IN THE EMPLOYMENT RELATIONS AUTHORITY
WELLINGTON

Determination Number:
WA 14/08
File Number:5039004

	BETWEEN	MARLENE McDOWALL Applicant
	AND	HUNT HEALTHCARE GROUP LIMITED Respondent

Member of Authority:	G J Wood
Representatives:	Richard Roil for Applicant Carl Reaich for Respondent
Investigation Meeting:	31 July and 1 August 2007 at Wellington
Further Information Received:	By 23 January 2008
Determination:	8 February 2008

DETERMINATION OF THE AUTHORITY

Employment Relationship Problem

[1] The applicant, Mrs Marlene McDowall, claims that she was unjustifiably dismissed by the respondent, (Hunt Healthcare or Huntleigh) from her position as Acting Charge Nurse at one of its hospital and rest homes, which is denied by Hunt Healthcare. Mrs McDowall had also raised a claim for arrears of wages over a possible wage rise, but this was not pursued at the investigation meeting.

The Facts

[2] Mrs McDowall was first registered as a nurse in 1971. She practiced in a number of countries until 1986. She then did not work as a nurse again for 15 years, while she cared for her children. She recommenced practice in 2001 and was employed at Huntleigh Hospital and Rest

Home in February 2003, initially as a casual nurse. On 21 October 2003 her employment became what is colloquially, but technically incorrectly, known as permanent. During that period she had a three day induction training session and completed a six week nursing staff orientation programme, focussing particularly on care for the aged which is the business Hunt Healthcare is in. As a registered nurse Mrs McDowall was required to provide competent professional clinical practice consistent with relevant legislation, to ensure documentation met legal requirements, to be an effective team leader, to take responsibility for her own educational requirements and to deputise for the Care Coordinator/Charge Nurse if required, amongst other things. Mrs McDowall had acted as Acting Charge Nurse in the absence of a Charge Nurse on several occasions.

[3] Mrs McDowall was also required by Huntleigh to take part in in-service education. During the course of her three year's employment she participated in around 34 training sessions, many of which looked at the issue of the safe management of medications. In a number of cases training was provided by a presentation by health professionals, but equally a large number involved staff viewing educational videos and the like. Only limited and probably inadequate training was provided on diabetes management.

[4] While Mrs McDowall's hours often varied from two to four days a week, in early 2006 the Charge Nurse took two month's sick leave. Mrs McDowall was asked to take on the acting role for this period. This was in addition to her other registered nurse duties and she accordingly worked full time. Mrs McDowall was asked to take on this superior role because her performance was seen to be of a good standard. It was very clear that she got on extremely well with the aged residents and formed close bonds with a number of them and their families, which is greatly to her credit. No additional training was given to Mrs McDowall to take on this new role.

[5] Unfortunately, early on in her period as Acting Charge Nurse Mrs McDowall was the subject of an investigation by the General Manager of Hunt Healthcare, Ms Jane Smart, over alleged breaches of confidentiality. These related to Mrs McDowall talking to medical professionals and clients' families about healthcare issues that had arisen at Huntleigh, and a restructuring that was taking place. I do not comment on this issue further as I am satisfied that even though disciplinary action was commenced against Mrs McDowall by Ms Smart, this had no part in her dismissal and the disciplinary investigation was "parked" after the issues which are the subject of this investigation were raised.

[6] By way of final comment however, I note that it is difficult to see how a nurse could be disciplined for talking with medical staff and patients' families about health issues that affected both Mrs McDowall and Huntleigh's residents.

[7] The restructuring was to result in the nurse manager and charge nurse roles at Huntleigh being disestablished. The disestablishment of the positions was in prospect, but had not occurred at the time Mrs McDowall took up her Acting Charge Nurse position. A new position of Clinical Services Manager had been created to replace the two roles and the recruitment process had begun, but these changes did not directly impact on Mrs McDowall's permanent position as a registered nurse.

