

**IN THE EMPLOYMENT RELATIONS AUTHORITY  
CHRISTCHURCH**

**I TE RATONGA AHUMANA TAIMAHI  
ŌTAUTAHI ROHE**

[2021] NZERA 554  
3151826

BETWEEN

FENGCAI SUN  
Applicant

AND

ST ALLISA REST HOME (2010)  
LIMITED  
Respondent

Member of Authority: David G Beck

Representatives: Anthony J Pool, advocate for the Applicant  
Kathryn McKinney, counsel for the Respondent

Investigation Meeting: By video-conference on 10 December 2021

Submissions Received: 9 December 2021 from the Applicant  
2 December 2021 from the Respondent

Date of Determination: 13 December 2021

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**DETERMINATION OF THE AUTHORITY**

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**Employment Relationship Problem**

[1] Fengcai (Cai) Sun worked as a cleaner for a rostered 25 hours per week at St Allisa Rest Home (2010) Limited (St Allisa) in Christchurch from 21 September 2015.

[2] In the mid-morning of 16 April 2021, Cai Sun without permission, was seen leaving her workplace - a rest home with a dementia care facility, for a period of time estimated to be over 40 minutes. Upon her return, Ms Tabak the facility manager, approached Cai Sun and

there was a dispute about what occurred during this interchange that Ms Tabak did not address in her affidavit.

[3] Cai Sun's daughter Grace, described three interchanges. One by the cleaning cupboard then a meeting in Ms Tabak's office that encountered communication difficulties and necessitated Ms Tabak ringing Grace and then Cai Sun sought her husband's assistance to attend a further aborted meeting in Ms Tabak's office. It would appear Ms Tabak tried to confront Cai Sun about her absence on an 'impromptu' basis.

[4] Ms Tabak then drafted a letter of 16 April inviting Cai Sun to a formal meeting described as an "investigation meeting" that took place on 21 April convened by Leigh Tabak. St Allisa's expressed concern was the unauthorised absence and an observation by Ms Tabak that Cai Sun had left her cleaning trolley replete with chemical cleaning products in an area accessible to vulnerable residents in breach of safety protocols.

[5] Cai Sun initially conceded she had left the premises and said the reason for her absence was to look for a recently purchased cell-phone that she located in her car. Cai Sun claimed it was not unusual for cleaning trollies to be left unattended when cleaners took scheduled rest breaks.

[6] During the ensuing disciplinary process, by letters of 3 and 5 May, after being provided with a draft investigation report authored by Ms Tabak, Cai Sun indicated for the first time the reason she had been absent was to attend a GP ordered blood test and she raised assault and harassment allegations against a co-worker and Ms Tabak. Mr Pool, who had been engaged as an advocate, addressed a response to Teresa Seux, General Manager Human Resources for Arvida (St Allisa's parent company).

[7] Ms Seux investigated Cai Sun's assault allegations, took witness statements and found both to have no substance although she crucially failed to interview Cai Sun and the interpreter present at the 21 April meeting. I observe no note of an interview with Ms Tabak was provided and Ms Seux appears to have relied upon Ms Tabak's own investigation report that detailed what Ms Tabak recalled happening on 16 April. A 10 May email from Ms Seux to Ms Tabak seemed to confirm this assumption.

[8] Ms Tabak, despite concern expressed by Mr Pool about potential bias, then completed her investigation report concerning Cai Sun's unauthorised absence and health and safety issues arising from the unattended cleaning trolley.

[9] Ana Vivas a manager of another Arvida facility, was appointed to complete the disciplinary process. Ms Vivas set out St Allisa's concerns and the conclusions of Ms Tabak's investigation report in a 19 May letter suggesting a potential dismissal for serious misconduct was at issue for the unauthorised absence and neglect of duty in leaving the cleaning trolley unattended. The letter also referenced that during the 21 April meeting, Cai Sun had apparently assaulted a translator during the meeting. The letter noted Cai Sun's explanation concerning the assault allegation that she was simulating an assault on the translator that Cai Sun claimed she had been subjected to by a co-worker. However, Ms Vivas noted that the explanation given by Cai Sun "does not excuse this shocking behaviour". A disciplinary meeting was sought for 21 May to allow Cai Sun to "provide us with any comments that you have regarding these potential breaches of your employment obligations".

