

**IN THE EMPLOYMENT RELATIONS AUTHORITY  
AUCKLAND**

**I TE RATONGA AHUMANA TAIMAHI  
TĀMAKI MAKAURAU ROHE**

[2021] NZERA 259  
3112359

BETWEEN

EMMA JAMES  
Applicant

AND

THE FARMERS TRADING  
COMPANY LIMITED  
Respondent

Member of Authority: Eleanor Robinson

Representatives: Alexandria Till, counsel for the Applicant  
Matthew McGoldrick, counsel for the Respondent

Investigation Meeting: 18 & 19 May 2021

Submissions and/or further  
evidence 19 May 2021

Determination: 18 June 2021

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**DETERMINATION OF THE AUTHORITY**

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**Employment Relationship Problem**

[1] The Applicant, Ms Emma James, claims that she was unjustifiably dismissed and unjustifiably disadvantaged by the Respondent, The Farmers Trading Company Limited (Farmers).

[2] Farmers denies that Ms James was unjustifiably dismissed or unjustifiably disadvantaged, and claims that she was justifiably dismissed for serious misconduct.

**The Authority's investigation**

[3] As permitted by s 174E of the Employment Relations Act 2000 (the Act) this determination has stated findings of fact and law, expressed conclusions on issues necessary to dispose of the matter and specified orders made. It has not recorded all evidence and submissions received.

## **Issues**

[4] The issues requiring investigation are whether or not Ms James was unjustifiably:

- dismissed by Farmers?
- disadvantaged by Farmers?
- Did Farmers breach the duty of good faith it owed Ms James?

## **Background**

[5] 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.

[6] Ms James commenced employment with Farmers as a Beauty Advisor on the Elizabeth Arden counter in the Hamilton CBD store (the CBD store) on or about September 2018.

[7] Ms James was employed pursuant to the Farmers and First Union Collective Agreement – Stores effective 1 April 2019 to 31 March 2020 (the Collective Agreement). The Collective Agreement provided the Farmers Work Rules and Conduct at Appendix 1 which contained the disciplinary procedures (the Work Rules). Ms James was also subject to a number of other company procedures and policies.

[8] The Work Rules set out the relevant rules, breach of which was considered to be serious misconduct. These included:

- a) Property: Unauthorised possession or removal of company property, regardless of value;
- b) Money and Valuables handling: Failure to follow money handling procedures;
- c) Honesty and Integrity: Deliberate falsification of Company records/documents, or the giving of false information at an interview;
- d) Point of Sales Procedures: Failure to follow the point of sale procedures including rules for cash register operation.

[9] The purpose of the Work Rules relating to point-of-sale procedures and money and valuables handling was to ensure stock and financial integrity. They safeguard Farmers from financial loss and safeguard employees from any criticism of their actions due to non-compliance with the procedures.

[10] Ms James had received training which included on the module: “Do The Right Thing”. This included training on the importance of complying with the processes specified, and concluded: “Breach of any of the above policies may result in disciplinary action, which could lead to dismissal.”

[11] Ms James was appointed Counter Manager of the Lancôme counter at the CBD Store with effect from 31 August 2019. As Counter Manager Ms James was responsible for sales of the products stocked by Farmers from Lancôme, and was responsible for the stock control of those products. The role of Counter Manager required the development of a good working relationship with the particular beauty house.

[12] As cosmetic stocks are considered to be high value products, the Counter Manager's earnings include commissions. In addition incentives could be earned, these were put in place by the beauty houses to incentivise sales of their products. As a consequence, the Counter Managers are amongst the highest paid employees in Farmers.

[13] Incentives are paid on a monthly basis, and depended on meeting the targets. Once targets met 100%, the incentive was paid however exceeding the targets by more than 100% did not earn additional incentive. There were also quarterly incentives.

[14] Ms James reported to a Beauty Sales Manager, Ms G, who in turn reported to Ms Tracy Sheehan, the CBD Store Manager.

*Verbal warning October 2019*

[15] Ms James was issued with a verbal warning in October 2019 in regard to sending a text message to a customer in breach of the Farmers Social Media Policy. The verbal warning letter dated 24 October 2019 included the statements:

- You were apologetic and remorseful about the incident and that you understood the companies position and reasoning for the policy...

... We did highlight that you hadn't taken the opportunity to raise the matter with your Manager and give them the opportunity to add some advice or provide support on the matter and instead had dealt with the matter on your own and in an incorrect way. ...

You should be aware that recurrence of this conduct or any further breach of company Work Rules and Conduct may result in disciplinary action.

*Sales transactions on 30 October 2019*

[16] Wednesday 30 October 2019 was the day before a sales event in Farmers. The sale had two parts to it: (i) a discount for VIP customers of 15%; and (ii) gifts with purchase (GWP) that could be given to customers who spent over a certain dollar amount.

[17] VIP customers were determined by Farmers and discount would be activated and applied automatically on the day the sale commenced by the computer system. A customer's VIP Farmers Loyalty card would be scanned at the time of purchase during the sale, and this would trigger the VIP discount if the customer met the criteria.

