

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

[2015] NZERA Auckland 383
5533215

BETWEEN EMMA CAMPBELL
 Applicant

A N D HOLISTIC VETS LIMITED
 Respondent

Member of Authority: Eleanor Robinson

Representatives: Rita Nabney, for the Applicant
 Liza Schneider, Representing the Respondent

Investigation Meeting: 2 and 3 December 2015 at Tauranga

Submissions Received: 3 December 2015 on behalf of the Applicant and Respondent

Date of Determination: 7 December 2015

DETERMINATION OF THE AUTHORITY

Employment relationship problem

[1] The Applicant, Ms Emma Campbell, claims that she was unjustifiably dismissed from her employment with the Respondent, Holistic Vets Limited (HVL) on 5 November 2014 for serious misconduct.

[2] Ms Campbell also claims that the dismissal was unjustifiable on the basis of disparity of treatment in that another employee carried out similar actions to herself and was not dismissed.

[3] Ms Campbell further claims that HVL breached its good faith duties in that it did not deal with her in good faith pursuant to s.4(4)(e) of the Employment Relations Act 2000 (the Act).

[4] HVL denies that Ms Campbell was unjustifiably dismissed and says that she was justifiably dismissed from her employment following a full and fair disciplinary investigation. HVL further claims that it did not act in breach of its duty of good faith pursuant to s.4(4)(e) of the Act.

Issues

[5] The issues for determination are whether or not:

- Ms Campbell was unjustifiably dismissed by HVL
- There was disparity of treatment
- HVL breached the statutory duty of good faith towards Ms Campbell

Background facts

[6] HVL is a veterinary practice based in Tauranga which combines conventional veterinary medicine and surgery with alternative therapies. It was established in 2003 by Dr Liza Schneider, Veterinarian Director and major shareholder of HVL, and it currently employs approximately five employees.

[7] A veterinarian (vet) may order prescription medication, including human prescription medication, for use on animals; however it is unlawful to order human prescription medication for use on humans through a veterinary practice. This is set out in the Veterinary Council of New Zealand's (VCNZ) Code of Professional Conduct at clause 11 which states:

Veterinarians must not use, recommend or authorise the use of veterinarian medicines, prescription medicines, pharmacy-only medicines or restricted medicines (as defined in the Medicines Act 1981) for use on human.

[8] When ordering prescription medicine for use on animals new to the practice, a vet's authorisation is required.

[9] Ms Campbell commenced employment with HVL in July 2009 and was initially employed as a Veterinary Nurse (vet nurse). In 2012 she was appointed as the Senior Veterinary Nurse which was the position she held at the time of the termination of her employment. Ms Campbell's responsibilities included administration tasks and she was the main staff member responsible for drug ordering.

[10] An individual employment agreement (the Employment Agreement) was provided to Ms Campbell and signed by her and the then HVL practice manager in July 2009. The Employment Agreement stated under clause 4.2 entitled "*Obligations of the Employee*" the following:

The employee shall:

- (v) *Deal with us at all times openly and in good faith;*
- (vii) *Honestly, diligently and professionally carry out the responsibilities of your role and any related responsibilities;*
- (ix) *Act in a way that promotes and protects our business, reputation and relationships;*
- (xii) *Comply with all reasonable requests and directions;*
- (xiii) *Comply with our policies and procedures which may be amended from time to time.*

[11] At clause 14.3 entitled ‘*Serious Misconduct*’ the Employment Agreement stated:

We may dismiss you without notice if you commit any act of serious misconduct, which includes (but is not necessarily limited to):

- (a) *Dishonesty or theft;*
- (b) *Refusing or repeatedly failing to comply with our reasonable and lawful requests, directions, policies or procedures.*

[12] During their employment HVL employees are entitled to purchase products at cost price from suppliers used by HVL as part of the staff privileges. The products purchased include toiletries, cosmetics and over-the-counter medical items.

Policies and procedures

[13] There are no written policies and procedures regarding the purchase of prescription medication, however Ms Schneider stated that there are oral policies which are communicated to, and well-known by, the employees. The policies include the fact that the purchasing of prescription medication without authorisation and/or for human use was strictly prohibited. Ms Schneider said that these policies are taught as part of a vet nurses’ training, and are applicable in all veterinary practices.

[14] Ms Karen Watts, a qualified vet nurse who commenced employment at HVL in 2012, said that it was the policy, and she understood, that the purchase and use of prescription medicine for humans at HVL was not allowed and had never been allowed. Ms Watts confirmed that this was also the policy at her previous employment at another veterinary practice and that she had also been advised of the prohibition as part of her vet nurse training.

[15] Ms Watts said that she was aware that the implication of ordering prescription medication would mean that the VCNZ would remove a vet from the VCNZ register (would be “*stuck off*”) and not permitted to practice.

[16] Ms Kerri Sawyer, Receptionist at HVL, said that she had been trained, although had not qualified, as a vet nurse. As a result of this training, she had gained enough knowledge of all aspects of vet nursing to be able to seek employment in a veterinary practice.

