

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

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

[2025] NZERA 123
3162442

BETWEEN MIAO WANG
 Applicant

AND AIR CHINA LIMITED
 Respondent

Member of Authority: Marija Urlich

Representatives: May Moncur, advocate for the Applicant
 Eva Ho, counsel for the Respondent

Investigation Meeting: 26 - 28 September 2023, 30 April, 1 May and 17 July
 2024

Submissions and
information received: 8 and 30 August 2024 and 14 February 2025 from the
 Applicant
 8, 22 August, 2 September, 11 December 2024 and 14
 February 2025 from the Respondent

Determination: 28 February 2025

DETERMINATION OF THE AUTHORITY

Employment Relationship Problem

[1] Miao Wang was employed by Air China Limited (ACL) as a customer service representative from 5 May 2017 until 31 July 2020 when she was dismissed without notice for serious misconduct. Ms Wang says she was unjustifiably disadvantaged in her employment by the unjustified actions of ACL and unjustifiably dismissed. She seeks remedies to compensate lost wages and injury to feelings and a contribution to costs. The parties have resolved Ms Wang's wage arrears claim.

[2] ACL is the New Zealand subsidiary of Air China. ACL denies Ms Wang was unjustifiably disadvantaged or unjustifiably dismissed or that its actions were not in compliance with the obligation of good faith. It says it engaged in a fair process with Ms Wang and that its actions were necessary to ensure the smooth running of ACL's operations in line with careful procedures. It says the employment relationship ended due to Ms Wang's repeated misconduct and refusal to follow reasonable instructions which amounted to serious misconduct.

[3] ACL brings a counter claim. It says Ms Wang disclosed information obtained during her employment in breach of her employment agreement and breached an interim non-publication order of the Authority. It also says Ms Wang's conduct has obstructed the Authority's investigation. Ms Wang denies any breach of statutory or contractual obligation or that her actions obstructed the Authority's investigation.

The Authority's investigation

[4] The Authority has received evidence from Ms Wang and for Air China, Gang (Tony) Guo, who at all relevant times was ACL's general manager and Richard Yu, who gave evidence, with leave of the Authority by audio-visual link.¹

[5] 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. In determining this matter, the Authority has carefully considered all the material before it, including all information received from the parties and the submissions of their representatives. At the investigation meeting the Authority was assisted by an interpreter of the Mandarin language.

Non-publication

[6] An interim non-publication order has been in place since 28 March 2022 of the names of the parties and any information which might lead to their identification.² The reason was to ensure a fair hearing including that witnesses were able to give their evidence without pressure or the risk of pressure.

¹ *VTK v WAW* [2022] NZERA 282.

² *VTK v WAW* [2022] NZERA 113.

[7] The parties have provided submissions on whether the non-publication order should be made permanent as has the publication which has run articles on this employment relationship problem.

[8] ACL indicated earlier in the proceedings that it would like the non-publication order to be made permanent and in closing submissions appears to have refined its position to one of abiding the Authority determination in relation to the continuation of the non-publication order.

[9] Ms Wang says it is in the interest of justice that the non-publication order is not continued and that it is not made permanent.

[10] The reason for the interim non-publication order is exhausted. The witnesses have given their evidence. There is no public interest in the non-publication of the names of the parties continuing. There is no compelling evidence before the Authority of any negative impact on any individual of publication which would weigh in favour of the order being made permanent. The interim non-publication order is not to continue and is not made permanent.

Issues

[11] The issues requiring investigation and determination are:

Ms Wang's claim

- i. Was Ms Wang unjustifiably disadvantaged in her employment by the actions of ACL by:³
 - a. consistent bullying and harassment by senior management of ACL from November 2017;

³ Closing submissions for Ms Wang refer to a claim for breach of good faith. A standalone claim for breach of good faith is not before the Authority (refer statement of problem lodged 2 February 2022, reply to counter-claim lodged 24 March 2022). It is accepted compliance with the obligation is a relevant consideration in a grievance setting.

- b. the publication on 24 May 2019 of a defamatory notice on WeChat and/or ACL's failure to take action to correct defamatory material on WeChat; and
 - c. partial suspension from duties on 5 June 2019 and full suspension on 19 June 2019.
- ii. Was Ms Wang unjustifiably dismissed from her employment on 31 July 2020?
- iii. If so, is Ms Wang entitled to a consideration of remedies sought including:⁴
 - a. reimbursement of lost wages (6 weeks); and
 - b. compensation of \$50,000 under s 123(1)(c)(i) of the Act.
- iv. Should any remedy awarded be reduced (under section 124 of the Act) for blameworthy conduct by Ms Wang which contributed to the circumstances which gave rise to her grievance/s?

Air China's claim

- v. Has Ms Wang breached the confidential information and non-disparagement clauses of her employment agreement?
- vi. Has Ms Wang breached the Authority non-publication order?
- vii. Has Ms Wang and/or her representative breached s 121 of the Act?
- viii. Should a compliance order be made under s 137 ordering Ms Wang and her representative to comply with the Authority non-publication order?
- ix. Should a penalty be ordered under s 134 for any established breach of the employment agreement and/or s 134A for obstruction or delay of the Authority investigation?

⁴ A claim for lost benefits was not pursued.

Costs

- x. Is either party entitled to an award of costs?

Relevant law

The test for justification

[12] In considering personal grievances for unjustified action and dismissal, as here, the Authority must apply the test for justification set out at section 103A of the Act. The Authority must carefully assess the reasons given to the employee by the employer and decide, on an objective basis, whether the employer's actions were reasonable. In addition, a fair and reasonable employer is expected to comply with its statutory obligations which include the good faith obligations which include at s 4(1A)(b):

The duty of good faith in subsection (1)—

(a) ...

(b) requires the parties to an employment relationship to be active and constructive in establishing and maintaining a productive employment relationship in which the parties are, among other things, responsive and communicative;...

[13] Further, s 4(1A)(c) of the Act requires an employer who is proposing to make a decision that will, or is likely to, have an adverse effect on the continuation of employment to provide the employee affected with access to information, relevant to the continuation of the employee's employment, about the decision. This engagement is to occur prior to the decision being made.

[14] Failure by an employer to comply with these obligations may fundamentally undermine its ability to justify a dismissal or other action "because a fair and reasonable employer will comply with the law".⁵

[15] Further, in assessing the fairness and reasonableness of the employer's actions in a s 103A setting focus is required on the employment relationship overall. In *FMV v TZB* the Supreme Court discussed this emphasis in the Act and its relationship with the statutory good faith obligations:⁶

⁵ *Simpsons Farms Ltd v Aberhart* [2006] ERNZ 825 (EmpC) at 842 [65].

⁶ *FMV v TZB* [2021] NZSC 102, [2021] 1 NZLR 466, [2021] ERNZ 740 at [46].

[46] ...As its name suggests, the current Act takes a relational approach, insisting that employment is more than a market transaction theoretically conducted at arm's length between individuals with equal bargaining power. The result is that while the employment agreement remains very important, it is the employment relationship that is the real focus under the current Act. The scope of the employment relationship is wider than the employment contract and it adds an additional dimension to contractual rights and obligations. This is reflected in two important ways.

[47] The first is the statutory incorporation of the principle of good faith into the employment relationship. This principle underpins the Act's relational approach.

[48] Part 1, "Key provisions", begins by stating that the object of the Act is:

to build productive employment relationships through the promotion of good faith in all aspects of the employment environment and of the employment relationship...

[49] This is to be done, first and foremost, by:

... recognising that employment relationships must be built not only on the implied mutual obligations of trust and confidence, but also on a legislative requirement for good faith behaviour...

[50] Section 4 then provides that parties to an employment relationship "must deal with each other in good faith". This means, of course, that parties must not mislead or deceive one another, but its effect is wider than that. Parties must also actively and constructively establish and maintain a productive employment relationship; they must be responsive and communicative; and employers must comply with procedural fairness requirements...Parliament was at pains to ensure that the principle of good faith should be the driver of all employment relationships, independently of and in addition to obligations in the employment contract.

