

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

**[2017] NZERA Auckland 235
5643075**

BETWEEN QIANG DENG
 Applicant

AND HENRY FENG LAWYERS LTD
 Respondent

Member of Authority: Eleanor Robinson

Representatives: May Moncur, Advocate for Applicant
 Lee Goffin, Counsel for Respondent

Investigation Meeting: 11 July at Auckland

Submissions received: 5 & 14 July 2017 from Applicant
 5 & 18 July 2017 from Respondent

Determination: 11 August 2017

DETERMINATION OF THE AUTHORITY

Employment Relationship Problem

[1] The Applicant, Ms Qiang (Zoe) Deng, claims that she was unjustifiably dismissed by the Respondent, Henry Feng Lawyers Limited (HFL), on 16 September 2016.

[2] Ms Deng also claims that she was unjustifiably disadvantaged during her employment as a result of being sexually harassed and bullied by Mr Feng.

[3] HFL denies that it unjustifiably dismissed or unjustifiably disadvantaged Ms Deng.

The issues

[4] The issues for determination are whether or not Ms Deng was unjustifiably:

- disadvantaged as a result of Mr Feng: bullying and/or sexually harassing her.

- dismissed by HFL

Background facts

[5] HFL is a boutique law firm specialising in property conveyancing and employing approximately 7 employees. Mr Henry Feng is the sole director and shareholder. The majority of HFL's clients are mainland Chinese and a large proportion speak little English and therefore Mandarin-speaking employees are preferred.

[6] On or about December 2015, Mr Li-Kang Ker, one of HFL's solicitors, informed him that he would be leaving during May 2016 to be with his fiancée who had accepted a job in Hong Kong. Mr Feng said he needed a solicitor to replace Mr Ker and therefore placed an advertisement on Trade Me. The advertisement was listed on 13 January 2016 and was headed: 'Staff Solicitor'.

[7] Ms Deng responded to the advertisement stating:

I will graduate from UOA in June 2016 with a conjoint degree in LLB/BProp. I am writing to you with regards to the office administrative position.

[8] Mr Feng said that at the time of interviewing Ms Deng, she did not have her academic transcript with her but provided a list of the courses she had sat and passed, and he was impressed by the level of achievement indicated.

[9] During the interview on 29 January 2016, they had discussed her proposed attendance at the Professional Legal Studies Course (PROFS). Ms Deng had stated that she had passed all her law degree papers and would graduate at the Graduation Ceremony in June 2016 and commence the PROFS course during March 2016, expecting to be admitted to the High Court of New Zealand as a solicitor and barrister by August 2016. He annotated her responses on an interview questionnaire: "19 weeks. 7/3/16 August /16 admission".

[10] On or about the same time Mr Feng also interviewed Ms Xuan Ng, another law graduate, who informed him that she would complete the PROFS requirements and be qualified to practice as a solicitor by April 2016.

[11] Ms Deng said that at the time of the interview with Mr Feng she believed she had finished all her law degree papers and would be eligible to graduate. As a result, she would have been eligible to commence the PROFS as stated to Mr Feng at the interview.

[12] However shortly after she commenced employment on 29 February 2016, she realised that she had not completed all the requirements to be eligible to graduate in June 2016 and consequently would not be able to commence the PROFS until after she had graduated.

[13] Prior to the commencement of her employment with HFL, Ms Deng was provided with an individual employment agreement (the Employment Agreement). The Employment Agreement contained the following clauses:

1 Agreement

...

1.3 *This agreement contains the whole of the agreement between the parties and supersedes or replaces any previous representations, understandings or arrangements.*

6. Remuneration

...

6.3 *The Employee's remuneration may be adjusted (annually from the date of qualified as a solicitor) in accordance with the remuneration reviews carried on from time to time at the Employer's sole discretion.*

14. Termination

...

14.3 *This agreement may be terminated without notice by the Employer in the following circumstances:*

...

(e) *If the Employee is no longer holding or is not entitled to be issued a practising certificate as a barrister and solicitor of the High Court of New Zealand .*

27. Resolution of employment relationship problems

27.1 *If the Employee has an employment relationship problem, the Employee should advise the Employer of it. The parties will discuss and attempt to resolve the problem in the first instance.*

27.2 *If the problem cannot be resolved between the parties directly, the Employee or the Employer may refer the problem to the Department of Labour for mediation.*

...

27.3 *If the Employee believes he has a personal grievance, the Employee must raise a grievance with the Employer within 90 days beginning with the date of the alleged action giving rise to the grievance, or coming to the notice of the Employee, whichever is the later.*

30. Stress

30.1 *The Employee acknowledges that in performing the duties as a staff solicitor under this Agreement, a*

certain amount of stress is to be expected and accepted as a normal part of the Employee's employment. The Employee agrees to advise the Employer without delay if the Employee feels stressed or fatigued at work.

[14] The First Schedule to the Employment Agreement stated the position as:

Staff Solicitor (when qualified in or about September 2016).

Commencement date: 29 February 2016.

Notice period: Four (4) weeks for termination and redundancy (but one week notice for trial period).

