

**IN THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH**

CA 116/09
5131271

BETWEEN ANNETTE HOLLIS-OWEN
 Applicant

AND THE WOOD LIFE CARE 2007
 LIMITED
 Respondent

Member of Authority: James Crichton

Representatives: Anjela Sharma, Advocate for Applicant
 Jeff Goldstein, Counsel for Respondent

Investigation Meeting: 30 June 2009 at Nelson

Determination: 31 July 2009

DETERMINATION OF THE AUTHORITY

Employment relationship problem

[1] The applicant (Ms Hollis-Owen) claims that she has been unjustifiably dismissed from her employment, says that she was unfairly suspended from her employment and also claims *unfair disadvantage* against her former employer the respondent (The Wood).

[2] For its part, The Wood says that Ms Hollis-Owen was justifiably dismissed, justifiably suspended, and not unjustifiably disadvantaged.

[3] Ms Hollis-Owen commenced employment with The Wood on 1 April 2007 as a Clinical Coordinator. As a registered nurse, Ms Hollis-Owen was bound by the code of conduct for nurses, as well as by an employment agreement and house rules provided by The Wood.

[4] On 28 March 2008, the management of The Wood was told that Ms Hollis-Owen had taken a tablet of Diazepam prescribed for a resident, while on duty.

[5] On 31 March 2008, Ms Hollis-Owen was suspended on pay while an investigation was conducted. At the same meeting that Ms Hollis-Owen was suspended, she was provided with information then available to The Wood about the allegation that she faced, invited to a disciplinary meeting at a time suitable to her and encouraged to obtain representation for the purposes of that meeting.

[6] Two days before the date agreed for the disciplinary meeting, on 7 April 2008, Ms Hollis-Owen emailed two senior managers at The Wood, acknowledged that she had taken half a tablet of Diazepam while at work, apologised, and acknowledged that her actions might well have an effect on The Wood's view of her integrity and whether it could continue to have trust and confidence in her.

[7] At the disciplinary meeting on 9 April 2008, Ms Hollis-Owen was given an opportunity to respond in detail to the allegations she faced and was provided with further written material relating to the investigation of The Wood into those allegations. After considering the representations of Ms Hollis-Owen and the submissions made on her behalf by her representative, The Wood determined to dismiss Ms Hollis-Owen for serious misconduct. The General Manager of The Wood, Ms Andrena Williams, wrote out a statement of her reasoning for implementing the dismissal and she read that statement to Ms Hollis-Owen at the disciplinary meeting and offered to provide Ms Hollis-Owen with a copy of the handwritten statement. The dismissal was subsequently confirmed by letter dated 11 April 2008.

[8] Ms Hollis-Owen subsequently brought her claim before the Authority in a statement of problem filed on 24 July 2008.

Issues

[9] It will be useful if the Authority considers the following issues:

- (a) The taking of the Diazepam; and
- (b) The employer's response.

The taking of the Diazepam

[10] Ms Hollis-Owen suffers from migraines. She habitually carries with her her own prescribed medication called Imigran which, if taken at the onset of symptoms, will alleviate the onset of the migraine headache.

[11] Ms Hollis-Owen says that on or about 1 November 2007, while working at The Wood on a day shift, she noticed the onset of a migraine headache but discovered that she did not have her tablets with her. Her evidence is that she ... *recalled that there were a couple of discarded Diazepam tablets on the bench in the treatment room, and that it occurred to me that a small amount of Diazepam could provide some form of rescue therapy ...*

[12] Ms Hollis-Owen claimed in her evidence that The Wood had no policy in place in respect of the discarding of unused drugs and medication, but that is not in fact true. A copy of The Wood's policy was provided to the Authority and it would appear to have been in place at the time that Ms Hollis-Owen elected to consume the Diazepam.

[13] While she was considering her options, another registered nurse, Ms Rackley, came in and Ms Hollis-Owen said that she told Ms Rackley that she was feeling *migrainous* although that is denied by Ms Rackley. Ms Rackley said that she was not aware that Ms Hollis-Owen had a migraine at the time and that she did not say she had visual disturbances. Ms Rackley described Ms Hollis-Owen as being *very stressed* and she said that Ms Hollis-Owen had come back from lunch in that condition. Ms Rackley had reason to be in the treatment room in order to obtain medication for a patient and when Ms Hollis-Owen proceeded to the treatment room, Ms Rackley followed her.