The employment agreement

[16] The parties have a written employment agreement (the employment agreement) which was signed by Ms Wang and Mr Guo. The employment agreement includes Ms Wang was a fulltime employee, working shifts and that her location of work was the ACL airport office, located at Auckland International Airport.

[17] Schedule 2 of the employment agreement lists Ms Wang's position duties in some detail and describes the type of day-to-day passenger interactions that could be expected of a customer service representative at a busy airline office located at an international airport.

[18] Clause 25 of the employment agreement is titled “General” and refers to a Human Resources Toolkit which “...contains more details of the various items set out in this agreement”. During the course of the investigation of this employment relationship problem the Authority requested a copy of this toolkit and was advised it does not exist as such but is made up of directives and memoranda circulated from time to time. The implementation of these directives is a matter relevant to this determination.

[19] The employment agreement includes clauses dealing with confidential information and non-disparagement:

Clause 12 Information and Intellectual Property

12.1 For the purposes of clause 12, “Confidential Information” means all information relating to the Employer’s business gained by the Employee in his or her employment, which is confidential and which the Employee should reasonably assume is confidential, and any information notified by the Employer to be confidential. The following is a non-exhaustive list on information which is regarded as confidential and must be treated as such by the Employee:

...
(d) Detailed information and records relating to customers, suppliers, staff and parties the Employer deals with commercially including customer lists, details of key contacts and information that has been received in confidence;

...
(g) Personal information about other employees or customers where disclosure would or would likely be in breach of the privacy Act 1993;

(h) Information about litigation or pending litigation to which the Employer is or is likely to be party, including any cause brought by or against any employees;

12.2 The Employee must not during the term of this agreement or after its termination, without the Employer’s written consent, use or disclose, or cause or permit to be used, copied, or disclosed any Confidential Information except for the purposes directly related to furthering the Employer’s business objectives and the Employee will use its best endeavours to prevent publications and disclosure of confidential information.

Clause 22 No Disparagement

22.1 The Employee shall not make any statements, comments and/or representations (including by conduct or implication) to any person, organisation, entity, third party and/or the public that are disparaging, reflect negatively on the Employer, may be perceived to reflect

negatively on the Employer, or have the potential to bring the Employer into disrepute.

Background

2017 – Ms Wang starts work with ACL

[20] As stated above Ms Wang was employed by ACL as a customer service representative from 15 May 2017 until her employment ended without notice by way of dismissal for serious misconduct on 31 July 2020. Ms Wang was born in China and came to live in New Zealand in 2011. She told the Authority working for ACL, as a subsidiary of Air China was an honour and source of great pride to her and her family and friends.

[21] In her role Ms Wang worked at Auckland airport and reported to the station manager. In her evidence she described herself as reporting also to Mr Yu and the cargo manager. While there is some dispute as to reporting lines, given the small operation in Auckland the senior employees of ACL had regular interaction with Ms Wang in the course of her employment.

[22] In the first months of her employment Ms Wang's evidence is she was often praised for her work by the senior managers. She also describes passing her three-month trial period "with flying colours". While the employment agreement expressly states Ms Wang's employment was not subject to a trial period, I accept she felt settled into the role after three months and was enjoying her work with ACL.

[23] Ms Wang says between August and October 2017 the cargo boss asked her personal favour to accept a transfer of offshore funds into her bank account and when she declined their relationship soured. Ms Wang's evidence was not directly disputed. I accept the events occurred as Ms Wang describes and that her decline of the request negatively impacted her working relationship with the cargo boss.

[24] On 16 November Ms Wang says she was physically assaulted and detained by the cargo boss. She says she was smacked in the face and kicked, and this was witnessed by another employee who when they tried to intervene was also assaulted. She complained to Mr Guo. She also spoke to airport police about the incident but did not make a complaint because she wanted to keep her job.

[25] On the evening of 27 November, as Ms Wang was leaving the airport carpark, she was asked to return to the airport office to attend a meeting with Mr Guo and Mr Yu. Mr Guo says Ms Wang was not instructed to drive back for the meeting. His evidence is she was asked if she could attend the meeting to investigate what had happened during the 16 November incident. There is no dispute the meeting was held after Ms Wang had finished her shift for the day and the request to attend the meeting was not made in writing. Ms Wang said she felt she had no choice but to return to the workplace to attend the meeting because she was directed to do so by Mr Guo. That she felt this way is accepted by the Authority.

[26] The ACL witnesses said the purpose of the meeting was to investigate Ms Wang's allegations of assault and detention. The meeting lasted for four hours and did not finish until after midnight.

[27] On 5 December ACL asked Ms Wang to attend a further meeting. Again, the meeting request was not made in writing. Ms Wang asked to bring her mother-in-law as a support person. She said this request was declined. In response she decided to take a recording device into the meeting. During the course of the meeting, it came to Mr Guo's attention that Ms Wang was recording the meeting. Ms Wang's evidence is he demanded she stop recording the meeting, used abusive language towards her and when she refused Mr Yu snatched the recording device from her and threw it into a rubbish bin. Mr Guo accepts he asked Ms Wang to stop recording the meeting when it came to his attention but denies speaking to her inappropriately or that the recording device was removed. The meeting continued for five hours.

[28] A redacted report dated 11 December titled [in translation] "Investigation report on the dispute between [cargo manager] and Wang Miao on November 16 and related issues" has been provided to the Authority. The report is signed by "Members of the investigation team" identified as Mr Yu, Mr Guo and a member of the finance team. The report ended [in translation]:⁷

⁷ This report was not provided to Ms Wang at the time. Mr Guo's evidence was he decided not to send the report to Air China and to keep it as a record of how ACL managed the incident.

3. Conclusion

The investigation team determined that Wang Miao's complaint against [the cargo manager] lacked logical and convincing evidence or witness support and should be considered invalid.

4. Solution

1. Wang Miao was asked to immediately adjust her emotions, control her extreme mentality and stop taking actions to intensify the situation. Clearly reminded Wang Miao that if the contradiction continues to intensify, resulting in an adverse impact on the image of the sale department and Air China. The sales department will resort to legal means.
2. Air China New Zealand will issue a warning letter to Wang Miao for recording without the consent of others during the talk. At the same time, the sale department will also reiterate that private recording is not permitted in the office.

[29] On 12 December Ms Wang was emailed the following letter from her employer [in translation]:

Warning letter

Hello Wang Miao

In view of the fact that your use of the voice recorder in the office meeting in December 5, 2017 has seriously violated the company's internal confidentiality agreement, the company hereby seriously criticizes you. In the future, please strictly abide by the company's confidentiality agreement. Bring recording equipment into the workplace with the permission of the company.

China Auckland
December 12, 2017

[30] The email covering note, under the name of the finance team member named in the investigation team, to the letter provides:

Hello Wang Miao

Attached is the company's warning letter regarding your illegal use of recording equipment during the meeting on December 5, please check it.

[31] On 17 December Ms Wang replied:

I would like to formally reject the warning letter, as I have not had a previous verbal warning for this offence first. Secondly because the use of recording a disciplinary meeting which was not followed legally in NZ employment law, the meeting we had on December 5 is illegal and invalid.

If you would like to discuss this further we can give you our family lawyers contact details. I have attached a link to the NZ employment law and also

copied an extract at the bottom, highlighting relevant past for your convenience.

[32] ACL did not respond to this letter. No witness for ACL could recall why.

2018

[33] In early 2018 ACL announced to staff, including Ms Wang a new policy which impacted on wage payments including meal allowances.

[34] Ms Wang was concerned about the policy and wrote to Mr Guo on 23 February requesting a copy of her employment agreement and her wage, time and leave records. In the same email Ms Wang repeated her concerns about the warning and requested information from the events in November and December:

Also, the illegal meeting I was subjected to last year, I was told that I would receive all the minutes of the meeting, the email you sent to HQ regarding [the cargo manager], the witness statements from [a co-worker] and [a co-worker] (that you said you would immediately provide at the conclusion of the meeting, which never eventuated) and acknowledgement that I have rejected the formal written warning (as there was no legal grounds to do so) and an apology for not following New Zealand law.

Failure to do so will result in Employment New Zealand stepping in.

I look forward to receiving these by the end of the day, or else I will be taking this further to the Employment Relations Agency and the Human Rights Commission.