[17] Ms Sawyer said that included in her vet nurse training had been a section about ethics and regulations in the veterinary industry as a result of which she understood that the purchase and use of prescription medicine for human use was not permitted, and the purchase and use of prescription medicine for animals ought to be authorised by a vet.

[18] She confirmed that HVL had policies and procedures regarding both the prohibition against the ordering of prescription medication for human use, and the purchasing and removal of products from its premises. She had learned about this in her induction when she joined HVL.

[19] Ms Sue Mackey, Practice Manager, said that due to her training as a vet nurse she knew it was illegal to order human prescription medicine without authorisation in a veterinary clinic and it was illegal to make personal use of human prescription medicine without a prescription from a doctor. She confirmed that was the policy at HVL.

[20] Ms Mackey also confirmed that she had a conversation with Ms Campbell in approximately February 2014 about the policy in which it was discussed that it was illegal to order human prescription medicines through the veterinary practice and Ms Campbell had confirmed that she understood this.

[21] Ms Sawyer explained that the policies at HVL included:

- (a) When purchasing food and other retail products, the products were to be charged to the employee's staff account on the Vetlink computer system by another employee and the products were not to be removed from the premises before that procedure had been completed;
- (b) Prescription medicines (whether human or animal) were for animal use only, i.e. not for an employee's personal use. Therefore the purchase of prescription medicines for an employee's animal(s) must be approved by the vet before they were charged to the employee's account and ideally should be charged by the vet.

[22] Further to this, the ordering of prescription medicines not previously used by HVL must only be ordered with the approval of a vet.

[23] Dr Schneider, said that on or about 2012 Ms Campbell had suggested to her that HVL would benefit from ordering some supplies from Pharmacy Wholesale Limited (PWL) since it had some medications and products that HVL was unable to source from its main veterinary supplier. In addition some of the products were less expensive than those from the main veterinary supplier. Acting upon this suggestion Dr Schneider said an account was set up to order from PWL.

[24] Ms Sawyer explained that Ms Campbell was responsible for the bulk of ordering for HVL and when she had placed the order at PWL prior to her termination of employment, she (Ms Campbell) reminded her, as she had done several times before, that if PWL rang to query anything on the order, she was to say that it was all for use in HVL, i.e. with animals. Ms Sawyer said orders from PWL often arrived on the same day they ordered if Ms Campbell did not go and pick them up herself which she did in about 50% of the cases.

26 October 2014

[25] Dr Schneider said she arrived at work on 26 October 2014 to find that Ms Sawyer had unpacked an order from PWL that had been placed by Ms Campbell the previous day. She said she examined the contents as she occasionally did and found that the box contained a prescription drug for human use: *Imovane*. She said she had been concerned that this was a human prescription medication which was never used for animals and she had not authorised this order. Her conclusion was that the item was either mistakenly packed by PWL or an employee had ordered the drug without authorisation.

[26] She asked Ms Sawyer if she knew anything about the *Imovane* and Ms Sawyer denied any knowledge except that Ms Campbell had placed the order. Dr Schneider explained her concern to Ms Mackey and asked her to investigate further.

[27] Ms Mackey said that from the middle of October 2014, she had become aware that Ms Campbell had taken products off the business premises without having entered them into her account and she was observing her closely to see when they would be entered.

[28] When Dr Schneider approached her and asked her to investigate the *Imovane* order, Ms Mackey had kept the *Imovane* box with her and questioned Ms Sawyer and Ms Watts to see if they had any information about it. They had both indicated that they had no knowledge of why *Imovane* was included in the PWL order.

[29] Ms Sawyer said when Ms Campbell arrived at work a little later, she had seen the box on the reception desk already partially unpacked, examined the contents, and asked about the

contents of the PWL order as she said something was missing and asked her if she knew where it was. At that point Ms Sawyer had referred Ms Campbell to Ms Mackey.

[30] Ms Sawyer said a short while later Ms Campbell had spoken to her. She had been holding the PWL product guide, and proceeded to tell and show her that she had ordered the *Imovane* incorrectly and that she ought to have ordered *Imodium*, a non-prescription medication..

[31] Ms Mackey said she had questioned Ms Campbell about the *Imovane*, and she immediately replied that she must have ordered it incorrectly and meant to order *Imodium*. Ms Mackey said she decided to investigate further as Ms Campbell's behaviour in answering had led her to suspect she was being dishonest.

[32] Ms Mackey said she had looked through the HVL files for all previous PWL invoices and found that two were missing. As a result she and Dr Schneider had subsequently obtained a sales history from PWL and the two missing invoices had the drug *Imovane* listed on them. She and Dr Schneider also looked through staff purchase histories and *Imodium* and *Imovane* had never been listed on Ms Campbell's staff account although *Zopiclone*, which has the same active ingredient as *Imovane*, was listed on Ms Campbell's account in May 2010.

[33] Also listed on Ms Campbell's account were purchases of *Voltaren 75* and *Brufen 400*, both prescription medications for human which would have been ordered and purchased by Ms Campbell without authorisation.

