claiming unfair dismissal and wrongful dismissal. She said (page 10) she had been dismissed after an incident on 23rd December 2019 when she accepted she had called Mr Sabry certain names but that the situation arose because she had needed to leave because she had an urgent childcare issue and Mr Sabry refused to allow her to leave and told her to speak to the Practice Manager (who was then on leave). She said she regretted the comments she had made.

3. The Claimant's unfair dismissal claim was put on the following basis, as to why she said it was unfair:

- The Claimant said that it was unfair because her mitigating circumstances had not been taken into account – namely the urgent childcare situation she was faced with (mitigating circumstances being the ground raised in the appeal, page 98)

- The Claimant said that whilst she had used two of the terms of abuse to Mr Sabry, she had not used the others she was accused of

- The Claimant said that a procedural failing was that Dr Lawal who took the decision to dismiss had sat in as notetaker in her original investigation meeting with Dr Arnott

- The Claimant said that Mr Sabry and Dr Carboo (who also witnessed part of the incident) had spoken to each other before they wrote their statements about the incident

- The Claimant said she had not had enough time to review the note of her investigation interview and the notes of the disciplinary hearing (this was an issue raised during her appeal).

4. The Claimant confirmed in this hearing that she did not claim that she had requested emergency leave to deal with the situation. The way she said she had dealt with the situation was to request to use some time off in lieu (TOIL) so that she could leave early to collect her daughter. She accepted that she had been dismissed because of her conduct towards Mr Sabry ie she did not challenge that that was the reason she was dismissed, even if she disagreed that it was fair.

5. The Claimant was not represented. The Respondent was represented. I heard oral evidence from the Claimant and from Dr Carboo (who witnessed part of the incident), Dr Lawal (who took the decision to dismiss) and Dr Lucas (who took the decision on the appeal based on an external HR report by Ms Atwood).

The Respondents provided witness statements (I was asked to disregard the statements of Ms Begum and Ms Nasrin) and the Claimant asked that her statement at page 78 (given at the time of the investigation) be treated as her witness statement (which she also confirmed at the appeal stage contained the main points, page 103). There was an electronic bundle to page 133. I heard submissions on both sides after giving the Claimant extra time to put together the points she wanted to make and heard the Respondents' submissions first so that it was easier for the Claimant to respond to the Respondents' case. I reserved my decision due to lack of time.

Findings of fact

6. The Respondents' Employee Handbook contains provisions about behaviour at work (page 53) requiring civility to colleagues and that a breach can result in disciplinary action (page 59). The Handbook also provides (page 60) that any behaviour resulting in a fundamental breach by the employee which irrevocably destroys trust and confidence will constitute gross misconduct, meaning that the employee can be dismissed without notice.

7. On 23rd December 2019 during her lunchtime break the Claimant received a call from her father in law telling her that he needed to go from a routine appointment at the Royal London straightaway to Barts for a further appointment and could not take the Claimant's daughter with him to Barts. This was a stressful situation for the Claimant and was unexpected.

8. However instead of going to Mr Sabry and explaining her father in law's predicament and how her need to leave had arisen (giving him the facts), the Claimant went to Mr Sabry to tell him that she wanted to use up 2 hours TOIL she thought she had accrued, in order to leave early. I find that she did not tell him about her father in law's circumstances or that it was an emergency though I find she did mention the reason for needing to use some TOIL to leave early was because of childcare issues; I find it more likely that, given the stressful situation, she did mention it was a childcare issue (as likely to mention something uppermost in her mind) though I find she did not say it was an emergency. Although Mr Sabry says she did not mention this as a childcare issue at this stage and only raised it later in the conversation when he had told her she did not in fact have 2 hours TOIL to take, I find that it is likely the Claimant did mention childcare being the issue, though she did not say it was an emergency or explain her father in law's predicament (which she accepted at the appeal stage she had not mentioned to him, page 105, saying instead he 'might' have overheard the call she got from her father in law when in the staff room, thereby accepting she had not told Mr Sabry the facts). On the face of it therefore Mr Sabry was being asked if she could take 2 hours TOIL (which would normally have to be pre-booked) so duly went to check the Respondents' records to check what she could take. The Claimant did not ask for emergency leave or any other type of discretionary leave but asked to use 2 hours TOIL. Whilst I accept that she did it this way because she wanted to ensure she would still be paid as normal if she left early, asking to take TOIL gave the impression to Mr Sabry that whilst the Claimant was asking to leave early it was not an emergency situation – she was simply asking if she could leave early by way of taking TOIL.

