IN THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH

[2012] NZERA Christchurch 119
5337528

	BETWEEN	AMY COSTAIN Applicant
	A N D	THE WAREHOUSE LIMITED Respondent

Member of Authority:	David Appleton
Representatives:	Heather Mckinnon, Counsel for Applicant Penny Swarbrick, Counsel for Respondent
Investigation meeting:	1 and 2 May 2012 at Nelson; 11 May 2012 by telephone conference.
Submissions Received	15 May 2012 from Applicant 15 June 2012 from Respondent
Date of Determination:	19 June 2012

DETERMINATION OF THE AUTHORITY

A. The Applicant was not unjustifiably dismissed and accordingly her personal grievance in that respect fails.

B. The Applicant did suffer an unjustified disadvantage in her employment due to the threat of a performance review and is awarded compensation accordingly.

C. Costs are reserved.

Employment relationship problem

[1] Ms Costain claims that she was unjustifiably dismissed from the employment of the respondent on 11 January 2011. In addition, she alleges that she was disadvantaged unjustifiably in her employment when, after she had informed the

respondent that she was suffering from depression, she was told that, if she wished to continue working for the respondent, then a performance review would be commenced.

Brief summary of events leading to the dismissal

[2] Ms Costain had worked for the respondent in various roles at its Motueka branch from November 2003 and, at the date of her dismissal, had been working as a Duty Manager.

[3] Ms Costain says that three events occurred on 15 December 2010 which were significant. First, she alleges that her superior, the Assistant Store Manager Ms Mackay, had told her that, since Ms Costain had advised her the week before that she was suffering from depression, Ms Costain had been unenthusiastic in her work and that everything appeared to be an effort for her. Therefore, she should go home and think about whether she really wanted to be working for the respondent. If she did wish to continue working there, it would commence a performance review in respect of her.

[4] The second event, which is uncontested, is that later that same day at around 8pm, Ms Costain noticed that, instead of being rostered to work from 2pm to 10.30pm, as she had believed, she had actually been rostered to work from 2.30pm to 12.30am. When Ms Costain questioned this with Ms Mackay she was told that she was indeed to work until 12.30am. This caused Ms Costain inconvenience as she had to make last minute changes to her childcare arrangements. (Ms Costain is a solo mother.)

[5] The third event that happened on 15 December 2010 led directly to her dismissal. A big one day pre Christmas sale was due to start the following day, but sale tickets had been put up in the store on 15 December at around 9pm, while it was still open, showing discounts on various items. Although no sales tickets from that day were available for the Authority to inspect, it seemed to be common ground that the sales tickets made clear, in small print, that it was a one day sale only, finishing on 16 December 2010, the following day. Ms Costain says that, despite this, a number of customers believed that the sale had already started that evening and so were getting irate and leaving trolleys full of items at the checkouts when they were told that the sale did not start until the following day.

[6] Ms Costain says that, in order to calm the situation down, she decided in her role as Duty Manager to honour the sales tickets for all customers because this was a practice that had occurred in the past and she felt that it would contribute to good customer service.

[7] Around 11.50pm on 15 December, ten minutes before the store was due to close at midnight, a member of the staff (Ms Ostergaard) who was by then off duty approached a checkout with a trolley full of items to buy, accompanied by her sister (who was not a staff member). One of the items in Ms Ostergaard's trolley was a child's dress. Clothing was one of the types of merchandise that was due to be discounted by 50% when the sale started the following day. Because Ms Costain had already informed the checkout staff that sales discounts were to be honoured, even though the sale did not start until the following day, the checkout operator dealing with Ms Ostergaard's transaction (Ms Bensemann) held up the child's dress and asked Ms Costain whether the 50% discount applied to that item too. Ms Costain told her to honour the discount.

[8] It turned out, although Ms Costain says that she was not aware of either of the following facts, that the dress was already subject to a 30% discount and that Ms Ostergaard used her team discount card to obtain a further discount of 20% (which was an enhanced discount rate that applied to staff that day, but which would revert to 12.5% the following day). According to the evidence of the respondent, Ms Ostergaard thereby ultimately paid only $10.56 for the child's dress which had a full value of $49.99.

[9] Ms Costain's evidence is that, the following day, because of her conversation with Ms Mackay, she went to see her GP and asked her to write a letter to the respondent in relation to her depression and the medication that she was on, which was adversely affecting her performance. This was prior to Ms Costain becoming aware that the respondent was to view her approval of the 50% discount for Ms Ostergaard's purchase as serious misconduct.

