

**IN THE MATTER OF A DISPUTE BEFORE THE EMPLOYMENT & LABOUR
RELATIONS TRIBUNAL**

Pursuant to Part VA Section 44B of the Employment Act 2000 ('the Act')

BETWEEN

Claimant

-and-

Respondent

Tribunal Members:

**Charlene A Scott Chair
McKeisha Smith Deputy Chair
Peter Aldrich Panelist**

Directions Hearing: 18 December 2023

Dates of Hearing: 15 and 19 March 2024 at the Workforce Development Training Room,

Final Submissions presented on or by 2 April 2024

Claimant and Respondent appeared In Person

Decision

- 1. This is the decision of the Employment and Labour Relations Tribunal who sat and heard the Claimant's and the Respondent's evidence on Friday 15 March 2024 and Tuesday 19 March 2024, in respect of a summary dismissal claim, with final submissions transmitted via online on or by 2 April 2024. Both parties attended in person.**

2. Both parties agreed that there shall be no publication of names and that there shall be no public or press allowed pursuant to section 44E and 44F of the Act at any time during the hearing.
3. The complaint was referred to the Employment and Labour Relations Tribunal on 29 September 2023 by the Department of Labour, pursuant to section 37(4) of the Employment Act 2000 (the Act). In this complaint, the Claimant contended that she was wrongly accused of unfounded claims by the employer that led to her unfair termination for gross misconduct. The Respondent employer's position was that the Claimant was terminated for gross misconduct, namely performing potentially invasive scans, on her own volition and on company time, on a high-risk pregnant member of the public, and taking measures to conceal the occurrence.
4. This Employment and Labour Relations Tribunal hearing was conducted in accordance with section 44B (2) and (3), 44C of the General Powers, section 44D Power to Obtain Information, if required, and more importantly, that the Tribunal shall regulate its own proceedings as it sees fit pursuant to Schedule 2(20) of the Act.
5. In the evidence, there will be mention of a recording which was recorded by the Office Manager at the meeting held on 1 August 2023, unbeknownst to both the Claimant and the Respondent. Prior to actual hearing, the Tribunal and the respective parties listened to aspects of this recording. We afforded them an opportunity to settle this matter and that did not occur. We explained that we could not rely on this recording in the hearing as the Claimant was not aware of being recorded at the time and she had not given her consent to the use of it.
6. In an effort to hear those matters which were relevant to the trial as well as the evidence contained in their witness statements, only those live witnesses who supported either party's case were allowed to give evidence. If either the Claimant or the Respondent could clearly speak to and give evidence on a particular aspect in the case, only their evidence was necessary and therefore allowed. With the presentation of witness statements, extra supporting evidence such as a stealthily recorded meeting or such evidence from additional workers at were not needed to say that they either witnessed in the office or outside of the office or heard or witnessed the same thing on the days in question that the Claimant or the Respondent or the three additional witnesses could give.

7. The Respondent took exception to this ruling as he thought it would detrimentally interfere with his case. To prove his case, the Tribunal felt that we would need the Respondent's evidence and in support of his evidence, we would need the Office Manager's evidence as she played an integral part in this case. Along with that, we did use the Radiologic Technologist's evidence as she was the only person upstairs in the area when a particular machine was in use on one of the days in question as well as she could clearly outline the protocol of using x-ray/ultra-scan technology. Lastly and more importantly, the IT computer expert was required to assist the Tribunal in understanding the process of capturing and more importantly, deleting an image from the ultrasound machine. There really was no need to have a receptionist nor a phlebotomist nor an accounts administrator give evidence in support of what was seen or heard on either of the days in question. As seasoned tribunal panelists, we have all had sufficient experience in listening and obtaining the best evidence from the persons appearing before us to prove a matter. We will also use the term 'scan' interchangeable with 'ultrasound'.
8. That being said, we all agreed at the start of the hearing that it would be accepted evidence that JS, the pregnant lady in question, attended and was seen at [redacted] on Saturday 29 July 2023, at approximately between 2:00 pm and 2:45 pm. This would save any denials either by her, if JS attended and gave evidence, or from other employees who saw her on that date, that JS attended at [redacted] on that date and around that approximate time and was in the presence of the Claimant. The major thrust of this case hinges on what allegedly occurred or did not occur while JS and the Claimant met in the ultrasound room if they did.

