



**EMPLOYMENT TRIBUNALS (SCOTLAND)**

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**Case No: 4100885/2020**

**Hearing on the Merits heard on the 25<sup>th</sup>, 26<sup>th</sup>, 27<sup>th</sup> and 30<sup>th</sup> November 2020 by  
Cloud Based Video Platform (CVP)**

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**Employment Judge Porter**

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**Mr John McKechnie**

**Claimant  
Represented by  
Mr Hay, Advocate**

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**M&D Green Dispensing Pharmacist Ltd**

**Respondents  
Represented by  
Ms Green, Advocate**

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**JUDGMENT OF THE EMPLOYMENT TRIBUNAL**

It is the judgment of Employment Tribunal to dismiss the claimant's claims of unfair dismissal and breach of contract

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**Introduction**

1. The claimant was employed by the respondents as a pharmacist from 4<sup>th</sup> January 1984 until his dismissal on the grounds of gross misconduct

effective on the 25<sup>th</sup> September 2019. The claimant's claims of unfair dismissal and breach of contract were resisted and the case was set down for a full Hearing on the Merits commencing on the 25<sup>th</sup> November 2020. In the course of the Hearing the claimant withdrew his claim of breach of contract.

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2. At the Hearing on the Merits the claimant was represented by Mr Hay, Advocate and the respondents were represented by Ms Green, Advocate. The parties referred to 2 Bundles of Documentation numbered 1-231 and 1-10. The Hearing took place via the CVP platform due to the continuing repercussions of the COVID-19 pandemic.

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3. The Tribunal heard evidence from Campbell Thomson, the investigating officer, Scott Hughes who heard the claimant's grievance and Louise Carson, the dismissing officer as witnesses for the respondents. For the claimant, the claimant's sole witness was himself.

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4. The parties agreed a List of Issues which is replicated below.

## 20 LIST OF ISSUES AGREED BY THE PARTIES

### Unfair Dismissal

25 Has the Respondent, in dismissing the Claimant for the reasons contained within Mrs Carson's letter of 25 September 2019, established a potentially fair reason for the dismissal of the Claimant in terms of section 98(1) and (2) of the Employment Rights Act 1996, namely either conduct or some other substantial reason?

30 Was such a reason genuinely held by the Respondent upon a reasonable basis, and after such investigation as was in the circumstances reasonable?

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If the answer to 1. and 2. above is yes, and applying the band of reasonable responses test found in Iceland Frozen Food v Jones [1982] IRLR 439, did the Respondent act reasonably or unreasonably in treating its reason for dismissal as

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sufficient for dismissal, having regard to all the circumstances and in accordance with equity and the substantial merits of the case, in particular having regard to the following:

- 5           i) The size and administrative resources of the Respondent;
- ii) The Claimant's position as a Pharmacist subject to professional obligations and regulation by the General Pharmaceutical Council;
- iii) The Claimant's length of service;
- iv) The Claimant's previous disciplinary record;
- 10           v) The presence or otherwise of a warning prior to dismissal;
- vi) The fairness of the procedure followed by the Respondent;
- vii) The gravity of the conduct/behaviour of the Claimant for which he was dismissed;

15       **Remedy**

If the Claimant's claim of unfair dismissal succeeds, to what level of compensation is he entitled, in particular:

- 20           (a) What is the level of basic award in terms of s119 ERA?
- (b) Should the level of basic award be reduced to reflect any aspect of the Claimant's own contribution to his dismissal in terms of s122(2) ERA and if so, by what proportion?
- (c) Did a relevant ACAS Code of Practice (in particular Code of Practice 1
- 25           of 2015) apply to the Claimant's dismissal?
- (d) If so, did the Claimant unreasonably fail to comply with that Code?
- (e) If so, is it just and equitable for the tribunal to decrease any award it makes to the employee by no more than 25% to reflect that unreasonable failure to comply with the Code?

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5. The parties agreed a Joint Statement of Facts, which is replicated below.

