

**NOTE: This determination  
contains an order prohibiting  
publication of certain  
information at paragraph [12]**

**IN THE EMPLOYMENT RELATIONS AUTHORITY  
AUCKLAND**

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

[2022] NZERA 666  
3119313

BETWEEN	THI THU HA NGUYEN Applicant
AND	DZPK Respondent

Member of Authority:	Leon Robinson
Representatives:	Keryn Morgan, counsel for the Applicant Ashley Fechny, advocate for the Respondent
Investigation Meeting:	23 – 24 August 2022, at Hamilton
Determination:	15 December 2022

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**DETERMINATION OF THE AUTHORITY**

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**Employment Relationship Problem**

[1] Thi Thu Ha (Stephanie) Nguyen (Ms Nguyen) claims that her employer DZPK failed to act in good faith and failed to comply with its statutory obligations. Ms Nguyen also claims she was unjustifiably disadvantaged. She seeks to recover arrears of wages of \$14,209.53.

[2] DZPK denies not acting in good faith towards Ms Nguyen. It denies that she has a personal grievance. It denies the various claims of breach of statutory duties and says that certain other failures were remedied.

[3] The parties were unable to resolve the problem by the use of mediation.

## **The Authority's investigation**

[4] For the Authority's investigation written witness statements were lodged from Ms Nguyen, Melanie Lewis, Thao Nguyen, Nhu Huynh Cao (Tiffany) Cao (Ms Cao), Van Tuong Le and Mi Tran. All witnesses answered questions under affirmation from me and the representatives. The representatives made closing submissions.

[5] This determination has been issued outside the timeframe set out at section 174C(3)(b) of the Employment Relations Act 2000 (the Act), where the Chief of the Authority considers exceptional circumstances exist. As permitted under section 174E of the Act, not all the evidence or information received has been recorded. Rather, this determination makes findings of fact and law and sets out conclusions on the issues necessary to dispose of the Applicant's claims.

## **Non-Publication**

[6] The Respondent seeks a non-publication order on the basis that should Ms Cao be significantly impacted by publication of the Respondent's name, she will not be able to properly tend to her business which might then result in further redundancies if it is required to undergo a change process to ensure its continuing viability in the market. The application is opposed.

[7] The Respondent makes application for an order that its name be prohibited from publication for reasons that include:-

- (a) a concern for Ms Cao's mental health which is evidenced by a doctors note provided in her evidence to the Authority;
- (b) a concern that Ms Cao will be unable to care for her three small children if she is mentally unwell;
- (c) a concern that Ms Cao will be unable to properly tend to the Respondent's business if she is unwell;
- (d) a concern that Ms Nguyen seeks to unfairly punish the Respondent as may be apparent from Ms Nguyen's significant involvement on an employment law focused Facebook group

[8] The doctor's note of August 2021 attests that Ms Cao was then suffering from depression and at that time had needed a home-based mental health treatment service

to look after her. That service started from April 2021. The doctors letter sought to have Immigration NZ process visa applications quickly so that Ms Cao could be supported.

[9] The application is opposed on the basis that open justice considerations ought to prevail and because a company does not have 'feelings'. It is countered that while it is accepted that a company does not have 'feelings', it would be artificial to refuse non-publication on that basis.

[10] There is a concern that identification of the Respondent's name would lead immediately to identification of Ms Cao by association. Non-publication of Ms Cao's name is not sought.

[11] I decline to grant a non-publication order of the Respondent's name on the basis that I am not persuaded that there is some specific identifiable harm that is sufficient to properly outweigh the public interest in open justice considerations. I trust that the appropriate care and treatment can continue to be provided to Ms Cao should her existing diagnosed condition of depression be impacted.

[12] However, I grant an interim non-publication order solely for the purpose of preserving the Respondent's entitlement to challenge my decision. I therefore grant an order that the Respondent's name, be prohibited from publication in relation to this matter for 28 days after the date of this determination. By reason of that order, the random combination of letters 'DZPK' is substituted for its actual name (bearing no relation to its actual name). This order is made under clause 10 of Schedule 2 to the Act.

### **The issues**

[13] Ms Cao is the sold director and shareholder of DZPK. She took over its business from the previous owner on 1 April 2019.

[14] Ms Nguyen was looking for work and through her enquiries she made contact with Ms Cao seeking work in late May 2019. Ms Nguyen met with Ms Cao for an informal interview on 29 May 2019. Ms Nguyen had no experience in working with nails.