[10] After some exchanges to set up a mediation at Mr Pool's request (initially agreed to by Ms Vivas) that did not come to fruition, the disciplinary meeting was re-scheduled for 16 June. On advice from her advocate, Cai Sun declined attendance. This led to Ms Vivas issuing a preliminary decision proposing dismissal on 17 June and seeking comment before finalising such. I observe that although by this point in time, Cai Sun had disclosed the reason for her absence (to attend a blood test) Ms Vivas did not refer to this and claimed no further "relevant information" had been provided.

[11] Mr Pool provided feedback in a letter of 21 June, re-asserting that Cai Sun had a legitimate reason to leave work to attend to a medical issue and was absent for less time than alleged and contested the extent of leaving her cleaning trolley unattended as being sufficient grounds for a serious misconduct finding. Allied bullying and assault claims were levelled against Ms Tabak and a claim that the investigator (Ms Tabak) had displayed partiality was made. Mr Pool signalled the existence of a personal grievance.

[12] Ms Vivas then issued a final decision to summarily dismiss Cai Sun by way of a letter of 24 June 2021. The letter sets out the reasoning for the decision predominantly being a conclusion that the unauthorised absence had been established without a satisfactory explanation and the unattended cleaning trolley "... exposed residents to the risk of harm from the chemicals and was in breach of Safe Storage and use of Chemicals policy". Ms Vivas also "noted" that the assault allegation against the interpreter during the 21 April investigation meeting, had essentially been upheld. The fact Cai Sun had left to attend a blood

test was briefly traversed and dismissed as not exculpatory but the letter failed to recognise this had been raised on 3 May. The dismissal was described as being effective from the date of the 24 June letter.

[13] Cai Sun provided an affidavit of 13 July 2021 for the interim investigation proceedings with an attached letter from her GP of 7 July 2021 confirming she attended a blood test on 16 April 2021.

[14] Mr Pool by way of a letter of 15 July 2021 raised a personal grievance alleging Cai Sun had been unjustifiably dismissed and he identified various remedies including seeking:

... immediately reinstatement of Mrs Sun's employment, on grounds that Arvida Group erred [sic] and cannot possibly justify terminating Mrs Sun, until such time as a settlement is reached or the Employment Relations Authority Investigation is completed and a Decision is made by the Employment Relations Authority or the Employment Court. If this is not accepted by Arvida Group ...

[15] The parties subsequently attended an unsuccessful mediation and Cai Sun made an application to the Authority seeking interim reinstatement on 22 September 2021 that I have now investigated and this determination concludes.

[16] As permitted by s 174E of the Employment Relations Act 2000 (the Act), I have not recorded all of the affidavit evidence provided and submissions given but I have stated relevant findings of fact and law that I am required to assess at this interim stage to allow me to express a conclusion on whether the interim reinstatement order sought should be granted or declined.

### **The approach to an interim injunction/legal test**

[17] The well-established legal framework that I must follow in respect of assessing an application for an interim injunction is in summary:

**Step one** — the applicant must establish that there is a serious question to be tried;

**Step two** — consideration must then be given to the balance of convenience and the impact on the parties of the granting of, or refusal to grant, the interim orders sought. The impact on any third parties will also be relevant to this weighing exercise; and

**Step three** — the overall interests of justice are to be considered, standing back from the detail required by the earlier steps.

**Discussion - is there a serious question to be tried?**

[18] The threshold to be met in assessing that a claim is either frivolous or vexatious is arrived at on a judicial assessment of the evidence and the submissions of the parties and is not just an exercise of bare discretion.<sup>1</sup>

[19] Two parts to the issue of assessing a serious question to be tried are here:

- (a) Is there a serious question to be tried that Cai Sun was unjustifiably dismissed?
- (b) Is there a serious question to be tried that as a consequence of any finding of unjustified dismissal should I reinstate Cai Sun?

