

**IN THE EMPLOYMENT RELATIONS AUTHORITY
WELLINGTON**

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

[2025] NZERA 74
3290820

BETWEEN THI THANH THUY DOAN
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 Thuy, worked for the respondent Ms Huynh (known as Amy) in 2023 at her nail salon. She and 6 other staff were all dismissed in late December 2023. All of the affected staff including Ms Thuy were Vietnamese nationals, who had been recruited by Ms Huynh to come to New Zealand and work in her salon.

[2] The affected staff including Ms Thuy gave evidence that before being offered employment by Ms Huynh, they had had to demonstrate their skills as Nail Technicians either by in person demonstration, or video footage. In addition, they all had to spend two days in Ho Chi Minh City being trained by and demonstrating their 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 Thi Dung Tran (applicant 3290799). In addition, Mr Myles Norris Ms Huynh 's partner, represented 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 dismissal¹ as well as breaches of good faith in relation to their treatment by the

¹ 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 (and in some cases, her representative also) 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 Thuy 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 Thuy 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 Thanh Thuy Doan's Evidence

[12] Ms Thuy was working as a Nail Technician in Vietnam, and was referred to Ms Huynh by her husband's friend. Ms Huynh asked Ms Thuy to send her videos of her

work, and Ms Thuy did so, understanding that if Ms Huynh thought she was skilled enough, she would be offered a role in New Zealand.

[13] Ms Thuy also attended training in Ho Chi Minh City with Ms Huynh's niece. She was told her skills were good, but she should continue to practice.

[14] After viewing the videos, Ms Huynh offered Ms Thuy the job subject to payment of a large fee (around \$40,000 NZD) which Ms Thuy said was to pay for a place in her work, and that Ms Thuy pass a health check necessary for obtaining a New Zealand visa.

[15] Ms Thuy recalls that Ms Huynh's niece rang her several times to get her to rush the payment through, which she had to make in two transactions. To get this amount of money, Ms Thuy explained that her brother-in-law had to "pawn" their house.

[16] Just before she got the necessary visa, her agent gave her the employment agreement, which was in English. He explained the wage rate of \$29.66 and that the hours were about 40 hours per week. Ms Thuy saw the agreement when her agent printed it for her together with other documents for her flight on 24 October 2023, and the agent had inserted her electronic signature into the document for her, as she could not read English.

[17] Ms Thuy arrived in New Zealand on 25 October 2023, and started work at the salon on 30 October 2023. On the first day, she was told to do massages and shampooing, and not the nail work which she had expected to be doing. She said at first, there were not many customers and the staff with longer tenure had priority so she was not very busy and this made her nervous. In the second week, she started working with customers.

[18] Ms Huynh said that Ms Thuy was given a new employment agreement shortly after starting work that covered these new duties. She had sent it to the agent by email, and he had returned it with Ms Thuy's electronic signature on it. Ms Thuy says she never saw this second agreement.

[19] She worked 7 days, from 9.00 am to when the shop closed, which was about 7 pm but sometimes later if needed to finish a job. She was paid \$200 in cash weekly, which was given to her by the shop manager Tina. Tina gave payments to each of the

staff members separately in the corner by the stairs. The staff took turns having lunch when there were fewer customers around. Although Ms Huynh provided pictures of a lunchroom, Ms Thuy said that at the time she worked there, this room was used as the eyelash room, and she usually ate her lunch sitting by the stairs. The eyelash room only became available for use as a lunchroom later, when Ms Huynh moved her office. The room that was the office became the eyelash room, and the eyelash room was set up as a lunchroom and all-purpose space.

[20] On one occasion, Ms Thuy refused to massage a male client. She was then assigned to work at Ms Huynh's salon in Lower Hutt. She did not get a choice in this and found the cost and time of the commute very draining, especially given her low income. She asked to be sent back to the Wellington Central salon for these reasons, but was told it was best not to ask. Ms Huynh says that she sent Ms Thuy to work at the Lower Hutt salon when she refused to massage male clients, because there were two other masseuses in the Lower Hutt salon, so this could be accommodated.