[15] On 14 February 2016 Ms Deng signed the Employment Agreement below a declaration which stated:

I, Zoe Qiang Deng of Auckland declare that:

- 1. I have read, understood the terms and conditions and received a copy of this agreement.*
- 2. I was given the opportunity to seek independent advice and/or explanations of any term or condition which I did not understand prior to signing the agreement.*
- 3. I did not knowingly have any disability, ...*
- 4. The information provided by me is true and correct to the best of my knowledge and belief.*
- 5. I understand that if the Employer discovers I have provided any false information or have misled the Employer in any way, this agreement may be terminated immediately.*

[16] Ms Deng confirmed at the Investigation Meeting that she had had the opportunity to seek independent advice but had chosen not to do so.

[17] At or about the same time as Ms Deng was employed, Ms Ng was also appointed. In the First Schedule to Ms Ng's employment agreement the position was stated as: "*Staff Solicitor (when qualified in or about April 2016)*".

[18] Ms Deng claimed that she had informed Mr Feng at the commencement of her employment that she was not eligible to graduate as expected due to the issue with her not having completed all the necessary degree papers, and this was common knowledge within HFL.

[19] Mr Feng said that he was not aware that Ms Deng had not completed her law degree or that she would not be adhering to the schedule to complete her PROFS by August 2016 as had been discussed at the job interview.

[20] Ms Yue Cheng, who had been employed as a legal assistant at HFL from 1 May 2014 until September 2016, said she had known Ms Deng reasonably well during the course of their employment together. At the Investigation Meeting Ms Cheng said she had not been aware that Ms Deng had not finished her legal degree and denied that this was general knowledge in the office environment.

[21] Ms Deng said that after commencing her employment she was not provided with any formal induction or training, however, she was able to learn from Ms Cheng and Ms Ching Feng who had been a senior legal assistant at HFL at the time that Ms Deng commenced employment, and from Mr Ker.

[22] Mr Ker said that when Ms Deng and Ms Ng commenced employment in February 2016, he realised that they would need to take over much of the work for which he had been responsible when he left and therefore he tried to provide as much training and support as he could.

[23] Mr Ker said that there were many templates and precedents which were available to the employees and he also assisted Ms Deng and Ms Ng to work through in-house workflow templates which he had helped to develop. In addition he had many seminars in his office with both Ms Deng and Ms Ng when the opportunity arose and when he learned anything new in the professional development courses, he shared that with them.

[24] Ms Cheng said that following the departure of Mr Ker and Ms Deng on or about May 2016, she had been responsible for supervising Ms Deng's work, supervising her client meetings and checking through work files to make sure that email correspondence had been printed and checklists completed.

Bullying

[25] Ms Deng said from the commencement of her employment at HFL Mr Feng would be rude and aggressive towards his employees. She said he would often yell and shout at her when addressing work-related issues which she found very humiliating and depressing. He would address phrases towards her such as "*I cannot imagine a conscientious employee could do this*" and "*none of you bring me anything but trouble*".

[26] Ms Amy Feng, Mr Feng's wife and the HFL accountant, said that she and Mr Feng aimed to treat their employees very well, providing Easter and Christmas gifts and celebrating

employees' birthdays by taking them out to a restaurant of their choice. In addition there would be barbecue parties at the office and lunch would be brought into and provided at the office. Ms Deng had participated in, and appeared to enjoy, these occasions.

[27] Mr Ker said he found working at HFL very pleasant. He had enjoyed his time there and had only left because his fiancée had been posted overseas. He had commenced working at HFL prior to qualifying as a solicitor and said he had found the working atmosphere to be convivial and supportive.

[28] Ms Cheng said she had also enjoyed working at HFL. Both she and Mr Ker confirmed there had been a number of social events and that Ms Deng had appeared to enjoy the social events. Neither of them recalled Mr Feng shouting and/or yelling at them or Ms Deng.

[29] Mr Feng said he had little contact with either Ms Deng or Ms Ng because their work had been supervised by Mr Ker, Ms Feng or Ms Cheng. However, there had been a number of social occasions when all the employees met up and socialised together which was in line with his intention to have a supportive and friendly family type working environment. He said that Ms Deng had taken full part in the social arrangements and had appeared to enjoy them.

[30] Mr Feng denied yelling or shouting or making demeaning comments to Ms Deng.

Sexual harassment

[31] Ms Deng said that more alarming than what she had described as the bullying and belittling behaviour from Mr Feng had been his entirely inappropriate manner with what was a predominantly young female workforce. She said Mr Feng often commented on her appearance which made her feel very uncomfortable and described an incident in March 2016 in which she had been in the downstairs kitchen making tea when Mr Feng had come in. He had started to talk and then suddenly touched her face. She said she had been unable to express how unwelcome his behaviour had been.

[32] Ms Deng said that Mr Feng's staring and touching did not stop after the March incident and that at different times Mr Feng touched her nose, earrings and hair.

[33] In addition Mr Feng had referred to her on numerous occasions as a 'party girl' which was a term often used within the Chinese community to refer to somebody having a " *messy personal life*". She said she had been very upset by such a term and had found the reference to be deeply offensive.

[34] Ms Cheng said she recalled Ms Deng telling her about the occasion when she alleged Mr Feng had touched her face. This had been after she (Ms Cheng) had resigned and before she left on 16 September 2016. Ms Cheng said it had been a casual conversation and that Ms Deng did not appear upset when she had told her about it. Ms Deng had not been crying and had not given her the impression that there was anything more that she wanted to tell her.