**Assessment - an arguable case for unjustified dismissal?**

[20] Ms McKinney sensibly acknowledged that Cai Sun had an arguable case for interim reinstatement “albeit that is contested by the respondent in the wider substantive context”. Mr Pool went further to urge the Authority to consider Cai Sun’s case to be strongly arguable, essentially contending that the conduct in dispute that led to the summary dismissal was not capable of being assessed as serious misconduct and a reasonable employer would have imposed a lesser sanction.

[21] In answer to the first consideration, without traversing detail, Cai Sun has been dismissed and the onus shifts to St Allisa’s to justify this decision having regard to s 103A(1) – (5) of the Act and good faith factors.

[22] From the untested affidavit evidence and contextual correspondence, I consider that a strongly arguable case has been made out that Cai Sun was unjustifiably dismissed. I base this on:

- (a) Concern about the way the initial investigation meeting of 21 April was run and the lack of prior disclosure of all St Allisa’s evidence and the subsequent retrospective assessment placed on how Cai Sun responded at this meeting.
- (b) A possible lack of care around Cai Sun’s language difficulties.

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<sup>1</sup> *NZ Tax Funds v Brooks Homes Limited* [2103] NZCA 90.

- (c) The adequacy and scope of Ms Tabak and Ms Seux's investigations and the continued use of Ms Tabak to investigate matters she was at times a participant in (including the disputed circumstance of what occurred prior to the first 16 April meeting when Ms Tabak had an interchange with Ms Sun whilst asking her to attend a meeting).
- (d) A failure of Ms Seux to interview Cai Sun (and Ms Tabak) in regard to her concerns about Ms Tabak and a co-worker and the concerns raised in Cai Sun's handwritten note of 3 May 2020.
- (e) A failure in making the preliminary decision in a letter of 17 June to traverse the issue of Cai Sun's blood test.
- (f) Concern that the threshold for establishing serious misconduct was potentially not met when assessing the nature of the issues in dispute having regard to St Allisa's own Employee Handbook distinctions between 'misconduct' and 'serious misconduct'.
- (g) Whether all relevant contextual factors, including Cai Sun identifying a blood test appointment as a reason for her absence, her service record and potential cultural factors were fairly considered and, whether alternatives to dismissal were properly canvassed.

### **Is there an arguable case for permanent reinstatement?**

[23] Section 125(2) of the Act provides that in considering reinstatement as a primary remedy the Authority "must provide for reinstatement wherever practicable and reasonable, irrespective of whether it provides for any other remedy as specified in section 123".<sup>2</sup>

[24] Ms McKinney asserted in submissions that reinstatement is neither practicable nor reasonable given the breakdown in trust between the parties and disruption to third party vulnerable residents that would ensue should Cai Sun return to work.

[25] Assessing practicality involves an overall assessment of the prospects of re-establishing the employment relationship and includes a factor of whether I consider Cai Sun could be a sufficiently harmonious employee of St Allisa's, if she were reinstated it does not mean simply being possible irrespective of consequences. The scope of assessing

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<sup>2</sup> Section 125(2) Employment Relations Act 2000.

practicability is wide and can include matters that may not have been advanced as reasons for a dismissal but are ones that go to whether a renewed relationship is feasible.<sup>3</sup>

[26] Assessing the separate requirement of reasonableness can take into account the potential impact on the employer and other employees and also where appropriate third parties (in this case residents).

[27] One immediate factor I have to consider is the delay between the dismissal date and Cai Sun seeking interim reinstatement (24 June 2021 – 22 September 2021) that there has been no satisfactory explanation for, apart from Mr Pool indicating he was at times unwell. Unfortunately due to Mr Pool being initially indisposed and then a delay caused by Covid issues the hearing of this matter was also further delayed. Ms McKinney accepted some delay had also been occasioned by Ms Tabak's unavailability to draft an affidavit.

