

**NOTE: This determination  
contains an order at paragraph  
[1] prohibiting publication of  
certain information**

**IN THE EMPLOYMENT RELATIONS AUTHORITY  
CHRISTCHURCH**

**I TE RATONGA AHUMANA TAIMAHI  
ŌTAUTAHI ROHE**

[2026] NZERA 168  
3305781

BETWEEN	LIYE ZHU Applicant
AND	THE DILIGENT COMPANY LIMITED First Respondent
AND	YI SHI Second Respondent
AND	ZHONGZHU PENG Third Respondent

Member of Authority:	Rachel Larmer
Representatives:	Shawn Law, advocate for the Applicant Marty Braithwaite, advocate for the Respondents
Investigation Meeting:	8 and 9 September 2025 in Christchurch
Submissions and Other Information Received:	12, 15 and 24 September 2025, 18 December 2025 and 17 February 2026 from the Applicant 12, 24 September and 8 December 2025, 5 and 12 January 2026 from the Respondents
Date of Determination:	20 March 2026

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**DETERMINATION OF THE AUTHORITY**

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**Non-publication order**

[1] The Authority has issued a non-publication order preventing publication of the applicant's medical information, subject to the condition that it does not apply to the

employment institutions or to the applicant, who can choose what personal information she wants to make public.

## **Employment Relationship Problem**

### *The parties*

[2] The applicant Ms Liye (Lily) Zhu was employed by the first respondent, The Diligent Company Limited (Diligent), as a Sales Assistant from 26 August 2023 until 15 March 2024. At the material time, Diligent was trading as The Vaping Warehouse.

[3] The second respondent, Yi (Jacqui) Shi, was Diligent's sole director and she held 52 per cent of its shares. The third respondent, Zhongzhu (Eason) Peng, has never been a director of Diligent, but at the material time he held a 48 per cent shareholding in Diligent. As an owner of other vape stores located outside Christchurch, Mr Peng provided advice and support to Ms Shi to help her set up and run the Christchurch vape stores.

### *The Vape stores*

[4] The Vaping Warehouse was a newly created business in 2023. When Diligent employed Ms Zhu she was employed to work in the Ferry Road store, which closed at the end of March 2024, after Ms Zhu resigned.

[5] In December 2024 Diligent opening a second vaping store in Papanui Road, Christchurch. Ms Zhu helped set up the Papanui store a couple of days before it opened on 22 December 2023. She also worked at the Papanui store for approximately 12 days over the period 23 December 2023 to 10 January 2024 after it had opened. Apart from that time, Ms Zhu worked at the Ferry Road store.

### *Ms Zhu's claims*

[6] Ms Zhu resigned on 1 March 2024, on two weeks' contractual notice as required by her individual employment agreement. Her last day of work was 15 March 2024.

[7] Ms Zhu claimed that Diligent breached employment standards, breached her employment agreement and its good faith obligations to her, failed to address her sexual harassment complaint, discriminated against her; subjected her to adverse action for a prohibited health and safety reason, unjustifiably disadvantaged her, and constructively dismissed her.

[8] Ms Zhu claimed also that Ms Shi and Mr Peng were persons who were involved in breaches of employment standards by Diligent. Ms Zhu sought leave to recover from them personally any wage arrears or other money that Diligent defaulted paying her.

#### *The respondents' position*

[9] The respondents denied all of Ms Zhu's claims. They said Ms Zhu had not been dismissed but had resigned for personal reasons. They also said no employment standards had been breached, so there was no basis for claims for the claims that had been made against Ms Shi and Mr Peng personally.

[10] The respondents said Ms Zhu had failed to raise any personal grievance claims, except her personal grievance claim alleging sexual harassment, within the 90-day time-limit required by s 114(1) of the Employment Relations Act 2000 (the Act). The respondents did not consent to Ms Zhu raising any personal grievance claims out of time. They disputed the Authority's jurisdiction to hear any personal grievance claims other than Ms Zhu's sexual harassment personal grievance claim which they acknowledged had been raised within time.

#### **The Authority's investigation**

[11] The Authority held an in-person investigation meeting (IM) for two days in Christchurch, during which it was assisted by a Mandarin interpreter who provided full interpretation of the IM.

[12] Ms Zhu was given permission to attend the IM via AVL, because she now resides in Australia and could not afford to travel back to New Zealand for the IM. Ms Zhu witness summonsed a former colleague Ms Zeng (Rill) He who had worked with Ms Zhu for some of the time she was employed by Diligent. Ms He appeared in-person at the IM and answered questions from the Authority and the parties' representatives.

[13] Ms Shu, Mr Peng and Ms Jia (Jennifer) Yuan Qu gave evidence for the respondents. Ms Qu's partner is Mr Peng and together they are experienced vape store owners of vape stores outside of Christchurch. Mr Peng and Ms Qu were friends with Ms Shi and they acted as advisors to help her set up Diligent's two vape stores in Christchurch. Neither Mr Peng nor Ms Qu were employed by Diligent.

[14] The parties lodged witness statements prior to the IM along with an agreed bundle of relevant documents. Both parties also lodged additional documents during and after the IM. The parties lodged written submissions after the IM.

[15] The delay that has occurred in the parties lodging their submission arose because Ms Zhu repeatedly breached the agreed timetable and subsequent extended timetable directions for the lodging of her submissions. After numerous extensions and continued timetable breaches the respondent was asked to lodge its submissions first. Ms Zhu then responded to those with her submissions.

[16] As permitted by s 174E of the Act this determination has stated findings of fact and law, expressed conclusions on issues necessary to dispose of the matter and specified orders made. It has not recorded all evidence and submissions received.

### **The issues to be determined**

[17] The parties agreed prior to the IM that the issues requiring investigation and determination were:

- (a) Did Diligent breach Ms Zhu's employment agreement?
- (b) Did Diligent breach its good faith obligations to Ms Zhu?
- (c) What date(s) did Ms Zhu raise her personal grievance claims with Diligent?
- (d) What personal grievance claims does the Authority have jurisdiction over?
- (e) If the Authority has jurisdiction over Ms Zhu's personal grievance claims, then did she have personal grievances for:
  - (i) Unjustified disadvantage?
  - (ii) Adverse conduct by Diligent towards her for a prohibited health and safety reason?
  - (iii) Discrimination?
  - (iv) Sexual harassment?
  - (v) Constructive dismissal?
- (f) What, if any, remedies should be awarded for any successful personal grievance claims Ms Zhu has?

- (g) Should any remedies that may be awarded to Ms Zhu be reduced on the grounds of contribution, under s 124 of the Act?
- (h) Has there been a breach of employment standards, as defined by s 5 of the Act?
- (i) If so, were the second and/or third respondents ‘a person involved in the breach of employment standards’, in accordance with the requirements of s 142W of the Act?
- (j) If so, should leave be granted to Ms Zhu under s 142Y of the Act to personally recover from the second and/or third respondents any wage arrears or other money Diligent defaulted on paying her?
- (k) What costs and disbursements should be awarded?

**Did Diligent breach Ms Zhu’s employment agreement?**

*The alleged breaches of the employment agreement*

[18] Ms Zhu made breaches of contract claims based on Diligent allegedly breaching her employment agreement by:

- (a) Failing to notify her of shift changes a week in advance.
- (b) Requiring her to clean the new Papanui store before it opened.
- (c) Failing to provide her with a safe workplace.