[35] After Mr Ker had left, Mr Feng said he had visited the offices downstairs more often than he had done previously so that he could see what work was being carried out and deal with matters that had previously been dealt with by Mr Ker. This gave him more of an opportunity to observe Ms Deng's work and her general conduct in the office.

[36] Mr Feng denied sexually harassing or behaving in an inappropriate manner towards Ms Deng, but said he had become concerned at the manner in which Ms Deng approached him with questions about her work because on each and almost every occasion she came to stand very close to him.

[37] Mrs Feng said she had noticed that, unlike the other employees who would stand or sit on the other side of the table to Mr Feng, Ms Deng went to Mr Feng's side and stood very close. She said she had spoken to Ms Deng and told her it was inappropriate and not to do so, however Ms Deng had ignored this instruction.

[38] Mr Ker said he had not noticed anything inappropriate in the interface between Mr Feng and Ms Deng prior to his leaving in May 2016.

[39] Ms Cheng said she had never seen Mr Feng touching Ms Deng or moving close to her. She had not seen anything in the relationship between Mr Feng and Ms Deng that would indicate anything other than a healthy and professional relationship.

[40] Ms Deng said that during July 2016 Mr Feng had spoken to her about having a heater on in her office and had followed this with an email dated 22 July 2016 in which he said:

Hi Zoe. Do not make your room stupidly hot. I cannot breathe nearby. You should not waste the power as well. Before you go home make sure the lights are turned off and all water and dehumidifier also switched off.

[41] Ms Cheng said that on two or three occasions she had noted that Ms Deng did not prepare for client meetings prior to the appointment time and that one client had waited over 30 minutes. As this was unacceptable to the HFL work standard she had reported the matter to Mr Feng. As a result, Mr Feng sent an email on 26 July 2016 to Ms Deng and also to Ms Ng saying:

*Can you please prepare documents for clients to sign beforehand.
Never do it when clients are here.*

[42] Ms Ng replied in an email of the same date saying that she had never asked Mrs Feng to rush through a document for her because she had access to LINZ and prepared them beforehand. Mr Feng replied stating:

Are you saying those are Zoe's cases? Zoe you need to be clear what you are doing. If I require you to provide me with a daily report of what you are doing then that will give you a lot of stress.

[43] Mr Feng said that he had been concerned about the quality of the documents Ms Deng had produced for her meeting with the clients so he had checked the file and found that the engagement letter she had provided to clients used Mr Ker's name, had Mr Ker's signature on it, and that the entitling was that of solicitor.

[44] He had asked Ms Deng to attend a meeting to be held on 27 July 2016 to explain this issue and other matters, informing her prior to the meeting that he needed to talk to her on employment matters. He had advised her she could have someone to support her in the meeting but she had declined.

Meeting held on 27 July 2016

[45] Among the issues to be discussed during the meeting on 27 July 2016 was the use of Mr Ker's name on the client engagement letter. Mr Feng said he was concerned and believed that Ms Deng's legal training ought to have alerted her to the misrepresentation that a solicitor was providing the advice. Mr Ker was no longer with the firm and so it was misleading to clients to indicate that he had provided the services. He believed that the use of Mr Ker's name on such a document after he had left the company was illegal. He had checked other files and all Ms Deng's client engagement letters had used the template letter with Mr Ker's name.

[46] The meeting on 27 July 2016 was attended by Mr Feng and Ms Deng and Ms Cheng had joined the meeting partway through. The main issues raised were Ms Deng:

- (a) handling clients' matters carelessly;
- (b) not preparing necessary documents beforehand;
- (c) not taking or following instructions and HFL precedents and checklists;
- (d) charging clients incorrectly;
- (e) using Mr Ker's name; and

(f) not being motivated to learn or perform her duties.

[47] During the meeting, Ms Deng said that she had used the letters with Mr Ker's name on because they were a template in the system. She had realised she should not have issued the letters and she should have changed the template.

[48] Mr Feng informed Ms Deng in the meeting that he would be providing her with a first oral warning and that she would need to inform him the next morning what tasks she had to complete during that day and in the evening inform him by email what she had completed.

[49] Ms Deng confirmed during the Investigation Meeting that her response during the meeting had been that she knew she might not be suitable as a solicitor and said she would resign giving one month's notice and that during the one month notice period she would work as hard as she could.

[50] Mr Feng said he had asked Ms Deng when she had decided to resign and she had said the previous day because she knew she was not suitable. Mr Feng had responded that Ms Deng would need to provide notice in writing and the meeting ended.

[51] Following the meeting, Mr Feng sent Ms Deng an email dated 28 July 2016 saying:

If you are resigning as you advised me yesterday, then I will need your formal notice in writing.

[52] Ms Deng replied on 29 July 2016 saying:

Hi Henry, I know I was careless and didn't pay enough attention to my work. ... I don't want to create any trouble to the firm and I know it is a hassle to you to train a new employee from scratch again. I know you and Amy are lovely people and you were triggered and disappointed by me. I thought about the whole thing and realised my work was not good enough. ... I haven't been here for long and there is a lot I need to learn from you. I want to stay here and give myself another try, if I still cannot improve I will resign.