BACKGROUND

9. The Claimant was hired in 2021 as a Sonographer from [redacted], and because of the necessary Bermuda immigration approvals being sought, she did not start working at [redacted] until 5 July 2022. With the Claimant's hiring package came a \$3000.00 relocation fee, accommodations and a return ticket. She was hired as the Ultrasound Technician. Matters seemed to sour the office relationship when she failed to abide by company overtime policy when she failed to submit overtime requests in advance as well as adding on extra leave time when she traveled abroad. She made her working hours from 7:00 am – 4:00 pm when most others worked from 8:00 am – 5:00 pm and then she wanted to claim overtime for those additional hours or so. From the very start, the Claimant would be asking for advances in salary as she failed to appreciate

or perhaps, did not care it seemed, that huge expenses are involved with moving across the world from one country to another country.

10. It all came to a head on Tuesday 1 August 2023, which happened to be just over one year working at [redacted] when the Claimant was questioned about using the ultrasound equipment on the prior Saturday 29 July 2023 on the pregnant woman, JS, who was known to her. JS did not appear to have a listed appointment for an ultrasound and this was being done without a doctor's requisition to have it done and thereafter the Claimant did not send the resulting information to a radiologist for a diagnosis to which she emphatically denied all of it. It was later discovered that the Claimant attempted to cover her behavior by attempting to 'delete' the scan. In that afternoon meeting on 1 August 2023 with the Respondent and the Office Manager, the Claimant was asked a number of times whether she scanned JS when they met on the Saturday and she repeatedly said no she did not. After the Respondent asking a number of times about this occurrence, the Claimant replied that she only said '*Yes, I did take a scan...*' because she felt pressured in the meeting. She was dismissed on the spot for gross misconduct.
11. The Claimant was then escorted back to her office where a minor scuffle took place when she started ripping up some of the company's documentation and then attempted to bite the Office Manager's hand when the Office Manager attempted to stop her from destroying company documents. We were shown a picture of the torn documents lying on the floor as well as copies of the same torn documents later pieced together. None of these documents had the Claimant's name on them nor were any of them her personal property. They were [redacted] property- patient requisition forms and reports.
12. If her prior behavior of denying having scanned an unrefereed 'high risk' patient and then attempting to delete that information, did not amount to gross misconduct, then this highly unprofessional behavior exhibited on 1 August 2023 in the afternoon around 4:00 pm between her and the Office Manager when she was asked to collect her belongings and to leave the building, did. This effectively severed any shred of a relationship between the Claimant and [redacted]

EVIDENCE

RESPONDENT

13. Dr. [redacted] was at all times the director of the [redacted] Ltd. ([redacted] (the Respondent Company). Throughout the document, Dr. [redacted] will be referred to as the Respondent. [redacted] was also known as and referred to as the [redacted] is situated on [redacted]. This company was originally incorporated in 2007 and had moved to [redacted] in 2021. It was a medical business that provided, amongst other services, taking ultrasounds. In summer of 2021, he employed the Claimant in the capacity of General and Vascular Ultrasound Technician/ Mammography/ X-ray Technologist (as set out in their contract dated 16 August 2021 and 14 September 2021). It was not until 5 July 2022 that the Claimant actually commenced working at [redacted].
14. Mrs. [redacted] the Claimant in this case, was hired to perform, amongst other modalities, ultrasound imaging. She was contracted to work from 8:00 am – 5:00 pm during the week and from 9:00 am – 4:00 pm on Saturdays, with a one (1) hour lunch. Prior to her coming on board at [redacted], \$3000.00 was expended for her relocation and accommodation. Her flight was paid for by [redacted]. In an email dated 20 July 2022, barely some two weeks after she started in her employment, the Claimant requested an advance on her salary to be paid in three (3) monthly installments. [redacted] willingly agreed to provide that to her.
15. Company policy was that no overtime was paid unless there was prior management agreement to it. We were shown in evidence at least (2) separate emails (one dated 27 September 2022 and the other dated 28 November 2022) where they clearly stated that all personnel were affected by this decision, even those that thought themselves as professionals and not regular staff members. What was given in evidence by the Office Manager was that 'time in lieu' could be considered with advance notice as well. The Claimant did not want that; she wanted cash in hand.
16. In a meeting with the Respondent and the Office Manager, the question asked of the Claimant that afternoon on 1 August 2023 was did she perform an ultrasound on JS on Saturday afternoon 29 July 2023 between 2:00 pm and 2:45 pm. The first response out of the Claimant's mouth was no, she did not. She was asked repeatedly in different ways by the Respondent and again all of her responses were no she did not. Finally, after the Respondent left the room for a few minutes and returned posing the same question about a scan being done on JS, seeing that she is getting nowhere with her responses, the

Claimant said that 'yes, I did a scan.' Then she proceeded to give reasons why she did it.