[28] Ms McKinney in trying to establish that St Allisa has lost all trust and confidence in Cai Sun and therefore reinstatement is not practicable or reasonable, points to Cai Sun's obstructive and misleading behaviour during the disciplinary process. I however have to take note of Judge Holden's observation in *Hong v Auckland Transport* that caution is required when objectively assessing the loss of trust and confidence in the context of a dismissal where contested procedural issues arise and give rise to subjective opinions around ongoing trust and confidence.<sup>4</sup>

[29] Ms McKinney raised questions about Cai Sun advancing physical assault allegations (and harassment) against a co-worker and her manager that were found on a limited investigation to be not upheld and the impact that may have on those involved. Affidavit evidence from senior staff and an administrator contained observation and opinion on the breakdown in relationships between Cai Sun and management of St Allisa and predictions on what may occur if she was reinstated but no evidence on how Cai Sun interacts with her co-workers in the cleaning team.

[30] Comment is made about the impact on vulnerable residents given Cai Sun's daughter and Cai Sun had petitioned them on matters that also could place Ms Tabak in a difficult position. A suggestion was made that if reinstated Cai Sun would not respect her managers and have difficulty following work instructions.

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<sup>3</sup> *Hong v Auckland Transport* [2019] NZEmpC 54 at [66].

<sup>4</sup> At [68].

[31] However, I note Ms Tabak is no longer employed at St Allisa but retains only a peripheral and transitional involvement of supporting an interim manager. Ms Tabak is now managing another Arvida facility. The interim manager did not provide an affidavit detailing her interactions, if any, with Cai Sun. I also note that Ms Tabak whilst expressing her distress over the reaction she got from Cai Sun in response to raising her unauthorised absence, indicated in her affidavit that prior to the disciplinary process: “I have never had any issues with how she performed her job during previous interactions with her”.

[32] By contrast Cai Sun explained how important the job was to and her family and her regard for residents and job satisfaction was high.

[33] St Allisa did not state whether Cai Sun’s position has been filled and it was suggested by Mr Pool that it was being filled on a casual basis.

### **Assessment**

[34] I consider some of the matters highlighted have been overstated including the likely impact on vulnerable residents. One factor is the poor communication arising from Cai Sun’s language difficulties and I observe that some of the relationship difficulties have been soured by Mr Pool’s overly enthusiastic and strongly partisan style of presenting Cai Sun’s responses and framing allegations. There was also the unfortunate decision to advise Cai Sun to not engage ‘face to face’ with Ms Vivas. The latter being created by Mr Pool’s wrong interpretation of the dispute resolution provisions of Cai Sun’s employment agreement and St Allisa confusing matters by agreeing to attend mediation whilst running a disciplinary process and then reneging on this agreement due to Mr Pool’s delay in setting it up.

[35] I also appreciate the issue of delay but observe this is mitigated by Mr Pool placing St Allisa on notice that Cai Sun would be seeking reinstatement in the personal grievance letter of 15 July 2021.

[36] I accept that Cai Sun has reacted very badly to being challenged over her unauthorised absence on 16 April and that the concerns St Allisa has expressed are legitimate including it being entirely inappropriate that vulnerable residents were canvassed. I note Cai Sun’s role is not clinical or care-giving and her interactions with residents are not as intimate.

[37] These factors, if I reinstated Cai Sun on an interim basis will be challenging to St Allisa but I consider them not to be insurmountable if handled sensitively. This would have to include a restatement, appropriately communicated to Cai Sun, of St Allisa’s ongoing

expectations around compliance with health and safety issues and prior communication of absences and given Cai Sun's language difficulties, some appropriate guidelines around future communication between the parties including not involving residents in any disputation. Some mediation would also assist communication around how Cai Sun's residual concerns that remain unheard can be resolved.

[38] I conclude there is an arguable case for permanent reinstatement.

### **Balance of convenience**

[39] Assessing the balance of convenience between the parties requires an analysis of the impact on each party and any third parties if the interim order sought is either granted or not.