[34] Ms Mackey said that *Imovane* and other human prescription medications of concern were not listed on any other employee's account. However Ms Watts had two purchases of *Brufen* on her account. These had been entered into the Vetlink system as *Brufen 30*, an over-the-counter strength medication which was not of concern.

[35] Ms Watts said she had never ordered stock from PWL. On the two occasions that she had ordered *Brufen* she was under the impression that employees were allowed it. She had checked with Ms Campbell if it was permissible to have it and Ms Campbell had informed her that it was, and that she had purchased *Brufen* for herself frequently.

[36] Ms Watts said that as Ms Campbell was a senior veterinary nurse, she had not questioned her assurance. When questioned by Ms Mackey in October 2014, she had been shocked to realise that the *Brufen* which Ms Campbell had ordered for her had been of prescription only strength, and had immediately given the unopened box to Ms Mackey.

[37] Ms Mackey said that as part of her investigation she had interviewed all the employees and Ms Sawyer had told her that she had seen Ms Campbell taking cat food from business premises without listing it in her account.

[38] Both Ms Sawyer and Ms Watts had confirmed that they knew HVL's policy regarding the ordering of human prescription medication, that it was not allowed as being against HVL policy and contrary to what they had learned during their training as veterinary nurses.

[39] Dr Schneider said she and Ms Mackey had been concerned about what they had discovered and before taking any action, they had sought the advice of an employment lawyer who had guided them through the process to ensure they conducted a disciplinary investigation meeting with Ms Campbell that was thorough and fair.

Meeting on 29 October 2014

[40] On 29 October 2014, Ms Campbell said she had been approached by Dr Schneider who had asked to see her in her office with Ms Mackey. During the meeting, Dr Schneider explained to Ms Campbell that she had concerns regarding the purchases of human prescription pharmaceuticals by Ms Campbell, and also that it appeared Ms Campbell had ordered other products and not put them on her staff account or paid for them.

[41] Dr Schneider had provided her with a letter which set out the allegations. The allegations were that she had:

1. *Ordered prescription drugs (Imovane and Voltaren) without authority. In doing so, you have breached clause 4.2(v), (vi), (ix), (xii) and (xiii), and clause 14.3(a) and (b) of your employment agreement and our policies and procedures on drug purchases;*
2. *Taken home those prescription drugs without authority. In doing so you have breached 4.2(v), (vi), (ix), (xii) and (xiii), and clause 14.3(a) and (b) of your employment agreement and our policies and procedures on drug purchases;*
3. *Made personal purchases of pharmaceuticals (including drugs) without recording them under your staff purchases in our Vetlink software system. In doing so you have breached 4.2(v), (vi), (ix), (xii) and (xiii), and clause 14.3(a) and (b) of your employment agreement and our policies and procedures on drug purchases.*
4. *Taken for your personal use pharmaceuticals (including drugs) from our premises without paying for them. In doing so you have breached 4.2(v), (vi), (ix), (xii) and (xiii), and clause 14.3(a) and (b) of your employment agreement and our policies and procedures on drug purchases.*

5. *Conducted yourself in a way that has seriously undermined the trust and confidence essential to the continuation of the employment relationship.*

[42] The letter also advised:

Disciplinary Investigation Meeting

We require you to attend a meeting at our offices on Monday 3 November 2014 at 5pm. The purpose of the meeting is to hear your responses to the allegations above and any explanations you may wish to make. We will then consider your responses and decide whether the alleged serious misconduct has been upheld or not. We may adjourn the disciplinary investigation meeting while we consider your responses.

Because of the seriousness of the allegations you are encouraged to bring a representative or support person to this meeting and if this time is unsuitable for them they are requested to contact either of us directly to reschedule.

If after hearing your responses and considering all of the circumstances we find all or some of the allegations upheld we will then consider what, if any, disciplinary outcome should be imposed. This could range from an employment warning to summary dismissal from your employment. Before we confirm any disciplinary consequence proposed, we will provide an opportunity for you to comment on it.

[43] Attached to the letter of 29 October 2014 were the two missing invoices which had been obtained from PWL and two statements from Ms Sawyer and Ms Mackey, both of which had been signed by them. The statement by Ms Sawyer stated:

I am making this statement in relation to an employment investigation concerning irregularities in product purchases by Emma Campbell and accounting for those purchases.

On 1 October 2014 a full tray of GO! chicken, turkey and duck cat food was ordered from Healthy Pet Foods and arrived on 2 October 2014.

I can confirm that this food was taken off Holistic Vet's premises by Emma Campbell and that the items do not appear to be accounted for on Emma's account. I understand that this statement will be used in a disciplinary investigation and the importance of making an accurate and statement.

[44] The statement by Ms Mackey stated:

I am making this statement in relation to an employment investigation concerning irregularities in product purchases by Emma Campbell and accounting for those purchases.

On 17 October 2014 Brufen tablets were ordered from SVS Veterinary Suppliers as requested by Emma Campbell. These arrived the following week and I saw her take these off our business premises.

