



skills to Ms Huynh 's niece. Having successfully proven their skills, they were offered employment and came to New Zealand once they had received a working visa.

[3] The applicants gave evidence that they worked long hours in the salon, and that once they had arrived in New Zealand, they were required to perform additional tasks particularly massage, waxing, and preparatory work for haircuts including hair washing.

[4] All of them were terminated from their employment at the same time, after they had visited a Vietnamese person active on Facebook to discuss their employment rights, and I am told, asking for various things including having their wages paid into a bank account with tax accounted for, the provision of rosters for certainty of work hours, and the ability to refuse clients who made inappropriate requests.

[5] Ms Huynh says that the applicants were all dismissed because there were problems with their work, and in any case, they cannot bring claims because they were subject to a 90 day trial period which prevents them from bringing claims of unjustified dismissal.

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

[6] For the Authority's investigation, each applicant lodged a written witness statement. Ms Huynh lodged two witness statements, one a general statement and one responding to Ms Dung Tran in particular. In addition, Mr Nykes Norris, Ms Huynh 's partner, represented her for part of the investigation meeting. All witnesses answered questions under oath or affirmation from me and the parties' representatives. The representatives also gave closing submissions.

[7] As permitted by s 174E of the Employment Relations Act 2000 (the Act) this determination has stated findings of fact and law, expressed conclusions on issues necessary to dispose of the matter and specified orders made. It has not recorded all evidence and submissions received.

### **The issues**

[8] The applicants each raise claims of unjustified disadvantage and unjustified dismissal<sup>1</sup> as well as breaches of good faith in relation to their treatment by the

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<sup>1</sup> Although claims of discrimination were initially raised, these were not pursued.

respondent. They seek compensation for hurt and humiliation, and penalties for the breaches of good faith. Counsel for the applicants advises that they have chosen not to raise claims for wages or holiday pay, as it is intended to put these claims in the hands of the Labour Inspectorate.

[9] Ms Huynh did not file a statement in reply (although she was represented by counsel at that time).

[10] Given that the applicants all worked for the respondent over a short period of time, the similarities in their claims, and the need for a translator, it was agreed at a case management conference that the matters would be heard consecutively over four days. At the investigation meeting, Ms Huynh was able to respond to the evidence of each applicant after each applicant had given her evidence.

[11] The issues requiring investigation and determination in relation to Ms Dung Tran were:

- (a) Was she unjustifiably dismissed?
- (b) Did she suffer an unjustified disadvantage?
- (c) If the respondent's actions were not justified (in respect of disadvantage and/or dismissal), what remedies should be awarded, considering:
  - Lost wages (subject to evidence of reasonable endeavours to mitigate loss); and
  - Compensation under s 123(1)(c)(i) of the Act
- (d) If any remedies are awarded, should they be reduced (under s 124 of the Act) for blameworthy conduct by Ms Dung Tran that contributed to the situation giving rise to her grievance?
- (e) Was there a breach of good faith or of the employment agreement, and should penalties be awarded?
- (f) Should either party contribute to the costs of representation of the other party.

### **Thi Dung Tran's Evidence**

[12] Ms Dung Tran gave evidence that she had previously worked doing housework and doing nails at a local salon in Vietnam. Her brother-in-law was applying for a visa in New Zealand, and he introduced Ms Dung Tran to his agent, who put her in touch with Ms Huynh. She met Ms Huynh with a group of other prospects on 15 April and

demonstrated her work with nails. She recalls that Ms Huynh told her her skills were okay, she just needed to learn how to do nails the New Zealand way (which I was advised included techniques such as ombre and powder dip).

[13] Ms Dung Tran attended training with Ms Huynh's niece in Ho Chi Minh City on two occasions, first for 2 days, and then for one-and-a-half days. She also practiced foot massages.

[14] She was offered employment, and was given an employment agreement by her agent shortly before leaving for New Zealand. She says that she is not sure if it is her signature on the agreement, but this was in any case done by her agent. The agreement was only provided in English, and she cannot read English, but the agent explained to her that: she was to work 40 hours per week, at a rate of \$29.66 per hour, for three years.