**Statement of Agreed Facts**

- The Claimant was employed by the Respondent as a Pharmacist from 4 January 1984 until his summary dismissal effective of 25 September 2019, the Claimant's employment having transferred by operation of TUPE from a previous owner in 2016. The Claimant was based at the Respondent's Fore Street Pharmacy. As at his effective date of termination, the Claimant was 58 years old. He earned an annual salary of £50,400 p.a. gross which amounted to £38,400 p.a. net. His gross weekly pay was £969.23. His net weekly pay was £738.46.
- The Respondent is a limited company in terms of the Companies Acts operating a chain of pharmacies across the West of Scotland. It operates 23 registered pharmacies predominantly in the greater Glasgow area. It employs in the region of 140 members staff in total.
- The Claimant was based at the Fore Street Pharmacy, Port Glasgow. He was one of two Pharmacists employed at the Fore Street Pharmacy. The other Pharmacist was Mr David Reilly. The role of Pharmacist was the most senior role within the branch. Both the Claimant and Mr Reilly were from time to time the Responsible Pharmacist in the branch in terms of the Medicines (Pharmacies) (Responsible Pharmacist) Regulations 2008.
- Pharmacy is a regulated profession. Pharmacists and pharmacy technicians are subject to regulation by the General Pharmaceutical Council, and expected to comply with and are subject to the General Pharmaceutical Council's 'Standards for pharmacy professionals'. A copy of the GPC's Standard's for pharmacy professionals is produced at pages 47 to 64 of the Joint Bundle.
- On 9 July 2019 the Cfaimanl was invited to attend a disciplinary investigation meeting by letter from the Respondent's Mr Campbell Thomson, Area Manager scheduled to take place on 11 July 2019 at 10am. A copy of this letter is produced at page 92 of the Joint Bundle. Enclosed with this letter was

a copy of the Respondent's Disciplinary Procedure, a copy of which is produced at pages 75 to 77 of the Joint Bundle.

- 5 • A disciplinary investigation meeting took place with the Claimant on 11 July 2019. It was chaired by the Respondent's Mr Thomson. Also present was Ms Connie Toner who took notes. The Claimant declined to have the meeting audio recorded. During discussions in this meeting the Claimant stated that he had collected evidence of malpractice going back three years.
- 10 • On 12 July 2019 the Respondent suspended the Claimant from work pending further investigation, confirmed in a letter dated 12 July 2019 from Mr Thomson, a copy of which is produced at page 102 of the Joint Bundle.
- 15 • By letter of 19 July 2019 the Respondent invited the Claimant to attend a disciplinary hearing to be chaired by Ms Louise Carson, Area Manager. A copy of this letter is produced at pages 103 to 104 of the Joint Bundle. Enclosed with the letter were minutes of the investigation meeting of 11 July 2019 and a further copy of the Respondent's disciplinary policy.
- 20 • On 24 July 2019 the Claimant raised a grievance by letter to the Respondent, a copy of which is produced at pages 105 to 109 of the Joint Bundle.
- 25 • A grievance meeting took place on 30 July 2019 at the Respondent's Head Office in Muirhead, Glasgow. The meeting was chaired by the Respondent's Mr Scott Hughes. The Claimant was accompanied by his trade union representative, Mr Gerard Samson-Dekker of the Pharmacists Defence Association. Mr Toner was present to take notes. The meeting was audio recorded. The Respondent's notes of the meeting are produced at pages 110 to 133 of the Joint Bundle. Subject to the points raised by the Claimant in his email of 13 August 2019 at pages 145 to 147 of the Joint Bundle, they are an accurate account of the content of that meeting.
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- 35 • On 9 August 2019 Mr Hughes wrote to the Claimant with his decisions in respect of the Claimant's grievance. Mr Hughes did not uphold ground (2) of the Claimant's grievance, and deferred consideration of the Claimant's ground (1) of grievance for consideration by the chair of the disciplinary

hearing. Enclosed with the letter was a grievance outcome report prepared by Mr Hughes. A copy of Mr Hughes' letter is produced at pages 134 to 135 of the Joint Bundle. A copy of Mr Hughes' grievance outcome report is produced at pages 136 to 144 of the Joint Bundle.