[8] Because of the absence of the Nurse Manager and the Charge Nurse, Hunt Healthcare's recently appointed Operations Manager, Ms Angela Crawford, decided to base herself at Huntleigh from 6 March. Mrs Crawford has a background of senior management within the aged care sector. She had also previously been the Deputy Chief Executive of 'Quality Health in New Zealand' and was involved in reviewing aged care policies and legal requirements throughout New Zealand.

[9] Mrs McDowall felt under pressure in taking on the new role due to the changes that had occurred in the restructure, such as the loss of the previous Nurse Manager. She decided to resign within a week of Ms Crawford starting to work from Huntleigh. Ms Crawford prevailed on Mrs McDowall not to do so, and she withdrew her resignation.

[10] Mrs McDowall claims that she had been told by the previous Nurse Manager that she was perceived as too outspoken and would have her employment terminated, but only after the Charge Nurse returned from sick leave. Mrs McDowall chose not to call the previous Nurse Manager to give evidence and there was no evidence other than her own claims to support the claim. On the other hand, given that the Charge Nurse was expected back within a month, and Mrs McDowall's employment agreement required her to give one month's notice, I do not accept that if this claim were true that Ms Crawford would have tried (successfully) to dissuade Mrs McDowall from resigning.

[11] Ms Crawford also offered to ensure that further staff were made available to Mrs McDowall at Huntleigh. In fact I accept that this occurred on a number of occasions. Given that the nursing support was likely to be by way of agency nurses, which Mrs McDowall understandably saw as less efficient than "permanent" staff, she declined. While it is understandable that "permanent" staff are preferable to agency nurses, particularly because of the extra supervision required, I prefer Ms Crawford's assessment that any extra professional staff could only have been of net positive value to Mrs McDowall and Huntleigh.

[12] Mrs McDowall also claimed being over worked. Certainly she worked greater hours than she had been working previously to taking on the Acting Charge Nurse position and this involved

average working hours of 45 hours per week. While that constitutes a great increase on Mrs McDowall's usual part time hours, and she no doubt had many family responsibilities, such a level of working time can not constitute over work. I therefore do not accept that Mrs McDowall was over-stressed and exhausted as a result of unfair treatment by Huntleigh during the periods relevant to this investigation.

[13] Around the same time as the notice of resignation, Ms Crawford became aware of a mistake by Mrs McDowall in authorising the giving of a codeine phosphate tablet to a resident who was having bowel trouble. Such treatment in fact required, by law, prescription by a medical practitioner. This showed a lack of understanding by Mrs McDowall of the scope of her practice and it could have had serious implications for the resident and for Huntleigh had something gone wrong. In actuality, however, the nurse to whom the order was given declined to act on it and instead complained to Ms Crawford.

[14] While Ms Crawford made much of this basic error in her evidence, the fact was that she chose not to deal with it in a disciplinary context. Instead, she decided to counsel Mrs McDowall about her error and tell her of the dangers of prescribing medication when she had no authority whatsoever to do so. Ms Crawford also arranged a training meeting of all nursing staff to tell them how they should comply with legal requirements and Huntleigh's policies before and when dispensing medication.

[15] On 17 March Mrs McDowall was away on sick leave. Ms Crawford arranged for Ms Kathy Gilbert, the Clinical Nurse Manager at Hadleigh Hospital and Retirement Home (Huntleigh's sister home) to cover for her. Ms Gilbert discovered a number of issues about the operation of Huntleigh during the course of that day. She first discovered that a diabetic patient, Ms T, did not have a drug chart prescribed by a medical practitioner for insulin, which is required before it can be dispensed. Insulin had been dispensed incorrectly from the time that Ms T had been transferred from another of Hunt Healthcare's homes. Ms Gilbert contacted Ms Crawford about this and she in turn contacted Mrs McDowall. Mrs McDowall told her that she and other nurses had used the drug chart from the previous home. By law, however, nurses can only administer medication from drug charts prepared by the patient's admitting doctor, in this case a Dr Chan Dassanayake. During this period Mrs McDowall had contacted Dr Dassanayake about other medication required for Ms T on two occasions, but she did not draw the issue of the lack of a chart for insulin treatment to his attention. Mrs McDowall did not understand that it was not appropriate to use an insulin sliding chart that was not prescribed by the resident's current doctor and was charted on another institution's chart. She

therefore did not appear to have a clear understanding of the legislative requirements in her scope of practice in relation to medication administration, a finding later made by the Nursing Council.

