

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

**[2017] NZERA Auckland 260
3007552**

BETWEEN

LUBELIA WILKINSON
Applicant

AND

THE FARMERS TRADING
COMPANY LIMITED
Respondent

Member of Authority: Eleanor Robinson

Representatives: David Jacques, Counsel for Applicant
Matthew McGoldrick, Counsel for Respondent

Investigation Meeting: 14 & 15 August 2017 at Auckland

Submissions received: 6 & 15 August 2017 from Applicant
7 & 15 August 2017 from Respondent

Determination: 31 August 2017

DETERMINATION OF THE AUTHORITY

Employment Relationship Problem

[1] The Applicant, Ms Lubelia Wilkinson, claims that she was unjustifiably dismissed by the Respondent, The Farmers Trading Company Limited (Farmers).

[2] Specifically Ms Wilkinson claims the dismissal was unjustifiable either substantively and/or procedurally due to pre-determination and disparity of treatment.

[3] Farmers denies that Ms Wilkinson was unjustifiably dismissed and claims that she was justifiably dismissed both procedurally and substantively.

Issues

[4] The issues for determination are whether or not Ms Wilkinson was unjustifiably dismissed by Farmers as a result of:

- Pre-determination
- Disparity of treatment

The Authority's Investigation

[5] At the Authority's investigation on 14 and 15 August 2017 the witnesses answered questions on the witness statements they had provided and – under oath or affirmation – answered questions from me and the parties' representatives. The representatives have also submitted closing submissions on the facts and law.

[6] I have considered those submissions and the evidence, including relevant documents provided by the parties, but, as permitted by s174 of the Employment Relations Act 2000 (the Act), this determination has not recorded all the evidence and submissions received. Instead the determination has stated findings of fact and law, expressed a conclusion on the issue necessary to dispose of the matter, and specified orders made as a result.

Background Facts

[7] Farmers is a national retail store in New Zealand with approximately 56 stores across New Zealand specialising in family fashion, beauty, homewares, furniture, electronics and large appliances/whiteware.

[8] Ms Wilkinson commenced employment with Farmers on 13 March 2006. Throughout her employment she was based at the Manukau store (the Store) where she was one of approximately 90 employees.

[9] Ms Wilkinson was a member of First Union and employed pursuant to the Farmers and First Union Collective Agreement currently operative 1 September 2015 to 31 August 2016 (the Collective Agreement). The Collective Agreement stated at clause 13.3:

Company rules, policies and procedures

The employer's Work Rules and Disciplinary Procedures apply to employees in employment (Appendix 1).

[10] Appendix 1 is entitled Work Rules and Disciplinary Procedures and states the following:

*... The following behaviours amount to **serious misconduct** and are most likely to result in summary dismissal ...*

1. ***Property***
Unauthorised possession, unauthorised removal or unauthorised wilful movement of the company property or the property of other persons. This includes scraps/waste/damaged items etc regardless of their value.

2. **Money and valuables handling**
Failure to follow money handling procedures – including receiving moneys/cheques/vouchers etc giving change/refund/unauthorised discounts.

...

4. **Honesty and integrity**
Deliberate falsification of company records/documents (including timekeeping) or the giving of false information at an interview or wilfully making false declarations.

...

6. **Point of sales procedures**
Failure to follow the point of sales procedures including the rules for cash register operation.

...

The following behaviours are misconduct which will result in disciplinary action and in the event of serious or repeated breaches are likely to result in summary dismissal:

...

4. **Staff purchases**
There are strict procedures for staff purchases and procedures for storage of goods purchased elsewhere.

...

7. **Carrying out instructions**
Employees must carry out instructions given by a person authorised to give such instructions but no employee shall be required to do anything that might endanger any employee.

Investigation procedures

In the event there is an allegation of misconduct the matter will be fully investigated according to the following procedure:

- *The manager, or a person authorised by the manager, will briefly examine the allegation to determine whether or not misconduct is apparent.*
- *(Note: If the initial examination indicates that serious misconduct may have occurred the employee(s) involved may be stood down whilst the matter is investigated. During the period of stand down the employee(s) may be paid for scheduled work hours and be required to be available for discussion. A stand down is not a disciplinary measure and the employee has the right to comment or give feedback prior to the stand down decision being taken.)*
- *If misconduct is apparent there will be prompt and thorough formal investigation by the manager or the person authorised by the manager. Discussions will be held with all persons considered to be able to assist. The employee(s) alleged to have conducted misconduct will be given an opportunity to have the allegations described and the opportunity to give an explanation. At the conclusion of the investigation:*
 1. *If the manager or his/her nominee determines that misconduct is not proven then no further action will be taken.*

2. *If the manager or his/her nominee determines that misconduct is proven, then the appropriate provisions of the disciplinary procedure will be applied.*

During the investigation process the employee may have another person present as their representative.

DISCIPLINARY PROCEDURES

1. *In cases of serious misconduct, disobedience or serious neglect of duty an employee will be liable to dismissal without notice.*

...

[11] Farmers' policies and procedures also included the Staff Discount policy which included the following in para.7 headed: 'Staff Discount-Conditions of Use for ALL Stores':

...

- *Team members must sign this declaration form (to acknowledge that they have read and understood the terms and conditions) before they receive their staff discount card.*
- *A team member must pay for the purchased goods themselves, it is considered to be serious misconduct if a friend or family member pays for the goods on a team member's behalf.*

...