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- The Claimant appealed against the grievance outcome decision by letter dated 19 August 2019. A copy of this letter is produced at pages 148 to 154 of the Joint Bundle. A grievance appeal hearing took place on 28 August 2019 at the Respondent's head office. This hearing was chaired by the Respondent's Mr Martin Green, Managing Director. Also present were the Claimant, the Claimant's union representative Mr Samson-Dekker and Ms Toner as note-taker. This meeting was audio recorded. The Claimant's grievance appeal was refused by reasons contained in a letter from Mr Green dated 4 September 2019. A copy of this letter is produced at pages 181 to 184 of the Joint Bundle.

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- The Respondent issued a further invite to a disciplinary hearing by letter dated 6 September 2019 by Ms Louise Carson with enclosures, sent by email. A copy of this letter is produced at pages 190 to 196 of the Joint Bundle. A disciplinary hearing took place on 18 September 2019 at the Respondent's head office. The meeting was chaired by Ms Louise Carson. Also present were the Claimant, his trade union representative Mr Samson-Dekker and Ms Connie Toner as note-taker. The meeting was audio recorded. The Respondent's notes of this meeting produced at pages 198 to 226 of the Joint Bundle are an accurate account of that meeting.

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- On 25 September 2019 the Respondent's Ms Louise Carson sent a letter confirming the Claimant's summary dismissal. A copy of this letter is produced at pages 227 to 231 of the Joint Bundle. The Claimant did not raise an appeal against Ms Carson' decision to dismiss.

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- On 13 November 2019 the Claimant was contacted by letter from the General Pharmaceutical Council advising that he was to be subject to investigation. A copy of this letter is produced at pages 78 to 83 of the Joint Bundle. The General Pharmaceutical Council's investigation remain ongoing as at the

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date of this Final Hearing.

- 5 • On 15 July 2020 the Respondent's Campbell Thomson received a letter from the General Pharmaceutical Council regarding that the concern raised by the Claimant. They confirmed that they would not be taking any further action over the matter and the investigation is now closed. A copy of this letter is produced at pages 1 to 3 of the second Joint Bundle.
- 10 • On 15 July 2020 the Respondent's Campbell Thomson received a letter from the General Pharmaceutical Council regarding that the concern raised by the Claimant. They confirmed that they would not be taking any further action over the matter and the investigation is now closed. A copy of this letter is produced at pages 1 to 3 of the second Joint Bundle.
- 15 • On 30 September 2020 the Respondent's David Reilly received a letter from the General Pharmaceutical Council regarding that the concern raised by the Claimant. They confirmed that they would not be taking any further action over the matter and the investigation is now closed. A copy of this letter is produced at pages 9 to 10 of the second Joint Bundle.

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### **Findings in Fact**

6. In addition, the Tribunal made the undernoted essential Findings in Fact.
- 25 7. On 9<sup>th</sup> July 2019 there was a meeting at the respondents' Fore St Pharmacy. At that meeting the claimant was present along with Campbell Thomson and David Reilly. A number of matters were discussed, including the mess and clutter in the Fore St Pharmacy together with issues of prioritising patients and communication between themselves. At that meeting the issue of dispensing errors in the pharmacy was also discussed, as was the fact that these had not  
30 been reported using the Standard Operating Procedures.
8. Following the meeting on 9<sup>th</sup> July 2019 Campbell Thomson wrote to the claimant and to David Reilly and summarised the issues raised at the meeting.  
35 A letter inviting the claimant to a disciplinary investigation meeting ensued



(92). That letter stated: “ 1 on a recent date (to be confirmed), an incorrect medication was issued to a patient in the Fore Street branch and 2 on a recent date (to be confirmed), the incorrect formulation of a controlled drug was dispensed to a patient(s) in the Fore Street branch and 3 that the company’s standard operating procedures and recording and reporting procedures were not on each occasion adhered to by you as the responsible pharmacist in the Fore Street branch when these issues came to light. ”

9. Notes of the disciplinary investigation meeting with the claimant on 11<sup>th</sup> July 2019 are to be found at 95-101. In the course of the disciplinary investigative meeting the claimant gave examples of specific errors that had not been recorded (96-97). He also stated: “I have lots of evidence of malpractice over the past 3 years and that’s all I want to say.” (98) and, further, made a statement that a lot of errors had not been recorded (97).

