



DECISION

Fair Work Act 2009

s.394 - Application for unfair dismissal remedy

Ms Fang Zheng

v

Guardian Community Early Learning Centres Pty Ltd

(U2025/12858)

COMMISSIONER REDFORD

MELBOURNE, 3 NOVEMBER 2025

Application for an unfair dismissal remedy; whether dismissal occurred without Applicant being aware; no valid reason; dismissal harsh, unjust, unreasonable; reinstatement appropriate

[1] On 6 August 2025, Ms Fang (Phoebe) Zheng filed an application pursuant to s 394 of the *Fair Work Act 2009* (Cth) (**the Act**) seeking a remedy in relation to unfair dismissal with respect to her former employer, Guardian Community Early Learning Centres Pty Ltd (**Guardian**).

[2] There appears to be no basis upon which it is said that Ms Zheng is not a person protected from unfair dismissal within the meaning of s 382 of the Act¹. The application was made within the time period required by s 394(2) of the Act, and it is not claimed the dismissal occurred as a result of a genuine redundancy. Guardian is not a small business within the meaning of s 23 of the Act.

[3] The application was the subject of a hearing conducted in the Commission in person on 17 October 2025 to determine its merits and if necessary, the question of remedy. Ms Zheng appeared for herself at the hearing, assisted by a mandarin interpreter. I granted Guardian permission to be represented by a lawyer or a paid agent pursuant to s 596 of the Act, because I considered it would enable the matter to be dealt with more efficiently. Ms Michelle Anthony appeared for Guardian.

[4] Ms Zheng gave evidence at the hearing. So too did Ms Kate Colley who is the National Manager, People and Culture, for Guardian.

Background to the dismissal

[5] Guardian is an early childhood education and care (ECEC) provider. Ms Zhang commenced working for Guardian as an early childhood educator on 28 November 2022. At all relevant times she was engaged on a casual basis. This meant that Ms Zhang was a member

of a “pool” of casual early childhood educators employed by Guardian and deployed based on its “operational needs”².

[6] Based on Ms Zheng’s payroll records, which were provided in evidence, she worked every week from the commencement of her employment until a period ending 17 March 2024, at which time she appears not to have worked until 28 July 2024, after which time she resumed working every week until her employment ended about a year later. Initially, she appears to have often worked about 22.5 hours per week, sometimes less and sometimes more, but with a degree of regularity. For a period between about September 2024 and May 2025 she often worked about 30 hours a week, not always, but again with a degree of regularity. Ms Zheng’s evidence, which was not contested, was that for the entire year preceding the end of her employment, she had always worked at the same ECEC centre – Guardian’s centre at Mentone West (save for two shifts worked during this period at other centres).

[7] The factual matrix in this matter is not complex, nor is it the subject of a great deal of dispute. Some elements of the background require more detailed analysis but what initially follows is a summary of the essential aspects of the evidence as is relevant to the issues I must determine, based on my findings in relation to that evidence.

Summary of factual background

[8] Ms Zheng, a casual employee, took what she considered to be leave from work on 3 July 2025 in order to travel to China. In May 2025, she told the Manager of the early childhood education and care centre where she had been working the past year she would be away from 3 July 2025 to 29 August 2025 for an overseas trip and was looking forward to coming back after her trip³. She also used Guardian’s “Human Force” app to do what she described as “apply” for leave. This may not have been the correct procedure for taking leave and it appears that what Ms Zheng should have done was communicate with the centralised Guardian “team” responsible for managing its casual employees. But Ms Zheng thought she had done the right thing, having communicated her plans to the person to whom she had been reporting on a day-to-day basis for the past year, and having used the relevant management portal (Human Force), which she said when she “clicked the button”, “it turned green” – indicating what she assumed to be approval. There was evidence before me, which I accept, that her status in the Human Force platform during the period was marked as “unavailable”.

[9] Just prior to Ms Zheng’s departure from Australia, on 2 July 2025, Guardian sent an email to employees including Ms Zheng, announcing that they would be required to complete a “Suitability Declaration” as a result of a recent high-profile child-safety issue in the ECEC sector. That communication did not require employees to complete the declaration but rather had the effect of notifying employees that the requirement would be implemented imminently.

[10] Ms Zheng travelled to a remote province of China where a typhoon caused her to lose internet, email and phone access. She did not regain access until 5 August 2025, when she returned to an urban area no longer affected by the typhoon.

[11] Meanwhile, Guardian had engaged a provider called Rapid Platform to undertake a bulk email communication with its workforce requesting the completion of the suitability declaration form.