- *Team members must NOT complete a document that any other family member or member of their household; or authorise or transact their own purchase or that of a family member.*

8. **Acknowledgment of staff discount policy**
I have read and understood these rules and procedures and agree to abide by them, both when making a purchase and processing a sale. I understand that a breach of these rules will be deemed to be serious misconduct and may result in disciplinary action up to and including dismissal.

Return and exchange policy

1. *Fourteen day peace of mind exchange ...*

1.2.1 Customer HAS proof of purchase ...

- *If the customer received a "gift with purchase" they MUST return this gift also if they are not exchanging for the same item or they are receiving a gift card.*

3. **Returns after 14 days**

When a customer wishes to return/exchange an article for a change of mind return and it is more than 14 days from the original purchase date:

- *Team members MUST call a manager/authoriser to the work station for approval.*
- *If the manager/authoriser allows a transaction to go ahead – before the “tender” stage the manager/authoriser must sign in to authorise the transaction.*

Gift with purchase guidelines/store operations

1. *Gift with purchase (GWP)/guidelines*

The supplier will provide Farmers with GWP to help increase sales for that particular brand or house.

In some instances, once a promotion is over, the GWPs are required to go back to the vendor.

Where Farmers can keep the GWP, it is expected that the salesperson will continue to give away the GWP as long as the customer is purchasing to meet the original GWP criteria within that particular range/house or brand. The aim here is that the GWP is used to increase sales and entice the customer to potentially spend more.

The stores must understand that even though the GWP is not a direct cost to Farmers, it is however a cost to the supplier. Therefore, the relationship with our supplier must be protected by ensuring that we use the GWP for the purpose it was intended for, that is, to drive an increased sales.

[12] There was also staff memorandum issued to the employees at the Store which covered staff purchases and gift with purchases and stated:

Gifts with purchase

Staff fall under the same procedure for these as customers. That is the required purchase is to be made to receive the GWP.

General security

... Staff must not serve their own family or friends. ...

[13] The staff memorandum ended:

Also attached is a copy of the company work rules as a refresher. These have not changed and are the same rules as in your agreement you have signed.

[14] Ms Wilkinson had sighted and signed the Work Rules, the Staff Discount procedure and the Store procedures.

[15] Ms Wilkinson was employed as a cosmetician. She was a Band 7 Beauty Adviser as defined within Appendix 2 of the Collective Agreement and a counter manager of the Clarins counter which is in the beauty products area of the Store. There are various other counters

within the beauty products area of the Store where cosmetics are sold relating to each of the major cosmetic brands that Farmers sells including Clarins and Yves Saint Laurent (YSL).

[16] Ms Wilkinson's role as a counter manager for the Clarins counter meant that she was responsible for sales of the products which Farmers stocked from the Clarins product range. She had overall responsibility for the products in the range and was responsible for stock control of the products. As cosmetic stocks are considered to be high value products, cosmeticians' earnings include commissions. As a consequence, they are amongst the highest paid employees in the store.

[17] Ms Wilkinson reported to a Beauty Sales Manager who in turn reported to Ms Evette Miller, the Store Manager.

Events 26 January 2017

[18] Ms Wilkinson said that on 26 January 2017 she wanted to buy some perfume which had been on sale at a promotion price and been admired by her and other employees. During the afternoon break at approximately 3.00 p.m., she realised that she did not have her purse with her at the Store.

[19] Sometime after that realisation, Ms Wilkinson said she had telephoned her home and left a message asking her daughter Cassandra to bring her purse to her at the Store when she arrived to collect her from work. However Cassandra had already left home when Ms Wilkinson made the call and therefore had not received the request. Cassandra is also employed at Farmers but at a different store located in Papakura.

[20] At the Store closing time and after Cassandra had arrived, Ms Wilkinson decided to make the perfume purchase. As the perfume stock was low and she was keen to secure some bottles of the perfume for herself without the knowledge of her colleague and friend, Ms Jovelin Lines, she had taken her purchase items from the beauty products area of the Store and downstairs to an unrelated sales counter namely the children sales counter.

[21] Ms Wilkinson said she had decided to have her daughter pay for her purchases and she would subsequently refund that amount to Cassandra. She served her daughter with the purchases she had made for herself which included the perfume.

[22] Mr Rajesh Jattan, at that time employed as the Loss Prevention Manager in the Store, was approached by another employee on 27 January 2017 who told him she had concern about a transaction made by Ms Wilkinson which had occurred the previous day.

[23] Mr Jattan informed Ms Miller of the employee's concern and she instructed him to obtain a full statement from the employee concerned. Mr Jattan did so and provided the statement to Ms Miller.

[24] Ms Miller said from the information obtained by Mr Jattan it appeared that Ms Wilkinson had deliberately gone downstairs to another area in the Store to serve her daughter, but in respect of a purchase for herself. The statement also included information that Ms Wilkinson might have placed items which had not been scanned through the Store transaction system into the bag.

[25] The statement and the associated transaction records concerned Ms Miller as it appeared Ms Wilkinson may have failed to comply with the rules regarding the processing of transactions.

[26] She asked Mr Jattan to look at the CCTV footage in the store and to make a copy of anything on the footage regarding the relevant purchase. Mr Jattan provided the CCTV footage to Ms Miller who reviewed it and said it appeared to show Ms Wilkinson processing the transaction.