[18] Ms James processed four sales transactions on 30 October 2019, the day before the sale commenced. She recorded the sales on Farmers gift cards of these customers whom she believed would qualify for the VIP discount the following day on the basis of her own judgment that they would qualify as VIP customers.

[19] Once the customers paid she said she gave them the products, issued them with a gift card receipt, telling them they would receive a new receipt once the gift card transaction was processed; put the customers' money onto the gift cards, and placed the cards in the Lancôme counter drawer ready to process the following day when the sale commenced.

[20] She also noted the customer's club card points number, their name and reference to them, adding the codes for the product which had been taken.

[21] The customer did not receive any loyalty points at that stage because the transactions were not complete.

*Events 31 October and 1 November 2019*

[22] The following day, 31 October 2019, was the day the sale commenced. Ms James worked during the day but said she was very busy and feeling unwell. In addition it was the month end and she had to complete the Lancôme sales reports. As a result she failed to process the gift cards.

[23] Ms Sheehan said that during the course of the day, she spoke to Ms James who made the comment that: "she wished her customers would go away". Ms Sheehan said that she knew Ms James' monthly incentive target had been reached, as did Ms James.

[24] Later that night Ms James was so unwell that she visited the hospital, was kept in overnight and certified to be on sick leave the following day, 1 November 2019. She telephoned Ms G to advise her that she was in hospital and would not be at work that day, however she did not mention the gift cards to her.

[25] During 1 November 2019 a colleague, Ms L, telephoned her and enquired if there was anything she could do to assist. Ms James asked Ms L to retrieve the gift cards and process them for her.

[26] Ms Sheehan said that on 1 November 2019 the CBD Store Loss Prevention Manager had told her that he had found four gift cards in a drawer at the Lancôme counter while he was carrying out routine checks on all the CBD Store's counters. He said he had found them in an unusual place where they would not normally be and there were various dockets around the gift cards for sums of money in odd denominations. There was also handwriting on the dockets.

[27] The individual amounts of the gifts cards were (i) \$123.25; (ii) 1,281.80; (iii) 262.00; and (iv) \$643.00; a total value of \$2,310.05. Ms Sheehan said she saw that the cards had all been processed by Ms James on 30 October 2019.

[28] She had secured the gift cards by placing them in the safe in the CBD Store office.

[29] Ms Sheehan said she and Ms James were both aware that the Lancôme counter had met its targets for that month because there was a sales report provided each day for each beauty counter. This meant that all the Lancôme incentive targets for October had been met.

[30] As a consequence Ms Sheehan said she was concerned that Ms James was storing up transactions on gift cards to process them at a later time because she had met her counter's targets for the month.

[31] Ms Sheehan said a review of the CBD Store's CCTV camera footage was unhelpful and she had been unable to do a stock check because the references were not on the dockets. At that point she had telephoned the Regional HR Manager and emailed her investigation findings to Mr David Paton, Regional Loss Prevention Manager.

[32] Mr Paton said that loss prevention was a critical part of Farmers business. Farmers guarded against, or tried to minimise, stock or financial loss, and regarded such issues seriously. Losses included those due to the actions of customers and also the actions of staff, these latter could include failing to follow correct processes, thereby having the effect of incorrectly recording transactions, or by having unauthorised possession of company property.

[33] After Ms Sheehan had emailed him, Mr Paton said they had together tried to ascertain what had occurred with the gift card transactions. Mr Paton said there were a number of issues from his point of view:

- a) The gift cards were unsecured in a drawer at the counter which was a breach of the rules;
- b) They were loaded with funds, and Farmers were not sure to whom they belonged, and the amount of funds was substantial being over \$2,000.00;
- c) The fact that there had been an underlying transaction of some item(s) which the customer had already taken, but to a gift card, meant that there had been a compromise of the stock integrity for the CBD Store. This meant that the CBD Store would not have an accurate record of stock on hand. Ms Sheehan had tried to do a stock check but could not because the stock references of the actual purchase of the product were

not on the dockets, which might lead to potential problems if the customer later tried to return the product;

- d) If the customer had purchased an item, but had been 'sold' a gift card and then taken the item home, the customer had not received a proper record of the actual purchase of the product which had the potential for problems if the customer later tried to return the product;
- e) There was an issue as to whether Ms James had provided customers with beauty club points or GWP to which they would not have been entitled; and
- f) Of most importance, Ms Sheehan had been concerned about why the sales had been completed as gift card transactions, and that the reason for this was that Ms James had tried to move some October sales for the Lancôme counter into her November sales in order that she could have 'a head start' on her incentives for the month of November.

#### *Gift Card use in relation to makeovers*

[34] Mr Paton said that despite working across a number of Farmers stores in his region, he was not aware of a similar incident. However he subsequently became aware of a system which had been set up by some cosmetic houses to take pre-bookings for makeovers.

[35] The system had been set up because the Farmers point of sale system does not have a code to be able to take pre-bookings and for customers to pay for those pre-bookings. Therefore a process had been developed to cope with that situation whereby the pre-booking was taken as the sale of a gift card.

[36] In that situation the gift card would be signed onto the register. When the register was balanced at the end of the day, the register would be signed into the office, and the person responsible for doing the banking in the office would receipt the gift card from the register and then sign the gift card into the safe.

