



EMPLOYMENT TRIBUNAL

Claimant: Mr R Nsiah

Respondent: Tesco Stores Limited

Heard at: Southampton

On: 23/3/2017

Before: Employment Judge Wright

Representation:

Claimant: Mr J Burns of Counsel

Respondent: Miss R Wedderspoon of Counsel

JUDGMENT

It is the Judgment of the Tribunal that the claimant's claim of unfair dismissal fails and is dismissed.

The remedy hearing listed for 4/5/2017 is vacated.

REASONS

1. The claimant presented a claim form on 24/11/2016 and he made a claim of unfair dismissal.
2. He was employed by the respondent as a Pharmacy Manager between 12/5/2008 and 18/8/2016; when he was summarily dismissed for gross misconduct.
3. The Tribunal heard evidence from Mr Robin Jarvis (Store Manager and dismissing officer) and Mr Andy Cruttenden (Store Director and appeal officer) for the respondent and from the claimant on his own behalf. There was an agreed bundle of approximately 330+ pages.

4. At the outset of the hearing it was immediately noted that it would be very difficult to conclude this matter in one day; the parties however wished to proceed. The parties supplied a reading list. As it was, the parties truncated their cross-examination and fortunately the evidence was concluded. Due to time constraints the hearing dealt with liability only and remedy was reserved to another date (if required). Written submissions were directed and judgment was reserved until they were received.
5. The issues were agreed between the parties (with which the Tribunal concurred) as:
 - the reason for the dismissal was conduct;
 - was the reason potentially fair - s. 98 (2) Employment Rights Act 1996 ('ERA');
 - did the respondent hold a genuine belief in the claimant's misconduct;
 - was that belief based upon reasonable grounds;
 - did the respondent follow a reasonable investigation;
 - was dismissal within the band of reasonable responses;
 - did the respondent act reasonably in all the circumstances in dismissing the claimant pursuant to s. 98 (4) ERA;
 - did the respondent comply with the Acas code of practice;
 - if the claimant's dismissal was unfair, what compensation is appropriate;
 - if the dismissal was unfair should any award be reduced for contributory fault; and
 - if the dismissal was unfair on procedural grounds, would the claimant have been dismissed in any event (Polkey)?

Law

6. The Tribunal has to determine whether the Claimant was fairly or unfairly dismissed. It is for the respondent to show the principal reason for dismissal in accordance with section 98 of the Employment Rights Act 1996:
 - (1) In determining for the purposes of this Part whether the dismissal of an employee is fair or unfair, it is for the employer to show-
 - the reason (or, if more than one, the principal reason) for the dismissal, and
 - that it is either a reason falling within subsection (2) or some other substantial of a kind such as to justify the dismissal of an employee holding the position which the employee held.
 - (2) A reason falls within this subsection if it-
 - ...
 - (b) relates to the conduct of the employee,

...

(4) In any other case 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.

7. Once the respondent has established the reason for dismissal, the burden is then neutral.
8. In applying s. 98 ERA the Tribunal directs itself to the approach established in the case of British Home Stores v Burchell 1980 ICR 303 EAT which is summarised in the issues set out above.
9. Furthermore, the Tribunal is conscious that it must not substitute its own opinion for the objective test of the band of reasonable responses as referred to in the case of Iceland Frozen Foods v Jones 1983 ICR 17 EAT:

'... in law the correct approach for the ... tribunal to adopt in answering the question posed by [s.98(4)] is as follows:

(1) the starting point should always be the words of [s.98(4)] themselves;

(2) in applying the section [a] tribunal must consider the reasonableness of the employer's conduct, not simply whether they (the members of the ... tribunal) consider the dismissal to be fair;

(3) in judging the reasonableness of the employer's conduct [a] 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 ... 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. It the dismissal falls within the band the dismissal is fair: if the dismissal falls outside the band it is unfair.'

Submissions

10. Written submissions were received from the parties and were considered by reference back to the witness statements, bundle and notes.

