

**IN THE EMPLOYMENT RELATIONS AUTHORITY
WELLINGTON**

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

[2025] NZERA 19
3286920

| | |
|---------|-------------------------------|
| BETWEEN | WANNEE BUTHKANHA Applicant |
| AND | BAI BUA LIMITED Respondent |

| | |
|---|---|
| Member of Authority: | Natasha Szeto |
| Representatives: | Padmi Wickramasinghe, counsel for the Applicant Ruth Katsui, representative for the Respondent |
| Investigation Meeting: | 11 September 2024 in Wellington |
| Submissions and further information received: | 25 September and 11 October 2024 from the Applicant 23 October 2024 from the Respondent |
| Date of Determination: | 17 January 2025 |

DETERMINATION OF THE AUTHORITY

The Employment Relationship Problem

[1] Wannee Buthkanha started worked for Bai Bua Limited as a Masseur on 21 November 2022. Bai Bua's owner and sole director is Suwimon Dokhuntutod. Ms Buthkanha and Ms Dukhuntutod had met through massage circles and were friendly. Ms Buthkanha was Bai Bua's first employee. Just prior to going on holiday to Thailand for two months, Ms Buthkanha and Ms Dokhuntutod had an argument, and Ms Dokhuntutod understood Ms Buthkanha had resigned. However, Ms Buthkanha returned to work at Bai Bua on 2 June 2023 and continued to work there until 10 August when there was another argument, and Ms Buthkanha gave Bai Bua her resignation. Her last day at work for Bai Bua was 7 September 2023.

[2] Ms Buthkanha says she was unjustifiably (constructively) dismissed from Bai Bua. She says Bai Bua unjustifiably disadvantaged her by not paying her for all hours she worked, making unauthorised deductions from her pay, reducing her hourly rate without agreement after she returned from Thailand, and incorrectly paying her holiday pay. She seeks compensation, as well as to be paid arrears and interest. Ms Buthkanha also says Bai Bua has breached its duty of good faith and a range of employment standards and should be ordered to pay a penalty. Finally, she says Ms Dokhuntutod should be joined to the proceedings as a person involved in Bai Bua's breaches.

[3] Bai Bua says Ms Buthkanha does not have any valid personal grievances – she was not constructively dismissed and her resignation was her choice. It also says it paid Ms Buthkanha correctly based on her status as an employee and independent contractor in the first term of her work, and then a casual employee in the second term of her work after she had resigned and then returned from Thailand. It says Ms Buthkanha was not unjustifiably disadvantaged, and it has not breached the duty of good faith or employment standards. To the extent that the Authority finds otherwise, Bai Bua says Ms Dokhuntutod can only be joined personally for breaches of employment standards and not personal grievances.

The Authority's Investigation

[4] Written witness statements were lodged from Ms Buthkanha and Ms Dokhuntutod, the sole director of Bai Bua Limited. Both witnesses attended the Investigation Meeting, and answered questions under oath or affirmation. An opportunity was given to Bai Bua to lodge a further affidavit from a witness who allegedly overheard a conversation between the parties while Ms Buthkanha was in Thailand, but no further witness evidence was filed.

[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 the orders made. It has not recorded all the evidence and submissions received, but all information submitted to the Authority has been considered.

Issues

[6] The issues the Authority is to investigate and determine are:

- (a) Whether Ms Buthkanha was unjustifiably (constructively) dismissed.

- (b) Whether Ms Buthkanha was unjustifiably disadvantaged by her employer:
 - (i) Not paying her for all hours worked.
 - (ii) Deducting pay without authorisation for rent and food.
 - (iii) Reducing her hourly rate without agreement.
 - (iv) Paying holiday pay incorrectly.
- (c) If Ms Buthkanha is found to have a personal grievance, whether she should be awarded compensation under s 123(1)(c)(i) of the Act.
- (d) Whether Ms Buthkanha has a claim to be paid:
 - (i) Unpaid / outstanding wages.
 - (ii) Unpaid / outstanding holiday pay including public holiday pay.
 - (iii) Interest on any wage and holiday pay arrears.
- (e) Whether Bai Bua breached its duty of good faith.
- (f) Whether Bai Bua should be ordered to pay a penalty for breach of employment standards.
- (g) Costs and disbursements.

[7] After filing her statement of problem, Ms Buthkanha applied for Ms Dokhuntutod to be joined to proceedings as the second respondent.

[8] During the investigation, it became apparent that the parties differed in their views about Ms Buthkanha's status. Ms Buthkanha says she was a permanent (full time) employee throughout her employment. Bai Bua says there were two distinct periods of employment, and that Ms Buthkanha was both a part-time employee and an independent contractor in the first period, and a casual employee in the second period.

[9] This determination resolves the issue of Ms Buthkanha's employment status, and determines her personal grievance and wage arrears claims including whether Bai Bua has breached its duty of good faith and should be ordered to pay a penalty. It also resolves whether the Authority should grant leave for Ms Buthkanha to pursue claims against Ms Dokhuntutod personally as a person involved in breaches of the Act.

Relevant Background

[10] Bai Bua Limited (Bai Bua) was incorporated on 27 October 2022. Ms Dokhantod is the owner and sole director of the company. Ms Buthkanha met Ms Dokhantod through Thai massage circles and Ms Buthkanha became Bai Bua's first employee.

[11] Before Ms Buthkanha started working for Bai Bua, she discussed the terms of her employment with Ms Dokhantod. Ms Buthkanha would work a minimum of 30 hours per week, and be paid at the hourly rate of \$35. Ms Buthkanha said she could always work more hours, but she needed at least 30 hours a week for her visa requirements.

[12] Approximately one month before Ms Buthkanha started working for Bai Bua, she says she discussed in face to face meetings and over the phone with Ms Dokhantod that she would be going back to Thailand between April and May 2023 and the parties agreed this would be unpaid leave. Ms Dokhantod gave Ms Buthkanha a copy of an individual employment agreement she had downloaded from the internet, dated 21 November 2022, and both parties signed the agreement on the day Ms Buthkanha started work.

[13] The employment agreement states that Ms Buthkanha's job title is "Masseur". The job duties are: "Provide massage to the customers professionally". They also included: "any and all duties as requested by the employer that are reasonable and that are customarily performed by a person holding a similar position in the industry or business of the employer". The normal hours of work, including breaks, are 30 hours per week however the agreement states: "the employee agrees on reasonable notice from the employer, to work additional hours outside their normal hours of work as deemed necessary by the employer to meet business needs of the employer".

[14] From the time Ms Buthkanha started, she was working regular hours starting at 9:00 am and finishing at 7:00 pm Monday to Friday when the shop was open from 9:30 am until 6:30 pm. On Saturday, her hours were 8:30 am until 7:00 pm because the shop was open from 9:00 am until 6:30 pm. Bai Bua says Saturday hours were 9:00 am until 4:00 pm until new opening hours were implemented in June 2023. However, Ms Buthkanha's Timesheets and Appointment Schedule demonstrate Ms Buthkanha was regularly providing massages after 4:00 pm on Saturdays from the beginning of her

employment. She says she stayed at the shop all day from except for going out during a 30 minute break if she had one. There was no specific time for breaks, it depended on the clients.