17. The Claimant said that she met with JS to get a message/package from her and that they talked about JS's pregnancy as JS had a concern about some pains she was experiencing in her lower abdomen as she did with a prior pregnancy. JS miscarried that prior pregnancy. At first, she said that they were only in the conference room chatting and then went to her room to get her glasses so she could look at what JS brought with her. JS plus her husband and son accompanied the Claimant into the ultrasound room. That's when the Claimant used the ultrasound probe on her and thereafter attempted to delete the image of what she had done.

DIAGNOSTIC IMAGING TECHNICIAN

18. The Diagnostic Imaging Technologist (DIT) qualified as a radiologist in 2014 and had worked with the company since November 2021. She was working that Saturday 29 July 2023 around 2:00 pm and was there on the same floor as the ultrasound room. The Office Manager came on the floor and had asked her if she had seen JS come up to her area or the ultrasound area. She had not seen anyone but could hear voices coming from the reception area on that floor. However, as she, the DIT walked past the ultrasound room, she could hear voices coming from that room. The door was closed and so she could not see who was in there. What she also heard was the sound of the ultrasound machine being used. When questioned by one of the panelists what it sounded like, she said it makes a 'whoosing/beating' sound. It means that the machine is in operation. Sound is important as well as the measurement of sound. When questioned about the sound, she said there is no sound produced when the machine is off. (my emphasis) That Saturday afternoon somewhere between 2:00 pm and 2:45 pm, the ultrasound machine was in use.
19. This DIT has worked in radiology departments with ultrasound machines present; has trained in breast ultrasound scanning and some of her previous duties involved operating an ultrasound machine while a senior radiologist scanned the patient. She said she has worked with GE machines and they all have the same sound when taking images. So, she was familiar with the sounds made by the various machines.
20. She had witnessed a male and a toddler enter the ultrasound room. About 45 minutes later, the Claimant, JS, the male and the toddler all exited the room. JS, who appeared to be pregnant, came over and spoke to her and then left

through the back door. They returned and then exited through the ground level. She then took a moment to check the schedule and noted that during that time slot, there was a break scheduled on the ultrasound schedule with no patient name in the slot. We were shown a schedule where we saw the words 'Break Patient from Dr. ' in the time slot 14h00 to 14h40. There was no patient registered on their Patient Information system (Schuylab) which is used to register a study for the day to indicate that JS had been sent by a referring doctor with a referral for study to be done on the day.

21. What we learned from the DIT is the established protocol used when someone is having an ultrasound or having to use radiology. She said – *'Any study done on a patient has to be referred by a doctor as well as accompanied by the necessary documentation which is a medico-legal requirement in radiology, any patient presenting without a doctor's referral will not be done until a referral with the patient's details, the clinical information and a doctor's signature is received. This documentation is then sent to the radiologist together with a sonographer's report of the study so that the radiologist can read the study, verify the sonographer's findings, and thereafter provide an official radiology report signed off by the radiologist. It is not within the scope of a sonographer to provide their own diagnosis without having said diagnosis verified and signed off by the radiologist.'*
22. The DIT goes on to add that in her opinion that it is unethical to act without a referring doctor or radiologist especially on studies involving radiation. If such a situation arose, the DIT would let the sonographer know that documentation is required from the referring doctor to provide an x-ray and will not act on any requests for further imaging without consent from the referring doctor.
23. When cross-examined by the Claimant, the DIT said that she did not see JS on the Friday; she saw her on the Saturday; that she did not go to the Brown & Co. sale on the Saturday, she went on the Friday; that she did not take a lunch break on the Saturday and was preparing to leave around 3:00 pm when she saw JS leaving the ultrasound room; she, the DIT, was in the passageway at her locker preparing to leave when she saw JS. The DIT said that it was not possible to hear another machine at the time in question; that she has operated x-ray machines, bone density and mammography machines. She said she heard the ultrasound machine at the time. She said she was the only one there; no patients at that time; the ultrasound machine does not make the same sound as the other machines. She repeated the ultrasound protocol as set out in paragraph 21 above.

