

**IN THE EMPLOYMENT RELATIONS AUTHORITY  
AUCKLAND**

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

[2020] NZERA 462  
3072752

BETWEEN	JING SHEN Applicant
AND	ORIENTAL NATURAL HEALTHY LIMITED First Respondent
AND	ZENGLI SHEN (deceased) Second Respondent

Member of Authority:	Eleanor Robinson
Representatives:	Applicant in person Sam Lowery, counsel for the Respondent
Investigation Meeting:	29 and 30 September 2020
Submissions and/or further evidence	5 October 2020 from the Applicant 5 October 2020 from the Respondent
Determination:	11 November 2020

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**DETERMINATION OF THE AUTHORITY**

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**Employment Relationship Problem**

[1] The Applicant, Ms Jing Shen, claims that she was unjustifiably dismissed and unjustifiably disadvantaged whilst working for the First Respondent, Oriental Natural Healthy Limited (ONHL).

[2] Ms Shen further claims that she was physically and sexually abused during her engagement at ONHL by the Second Respondent, Mr Zengli Shen.

[3] ONHL denies that Ms Shen was unjustifiably dismissed or disadvantaged and claims that Ms Shen was not an employee but an independent contractor.

[4] ONHL further denies that Ms Shen was physically and sexually abused during her engagement at ONHL by Mr Shen.

## **The Authority's investigation**

[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.

## **Issues**

[6] The issues requiring investigation are whether or not Ms Shen:

- was an employee or an independent contractor whilst working at ONHL

If Ms Shen was an employee whether or not she was:

- unjustifiably dismissed by ONHL
- unjustifiably disadvantaged by OHNL failing to:
  - provide her with a written employment agreement
  - pay her the relevant minimum wage for all the hours she worked
  - pay her holiday pay
  - act in good faith
- Sexually harassed by Mr Shen during her employment at ONHL
- Bullied and physically assaulted by Mr Shen during her employment at OHNL

## **Background**

[7] ONHL is a massage and health business that operates in St Luke's Mall, Auckland. It trades under the name Body Haven and offers services including massage, reflexology, traditional Chinese medicine, acupuncture, hot stone massage and ear candling.

[8] Until the death of Mr Zengli Shen, the Second Respondent, on 2 October 2019 he and Ms Xinyu Huang, his wife, were shareholders of ONHL and Mr Zengli Shen was the sole director. Since his death Ms Huang has become the sole director and shareholder of ONHL.

### *Independent Contractor arrangements*

[9] Ms Huang stated that ONHL engaged most of its massage therapists as independent contractors rather than employees. This was explained to prospective massage therapists at the initial interview, and they were also told that if they wished to continue with their application

for work, a training period would be provided. This was not compensated and there was no massage work performed on customers until the training was complete. An internship agreement was provided.

[10] Following completion of the training period, the therapist entered into an independent contractor agreement (the Contractor Agreement) with ONHL. The independent contractor would be paid on a commission basis, being 40% of the revenue from each customer serviced by the therapist.

[11] The Contractor Agreement included the following clauses:

B The parties agree and acknowledge that their relationship is one of independent contractor and principle.

4.2 The contractor will render an itemised tax invoice weekly for such charges.

5.1 The contractor is an independent contractor and will be responsible for the contractor's own liability for tax and accident compensation premiums.

[12] Although clause 4.2 of the Contractor Agreement specified that an itemised tax invoice should be provided by the therapist, Ms Huang said that in practice ONHL kept a record of the customers serviced by the therapist on a given day, updating the record with the time the customer was seen, the service provided and the revenue generated.

[13] ONHL used the daily customer records to calculate payments owed to each contractor. Clause 5.1 of the Contractor Agreement states that contractors are responsible for paying their own tax and ACC payments, however Ms Huang confirmed that ONHL deducted PAYE and ACC levies from payments due to the contractors. Ms Huang said this was on the advice of ONHL's accountant who advised ONHL to deduct withholding tax for all therapists.

#### *Employee arrangements*

[14] Ms Huang said that ONHL engaged therapists as employees when the prospective therapist did not have a New Zealand work visa. In this situation an offer of employment enabled the therapist to apply for a work visa under the China Special Work Visa arrangement which covers traditional medicine practitioners. Ms Huang said this arrangement applied to a small number of therapists only, with the majority of the ONHL masseurs being engaged as contractors.