*Did Diligent fail to notify Ms Zhu of shift changes a week in advance?*

[19] Ms Zhu’s employment agreement provided that she would be given one week’s notification of shift changes. The rosters provided to the Authority showed Ms Zhu had a regular work pattern. Ms Zhu’s work hours were mostly fixed so she knew when she would be working even without being given a roster.

[20] Ms Zhu’s start and finish times occasionally changed due to seasonal changes to the shop opening/closing hours or due to the need to cover other staff absences. Roster changes would be sent by WeChat message. It was accepted this did not always occur a week in advance, but sometimes a late roster notification was simply confirming the roster pattern Ms Zhu had already been working.

[21] Ms Zhu's evidence that she was "almost always" notified of her shifts the night before or that she "was never informed of shifts in a timely or proper manner" was not accepted, as it was undermined by the available documentary evidence.

[22] The evidence presented to the Authority established that late shift notification was not a problem for Ms Zhu during the employment relationship. Ms Zhu knew when she was required to work and did not raise any issues about late roster notification while she was employed. If Ms Zhu had ever felt unsure of her days or hours of work she could have asked Ms Shi in the work WeChat group for those details. However, Ms Zhu never did so.

[23] To the extent there were late roster notifications (less than one week's notice of changes was provided) it was a minor technical breach of the employment agreement did not cause Ms Zhu any actual harm. The roster changes were made with the agreement of employees, so if a roster that had been provided to Ms Zhu late she could have declined to change her days or hours of work from what she had already been working. However, that did not occur.

[24] No penalty was claimed for the alleged breaches of Ms Zhu's employment agreement, as she was pursuing contractual damages of more than \$182,000.00 for the alleged breach of contract claim. The minor nature of any roster notification breaches that occurred would not have warranted a penalty being imposed, had one been claimed. Ms Zhu did not make any reference to roster notification concerns in her resignation letter. The roster notification breach was not serious enough to fundamentally undermine the employment relationship so it did not support Ms Zhu's constructive dismissal grievance claim.

*Was Ms Zhu required to clean the new Papanui store before it opened?*

[25] The evidence contradicted Ms Zhu's allegation that she had been required to clean the Papanui store before it opened.

[26] Ms Zhu volunteered help get the new Papanui store ready for opening. She was very enthusiastic about doing this and was permitted to work at the Papanui store for two or three days before it opened. Ms Zhu took great pride in the work she did to get the Papanui store ready for opening. She described the new store as "her baby" and commented more than once "it was like looking after her children."

[27] Ms Zhu suggested it was a breach of her employment agreement for Diligent to have allowed her to do any work at the Papanui store. That was not accepted. Ms Zhu's employment agreement recorded her work location as Ferry Road, as that was the only store that was open when she was employed. This work location did not prevent Ms Zhu from working at the Papanui store, particularly when she had asked to do so.

[28] The fact Ms Zhu was allowed to work in the Papanui store, because she had said she wanted to do so, was not a breach of her employment agreement. The evidence established that Ms Zhu had identified what work had to be done to get the Papanui store ready for opening. She also selected what work activities she did, as she was self-managed. Ms Zhu was not instructed to do work she did not want to do.

[29] Ms Zhu did not tell the respondents she had changed her mind about working at the Papanui store. Nor did she ask to return to work at the Ferry Road store she usually worked at. Ms Zhu helped get the Papanui store ready to open and then worked in the new store for 12 days, before she returned to work exclusively in the Ferry Road store.

[30] Ms Zhu said she should have been provided with Personal Protection Equipment (PPE) to clean the Papanui store before it opened and that failure to do so had caused her harm. However, she did not request PPE or raise that as an issue while she was employed.

[31] Ms Zhu's evidence that her cleaning activities during the two or three days she was at the Papanui store before it opened had caused her harm because she was not given PPE was not supported by the evidence. Ms Shi was in and out of the Papanui store before it opened and she did the same cleaning activities Ms Zhu reported doing. PPE was not required or necessary.

[32] The cleaning Ms Zhu referred to doing was the usual wiping of cabinets and sweeping of the floor to ensure the store and its fixtures were clean and tidy before opening. There was nothing inherently dangerous or potentially hazardous or harmful about the light cleaning duties Ms Zhu did. This had simply involved Ms Zhu using normal cleaning items and products that Ms Shi used in her own home.

[33] Ms Zhu's employment agreement expressly recorded her right to refuse to do unsafe work. It also required her to report in writing as soon as possible any conditions or practice that may have become unsafe, any hazards, accidents or injuries to Diligent. That did not occur.

[34] Ms Zhu offered to help with the cleaning tasks she did at Papanui so it was open to her to have elected to return to work at Ferry Road if she was unhappy with the cleaning that had to be done at the Papanui store before it opened. At no stage did she raise a problem about being at the Papanui store, the nature of the work she did there, or about the cleaning items and products she used. Even though her employment agreement expressly required her to do so, Ms Zhu did not report she had suffered harm while she was employed.

[35] Although Ms Zhu's personal grievance letter dated 14 April 2024 stated s 36 of the HSWA had been breached because she was not given PPE to clean the Papanui store, when Diligent asked her advocate on 12 and 26 June 2024 for information about that it was not provided.

[36] Ms Zhu's claim she had ended up with serious lung and respiratory disorders from cleaning the Papanui store before it opened was unsupported by the available evidence, so did not succeed.

*Did Diligent fail to provide Ms Zhu with a safe workplace?*

[37] Ms Zhu claimed Diligent had breached her employment agreement because it had failed to provide a safe workplace for the following reasons:

- (a) There was no first aid kit at the Ferry Road store.
- (b) She was not permitted to take toilet, meal or rest breaks.
- (c) She was instructed to use "sexual marketing" for the Papanui store.
- (d) There was no investigation to prevent employees from being harassed due to the "sexual marketing" that was used for the Papanui store.
- (e) Ms Shi mocked her by laughing on 22 December 2023 when Ms Zhu said she found it hard speaking to potential customers on the footpath outside the newly opened Papanui store.
- (f) She told Ms Shi during the meeting they had on 16 January 2024 that Mr Peng was "being mean to her".

[38] Ms Zhu said the above matters had caused her "physical harm and psychological distress brought on from these horrific and toxic work experiences" and she sought in

excess of \$182,000.00 to compensate her for these alleged breaches of her employment agreement.

*The Authority's factual findings on the evidence Ms Zhu relied on for her 'unsafe workplace' breach of contract claim*

[39] The Authority makes the following factual findings regarding each of the above allegations Ms Zhu relied on to establish her claim that Diligent breached her employment agreement because it failed to provide her with a safe workplace:

- (a) *No first aid kit* - Although there was no first aid kit at the Ferry Road store, there were likely band aids available. Ms Zhu's evidence that there were no band aids was not accepted over Ms Shi's evidence there were band aids available, because Ms Zhu had not raised that as an issue while employed. Ms Shi had promptly provided Ms Zhu with a microwave to use when Ms Zhu complained that she could not heat her lunch up. Ms Zhu would therefore likely have complained about the absence of band aids (because she had complained about not being able to heat her lunch), so her failure to do so suggested there were band aids available at the Ferry Road store. The absence of a first aid kit did not make the workplace unsafe.
- (b) *Not permitted to take breaks* - Ms Zhu's evidence that she was not permitted to take toilet, meal or rest breaks was not accepted. Ms Zhu's evidence was not credible as it was contradicted by available documents and by other witnesses. Ms Zhu gave evidence of being distressed at customers and couriers knocking on the store door when she had closed it to go to the toilet. That established she did take toilet breaks. Ms Shi told staff they could close the store to take breaks and they were given signage to that effect. Ms Zhu acknowledged she was aware her employment agreement recorded her right to take rest and meal breaks. She also accepted she had been given an 'away' sign with a clock on it to put up when she closed the store during working hours while she was taking a break. Ms He and Ms Shi had both at separate times reminded Ms Zhu to use the "away" sign on the store door if she was unavailable during the store's opening hours. Ms Zhu's boyfriend often had lunch with her and Ms Zhu admitted to leaving part of her lunch in the store.