DO NOT CALL MY PERSONAL CELL PHONE, AS THAT WILL CONSTITUTE WORKPLACE BULLYING.

Any communication can be done via email (IN ENGLISH)

Thankyou
Have a good day

[35] ACL did not respond to this email or provide the information sought. It is clear by at least this stage there was an employment relationship problem between the parties. Ms Wang's 23 February email demonstrates the impact the deteriorating employment relationship was having on her. The email raises a personal grievance in respect of the warning and the manner in which the meeting was conducted. For completeness, ACL has acknowledged there was an error in how wages were paid during this period which it corrected for all staff. At about this time Ms Wang joined a union. She said she was

feeling harassed and bullied at work and micromanaged which left her feeling overwhelmed.

[36] On the afternoon of Friday 23 March Mr Yu emailed Ms Wang inviting her to a meeting on Thursday 29 March along with a support person of her choice to review matters described as a “business error review meeting” and included:

...

5. Contents of the meeting:

Communicate with several business errors that have occurred in your work since the end of January this year, analyze the reasons for the errors, and find ways to improve. Please refer to our recent exchange of emails containing our questions to you, your answers and our replies.

[37] Ms Wang replied on the morning of 28 March that she had not heard back from her representative, she was seeking advice on this and other employment matters and her or her representative would be in touch as soon as possible. Later that day Ms Wang forwarded her representative’s contact details to ACL and its solicitors. ACL’s solicitor wrote then to Ms Wang’s representative on the evening of 29 March asking that they confirm they are Ms Wang’s “support person” through whom matters relating to what was described as an appraisal meeting and work procedures should be directed and proposing a meeting on 4 April.

[38] On 5 April the meeting went ahead as proposed. Ms Wang attended with her representative and Mr Guo, Mr Yu and the finance team member attended with counsel. Minutes taken at the meeting have been provided to the Authority which record matters discussed under the following headings – confirmation of agenda, performance appraisal, incident on 5 December 2017, incident on 7 February 2018 and alleged unpaid wages and meal break arrangement. For the purposes of this determination the minutes record in respect of the 5 December meeting that “...there is no warning letter issued on this incident and [ACL] further acknowledged its responsibility to provide a safe work environment”. With regard to the employment relationship, the minutes record the parties agreed to “...move forward in a positive manner”. The minutes have a section where the parties could sign confirming “...the minutes above are a true and complete record of the meeting”.

[39] On 7 May ACL’s lawyers wrote to Ms Wang’s then representative attaching “...a summary of the discussions of the meeting held on 4 May”.

[40] On 30 May ACL's lawyers wrote to Ms Wang's then representative referring to earlier correspondence attaching minutes of the 4 May meeting and asking Ms Wang to confirm the contents of the minutes "are all correct" and to "Please sign and forward that back to us". The letter does not explain why ACL requested Ms Wang confirm the contents of the minutes and/or sign the minutes. Ms Wang's representative did not respond.

[41] Ms Wang gave evidence Mr Guo asked her repeatedly to sign the minutes meeting and became insistent that she do so. Mr Guo says Ms Wang refused to sign the minutes. Suffice to say, Mr Wang did not sign the minutes and does not accept them as accurately recording where matters stood between the parties at that time. Why ACL wanted Ms Wang to sign these minutes, or indeed other documents later at issue between the parties, in the face of her clear reluctance remains unclear to the Authority. Further, the action point recorded in the minutes for Ms Wang to identify areas of work process where training would assist does not appear to have been progressed by the parties.

[42] There were no direct matters between the parties in the balance of 2018. Matters concerning Ms Wang's work performance in 2018 were not formally raised with her until February 2019.

2019

11 February – ACL seeks to convene a "formal appraisal meeting" with Ms Wang

[43] The next significant event in the timeline of this employment relationship problem is 11 February 2019 when ACL's lawyers wrote to Ms Wang's then representative seeking what was described as "a formal appraisal meeting" that week to discuss the following events:

- (i) 5 June 2018 – it was alleged that on that date Ms Wang failed to collect a payment of \$150 from a passenger for a seat upgrade, Ms Wang then requested the payment by email from the passenger without identifying herself in the email, her supervisor had spoken to her about the issue in July 2018 and Ms Wang had "...not formally..." responded to the supervisor's inquiry; and

- (ii) 3 November 2018 – it was alleged on or around that date Ms Wang failed to account for a \$70 payment collected from a passenger, the matter had been raised with her by Mr Yu, then the station manager, and Ms Wang “As of writing [Ms Wang] has not yet responded to Richard Yu’s inquiries nor has she accounted for the \$70 shortfall”.

[44] The letter does not describe what a “formal appraisal meeting” is, noting there is no such reference in the employment agreement, and does not indicate the matters are disciplinary or potentially disciplinary in nature. The letter does not explain what has initiated the “formal appraisal Meeting” request that is, why the issues were being raised some months after they are alleged to have occurred.

[45] The meeting was unable to be convened as proposed. ACL followed up with Ms Wang’s then representative who on 26 February asked for more detail of the matters ACL wished to discuss including if the matters were potentially disciplinary in nature, what the allegation Ms Wang faced, and that the representative was unable to seek instructions for two weeks. On 12 and 24 April ACL’s lawyers made further inquiries with Ms Wang’s then representative about a date for the proposed meeting. On 24 April ACL was advised the then representative was no longer acting for Ms Wang. ACL’s lawyers wrote directly to Ms Wang inviting her to a performance appraisal meeting and outlining matters for discussion per the 11 February letter. On 26 April Ms Wang wrote to ACL’s lawyers that she had sent ACL’s communication to her new representative with whom she was meeting on the following Monday and asked for a copy of minutes from a meeting Mr Guo had held with her earlier that year at which she said “this topic” had been brought up, adding she felt this was inappropriate and the discussion with Mr Guo had lasted 2 hours. On 30 April ACL was advised of Ms Wang’s new representative.

[46] Through the month of May ACL’s lawyers and Ms Wang’s representative exchanged detailed correspondence regarding the matters ACL wished to discuss with Ms Wang and actively tried to schedule a meeting, which proved difficult. In the course of this correspondence Ms Wang’s lawyer raised serious concerns including the meeting Ms Wang attended with Mr Guo on 18 January 2019 (referred to above). He said it was unfairly constituted because it was not informal, as ACL had said and this

unjustifiably disadvantaged Ms Wang when serious issues were raised by Mr Guo including accusing Ms Wang of theft in relation to the alleged unaccounted-for sums. On 7 May, again during the course of this correspondence, Ms Wang's representative asked for additional information and documentation to allow her to respond to the allegations. On 14 May Ms Wang's representative raised concerns about the cash handling allegations, detailed information requested to respond to the allegations and on the same day, but in a different correspondence, raised further concerns about the 18 January meeting including that Ms Wang had felt "...harassed, intimidated, badgered, interrogated and hounded" and the requirement for her to attend a further performance meeting "constitutes a disparity of treatment" because other ACL staff were not required to do so.

[47] By reply 16 May ACL's lawyers responded it wished to meet in good faith, provided some more detail of the cash handling issues it wished to discuss and offered to provide more information on request "on the basis of *mutual* exchange of information during the appraisal meeting". The serious concerns raised by Ms Wang's representative were not addressed in any detail.

April – Customs' cigarette smuggling investigation

[48] Also in April ACL was facing a Customs investigation into alleged cigarette smuggling. Ms Wang was not interviewed by the investigating agency and was never a suspect. Details of the investigation and its consequences have been reported on in the media.⁸ On 20 April Mr Yu's Auckland secondment ended, and a new station manager was appointed.

[49] Ms Wang said about five months after her employment commenced, she had been asked and refused to smuggle cigarettes and that from then, the pressure on her at work continued and she felt bullied and subject to unwarranted performance allegations. She said Mr Yu asked her to resign several times. ACL denies the claim. It says Ms Wang has provided no evidence in support.

⁸"Air China staffer: I was sacked for refusing to smuggle cigarettes" The Sunday Star Times, 13 March 2022.

