

**IN THE EMPLOYMENT RELATIONS AUTHORITY  
AUCKLAND**

[2011] NZERA Auckland 552  
5352332

BETWEEN FAE OSBORNE  
Applicant

AND THE FARMERS' TRADING  
COMPANY LIMITED  
Respondent

Member of Authority: Rachel Larmer

Representatives: Ken Nicholson, Counsel for Applicant  
Penny Swarbrick, Counsel for Respondent

Investigation Meeting: 7 November 2011

Submissions Received 01 December 2011 from Applicant  
12 December 2011 from Respondent  
16 December 2011 from Applicant

Additional information: 20 December 2011 from Respondent  
20 December 2011 from Applicant

Determination: 22 December 2011

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**DETERMINATION OF THE AUTHORITY**

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- A. The Farmers' Trading Company Limited ("Farmers") was justified in dismissing Ms Fae Osborne.**
- B. Ms Osborne's personal grievance claim is dismissed.**

**Employment relationship problem**

[1] Ms Fae Osborne was employed by Farmers as a Department Manager based at the Lynmall store. She was dismissed on 25 March 2010 for breaching the company's

discount and holds policies. Ms Osborne claimed her dismissal was unjustified. She sought reinstatement and distress compensation of \$30,000.

[2] In her statement of problem Ms Osborne also claimed lost remuneration from the date of dismissal to the date of this determination. However, during the Authority's investigation Mr Nicholson advised that Ms Osborne only wished to claim three months' lost remuneration. When Mr Nicholson filed his submissions he submitted that Ms Osborne sought a total of 20 months lost remuneration.

[3] Ms Osborne's statement of problem included an unjustified disadvantage claim which related to a final written warning she had received for removing company property without authorisation and for instructing a team member to falsify a company document. The warning was dated 10 November 2009 and was stated to be valid for six months.

[4] Ms Osborne had not raised her disadvantage grievance with Farmers within 90 days of it arising. When that was drawn to Mr Nicholson's attention, he withdrew the disadvantage claim. However, Mr Nicholson's submissions sought to claim that the warning had disadvantaged Ms Osborne. The disadvantage grievance was not before the Authority for determination, and this case solely involved Ms Osborne's dismissal grievance.

[5] Although no claim for breach of good faith was made, either in the statement of problem or in Ms Osborne's evidence, Mr Nicholson's submissions claimed that Farmers had breached s.4 of the Employment Relations Act 2000 ("the Act") because it had engaged in deceptive conduct in respect of the warning.

[6] Farmers said that Ms Osborne was dismissed because it had lost trust and confidence in her to properly follow company rules, policies, and procedures in future because she had breached the staff discount and holds policies after having been issued with a final written warning for a breach of policy less than five months prior to her dismissal.

[7] Farmers maintained that Ms Osborne's dismissal was procedurally and substantively justified in all of the circumstances.

### **Justification test**

[8] Ms Osborne was dismissed on 25 March 2010 so justification of her dismissal falls to be determined under the s.103A justification test in the Employment Relations Act 2000 (“the Act”) as it applied prior to the amendments which came into effect on 1 April 2011.

[9] The old s.103A justification test in force at the time Ms Osborne was dismissed required the Authority to consider whether Farmers’ actions, and how it acted, were what a fair and reasonable employer would have done in all of the circumstances at the time Ms Osborne was dismissed.

### **Relevant documentation**

[10] Ms Osborne signed an employment agreement on 15 October 2007. This stated:

*“You must abide by all rules, procedures and policies currently in force (or as modified from time to time by the company) during the course of your employment and it shall be your responsibility to familiarise yourself with such rules, policies and procedures. In particular, the relevant provisions of the Farmers personal employment agreement (copy enclosed) will apply.”*

[11] When Ms Osborne was transferred from the St Lukes to the Lynmall store she was given another employment agreement dated 8 December 2009. This included the same clause as above.

[12] Farmers had a standard personal employment agreement for Support Centre and Store Management which, among other things, contained work rules and disciplinary procedures. The work rules and conduct gave examples of serious misconduct which was likely to result in summary dismissal. This included:

*“Failure to follow the correct procedure for the operation of company systems.”*

[13] The Loss Prevention Controls Manual contained the discount and holds policies. The discount policy stated (among other things) that:

*“It is only for the benefit of team members personally (and a second nominated person living on the same premises). Abuse of the*

*privilege (for example attempting to transfer it to someone else) may incur penalty, including dismissal.”*

[14] The hold articles for team members section stated:

*“Under NO circumstances is Clearance Stock [...] to be placed on hold.”*

[15] In May 2009 Farmers updated its staff discount policy to include further information under the “*conditions of use*” section of the policy. For the purposes of this matter, the two material additions are:

- *“Discounts only apply to purchases for employee’s personal use and as gifts from these employees; however such purchases should be at reasonable levels.*
- *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 the team member’s behalf.”*

[16] The policy still contained the following statement:

*“Any misuse/abuse of the card (or the policy) will result in disciplinary action up to and including dismissal.”*

[17] The General Executive of Farmers provided the new policy to the top three levels of management with the instruction that all staff had to be provided with copies of the new staff discount policy and were required to sign and return it. A copy of the new policy was also to be printed and placed on relevant staff notice boards in the store.