11. The claimant made submissions on the law, the reasons for dismissal and genuine belief (accepting both decision makers had a genuine belief in the claimant's wrongdoing) (paragraph 17).
12. The claimant however submitted that the belief was not based upon reasonable grounds; that there was no fair investigation or procedure and the dismissal was not within the range of reasonable responses and urged the Tribunal to find that the decision was procedurally and substantively unfair. The claimant also submitted that any Polkey argument (that he was still have been dismissed had any procedural unfairness been corrected) should be rejected. In respect of contributory fault, the claimant suggested that any such fault was fairly minor. In a nutshell, the claimant submitted that using his 'professional judgement' was subjective and that, along with the respondent's various failings, meant the conclusion which should have been to issue to the claimant guidance and a warning.
13. The respondent submitted that professional judgement cannot be used as a way of ignoring legitimate supply and that it could not be used to justify a decision which was 'convenient, expedient or illegal when a legitimate solution was possible' (paragraph 14). The respondent submitted the claimant was not prejudiced by not being provided with copies of the customer records as he was able to provide explanations when questioned and he did not say for example, that he could not recall the customer and so needed to reflect.
14. It was pointed out (in paragraph 21) that the claimant's explanation for dispensing to the customer aged over 65 (GL page 71) was he had seen the patient's 'repeat slip', which undermined his explanation that this was an emergency supply. Or, this did not explain why he did not dispense a minimal number of tablets and await the repeat prescription.
15. The respondent submitted that the reason for dismissal was misconduct, the respondent held a genuine belief in the claimant's misconduct, following a reasonable investigation and the claimant had (which he accepted) dispensed Viagra outside of the PGD. The issue was whether the claimant's explanation, which was that he had exercised his professional judgement was accepted by the respondent; based upon the evidence which it had before it. Accordingly, dismissal in these circumstances was within the band of reasonable responses.
16. The respondent submitted that any contributory fault should be 100% and that even if there had been procedural flaws in the procedure, that the claimant was subsequently have been fairly dismissed in any event.

Findings of Fact

17. The claimant was Pharmacy Manger at the respondent's Southampton Superstore, having transferred there from the respondent's Bursledon Tower Extra Store in around March 2016.
18. The respondent operates a Patient Group Direction ('PGD') process which allows, in certain circumstances, a pharmacist to supply some prescription only medicines to patients without a prescription. If the process is not followed, the supply is potentially illegal and the General Pharmaceutical Council may take action.

19. The claimant had been trained in the relevant PGD and he had signed it on 7/8/2015 (page 38).
20. For the purposes of this claim, the PGD was in respect of dispensing 'Sildenafil', brand name Viagra (that reference will be used through this judgment) (page 33-38). The criteria were that Viagra can only be supplied to male patients between the ages of 40 and 65; therefore male patients aged 66 or over were excluded from the PGD. It was explained (and indeed the PGD states this on page 36) that patients over the age of 65 should be referred to their GP in order that other aspects of their health could be checked. The tablets come in three doses - 25mg, 50mg and 100mg. Only one table should be taken in any 24 hour period. Under dosage, the PGD states:
- 'At the initial supply 4 or 8 tablets may be dispensed.
Follow up quantities of either 4, 8, 12 or 16 tablets may be dispensed, with a maximum of 16 tablets issued in any consultation.
21. Following the claimant's transfer to the Southampton Superstore, the question of the claimant's dispensing practices at Bursledon Tower Extra Store arose. He was informed of this on 7/4/2016 (page 128). Other concerns were raised, but they are not relevant for the purposes of this Judgment as ultimately, the claimant was dismissed over his dispensing of Viagra.
22. At the first investigation meeting conducted on 15/4/2016 by Mr Ahmed Issa (Regional Pharmacy Manager), the dispensing of Viagra was not mentioned. The claimant made an allegation against Mr Issa that he (Mr Issa) had previously said if the claimant raised a grievance about him, he (Mr Issa) would find 'something' to be used against him (the claimant) (page 144). Mr Issa therefore closed the meeting. The claimant raised a grievance about Mr Issa on 14/4/2016 (page 129). He was suspended 15/4/2016 on full pay (page 146).
23. The investigation was then taken over by Mr Jai Shah (Regional Pharmacy Manager) and he met with the claimant on 27/4/2016. Mr Shah did ask the claimant about his dispensing of Viagra. He prefaced that part of the discussion by referring to the PGD and confirmed the claimant had had training. He went on to discuss various customers. In respect of customer GL (born in 1944 and therefore aged over 65 since 2009), the claimant's explanation was he was sure GL had a prescription and GL could not get to see his doctor (page 177). He dispensed 8 x 100mg and 8 x 100mg on 1/10/2015. On 5/11/2015 he dispensed 28 x 50 mg and 8 x 100 mg. The electronic record refers to all three dispensations being under the 'PGD supply' (page 71).
24. There was also a customer KP who was born in 1947 (page 72). The electronic record for him showed, in respect of the three most recent dispensations to be:

16 x 100mg NHS 29/9/2015
32 x 100mg PGD 29/9/2015

32 x 100mg PGD 20/11/2014

8 x 100mg PGD 2/4/2014
16 x 50mg PGD 2/4/2014

25. Some of the respondent's questionnaire forms were incorrectly completed, for example the claimant did not record the 'Batch Number' or the 'Expiry date' on all occasions (pages 70 and 72). There were also other examples of supplies of Viagra outside the PGD (the respondent referred to 'all of the other occasions' (Mr Jarvis witness statement paragraph 40)), however the claimant had concentrated on his explanation in respect of GL and the respondent also directed its questions to the claimant in respect of the same customer.
26. Mr Shah recommended to Darren Jenkins (Store Manager) that the evidence in respect of the dispensation of Viagra constituted gross misconduct. He noted the claimant did not deny he had supplied the drug, but he felt that in the circumstances, he was able to do so (pages 191-192).
27. The claimant then attended a disciplinary meeting Mr Jenkins on 12/5/2016 (page 193).
28. Mr Jenkins referred the claimant to the PGD and then asked the claimant were there any age restrictions under the PGD? The claimant replied up to 65 and agreed the customer should be referred to his GP if he was aged over 65. Mr Jenkins asked the claimant about GL. The claimant replied:
- 'We can supply up to 30 days, if they can't get to their GP. I trusted him and wanted to help him. I looked at his repeat prescription to check if it was safe. I am sure it was safe. In hindsight it was better to just supply 16.' (page 205).
29. The claimant went onto say he had found himself in a dilemma and he was exercising his professional judgement (page 206). Mr Jenkins said he understood the claimant to be saying it was his professional judgement verses the respondent's policy. The claimant went onto say:
- 'I want to say with hindsight I am only going to look at how I operate my PGD by having a CPD and ensure going forward I will refer patients back to their doctors. I have using [sic] my professional judgement. E.g. I can give them an alternative if not 100mg in stock, can give 2 x 50mg.'
30. It would appear the claimant was confusing two different policies. Under the PGD the maximum supply of Viagra is 16 tablets (the dosage is not specified, so presumably it is 16 x 100mg). The Tribunal was referred to an extract from the Royal Pharmaceutical Society's Medicines, Ethics and Practice - The professional guide for pharmacists ('MEP') (the version provided to the Tribunal was edition 40 dated July 2016, but presumably the same principles applied at the relevant time) (pages 315-322). Under a section headed 3.3.10 Exemptions: sale and supply without a prescription, subsection 3.3.10.1 refers to PGDs. Subsection 3.3.10.2 is headed emergency supply. Under the heading Emergency Supply at the Request of a Patient and then length of treatment, it states that apart from controlled drugs, any other prescription only medicine, no more than 30- days can be supplied (page 321).
31. Despite that, in the examples noted above (apart from the one reference to a supply under the NHS (page 75 - the claimant was not questioned in respect of this example and so the Tribunal cannot make any finding or comment), the claimant dispensed the drugs according to his records under the PGD and therefore, the maximum supply was 16 tablets, not a 30-day supply.

32. Mr Jenkins wished to review certain matters and adjourned the meeting (page 208). On 19/5/2016 the claimant was certified as unfit for work due to 'stress from work' (page 221).

33. There were then various attempts to engage with the claimant and for him to attend a meeting. On 30/7/2016 the claimant provided written submissions/responses. In respect of GL, he said (page 236):

'Again the 71 year old who had [Viagra] on prescription, and couldn't see his regular GP who was on holiday and was embarrassed talking to the lady doctors about this issue was a difficult one for me another dilemma however as his review was months away I thought it was alright to help him until his GP was back. On reflection I will not repeat the decision I made if I were to find myself in a similar professional dilemma in the future. I have learnt from that. My decision was just to help our customer that I was confident would be fine. I didn't have any financial gain or interest in the decision.'