[15] Ms Dung Tran arrived in New Zealand on 18 October 2023. On 21 October, she visited the salon and undertook some small tasks before Ms Huynh asked her to demonstrate her massage skills. On 22 October, she had the day off, and on 23 October, she started work. Ms Huynh agrees with this.

[16] Ms Huynh also says that she gave Ms Dung Tran a second employment agreement, dated 24 October 2023 on about that date. This agreement had a job description that referred to "other beauty services such as: body massage, washing hair" as well as the job of nail technician. Ms Huynh's evidence was that she sent the English agreement to the agent with her signature on it, and got the agent to put Ms Dung Tran's signature on it. Ms Dung Tran never saw this agreement.

[17] Ms Dung Tran performed massage, nails, shampooing, and some waxing. She says she was hired only as a nail technician, but the other ladies had told her she would need to learn other skills, so she did a lot of massages. This ended up hurting her shoulder so much she could not sleep, but she didn't want to complain. Ms Huynh agrees with this, and says that Ms Dung Tran could only do basic nails, not advanced designs.

[18] Ms Dung Tran also says that she was asked by a male client to give an intimate massage. She was not okay with that, especially since she was a married woman. Ms Huynh told her she could say no but must be polite. Ms Huynh agrees that she said this

and emphasised the importance of being polite to customers even though this was not the sort of massage the salon offered.

[19] Ms Dung Tran was living at a room on Dixon Street, and when her husband and three children arrived, they shared the room with her. She says that Ms Huynh told her she could stay without paying rent and never mentioned that she would need to repay Ms Huynh for rent at a future point. She also says a bond was never mentioned until after she was dismissed.

[20] Ms Dung Tran received \$200 per week for the first 2 week's work, \$300 per week for the next 2 week's work, \$400 per week for the next 4 weeks, and for the last 2 weeks of her employment (in the second half of December 2023) she received her last 2 week's pay into her bank account. There are two other payslips in evidence for the month of January. It is common ground that Ms Dung Tran did not receive the amounts set out in these pay slips. They were paid into Ms Huynh's bank account, as Ms Huynh considered that this money represented the repayment of rent to her as well as wage advances. Ms Huynh accepts that she never had any written agreements about the repayment of rent, bond, or what she says was the cash allowances given to staff including Ms Dung Tran prior to them setting up bank accounts.

[21] Ms Dung Tran refers to two incidents during her employment. First, she says Labour Inspectors visited the salon on 5 December 2023. She spoke with Ms Huynh by phone, and was told to say that she was only training for 2 to 3 hours per day, rather than working, which she was doing 7 days a week, from 9 am to when the shop closed which was usually around 7 pm. She said she did as she was told, as the shop manager Tina had mentioned deportation and she was scared. Ms Huynh denies telling any staff to lie, and says she could not have done so, as she did not know the Labour Inspectors were going to visit.

[22] On 18 December 2023, Ms Dung Tran says Ms Huynh asked to meet with her. Ms Dung Tran said that Ms Huynh asked her for details of payments she had made to a third-party at Ms Huynh's request, which were payments for her job. She said she wanted to discuss this while that person was present as well. She says Ms Huynh took her phone and gave it to her nephew to search her phone for the payment details which he did. He then told Ms Dung Tran that if she were a man, he would have beaten her up for refusing to obey orders. Ms Dung Tran was so scared she reported the matter to

the police, and provided an Acknowledgement Form dated 19 December 2023, showing her case file number.

[23] Ms Huynh denies that any of this occurred and says that she talked to Ms Dung Tran about not taking videos or pictures in the salon, as she had been taking pictures of the manicure tables.

[24] I pause to note that Ms Huynh emphasised to me that she did not tolerate staff taking pictures or videos of any of the work they were doing in the salon, but that this sits uneasily with her requests that those same staff send her videos of themselves working to demonstrate their skills as a precursor to her hiring them, which suggests this is a common practice.

[25] Ms Dung Tran worked as normal until 27 December 2023. She says that at the end of the day, Ms Huynh asked her if she had received an email from her the previous day (this attached a termination letter written in English). Ms Dung Tran said she had not, so Ms Huynh told her that her job was at an end.