However I cannot accept your requirement for me to report my work every day, because I feel it is humiliating and I am a grown up. If you insist I will have to leave this job. ... I will change my attitude and be more cautious and serious to my work. I hope you can give me another chance and I apologise for my previous mistakes and attitude.

[53] Mr Feng responded on 1 August 2016 recording the details of the meeting and the matters raised and confirming that Ms Deng had been issued with an oral warning as a result. Mr Feng had written:

I do need to supervise your work therefore please check and let me know daily what you have to do for that day and what you need to prepare for the day after (at the least).

[54] Ms Deng replied on 5 August 2016 saying:

I do not accept your requirement for reporting my daily work. This is formal notice of my resignation. Please note I will leave my position on 5 September.

Further incidents of sexual harassment

[55] During August 2016, Ms Deng said there were two incidents which she regarded as sexual harassment. On one occasion she had gone to see Mr Feng for clarification regarding a case she was handling. She happened to be standing next to him and he had asked her whether she was wearing perfume that day. She had denied she was, explaining that it was hand cream. On hearing this, she said Mr Feng proceeded to sniff her hands leaving her feeling extremely uncomfortable and embarrassed. He had informed her that her job did not entail her wearing perfume at work because it might offend some clients.

[56] In the second incident, a client had come into the office to sign some documents. She thought that the client may have believed she was Korean and did not understand Chinese as he had said to Mr Feng in Chinese “Henry you always hire pretty Korean girls to work for you. They cannot speak Chinese and may be hard to communicate with though”. Mr Feng had then told the client that Ms Deng was Chinese and asked her to greet him in Chinese at which point she had greeted the client. She said Mr Feng had asked the client “so which girl in our firm do you want?”. She said she had been embarrassed by Mr Feng’s remarks.

[57] Mr Feng denied that the incident regarding the sniffing of Ms Deng’s hands had happened and that the allegation was false and unfounded. He was not sure to which client Ms Deng had been referring but did recall a meeting with one client after which the client had commented that all the HFL female employees were beautiful but denied that he had made the comment alleged by Ms Deng..

Resignation rescinded 2 September 2016

[58] Mr Feng said that on 2 September 2016 he had a meeting with Ms Deng to arrange a handover of her work prior to her leaving date of 5 September 2016. At the meeting Ms Deng had said that she wanted to stay working at HFL and asked if he would give her another chance as she would do her best to improve. He said Ms Deng appeared to be sincere and after he discussed the matter with Mrs Feng it had been decided to give Ms Deng another opportunity to improve her performance.

[59] On 5 September 2016, Mr Feng said there had been a very strong smell of perfume from Ms Deng's room. As a result he had sent her an email that day saying:

It may be a good idea for you to check in general what is an appropriate way to present yourself at a formal place such as a law firm (our firm). Let me know what you have in hand? Let me know daily what you have done (also daily what need to be done).

[60] That same day, 5 September 2016, Ms Deng provided a report saying:

For this week I have two settlements on hand. For both I am waiting for e-dealing number and followed up with the purchaser's solicitor this morning. I will prepare A&L and arrange meeting soon after I get the e-dealing.

[61] Mr Feng responded the following day, 6 September 2016, saying:

Your working time was less than 20 minutes yesterday. ... Please be motivated and actively bring up your skills to a reasonable level. It does not mean we do not have enough work, the current problem is that I cannot pass you those work which you are not capable of. Let me know what you have done daily, so I will have fair idea of what you are capable of. Let me know what you are not sure about, if you do not tell me what you are not sure about, I will be unable to help you.

[62] On 7 September 2016, Ms Deng emailed Mr Feng informing him she needed to leave early to attend a non-work related auction that day. She stated that she had a meeting with her client at 3pm and that Ms Cheng would take the meeting for her. Mr Feng responded that same day, 7 September 2016, saying:

- 1. I have on three occasions requested you to report to me what you have in hand daily and what you have done daily.*
- 2. You have constantly ignored my requests.*
- 3. You are an employee here, follow my instructions please.*
- 4. You have given my resignation notice to terminate your work, which should have been terminated last Monday on 5 September 2016. On 2 September 2016 at your request I have been kind to allow you to stay and to try to bring yourself up to reasonable standard. However you do not appear to be willing to cooperate and follow my instructions.*
- 5. You email me at 12.34pm today saying you are to attend an auction in Albany today. I have not given you such permission to leave. However you just left your workplace at about 3.08 without permission.*
- 6. Please take this email as a formal written warning that you should perform your duty as an employee and you should bring*

up your skills to fit the work and to adjust your attitude towards the work and to fit into the firm's culture.

[63] On 9 September 2016, Mr Feng again emailed Ms Deng stating:

Is there any reason that you may constantly ignore my request to provide me with daily reports? Even after a written notice/warning has been given to you by email on 7 September 2016. Your attitude is not acceptable.

[64] During her period of employment, Mr and Mrs Feng said that Ms Deng had applied for and been granted leave on a number of occasions which she stated as being required for her PROFS examinations.

[65] Mr Feng said he did not recall how it had come to his notice that Ms Deng had not referred to her completing her PROFS course and would not be admitted and qualified as a solicitor in August 2016 as she had stated she would be before she was appointed. On 15 September 2016, he had sent her an email asking when she had been admitted as a solicitor.

