

**IN THE EMPLOYMENT RELATIONS AUTHORITY
WELLINGTON**

**I TE RATONGA AHUMANA TAIMAHI
TE WHANGANUI-Ā-TARA ROHE**

[2025] NZERA 75
3293219

BETWEEN KIM DUNG PHAM
Applicant

AND NGOC TUYET UYEN
HUYNH
Respondent

Member of Authority: Claire English

Representatives: Dhilum Nightingale and Jordan Rennie, counsel for the
Applicants
Myles Norris and Ngoc Tuyet Uyen Huynh in person

Investigation Meeting: 9, 10, 11, and 12 September 2024 in Wellington

Submissions received: 7 October and 20 November 2024 from Applicant
6 November 2024 from Respondent

Determination: 14 February 2025

DETERMINATION OF THE AUTHORITY

Employment Relationship Problem

[1] The applicant, who I will refer to as Ms Dung Pham, signed an employment agreement with the respondent Ms Huynh (known as Amy) to work at her nail salon starting 10 October 2023. She arrived in New Zealand in late December 2023 on the basis of this agreement as well as discussions with Ms Huynh and fulfilling various personal and visa conditions. When she arrived, Ms Huynh declined to provide her with employment, then told her to wait 3 months and start in March instead. The relationship ended when Ms Huynh attempted to forcibly take Ms Dung Pham's phone from her without explanation, and Ms Dung Pham attempted to run away, falling and hurting herself in the process.

[2] Ms Dung Pham brings claims on the basis that she is a person intending to work.

[3] It is submitted for Ms Huynh that Ms Dung Pham abandoned her employment by not turning up to work in March. Ms Huynh's in-person evidence was that she did not have the work she expected for Ms Dung Pham because the opening of a new salon had been delayed, but when Ms Dung Pham had returned to ask for work again, Ms Huynh concluded Ms Dung Pham was part of a group of workers (amounting to 7 other applicants in total) who had gone to seek advice on their New Zealand employment rights, and this was why Ms Huynh had attempted to take away her phone and had sent her away.

The Authority's investigation

[4] 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 Thi Dung Tran (applicant 3290799). In addition, Mr Myles 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.

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

The issues

[6] Ms Dung Pham raise claims of unjustified disadvantage and unjustified dismissal¹ as well as breaches of good faith in relation to her treatment by Ms Huynh. She seeks compensation for hurt and humiliation, and penalties for breaches of good faith.

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

[8] 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

¹ Although claims of discrimination were initially raised, these were not pursued.

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.

[9] The issues requiring investigation and determination in relation to Ms Dung Pham 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 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.

Kim Dung Pham's Evidence

[10] Ms Dung Pham was a person intending to work. She was a young woman with limited work experience. She signed an employment agreement with Ms Huynh on 28 August 2023.

[11] Ms Huynh did not give her a start date, but told her to wait². At first, she did. Ms Pham's evidence was that there came a point where she could not wait any longer, as she had sold her car and house in anticipation of imminent travel and to fund the move. She purchased flights to New Zealand and advised Ms Huynh of her arrival, but got no response. She and her husband and child travelled to New Zealand in on 25 December 2023. They landed in Christchurch, and stayed with friends on a temporary basis.

² The employment agreement contained a start date of 23 October 2023, but Ms Huynh's evidence in relation to all the applicants was that the start date was indicative only give the variabilities of the applicants needing to obtain visas and then travel to New Zealand.

[12] Ms Pham then contacted Ms Huynh via a message app, but was told to stay in Christchurch. Ms Huynh then stopped responding.

[13] Ms Pham's evidence was that she and her family were desperate, as they were in a foreign country with depleted funds, no income and no permanent place to stay, as she was also expecting temporary accommodation together with an immediate start to her work and earnings. She therefore flew to Wellington by herself to meet with Ms Huynh and understand what had gone wrong. Ms Huynh met with her on 13 January 2023, and told her there was no job for her.

[14] Ms Pham was very distressed by this. She had nowhere to stay and could not afford accommodation, so she walked around the central city and sat down on park benches to pass the night.