[27] Ms Miller had sought further advice from Mr Hayden Crosby, Regional Loss Prevention Manager, and from Mr Barend Pretorius, HR Manager, Operations, who she asked to draft a letter inviting Ms Wilkinson to a disciplinary meeting to address the concerns.

[28] Due to both Mr Crosby and Mr Pretorius having leave on or about that time and the fact that there were two public holidays in the period involved, a letter inviting Ms Wilkinson to a disciplinary meeting had only been drafted just prior to 21 February 2017.

[29] However prior to it being sent, a further transaction that Ms Wilkinson processed with Ms Lines on 19 February 2017 occurred.

Events on 19 February 2017

[30] Members of the Store Loss Prevention team met with Ms Miller and showed her some CCTV footage of a transaction which occurred on 19 February 2017. The footage of the transaction concerned the processing of a product return, the return being associated with a 'Gift with Purchase' (GWP).

[31] The product return had been made by Ms Lines, and Ms Wilkinson had processed it. The relevant GWP was associated with a promotion by YSL held in November 2016 and comprised a gold bag with four items in it, the value of which was \$157.40. The GWP was to be given to any customer who purchased any two full price items from the YSL counter.

Ms Lines had purchased only one YSL item (a 'Rouge Volupte Shine' lipstick) from the YSL counter on 24 January 2017 and therefore did not meet the requirement to purchase two full priced items.

[32] The product return transaction recorded by Ms Wilkinson showed that the GWP had been returned at the time of the product return; however this is not correct because Ms Lines had said she would return the GWP later.

[33] As the product return was being made 14 days after purchase, it needed to be authorised by a manager. Ms Miller said she had therefore spoken to Ms Samantha Grey, the Beauty Sales Manager who had been on duty at that time, and asked her whether or not she had authorised the product return. Ms Grey confirmed that she had done so.

[34] Ms Miller said she had asked an employee at the YSL counter to do a stock count with her on two products, the lipsticks associated with the GWP promotion and the YSL four piece GWP. The product count showed four lipsticks instead of the seven indicted on the stock records, and while the Farmers stock records showed four of the four piece YSL GWPs, they had been unable to find any. Ms Miller said she had been particularly concerned because despite the transaction record, which would have resulted in one GWP being shown as stock, it did not appear that the GWP had been returned when the transaction record indicated that it had been.

[35] Ms Miller said she had shared the additional information she had obtained with Mr Crosby and Mr Pretorius who updated the information in the original letter which had been intended to be provided to Ms Wilkinson. This was finally completed on 22 February 2017. As Mr Crosby was not available for a disciplinary meeting in the following week, Ms Jo McMahon, Regional HR Manager, attended the meeting.

The letter dated 22 February 2017

[36] The redrafted letter dated 22 February 2017 was issued by Ms Miller to Ms Wilkinson on 23 February 2017. The letter invited Ms Wilkinson to attend a disciplinary meeting on Monday 27 February 2017 at 10 a.m. and advised her that she was entitled to have a representative present at the meeting. The allegations as stated in the letter were:

- (a) *That you removed company property without authorisation.*
- (b) *That on two occasions you failed to process transactions completely through register.*
- (c) *That you have knowingly served a family member.*

- (d) *That on two occasions you have caused the company to suffer financial loss.*
- (e) *Failed to carry out instructions given to you by a manager.*

[37] Details of the allegations were set out as:

There are two instances we wish to discuss with you. One relates to serving your daughter and placing items in the shopping bag that were not scanned through the Point of Sale, and the second you appear to have returned an article and Gift with Purchase however you did not recover the gift with purchase with the return although the docket says the gift with purchase was returned.

1. *That at approximately 8.49pm on Thursday 26 January 2017 you were observed on Farmers' CCTV system processing transaction 26392109 at till 26:*
 - (a) *That you deliberately went downstairs to the staff purchase counter to serve your daughter;*
 - (b) *That your daughter's staff discount card was used, but that you maintained possession of the items;*
 - (c) *That you knowingly served your daughter, Cassandra Fernandez;*
 - (d) *That you were observed by a staff member placing unscanned items into the Farmers bag with the items scanned in transaction 26392109 and securing the Farmers bag with sellotape;*
 - (e) *That your rostered shift on this day was from 11.45am to 8.30pm and that you processed this transaction outside of work hours;*
 - (f) *That you have caused the company to suffer a financial loss.*
2. *That at approximately 1.30pm on Sunday, 19 February 2017 you were observed on Farmers' CCTV processing transaction 7125495 at till 7:*
3.
 - (a) *That you processed a return of transaction 27140990, a YSL Rouge Volupte Shine lipstick and YSL four piece gift set with purchase;*
 - (b) *That the YSL four piece gift with purchase was not returned;*
 - (c) *That you adjusted the transaction to reflect the gift with purchase being returned;*
 - (d) *That our stock on hand count confirms that we are missing the gift with purchase;*

(e) *That you have caused the company to suffer a financial loss.*

Copies of the transactions mentioned above and your signed staff discount policy acknowledgment are attached for your information as well as a statement from [the employee]...

[38] The letter concluded with the information that Ms Wilkinson's explanations or comments would be taken into consideration before a decision was made and that disciplinary action could be taken up to and including dismissal.