[26] Ms Dung Tran says that Ms Huynh explained that she was firing her because she continued to be friends with the people she had fired on 17 December. Ms Huynh denies this, and says that the main reason Ms Dung Tran was fired was because she kept taking videos in the salon despite being told not to, and to a lesser extent, because she had problems with lateness, and her nail work was basic.

[27] Ms Dung Tran says this was the last day she worked, and she did not receive any notice or payment for notice. She says she was very upset and surprised, and cried, and a client saw her crying.

[28] Ms Dung Tran said that Ms Huynh promptly deactivated her house key card, and came to her apartment to take away her furniture for other staff to use, and to ask Ms Dung Tran to immediately start paying rent. She says Ms Huynh came three times, before she was able to move out on the 14<sup>th</sup> of January 2024.

[29] Ms Huynh acknowledges that she promptly sought to repossess the furniture Ms Dung Tran was using, and immediately sought rent payments from her even though she had just been fired. She explained that Ms Dung Tran could pay rent if her husband got

a job, and that there was lots of work, like cleaning jobs, to be had in Wellington to help pay the rent.

[30] Ms Dung Tran says she struggled to find a new job over the summer period, and did not find a job until 13 March 2024, working part time in a hotel where she still works today. She had to borrow money from family in Vietnam, and found this very stressful as she was not in a position to go back to Vietnam.

### **Ms Huynh 's Position Overall**

[31] Ms Huynh gave evidence at the end of the third day of hearing that she was very distressed about having to fire so many people. She explained that she had to fire the applicants, because they all knew each other, and all of them created trouble by asking for what was strictly in their contracts, trying to do only the type of work they were first hired for, videoing her in the salon and also videoing when clients were around. Ms Huynh said that the videos of her in particular caused her much distress, and that she had also lost customers who were not happy with the videos (as well as other quality of work issues and raised voices in the salon). Ms Huynh said that this had been distressing for her to do, as she had been an immigrant herself, but she felt the group of applicants had left her with no other choice. Now, staff were happy, things were peaceful, and she was building her business back up.

[32] Ms Huynh explained further that she was able to fire the applicants because they all had 90-day trial periods in their employment agreements. When describing how and when these agreements were signed, Ms Huynh explained that she had provided the agent in Vietnam with an employment agreement for each applicant written in English. She then received the agreement back from the agent with a signature in the "employee" field. She did not know how or when the agreement was signed as she relied on the agent to arrange this. She did not know when the agreement was provided to each applicant, what the agent told them about the terms of the agreement, or their ability to understand and agreement written in English, although it was common ground that none of the applicants were fluent in English and spoke with Ms Huynh in Vietnamese.

[33] Ms Huynh said that once the applicants had arrived in New Zealand, she prepared a new employment agreement for each of them, making sure that it had the trial period clause, and a job description that said they would be required to perform all the services the salon offered and not just nails or hairdressing. Sometimes, the hours

of work were also updated. Ms Huynh would put a new date in this agreement reflecting the date on which she expected the employee to arrive at the salon. She then sent the agreement to the agent and asked him to provide the employee's signature. He would do so, return the agreement with the signature of the relevant employee in a day or two.

[34] The applicants said they had not seen or received the second agreement. Ms Huynh was clear that she did not talk to the applicants about this or get their signature herself even though they were in the salon together, but rather she emailed the agreement to the agent and asked him to acquire their signature, as this was easier for her. She did not know how the agent acquired the signatures, or how and when the new agreements were given to the applicants.

[35] Ms Huynh claimed that the applicants owed her rent and in some cases, a bond. She accepted that there was no written record showing the applicants were liable to pay rent or bond to her. Ms Huynh said that she had arranged shared accommodation for the newly arrived staff, with the expectation that they would move out after about three months so that newer staff could move in. This was because if their employment continued after three months, Ms Huynh would then start paying them the wages set out in the employment agreement. Up until then, they would only be receiving \$200 or \$300 per week, which was not enough to support their own rent payments.