[50] In support of the claim that she had been asked to smuggle cigarettes, Ms Wang provided a video and audio recording taken on her mobile telephone on board an airplane in February 2018. Ms Wang says she took the video and it was on board a recently landed Air China airplane. The video shows a paper carry bag containing oblong boxes and audio, translated for the Authority, records a person not in the video asking Ms Wang to carry the bag off the plane from airside. Ms Wang says the oblong boxes are cartons of cigarettes and that she declined the request because if she carried the cigarettes from airside, as a customer service representative able to move freely, the cartons would not have to be declared at customs. I accept Ms Wang understood the request was to carry cigarettes through airside.

[51] Ms Wang describes this as a request to smuggle cigarettes and that when she raised the issue with Mr Guo, he warned her not to take the matter any further or there would be negative consequences for herself and her family. These are serious allegations. They were strenuously denied by Mr Yu and Mr Guo in their evidence to the Authority.

[52] The Authority accepts in February 2018 an unidentified person on board an Air China plane asked Ms Wang to carry a bag through airside and Ms Wang understood the bag contained cigarettes. It is also accepted Ms Wang declined the request. This is recorded on the video and audio. Ms Wang's claim that she raised concerns about the request with Mr Guo and he threatened her is not supported by any such evidence. Given the seriousness of the allegation, this aspect of Ms Wang's claim can be taken no further.

19 May - Ms Wang travels to Beijing for work training

[53] On 19 May Ms Wang travelled to Beijing to attend work related training on 23 – 25 May 2019. She returned to New Zealand on 1 June having taken a few days annual leave.

[54] On 20 May ACL's lawyers wrote to Ms Wang's representative raising a new incident it wished to discuss with Ms Wang which occurred on 16 May 2019 and concerned Ms Wang's alleged refusal to stay late which caused disruption to services. The letter concluded:

Again, our client will not entertain any further delay on your client's end in convening the performance appraisal meeting. Please confirm a date/time for the meeting by 14th June 2019. Unless the deadline is adhered to, we are instructed to lodge a complaint to the ERA.

[55] Then on 21 May ACL's representative wrote again to Ms Wang's representative, listing their emails through the month of May but not those from Ms Wang's representative and included:

- (i) matters concerning Ms Wang's performance had "...been raised as a matter of urgency since June 2018";
- (ii) there had been a formal performance appraisal in February 2019; and
- (iii) ACL did not feel Ms Wang had been cooperative and had caused prolonged delay.

[56] In respect of scheduling a meeting, the letter described Ms Wang "as being evasive", restated the nature of the concerns ACL wished to discuss with Ms Wang and raised a fresh incident on 16 May which was characterised as a refusal to follow reasonable instructions. The letter advised a meeting would be held on 5 June, enclosed an agenda and restated the intention to lodge an application in the Authority if Ms Wang did not attend.

[57] On 21 May Ms Wang's representative sent to ACL's lawyers a letter from Ms Wang as requested advising the scope of their instructions was existing matters between the parties and for any new issues Ms Wang would be represented by her union. The union organiser's details were included.

[58] In addition to the above exchange and while Ms Wang was in China attending work training, on 24 May a statement was made in an official Air China staff WeChat group which identified Ms Wang by name and contained allegations as to her conduct. This communication came to Ms Wang's attention after her return to New Zealand and at work on 2 June, when an Air China captain recognised her as the person identified in the WeChat group message and asked why she was working. Ms Wang was devastated by this. Ms Wang has successfully brought defamation proceedings against Air China in China for which she was awarded compensation.

[59] On 30 May ACL's lawyers wrote to Ms Wang's representative that no response had been received to the 21 May letter, listed their correspondence to Ms Wang's representative on the issue and included, again the matters for discussion at the meeting – the cash handling incidents on 6 June and 3 November 2018, a failure to follow reasonable instructions on 16 May 2019 and matters arising from security footage of 27 April 2019 which appeared to show Ms Wang carrying a brown paper bag from airside to outside the airport building.

[60] The letter again advised a performance appraisal meeting would be held on 5 June and restated proceedings would be lodged in the Authority if Ms Wang did not attend. The letter referred to Ms Wang's "persistent refusal to attend the proposed appraisal meeting" as "...evident of a pattern of defiance of reasonable instructions..." and that Air China "finds it objectionable...[Ms Wang] had refused to sign off minutes of meetings...refused to acknowledge receipt of study materials (including safety procedures) and...abandoned her post on 16 May 2019". Attached to the document is a statement of Mr Yu dated 29 May further detailing ACL's concerns. Confirmation of attendance at the meeting was sought by 4 June.

[61] On 31 May Ms Wang's representative wrote to ACL's lawyers:

- (i) describing the proposed 5 June agenda as "highhanded" and raised concerns about the number of lawyers and senior managers ACL had advised (5 in total) would attend an appraisal meeting including as "...very coercive and intimidating...";
- (ii) Ms Wang would not attend the meeting with so many managers and lawyers present for ACL;
- (iii) information requested on 15 May had not yet been provided, Ms Wang had advised she could not attend the meeting until the information had been provided and ACL had had adequate time to provide it; and
- (iv) reserved the right to reply to matters not addressed.

[62] ACL's lawyers then sought confirmation as to whether the 5 June meeting would proceed.

[63] On 4 June Ms Wang's union wrote to ACL raising concerns about the communications with Ms Wang to date:

- (i) Ms Wang was on a period of leave and could not be required to attend meetings during approved leave;
- (ii) she was currently in China and had limited access to her email accounts;
- (iii) it was inaccurate and menacing given these circumstances for ACL to state it would not "...entertain any further delay...";
- (iv) the first meeting invitation was different to the second and the union was representing Ms Wang in respect of the 16 May allegation and the paper bag incident;
- (v) they would not be attending the meeting given it was one working day since Ms Wang's return to New Zealand; and
- (vi) sought confirmation no new information would be presented at the meeting to allow Ms Wang a fair opportunity to respond to the allegations.

[64] On 5 June ACL's lawyers wrote to Ms Wang's representatives:

- (i) setting out the sequence of exchange of correspondence regarding the proposed appraisal meeting in the letter of 11 February;
- (ii) referred to the concerns raised in the 30 May letter about Ms Wang's alleged conduct on 27 April 2019;
- (iii) that those matters were serious and needed to be addressed urgently;
- (iv) the proposed meeting 5 June was reasonable and during scheduled work time for Ms Wang;
- (v) the letter then advised "...a decision has been made to suspend the employment of [Ms Wang] ...from 6 June" to the extent that she is not to go airside to perform any duties;
- (vi) the letter reminded Ms Wang of her obligation at clause 22 of the employment agreement titled "No disparagement"; and
- (vii) the letter also advised a "complaint" to the Employment Relations Authority would be filed.

[65] On 6 June ACL lodged an application in the Authority seeking orders against Ms Wang. The application describes the employment relationship problem as:

It is the applicant's wishes (sic) that the respondent attends the proposed appraisal meeting or a mediation meeting...The respondent's persistent refusal to attend the proposed performance appraisal meeting is outlined in the recollection of events of Yang Yu (Richard Yu) dated 29th May 2019. It has left the applicant with not other choice but to bring the issues to the Authority's attention.

[66] Also on 6 June Ms Wang's union wrote to ACL's lawyers in response to the 5 June purported partial suspension:

Kia ora

Our view of the suspension letter is that [Miao] Wang has been fully suspended. It states in the letters that "a decision has been made to suspend the employment of [Miao] Wang as follows from 6 June 2019.

This clause does have clear contradictions and since we have not been provided clear detail in regards to the suspension of [Miao] Wang.

As a result [Miao] Wang will not be working at Air China.

We have made clear attempts to get clarification on this issue and this has not been provided to us and when calling station manager this went to the answer phone and general manager told me to contact his solicitor.

[67] Ms Wang's union representative and ACL's lawyers discussed the suspension issues. The union sent the following letter on 7 June to ACL's lawyers:

Kia ora

As per our conversation I expect a written suspension letter that outlines the suspension and what specific areas she is suspended from and an outline as to whether she is partially or fully suspended, the difference between being partially or fully suspended is not irrelevant.