[10] It is germane to cite in full the content of this letter from the GP, which was dated 16 December 2010:

> *16 Dec 2010*
>
> *To whom it may concern*

> *Re: Miss Amy Costain*
>
> [Personal details omitted]
>
> *Amy was seen at this practice on November 26th, and a diagnosis of depression was made. She was started on antidepressant medication, which take several weeks to work.*
>
> *Until they are fully effective, Amy is not able to perform to her usual standard of work, but she is expected to make a full recovery.*
>
> *Until the medication is working I would recommend that Amy have time off work.*
> *I recommend that Amy have two weeks off to recover, and on her return, I would expect that she will be functioning normally.*
>
> *We are monitoring Amy's progress closely.*
>
> *Yours sincerely,*
> *Dr Ros Quick*

[11] The letter was accompanied by a medical certificate dated 16 December 2010, signing Ms Costain off for two weeks from the following day. Ms Costain gave this letter and certificate to the Store Manager, Mr Cotton, on 16 December. Mr Cotton, having taken advice from the Regional HR Manager, decided that if Ms Costain was assessed as unfit to work, the sick leave should commence immediately, not the following day. He therefore sent her home.

[12] Ms Costain returned to work on 2 January 2011 and was subject to the respondent's Welcome Back process. On the same day, she was given a letter which is called a *Step One Advice of Disciplinary Meeting* (the Step One letter). The salient points of this largely pro forma letter were as follows:

> *You are required to attend a disciplinary meeting to respond to the following allegation(s) of misconduct/serious misconduct:*
>
> *Abuse of discount, and failure to comply with company policies or procedures.*
>
> *Abuse of position as Duty Manager.*
>
> *If applicable, the policy or House Rule(s) that have been breached are:*
>
> *(7) Abuse of discount including but not limited to unauthorised staff discount, resale of discounted purchases.*
>
> *(8) Failure to comply with company policies or procedures.*

> *If the allegation(s) against you are found to have substance, the most serious disciplinary action that may be taken against you is:*
>
> *Dismissed without notice*
>
> *You are entitled to bring a support person or representative to the meeting. At the meeting you will be required to give a full explanation in response to the allegation(s) made against you.*

[13] The letter went on to say that Ms Costain was required to attend work as normal pending the disciplinary meeting and that the meeting was to take place on Wednesday 5 January 2011. The meeting took place on that date. Ms Costain was accompanied by a friend.

[14] Ms Costain was given two short statements to read, which had been written by Ms Bensemann and one of the supervisors, Ms Win. She was then asked a series of questions by Mr Cotton in relation to her understanding of the use of the team discount card, the practice of honouring sale discounts prior to the sale starting and the events of the night of 15 December 2010.

[15] The meeting was adjourned to enable Mr Cotton to carry out further investigations, primarily into Ms Costain's assertion that honouring discounts prior to the start of the sale was a practice that she had been trained to do by previous managers.

[16] The disciplinary process recommenced on Monday 10 January 2011 and Ms Costain was given copies at that reconvened disciplinary investigation of statements that had been obtained in the intervening period. These statements showed that the individuals who had been interviewed did not agree that there was a practice of honouring sale discounts prior to a sale starting. Ms Costain asserted that the individuals who had made these statements were lying.

[17] At the end of the disciplinary investigation, Mr Cotton adjourned the meeting for 50 minutes and then reconvened it to tell Ms Costain that he believed that she had committed serious misconduct and that her employment was to be terminated immediately. He asked Ms Costain her thoughts (to which she is recorded as stating that it was the wrong decision) and adjourned the meeting for a further 12 minutes and reconvened it to confirm that he believed that he had made the correct decision.

[18] This decision was confirmed by letter the following day, 11 January 2011, in which Mr Cotton stated that Ms Costain's explanation on the matters discussed was not acceptable and that, after due consideration, a decision had been made to terminate her employment. The termination was effective from that date.

The issues

[19] The Authority must consider whether the decision to dismiss Ms Costain was justifiable in accordance with s.103A of the Employment Relations Act 2000, as it stood prior to 1 April 2011, when it was amended. The pre amendment wording of s.103A is as follows:

> *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 considering whether the employer's actions, and how the employer acted, were what a fair and reasonable employer would have done in all the circumstances at the time the dismissal or action occurred.*

[20] The task of the Authority is to determine whether the employer's actions pass the s 103A test, not to hold a new disciplinary hearing.

[21] The following issues relating to Ms Costain's dismissal need to be considered in particular:

(a) Whether the rules relating to the giving of discounts was sufficiently clear in general.

(b) Whether it had been made sufficiently clear to Ms Costain prior to and during the disciplinary meeting what aspects of the transaction on 15 December 2010 were regarded by the respondent as serious misconduct.