[15] Ms Nguyen says she began working at DZPK on 3 June 2019 attending from 9am until 3pm every day from Monday 3 June 2019 until Saturday 8 June 2019. She

says she was not paid for these hours. Ms Cao says that from 3 June 2019 to 8 June 2019 Ms Nguyen went to DZPK twice to observe Ms Cao working. Ms Cao says Ms Nguyen remained for one or two hours each time.

[16] From 10 June 2019 until 17 August 2019 Ms Nguyen says she worked a total of 7 weeks from 9am to 5pm Thursdays and Fridays and from 9am to 6pm on Saturdays. Ms Cao says that from 10 June 2019 until 18 August 2019 Ms Nguyen was not an employee and attended DZPK to learn. She says DZPK hours were Monday, Tuesday, Friday and Saturday 9am to 6pm and Wednesday to Thursday 9am to 7pm.

[17] Ms Cao says that on 14 June 2019 Ms Nguyen insisted on being paid in cash. Ms Nguyen was paid in cash the sum of \$235.00 per week worked, totalling \$1,645.00 over the period.

[18] From the week beginning 19 August 2019 Ms Nguyen began working five days per week, for at least 7.5 hours each day.

[19] In November 2019 DZPK became seasonally busier and Ms Nguyen worked longer hours. During this time, she would often collect her youngest son from day-care around 5pm and return to DZPK with him.

[20] During the week of 16 December 2019 to 21 December 2019 Ms Nguyen worked longer hours again without remuneration for the additional hours.

[21] On 21 December 2019 Ms Nguyen requested her hours return to 9am to 5pm Monday to Friday and 9am to 6pm Saturdays. Ms Cao agreed to this request via text message.

[22] On 13 June 2020 Ms Cao sent a text message to Ms Nguyen advising her that there would be two days of work available for her in the following two weeks and then there would be no further work available for her.

[23] These issues are for determination:-

- (a) is Ms Nguyen owed unpaid wages, unpaid annual leave and unpaid holidays?
- (b) should penalties be imposed on DZPK?
- (c) was Ms Nguyen unjustifiably dismissed from her employment?

- (d) if she was unjustifiably dismissed, what remedies should be provided to Ms Nguyen?
- (e) should any remedies to be provided to Ms Nguyen be reduced for contribution?
- (f) should any party be required to make a contribution to the costs of professional representation to another party?

**Action for recovery of arrears of wages**

[24] Ms Nguyen seeks to recover unpaid wages, unpaid annual leave and unpaid holidays.

[25] Ms Cao says that Ms Nguyen asked to observe people working and that this was the basis Ms Nguyen was at DZPK from 3 June to 8 June 2019. Ms Cao says Ms Nguyen had not been “officially recruited” at that time. She says she did not think she had to pay anyone who was merely observing. She says too that she did not think Ms Nguyen was an employee because she was training and wanted to be paid in cash.

[26] Ms Nguyen says she commenced the role of nail technician initially on a part-time basis on 3 June 2019. She says she worked Monday to Saturday from 9am to 3pm in the first week to learn the role and was mostly supervised by Ms Cao. She was not paid for this first week of work and claims wage arrears in respect of it.

[27] I am persuaded to accept Ms Nguyen’s evidence. From 3 June 2019 she was employed by DZPK as a nail technician. I accept her evidence too that she worked the hours she did. It is not disputed that she was not paid. I consider she ought to have been paid. I find she is owed wage arrears in this respect of 36 hours.

[28] I find that Ms Nguyen was employed from 3 June 2019. A casual employment agreement was presented to her and she was apparently employed on that basis until 17 August 2019. From 18 August 2019 the parties entered into an indefinite employment relationship.

[29] Ms Nguyen was paid in cash the sum of \$235.00 per week worked, totalling \$1,645.00 for the period from 9 June 2019 to 17 August 2019. During this period, she worked 9am to 5pm Thursday and Friday and from 9am to 6pm on Saturday each week.

[30] Ms Nguyen believed she was being underpaid and that she should have been receiving the minimum wage of \$17.70 at the time. She says she was not confident enough to approach Ms Cao because (from a cultural perspective) she believed it was inappropriate for her to be questioning Ms Cao who was her superior. She says she was pressured to sign the employment agreement at this hourly rate.