[21] Ms Thuy says that she never knew what time she would finish each day, as this was decided by the store manager, and sometimes could be as late as 8 or even 9 pm. She refutes the idea that she stayed at the salon when she was otherwise free to go home. She accepts that, on those occasions when customers were not present, she and the other girls would train by practicing each other's nails, and would help each other with their English, but they did not do this while they were working, as talking in front of customers was not allowed.

[22] In November, there was a staff meeting where Ms Huynh encouraged everyone to speak if they had concerns. One of the outcomes from this meeting, driven from staff suggestions, was that staff had more ability to work to their strengths and do the tasks they were best at, and Ms Thuy felt this resulted in less work pressure. She recalls that there were still no work rosters. These were only instituted after Labour Inspectors visited.

[23] Ms Thuy recalls that she was working long hours and was happy to work with customers and improve her skills. She says that she was only aware of one potential complaint, but that this was a situation where she and another staff member were working with two clients, and one of those clients made a complaint. This was not Ms Thuy's client, but she recalls that Ms Huynh told her to be careful anyway.

[24] Ms Thuy was shocked to receive an email terminating her employment on 17 December 2023. She states she had done everything she was asked to do, up to and including delivering flyers, and her dismissal meant that everything came crumbling down. Ms Thuy was present at a general staff meeting where Ms Huynh asked staff if they had “turned against her” by attending a public meeting with an employment advocate. Ms Thuy did not meet with the advocate in question, as she was working at the salon at the time of that meeting. Ms Thuy said that Ms Huynh stated she had “gone against” her by “going out looking for laws”. She was then told to go home and wait for an email. She was then terminated by way of an emailed letter later that day and did not understand what she had done wrong or what Ms Huynh meant as she had been at work.

[25] Ms Huynh says Ms Thuy was fired because she had secondary employment in a salon in Kilbirnie. She says she visited this salon hoping to catch Ms Thuy there, but never saw her, so this meant Ms Thuy must have seen her coming and run away. Ms Huynh freely explained that she would go around other nail salons to see if any of her staff were working there. Ms Huynh also said that Ms Thuy had taken videos in the salon which was against policy.

[26] Ms Thuy’s evidence is that 17 December was her last day of work, and she received no pay or notice after this. There are two payslips following her termination of employment, but the money went into Ms Huynh ’s bank account, not hers.

[27] Ms Huynh accepted this, and explained that the final two payslips showed payments made to her, to repay her for the rent payments she had loaned Ms Thuy, and the \$200 per week she had loaned Ms Thuy. Ms Huynh accepted that there was no written agreement that Ms Thuy would repay such monies, and has no other records of this. She simply recalled the total amount she said was owed to her by Ms Thuy from memory. Ms Thuy rejects the idea that the \$200 per week was a loan, and says this was wages.

[28] She says that Ms Huynh told her she would support her with rent payments. Ms Thuy paid Ms Huynh \$225 per week for rent in the flat she and her husband and children shared with another family. She did not expect to have to pay or repay Ms Huynh for further rent on top of this, and it was never discussed that she would need to pay or repay a bond.

[29] Ms Thuy said that losing her job was overall a terrible experience for her, especially since her husband was not working and she was on a work visa stating she could only work for Ms Huynh. She says she felt pushed to the edge especially since she had been fired without reason.

[30] She immediately started looking for other jobs, and was asked to demonstrate her skills at another salon, but Ms Huynh found out and came to video her in the other salon. As a result, the owner of the salon said he would not employ her unless she was able to get a different visa, as they did not want anything to do with Ms Huynh. Ms Thuy did get a six-month visa not tied to Ms Huynh, and was then able to work at another nail salon. She was out of work for four weeks.