### **Findings – was there a valid 90-day trial period?**

[36] Ms Huynh states that she was entitled to dismiss Ms Dung Tran in accordance with the 90 day trial period in her employment agreement. In her written submissions, she denies that Ms Dung Tran was fired because she was friends with staff she had fired on 17 December 2023, and says the termination was for poor performance. This directly contradicts her in-person evidence at the investigation meeting, when she said she fired all of the staff who knew each other and had sought advice from an employment advocate, because she considered them all to be connected and creating difficulties for her.

[37] The evidence was that Ms Dung Tran was not involved in the staff meeting of 17 December, but for reasons unknown to her, Ms Huynh pulled her into a meeting the following day on 18 December, and forcibly took her phone from her and looked through her contacts, while one of her relatives threatened to physically assault her. She was then emailed a termination letter at 10.00 pm on 26 December 2023. She had

no reason to expect this, so did not receive it and turned up for work the following day only to be fired by Ms Huynh in person. Although the letter of termination provided for the payment of one week's notice, there is no dispute that the one week's notice was paid to Ms Huynh's bank account.

[38] I will now consider the impact of the 90-day trial period in the employment agreement.

[39] Ms Dung Tran provided an employment agreement dated 4 August 2023, which appeared to be signed by both parties. The agreement contained a trial period on the first and second pages, stating that "the first 90 days of employment will be a trial period, starting from the first day of work". It stated that she would start work on 15 September 2023. This did not occur, and Ms Dung Tran says she arrived in New Zealand on 18 October 2023 and started work on 21 October 2023. Ms Huynh says she started work on 30 October 2023, and was to work for 30 hours per week.

[40] It is submitted for Ms Dung Tran that the 90 day trial period is not valid because:

- a. She was not paid one week's notice as required by the trial period; or
- b. The business employed more than 19 employees at the time, therefore the 90-day trial period was not available to an employer of that size; or
- c. The clause is unenforceable because Ms Trang Bui did not sign the agreement herself.

[41] There is no dispute about the first of these points. The 90-day trial period clause provided for one week's notice to be given or paid. This is referenced in the termination letter emailed to Ms Dung Tran, which letter goes on to state "I have elected to pay this in lieu of having your [sic] work out the notice period".

[42] It is common ground that Ms Dung Tran did not receive her final pay, but that the entire amount was directed by Ms Huynh into her own bank account. It is submitted for Ms Huynh that "the wages were paid into the respondent's rent account under the mistaken belief that she was able to off-set money owed by Ms Dung Tran. It is submitted that this does not invalidate the termination.<sup>2</sup>"

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<sup>2</sup> Paragraphs 79 and 80 of the respondent's submissions dated 6 November 2024.

[43] The Court has held in respect of 90-day trial periods that:<sup>3</sup>

Sections 67A and 67B remove longstanding employee protections and access to dispute resolution and to justice. As such, they should be interpreted strictly and not liberally because they are an exception to the general employee protective scheme of the Act as it otherwise deals with issues of disadvantage in, and dismissals from, employment. Legislation that removes previously available access to courts and tribunals should be strictly interpreted and as having that consequence only to the extent that this is clearly articulated.

[44] The Court then considered the impact of short-paid notice, and found that:<sup>4</sup>

Deficient notice was not lawful notice so that Ms Smith was not dismissed on notice as 67B requires....For this reason, also, she is not precluded from challenging her dismissal by personal grievance.

[45] This is also the case here. When relying on the clause to dismiss Ms Dung Tran, Ms Huynh did not comply with her own obligations under that clause to pay one week's notice. I do not consider that payment which was not made to Ms Dung Tran is payment of the required notice period, in circumstances where there is no documentary evidence to support Ms Huynh's contention that she thought she was entitled to offset amounts supposedly owed to her for rent, and Ms Dung Tran's evidence that Ms Huynh never mentioned the payment of rent until after dismissal.

[46] As the clause must be interpreted strictly, this failure invalidates the protections that might have been available for the employer and means that Ms Dung Tran is not precluded from bringing a personal grievance claim of unjustified dismissal.