[15] She returned to the salon on 14 January to ask again for a job, hoping she could change things. After speaking with Ms Huynh, she was told there would be a job for her from 15 March onwards. Ms Pham was relieved, but also worried about supporting her family until then. When Ms Huynh found out she had not slept the night before, she arranged for Ms Pham to stay with another salon worker that night.

[16] Ms Pham returned to the salon again on 15 January. She said she still intended to beg for a job in the interim. She said she had paid Ms Huynh money for the job (which Ms Huynh denies), and I infer felt very let down.

[17] This time, Ms Huynh took Ms Pham into a back room for further discussion. Four other ladies were with Ms Huynh, one being her store manager, and one being related to Ms Huynh (Ms Pham thought a niece or cousin). Ms Huynh then asked Ms Pham for her phone. She did not explain why. When Ms Pham refused to hand over her phone, Ms Huynh attempted to forcibly take it from Ms Pham. Ms Pham said she was very scared by this, and started yelling "help me" in Vietnamese. There was a scuffle, and Ms Pham says she was panicking and bit Ms Huynh on the hand to make her let go of the phone. She then fled the office out into the salon, tripping over a piece of furniture and hitting her head hard enough to leave a bruise.

[18] When she fled the salon, a bus driver saw her. He helped her report the incident to the police, and then took her to hospital where she received emergency treatment, including for her head, which Ms Pham describes as still hurting.

[19] Ms Huynh attempted to visit Ms Pham in the hospital, but her friend who was with her told security Ms Huynh was not welcome, so Ms Huynh left.

[20] Ms Pham said she had not seen or heard from Ms Huynh since. She said she could not work for Ms Huynh after being assaulted by her, so began looking for other jobs. She found a new job on 8 April 2024 doing nails. She recalls being scared, cold, and hungry, living temporarily in other people's houses and garages, and then spending all her money on rent. Ms Pham says that the whole experience has left her with an ongoing mental injury, and even at the time of the investigation meeting, she was unable to recall what had occurred without becoming very distressed. She says that she had done all this to have a better life for her and her family, but had been let down.

[21] Ms Huynh said that she had given Ms Pham an employment agreement in about August 2023, but had asked her to remain in Vietnam for a while as she did not have the work for her. Ms Huynh agreed that she had told Ms Pham when she visited the second time (on 14 January 2024) that she could start work on 15 March 2024, as this was when Ms Huynh expected to open a new salon in Newtown (this did not eventuate for unrelated reasons).

[22] In respect of the incident on the third day, 15 January 2024, Ms Huynh said she felt uncomfortable with how Ms Pham kept coming back and asking for work even after Ms Huynh had said no. Ms Huynh admitted she had tried to forcibly take Ms Pham's phone away, and said that she had assumed Ms Pham was also trying to record her and insist on her rights even after being told "no", just like the other staff she had dismissed before Christmas. There was no contact between the parties after that day.

Ms Huynh's Position Overall

[23] 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.

[24] When asked about how this related to Ms Dung Pham, who had only arrived in New Zealand on 25 December, when other staff had already been dismissed, Ms Huynh's in-person evidence was that when Ms Dung Pham returned to the salon after being told there was no job, Ms Huynh was concerned by this, and when Ms Dung Pham returned the third time after being told she could start work on 15 March 2023, this was when Ms Huynh concluded that Ms Dung Pham was connected to the previous group of staff who had been dismissed after seeking advice on their employment rights. Ms Huynh had tried to take Ms Dung Pham's phone out of concern she was being recorded for reasons connected to this.

Findings – was Ms Dung Pham a person intending to work

[25] There is no dispute that Ms Huynh hired Ms Dung Pham to work in one of her nail salons. This is set out in the employment agreement between the parties, and both parties (including Ms Huynh initially) acted in reliance on it.

[26] The in-person evidence established that two things occurred which impacted Ms Dung Pham's employment, although she herself was not aware of this. First, Ms Huynh had plans to open a nail salon in Newtown and had entered into a lease agreement accordingly. She expected to need more staff in early 2024 as a result. Unfortunately, the opening of that shop was pushed back by 3 or 4 months, for reasons relating to the building soundness which were unexpected and outside Ms Huynh's control. This is why she had asked Ms Dung Pham to stay in Vietnam longer, and why she did not immediately respond to Ms Dung Pham's inquires as to when she should buy her flights to New Zealand. There was no immediate work for Ms Dung Pham. Ms Huynh did not explain any of this to Ms Dung Pham at the time. The second thing that impacted Ms Pham although she was not aware of this, is that Ms Huynh was in the process of dismissing 7 of her existing staff between 17 December and about 27 or 28 December 2023.