9. Mr Sabry duly checked the records and told the Claimant that she did not in fact have 2 hours TOIL accrued but only had 0.8 hours accrued. At this point

the discussion got heated with the Claimant saying she did have 2 hours because she had discussed that this was what she had left with Ms Amedee the Practice Manager, who was then away on holiday. Mr Sabry had looked at the record and saw that it showed 0.8 hours. In fact Ms Amedee later confirmed (page 77) that there had been a previous discussion between her and the Claimant about her having 2 hours TOIL to use up (even though Ms Amedee later recognised that that wasn't in fact right, looking at the records).

10. I find that this was the trigger to the Claimant losing her temper because in her eyes she was simply asking to take the amount of TOIL she thought had agreed with Ms Amedee she had left. She was also annoyed that she would be unable to carry forward any unused TOIL into the next year. There was a mismatch between the two of them because the Claimant thought she was asking to use the TOIL she thought she had and Mr Sabry was responding to a request for TOIL in a situation which had not been expressed as an emergency and which should have been pre-booked on the Intradoc system. The Claimant was not asking for emergency leave or telling him about her father in law's predicament. Things now escalated.

11. The Claimant was angry and walked away but then went up to see Mr Sabry in his office. She told Mr Sabry that she had now sorted childcare and asked for financial help to pay for this. She still had not told Mr Sabry about the situation her father in law had been put in (she accepted in her oral evidence that she only told him it was a childcare issue) but in any event what Mr Sabry was now being presented with was no longer a request to leave early using TOIL but a request for the Respondents to cover her extra childcare costs because she was not leaving early. The initial stressful situation the Claimant had found herself in was largely resolved even if it was going to be expensive. The Claimant said the cover she had arranged was 'provisional' but it was only provisional in the sense that she wanted to see if the Respondents would pay for it. The fact that she left it as provisional with the childminder was because of the cost and to see if she could see if the Respondents would pay for it – this was consistent with the situation not being an emergency but still linked to the TOIL argument. The Claimant accepted that she then called Mr Sabry a joke and a laughing stock (page 78, ie after telling him she had found alternative cover and asking for the Respondents to pay for that). I find that she was raising her voice. Dr Carboo had by this time been called by Mr Sabry to come to his office, consistent with the Claimant raising her voice and being aggressive.

12. As regards the other four comments the Claimant is said to have made to Mr Sabry ('you are a man not a mouse', ' you do nothing', 'you are a coward' and ' you are a control freak') I find that the Claimant did make the ' man not mouse comment' because she confirmed to Dr Carboo when she arrived (Dr Carboo ws para 6) that she had already said this to Mr Sabry before Dr Carboo arrived (and even if she later disagreed she had in fact said it she told Dr Carboo that she had, page 79 (para 4)). I find that the Claimant also made the 'you are a coward' comment (Dr Carboo ws para 6). Given the conflicting accounts on the other two comments which Dr Carboo did not hear herself or receive the Claimant's confirmation that she had said it before Dr Carboo arrived, I find that the Claimant did not make the other two comments. However the four which were made were a serious matter and were rude and abusive.

13. As Dr Carboo arrived Mr Sabry was telling the Claimant that she was to

go home, expressing that to be 'garden leave' which, based on his oral evidence I find to mean paid leave pending a decision by another manager because he did not consider he should be the person making any decision about suspension. The Claimant accepted (page 79) she by now had raised her voice and accepted she said she would not leave and that the police would have to be called. This was aggressive. Dr Carboo then went to speak to the Claimant (ws para 9) to ask if she was ok and the Claimant referred to the refusal to take TOIL she thought had been agreed. She again did not explain the predicament with her father in law even when being asked if she was ok – this was a clear opportunity to fully explain what her situation had been when she had asked to take the TOIL but again she did not take it. The Claimant was subsequently suspended on 31st December 2019 (page 75), the allegation being the verbal abuse to Mr Sabry.

14. The Claimant criticised the Respondents' procedure because Dr Lawal sat in as notetaker in the investigation meeting with Dr Arnott on 7th January 2020 which resulted in the statement at page 78. The Claimant confirmed at this hearing that she stood by the content of that statement. She did not suggest that Dr Lawal had interrupted her or asked her questions or in any other way gone beyond the role of notetaker. Therefore whilst in other circumstances the person taking the decision to dismiss taking a part in the investigation phase might render the dismissal unfair, I find that in this situation it did not because the Claimant stood by the statement typed up for her to sign based on that meeting (which included some changes she had asked for) and she did not suggest that Dr Lawal in fact went beyond the role of notetaker. I find that it was Dr Arnott who conducted the investigation and that Dr Lawal's role was simply notetaker at that meeting. I find that in this particular case his presence did not make the dismissal unfair and take into account there were a limited number of appropriate people who could take that role.