(c) Whether Mr Cotton had carried out a sufficient investigation when Ms Costain had stated that she had believed that some of the witnesses had lied in their statements.

(d) Whether Mr Cotton had taken into account the fact that Ms Ostergaard had received a 30% discount in his decision that Ms Costain had committed serious misconduct.

(e) Whether Mr Cotton was justified in concluding that Ms Costain had known that Ms Ostergaard had used her discount card.

(f) Whether Mr Cotton had acted unfairly in failing to advise Ms Costain that he had viewed CCTV footage that had showed that she had been present throughout the transaction despite her denial that she had been.

(g) Whether there had been a disparity of treatment as between Ms Costain and other employees who had been disciplined over similar matters

(h) Whether Mr Cotton's awareness of the contents of the GP's letter dated 16 December 2010, should have led him to conclude that Ms Costain had not been able to perform to her usual standard of work on 15 December 2010 and so dismissal was not appropriate.

[22] In addition, the Authority must determine whether Ms Costain had been unjustifiably disadvantaged in her employment by the respondent threatening her with a performance review following her disclosing she was suffering from depression.

The Authority's findings

[23] Evidence was heard from six witnesses for Ms Costain, including herself, and a further four for the respondent. Evidence was taken by telephone from two witnesses.

Whether the rules relating to the giving of discounts was sufficiently clear in general.

[24] It is a general, fundamental principle of fairness that an employer cannot treat conduct by an employee as serious misconduct leading to dismissal if the employee did not know, and cannot reasonably be expected to have known that the employer would treat that conduct as such.

[25] Despite the plethora of documentation that had been disclosed prior to the Authority's investigation meeting, it was only during questioning of Mr Cotton that it became entirely clear to me what aspects of the events of 15 December 2010 had been regarded as serious misconduct by the respondent. This was essentially that Ms Costain honouring a discount for customers before the sale started because the sale tickets had been put out early, was not serious misconduct but that doing so for a staff member (even one who was off duty) was serious misconduct.

[26] Mr Cotton's evidence was that the fact that Ms Ostergaard had benefitted from further discounts (the 30% discount and the 20% team discount) had merely compounded the wrong, but had not moved it into the realm of serious misconduct, as the fact of giving a sales discount to a staff member prior to the sale starting was serious misconduct on its own. It is permissible for staff members to get the benefit of a sales discount and a team card discount however.

[27] The respondent has a number of written rules, including its House Rules, which are set out in the individual and collective employment agreements. Extracts from these had been cited in Ms Costain's Step One letter, referred to above. It also has a booklet called *The Warehouse Way*, which sets out information for staff, including rules for the use of the team discount card. No doubt other documentation exists, but nothing shown to the Authority or referred to it set out expressly the rule that a staff member cannot be given the benefit of a sales discount before the sale starts if customers were given such a benefit. I accept, however, that in a complex retail environment such as the respondent, it is impossible to set out in writing all the rules that apply.

[28] I also accept that it was reasonable for the respondent to have expected Ms Costain to have known that letting a staff member have the benefit of a sales discount before the sale had commenced would not be acceptable conduct. I reach this conclusion on the basis of the evidence from the respondent, which I accept, that transactions involving stock must be carefully controlled as otherwise discrepancies can occur which lead to loss. Experienced staff would be well aware of the importance of proper stock and pricing control.

[29] I also bear in mind the evidence of a former manager of the Motueka branch, Mr Ferguson, who said that he would honour sales discounts outside of a sales period for customers, but not for staff, as they know the business. I am also mindful that, whilst there was some rationale in honouring a sales discount early for a customer, because of the importance of customer service and keeping customers happy, the same imperative does not apply to staff, especially as staff already have the benefit of staff discounts on many goods.

[30] Finally, I take into account the fact that Ms Costain states in her brief of evidence that she accepted that she probably should not have authorised the 50% off

sale price for the dress because the sale had not yet started and Ms Ostergaard was a staff member.

[31] Taking all these factors into account, I accept that, whilst there was no written policy in place prohibiting the giving of sales discounts to staff prior to the sale starting, it was reasonable for the respondent to have expected Ms Costain to have known that such conduct would be treated seriously, and as serious misconduct.

Whether it had been made sufficiently clear to Ms Costain what aspects of the transaction had been regarded as serious misconduct.

[32] The Step One letter cited above did not set out with any particularity what specific conduct Ms Costain was alleged to have carried out that led the respondent to instigate a disciplinary process. The sentences *Abuse of discount, and failure to comply with company policies or procedures* and *Abuse of position as Duty Manager* are general in their scope and make no reference to the actual discounts authorised and the circumstances.