[37] When the customer presented for the makeover, the team member would go to the office where they would arrange for a manager to sign out the gift card from the safe. The gift card would then be redeemed to pay for the makeover.

[38] Mr Paton said that as a Loss Prevention specialist, he was happy with the system because it secured the gift card at all times and there were records to show where the gift card was at all times so that the risk of loss was eliminated.

[39] Mr Paton said that additionally managers had the authority to honour the price of a promotion if a regular or VIP customer was unable to attend the promotional event. In that case a comment would be noted on the transaction docket.

*2 November 2019*

[40] On 2 November 2019 Ms Sheehan said she had entered her office and saw Ms L talking to the CBD Store administration assistant. She heard Ms L say: “no don’t tell Tracy” and as soon as she entered, Ms L left.

[41] She had thought this strange so asked what had occurred and was told that Ms L had been trying to find some Lancôme gift cards. She was told that Ms L had noted an envelope in which Ms Sheehan had placed the gift cards with the words: “Attn Tracy” written on it, and said “that will be it”. The administration assistant had said to Ms L that she would need to talk to Ms Sheehan about it, which was when Ms L had said: “no don’t tell Tracy”.

[42] Later that day Ms Sheehan said Ms James had telephoned her and said she wanted to talk about the gift cards. She had been agitated and said that Ms Sheehan was disadvantaging her customers by not processing the gift cards. Ms Sheehan said she had told Ms James she could not discuss the issue at that point.

*Preparatory actions prior to the disciplinary meeting*

[43] During the following days Ms Sheehan said she had examined Farmers sales transactions records to see if there had been any past gift cards sales similar to these i.e. in unusual amounts.

[44] She also examined whether or not the current employees in the CBD Store had made such sales in unusual amounts, and found only Ms L had done so. Ms Sheehan could see the transactions because she could enter the gift card number which had been transacted by Ms L and see a pattern for the next day where the gift card was redeemed, and those would be days where there were applications of double loyalty points or GWP transactions. There were 10 such occasions to be seen.

[45] With the assistance of HR, and in conjunction with Mr Paton, Ms Sheehan prepared a letter to be given to Ms James. The letter dated 5 November 2019 advised Ms James that she would be required to attend a disciplinary meeting on 6 November 2019 to discuss an allegation that she had breached the Farmers Work Rules. The specific allegations were a breach of:

#6 Point of Sales Procedures (Serious Misconduct), failure to follow the point of sales procedures including the rules for cash register operation and rules for Club card use (*whereby it is alleged that you have not processed transactions as per process*)

#3 Care and Responsibility (Serious Misconduct), failure to carry out normal safety procedures, acts of negligence and irresponsible behaviour (*whereby it is alleged that you have acted negligently and irresponsibly by leaving a large amount of money in the form of gift cards unsecured and risked serious complaints from the company which could have amounted to the company coming into disrepute.*)

#4 Honesty & Integrity (Serious Misconduct) deliberate falsification of company records/documents (*whereby it is alleged that you have deliberately delayed the processing of customer purchases to falsify your sales records for your own commission based gains and have subsequently falsified store takings for the month of October*),

#7 Carrying out Instruction (Misconduct)

Breach of Customer Service Standards – (*whereby it is alleged that you have not provided the customer with the appropriate transaction record for their purchase or club points when they were entitled to them*).

[46] The letter attached copies of the transactions, receipts and some loyalty card details together with a copy of the verbal warning which had been issued to Ms James.

[47] The letter proposed a period of stand down from work until the disciplinary meeting and stated: “should you wish to make representation about this stand down period, please do so before 5pm, 5 November 2019.”

*Events 5 November 2019*

[48] Ms James returned to work following sick leave on 5 November 2019. Ms Sheehan asked to speak to her in her office. The Assistant Store Manager was also present. Ms Sheehan said she read out the letter to Ms James.

[49] Ms James said she was shocked and distressed. She asked if she could stay at work to finish some tasks but Ms Sheehan told her to go home. She had not considered that she had any



option but to leave the work place, and that it would make no difference to the outcome had she made any representation about the proposed suspension.

[50] The following day she had visited her doctor who had increased the dose of the antidepressant she was prescribed.

*First Disciplinary Meeting 12 November 2019*

[51] Ms James attended the disciplinary meeting held on 12 November 2019 with Mr Paton and Ms Sheehan accompanied by Ms Kathryn Tucker, Union Organiser for First Union. Mr Paton took notes.

[52] Ms Sheehan said she read out the allegations and asked Ms James to respond to them. Ms James confirmed that she had processed the transactions as alleged in the letter dated 5 November 2019, and her intention had been to process the gift cards the following day but she had not felt well.

[53] Ms James said that the customers involved had been aware of the sales promotion and because they were unable to return the following day, they had not wanted to be unable to benefit from the sale.

[54] Ms Sheehan said that Ms James' main point had been that the practice was "common practice" in the CBD Store and that Ms G and the other Beauty Manager promoted the practice. At this stage she had wanted to investigate what Ms James had said about it being a common practice in the CBD Store.