34. It was noted by the respondent that the claimant had not previously raised the explanation that GL was embarrassed to see a lady doctor. It was put to the claimant in cross examination that if there was a repeat prescription, the customer would not need to see the GP in any event (the claimant had also said the patient's review was 'months away').

35. It was put to the claimant in cross-examination the correct thing to do would have been to process the repeat prescription (which would take 48 hours) and to supply the customer with two or three tablets until he could collect the repeat prescription. The claimant replied:

'Well I look at case in front of me and I am allowed to supply emergency tablets up to 30 days, his doctor was away and he was embarrassed, I felt it was the right thing to do and to provide what I am allowed to provide which is an emergency supply.'

36. A fourth invitation was sent to the claimant inviting him to a disciplinary meeting on 10/8/2016 (page 245). The claimant was advised if he chose not to attend (he had been referred to Occupational Health on 15/7/2016) (pages 230 - 232) the meeting would go ahead in his absence.

37. The claimant informed Human Resources on 11/8/2016 that he was too unwell to attend and asked for 'the questions' to be sent to him (page 246). Mr Jarvis had by then taken over the disciplinary hearing and his questions were put to the claimant on 13/8/2016 (page 249). The second question from Mr Jenkins was:

'can you describe to me why your professional judgement overrides the law in selling high amounts of Viagra to a 71 year old customer [GL]?'

38. The claimant responded on 17/8/2016 (page 253);

'My decision to supply the 71 year old [Viagra] was not meant to override any law or disregard any Tesco policy. It was the exemption and not the rule. It was in exceptional circumstances that I needed to take a decision which was in the best

interest of the patient. I interviewed the man and was satisfied that there was an immediate need for the [prescription only medicine] and that it wasn't practical for the patient to obtain a prescription without undue delay. I was also satisfied that [Viagra] had been previously used as a treatment by him and prescribed by his GP as was evident from his prescription repeat slip. I was satisfied of knowing the dose he needed from the repeat slip. I was also satisfied that the requested medicine wasn't a controlled drug. I therefore used my Professional Judgement to decide that a supply was appropriate (under emergency supply) and in the best interests of the patient. The supply should have been documented as an emergency supply not PGD. On reflection I should have completed the transaction as an emergency supply. I have learnt my lesson and planned to have PGD high on my CPD.'

39. The claimant went onto say:

'I have suffered enough punishment for professional judgement I made when in an ethical dilemma, to help a patient I didn't know personally and will not recognise today if he stood before me. A decision I made with no personal gain or economic interest or financial gain. The only interest I had at the centre of my decision was the patient's.'

40. The respondent said (Mr Jarvis' witness statement paragraph 44) that the claimant's explanation was now this was an 'emergency' situation, but it was not clear what the 'emergency' was. Also, it was noted that the claimant did not now refer to the customer's embarrassment, which he had previously referred to. There were also contradictions in respect of the claimant knowing and trusting the customer and then him saying he would not know/recognise him.

41. The meeting went ahead in the claimant's absence. The claimant had said on 17/8/2016 that he would like his Trade Union representative to attend in his absence, but she did not do so. It transpires the claimant had attempted to contact her at 2.30am on the morning of the 18/8/2017, but she was unable to attend. The claimant sought to criticize the respondent for not again adjourning the meeting due to her absence, however the respondent quite rightly responded that his representative's attendance was a matter for the claimant to arrange and not for it. The claimant had been informed of the date and time of the meeting on 10/8/2016 (page 245).

42. The outcome of the meeting was Mr Jarvis took the decision to summarily dismiss the claimant. This was communicated to the claimant on the same date (page 279). The reason given was 'supplying Viagra against legal guidelines to an over age customer and subsequent poor evidence of this transaction.' Mr Jarvis took into account the claimant had admitted over-supplying and to over-aged customers.

43. The claimant appealed by letter dated 25/8/2016 (page 285). He said (amongst other things) that exercising professional judgement should not be considered gross misconduct. He again raised the Royal Pharmaceutical Society's Medicines, Ethics and Practice procedure and referred to using his professional judgement under that policy. He said the penalty was too harsh and he was not given a fair hearing as his representative had not attended the hearing.