Also I am providing in writing that E tu Union did advise the employee not to attend employment until provided a clear indication of what her suspension entails. I am happy to communicate with the branch manager in regards to the suspension but this does not change my stance that I do expect an outline of what the employee is suspended from ad whether [Ms Wang] is partially or fully suspended. Suspended from employment. [Ms Wang] has been instructed not to attend employment until a clear suspension letter has been provided and a clear written outline of suspension areas and duties this is to be arranged by the person who has submitted the suspension letter has been provided and a clear written outline of suspension areas and duties this is to be arranged by the person who has submitted the suspension letter with discussions with your client.

[68] On 7 June ACL's lawyers wrote directly to Ms Wang:

As set out in prior correspondence, the employer has made a decision based on public safety and your defiance to suspend your employment in the manner set out in our letter of 5 June 2019. We as lawyers, are asked with conveying to your representative such decision. If you have any doubts about the extent/duties of your suspension, we believe it is effective and efficient for you to directly liaise with the Station Manager about details of your work as we are unable to help. You would appear to be ill advised to not turn up for work for want of clarity of your duties. Ee say this because:

You have been circulated on 4th June Tuesday the attached job description/shift pattern, you adhered to same and completed your duties accordingly on the same day. In particular, your shift pattern is labelled as “Shift A” (the part highlighted in green). You are very familiar with the attached description as this has formed part of your work pattern for the past two years at Air China.

Shift patten A does not require any work to be carried out on the Airside. Our client re-iterates that our letter of 5th June and our email of 6th June clearly sets out the arrangements regarding your suspension. Your failure to turn up to work appears to be based on:

- a. Ambiguity with the suspension. This is not accepted. Our client of 5 June states:

...

In our opinion there is no ambiguity.

- b. Inability to talk to the Station manager – this is not accepted as he was on duty and could be contacted. The fact that your representative’s call was unanswered at a certain time before 12pm does not justify his advice that you not to turn up for work. Any ambiguity (which we deny) can easily be clarified by liaison with your supervisor/Station manager. To not do so and jump to conclusion that you could be excused from work is not an act of good faith.

Your failure to turn up to work on 6th June 2019 is deemed a further act of defiance. Disciplinary action will follow.

Please answer to our email to your representative of 6th June whether such pattern will persist.

We look forward to hearing from you.

[69] On 8, 11, 15, 16 and 18 June Ms Wang and ACL managers disagreed about issues related to scope of work. For example, on 18 June Ms Wang wrote to Mr Yu, the station manager, copying in her representatives, seeking to clarify the terms of her partial suspension and in particular the direction that she work “shift pattern A” which required no work to be carried out airside. Ms Wang asked for clarification if Mr Yu asked her to perform duties outside the written notification and this variation was not put in writing and asked for any such variation to be put in writing and communicated to her representatives. Again, on 18 June Ms Wang wrote to Mr Yu, copying in her

representatives, asking that any company notices or policies requiring her signature were sent first to her representative for the purpose of providing advice.

19 June - Ms Wang is suspended from her duties

[70] On 19 June ACL's lawyers wrote to Ms Wang's representatives advising she was fully suspended from all duties from 20 June on the following allegations of her conduct:

- (i) working to rule, making unreasonable demands and defying reasonable instructions;
- (ii) Mr Yu's viewing of security footage of Ms Wang on 27 April 2019 when Ms Wang was seen carrying a brown paper bag;
- (iii) retaining work-related documents;
- (iv) abandoning her post on 16 May and 8 June 2019; and
- (v) poor performance relating to money handling and failing to account on 6 June and 3 November 2018.

[71] The letter concluded:

Air China provides a public service and must ensure public safety in the delivery of its services. As explained in the above incidents, the Employee's behaviours significantly hinders the Employer's operations, and is destructive to the trust and confidence between staff members. To allow such behaviour to continue would (sic) "paralyze" the Employer's operation.

On the basis of the above, a decision has been made to fully suspend the employment of [Ms Wang] as follows from 20th June 2019:

- (i) While [Ms Wang] is suspended, she is not required to report to work. Her access to work will be terminated.
- (ii) In accordance to [Ms Wang's] Employment Agreement, she must not disclose any confidential information, make any statements/comments/representations to any person, organisation, third party and/or the public that are disparaging, reflect negatively on the employer.

Please acknowledge receipt of this letter.

[72] On 4 July the parties attended mediation having been directed to do so by the Authority on 14 June. They were unable to resolve the employment relationship problem. ACL has not pursued its application to the Authority.

12 July - Ms Wang responds to the allegations and raises personal grievances for unjustified disadvantage

[73] On 12 July Ms Wang's union wrote to ACL:

- (i) responding to the allegation of dishonesty, delay in meeting, abandoning her post and refusing to sign documentation;
- (ii) raising personal grievances for unjustified disadvantage for defamation and suspension;
- (iii) raising concerns about ACL's letters to the Authority on 6, 11 and 13 June;
- (iv) recording events around the parties attendance at mediation on 4 July;
- (v) seeking Ms Wang's reinstatement to work from suspension and "...that the plethora of allegations against her will be taken no further. Steps will need to be taken to repair her good reputation and to remedy the grievances we have raised. There also needs to be a discussion about the logistics of ensuring her safe and harmonious return to work"; and
- (vi) proposing a further mediation

[74] Also on 12 July, ACL's lawyers wrote to Ms Wang by way of her union representatives, seeking a meeting on 18 July to discuss the allegations set out in the 19 June suspension letter. The letter described the meeting as a "performance appraisal meeting" and listed the correspondence ACL had sent Ms Wang and/or her representatives from 21 February 2019 to 30 May 2019. Five matters concerning Ms Wang's conduct were detailed for discussion under the following headings – work-to-rule, security footage 27 April, retention of work-related documents, abandoning her post and poor performance. Attached to the letter was a full agenda and supporting documentation.

[75] On 16 July Ms Wang's union provided information in support of the personal grievance raised about the WeChat message. Further information was sought from ACL on grounds that would allow it to investigate the matters raised. Also, around this time ACL proposed engaging an independent

workplace investigator to investigate the allegations it had raised. Ms Wang did not agree to the draft terms of reference and requested her personal grievance regarding the WeChat message be included in the workplace investigation.

[76] On 25 July ACL commissioned an independent workplace investigator to investigate allegations set out in a term of reference which concerned alleged actions of and behaviours of Ms Wang from Ms Wang's alleged refusal to sign the 4 May 2018 minutes through to events of June 2019. Their role was to "undertake an independent investigation into the allegations in accordance with the Terms of Reference...[ACL's] decision makers, not the investigator, will decide whether any conduct (if established) amounts to misconduct and what action should be taken".

[77] Ms Wang's personal grievances and the matters which I have found to be part of the parties' employment relationship problem since late 2017 did not form part of the workplace investigation. ACL amended the terms of reference on 1 November. The amendments appear to be in response to the first draft report submitted by the workplace investigator and narrowed the scope of their inquiry. Ms Wang was interviewed by the workplace investigator as was Mr Guo, Mr Yu, the ACL airport team supervisor and two ACL customer service representatives.

[78] The workplace investigator's draft report dated 13 December 2019 was distributed to the parties for comment.