### **Was Ms Dung Tran unjustifiably dismissed?**

[47] The law is clear that an employee may only be dismissed for good cause. This is commonly expressed as being for poor performance or for serious or repeated misconduct or untoward behaviour. In this case, Ms Dung Tran's employment was terminated because her employer had formed an adverse view of Ms Dung Tran on the basis of assumptions about Ms Dung Tran being or remaining on friendly terms with other staff who had recently been fired. This was Ms Huynh's in-person evidence at the investigation meeting. Ms Dung Tran committed no breach of her employment obligations that would support her termination. Ms Dung Tran's termination was substantively unjustified.

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<sup>3</sup> *Smith v Stokes Valley Pharmacy (2009) Ltd*, [2010] NZEmpC 111, at para [48]

<sup>4</sup> *Ibid*, at paragraph [97].

[48] I have also considered whether Ms Dung Tran's termination met the test of justification set out at s 103A of the Act, which requires that, before dismissal, the employer must:

- a. Sufficiently investigate the allegations against the employee;
- b. Raise the concerns with the employee;
- c. Give the employee a reasonable opportunity to respond; and
- d. Genuinely consider any explanation given by the employee

[49] There is no evidence as to what investigation Ms Huynh did to form an adverse view of Ms Dung Tran.

[50] Ms Huynh did not raise her concerns with Ms Dung Tran before dismissing her. Ms Huynh did not explain to Ms Dung Tran what she considered Ms Dung Tran had done wrong. Ms Dung Tran was not given any opportunity to respond as she was not given any explanation at all at the time. No further discussion occurred prior to dismissal, and accordingly, there was no opportunity for Ms Huynh to genuinely consider any explanation that Ms Dung Tran might have made either.

[51] Although Ms Huynh has raised allegations of poor performance by Ms Dung Tran, and said generally that she "was always going against me", neither of these issues were raised with Ms Dung Tran at the time either, and so cannot be relied on to justify her dismissal.

[52] Ms Dung Tran's dismissal was procedurally unjustified also. Ms Dung Tran's personal grievance of unjustified dismissal is made out.

### **Was Ms Dung Tran unjustifiably disadvantaged?**

[53] It is submitted for Ms Dung Tran that she suffered unjustifiable disadvantages in her employment, by way of breaching her employment agreement, failing to pay wages when due, threatening and bullying, and failing to pay leave entitlements at the ending of her employment. These claims are denied by the respondent.

[54] There are aspects of the employment that are not in dispute. Ms Dung Tran's original employment agreement had no job description attached, but stated she was "being employed as a Nail Technician". Her evidence is that she had previously worked in the beauty industry in a named salon called La Nails. She met Ms Huynh and demonstrated her skills in person, and Ms Huynh said her skills were okay. Ms Huynh then offered her a job, and arranged for her to have training in Ho Chi Minh City with Ms Huynh's niece before coming to New Zealand. Once Ms Dung Tran had arrived in New Zealand, Ms Huynh prepared a further employment agreement dated 24 October 2023, which had a job description requiring Ms Dung Tran to "provide other beauty services such as: body massage, washing hair, hair assistant."

[55] Ms Huynh accepts that she amended the duties once Ms Dung Tran was in New Zealand and says she could have expected to carry out these duties as part of working in a beauty salon.

[56] Ms Huynh accepts that Ms Dung Tran was not paid her contractual wage, but received either \$200 or \$300 per week in cash. When her New Zealand bank account was open, she was paid at the rate of the minimum wage rather than her contractual rate

[57] Ms Huynh says that Ms Dung Tran is owed an unspecified amount in unpaid wages, but that Ms Dung Tran owes her \$8,400 for rent and food costs, and \$3,600 as a loan. Ms Huynh is unable to point to any documents setting out an agreement by Ms Trang Bui to pay or repay these monies. Ms Dung Tran believed the cash given to her in the first weeks of her employment was wages.