[12] Guardian asserts that Ms Zheng was sent emails by Rapid Platform on 15 July 2025 and 21 July 2025 requesting that she complete the Suitability Declaration. Ms Zheng claims not to have received those emails. She certainly did not see them when they were alleged to have been sent, because she did not have email access at the time (for the reasons explained above). She also says that upon regaining access to her email she can find no record of having received the messages. As is expanded upon below, doubt exists on the evidence before me as to whether Ms Zheng received these messages or not.

[13] There was a somewhat vague suggestion made by Guardian that text messages were also sent to employees, but it did not appear there was any evidence before me that Ms Zheng was sent a text message.

[14] On 23 July 2025, Ms Zheng was sent an email by Ms Schultz who did not give evidence in this proceeding but is Guardian's casual workforce and agency manager. The email said that Ms Zheng had been sent an urgent survey to be completed and that if it "is not completed by Friday then your employment with us will be ended". Once again, Ms Zheng did not see this email until she regained email access on 5 August 2025.

[15] Ms Zheng was sent another email on 29 July 2025 from a Ms Gilchrist, the scheduling coordinator, stating that if she did not complete and return the Declaration by the following day, 30 July 2025, her employment would "have to be ended".

[16] Guardian says that, not having received a reply from Ms Zheng by 30 July 2025, it considered that Ms Zheng's employment had ceased, and internally, steps commenced consistent with this outcome. On 4 August 2025, steps were taken to delete certain entries relating to Ms Zheng from the Human Force system. This or some other function also triggered a form email being sent to Ms Zheng on 4 August 2025 which said:

"We're sorry to see you go and want to thank you for the time and contributions you've made during your time with us. As part of our ongoing efforts to improve the experience for everyone on our team, we would appreciate it if you could take a few moments to complete our exit survey ..."

[17] Upon regaining access to her emails, Ms Zheng replied to this email relating to the employee survey. She said:

"I sincerely apologize for the delay in responding. I am currently overseas on personal leave, and during my travels I visited areas with extremely limited mobile reception. My phone does not work overseas, so I have only been able to access email when Wi-Fi is available. Unfortunately, this meant I only saw your recent emails today."

Please understand that I did not intend to ignore the messages, and I have no intention of resigning or ending my employment. I truly enjoy working with the team and greatly value my position at the centre.

I hope this clears up the confusion, and I would be happy to complete any outstanding forms or requirements now that I've regained access to my inbox."

[18] The exchanges that followed require more detailed analysis and are set out below. Suffice to say that Ms Zheng has not worked for Guardian since.

The 15 and 21 July emails

[19] Ms Colley explained in her evidence that Rapid Platform was engaged by Guardian in around July 2025 to send out emails communicating to employees they were required to complete the Suitability Declaration⁴. She provided a copy of a report apparently made by Rapid Platform which she said shows that Ms Zheng was sent an email to her personal email address titled "Your Suitability Declaration Form" on 15 July 2025⁵. I did not have the benefit of hearing from the person who made the report. The columns in the report include one titled "sent" which appear to show an email sent to a "recipient" email which is Ms Zheng's email address, on 15 July 2025 at 2:17PM. No data appears under the columns entitled "opens" or "clicks".

[20] Ms Colley said another email was sent to Ms Zheng on 21 July 2025. The report provided from Rapid Platform contains the same data as in relation to the 15 July 2025 email.

[21] I note the report from Rapid Platform shows the same email address as the Commission has been using to communicate with Ms Zheng during this proceeding.

[22] Ms Colley also provided what she said was a copy of the emails she said were sent to Ms Zheng on 15 July 2025 and 21 July 2025⁶. However, these are not the emails that were sent to Ms Zheng. They are addressed to "Dylan" and sent to Mr Dylan Sharp from Rapid Platform. They are in fact copies of the email Guardian asked Rapid Platform to send to its employees. Ms Colley said in her evidence that the text of the emails sent to Guardian employees were the same as these emails.

[23] Ms Zheng said in her evidence she has searched her email inbox and cannot find the emails Guardian says were sent to her on 15 July 2025 and 21 July 2025.

[24] I have no reason to doubt Ms Colley's assertion, that Guardian instructed Rapid Platform to send to its employees, including Ms Zheng, emails in the form of those provided by Ms Colley in her evidence. I also have no reason to doubt Ms Zheng's evidence, that she can find no record of having received the emails. The report Ms Colley provided in her evidence, which was made by someone who did not give evidence in this proceeding, appears to show the system being used to send bulk emails records emails as having been sent to Ms Zheng. But there is no actual record before me, such as a copy of the emails themselves, that the emails were actually sent and were received by Ms Zheng.

