

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

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

[2024] NZERA 24
3200519

BETWEEN JINGYI SUN
 Applicant

AND TE WHATU ORA - HEALTH
 NEW ZEALAND
 Respondent

Member of Authority: Alex Leulu

Representatives: May Moncur, counsel for the Applicant
 Rebecca Rendle & Sara-Jane Lloyd, counsel for the
 Respondent

Investigation Meeting: 15 and 16 August 2023 in Auckland

Submissions and further 12 September 2023 and 25 October 2023 from
information received: Applicant
 4 October 2023 from Respondent

Determination: 18 January 2024

DETERMINATION OF THE AUTHORITY

Employment relationship problem

[1] Jingyi (Ammanda) Sun was employed by Te Whatu Ora - Health New Zealand (TWO) as a health care assistant (HCA). Ms Sun claimed she was unjustifiably dismissed by TWO after a meeting with her charge nurse manager Karen Taufu on 27 July 2022. She also claimed she was unjustifiably disadvantaged by TWO during her employment.

[2] TWO opposed both Ms Sun's claims. It said she was not unjustifiably dismissed and instead resigned from her employment in January 2023. TWO also opposed Ms Sun's unjustified disadvantaged claim because it was not appropriately raised within the statutory 90-day period.

The Authority's investigation

[3] While investigating this employment relationship problem, written statements were lodged from Ms Sun, Ms Taufa, and human resources advisor Linda Lim. All three witnesses attended the investigation meeting and under oath they answered questions from me and the party's representatives. The representatives also submitted written closing submissions.

[4] 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.

The issues

[5] The issues for determination were:

- (a) Was Ms Sun unjustifiably disadvantaged during her employment with TWO?
- (b) Was Ms Sun unjustifiably dismissed by TWO?
- (c) If Ms Sun was unjustifiably dismissed and/or unjustifiably disadvantaged, was she entitled to remedies including:
 - (i) Compensation under s 123(1)(c)(i) of the Act; and
 - (ii) Remuneration for lost wages (subject to evidence of reasonable endeavours to mitigate her loss)?
- (d) Should either party contribute to the costs of representation of the other party.

Context

Ms Sun's orientation and supervision

[6] Ms Sun first began working for TWO on Tuesday 19 July 2022 at Middlemore Hospital. She was assigned to work on Ward 7 as an HCA and was to report to Ms Taufa.

[7] Ward 7 operated 24 hours a day. Its daily work shifts consisted of a morning shift, an afternoon shift, and a night shift.

[8] Ms Sun was rostered to work at least 64 hours a fortnight and would be assigned work shifts from Monday to Sunday. For her first week of work, she was rostered to work four days from Tuesday 19 July to Friday 22 July 2022.

[9] As part of her induction into the HCA role, Ms Sun was to receive orientation training and oversight from a senior HCA. Orientation usually took two weeks and as part of her orientation, Ms Sun was initially required to work morning shifts.

[10] During her first two shifts, Ms Sun's assigned senior HCA was on sick leave. Both Ms Sun and TWO disagreed on whether another senior HCA or HCA was present at these shifts to assist Ms Sun.

[11] On her second week, Ms Sun was rostered to work the morning shift on 25 July 2022, but was changed to the night shift upon request from Ms Sun.

[12] Initially, Ms Sun did not attend her assigned night shift on time. Ms Taufa followed up by calling Ms Sun who apologised to her as she was in a class and had to be present for roll call. Ms Taufa said this was the first time she realised Ms Sun was undertaking studies. Ms Sun eventually arrived at work and completed her night shift.

[13] Upon finishing her shift, Ms Sun said she took steps to speak to Ms Taufa about not receiving proper orientation. The evidence of Ms Taufa and Ms Sun differed on whether they had discussed that concern.

The 27 July Meeting

[14] On 27 July 2022 Ms Taufa sent Ms Sun a text message inviting her to a meeting on the same day (27 July meeting). During the meeting, Ms Taufa told Ms Sun about an allegation made against her by another HCA (the complainant). The complainant accused Ms Sun of constantly asking her about her rate of pay. Ms Sun denied the allegation but admitted to showing the complainant her own payrate (via a digital version of her employment agreement on her mobile phone).

[15] Ms Sun and Ms Taufa also discussed a potential change to Ms Sun's work shift arrangement. They both dispute the nature of this conversation and whether, because

of the conversation, Ms Sun had resigned from her employment or had been dismissed by TWO.