*Further Investigations*

[55] To that point Ms Sheehan said that she and Mr Paton had not looked at previous employees but she became aware upon further investigation that two previous Store employees, Ms J and Ms N who then worked at other Farmers stores, had carried out the practice. They had subsequently been interviewed at disciplinary interviews, but not by Ms Sheehan because they no longer worked at the CBD Store.

[56] Ms Sheehan and Mr Paton spoke to Ms G and obtained a statement from her in which she stated:

The process for honouring a promotional event for a regular customer is done on a case by case and the beauty advisor would need to contact myself or the store manager to approve.

This is not a general practice. ...

I have been in Farmers CBD Hamilton Store for the past three years. I can tell you I have heard nothing from [Mr Q and Mr P, previous Store managers] advising the beauty advisers they can process gift cards and process the gift cards for the customers to receive GWP, prom discount and double loyalty points. ...

[57] Ms Sheehan said she had been with Mr Paton when he had spoken to all current available Counter Managers and Beauty Advisors, reviewed their sales histories, and were able to see that, other than Ms L, they had not engaged in the practice. They had also told them that Ms James' actions were not common practice.

[58] She had also overheard the conversation between Mr Paton and Ms M, who was the Lancôme representative, but had been previously employed by Farmers as Beauty Sales Manager at the CBD Store. Ms Sheehan said she heard Ms M tell Mr Paton this had never been the practice and it was not an approved practice.

*Second Disciplinary Meeting 15 November 2019*

[59] Ms Tucker accompanied Ms James at the meeting, and Mr Paton again took notes.

[60] Ms Sheehan said they had presented the written statement from Ms G , and she ran through the investigation she had undertaken since the last meeting, and given Ms James an opportunity to respond. Ms James had said that she was carrying out the practice intentionally, and that it was Mr P, a previous Store Manager, who had endorsed the practice.

[61] Ms Tucker had said that Ms G had been lying, as were other staff members because they did not want to get into trouble themselves.

[62] Ms Sheehan said Ms Tucker also questioned how gift card transactions were being investigated as a practice and in response she had explained that she had looked for gift cards in odd (i.e. not round) numbers towards the end of the month then saw if they were reconciled to sales at the beginning of each month.

[63] The meeting was then adjourned so that she and Mr Paton could investigate the claim that Mr P had endorsed the practice.

*Ms Tucker's investigations*

[64] Ms Tucker said she had not considered that Farmers were sufficiently investigating the allegations, so she carried out her own investigations and obtained statements from previous Farmers employees about the gift card practice.

[65] She then provided Farmers with nine email statements from previous employees who confirmed that they had been aware of, and had participated in the practice. They named Ms G and Ms M as being aware of the practice.

*Further investigations by Farmers*

[66] Ms Sheehan said that following the second disciplinary meeting she spoke to Mr P who confirmed that it was not a practice he endorsed and he could not remember an example of it happening.

[67] She had also spoken to the CBD Store Loss Prevention Manager who told her it was not a practice endorsed by Ms M and Mr N when they had management of the CBD Store. He also confirmed that counter checks had found no other loaded gift cards at the beauty counters.

[68] Once she had received the nine names and statements from Ms Tucker, she had looked as far back in their sales histories as she could. While there had been transactions for odd amounts on gift cards, she was able to identify that it was not a common practice in the CBD Store for transacting gift cards.

[69] Ms Sheehan said she was confident that if there had been a common practice in the CBD Store, she would have found it during her investigations.

[70] Ms Sheehan said she arranged for the HR Manager to undertake interviews with all the other counter managers to understand if it was a practice they were either aware of, or endorsed.

[71] The HR Manager provided her notes to Ms Sheehan and they were also provided to Ms James at the disciplinary meeting held on 21 November 2019.

*Third Disciplinary Meeting 21 November 2019*

[72] Ms James and Ms Tucker attended the meeting held with Ms Sheehan and Mr Paton on 21 November 2019.

[73] Ms Sheehan said she summarised the process to that point and outlined what further investigation had been taken. She then invited further responses.

[74] Ms Tucker said she did not believe that Farmers investigated the statements she supplied based upon its finding that there were no inconsistencies revealed in a search of their sales histories, and noted that she and Ms James were not given a copy of the relevant sales histories.

[75] Ms Tucker continued to say that those she was representing were telling her that 'everyone was doing it' and that it was endorsed by management. Ms Sheehan responded that based on her investigations she had been unable to identify that there was any such common practice in Store, or that managers were either aware of it, or endorsed it.

[76] There had been discussion about the process in place for gift cards in respect of makeover pre-bookings. Ms James denied that she had been at a staff meeting in which management had reminded the team members of the practice. Ms Sheehan said she had not been convinced by Ms James' statement and was confident Ms James knew of the process.

[77] Ms James said she had no intention to breach any policy, and did not understand or know the gift card policy.

[78] Ms Sheehan said she again put to Ms James that her motivation for undertaking the practice was for her own self gain, to load sales in November rather than October 2019. Ms James denied that was the case.

[79] The meeting was adjourned for Ms Sheehan and Mr Paton to consider Ms James and Ms Tucker's responses.