The exchanges from 5 August 2025 onwards

[25] The message Ms Zheng sent Guardian when she regained access to her emails, explaining her absence, apologising for her failure to respond and confirming her willingness to complete any outstanding requirements was rebuffed by Guardian. It's first response, sent to her via email from Ms Schulz said:

*“Unfortunately, your employment with us was ended as the survey was not completed
We recommend when you return to reach out for any possible casual opportunities.”*

[26] Shortly afterwards, Ms Zheng sent another email, clarifying that she had informed the “centre” (the Mentone West Guardian centre) of her leave plans and submitted her leave request through Human Force. She said again she had very limited access to email and had only that day seen the “compliance survey message”. She said, “I respectfully feel the decision to end my employment based on this situation is not only unexpected but also unfair ...” and “kindly ask for this matter to be reconsidered”, confirming she remained committed her role.

[27] About ten minutes later Ms Schulz said in another email “we will not be changing this decision”. It said, “communication needs to come through to the casual feedback team and not to centres”, and that Ms Zheng “had been absent for more than four weeks, and leave is only approved for four weeks”. It said Guardian had reached out a number of times for the survey to be completed.

[28] Ms Zheng sent Ms Schulz another email a short time later. She again explained the manner in which she had provided her availability through Human Force and told her centre manager about her leave. She also explained, again, that she did not have access to email until 5 August 2025.

[29] Another somewhat blunt response was sent by Ms Schulz the next day. It said:

“As a casual we have elected to end your casual employment with us.

The Centres are aware and have also been advised that casuals fall under the casual pool specific for states and are managed by the casual team.

We wish you all the best in your future.”

[30] Ms Zheng sent yet another message later that day, repeating again that she had “formally submitted her absence” through the Human Force system, asking for the decision to be reviewed and confirming her commitment to the “organisation and its values”.

[31] A further response sent by Ms Schulz said “we currently don't have a need for you to provide casual labour, so you won't be receiving any more shift notifications”, and “you are a casual and we can elect to end employment based on the need of casuals and at this time we do

not require casual support”. The email also references, again, Ms Zheng’s failure to complete the “survey”.

[32] On 8 August 2025, Ms Zheng sent an email to Mr Bright, the Guardian CEO, complaining about the decision that had been made to terminate her employment. Ms Colley sent a response to this email, advising she would look into the matter. Ms Colley later responded, stating that “as a casual educator, your employment contract ends at the end of each shift”, and that as Ms Zheng had not completed the Suitability Declaration within the given time frame, Guardian had made the “difficult decision to terminate your employment”. Ms Colley said this occurred after “an investigation”⁷.

Statutory provisions - unfair dismissal

[33] Section 387 of the Act provides that, in considering whether it is satisfied that a dismissal was harsh, unjust or unreasonable, the Commission must take into account:

- a. whether there was a valid reason for the dismissal related to the person’s capacity or conduct (including its effect on the safety and welfare of other employees); and
- b. whether the person was notified of that reason; and
- c. whether the person was given an opportunity to respond to any reason related to the capacity or conduct of the person; and
- d. any unreasonable refusal by the employer to allow the person to have a support person present to assist at any discussions relating to dismissal; and
- e. if the dismissal related to unsatisfactory performance by the person – whether the person had been warned about that unsatisfactory performance before the dismissal; and
- f. the degree to which the size of the employer’s enterprise would be likely to impact on the procedures followed in effecting the dismissal; and
- g. the degree to which the absence of dedicated human resource management specialists or expertise in the enterprise would be likely to impact on the procedures followed in effecting the dismissal; and
- h. any other matters that the Commission considers relevant.

[34] I am required to consider each of these factors, to the extent they are relevant to the factual circumstances before me⁸.

Was there a valid reason for dismissal related to Ms Zheng’s capacity or conduct?

[35] It is well established that order to be a valid reason, the reason for the dismissal should be “sound, defensible or well founded” and should not be “capricious, fanciful, spiteful or prejudiced”⁹.