[14] While Ms Hollis-Owen claims to have taken only half a tablet of Diazepam, Ms Rackley was sure that she took *one whole tablet*.

[15] Ms Hollis-Owen says in her evidence that Ms Rackley expressed no *professional concern* about her decision to ingest the tablet and when that was put to Ms Rackley at the investigation meeting, she confirmed that she had said nothing but indicated that the reason she did not express her reservations was because Ms Hollis-Owen was Ms Rackley's boss. Ms Rackley said that she was worried about herself

and went on to say: *I wish I had said something. I hadn't realised how seriously this would be taken. I knew what Ms Hollis-Owen did was wrong.*

[16] Once Ms Hollis-Owen had ingested the tablet, she continued with the work that she was attending to that day which was paperwork and her evidence is that the tablet *had the desired effect*. Ms Rackley did not report the matter to management, at least not at that point.

[17] There are serious differences between Ms Rackley's account and Ms Hollis-Owen's account of the same events. Ms Rackley is clear that Ms Hollis-Owen took a whole tablet and that is what she conveyed to The Wood when she eventually fessed up about what she knew, whereas Ms Hollis-Owen continued to maintain that she only took half a tablet. Furthermore, Ms Rackley was very clear in her oral evidence before the Authority that she had no idea that Ms Hollis-Owen was suffering from a migraine at the relevant time. She said in her evidence at the Authority and in what she told the employer that she thought that Ms Hollis-Owen was stressed.

[18] I was impressed with Ms Rackley's evidence. She gave her evidence clearly and thoughtfully and was plainly concerned about Ms Hollis-Owen and most anxious that she had effectively got her into trouble by her eventual report to the employer about what had happened. Because of the genuine concern that Ms Rackley had for Ms Hollis-Owen, I cannot imagine why Ms Rackley would want to lie about what she recalled. It is for that reason that I prefer her recollection of events to Ms Hollis-Owen's, both in respect of the quantity of the Diazepam that was taken (one whole tab), and in respect of the intelligence that she (Ms Rackley) was unaware that Ms Hollis-Owen was suffering a migraine at the relevant time.

[19] Ms Hollis-Owen, in her evidence before the Authority, was keen for me to accept that she had no viable alternative to taking the Diazepam. She emphasised that she had a strong work ethic and that The Wood was at that point short staffed and that if she went home she would be leaving others in the lurch. However, given that by her own admission she was doing paperwork that day, that argument seemed to me a little thin.

[20] Ms Hollis-Owen was also resistant to my suggestion that she could have reported urgently to the management of The Wood that she was unwell and it would have looked after her. She said that the migraine came on very quickly and gave her

no chance to do that. But again, her own evidence confirms that Ms Rackley was with her at the relevant time. Even if she was unable to make a phone call to her manager, Ms Rackley could have been deputed to attend to that. In the alternative, Ms Rackley could have driven Ms Hollis-Owen to the emergency doctor or to her own doctor or to her home to get her tablets. Similarly, Ms Hollis-Owen could have taken a taxi to get medical assistance as she would have been unable to drive.

[21] All of these suggestions were rejected by Ms Hollis-Owen in evidence because allegedly the visual disturbance came on so quickly that she would have been unable to take any of the steps I have just referred to. I do not accept that evidence at all. She seemed perfectly capable of reaching a conclusion to ingest a tablet of Diazepam which required some thought and some recollection that the Diazepam was in fact available to be taken and, by her own admission, she spoke to Ms Rackley, although the contents of that discussion are disputed. I am not satisfied then that Ms Hollis-Owen had no alternative as she sought to imply. I am satisfied she had plenty of alternatives but she just chose to take a course of action which, ultimately, resulted in her dismissal.

The employer's response

[22] On 27 March 2008, Ms Blackbeard, the manager of The Wood, gave evidence that she had received a complaint from Ms Hollis-Owen who was stressed and was feeling *unsupported* by Ms Rackley and one other registered nurse. Ms Blackbeard took notes of that conversation which have been provided to the Authority. Ms Hollis-Owen, in her evidence, took issue with the suggestion that she had formally raised the matter with Ms Blackbeard. She says that the discussion was very much in passing, but she does not deny that the discussion happened.

[23] The following day, Ms Blackbeard spoke to Ms Rackley. Again there were notes taken of this conversation. Ms Rackley said that she felt that Ms Hollis-Owen was not coping with her job and she gave some examples to support that contention which included the Diazepam episode of several months previously.