[15] Ms Shen, who had been a New Zealand Permanent Resident since January 2017, responded to an advertisement placed by ONHL for a part-time Masseur. She had not

previously worked in New Zealand, and in particular she had no previous masseur experience, but this was an area in which she hoped to be able to work and the advertisement stated that: “unexperienced new staff may get training”. The salary was indicated as being: “Higher than the prescribed minimum wage” and the ‘Time of work’ as being: “Same as the Mall’s operation hours”.

[16] During her interview with Mr Zengli Shen, Ms Shen said she was told that some masseurs earned from \$800 to \$1,000 per week. Ms Shen said that Mr Zengli Shen had not told her she was being engaged as a contractor. He referred to the masseurs as staff members and she assumed she was being engaged as an employee.

[17] Ms Shen commenced work at ONHL on 14 May 2019. She said she was not provided with an employment agreement. During her first few weeks after commencement she had been trained by the other masseurs when they had free time between clients, and also performed some small tasks in between such as providing items to the other masseurs and helping with reception.

[18] Mr Yifu Zhou, a masseur to ONHL since 2017, said that he had been provided with a month of free training during which he had no dealing with customers and was not generating any revenue. He had been appreciative of the training because he gained skills as a trained masseur.

[19] After she passed a test set by Mr Zengli Shen Ms Shen said she started providing more minor massage treatments such as neck massage.

[20] Ms Shen received her first payment on 13 June 2019 which was in the sum of \$170.94. Ms Shen said she had worked at a total of 198.5 hours by this date.

[21] Thereafter Ms Shen was paid on a weekly basis, the amounts varying significantly each week between \$270 for the week ending 16 June 2019 and \$499.02 for the week ending 25 August 2019.

[22] Ms Shen said she had not understood why the amount of payments varied each week, but she had not questioned this with Mr Zengli Shen.

[23] Ms Shen said that she attended for work in accordance with a roster issued by the manager, Ms Jan Jiang, and that she worked every day, however during cross examination Ms Shen agreed that the days of the week she worked at ONHL varied from week to week.

[24] Ms Jiang said that ONHL had casual clients but many of the masseurs had their regular clients, and she prepared a roster on a weekly basis to ensure there was coverage for each day

ONHL opened for business. However the masseurs arrived and left at varying times during each day, depending on whether or not they had clients booked that day, although many preferred to stay most of the day until closing time to maximise client treatments and their income.

[25] Although days were noted on the roster a masseur could change the days or times depending on their personal commitments which could be arranged between themselves. Ms Jiang said that during a working day a masseur with no client booking was able to leave ONHL for personal reasons and return when they wished to do so, or carry out activities of a personal nature. All the masseurs did so on occasion.

[26] Mr Yifu Zhou said he worked full days when he was working at ONHL because he wanted to maximise his commission, and that between clients coming in for a massage he played video games. Ms Linjuan Huang who was an international student during the time she worked as a masseur at ONHL said she studied in-between the time spent with clients.

#### *Sick Leave*

[27] Ms Shen said that she was unable to take sick leave during the period when she was working at ONHL, and that other masseurs who were unwell were made to attend for work.

[28] Ms Jiang denied that masseurs were expected to attend for work when sick, observing that the masseurs work involved close personal contact with their clients and therefore ONHL preferred masseurs who were unwell not to attend the workplace.

[29] Other masseurs who provided evidence confirmed this was the case and I accept that ONHL would not want sick masseurs providing close personal services to clients.

#### *Bonus payment*

[30] The payment records provided by ONHL contain a bonus column. Ms Huang explained that bonuses were paid when the ONHL revenue reached a certain figure. The bonus was meant to incentivise masseurs to be physically present during opening hours to maximise on clients and income.

#### *Alleged sexual and physical harassment*

[31] During the time she worked at ONHL Ms Shen said that Mr Zengli Shen had sexually harassed her in the workplace, making crude jokes using sexually explicit language, however during the Investigation Meeting Ms Shen confirmed that the comments were not directed to her personally.

[32] Ms Shen also said that during a car trip to another masseur's home for a barbeque, Mr Shen with whom she had been sitting in the back seat of the car had talked to her using profane language and had made inappropriate comments to her which made her feel uncomfortable.

[33] Ms Xiu Ping Sun, a former masseur at ONHL, said that Mr Zengli Shen used sexually explicit language in the work place and this offended her.