I have checked staff purchases and cannot identify that this has been accounted for on Emma's staff account. I understand that this statement will be used in a disciplinary investigation and the importance of making an accurate and truthful statement.

Ms Mackey had signed the statement.

[45] Ms Campbell said she had been totally shocked by the two statements that had been handed to her with the letter as she found them to be untruthful and it appeared to her that there had been coercion in respect of these statements as they appeared to have been written by somebody else and Ms Sawyer and Ms Mackey asked to sign them. At the Investigation Meeting Ms Sawyer and Ms Mackey said when questioned that they had written the statements freely and without coercion.

[46] Ms Campbell said that she also been concerned to read that she was alleged to have ordered cat food and not put it on her account or paid for it. She had immediately approached Ms Mackey after the meeting and explained that she had asked Ms Sawyer to order the cat food for her and to put it on her staff account when it came in. Ms Campbell said it had been custom and practice at HVL that if a staff member ordered product from any supplier they could ask another employee to put it on their staff account in the Vetlink system.

[47] Ms Campbell also said it had been custom and practice during the period of her employment with HVL that she and other employees could order prescription medicine, animal products and personal hygiene products from various suppliers. Her understanding was that it was not acceptable to order controlled prescription medications only.

[48] However evidence was provided by HVL that established that in 2007, Ms Campbell had made a complaint about her previous employer to the VCNZ. During that process she had sworn an affidavit on 5 October 2007 in which she confirmed that under the VCNZs Code of Professional Conduct, she understood that the ordering of prescription-only medicines for human use through a veterinarian practice was not allowed by law.

[49] In response to the statement from Ms Mackey which said that she had ordered *Brufen* and that Ms Mackey had seen her leaving the premises without paying for it, she explained it had been put on her account the following day when she entered the invoices.

[50] Ms Mackey said on the evening of 29 October 2014 Ms Campbell had called her to explain that she was feeling stressed about the letter she had received and the allegations it contained. She explained that she had wanted to resolve the situation as quickly as possible

and asked if the meeting scheduled for 3 November 2014 could be brought forward and held the next day.

Meeting of 30 October 2014

[51] Dr Schneider and Ms Mackey agreed to Ms Campbell's request. Dr Schneider said she had commenced the meeting on 30 October 2014 by explaining that it was a disciplinary investigation meeting and that she had some prepared points to discuss, a copy of which Ms Campbell could look at while she (Dr Schneider) made notes throughout the meeting.

[52] Dr Schneider said Ms Campbell chose not to have a representative or support person present at the meeting and when she had questioned Ms Campbell about this, she had said that the only person she might consider having as her support person was her husband, Mr Andrew Campbell, however she did not want him involved at that stage.

[53] Ms Mackey said that they had been concerned that Ms Campbell wished to proceed without a support person and encouraged her to reconsider given the serious nature of the meeting. However, Ms Campbell had insisted that the meeting proceeded.

[54] Dr Schneider said that during the meeting she and Ms Mackey had asked Ms Campbell for her responses to the allegations and had gone through a series of questions to gather the facts relating to the allegations listed in the letter and explained the seriousness of the allegations, and the potential implications as well as the importance of collecting accurate information.

[55] Dr Schneider said that during the meeting Ms Campbell admitted that she knew she had done the wrong thing by ordering prescription drugs, taking them home for personal use and not putting product on her account or paying for them. She had said that none of the actions had been intentional or malicious and that she did not mean to compromise HVL's business.

[56] Ms Campbell explained that the products that had been taken off HVL premises without being listed on her account were because she had forgotten to put them on it or had just been too busy to put them in the account.

[57] Dr Schneider said in order to ensure that it was clearly understood what had been discussed at the meeting, she drafted a summary of the discussion in conjunction with Ms Mackey and presented it to Ms Campbell that afternoon. They had encouraged Ms Campbell to read through it carefully to ensure that she agreed with the points listed as being correct and true and to take it home and consider the content overnight.

[58] Ms Campbell said she had not appreciated that the meeting on 30 October 2014 had been a disciplinary investigation meeting and that her intention had been to have a chat with Dr Schneider to try and resolve things. She said she had been unaware that it was a disciplinary meeting and that she was electing not to bring a support person or representative to it. Ms Campbell said that she had been presented with a piece of paper containing notes of the meeting by Dr Schneider and she had refused to sign this.

[59] Dr Schneider said that on the morning of 31 October 2014, Ms Campbell advised that she wanted Mr Campbell to be involved in any further discussion. In order to accommodate this request, she and Ms Mackey agreed to recommence the investigation meeting on Monday, 3 November 2014 as had been originally planned.

3 November 2014

[60] On the morning of 3 November 2014, Dr Schneider said she received an email from Mr Campbell advising that he was arranging a meeting for Ms Campbell with an employment advocate, Mr Dave Vinnicombe, and that the meeting scheduled for that day was no longer required. When Ms Campbell arrived at work, she confirmed that that was correct, and on that basis it was agreed to wait for her employment advocate before proceeding.