15. The Claimant also criticised the fact that Mr Sabry and Dr Carboo had spoken to each other before they wrote their statements for the investigation (page 73,69), which they both accepted in their oral evidence they had done. Whether or not they spoke to each other further about the incident before they wrote these statements does not mean that they colluded in putting together an account which was factually inaccurate, taking into account the Claimant admitted to using two of the abusive terms in any event, accepted she had been loud and accepted she had made the comment about calling the police. Their statements do not give an entirely matching accounts in all respects consistent with no collusion in their writing of them.

16. The Claimant had not told Mr Sabry or Dr Carboo on the day in question about her father in law's situation or that there was an emergency she had to deal with or had requested emergency leave – she had requested TOIL, mentioned childcare and was angry when that was refused but still did not request it even when told she had insufficient TOIL. At the disciplinary hearing she now said it had been an emergency childcare issue (page 91) but accepted that she had not asked for emergency leave. She criticised Mr Sabry (page 92) for not offering emergency leave as an option but she had not told Mr Sabry about her father in law or that there was an emergency or asked for it – she had asked for TOIL and when that was refused asked for childcare costs (for care she had been able to arrange, even if it was expensive) to be covered by the Respondents rather than from the outset telling Mr Sabry the facts, telling him it was an emergency and asking for emergency leave to go and deal with the

problem. She also did not tell Dr Carboo when she later asked if the Claimant was ok. From the Respondent's point of view the situation was one of an employee becoming verbally abusive when a request for TOIL was refused and when the Claimant had by now found alternative cover and was not asking for time off – only asking for a financial contribution to the cost of that alternative cover.

17. Dr Lawal took the decision to dismiss (page 95). He reasonably took the view that in the light of the situation as presented to Mr Sabry by the Claimant on the day in question, her abusive comments to him (some of which she admitted) were unacceptable as whatever the childcare situation had been, it had been resolved (by finding alternative cover) and the Claimant no longer needed time off. I find however that to characterise what the Claimant said on page 93 about Dr Carboo being confused as an allegation that Dr Carboo was lying was putting it too high, taking into account that as Dr Lawal said (page 93) there can be differing accounts in a confusing situation where people are upset. It was reasonable of Dr Lawal to conclude however that the Claimant showed a lack of insight if she thought it had not been verbal abuse (page 79), particularly as she accepted some of the terms used and that she had been loud. It was reasonable to conclude that calling a colleague a joke and a laughing stock in a loud voice (even if there was a dispute about the other comments) constituted verbal abuse, even if it involved no swearing. Dr Lawal concluded that as the childcare situation had been resolved by the time the comments were made, there were no mitigating circumstances as regards the abusive comments. These were reasonable findings based on the information in front of him.

18. The Claimant appealed (page 98) saying that mitigating circumstances had not been taken into account. The Respondents asked Ms Bright an external HR consultant to do a report. She did this (page 106) having conducted an appeal hearing with the Claimant (page 99), accompanied by her UNISON representative and re-interviewed Mr Sabry and Dr Carboo. The Respondents' case was that it was Dr Lucas who took the decision on the appeal based on Ms Atwood's report. I have considered whether the fact the appeal hearing was with Ms Atwood (who is said not to have taken the decision on the appeal) without Dr Lucas (who was to decide the appeal) gave rise to any unfairness to the Claimant because Dr Lucas did not hear directly from the Claimant her account of what happened in her own words but conclude that the absence of Dr Lucas at the appeal hearing did not cause unfairness because Dr Lucas had the full notes of that appeal hearing and had Ms Atwood's detailed report and all the relevant documents and could see what the Claimant was saying at the appeal stage about her mitigating circumstances. I find that the Claimant gave the typed up statement at page 80 to Ms Atwood at the appeal stage (because it refers to her dismissal) and that this was the document Ms Atwood referred to in her report (page 122) as having been provided at the appeal stage (marked as Appendix B but referred to as Appendix 2).

19. The Claimant accepted at the appeal that she had only called Mr Sabry names after she had told him she had sorted out alternative childcare cover (page 99,101). Whilst she said that alternative arrangement was provisional (page 104) I find that it was provisional in the sense that she was first seeing whether the Respondents would pay for it but that alternative cover was available and the immediate stress of the situation had to a large extent been alleviated in terms of concern about her daughter. The Claimant now said, contrary to what

she said at this hearing and at the disciplinary hearing, that she had in fact asked Mr Sabry for emergency leave (page 105) but that was inconsistent with her previous accounts and inconsistent with first asking for TOIL and then having arranged alternative cover (and asking for the Respondents to bear the cost).