[33] Ms Costain said in her evidence that she had been confused throughout the disciplinary meeting as to which discount was being discussed at any particular time. Reasonably comprehensive notes had been taken throughout the disciplinary meetings which show that Mr Cotton had asked Ms Costain questions about the use of a team discount card and when sales discounts are given prior to a sale starting. However, the notes do not record that Mr Cotton spelled out what it was that he believed constituted the wrong-doing. Mr Cotton's evidence was that the two statements that had been given to Ms Costain at the start of the first day of the disciplinary meeting set out the alleged wrong-doing. These statements were from Ms Bensemann, and Ms Win.

[34] Ms Bensemann's statement was short and dealt solely with the issue of Ms Costain allowing the customers to get the benefit of sales discounts prior to the sale starting, with no mention of Ms Ostergaard. Ms Win's statement did refer to Ms Ostergaard getting the early sales discount *and all other discounts*. She said in the statement *It felt funny at the time but I just did as instructed.* Ms Win had added as a post script *When Nancy* (Ms Ostergaard) *went through check out @ 1.50pm she had a childs dress and asked for 50% discount. Amy approved – Julie* (Ms Bensemann) *not too happy but did as she was advised at the time.* Ms Win's evidence to the Authority

was that she had *felt funny* because she had not known what to do about the sales signs going up early. Even if this is true, her statement does not suggest this – it clearly suggests that the giving of the discount to Ms Ostergaard had *felt funny*.

[35] Ms Costain gave evidence that, while she had been off work sick after the events of 15 December 2010, Ms Ostergaard had telephoned her to tell her she had been dismissed for the incident.

[36] In my view, the Step One letter should have spelled out with sufficient particularity the actual events that the respondent viewed as serious misconduct. This is a requirement of s 4(1A)(c) of the Act, which states that the duty of good faith:

> *Without limiting paragraph (b), requires an employer who is proposing to make a decision that will, or is likely to, have an adverse effect on the continuation of employment of 1 or more of his or her employees to provide to the employees affected—*
>
> > *(i) access to information, relevant to the continuation of the employees' employment, about the decision; and*
> >
> > *(ii) an opportunity to comment on the information to their employer before the decision is made*.

[37] In addition, Mr Cotton should have started the disciplinary meeting by checking that Ms Costain understood the allegations against her. This is especially so in a case where there were different discounts given to Ms Ostergaard which the respondent had objected to.

[38] However, the respondent's position in this regard is saved, I believe, by the giving to Ms Costain of a copy of Ms Win's statement which had referred to the authorisation by Ms Costain of an early discount for a staff member, and by the fortuitous fact that Ms Ostergaard had told Ms Costain of her own dismissal. Although the Step One letter was inadequate, in my view, in failing to set out the particularity of the allegations, ultimately Ms Costain did know, I believe, what the allegations against her were by the time the questions from Mr Cotton had started. She also did not state in the disciplinary meetings that she did not understand what she was supposed to have done wrong, but answered the questions. Therefore, I do not believe that she was disadvantaged in this respect.

Whether Mr Cotton had carried out a sufficient investigation when Ms Costain had stated that she had believed that some of the witnesses had lied in their statements

[39] During the first disciplinary interview, Ms Costain had made it clear to Mr Cotton that she believed that the honouring of discounts early for customers was a common practice for customer satisfaction that had been approved by previous managers. Mr Cotton, who had been working at the Motueka branch for around nine months by the time of Ms Costain's disciplinary meeting, was not aware of such a practice and so adjourned the meeting to investigate further this claim by Ms Costain.

[40] Statements were then taken from three members of senior staff who had been working at the branch for some time. All three stated that it had not been the practice in their experience to honour sales discounts prior to the sale starting. When Ms Costain was shown these statements at the reconvened disciplinary meeting, she said that the staff had been lying and that she was going to be looking into this herself and *speaking to people*. Mr Cotton informed her that he did not want her or anyone else *harassing any of our team members*. He said that there was a process to follow.

[41] During the investigation meeting Mr Cotton stated in evidence that he had not gone back to question two of the three individuals despite Ms Costain's assertion that they had been lying because he had asked Ms Costain for details and she had not given him any information to allow him to investigate the allegations further.

[42] The notes of the reconvened disciplinary hearing show that Mr Cotton did ask Ms Costain for details of her allegations, and that she had made various statements.

[43] These statements included the following;

a. that there were two teams in the branch, that management was picking favourites and there were no equals;

b. that everyone knew who the teams were;

c. that two of the persons giving the statements (whom she named) might lie to avoid bullying;

d. that the third person was making his way up in the company and was in trouble of his own, but she would not say what kind.