[31] Ms Huynh says that she did follow Ms Thuy to another salon and attempt to video her working at that salon, as proof against Ms Thuy (and it was intimated, proof against the other salon owner), as she believed Ms Thuy should not be working for others. Ms Huynh also said that this occurred before Ms Thuy was fired, although Ms Thuy firmly refuted that and explained she would not have time to visit other salons before she was fired as she was working 7 days a week.

Ms Huynh 's Position Overall

[32] 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.

[33] 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.

[34] 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.

[35] 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.

[36] 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?

[37] Ms Huynh states that she was entitled to dismiss Ms Thuy in accordance with the 90-day trial period in her employment agreement.

[38] Ms Huynh does not deny the comments attributed to her by Ms Thuy and others at the staff meeting on 17 December 2023, that she was going to fire or dismiss Ms Thuy and others for “going against her” by speaking to an employment advocate about their employment rights. A letter of termination was given to Ms Thuy that day, ending her employment with the payment of one weeks’ notice. There is no dispute that the one weeks’ notice was paid to Ms Huynh ’s bank account.

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

[40] Ms Thuy provided an employment agreement dated 4 September 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 10 October 2023. This did not occur, and Ms Thuy says she arrived in New Zealand on 25 October 2023 and started work on 30 October.

[41] Ms Huynh refers to a second employment agreement which she says was signed on 30 October 2023, being the day that Ms Thuy first started work.

[42] It is submitted for Ms Thuy 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 Thuy did not sign the agreement herself.

[43] There is no dispute about the first of these points. The 90-day trial period clause provided for one weeks’ notice to be given or paid. This is referenced in the termination letter given to Ms Thuy, which letter goes on to state “I have elected to pay this in lieu of having your [sic] work out the notice period”.

[44] It is common ground that Ms Thuy 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 Thuy. It is submitted that this does not invalidate the termination.²”

[45] The Court has held in respect of 90-day trial periods that:³

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.

[46] The Court then considered the impact of short-paid notice, and found that:⁴

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.

[47] This is also the case here. When relying on the clause to dismiss Ms Thuy, Ms Huynh did not comply with her own obligations under that clause to pay one weeks’ notice. I do not consider that payment which was not made to Ms Thuy is payment of the required notice period, in circumstances where there is no documentary evidence to support Ms Huynh’s contention that she was entitled to off-set amounts supposedly owed to her, and Ms Thuy’s evidence that she paid \$225 to Ms Huynh for rent and believed this was the entirety of the portion due for her share in the house she shared with others.

[48] As the 90-day clause must be interpreted strictly, this failure invalidates the protections that might have been available for the employer and means that Ms Thuy is not precluded from bringing a personal grievance claim of unjustified dismissal.

Was Ms Thuy unjustifiably dismissed?

[49] On its face, Ms Thuy’s termination is unjustified. 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 Thuy’s employment was terminated because her employer believed she had attended a public meeting to seek advice about her employment rights under the

² Paragraphs 73 and 74 of the respondent’s submissions dated 6 November 2024.

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

⁴ *Ibid*, at paragraph [97].

law, and/or because Ms Thuy had been added to a group message chat discussing this. Ms Thuy did not do this. She was at work, which her employer ought to have known. Even if she had attended such a meeting, she was fully entitled to seek such advice. She committed no breach of her employment obligations by contemplating seeking advice. Her termination was substantively unjustified.

[50] I have also considered whether Ms Thuy'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

[51] There is limited evidence as to what investigation Ms Huynh did to form the view that Ms Thuy was "going against her" and/or was "not on her side anymore", apart from the comment by Ms Huynh at the staff meeting to the effect that Ms Thuy was part of a group chat regarding a third party holding a public meeting about New Zealand employment rights.

[52] Ms Huynh did not raise her concerns with Ms Thuy before dismissing her. This is particularly relevant, as Ms Thuy was working at the relevant time. Ms Huynh did not explain to Ms Thuy what she considered Ms Thuy had done wrong, or how Ms Thuy had allegedly breached her employment obligations. Ms Thuy was not given any opportunity to respond to the allegation against her such as it was. No further discussion occurred prior to dismissal, and accordingly, there was no opportunity for Ms Huynh to genuinely consider any explanation that Ms Thuy might have made either.