[36] Guardian claims to have dismissed Ms Zheng’s employment on 30 July 2025. At this point, it had not received the Suitability Declaration from Ms Zheng and it had received no reply to at least four pieces of correspondence it had sent her requesting the completion of the document (at least in its belief), including two in the days prior, both of which had warned that if the Suitability Declaration was not returned by 30 July 2025 the employment would cease. Not having received any reply by 30 July 2025, Guardian effectively considered the employment to be over at this point. It then took some internal steps to process what it considered to be the termination, which were in effect to remove Ms Zheng from its system, later causing an email to be sent to her which was not explicit as to termination, but implied as much.

[37] At first blush, Guardian’s reasoning at this point appears valid. It’s requirement that its employees complete a Suitability Declaration was an entirely appropriate one, arising from a significant child-safety incident which had national significance and sector-wide consequences. Ms Zheng had not returned the completed Declaration despite having been urged to do so.

[38] Impugning the validity of this reasoning, to some extent, is Guardian’s failure to apprehend that Ms Zheng had not responded because she was on leave. I accept that as a member of the casual pool, Ms Zheng was not entitled to “annual leave” and further, that she should have informed the central casual team rather than her centre manager of her leave plans. However, it appears to me not unreasonable that in response to Ms Zheng’s deafening silence over email, Ms Schultz, or someone, might have checked with the centre at which Ms Zheng had been working regularly for the past year who would have been able to inform them Ms Zheng had told them she was travelling overseas. Ms Colley said the team of Guardian employees that manages its casual workforce checked to see whether employees who had failed to complete the Suitability Declaration were on approved leave¹⁰. Presumably this happened in relation to Ms Zheng, although the evidence is not clear on this point. Ms Colley also said that a review of Human Force “did not indicate Ms Zheng was on approved leave over the relevant weeks”¹¹. I note however there is evidence before me that this system did indicate Ms Zheng’s status was “unavailable”. I consider this might have also reasonably triggered a follow up check with the centre she had been working at for so long. There was no evidence before me that any such check had occurred. Such a check may have revealed the logical possibility that Ms Zheng was not refusing to follow her employer’s direction, but rather, she was not aware the direction had been given.

[39] An even more significant issue arises. Guardian is inviting me in this matter to accept that the termination of Ms Zheng’s employment occurred on 30 July 2025 - in circumstances where she did not know about it.

[40] It is well established that dismissal does not ordinarily take effect unless and until it is communicated to the employee by plain or unambiguous words or conduct¹². There is no proper exception to the general proposition that a dismissal, for the purposes of Part 3-2 of the Act, cannot take effect before it is communicated to the employee¹³. The mere delivery of a

document to an employee's usual address notifying the employee of their dismissal would not itself constitute communication of the dismissal if the circumstances were that this did not constitute a reasonable opportunity for the employee to actually read the document¹⁴. When an employee is informed by email that they have been dismissed, they can usually be regarded as knowing or having a reasonable opportunity to know of the dismissal when the email is received in the inbox of the employee's usual email address¹⁵. However, as a Full Bench of this Commission has said:

“There may be circumstances in which mere receipt of an email may not constitute a reasonable opportunity to become aware of a dismissal – for example when the employee has not read the email because of an incapacitating illness or is legitimately unable to access their email for other reasons.”¹⁶

[41] There is no evidence before me that there was any form of clear and unambiguous communication with Ms Zheng that her employment was terminated on 30 July 2025. It may be that from Guardian's perspective, Ms Zheng's employment had been terminated, but this is not enough. It was not communicated to Ms Zheng.

[42] I have considered whether the accepted principle that an employee cannot be dismissed without it being communicated to them appropriately operates differently with respect to a casual employee, such as Ms Zheng. Identifying precisely when a casual employee has been dismissed with precision can sometimes be more difficult than in relation to permanent employees¹⁷. But, in the context of Part 3-2 of the Act, the fundamental principles associated with the concept of “dismissal” apply¹⁸. I do not consider that Ms Zheng's casual status changes the notion that in these circumstances, dismissal required clear and unambiguous communication to have been made with her to that effect.

[43] There was some evidence that ordinarily Guardian's processes are such that a letter to Ms Zheng should have been sent to her confirming Guardian had ended her employment¹⁹. This does not assist Guardian. Whether through mistake or oversight, no such communication was sent.

[44] I do not agree with Guardian's submission that Ms Zheng was dismissed on 30 July 2025.

[45] If the dismissal did not occur on 30 July 2025, could it have occurred on 4 August 2025, when what appears to be an automated email was sent to Ms Zheng stating that “we're sorry to see you go” and asking her to complete an exit survey?

[46] In my view, I do not think this is the case.