#### *Preliminary Decision*

[80] Ms Sheehan said at that point she considered she had sufficiently investigated and was in a position to prepare a preliminary decision.

[81] She said that she did not believe that what Ms James was claiming was common practice in the CBD Store. Further the issue of potential personal gain for Ms James was significant for her, noting that the way the gift cards were hidden in a drawer which was not secure was very concerning. She had believed that Ms James' actions were deceitful.

[82] Ms Sheehan said she had spoken to HR who had supported her preliminary decision and so she prepared a document summarising her preliminary decision.

[83] The preliminary decision document noted that Ms James had admitted to carrying out the four transactions using gift cards, outlined in details the steps in the process, the explanations provided by Ms James, the investigation findings and concluded:

I find your actions to be very deceptive and a significant breach of trust.  
You are already on a verbal warning for texting customers when you knew this practice was not allowed.

*Fourth Disciplinary Meeting 2 December 2019*

[84] At the disciplinary meeting on 2 December 2019 attended by Ms James and Ms Tucker, Ms Sheehan read the preliminary decision document she had prepared.

[85] The meeting was immediately adjourned so that Ms James and Ms Tucker could consider the preliminary decision.

[86] Ms James said she totally disagreed with Farmers view that there had been any benefit to herself intended in her actions, and whilst she could see why there could be certain benefits, she had not seen it like that at the time. She understood what constituted serious misconduct, but did not believe that she had acted in such a way as to commit it.

[87] Ms James said that throughout the meetings Ms Sheehan had been sarcastic and Mr Paton “on the attack”. Ms Tucker said that Mr Paton’s behaviour had been inappropriate in that he had been aggressive and dismissive of facts.

[88] Ms Sheehan and Mr Paton said that no complaint had been raised about their behaviour throughout the process. Mr Paton said that he attended 13 meetings in total, four with Ms James and nine with other employees. Ms Tucker was present at all of the meetings but raised no comment about his behaviour either during the meetings or subsequently with Farmers.

*Outcome for other employees*

*Ms J*

[89] Ms Sheehan said she had not been involved in the process for Ms J but her understanding was that Ms J, who had admitted to carrying out the practice seven times but had stopped after the staff meeting when advised about the gift card process, received a final written warning for six months.

[90] This was on the basis that there had been no element of self-gain and she had been genuinely remorseful.

*Ms S*

[91] Ms Sheehan said she had not been involved in the process for Ms S but her understanding was that Ms S, who had admitted to carrying out the practice 22 times, was given a final written warning for twelve months.

[92] This was on the basis that there was no element of self-gain and she had been genuinely remorseful.

*Ms L*

[93] Ms Sheehan said that Ms L had received a preliminary decision of a final written warning for 12 months. Seven of the 10 allegations against Ms L were upheld, which included that she was willing to assist Ms James to locate the gift cards and hide this from her as the CBD Store Manager.

[94] While there was no remorse from Ms L, there was no element of self-gain and she resigned effective immediately.

*Roster Issue*

[95] During the investigation process Ms James said she received a message from a colleague informing her that the fact that she was suspended had been noted on a roster which had been put up in the staff room.

[96] Ms James said this was humiliating and she felt extremely embarrassed. It also gave her a false sense of security because the roster had two of her shifts marked as stand-down and then three marked as normal. She had therefore thought that this meant she would continue working for Farmers.

[97] Ms Tucker had raised a complaint about the roster.

[98] Ms Sheehan said that the roster for the beauty team was pre-printed and sent out for the beauty team. At that particular time the payroll system was down due to the days the public holidays fell and Farmers were using a manual system to sign in and out.

[99] When advised by the Regional Manager about the roster she had looked and found the printed roster in the beauty area and removed it immediately. At the start of the next meeting she had apologised to Ms James for the fact that her suspension was mentioned on the roster.

*Fifth Disciplinary Meeting*

[100] Prior to the fifth disciplinary meeting Ms Tucker advised Ms James about the possibility of her obtaining legal advice. Ms James did so and requested the next meeting was postponed because Ms Matheson from Harkness Henry who was then representing Ms James, requested all the documents relating to the investigation concerning Ms James. The information was sent on 12 December 2019.

[101] The fifth meeting was delayed due to Ms James being in hospital, and took place on 23 January 2020 when it was attended by Ms James, her mother, Ms Matheson, Mr Paton and Ms Sheehan.

[102] At the outset Ms Sheehan said she apologised about the roster and confirmed it had been taken down.

[103] Ms Sheehan said she recalled there had been a discussion about the reason why Ms James had not processed the gift cards during the day on 31 October 2019.

[104] At that point there was an adjournment whilst Ms Sheehan and Mr Paton had a discussion with HR.

[105] Ms Sheehan said nothing had occurred which altered her view so she prepared a note of what she wished to communicate about her final decision. She read this out when the meeting recommenced and subsequently forwarded a copy of it to Ms Matheson. The note confirmed Ms Sheehan's view that the preliminary decision remained a summary dismissal but she invited further comments to be presented by midday the following day.

#### *Final Decision*

[106] Ms Matheson emailed Ms Sheehan with some comments on the preliminary decision on 28 January 2020. Ms Sheehan said there were a number of issues raised, but all of them she had considered, and having reviewed them again, decided that they did not change her decision.