[66] Ms Deng had responded and said that she anticipated she would finish the PROFS course in November 2016 and her admission to the High Court as a solicitor would be in April 2017.

[67] Mr Feng said that he had not been given any indication by Ms Deng in the months that had passed since her interview in February 2016 that she had not completed or passed the PROFS course. In her email response to him dated 15 September 2016, she offered no explanation or apology. He said Ms Deng was not qualified for the position of staff solicitor and was not able to do the work even with all the support and training with which she had been provided.

[68] He said on the basis of the assurances she had given and promises that she had made to him he had allowed her employment to continue but had taken the decision to terminate her employment from the end of September 2016, more than one month later than the admission date in August and the date for leaving her employment which she had previously nominated in her resignation letter.

Emails 16 September 2016

[69] Mr Feng confirmed his decision in an email dated 16 September 2016 in which he stated:

Your position is a staff solicitor. In your employment agreement I have allowed you to obtain your licence in about September. I will not wait until next April.

As you are not qualified for the work your employment is to be ended by the end of this month 30 September 2016.

[70] Shortly afterwards he sent a further email saying:

As you are still working here the normal rules and the firm's culture will still be applicable to you.

Please take this email as a second formal warning that you have constantly ignored my instructions to provide me with your daily report. Your manner is not acceptable.

Please provide me with your daily report as to what you have in hand in the morning and what you have done for each and every day.

[71] Ms Deng replied stating:

I accept your proposition to end my work. However, according to the contract I am entitled to four weeks' notification of termination of my employment. Also I need to clarify some points before I leave.

Firstly, I do not accept your attitudes towards your employees. I believe on some occasions your behaviour amounted to sexual harassment in the workplace. I can write you a formal report listing the occasions if you want me to clarify this.

Secondly, I object your attitude towards Chinese. On many occasions your comments and attitudes towards Chinese are very disrespectful and out of no reason. Not saying that you are a Chinese yourself, and most of our clients are Chinese, your behaviour clearly amounts to workplace discrimination. None of us agrees with your rude attitude and I believe this constitutes discrimination against your employees including myself.

[72] Mr Feng responded:

Four weeks' notice is for normal termination (redundancy etc). You simply are not qualified to do the work, therefore no notice is required.

You have been given 2 written notice and while you are working here please follow the instructions. You will have a final warning remaining. After that you will be instantly dismissed if you continue to behave in an unacceptable manner.

I have been running the firm for about 12 years and most of the employees are females. There has never been any occasion of sexual harassment from me. Your allegations are simply denied.

My understanding about Chinese will not be part of your working conditions, as you mention that myself is a Chinese being raised and lived in that environment for about 27 years I have my understanding and impression of them

You may wish to consult an employment relationship lawyer.

In the meantime you are required to report to me daily.

[73] Later that same day Mr Feng emailed the other employees and stated that Ms Deng alleged that he had sexually harassed her on occasions and asked if any of them could let him know if they had such feelings or concerns.

[74] Mr Feng received responses from Ms Olivia Liu and from Ms Cheng confirming that they had not experienced sexual harassment from him. Ms Cheng also confirmed that although Ms Feng had left HFL and was presently in China Ms Feng had provided 100% positive feedback about her relationship with Mr Feng during her employment.

[75] Mr Feng emailed Ms Deng saying that he had talked all the other employees and none of them believed that there had been such harassment.

[76] Ms Deng replied:

Yes you constantly asked everyone to send you an email confirming you have not conducted sexual harassment to them after you received my email. But that doesn't mean you never do that to me personally.

[77] Mr Feng responded by confirming that he had spoken to Ms Ng, Ms Cheng and Ms Liu again and they had all denied that they had ever talked to her about sexual harassment and that none of them had alleged that any sexual harassment had occurred. He confirmed that her allegations were denied again. He added:

Please be reminded that you will have to behave in an acceptable manner and providing me with daily report as to what you have in hand and what you have done each day.

[78] Ms Deng responded by email confirming that what she was requesting was payment of her four weeks' contractual wages. Unless she received this, she would:

... have no other choice but to consult an employment law solicitor and pursue to my claims against you for wrongful dismissal, workplace discrimination and sexual harassment.

[79] Mr Feng said he and Mrs Feng had met with Ms Deng and he responded:

This is to record our (Amy and me), short meeting at about 2.40 to 2.45pm today.

Before the meeting I asked Olivia to support you, however she did not appear to be comfortable to do so, I have mentioned this to you at the meeting.

I have given you two weeks' notice as you are not qualified to perform the work as a solicitor because you are not qualified. At the

time of employ you, you have given me assurance that you will be admitted to the Bar as barrister and solicitor in September 2016. This does not appear to happen until April 2017 (as advertised by you).

You requested for four weeks' payment in lieu of notice which I do not believe you are entitled to. You will need to work through the notice period.

[80] Following receipt of the email, Ms Deng confirmed that 16 September 2016 would be her last working day and left HFL.

Determination

Was Ms Deng unjustifiably disadvantaged by Mr Feng bullying her?