[31] In July 2020 Ms Nguyen arranged to pay tax on the cash wages she had requested to be paid.

[32] From mid-September 2019 Ms Nguyen worked 50+ hours per week.

[33] I accept that from November 2019 DZPK became increasingly busier and Ms Nguyen was directed to work longer hours. She was told to collect her son from day-care and then return to work until closing. I accept that Ms Nguyen believed this to be a temporary situation and complied.

[34] Ms Nguyen gives evidence that while she worked, her son would sit on the chairs in DZPK and she was unable to properly supervise him. She describes an occasion in December 2019 where her son opened the door of DZPK and ran out on to the Main Street in Cambridge. She says that it was only when a client alerted her, that she ran down the street after him. She says that her husband would drive down to DZPK and collect their son at approximately 6.15pm each day. She gives evidence she was not paid any additional wages for working longer hours.

[35] From 16 December 2019 Ms Nguyen worked until DZPK closed at 7pm. She did not leave until around 7.30pm. She was not paid for the extra hours she worked between 16 December 2019 and 21 December 2019.

[36] Ms Nguyen says the additional hours she was working were placing stress on her (her husband worked out of town). As a result, she felt stressed and extremely undervalued as an employee.

[37] On 21 December 2019 Ms Nguyen asked that her hours return to Monday to Friday 9am to 5pm and Saturdays 9am to 6pm. Ms Cao agreed by text message.

[38] Ms Nguyen claims statutory holidays she worked but was not paid for. She notes she had accrued but not taken annual leave and was not paid this outstanding leave at termination.

[39] I am not persuaded by the employer's wage and time record produced to the Authority. I am not convinced of Ms Cao's evidence that she filled in each employees' hours of work at the end of each week. That is a lot to remember at the end of each week and I doubt its reliability accordingly. As well, while there is a place for the employee to sign, there are no signatures attesting to Ms Nguyen's concurrence.

[40] I accept Ms Nguyen is owed wages for the period 3 June 2019 to 8 June 2019.

[41] I accept Ms Nguyen's evidence that she was not paid correctly for the period 10 June 2019 to 17 August 2019. She worked 9am to 5pm Thursdays and Fridays and 9am to 6pm on Saturdays. She accepts she worked seven out of these ten weeks. She ought to have been paid \$415.95 instead of the \$235.00 she was paid.

[42] I accept that Ms Nguyen was not paid correctly for the period between 19 August 2019 up to 31 March 2020. She worked five days per week for a minimum of 7.5 hours per day.

[43] Having regard to the evidence of Ms Nguyen, her husband Thao Nguyen, Melanie Lewis, Emma Phan and text correspondence between the parties I am persuaded that it is more likely than not that Ms Nguyen worked more hours than was recorded by DZPK and what she was paid for.

[44] I find that Ms Nguyen is owed wage arrears in the gross sum of \$14,209.53 as calculated in workings provided to the Authority on 24 May 2021.

### **Unjustifiable dismissal**

[45] On 6 June 2020 Ms Cao told Ms Nguyen that her uncle had deported one of his staff members back to Vietnam because she had stolen an item from his shop. Ms Cao added that the staff member deported was on the same sort of work visa that Ms Nguyen had.

[46] Ms Nguyen says she realised she was being challenged by Ms Cao. She later texted Ms Cao asking why she had told her about the deported staff member. Ms Cao responded that if she had done nothing wrong then she should not be worried. Ms Nguyen says this confused and upset her considerably.

[47] On 13 June 2020, Ms Cao texted Ms Nguyen after she had finished work for the day and without any consultation that DZPK could only offer her two days' work per

week, commencing in two weeks' time and then it would be quiet for a couple of months, but that DZPK would keep in contact.

[48] As a result, Ms Nguyen felt she had no other option but to leave the employment as she needed more work to support her family. From her perspective she had been working six days every week on a fulltime basis for approximately seven months. She texted Ms Cao asking if she could leave the employment immediately without notice. Ms Cao agreed.

[49] I find that DZPK by its actions in communicating to Ms Nguyen that it could only offer her two days' work per week, commencing in two weeks' time and then possibly very little work for two months thereafter amounted to a serious breach of both the duty not to do anything calculated or likely to destroy the relationship of trust and confidence and the duty of good faith, such that Ms Nguyen's request to be permitted to go immediately was reasonably foreseeable having regard to the seriousness of the breaches. Ms Nguyen's decision to go came entirely at DZPK' instigation.