[27] Ms Dung Pham had sold her assets including her house to fund her emigration to New Zealand, and was without a job in anticipation. She was not in a position to wait indefinitely for further contact from Ms Huynh. This is why she purchased flights to come to New Zealand even without receiving a confirmation from Ms Huynh, as she could not afford to wait. I infer that she had taken the start date in her employment agreement with some seriousness.

[28] Section 6 of the Act provides that the term “employee” includes “a person intending to work”.³ This is further defined in s 5 of the Act as meaning “a person who has been offered, and accepted, work as an employee”. This describes Ms Dung Pham, and both parties agree that this was the original intention. I find that Ms Dung Pham was a person intending to work, and is entitled to pursue claims under the Act.

Was Ms Dung Pham unjustifiably dismissed?

[29] I must now consider whether Ms Dung Pham was unjustifiably dismissed. It is submitted for her that Ms Huynh’s actions when she met with Ms Dung Pham in January amount to either an actual dismissal or a constructive dismissal, and were unjustified.

[30] In particular, it is submitted that Ms Huynh’s statement to Ms Dung Pham on 13 January 2024 that there was no work for her, would not be any work for her, was no accommodation for her, and to return to the South Island was in fact a dismissal. In the alternative, it is submitted that Ms Huynh’s actions on 15 January where she attempted to forcibly take Ms Dung Pham’s phone off her, engaged in a scuffle, and did not attempt to assist Ms Dung Pham when seeing she was frightened and hurt, amount to a constructive dismissal.

[31] When Ms Dung Pham arrived at Ms Huynh’s central city salon on 13 January, Ms Huynh told her to leave, and that there was no work for her. This was unequivocal. Ms Dung Pham certainly believed it to be an ending, as she spent the night walking around in shock, unwilling and unable to even purchase a hotel for a night without any funds or job security. In her in-person evidence, she explained that she returned the following day to try to convince Ms Huynh to change her mind, as she was “desperate” and did not know where to turn to find a job in a foreign country where she had no

³ Section 6(1)(b)(ii).

funds, no contacts and could not speak the language. The language used by Ms Dung Pham also supports the view that she understood she was dismissed on 13 January.

[32] Having said this, Ms Huynh accepted that her employment could continue in some fashion if Ms Dung Pham was willing to accept the significant change that the job would not start until 15 March 2024 (compared to the start date of 10 October 2023 that had been offered and accepted). In light of what occurred the following day, I find that there was never a concluded meeting of minds on this point. Ms Dung Pham's return to ask again to start sooner also indicates a lack of full acceptance.

[33] In turn, Ms Huynh's stated discomfort with Ms Dung Pham's repeated requests, her attempt to take Ms Dung Pham's phone away for no good reason in a physical manner, and her decision to take no action while Ms Dung screamed for help, fell and hurt herself to the point that a passing stranger found her in such distress that he assisted her to the police and the hospital, amount to repudiatory conduct. This is supported by Ms Huynh's in-person evidence when she explained she had formed an adverse view of Ms Dung Pham, and considered her to be connected to the staff she had previously fired for seeking advice on their employment rights.

[34] I find that Ms Dung Pham was in fact dismissed on 13 January 2024. This was not undone by the offer of employment starting on 15 March 2025 the following day. Rather, it was reinforced by Ms Huynh's conduct on 15 January, which amounted to repudiatory actions in any event.

[35] Having found Ms Dung Pham was dismissed, I must consider whether her 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

[36] The evidence as to what investigation Ms Huynh did to form an adverse view of Ms Dung Pham is that this was an assumption on Ms Huynh's part. Certainly, it was never discussed with Ms Dung Pham.