[44] Whilst Mr Cotton could have made greater efforts to press Ms Costain further to substantiate her allegations, she is an articulate person who, I believe, would have taken the opportunity to provide more details if she had wished to. As it was, she made generalised allegations of lying in respect of which Mr Cotton attempted to obtain more details, but was met by some resistance by Ms Costain in providing them.

[45] Mr Cotton did ask one of the three witnesses whether he had anything to tell him, in respect of the point at 43 (d) above, but was told that he did not. He did not question the other two witnesses. I accept Mr Cotton's evidence that he did not have enough information to warrant him pursuing further Ms Costain's allegation of lying.

Whether Mr Cotton had unfairly taken into account the fact that Ms Ostergaard had received a 30% discount in his decision that Ms Costain had committed serious misconduct.

[46] The briefs of evidence of Mr Cotton and Ms Marshall, who is a regional Employment Relations Manager from whom Mr Cotton obtained advice during the disciplinary process, both made reference to Ms Ostergaard obtaining the early 50% discount on an item that had been already discounted (by 30%). Ms Costain's evidence was that she had not known about the 30% discount. On balance, I accept that evidence. It is also clear from both sets of disciplinary interview notes that Mr Cotton had never mentioned the 30% discount to Ms Costain.

[47] If this issue had featured in Mr Cotton's decision to dismiss Ms Costain it would have led me to conclude that the decision was unjustifiable, as Ms Costain had not been given any opportunity at the disciplinary meeting to address the concern. However, having heard the evidence of Mr Cotton, I am satisfied that it did not feature in his decision, and that his decision was based primarily upon three factors:

a. that Ms Costain had authorised Ms Ostergaard being given a 50% sales discount before the sale commenced;

b. that Ms Costain had authorised that knowing that Ms Ostergaard would use her team discount card; and

c. that Ms Costain had lied in the disciplinary meeting when she had asserted that she had not been present throughout the transaction (arguing that she could not have known that Ms Ostergaard had used

her discount card). Mr Cotton had known that she had been present because he had seen her on the CCTV footage as being there throughout. Witness evidence also supported that.

Whether Mr Cotton was justified in concluding that Ms Costain had known that Ms Ostergaard had used her discount card.

[48] In light of the fact that Mr Cotton regarded Ms Costain as having committed serious misconduct merely by allowing Ms Ostergaard to have the benefit of the 50% sales discount early, the issue of the discount card also being used is not significant in the sense that Mr Cotton would have dismissed Ms Costain for allowing the 50% discount alone. However, much evidence was given about whether it was reasonable for Ms Costain to assert that she did not know that Ms Ostergaard used or would use her discount card on 15 December 2010 and that it was offering a higher discount (20%) than usual until midnight that night. Therefore, I shall address this issue.

[49] I am satisfied that the respondent was reasonable in its conclusion that Ms Costain had known or ought to have known that Ms Ostergaard would use her discount card in the transaction, given that the latter was buying a considerable amount of goods and that it would be strange for someone not to use their card to obtain a discount. Ms Costain had not stated in the disciplinary interviews, as she later stated in evidence during the Authority's investigation meeting, that she had not known which goods were being bought by Ms Ostergaard and which by her sister, but accepted in evidence in any event that she expected Ms Ostergaard to be buying some of them.

[50] Another factor to take into account in assessing whether it had been reasonable for the respondent to have concluded that Ms Costain had known that Ms Ostergaard had used her discount card was that Mr Cotton had viewed CCTV footage which had shown that Ms Costain had stayed by the checkout throughout the transaction with Ms Ostergaard. In addition, Ms Win, in one of her statements for the disciplinary meeting, had stated that Ms Costain had been present throughout the transaction, and Ms Bensemann had stated that she thought Ms Costain had been there when Ms Ostergaard had used her team discount card.

[51] In light of this evidence, I believe that it was reasonable for the respondent to have concluded that Ms Costain had known or ought reasonably to have known that Ms Ostergaard had used or was likely to use her team discount card.

[52] Evidence was also given about whether Ms Costain would have known that the discount card was still offering a discount of 20% on 15 December 2010 rather than 12.5%. Ms Costain stated in evidence that she did not know that. However, I do not believe it is necessary for me to reach a conclusion on that, as that did not lead, in itself, to Ms Costain being dismissed.