[15] Ms Buthkanha's work day consisted of changing Bai Bua's signage, checking bookings, setting up the rooms for massages, doing the massages, tidying the rooms in between clients, and restocking towels and treatment products. At the end of each day she carried out light cleaning including cleaning up the rooms, collecting laundry, cleaning bathrooms and emptying rubbish. When Ms Buthkanha was not doing massages she stayed at the shop on stand-by to answer the phones, take payments and attend to walk-in customers. She says she was at the shop for nine hours a day on her working days. Ms Dokhuntutod says while she initially instructed Ms Buthkanha to carry out these extra tasks (other than massages), Ms Buthkanha frequently refused her instructions, so she did them herself. If Ms Buthkanha did carry out these tasks, Ms Dokhuntutod said she did it to help the business as a volunteer. Ms Dokhuntutod described it as being "at Ms Buthkanha's convenience".

[16] Bai Bua had three different systems for recording Ms Buthkanha's time. It had a handwritten "Logbook" where times, client names, type of massage, duration of massage, cost of massage and masseur were noted. There was an electronic booking system called an "Appointment Schedule" for Ms Buthkanha which recorded massage appointments and blocked out break times and days off. And there were "Timesheets" which noted times of Ms Buthkanha's massages on each date, totalled the number of hours she had massaged that day, and recorded her days off work. The Timesheet appears to have been the basis for calculating Ms Buthkanha's pay. None of the documents record the hours Ms Buthkanha was actually in the shop and carrying out tasks other than massages.

[17] Before she left to go to Thailand, Ms Buthkanha was paid for 30 hours a week at \$35 an hour (21 November 2022 to 26 March 2023). For the period 27 March to 2 April, Ms Buthkanha was paid for 19.5 hours at \$35 an hour. During this period, Ms Buthkanha was paid for 5 hours on Christmas Day, 5 hours on Boxing Day, 5 hours on New Year's Day, 7.5 hours on 2 January, and 5 hours on Waitangi Day.

[18] Ms Buthkanha was paid by bank transfers from Bai Bua, and says she did not receive any cash payments for the first period of her employment. She did not keep her own records of hours she was in the shop and working. Bai Bua says it paid Ms

Buthkanha by direct bank transfer for the first 30 hours of work she did each week, and then in cash for hours worked above 30 because Ms Buthkanha had requested cash payments for money to send to her family in Thailand.

[19] Ms Buthkanha also lived with Ms Dokhuntutod. The living arrangement was that Ms Buthkanha paid Ms Dokhuntutod \$120 a week which she transferred via bank account. There was no agreement for deductions to be made from Ms Buthkanha's wages for rent or food and Ms Dokhuntutod says Bai Bua never made any deductions.

[20] Ms Buthkanha went on holiday to Thailand in April 2023. As Ms Buthkanha had not worked at Bai Bua for a full year, she had no expectation of receiving pay while on leave. Ms Buthkanha and Ms Dokhuntutod discussed all the things that Ms Buthkanha would bring back from Thailand and Ms Dokhuntutod helped her to arrange travel and accommodation to get from Whanganui to Wellington.

[21] Before Ms Buthkanha left for Thailand, there was an incident between them concerning a client Ms Buthkanha no longer wanted to massage. Ms Buthkanha was unhappy, and she recalled Ms Dokhuntutod telling her to find a new position. Ms Dokhuntutod agrees Ms Buthkanha was unhappy, but she says Ms Buthkanha resigned. Ms Dokhuntutod understood Ms Buthkanha was quitting and would not come back to work at Bai Bua after she returned from Thailand.

[22] On 10 April 2023, while she was in Thailand, Ms Buthkanha received a message saying that she had been paid holiday pay consisting of two hours of alternative holiday pay, and \$1,593.20 (gross) holiday pay. Ms Buthkanha says she immediately called Ms Dokhuntutod to ask why she had been paid holiday pay when she had not asked for it. Ms Dokhuntutod's response was she had discussed it with her accountant and the accountant said it was okay. There was no discussion about the reason for the payment being Ms Buthkanha's resignation.

[23] While Ms Buthkanha was in Thailand, Ms Dokhuntutod says they discussed changes to Ms Buthkanha's working conditions on her return, including that Ms Buthkanha would need to work seven days because the shop had started opening on Sundays as a trial to see whether it could be profitable, her pay would reduce from \$35 per hour to \$30 per hour and she would not be guaranteed 30 hours work per week. Ms Buthkanha says this conversation never happened in Thailand and it was only after she returned to New Zealand and resumed her employment that she realised her pay had

decreased and she was expected to work on Sundays. Ms Dokhuntutod says the arrangement for Ms Buthkanha to work Sundays was not fixed and she could choose a day off whenever she wanted to by blocking off time in the booking system.

[24] Ms Dokhuntutod also says her understanding was Ms Buthkanha would only be temporarily working for Bai Bua for one month while she looked for a new job. Ms Dokhuntutod says that she asked Ms Buthkanha to sign a new employment agreement but because the arrangement was only temporary she did not insist on it when Ms Buthkanha refused.

[25] According to timesheets, Ms Buthkanha's first day back at work for Bai Bua was 2 June 2023. Ms Dokhuntutod made a \$900 cash payment to Ms Buthkanha for her work from 2 to 11 June. When Ms Buthkanha queried this, she was told it equated to \$30 per hour for 30 hours. Ms Dokhuntutod told her to just follow her instructions and that the cash flow had not been good when there were no customers and a decline of business. Ms Buthkanha was paid for 32 hours of work from 12 June to 23 July at the rate of \$30 per hour. Her rate increased back to \$35 per hour for the pay period from 24 to 30 July.

[26] The Timesheet and Appointment Schedule records for Bai Bua suggest that Ms Buthkanha had at least one day off per week when she returned from Thailand which mostly fell on a Tuesday, but did include a Monday and a Thursday. Ms Buthkanha disputes this and says she was working seven days a week after her return, and found this to be stressful.

[27] On 28 July, Ms Dokhuntutod asked Ms Buthkanha if she would manage the business for her from 1 to 5 August while she was planning to be away, including providing training to a massage therapist who would help provide coverage. Ms Dokhuntutod thought it was a good time for someone to do a trial as Ms Buthkanha had begun to insist on only doing massages and not doing other parts of the business. Although the parties differ in their evidence, it appears Ms Dokhuntutod asked Ms Buthkanha to provide some training to the massage therapist, but not in massage therapy. Ms Buthkanha says there was another incident, during which Ms Dokhuntutod yelled at her and told her to find another place to work if she could not manage the shop while Ms Dokhuntutod was away.

[28] While Ms Dokhuntutod was away, Ms Buthkanha says she worked 10 to 12 hour days, developed headaches from stress, had a migraine and vomited. She ended up being off work on sick leave for several days from 4 August. Ms Buthkanha was still sick on 6 August when Ms Dokhuntutod returned to work. At approximately 9:00 pm, Ms Dokhuntutod came to Ms Buthkanha's room and asked her why she still could not work and told Ms Buthkanha if she could not work then she would need to get a new job. Ms Buthkanha says Ms Dokhuntutod asked her to give a letter of resignation even though she had given Ms Dokhuntutod a doctor's certificate. Ms Dokhuntutod says she did not ask Ms Buthkanha to resign – she was asking about her plans, given her earlier indication she was looking for other work. Bai Bua paid Ms Buthkanha sick leave for her time off work from 4 to 8 August.¹

[29] Ms Buthkanha wrote a resignation letter on 7 August, but did not give it to Ms Dokhuntutod right away. On 10 August when Ms Buthkanha returned to work, Ms Dokhuntutod said “if you can't work you must find a new job because I need someone to do the work”. Ms Buthkanha gave Ms Dokhuntutod the resignation letter. The notice period was two weeks but Ms Dokhuntutod asked for one month's notice.