[58] I find that Ms Dung Tran was employed as a Nail Technician. These were the skills she demonstrated to Ms Huynh and later her niece in order to achieve a job offer. It was only once Ms Dung Tran had arrived in New Zealand (and was not receiving regular wages) that Ms Huynh unilaterally changed her job description. Ms Huynh has then proceeded to critique Ms Dung Tran's attitude and alleged poor performance albeit inconsistently as a defence against paying her wages at all, paying her contractual rate, and to justify her summary dismissal. The unilateral changes of job description at a late stage, and the critique of her for allegedly failing to satisfactorily fulfil duties she did not agree to perform amount to an unjustified disadvantage in her terms and conditions of employment. This is exacerbated by the fact that Ms Huynh knew her own business

needs, and could have been upfront with Ms Dung Tran about what duties she needed done.

[59] For completeness, I note that the written submissions in relation to Ms Dung Tran refer to “claims” being raised out of time, but as it is not stated which claims the respondent objects to, I am unable to take this further. In any case, my view is that these disadvantages were ongoing and sufficiently canvassed in the personal grievance letter of 7 February 2024.

[60] In addition to the above, Ms Huynh accepts that she paid Ms Dung Tran at first only \$200 per week, and then \$300 per week in cash. It is well established that a failure to pay wages in full and when due may be an unjustified disadvantage. Even if I accept Ms Huynh’s explanations that she could not pay Ms Dung Tran her wages in full until Ms Dung Tran had a New Zealand bank account and IRD number, this does not explain why Ms Dung Tran was not paid her arrears in full once she had set up her bank account, or why she was paid less per week than in her employment agreement. I find that the failure to pay wages in full and when due was unjustified and disadvantaged Ms Dung Tran in the terms and conditions of her employment. I accept Ms Dung Tran’s evidence of the practical difficulties as well as the stress and distress that the failure to pay wages caused her.

[61] Ms Dung Tran experienced unjustified disadvantages in her employment, by way of unilateral changes to her job description and failures to pay wages in accordance with her employment agreement, and she is entitled to remedies accordingly. I make no findings on other matters raised in the circumstances.

### **Remedies**

[62] Ms Dung Tran is entitled to remedies in respect of her personal grievances. She claims 11 week’s lost wages and compensation for hurt, humiliation, and injury to feelings in respect of her grievances. I note that in her statement of problem, Ms Dung Tran claimed a compensatory sum of \$20,000, but in submissions filed after the investigation meeting, she increased this to \$45,000. She has also claimed a penalty for breach of good faith, a penalty of \$20,000 for breaches of her employment agreement, that penalties be paid to her rather than the Crown, and costs and reimbursement of the filing fee.

[63] I will first consider the claim for three months lost wages resulting from unjustified dismissal, which the respondent resists on the grounds that there is no evidence of mitigation.

[64] Ms Dung Tran gave evidence that she actively applied for many jobs but was hampered in starting her job search during the Christmas and New Year's break. She found a part-time job in a hotel on 13 March 2024. Her evidence was that this was very stressful, as her husband and children had arrived from Vietnam the day before she was fired, and she could not support them. This is direct evidence of steps taken in mitigation, and as a result, Ms Dung Tran has quantified her claim as being for 11 weeks lost remuneration. Section 128(2) of the Act provides that where an employee has a personal grievance and has lost remuneration as a result, the Authority must order the employer to pay the employee a sum equal to that lost remuneration. Ms Dung Tran has lost 11 weeks wages and is entitled to be reimbursed for this.

[65] Ms Dung Tran's employment agreement provided that her usual hours of work would be 40, at \$29.66/hour. I consider it appropriate to calculate her lost wages at the rate of 40 hours per week. Forty hours at the rate of \$29.66 per hour equates to \$1,186.40 per week. Over 11 weeks, this amounts to \$13,050.40. Orders are made accordingly.

[66] I must now consider an award of compensation for hurt and humiliation. It is submitted for the respondent that no compensation is justified. I am not persuaded by this bare assertion. While Ms Dung Tran was only employed for somewhat over two months, I accept Ms Dung Tran's evidence of the impact on her, including her surprise and distress at the suddenness of her termination when she had believed her employment was secure.