[34] Ms Jiang, Ms Linjuan Huang and Mr Zhou said Mr Zengli Shen did make jokes in the workplace which were sometimes sexual in nature, but these were never when customers were present, and were not addressed to anyone in particular.

[35] Ms Shen alleged that Mr Zengli Shen had kicked her on the shin on or about June 2019. She had not reported this incident to the police and apart from Mr Yuze Liu, Ms Jiang, Ms Xuiping Sun, Ms Huang and Mr Zhou all denied having witnessed the alleged kick or having been told about it by Ms Shen. They also said that they were not aware of Mr Zengli Shen being physically or verbally offensive towards any member of staff.

[36] Mr Liu said that not only did he see Mr Zengli Shen kick Ms Shen on more than one occasion, he had also seen him strike Ms Shen with his hand across the face on a number of occasions.

[37] I did not find the evidence of Mr Liu to be credible. Ms Shen confirmed that Mr Liu had not been present during the alleged kicking incident, and she gave no evidence of any other alleged assaults.

[38] I also observe that none of the evidence provided by other staff members accorded with the description of the actions or behaviour pattern of Mr Zengli Shen as provided by them during the Investigation Meeting or with Mr Liu's allegation of widespread violence, or indeed any violence, being used by Mr Zengli Shen towards the masseurs.

[39] Ms Shen said that towards the end of the time she worked at ONHL there had been a cooling of the initially fairly good relationship she had with Mr Zengli Shen. She felt that he had shown more favourable treatment towards Ms Linjuan Huang who was a tenant in his home, and that some of the other masseurs were not as friendly towards her as they had been previously.

[40] Mr Zhou said that Ms Shen had developed a relationship with Mr Liu. It was following this that Ms Shen's relationship with Mr Zengli Shen and some of the other masseurs appeared to be adversely affected after they had advised her against the relationship.

[41] Mr Zhou and Ms Jiang both confirmed that Ms Shen's massage techniques remained restricted to shoulder, neck and arm massages and she was unable to do back or leg massages. Mr Zhou said that Mr Zengli Shen encouraged her to do whole body massage but she was resistant to this, saying this was because she had pains in her thumbs.

*The dismissal*

[42] Ms Shen said that on 28 August 2019 Mr Zengli Shen accompanied by Ms Jiang, had asked her to come outside the ONHL premises, handed her a letter and told her the employment was over. The letter stated:

Hello!

First of all, thank you for all the hard work you did for the shop in the past period of more than two months.

Base on the present business operation situation, it's needed to reduce the number of (our) staff members, in consideration of your skill level and ability to learn, and all other comprehensive situations, I think you are not the type of staff members that we would hire for ta long term for the continuing development of this shop. Hope you can leave my company, and have a better career development in other companies, {and/or] areas.

Hereby take the written notice as above.

**Was Ms Shen an employee or an independent contractor whilst working at ONHL?**

[43] In proceeding to determine whether Ms Shen was employed by ONHL as an employee or engaged as an independent contractor I apply s.6 of the Employment Relations Act 2000 (the Act) which provides:

s.6 Meaning of employee:

1. In deciding ... whether a person is employed by another person under a contract of service, the .... Authority-... must determine the real nature of the relationship between them.
- (3) For the purposes of subsection (2)... or the Authority-
  - (a) must consider any relevant matters, including any matters that indicate the intention of the parties
  - (b) is not to treat as a determining matter any statement by the persons that describes the nature of their relationship

[44] In *Bryson v Three Foot Six Limited (No2)* the Supreme Court stated the following:

All relevant' matters certainly includes the written and oral terms of the contract between the parties, which will usually contain indications of their common intention concerning the status of their relationship They will also

include any divergences from or supplementation of those terms and conditions which are apparent in the way in which the relationship has operated in practice. It is important that the Court or the Authority should consider the way in which parties have actually behaved in implementing their contract. How their relationship operates in practice is crucial to a determination of its real nature. “All relevant matters’ equally clearly requires the Court or the Authority to have regard to features of control and integration and to whether the contracted person has been effectively working on his or her own account (the fundamental test), which were important determinants of the relationship in common law. It is not until the Court or the Authority has examined the terms and conditions of the contract and the way in which it actually operated in practice that it will usually be possible to examine the relationship in the light of the control, integration and fundamental test.<sup>1</sup>

*Contractual basis and common intention*

[45] In *Cunningham v TNT Express Worldwide (NZ) Ltd* the Court of Appeal established that the terms of a written contract must be placed at the forefront of consideration of the working relationship.<sup>2</sup>

[46] Ms Shen had no written agreement, however the relevant intention could be inferred from words or conduct at the time the contract was formed was held in *Muollo v Rotaru*.<sup>3</sup>

[47] It was Mr Zengli Shen who interviewed Ms Shen and because he is deceased and no examination is possible, any intention that he may have had must be inferred from the evidence of Ms Shen and other indications of the employment relationship.