[30] Ms Dokhuntutod denies asking for Ms Buthkanha's resignation or a letter. However when she received the 7 August resignation letter on 10 August, Ms Dokhuntutod did not ask Ms Buthkanha why she was resigning. She now says this was because there was no point in talking further after they had had an argument about the client.

[31] Ms Buthkanha worked through her one month notice period. Between 10 August and her last day of work of 7 September 2023, Ms Buthkanha's wages were variable based on between 15 and 37 hours of massages per week. In the first week of September, towards the end of her notice period Ms Buthkanha gave Ms Dokhuntutod a further resignation letter, which she called “Notification of stopping work as your per you request” [sic]. Her reasons included she had been treated and talked to very badly causing her to be unwell and seek medical assistance, and she had not been paid wages for all the hours she had worked.

[32] Bai Bua responded on 9 September 2023 by Messenger, saying that Ms Buthkanha had neglected her work and gone out without prior notice (Ms Buthkanha

¹ Sick leave was paid: 6 hours per day for 4 to 5 August, and 4 hours per day for 7 to 8 August.

says this relates to when she went to the hospital, and had informed Ms Dokhuntutod of this) and had verbally abused and disrespected Ms Dokhuntutod. Bai Bua also raised that it had no intention of firing Ms Buthkanha, but asked her about whether she was able to work on the 10th and about her resignation because she had taken two months off work. The message concludes by saying that Bai Bua wants everything to end as well as possible, but if Ms Buthkanha is still not satisfied or wants something more, then it cannot give it.

[33] Ms Buthkanha found a part-time role in Auckland through her personal networks, and she started her new job on 11 September 2023. Ms Buthkanha says she did not look for or arrange the new work before leaving Bai Bua, partly because of her health issues. She was on an open visa which allowed her to work anywhere in New Zealand and for anyone. However, the expenses of moving and transport meant she wanted to keep working in one place for a long period to make sure she had savings.

[34] On 24 October 2023, Ms Buthkanha raised a personal grievance.

What was Ms Buthkanha’s status while working for Bai Bua?

The law

[35] The parties agree that Ms Buthkanha was an employee of Bai Bua for both periods of her employment. However, Bai Bua says Ms Buthkanha was also an independent contractor for hours worked above 30 per week.

[36] The law on employment status is well-settled. The Act sets out the definition of an employee which means “any person of any age employed by an employer to do any work for hire or reward under a contract of service”.² Of particular relevance to the present case, the definition excludes a volunteer who does not expect to be rewarded for that work and does not receive any reward for that work.

[37] In deciding whether a person is employed by another person under a contract of service, the court or the Authority (as the case may be) must determine the real nature of the relationship between them by considering all relevant matters. Statements or labels describing the nature of the relationship are not determinative.

² Employment Relations Act 2000, section 6.

[38] The Supreme Court outlined the principles relevant when determining when somebody is an employee³, which includes the intention of the parties, the written and oral terms of any contract, and operation of the relationship in practice.

[39] The Court of Appeal has recently confirmed a two-step process under section 6 of the Act.⁴ The first step involves identifying the substance of the parties' mutual rights and obligations (the agreement between the parties which includes the written and oral terms of the contract) as a matter of objective reality and not form. The second step involves determining whether those rights and obligations amount to a contract of service by applying the well-settled common law tests of control, integration and fundamental to the real relationship between the parties.

[40] Casual employment is not defined in the Act, and therefore factual evidence is of paramount importance in determining whether or not the employment is casual or permanent in nature. The Employment Court judgment in *Jinkinson v Oceana Gold (NZ) Ltd*⁵ set out a series of indicia established by Australian case law, for determining whether or not the nature of the employment was casual or permanent. These are:

- (a) The number of hours worked each week;
- (b) Whether work is allocated in advance by a roster;
- (c) Whether there is a regular pattern of work;
- (d) Whether there is a mutual expectation of continuity of employment;
- (e) Whether the employer requires notice before an employee is absent or on leave; and
- (f) Whether the employee works to consistent starting and finishing times.

Parties' submissions

[41] Ms Buthkanha says she was an employee from the date she commenced work to the last day of her employment, based on the following:

³ *Bryson v Three Foot Six Limited (No. 2)* ERNZ [2005] 372 at [31] to [32] (footnotes omitted), referred to by the Court of Appeal in *Rasier Operations BV & Ors v E tū Incorporated & Ors* [2024] NZCA 403.

⁴ *Rasier Operations BV & Ors v E tū Incorporated & Ors* [2024] NZCA 403, at [97] to [99].

⁵ *Jinkinson v Oceana Gold (NZ) Ltd* [2009] ERNZ 225 at [47].

- (a) Bai Bua executed and exercised control over her work including booking customers.
- (b) Bai Bua decided the nature of the work, days and time of work and meal breaks.
- (c) Ms Buthkanha was required to wear a uniform.
- (d) The employment agreement was a contract of service - no variation or new agreement was signed after Ms Buthkanha arrived back from Thailand.
- (e) Wages paid were after deducting income tax.
- (f) Ms Buthkanha had no ability to improve profitability or economic growth. The work she carried out was essential for Bai Bua.
- (g) Ms Buthkanha was not permitted to work as a contractor under the terms of her work visa with Immigration New Zealand.

[42] Ms Buthkanha also says she was not a casual employee when she returned from Thailand because her status had not changed – the mutual obligations between the parties continued the same as before. She had a regular and continuous pattern of employment on an ongoing basis, working from 30 minutes prior to the shop opening until 30 minutes after the shop closing. She was paid regularly for guaranteed hours.

[43] Bai Bua's position is that in the first period of her employment, Ms Buthkanha was simultaneously an employee (for up to 30 hours per week) and an independent contractor for extra shifts beyond 30 hours, as she wanted to be paid in cash to send to her family and on the basis that she would not receive leave entitlements on those amounts and would be liable for her own tax. Bai Bua says it has recently become apparent this was to support Ms Buthkanha's visa which required 30 hours of work as an employee. It also says it received no benefit from this cash arrangement. The evidence Bai Bua says pointing to Ms Buthkanha's "mixed" status is:

- (a) Ms Buthkanha insisted on being responsible for her own tax and knew she would not receive leave entitlements on payments above 30 hours.
- (b) Ms Buthkanha's insistence on the arrangement was because of visa requirements and the fact that she did not hold the correct visa to be an independent contractor does not prevent a contracting relationship from being formed.

- (c) Labels are not determinative, and it is not material that Ms Dokhuntod was not aware of technical requirements of different status.
- (d) Ms Buthkanha was free to come and go from the premises and did not have fixed hours of work outside 30 hours per week.
- (e) Ms Buthkanha's hourly rate was set at \$35 being half the cost of a \$70 massage.
- (f) Timesheet records indicate the intention was always to pay Ms Buthkanha per massage.
- (g) Bai Bua did not have a uniform or logo - Ms Buthkanha bought her own uniform in Thailand and took it with her when she left the job.
- (h) GST registration was irrelevant if her income was less than \$60,000 per year.
- (i) Bank account records indicate Ms Buthkanha was receiving money from Bai Bua clients outside her work.

[44] Ms Buthkanha was Bai Bua's first worker, and Ms Dokhuntod admitted she did not understand the difference between employees and contractors, casual employees trainees and subcontractors. Bai Bua says Ms Buthkanha requested the arrangement for her own benefits relating to immigration and taxation, and cannot now claim she is entitled to be treated as an employee for hours she asked to be paid as a contractor.