44. Andy Cruttenden was appointed as appeal manager and the appeal hearing was scheduled for 9/9/2016. The claimant attended with his trade union representative.

45. It was put to the claimant in the appeal that he did not think dispensing Viagra to a customer aged over 65 was an issue, whereas the Superintendent Pharmacist did? He replied (page 298):

'Not I don't think it's a problem. Just when I decided to give it I had to make a judgement if it is my only option. He had prescription from Dr if they didn't I wouldn't have issued but I could tell the prescription and I knew he's a responsible patient I referred to MEP and exemptions apply without prescription and patient had completed a consultation form with patient history. From this I saw he's had it before, he's over 65 and had had it from Dr. My concern if he saw this as emergency supply of Viagra so I gave it to him as first time emergency supply. Rather than going other places.'

Mr Cruttenden asked: 'Why would Viagra constitute an emergency?'

The claimant replied: 'I have to have patient interest. Emergency supply is a term.'

Mr Cruttenden said: 'You thought okay to supply 71 year old Viagra even though it's against guidelines of 65.'

The claimant replied: '65 is a guideline for if they have never had Viagra not same as someone who has had it before.'

46. After an adjournment and presumably referring back to Mr Cruttenden's question about why the situation was classed as an emergency the claimant referred to the customer going on holiday with his partner and so that was why he had classed the situation as an emergency.

47. Mr Cruttenden upheld the decision to dismiss. He preferred the expert evidence of the Regional Pharmacy Manager and the Superintendent Pharmacist that the claimant should not have dispensed Viagra to the customer.

48. In respect of the 71 year old, in his witness statement (paragraph 27), the claimant said:

'In relation to the patient in question, while he was over the age for a PGD, he had previously been prescribed [Viagra] by his GP and his partner was visiting. He had noticed he had no tablets left and when he contacted his GP was informed he was on holiday and offered an appointment with a female doctor. The patient found that embarrassing, given the nature of the drug to be prescribed, and sought assistance from a pharmacist. The respondent does not accept that there was any urgency to this situation, however I absolutely disagree with this.'

49. The claimant also said (paragraph 25) the pharmacist should consider whether it is appropriate to supply less than the maximum quantity allowed under the legislation? It is assumed he is referring to the 30-day supply referred to in the Royal Pharmaceutical Society's Medicines, Ethics and Practice procedure, rather than the maximum 16-tablets under the PGD. As it was, the claimant dispensed to the 71 year old customer 28 x 50mg and 8 x 100mg on 5/11/2015.

50. If the claimant is correct and the Royal Pharmaceutical Society's Medicines, Ethics and Practice guidance overrides the PGD, then what is the purpose of the PGD? In

addition, the claimant's own records record him making the dispensation under the PGD and not under any other authority. Furthermore, as identified by the respondent, the claimant over-supplied and dispensed to over-aged customers in breach of the PGD and the MEP.