10. At the grievance meeting on the 30<sup>th</sup> July 2019 the claimant spoke of both specific (126-127) and general errors (112) which had not been reported. His explanation was that he had ‘no trust’<sup>II?</sup>. He spoke of the Fore St Pharmacy as being “a very very unsafe pharmacy” (127).

11. The Notes of the claimant’s grievance appeal hearing are to be found at 155-180. At the grievance appeal hearing the claimant re-iterated that there were unsafe practices in Fore Street Pharmacy (178).

12. At the claimant’s disciplinary hearing he stated that he should have raised the issue of David Reilly failing to record his errors with the respondents (205) and reiterated that the Fore Street Pharmacy was an “unsafe pharmacy with David Reilly present” (214).

13. The claimant’s letter of dismissal dismissed him on the basis of Allegations 1 and 2 only. Allegation 1 stated: “Over a period of three years you have failed to disclose information required by your employment and required by your professional obligations which may have a bearing on the safety of patients at Fore Street Pharmacy, whether in your capacity as a Responsible Pharmacist or otherwise. Allegation 2 stated: ‘The company considers that statements



made by you on Thursday 11 July 2019 and/or on 30 July 2019 about evidence you had gathered about malpractice at Fore Street may have been made maliciously or for personal gain or otherwise in bad faith in response to the company's investigation into potential disciplinary matters against you regarding your reporting obligations whilst responsible pharmacist or otherwise as set out below." **(227-229)**

14. The Tribunal finds that at all material times the claimant was aware of the General Pharmaceutical Council's Core Standards, which include the requirement to speak up when a pharmacist has concerns or when things go wrong (53 and 61). The Tribunal finds that at all material times the claimant was aware of the respondents' Standard Operating Procedures, including Section 4: Reporting an Incident (66)

#### 15 **Observations on the Evidence**

15. The Tribunal found the respondents witnesses generally to be reliable and credible. It was clear from the evidence of Campbell Thomson, Scott Hughes and Louise Carson that they had considerable concerns over the frank admissions made by the claimant in the course of the investigative, grievance and disciplinary hearings held by them. The Tribunal found Louise Carson to be a particularly thorough and careful individual, reflected in the length of the disciplinary hearing with the claimant and her measured letter of dismissal dated the 25<sup>th</sup> September 2019 **(227-231)**.

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16. The Tribunal found the claimant's evidence to be wholly contradictory and confusing in the course of which he was, at times, unable to provide answers to uncontroversial straightforward questions. The Tribunal did, however, applaud the claimant's candour in his admissions in evidence that he had failed to comply with his professional standards and standard operating procedures over the period of 3 years in question.

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**THE LAW**

17. Section 98 of the Employment Rights Act 1996 provides:

5                    "General

(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 -*

10                    (a) *the reason (or if more than one the principal reason) for the dismissal, and*

                      (b) *that it is either a reason falling within sub-section (2) or some other substantial reason of a kind such as to justify the dismissal of an employee holding the position which the*  
15                    *employee held.*

(2) *A reason falls within this sub-section if it -*

                      (b) *relates to the conduct of the employee*

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(4) *Where the employer has fulfilled the requirements of sub-section (1) the determination of the question whether the dismissal is fair or unfair (having regard to the reasons shown by the employer) -*

25                    (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*  
30                    *substantial merits of the case."*

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18. The case of **British Home Stores v Burchell (1978) IRLR 379 EAT** remains good law. In that case it was decided that in determining whether a dismissal is unfair an Employment Tribunal has to decide whether the employer who

discharged the employee on the grounds of the misconduct in question entertained a reasonable suspicion amounting to a belief in the guilt of the employee of that misconduct at the time. This was said to involve three elements - firstly that there must be established by the employer the fact of their belief that the employer did believe it, secondly that it must be shown that the employer had in his mind reasonable grounds upon which to sustain that belief and thirdly that the employer at the stage at which he formed that belief on those grounds must have carried out as much investigation into the matter as is reasonable in all the circumstances of the case.