24. The DIT was also cross-examined on which machines she was trained to use and she said that she was trained in breast ultrasound and scanning patients. She said she was familiar with taking a breast ultrasound on a GE machine and that was the same type of machine as [redacted] has there.
25. The DIT added that there was a time when the Claimant came back with a patient and told her of a gender reveal. That patient ended up taking the Claimant to lunch. No name was mentioned. She was informed that patient had ended up at the wrong facility. The receptionist was not there at the time.

OFFICE MANAGER

26. The Office Manager had worked for 11 years with the Respondent, of which the last three years as the Office Manager. She had emailed all staff on 28 November 2022 about this overtime policy, including the Claimant. The email simply reminded staff that they '*... must consult myself or Dr. [redacted] if I am unavailable to have overtime requests approved. These requests will be approved or rejected based on business needs. Similarly, you may still be asked to work overtime if business requires it.*' The email clearly stated the procedure to follow should there be a request for overtime. The Claimant failed to adhere to this policy.
27. On 29 July 2023, around 2:00 pm, the Office Manager had seen JS along with her husband at the elevator. She noticed that she was pregnant and congratulated her. She noticed that the elevator went to the first floor where the ultrasound department is located. She then checked the appointment book and saw an appointment booked for 2:00 pm and the doctor associated with the client was Dr. [redacted], but no patient information was included nor was there a number for an ultrasound to be entered in Schuylab. (We were shown in evidence a schedule copy from the Office Manager's 'drchrono' for July 29, 2023. We saw where it lists for 2:00 pm -Break: PATIENT FROM DR [redacted]). The Office Manager then checked with the DIT to ascertain if she saw JS at the time and she did not at that time.
28. Around 2:45 pm that day, the Office Manager saw JS, her husband and son leaving the building. She called Dr. [redacted] office and found out that they had not prescribed an ultrasound at [redacted] for JS nor did they have her as their patient.
29. On 1 August 2023 in the afternoon, the Office Manager invited the Claimant to a meeting with the Respondent. They needed to know what had occurred on the prior Saturday afternoon with JS. When first questioned, the Claimant

informed them that it was a normal day and that she scanned regular patients and followed protocols and procedures. When asked about the appointment scheduled as Dr. _____'s patient at 2:00 pm, the Claimant said it was JS. When asked if the Claimant performed an ultrasound on JS, she denied doing such on JS. Her words: 'Dr. _____, 100% I did not do a scan on JS.' When asked why JS went to see her, the Claimant at first said that she did not know; that JS had been there the day before; that JS was going to return with a requisition for an ultrasound from Dr. _____. She said she told JS that she would not perform an ultrasound without a doctor's order. The Claimant told them that JS had shown her an 11 week ultrasound report and lab results done at a hospital.

30. The Respondent asked the Claimant again if she did a scan on JS. The Claimant denied touching her and added that she would not do a scan without a requisition. She said that she confirmed that JS had no medical insurance. She was asked if they were in the ultrasound room together to which the Claimant denied being in there with her and that they were in the conference room. But a little later, the Claimant said that they were in her room with the door open.
31. With all of these denials to having done a non-requisitioned scan, the Respondent left the room for a few minutes and then returned. He outright told her that he had information confirming that she was in the ultrasound room with the door closed doing a scan.
32. The Office Manager told us that she had actually started recording for the meeting from the time she entered the elevator. She said that she was doing that for her own protection and also from past experience with employees. In the meeting, there was no screaming or no cursing. It was calm. The Respondent was asking questions and the Claimant denied doing anything at first and then admitted taking a scan of JS. From what she observed, the Respondent was not pressuring the Claimant, he was asking the questions and finally the Claimant admitted taking the scan.
33. The Respondent put to her that she, the Claimant was breaking protocol when she did the scan on JS. She was asked if she was aware that JS was a high-risk patient and she said she was aware of that. The Claimant's response to that was that she did not do anything wrong and that she was not looking for a diagnosis; that she was not looking for anything. She said that she did nothing wrong and that other people do this all of the time.

34. At that point, the meeting ended. The Respondent stated that he was now dismissing the Claimant for gross misconduct. What had transpired between the Claimant and JS was inappropriate, unprofessional and fraudulent. He went on to let her know that it opened [redacted] to liability and should never have happened. He also let her know that he was aware of the efforts that she went through to conceal the whole event. He then handed her a Termination Letter dated 1 August 2023 confirming what he said wherein it stated – ‘ ... This letter confirms that you are terminated without notice following our meeting on 1 August 2023, for gross misconduct. This ended your employment relationship immediately with [redacted] : This letter is a formal notice that your employment is terminated as of the date of this letter... ’

35. The Respondent asked the Office Manager to escort the Claimant back to her room to collect her belongings. That’s when the Claimant grabbed a stack of papers on her desk and started to tear them up. The Office Manager attempted to stop her from doing this and that when the Claimant attempted to bite her. The Office Manager then called the Respondent to come and assist her. The Claimant was asked to leave the building. The Office Manager later filed a police report about this assault on her. She said that this assault severely impacted her such that she has to now seek therapy to help her.