2020

[79] By letter dated 17 February 2020 Ms Wang's union lawyer provided a response to the workplace investigator concerning the 13 December draft. The letter included the following comments:

- (i) a general comment that it was unusual for a commissioning employer to alter the terms of reference agreed with the workplace investigator after they had submitted a draft report for comment particularly when the effect was to limit their findings;

- (ii) this brought into question the intention of ACL in any future proceedings;
- (iii) acknowledging four of the allegations against Ms Wang were found unsubstantiated – allegation 3, being observed on 27 April 2019 with an Air China brown paper bag, allegation 7 on 8 June abandoned her post, allegation 11 recorded a workplace conversation with a co-worker and allegation 12 refused to provide her training certificate until she was full reimbursed for travelling expenses for the Beijing training trip;
- (iv) with respect to allegation 1 – refusal to sign allegations (a) housekeeping rules - restated Ms Wang’s explanation that she wished to seek advice on the documents, the documents were in Chinese and she requested the documents be provided in translation which was declined, (b) minutes of the 4 May 2018 appraisal meeting – restated that she did attend the meeting represented by her union representative at the time, it was not an appraisal meeting as described in the minutes but an investigation or disciplinary meeting and she has not been provided with a copy of the minutes either from her union representative or ACL and has not refused to sign them and (c) CCTV and IT system confidentiality notice – restated that she wished to seek advice before signing and had requested copies of the documents in English to enable her to do so;
- (v) with respect to allegation 2 – not attending appraisal meetings on 11 February to 22 May 2019, restated Ms Wang’s explanation the reason for non-attendance was her then representative’s attempts to schedule a suitable time to meet so Ms Wang could be represented and noting the investigator’s comment that it was appropriate Ms Wang was represented in the meetings because they were disciplinary in nature rather than for the purposes of conducting an appraisal;
- (vi) with respect to allegation 5 – that on 16 May 2019 Ms Wang left work early without consent when she was required at work – she restated she understood she was released from work, sent a WeChat message to Mr Guo and Mr Yu that she had left,

received and 'ok' response from Mr Yu and referred to the matter as raised in her personal grievance letter 12 July;

- (vii) with respect to allegation 7 – that on 8 June Ms Wang abandoned her post, recorded a conversation between herself and Mr Yu and refused to provide her training certificate from the Beijing training – restated (a) the abandonment claim had been found unsubstantiated, (b) Mr Yu created an impression recording the conversation was acceptable by recording it and did not object when Ms Wang asked if she could record their conversation, (c) and Ms Wang's expenses remain unreimbursed
- (viii) with respect to allegation 8 – that on 8 and 11 June Ms Wang demanded her supervisors sign an acknowledgement confirming work instructions – Ms Wang genuinely believed the work instructions would put her outside the parameters of the suspension; and
- (ix) with respect to allegation 9 – that on 15 June 2019 Ms Wang refused to work new tasks assigned to her – the investigator's findings were noted that it was not possible for Ms Wang to comply without understanding the changes.

[80] On 13 March the workplace investigator issued their report concluding:

The Amended Terms of reference provided that the investigator was to make findings as to whether the allegations, based on evidence, were substantiated or not.

A series of twelve allegations were provided for in the Terms of Reference. There are effectively eleven separate allegations. One allegation, that Ms Wang refused to sign acknowledgement sheets, is repeated four times. I regard that particular allegation as a single allegation because Ms Wang's explanation for her various refusals is consistent throughout. Allegation 7 refers to three separate incidents that occurred on 8 June 2019 and I regard this as three allegations.

Of the eleven separate allegations:

- the repeated allegations (1, 4, 6, 10), all four are substantiated;
- six are substantiated, however Ms Wang's reasons in allegation 2 and her behaviour in allegation 9 is entirely explicable;
- the balance of four allegations are not substantiated.

It is a matter now for Air China to decide what recourse they make to this investigation report.

[81] On 17 March the final report was sent to Ms Wang's union and the following day Ms Wang was invited to a disciplinary meeting.

[82] Over 23 and 24 March the parties' representatives conferred as to how the meeting could be convened given the COVID 19 pandemic restrictions in place at that time. By agreement the meeting was postponed for four weeks anticipating a shift in the COVID-19 restrictions and to allow an in-person meeting.

[83] The parties met on 20 May. Two days later Ms Wang provided ACL with further information to support the WeChat personal grievance claim made in earlier in the year.

[84] At about this time the parties entered discussions with a view to resolving the employment relationship problem. These discussions continued through to 3 July when ACL made an open settlement offer to resolve all issues "directly or indirectly" between the parties.

[85] On 10 July Ms Wang lodged proceedings in the Beijing Internet Court against Air China in defamation.

[86] On 17 July Ms Wang, through her lawyer, requested the settlement not restrict her ability to pursue proceedings in China. On 20 July, ACL proposed a revised offer seeking to accommodate that request. The parties discussed the proposed terms of settlement further and on 29 July Ms Wang, through her lawyer, wrote to ACL that she wished to return to her employment with ACL and she could not agree to the proposed settlement "...as she wished to reserve her right to attach New Zealand employees to her Chinese legal claim in the future should she wish to do so". The lawyers conferred further and Ms Wang's representative sought more time to seek instructions.

[87] On 27 July ACL, through its lawyers, advised the 20 July settlement offer would remain open until 5pm 29 July "...after which if our open offer is not accepted, our client will have no choice to but undertake its action accordingly. This will include the necessary dismissal in light of the multiple

breaches as set out in previous reports and correspondence”. On 29 July Ms Wang’s representative confirmed to ACL the settlement offer was not accepted.

The dismissal letter – 31 July 2020

[88] By letter dated 31 July ACL dismissed Ms Wang. The letter outlined the disciplinary investigation process:

- (i) a disciplinary meeting was held on 20 May following the conclusion of the workplace investigation;
- (ii) after the meeting ACL asked for more information arising from matters raised by Ms Wang and provided more information by email dated 22 May; and
- (iii) Ms Wang provided a response by email dated 10 June.

[89] The letter then outlined the basis of the decision to dismiss being the allegations for which findings of fact were made in the workplace investigation report and summarised the comments Ms Wang had made by way of response at the 20 May meeting. The following headings were used:

- (i) the employee’s consistent refusal to sign acknowledgement sheets - four separate incidents;
- (ii) the employee’s repeated refusal to attend meetings – 7 separate incidents;
- (iii) the employee’s repeated demands for supervisor to sign acknowledgement – 2 separate incidents;
- (iv) the employee’s repeated refusal to work according to changes to tasks – 2 separate incidents;
- (v) the employee’s abandonment of post; and
- (vi) the employee’s refusal to provide training certificate.

[90] The letter concludes:

The Employer has taken your client’s feedback into account and has decided that it is appropriate to dismiss your client without notice on the basis of her repeated conducts as set out above. That was the Employer’s preliminary view and your client was advised of same on 18th March 2020 and during the Meeting.

The Employee's repeated conducts were wilful defiance of the Employer's reasonable instructions and in totality, constituted serious misconduct that justifies summary dismissal. The relationship of the parties has completely broken down and the lack of mutual trust and confidence meant that the employment⁶ must come to an end. In addition, public transportation safety is the number one priority for the Employer, as an airline company and a national flag carrier. Your client's conducts (e.g., Repeated refusal to sign study materials acknowledgement sheets) inevitably poses serious safety risks and concerns to public transportation safety.

This letter is formal notice that you client's employment is terminated as of the date of this letter.

The decision to terminate your client's employment was not made easily or swiftly. To ensure the alleged breaches are investigated fairly, the Employer paid for an outside specialist to conduct an investigation where your client was given the opportunity to provide her side of the story in the presence of her legal advisor on at least two occasions. The investigation report is the product of 8 months of meticulous work. During the investigation, your client was on full pay.

We further note that notwithstanding the breakdown of the relationship, the Employer made the attached Open Offer on 3 July 2020 to pay the Employee \$8,347.77 to settle all difference ("Open Offer"). The Employer, out of good faith, altered the terms of the Open Offer subsequently to accommodate new requests twice:

- First, for additional overtime payment; and
- Second, accepting the Employee demand to excluding the litigation she has commenced in China against Air China's parent company.

The Employer also accepted the Employee's multiple requests for extension of time. One should not lose perspective of the fact that the Employer's first alleged breach by the Employee dates back to May 2018. The Employer has allowed your client more indulgence than a reasonable employer would have done. The attached timeline will show your client sought delay on numerous occasions to stall the proper process. However, the Open Offer was made after the Employee was suspended with full pay for 13 months. The Employee's refusal to accept the Open Offer almost one month after same was first put forward to the Employee, left the Employer with no choice but to make the difficult decision of termination.

[91] The letter ended by addressing matters involving final pay and return of property.

[92] On 20 October Ms Wang raised a personal grievance for unjustified dismissal. ACL's lawyers acknowledged receipt of the personal grievance, advised it was willing to attend mediation and asked Ms Wang to arrange such.

[93] On 12 December Ms Moncur, now acting for Ms Wang, wrote to ACL advancing Ms Wang's personal grievances for unjustified disadvantage and unjustified dismissal.