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19. **Iceland Frozen Foods Limited v Jones (1982) IRLR 439 EAT** also remains good law. In that case it was determined that the correct approach for an Employment Tribunal to adopt in answering the questions posed by section 98(4) is that in applying the section an Employment Tribunal must consider the reasonableness of the employer's conduct not simply whether they, being the members of the Employment Tribunal, consider the dismissal to be fair; in judging the reasonableness of the employer's conduct an Employment Tribunal must not substitute its decision as to what was the right course to adopt for that of the employer; in many 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; and that, finally, that the function of the Employment Tribunal as an industrial jury is to determine whether in the particular circumstances of each case the decision to dismiss the employee fell within the band of reasonable responses which a reasonable employer might have adopted.

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20. For a more recent summary of the law the Employment Tribunal turned to the words of Lord Justice Aitkens in the Court of Appeal case **Graham v Secretary of State for Work and Pensions (2012) EWCA Civ 903**. In paragraphs 35 and 36 of that case it is stated, quoting from **Orr v Milton Keynes Council**

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*dismissing the employee was a "valid" reason within the statute the ET has to consider three aspects of the employer's conduct First did the employer carry out an investigation into the matter that was reasonable in the circumstances*

of this case; secondly did the employer believe that the employee was guilty of the misconduct complained of and thirdly did the employer have reasonable grounds for that belief. 36 If the answer to each of those questions is "yes", the ET must then decide on the reasonableness of the response by the employer. In performing the latter exercise, the ET must consider, by the objective standards of the hypothetical reasonable employer, rather than by reference to ET's own subjective views whether the employer has acted within a 'band or range of reasonable responses' to the particular misconduct found of the particular employee. If the employer has so acted, then the employer's decision to dismiss will be reasonable. However this is not the same thing as saying that a decision of an employer to dismiss will only be regarded as unreasonable if it is shown to be perverse. The ET must not simply consider whether they think that the dismissal was fair and thereby substitute their decision as to what was the right course to adopt for that of the employer. The ET must determine whether the decision of the employer to dismiss the employee fell within the band of reasonable responses which "a reasonable employer might have adopted." An ET must focus its attention on the fairness of the conduct of the employer at the time of the investigation and dismissal (or any internal Appeal process) and not on whether the employee has suffered an injustice."

21. The case of **Bryant v Sage Care Homes Ltd (2012) UKEAT/0453/11** was noted by the claimant as was the parties' respective positions on the authority of that case.

22. **Boys and Girls Welfare Society v Macdonald 1997 ICR 693, EAT** was raised by the Employment Judge in submissions and is authority for the proposition that where an employee admits an act of gross misconduct and the facts are not in dispute it may not be necessary to carry out a full investigation. In that case the EAT said that it was not always necessary to apply the test in **British Home Stores v Burchell** where there is no real conflict on the facts.

23. The Tribunal also accepted the proposition that in cases where an employee is accused of more than one offence, the correct approach is not whether the

acts of misconduct individually or cumulative amount to gross misconduct but rather whether the conduct in its totality amounts to a sufficient reason for dismissal in terms of s98(4) of the Employment Rights Act 1996.

- 5 24. It was not in dispute in this case that professionals are subject to an implied contractual term that they are reasonably competent to perform the work for which they are employed.