[45] Bai Bua also says Ms Buthkanha resigned before she went to Thailand (which is denied by Ms Buthkanha), and when she returned Ms Buthkanha was a casual employee at her own request although she refused to sign an updated employment agreement. Ms Dokhuntod says her understanding was Ms Buthkanha wanted temporary work for one month until she could find another job, and that casual status would allow her the flexibility to seek out other work and refuse shifts as needed.

Analysis of Ms Buthkanha's status

[46] The parties agree Ms Buthkanha was a permanent employee for at least part of her employment prior to going to Thailand, and would be on unpaid leave from April to May 2023.

[47] Based on the evidence before the Authority, I find Ms Buthkanha was an employee of Bai Bua and was not an independent contractor for part of her employment

as Bai Bua submits. The real nature of the relationship was one of employment, and there is insufficient evidence to support Bai Bua's contention that Ms Buthkanha worked in a "mixed status" capacity.

[48] The only written agreement between the parties is an Employment Contract (21 November 2022) which refers to the parties as employer and the employee. The written agreement also allows for (or even anticipates) work beyond 30 hours per week to be carried out by the employee on reasonable notice from the employer and the parties agree that Ms Buthkanha did carry out work in excess of 30 hours per week. There are no written records to support there was a contract for services, which Ms Dokhantod submits was a verbal arrangement and which Ms Buthkanha denies she agreed to. Based on the complete absence of corroborating evidence, I am unable to conclude there was any agreement between the parties that Ms Buthkanha would work as an independent contractor above 30 hours per week.

[49] In practice, the parties' actions were entirely consistent with Ms Buthkanha being an employee and not a contractor. Ms Buthkanha's work was directed by Bai Bua and carried out for the benefit of Bai Bua. The tasks Ms Buthkanha carried out for Bai Bua were consistent with employment rather than contracting, including updating signage, managing bookings and walk-in clients, preparing rooms and products, resetting the rooms in between clients, and light cleaning. She had no real control over her hours of work, or the ability to decline massages which was exemplified by the argument Ms Buthkanha and Ms Dokhantod had when Ms Buthkanha said she did not wish to provide massages for a particular client which led to what Ms Dokhantod says was the first resignation. Ms Dokhantod says Ms Buthkanha could have chosen to take time off or go elsewhere to "play on her phone". Ms Dokhantod says she has run an operation by herself before and would have done that rather than pay someone to sit around. While that may be so, Ms Dokhantod accepts she initially directed Ms Buthkanha to carry out tasks other than massaging, and I am not persuaded Ms Buthkanha carried out or continued to carry out these tasks as a volunteer to help the business out. I prefer Ms Buthkanha's evidence that she expected to be paid for her work. She had consistent hours of work based on the opening and closing times of the shop, and was paid consistently at \$35 per hour for 30 hours a week in the first period of her employment. Ms Buthkanha was paid holiday pay, including for working on public holidays and was provided with some alternative holiday hours.

[50] Ms Buthkanha carried out work integral to the business of Bai Bua and was fully integrated into its systems. Bai Bua has not provided any evidence to support its position that there was any distinction between the employee and contractor parts of the relationship operating in practice, other than the cash payments it says it made (but that Ms Buthkanha disputes were made).

[51] For the sake of completeness, I record there was discussion at the investigation meeting about whether Ms Buthkanha was required to have 30 hours of employment per week for Immigration Visa purposes and I find this evidence was inconclusive. In any event, I consider evidence of visa requirements does not assist my inquiry because it is clear Ms Buthkanha believed she had to work a minimum of 30 hours, and it is likely Ms Dokhantod believed this too.

[52] Turning to Ms Buthkanha's employment status after her return from Thailand, I find Ms Buthkanha did not resign before she went to Thailand and there was no "break" in the employment relationship. That is important because Ms Buthkanha could reasonably expect her employment status and the pre-existing terms and conditions of her employment to continue on her return.

[53] I find Ms Buthkanha did not resign from Bai Bua for the following reasons:

- (a) Ms Buthkanha gave evidence that she did not resign. Communications between Ms Buthkanha and Ms Dokhantod while Ms Buthkanha was in Thailand suggest there was no animosity between them.
- (b) There was no letter of resignation or anything in writing from Ms Buthkanha confirming she had resigned. This contrasts with Ms Buthkanha's actual resignation in August 2023, where she sent Ms Dokhantod not one but two formal resignation letters.
- (c) There is no evidence Ms Buthkanha asked to be paid her holiday pay, despite Ms Dokhantod's evidence she verbally requested it. To the contrary, records of messages between the parties supports Ms Buthkanha's version of events that she was surprised to have been paid her holiday pay and queried it immediately with Ms Dokhantod.

- (d) The Logbook entry from 30 March 2023 produced for the Authority says “holiday” in Thai, while the Timesheet says “resign”.⁶ Ms Dokhantod says the plan was originally a holiday, and it was changed to “resignation” after Ms Buthkanha resigned, and there is no significance to this. I accept the Logbook entries and Appointment Schedule entries could have been manually altered at any time, and ultimately the entries are not significant or determinative of the issue.
- (e) Even if Ms Dokhantod had believed Ms Buthkanha had resigned because of their argument, there is no evidence she followed up to confirm the resignation after a “cooling off” period, which I find to be inconsistent with the actions of a fair and reasonable employer.
- (f) It is also inconsistent Ms Dokhantod would expect Ms Buthkanha to bring items back from Thailand for her and that Ms Buthkanha would be happy to do so after Ms Buthkanha had resigned during an argument.
- (g) Ms Dokhantod says paying Ms Buthkanha’s holiday pay would have been an unnecessary expense if she did not believe Ms Buthkanha had resigned. This submission overlooks the benefit of Bai Bua ending the employment and purporting to change the terms and conditions of Ms Buthkanha’s employment on her return to New Zealand including reducing her hourly rate, increasing her days of work, and removing the guarantee of minimum hours.
- (h) Ms Dokhantod says she asked Ms Buthkanha to sign an updated employment agreement but she refused, which Ms Buthkanha denies. No draft or template agreement has been provided to the Authority to support Ms Dokhantod’s statement. Further, despite Ms Dokhantod claiming Ms Buthkanha only wanted temporary employment for a month after her return, Ms Buthkanha worked for Bai Bua for more than two months before her resignation (from 2 June to 10 August), and then continued to work for Bai Bua for another month through her notice period (until 7 September).
- (i) Bai Bua paid Ms Buthkanha sick pay for her absences in August. Ms Dokhantod says this is because she felt bad for Ms Buthkanha, but if Ms

⁶ Bundle of evidence, p290.

Buthkanha had resigned in March and was re-employed in June, she would have had no statutory entitlement to sick leave by August.

[54] When Ms Buthkanha returned from Thailand, I accept there was a change to her terms and conditions, in that Bai Bua reduced the amount of Ms Buthkanha's pay to \$30.00 per hour.

[55] There was no written variation to Ms Buthkanha's employment agreement and I am not persuaded Ms Buthkanha agreed to any of the changes as Bai Bua claims. It is unclear why Ms Buthkanha would agree to reducing her hourly rate and I accept her evidence that she was unaware of this change until she received her first payment from Ms Dokhantod (in cash). There is no evidence to support Ms Dokhantod's contention Ms Buthkanha was returning to Bai Bua on a temporary basis while she looked for other work and agreed to being a casual employee. I am persuaded by Ms Buthkanha's evidence that the opposite was true - she wanted continuity and longer-term employment for security.

[56] Having concluded Ms Buthkanha was a permanent employee and not a contractor throughout her employment with Bai Bua from 21 November 2022 until 7 September 2023, and there was no break in the employment relationship or change in her status, I proceed to determine her claims.