[16] Ms Crawford then contacted Dr Dassanayake. Dr Dassanayake, in an affidavit not received by the Authority until around five months after the Authority's investigation meeting, stated that he believed that he would have written up a drug chart on admission, as that is his normal practice. He stated that he found Ms Crawford's request for an insulin chart a strange request – *as I was sure that there was already a chart in operation for the patient.*

[17] Furthermore, on that same day that Dr Dassanayake came to Huntleigh to rewrite the chart his notes state –

> *Several incidents have occurred including incorrect insulin doses given and several hypoglycaemic events.*

Dr Dassanayake then noted that he had informed Huntleigh of the errors and had *rewritten drug chart*. This shows that even at that time he believed that he had previously written out the drug chart.

[18] I accept this evidence over Mrs McDowall's view that no drug chart was ever completed for Ms T because no drug chart was with the patient. While it is possible that an experienced medical professional may have overlooked writing up something as fundamental as a patient's insulin chart, this is less likely than not, I conclude.

[19] Ms Gilbert also discovered on 17 March that another resident, a Mrs H, had incomplete admission records, including, again, no drug chart.

[20] Ms Crawford was very concerned about these issues, which she investigated further, as was standard practice. In the case of Mrs H, a respite care resident, she found that another nurse had admitted her. In Ms Crawford's opinion, while it was the responsibility of the nurse to complete the admission forms and procedures, it was Mrs McDowall's role as Acting Charge Nurse to ensure that the respite care medication forms had been completed and that the medical practitioner's and the patient's consent for treatment had been obtained. Given her ongoing concerns about these issues Ms Crawford decided to deal with them in a disciplinary context and wrote to Mrs McDowall on 20 March accordingly.

[21] This letter noted the two issues of concern and that Ms Crawford had not been alerted about them, as well as the codeine phosphate issue and the follow-up training that had occurred. Mrs

McDowall was told that the matter was very serious, that disciplinary action may be taken and she was encouraged to bring a support person or representative.

[22] The meeting was held on 23 March. Mrs McDowall gave a number of explanations, including that she did not consider that it was her responsibility to check on admissions completed by other nurses and that a number of other nurses, not including herself, had treated Mrs H in the absence of proper paperwork. In relation to Ms T, Mrs McDowall stated that the doctor had referred to a sliding scale and she had used the only sliding scale available, not realising that that sliding scale could not be utilised because it was completed at Ms T's previous home. She also noted that all the other nurses did the same thing.

[23] I accept Ms Gilbert's evidence that she did no more than acknowledge Mrs McDowall's question as to whether she had answered the questions at the meeting fully and properly – not that she agreed with Mrs McDowall, as now claimed. This is particularly so as Ms Gilbert remains concerned about Mrs McDowall's lack of awareness that nurses have to get authority from doctors before administering medication.

[24] Ms Crawford responded by letter the next day, noting that the other nursing staff had been with Huntleigh for a relatively short period of time and that she had been told by Dr Dassanayake that he believed he had left a signed medication drug chart. Ms Crawford also noted that she was concerned about Mrs McDowall's failure to keep up with current nursing practice, particularly the implementation of medication to patients, did not show a proper sense of urgency about behaviour that was illegal and unsafe, and that Mrs McDowall took no personal responsibility, but appeared to blame others for any problems.

[25] Mrs McDowall was suspended and another meeting was arranged for 31 March. It was attended by Mrs McDowall, her husband, Ms Crawford and the Charge Nurse at Huntleigh. I accept that although this was a tense meeting, none of those in attendance behaved in a way that denied the other a full opportunity to put their point of view. Any frustration that was exhibited was because the opinions of Mrs McDowall and Ms Crawford were simply not accepted by the other.