[67] Ms Dung Tran initially sought \$20,000 in compensation. Taking into account other comparable cases, I consider this is an appropriate amount to award under s 123(1)(c)(i) of the Act, and that it reasonably reflects the impacts on Ms Dung Tran. I do not consider it would be fair to award the significantly higher amount that was only sought following the investigation meeting. Orders are made accordingly.

### **Breach of Good Faith and the employment agreement**

[68] The statement of problem sets out a claim for breach of good faith, being that Ms Dung Tran was exploited by being grossly underpaid, that her terms of employment were unilaterally varied, she was dismissed, she did not receive her notice payment.

[69] As will be apparent, these claims are the same as her personal grievance claims for which remedies have already been awarded. Accordingly, I decline to make further awards in respect of these same actions.

[70] Ms Dung Tran also claims a penalty for breaches of her employment agreement. There are several terms which Ms Dung Tran says were breached including failure to pay the contractual wage rate, failure to pay wages when due and into a bank account, failure to provide rest and meal breaks (which is disputed), and requiring Ms Dung Tran to carry out additional duties that she was not trained for.

[71] There is also considerable overlap between these breaches and the personal grievance claims. I consider there to be a distinction however, in that Ms Huynh offered employment to Ms Dung Tran by way of both verbal and written terms on 4 August 2023. In the event, practically none of the key terms of either agreement were honoured, with Ms Huynh changing the rate of pay, type and frequency of payments, duties, and minimum and maximum hours of work and premises of work to suit herself after Ms Dung Tran had arrived in New Zealand. Ms Huynh's in-person evidence suggested that she never intended to honour the written terms she had provided, and instead she expected Ms Dung Tran and others to accept very low rates of pay and long hours for the first 3 months while they were being trained.

[72] The submissions made for Ms Huynh support this, saying it is "not credible"... "that Ms Dung Tran would be paid well above the minimum wage as a nail technician her food and living costs would be effectively free."<sup>5</sup>

[73] Although Ms Huynh says now that Ms Dung Tran owes her money for accommodation, she is unable to point to any written agreement about this and says the sums are taken from memory only. The evidence of Ms Dung Tran is that she was never told rent was owed until this claim was raised in answer to her grievances and at one point she and her family were sleeping on a mattress on the floor. On balance, I

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<sup>5</sup> Paragraphs 103 - 104 of the respondent's submissions dated 6 November 2024.

prefer Ms Dung Tran's evidence and do not accept there was any agreement to pay more as Ms Huynh now claims.

[74] Ms Huynh made explicit written commitments to Ms Dung Tran through the employment agreement as to hours of work, rate of pay, and duties. Ms Huynh was in control of the terms and conditions she offered, and can expect to be bound by them. I consider a single penalty for breaching the terms of the employment agreement warranted in the circumstances.

[75] The law in respect to quantification is well established given the content of s 133A of the Act and cases such as *Borsboom (Labour Inspector) v Preet PVT Limited and Warrington Discount Tobacco Limited*,<sup>6</sup> *A Labour Inspector v Prabh*<sup>7</sup> and *A Labour Inspector v Daleson Investment*.<sup>8</sup> Section 133A requires I have regard to the object of the Act, the nature and extent of the breach(s), whether they were intentional or not, the nature and extent of any loss or damage, steps to mitigate effects of the breach, circumstances of the breach and any vulnerability and finally previous conduct.

[76] The Court has found a failure to provide minimum standards directly disadvantages employees, and often arise in circumstances involving a distinct power imbalance.<sup>9</sup> That is the case here and suggests that a penalty should be awarded.

[77] The requirement of intention is not necessarily about whether the party was aware they were breaching the law. Instead, it is about whether they acted intentionally, in the sense of intending to do the act in question<sup>10</sup>, or failed to take reasonable steps to fulfil their legal obligations.<sup>11</sup> Here the evidence leads to a conclusion the failure is deliberate given the non-compliance with the terms of the employment agreement was to Ms Huynh's financial benefit.

[78] The question as to quantum must be weighed carefully. I have considered evidence from Ms Huynh as to her financial situation, and the impact on her ability to pay.