[81] Bullying has been defined as:¹

Unwanted and unwarranted behaviour that a person finds offensive, intimidating or humiliating and is repeated so as to have a detrimental effect on a person's dignity, safety and well-being.

[82] Ms Deng claimed that Mr Feng bullied her during her employment at HFL.

[83] The evidence of Mr Ker and Ms Cheng was that HFL had been a pleasant place to work, and they had enjoyed working there. They said there were many social events and their evidence, and that of Mr and Mrs Feng, was that Ms Deng had fully participated in and appeared to enjoy these events.

[84] There is no evidence that Ms Deng raised the alleged bullying as a concern with HFL prior to her resignation on 5 August 2016. In fact in her email to Mr Feng dated 29 July 2016 in which she stated: "*I want to stay here and give myself another try, if I still cannot improve I will resign*". She not only does not refer to bullying, but refers to Mr and Mrs Feng as: "*lovely people*".

[85] Moreover there is no mention of bullying in the email giving formal notice of her resignation dated 5 August 2016, the reason for the resignation being stated as: "*I do not accept your requirement for reporting my daily work*".

[86] I have considered whether or not the request by Mr Feng requiring Ms Deng to report daily on her work constitutes bullying and note that in the Employment Agreement clause 2.2

¹ Hayden-Olsen, Workplace Bullying and Harassment (CCH New Zealand Ltd) Auckland 2005

is unequivocal: *“The Employee will carry out and comply with all reasonable and lawful directions given to the Employee by the Employer”*..

[87] I find that the instruction by Mr Feng that Ms Deng report daily on her work is a reasonable and lawful instruction by an employer who has concern about the quality of an employee’s work. As Mr Feng explained in the email dated 6 September 2016: *“... if you do not tell me what you are not sure about, I will be unable to help you”*.

[88] Moreover if Ms Deng had a concern that she was being bullied during her employment she should have advised HFL of this in accordance with clause 27.1 of the Employment Agreement which stated: *“the Employee should advise the Employer of it [an employment relationship problem]”*. Failing resolution at that stage Ms Deng could have referred the matter to: *“the Department of Labour for mediation”* in accordance with clause 27.2. of the Employment Agreement. However Ms Deng did not follow either stage of this designated course of action.

[89] I find no evidence that Ms Deng was bullied by Mr Feng during her employment with HFL.

[90] I determine that Ms Deng was not bullied by Mr Feng and was not therefore unjustifiably disadvantaged on that basis in her employment by HFL.

Was Ms Feng unjustifiably disadvantaged by Mr Feng sexually harassing her?

[91] Ms Deng claims that she was sexually harassed during her employment at HFL by Mr Feng.

[92] The relevant statutory and procedural requirements dealing with sexual harassment are set out in s.103, s.108 and s.117 of the Act.

[93] 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”*.

[94] 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.

[95] 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.

[96] 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*".

[97] I find there is no evidence that there was a request pursuant to s.108(1)(a) made to Ms Deng or that Mr Feng or a representative of HFL used language or material pursuant to s. 108(1)(b) of the Act..

[98] Ms Deng claimed that Mr Feng touched her face during March 2016 and that there were incidents after that of his touching her face and neck.

[99] Ms Cheng confirmed that Ms Deng had mentioned the face touching incident to her shortly after she (Ms Cheng) had resigned and just prior to her leaving HFL during September 2016.

[100] Ms Deng resigned orally during the meeting with Mr Feng on 27 July 2016 citing her view that she was not suitable for the position. On 29 July 2016 she requested that Mr Feng gave her another opportunity to perform satisfactorily and described him and Mrs Feng as: “*lovely people*”.

[101] Ms Deng confirmed her formal resignation on 5 August 2016 giving as the reason: “*I do not accept your requirement for reporting my daily work*”.

[102] On 2 September 2016 Ms Deng requested a second time that her resignation be rescinded, despite her later allegation that there were two further incidents of sexual harassment during August 2016.

[103] I do not find Ms Deng’s claims of sexual harassment by Mr Feng credible on the basis that Ms Deng:

- gave as the reason for her oral resignation on 27 July 2016 an acknowledgment that she was not suitable for the role. There was no claim of sexual harassment being the reason;
- in an email dated 29 July 2016 headed: “*Notice to terminate employment relationship*”, she asked for: “*another chance*” to prove herself, making no reference to any claim of sexual harassment;
- she referred to Mr Feng being a ‘*lovely person*’ in that email;
- she stated in the final paragraph of the email that she did not accept Mr Feng’s requirement to report her work on a daily basis, and if he insisted she: “*will have to leave this job*” making no reference to any claim of sexual harassment.
- followed up her indication that she: “*would leave this job*” in her written resignation dated 5 August 2016 because she did not accept Mr Feng’s request for daily reporting, and stated: “*This is a formal notice of my resignation*” making no reference to sexual harassment; and
- she rescinded this resignation on 2 September 2016 despite her later claims that there were further incidents of sexual harassment during August 2016.

[104] I find that Ms Deng's claims of sexual harassment are not supported by the evidence or her reasons provided for her resignation. In particular I do not find it credible that having alleged that she had been subjected to two further incidents of sexual harassment during August 2016, she would ask to rescind her notice on 2 September 2016.