36. The Claimant then proceeded to cross-examine the Office Manager. She asks about the date on the police report which is 9 February 2024. She asks the Office Manager if she started recording before the meeting to which the reply was yes. She said she did it for her protection. The Office Manager said that she had gone to the Claimant about her time and that she, the Claimant went from being a nice person to an angry person. She recorded for her own protection as she was alone with the Claimant. When asked why she didn’t get her consent to record the meeting, the Office Manager replied that she did not think about it at the time. She was just thinking about protecting herself.

37. She was asked about her designation as Office Manager. She confirmed that there is no handbook, no protocol or disciplinary policy at [redacted] .

IT EXPERT

38. We heard the sworn evidence from a Mr. E.N. who was hired as a consultant from CCS Group Ltd. and he has managed the IT for the Respondent company [redacted] since 2009. He has a BSc. (Hons) in Mathematics and Computer Science. He has been in Bermuda for the last 18 years. He has completed several network and security courses as well as has been certified in several [redacted]

Microsoft modalities. We accepted his evidence as that of an expert for the use of the ultrasound equipment used on the day in question. He said that the machine provides an audit trail of how the machine is used and what is done with it.

39. He conducted an independent investigation of the ultrasounds conducted on July 29, 2023. His findings were as follows:

- There were 8 exams conducted on Ultrasound on July 29, 2023.
- 7 of these exams were uploaded to the online PACS (Picture Archiving Online and Communication System).
- There was one Ultrasound exam deleted on that day that was never uploaded onto PACS.
- The deleted exam in question started at 2:12 PM and ended at 2:50 PM.
- The deleted exam's patient name was labelled TEST001

40. Taken from his report, the logs clearly indicated that the exam started at 2:12 pm and ended at 2:50 pm. This was after the last exam recorded by Ambra PACS as was shown to us from a screenshot. All the previous ultrasounds clearly had their start times and end times shown, the first starting at 09:23:11 and the last proper exam finishing at 12:33:20 pm. At 2:12:27, the ultrasound was changed to obstetrics mode and it was showing a new patient. At 2:39:59, there was a printing of an image. The screenshot showed the words 'Ready for Printing'. That means something was printed. Next we were shown at 2:50:09 a 'Warning': **You are about to delete the highlighted patient TEST001 . Push OK to continue or push Cancel to abort.** At 2:50:11, we see 'Patient Deleted'.

41. He had impressed on us that once the technician finishes taking images etc., they must then manually send the study to the PACS to be recorded. It is important to note that all exams, even if there are test exams should be sent to the PACS as a record. In the case before us, that was not done.

42. In his report, the IT Expert said that at 2:50 pm, we were shown that the exam patient was named TEST001S, (which is not how a test should be named). If this was a legitimate examination, it would not have the word 'test' with it. There was a warning message stating that the exam/study was about to be deleted from the ultrasound machine. Then the exam was deleted.

43. In cross-examination, the IT Expert was asked if he had knowledge of 3-D and 4-D imaging. He said that is for the technicians to use. As an aside, the

Claimant in her testimony said that the IT Expert was the most credible witness before us and we, the Tribunal, agree 100% with that comment.