This demonstrated she had meal breaks, as did the provision of a microwave in response to Ms Zhu's complaint that she could not heat her lunch at work. Sole charge staff self-managed their breaks. The Ferry Road store was quiet with minimal customers and sales, so Ms Zhu had many opportunities to take meal and rest breaks and most likely did so. On some days there was only one customer or sale all day. Ms Zhu did not raise any issue about not being permitted to take breaks while she was employed. To the extent Ms Zhu did not take her contractual and statutory rest and meal breaks, then that was likely due to her choice and not something Diligent or Ms Shi was made aware of.

- (c) *Sexual marketing* - Ms Zhu was never instructed to use "sexual marketing" for the Papanui store or anywhere else for that matter, see paragraphs [130] to [137] of this determination. Ms Zhu admitted during the IM that was a term she had made up herself after her employment had ended. This is discussed in more detail later in this determination as it forms the basis for her sexual harassment claim. What Ms Zhu was actually referring to was when she used the term "sexual marketing" was the request that staff stand in the shop door or on the footpath outside the newly opened Papanui store to invite passersby into the store to check out its competitive pricing. All staff and Ms Shi promoted the new Papanui store in this way for a couple of weeks after it had opened. This type of promotion of the new store was not a breach of Diligent's health and safety obligations or MS Zhu's employment agreement.
- (d) *No harassment investigation* – No harassment complaints had been made by Ms Zhu or any other staff, so there was nothing for Diligent to have investigated. There was no "sexual marketing" being done by anyone. Ms Zhu's comment made in passing during the 16 January 2024 meeting that a potential customer had asked for her phone number (which she had not provided) was insufficient to have put Diligent on notice there was a potential issue that had to be investigated. No harassment or sexual harassment concerns were raised by Ms Zhu while she was employed. Although Ms Zhu's boyfriend said it was "inappropriate" for staff at the Papanui store to invite potential customers to check out the new store's competitive pricing, by then Ms

Zhu had returned to the Ferry Road store where that type of promotion did not occur. Talking to passersby to alert them to the new store had only occurred for the first two weeks the Papanui store was open, so it had ended by 10 January 2024. No other staff had complained about promoting the new store in this way. Nothing had been put to Diligent that it needed to investigate. Diligent's failure to conduct an investigation into harassment in the absence of a harassment complaint being made was not a breach of its health and safety obligations or of Ms Zhu's employment agreement.

(e) *Mocked by Ms Shi* - Ms Shi's evidence that she did not mock or laugh at Ms Zhu on 22 December 2023 was accepted because Ms Zhu was proven to be an unreliable narrator, as she presented her subjected thoughts and feelings as if they were objective facts. Ms Zhu and Ms Shi had a good relationship, so for Ms Shi to have done what was alleged would have been out of character. Ms Zhu also never raised that as a concern at the meeting on 16 January 2024, during which she criticised Mr Peng's conduct towards her. Had it been an issue the Authority expected she would have raised it during the 16 January 2024 meeting. The Authority accepted Ms Shi's evidence that she was not aware Ms Zhu had any issue informing passersby that the new Papanui store had opened until Ms Zhu's boyfriend said that activity by staff was "inappropriate" during the 16 January 2024 meeting. By the Ms Zhu was no longer doing that type of promotion. This allegation by Ms Zhu did not support her claim that Diligent had breached its health and safety obligations.

(f) *Mr Peng "being mean"* - Ms Zhu told Ms Shi during the meeting held on 16 January 2024 that Mr Peng was "being mean to her", essentially because he had identified areas in which Ms Zhu's performance could be improved. Ms Shi informally raised this with Ms Zhu and there was an evidential basis for doing so. For example, Ms Zhu was asked to do the work she had been assigned instead of passing it on to others to do; to tell the person who assigned her work if she was unable to do the task in the timeframe she had provided or been given; not to play on her phone in the store if she had outstanding tasks to do; to put the receipts in the safe overnight with the cash; not mix different coins together; and

to take the initiative in ensuring she finished tasks she had been asked to do. Mr Peng was not “being mean” to Ms Zhu because he suggested Ms Shi speak to Ms Zhu about these matters. Nevertheless, Ms Shi raised Ms Zhu’s “being mean” comment with Mr Peng which he denied. After that Ms Peng did not have much to do with Ms Zhu to avoid miscommunications arising. Ms Shi’s informal raising of performance issues Mr Peng had identified with Ms Zhu was not a breach of Diligent’s health and safety obligations to her.

[40] The Authority was not satisfied that any of the examples relied on by Ms Zhu as having breached her employment agreement had caused her physical and/or psychological harm.

[41] The evidence did not support Ms Zhu’s claim she had been subjected to a “toxic workplace”. There was no credible evidence to support Ms Zhu’s claim that Diligent had breached her employment agreement because it had failed to meet its health and safety obligations to her.

[42] Accordingly, Ms Zhu’s breach of contract claims based on alleged breaches by Diligent of her employment agreement did not succeed.

### **Did Diligent breach its good faith obligations to Ms Zhu?**

#### *Alleged breaches of good faith*

[43] Ms Zhu alleged Diligent had breached good faith by:

- (a) Not responding to her sick leave request on 11 January 2024.
- (b) Holding a disciplinary meeting with her on 16 January 2024.
- (c) Blaming her for a potential new employee not being employed on 11 January 2024.
- (d) Encouraging other staff to “break relationships” with her, by rostering them to cover her sick leave on 12 January 2024.

#### *Factual findings on Ms Zhu’s breach of good faith allegations*

[44] *Not replying to sick leave notification* – The evidence disproved this allegation, see paragraph [102] of this determination.

[45] *16 January 2024 meeting* – The evidence disproved this allegation. There was no disciplinary allegations or disciplinary meeting. The informal meeting held on 16 January 2024 to clarify the sick leave reporting procedure and to identify areas in which Ms Zhu’s performance could be improved was not a breach of good faith. Such an approach complied with Diligent’s good faith obligations.

[46] *Non-employment of potential employee* – The facts did not support this allegation. Ms Zhu was not blamed for this as there were a number of reasons why Diligent decided not to employ a new employee.

[47] *Encouraging staff to break relationships with Ms Zhu* – The facts did not support this allegation, which was based on Diligent rostering Ms He to cover Ms Zhu’s sick leave absence on 12 January 2024. Although Ms He expressed her unhappiness about that to Ms Zhu, that was not a breach of good faith by Diligent.

[48] *Outcome* - Ms Zhu’s claim that Diligent had breached its good faith obligations to her did not succeed.

**What date(s) did Ms Zhu raise her various personal grievance claims with Diligent?**

*Relevant law*

[49] Section 114(1) of the Act requires an employee to raise a personal grievance claim with their employer within the applicable notification period.

[50] For sexual harassment claims s 114(7)(a) of the Act requires these be raised with the employer within 12 months from the date the alleged conduct occurred or came to the notice of the employee, whichever was the latest. For claims other than sexual harassment, the applicable notification period in s 114(7)(b) of the Act is 90 days from the date the action occurred or came to the employee’s notice, whichever is later.