[18] The first page of the staff discount policy was unchanged and it stated (among other things):

*“Team members must pay for the purchased goods themselves; it is considered serious misconduct to have a friend or family member pay for the goods using the team member’s staff discount card.”*

[19] Ms Osborne signed the staff discount policy on 12 November 2007 which stated:

*“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 them will result in disciplinary action and may include dismissal.”*

[20] Ms Osborne again signed the staff discount policy on 14 May 2008, when she obtained a replacement staff discount card after her original card had been stolen.

[21] Ms Osborne also signed an acknowledgement of the updated staff discount policy on 25 May 2009. This also stated:

*“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.”*

## **Factual background**

### *Nature of role*

[22] Ms Osborne commenced employment with Farmers in October 2007. She was initially based at St Lukes store but after receiving a final written warning moved to the Lynmall store on 26 November 2009.

[23] As the Department Manager, Ms Osborne’s responsibilities included ensuring that her direct reports adhered to Farmers’ policies and procedures. Of particular importance to Farmers’ business were its procedures relating to the movement of stock, such as discount, gifts, point of sale transactions, and the movement of goods into and out of the store.

[24] At Lynmall Ms Osborne had eight staff reporting to her. She was responsible for training these staff, for overseeing them, and responding to any queries they may have had about policies or procedures. She was also responsible for ensuring her staff complied with all relevant policies and procedures. Ms Osborne was expected to take action regarding her direct reports if they breached Farmers’ policies or procedures.

[25] When giving her evidence, Ms Osborne agreed that honesty and integrity were fundamental to her position and that issues involving stock management were of the utmost importance to Farmers. Ms Osborne also described her boss, Mr Ken Manuel, Store Manager of Lynmall, as known to be a “*stickler*” for the rules.

*February purchase*

[26] On 11 February 2010 Ms Osborne attempted to obtain a staff discount on a purchase for which she presented her father's eftpos card for payment. This transaction was processed by another Department Manager, Jasmine Mounter, who advised Ms Osborne that she could not obtain staff discount if her father was paying for the items because discount could only be used if she paid for the items with her own money.

[27] As a result of this advice, Ms Osborne and her father went to an ATM and withdraw cash. She then made the purchase (which was processed by a different sales person) by using a combination of \$90 cash and \$8.10 on her own eftpos card.

*Ms Mounter's note*

[28] In a note dated 12 February 2010, Ms Mounter drew to Farmers' attention the concerns she had about the transaction, and about Ms Osborne allegedly having "*stashed*" bottles of Brut which had been heavily discounted as clearance stock for herself to purchase so that these items were not available to other customers to purchase.

[29] Ms Mounter's note recorded that she had seen Ms Osborne and her father approach the sales counter with an armload of goods and that she had observed Ms Osborne stoop down as she passed the impulse stand and pick up four bottles of Brut body spray which appeared to have been pushed under the stand. Ms Mounter described how a number of the items Ms Osborne wanted to purchase had a rubber band around them with a piece of torn paper folded into the rubber band with Ms Osborne's name on it.

[30] Ms Mounter recorded that when she scanned the goods she could see that all of the items were clearance items and that Ms Osborne's father then pulled out his wallet and gave his daughter a blue eftpos card and he asked Ms Mounter to pack two of the items (a pink nightgown and a dressingown) into a separate bag so that he could take them home.

[31] When Ms Osborne handed over her staff discount card for the purchase, Ms Mounter told her that she could not use the staff discount unless she purchased the goods with her own money. Ms Mounter said that Ms Osborne initially told her that

the eftpos card was hers but when asked if all of the items being purchased were for her own personal use, Ms Osborne did not answer that question, but then changed her earlier statement to say that the card being used to purchase the items was her father's eftpos card.

[32] It was at this point that Ms Mounter advised Ms Osborne that she could not process the sale because payment was not being made by Ms Osborne personally.

### *Investigation*

[33] The information from Ms Mounter resulted in Farmers commencing a formal investigation.

[34] As part of its investigation process, Farmers reviewed its CCTV footage to see if it supported Ms Mounter's statement. This determined that around 6pm Ms Osborne had removed stock from the shop floor and had entered the lingerie reserve area, which is an area where Farmers keep excess stock such as extra sizes of a particular garment so these are readily available if customers request an alternative size to that which is on display. At 6.47pm Ms Osborne had then gone back into the lingerie reserve with another pink nightgown and had collected the clearance stock.