Whether Mr Cotton had acted unfairly in failing to advise Ms Costain that he had viewed CCTV footage

[53] After Mr Costain had viewed the footage of the transaction on the CCTV cameras it was overwritten accidentally, according to Mr Cotton's evidence, before Ms Costain's first disciplinary meeting had started. Mr Cotton had wished to rely on this footage to prove that Ms Costain had been present throughout the transaction and had therefore known about Ms Ostergaard's use of the discount card. However, once he had discovered that it had been overwritten, he had been advised by a company HR adviser that he could not rely on it in Ms Costain's disciplinary meeting and not to mention it to Ms Costain.

[54] I accept that it was appropriate to have decided not to use the footage in the disciplinary investigation as it had been no longer available to be shown to Ms Costain. However, Mr Cotton should have been open with her and advised her what he had seen and what had happened to the footage, because of the duty of the respondent under s 4 (1) of the Act that parties to an employment relationship must deal with each other in good faith; and must not, whether directly or indirectly, do anything to mislead or deceive each other; or that is likely to mislead or deceive each other.

[55] Mr Cotton did, I believe, mislead Ms Costain when he stated in the disciplinary investigation that he could not say what the security camera showed on the day.

[56] However, as Mr Cotton had had the benefit of Ms Win's statement that Ms Costain had been present throughout the transaction, and as Mr Cotton confirmed in his evidence that he would have dismissed Ms Costain even if she had only allowed

Ms Ostergaard the 50% sales discount early without any further discount, I do not believe that this failure alone to tell Ms Costain of his viewing of the footage renders the decision to dismiss unjustified.

Whether there had been a disparity of treatment as between Ms Costain and other employees who had been disciplined over similar matters

[57] In *Airline Stewards and Hostesses of NZ IUOW v Air NZ Ltd* [1985] ERNZ Sel Cas 156 (CA), the Court of Appeal held that disparity of treatment between employees can, in some cases, allow the Court to hold that a dismissal is unjustified unless an adequate explanation is forthcoming. However, all the circumstances need to be taken into account. *Samu v Air New Zealand Ltd* [1995] 1 ERNZ 636 (CA). This was confirmed by the Supreme Court in *Buchanan v Chief Executive of the Department of Inland Revenue* [2006] NZSC 37, [2006] ERNZ 512.

[58] Ms Costain asserts that other staff had committed similar acts of misconduct but had not been dismissed. One instance was that of a senior staff member who had put a lay-by on hold for another staff member, using that member's staff discount card, against the Motueka store's policy. Dismissal did not occur in that case, the respondent asserts, because no financial loss had occurred to the company, and because the Motueka store had a different policy from other stores.

[59] Another example cited by Ms Costain was that of a security officer who had used her discount card to reduce the price of a television for a relative, against company policy. This individual gave evidence to the Authority that she was not dismissed for that misconduct even though the manager did not believe her excuse. However, the manager in question, Mr Ferguson, gave convincing evidence that he had believed the reason given by the security guard (that the relative paid because he owed her money, and so the goods had been for her benefit) and that was the reason he had not dismissed her.

[60] I accept that both these examples can be distinguished from Ms Costain's case. First, there was a financial loss to the company in the present case, where Ms Ostergaard paid less for the item than she should have done. Second, the example of the discounted television occurred two years before Ms Costain's disciplinary process, under a different manager. An employer cannot be forever bound by a decision taken by a previous manager a considerable length of time before.

[61] Ms Bensemann was not dismissed for the incident on 15 December because Mr Cotton accepted that she had acted under the direction of Ms Costain. Ms Ostergaard was dismissed for her part in the incident.

Whether Mr Cotton's awareness of the contents of the GP's letter dated 16 December 2010 means that dismissal was not appropriate

[62] Mr Cotton's evidence was that he had known nothing of Ms Costain's depression until he had received a copy of the letter from Ms Costain's GP dated 16 December 2010. He said that during the disciplinary investigation, Ms Costain had said nothing to persuade him to put weight on the contents of the letter, but that he had reread the letter and had asked her at the end of the process specifically whether there was anything else that she wanted him to take into account, to which she had stated *no*. Mr Cotton had also asked at least twice before whether she wished to ask or add anything. Ms Costain had explained in reply to one of these questions about the roster change causing her to have to make late changes to her child care arrangements but that, despite this, she stood by her decision and would still have gone through with allowing the early 50% discount without the distraction caused by the roster confusion.

[63] Whilst Mr Cotton should ideally have asked specifically whether Ms Costain's judgement had been impaired on the night of 15 December 2010 due to the medication she had been on, given that he was aware of that possibility from the GP's letter which he had received prior to the disciplinary meetings, he did give Ms Costain ample opportunity to mention this. Ms Costain said in evidence to the Authority that she deliberately did not raise it because she did not want to make her depression more prominent, in view of the fact that she had been threatened with a performance review. She also said that she had felt that, whatever she said during the disciplinary meeting, the same outcome (of dismissal) would eventuate.