10 **The parties produced summaries of their submissions. These are replicated below**

### **Respondents Submissions**

- 15 25. The respondents submit as follows:

20 The Respondent's case proceeds on the basis that the Claimant was under various legal and professional duties to ensure the safe and effective running of the pharmacy. That the Claimant's failure to raise those concerns over patient safety over a sustained period of time, was a serious and repeated neglect of duties that amounted to gross misconduct. The Respondent referred to the unreported decision of the Employment Appeal Tribunal in *Bryant v Sage Care Homes Ltd (2012) UKEAT/0453/1 1*.

25 The point in issue was whether the conduct, which was accepted by the Claimant, was serious or gross and whether dismissal was within the range of reasonable responses.

30 Mrs Carson was clear that she considered the results of the investigation into the Claimant's allegations of malpractice (raised in the grievance process and in the absence of information to the contrary, she accepted that the incidents had occurred. She believed that some of the incidents affected patient safety. The Respondent's submitted that they were

entitled to accept the Claimant's concerns and find that his failure to report these concerns was gross misconduct.

5 That to submit, as the Claimant did, that the Respondent ought to have found the Claimant's concerns to be unreliable, would lead inevitably to an inference that he acted in bad faith. That being so, the outcome would have been the same.

10 It is submitted that by the Respondent that the misconduct which was deliberate and sustained over 3 years made it fair to dismiss the Claimant without prior warning. In any event, under the ERA 1996 s.98(4), dismissal for serious misconduct, as opposed to gross misconduct, could be fair even if the employee had received no prior disciplinary warnings, see *Quantiles Commercial UK Ltd v Barongo* 2018 3 WLUK 415 at par  
15 28.

The alternative submission is that the Claimant has been dismissed for, "some other substantial reason of a kind such as to justify the dismissal of an employee holding the position which the employee held" in terms of  
20 Section 98 (1)(b) and in this case Mrs Carson provided reasons for this belief in her decision letter, and gave evidence to this effect.

25 That, in terms of the Employment Rights Act 1996 s.122(2) and s.123(6), the employee's conduct caused or contributed to their dismissal, and the amount of the award should be reduced to nil.

### **Claimant's Submissions**

26. The Claimant submitted as follows in summary:

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- It reminded the Tribunal that the focus of determining unfairness of a dismissal was on the employer's conduct, with the employee's conduct being the subject of focus in the event of a finding of unfairness, when consideration would then turn to contributory conduct.

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- 5 • The Claimant's case, standing his frank concessions in evidence, was not that he should not have been disciplined at all, but that the Respondent's stated reason (being for conclusions relating to disciplinary Allegations 1 & 2 per Mrs Carson's outcome letter of 25/9/19), based on the facts and beliefs known to it at the time, was not sufficient to dismiss applying the band of reasonable responses.
  
- io • Whilst compliance with professional obligations are present within the contract of employment, absent clear indication that they are considered to go to the root of the contract (that any breach is a material breach, constituting gross misconduct) either in the contract terms themselves, or in relevant policy documentation. There is no authority that expectations of professional obligations constitute part of the implied term of mutual trust and confidence. The relevant implied term was submitted to be that of a professional employee being reasonably competent to carry out the work for which they are employed. That term is not to the effect that any breach thereof amounts to a material breach. The unreported EAT decision of **Bryant v Sage Care Homes** will be scrutinised by the Tribunal with care, but 15 that case was confined to its particular factual matrix. There is in law no short cut to a fair dismissal based on professional obligations.
  
- 20 • An examination of Mrs Carson's evidence on her reasons for dismissal on Allegation 1 both in her outcome letter and in cross-examination shows that she did not perform an assessment of the gravity of the matters the Claimant stated to be errors which he had not recorded. The Claimant posed the rhetorical question, what conclusions could such facts and beliefs sustain?
  
- 30 • A curious feature of the case has been that despite the repeated assertions of the fundamental importance of compliance with the reporting obligation by the Respondent's witnesses, no such prior warning exists to that effect in its own policies or contractual documentation.



- 5 • That whilst an alternative basis for dismissal was asserted in respect of a breach of trust and confidence, that too engaged questions of gravity and sufficiency, the Inner House having indicated in **McNeill v Aberdeen City Council** that it was not every breach of the implied term of mutual trust and confidence is a material breach.
  