[94] On 28 December the Beijing Internet Court handed down its judgment in favour of Ms Wang's defamation claim. Air China was ordered to pay her damages of RMB 20,000 (approximately \$4,500) and issue an apology letter to Ms Wang. Ms Wang's appeal of the judgment was unsuccessful and the lower Court's decision was confirmed.

2022

[95] In early 2022 Ms Wang lodged an application in the Authority seeking investigation of the matters currently under consideration.

[96] On 10 March ACL was contacted by Stuff News to comment about an article it was running about the Authority investigation. As a consequence, on 11 March ACL wrote to Ms Wang by her representative reminding her of her post employment obligations to ACL including those relating to confidential information. On 13 March Stuff published the article.

[97] On 16 March ACL lodged a counterclaim and sought a non-publication order.

Discussion

Ms Wang's claims

- (i) *Was Ms Wang unjustifiably disadvantaged in her employment by the actions of ACL by consistent bullying and harassment by senior management of ACL from November 2017?*

[98] As stated above at [35] Ms Wang raised a personal grievance in respect of actions which I am satisfied form the basis of this unjustified disadvantage grievance. In any event and for the avoidance of doubt ACL has not raised a challenge to

jurisdiction for this grievance and its actions are consistent with consenting to such having engaged in the resolution process to date.⁹

[99] Where an employee raises a complaint, particularly one which concerns a co-worker and/or safety at work, an employer has an obligation to investigate the complaint fairly and reasonably. ACL's actions in undertaking the investigation of Ms Wang's complaint by convening and holding the 27 November and 5 December meetings and the written warning issued to Ms Wang by email of 12 December were not fair or reasonable or consistent with the obligations of good faith:

- (i) notification of the 27 November and 5 December meeting and the purpose of such was insufficient to allow Ms Wang to prepare or bring a support person if she so wished;
- (ii) the timing of the first meeting, finishing after midnight, was unreasonable and the length of both meetings appears excessive. There is no indication ACL inquired as to Ms Wang's reasonable ability to participate in the first meeting given she had just finished an evening shift and the meeting ran until after midnight; and
- (iii) Ms Wang was not given a fair opportunity to comment on the issues which gave rise to the written warning. The circumstances as described above prevented Ms Wang from fairly considering or commenting on the witness statements ACL gathered.

[100] Given the meeting was convened by ACL, as the employer, to investigate Ms Wang's complaint of bullying, assault and detention it was responsible for ensuring the meeting was fairly convened and carried out in a manner which allowed the effected individuals to fairly make their statements as to the subject events. It had a further obligation to fairly consider those statements.

[101] The near contemporaneous record of the meeting dated 11 December confirms the evidence before the Authority that the meeting was characterised by high emotion. ACL says, in the 11 December report, this was a result of Ms Wang's conduct. Given ACL bore the responsibility to properly and fairly convene and run the meeting, it is not fair or reasonable to lay the blame on Ms Wang. Indeed, given the clear deficiencies

⁹ Employment Relations Act 2000, s 114(3).

in how the meeting was conducted by ACL it is little wonder Ms Wang felt, as she told the Authority, she was not being listened to or that her complaint was not being fairly considered. This has negatively impacted the meeting. Given this, there can be no fair or reasonable basis for ACL to issue Ms Wang with a written warning amplified by the total failure on its part to give her an opportunity to comment on the reasonableness of a warning being issued prior to that decision being made.

[102] These failures of ACL are serious particularly given the significant issues of which Ms Wang complained. Ms Wang was unjustifiably disadvantaged in her employment by ACL's failure to reasonably investigate her complaint and the subsequent issuing of a written warning. I am satisfied these significant failures of ACL including the extraordinary and unjustified step of issuing Ms Wang with a warning, with the concomitant effect of placing her continued employment at risk, has undermined to a significant degree Ms Wang's confidence that her employer would treat her fairly and reasonably. This has tainted the employment relationship and echoed through the subsequent years of Ms Wang's employment.

(ii) *Was Ms Wang unjustifiably disadvantaged in her employment by the actions of ACL by the publication on 24 May 2019 of a defamatory notice on WeChat and/or ACL's failure to take action to correct defamatory material on WeChat?*

[103] ACL is a separate legal entity to Air China. The Authority investigation has not established ACL was responsible for the WeChat notification concerning Ms Wang. Though it is more likely than not ACL would have communicated information to the parent company about the Customs raid and also, I find, its growing concerns about Ms Wang's workplace conduct there is insufficient evidence ACL was involved in the decision to publish the information contained in the 24 May 2019 WeChat staff notification.

[104] I am satisfied ACL failed to take reasonable action to investigate and support Ms Wang subsequent to the WeChat personal grievance being raised. Ms Wang raised a serious concern by way of personal grievance in the letter dated 12 July 2019. While it was reasonable for ACL to ask Ms Wang to provide information to support the personal grievance when she provided information, which she did, it was incumbent on ACL to take reasonable steps to ensure the negative impact on Ms Wang was limited. It took no action. Ms Wang has established this personal grievance.

(iii) Was Ms Wang unjustifiably disadvantaged in her employment by the actions of ACL by partial suspension from duties on 5 June 2019 and full suspension on 19 June 2019?

[105] The parties' employment agreement contains one reference to suspension in the section titled "Termination of Employment" at cl 13.6:¹⁰

The Employer can require the Employee to participate in any investigation for an alleged misconduct or negligence in the performance of the Employee's duty. Where the Employer considered that the Employee cannot reasonably perform his or her duties during the investigation or where the Employee refuses to co-operate with the investigation the Employer can suspend the employment without pay or other related benefits until such time when the investigation has been concluded to the Employer's satisfaction.

[106] Suspension without pay is unlikely to be lawful.¹¹

[107] As with any aspect of or action taken within an employment relationship, the statutory obligation of good faith must apply and be met. That obligation includes being open and communicative in establishing and maintaining a productive employment relationship.¹²

[108] In addition, the following list of factors are relevant in an assessment of the justification of ACL's suspension of Ms Wang from her employment:¹³

[74] It is appropriate, however, to reiterate a number of fundamental principles about suspensions from employment. They are not outcomes of a disciplinary process. A suspension is a temporary status determined by the employer where allegations of misconduct have been made, are being investigated, but have not been established or dismissed. It is the result of a decision by the employer that the usual employment relationship cannot function effectively while the investigation is continuing. It does not connote culpability and may benefit the employee as well as the employer in the sense of allowing the employee time to investigate and answer serious allegations. It is a serious step but its significance should not be overstated. To use a not entirely apt analogy, an employee suspended is entitled to the presumption of innocence of the misconduct being investigated.

[75] An employee should usually be provided with all relevant information on which a decision to suspend may be made and be given an opportunity to

¹⁰ There is no Human Resources Toolkit and any policies relating to suspension have not been provided to the Authority.

¹¹ *Canterbury Rubber Workers IUW v Dunlop (NZ) Ltd* [1983] ACJ 367.

¹² Employment Relations Act 2000, s 4(1A).

¹³ *Tawhiwhirangi v Chief Executive, Dept of Corrections* [2007] ERNZ 652, [74] – [75].

comment on or disabuse the employer of any views reached. All the circumstances should be such that the employer concludes, fairly and reasonably, that they are inconsistent with even temporary continuation of employment by the employee pending outcome of the investigation. The age and nature of the complaints and the strength of them will be factors to be taken into account in deciding whether to suspend.

[109] As the 12 July personal grievance letter states there was no consultation with Ms Wang as to the suspension decision. There was no consultation when Ms Wang was fully suspended. This was not disputed. Suspension is a disciplinary action. Suspending Ms Wang, partially or fully, was likely to have an adverse effect on the continuation of her employment. The clear procedural failings in ACL's suspension process renders the actions unjustified. The substantive basis is also weak. The safety concerns arise directly from the partial suspension, which I am satisfied has created ambiguity as to the scope of Ms Wang's duties which she sought to clarify. I accept ACL was frustrated by the employment relationship problem with Ms Wang but that is not a basis for suspension. The suspension and its continuation for the balance of Ms Wang's employment was unfair and unreasonable. Ms Wang has established a personal grievance for unjustified action arising from the suspension.