[16] After the 27 July meeting there were ongoing communications between Ms Sun and Ms Taufa about whether she had resigned or whether she was dismissed. There were also ongoing communications between them about the potential return of Ms Sun's work uniform, access card and car park card.

[17] On 29 July 2022 Ms Sun lodged a formal complaint about Ms Taufa to the TWO HR team. The matter remained unresolved up until 11 August 2022 where Ms Sun (through her representative) raised a personal grievance claim against TWO for unjustified dismissal.

[18] TWO disagreed with Ms Sun's grievance allegations and said Ms Sun was still employed. It also continued to engage with Ms Sun about whether she was going to return to work. After an attempt to resolve the matter at mediation, Ms Sun lodged the matter at the Authority. TWO eventually terminated Ms Sun's employment in January 2023 and treated the termination as a resignation.

Unjustified disadvantage claim

[19] Ms Sun's statement of problem was lodged on 21 November 2022. TWO argued this was the first time Ms Sun had raised an allegation against TWO for unjustified disadvantage. Although Ms Sun raised a personal grievance with TWO on 11 August 2022, it referred to an unjustified dismissal and not any disadvantage.

[20] TWO also argued it was not sufficiently clear which action by TWO were the subject of Ms Sun's claim of unjustified disadvantage. For these reasons, TWO said Ms Sun's claim for unjustified disadvantage could not be investigated by the Authority because they were not properly raised within the statutory 90-day period.

[21] An employee who wishes to raise a personal grievance must raise the grievance within 90 days beginning with the date on which the action alleged to amount to a personal grievance occurred or came to the notice of the employee, whichever was later.¹ A grievance is treated as being raised as soon as the employee has taken

¹ Employment Relations Act 2000, s 114.

reasonable steps to make the employer (or their representative) aware of the personal grievance the employee wants the employer to address.

[22] If a grievance is raised outside the 90-day period, an employer may agree to the grievance being raised outside the statutory time frame or an employee may seek leave from the authority to raise the grievance due to exceptional circumstances.

[23] Ms Sun did not provide any views, submissions, or evidence to support her position on whether her unjustified disadvantage claim was raised within the 90-day period. She was also given an opportunity to reply to TWO's closing submissions which set out TWO's position on her unjustified disadvantage claim. Ms Sun declined the opportunity to file a reply to TWO's closing submissions.

[24] Based on the available information before the Authority, Ms Sun had not raised a personal grievance for unjustified disadvantage in accordance with the Act because she did not properly specify the grounds of her grievance which would have allowed TWO a chance to properly respond to her claims. There was also no evidence before the Authority to show Ms Sun had raised a personal grievance for unjustified disadvantage before she had lodged her statement of problem.

[25] TWO had not consented to Ms Sun raising her unjustified disadvantage claim out of time. Ms Sun also did not seek leave from the Authority for her unjustified disadvantage claim to be raised after the expiration of the 90-day period. For these reasons the Authority did not have jurisdiction to investigate Ms Sun's claims for unjustified disadvantage against TWO.

Unjustified dismissal claim

Ms Sun's recollection of the 27 July meeting

[26] On 27 July, Ms Taufa invited Ms Sun to a meeting to discuss the complaint made against Ms Sun. The accounts they each gave of the discussion relating to the complaint were consistent.

[27] However, Ms Taufa and Ms Sun's accounts of the 27 July meeting differed on various other aspects of the discussion. Ms Sun's recollection of discussion included the following:

- Ms Sun asked Mr Taufa about working fixed hours and raised her previous concerns about not receiving appropriate orientation. In response, Ms Taufa said she was too busy to adjust shifts and to follow up on staff concerns. Ms Taufa also said, if Ms Sun wanted further orientation, Ms Taufa would arrange for Ms Sun to be supervised by Ms Taufa for every shift.
- During the meeting, Ms Taufa yelled at Ms Sun and told her to work in another ward. Ms Taufa also raised issues about Ms Sun's work performance and said she was not fit to work for her. She also criticised the references provided by Ms Sun's referees during her recruitment by TWO.
- Ms Sun said she became deeply hurt and upset because of Ms Taufa's attitude during the meeting and felt like she was not being listened to.
- Ms Taufa then told Ms Sun to sign a "termination file" and to also return her access cards and her work uniform. Although Ms Sun declined to do so, Ms Taufa told her if she did not sign the "termination file", Ms Taufa would assign her with work shifts she did not like.