CLAIMANT

44. Then the Claimant gave us sworn evidence as well. She confirmed that she is a Sonographer. She started working at [redacted] on 5 July 2022 until 1 August 2023. She said she scanned according to health guidelines following American Standards of Radiology or Australian Standards Protocol Guidelines.
45. She said that she would arrive at work at 7:00 am. She would print off the previous days' reports and then compare to her reports. Then she would fax to respective doctors and keep copies for Dr. [redacted]. Files are kept with original reports of the patients she saw. She would view the schedule and look at previous history of patients. Oftentimes, she would have back to back patients which left little to no time to prepare reports until the end of the day. She would then have to do reports and there is no overtime for doing it then. Sometimes it would take her to 6:00 pm to complete her reports.
46. She said that one of the other doctors at [redacted] would ask her to do a soft tissue scan. This would keep her until 7:00 pm on those occasions. Other times, outside doctors would call for scans of someone who had an ectopic pregnancy. She would do her best to accommodate them.
47. Then the Claimant provide evidence on diagnostic reports versus non-diagnostic reports. She said that diagnostic reports require a report from a radiologist whereas a non-diagnostic report is just put on the machine. There is no report and it has no referrer. It is an esthetic report. Non-diagnostic reports are mainly for pregnancies and these are not common in Bermuda. She said 3-D ultrasound is a static image whereas 4-D ultrasound is sweep of the image. There was no protocol in place nor was there a policy in place to do this. There was no mention of her role as well as who was reporting to who. She felt that it was left in her hands.
48. The Claimant said that she had asked the Respondent if she could do a '3-D/4-D' scan as a test. There were not that many pregnancies that presented at [redacted]. It would be her first time doing one. She did not know that JS was high risk. There was no form or referral from a doctor. It was not a scan as she was not looking for something wrong with the baby.

49. JS came in and showed her report. JS asked if she could do a picture for a baby shower. In her mind, the Claimant said that she was doing an image and was not looking for anything. She was not looking for a diagnosis as she is not in the position to diagnose. She was getting an image which to her was not a scan. There was no requisition; no report; no follow-up. It did not take a long time; just 20-30 minutes. She said that the machine's sound was turned off. Yes, she did do a face scan. She told JS that she had reports to do and had to get back to work. She said at 14 weeks, one cannot see anything.
50. As regards page 5 of IT Expert's report, she said that she would not go to the lengths to cancel and she has never done that before. She said that she has never taken a scan and then deleted it. She said that if she did a test, she would not enter the name of the patient. It would just read 'Test 001, 002, etc.'
51. Then she moved on to what occurred on Tuesday 1 August 2023 with the Office Manager and the Respondent. The Office Manager approached her and told her that the Respondent wanted to see her. The Office Manager said that she did not know what it was all about. The Respondent asked the Claimant if she had done a scan. The Claimant replied no she didn't do a scan. The Respondent said that she did do one. The Claimant replied that there is no information or diagnosis at 14 weeks. The Respondent said to her- 'Don't lie to me.' She then said that she had done a scan and did not do a study of JS's baby.
52. The Claimant takes us back to 6 June 2023 where she was told that she was dismissed, that she should take her things and go; only to be told later that she was temporarily suspended. She was told that she had been rude to the Office Manager. That was the time she had gone out to Mag's List to find out what to do in such a situation.
53. After the meeting on 1 August 2023, the Office Manager was behind her as she, the Claimant goes to her office. The Claimant did not know what to do at that point. She said that she had bills to pay as well as rent due. There was nobody to help her. She was feeling unappreciated. This was very traumatic to her.
54. There was a file on her desk that she took and put in her bag. The Office Manager grabbed it; there were scratches on her hand and she pushed the Office Manager. Usually, she said that she is not a violent person. It was her reflexes she said. She felt that the Office Manager and another office worker

had a vendetta against her. She may have torn papers that belonged to I . Her logs were on the desk and she may have thrown them on the floor as well.

55. The Claimant disputes the gross misconduct; that she did not put the patient at risk; that she was not stealing.
56. When asked if something had gone wrong while JS was in her care, what would she have done? She said JS would have gone to the hospital. She did not see this as being detrimental to the Respondent. She was aware that JS had a prior miscarriage. She still maintained that she did not do a scan on JS. She said that she had not done anything outside of the scope of her practice. She said that once she had been asked by the Respondent to do a scan on a person's heart.
57. The Respondent then cross-examined the Claimant. He started by asking her if she did a scan on JS to which the reply was 'No, not a full study.' Yes, she did 3-D/4-D scan and yes, she was testing the probe. She said that it did not last 40-45 minutes; she said that one can manipulate the image: looked at page 4 of the IT Expert's report and disputed that it took as long as it is shown in the document. She said that she may have been looking at a document; that no she did not delete anything; she cancelled so that it did not go to PACS. With the 3-D/4-D, she said she pressed 'Cancel' as she wanted the test to cancel, even though it may show 'Delete'.
58. JS wanted a 20 week scan even though she was only at 14 weeks. The Claimant said she told her to go to Dr to get the kind of scan she desired. The Claimant said that she needed a 'test' subject. She was going to test out the 3-D/4-D probe. No consent form was signed; no waiver was signed; no exemption of liability was signed. The Claimant said that she was aware that JS had lost an earlier pregnancy. However, JS had said something funny was happening down there. It was the same thing happening again. And she had no insurance.
59. She used the probe to see movement. The purpose of the visit was to see what the face looks like. She did not look to see if there was any cervical incompetence. JS went to the hospital 6 weeks later and told her that everything was fine.
60. When asked if the Claimant did a scan, she said that she did not do a scan. She then told the Respondent that he could go and check for himself and see

if there was a scan done. There was no scan; there was no information; that she would not be able to delete it; she canceled the examination for JS.