[35] Farmers considered that Ms Osborne's actions suggested that Ms Osborne had removed clearance stock from the shop floor and had put it on hold, in breach of the holds policy which forbid staff to put clearance items on hold. It also considered that Ms Mounter's allegation that Ms Osborne had allegedly stashed some bottles of Brut was another potential breach of the holds policy.

[36] Farmers considered that the issue could have involved "*sweet hearting*" which is the term used when a staff member provides reduced pricing to someone who was not entitled to it, or uses their staff discount for the benefit of someone else. It was considered a potential sweet hearting issue because Ms Osborne's father had produced his eftpos card from his wallet to pay for the transaction she had claimed staff discount on and because some of the items which had been purchased (such as the bottles of Brut body spray) were for men and were therefore seen as unlikely to be for Ms Osborne personally.

[37] In accordance with its usual practice, the company investigated Ms Osborne's past transactions to determine whether it was dealing with an isolated incident or not.

As a result of that exercise, Farmers noticed that Ms Osborne had used many different payment cards in connection with transactions which had been associated with her staff discount card.

[38] Farmers identified six instances, in addition to its concerns about the 11 February 2010 purchase, which made them concerned that Ms Osborne may not have been complying with the staff discount policy, because it appeared that the cards used to purchase the items to which staff discount had been applied did not appear to be her own personal cards.

*Disciplinary allegations*

[39] Farmers issued Ms Osborne with a disciplinary letter dated 3 March 2010 which set up a disciplinary meeting on 9 March 2010 to discuss concerns that Ms Osborne had breached the company rule No.7 – carrying out instructions, the staff discount policy and the rules surrounding staff holds. The particular allegations included that she:

- “(a) Permitted acquaintances to use her staff discount card without authorisation.*
- (b) Presented your staff discount card during a purchase being made by your father.*
- (c) Failed to follow staff holds procedures.”*

[40] The details of each allegation were specified in the letter.

[41] Attached to the disciplinary letter were copies of the documentation supporting each transaction which was alleged to have breached policy. This included the till receipt, computer data showing times, products and discount, and a copy of the customer docket for each transaction. Also included were the signed staff policy document, Ms Mounter’s note of 11 February 2011 and Kerryn Steel’s (from the Lost Prevention Section) notes of the CCTV footage.

[42] The first disciplinary allegation referred to six transactions made between January 2008 and December 2009. The remaining two allegations related to the purchase on 11 February 2010.

[43] The disciplinary process involved four separate meetings (9, 10, 16 and 19 March 2010) at which Mr Phil Morley, the National Loss Prevention Manager, and Mr Manuel were present. Ms Osborne was advised of her rights to representation, but declined to have a support person at the first two meetings. She was represented by Mr Nicholson at the last two disciplinary meetings. Notes were taken of all meetings and these were provided to the Authority.

*First meeting*

[44] At the first disciplinary meeting Ms Osborne accepted that she had used her staff discount card to purchase goods for her partner and that she had used her partner's eftpos card to pay for these items because they shared money. Ms Osborne accepted that she was not a joint cardholder of her partner's card, but said it was their practice to use each other's cards and money as if it were their own.

[45] Ms Osborne said she did not realise she was doing anything wrong at the time, but having reviewed the staff discount policy she had subsequently realised that she had not followed procedures properly. Ms Osborne said that she had only read the first page of the amended staff discount policy which had been revised in May 2009 before signing and returning it. Ms Osborne said that she believed she knew everything about the policy which was why she did not read it herself, but that she now acknowledged that she did not properly know the rules.

[46] Ms Osborne also acknowledged that she had not properly explained the policy or the changes to her team members before she had asked them to sign that they had read and understood the updated staff discount policy.

[47] Ms Osborne's explanation to the issues surrounding the purchase on 11 February 2010 was that she put the goods into the lingerie reserve area until she could pick them up later because she was working late. She said that she could not leave them on the shop floor and could not take a break to purchase them because she was busy, so she had put them in the lingerie reserve area.

[48] When asked why she did not leave the items on the floor, Ms Osborne said that the deal was "*too good to miss*", plus she was working outside her normal shift, it was a long way to go upstairs to get her purse, and her father was waiting to take her grocery shopping.

[49] When asked about the holds policy, Ms Osborne said that she allowed staff to leave stock at the counter ready to purchase during their breaks. However, in her case there had been so much stock she wanted to purchase that she decided to put it into the lingerie reserve area because there was not sufficient room on the counter. She said she wanted to keep the counter clear for staff to serve customers.

[50] When asked what she would do if she found clearance items in reserve, Ms Osborne said that she would put them back on sale and she acknowledged that she knew clearance items were not to be put on hold.

[51] Ms Osborne denied she had put any items on hold and said she had merely moved the items she wished to purchase from the counter to the lingerie reserve area until she had time to purchase them. She said the items were there for 45 minutes so she did not believe that breached the holds policy.