Was Ms Buthkanha unjustifiably (constructively) dismissed?

What is the law?

[57] In some circumstances a resignation may amount to a dismissal. The Court of Appeal in *Wellington, Taranaki and Marlborough Clerical IUOW v Greenwich* stated:⁷

There is no substantial difference between the case of an employer who, intending to terminate the employment relationship, dismisses the employee and the case of the employer who, by conduct, compels the employee to leave the employment.

[58] The Court of Appeal listed three situations in *Auckland Shop Employees Union v Woolworths (New Zealand) Limited*⁸ where a constructive dismissal might occur. These situations are not exhaustive:

⁷ *Wellington, Taranaki and Marlborough Clerical IUOW v Greenwich* [1983] ACJ 965.

⁸ *Auckland Shop Employees Union v Woolworths (NZ) Limited* [1985] 2 NZLR 372 (CA) at 374.

- (a) Where the employee is given a choice of resignation or dismissal;
- (b) Where the employer has followed a course of conduct with the deliberate and dominant purpose of coercing an employee to resign; and
- (c) Where a breach of duty by the employer leads a worker to resign.

[59] The conduct complained of must amount to a repudiation of the contract rather than just be unreasonable.

[60] The Court of Appeal⁹ has stated the broad legal approach starts with the question of whether the resignation has been caused by a breach of duty on the part of the employer by looking at all the circumstances of the resignation. If so, the next question is whether the breach of duty by the employer was of sufficient seriousness to make it reasonably foreseeable by the employer that the employee would not be prepared to work under those conditions. The court has emphasised that the focus of such claims is on the employee's motivation for their decision to leave, and whether that motivation arises from a breach of the employer's duty, or some other factor.¹⁰

[61] In determining whether a dismissal was unjustifiable, the Authority must apply the test of justification in s 103A of the Act and is required to consider on an objective basis whether Bai Bua's actions and how it acted were what a fair and reasonable employer could have done in all the circumstances at the time the dismissal occurred.

[62] Ms Buthkanha claims constructive dismissal on both the first and third grounds under *Woolworths*, on the basis that Ms Dokhuntutod asked her to resign three times between 28 July 2023 and 10 August 2023 and that Bai Bua breached a duty to her and should have been able to reasonably foresee that rather than putting up with breaches, she would resign. Ms Buthkanha says Bai Bua breached its duties of good faith and failed to comply with s 103A of the Act, and those actions irreparably damaged the relationship of trust and confidence.

⁹ *Auckland Electric Power Board v Auckland Provincial District Local Authorities Officers IUOW Inc* [1994] 2 NZLR 415 (CA) at 419.

¹⁰ See for example, *Commissioner of Police v Hawkins* [2009] NZCA 209.

[63] Ms Buthkanha relies on the events from 28 July 2023 to 10 August 2023. On 28 July Ms Dokhantod told Ms Buthkanha she would be away and Ms Buthkanha would need to manage the shop. Ms Buthkanha did not feel capable of doing so due to her inability to communicate well in English and to manage the workload alone. Ms Buthkanha says Ms Dokhantod got angry and shouted at her, resulting in her feeling unwell that night.

[64] On 29 July, Ms Buthkanha was still feeling unwell and asked for a day of sick leave. Ms Dokhantod refused Ms Buthkanha's request because customers were already booked in. From 1 to 4 August, Ms Buthkanha says she worked 10 to 12 hour days managing the business (which Bai Bua disputes) and on 4 August was diagnosed by a doctor with having high blood pressure due to stress. On 6 August, the parties had an argument about when Ms Buthkanha would be well enough to return to work, during which Ms Dokhantod allegedly asked for Ms Buthkanha's resignation and one-month notice.

Parties' submissions

[65] Ms Buthkanha says she was objectively treated unfairly by Bai Bua, and it was sufficiently serious to make it reasonably foreseeable that she would not be prepared to continue to work under those conditions. Ms Buthkanha says the unfair treatment included:

- (a) She was subject to ongoing breaches of a serious nature being breaches of Bai Bua's statutory duty of good faith to be active and constructive in maintaining a relationship in which the parties are responsive and communicative.¹¹
- (b) Ms Dokhantod asked her to resign and Bai Bua used its authority to force Ms Buthkanha to work a four-week notice period rather than her stipulated two-week notice period. It also exploited her by not paying correct wages.
- (c) Ms Dokhantod's reaction to Ms Buthkanha being unwell was disproportionate and unreasonable.

¹¹ Employment Relations Act 2000, s 4(1A)(a).

[66] Ms Buthkanha had prepared a resignation letter on 7 August but did not provide it to Bai Bua until 10 August which she says demonstrates the difficulty she faced in deciding to leave Bai Bua without alternative employment. She refers to the argument on 10 August 2023 as “the final straw”. Bai Bua did not respond to Ms Buthkanha’s first resignation letter, and only responded to her second resignation letter by Messenger as set out above.

[67] Bai Bua submits the Authority needs to consider the resources available to it when considering whether its actions were reasonable. In support of this, it points to Ms Dokhuntutod being a relatively new migrant to New Zealand, this being her first time running a small business and Ms Buthkanha being her first employee. She had a Thai-speaking accountant, but no human resources or employment law advice.

[68] Bai Bua also says Ms Buthkanha’s evidence has not been consistent, and Ms Dokhuntutod denies yelling at Ms Buthkanha and telling her to find another place to work. Ms Dokhuntutod says her communications were designed to confirm whether Ms Buthkanha was planning to resign, and was not requesting her resignation. It says there was never an ultimatum that Ms Buthkanha should resign or would be dismissed and therefore the first ground is not made out. It says there was no breach of duty because Ms Buthkanha was receiving pay for hours worked, there were no unlawful deductions from wages, leave entitlements were calculated based on work completed and the threshold of foreseeability for the third ground has not been met. It says Ms Buthkanha’s credibility is in question and her evidence about the events preceding her resignation has been inconsistent.

Analysis of constructive dismissal

[69] Ms Buthkanha says her resignation letter dated 7 August 2023 was copied from an online template and was not an accurate reflection of the situation. I accept her evidence on this, as her resignation letter clearly says she has “enjoyed working for Jobly Inc.” and not Bai Bua. The resignation letter does not give any reasons for Ms Buthkanha’s resignation, and the tone is at odds with the employment relationship at the time as both parties described it to me at the investigation meeting.

[70] I find Ms Buthkanha’s later resignation letter which was given to Ms Dokhuntutod on or around the beginning of September around a week before her final day of

employment on 7 September 2023 more accurately reflects the situation from Ms Buthkanha's perspective including:

- (a) On 6 August 2023, Ms Dokhuntutod gave Ms Buthkanha one month notice and asked her to stop working for Bai Bua without explanation of why her employment was ending.
- (b) Ms Buthkanha believed she had been treated and talked to very badly, leading to her feeling upset, sick and stressed and seeking medical help.
- (c) Ms Buthkanha advised Ms Dokhuntutod she had high blood pressure and could not sleep well.
- (d) Bai Bua did not pay Ms Buthkanha wages for all the hours she had worked, and she wanted to be paid outstanding wages, holiday pay, costs for medical bills and compensation for humiliation and stress.

[71] I find Bai Bua's conduct was repudiation of the contract because Bai Bua changed the terms of conditions of Ms Buthkanha's employment, firstly by reducing her hourly rate from \$35.00 to \$30.00 between 2 June and 23 July 2023; secondly by requiring her to be available to work Sundays when previously she had worked Monday to Saturday; and thirdly, by not guaranteeing her 30 hours of paid employment per week. As I have set out above, it is not clear whether Ms Buthkanha required 30-hours of employment a week for her visa, but it was her understanding that she did, and consequently it was a critical term of the employment for her.