61. The Claimant said that she did not charge JS; yes, she used the equipment. She added that this was done for aesthetic reasons and that this was the first time and the first person she used it with. There was no requisition from a doctor for JS. She claimed not to know where the 'whooshing' sound came from.

62. She was then asked about what happened when she returned to her office with the Office Manager. She said that she did not remember what she did; she wished that she had made her own recording. She said she also was traumatized from the event. When questioned by a panelist, she denied destroying any company documents.

63. She was asked about her having DVT- deep vein thrombosis when she traveled to New Zealand and she emailed saying that she would not be able to return sooner for work. She said in evidence that she should have said SVT- superficial vein thrombosis. She agreed that it would be misleading to someone reading the email.

64. She agreed that she received the policy about overtime in that all overtime must be approved in advance and that any such request must be approved by the Office Manager or the Respondent in advance. She accepted that such requests could not be signed off by the other doctor at even though another doctor had asked her to work later on a couple of occasions.

65. Lastly, in regard to receiving overtime for working on the King's Coronation Public Holiday, the Claimant failed to request it in advance. Even though someone may have let her in the building that day, she did not bring that person in to support her case and neither did she request someone in IT to show that there was entry to the building then.

THE LAW

Termination of employment

66. Section 18 (1)(a) of the Act applies in this situation and it states as follows:

An employee's contract of employment shall not be terminated by an employer unless there is a valid reason for termination connected with—

(a) the ability, performance or conduct of the employee; or

(b) the operational requirements of the employer's business.

(1A) An employee's contract of employment shall not be terminated by an employer-

(a) pursuant to subsection (1)(a), unless the notice requirements under section 20 and the provisions under section 26 or 27 have been complied with;

(b) pursuant to subsection (1)(b), unless the notice requirement under section 20 has been complied with...

(3) An employee's contract of employment may be terminated by the employer for any reason in accordance with the notice requirements of section 20.

(4) Notwithstanding subsections (1) and (1A), an employee's contract of employment may be terminated by the employer without notice, for serious misconduct, under section 25.

(5) Where an employee's contract of employment is terminated, his employer shall pay any wages and other remuneration and benefits which accrued at the date of termination and such payment shall be made within seven days of termination or at the next interval at which the employee would have been paid had the contract of employment not been terminated, whichever period is the longer.

67. Section 25 in the Employment Act 2000 for termination for serious misconduct states as follows:

An employer is entitled to dismiss without notice or payment of any severance allowance an employee who is guilty of serious misconduct-

(a) which is directly related to the employment relationship; or

(b) which has a detrimental effect on the employer's business,

such that it would be unreasonable to expect the employer to continue the employment relationship.

68. Given the nature of the circumstances in this case, sections 20, 26 and 27 of the Act do not apply; sections 18(1)(a) and 25(a) do. Section 18(4) allows for a termination without notice for serious misconduct under section 25 of the Act.

69. With this case before us, sections 18(1)(a) and 25 (a) and (b) apply even though it allows for one or the other aspect of the section. The Respondent's relationship with the Claimant was effectively impaired when she took it upon herself to use the ultrasound probe with JS. JS had a history of miscarrying a fetus. The Claimant had not tested this probe out before on anyone as there were never enough patients to come into the r to do it on. She had not sat down and fully discussed with the Respondent the use of the probe

with new patients nor had she mapped out a control study with him or looked at possible ramifications of such testing. No release or exemption of liability was prepared for such instances. Clearly no thought at the business level had been given to this kind of situation.