[51] The respondents did not consent to the raising of any personal grievances outside the applicable notification period. Ms Zhu has not sought leave to raise personal grievances outside the applicable time-limit periods.

*What did Ms Zhu do to raise her grievance claims?*

[52] Ms Zhu's claim that she raised personal grievance claims verbally, in WeChat messages and during the meeting she had with Ms Shi on 16 January 2024 was not accepted by the Authority. Ms Zhu's position that any communication she had, including her WeChat messages with her colleagues (not management) or boyfriend amounted to the raising of a personal grievance on the topic she discussed was not accepted.

[53] Complaining to others (such as Ms Zhu did with Ms He) in WeChat conversations or raising generalised matters (as she did with Ms Shi) or concerns with others (as she did with her boyfriend) did not constitute the raising of a personal grievance with Diligent, as such communications lacked the required detail or specificity to put Diligent on notice that Ms Zhu had a problem it needed to address.

[54] None of the evidence Ms Zhu gave to the Authority established that any communications by her while employed (either written or verbal) were capable either by themselves or viewed in the totality as part of a chain of communications, of having put Diligent on notice that she had an employment relationship problem she wanted it to address.

[55] Based on Ms Zhu's own evidence, and on a close review of the documents she relied on, a reasonable employer would likely not have viewed any of her communications outside of those coming from her advocate as having raised personal grievance claims. In particular, Ms Zhu did not raise any personal grievance claims at the meeting she had with Ms Shi on 16 January 2024, as was evident from reviewing the transcript of the secret recording Ms Zhu had made of that meeting.

[56] Ms Zhu's advocate's letter dated 14 April 2024 did not refer to Ms Zhu having previously raised any personal grievance claims with Diligent. It likely would have referred to the prior raising of personal grievance claims if that had occurred.

*When did Diligent receive the 14 April 2024 letter?*

[57] Ms Zhu's advocate sent Diligent a letter dated 14 April 2024 to its registered address for service raising personal grievance claims. Diligent said this was not received by it until 29 May 2024.

[58] The Authority considered the date of 14 April 2024 was likely inaccurate. The evidence given by Ms Shi and Ms Qu, that the letter dated 14 April 2024 from Ms Zhu's advocate was not received by Diligent until 29 May 2024, was accepted on the basis it was more likely than not to be correct.

[59] At the material time, Ms Qu was the person responsible for checking Diligent's emails and for correspondence that had been sent to its registered address for service because Ms Shi was in China. Ms Qu did that daily, so she forwarded any matters that needed to be actioned to Ms Shi each day.

[60] That process applied to Ms Zhu's advocate's letter. As soon as the 14 April 2024 letter was received on 29 May 2026 it was brought to Ms Shi's attention and was promptly actioned. It was unlikely Ms Qu would not have immediately passed the 14 April 2024 letter to Ms Shi had it been received shortly after that date.

[61] Accordingly, the earliest date on which Ms Zhu's personal grievance claims were raised with Diligent was 29 May 2024, when her advocate's letter dated 14 April 2024 was received by Ms Qu at Diligent's registered address for service. Ms Qu immediately sent a copy of it to Ms Shi who was at that time in China.

*What did the 14 April 2024 personal grievance letter say?*

[62] The 14 April 20254 letter stated that the following issues "in their entirety, they constitute personal grievances" arising from Diligent's conduct each of which had occurred "on multiple occasions and had caused Ms Zhu "severe physical and mental harm":

- (a) Failure to comply with workplace health and safety regulations.
- (b) Workplace bullying or discrimination.
- (c) Breach of contract.
- (d) Breach of good faith.

[63] The 14 April 2024 letter also alleged a breach of the Health and Safety at Work Act 2015 (HSWA) had occurred. The Authority notes that this alleged breach of the HSWA was outside the Authority's jurisdiction, as WorkSafe New Zealand deals with those claims.

*Personal grievance details recorded in Schedule 1 of the 14 April 24 letter*

(i) Breach of contract and of health and safety obligations claims

[64] Schedule 1 of the 14 April 2024 letter set out breach of contract and unsafe workplace claims, which consisted of:

- (a) No first aid kit in the store.
- (b) No time off to go to the toilet or have breaks.
- (c) Informing staff of their work hours the day before or day of work.
- (d) Being required to clean the Papanui store before it opened for the first time without being provided with PPE.

(ii) Unjustified disadvantage grievance claims

[65] Schedule 1 of the 14 April 2024 letter identified the following actions by Diligent as having unjustifiably disadvantaged Ms Zhu:

- (a) Bullying.
- (b) Failure to give toilet or other breaks.
- (c) Deliberately not responding to notification from her on 11 January 2024 that she was sick.

(iii) Other personal grievance claims Ms Zhu raised

[66] Schedule 1 of the 14 April 2024 letter also recorded that Ms Zhu considered she had other personal grievances for:

- (a) Being subjected by Diligent to adverse conduct for a prohibited health and safety reason, as per s 103(1)(j) of the Act, because she was not permitted to have breaks.
- (b) Discrimination as per s 103(1)(c) of the Act due to:
  - (i) A failure by Diligent to give her training and equipment.
  - (ii) Mr Peng delaying or not responding to Ms Zhu's work content (such as notification of expired products).
- (c) Sexual harassment as per s 103(1)(d) of the Act consisting of her "being forced to use sexual marketing on the street" which caused "multiple

sexual harassments (sic) from customers” which Diligent failed to address.

(vi) Constructive dismissal personal grievance claim

[67] Schedule 1 of the 14 April 2024 letter recorded Ms Zhu’s view that she had been constructively dismissed when Ms Shi told Ms Zhu on 19 February 2024 that “management was proposing to close the [Ferry Rd] store”.

[68] Diligent asked Ms Zhu for details of these claims in letters dated 12, 19 and 26 June 2024, but she declined to provide the requested information detailing her claims.

*The Authority’s findings on the disputed jurisdiction issues*

(i) Date Ms Zhu raised her personal grievance claims with Diligent

[69] The date Ms Zhu first raised her personal grievance claims with Diligent was the date the 14 April 2024 personal grievance letter was received by Diligent at its registered address for service. That occurred on 29 May 2024.

(ii) Period covered by the personal grievances that were raised on 29 May 2024

[70] Because the 14 April 2024 letter was not received by Diligent until 29 May 2024, it covered personal grievances that arose in the 90-days’ period preceding that. This covered the period from 29 February 2024 (a leap year) until Ms Zhu’s employment ended on 15 March 2024. The exception to that 90-days’ period was:

- (a) Conduct that formed part of an ongoing course of conduct that gave rise to any of her disadvantage grievances which she alleged were still continuing as at 29 February 2024, such as the:
  - (i) Workplace bullying personal grievance claims.
  - (ii) Unsafe work environment personal grievance claims.
- (b) The personal grievance claim of adverse conduct for a prohibited health and safety reason, which was based on a lack of breaks that she alleged was a continuing problem.
- (c) The claim that Ms Zhu had been sexually harassed in her employment, because the time-limit in s 114(7)(a) of the Act for raising a sexual harassment personal grievance claim was 12 months from the date it occurred or came to her attention, whichever was the later.