[48] Ms Shen’s evidence was that apart from Mr Zengli Shen telling her that the earning potential of masseurs was between \$800 - \$1,000 per week, there was no discussion of how payment to her would be made. Ms Shen said she understood that the wage on offer was ‘higher than the prescribed minimum wage’ from which she concluded what was being offered was employment, however I find that statement to be inconclusive because this representation of earning potential could apply in either an employment or a contractor situation.

[49] However I accept that the reference to minimum wage is usually found in the context of an employment agreement, and the Minimum Wages Act 1983 applies only to employees.

[50] The job advertisement indicated the position offered was part-time but also stated: “suitable part-time or full time job for students who have their scattered time”. Whilst this is consistent with contractor status, it could also include casual or part-time employment.

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<sup>1</sup> *Bryson v Three Foot Six Limited (No 2)* [2005] 1 ERNZ 372

<sup>2</sup> *Cunningham v TNT Express Worldwide (NZ) Ltd* [1993] 1 ERNZ 695

<sup>3</sup> *Muollo v Rotaru* [1995] 2 ERNZ 414

[51] Ms Shen who commenced working at ONHL on 14 May 2019 received her first payment on 13 June 2019. This was in the amount of \$170.94. Although the record of hours worked provided by Ms Shen recorded her as having worked 198.5 hours by that date, she did not query the payment as being incorrect.

[52] The amount of this payment based on amounts charged to clients is consistent with ONHL providing free training for the first few weeks to potential masseurs with no previous experience which applied to Ms Shen who had no previous masseur experience or skills. This also accords with the evidence of Ms Huang, and the other masseurs who stated that ONHL provided free training which was of high value to them because of the skills taught.

[53] Ms Shen was paid varying amounts during the succeeding weeks which bear no relation to the hours she has recorded as having worked, however at no time during her engagement with ONHL did she query how the payments were being calculated.

[54] Ms Shen stated that her understanding was that she was an employee who would be earning higher than the prescribed minimum wage, however an analysis of the payments received against the hours she recorded as having been worked would provide a net payment of \$0.86 per hour, significantly far below the minimum wage rate at that time. However she did not query this with Mr Zengli Shen, Ms Jiang or discuss it with the other masseurs. This would be consistent with the relationship being that of an independent contractor.

[55] I find the terms of the Agreement between the parties inconclusive to demonstrate the intention of both parties at the outset of the relationship.

[56] I shall now examine the way in which Ms Shen and ONHL operated in practice.

#### *Control and Integration*

[57] In examining whether Ms Shen was an employee or an independent contractor whilst working for ONHL I find that the evidence of Ms Jiang was that although the masseurs had flexibility in deciding their hours of work, there was a roster which she prepared which set out the days the masseurs would work with an expectation that they would stay until closing time in order to deal with casual clients.

[58] Although Ms Jiang's evidence was that she set a roster, she said the masseurs were able to swap their hours and days with other masseurs depending on their personal circumstances.

[59] The record of hours submitted in evidence indicate that Ms Shen worked five days a week on different days each week over a seven day period. Whilst her start time varied between either 9.00 a.m. or 9.30 a.m. her finishing time was at the closing time of the Mall. This is

consistent with the evidence of Ms Huang of an incentive bonus payment to the masseurs to stay until the end of the shop hours.

[60] Ms Jiang also said that the masseurs were free to leave the ONHL premises during the day to see to personal business, and all did so, including Ms Shen. However the record of hours worked provided by Ms Shen make no deduction for time spent on personal matters during ONHL business hours.

[61] The evidence of Ms Huang, Ms Shen and the masseurs was that there was no provision of a uniform, sick leave, holiday pay or KiwiSaver contributions I find this is consistent with a contractor relationship.