[47] First, I accept Ms Zheng's evidence that she did not have access to her email until 5 August 2025. Her evidence that up until then she was in a remote part of China where there was a typhoon was clear and not impeached. The degree to which she sought to communicate with Guardian after 5 August 2025, by sending a flurry of emails, supports the notion that up until then she could not do so. Thus, I accept that while Ms Zheng received the email on 4 August

2025 in her inbox on that day, she was legitimately unable to access her email when it was sent, did not read the email and thus it could not have given rise to the termination of her employment.

[48] Secondly, even if Ms Zheng had read this email, I do not consider this email is the kind of “clear and unambiguous” communication of the termination of her employment. It does not advise her that her employment is terminated. The implication is there but it is not explicit.

[49] This may be contrasted with the email sent to Ms Zheng by Ms Schulz on 5 August 2025, sent after Ms Zheng’s email in which she attempted to explain her whereabouts and failure until then to respond. This email *is* unambiguous. Whilst it does say that Ms Zheng might reach out upon her return for more “casual opportunities”, it also says “unfortunately, your employment with us was ended”.

[50] I consider this is the point at which Ms Zheng received clear and unambiguous advice that her employment was terminated.

[51] Thus, consideration must be given to whether at this point Guardian had a sound, defensible and well-founded reason to terminate the employment.

[52] I consider it did not. Guardian’s reason for the dismissal of the employment was Ms Zheng’s failure to complete the Suitability Declaration. But at this point, Guardian was in possession of Ms Zheng’s entirely reasonable explanation as to her failure to return the Suitability Declaration. It was also told clearly that Ms Zheng was “happy to complete any outstanding forms or requirements” which I consider should have been read as her preparedness to complete the Suitability Declaration (bearing in mind that at this point, on Ms Zheng’s evidence, which I accept, she had not actually received the Declaration itself).

[53] Notwithstanding this explanation, Guardian terminated Ms Zheng’s employment. While from its perspective, this was the maintenance of a decision already made and a state of affairs already in place, it was entirely unreasonable taking into account what it then knew – that Ms Zheng had not simply ignored the directive and was entirely prepared to comply with it, and her reason for not replying was that she was not able to.

[54] Several matters fortify my consideration in this regard. First, even if the dismissal had occurred on 30 July 2025 (which it did not) I am not, for the reasons mentioned above, convinced that it was well-founded, in circumstances where there is no evidence before me that Guardian thought to check with the Mentone West centre as to whether Ms Zheng’s failure to respond may have had a reasonable explanation, such as her being on leave. Second, I am not convinced on the evidence before me that Ms Zheng was even sent the emails containing the Declaration on 15 and 21 July 2025 or indeed has ever been sent a link to the Declaration for her to complete. It seems odd to me that if Ms Zheng was indeed sent these emails by Guardian, copies of them would not have been provided in evidence. If Ms Zheng was not sent those emails, the approach taken by Guardian during the last week of July 2025 seems even more unreasonable. Third, if the crux of Guardian’s rationale for its decision to terminate Ms Zheng’s employment is her failure to complete the Suitability Declaration, I am struck by its intractability in response to her confirmation via email that she was entirely prepared to do it.

It is perplexing that this matter has not been resolved simply by Guardian sending Ms Zheng the form, her completing it, and then things returning to normal.

[55] Obviously, if Ms Zheng was provided with that opportunity – to complete the Declaration – and then, having received it and being provided with a reasonable opportunity to complete it - failed to do so, Guardian would have been entirely justified in ending the employment. But as I have explained above, that is not what occurred in this matter, Ms Zheng has never refused to complete the Suitability Declaration.

[56] I do not consider Guardian had a valid reason to terminate Ms Zheng’s employment relating to her capacity or conduct and this weighs in favour of a finding that the dismissal was unfair.

The matters referred to in s 387(b) – (e) of the Act

[57] Ms Zheng’s employment was not dismissed as a result of performance, and thus the question posed by s 387(e) of the Act – whether she was warned about unsatisfactory performance – is not relevant. Guardian submits Ms Zheng was notified of the reason for the termination, and provided with an opportunity to respond, by way of the email communications she received on 15, 21, 23, 29 and 30 July 2025. However, I have found these emails were sent before Ms Zheng’s employment was dismissed, and it was not until 5 August 2025, when Ms Schulz told Ms Zheng her employment was terminated (or in the way it was put, had already been terminated), that the dismissal occurred. That email told her “the survey” was not completed, which was the reason for the dismissal, but it cannot be said that Ms Zheng was notified of this reason before the decision was made, or that she had an opportunity to provide a response to the reason before the decision was taken because at that point the decision had already been made. The considerations in s 387(b) and (c) weigh in favour of a conclusion the dismissal of Ms Zheng’s employment was unfair. She was not refused the opportunity to have a support person present in any discussion, but given the circumstances of the dismissal, this is a neutral consideration in this matter.