[24] Realising the seriousness of the allegation, Ms Blackbeard sought an explanation promptly from Ms Hollis-Owen and the pair met briefly the following day, 28 March 2008. Ms Hollis-Owen confirmed that she had taken a Diazepam tablet several months previously. Ms Blackbeard told Ms Hollis-Owen that the

employer would regard that intelligence very seriously and that she would refer the matter to the General Manager, Ms Williams. Ms Blackbeard was adamant in her evidence before the Authority that at no time did Ms Hollis-Owen indicate that she had taken just half a tablet of Diazepam or that she had taken it in the context of trying to prevent a migraine coming on.

[25] Ms Blackbeard said that she knew that Ms Hollis-Owen suffered from migraines, but had no idea that she was suffering them in the workplace. She was quite unequivocal that she would have expected to have been told about a staff member who was affected by any illness during work which would impact on the care of the residents.

[26] Ms Hollis-Owen clearly thought Ms Blackbeard rather unsympathetic. That is probably an accurate perception. Ms Blackbeard told me that taking Diazepam while on duty was, in her view, *pretty serious*, particularly as a registered nurse *would have clinical knowledge of the effect of the drug*. She went on to say *I've never heard of Diazepam being taken for migraine*.

[27] When I asked Ms Blackbeard what Ms Hollis-Owen should have done, she said that she should have alerted management and she would have been taken promptly to her own doctor or an emergency doctor and she wryly made the observation that it would have taken Ms Hollis-Owen *less time to phone me than to walk to the treatment room and ingest the Diazepam*.

[28] Ms Blackbeard was adamant that Ms Hollis-Owen should have obtained medical help immediately and, if necessary, arrange to be taken home and to not have continued working, either with the effects of a migraine or with the effects of having taken a prescription drug which was not prescribed for her.

[29] After the brief conversation with Ms Hollis-Owen, Ms Blackbeard reinterviewed Ms Rackley and sent an email of that conversation to the General Manager in Christchurch, Ms Williams. Later that same day, 28 March 2008, Ms Hollis-Owen approached Ms Blackbeard again to *seek Ms Blackbeard's support*. The text of that discussion was also recorded by Ms Blackbeard and made available to the Authority. Ms Blackbeard said in evidence that she thought that Ms Hollis-Owen was asking her to *cover up* for her; Ms Hollis-Owen in her evidence simply said that she was looking for the support of her superior.

[30] The following working day, Monday, 31 March 2008, Ms Williams, the General Manager, and Ms Blackbeard arranged to meet with Ms Hollis-Owen late in the afternoon. This meeting resulted in Ms Hollis-Owen's suspension on pay while The Wood conducted an investigation. Ms Hollis-Owen complained that she was surprised by this meeting and not given the opportunity to have a support person present. That evidence is refuted by The Wood's management who say that Ms Hollis-Owen was asked to attend the meeting, told what the meeting was for, and given an opportunity to reschedule that meeting in order for a support person to be present to assist Ms Hollis-Owen. Ms Williams' evidence and Ms Blackbeard's evidence, together with the notes of that meeting, record that Ms Hollis-Owen declined to postpone the meeting, indicated she did not need support and stated that she would like to have the meeting right away *to get it over and done with*. I prefer the employer's evidence on this point.

[31] I am not satisfied that Ms Hollis-Owen has been disadvantaged by this process. The employment agreement allows The Wood to suspend on pay and I am satisfied on the facts that Ms Hollis-Owen affirmatively gave her consent to proceed at the time the meeting was originally called without a support person present.

[32] On 7 April 2008, Ms Hollis-Owen sent an email to the management of The Wood, apologising for taking the Diazepam, accepting that her actions might well compromise the employer's trust and confidence in her, and seeking to mitigate the offence by referring to the migraine as the precipitating cause. The Wood's managers say that this email was the first occasion on which they were told that the onset of a migraine was the precipitating cause of Ms Hollis-Owen taking the Diazepam. This of course is in contrast to Ms Hollis-Owen's own evidence which is that she told Ms Rackley at the time and she also alleged that she told Ms Blackbeard when initially confronted with the allegation. Indeed, Ms Hollis-Owen went further and alleged that Ms Blackbeard was *lying* when Ms Blackbeard gave her evidence and denied that she knew about the migraine until the receipt of the 7 April email.