[72] Further, Ms Dokhuntutod's reaction when Ms Buthkanha was unwell and unable to return to work were not the actions of a fair and reasonable employer. I accept Ms Dokhuntutod may have been frustrated by Ms Buthkanha's inability to work when she was away from the shop, but her reliance on Ms Buthkanha working is also inconsistent with her stated understanding that Ms Buthkanha was only a casual employee working for her on a temporary basis until she could find alternative employment (which was only supposed to be one month after her return from Thailand). I conclude Ms Buthkanha's resignation was caused by a breach of duty on the part of Bai Bua because throughout this time, Bai Bua was not active and constructive in maintaining a relationship in which the parties are responsive and communicative, which is a breach of the statutory duty of good faith in s 4(1A)(a) of the Act.

[73] I also find the breach of duty was of sufficient seriousness to make it reasonably foreseeable by Bai Bua that Ms Buthkanha would not be prepared to work under those conditions. Ms Buthkanha's motivation for her decision to resign from her employment with Bai Bua was the way she was treated. After returning from Thailand, her hourly rate had been reduced without her agreement. She had no guaranteed hours of work. Bai Bua changed her regular day off while the business was trialling Sunday operations. She had not been paid for all hours she had worked since the beginning of her employment. Bai Bua says Ms Buthkanha did not want to do all the other tasks and she just wanted to do the massages and this may have been part of the argument on 10 August. However, given the evidence shows Ms Buthkanha was not being paid for any tasks except massaging, it would have been a reasonable position for her to take. I accept the "final straw" for Ms Buthkanha was the argument on 10 August when Ms Buthkanha had returned to work after being unwell.

[74] I am not persuaded by Bai Bua's submission that Ms Buthkanha's main motivation for resigning was that she had another job offer. The evidence shows Ms Buthkanha left her previous employment to earn a higher hourly rate at Bai Bua along with having guaranteed accommodation with reasonable living expenses. I accept Ms Buthkanha's evidence that she would have preferred to stay employed at Bai Bua rather than resigning which required her to move away from the relative security of her employment and living conditions in Whanganui.

[75] The breakdown in the relationship and lack of good faith is also evidenced by the events immediately following Ms Buthkanha's resignation on 10 August. Bai Bua appeared to take Ms Buthkanha's first resignation letter at face value. According to Ms Buthkanha, after receiving her resignation letter, Ms Dokhuntutod refused to engage with her and it was apparent Ms Dokhuntutod was very angry with her. Ms Buthkanha said she was afraid of Ms Dokhuntutod because she was staying in the same house, she did not know anybody in Whanganui and did not have funds for a rental on her own or the ability to leave and find a new rental. Ms Buthkanha said she would lock the front door so she could hear Ms Dokhuntutod's key in the lock when she came home. She also said Ms Dokhuntutod would only communicate with her through leaving notes.

[76] Based on the evidence before the Authority, I find there was a breach of duty sufficient to amount to repudiation of the employment agreement. Ms Buthkanha's

resignation was caused by Bai Bua's actions. I find Ms Buthkanha was unjustifiably (constructively) dismissed.

Was Ms Buthkanha unjustifiably disadvantaged in her employment?

What is the law?

[77] For her disadvantage claim to succeed, Ms Buthkanha must establish that one or more conditions of her employment was affected to her disadvantage by an unjustified action by Bai Bua.¹² This means I need to determine whether Ms Buthkanha suffered a disadvantage in her employment, and – if so – whether this was caused by an action by Bai Bua and whether that action was unjustified.

[78] Bai Bua's actions are assessed in light of the test under s 103A of the Act and in particular, whether its actions and how it acted, were what a fair and reasonable employer could have done in all the circumstances at the time the action occurred.

Parties' submissions

[79] Ms Buthkanha claims unjustifiable disadvantage by Bai Bua for the following reasons:

- (a) She was not paid for all hours worked. Ms Buthkanha did not agree to being paid in cash for hours worked above 30 per week and says she was not paid in cash except for one payment of \$900 made after she returned from Thailand.
- (b) Her pay was deducted without authorisation for rent and food (as well as bus fare and accommodation).
- (c) Her hourly rate was reduced without agreement.
- (d) Her holiday pay was paid incorrectly.
- (e) She was not paid correctly for working on public holidays.

[80] Bai Bua says it has paid Ms Buthkanha correctly, based on hours she provided massages. Bai Bua says if the Authority finds Ms Buthkanha carried out additional

¹² *ANZ National Bank Ltd v Doidge* [2005] ERNZ 518 (EmpC).

work each day outside of the scheduled massages, it should be limited to a few minutes per massage for stripping beds and other tasks.

[81] Bai Bua says it has provided records of cash payments made to Ms Buthkanha¹³ and because Ms Buthkanha did not raise concerns about underpayment until after her resignation, its evidence that she was paid correctly should be preferred.

[82] Bai Bua said it did not make deductions from Ms Buthkanha's wages for rent and food and the flatting arrangement was separate to Ms Buthkanha's employment. It says Ms Buthkanha has not specified particulars of her claim or provided sufficient evidence of which payments have allegedly been deducted and accordingly Ms Buthkanha's claim has not been made out.

[83] In terms of reducing her hourly rate unilaterally, Bai Bua says Ms Buthkanha's evidence has not been consistent and that the reduction to \$30.00 per hour was both temporary and a fair reduction made in consultation with Ms Buthkanha.

[84] Bai Bua also acknowledges that whether Ms Buthkanha has received her correct entitlement to holiday pay will depend on her status as an employee or contractor.

Analysis of disadvantages

Was Ms Buthkanha paid in full for all hours worked?

[85] Ms Buthkanha did not agree to being paid in cash for hours worked above 30 per week and says she was not paid in cash except for one payment of \$900 made after she returned from Thailand. Clause 8 of Ms Buthkanha's employment agreement says that her remuneration will be payable every week via direct deposit into the employee's chosen bank account. There is no provision for cash payments to be made.

[86] When questioned by the Authority about why Ms Buthkanha did not just leave her employment if she was being underpaid, she said she stayed in the employment because she needed the money to send back to her family in Thailand.

[87] I am not satisfied the evidence shows Bai Bua paid Ms Buthkanha for hours she worked other than what is included in her payslips. Bank records have been provided

¹³ Bundle of Documents, pages 405 and 363.

by Ms Buthkanha at Bai Bua's insistence, but unsurprisingly, they do not show any evidence of cash being deposited into her account other than the single payment of \$900 made on 13 June against the reference "thialand" [sic]. The primary evidence of whether cash payments were made comes from the parties. In this case, I am not persuaded Ms Buthkanha asked to be paid in cash, or was paid in cash. This is because the written records of cash payments produced for the Authority are inconsistent and many aspects are inherently unreliable. Most notably, the only cash payment Ms Buthkanha agrees was made (for work on 2-11 June of \$900) was not included in the spreadsheet schedules initially provided to the Authority, and was not included on the schedule of cash payments provided to the Authority following the investigation meeting which was said to correlate to Ms Dokhantod's handwritten record of cash payments.¹⁴ The handwritten record of cash payments also appears to calculate Ms Buthkanha's wages based on \$35.00 per hour for June, when both parties told me that the hourly rate had been reduced to \$30.00 as reflected in Ms Buthkanha's payslips. Based on this, I prefer Ms Buthkanha's evidence that she did not receive cash payments from Bai Bua.