[53] In her written submissions following the investigation meeting, Ms Huynh states that Ms Thuy came to work late and had poor skills. However, this was not raised with Ms Thuy either prior to her dismissal, or on the 17th of December when dismissal occurred. It follows that Ms Thuy was not given an opportunity to respond, and Ms

Huynh did not genuinely consider any explanation given, as there was no opportunity for this either.

[54] Ms Thuy's dismissal was procedurally unjustified also. Ms Thuy's personal grievance of unjustified dismissal is made out.

Was Ms Thuy unjustifiably disadvantaged?

[55] It is submitted for Ms Thuy 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.

[56] There are aspects of the employment that are not in dispute. Ms Thuy'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 at a small nail salon in her home village. Ms Thuy demonstrated her skills by sending videos of her work to Ms Huynh. Ms Huynh then offered her a job, and arranged for her to have training in Ho Chi Minh City with Ms Huynh's niece, again painting nails. She was told she was doing okay. Once Ms Thuy had arrived in New Zealand, Ms Huynh prepared a further employment agreement dated 30 October 2023, which had a job description requiring Ms Thuy to "provide other beauty services such as: body massage, washing hair, hair assistant."

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

[58] Ms Huynh accepts that Ms Thuy was not paid her contractual wage. She says that for the first week, Ms Thuy only watched other staff, did training, and washed hair. She says that Ms Thuy is owed approximately \$2,900 in unpaid wages, but that Ms Thuy owes her \$5,900 for rent and food costs, \$3,400 for rent paid in advance, and \$1,600 loaned as a cash advance on wages prior to Ms Thuy having a bank account. Ms Huynh is unable to point to any documents setting out an agreement by Ms Thuy to pay her for rent, food, or an advance on wages. Ms Thuy believed the \$1,600 paid to her weekly at \$200 per week was her wages, and gave evidence that she had already paid Ms Huynh \$225 weekly for rent as was agreed.

[59] I find that Ms Thuy 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, and these were the skills that Ms Huynh further trained her in before arrival in New Zealand. It was only once Ms Thuy 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 Thuy's work performance as a defence against paying her wages at all, paying her contractual rate, and to justify her summary dismissal. In addition, Ms Huynh changed Ms Thuy's place of work, by sending her to work in Lower Hutt when she complained about being required to massage male clients with no regard for the additional time and expense this generated. 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 Thuy about what duties she wished Ms Thuy to do and why.

[60] For completeness, I do not accept that these disadvantages have been raised out of time as suggested by Ms Huynh, as they were on-going up to the end of Ms Thuy's employment and raised in Ms Thuy's personal grievance letter dated 2 February 2024.

[61] In addition, Ms Huynh admits she did not pay wages in full and when due. She paid a weekly sum of \$200 instead which she later described as a loan. 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 Thuy her wages in full until Ms Thuy had a New Zealand bank account and IRD number, this does not explain why Ms Thuy was not paid her arrears in full once she had set up her bank account, or why she did not begin receiving her full wages from that point onwards including for her first week of work. I find that the failure to pay wages in full and when due was unjustified and disadvantaged Ms Thuy in the terms and conditions of her employment. I accept Ms Thuy's evidence of the practical difficulties as well as the stress and distress that the failure to pay wages caused her.

[62] Ms Thuy 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. She is entitled to remedies accordingly. I make no findings other matters raised in the circumstances.

Remedies

[63] Ms Thuy is entitled to remedies in respect of her personal grievances. She claims four weeks 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 Thuy 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.