[52] Ms Osborne said that the cash which she had used to purchase the items on 11 February 2010 had been sent to her for Christmas by overseas relatives and had been put into her father's bank account for her to use. She said it was still in her father's bank account because she had not yet used the money she had been sent.

#### *Further inquiries*

[53] Farmers adjourned the first meeting so that it could make further inquiries with Ms Osborne's previous Manager at St Lukes to determine what Ms Osborne had been told about the relevant policies and to interview Ms Mounter again to clarify what had been said at the time of the transaction.

[54] Ms Osborne's previous Manager, Ms Josie Jonkers, Store Manager of St Lukes, confirmed that Ms Osborne had been present at a management team meeting on 21 May 2009 when the changes to the staff discount policy had been discussed. Ms Fiona Bateman, the St Lukes Retail Manager, also confirmed that Ms Osborne had been present at a meeting where the need for sign-off on the company's updated staff discount policy was discussed in detail.

#### *Second meeting*

[55] A second disciplinary meeting was held on 10 March 2010. Ms Osborne confirmed her understanding of the holds policy was that there were to be no holds,

but staff could ask their manager to take a break so they could make a purchase immediately should they wish to do so. Ms Osborne's position in respect of the 11 February 2010 transaction was that the goods were not on hold, because they had been set aside for only 45 minutes and she did not believe that she had done anything wrong.

[56] When asked what Ms Osborne would do if a staff member had done the same thing she had done, Ms Osborne said she would probably question it and "*deal with it*".

[57] Ms Osborne was asked to provide proof that money she had used to purchase the items was her own money, and she said she would get that from her mother.

[58] Ms Osborne was shown the relevant part of the staff discount policy which stated that she had to pay for the goods herself when using her staff discount, and Ms Osborne responded that she had not read that properly.

[59] In response to the discussion that she had been at a management team meeting which had discussed the changes in the need for staff to sign and acknowledge the changes, Ms Osborne said that she understood that the policy review in May 2009 was a "*massive issue*" but she believed its main objective was around beauty club points issues.

[60] When asked why, if she understood it was a "*massive issue*", she had not read the policy, Ms Osborne had no response to that. When asked why she did not obtain a discount card for her partner (because he would have been entitled to one), she said she did not think there was much point because he did not shop by himself.

[61] The meeting was adjourned to give Ms Osborne an opportunity to bring further evidence to show that it had been her money she had used to make the purchase.

### *Third meeting*

[62] The third disciplinary meeting occurred on 16 March 2010. Ms Osborne was represented by Mr Nicholson. Mr Nicholson said that Ms Osborne's parents had provided him with evidence about the money, but he felt it unnecessary to provide that documentation to the company. Mr Morley said it would be best if the evidence

was provided and at that point Ms Osborne provided a letter from her father stating that the money in question belonged to her, and not to him.

[63] Mr Morley asked for the banking documentation to show the transactions and Ms Osborne said that she would not provide that because it was private and she did not feel it was necessary to provide such information.

[64] Mr Nicholson said that Ms Osborne had moved the clearance stock because she was not on a break and therefore could not purchase the items immediately.

[65] Farmers adjourned this meeting for approximately 1 ½ hours to consider the evidence and its position. This led Mr Manuel to conclude that dismissal was a likely outcome, so he reconvened the meeting to advise Ms Osborne of that and to give her a further opportunity to provide any other information which she thought would support her case before the company made a final decision.

[66] Subsequent to that advice, Mr Nicholson faxed an extract from a bank account which showed that an international transfer of just over \$1,000 had been made on 14 December 2009 to Mr and Mrs Osborne's joint account.

#### *Final meeting*

[67] At the final disciplinary meeting which occurred on 19 March 2010, Ms Osborne was given a further opportunity to provide any other information and she confirmed that she had nothing further to add.

[68] Mr Manuel then conveyed the company's decision by reading from a document he had prepared earlier, a copy of which he provided to Mr Nicholson. Ms Osborne was informed that she would be dismissed on notice. She was advised she would receive one month's pay in lieu of notice so was not required to return to work. This was confirmed by letter dated 25 March 2010.

#### **Final written warning**

[69] The final written warning dated 10 November 2009 arose from an incident which had occurred when Ms Osborne was working as a Department Manager at the St Lukes store. She had, without authority and in contravention of the company's gift and gratuity policy, taken for herself a gift with purchase that a customer had not wanted. She had also given instructions to a junior staff member to remove her name

from the gift with purchase documentation. Farmers considered that this involved breaches of Work Rule No.1 relating to property and No.4 relating to honesty and integrity. Ms Osborne's explanation (which was not accepted at the time) was that she was not aware of the company's gifts and gratuities policy.