- 10 • This did not amount to the Claimant 'having his cake and eating it too', because a substantial reduction of award on the grounds of contribution was inevitable.
  
- 15 • With respect to remedy, all that was sought was a basic award in terms of s119 ERA. Reduction for contribution was accepted as inevitable, although only in a rare case should it be a 100% reduction. Whilst the ACAS Code did apply, and the Claimant did not appeal and thus was not in compliance with paragraph 26 of the Code, it was submitted that such non-compliance was not unreasonable, or separately should not amount to a basis for a further reduction to an already inevitably small level of financial award.

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### **Discussion and Decision**

25 27. The Tribunal commenced its deliberations by observing that it was not questioned that the reason for the claimant's dismissal, namely misconduct, is a potentially fair reason in terms of **s98(2)** of the **Employment Rights Act 1996**.

30 28. The Tribunal then reminded itself of the test contained in the words of s98 of the **Employment Rights Act 1996** and the well known test set out in **British Home Stores v Burchell**. To this end, in the words of Lord Justice Aitkens in **Graham v Secretary of State for Work and Pensions** the ET has to consider three aspects of the employer's conduct. First, did the employer carry out an investigation into the matter that was reasonable in the circumstances of this case; secondly did the employer believe that the employee was guilty of the

misconduct complained of and thirdly did the employer have reasonable grounds for this belief.

5 29. The Tribunal considered the investigation by Campbell Thomson to be thorough. The investigation elicited responses from the claimant that had to merit further enquiry. In particular, the investigation elicited unexpected responses from the claimant that: "a lot of errors have not been recorded" (97) and "I have lots of evidence of malpractice over the past 3 years and that's all I want to say." (98). In addition, the claimant gave examples of specific errors  
10 that had not been recorded (96-97). Further, there was no doubt that Louise Carson sincerely believed that the claimant was guilty of the misconduct complained of. Indeed, these do not appear to be matters in contention by the claimant.

15 30. What is in contention, however, is whether the respondents and in particular Louise Carson had reasonable grounds for their belief in the guilt of the claimant and that the claimant's conduct constituted gross misconduct. To this end, in submissions the claimant highlighted that where an employer dismisses a man on conduct grounds on his own word with little, if any supporting  
20 evidence it is not a complete answer to rely upon that word alone. In their submissions the respondents also highlighted the issue of the gravity of the conduct which provided the basis of Louise Carson's decision to dismiss the claimant in all the circumstances of this case.

25 31. The Tribunal considered these matters with care. In this respect the Tribunal had regard to the body of information that was before Louise Carson which included the investigative meeting by Campbell Thomson, the grievance and grievance appeal hearing notes and the notes of the disciplinary hearing. With this in mind, the Tribunal had regard to the facts before Louise Carson in  
30 determining whether she had reasonable grounds for her belief in the gross misconduct of the claimant. The Tribunal reminded itself that in the course of the disciplinary hearing the claimant described the pharmacy as an '*unsafe pharmacy while David Reilly was present*' (214) and admitted that he should have raised the issue of David Reilly's failure to record his errors with the  
35 respondents (205). Further, Louise Carson had before her evidence that at the

investigatory disciplinary hearing the claimant advised of specific errors, such as the mix up with Amlodipine and Amitriptyline (96-97) which, according to the claimant, were not reported as well as a general statement that he had lots of evidence of malpractice over the past 3 years (98). Louise Carson also had before her the Notes of the Grievance Hearing which narrated specific errors (126-127) as well as general errors (112) and it was a matter of admission that these had not been escalated by the claimant (127). The claimant also spoke of the Fore St Pharmacy being a “*very very unsafe pharmacy*” (127).

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10 32. On the basis of the evidence before her, therefore, the Tribunal considered whether Louise Carson had reasonable grounds to categorise the misconduct on the part of the claimant as gross misconduct. In the light of the claimant’s repeated assertions of errors in the pharmacy, the fact that he repeatedly stated during the hearings that the pharmacy was “*unsafe*” and his admission at the disciplinary hearing that he should have brought these errors to the attention of the respondents, the Tribunal concluded that the categorisation of the claimant’s conduct as gross misconduct fell within the band of reasonable responses open to the respondents in the circumstances of this case.