[33] Again, I have to say I prefer the evidence of the employer's witnesses who seemed to me measured and level headed in their giving of evidence and who had no particular reason to deny Ms Hollis-Owen having a migraine if in fact they were told that earlier. This is particularly so because Ms Blackbeard made it quite clear that whether Ms Hollis-Owen had a migraine or not was, in her judgement, immaterial.

The issue was whether Ms Hollis-Owen ought to have taken a prescription medication for somebody else without the authority of the employer, and continued to work.

[34] The disciplinary meeting took place two days after the email was sent, that is on 9 April 2008. It was by all accounts a long meeting of over two hours and it included three breaks, the first of 20 minutes and two following breaks of about 10 minutes each. Ms Hollis-Owen says that the meeting was disjointed and that she did not get the opportunity to be heard. The Wood, for its part, denies that Ms Hollis-Owen was not given an opportunity to be heard but do say that if there was any difficulty in her expressing herself, it was a consequence of Ms Sharma's rude and aggressive approach at the disciplinary meeting. Having heard the evidence of Ms Williams, Ms Blackbeard and Ms Hollis-Owen about the nature and extent of that meeting and looked at the employer's notes of that meeting which were made available to the Authority, I am not satisfied that there are any deficits in the way the meeting was conducted.

[35] The reality is that by the time the meeting of 9 April took place, Ms Hollis-Owen had already accepted that she had taken the Diazepam tablet, had accepted in writing that this might impact on the employer's trust and confidence of her, but had continuously sought to minimise the importance of what she had done, notwithstanding her professional obligations and the clear obligations that she undertook by virtue of accepting the house rules and the particular examples of serious misconduct that were relevant to the behaviour in question.

[36] At the end of the meeting, there was an adjournment in which Ms Williams and Ms Blackbeard went away to consider matters and, in the result, Ms Williams, as the decision-maker, returned to the meeting and read from a handwritten statement which determined to dismiss Ms Hollis-Owen summarily and set out the reasons for that conclusion being reached. Ms Williams quite properly offered a copy of that handwritten document to Ms Hollis-Owen.

Determination

[37] The test is set out in s.103A of the Employment Relations Act 2000. The Authority is required to consider what a fair and reasonable employer would have done in the circumstances confronted by this employer after the conducting of a proper investigation.

[38] It is clear on the facts that this employer conducted a full inquiry into the facts, notwithstanding the early acknowledgment by Ms Hollis-Owen that she had in fact done what she was accused of doing. As I say, despite that, The Wood talked to the only other witness on two occasions, the second after Ms Hollis-Owen had accepted that she had taken the Diazepam, and there was a proper legal suspension, mandated by the employment agreement, and a subsequent disciplinary meeting of sufficient length and detail to enable any explanation for the wrongdoing to be fully and adequately provided, if the time was properly used.

[39] Ms Hollis-Owen accepted that she had taken some Diazepam. There is dispute about whether it was half a tab or a full tab. I have already indicated my preference for the view that she took a full tab and not a half tab.

[40] The Diazepam did not belong to Ms Hollis-Owen and was a prescription medicine prescribed for a resident of The Wood. The fact that the medicine had been discarded by the person it was supposed to be used by is neither here nor there; Ms Hollis-Owen took the medication without lawful excuse and used it by ingesting it herself thus effectively self-prescribing in circumstances where she has no legal or moral authority to do so.

[41] Worse than that, Ms Hollis-Owen is a registered nurse and as a consequence has professional obligations under the nurses' code of conduct which absolutely prohibits such behaviour. From a clinical standpoint, Ms Hollis-Owen would have known or ought to have known the potential effect that Diazepam (the clinical name for Valium) might have had on someone it was not designed for.

[42] Next, Ms Hollis-Owen, having ingested the Diazepam, continued to work and although she says that she was only doing paperwork on that day, presumably that paperwork was itself important for the benefit of the residents who she was supposed to be caring for. The prospect of her making fundamental errors as a consequence of being affected by a prescription drug she had no entitlement to really underlines the impossibility of her position.

[43] In all the circumstances, it seems to me axiomatic that any employer confronted with this factual matrix would have reached precisely the same conclusion as The Wood and summarily dismissed Ms Hollis-Owen.

[44] It follows that Ms Hollis-Owen has not made out her case for having been unjustifiably dismissed from her employment and her application to the Authority fails in its entirety.

Costs

[45] Costs are reserved.

James Crichton
Member of the Employment Relations Authority