[62] The evidence establishes that the masseurs had flexibility in carrying out the services they provided to their clients. Mr Zhou and Ms Jiang's evidence was that they wanted to work as many hours as possible to maximise on the client numbers they saw and consequently their commission. There was no evidence given by Ms Shen that she was given a set number of massages to complete daily.

[63] I find that these circumstances, whilst indicative of a contractor relationship, are not of themselves determinative of the true nature of the relationship and have to be balanced against considerations of contractual intention between the parties and examination of the question of whether Ms Shen was in business on her own account, the fundamental test.

#### *The Fundamental Test*

[64] In *Singh v Eric James & Associates Limited* Chief Judge Colgan observed that: "Taxation arrangements, both generally and in particular are a relevant consideration."<sup>4</sup>

[65] IRD records record Ms Shen's tax code as 'M' which is the appropriate code for an employee rather than 'MT' which is the code for a contractor.

[66] In Ms Shen's IRD records the section headed: "Earnings not liable for ACC earners' levy" is a nil entry, whereas if Ms Shen was a contractor the entry would be the full amount of the payment in the pay period.

[67] PAYE is shown as having been deducted from Ms Shen's gross earnings and paid to the IRD. It is considered by ONHL that this may be because Mr Zengli Shen completed the entries personally and he lacked payroll experience or knowledge as to how to treat PAYE deductions. Considering his experience in the massage business and the fact that payment is

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<sup>4</sup> *Singh v Eric James & Associates Limited* [2010] NZEMPC 1

made to IRD, this seems unlikely. The fact that Ms Shen did not query the deduction of PAYE from her gross earnings is consistent with her evidence that she considered herself to be an employee.

[68] Turning to examine her ability to work on her own account, there is no evidence to support the fact that as an independent contractor Ms Shen had work elsewhere, and the record of hours she maintained show a regular pattern of working at ONHL which would also severely limit her ability to work elsewhere.

[69] Having considered all the circumstances, on the balance of probability I determine that Ms Shen was an employee whilst working for ONHL.

#### **Was Ms Shen unjustifiably dismissed by ONHL?**

[70] It is accepted by both parties that Ms Shen was dismissed on 28 August 2019 by Mr Shen handing her a letter.

[71] An employer must follow a fair and reasonable process in terminating an employee, however there is no evidence that ONHL followed any procedure in respect of ending its relationship with Ms Shen.

[72] I determine that Ms Shen was unjustifiably dismissed by ONHL.

#### **Was Ms Shen unjustifiably disadvantaged by ONHL failing to provide her with a written employment agreement?**

[73] Ms Shen's evidence was that she did not receive a written employment agreement as is required pursuant to s 65 of the Act.

[74] The evidence of the other masseurs was that they had received a written contract, and copies were provided in evidence, however ONHL has not been able to produce either a written employment agreement or an independent contractor agreement for Ms Shen.

[75] Not having a written employment agreement prevented Ms Shen from knowing the precise terms and conditions of her employment.

[76] I determine that Ms Shen was disadvantaged in her employment by not having a written employment agreement.

**Was Ms Shen unjustifiably disadvantaged by ONHL failing to pay the relevant minimum wage for all the hours she worked?**

[77] I accept that persons lacking any previous masseur experience and having no skills as a masseur, would be provided with training by ONHL. This was on an understanding that there would be no payment in respect of that training period during which she would do no productive work.

[78] Ms Shen's evidence was that she had received training during the initial period, and she did not carry out massage on ONHL clients during that period

[79] I determine that as an employee Ms Shen was entitled to be paid the relevant minimum wage for all the hours she worked once the unpaid period of training was completed and that she would have been disadvantaged by not having been paid the relevant minimum wage for the hours worked.

**Was Ms Shen unjustifiably disadvantaged by ONHL failing to pay her holiday pay?**

[80] Employees are entitled to be paid holiday pay on the wages they earn pursuant to s21 of the Holidays Act 2003.

[81] Ms Shen did not receive holiday pay either on an earn-as-you-go-basis during her employment, or when her employment ended.

[82] I determine that Ms Shen was unjustifiably disadvantaged by ONHL failing to pay holiday pay.

**Was Ms Shen unjustifiably disadvantaged by ONHL as a result of its handling of her claim of sexual harassment?**

[83] Ms Shen claims that she was sexually harassed by Mr Zengli Shen.

[84] The relevant statutory and procedural requirements are set out in s.103, s.108 and s.117 of the Act.