[37] Ms Huynh did not raise her concerns with Ms Dung Pham before dismissing her. My view is that both the delayed opening of the new salon and the adverse perception Ms Huynh had formed of Ms Dung Pham contributed to her dismissal, although Ms Huynh's in-person evidence suggests that the main reason the employment ended was due to her adverse perception of Ms Dung Pham as being connected to the group of other dismissed staff, as Ms Huynh explained to me that the dismissal of Ms Dung Pham was part of this same course of events. In any event, neither of these concerns were raised or discussed with Ms Dung Pham at any point. There was no opportunity for her to respond to them, and no opportunity for Ms Huynh to consider any explanation that Ms Dung Pham might have wanted to give, had she known of the concerns.

[38] I find that Ms Dung Pham was unjustifiably dismissed.

[39] In her written submissions following the investigation meeting, Ms Huynh states that Ms Dung Pham abandoned her employment by failing to turn up for work on 15 March 2024 as instructed. It is submitted that Ms Huynh texted Ms Dung Pham on 15 January stating she could start work on 15 March, but it was Ms Dung Pham's decision to abandon her employment, as demonstrated by her evidence that she could not continue to work for Ms Huynh after what is described as the incident in the salon.

[40] I find this submission is inconsistent with the evidence of what actually occurred. First, it does not respond to Ms Huynh's prior dismissal of Ms Dung Pham on 13 January. Criticism is made of Ms Dung Pham not waiting longer in Vietnam, and buying her flights without an explicit approval of dates and times from Ms Huynh. However, Ms Huynh had already given a date of 10 October 2023. If matters truly had changed, it was her responsibility to advise Ms Huynh that she should plan to start work at a different date, not the other way around.

[41] Second, it is at best naïve to assume that Ms Dung Pham would be willing to work for Ms Huynh after Ms Huynh attempted to use physical force to take her belongings without explanation, and where Ms Huynh showed no care or remorse when Ms Dung Pham was in mental and physical distress. Ms Huynh admits her conduct

here. Although I accept that Ms Dung tripped on a piece of furniture and hit her head that way, Ms Huynh must bear responsibility for holding Ms Dung Pham in an office crowded with other people, and starting a scuffle to take her personal possessions away. This was entirely within Ms Huynh's control, as was her decision to ignore Ms Dung Pham's distress. These are not the actions of a fair and reasonable employer, looking to maintain an employment relationship with a delayed start date.

[42] Finally, Ms Huynh's in-person evidence is that she only sent the text referring to the 15 March start date to Ms Dung Pham once she had attempted to visit Ms Dung Pham in hospital and been turned away. There was never any follow up either before or after the date of 15 March 2023, as might have been expected if Ms Huynh had genuinely been expecting Ms Dung Pham to attend work on that date.

[43] It is significant that the employment agreement between the parties contains an abandonment provision on page 13. The clause requires the employer to make reasonable efforts to contact the employee, and that the employer will tell the employee that they are deemed to have ended their employment. Neither of these things occurred. Ms Huynh cannot rely on this clause if she herself did not abide by its conditions.

[44] Ms Dung Pham did not abandon her employment. She was unjustifiably dismissed by Ms Huynh. She is entitled to remedies accordingly.

Was Ms Dung Pham unjustifiably disadvantaged?

[45] It is submitted for Ms Dung Pham that she suffered an unjustifiable disadvantage due to the failure to provide her with a safe work environment. This failure is said to have occurred when Ms Huynh attempted to take Ms Dung Pham's phone off her and obstructed her from leaving.

[46] This is denied by the respondent, on the basis that Ms Huynh only wanted to see Ms Dung Pham's text messages, and also that Ms Dung Pham bit Ms Huynh on the hand, which is not denied.

[47] My view is that the events of 15 January 2024 cannot realistically be separated from Ms Dung Pham's unjustified dismissal claim. They form part of the same course of conduct, as is shown by the respondent's claim of abandonment of employment

based on actions that occurred that day as a defence to the unjustified dismissal claim. In all the circumstances, I decline to consider the matters separately.

Remedies

[48] Ms Dung Pham is entitled to remedies in respect of her personal grievances. She claims three months lost wages, at the rate of 40 hours per week and \$29.66 per hour, as well as compensation for hurt, humiliation, and injury to feelings in respect of her grievances. I note that in her statement of problem, Ms Dung Pham claimed a compensatory sum of \$20,000, but in submissions filed after the investigation meeting, she increased this to \$30,000. She has also claimed a penalty for breach of good faith, that the penalty should be paid to her rather than the Crown, and costs and reimbursement of the filing fee.