[39] The letter also proposed that Ms Wilkinson be stood down from work on full pay until the meeting took place to provide Farmers with time to continue its investigation and to provide Ms Wilkinson with time to prepare for the meeting.

[40] The letter invited her, if she wished to make a representation about the stand down period, to do so in writing to Ms Miller. Ms Wilkinson said she had not made any representation about the stand down period.

Disciplinary meeting 6 March 2017

[41] Ms Miller accompanied by Ms McMahon met with Ms Wilkinson and her representative, Ms Sarah Thompson, Organiser, First Union. Prior to the disciplinary meeting Ms Miller said she had provided Ms Thompson with all of the transaction records, the CCTV material which was viewed in the Store prior to the meeting, and the policy documentation.

[42] During the meeting, Ms Miller said that Ms Wilkinson told her and Ms McMahon that she:

- (a) had wanted to purchase two bottles of perfume but she did not want Ms Lines to see her purchasing them so she had taken them to sales counter in the children's department;
- (b) had forgotten her wallet but that her daughter, Cassandra, had her wallet in her car;
- (c) had taken body care items (which were part of a GWP promotion) to try them as she wanted to learn more about skincare. It was a small tube of body lotion she had taken. She had not scanned them because the GWP had been broken down into elements of the promotion;
- (d) had placed these items in a bag of dirty towels she was taking home to clean and had forgotten they were there until she took the towels out of the bag to clean them;

- (e) agreed the items she had purchased did not entitle her to a Clarins GWP;
- (f) confirmed that she knew it was not the correct process to serve yourself or family members but she had finished her shift and needed to get home as her son was not well. As she had forgotten her wallet, she used her daughter's credit card to process the transaction for items which were for herself and her daughter. She admitted this was wrong and said she was apologetic;
- (g) had not previously served her daughter.

[43] In relation to the transaction on 19 February 2017, Ms Wilkinson had said:

- (a) when Ms Lines came to return the one YSL item she had purchased, namely the YSL lipstick, Ms Lines had told her that she was thinking of purchasing other YSL products and so had not brought back the GWP;
- (b) because the product return was over 14 days she called Ms Grey to ask her to authorise the return but had not told Ms Grey about the GWP not being returned;
- (c) Ms Lines told her that she had already used up some of the GWP but that she would return what was left of the GWP;
- (d) She had posted through the transaction as if the GWP had been returned because Ms Lines said she was intending to bring it back. Ms Wilkinson said this had been an error in judgement and apologised for what she called a minor error;
- (e) Ms Lines did bring the GWP back and had no intention of defrauding the company.

[44] Following the meeting Ms Thompson requested that Farmers provide a preliminary decision, but Ms Miller emailed in response that further information had been discovered and this needed to be investigated and considered. Accordingly Ms Miller stated that Farmers did not consider it was in a position to issue a preliminary decision.

[45] Ms Thompson responded by email dated 7 March 2017 reiterating the request for a preliminary decision, and requesting that she be sent the further information to which Ms Miller had referred.

Further investigation

[46] Ms Miller said that following the meeting on 6 March 2017 the statement Ms Wilkinson had given to the effect she had not previously served her daughter was further investigated. As a result, information was obtained which indicated that she had served her daughter on 30 December 2016.

[47] On 7 March 2017, the disciplinary meeting letter had been updated to advise Ms Wilkinson of that concern. The original disciplinary meeting invitation letter was also redrafted to include the December allegation and the transaction records.

Second disciplinary meeting 13 March 2017

[48] Shortly before the second disciplinary meeting held on 13 March 2017 Mr Jacques advised that he was now representing Ms Wilkinson.

[49] At the second disciplinary meeting Ms Miller was accompanied by Mr Crosby and Ms Wilkinson was accompanied by Mr Jacques.

[50] Ms Miller said she had found what Ms Wilkinson was saying during the meeting, confusing and difficult to understand and in fact the meeting was closed by Mr Jacques confirming that Ms Wilkinson's response would be put in writing. Mr Jacques also requested that statements were obtained from Ms Grey and the Loss Prevention Officer, Ms Sally Kaokao.

[51] The statement provided by Ms Grey confirmed that she had processed the return of the two items shown to her by Ms Wilkinson.

[52] The statement provided by Ms Kaokao stated that on 26 January 2017, she had been closing the Store when she was approached by Ms Wilkinson who had a staff purchase of what she believed to be fragrances because that was what Ms Wilkinson had told her. Ms Wilkinson had held up a bag with the 'sold' tape attached and she had just glanced at it, not properly checking the receipt or the contents of the bag. She had handed a bag of towels for Ms Wilkinson to take home for washing and had proceeded to close the Store.

Ms Wilkinson's written statement 15 March 2017

[53] Ms Wilkinson provided a written statement dated 15 March 2017. In the written statement she said that in relation to the incident on 30 December 2016 when she served her daughter:

I am aware I am not supposed to serve family members. I am aware I was also not supposed to serve close friends. No one has raised it with me but in hindsight I suppose Jovelin is now a close friend and we should not be serving each other. ...

I regret to say I have been having some problems at home ...

The issue I am experiencing is causing me loss of sleep and at times fairly extreme stress. While I can function and do my job well, it has affected my memory. ...

It has been alleged I served my daughter on 30 December 2016. I am sorry but I have no recollection of this.