[26] The key points in Mrs McDowall's defence were that Huntleigh had never had a diabetic patient before and that all the staff, including her, needed training in how to handle them. She then claimed that Dr Dassanayake had not written up a separate chart for Ms T and that they did not know any better about how to handle the situation when it was not available, because they had not had sufficient training. Mrs McDowall referred to the work pressure she was under. She requested Ms Crawford to ring Dr Dassanayake to confirm that he had not done the insulin chart, which was

agreed to. Mrs McDowall also wanted to see any records of interviews done with other witnesses and an opportunity to question them before any decision was made. Mrs McDowall also made the point that all the staff had not followed the procedures, and her husband commented that his wife was being unfairly singled out accordingly. Ms Crawford replied that all relevant staff were being followed up, but that Mrs McDowall was the senior nurse and needed to provide leadership and that there had been previous incidents.

[27] Ms Crawford rang Ms Gilbert to get confirmation of some of the points discussed. It appears that it was never specifically agreed at the end of the meeting, i.e. before it was adjourned, that she would ring Dr Dassanayake (although it had been earlier in the meeting). I accept that she did not because there is no reference to it in what are very full minutes.

[28] At 3pm the meeting reconvened for the purposes of Ms Crawford giving a preliminary assessment and conclusions, and to give Mrs McDowall an opportunity to comment. Ms Crawford noted that in her assessment Mrs McDowall had administered medications, which had not been authorised by the resident's GP, despite having been in contact with him on at least two occasions throughout that period. She considered this to be reckless and dangerous behaviour and that Mrs McDowall had not personally acknowledged any wrongdoing. She then stated that she therefore had no confidence in her professional conduct for the future and that Mrs McDowall should be summarily dismissed.

[29] The key to Mrs McDowall's response was that others had also made mistakes, that she had assumed that the doctor's reference to sliding scale referred to the previous doctor's chart, and that she wanted to question all the witnesses involved. Ms Crawford called another adjournment for approximately one hour, at the end of which she informed Mrs McDowall that her opinions had not changed and that summary dismissal would be effected immediately.

[30] Ms Crawford subsequently wrote to the Nursing Council, raising with them the issues that led to Mrs McDowall's dismissal, plus the previous issue about the codeine phosphate. The Competence Review Panel determined that Mrs McDowall did not meet the required standards of competence for a registered nurse, but did not pose a risk of serious harm to the public. The Council therefore recommended that Mrs McDowall undertake a competence assessment programme, including a course of instruction in physical health assessment (which must include clinical placements) before June 2007, and that then she should undertake a competence assessment against the competencies for registered nurses' scope of practice. She was also required to advise the Nursing Council if she took up employment. Mrs McDowall chose not to seek employment

again as a nurse and did not therefore go through the competence assessment programme and assessment.

[31] The Panel's investigation found that

> *Marlene did not have a clear understanding of the legal requirements for prescription and administration of medicine. She admitted that she did not understand that it was not appropriate to use an insulin sliding scale that was not prescribed by the resident's current doctor and was charted on another institution's chart. She also lacked understanding of the scope of practice in relation to the "verbal order" for codeine phosphate and the legality of having this prescribed by a medical practitioner. When questioned she did not know what the Health Practitioners' Competence Assurance Act was.*
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> *… On questioning Marlene was not able to satisfy the Panel that she had a clear understanding of the legislative requirements and the scope of practice in relation to medication administration …*
>
> *The Panel found that Marlene failed to undertake a assessment in an organised and systematic way. She had a lack of research awareness…*
>
> *The Panel identified that Marlene's documentation would be impacted on by her lack of systematic assessment skills and a lack of knowledge of the legalities impacting on nursing …*
>
> *The Panel were concerned at Marlene's lack of self responsibility, the lack of insight and to her lack of current knowledge of nursing practice. Her training record indicated that she attended short courses – 30 minutes to a few hours in duration that were required by her place of work, but did not indicate if there had been any impact on her practice. …*

[32] Mrs McDowall did not in fact seek work for six or seven months after her dismissal and then in another field.

[33] This matter has been unable to be resolved through mediation and attempts by the parties to resolve the matter on their own terms. It therefore falls to the Authority to make a determination.