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20 33. The Tribunal also considered the fact that the claimant is a very experienced pharmacist who, at no point in his evidence denied that he was aware of the Standard Operating Procedures, in particular section 4 (66) and the Standards for Pharmacy Professionals with reference to Standard 8, being the need to speak up about concerns (52-53). Against that background, the Tribunal had regard to the assertion by Mr Hay, that there is no authority to suggest that professional obligations are to be automatically considered as incorporated within the implied contractual term that professionals are reasonably competent to perform the work for which they are employed. The Tribunal was of the view that this is a correct summation of the law.

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34. However, after considering their Findings in Fact the Tribunal reached the view that whilst it is the case that each and every professional standard is not incorporated into a professional’s contract of employment, the respondents were within the band of reasonable responses to consider that the claimant’s

actings and admissions were tantamount to a breach of the implied contractual term that he was reasonably competent to perform the work for which he was employed which was, as pharmacist, the most senior role within Fore St pharmacy and involved at times acting as the Responsible Pharmacist.

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35. The Tribunal also had regard to the undisputed fact that the respondents did carry out inquiry at both pharmacies in Port Glasgow and found no evidence to dispute the claimant's specific and general assertions of unreported malpractice.

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36. In deliberating on these issues, the Tribunal also had regard to the line of authority emanating from **Boys and Girls Welfare Society v Macdonald 1997 ICR 693, EAT**. In submissions, Mr Hay distinguished this line on the basis that the claimant at no point admitted acts of gross misconduct; and that his admitted acts, at their high water mark, amounted to acts of misconduct not gross misconduct. However, the Tribunal read this authority as authority for the proposition that an admission of a material fact (where there is no real conflict on the facts) in a disciplinary process is an exception to the general rule in **BHS v Burchell** and no further investigation is required into such admitted facts. To this end, at para 29 of the judgment in **Boys and Girls Welfare Society** Judge Clark stated: *"Setting aside the question of onus of proof, it is apparent that the threefold Burchell test is appropriate where the employer has to decide a factual contest. The position may be otherwise where there is no real conflict on the facts."*

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37. Against this background the Tribunal considered there to be no merit in the argument put forward by Mr Hay, to the effect that the respondents should not have dismissed the claimant on conduct grounds on his own word with little, if any, supporting evidence.

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38. The Tribunal accepted the evidence given by Louise Carson, as recorded in the letter of dismissal, that she gave the claimant's length of service due weight in reaching the decision to dismiss. The Tribunal accepted the evidence of Louise Carson, given orally, that she took into account the absence of a

warning and the claimant's otherwise clean disciplinary record in deciding to dismiss the claimant.

39. Insofar as Allegation 2 is concerned, the Tribunal noted that it was accepted  
5 by the claimant that Allegation 2 in the dismissal letter of 25<sup>th</sup> September 2019  
(227) follows from and depends on proof of Allegation 1.
40. Finally, the Employment Judge had regard to the fact that the law is clear and  
settled in its terms in that the Tribunal must consider by the objective standards  
10 of the hypothetical reasonable employer rather than by reference to the  
Tribunal's own subjective views whether that employer acted within a band or  
range of reasonable responses to the particular misconduct of the particular  
employee.
- 15 41. After having deliberated and reached the above conclusions, and after  
reminding itself that the Tribunal must not substitute its decision as to what was  
the right course to adopt for that of the respondents, the Employment Tribunal  
concluded that the decision to dismiss the claimant did fall within the band of  
reasonable responses open to the respondents in all the circumstances of this  
20 case. Accordingly the claimant's claim of unfair dismissal is dismissed.

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**Employment Judge: J Porter**  
**Date of Judgment: 8 December 2020**  
**Entered in register: 22 December 2020**  
**and copied to parties**