[64] I find this a finely balanced issue, but on balance believe that, as Ms Costain had deliberately chosen during the disciplinary not to mention her depression and medication as a contributory factor to her actions, Mr Cotton was not to be expected to assume that it had been. In addition, Ms Costain had maintained during the disciplinary meetings that she stood by her decision to give Ms Ostergaard the early discount, which strongly implied that Ms Costain did not believe that the medication had adversely affected her judgement.

[65] Therefore, I do not consider that this aspect renders the decision to dismiss Ms Costain unjustifiable.

The overall fairness of the decision

[66] Mr Cotton explained in his evidence that he had been influenced to dismiss Ms Costain because she had lied about her being present throughout the transaction, that she had maintained throughout the disciplinary process that she had not done anything wrong, and because of the importance of effective stock control and loss prevention.

[67] I accept the evidence of Mr Cotton that the CCTV footage which he had viewed had shown that Ms Costain had been present throughout the transaction with Ms Ostergaard. However, as he had not told Ms Costain that he had viewed the footage, she had not been given the opportunity to comment on this revelation, which could have caused her to have revised her statement to him that she had not been present throughout the transaction. This failure, in my view, means that it had not been reasonable for Mr Cotton to have concluded that Ms Costain had lied.

[68] However, Mr Cotton had also relied on Ms Costain's refusal to accept that she had done anything wrong. It seems plain to me that Ms Costain's decision to give a staff member the benefit of a 50% discount before the sale had started was a major error of judgement for an experienced retail manager to have made, and that Ms Costain's refusal during the disciplinary meetings to accept this would reasonably have caused Mr Cotton significant concerns about the suitability of Ms Costain to hold the role she did. Furthermore, in light of the fact that her approach had caused loss to the respondent (albeit not a significant loss), I believe that Ms Costain's continued refusal during the disciplinary process to accept that her decision had been wrong would also have reasonably caused Mr Cotton legitimate concerns about future loss to the respondent.

[69] I therefore conclude that the decision to dismiss Ms Costain was not based solely upon a single act of negligence (as counsel for Ms Costain has submitted) but was also based upon Ms Costain's refusal to acknowledge that negligence and its consequences. This refusal occurred nearly a month after the incident on 15 December 2010, after she had returned to work fully fit. Mr Cotton's evidence was that Ms Costain had been very articulate during the disciplinary hearing. Therefore, it

is unlikely that her refusal to acknowledge that her action was wrong had been affected by her depression, even if the mistake itself had been.

[70] Therefore, I find that the decision to dismiss was one that a fair and reasonable employer would have taken in all the circumstances at the time the dismissal occurred.

The disadvantage claim

[71] Ms Costain claims that she had been unjustifiably disadvantaged in her employment on 15 December 2010 when she had been told that she would face a performance review after having previously discussed her depression with the assistant store manager, Ms Mackay. Ms Costain raised a grievance about the issue by way of her solicitor's letter dated 18 February 2011, so I am satisfied that it had been raised in time.

[72] Contrary to the submission of counsel for the respondent, Ms Costain did give evidence in relation to this claim, during her answers to my questions at the investigation meeting and in her brief of evidence.

[73] The evidence between Ms Costain and Ms Mackay was in direct conflict, with Ms Mackay denying in the investigation meting that she had had a discussion with Ms Costain about the latter's depression, and further denying in the investigation meeting that she had talked to Ms Costain about starting a performance review.

[74] On balance I prefer the evidence of Ms Costain on both counts. This is for the following reasons. With regard to the issue of whether Ms Costain had mentioned her depression to Ms Mackay, Ms Costain came across as credible, whilst Ms Mackay had said in her brief of evidence that she did not *recall* Ms Costain drawing particular attention to being depressed and that Ms Costain *did not raise her depression or medication with her to the extent she now says she did.* Although she later wanted to change this latter statement when I questioned it, at the start of her evidence she said she did not want to change her brief of evidence, save in one small unrelated respect. On this issue, I therefore prefer Ms Costain's evidence as being more consistent.