Meeting on 4 November 2014

[61] On the morning of 4 November 2014, Dr Schneider received an email from Ms Campbell advising that Mr Vinnicombe, her representative, had been sent all relevant information and would contact her as soon as possible.

[62] On the afternoon of 4 November 2014, Ms Campbell presented Dr Schneider with a letter which she had signed with her representation of the information needed for the disciplinary investigation. Ms Campbell advised that this was all that she wished to contribute to the investigation and that she did not want or require Mr Campbell as a support person and that Mr Vinnicombe was unavailable for a meeting.

[63] Dr Schneider said upon reading the letter from Ms Campbell, she and Ms Mackey had noticed several inconsistencies with the responses that had been communicated to them by Ms Campbell at the meeting on 30 October 2014 and they therefore reconvened a further meeting with Ms Campbell to discuss them that day.

[64] Dr Schneider said Ms Campbell had been asked if she wanted to have a support person or representative present at the meeting, and had offered to reconvene the meeting to another date, however Ms Campbell had explained that she did not want Mr Campbell to be there, and Mr Vinnicombe was unavailable, and the meeting had proceeded..

[65] Mr Campbell said that he had understood that Mr Vinnicombe was to be joining the meeting by telephone and that he (Mr Vinnicombe) had emailed Dr Schneider to advise her of that. Dr Schneider said that she had not received an email from Mr Vinnicombe, and that Ms Campbell had not told her that Mr Vinnicombe would be joining the meeting by telephone, nor had Ms Campbell done so.

[66] At the meeting on the afternoon of 4 November 2014, the parties had addressed each point and corrected some information based on Ms Campbell's further responses. To ensure that all parties were in agreement of the facts, they had offered a copy of the amended meeting notes draft to Ms Campbell and suggested that she take it away and check it before she signed it. However Ms Campbell was adamant that the discussion was sufficient, and they had all signed the agreed statement.

[67] The agreed statement signed by the parties on 4 November 2014 stated:

Emma's general comments

- *Would like to resolve things as quickly as possible, loves her job and doesn't want to lose it.*
- *Considers herself trustworthy.*
- *Admits she has done the wrong thing by ordering prescription drugs and not putting some of them on her account or paying for them.*
- *None of these actions have been intentional or malicious and she didn't mean to compromise the business in any way.*
- *Products had been taken off business premises without being listed on her account are because she has forgotten to put them onto her account or has just been too busy to put them onto her account.*

Specific questions asked and answered by Emma

- *Are you aware that Imovane, Voltaren 75 and Brufen 400 are prescription meds – yes.*
- *Do you understand the seriousness of the NZVC code and veterinarian obligations with regards to the ordering of prescription drugs for human use. As senior vet nurse you know that the ordering of prescription drugs and their use could result in disciplinary action – yes.*
- *Was Imovane intentionally ordered on Friday – no it was ordered in error. Upon noting this first thing on arrival at work, Emma questioned Kerri about it as she meant to order Imodium.*

- *Has Imodium been ordered before, from which supplier and when. Was it paid for – **no, it hasn't been ordered before.***
- *When Imovane arrived on the previous dates, where was the itemised invoice stored – **they were filed in the usual place where invoices are filed.***
- *Do you make personal use of Imovane and Voltaren 75 and Brufen 400 – **yes, only for me but occasionally Andrew may take some.***
- *To the best of your knowledge has anyone else placed orders from PWL in the last two years – **no, but in my absence orders may have been previously placed by Louby.***
- *Can you show that products taken have been paid for (Imovane, food, Brufen) – **no, all products would be listed on account and any payments made would be on the account. If they were not on my account then either I'd forgotten to enter them or I was too busy.***

I hereby agree that the above is a truthful and accurate presentation of the points discussed at the meeting.

[68] At the conclusion of the meeting, Dr Schneider said they had explained to Ms Campbell that the disciplinary investigation meeting was concluded and indicated to her that the next step would be a meeting to advise of the outcome which could mean a finding of serious misconduct and lead to disciplinary measures or the termination of her employment.

[69] It was advised that the meeting would take place the next day on 5 November 2014 and Ms Campbell was invited to bring a support person or representative to the meeting.

[70] Ms Campbell then indicated that the person she would like as a support person was Ms Watts. Dr Schneider said she and Ms Mackey explained that it might not be appropriate as it would be a difficult position for Ms Watts to be in as there might be a conflict of interest, but agreed that she would be consulted.

Meeting of 5 November 2014

[71] In the morning of 5 November 2014, Dr Schneider said she spoke with Ms Watts and gave her the option of being a support person for Ms Campbell. However, Ms Watts told her that while she would have like to support Ms Campbell as her friend, being an HVL employee placed her in a difficult position with a conflict of interest and she therefore elected not to be present at the meeting.

[72] Ms Watts confirmed at the Investigation Meeting that she had declined to be Ms Campbell's support person as she had not been comfortable with the situation and did not

want to be involved. She confirmed it was her choice not to be Ms Campbell's support person and that she had not been pressurised in making the decision.