[85] Sexual Harassment is specifically addressed in the Act being referred to as a personal grievance in s.103(1)(d) of the Act on the basis that: "that the employee has been sexually harassed in the employee's employment".

[86] Sexual harassment is defined in s.108 of the Act as:

- (1) For the purposes of sections 103(1)(d) and 123(1)(d) an employee is **sexually harassed in that employee's employment** if that employee's employer or a representative of that employer—
- (a) directly or indirectly makes a request of that employee for sexual intercourse, sexual contact, or other form of sexual activity that contains—
- (i) an implied or overt promise of preferential treatment in that employee's employment; or
  - (ii) an implied or overt threat of detrimental treatment in that employee's employment; or
  - (iii) an implied or overt threat about the present or future employment status of that employee; or
- (b) by—
- (i) the use of language (whether written or spoken) of a sexual nature; or
  - (ii) the use of visual material of a sexual nature; or
  - (iii) physical behaviour of a sexual nature,—

directly or indirectly subjects the employee to behaviour that is unwelcome or offensive to that employee (whether or not that is conveyed to the employer or representative) and that, either by its nature or through repetition, has a detrimental effect on that employee's employment, job performance, or job satisfaction.

[87] Pursuant to s.108(1)(a) of the Act sexual harassment primarily occurs where there has been a direct or an indirect request by the employee's employer or a representative of the employer for: "sexual intercourse, sexual contact, or other sexual activity" that contains an implied or overt promise of preferential or detrimental treatment in regard to the employee's employment or future employment status.

[88] Sexual harassment may also occur pursuant to s. 108(b) where the employee's employer or a representative of the employer has used language of: "a sexual nature", or used: "visual material of a sexual nature" or: subjected the employee to: "physical behaviour of a sexual nature".

[89] I find there is no evidence to support that there was a request pursuant to s.108(1)(a) made to Ms Shen, nor was there conduct of the type set out in s.108(1)(b) of the Act.

[90] Ms Shen's evidence was that Mr Shen made jokes of a sexual nature in the workplace which she found offensive but there is no evidence that Mr Zengli Shen made such comments directed at or to her. Rather the comments were made within the general workplace environment and were in the nature of jokes.

[91] In accordance with s.117(3) of the Act, once an employee has made a complaint the employer: “must inquire into the facts”. If the employer then is satisfied that the behaviour took place, s.117(4) states that the employer: “must take whatever steps are practicable to prevent any repetition of ... such behaviour

[92] There is no evidence that during her employment at ONHL Ms Shen complained to Mr Shen, as Managing Director, that he was sexually harassing her, and Ms Jiang’s evidence was that Ms Shen had made no such complaint to her as her manager. Therefore I find that no complaint was made to ONHL until it was raised in the Statement of Problem.

[93] As a consequence of there having been no complaint made to it during Ms Shen’s employment, I find that ONHL did not fail to enquire into the facts or to take steps to prevent a repetition.

[94] I determine that Ms Shen was not unjustifiably disadvantaged by ONHL as a result of its handling of her claim of sexual harassment since none had been made to it.

[95] **Was Ms Shen unjustifiably disadvantaged by ONHL as a result of bullying?**

[96] Ms Shen’s evidence is that Mr Zengli Shen kicked her shin on one occasion, and on occasion spoke harshly to her.

[97] There is no evidence that during her employment at ONHL Ms Shen raised a complaint of bullying.

[98] Moreover Ms Jiang, Ms Huang and Mr Zhou’s evidence was that they had no knowledge of the alleged kick, or of Mr Zengli Shen acting in a bullying manner towards Ms Shen.

[99] I determine that Ms Shen was not unjustifiably disadvantaged by ONHL as a result of its handling of her claim of sexual harassment since none had been made to it.

### **Remedies**

[100] Ms Shen is entitled to remedies in respect of her unjustifiable dismissal and determined disadvantage claims.

### *Lost Wages*

[101] Ms Shen was summarily dismissed on 28 August 2019 and started new employment on 20 September 2019.

[102] The record of hours submitted by Ms Shen show an average working week of 29 hours. However there was no agreement on hours and therefore I have taken 40 hours based upon the traditional working week in the absence of an agreement.