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

[65] Ms Thuy gave evidence that she applied for between 20 and 30 jobs before securing other employment. Her evidence was that she had to wait for a new visa and new employment, because her new boss told her he did not want anything to do with Ms Huynh. This is direct evidence of steps taken in mitigation, and as a result, Ms Thuy has quantified her claim as being for only four weeks of unemployment. 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 Thuy has lost four weeks wages and is entitled to be reimbursed for this.

[66] Ms Thuy's employment agreement provided that she would work 30 - 40 hours per week, at \$29.66/hour. The salon was open 7 days, 8 hours per day except on Fridays when it was open for 10 hours. Given Ms Thuy's evidence that she worked 6 days per week with a late start on Sundays so she could go to church, I consider it appropriate to calculate her lost wages at the rate of 40 hours per week rather than 30 hours. Forty hours at the rate of \$29.66 per hour equates to \$1,186.40 per week. Over four weeks, this amounts to \$4,745.60 gross. Orders are made accordingly.

[67] 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 Thuy was only employed for approximately two months, I accept her evidence of the impact on her, including her fear of being deported after

the loss of her job and that she had no home to return to in Vietnam. Ms Thuy 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 impact on Ms Thuy. 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 Thuy 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 Thuy also claims a penalty for breaches of her employment agreement. There are several terms which Ms Thuy 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 Thuy 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 Thuy by way of both verbal and written terms on 10 October 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 Thuy 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 Thuy 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 Thuy would be paid well above the minimum wage as a nail technician and would be able to live with her husband and children in fully furnished accommodation with food and living expenses paid by the respondent...the respondent

[stating] that she would take care of accommodation in New Zealand is not an admission that accommodation and living costs for Thuy, her husband and three children, would be provided for free.”⁵

[73] Although Ms Huynh says now that Ms Thuy 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 Thuy is that her she and husband paid Ms Huynh \$225 per week in rent, and she was never told more was owed until this claim was raised in answer to her grievances. On balance, I prefer Ms Thuy’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 Thuy 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*,⁶ *A Labour Inspector v Prabh*⁷ and *A Labour Inspector v Daleson Investment*.⁸ 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.⁹ 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 question¹⁰, or failed to take reasonable steps to

⁵ Paragraphs 106 - 110, and 114 of the respondent’s submissions dated 6 November 2024.

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

⁷ *A Labour Inspector v Prabh Limited* [2018] NZEmpC 110

⁸ *A Labour Inspector v Daleson Investment Limited* [2019] NZEmpC 12

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

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

fulfil their legal obligations.¹¹ 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.

[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 Thuy. 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 Thuy's "conduct and poor performance". There is no evidence of any conduct by Ms Thuy that was untoward, or which might have contributed to her dismissal or unjustified disadvantages. I also consider that there is no evidence of poor performance which might have resulted in her eventual dismissal. Allegations of poor performance were only raised after Ms Thuy was dismissed rather than during her employment, and Ms Thuy's evidence was that Ms Huynh and Ms Huynh 's niece had the chance to assess her work in person before she came to New Zealand and found it acceptable.

[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 Thuy 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 Thuy's claims are part of a "scheme" which has been "concocted" to "extort money from the respondent"¹². 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 documents¹³.

¹¹ *El-Agez v Comprede Limited*, TT 4121553, at para 18

¹² Paragraph 26 of the respondent's submissions dated 6 November 2024.

¹³ *Ibid*, paragraphs 32 to 43 generally.

[83] I do not accept that there is any reliable evidence of this. Nor do I accept that Ms Thuy 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.

Orders

[84] Ms Thi Thanh Thuy Doan 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 Thanh Thuy Doan within 28 days of the date of this determination:

- a. The sum of \$4,745.60 gross as compensation for four 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 Thuy’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 applicant¹⁴ 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.

¹⁴ Where it is not clear who may be seeking costs use “the party who believes they are entitled to costs”.

[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.¹⁵

Claire English
Member of the Employment Relations Authority

¹⁵ For further information about the factors considered in assessing costs see: www.era.govt.nz/determinations/awarding-costs-remedies/#awarding-and-paying-costs-1