[28] Ms Sun said she told Ms Taufa she wanted to first speak to HR before signing the "termination file". In response Ms Taufa became angry and started shouting at her saying she did not need to go to HR. To appease Ms Taufa, Ms Sun said she tried to calm Ms Taufa down and eventually agreed to sign the "termination file" once it became available from HR.

Ms Taufa's recollection of the 27 July meeting

[29] Ms Taufa disagreed with Ms Sun's recollection of the 27 July meeting. After the discussion about the complaint, she said Ms Sun asked her about enrolling into the Enrolled Nursing course ("the course"). Ms Sun wanted to study full-time while continuing her work with TWO. She wanted to arrange her shifts around her study.

[30] Upon showing Ms Taufa a copy of the proposed program timetable for the course, Ms Taufa reminded Ms Sun about her roster shifts and realised the only available shifts would be night shifts. This presented practical implications for Ms Sun given she would need to study during the day and then work at night. This also presented a health and safety risk due to how long Ms Sun had to both study and work.

[31] Ms Taufa said they also discussed Ms Sun working either fixed shifts or as a casual employee. Ms Taufa said TWO could not accommodate this because the nature of the work roster was for ongoing changing shifts. Ms Sun was also recruited in a “0.8 Full Time Equivalent Role” and could not be changed to casual employment.

[32] Ms Taufa also recalled Ms Sun saying she wanted to study and could not commit to a rostered shift. Ms Sun then asked Ms Taufa to be released from her contract and was happy to sign a form. Ms Taufa said she would enquire further with HR.

[33] Ms Sun also asked about returning her access cards and her uniform. Ms Taufa replied by saying these would need to be returned but wanted to check with HR to make sure she was following the correct process.

[34] At the end of the meeting, Ms Taufa said Ms Sun looked upset and in response she gave Ms Sun a hug. Ms Taufa denied Ms Sun’s allegations of her yelling at Ms Sun during the meeting and questioning Ms Sun’s work performance and her referees from her previous role. She also denied telling Ms Sun to work on another ward.

After the 27 July meeting

[35] After the 27 July meeting and on the same day, Ms Taufa had attempted to contact Ms Lim from the HR team to confirm the process for resignation. She could not contact Ms Lim and left a message. Ms Lim contacted Ms Taufa the next day. Ms Lim said Ms Sun would need to provide a resignation letter to confirm her resignation. At 8.42 am on the same day, Ms Lim sent a resignation letter example to Ms Taufa.

[36] Again on the same day, Ms Taufa and Ms Sun had a text message conversation as follows:

9:00 am

Karen: Hi Ammanda, Are you free to come in and see me today?

9:05 am

Ammanda: Hi Karen, I got whole days’ class today till 1930, uniforms packed up with staff ID and parking card. I can drop it another day

10:24 am

Karen: Are you able to come in tomorrow so you can sign the file and return your uniform directly to me?

10:34 am

Ammanda: Sure, I can sign the printed documents and give it to

you tomorrow, can I see you around 1330? I got 1500 o'clock interview in city, still need a place to make ends meet. Could you please email me the form please?

10:44 am

Karen: I'll see you when you come in I'll have the form ready

10:45 am

Ammanda: Sorry Karen, I need to have a look the form by a friend first, please email it to me first.

11:28 am

Karen: I need a resignation letter from you no form

Karen: No documents

11:29 am

Karen: Resignation letter

11:31 am

Ammanda: What?

Ammanda: I was dismissed, not resigned!

11:35 am

Karen: No one dismissed you.

[37] The interactions between Ms Sun and Ms Taufa continued with Ms Sun saying she was dismissed and Ms Taufa maintaining her view Ms Sun was still employed by TWO. Ms Taufa continued to contact Ms Sun about her work shifts. This contact with Ms Sun continued after Ms Sun tested positive for Covid-19 on 2 August 2022.

[38] On 29 July 2022 Ms Sun contacted a member of the TWO HR team by text message, informing them of what occurred during the 27 July meeting. Ms Sun's message was referred to Ms Lim.

[39] On 4 August 2022 Ms Lim exchanged messages with Ms Sun where she asked her when she was due to return to work. Ms Sun replied by saying she would not return until an investigation was carried out against Ms Taufa.