To what degree would the size of Guardian’s enterprise or the absence of human resources management specialists be likely to impact on the procedures followed in effecting the dismissal?

[58] Guardian is a medium to large sized employer and has in-house dedicated human resource management expertise. The stubborn refusals in Ms Schulz’ emails to give credence to Ms Zheng’s explanations as to her absence and failure to respond appears to have been the subject of a review by Ms Colley. Despite this, for some reason, the dismissal of Ms Zheng’s employment was confirmed. This matter does not weigh against a finding that the dismissal of Ms Zheng’s employment was unfair.

What other matters are relevant?

[59] Guardian submitted that it should have been entitled to rely on Ms Zheng’s personal email address, for the purposes of it providing her with a directive which was “critical”. It

submitted Ms Zheng bore responsibility, if travelling outside Australia, to put in place alternative communication processes which would have facilitated her receipt of communications.

[60] Even if this submission has weight, Ms Zheng *did* communicate with Guardian, explained her situation, but the explanation was dismissed out of hand. I do not consider this submission weighs against a finding that the dismissal was unfair.

[61] I have given consideration to the importance of the directive that Guardian considered Ms Zheng failed to comply with. The seriousness of the child-safety issue which occurred in the Australian early childhood sector, and which gave rise to Guardian's Suitability Declaration directive cannot be understated. Guardian is entirely justified in having taken its directive extremely seriously.

[62] I do not however consider that this weighs against a finding that the dismissal of Ms Zheng's employment was unfair. There is no evidence before me Ms Zheng ever refused to complete the Declaration, and she gave evidence she was prepared to complete it. I also consider her responses provided to Ms Schulz' emails to be courteous, straightforward and reasonable and the seriousness of the matter in question does not justify the obstinate rejection by Guardian of these explanations.

Is the Commission satisfied that the dismissal of Ms Zheng was harsh, unjust or unreasonable?

[63] I have made findings in relation to each matter specified in s 387 of the Act. I must consider and give due weight to each as a fundamental element in determining whether the termination was harsh, unjust or unreasonable²⁰. The weight of these considerations bears in favour of a finding that the dismissal of Ms Zheng was harsh, unjust and unreasonable and I find Ms Zheng was unfairly dismissed.

Remedy

[64] Being satisfied that Ms Zheng

- a. made an application for an order granting a remedy under s 394;
- b. was a person protected from unfair dismissal;

and was unfairly dismissed within the meaning of s 385 of the Act, I may, subject to the Act, order Ms Zheng's reinstatement, or the payment of compensation to Ms Zheng

[65] Under s 390(3) of the Act, I must not order the payment of compensation to Ms Zheng unless (a) I am satisfied that reinstatement of Ms Zheng is inappropriate; and (b) I consider an order for payment of compensation is appropriate in all the circumstances of the case.

Is reinstatement of Ms Zheng inappropriate?

[66] It was not entirely clear whether Ms Zheng seeks the reinstatement of her employment. In her Form F2 application, Ms Zheng seeks to be reinstated as a casual educator with Guardian. In her Outline of Submissions, as noted by Guardian, Ms Zheng said she did not seek reinstatement. In her oral submissions, she appeared to indicate at one point that she was not seeking reinstatement because of “trust” issue, but then in a different part of her submissions appeared to say she was seeking reinstatement.

[67] Guardian submitted that an order of reinstatement in this matter is inappropriate because there is a breakdown of trust and confidence between Ms Zheng and Guardian. I do not understand the basis of the submission. There is no evidence before me of any issue with Ms Zheng’s employment. Given she worked with regularity at the same centre for a year, I infer that her work performance and contribution to the centre was valued. The people with whom Ms Zheng engaged with at the time of her dismissal – Ms Schulz and Ms Colley – are not the people she worked with on a day-to-day basis. As she has said repeatedly, she is prepared to complete the Suitability Declaration and has not refused to do so. In some of the evidence, Ms Zheng refers to her continued commitment to Guardian and its values and her desire to contribute to the work of her team.