51. It is not clear to the Tribunal why if the customer did have a prescription, the drug was not dispensed to him using that prescription.
52. It is noted that at the appeal hearing (page 299) the claimant stated that the prohibition on dispensing to someone aged over 65 was not an absolute prohibition. He said '65 is a guideline for if they have never had it before'. It is not accepted by the Tribunal that the PGD is 'guidance' and can be over-ridden by a pharmacist if the patient is aged over 65 but has had Viagra prescribed by his GP. The PGD simply does not say this and there are accepted reasons why Viagra cannot be dispensed without a prescription to a customer aged over 65.
53. Although both the respondent and claimant focussed on the 71 year old patient, even if the claimant had been justified in dispensing Viagra under the guideline, rather than the PGD, he had also supplied incorrectly under the PGD on numerous other occasions. For example, to customer SM (page 96) on 17/10/2014 he dispensed under the PGD 2 x 32 x 50mg tablets with a dosage regime of 'as directed'. On the basis that under the PGD the frequency of administration of Viagra is one table per day, this exceeds 16 tablets. It also exceeds the 30-day supply under the Royal Pharmaceutical Society's Medicines, Ethics and Practice guidance.
54. To customer KJ on 24/10/2014 (page 101) the claimant prescribed under the PGD 48 x 100mg and 4 x 100mg, so the equivalent of a 52 day supply.
55. It was advanced on behalf of the claimant that some of the supplies did not exceed the maximum supply under the PGD. Such as customer GL (page 70) who was dispensed 28 x 50 mg and 8 x 100 mg on 5/11/2015. It was suggested this amounted to the equivalent of a 22 day supply at 100mg, even though this was over the maximum of 16 tablets under the PGD. That however cannot be correct as under the dosage regime, the claimant has completed 'one as needed one hour before needed'. Where the claimant has completed the dosage regime (of the samples provided the claimant has not completed the dosage regime on pages 62-64, 66-68, 88, 105, 110 and 112) he has either written words to the effect of 'one as needed an hour before use' or 'as directed'. Save that for one customer (CH (age 109) he has written '1/2 to 1 tablet as needed one hour before needed' in respect of a dispensation of 32 x 100 mg tablets on 24/6/2014 (page 113)). The Tribunal therefore finds the dosage regime (apart from on one occasion) is one tablet per day.
56. The claimant claims that the respondent instigated a disciplinary investigation against him as a result of him raising a grievance against Mr Issa. As the respondent has pointed out, he was invited to an investigatory meeting on 7/4/2016 and he first raised his grievance on 14/4/2016.

Conclusion

57. Then applying the law and Burchell test to these facts the Tribunal finds as follows. It is accepted the reason for dismissal was the claimant's conduct. The respondent held a genuine belief in the claimant's misconduct and indeed, the claimant did not deny he

had dispensed Viagra in the manner he did. The respondent's belief was therefore reasonable. There was a reasonable investigation. The key issue here is whether the respondent should have accepted the claimant's explanation and accepted that he was exercising his professional judgement under the Royal Pharmaceutical Society's Medicines, Ethics and Practice procedure, which he says he was entitled to do. The difficulty with this is that the claimant supplied Viagra outside of the restrictions of the PGD on numerous occasions and on each one, he registered that it was a dispensation under the PGD. Even if the example of the 71 year old was exceptional and could be excused (and certainly the expert Pharmacists which the respondent consulted did not agree it was the case) there were other breaches by the claimant of the PGD. The respondent's decision to dismiss was therefore within a band of reasonable responses open to it. It is of note that the respondent took into consideration the claimant did not accept he had done anything wrong and believed that exercising his professional judgement could override any other guidance or restrictions.

58. The respondent therefore acted reasonably in dismissing the claimant and its decision overall was in accordance with equity and the substantial merits of the case.
59. As the submissions were lengthy and understandably, the claimant made numerous criticisms of the respondent, further findings are made.
60. The respondent was consistent in respect of *the principal reason* for the dismissal in accordance with s. 98 (1) ERA. It is accepted there were other issues which were raised and which in a perfect world the respondent would have made clear they were either being considered or not. That said, the respondent was clear the principal reason for the dismissal was the claimant's conduct in dispensing Viagra outside of the PGD and that it did not accept his explanation that he was able to do so using his professional judgement. The Tribunal accepts with those reasons as set out above.
61. The claimant referred to respondent's consideration of his previous disciplinary warnings; which the respondent stated was background going to its reasonable belief in the claimant's wrong-doing. The respondent could have not made reference to the previous disciplinary record in the ET3 (although it could take issue with the claimant if he said he had a clean disciplinary record, when in fact he had expired warnings for matters unconnected to the over-dispensation of Viagra), however it chose to do so. The previous expired warnings did not matter to the extent that it was within the range of reasonable responses to dismiss the claimant in these circumstances and when his explanation of using his professional judgement was rejected by the respondent and to that extent, the expired warnings are irrelevant.
62. The claimant criticised the involvement of Adrian Price as an expert witness. In respect of Mr Price, he did not make the decision to dismiss - Mr Jarvis did, albeit taking into account (as a lay person) Mr Price's view that the use of professional judgement cannot be used as a means of ignoring legitimate guidelines (page 211). Mr Price was asked as Superintendent Pharmacist for his view and he gave it. It was considered (as an expert opinion) by Mr Jarvis. The claimant disagreed and commented on the email on 30/7/2016 (page 235). Mr Jarvis was entitled to reach the view which he did, after taking into account Mr Price's and the claimant's opinions. His conclusion was within the range of reasonable responses.