(iii) Personal grievance claims the Authority has jurisdiction over

[71] Ms Zhu raised the following personal grievance claims with Diligent within the required time-limit, so the Authority has jurisdiction over these personal grievance claims:

- (a) Disadvantage grievance arising from alleged breach of health and safety obligations by not providing breaks.
- (b) Adverse conduct grievance for a prohibited health and safety reason because she was not allowed to take breaks.
- (c) Disadvantage grievance arising from bullying allegations.
- (d) Discrimination grievance.
- (e) Sexual harassment grievance.

[72] The body of the letter dated 14 April 2024 did not refer to dismissal, constructive dismissal or to a personal grievance claim for unjustified dismissal. Schedule 1 attached to the letter dated 14 April 2024 only referred to an “indication” of constructive/unjustified dismissal.

[73] This “indication” of constructive dismissal consisted of an allegation that Ms Shi told Ms Zhu on 19 February 2024 that “management proposed closing the Ferry Road store.” Ms Zhu said she “was not informed of the way forward. Which (sic) is seen as an indication of constructive/unjustified dismissal.”

[74] When Diligent requested details of the constructive dismissal personal grievance claim, Ms Zhu declined to provide any.

[75] Ms Zhu’s employment did not end on 19 February 2024, nor was she given notice of termination of her employment that day.

[76] To the extent that Ms Zhu’s personal grievance letter raised a constructive dismissal claim regarding a dismissal that allegedly occurred on 19 February 2024, then that was out of time. This constructive dismissal claim was not raised until 29 May

2024 and 90-days prior to 29 May 2024 was 29 February 2024, due to it being a leap year.

[77] Ms Zhu provided a resignation letter dated 1 March 2024 which she emailed to Ms Shi at 8.57pm that day. Ms Zhu resigned on two weeks' notice, so her employment ended on 15 March 2024.

[78] The Authority therefore proceeded on the basis that Ms Zhu's constructive dismissal grievance related to her decision to resign and to the termination of her employment on 15 March 2024. On that basis, she did raise a constructive dismissal claim within the required 90-days' time-limit.

(iv) Personal grievances claims the Authority does not have jurisdiction over

[79] Schedule 1 in the letter dated 14 April 2024 claimed the following actions breached Diligent's good faith obligations to Ms Zhu, which she said had unjustifiably disadvantaged her in her employment:

- (a) Not responding to her sick leave request on 11 January 2024.
- (b) Holding a disciplinary meeting with her on 16 January 2024.
- (c) Blaming her for a potential new employee not being employed on 11 January 2024.
- (d) Encouraging other staff (meaning Ms He) to "break relationships" with Ms Zhu, by rostering Ms He to cover Ms Zhu's sick leave on 12 January 2024.

[80] All of these alleged breaches of good faith occurred before 29 February 2024, so they were out of time in terms of being able to be investigated by the Authority as an unjustified disadvantage personal grievance claim.

[81] However, a breach of good faith is also a standalone claim in itself that is not subject to the 90-days' time-limit in s 114(1) of the Act. Ms Zhu's alleged breaches of good faith have therefore been considered by the Authority as a separate breach of good faith claim, which was determined in paragraphs [44]-[48] of this determination.

[82] The only breach of contract claim that was supported by the evidence was Diligent's failure on occasion to provide one week's advance notice of the roster. However, that could not be considered as a standalone unjustified disadvantage

grievance claim because there was no evidence of that occurring over the period 29 February to 15 March 2024, which was within the 90-days' period covered by the personal grievances that were raised with Diligent on 29 May 2024. The Authority therefore does not have jurisdiction over the unjustified disadvantage claim that was based on alleged breaches of contract.

[83] The Authority also did not have jurisdiction over any new personal grievance claims Ms Zhu made for the first time in her statement of problem (SoP), amended statement of problem (ASoP), in her witness statements, when giving evidence during the IM or in her advocate's submissions. These new personal grievance claims were not raised within the 90-days' time-limit required by s 114(1) of the Act.

### **Did Diligent unjustifiably disadvantage Ms Zhu?**

#### *Applicable law*

[84] To establish that Diligent unjustifiably disadvantaged Ms Zhu in her employment she was required to establish on the balance of probabilities that her rights, benefits and/or obligations arising out of the employment relationship, as well as conditions which were understood and applied by the parties in practice or habitually, were affected to her disadvantage.

#### *Alleged disadvantage grievances*

[85] Ms Zhu claimed the following actions had unjustifiably disadvantaged her in her employment:

- (a) Failure to comply with workplace health and safety obligations.
- (b) Workplace bullying.
- (c) Failure to give her toilet, meal or rest breaks.

#### *Did Diligent fail to comply with workplace health and safety obligations?*

##### (i) Ms Zhu's health and safety allegations

[86] Ms Zhu claimed she was unjustifiably disadvantaged by Diligent's failure to comply with its health and safety obligations to provide a safe workplace because:

- (a) The Ferry Road store did not have a first aid kit.

- (b) She was not given time off to go to the toilet, or to take meal and rest breaks.
- (c) She was not given PPE to use when cleaning the Papanui store before it opened for the first time.
- (d) She fell over on 14 March 2024.

(ii) The Authority's factual findings on Ms Zhu's health and safety allegations

[87] *No first aid kit* – The provisions of band aids at the Ferry Road store was sufficient to meet Diligent's health and safety obligations. The lack of a first aid kit at the Ferry Road store was insufficient to establish Ms Zhu's unjustified disadvantage grievance claim, as she could have asked for one and it would have been supplied. There was no evidence of her needing anything that was in the first aid kit while she was employed, other than a band aid which was likely available to her.

[88] *No time off for breaks* – The evidence contradicted that allegation. Ms Zhu gave evidence of being upset that customers and couriers knocked on the store door when she had closed the store to use the toilet. Her evidence was that her boyfriend often had lunch with her. Ms Zhu self-managed her breaks and the store was quiet, sometimes having only one customer all day. Ms Zhu had also been reminded by Ms He and Ms Shi on different occasions to use the signage she had been given to close the store when she wanted to take breaks.

[89] *No PPE* – Normal household cleaning products were used to clean the Papanui store before it opened. PPE was not necessary or required.

[90] *Ms Zhu's fall* – Ms Zhu said she got a spinning sensation on 14 March 2024 and fell over. Diligent was not to blame for Ms Zhu's fall.

[91] Ms Zhu's unjustified disadvantage grievance claim based on alleged breaches by Diligent of its health and safety obligations did not succeed.

(iii) Other health and safety related allegations

[92] Ms Zhu's employment agreement stated that employees can exercise their right not to do unsafe work. It also required Ms Zhu to "report any conditions or practice that may have become unsafe, and hazards, accidents or injuries ... in writing as soon as

possible.” Ms Zhu did not make any health and safety reports and she did not make any complaints or raise any health and safety concerns while she was employed.

[93] In her witness statements and during the IM, Ms Zhu raised other safety concerns about:

- (a) The staff/owner in the neighbouring vape store being “threatening”.
- (b) The area around the stores being unsafe due to the type of people in the area.
- (c) The sale of Nitrous Oxide (NO), known as laughing gas, made her anxious.