[54] In relation to the incident on 26 January 2017 the letter stated:

It is true I went downstairs and made my purchase at the children's counter and that my daughter paid for it, but it is not true I stole any items that should have been paid for ...

... I thought it would be a good way around it that Cassandra pay for it with her money and I could pay her back.

In doing so I failed to realise that I was now serving my daughter....

Anyway, I got it wrong and I apologise for this.

[55] Ms Wilkinson denied in the written statement that she had stolen anything and stated that she had not put any extra items into the bag after she had paid. In relation to the body care products, Ms Wilkinson stated:

... I say if I have taken anything it might be body products because I want to try. I do not know what I am saying here. I did not take any body products (but if I did want to try anything it would be body products) but they just want me to explain what I might be doing then.

I regret saying this now. ... I want to make it clear I do not say I took 2 body products to try without paying. I do not do that.

[56] In relation to the incident involving Ms Lines on 19 February 2017, Ms Wilkinson stated that as the purchase was over 14 days she needed to call a supervisor to authorise it and Ms Grey had authorised the product return.

[57] In regards to the GWP, Ms Wilkinson stated that Ms Lines had told her she had forgotten to bring the GWP back and stated:

What I did is mark down she had returned it. She had not, but she is bringing it back later so that is okay.

[58] Ms Wilkinson also stated that she had a choice as to what gift she could give the customer and she could break down a GWP and give one thing out of it or she could give all of it:

It is my understanding this is my discretion. So why do I not treat Jovelin as a customer when she comes back in? ...

Anyway Jovelin says she will bring back and I trust her. ...

[59] Ms Miller said Ms Wilkinson was a counter manager of Clarins. She was not the counter manager of YSL; therefore she had no authority or discretion in respect of the provision of YSL GWP. The standard procedure was that if a customer did not have all parts of their purchase or had used some part of a GWP, the employee processing the return was expected to obtain authorisation. However Ms Wilkinson had not told the Supervisor about the GWP but had simply processed the return as if it had been returned when it had not.

Further communication after 13 March 2017

(a) Letter dated 17 March 2017: preliminary dismissal decision

[60] On 17 March 2017, Ms Miller wrote to Mr Jacques to provide the additional statements obtained and to respond to the additional information from Ms Wilkinson. She had set out in the letter her concerns about the explanation provided by Ms Wilkinson in her written statement.

[61] In addition Ms Miller asked for Ms Wilkinson to provide further information on the additional materials provided, namely:

1. *The information from Ms Kaokao and Ms Grey;*
2. *Why and in what circumstances did Ms Wilkinson consider it appropriate to serve herself and have her daughter pay for it;*
3. *It is a longstanding policy that you must not serve family, friends or yourself at point of sale. This is one well known among managers and staff alike;*
4. *It is fair for you to clarify that using another team member's staff discount for your own transaction is prohibited by the company and well known amongst managers and staff alike.*

[62] Mr Jacques responded on 21 March 2017 providing additional information. In the letter Mr Jacques stated:

Lubelia believes you have predetermined this matter for the following reasons:

- (a) *You did not raise the allegation 26 January with her until 23 February and*
- (b) *You instructed loss prevention to focus the cameras closely in on every opportunity there was to scrutinise Lubelia ...*
- (c) *Your conduct is much more akin to a “squeezing out” where the objective is to find reasons to dismiss than that of a fair and objective inquiry into the facts; and*
- (d) *Multiple staff told her she was “gone” starting with 23 February 2017.*

[63] Ms Miller had also been concerned at the statement:

Your account that Lubelia admitted to taking one or two products on 6 March is incorrect. Lubelia said you essentially hounded her and she felt obliged to give you something even though it was not true.

[64] Ms Miller said that she had felt concerned because she had not predetermined the issue and it was not true that Ms Wilkinson had been hounded at the disciplinary meeting held on 6 March 2017 at which she had been represented by Ms Thompson.

[65] During the disciplinary meeting held on 6 March 2017, Ms Wilkinson had disclosed she taken body care products which were part of a GWP promotion to try them as she wanted to learn more about skincare and said it was a small tube of body lotion which she had not scanned because the GWP was broken down. The information had been openly provided by Ms Wilkinson at the disciplinary meeting to explain her actions and in which she had representation, and Ms Miller said she was very concerned to hear it asserted that Ms Wilkinson had been ‘hounded’ at the meeting.

[66] Ms Miller provided her response to Mr Jacques on 23 March 2017 in which she denied having predetermined the outcome and stated:

1. *The company has not pre-determined the outcome of this meeting. The only people who are aware of the allegations and meetings are those who have attended. We have kept strict confidence on all matters relating to this investigation.*
2. *The delay in raising the allegation with Lubelia was simply to ensure we had correct and accurate information and to allow us to complete a robust and thorough investigation*
3. *It is completely routine for Loss Prevention to watch closely any unusual behaviour identified on the trading floor. In fact this is a key part of their role. All staff are aware of this.*
4. *Lubelia’s view that she was ‘hounded’ in the initial meeting on 6 March is incorrect. Our meeting notes provide clear evidence that she was asked reasonable and fair questions in a polite and professional manner. She openly advised us that*

she had pulled apart a GWP and took body care items as she wanted to learn about the skincare side of Clarins.

5. *Lubelia falsified the POS receipt by inputting that the GWP had been returned when it had not. She is well aware that this is not correct procedure and that she should have notified a manager to avoid an investigation.*

[67] The letter concluded “*the company is issuing a preliminary decision of dismissal*”.