### **The result**

[50] For the foregoing reasons I conclude that DZPK' decisions through Ms Cao in breaching the duties owed to Ms Nguyen and how those decisions were made and carried out, were not what a fair and reasonable employer could have done in all the circumstances at the time. I find that Ms Nguyen has a personal grievance for unjustifiable constructive dismissal. While I accept that Ms Nguyen was unjustifiably disadvantaged in her employment, I consider the remedies I now grant sufficient to resolve that personal grievance too.

[51] I find that Ms Nguyen is owed arrears of wages in the total gross sum of \$14,209.53.

[52] I consider it is appropriate to impose penalties in respect of various breaches of statutory obligations.

### **The resolution**

[53] Ms Nguyen is entitled to formal orders to resolve the personal grievance I have found.

[54] I must first consider whether there was any blameworthy conduct on Ms Nguyen's part which contributed to the situation that led to the personal grievance I have found. I find that there was no such blameworthy conduct on Ms Nguyen's part and there is no basis to reduce either the nature or the extent of any remedies to be provided to her.

#### *Reimbursement*

[55] Ms Nguyen claims reimbursement of lost wages. Ms Nguyen was able to secure alternative employment four weeks after she finished with DZPK.

[56] I am satisfied that Ms Nguyen has lost remuneration as a result of the personal grievance of unjustifiable dismissal. I am satisfied too that she acted to mitigate her losses.

[57] I consider Ms Nguyen ought to be reimbursed the sum of four weeks' wages as reimbursement. I order DZPK to pay the gross sum of \$3,477.60 (Three thousand four hundred and seventy-seven dollars and sixty cents) (46 hours x \$18.90 x 4 weeks) to Thi Thu Ha (Stephanie) Nguyen as reimbursement and to do so within 28 days of the date of this determination.

#### *Compensation*

[58] Ms Nguyen seeks compensation for the hurt and humiliation, loss of dignity and injury to her feelings she suffered as a result of her dismissal.

[59] Following her departure, Ms Nguyen says she became aware that Ms Cao was telling people within the Vietnamese community and clients that she had gone because she had stolen vouchers from DZPK.

[60] Ms Nguyen says Ms Cao's partner Le Van Tuong often behaved in an intimidating manner to her when he was working at DZPK. She says he demanded that she work longer hours on public holidays, and she was not properly paid for the time worked.

[61] Ms Nguyen says her employment at DZPK salon left her stressed and upset. She says she felt very let down and sad by the way she was treated during the employment and the way she was let go.

[62] I am satisfied that Ms Nguyen has suffered hurt and humiliation, loss of dignity and injury to her feelings as a result of her unjustifiable dismissal. Having regard to the nature of the personal grievance and the evidence given by her, I order DZPK to pay to Thi Thu Ha (Stephanie) Nguyen the sum of \$15,000.00 as compensation and to do so within 28 days of the date of this determination.

*Arrears of wages*

[63] I order DZPK to pay to Thi Thu Ha (Stephanie) Nguyen the gross sum of \$14,209.53 (Fourteen thousand two hundred and nine dollars and fifty-three cents) as arrears of wages and to do so within 28 days of the date of this determination.

*Penalties*

[64] I am satisfied that DZPK has acted in breach of certain statutory obligations. It failed to act in good faith towards Ms Nguyen. It failed to retain a copy of a signed employment agreement for Ms Nguyen. It failed to properly keep a wage and time record for Ms Nguyen. It failed to pay the correct adult minimum wage. It failed to pay out accrued but untaken leave on termination. It failed to pay holiday pay.

[65] I impose a penalty on a global basis taking into account the various breaches. I order DZPK to pay a penalty of \$5,000.00 in respect of these breaches with half of that penalty (\$2,500.00) payable to Thi Thu Ha (Stephanie) Nguyen and the remaining half (\$2,500.00) to the Crown and to do so within 28 days of the date of this determination.

**Costs**

[66] Costs are reserved. The parties are encouraged to resolve any issue of costs between themselves. If they are not able to do so Ms Morgan may lodge and serve a memorandum on costs within 14 days of the date of this determination. From the date of service of that memorandum Ms Fechny will have 14 days to lodge any reply memorandum. I will not consider any memorandum out of time without leave.

Leon Robinson  
Member of the Employment Relations Authority