[73] Dr Schneider said she subsequently advised Ms Campbell that Ms Watts had declined to be her support person and invited her to bring someone else to the meeting. Ms Campbell declined the invitation and said that she wanted the process to be concluded..

[74] With the investigation process completed, Dr Schneider said she and Ms Mackey deliberated carefully on what would be a fair and appropriate outcome for Ms Campbell and the business. She had also consulted the NZVA to obtain advice on what action was appropriate.

[75] She and Ms Mackey had considered Ms Campbell's statement that she had forgotten or was too busy to charge products to her staff account. They had decided that on the balance of probabilities, Ms Campbell knew that the products needed to be put onto her account and they had not accepted her explanation that there was a valid reason for omitting to do so.

[76] Dr Schneider said she and Ms Mackey had concluded that:

- (a) *By her own admission Emma knew that ordering, purchasing and using human prescription medication through the vet clinic was not allowed, and that she had ordered prescription drugs (Imovane and Voltaren) without authority. In doing so she had breached her employment agreement and our policies and procedures on drug purchases.*
- (b) *By her own admission Emma had taken home those prescription drugs without authority. In doing so she breached her employment agreement, and our policies and procedures on drug purchases.*
- (c) *By admission Emma had taken for her personal use pharmaceuticals (including drugs) as well as other products from our premises without paying for them. In doing so she breached her employment agreement, and our policies and procedures on staff purchases.*
- (d) *Emma had conducted herself in a way that had seriously undermined the trust and confidence essential to the continuation of the employment relationship.*

After careful and full consideration of all the facts, it was clear that Emma's actions had irreparably damaged our trust and confidence. We concluded that given the extent of this, dismissal was the appropriate disciplinary outcome.

[77] On the afternoon of 5 November 2014, Dr Schneider and Ms Mackey met with Ms Campbell to deliver the findings of the investigation and the proposed disciplinary action. Dr Schneider said they had explained that after careful and full consideration of all the facts it

was proposed to terminate Ms Campbell's employment. They had then sought Ms Campbell's comment on the proposal; however she did not have one.

[78] Dr Schneider said that at that point the parties had entered into a confidential off-the-record and without prejudice discussion with Ms Campbell who had agreed to do so. However, the without prejudice discussions were unproductive and the meeting resumed.

[79] Upon resumption, Dr Schneider and Ms Mackey confirmed that Ms Campbell's employment was terminated immediately without notice under clause 14 of the Employment Agreement due to serious misconduct.

[80] The findings and outcome were recorded in a letter to Ms Campbell dated 6 November 2014. The letter commenced with the opening:

Further to our meeting to conclude the outcome of our disciplinary investigation, this letter serves to confirm that your employment at Holistic Vets has been terminated with immediate effect due to findings of serious misconduct on 5 November 2014.

[81] The allegations were set out in the letter as being those as previously set out in the letter dated 29 October 2014. Under the heading, *Presentation of findings*, the letter set out Dr Schneider's and Ms Mackey's conclusion that:

- 1. By your own admission you ordered prescription drugs (Immovane and Voltaren 75) without authority. In doing so you have breached clause 4.2(v), (vi), (ix), (xii) and (xiii), and clause 14.3(a) and (b) of your employment agreement and our policies and procedures on drug purchases.*
- 2. By your own admission you have taken home those prescription drugs without authority. In doing so you have breached 4.2(v), (vi), (ix), (xii) and (xiii), and clause 14.3(a) and (b) of your employment agreement and our policies and procedures on drug purchases;*
- 3. By your own admission you have taken for your personal use pharmaceuticals (including drugs) from our premises paying for them. In doing so you have breached 4.2(v), (vi), (ix), (xii) and (xiii), and clause 14.3(a) and (b) of your employment agreement and our policies and procedures on drug purchases. You stated that you had forgotten or were too busy to charge these to your staff account. We find that the balance of probabilities is that you knew that these products needed to be put onto your account and do not accept this as a valid reason for omitting to do so.*

In conclusion you have conducted yourself in a way that has seriously undermined the trust and confidence essential to the continuation of the employment relationship and a finding of serious misconduct has been paid. No viable alternative to dismissal was found after careful and full consideration of all of the facts and so we propose to terminate your employment. We then sought your comment on this

proposal but you had none. At that point we entered into a confidential, off the record and without prejudice discussion. The final outcome is that your employment was immediately terminated without notice under clause 14 of your employment agreement signed 16 July 2009 due to serious misconduct.

[82] Ms Campbell subsequently claimed that the dismissal was unjustifiable. Mediation took place on 19 February 2015 but was unsuccessful.

Determination

Was Ms Campbell unjustifiably dismissed by HVL?