**[103] ONHL is ordered to pay Ms Shen the sum of \$2,124.00 gross in respect of lost remuneration pursuant to s 128 (2) of the Act.**

*Arrears of wages*

[104] Ms Jiang was not paid the applicable minimum wage rate of \$17.70 per hour for all the hours she worked at ONHL following the completion of the three week unpaid training period.

[105] In light of all the evidence received and taking into consideration the pattern of working, I accept the calculations made by ONHL.

**[106] ONHL is to pay Ms Shen the sum of \$7,222.65 gross as arrears of wages for the period 3 June 2019 – 28 August 2019.**

*Holiday Pay entitlement*

[107] Ms Shen is entitled to a payment for annual leave and for public holiday pay.

**[108] ONHL is ordered to pay Ms Shen the sum of \$840.30 in respect of annual leave entitlement pursuant to s. 23 of the Holidays Act 2003.**

**[109] ONHL is ordered to pay Ms Shen the sum of \$141.60 in respect of public holiday pay pursuant to s 50 of the Holidays Act 2003.**

*Compensation for Hurt and Humiliation under s 123 (1) (c) (i).*

[110] Ms Shen is also entitled to compensation for hurt and humiliation.

[111] Ms Shen said she had felt angry at the loss of her job at ONHL.

[112] Ms Shen had a short period of employment at ONHL, and during that time received valuable training with transferable skills as a masseur.

**[113] I order ONHL pay Ms Shen the sum of \$3,000.00 for humiliation, loss of dignity and injury to feelings, pursuant to s 123(1) (c) (i) of the Act.**

### *Contribution*

[114] I am required under s. 124 of the Act to consider the issue of any contribution that may influence the remedies awarded.

[115] Towards the latter part of her employment the evidence was that Ms Shen developed difficulties in her relationships with the other masseurs and to have become resentful of Ms Linjuan Huang. This was also reflected in the previously warm relationship she appeared to have had with Mr Zengli Shen.

[116] This may have contributed to the decision that led to her summary dismissal by Mr Zengli Shen, however I cannot conclude, in the absence of any evidence from the deceased Mr Zengli Shen that it contributed to Ms Shen's dismissal.

### *Unjustifiable disadvantage*

[117] I make no separate order for compensation for the unjustifiable disadvantage claims in respect of the non-provision of a written employment agreement, failure to pay the minimum wage rate or holiday pay entitlement. These have been addressed and rectified above.

### *Penalties*

[118] Ms Shen is claiming penalties in respect of the failure by ONHL to provide her with Ms Shen was a written employment agreement, to pay wages at the relevant minimum wage rate, and failure to pay holiday pay.

[119] Having considered the principles which should govern the imposition of a penalty<sup>5</sup>, I take into account in setting the level of penalties that the failures arose from a mistaken but genuine belief by ONHL that Ms Shen was a contractor rather than a deliberate intention to flout the statutory requirements.

### *Failure to provide a written employment agreement pursuant to s 65 of the Act*

**[120] I order that ONHL is to pay a penalty of \$150.00 to the Authority to be paid to the Crown Trust Account. Payment is to be made within 14 days of the date of this Determination.**

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<sup>5</sup> *Borsboom (Labour Inspector) v Preet PVT Ltd and Warrington Discount Tobacco Ltd* [2016] NZEmpC 143

*Failure to pay wages at the minimum wage rate pursuant to s10 of the Minimum Wages Act 1983*

**[121] I order that ONHL is to pay a penalty of \$150.00 to the MBIE Trust Account. Payment is to be made within 14 days of the date of this Determination.**

*Failure to pay holiday pay pursuant to s 75 of the Holidays Act 2003*

**[122] I order that ONHL is to pay a penalty of \$150.00 to the MBIE Trust Account. Payment is to be made within 14 days of the date of this Determination.**

### **Costs**

[123] Ms Shen represented herself during the investigation Meeting but I understand that she may have incurred legal costs in respect of her application to the Authority, and may therefore be able some costs in respect of this matter.

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

[125] If they are not able to do so and an Authority determination on costs is needed the Applicant may lodge, and then should serve, a memorandum on costs within 14 days of the date of issue of the written determination in this matter. From the date of service of that memorandum the Respondent would then have 14 days to lodge any reply memorandum. Costs will not be considered outside this timetable unless prior leave to do so is sought and granted.

[126] All submissions must include a breakdown of how and when the costs were incurred and be accompanied by supporting evidence.

**Eleanor Robinson**  
**Member of the Employment Relations Authority**