20. At the appeal stage the Claimant raised a further irregularity, namely that she had not had enough time to review her investigation statement at page 78 before she signed it and had not had enough time to review the notes of the disciplinary hearing before confirming them. However she said at this hearing and at the appeal (page 103) that her amendments on her statement had been included in the final version on page 78 after she asked for some changes and confirmed to Ms Bright that it covered the main points (page 103). She also confirmed to Ms Bright that the disciplinary hearing notes covered the main points (page 103). The Claimant did not suggest she had asked for more time to read them through. I therefore find that no unfairness arose because in the end her statement and the notes were broadly accurate.

21. Given the evidence actually before her at the time of the appeal Ms Atwood concluded that the Claimant had not in fact had an emergency childcare situation on the day in question (page 117, para 8.7). Although the Claimant had provided a call log showing a call in from her father in law (page 82) Ms Atwood concluded that it had not been an emergency situation in the way the Claimant now said had existed. This lead to Ms Atwood's conclusion (page 120 para 9.12) that no mitigating factors were therefore present. The Claimant did not provide the hospital letter at page 124 until after her appeal had been decided.

22. Dr Lucas considered the report and decided to uphold the decision to dismiss. I find that she was not merely 'rubber stamping' Ms Atwood's conclusions but gave it some independent thought. Dr Lucas was therefore of the same mind as Ms Atwood had been in terms of the conclusions reached in the report.

23. After receiving the decision on her appeal the Claimant provided the letter at page 124 showing that her father in law had been at the Royal London on 23rd December 2019. Although it was only a partial letter and did not refer to the need to go on to Barts, it was printed at a time (12.47) broadly in line with the timing of what the Claimant had said happened – namely it was printed for her father in law (as he was due to go on to Barts for a further appointment) before he called the Claimant to explain his predicament at 13.12 (page 82). I therefore find that the Claimant's father in law was at the Royal London when she said he was and that it was because he unexpectedly needed to go for a further appointment that he called the Claimant. The Respondents at the appeal stage did not accept the phone record to show this because the Claimant had not also produced phone logs showing her call back to him or any of the many calls she said she had made to arrange alternative childcare. However I find that the call log taken in conjunction with the hospital letter does show that the Claimant was called by her father in law from the Royal London and given she then asked to leave early find that the circumstances were in fact that she was having to deal with an urgent and stressful childcare problem at short notice. I find these to be mitigating circumstances as regards whether or not she was in fact guilty of gross misconduct justifying dismissal or the less serious offence of misconduct which justified dismissal, but with notice.

Relevant law
Unfair dismissal

24. The relevant law for unfair dismissal is s98 Employment Rights Act 1996 (fair reason and fairness of dismissal) and the test in *BHS v Burchell [1978] IRLR 379* for conduct dismissals, namely that the employer must have a genuine belief that the misconduct has occurred, on reasonable grounds and following a reasonable investigation. The test for wrongful dismissal (the notice pay claim) is different – see below.

25. The range of reasonable responses test in *Iceland Frozen Foods Ltd v Jones* [1982] IRLR 439 applied to the dismissal and as that test applies to the reasonableness of the extent of an investigation, *Sainsburys v Hitt [2003] IRLR 2*

26. It is not for the Tribunal to decide whether it would have dismissed the Claimant or to substitute its own view as to what should have happened but to assess the fairness of the dismissal within the band or range of reasonable responses test taking into account what was in the employer's mind at the time of the dismissal and the material before the employer at that time.

Wrongful dismissal (the claim for notice pay)

27. The issue is whether the employee committed an act of gross misconduct namely a repudiatory breach of contract meaning that the employer is entitled to terminate without notice. This claim looks at what actually happened and whether that justified dismissal without notice. This means that it is different from the unfair dismissal claim which considers what the employer knew about when dismissing, providing it had done a reasonable investigation. This means that for example the employer can find something out after the dismissal which either justified that dismissal or finds out something which means it was not justified.