[68] Ms Miller said she had reached the decision that dismissal was the appropriate outcome on the basis that she felt the allegations had been established, namely that:

- that Ms Wilkinson had served herself and her daughter in breach of the point of sale procedures;
- Ms Wilkinson had also breached management instructions not to serve herself or a family member;
- Ms Wilkinson had removed company property without authorisation, being the GWP items she admitted taking; and
- It was a case of the company suffering a loss of its property.
- Ms Wilkinson had falsified a company record in that she had processed a GWP as being returned when it had not. Because Farmers had not recovered the GWP, it was not able to provide it to another customer in future as a means of driving further sales for that supplier.

(b) Letter dated 24 March 2017: response to preliminary dismissal decision

[69] Mr Jacques wrote to Farmers on 24 March 2017 with Ms Wilkinson’s response to the preliminary decision. Ms Miller said that she had been concerned by paragraphs.7 and 8 of Mr Jacques’ letter which stated:

7. *On 26 March it is accepted a 7 piece Clarins GWP that was off-promotion was already broken down upstairs in a product draw. When Lubelia brought her 2 x fragrance and 1 x Clarins down (\$130 value) she also took some of that GWP. She regards herself as having taken ‘a’ gift and that it was part of a 7-piece broken down set, that she was entitled to. She has constantly said she does not recall if it was one product or two. The GWP items do not have SKU and cannot be scanned. ...*
8. *The critical aspect of this matter is Lubelia has not treated herself any differently than how any arm’s length customer would have been.*

[70] Ms Miller said she had been concerned that it was now stated that Ms Wilkinson had taken part of a 7 piece GWP that had been broken down and that Ms Wilkinson had taken the items as a gift to which she was entitled.

[71] It was also stated that Ms Wilkinson had said she did not recall if it was one product or two and that Ms Wilkinson had not treated herself any differently to: “*how any arm’s length customer would have been*” treated, and that the GWP were of no commercial value and an off-promotion GWP akin to: “*rubbish*”.

[72] Ms Miller said the issue was that Ms Wilkinson had served herself and so it was entirely incorrect to say that this was no different to how an: “*arm’s length customer*” would have been treated.

[73] In addition, Ms Wilkinson was now stating that she had taken body care products when in her written statement dated 15 March 2017 she had said she had not done so. Ms Wilkinson now stated that she was entitled to them when in the first disciplinary meeting she had accepted that she was not entitled to them and had apologised. Ms Miller said this changing version of what had occurred was a major concern to her.

[74] The letter dated 24 March 2017 also stated that the 30 December 2016 allegation that Ms Wilkinson had served her daughter on that date had not been established, but Ms Miller said in her view the transaction records were very clear and so she remained of the view that the allegation had been established.

[75] Ms Miller said that she had considered from the submissions made by Mr Jacques on behalf of Ms Wilkinson that while in relation to the 26 January 2017 transaction there had been confusion by Ms Wilkinson, and in relation to 30 December 2016 transaction Ms Wilkinson had been under stress in her personal life, she concluded that this did not detract from the fact that Ms Wilkinson had served herself and her daughter on these occasions.

(c) Letter dated 31 March 2017: Response from Farmers

[76] Ms Miller responded to Mr Jacques on 31 March 2017 and again confirmed her preliminary decision to dismiss Ms Wilkinson from her employment. Ms Miller set out her reasons for confirming that decision and stated that:

The company has significant concerns with this contradictory and changing account by Lubelia of what has occurred. Based on the information we have to date the company’s view is that she has been dishonest and misleading.

[77] In concluding the letter, Ms Miller sought further comments from Ms Wilkinson.

(d) Letter dated 4 April 2017: Warning Outcome requested

[78] Mr Jacques wrote to Farmers on 4 April 2017 to seek that a warning be imposed against Ms Wilkinson.

[79] Ms Miller said she had considered the submissions made by Mr Jacques that a written warning should be imposed. However she considered that the actions to which Ms Wilkinson had admitted were of substantial concern, especially that:

- Ms Wilkinson had taken items away from the beauty products area and gone downstairs in the store to the children sales counter. There had been no need to process the sale away from the beauty products area;
- Ms Wilkinson had processed the sale for a family member when clearly she was not allowed to serve family and friends and told Farmers that she had in fact served herself;
- In regard to the taking of the GWP items, Ms Miller said that she was never able to establish exactly what Ms Wilkinson had taken but ultimately the conclusion she reached was that Ms Wilkinson had taken one or two body products. While she had said she was entitled to take them as a gift, this was not the case;
- At the disciplinary meeting on 6 March 2017, Ms Wilkinson had told both her and Ms McMahon that she had never served her daughter before, only for that to have been almost immediately discovered as having occurred a month previously; and
- In relation to the transaction regarding Ms Lines, Ms Miller said it was concerning to her that Ms Wilkinson had recorded something as having happened when it had not done so, and that the person authorising the return was unaware of that fact.

[80] Ms Miller said that she regarded these matters as being misleading to Farmers and they had significantly affected her trust in Ms Wilkinson. Each of the issues was very serious and she considered that they amounted to serious misconduct.