[83] The decision to dismiss Ms Campbell on the basis of serious misconduct must be a justifiable decision in accordance with the Test of Justification as set out in s 103A of the Act which states:

S103A Test of Justification

- i. For the purposes of section 103(1) (a) and (b), the question of whether a dismissal or an action was justifiable must be determined, on an objective basis, by applying the test in subsection (2).*
- ii. The test is whether the employer's actions, and how the employer acted, were what a fair and reasonable employer could have done in all the circumstances at the time the dismissal or action occurred.*

[84] The Test of Justification requires that the employer acted in a manner that was substantively and procedurally fair. HVL must show that it carried out a full and fair investigation into the issue of whether Ms Campbell's actions constituted serious misconduct, taking into consideration the factors in s 103A(3), statutory good faith requirements and natural justice. HVL must also establish that the dismissal was a decision that a fair and reasonable employer could have made in all the circumstances at the relevant time.

Substantive Justification

[85] The finding by HVL that Ms Campbell was guilty of committing serious misconduct was founded upon the definition of serious misconduct as set out in clause 14.3 of the Employment Agreement, specifically:

- (a) Dishonesty or theft;*
- (b) Refusing or repeatedly failing to comply with our reasonable and lawful requests, directions, policies or procedures.*

[86] In so doing HVL had taken into consideration the obligations of Ms Campbell as an employee as set out in clause 4.2 of the Employment Agreement that she would:

- (v) *Deal with us at all times openly and in good faith;*
- (vii) *Honestly, diligently and professionally carry out the responsibilities of your role and any related responsibilities;*
- (ix) *Act in a way that promotes and protects our business, reputation and relationships;*
- (xii) *Comply with all reasonable requests and directions;*
- (xiii) *Comply with our policies and procedures which may be amended from time to time.*

[87] The implication of the test of justification in s.103A was considered by the Employment Court in *Angus v Ports of Auckland Limited*¹. The Employment Court stated:²

The legislation contemplates that there may be more than one fair and reasonable response or other outcome that might justifiably be applied by a fair and reasonable employer in these circumstances. If the employer's decision to dismiss or to disadvantage the employee is one of those responses or outcomes, the dismissal or disadvantage must be found to be justified.

[88] HVL dismissed Ms Campbell for serious misconduct. In *Northern Distribution Union v BP Oil New Zealand Ltd*³ the Court of Appeal stated that whilst it is not possible to define serious misconduct warranting summary dismissal as it is always a matter of degree:⁴ “Usually what is needed is conduct that deeply impairs or is destructive of that basis confidence or trust that is an essential of the employment relationship”.

[89] Whilst Ms Campbell claimed that she was unaware of the policies regarding the ordering of prescription medication for human use at HVL, the findings of an investigation meeting were that the other employees were all aware of the prohibition on such practice via the oral policy at HVL, and that they were also aware it was illegal both as part of the training which they, and Ms Campbell, had undertaken as vet nurses.

[90] During the investigation process HVL found Ms Campbell had admitted that:

- she had ordered prescription drugs for her personal use;

¹ [2011] NZEmpC 160

² *Angus at para [23]*

³ [1992] 3 ERNZ 483

⁴ *Ibid* at page 487

- not put some of those medications on her personal account or paid for them;
- not recorded some of the purchases because she forgot or was too busy;
- was aware that the medications she had ordered were prescription medicines;
- understood the seriousness of the VCNZ Code of Professional Conduct and the veterinarian obligations in respect of the ordering of prescription medicines; and knew that it had serious disciplinary implications for the vet concerned; and
- to the best of her knowledge no one else had placed orders with PWL except during her absence

[91] HVL decided after due consideration, that the dismissal of Ms Campbell was justifiable on that basis of its finding of serious misconduct due to the fact that she had: “*seriously undermined the trust and confidence essential to the continuation of the employment relationship*”.

[92] HVL was a small business operation in which the Vet and the Practice Manager trusted its employees. It had trusted Ms Campbell, a senior veterinary nurse, to order the supplies needed and to observe both the legal requirements and its oral well-known and articulated policies regarding the ordering of prescription medicines. She had failed to act accordingly

[93] I find that in those circumstances HVL had substantive justification for terminating Ms Campbell’s employment.

Procedural justification

[94] In accordance with s 103A (3) of the Act, HVL must also act in a procedurally fair manner, it was required to carry out a fair investigation and follow a fair procedure.

[95] *Ministry of Maori Development v Travers-Jones*⁵ the then Chief Judge Goddard stated in regards to a fair procedure:⁶

What amounts to a fair procedure has been described often enough. It is generally accepted that the minimum elementary components must be clear notice to the employee of the misconduct alleged, a fair opportunity to answer or explain, including adequate time for

⁵ [2003] 1 ERNZ 174

⁶ Ibid at para [30]

preparation, followed by consideration by a mind at least receptive to the need to evaluate the answers and explanations and generally open to the possibility that there may be an innocent explanation for suspicious circumstances.

[96] Ms Campbell was made aware of the allegations against her in the letter dated 29 October 2014. That letter advised her of the proposed meeting to take place on 3 November 2014 to which she was invited to bring a support person or representative. No comment or explanation was asked or expected of her at that meeting, which Ms Campbell confirmed during the Investigation Meeting.