[94] Ms Zhu had not raised these raised these additional matters as health and safety concerns while she was employed and they were not raised in her personal grievance letter but she had discussed them with Ms Shi. Diligent appropriately addressed these matters during Ms Zhu’s employment in a way that was consistent with its health and safety obligations. In particular:

- (a) Ms Shi spoke to the staff and owner of the neighbouring store to de-escalate the tensions and positive friendly relations resulted from that. No threats had been made and although there was tension due to competing for customers, Ms Zhu was not at risk of actual harm from the neighbours.
- (b) The stores were set up with safety features designed to protect staff. Staff were also told to prioritise their personal safety and protection over products or money. Ms Zhu was told she could refuse people entry to the store, could ask customers to leave and could call the Police if she felt unsafe.
- (c) The sale of nitrous oxide (NO) was legally permitted while Ms Zhu was employed. It was commonly used by bakers, as an anaesthetic and for pain relief. Up until Medsafe’s advice in late 2024 (after Ms Zhu’s employment had ended) NO was commonly sold in dairies and vape stores. Ms Shi told Ms Zhu she needed to check with customers that they were purchasing NO for a legitimate reason and they had to sign a declaration that it was not for recreational use. The first time Ms Zhu

raised any concern about the sale of NO was on 24 August 2025 in her witness statement for these proceedings.

[95] Section 36 of the HSWA requires a Person Conducting a Business or Undertaking (PCBU) to ensure as far as reasonably practical the health and safety of workers at work or performing their duties. The evidence established the respondents met that obligation.

[96] Accordingly, Ms Zhu's claim that Diligent failed to provide her with a safe workplace did not succeed.

#### *Workplace bullying disadvantage grievance*

[97] Ms Zhu claimed the following actions amounted to workplace bullying, which she said had unjustifiably disadvantaged her in her employment:

- (a) She was not given training.
- (b) She was accused of "plagiarism" by Mr Peng.
- (c) Mr Peng blamed her for poor sales by the Papanui store during Christmas 2023.
- (d) She was "defamed" when Mr Peng told her on 9 January 2024 "I am so disappointed in you".
- (e) She was deliberately not given a response to her sick leave notification on 11 January 2024.
- (f) She was required to attend a disciplinary meeting on 16 January 2024.
- (g) "Faulty allegations" were made against her during the 16 January 2024 meeting.
- (h) She was blamed for a prospective employee not being employed.
- (i) Staff were encouraged to "break relationships" with Ms Zhu.

#### *The Authority's factual findings on these bullying allegations*

[98] *Lack of training allegation* - The evidence established Ms Zhu was trained in all aspects of her job. She had not raised any concern about a lack of training while employed. To the contrary, Ms Zhu's evidence was that she trained and supported other staff with problems such as the till and EFTPOS operation, including changes to add

payWave surcharges. The evidence did not support this allegation as an example of bullying.

[99] *Plagiarism allegation* – All staff, not just Ms Zhu, were required to familiarise themselves with the products and pricing in the stores. From time to time staff were asked about this, which was legitimate work related training, not an example of bullying. Around November 2023 staff completed a product knowledge exercise. This was an open book in-store ‘test’ about products and pricing. Mr Peng noted that Ms Zhu’s and Ms He’s answers were similar, so he asked Ms Zhi if they had worked together. Ms Zhu denied they had and Mr Peng accepted that response. Ms Zhu was never accused of “plagiarism” which was a word she used, not Mr Peng. His question to Ms Zhu was a legitimate work related query, it was not an example of bullying. This bullying allegation did not succeed.

[100] *Blamed for poor sales* - Mr Peng did not blame Ms Zhu for poor sales by the Papanui store during Christmas 2023. The transcript of the 16 January 2024 meeting made it clear the poorer than expected sales were not attributed to Ms Zhu. Ms Zhu appeared to have taken the fact that the new Papanui store (which she considered was “her baby”) had not generated a large number of sales as a personal slight on herself. However, no-one blamed Ms Zhu for low Christmas sales. There were many reasons for that, including that the store had only been open for two days before Christmas and the traffic in the area was lower than anticipated. There was no reproachment to Ms Zhu about a lack of sales. The evidence did not support this allegation as an example of bullying.

[101] *Being “defamed” by Mr Peng* - Ms Zhu’s claim she was defamed on 9 January 2024 in the Papanui store because Mr Peng allegedly said she was disappointed in her was recorded in the ASoP, but she did not provide any evidence in support of that allegation during the IM. Mr Peng’s denial of Ms Zhu’s allegation was preferred on the basis it was more likely than not to be correct. Mr Peng was only in the store for 10-15 minutes and while there he was accompanied by Ms Shi and Ms Qu, so they would have likely heard the comment had it been made. Ms Zhu did not refer to this alleged comment while she was employed or during the 16 January 2024 meeting she had with Ms Shi, during which Ms Zhu made other adverse comments about Mr Peng. The Authority therefore considered Ms Zhu would likely have referred to this comment had it been

made. This allegation was not established on the evidence, so it did not support her bullying allegation.

[102] *Not responding to sick leave request* – Ms Zhu’s claim that Ms Shi and Mr Peng had deliberately not responded to her request for sick leave on 11 January 2024 was demonstratively incorrect. Ms Shi and Mr Peng were in a meeting until 1pm, so they did not see Ms Zhu’s message until then. At 1.09pm Ms Shi explained to Ms Zhu in a text that she and Mr Peng had not seen her sick leave text until 1.00pm. Ms Shi promptly responded to Ms Zhu a few minutes later in a sympathetic manner, asking how she was feeling and telling her to have two days off work to get better. This allegation was contradicted by the evidence so it was not an example of bullying.

*Disciplinary meeting* – The 16 January 2024 meeting was not a disciplinary meeting. The purpose of this meeting was to discuss sick leave reporting procedures and to informally discuss ways Ms Zhu could improve her performance. No disciplinary action resulted from this informal discussion. Ms Zhu was accompanied by her boyfriend during this meeting, which she secretly recorded. Ms Zhu and her boyfriend were both given an opportunity to speak. Ms Zhu noted on the letter recording the outcome of the meeting that she disputed the matters that had been raised with her. Neither the fact that this meeting occurred, the way in which it was conducted, or the non-disciplinary outcome of it, amounted to bullying of Ms Zhu. These allegations therefore did not support her unjustified disadvantage grievance claim that she had been bullied during her employment.

[103] *“Faulty allegations” made on 16 January 2024* – The transcript of this meeting made it clear that legitimate work related concerns had been raised (not “faulty allegations”) and that Ms Zhu was given an opportunity to provide her views, which included denying her performance could be improved. Diligent and Ms Shi were entitled to raise these matters with Ms Zhu. Doing so did not amount to bullying her and this meeting was not conducted in a bullying manner. This allegation did not succeed as an example of bullying.

[104] *Non-employment of prospective employee* – Ms Zhu’s claim that she was blamed for a potential employee not being employed did not succeed. The potential employee had turned up to the Ferry Road store for a work trial on the day Ms Zhu was sick, so the store was closed and the trial did not occur. Ms Shi provided a number of

reasons for not employing this potential employee which had nothing to do with Ms Zhu. This claim did not succeed as an example of bullying.

[105] *Encouraging staff to “break relationships”* - Ms Zhu’s claim that Diligent encouraged staff to “break relationships” with her was based on Ms He being asked to work on 12 January 2024 when Ms Zhu was on sick leave. Ms He was unhappy about that because it meant she had to work an extra day without a break. Ms Zhu said that was an example of Diligent trying to ruin her relationships with other staff. That allegation was not accepted. It is normal for an employer to ask another employee to cover sick leave, so Diligent doing so did not amount to bullying of Ms Zhu.

*The Authority’s findings on the bullying disadvantage grievance claim*

[106] WorkSafe New Zealand defines workplace bullying as “repeated unreasonable behaviour directed at a worker or group of workers that can cause physical or psychological harm.”

[107] The evidence did not establish that Ms Zhu had been subjected to bullying conduct at work. Her allegations of bullying were not substantiated by the evidence, either as single instances or cumulatively. Accordingly, Ms Zhu’s unjustified disadvantage personal grievance claim for workplace bullying did not succeed.