[88] I also do not find it a credible submission that Ms Buthkanha's presence in the shop during working hours but outside her massage hours was as a volunteer or just to help out the business. I find she was working and was entitled to be paid for her work. I conclude Ms Buthkanha was unjustifiably disadvantaged by Bai Bua not paying her for all hours worked.

Was Ms Buthkanha's pay deducted without authorisation?

[89] Based on the evidence before the Authority, Ms Buthkanha's pay was deducted without authorisation for rent, food, bus fare and accommodation in relation to the payment made for the period 2 to 11 June 2023. Ms Buthkanha says she worked 102.5 hours over this time, while Ms Dokhantod's evidence shows she carried out 47.5 hours of massages. Both parties agree Ms Buthkanha was paid \$900 cash for this work. Even based on the most conservative estimate of 47.5 hours worked at \$30.00 per hour, Ms Buthkanha's gross wages should have been more than the \$900 cash she was paid. Ms Buthkanha says she did not agree to any deductions, and Bai Bua does not have any evidence to support a deduction was authorised. I therefore find a deduction was made,

¹⁴ Bundle of documents, pages 4-5.

and was an unjustifiable action that caused disadvantage to Ms Buthkanha as she did not have the benefit of receiving the full amount of wages for her work.

[90] Aside from this one instance, bank records show Ms Buthkanha made separate payments to Ms Dokhantod for rent and food which align with the evidence of both parties that she paid approximately \$120 a week. I conclude there is insufficient evidence of any other unauthorised deductions from Ms Buthkanha's wages.

Was Ms Buthkanha's hourly rate reduced without her agreement?

[91] I find Ms Buthkanha's hourly rate was reduced without her agreement after she returned from Thailand. I am not persuaded there was a conversation between the parties while Ms Buthkanha was in Thailand about changing her terms and conditions, but even if there had been, an agreed material change to her terms and conditions should have been recorded in writing. I therefore accept Ms Buthkanha's evidence that she did not agree to a reduced hourly rate. There was no justification for Bai Bua reducing Ms Buthkanha's hourly rate without her agreement. Because there was a unilateral change to Ms Buthkanha's employment agreement to reduce her pay, I find she was disadvantaged by this unjustifiable action by Bai Bua.

Was Ms Buthkanha's holiday pay paid incorrectly?

[92] Because I have concluded Ms Buthkanha's employment was continuous, it follows that she should not have been paid holiday pay in April 2023 while she was in Thailand. The amount of holiday pay must have been incorrectly calculated at the time because of my finding that Ms Buthkanha was not paid her full wages for hours worked. However, Ms Buthkanha's claim for disadvantage relates to her being paid holiday pay in error when her employment had not ended. In relation to this claim, I find while the action was unjustifiable, there was no disadvantage to Ms Buthkanha.

Was Ms Buthkanha paid incorrectly for working on public holidays?

[93] Ms Buthkanha says she was not paid correctly for working on public holidays. The records show she worked and was paid for 5 hours on Christmas Day, 5 hours on Boxing Day, 5 hours on New Year's Day, 7.5 hours on 2 January, and 5 hours on Waitangi Day. Ms Buthkanha says she is entitled to be paid for 7 alternative holidays as follows:

- (a) 26.12.22 – Boxing Day
- (b) 27.12.22 – Christmas Day observed (Sunday)
- (c) 2.1.23 – Day after New Year’s
- (d) 3.1.23 – 1st Jan observed
- (e) 6.2.23 – Waitangi Day
- (f) 5.6.23 – King’s Birthday
- (g) 14.7.23 – Matariki

[94] Bai Bua should have paid Ms Buthkanha correctly for working on public holidays including providing her with her statutory entitlement to an alternative holiday for working on a public holiday.¹⁵ Not doing so was an unjustifiable action that caused a disadvantage to Ms Buthkanha in that she did not have the benefit of being paid appropriately, and I find it disadvantaged her.

Remedies - personal grievances

[95] I have found Ms Buthkanha was unjustifiably (constructively) dismissed and disadvantaged in her employment and she is therefore entitled to an assessment of remedies.

[96] In relation to her personal grievances, Ms Buthkanha seeks compensation for humiliation, loss of dignity and injury to feelings under s 123(1)(c) of the Act. Ms Buthkanha also raised “loss of income” as a remedy, although it was not clear whether this was a separate claim in relation to her personal grievances.

[97] Although there are two separate grievances, the matters that I have found unjustifiably disadvantaged Ms Buthkanha are interconnected with her constructive dismissal claim and her wage arrears claims. She refers to the incidents leading up to her actual resignation as the “final straw”. In the circumstances, I consider it is appropriate and proportionate to award a global figure for compensation for both personal grievances based on the impact of these events on Ms Buthkanha.

Compensation

[98] Ms Buthkanha seeks an award of compensation for her personal grievance claims under section 123(1)(c)(i) of the Act.

¹⁵ Holidays Act 2003, s 56.

[99] Ms Buthkanha says she went through significant stress, anxiety and humiliation which had a serious impact on her physical and mental health. The impacts Ms Buthkanha suffered particularly relate to events leading to her dismissal claim which started from the end of July and went into early August 2023, including her admission to emergency services at Whanganui Hospital where she was diagnosed with high blood pressure. Ms Buthkanha says she is still sad about how Ms Dokhuntutod treated her. To demonstrate the ongoing and more recent impacts, Ms Buthkanha says after attending mediation with Bai Bua she was taken to Emergency Services at Whanganui Hospital.

[100] I have considered the general range of compensation awards in other cases. Based on the information before the Authority and standing back to objectively assess the impact as best I can, and subject to any reduction for contribution, I consider an appropriate award of compensation under s 123(1)(c)(i) of the Act is \$17,000.

Lost wages

[101] Ms Buthkanha raised a claim for “loss of income”. The claim was not quantified, and no evidence was provided in support of any loss of wages following the end of her employment. Ms Buthkanha’s last day of employment was 7 September 2023. She started a new role in Auckland on 11 September 2023 which continued for a month, and then worked from 2 January 2024 to 11 February 2024 at another role. Ms Buthkanha says she did not have another job to go to when she resigned from Bai Bua and did not arrange further employment during her notice period because she was so unwell.

[102] Ms Dokhuntutod says she became aware that Ms Buthkanha had other massage clients in Whanganui because a client told her they had seen Ms Buthkanha around in Whanganui. Bai Bua also says Ms Buthkanha must have arranged new employment during her notice period at the latest. Irrespective, there is no dispute that Ms Buthkanha started a new job within days of her employment with Bai Bua ending. She took appropriate steps to mitigate her loss. There is no evidence that she suffered any loss of income as a result of the personal grievance, and I find a claim for lost wages is unsupported on the evidence. I decline to make an order for any lost wages.

Contribution

[103] In deciding the nature and extent of remedies for any personal grievance, I must consider the extent to which Ms Buthkanha may have acted in a way that contributed to the situation that gave rise to her grievances.¹⁶

[104] The Employment Court has recently succinctly summarised the key principles relating to contribution as follows:¹⁷

- (a) First, the Court must be satisfied that the actions of the employee contributed to the situation that gave rise to the personal grievance; if so
- (b) Second, an assessment of whether the employee's actions "require" a reduction in the remedies that would otherwise have been awarded.

[105] The Court also stated:¹⁸

The primary considerations when determining whether a particular action should result in a reduction for contribution are causation and proportionality.