[81] She concluded that a written warning was not appropriate because Ms Wilkinson's conduct had involved very serious breaches of the procedures which Farmers considered to be

of critical importance. In addition, she did not consider that Ms Wilkinson's actions were in line with the other employees involved in the transactions, they were much more serious.

(e) Letter dated 6 April 2017: confirmation of dismissal

[82] On 6 April 2017, Ms Miller had written to Mr Jacques confirming Ms Wilkinson's dismissal without notice on the basis that her conduct amounted to serious misconduct and misconduct. She stated:

... given Lubelia's conduct, Farmers does not consider that it can have in her the necessary trust and confidence to maintain her employment.

Determination

Was Ms Wilkinson was unjustifiably dismissed by Farmers?

[83] Ms Wilkinson claims that she was unjustifiably dismissed by Farmers. The test of justification in s 103A Employment Relations Act 2000 (the Act) states:

103A Test of justification

- 1) *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).*
- 2) *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. Farmers must 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 Collective Agreement states at clause 13.3 that Farmers have Work Rules and procedures which apply to employees. The Work Rules and Disciplinary Procedures are set out in Appendix 1 of the Collective Agreement.

[86] At the Investigation Meeting Ms Wilkinson said she had read through the Collective Agreement when provided with it and had memorised some of the rules and procedures, although she had not been completely familiar with all the policies and procedures. She confirmed that she was familiar with the Staff Discount policy, GWP guidelines and the Store memorandum and procedures.

[87] Ms Wilkinson confirmed that she was familiar with the rules concerning staff discounts, not serving family members or friends, and the return and exchange policies.

[88] I find that Ms Wilkinson had knowledge of the rules and procedures which applied in respect of the transactions which took place on 30 December 2016, 26 January and 19 February 2017. I also find that Ms Wilkinson had knowledge of the acts which Farmers regarded as serious misconduct and which could result in serious misconduct as set out in the Collective Agreement.

[89] Farmers reached the conclusion following its investigation process that in respect of the events on 30 December 2016, 26 January 2017 and 19 February 2017 Ms Wilkinson had breached its policies and procedures in a number of respects as set out in the letters dated 23 and 31 March and 6 April 2017.

[90] I observe that during cross examination at the Investigation Meeting Ms Wilkinson acknowledged that she had in fact served Ms Lines on many occasions during the years of their employment in breach of Farmers policies.

[91] Farmers regarded these breaches as being serious misconduct in accordance with Appendix 1 of the Collective Agreement.

[92] I find that Farmers had substantive justification for the decision that Ms Wilkinson had committed serious misconduct.

Procedural Justification

[93] A dismissal must not only have substantive justification, it must be procedurally justifiable. In accordance with s 103A (3) of the Act, Farmers was required to carry out a fair investigation and follow a fair procedure.

[94] *Ministry of Maori Development v Travers-Jones*¹ the then Chief Judge Goddard stated in regards to a fair procedure:²

¹ [2003] 1 ERNZ 174

² Ibid at para [30]

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 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.

(i) Notice of the alleged misconduct

[95] Ms Wilkinson had been advised of the allegations against her in the letter dated 22 February 2017. The allegations referred to Ms Wilkinson's signed staff discount policy.

[96] The letter dated 22 February 2017 set out the allegations clearly and referred to the Point of Sale and GWP policy and procedures.

[97] I find that Ms Wilkinson was provided with notice of the alleged misconduct.

(ii) Opportunity to respond to the allegations and adequate time for preparation

[98] Ms Wilkinson attended two meetings with Farmers and had representation at both: Ms Thompson at the first on 6 March and Mr Jacques at the second on 13 March 2017.

[99] Prior to attending meeting on 6 March 2017 Ms Wilkinson had been stood down on full pay to allow her time to prepare for the meeting. I note that the Disciplinary procedures contained in Appendix 1 of the Collective Agreement permitted a stand down in the situation in which serious misconduct was indicated. I further note that the letter dated 22 February 2017 advised Ms Wilkinson of her right to make a representation about the proposal of stand down, but she chose not to do so.

[100] In addition Ms Wilkinson was provided with adequate time to prepare her responses to the allegations during what was a fairly lengthy investigation process, observing that she had experienced representatives who could advise her during that preparation process.

[101] At each meeting she was provided with an opportunity to provide an explanation, and following the meeting held on 13 March 2017, Ms Wilkinson provided a detailed 4 page written statement setting out her explanation. The conclusions reached by Ms Miller were set

out in the letters dated 23 and 31 March 2017 and Mr Jacques was able to, and did, respond to these on Ms Wilkinson's behalf in the letters dated 24 March and 4 April 2017.

[102] I find that Ms Wilkinson had a fair opportunity and adequate time to provide an explanation in respect of the allegations.

(iii) A fair and reasonable consideration of her explanations

[103] I have considered whether or not Ms Miller gave full and fair consideration to the explanations provided by Ms Wilkinson. I have therefore considered whether or not there was predetermination on her part and/or disparity of treatment.

(iv) Predetermination

[104] During the Investigation Meeting there was reference by Mr Jattan and Ms Lines to Ms Miller having a 'hit list' of employees she intended to oust out of the Store. Ms Miller denied having such a list and Mr Crosby confirmed that he had never seen, or had any knowledge of, such a list.

[105] The alleged 'hit list' was not provided to the Authority, and in fact the evidence of both Mr Jattan and Ms Lines was that they had not seen it but had instead relied upon Store rumour.