63. The claimant also submitted that the genuine belief was not based upon reasonable grounds as there was no 'legal' guideline in play. It appears Mr Jarvis was influenced by Mr Price's wording that the PGD must be followed as otherwise, the supply is potentially illegal (page 211). If the witnesses used their lay understanding to say that a legal guideline had not been followed, then nothing turns on the fact that there may not strictly speaking be such 'legal' guidance. In any event, that does not impact upon the respondent's reasonable belief in the claimant's wrongdoing; which he admitted was in breach of the PGD and which on his own records, the dispensation was made under (rather than the dispensation being recorded a under the discretion to use professional judgement to supply in an emergency).
64. The standard operating procedure (SOP) does state that there will never be a SOP for every situation and the claimant seeks to rely upon this (page 46A). What that point fails to acknowledge is that there is a SOP for this situation of dispensing Viagra without a prescription; which is the PGD. The claimant admitted supply in breach of the PGD and his reasoning for the rational for doing so was not accepted by the decision maker Mr Jarvis.
65. The claimant criticised the respondent for not providing the statement of Patricia Lee, although the Tribunal was not taken to this statement. The claimant did not mention this in his witness statement. Again it is noted that the respondent's procedure was not perfect, but the question is whether failing to provide the statement to the claimant made any difference? It is difficult to see that it could have in view of the claimant's admission and the respondent's rejection of the professional judgement explanation.
66. The claimant now takes issue with the fact that the dispensation in breach of the PGD only focussed on GL (whom he refers to as the over-65-year old without a current prescription (paragraph 30). In fact, as highlighted by the respondent, the claimant made reference to GL having a prescription as he 'looked at his repeat prescription' in the meeting with Darren Jenkins on 12/5/2016 (page 205), said on 17/8/2016 the fact GL's GP had prescribed Viagra as was evidence from his 'repeat slip' (page 253) and said in the appeal meeting on 9/9/2016 'I had to make a judgement if it is my only option. He had a prescription from Dr if he didn't I wouldn't have issued (page 298). The claimant did not say he could not recall GL and referred to trusting him (page 205) and him being a responsible patient (page 299).
67. The claimant's criticism was therefore not justified as he did not state that he could not remember GL or another of the other customers referred to (in fact he responded in detail for example in respect of customer CH during the Jai Shah investigation meeting on 27/4/2016 when he informed Mr Shah that CH works for cyber-crime prevention and is often away traveling (page 173). It is observed the claimant did on another occasion say that he would not recognise GL if he were stood in front of him. His lack of consistency undermined all of the explanations which he gave. The point is simply the respondent did not accept the claimant's explanation in respect of dispensing to GL. It also established the supply to GL exceeded the maximum dosage and he was over-age for the purposes of the PGD.
68. The claimant referred to the fact Mr Shah's email of 11/5/2016 was redacted and his conclusion was deleted (page 191) and said that omission was hugely significant and damaging. Mr Shah concluded that as per his investigation, the claimant had committed an act of gross misconduct. Again, it is accepted that Mr Shah could have omitted a conclusion - he could have simply presented his findings. The question is

whether or not him doing so represents a flawed investigation or means that the respondent did not hold a belief in the claimant's wrongdoing so as to render the dismissal unfair? Irrespective of Mr Shah's conclusion (Mr Shah being the Regional Healthcare Manager) and in view of the claimant's admission and his explanation; did Mr Jarvis reach a decision to dismiss which was within the range of reasonable responses open to him? It is found that he did.