[70] Ms Osborne was issued with a final written warning and was advised:

*"It is your responsibility to familiarise yourself with the grounds to all relevant policies and procedures and if you are unsure you should seek clarification from your line manager.*

*Any further breaches of company procedures or work rules or neglect of duty will result in further disciplinary action, which may lead to your dismissal. The warning will remain on your personnel file for six months."*

[71] I do not accept Mr Nicholson's submissions that because the final written warning was issued when Ms Osborne was based at the St Lukes store it therefore did not cover any conduct which occurred in future at the Lynmall store. Farmers is a national chain and the fact that Ms Osborne moved stores, whilst all her other terms and conditions remained the same, did not invalidate her live final written warning.

[72] I also reject Mr Nicholson's submission that the final written warning was not about any issues which related to Ms Osborne's conduct at the Lynmall store. I find that the conduct was similar in that both involved breaches of important policies which involved stock handling and purchases. Both disciplinary matters involved a failure by Ms Osborne to properly familiarise herself with applicable policies. Both instances involved conduct which had called Ms Osborne's honesty and integrity into question.

[73] Despite having withdrawn the disadvantage grievance, Mr Nicholson in his submissions sought to undermine the legitimacy of the final written warning on the basis that there were no other earlier warnings in place. I do not accept that. The first disciplinary issue which gave rise to the final written warning was considered by Farmers to be a trust and confidence issue, which it said it would have been entitled to summarily dismiss Ms Osborne for. It said it had decided to take action short of dismissal, by imposing a final written warning on her.

[74] I find that the warning dated 10 November 2009 was a valid final written warning, which Farmers was justified in taking into account in determining what outcome was appropriate in respect of the Lynmall disciplinary concerns.

[75] There is a conflict in the evidence between Ms Osborne and Mr Manuel about what was discussed regarding the final written warning when she commenced employment at the Lynmall store. Ms Osborne said she asked Mr Manuel whether her warning carried over to the Lynmall store, to which she alleged he had responded:

*“This is a new start, new store, new manager and none of that is relevant here, we have a great team who are very supportive and we work together to ensure things are done correctly here.”*

[76] Ms Osborne said that this assured her that she was having a fresh start and that previous problems and warnings would bear no relevance to her new position at Lynmall. She said that advice influenced her not to challenge her final written warning. Mr Nicholson submitted that Mr Manuel’s advice to Ms Osborne was deceptive conduct. I reject that submission.

[77] Mr Manuel had an entirely different perspective on their discussion. His evidence was that he would not need to look at her final written warning unless Ms Osborne’s conduct required him to do so. He said he did nothing to indicate or imply that her final written warning had been wiped from her file. Mr Manuel said that he emphasised in his discussions with Ms Osborne that she was required to comply with company policies and procedures and that as a manager she must be seen to deliver them. Mr Manuel said he also spoke about the necessity for her to be familiar with all policies and that should she exhibit behaviour which contravened the company policies or procedures, then the final written warning would become relevant in relation to any action that would be taken.

[78] I prefer Mr Manuel’s evidence on this issue. I consider it inherently unlikely that Mr Manuel would have told Ms Osborne that the final written warning she had received (instead of dismissal) only 16 days earlier, was suddenly expunged from her record merely because she had moved stores. I find that an extraordinary proposition. I accept Mr Manuel’s evidence that he had no authority to expunge a final written warning, nor would he have wished to do so when it had been given by a different manager at a different store.

[79] Ms Osborne was represented by Mr Nicholson at the time the final written warning was given and he represented her during that disciplinary process. She was also represented by Mr Nicholson during the Lynmall disciplinary process and at no stage did either Ms Osborne or Mr Nicholson raise any concern about the final written warning. They never alleged that it had been wrongly issued, even when it was specifically referred to during the disciplinary meetings, and when Farmers communicated its preliminary view that dismissal was appropriate in light of the final written warning.

[80] I consider that Farmers' advice that it would be taking the final written warning into account when deciding on the appropriate sanction provided Ms Osborne and Mr Nicholson with a good opportunity to consider that preliminary view and to make further representations about the effect of the final written warning, yet they did not raise any concern about the legitimacy of the final written warning.

[81] Issues about the validity of the final written warning were raised for the first time in Ms Osborne's statement of problem which was not filed until 2 August 2011, almost 21 months after the warning had been issued.

[82] I find that Farmers was entitled to rely on the final written warning, as it told Ms Osborne it would.

### **Procedural fairness**

[83] Ms Osborne alleged that when Mr Manuel handed her the disciplinary letter on 3 March 2010 he asked her to respond to the allegations that had been made. She alleged that the responses she gave in this first meeting prejudiced Mr Manuel against her for the remainder of the disciplinary process.

[84] That was strongly disputed by Mr Manuel. I accept his evidence. He is a very experienced manager and has run numerous disciplinary processes. He is known to be a stickler for the rules and I consider it highly unlikely that he demanded Ms Osborne respond to the disciplinary allegations when he had scheduled a disciplinary meeting on 9 March 2010 specifically so she could respond to the disciplinary allegations.