[106] I do not accept that the evidence provided supports Ms Miller having prepared such a list.

[107] In regards to the statement that Ms Miller had instructed the Loss Prevention team to focus the CCTV cameras on Ms Wilkinson as made in Mr Jacques letter dated 21 March 2017 I note that the 'Comms' book method of communication between the Store Loss Prevention team introduced by Mr Jattan confirms that it was the Loss Prevention team which had initiated the focus of the CCTV cameras on the YSL counter area of the Store after a staff member had complained that product in that area was going missing. This had resulted in the cameras being focused on the transaction between Ms Wilkinson and Ms Lines on 19 February 2017.

[108] I find that it was members of the Loss Prevention team who approached Ms Miller with their concern about the transaction between Ms Wilkinson and Ms Lines which had been observed by them as a result of focussing the CCTV cameras on their own initiative.

[109] I find no evidence of predetermination on the part of Ms Miller as a result of CCTV cameras having been focused on the area of the Store in which the transaction between Ms Wilkinson and Ms Lines took place on 19 February 2017.

[110] I have also considered the submission made on behalf of Ms Wilkinson that the investigation process was delayed in an attempt to 'entrap' Ms Wilkinson. Ms Miller's evidence was that the delay was occasioned by the leave taken by Mr Crosby and Mr Pretorius and the public holidays. There was also a need to undertake further investigation.

[111] Taking into consideration the time of the year which is peak holiday time, and the need to carry out further investigation; I accept there was a valid reason for the delay in issuing the letter dated 22 February 2017.

(v) Disparity of Treatment

[112] Even where grounds for dismissal have been established, the Employment Court has confirmed that it is the prerogative of the employer to decide whether to dismiss or not.³ However this right must be exercised in accordance with the principles of fairness and reasonableness

[113] The Court of Appeal judgment in *Chief Executive of the Dept of Inland Revenue v Buchanan*⁴ (*Buchanan*) outlines three separate issues⁴ to be considered in relation to the question of disparity of treatment:

- 1) *Is there disparity of treatment?*
- 2) *If so, is there an adequate explanation for the disparity?*
- 3) *If not, is the dismissal justified, notwithstanding the disparity for which there is no adequate explanation?*⁵

[114] 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.

[115] On 23 March 2017, following the disciplinary process with Ms Lines, a first written warning had been issued to Ms Lines for failing to return in full the GWP when returning the product purchase and having caused the company to suffer a financial loss.

³ *Cooke v Tranz Rail Ltd* [1996] 1 ERNZ 610

⁴ [2005] ERNZ 767; (2006) 7 NZELC 98,153 (CA)

⁵ *Ibid* at para [45]

[116] On 6 April 2017, following the disciplinary process, the Store Manager of the Farmers Papakura store, issued a first written warning to Cassandra for knowingly being served by a family member.

[117] Ms Miller considered that the conduct of Ms Wilkinson was serious misconduct and as such could be distinguished from that of Ms Lines. As such there was an explanation for the disparity of treatment.

[118] I observe that the outcome of a first written warning to Cassandra had been the decision of a different Farmers Store Manager and Ms Miller was not part of this decision.

[119] As regards the submission made by Mr Jacques regarding a previous employee I note that Farmers submits that this was some considerable time prior to the events with Ms Wilkinson. Moreover In *Samu v Air New Zealand*⁶ 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 employer is for ever bound by the mistaken or over-generous treatment of a particular employee on a particular occasion.

[120] Disparity of treatment I do not find disparity of treatment on the part of Farmers.

[121] Having regard to the investigation process carried out by Ms Miller I observe that it was robust and comprehensive, involving further investigation and full consideration of the explanations and submissions made by Ms Wilkinson.

[122] Following notification that she was considering a preliminary outcome of dismissal on two occasions in the letters dated 23 March and 31 March 2017, Ms Wilkinson was able to respond and these responses were considered by Ms Miller before the final decision of dismissal was confirmed on 7 April 2017.

[123] In the letter confirming the decision to dismiss dated 7 April 2017 Ms Miller stated that she had considered a warning rather than dismissal, but rejected this after consideration: *“I do not consider that a warning is the appropriate response to my determination that her conduct amounts to serious misconduct and misconduct”*.

[124] I find that Farmers followed a fair and reasonable procedure prior to reaching the decision that dismissal was the appropriate outcome.

⁶ [1995] 1 ERNZ 636 (CA)

[125] Farmers had reached the conclusion that it no longer had the requisite trust and confidence in Ms Wilkinson and that dismissal was the appropriate outcome. I find this was a conclusion reached on substantive and procedural grounds and one which was open to a fair and reasonable employer in all the circumstances which included Ms Wilkinson knowingly breaching Farmers policies and knowing that Farmers considered such breaches to constitute serious misconduct.

[126] I determine that Ms Wilkinson was justifiably dismissed by Farmers.

Costs

[127] Costs are reserved. The parties are encouraged to agree costs between themselves. If they are not able to do so, the Respondent may lodge and serve a memorandum as to costs within 28 days of the date of this determination. The Applicant will have 14 days from the date of service to lodge a reply memorandum. No application for costs will be considered outside this time frame without prior leave.

[128] All submissions must include a breakdown of how and when the costs were incurred and be accompanied by supporting evidence.

Eleanor Robinson
Member of the Employment Relations Authority