[49] 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.

[50] Ms Dung Pham gave evidence that she looked for jobs constantly, even though she was hampered by her poor English language. She found a job on 8 April 2024. I consider this to be direct evidence of steps taken in mitigation. 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. I must therefore consider what wages Ms Dung Pham has lost as a result of her unjustified dismissal.

[51] Ms Dung Pham arrived in Wellington on 14 January 2024, ready and willing to work. She found a job on 8 April 2024 which is 12 weeks later. I consider that 12 weeks is the amount of wages lost, as I have already set out above why I do not consider that Ms Dung Pham could have reasonably started working for Ms Huynh on 15 March 2024, and that in reality this was not an open offer by then in any case.

[52] Ms Dung Pham has lost 12 weeks wages, and is entitled to be reimbursed for this.

[53] Her employment agreement provided that she would have a guaranteed minimum of 40 hours of work per week, at \$29.66/hour. Forty hours at the rate of

\$29.66 per hour equates to \$1,186.40 per week. Over twelve weeks, this amounts to \$14,236.80 gross. Orders are made accordingly.

[54] I must now consider an award of compensation for hurt and humiliation. It is submitted for the respondent that Ms Dung Pham is not entitled to compensation. I am not persuaded by this bare assertion. I accept Ms Dung Pham's evidence of the impact on her, including that she described this as an on-going mental injury. Ms Dung Pham initially sought \$20,000 in compensation. Taking into account other comparable cases, and particularly the degree of harm caused to Ms Dung Pham through no fault of her own, I consider it appropriate this an appropriate amount to award under s 123(1)(c)(i) of the Act. 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.

[55] The statement of problem sets out a claim for breach of good faith, being that Ms Huynh refused to provide Ms Dung Pham with work. This is the same as her claim of unjustified dismissal. Accordingly, I decline to make further awards in respect of these same actions.

Contribution and other matters

[56] It is submitted for Ms Huynh that any remedies be reduced by 50%, due to Ms Dung Pham's "conduct and poor performance". The only evidence of any action by Ms Dung Pham which might fall under this heading is her admission that she bit Ms Huynh's hand when Ms Huynh attempted to take her phone away. This did not contribute to the dismissal which had effectively already occurred, and was part of what both parties described as a mutual "scuffle" in any event.

[57] No actions by Ms Dung Pham contributed to the situation that led to her grievance. No deductions for contribution are made.

[58] In addition, I record that even in the case of Ms Dung Pham, who did not meet with Ms Huynh in New Zealand until after the 7 other applicants in this case had been dismissed, Ms Huynh has raised by way of written submissions after the investigation meeting, that her claims are part of a "scheme" which has been "concocted" to "extort money from the respondent"⁴. It is stated that a third party has convinced the applicants

⁴ Paragraph 26 of the respondent's submissions dated 6 November 2024.

that they would be able to obtain substantial compensation, and that the applicant's stories are "fabricated" and they have provided false documents⁵.

[59] There is no reliable evidence of this, and I discount it. However, the fact of it being raised in relation to Ms Dung Pham supports my conclusion that she was dismissed by Ms Huynh due to an adverse perception that Ms Huynh had formed of her. I also 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.

Orders

[60] Ms Kim Dung Pham has a personal grievance in that she was unjustifiably dismissed and unjustifiably disadvantaged in her employment.

[61] Ms Ngoc Tuyet Uyen Huynh is ordered to pay to Ms Kim Dung Pham within 28 days of the date of this determination :

- a. The sum of \$14,236.80 gross as compensation for lost remuneration;
- b. The sum of \$20,000 without deduction as compensation for hurt and humiliation.

Costs

[62] 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 Pham's matter was approximately half a day.

[63] If the parties are unable to resolve costs, and an Authority determination on costs is needed, the applicant⁶ 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.

⁵ Ibid, paragraphs 32 to 43 generally.

⁶ Where it is not clear who may be seeking costs use "the party who believes they are entitled to costs".

[64] 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.⁷

Claire English
Member of the Employment Relations Authority

⁷ For further information about the factors considered in assessing costs see: www.era.govt.nz/determinations/awarding-costs-remedies/#awarding-and-paying-costs-1