*Failure to give toilet, meal or rest breaks*

[108] Ms Zhu’s claim that she was not permitted toilet, rest or meal breaks was not supported by the evidence, which contradicted her allegations about the lack of breaks. Ms Zhu’s claim that she was unjustifiably disadvantaged in her employment because she was not allowed to take breaks did not succeed.

**Was Ms Zhu subjected to adverse conduct for a prohibited health and safety reason?**

[109] Ms Zhu claimed the failure to provide her with breaks amounted to a personal grievance under s 103(1)(j) of the Act on the grounds Diligent had:

- (a) Subjected her to adverse conduct for a prohibited health and safety reason; or
- (b) Contravened s 92 of the HSWA which prohibits coercion or inducement.

[110] Ms Zhu did not provide evidence that any adverse conduct described in s 110A of the Act, which was necessary in order to establish this unjustified disadvantage grievance claim under s 103(1)(j) of the Act, existed. None of the qualifying requirements set out in s 89 of the HSWA applied to Ms Zhu's situation.

[111] The other available evidence did not support this personal grievance claim. Ms Zhu self-managed her breaks and had not complained to the respondents about a lack of breaks while she was employed. Both stores were quiet with minimal customers, so Ms Zhu had ample time to take toilet, meal and rest breaks at her own convenience. Accordingly, Ms Zhu's personal grievance claim under s 103(1)(j) of the Act did not succeed.

### **Was Ms Zhu discriminated against in her employment?**

[112] In Schedule 1 of the 14 April 2024 letter, Ms Zhu claimed she was discriminated against because:

- (a) She was not given training or equipment to do her job.
- (b) Mr Peng delayed responding or did not respond to her work content, such as her advice that products had expired.

[113] When the Authority questioned Ms Zhu about her discrimination claim during the IM she was unable to identify any prohibited ground of discrimination, as identified by s 105 of the Act, which was a pre-requisite to establishing discrimination had occurred. The facts required to support a discrimination grievance claim were also not established.

[114] Ms Zhu was given appropriate training and the equipment she needed to do her job. She did not complain about these issues while employed. There was no deliberate failure by Mr Peng to respond to Ms Zhu or deliberate delay by him in responding to her that was established from the evidence. Mr Peng was merely an ad hoc consultant to Diligent while he and his partner Ms Qu also ran their own vape stores that were located outside of Christchurch.

[115] Ms Zhu's personal grievance claim under s 103(1)(c) of the Act on the grounds of discrimination did not succeed.

## **Was Ms Zhu sexually harassed in her employment?**

### *Relevant law*

[116] Sexual harassment is defined in s108 of the Act. There was no allegation that the elements described in s108(1)(a) applied to Ms Zhu. No claim were made in relation to:

- (a) Section 108(1)(b)(ii) of the Act which relates to the use of visual material of a sexual nature.
- (b) Section 108(1)(b)(iii) of the Act which involves physical behaviour of a sexual nature, which was not established on the evidence.

[117] Ms Zhu relied on s108(1)(b)(i) of the Act, which covers use of language (written or spoken) of a sexual nature by the employer or its representative.

### *What conduct was reported to Diligent?*

[118] Ms Zhu told Ms Shi when they met on 16 January 2024 that a customer had asked for her phone number. No more information than that was provided, so it was not known when this had occurred or where this had occurred. No subsequent claimed instances of harassment, sexual or otherwise, were made by Ms Zhu following the 16 January 2024 meeting.

[119] After receiving the letter dated 14 April 2024 on 29 May 2024, Diligent asked Ms Zhu's representative to provide details of her sexual harassment claim. Ms Zhu refused to do so.

[120] Diligent was justified in not viewing Ms Zhu's disclosure on 16 January 2024 that a potential customer had asked for her phone number as a sexual harassment complaint that required investigation. The request for a phone number by a potential customer did not involve spoken language of a sexual nature by Diligent or its representative. It was therefore not covered by the definition of sexual harassment in s 108(1)(b)(i) of the Act.

[121] Ms Zhu's claim she was sexually harassed by her employer or its representative did not succeed.

*Was there sexual harassment of Ms Zhu by a person other than the employer?*

[122] Section 117 of the Act sets out when sexual harassment by someone other than the employer occurs. Section 117(2) permits the employee to complain to the employer about conduct by another employee, customer or client of the employer's that involved (among other things) language of a sexual nature.

[123] Section 117(3) of the Act requires the employer on receipt of the complaint to inquire into the facts. If the employer is satisfied the conduct occurred, then s 117(4) of the Act required it to take practicable action to prevent it recurring.

[124] Section 118(2) of the Act deems an employee to have a sexual harassment personal grievance claim if a complaint was made to the employer under s 117(2) of the Act but the employer failed to take practicable steps to prevent the conduct that had been complained about recurring.

[125] That was not the case here. Ms Zhu's disclosure on 16 January 2024 that she had been asked for her phone number did not amount to a complaint of sexual harassment that Diligent was required to investigate under s 117(3) of the Act. Nor was there any repeat of that conduct after 16 January 2024, which was when Ms Zhu told Ms Shi about the phone number request.

*What is Ms Zhu now claiming?*

[126] During the IM Ms Zhu said that after she failed to give her phone number to the potential customer he commented to her that they could have a "lovely night". This potential customer had looked around the shop but left without buying anything after Ms Zhu told him she had a boyfriend. She did not know who this person was or how he could be contacted. Diligent was therefore unable to exercise any control over him.

[127] Prior to this incident, Ms Zhu had been told she could refuse entrance or service to anyone, she could call the Police if she was uncomfortable, she could shut the shop or retire to a locked room out the back if she was concerned about her safety. The Ferry Road store also had CCTV in it.

[128] In text messages to her boyfriend sent on 10 January 2024 Ms Zhu stated, "someone asked me how much" and "it feels like I am being a damn sex worker". However, she did not raise that with her employer, so the respondents were unaware of

this until Ms Zhu provided her evidence in these proceedings. This alleged “how much” comment was made by a passerby outside the shop, so Diligent had no control over them.

[129] Ms Zhu did not tell any of the respondents she considered she had been subjected to sexual harassment by a passerby and/or a potential customer, who had entered the shop but had not purchased anything.

*Was Diligent legally responsible for the conduct Ms Zhu reported?*

[130] For the first two weeks the Papanui store was open Diligent asked staff working there to promote it by either standing at the door to the shop or on the footpath outside the store and inviting potential customers see the new store and check out its competitive pricing. Ms Shi also did this herself along with the other employees. There was nothing sexual about that request.

[131] This promotion occurred over the period 22 December 2023 to approximately 7 January 2024. No other employees complained about promoting the new store in this way. There was no evidence that Ms Zhu was required to market the Papanui store in a sexual way or that she actually did so.

[132] Employees were asked to ensure they looked tidy when promoting the store but it was up to them to decide what they wanted to wear and how they wanted to interact with potential customers. Employees were not asked to engage in “sexual marketing”, they were not told to “attract” customers, to act sexy or sexual or to flirt with passersby. Diligent’s request to employees to look “tidy” did not constitute sexual harassment of Ms Zhu.

[133] Diligent’s employees did not have a uniform or dress code, so they could wear whatever they wanted to. Employees were not asked to wear makeup or to do their hair in a particular manner or to wear skirts, dresses, or form fitting clothing. The Authority was told the employees mostly wore “normal street clothes”, which was described by Ms He as jeans, tee-shirts, sweatshirts, and trainers.