(iv) Was Ms Wang unjustifiably dismissed from her employment on 31 July 2020?

[110] ACL says given the length of the process, the detailed exchange of correspondence between the parties, the commissioning of a workplace investigator and the subsequent process of consideration Ms Wang's dismissal is justified.

[111] I do not agree. ACL has failed to meet its obligations to Ms Wang to be active and constructive in establishing and maintaining a productive employment relationship and failed to consider what she had to say with an open mind before reaching a concluded view. These failures stretch back to late 2017.

[112] The narration shows when Ms Wang has sought to raise concerns she has not been listened to and ACL have taken disciplinary action against her. The first occasion was 2017 when the written warning was, as I have found, unjustifiably issued and ACL failed to investigate fairly her serious complaints and the next was in March 2018, when, in apparent response to Ms Wang raising pay concerns and a personal grievance in respect of the written warning, ACL commenced a process to review alleged conduct of Ms Wang's and then became insistent she sign the minutes of that meeting in acknowledgment in the face of her disagreement.

[113] This pattern has continued through 2019. ACL did not respond adequately to Ms Wang's requests to understand the purpose and basis of the ambiguously termed "formal appraisal meeting" first proposed in February 2019 and have turned the focus on her conduct by seeking to emphasise, in my view, peripheral issues about her representation and apparent delay. This misplaced focus has escalated to suspension and lodgement of proceedings in the Authority while taking no steps to address the extraordinary situation whereby the parent company posted defamatory information about Ms Wang. Further, ACL have inexorably tainted the work of the workplace investigator by commissioning a report which did not consider the whole history of the parties' employment relationship and then changed the focus of the inquiry part way through to further narrow its scope. Given this, ACL could not reasonably rely on the factual findings in the report to proceed with an investigation of allegations of misconduct against Ms Wang, because, as detailed above, it was only part of the picture. ACL's failure to consider the allegations in the whole render the dismissal unjustified.

Remedies

[114] Ms Wang has established personal grievances for unjustified disadvantage and unjustified dismissal. She is entitled to a consideration of the remedies sought.

Reimbursement of lost wages

[115] Mr Wang claims 6 weeks lost wages. After reviewing the evidence of loss and Ms Wang's attempts to mitigate that loss the Authority is satisfied, she is entitled to an award of lost wages of 6 weeks being \$7,323.75 (gross).¹⁴ Holiday pay of \$585.66 (gross) is to be paid on that sum.¹⁵

Compensation for humiliation, loss of dignity and injury to feelings

[116] The circumstances of Ms Wang's personal grievances have caused her stress, made her feel hopeless and negatively affected her health for which she has provided supporting information. She described to the Authority the impact of her employer's actions on her including the significant distress she suffered. With respect to the late 2017 meetings and the warning. She said the situation made her feel worried, bullied, harassed and overwhelmed. Her distress at the situation is evident from her 23 February

¹⁴ Refer pay period record 1-30 April 2019.

¹⁵ Holidays Act 2003, s 23.

2018 email to ACL. With respect to the suspension and ACL's failure to take reasonable action with regard to the defamatory WeChat message – the evidence was Ms Wang was stunned to discover the message and deeply humiliated and distressed by the message and ACL's failure to act has reinforced these feelings. The suspension was distressing to Ms Wang.

[117] With respect to her dismissal Ms Wang experienced uncertainty and distress to herself and her family which has had an ongoing negative impact. She is entitled to an award to compensate the humiliation, loss of dignity and injury to feelings consequent to such of \$20,000 in total for the unjustified disadvantages and \$20,000.00 for the unjustified dismissal.

Contribution

[118] The Authority is required under s 124 of the Act, where it determines an employee has a personal grievance, to consider the extent to which the employee's actions contributed towards the situation that gave rise to the personal grievance and if the actions require, then reduce remedies that would otherwise have been awarded.

[119] Ms Wang has not contributed in a blameworthy way to the circumstances which have given rise to her personal grievances.

Air China's claims

- (i) *Has Ms Wang breached the confidential information and non-disparagement clauses of her employment agreement?*

[120] ACL says Ms Wang has breached clause 12 of the parties' employment agreement by giving journalists the Authority proceedings and related documents. The interpretation of the employment agreement proposed by ACL is unsustainable. ACL has not established any of the information contained in the subject documents has the "necessary quality of confidence".¹⁶ Ms Wang was exercising her statutory right to lodge proceedings in the Authority. The basis of the proceedings is her employment

¹⁶ *Transpacific Industries Group (NZ) Ltd v Harris* [2013] NZEmpC 97 [37] – [41].

agreement with ACL and the parties' employment relationship. Clause 12 cannot act as a gag on a party to such proceedings.

[121] The claim of breach of the 'no disparagement' clause cannot succeed. The clause ended with the employment relationship.

(ii) *Has Ms Wang and/or her representative breached s 121 of the Act?*

[122] The practical consequence of s 121 is that the parties are protected from actions for defamation arising from statements made in the course of resolving a personal grievance.¹⁷ Section 121 does not confer any status of confidentiality.¹⁸ Blanket confidentiality as proposed by ACL is not conferred by s 121 and the provision of documents to a journalist is not a breach of "absolute privilege".

(iii) *Has Ms Wang breached the Authority non-publication order?*

[123] The Authority issued an interim non-publication order on 28 March 2022, 15 days before the Sunday-Star Times article was published.¹⁹ The article remained on Mrs Moncur's website and then in a modified form from 31 March. On 4 April the content changed to include a link to the Authority determination.

[124] The article modified or otherwise should have been immediately removed from Mrs Moncur's website on issuing of the Authority determination because it would likely lead to identification of those to whom the non-publication order applied. That the article and its modified form remained on Mrs Moncur's website at least until 5 April 2022 was a breach of the Authority's non-publication order.

[125] Mrs Moncur is not party to these proceedings. The evidence has not established Ms Wang was responsible for the publication on Mrs Moncur's website.

¹⁷ *Creser v THC of New Zealand* [1989]2 NZILR 397 (CA).

¹⁸ The equivalent provision under the Employment Contracts Act 1991 was addressed in *Anderson v the Employment Tribunal* [1992] 1 ERNZ 500.

¹⁹ *VTK v WAW* [2022] NZERA 113.

- (iv) *Should a compliance order be made under s 137 ordering Ms Wang and her representative to comply with the Authority non-publication order?*

[126] A compliance order is a discretionary remedy. Given the effluxion of time and the lifting of the non-publication order by way of this determination, the issue is moot. I decline to issue the compliance order sought.

- (v) *Should a penalty be ordered under s 134 for any established breach of the employment agreement and/or s 134A for obstruction or delay of the Authority investigation?*

[127] The basis of this claim is the publication of the articles. They have not obstructed the Authority's investigation of this employment relationship problem. I accept the publication, and the breach of the non-publication order has resulted in ACL using its resources, but these matters have not caused delay to the Authority which would amount to an obstruction. The long history of this investigation has been caused by other matters including a period of unavailability for Ms Wang due to personal matters and unrelated circumstances which have impacted the parties' and Authority's availability. These are not matters of obstruction.

Summary

[128] Within 28 days of the date of determination Air China Limited is to make the following payments to Miao Wang:

- a) \$40,000 for compensation pursuant to s 123(1)(c)(i) of the Employment Relations Act 2000; and
- b) \$7,909.41 (gross) pursuant to section 123(1)(b) of the Employment Relations Act 2000.

Costs

[129] Costs are reserved. The parties are encouraged to resolve any issue of costs between themselves. If the parties are unable to resolve costs, and an Authority determination on costs is needed, Ms Wang may lodge, and then should serve, a memorandum on costs within 21 days of the date of this determination. From the date

of service of that memorandum Air China Limited will then have 14 days to lodge any reply memorandum.

[130] On request by either party, an extension of time for the parties to continue to negotiate costs between themselves may be granted. The parties can anticipate the Authority will determine costs, if asked to do so, on its usual “daily tariff” basis unless circumstances or factors, require an adjustment.

Marija Urlich
Member of the Employment Relations Authority