[105] Ms Deng's claims are not supported by the evidence of the other female employees of HFL, in particular by Ms Cheng whom I note no longer works at HFL and is therefore not influenced by a wish to maintain ongoing employment with HFL.

[106] I determine that Ms Deng was not sexually harassed by Mr Feng and was not therefore unjustifiably disadvantaged on that basis in her employment with HFL

Was Ms Deng unjustifiably dismissed by HFL?

[107] Ms Feng claims that she was unjustifiably dismissed by HFL. The test of justification in s 103A Employment Relations Act 2000 (the Act) states:

103A Test of justification

- i. For the purposes of section 103(1) (a) and (b), the question of whether a dismissal or an action was justifiable must be determined, on an objective basis, by applying the test in subsection (2).*
- ii. The test is whether the employer's actions, and how the employer acted, were what a fair and reasonable employer could have done in all the circumstances at the time the dismissal or action occurred.*

[108] The test of justification requires that the employer acted in a manner that was substantively and procedurally fair. HFL must establish that the dismissal was a decision that a fair and reasonable employer could have made in all the circumstances at the relevant time.

[109] Ms Deng responded to a job advertisement, placed by Mr Feng, headed Staff Solicitor which was listed on 13 January 2016, noting in her application that she was applying for the "administrative position." Her letter of application stated "I will graduate from UoA in June 2016 with a conjoint degree in LLB/Bprop." adding "I look forward to discussing my qualifications further."

[110] At the job interview, Ms Deng provided Mr Feng with a typed up copy of what she claimed were her achievements in various legal courses at Auckland University, and claimed to have graduated with a conjoint degree LLB/B Prop.

[111] At the Investigation Meeting Ms Deng confirmed that she had not applied for an Official Academic Transcript from the University and that Mr Feng had not requested an Official Academic Transcript. An Official Academic Transcript would have shown that Ms Deng was eligible to graduate. It is more likely than not that the typed up information provided to Mr Feng was taken from Ms Deng's Unofficial transcript which would have shown her that she had not at that time completed the LLB/BProp programme.

[112] I also note that the typed up information provided shows that Ms Deng attended 2016 Summer School, with no grade annotated for the Law 400 course. The 2016 summer school dates were from 6 January – 17 February 2016. It is therefore reasonable to assume that Ms Deng was aware that she had not completed the LLB programme at the time of her job interview with Mr Feng.

[113] I also note that in her written evidence Ms Deng stated that “*In February 2016 I was a law graduate,,,*” However the University of Auckland graduate database lists Qiang Deng as graduating on 27 September 2016 with a Bachelor of Laws (Conjoint) degree. Also Ms Deng confirmed to the College of Law in an email dated 7 March 2016, shortly after she commenced employment at HFL, that she had a final exam to take in order to achieve the LLB degree.

[114] Ms Deng was employed pursuant to the Employment Agreement which she signed on 14 February 2016. The Employment Agreement designated her job title in the First Schedule as: “*Staff Solicitor (when qualified in or about September 2016)*”.

[115] A law graduate has to complete PROFS before he or she can be admitted to the High Court of New Zealand as a solicitor and barrister. Only after he or she has been admitted and obtained a practising certificate from the Law Society can he or she work as a solicitor. Accordingly Ms Deng could only work as a Law Clerk pending completion of the PROFS and her admittance to the High Court of New Zealand as a Barrister and Solicitor and obtaining a practicing certificate from the Auckland Law Society.

[116] Mr Feng's evidence was that at the job interview Ms Deng had informed him that she had completed her degree studies and expected to be admitted to the High Court of New Zealand in August 2016. The Employment Agreement reflects that understanding and implies that pending such admittance Ms Deng would be employed as a law clerk.

[117] The Employment Agreement also stated in clause 14.3 (e) that termination without notice might occur if the Employee: “*is no longer holding or not entitled to be issued a practicing certificate as a barrister and solicitor of the High Court of New Zealand*”.

[118] Ms Deng signed the Employment Agreement following the Declaration in which she confirmed that she had read, understood the terms and conditions and agreed that if she had supplied false information or misled the Employer in any way, the agreement could be terminated immediately. I observe that Ms Deng had sufficient opportunity to seek independent advice before signing the Employment Agreement but had chosen not to do so.

[119] Ms Deng’s evidence was that she had informed Mr Feng that she had completed her law degree at the commencement of her employment and that this fact was widely known within HFL.

[120] Mr Feng denied knowing that was the case, there is no written supporting evidence that Ms Deng had informed HFL of this, and there is no corroborative evidence from other employees of HFL that they were aware this was the case.

[121] Mr Feng said his expectation had been that Ms Deng would be admitted and able to work as a Staff Solicitor on or about September 2016 as reflected in the Employment Agreement.

[122] I note that Ms Ng was employed by HFL on or about the same time as Ms Deng, her Employment Agreement reflected the understanding that she would complete the PROFS and be admitted in April 2016. I understand that she was duly admitted in line with this expectation.

[123] Mr Feng said he had not been aware that Ms Deng had not completed her PROFS until sometime in September 2016 when he wrote to her by email dated 15 September 2016 asking for information on her admittance status. In response Ms Deng advised of an admittance date some 6 months later than had been envisaged by Mr Feng and as stated in the Employment Agreement.