[107] Ms Sheehan said that Ms James had raised the issue of disparity of treatment with the other employees. Ms James disputed that the selling of the gift cards at the end of the month was coincidental and her reason for doing so was the same as her colleagues, namely to assist and build loyal relationships with the customers.

[108] Ms Sheehan said she considered this point but decided that there was a proper reason for Ms James to be treated differently, and that was because her actions involved her acting for personal gain.

[109] She had given Ms James the benefit of the doubt that the sales would have been rung in later, but the reality was that the gift cards were loaded with money values of over \$2,000 which could have been taken by any dishonest customer or staff member finding them.

[110] In addition by the way in which she had processed the transactions, Ms James had allowed stock to be taken from the CBD Store without it having been rung through the system and therefore if returned by a customer there would be no record of it in the Farmers system.

[111] Ms Sheehan said that Ms James' attitude was also a concern for her. At no point did Ms James demonstrate any remorse, and her explanations were not convincing. Ms James' responses had included that everyone else was lying, but this had not been borne out in her investigations.

[112] On 3 February 2020 Ms Sheehan issued the final decision. The letter dated 3 February 2020 covered in detail the allegations and findings, Ms James' explanation for the allegations and further comments and statements she had made, together with Farmers responses. Farmers findings were set out as:

1. That Emma, transacted four transactions on the 30 October 2019 to gift cards for products that customers bought on this day and that they left the store with no receipt or proof of purchase. That this amounts to serious misconduct.
2. That Emma left a large amount of active gift cards unsecured at her counter. That this amounts to serious misconduct.
3. That Emma acted in a dishonest manner by not recording her sales accurately through the POS system. That this amounts to serious misconduct.
4. That Farmers beliefs (sic) that Emma's motivations was to process these sale in November as she has already made her maximum incentive targets for October. That this amounts to serious misconduct.

[113] The letter concluded:

I have considered all the point raised by you and all of my findings and has considered if termination of Emma's employment was still valid in all these circumstance (sic). Taking into consideration the breach of our Company rules that constituted serious misconduct on several occasion and that Emma is currently on a Verbal Warning (16 October 2019) for breaching the Farmers Social Media Policy, it is my decision to terminated (sic) Emma's employment as of today Tuesday, 4 January 2020.

### **Was Ms James unjustifiably dismissed by Farmers?**

[114] Ms James was dismissed on 4 January 2020 for serious misconduct. Justification for dismissal is stated in the Employment Relations Act 2000 (the Act), which at s 103A sets out the Test of Justification as being:

#### **S103A 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.
- (3) In applying the test in subsection (2), the Authority or the court must consider-



- a) Whether, having regard to the resources available to the employer, the employer sufficiently investigated the allegations against the employee before dismissing or taking action against the employee; and
  - b) Whether the employer raised the concerns that the employer had with the employee before dismissing or taking action against the employee; and
  - c) Whether the employer gave the employee a reasonable opportunity to respond to the employer's concerns before dismissing or taking action against the employee; and
  - d) Whether the employer genuinely considered the employee's explanations (if any) in relation to the allegations against the employee before dismissing or taking action against the employee.
- (4) In addition to the factors described in subsection (3), the Authority or the court may consider any other factors it thinks appropriate.
- (5) The Authority or the court must not determine a dismissal or an action to be unjustifiable under this section solely because of defects in the process followed by the employer if the defects were-
- a) Minor; and
  - b) Did not result in the employee being treated unfairly.

[115] The Test of Justification requires that the employer acted in a substantively and procedurally fair manner, and that the dismissal was a decision that a fair and reasonable employer could have made in all the circumstances at the relevant time.

[116] Ms James was dismissed for a breach of the Work Rules. Ms James claimed that what she had done by processing the sale of products as gift cards rather than products so that the sales were not recorded accurately through the POS system, was 'common practice'.

[117] Farmers had set out what constituted the Work Rules in Appendix 1 of the Collective Agreement with First Union of which Ms James was a member. It was clearly stated what constituted serious misconduct, and that the outcome if found to be serious misconduct would most likely be summary dismissal.

[118] I observe that the fact that something is common practice does not legitimise the action, but may provide a degree of exoneration for it. However I also observe that Farmers considered this explanation which was put forward by Ms James, and investigated it. Farmers investigation concluded that there was no such common practice, although some employees had also carried it out.

[119] Farmers had a number of issues with the transactions. The gift cards were not secured in the office safe. Ms James says that she was not aware that was the correct thing to do because she had not been informed to do that.

[120] I can accept that Ms James may not have been present at a meeting in which this information was provided since attendance at these informal meetings was not mandatory and there were no attendance records kept. However Ms James' evidence under cross examination confirmed that she was aware that there was a safe in which floats were placed at the end of the working day.

[121] The gift cards were of significant value being over \$2,000.00 and if taken by an unauthorised person could be redeemed for stock items as a normal gift card would be, a point accepted by Ms James. In that situation I consider a reasonable and responsible employee would have taken steps to secure the gift cards responsibly or at least have mentioned what she had done to a member of management for her own protection.