[134] During the short time Ms Zhu was promoting the opening of the new Papanui store, she elected to dress up in what she described as “a Lolita cos play outfit”. Ms Zhu told the Authority she wore this “Lolita outfit” to costume (cos) play conventions. It was Ms Zhu’s decision to dress up in this costume at work.

[135] Diligent did not act inappropriately by asking employees to promote the new Papanui store by letting passersby know the shop had just opened and that it offered competitive prices. There was more limited traffic in the area than had been expected, so this was a reasonable way to let potential customers in the immediate area know about the newly opened store.

[136] By the time Ms Zhu told Ms Shi on 16 January 2024 she had been asked for her phone number by a potential customer, staff were no longer promoting the Papanui store in this manner. Nor was Ms Zhu still working at the Papanui store, as her last day there was on 10 January 2024. Employees were not required to promote the Ferry Road store in the same way because it had been open for longer, so that was not something Ms Zhu was required to do.

[137] The evidence did not establish that Ms Zhu had been sexually harassed in her employment, so her sexual harassment personal grievance claim did not succeed.

#### **Was Ms Zhu constructively dismissed?**

*Suggestion the Ferry Road store may need to be closed if sales did not improve*

[138] On or around 19 February 2024 Ms Shi and Ms Zhu discussed that sales at the Ferry Road store were not to a satisfactory level. This was a general conversation and not a proposal to close the store. Nor was it a suggestion that Ms Zhu's job would be in jeopardy if there was a subsequent restructuring proposal and the store did close.

[139] At the time of this conversation, sometimes sales were less than \$100.00 a day and sometimes only one customer would enter the store or only one person would make a purchase all day. Ms Zhu knew this, so it would not have been not surprising to her that Ms Shi was considering the store's ongoing viability.

[140] No decision had been made to close the store and Ms Zhu acknowledged that when giving her evidence during the IM. Diligent was also advertising for more employees when this conversation with Ms Zhu occurred. After this conversation Ms Zhu had asked Ms Shi if she should order more stock and she was told to do so.

[141] The conversation Ms Shi had with Ms Zhu was not an actual or constructive dismissal. It was simply an informal discussion. Ms Zhu could have asked what would happen to her if the store closed if she was worried about that but did not do so.

[142] Ms Shi said Ms Zhu would have been offered ongoing employment at the Papanui store if the Ferry Road store closed. Ms Shi had been advertising for additional employees when Ms Zhu resigned but subsequently withdrew this advertising after her employment had ended and a decision was made to close the Ferry Road store.

[143] Shortly after Ms Zhu's employment ended, the Ferry Road store was closed and the remaining employees were deployed to the Papanui Road store. There were no job losses. Ms Shi had to increase Ms He's hours of work from part-time to full-time as a direct consequence of Ms Zhu's resignation.

*What did Ms Zhu say in her resignation letter?*

[144] Ms Zhu's resignation letter did not link her resignation to the respondents' actions or conduct. Ms Zhu cited personal concerns. These included her discomfort regarding the area surrounding the store which made her commute to and from work a "source of stress". Ms Zhu also said she had found the low sales disheartening which "had fostered a sense of pressure [she found] increasingly difficult to manage."

[145] Ms Zhu stated "... my decision to leave is not a reflection of the management or the team, both of which I hold in high regard." Ms Zhu acknowledged the "opportunities for growth" she had been provided and stated "I cherish the experiences and the relationships I have built here..."

*Personal grievance letter dated 14 April 2024*

[146] Ms Zhu's personal grievance letter dated 14 April 2024 attributed her constructive dismissal to the conversation that had occurred on 19 February 2024. She did not allege there had been a subsequent breach of duty by Diligent that had caused her resignation.

[147] Ms Zhu's claim that she was told the Ferry Road store was going to be closed was not supported by the evidence. No such proposal had been made. Ms Shi had simply informed Ms Zhu that option may need to be considered if sales stayed low.

[148] Ms Zhu had asked if she should continue ordered stock and Ms Shi told her "Yes" she should. That should have put Ms Zhu on notice that store closure was not imminent. Even if the Ferry Road store had closed there would have been work available to Ms Zhu at the Papanui store.

*Was Ms Zhu dismissed?*

[149] A dismissal is a sending away that occurs at the employer's initiative. A resignation can amount to a dismissal in law if it resulted from the employer's actions. The reason for Ms Zhu's resignation is to be assessed at the time it occurred.

[150] Ms Zhu was not dismissed on 19 February 2024. The issue was therefore whether her resignation on notice on 1 March 2024, which resulted in her employment ending on 15 March 2024, was in fact a dismissal and not a genuine resignation.

[151] The difficulty Ms Zhu faced with her constructive dismissal grievance claim was that there was no conduct, action/inaction or breach of duty identified in the period 19 February 2024 to 1 March 2024, which was the date she gave two weeks' notice of her resignation. The matters Ms Zhu sought to rely on that arose before 29 February 2024 did not involve any breach of duty or a repudiation of the employment relationship by Diligent that would have made her resignation reasonably foreseeable.

[152] Ms Zhu's resignation letter did not refer to the proposed closure of the Ferry Road store. Nor did it attribute her resignation to any actions/inaction or breach of duty by Diligent or the other respondents.

[153] Ms Zhu's resignation letter read as if it was a free and voluntary genuine resignation made for her own personal reasons and her evidence during the IM supported that view. Ms Zhu did not like the late hours the store was open, the people in the area surrounding the store made her nervous and stressed during her travel to and from work, and the low volume of sales and customers got her down.

*The Authority's finding on the constructive dismissal personal grievance claim*

[154] The evidence did not support Ms Zhu's claim that she had been dismissed or constructively dismissed. Ms Zhu resigned of her own free will as she had decided to return to be with her family in China.

[155] There was no breach of duty by Diligent that made Ms Zhu's resignation reasonably foreseeable. Diligent valued Ms Zhu and wanted her employment to continue. There was no course of conduct which had the deliberate and dominant purpose of coercing Ms Zhu to resign. Ms Zhu was not given the choice of resignation or dismissal. There was no repudiatory conduct by the respondents.

[156] Ms Zhu's employment ended because of her free and voluntary resignation. She decided to return to her family in China. Because Ms Zhu was not dismissed, her unjustified constructive dismissal grievance did not succeed.

### **Did Diligent breach employment standards?**

[157] Section 5 of the Act defines employment standards. Diligent did not engage in breaches of any of the obligations in s 5 of the Act.

### **Claims against the second and third respondents**

[158] Ms Zhu's claims against Ms Shi and Mr Peng did not succeed.

### **Costs**

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

[160] If the parties are unable to resolve costs, and an Authority determination on costs is needed, the respondents as the successful parties may lodge, and then should serve, a memorandum on costs within 28 days of the date of this determination. Proof of the actual legal costs incurred by each respondent, such as a GST invoice, is required.

[161] From the date of service of that memorandum Ms Zhu will then have 14 days to lodge any reply memorandum. On request by either party, an extension of time for the parties to continue to negotiate costs between themselves may be granted provided it has been applied for before the deadline for lodging submission has passed.

[162] The parties can anticipate the Authority will determine costs, if asked to do so, on its usual "daily tariff" basis. They are therefore invited to identify any factors they say should result in adjustments being made to the notional starting tariff, which will be \$8,000.00 for this IM which involved two days of investigation time.

Rachel Larmer  
Member of the Employment Relations Authority