[40] On 5 August 2022 Ms Lim emailed Ms Sun asking for evidence supporting her recollection of events on the 27 July meeting. In response, Ms Sun emailed Ms Lim saying she needed to request the phone records from Ms Taufa and not request records from her. Ms Sun also briefly explained what the messages on Ms Taufa's phone would show. This was the last direct interaction between TWO and Ms Sun.

Conclusion of what occurred during the 27 July meeting

[41] Putting aside their discussion about the complaint against Ms Sun, both parties have significantly different views as to what was discussed during the 27 July meeting. Given Ms Sun's relatively short period of work for TWO, it was difficult to adequately assess the nature of the working relationship between Ms Sun and Ms Taufa.

[42] Considering all the available evidence, Ms Taufa's account of what occurred during the 27 July meeting was likely to be a more accurate account of what was discussed for several reasons. Firstly, Ms Sun had only worked five shifts for TWO from 19 July 2022 to 27 July 2022. Although she expressed concerns early on about not receiving appropriate orientation, there had been no evidence to show any concern from TWO about her performance.

[43] Secondly, Ms Taufa's recollection of the discussion involved Ms Sun's intention to undertake study. This is consistent with evidence showing Ms Sun was already engaged in some form of study or schooling while she was employed by TWO. This included references to classes and roll call in text messages and phone call discussions with Ms Taufa.

[44] At the investigation meeting, Ms Sun said she had only been observing her friend's study classes. However, based on the text messages and Ms Taufa's evidence, Ms Sun's studies appeared to be more than mere observation. She was more than likely enrolled in some form of study.

[45] Given Ms Sun's relatively short period of employment up to 27 July meeting, it was sufficient time for Ms Sun to assess her ability to study and work at the same time. This was a plausible reason for why Ms Sun would request to adjust her roster or work as a casual employee.

[46] Thirdly, the nature of the initial interactions between Ms Sun and Ms Taufa after the 27 July meeting was inconsistent with Ms Sun's recollection of the 27 July meeting. Ms Sun's recollection portrayed a heated exchange between her and Ms Taufa and included Ms Taufa being in a state of anger. However, following the meeting their interactions appeared to be cordial and at one point Ms Sun sent a "smiley face" emoji to Ms Taufa.

[47] It should be noted also, Ms Sun had covertly recorded the 27 July meeting. Unfortunately, the recording was not available. Ms Sun said she deleted the recording because she said it was too traumatic for her to listen to again.

Was Ms Sun unjustifiably dismissed?

[48] Ms Taufu did not terminate Ms Sun's employment during the 27 July meeting. Instead, there was likely a misunderstanding between Ms Sun and Ms Taufu about how to end Ms Sun's employment. Ms Taufu believed Ms Sun wanted to resign from her role and wanted to clarify how to facilitate this. This was consistent with Ms Taufu's immediate steps after the 27 July meeting in contacting Ms Lim about the resignation process.

[49] However, Ms Sun was clearly of the view her employment was terminated by Ms Taufu. Once Ms Sun's views became apparent to TWO, TWO confirmed Ms Sun's employment was not terminated, and steps were taken to try and resolve the employment relationship problem.

[50] Although Ms Sun had requested an investigation, she did not sufficiently engage with Ms Lim's inquiries into her complaint to HR. If she did, she may have helped resolve any misunderstanding between her and Ms Taufu (and possibly would have assisted in resolving the employment relationship problem at an early stage).

[51] TWO took reasonable steps to try and communicate with Ms Sun and to try resolve the employment relationship problem. Ms Sun remained employed during this time. Once it became clear Ms Sun was not going to return to the workplace, TWO terminated Ms Sun's employment. TWO's actions were what a fair and reasonable employer could have done in all the circumstances at the time the dismissal or action occurred.²

Outcome

[52] For the reasons given Ms Sun had not established TWO acted unjustifiably in the decisions made and the process followed both during and at the end of her employment.

² Employment Relations Act 2000, s 103A(2).

[53] Accordingly, Ms Sun's application to the Authority is dismissed.

Costs

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

[55] However, if an Authority determination on costs is needed either party 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 opposing party 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.

[56] 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.³

Alex Leulu
Member of the Employment Relations Authority

³ See www.era.govt.nz/determinations/awarding-costs-remedies.