[122] Ms James had provided the four relevant customers with discounts and GWP. Farmers evidence was that these were things to which some of the customers were not entitled.

[123] Ms James' evidence was that she knew who the customers were, and had attached notes to the gift cards so that the customers could be contacted to collect an updated receipt when she processed the sales on the day of the sale. However Farmers evidence was that at least two of the attached notes did not clearly identify either the customers or a way to contact them.

[124] Importantly for Farmers there was no way in which it could reconcile the transactions with the stock on hand, thereby ensuring there was stock integrity.

[125] Ms James' evidence was that she had intended to process the gift card transactions on 31 October 2019, the first day of the sale, however she had omitted to do so due to the fact that she was unwell and the day was very busy.

[126] Farmers concluded that this was not correct in that she had adequate opportunity for doing so since she worked from 8.26 a.m. until 5.06 p.m. which was a full working day.

[127] I accept Ms James was unwell and busy, but this was a full working day and it would be reasonable for Farmers to conclude that she had some time available during the day to process the transactions through the POS system.

[128] Turning to the procedure adopted by Farmers, it is submitted that Ms James was not provided with sufficient information prior to each disciplinary meeting but was 'blind-sided' by being presented with information at the start of each meeting and being asked to respond without sufficient time to prepare a response.

[129] In addition that Ms Sheehan and in particular Mr Paton acted inappropriately towards her, being dismissive of her responses and aggressive.

[130] I am not persuaded that this latter was the case. I observe that Ms James was represented at four of the disciplinary meetings by Ms Tucker who was an experienced union organiser. Ms Tucker's evidence was that at no stage did she raise concerns about the behaviour of Ms Sheehan or Mr Paton as would have been expected if the behaviour had been unacceptable.

[131] In respect of the process adopted, apart from the initial disciplinary meeting when Ms James was provided with a letter which set out in detail the allegations, there was no advance notification of what was to be discussed during the meeting. This is unusual.

[132] I observe however that Ms James did have advance notification of the allegations, and that the second and third subsequent meetings comprised a pattern of Ms Sheehan summarising the investigation and/or further investigation carried out by Farmers since the previous meeting, followed by discussion and response from the applicant and her representative, and a further adjournment for Farmers to carry out further investigation.

[133] At the fourth disciplinary meeting the preliminary decision was read out and there was an adjournment for the applicant to consider it, followed by a fifth meeting which comprised a discussion between the parties, and an invitation from Farmers for the applicant to provide further comment, which occurred when Ms James' legal counsel emailed Ms Sheehan on 28 January 2020.

[134] Whilst the method of proceeding by Farmers reading out the letters at the start of the meeting rather than sending them to Ms James in advance of the meeting was unusual, I find that Ms James, who had competent representation throughout, was able to respond and did so, with Farmers carrying out further investigations as a result of her responses.

[135] I therefore consider that there is no evidence Ms James was treated unfairly: the process was unhurried and the issues raised by her and the evidence presented by Ms Tucker, were carefully considered, investigated and responded to before Farmers reached the preliminary and then the final, decision.

[136] The failure to set out what was to be discussed in advance could be seen as a flaw but I consider it to be minor given the initial detailed setting out of the allegations, and the scope for discussion, adjournment, investigation and feedback during the disciplinary meetings. In addition as stated, there is no evidence that it resulted in any unfairness to Ms James.

[137] In terms of the investigation, I find that Farmers listened to the responses raised by Ms James and Ms Tucker on her behalf, and investigated these as well as carrying out their own and further investigation into the assertion of 'common practice'.

[138] I find that Farmers carried out a fair and reasonable process.

*Disparity of Treatment*

[139] It is claimed that Farmers exercised a disparity of treatment in regard to Ms James because other employees found to have carried out similar transactions received warnings rather than dismissal.

[140] 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.<sup>1</sup> However this right must be exercised in accordance with the principles of fairness and reasonableness

[141] The Court of Appeal judgment in *Chief Executive of the Dept of Inland Revenue v Buchanan*<sup>2</sup> (*Buchanan*) outlines three separate issues to be considered in relation to the question of disparity of treatment:

- a) Is there disparity of treatment?
- b) If so, is there an adequate explanation for the disparity?
- c) If not, is the dismissal justified, notwithstanding the disparity for which there is no adequate explanation?

[142] 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.

[143] Farmers found that there was an element of self-gain in Ms James' actions which was lacking in that of the other employees. In addition the other employees expressed genuine remorse unlike Ms James, and finally Ms James had been issued with a verbal warning dated 24 October 2019, shortly before the events in late October 2019.

[144] In *Nel v ASB Bank Ltd (No 2)* the Court stated:

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<sup>1</sup> *Cooke v Tranz Rail Ltd* [1996] 1 ERNZ 610

<sup>2</sup> *Chief Executive of the Dept of Inland Revenue v Buchanan* [2005] ERNZ 767; (2006) 7 NZELC 98,153 (CA) at [45]

When making a disparity assessment, it will be necessary to consider whether the comparative conduct is sufficiently similar. Consideration should be given to all relevant circumstances, including context. ...<sup>3</sup>

[145] The context included the verbal warning and I find significant the fact that the warning noted that (i) Ms James had shown remorse for her actions; (ii) provided advice that she referred issues to her manager for guidance rather than carrying them out incorrectly; and (iii) that a breach of the Work Rules and Conduct might result in disciplinary action.