70. She said in evidence that she had mentioned to the Respondent using the probe and there was no answer from him. A non-response is a negative response until there are further discussions and a positive response to be able to effectively move forward with the necessary tools and paperwork in place. The Claimant failed to charge JS who did not have insurance. The Claimant was exposing to a possible lawsuit should something untoward have occurred when she did a vaginal insertion with the probe on a high-risk person and if something had gone drastically wrong, even though that was not intended. The business aspect of what she did was not thought through. Matters happen!
71. Each time she was questioned in the meeting about having done a scan, she denied it. The Respondent had to leave the room during the meeting and check with the DIT person to ensure that he was correct in his assumption about the use of the scan with JS on that Saturday afternoon. The Claimant eventually owned up to using the probe which is connected to the ultrasound machine. The ultrasound machine was in use whether it was for a scan or for a probe. We failed to see the difference; it was on.
72. The Claimant said that she cancelled the exam so that it would not go through to PACS. She is playing with words here. The IT Expert pointed out the words showing a 'Warning' that something was about to be deleted and then she, the Claimant went about deleting the image so that it would not go to PACS. She did not have a doctor's requisition for JS to have an ultrasound nor was JS in the calendar for any sort of treatment. Then the Claimant proceeds to cover it up by saying that another doctor's client had canceled and she had free time and she did not take a scan.
73. What the Claimant was failing to appreciate was that ; is a business and with that, there is an expectation to succeed as well as profit. Without being able to do that, people will lose their jobs and the place could eventually close down. Reputation is everything in a small society. If the word got out that offers 3-D/4-D imaging for free, that would not be good for business.
74. She acknowledges in an email dated 26 April 2023 while still out of the country, that after delaying her return to Bermuda when her leave form was approved

from 7 March to 14 April 2023, this was now some 12 additional days out of the country, she acknowledged that the ultrasound service has been disrupted. As regards this same leave form, she claimed that she had requested additional days but did not know where that form was. We suspect that it was never prepared.

75. The Claimant has her own view of things that occurred which is much skewed from others. She was directly asked a question about the meeting with JS by the Respondent in the meeting on 1 August 2023 and then lied with her answers. She then attempted to give her personal view with her answer to show that she did not use the scan because in her mind, testing the probe on someone is not the same thing as taking a scan. We were told by the DIT in cross-examination that the Claimant had used the ultrasound machine another time to identify the sex of a baby and that person had taken her to lunch as a form of payment.
76. She takes more leave than what was approved and then makes it seem as though the others got it wrong when it is clear that another form requesting more time was never submitted for approval. She says that she has DVT and that it is unwise to travel. She fails to submit a medical certificate and when questioned about it, she then says it is really an SVT, which is not as serious as having DVT. A lie? A half-truth? She finally returned to work on 1 May 2023 some 17 days after the original approved leave time. That amounts to many days away from the workplace without there being someone to do an ultrasound which then translates into lost revenue.
77. When we look at the contract signed between the parties 16 August 2021 and 14 September 2021, we note in section 12(iii) where it states the following:

This Agreement may be terminated in the following manners only:
... (iii) By the Employer in the event of commission by the Employee acts of dishonesty, disobedience, or negligence in the performance of the Employee's duties aforesaid or in the event the Employer is transferred or moved off the Island ...

In our view, the Claimant was clearly dishonest about her dealings with JS. When confronted with the events of 29 July 2023, she lied when asked if she used the ultrasound equipment and then proceeded to give her version of events. She makes it look like the office was mistaken about her leave request when no such request for that amount of leave was ever requested. She emails them to say she developed DVT when it was something less serious. In our world, these behaviors all equate to clear acts of dishonesty in the workplace.

78. These kinds of behaviors go against the spirit of the signed contract as well as section 25(a) of the Act. The burden of proof rested on the Respondent to demonstrate that the conduct of the Claimant either directly related to the employment relationship or had a detrimental effect on the Respondent's business such that, it would be unreasonable to expect the employer to continue the employment relationship. There is more than ample evidence provided by the Respondent to meet those criteria.

AWARD

79. The Tribunal is satisfied that there is a plethora of credible evidence submitted by the Respondent and as such dismiss the Claimant's claims. We found the Claimant not to be credible. We find that on a balance of probability, the Respondent's evidence supported his position that the Claimant's application should be dismissed and so it is.

80. In conclusion, the Tribunal dismisses the Claimant's application for all of the following:

1. Unfair dismissal;
2. Remaining Notice Pay- 4 weeks plus 2 days' wages; and
3. Vacation Pay - 1.5 days.

81. There will be no Order for Costs.



82. Determination and Order of this Tribunal are binding. It was also made clear that, in accordance with section 44J and section 44I of the 2000 Act, a party aggrieved by a Determination or Order of the Tribunal may appeal to the Supreme Court on a point of law.

Dated this 30TH day of April 2024



Charlene A Scott FCI Arb
Chair



McKeisha Smith, Deputy Chair



Peter L Aldrich, Panelist