Reasons

Unfair dismissal

28. Taking into account the above findings of fact I conclude that the Claimant was not unfairly dismissed by the Respondents. What had happened was that she had become abusive to Mr Sabry after her request for 2 hours TOIL had been turned down and when she had already found alternative cover for her daughter. She did not tell Mr Sabry it was an emergency and did not tell him about her father in law's hospital predicament or ask for emergency leave. If disputing the outstanding TOIL amount the appropriate course was to take it up with Ms Amedee on her return to work. What Mr Sabry thought he was dealing with was an employee asking for TOIL she did not have accrued which was reasonable given the records (even if in fact Ms Amedee had had a discussion with the Claimant about it being 2 hours in total). Whilst the Claimant had been in a stressful situation, that immediate stress had abated because she had found alternative cover. Whatever had been mitigating circumstances as regards being under pressure to find a solution to a childcare problem or feeling aggrieved about the TOIL amount she had discussed with Ms Amedee, she had found a solution to the immediate problem and her subsequent abusive comments and anger to Mr Sabry were reasonably considered by the Respondents to be unacceptable behaviour in the workplace and not a response to having a request

for emergency leave or any other kind of exceptional leave turned down. It was unfortunate at the appeal stage that Ms Atwood and Dr Lucas did not have the hospital letter because it might have avoided the conclusion that there in fact had been no emergency in the way claimed at all, which fed into conclusion about a lack of mitigating circumstances.

29. Taking into account the above findings of fact I conclude that the procedural failings identified by the Claimant did not in practice affect the overall fairness of the procedure.

30. Although the Claimant accepted she had used at least two of the abusive comments and had apologised, it was reasonable for the Respondents to conclude (based on its investigations and bearing in mind this was not a case where the Claimant was not saying she had not made any of them at all) that there had been further comments and to take into account that her view that it was not verbal abuse showed a lack of insight, which fed into the view at the dismissal stage that they did not have ongoing confidence in the relationship the Claimant.

31. The Respondents conducted a reasonable investigation (both at the initial investigation stage and at the appeal stage) and the dismissal was within the band or range of reasonable responses (which encompasses the range between the strict employer and the more relaxed employer). The Respondents did consider the mitigating circumstances the Claimant put forward but ultimately reasonably concluded that given the sequence of events and when the abusive comments were in fact made, any immediate childcare problem had been resolved and that such behaviour breached the terms of its behaviour at work policy. The Respondents genuinely thought on reasonable grounds that she had committed an act of misconduct and reasonably concluded that what was put forward as mitigating circumstances did not justify her behaviour, based on what was known at the time of the dismissal and appeal. The Respondents' decision to dismiss was within the band or range of reasonable responses.

32. I have found that there were no procedural failings resulting in unfairness to the Claimant and that her dismissal was fair. However even if there had been procedural failings I conclude also that there is a 100% chance that she would have been dismissed in any event, such that any compensatory award would have been reduced by 100%.

Wrongful dismissal

33. I conclude based on the above findings of fact and taking into account the hospital letter at page 124 that the Claimant had in fact been in a stressful situation with a relatively urgent childcare issue, even if not strictly an emergency (even if she did not communicate this fully to Mr Sabry or Dr Carboo). Whilst her behaviour was such that the Respondents were entitled to dismiss her, I conclude that those circumstances were factors meaning that the Claimant did not when the situation was looked at in the round commit a repudiatory breach of contract justifying dismissal without notice when she lost her temper and was rude to Mr Sabry, though her conduct falls close to the line where dismissal without notice would have been justified. Whilst her misconduct was serious and resulted in a loss of confidence in her, what she did in the factual situation she was in did not amount to a repudiation of the contract of employment by her,

taking into account firstly she had been under quite some pressure (even if that pressure had abated as she had found cover) and secondly she had genuinely thought after a discussion with Ms Amedee that she had 2 hours TOIL to take. She failed to communicate with the Respondents and the dismissal was not unfair based on what the Respondents knew and were provided with up to and including the appeal, but ultimately after her appeal the Claimant produced a letter which in practice undermines Ms Atwood's and Dr Lucas' conclusion that there had been no emergency in the way claimed at all. That later evidence can be taken into account in the wrongful dismissal claim in assessing what actually happened and whether the Claimant was in fact in repudiatory breach of contract. The Respondents were therefore entitled to dismiss her, but not to dismiss her without notice.

34. The Claimant was therefore wrongfully dismissed by the Respondents. At the hearing it was identified that her notice period was 4 weeks and that that amount was readily identifiable. She is entitled to be paid for her notice period, subject to any arguments about mitigation in that first 4 weeks. Given she did not find a new job in that period the parties are likely to be able to agree this amount. The parties are to update the Tribunal by **8th February 2021** as to whether a further remedy hearing is necessary or whether they have been able to agree the amount between them. If they require a further hearing it should be listed for a 2 hour CVP hearing.

Employment Judge Reid
Date 11 January 2021