[85] I find that Mr Manuel kept an open mind throughout the disciplinary process because he was clearly listening to Ms Osborne's responses and he took steps to

obtain further information in light of those responses. I do not believe that Mr Manuel acted in the manner which was predetermined against Ms Osborne, as she has alleged.

[86] Ms Osborne did not raise any concern about Mr Manuel's actions on 3 March 2010 during any of the four subsequent disciplinary meetings. Nor did Mr Nicholson raise it during the two disciplinary meetings he attended. These allegations were not raised in her personal grievance letter. Nor were they referred to in the statement of problem. They were not mentioned in Ms Osborne's written statement. This was an allegation which Ms Osborne made for the first time during the investigation meeting. I did not find it credible.

[87] I find that Farmers adopted a fair and proper process. It put specific disciplinary allegations to Ms Osborne. It provided her with all relevant information and it gave her a real and genuine opportunity to comment on it. It clearly listened to Ms Osborne's explanations and then made further inquiries. Farmers put its specific concerns to Ms Osborne and it advised her that her ongoing employment was at risk. Farmers formed a preliminary view on the disciplinary concerns and after identifying that dismissal was a likely outcome, it advised Ms Osborne of that so she had an opportunity to respond before it made a decision about the appropriate disciplinary sanction.

[88] I consider that Mr Manuel approached the matter in a fair and thorough manner and that he kept an open mind throughout the process. I find that Farmers followed a fair and proper process before it decided to dismiss Ms Osborne.

### **Substantive justification**

[89] There were six allegations against Ms Osborne involving improper use of her staff discount card in contravention of the staff discount policy and one allegation involving her holding clearance goods in contravention of the holds policy.

[90] Farmers accepted Ms Osborne's explanations to three allegations, which left the following three allegation as live issues, namely that:

- (a) Ms Osborne made two purchases using her staff discount card on 3 January and 22 September 2008 respectively, when payment for the items purchased was made using her partner's eftpos card, in breach of

the requirement that staff who wished to use the staff discount must pay for the items themselves.

- (b) Ms Osborne admitted using her staff discount card for a purchase on 3 September 2009 when she paid for items by using her partner's card, in breach of the staff discount policy.
- (c) On 11 February 2010 Ms Osborne placed clearance items on hold and she used her staff discount card to purchase items that her father had presented his card to pay for in breach of both the holds policy and the staff discount policy.

[91] Farmers did not accept Ms Osborne's explanation that she believed she and her partner were both entitled to use the staff discount because she had not applied to make him a nominated cardholder, so there was no reasonable basis for believing that he was entitled to a staff discount. I consider that view was justified.

[92] Farmers concluded that Ms Osborne should have known that the purchases were not in accordance with the staff discount policy because she had signed the policy which made it clear on the front page that staff had to pay for goods on which they claimed a discount themselves. The staff discount card itself had written terms of use on the reverse which recorded that only employees and "*nominated family member*" could use the staff discount card, and Ms Osborne knew that her partner had not been nominated by her as a family member who would be eligible to use a staff discount card.

[93] The 2009 purchase was again of goods for Ms Osborne's partner, and she again used his card to pay for the items. Farmers concluded that Ms Osborne should reasonably have known that this purchase was not in accordance with its discount policy. By this time, the policy had been updated and Ms Osborne had re-signed it in May 2009. She had also attended a managers' meeting at the St Lukes store on 21 May 2009 at which the updated policy was discussed together with the reason for the update. Farmers' conclusion about this allegation was also justified.

[94] Ms Osborne confirmed that she did not fully read the policy before she signed it, despite the fact that she was a manager and was required to enforce the policy, and had been tasked with ensuring that her direct reports had signed and understood the amended policy.

[95] I consider that Ms Osborne failed in her obligations not only as an employee, but also as a manager in this regard. Compounding that failure was Ms Osborne's failure to comply with the direction she had received on 10 November 2010 to ensure that she had familiarised herself with all company policies and procedures. Ms Osborne admitted that she did nothing about that instruction. That was a serious omission particularly because the instruction had been contained in her final written warning, which meant she was aware further instances of misconduct could put her employment in jeopardy.

[96] I find Farmers was justified in concluding that Ms Osborne had breached the staff discount policy.

[97] Farmers concluded that Ms Osborne's actions on 11 February 2010 were in breach of its holds policy. Ms Osborne maintained that because the items had been put aside for only 45 minutes while she finished work, they were not on hold. I consider it was reasonable in all the circumstances for Farmers to reject that explanation.

[98] Ms Osborne's own evidence is that she selected clearance items which she wished to purchase, took those to the counter and then remembered she had other work to do, so removed the items from the counter to the lingerie reserve area.