[146] I find there was a reason for the disparity of treatment.

[147] Having considered all the circumstances I find that dismissal was within the range of outcomes available to Farmers which acted as a fair and reasonable employer in all the circumstances at the relevant time.

[148] I determine that Ms James was not unjustifiably dismissed by Farmers.

#### **Was Ms James unjustifiably disadvantaged by Farmers?**

[149] Ms James is claiming unjustifiable disadvantage. Section 103(1) of the Act is applicable to personal grievances and defines a personal grievance as any grievance that an employee may have about the employer including at s 103(1)(b):

that the employee's employment (including any condition that survives termination of the employment), is or are or was (during employment that has since been terminated) affected to the employee's disadvantage by some unjustifiable action by the employer;

[150] The elements of s103 (1) (b) are twofold, being:

- a. An unjustifiable action by the employer, which
- b. Affected the employee's terms and conditions of employment, and this was to the employee's disadvantage.

[151] Ms James must therefore establish that there was some unjustifiable action by Farmers which affected her terms and conditions of employment to her disadvantage.

#### *Suspension*

[152] Ms James claims that her suspension by Farmers was an unjustifiable disadvantage.

[153] Appendix 1 of the Collective Agreement, the 'Work Rules & Conduct' states:

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<sup>3</sup> *Nel v ASB Bank Ltd (No2)* [2017] NZEmpC 97 at [52]

(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. ... 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.)

[154] Ms Sheehan's evidence was that Ms James was upset and in tears which was the reason she had told Ms James to go home. Ms James had been unwell prior to her return to work on 5 November 2019, and her evidence was that she was shocked and distressed during the meeting when Ms Sheehan read the letter dated 5 November 2019 to her. So much so in fact that she visited her doctor on the following day and was prescribed an increase in the dosage of the tranquilliser she was taking.

[155] In these circumstances I accept that Ms James was visibly distressed during the meeting and that it was suggested that she go home as a compassionate and practical suggestion in the circumstances rather than as an order that she do so.

[156] The Collective Agreement set out that an employee had the right to make comment prior to the stand down decision being taken, and this right was set out in the letter proposing a period of stand down dated 5 November 2019.

[157] I find that there was the opportunity provided for Ms James to make representation about the proposed stand down once she had regained self-control, and that opportunity was available until 5.00 p.m. on 5 November 2019, however she did not do so.

[158] I determine that Ms James was not unjustifiably disadvantaged by Farmers suspending her.

#### *Privacy Breach*

[159] Ms James claims that the posting of the roster containing the information that she had been stood down caused her to feel embarrassed and humiliated.

[160] Farmers evidence was that the roster would have only been seen by a few employees given where it had been posted. However I find that rumours spread rapidly and it can be reasonably anticipated that the news of Ms James' suspension would have permeated the Farmers work teams in the CBD Store quickly.

[161] I accept that as soon as she was made aware, Ms Sheehan had the roster removed and that an apology was provided, but by that stage the information would have been made known to a number of Ms James' colleagues and fellow employees. I accept that situation would have been distressing for Ms James.

[162] I find that Ms James was unjustifiably disadvantaged by the posting of the roster containing the details of her suspension.

**Has there been a breach of good faith by Farmers?**

[163] I have found that Ms James was justifiably dismissed by Farmers, and that the process followed was substantively fair and reasonable.

[164] In these circumstances I do believe not that there has been a breach of good faith.

**Remedies**

[165] I have found that Ms James was unjustifiably disadvantaged by Farmers in respect of the roster posting.

*Compensation for Hurt and Humiliation under s 123 (1) (c) (i) of the Act.*

[166] **I order that Farmers pay Ms James the sum of \$2,500.00, pursuant to s 123(1) (c) (i) of the Act.**

*Contribution*

[167] I am required under s 124 of the Act to consider the issue of any contribution that may influence the remedies awarded.

[168] Ms James did not contribute to the posting of the roster and I made no deduction from the remedy ordered on that basis.

**Costs**

[169] Costs are reserved. The parties are encouraged to resolve any issue of costs between themselves.

[170] If they are not able to do so and an Authority determination on costs is needed the Respondent may lodge, and then should serve, a memorandum on costs within 14 days of the date of issue of the written determination in this matter. From the date of service of that memorandum the Applicant would then have 14 days to lodge any reply memorandum. Costs will not be considered outside this timetable unless prior leave to do so is sought and granted.

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

[172] The parties could expect the Authority to determine costs, if asked to do so, on its usual notional daily rate unless particular circumstances or factors required an upward or downward adjustment of that tariff.<sup>4</sup>

**Eleanor Robinson**  
**Member of the Employment Relations Authority**

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<sup>4</sup> *PBO Ltd v Da Cruz* [2005] 1 ERNZ 808, 819-820 and *Fagotti v Acme & Co Limited* [2015] NZEmpC 135 at [106]-[108].