69. The claimant takes a similar point that the respondent is in breach of the Acas Code in respect of the above issues and in particular that they are enough to render the dismissal unfair. For example, the claimant refers to the fact that the claimant did not receive proper notification of the charges against him. It is not accepted this was the case as the claimant in his written response of 17/8/2016 (page 253) gave a detailed response to the respondent's question two 'can you describe to me why your professional judgement overrides the law in selling high amounts of Viagra to a 71 year old customer?' (page 249)
70. The claimant submitted the only 'proven instance of dispensation Viagra to a customer over the age of 65 was GL' (page 71), yet the records of patient KP who was aged 68 at the relevant time and to whom the claimant supplied on 29/9/2015 32 x 100mg under the PGD (in breach of both the amount and age restriction) with the dosage noted as 'one as needed one hour before needed' (page 72), in addition to 16 x 100mg on the same date as an NHS supply.
71. It is agreed that there is no appeal outcome letter in the bundle, however Mr Cruttenden has ticked the appeal checklist (point 4) to say that he informed the claimant that a letter will be sent (page 310). In any event, Mr Cruttenden gave the claimant his oral decision to uphold the decision to dismiss at the appeal hearing (page 302).
72. The claimant says (in paragraph 54 of the submissions), putting the respondent's case at its highest, he dispensed Viagra, without a prescription to GL who was aged 71, 16 x 100mg on 1/10/2015 and 36 (equivalent to 22 x 100mg) on 5/11/2015 (claimant's submissions paragraph 54). This was against a background of recent prescriptions by GL's GP and various reasons why GL could not see his GP.
73. GL's patient details in fact show, the claimant dispensed 8 x 100mg and 8 x 100mg on 1/10/2015 and 28 x 50mg and 8 x 100mg on 5/11/2015 (page 71) all recorded as a supply under the PGD. It is in breach of the PGD in respect of GL's age and on the second occasion in respect of the number of tablets dispensed. If however the 1/10/2015 was the initial dispensation, then it was in breach of the PGD direction of an initial supply of 4 or 8 tablets.
74. The respondent is entitled to reject the claimant's subsequent explanation that he was dispensing an emergency supply outside of the PGD. If perhaps the dispensation as an emergency was a 'one-off' and recorded as such, the claimant's explanation may have had more credibility. It is not accepted there were numerous 'emergency' supplies as the claimant claims (for example CH who appears to have received 14 supplies recorded as under the PGD by the claimant over various dates (some on the same date) between 4/11/2011 and 16/2/2016 (page 113), the claimant was taken to this customer in the meeting with Mr Shah (page 173). The respondent is entitled to reject claimant's justification. Furthermore, the claimant does not accept there was any wrongdoing on his part and claimed that he was justified in dispensing as he did.

75. The claimant professional judgement cannot be used to override the PGD. Even if he did dispense outside of the PGD, he recorded all the occasions (certainly the ones which were focussed on by the respondent) as being under the PGD.
76. The respondent concluded that dispensation of prescription only medicines outside of the PGD, with no justification for the amount of tablets supplied and in view of the age of some of the recipients (rejecting the claimant's explanation) was admitted conduct which was serious enough to warrant summary dismissal. Its decision to dismiss was therefore within the range of reasonable responses and as such the dismissal is fair.
77. On the Polkey point (that even if there were procedural flaws, the claimant would have been fairly dismissed in any event), the claimant admitted wrongdoing and his explanation (that he exercised his professional judgement) was not accepted. Of course any procedure followed could be different and most probably could have been improved with hindsight; however, the respondent's submission is accepted that it would have made no difference. It is noted that the claimant did not expressly plead that there were procedural failings and it was highlighted at the outset of the hearing that no application to amend the claim to include this issue had been made. As however, the respondent had accepted in the list of issues that the procedure followed was an issue, the claimant was allowed to raise it, even if ultimately it failed.
78. On contributory fault, the respondent says any compensation should be reduced by 100% and the claimant says any fault was fairly minor. The claimant admitted his wrongdoing and he respondent did not accept his explanation for dispensing outside of the PGD guidelines.
79. In accordance with the test set out in Nelson v British Broadcasting Corporation [1980] ICR 110, the Tribunal finds that the claimant's conduct is culpable and blameworthy. That conduct did contribute to the dismissal - it was the reason for the dismissal and it would be, in the circumstances just and equitable to reduce any compensation which would have been awarded had the dismissal have been found to be fair. The Tribunal agrees with the respondent that a reduction of 100% would be just and equitable.
80. For those reasons, the claimant's claim fails and is dismissed.

Employment Judge Wright
20 April 2017
JUDGMENT SENT TO THE PARTIES ON

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FOR THE SECRETARY OF
EMPLOYMENT TRIBUNALS