[124] I accept that Mr Feng had been advised by Ms Deng of an admission date of August 2016 during the interview as noted on the interview questionnaire. However irrespective of this, I find that the expectation that admittance would take place on or about September 2016 was clearly set out in the Employment Agreement on the First Schedule.

[125] Ms Deng had accepted the terms and conditions of the Employment Agreement including clause 14.3 (e) and signed the declaration which included her understanding that supplying false information or misleading the Employer in any way might lead to the immediate termination of the Employment Agreement.

[126] There is no evidence that Ms Deng advised Mr Feng after she commenced employment that she had not completed her law degree as represented during the interview, or that she was unable to complete the PROFS so as to be able to be admitted in September 2016 as I find she had agreed by signing the Employment Agreement.

[127] I find that Ms Deng was in breach of the agreed terms of the Employment Agreement and that her dismissal was in accordance with those terms.

[128] I find that HFL had substantive justification for terminating Ms Deng's employment.

[129] In accordance with s 103A (3) of the Act, Mr Feng was required to carry out a fair investigation and follow a fair procedure.

[130] *Ministry of Maori Development v Travers-Jones*² the then Chief Judge Goddard stated in regards to a fair procedure:³

What amounts to a fair procedure has been described often enough. It is generally accepted that the minimum elementary components must be clear notice to the employee of the misconduct alleged, a fair opportunity to answer or explain, including adequate time for preparation, followed by consideration by a mind at least receptive to the need to evaluate the answers and explanations and generally open to the possibility that there may be an innocent explanation for suspicious circumstances.

[131] Mr Feng terminated Ms Deng's employment by email dated 16 September 2016. His email notified her that her employment would end on 30 September 2016. There was no meeting to discuss the matter or to provide Ms Deng with an opportunity to explain why her admittance date had been delayed.

[132] I find that HFL as a fair and reasonable employer ought to have met with Ms Deng prior to terminating her employment by email to provide her with an opportunity to address

² [2003] 1 ERNZ 174

³ Ibid at para [30]

its concern that she misled it and provided false information at the time of obtaining employment with HFL. It did not do so.

[133] I find that HFL did not act as a fair and reasonable employer procedurally.

[134] I determine that Ms Deng was unjustifiably dismissed by HFL.

Remedies

[135] Ms Deng has been unjustifiably dismissed by HFL.

Lost Wages

[136] Ms Deng obtained alternative employment after a period of seven weeks.

[137] I order that HFL pay Ms Deng the sum of \$5115.38 (calculated as \$30.76 per week x 7 weeks) pursuant to s 128(2) of the Act.

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

[138] Ms Deng is also entitled to compensation for humiliation and distress.

[139] I order HFL to pay Ms Deng the sum of \$4,000.00 for humiliation, loss of dignity and injury to feelings, pursuant to s 123(1) (c) (i) of the Act.

Contribution

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

[141] I find significant contribution by Ms Deng to the situation in which she found herself, in particular Ms Deng had several opportunities to provide an explanation for her reasons why she had not completed her law degree as indicated to Mr Feng, and not been able to apply for admission in the High Court of New Zealand as a Barrister and Solicitor by September 2016.

[142] I also find that on the balance of probabilities Ms Deng, at her job interview, misled Mr Feng into believing that she had completed her degree studies at Auckland University, and would graduate in June 2016, and that thereafter she failed to correct this situation.

[143] Given the extent to which Mr Feng had been prepared to accept the rescinding of her resignation, both the oral resignation provided at the meeting on 27 July 2016 and the formal resignation provided on 5 August 2016, and the fact that HFL appears to be a tolerant and family friendly firm, an early explanation of the reason for her situation may have had a understanding reception.

[144] However Ms Deng did not provide Mr Feng or HFL with that opportunity, in fact she did not provide any indication that her application to enrol on the PROFS course had been rejected on 6 March 2016 for the reason that she had not completed the LLB programme, nor given any indication that her admission to the High Court of New Zealand as a Barrister and Solicitor was not going to take place as she had first indicated at her job interview until Mr Feng questioned her about it on 15 September 2016.

[145] I find this behaviour to be in breach of the good faith requirements in s4 of the Act, in particular the requirement as set out in s4(1A)(b): “*to be active and constructive ... responsive and communicative*”. It is clear that Ms Deng’s failure to communicate her situation regarding her academic qualifications and eligibility status regarding the PROFS and qualification to be admitted to the High Court of New Zealand as a Barrister and Solicitor as indicated at the commencement of the employment relationship, in addition to her continual refusal to obey a lawful and reasonable instruction, lead to a complete loss of trust and confidence in her by HFL.

[146] In these circumstances, I consider that a substantial reduction to be merited⁴ I therefore reduce the amounts awarded by 80%.

Costs

[147] Costs are reserved. This is an appropriate case for letting costs lie where they fall. However in the event that costs are sought, the parties are encouraged to resolve the matter between them.

[148] Failing resolution the Applicant may lodge and serve a memorandum as to costs within 28 days of the date of this determination. The Respondent will have 14 days from the date of service to lodge a reply memorandum. No application for costs will be considered outside this time frame without prior leave.

⁴ *Wikaira v The Chief Executive of the Department of Corrections* [2016] NZEmpC 175 at [239]

[149] 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