[97] The meeting scheduled for 3 November 2014 was brought forward and took place on 30 October 2014 at Ms Campbell's request. Whilst Ms Campbell states that she believed that meeting was just to be an informal chat about the situation with Ms Schneider, I accept that she was informed it was a disciplinary investigation meeting and told that it could be delayed until she had a support person or representative present. It was however at her request that the meeting proceeded.

[98] There is no procedural requirement on an employer to delay an investigation meeting in circumstances in which it proceeds at the insistence of an employee who has been advised of his or her entitlement to have a representative present, and for the meeting to be delayed until one is present, should that be the employee's wish.

[99] Notes were made of that meeting, and I find Ms Campbell was given an opportunity to review these prior to any agreement, and that she did so. Her response document was considered during the meeting held on 4 November 2014 and a revised document was signed by all the parties including Ms Campbell on 4 November 2014. I observe that Ms Campbell was provided with an opportunity to fully consider the redrafted notes before signing, but that she declined that opportunity.

[100] In regard to the presence of a support person, I find that the process was driven by Ms Campbell and that it was her decision to proceed on 4 November 2014 without a support person or representative, despite being given the opportunity to delay the meeting until she was represented.

[101] I find that Ms Schneider and Ms Mackey considered the explanation provided by Ms Campbell and the evidence uncovered in the investigation prior to making any decision. They had considered a lesser sanction than dismissal, but given the evidence of dishonesty felt they could no longer trust Ms Campbell to act appropriately and in HVL's best interests.

[102] I find that HVL conducted a fair investigation and followed a fair procedure.

Was there disparity in the treatment of Ms Campbell such as to render the decision to dismiss her one which was not available to HVL as a fair and reasonable employer?

[103] Ms Campbell claims that she has been treated differently to Ms Watts, who also had been the recipient of prescription medication for her own use whilst an employee at HVL, but who had not been dismissed.

[104] Even where grounds for dismissal have been established, the Employment Court⁷ has confirmed that it is the prerogative of the employer to decide whether to dismiss or not. However this right must be exercised in accordance with the principles of fairness and reasonableness.

[105] In *Chief Executive of the Dept of Inland Revenue v Buchanan*⁸ the Court of Appeal outlined three separate issues to be considered in relation to the question of disparity of treatment:

- i. *Is there disparity of treatment?*
- ii. *If so, is there an adequate explanation for the disparity?*
- iii. *If not, is the dismissal justified, notwithstanding the disparity for which there is no adequate explanation?*⁹

[106] The first issue is the establishment of disparity of treatment. Should disparity be found then the employer may be found to have dismissed unjustifiably unless the employer can provide an adequate explanation for the disparity.

[107] In *Samu v Air New Zealand*¹⁰ the Court of Appeal stated:

Thus if there is an adequate explanation for the disparity, it becomes irrelevant. Moreover, even without an explanation disparity will not necessarily render a dismissal unjustifiable. All the circumstances must be considered. There is certainly no requirement that an

⁷ *Cooke v Tranz Rail Ltd* [1996] 1 ERNZ 610

⁸ [2005] ERNZ 767; (2006) 7 NZELC 98,153 (CA)

⁹ *Ibid* at para [45]

¹⁰ [1995] 1 ERNZ 636 (CA)

employer is for ever bound by the mistaken or over-generous treatment of a particular employee on a particular occasion.

[108] HVL claims that the situation regarding Ms Watts could be differentiated from that of Ms Campbell in that:

- (i) she had not ordered the prescription medication herself;
- (ii) she had understood the medication to be of an ‘over-the-counter’ acceptable variety;
- (iii) she had relied upon Ms Campbell as the senior vet nurse to order appropriately for her; and
- (iv) once questioned about the medication she had received, she was upset, shocked, and returned it unopened.

[109] I find that there was adequate explanation for the disparity in the treatment of Ms Watts.

[110] Even had I not found an adequate reason for the disparity, I find that the dismissal was justified on the basis of the serious misconduct committed by Ms Campbell, and the resultant inability of HVL to have the requisite trust and confidence in her as a senior vet nurse to follow the appropriate policies and procedures.

[111] I determine in all the circumstances that that there was not disparity in regards to the treatment of Ms Campbell such as to render the dismissal unjustifiable.

Did HVL breach the duty of good faith?

[112] I have found that HVL found substantive justification for terminating Ms Campbell’s employment on the basis of serious misconduct after undertaking a full and fair investigation process.

[113] I do not find that HVL breached the duty of good faith it owed Ms Campbell pursuant to s 4 (4)(e) of the Act.

[114] I determine that Ms Campbell was not unjustifiably dismissed by HVL.

Costs

[115] While costs are reserved, I note here that, subject to its submissions, HVL represented itself at the Investigation Meeting. However if it incurred legal costs, it may file and serve memorandum on costs supported by relevant invoices within 28 days with reply submissions to be lodged by the Respondent within 14 days of the days of receipt. I will not consider any costs submissions outside that time frame

Eleanor Robinson
Member of the Employment Relations Authority