[99] The lingerie reserve area could not be accessed by customers. It was an area which was restricted to staff, who could only access it while they were still working. Once they had clocked off work they were not permitted to be in the lingerie reserve area.

[100] I find that Farmers was justified in concluding that Ms Osborne was not entitled to remove the clearance items from the shop floor and that she should not have put them in the lingerie reserve area because then the items were not available for customers to purchase. Ms Osborne should have either left the items on the shop floor until she was ready to purchase them or she should have taken a break and immediately purchased the items she wanted.

[101] I find that Farmers was justified in concluding that by storing the items she wanted to purchase in the lingerie reserve area, Ms Osborne had put clearance items on hold, contrary to the holds policy.

[102] Ms Osborne confirmed at the first disciplinary meeting that she was aware that clearance items could not be placed on hold. She was also aware that Mr Manuel operated a rule where staff could ask for time during work hours to make a purchase of a clearance item, if they did not want to wait until break time. Mr Manuel had implemented that arrangement to ensure that staff would not be tempted to breach the holds policy. Ms Osborne did not do that in this case.

[103] Her explanation for not doing so was that she would have to go and get her purse and bag and that would take too much time. Farmers were entitled to view that explanation as unsatisfactory.

[104] Farmers also concluded that Ms Osborne had placed some bottles of Brut at \$1 each on the floor, for later purchase, again in breach of the holds policy. Because these were clearance items, they should have been purchased immediately, but Ms Osborne did not do so. I also find that Farmers were justified on the evidence available in concluding that Ms Osborne's actions in regard to the Brut bottles effectively put those items on hold, contrary to the policy, because the items were hidden from view and therefore could not be purchased by other customers.

[105] Ms Osborne's explanation during the investigation meeting was that she had not stashed the bottles of Brut, but had merely placed them on the floor near the impulse stand at the end of the counter so that her staff had a clear working space was not accepted by Farmers.

[106] I find that Farmer's was justified in preferring Ms Mounter's account (that Ms Osborne had deliberately moved the Brut items to a position where they could not be seen by other customers or staff until she could purchase them herself) over Ms Osborne's explanation (that she were merely clearing the counter and that the items had not been concealed).

### **New explanation**

[107] During the Authority's investigation Ms Osborne raised for the first time a new explanation that she had not taken the clearance goods from the shop floor but had taken there from "*out the back*" where there were "*loads of rails of items waiting to be scanned out to another store*". This was the first time that she had provided this explanation. It had not been given at any of the disciplinary meetings, it was not

referred to in the personal grievance letter or the statement of problem or in her written evidence.

[108] This was an explanation that arose for the first time when Ms Osborne responded to cross examination about why she believed the items were not on hold. Ms Osborne's explanation was that because the items had been checked out of the Lynmall store for transfer to another store then they would not have been available for customers to purchase anyway.

[109] This was a surprising explanation to hear for the first time during cross examination particularly when Ms Osborne had been legally represented since 16 March 2011. Her lawyer had not previously ever referred to this new explanation.

[110] If Ms Osborne's evidence to the Authority in respect of this new explanation is to be believed then it raised some new and serious issues about Ms Osborne's admitted conduct.

[111] If what Ms Osborne told me was correct then she had gone into a restricted area to remove stock that had been checked out of the store, and had then put those items aside in the lingerie reserve area (which should not have been used to store these items in any event) until she had checked out of work. There was no record of her removing these items so her actions would have resulted in a stock discrepancy whereby all of the stock that had been signed out of Lynmall did not make it to the new store. That creates a very obvious problem about "missing" stock which as a manager Ms Osborne should have understood the implications of.

[112] However, there are further problems with her explanation. Part of the process involved in staff checking out of work is the requirement to present themselves for a security bag check before they leave work. Ms Osborne had her bags checked in accordance with normal sign-out procedures but instead of leaving the store on her evidence she returned to the shop floor with her handbag and had then gone into the restricted lingerie reserve area to uplift the items she had put there earlier.

[113] There are a number of obvious problems with that. Ms Osborne should not have been in a restricted area after signing-out of work. Ms Osborne should not have been in a restricted area with her handbag particularly when she had already completed the security bag search, and therefore would not be subject to another search before leaving the store. It was also problematic that Ms Osborne admitted

removing items from a restricted area which she had been in with her handbag, but did not represent herself to security for another bag search before leaving the store.

[114] All of these were obvious issues which Ms Osborne should have been aware of in her capacity as a manager. Farmers considered that Ms Osborne's evidence involved a number of highly inappropriate actions, each of which could have given rise to serious disciplinary concerns.

[115] The dock is a secure area and documentation is required to keep track of stock movements through that area. A person requires the authority of either Mr Morley or the store receiver before items can be removed from the dock area. It should have been obvious to Ms Osborne that she should not be helping herself to stock from that area without authority.