[75] As to the issue of the threatened performance review, Ms Costain says that she went to her GP the following day after the conversation with Ms Mackay on 15 December 2010 specifically because of that conversation. The letter from the GP,

cited above, makes reference to the effect of the medication on her standards of work. In addition, another doctor from Ms Costain's surgery wrote a second letter after Ms Costain's dismissal, which included the following statement:

> [Ms Costain] *was seen again on 16 December 2010, at which time she was beginning to feel an improvement in her mood. However, she mentioned that she was facing a Performance Review because one or more of her superiors felt that she was not sufficiently enthusiastic at work. She was provided with a letter for her superiors stating that she was suffering from depression, and was unlikely to be able to work at her usual level until she had time to respond to her medication.*

[76] I believe that it would have been a particularly elaborate and prescient ruse for Ms Costain to have visited her doctor on 16 December 2010 before she even knew she was to be disciplined for the events of the previous night, if she did so for some ulterior and improper motive.

[77] Furthermore, the brief of evidence of Ms Mackay on the topic of the alleged conversation with Ms Costain on 15 December 2010 was written in a particularly cautious manner, speaking not of her denial of the meeting having taken place, but of her having *no recollection of that conversation taking place,* of her checking with Mr Cotton and him not recalling her raising issues with Ms Costain's performance, of her not being able to find any notes of having raised performance informally and not appearing to have any notes of *that apparent meeting*. Whilst I appreciate that the brief had been written by counsel for the respondent, Ms Mackay did agree to its contents and it was presented as her evidence. She only went so far as to directly deny the meeting had happened when I pressed her during the investigation meeting.

[78] Having concluded that the conversations had taken place as Ms Costain had alleged, I must now consider whether Ms Mackay threatening a performance review due to Ms Costain's lack of enthusiasm, when Ms Mackay knew that Ms Costain was suffering from depression, was an unjustifiable action by the respondent that affected Ms Costain's employment to her disadvantage.

[79] Whilst the respondent tried to argue that a performance review is not the same as a disciplinary process, it is still a process imposed by the respondent upon an employee because of dissatisfaction with the employee's performance or standard of work, which could result in dismissal if the employee failed to improve to the respondent's expectations. Therefore, telling Ms Costain that her lack of enthusiasm

arising from her depression would result in a performance review was likely to cause Ms Costain reasonably significant disadvantage in her employment.

[80] Whilst I accept that it is open for an employer to raise its concerns about performance with an employee, including his or her level of enthusiasm, I believe that the respondent was not justified in doing so by telling Ms Costain that she should think about whether she really wanted to work for The Warehouse. It was also not justified in linking the threat of a performance review with Ms Costain's depression. Ms Costain did not bring a discrimination claim under s 104 of the Act, but if she had, she may have succeeded in a direct discrimination claim on the grounds of disability.

[81] As it is, I believe that the action of Ms Mackay, carried out on behalf of the respondent, was not the action that a fair and reasonable employer would have done in all the circumstances at the time the action occurred. I therefore find that Ms Costain's claim succeeds.

Remedies

[82] Ms Costain is entitled to compensation for humiliation, loss of dignity, and injury to her feelings pursuant to s 123 (1) (c) of the Act arising from the unjustifiable disadvantage she suffered when she was threatened with a performance review, and the way the threat was made, on 15 December 2010. No evidence was given that any direct loss flowed from the disadvantage.

[83] Ms Costain did not give much evidence of the effect on her of the threat, but did say that she felt it had been ridiculous to threaten her with a performance review, that she was *messed up at the time* and that it was *absurd to be faced with a disciplinary process for being depressed*. It had obviously worried her enough to cause her to go to her GP for a letter the next day. I believe that an award of $5,000 for humiliation, loss of dignity, and injury to her feelings is an appropriate amount to award.

[84] Section 124 of the Act provides that, where the Authority determines that an employee has a personal grievance, the Authority must, in deciding both the nature and the extent of the remedies to be provided in respect of that personal grievance:

> *a. consider the extent to which the actions of the employee contributed towards the situation that gave rise to the personal grievance; and*

> *b. if those actions so require, reduce the remedies that would otherwise have been awarded accordingly.*

[85] I am satisfied that Ms Costain did not contribute to her disadvantage in any blameworthy way.

Costs

[86] Costs are reserved. Ms Costain is understood to be in receipt of legal aid. If the respondent intends to seek costs against Ms Costain, it is reminded that Section 45(2) of the Legal Services Act 2011, dealing with the liability of legally aided persons for costs, states that

> *No order for costs may be made against an aided person in a civil proceeding unless the court is satisfied that there are exceptional circumstances.*

[87] In *Wadley v. Salon D'Orsay Ltd* [1998] 1 ERNZ 369, the Employment Court construed the expression *exceptional circumstances* as meaning *quite out of the ordinary*.

[88] Any claim for costs should be made by lodging and serving a memorandum within 28 days of the date of this determination. The responding party will have a further 28 days to lodge and serve any reply.

David Appleton
Member of the Employment Relations Authority