[68] The decision of a Full Bench of this Commission in *Nguyen v Vietnamese Community in Australia t/a Vietnamese Community Ethnic School South Australia Chapter*²¹ is often referred to with respect to the question as to whether a reinstatement order is appropriate taking into account the relationship between the parties, because it contains the following useful summary of the key principles relevant to this consideration:

“Whether there has been a loss of trust and confidence is a relevant consideration in determining whether reinstatement is appropriate but while it will often be an important consideration it is not the sole criterion or even a necessary one in determining whether or not to order reinstatement.

Each case must be decided on its own facts, including the nature of the employment concerned. There may be a limited number of circumstances in which any ripple on the surface of the employment relationship will destroy its viability but in most cases the employment relationship is capable of withstanding some friction and doubts.

An allegation that there has been a loss of trust and confidence must be soundly and rationally based and it is important to carefully scrutinise a claim that reinstatement is inappropriate because of a loss of confidence in the employee. The onus of establishing a loss of trust and confidence rests on the party making the assertion.

The reluctance of an employer to shift from a view, despite a tribunal’s assessment that the employee was not guilty of serious wrongdoing or misconduct, does not provide a sound basis to conclude that the relationship of trust and confidence is irreparably damaged or destroyed.

The fact that it may be difficult or embarrassing for an employer to be required to re-employ an employee whom the employer believed to have been guilty of serious wrongdoing or misconduct are not necessarily indicative of a loss of trust and confidence so as to make restoring the employment relationship inappropriate.”²²

[69] There is no evidence before me providing a sound basis for a conclusion there has been a breakdown in the relationship of trust and confidence between Guardian and Ms Zheng. I do not consider it inappropriate to order the reinstatement of Ms Zheng’s employment and I intend to do so.

[70] The position in which Ms Zheng was employed immediately before her dismissal was as a member of Guardian’s “casual pool”. In this position, she worked every week since the commencement of her employment in November 2022 save for a period of absence between March and July 2024 (which was not explained) and her recent leave. For the last year she worked at the same centre – Mentone West.

[71] It appears Guardian’s casual pool is deployed by it on an as needed basis, subject to employees’ availability. For Ms Zheng, when she was available, this meant regular work. I expect this to be the case when Ms Zheng’s employment is reinstated.

[72] Section 391(3) of the Act provides that, if the Commission makes an order for reinstatement and considers it appropriate to do so, the Commission may also make any order that the Commission considers appropriate to cause the employer to pay to the Applicant an amount for the remuneration lost, or likely to have been lost, by the Applicant because of the dismissal.

[73] Section 391(4) of the Act provides that, in determining an amount for the purposes of such an order, the Commission must take into account: (a) the amount of any remuneration earned by the Applicant from employment or other work during the period between the dismissal and the making of the order for reinstatement; and (b) the amount of any remuneration reasonably likely to be so earned by the Applicant during the period between the making of the order for reinstatement and the actual reinstatement.

[74] An order to restore lost pay does not necessarily follow an order for reinstatement. The Commission may only make an order if it considers it appropriate to do so and only make an order that the Commission considers appropriate²³. The Commission may take into account all of the circumstances of the case, including the conduct of the employee that led to the dismissal²⁴. Where an employee has engaged in misconduct, the Commission may refuse to make any order to restore lost pay.

[75] Ms Zheng said she had not earned remuneration since the dismissal of her employment with Guardian. She said she had not sought alternative employment because she was studying and preparing for her unfair dismissal case. It is therefore the case that in calculating an amount appropriate in respect to remuneration lost, no deduction should be made for remuneration earned or likely to be earned between termination and reinstatement.

[76] I have considered whether Ms Zheng's failure to make any attempt to find alternative employment, and in this sense mitigate her loss of earnings, should result in a reduction in any amount awarded to her in relation to lost pay. Section 392(2)(d) of the Act, dealing with circumstances in which the Commission might make an order of compensation in respect to unfair dismissal where reinstatement is *not* appropriate, requires the Commission to consider the efforts of the Applicant (if any) to mitigate the loss suffered because of the dismissal. Sections 391(3) and (4) do not require the consideration of this matter. However, an order in respect of lost pay is discretionary, and Courts and Tribunals will usually take into account a plaintiff's failure to mitigate when exercising a discretion in relation to the award of a civil remedy²⁵.

[77] Ms Zheng submitted that her average weekly gross pay in the six months prior to 6 July 2025 (when her leave commenced) was \$1,206.09, based on her payroll records. Guardian submitted that if it were necessary in this matter to ascertain Ms Zheng's ordinary weekly remuneration rate, averaging that rate over the entirety of her employment is more appropriate. An order in respect of lost remuneration is discretionary, and with this in mind I prefer Ms Zheng's methodology using an average based on her last six months of work.