[116] The explanation Ms Osborne gave during the Authority's investigation raised a number of serious issues from Farmers' perspective, namely:

- Ms Osborne had no authority to remove stock from the dock area;
- If authority had given by the store receiver, the stock must have been removed before 3.30pm when he finished for the day, in which case it had been "*on hold*" for 2 hours longer than Ms Osborne had stated; or
- If she took the goods while they had been scanned out to another store, then that would have occurred earlier than 5.30pm (the end of the working day) thus rendering her explanation about selecting the items at around 5.30pm incorrect; or
- If Ms Osborne was correct and she had finished work for the day at the time she put the items she wanted to purchase into the lingerie reserve area, then she retrieved items from the dock area after she had signed herself off work for the day, and should have presented herself to loss prevention for another bag search. Either she had not done that, or she had gone back onto the floor and into the dock and/or the reserves area, which she was not allowed to do once she had finished for the day; and

- Ms Osborne cannot have been unaware of the rules around the removal of items from the dock area, given the restrictions that applied to that part of the store.

[117] Notwithstanding Ms Osborne's new explanation to the Authority about her actions on 11 February 2010, the fact remains that the items Ms Osborne elected to purchase were clearance items and therefore clearly should not have been put on hold. I consider that a fair and reasonable employer would have concluded that Ms Osborne had put clearance items on hold for a period of time between selecting the items at around 6pm and actually purchasing the items at around 6.47pm that same day.

[118] In respect to the use of money to purchase the items on 11 February 2010, the notes of the disciplinary meeting on 19 March 2010 recorded: "*We have accepted the fact that the money appears to be yours, so that part of the allegation had not been upheld*" so that did not form part of the decision to dismiss.

[119] I find that Ms Osborne was aware that Farmers had well established rules regarding staff discount and the holding of clearance goods. It was also Ms Osborne's job to ensure that staff adhered to policies. Ms Osborne was relied upon as a manager not only to follow but also to ensure compliance by others of the staff discount, holds and other important policies.

[120] I find that she must have understood that non-compliance was a serious issue. She had recently been through a disciplinary process regarding a breach of the gifts and gratuities policy, which she alleged she had not been familiar with. In addition to receiving a final written warning, Ms Osborne was specifically instructed to familiarise herself with Farmers' policies, but she decided not to do that.

[121] I find that Farmers was justified in concluding that Ms Osborne was aware of, or ought reasonably to have been aware of, the discount and holds policies which she was found to have breached.

[122] I also find that Farmers was justified in concluding that the staff discount and holds policies had been breached because –

- (a) Ms Osborne had used her partner's card on two occasions in 2008 to pay for goods when she had also claimed a staff discount, contrary to policy;

- (b) In 2009 Ms Osborne had used a staff discount and her partner's card to pay for items for him, contrary to the staff discount policy; and
- (c) In relation to February 2010, she put clearance items on hold for herself in breach of the holds policy.

### **Outcome**

[123] I find that Farmers was justified in concluding that dismissal was an appropriate disciplinary sanction for the following reasons:

- (a) Ms Osborne had failed on multiple occasions to comply with its policies;
- (b) The rules that Ms Osborne failed to comply with related to stock and money handling, which were of the utmost importance to Farmers' business;
- (c) Ms Osborne was responsible for ensuring that she not only followed the rules but also that her direct reports adhered to them;
- (d) Farmers had to have high levels of trust and confidence in Ms Osborne because of the nature of her role as a manager;
- (e) Ms Osborne knew or ought reasonably to have known the rules and policies in question, not only because she was obliged to under her employment agreement, but also because she had been specifically instructed in the final written warning to do so;
- (f) Farmers had already given Ms Osborne a final chance after she had breached the gifts and gratuities policy in late 2009;
- (g) Ms Osborne's acknowledgement that she had not read the policies or familiarised herself with them despite being specifically instructed to, meant that Farmers was justified in concluding that it could not reasonably have the necessary level of trust and confidence in her to do so in future;

- (h) Farmers was entitled to take into account the final written warning which was in place at the time it made its decision to dismiss Ms Osborne.
- (i) Ms Osborne was clearly on notice that any further misconduct within six months of the final written warning could result in termination of her employment.

[124] I find that Farmers' decision to dismiss Ms Osborne for breach of the staff discount and holds policies was procedurally and substantively justified. Ms Osborne's dismissal grievance is dismissed.

### **Costs**

[125] Farmers as the successful party is entitled to a contribution towards its costs. The parties are encouraged to resolve costs by agreement. If that is not possible costs will be dealt with by an exchange of memoranda.

[126] Farmers has 28 days within which to file its costs memoranda, Ms Osborne has 14 days within which to respond and Farmers has 7 days within which to reply. This timetable may only be departed from with the prior leave of the Authority.

Rachel Larmer  
Member of the Employment Relations Authority