Determination

[34] Concerns about the issues relating to Mrs H were not particularly important compared to those relating to Ms T. I so conclude from the focus of the second meeting in particular and Ms Crawford's evidence on this question. I also therefore accept that the decision to dismiss was principally based on Mrs McDowall's treatment of Ms T's situation, which followed the suggested prescription of codeine phosphate and the further training about administering medications.

[35] The Nursing Council report makes it clear that Mrs McDowall's practice, particularly in prescribing medications without proper authority, did not meet the required standards of

competence for a registered nurse. The use of a previous chart was a serious mistake with potentially fatal consequences. It was open to Mr Crawford to fairly conclude that even if this was an error by Dr Dassanayake in the first place, Mrs McDowall was seriously remiss in her duties as a registered nurse in failing to query the matter. This is especially so given her admitted failure on the codeine phosphate incident and the training session that had followed it. This was a serious failure in terms of Mrs McDowall's role as a registered nurse, who was required to maintain the legal requirements of her position, keep up to date with contemporary nursing practice, and adhere to the Nursing Council's code of conduct for nurses and midwives. Principle 2 of the Code requires nurses to act ethically and maintain standards of practice. In particular, nurses are accountable for practising safely within their scope of practice. Examples of behaviour that could be considered professional misconduct include –

- Lack of expected professional knowledge and judgement;
- Lack of skill and delivery of professional nursing practice; and
- Failure to comply with legislative requirements.

[36] Mrs Crawford was entitled to conclude, as the Nursing Council did later, that the problems raised showed that Mrs McDowall did not meet the required standards of competence for a registered nurse. Given the responsibility of Huntleigh to ensure that the nursing staff it employs are competent, it follows that dismissal was an option reasonably open to it. In this context it must be remembered that the consequences for Mrs H and Ms T after them being not given properly authorised medication could have been very serious, particularly as Ms T was an unstable diabetic. Despite all of Mrs McDowall's good qualities, such as her excellent rapport with patients, her volunteering to help Huntleigh out by taking on a supervisory role and her hard working nature, together with the fact that she never did anything knowingly wrong, these defects were so serious that it was open to Huntleigh not to overlook them, but to conclude serious misconduct warranting summary dismissal had occurred. A fair and reasonable employer would therefore have had good cause to dismiss Mrs McDowall.

[37] In terms of the process adopted by Huntleigh, there are no serious questions as to its handling of the matter, except its failure to contact Dr Dassanayake. I do not accept that this had any serious impact on the decision because the decision was justifiable even if Dr Dassanayake had made the initial mistake. The responsibility still lay on the Huntleigh nurses and Mrs McDowall in particular (as the senior nurse) to notice the absence of a chart, and to contact Dr Dassanayake accordingly. It was a major error that Mrs McDowall must take primary responsibility for because

she assumed, which is always very risky in the medical area, that the reference to a sliding chart was to a previous sliding chart, which demonstrated a major problem in Mrs McDowall's practice as highlighted above, as her subsequent actions were contrary to the laws applying to the dispensing of medicines.

[38] The final issue that remains is the issue of disparity of treatment. I conclude that Mrs McDowall was treated in a disparate manner to other nurses. None were formally disciplined or referred to the Nursing Council, although they were spoken to and given further training. The reasons for this disparity are, however, justifiable. First, two of those four nurses were about to leave, or already had left, Huntleigh's employment. Second, those that gave the wrong medications unlawfully to Ms T were acting on Mrs McDowall's instructions and Mrs McDowall was the acknowledged Acting Charge Nurse at that time. Third, one of the nurses was still within her three month induction period. Fourth, all apologised and agreed to further training. It therefore follows that Huntleigh was entitled to treat Mrs McDowall differently as a more experienced, senior nurse in a position of responsibility, although it is still somewhat surprising that no other nurse was subjected to a formal warning in all the circumstances. Furthermore, for all the above reasons, Mrs McDowall's errors were so serious as to justify dismissal in any event, despite the disparity of treatment (*IRD v Buchanan & Symes (CA)* [2005] ERNZ 767 applied). I therefore dismiss Mrs McDowall's claims.

Costs

[39] Costs are reserved.

G J Wood
Member of the Employment Relations Authority