[78] Above, I have outlined why I consider Ms Zheng's dismissal occurred on 5 August 2025. However, had she not been dismissed, she would not have worked or earned remuneration until at least 28 August 2025, when she returned to Australia from overseas. It is not appropriate that any order for lost pay include this period – when Ms Zheng would not have worked.

[79] Guardian submitted that had Ms Zheng not been dismissed, as a member of the casual pool, there is no guarantee she would have worked during September 2025 or thereafter. I do not accept that submission. It flies in the face of what actually occurred during Ms Zheng's employment for over two years with Guardian – she worked every week (save for the absences I have noted above). I consider it likely that had Ms Zheng's employment not been dismissed, she would have commenced work again from the week beginning 1 September 2025. The period between 1 September 2025 and the date the order I intend to make for her reinstatement is to be effective is eleven weeks.

[80] Ms Zheng's evidence about her failure to attempt to mitigate her loss was forthright, and, consistent with my comments above, I consider it appropriate to apply a discount to the amount I intend to order in respect of her lost pay for this reason.

Orders

[81] Given my findings above, I will make an Order pursuant to s 391(1)(a) of the Act that Guardian must reinstate Ms Zheng's employment to the position she held immediately before her dismissal – the Guardian casual pool – on or by 17 November 2025. I will also make an Order pursuant to s 391(2) to maintain the continuity of her employment, in so far as it is necessary with respect to the nature of her employment. I will also Order pursuant to s 391(3) that she be paid a sum in respect of remuneration lost, equal to eleven weeks' pay minus a discount of ten per-cent. The amount of \$11,940.29 and an appropriate superannuation contribution is to be paid to Ms Zheng within 14 days of the date of the Order. Orders²⁶ will issue to that effect.

[82] I expect that after Ms Zheng's employment is reinstated, Guardian will immediately require her to complete the Suitability Declaration. I consider this to be entirely appropriate. If for some reason Ms Zheng fails to or refuses to complete the document, presumably that will cause Guardian to take such steps as it considers necessary in response to a failure to follow that directive and nothing in this decision should be read as intending to limit its prerogative in that regard.



COMMISSIONER

Appearances:

Ms Zheng appearing for herself

Ms Anthony of Mapien Law appearing for the Respondent

Hearing details:

Melbourne

2025

Friday 17 October

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¹ Amended Respondents Outline of Submissions, 15 October 2025, [6]

² Amended Respondent's Outline of Submissions, 15 October 2025 [9]

³ Witness Statement – Fang Zheng, Exhibit 11

⁴ Witness Statement of Kate Colley [4]

⁵ Ibid KC-1

⁶ Supplementary Witness Statement of Kaye Colley, 15 October 2025, [3] – [4]; KC-6; KC-7

⁷ Witness Statement of Kaye Colley [11]

⁸ *Sayer v Melsteel Pty Ltd* [2011] FWAFB 7498 [14]

⁹ *Selvachandran v Peteron Plastics Pty Ltd* (1995) 62 IR 371 [373]

¹⁰ Witness Statement of Kate Colley [5]

¹¹ Ibid

¹² *Mohammad Ayub v NSW Trains* [2016] FWCFCB 5500 [17]

¹³ Ibid [41]

¹⁴ Ibid [42]

¹⁵ Ibid [50]

¹⁶ Ibid

¹⁷ *Khayam v Navitas English Pty Ltd (t/a Navitas English)* [\[2017\] FWCFCB 5162](#) [127] fn 121

¹⁸ Ibid [71]

¹⁹ Supplementary Witness Statement of Kate Colley [6]

²⁰ *ALH Group Pty Ltd t/a The Royal Exchange Hotel v Mulhall* (2002) IR 117 357 [51]; *Edwards v Giudice* [1999] FCA 1836 [6] – [7]

²¹ [\[2014\] FWCFCB 7198](#)

²² Ibid [27]

²³ *Aurora Energy Pty Ltd v Davison* [PR902108](#) (AIRCFCB, Watson SDP, Williams SDP, Holmes C, 8 March 2001) [25]

²⁴ *Humphries v Buslink Vivo Pty Ltd* [\[2015\] FWC 6278](#) citing *Kenley v JB Hi Fi*, Print S7235 at [36]

²⁵ *Shorten v Australia Meat Holdings* (1996) 70 IR 360 [377]

²⁶ [PR793273](#)