[40] Cai Sun says the impact of not reinstating her is that she is uniquely unable due to her age (68), skill level and language difficulties to find alternative employment that would allow her to earn remuneration. This is according to Cai Sun, compounded by the lack of available casual cleaning positions due to Covid's impact on the hospitality sector and Cai Sun not having lived long enough in New Zealand to qualify for government superannuation. I accept this premise but observe this cannot be attributed to St Allisa. However, in the unique circumstances, I accept interim reinstatement is potentially the only way Cai Sun will find a remunerated position to ease financial difficulties although I had scant detail of such before me other than an allusion to the modest earnings of Cai Sun's husband and daughter.

[41] By contrast, Ms McKinney and her client's affidavit evidence emphasised that trust was destroyed mainly by what they saw as Cai Sun's misleading initial responses, her what are considered unfounded counter allegations against managers and that she chose to embroil residents in her cause. Overall, St Allisa suggest reinstatement of Cai Sun will cause too much disruption to the residents.

[42] Ms McKinney placed emphasis on the delay in Mr Pool advancing the interim proceedings on Cai Sun's behalf. Having commented on St Allisa being placed on notice I do not consider the further delay exacerbated by Mr Pool's inexperience and misunderstanding of interim process matters should be attributed to Cai Sun. Ms McKinney concentrated on bare delay issues and made no suggestion that St Allisa had taken any steps to replace Cai Sun.

### **Assessment of where the balance of convenience falls**

[43] Weighing all factors including some merit in St Allisa's perspective of the delay in bringing these proceedings and the recent difficulties of managing Cai Sun and the difficulty St Allisa may face in recovering money should the substantive proceedings not favour Cai Sun, I nevertheless find by a fine margin that the balance of convenience does favour the granting of an interim reinstatement order. I consider damages if subsequently granted would be an inadequate remedy for Cai Sun if she is not reinstated on an interim basis as they will potentially be the subject of some contributory conduct when this matter is determined on a substantive basis.

### **Overall justice**

[44] An overall justice assessment is a reality check on the position which has been reached after the analysis of the serious question to be tried and the balance of convenience has been weighed.

[45] As I have said, there is a serious question to be assessed in regard to the manner by which Cai Sun was summarily dismissed and consequently I conclude she has an arguable case for unjustified dismissal. I consider the case for permanent reinstatement to be less compelling and suggest there is a lot of work to be done in the interim for Cai Sun to restore her employer's trust and confidence in her. Ms McKinney has noted that Cai Sun has not addressed her own contribution or expressed remorse in her evidence. This will have to be addressed and carefully with sensitivity for cultural reasons but also it must involve Cai Sun appreciating her employer's needs and her responsibilities that include resident safety, compliance with expectations around absences and duty to comply with reasonable instructions.

[46] Standing back and looking at all factors, I find that the balance of convenience does favour granting the interim reinstatement order sought pending a substantive investigation meeting.

[47] I have considered whether it is appropriate to only place Cai Sun back on the pay roll but accept Ms McKinney's suggestion that further time away from the workplace awaiting a substantive hearing is not a wise approach to restoring relationships.

### **Orders**

[48] On the basis of the signed undertaking as to damages and pending this matter being determined on a substantive basis, I direct St Allisa Rest Home (2010) Limited to reinstate Fengcai Sun on an interim basis to her former position by no later fourteen days from the date of this determination. This period will allow St Allisa's management to arrange to make the necessary roster changes to accommodate Fengcai Sun and to meet and discuss details of such including deciding whether it is necessary to involve a mediator at some point to resolve ongoing expectation and communication issues.

[49] All issues of claimed lost remuneration and other remedies sought, will be dealt with at the substantive investigation meeting

**Further steps**

[50] A telephone conference is to be convened as soon as practicable to organise a date for a substantive investigation meeting.

**Costs**

[51] Costs are reserved.

David G Beck  
Member of the Employment Relations Authority