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<sup>6</sup> *Borsboom v Preet PVT Limited and Warrington Discount Tobacco Limited* [2016] NZEmpC 143

<sup>7</sup> *A Labour Inspector v Prabh Limited* [2018] NZEmpC 110

<sup>8</sup> *A Labour Inspector v Daleson Investment Limited* [2019] NZEmpC 12

<sup>9</sup> *A Labour Inspector v Daleson Investment Limited*, above n 3, at para [27].

<sup>10</sup> *Parton v Fifita*, TT 1815/00 DC Auckland, quoted in *MBIE v Sumich*, Auckland TT 4088383

<sup>11</sup> *El-Agez v Comprede Limited*, TT 4121553, at para 18

[79] Having weighed these factors I conclude the respondent should be required to pay a penalty of \$2,500, which is half of that requested by Ms Dung Tran. However, I direct that all of this should be paid to the applicant, in recognition of the direct impact on her stemming from these breaches. Orders are made accordingly.

### **Contribution and other matters**

[80] It is submitted for Ms Huynh that any remedies be reduced by 50%, due to Ms Dung Tran's "conduct and poor performance". There is no evidence of any conduct by Ms Dung Tran that was untoward, or which might have contributed to her dismissal or unjustified disadvantages. Allegations of poor performance were only raised after Ms Dung Tran was dismissed rather than during her employment, and were not on all fours with Ms Huynh's evidence at the investigation meeting.

[81] In any event, these matters would not relieve the employer of its obligations to both comply with the employment agreement and follow a fair process when considering dismissal. No actions by Ms Dung Tran contributed to the situation that led to her grievances. No deductions for contribution are made.

[82] In addition, Ms Huynh has raised by way of written submissions after the investigation meeting, that Ms Dung Tran's claims are part of a "scheme" which has been "concocted" to "extort money from the respondent"<sup>12</sup>. It is stated that a third party has convinced the applicants that they would be able to obtain substantial compensation, and that the applicant's stories are "fabricated" and they have provided false documents<sup>13</sup>.

[83] I do not accept that there is any reliable evidence of this. Nor do I accept that Ms Dung Tran seeking her employment rights amounts to a "scheme" even where other staff are doing the same. Nevertheless, I consider it appropriate to record that this determination and the remedies resulting focuses on matters where there was little to no factual dispute between the parties. I have not expressed conclusions on other matters mentioned by the parties which I was not required to determine.

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<sup>12</sup> Paragraph 26 of the respondent's submissions dated 6 November 2024.

<sup>13</sup> Ibid, paragraphs 32 to 43 generally.

## Orders

[84] Ms Thi Dung Tran has a personal grievance in that she was unjustifiably dismissed and unjustifiably disadvantaged in her employment.

[85] Ms Ngoc Tuyet Uyen Huynh is ordered to pay to Ms Thi Dung Tran within 28 days of the date of this determination:

- a. The sum of \$13,050.40 gross as compensation for 11 weeks lost remuneration;
- b. The sum of \$20,000 without deduction as compensation for hurt and humiliation; and
- c. The sum of \$2,500 without deduction as a penalty for breaching the employment agreement.

## Costs

[86] Costs are reserved. The parties are encouraged to resolve any issue of costs between themselves, bearing in mind that the amount of time taken to hear Ms Dung Tran's matter was approximately half a day.

[87] If the parties are unable to resolve costs, and an Authority determination on costs is needed, the applicant<sup>14</sup> may lodge, and then should serve, a memorandum on costs within 28 days of the date of this determination. From the date of service of that memorandum, the respondent 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.

[88] The parties can anticipate the Authority will determine costs, if asked to do so, on its usual "daily tariff" basis unless circumstances or factors, require an adjustment upwards or downwards.<sup>15</sup>

Claire English  
Member of the Employment Relations Authority

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<sup>14</sup> Where it is not clear who may be seeking costs use "the party who believes they are entitled to costs".

<sup>15</sup> For further information about the factors considered in assessing costs see: [www.era.govt.nz/determinations/awarding-costs-remedies/#awarding-and-paying-costs-1](http://www.era.govt.nz/determinations/awarding-costs-remedies/#awarding-and-paying-costs-1)