[106] The Court has endorsed an approach where a reduction of 50 percent sits at the higher end with 25 percent representing a still significant reduction.

[107] Bai Bua says Ms Buthkanha contributed to the situation because she failed to raise underpayment issues with it, and now seeks to benefit from the lack of clarification on her status. Bai Bua says Ms Buthkanha took copies of confidential company records without permission and has not specified her claims. Ms Buthkanha says she has not contributed to her personal grievance.

[108] Based on the evidence before the Authority, I am not satisfied Ms Buthkanha's actions contributed to the situation giving rise to her personal grievances – namely the constructive dismissal and disadvantage claims. I decline to reduce any appropriate award for contribution.

Does Ms Buthkanha have a claim to wage arrears, holiday pay and interest?

[109] Ms Buthkanha claims:

¹⁶ Employment Relations Act 2000, section 124.

¹⁷ *Keighran v Kensington Tavern Limited* [2024] NZEmpC 28; see also *Maddigan v Director General of Conservation* [2019] NZEmpC 190 at [71] – [76].

¹⁸ *Keighran v Kensington Tavern Limited* [2024] NZEmpC 28 at [17].

- (a) Unpaid / outstanding wages
- (b) Unpaid / outstanding holiday pay and public holiday pay
- (c) Interest on any wage and holiday pay arrears

[110] Ms Buthkanha also says there were discrepancies in the wages and time records, and Bai Bua has breached s 130 of the Act because it has not provided accurate time records in accordance with s 130 (1) (a) – (j) of the Act, reflecting the actual hours she worked. Ms Buthkanha says her ability to bring an accurate wage arrears claim has been prejudiced by Bai Bua's failure to comply with its obligations. Ms Buthkanha submits the Authority should use its discretion under s 132(2) of the Act to accept her claims as to wages actually paid and hours, days and time worked, as proved because Bai Bua has not proved her claims are incorrect.

[111] Bai Bua says it has provided extensive evidence of timesheets, screenshots of the online booking system (Appointment Schedule), logbooks of appointments (Logbook) and evidence of opening hours (from Facebook and Messenger) compared with Ms Buthkanha's evidence which consists of estimations of when she began and finished work from memory, calculated to provide the best personal benefit. Bai Bua says if the Authority finds Ms Buthkanha carried out additional work each day outside of the scheduled massages, it should be limited to a few minutes per massage for stripping beds and other tasks.

[112] Based on the evidence before the Authority, I accept Ms Buthkanha's submission that Bai Bua did not keep a wages and time record for her because there is no record of the number of hours she worked each day in the pay period. As I found above, Ms Buthkanha was working when she was carrying out tasks other than massages in the shop. While the parties have endeavoured to provide accurate breakdowns in support of their respective positions, I have identified inaccuracies and inconsistencies in the records which means they are unreliable. I accept Ms Buthkanha's submission that I am able to accept her claims as proved in the absence of evidence to the contrary and proceed on the basis that her calculations should be used as the starting point for assessing whether any arrears are owed.

Wage arrears including payment for working public holidays, and deduction

[113] Ms Buthkanha was entitled to be paid her contractual hourly rate for hours worked throughout her employment.

[114] Originally Ms Buthkanha claimed \$30,390.50 as the total shortfall in her wages. This had increased to \$36,958.75 in her closing submissions. I have carefully reviewed the list of claims Ms Buthkanha has made in the document: “Full list of the days the Applicant claims wage arrears / shortfalls for, and the amount claimed”¹⁹ and conclude Ms Buthkanha is owed **\$30,822.50** (gross) as a shortfall in wages based on the following:

- (a) Before she went to Thailand, Ms Buthkanha’s usual working pattern was 9.5 hours a day Monday to Thursday (9:00 am until 7:00 pm with a half hour unpaid meal break) and 10 hours on Saturdays (8:30 am until 7:00 pm with a half hour unpaid meal break). Ms Buthkanha’s latest calculations have not accounted for unpaid meal breaks.
- (b) She was entitled to be paid time and a half for working public holidays, including public holidays that were transferred over the Christmas and New Year period.²⁰ New Year’s eve was not a public holiday, but it was an otherwise working day for Ms Buthkanha. Time and a half for work Ms Buthkanha carried out on public holidays was calculated based on her relevant daily pay.
- (c) When she returned from Thailand, I accept Ms Buthkanha was required to work Sundays, but this work did not always equate to a “full” day (of 9.5 to 10 hours) based on the Timesheet and Appointment Schedule records provided. Accordingly, I have revised Ms Buthkanha’s Sunday hours based on her evidence that she was required to be in the shop and working half an hour prior to opening and half an hour after closing, and based on the records of massages that she provided those days.
- (d) For the period 2 to 11 June 2023 when Ms Buthkanha was paid \$900.00 cash, I have reviewed her hours and conclude she should have been paid for 90.75 hours (a total of \$3,176.25 gross).²¹ The \$900 cash payment has been deducted from the total owing to Ms Buthkanha for this period.

¹⁹ Appendix D, provided by the Applicant.

²⁰ Holidays Act 20023, s 45 and 50.

²¹ Ms Buthkanha says she worked 102.5 hours in this period, while Bai Bua’s records show 47.5 hours of massages.

- (e) For the period 2 June to 23 July, Ms Buthkanha was only paid at the rate of \$30 per hour and this should have been \$35 per hour.
- (f) Although Ms Buthkanha says she was working 10 to 12 hour days from 1 to 3 August, the Timesheets and Appointment Schedule show that her massaging hours were not significantly different to her usual hours for these days, and there is no evidence to support her position. I therefore apply a shortfall calculation based on her consistent work pattern of 9.5 hours for those days.
- (g) As above, I do not accept Ms Buthkanha has been paid any other amounts in cash. Therefore the amounts she should have been paid are reduced by amounts she was actually paid as set out in her payslips.

[115] The amount I have calculated is within \$400 of Ms Buthkanha's original claim, which I find to be more accurate than the latest calculations provided, for the reasons I have set out above. Based on the evidence before the Authority, I find Ms Buthkanha is owed **\$30,735.00** (gross) as a shortfall in wages and I order Bai Bua to pay her that amount.

Public holidays / alternative holidays

[116] Ms Buthkanha was entitled to be paid for public holidays according to whether she worked (paid at time and a half, and an alternative holiday)²² or did not work (otherwise working day, paid at relevant daily pay or average daily pay).²³

[117] Included in the wage arrears calculations above, Ms Buthkanha worked the following public holidays:

- (a) 26.12.22 – Boxing Day (9.5 hours)
- (b) 27.12.22 – Christmas Day transferred from Sunday 25.12.22 (9.5 hours)
- (c) 2.1.23 – Day after New Year's (9.5 hours)
- (d) 3.1.23 – 1st Jan transferred from Sunday 1.1.23 (9.5 hours)
- (e) 6.2.23 – Waitangi Day (9.5 hours)
- (f) 5.6.23 – King's Birthday (9.5 hours)
- (g) 14.7.23 – Matariki (9.5 hours)

²² Holidays Act 2003, s 56.

²³ Holidays Act 2003, s 49.

[118] Ms Buthkanha should have been paid for alternative holidays at her relevant daily pay in the pay that related her final period of employment.²⁴ She appears to have been paid for a total of 5.5 hours of alternative holidays (payslips for pay period 3-9 April 2023 and 11-17 September 2023), which leaves 61 hours of alternative holidays outstanding, totalling **\$2,135.00 (gross)**. I order that to be paid.

[119] Ms Buthkanha was also entitled to be paid annual holiday pay of 8% of her gross earnings since the commencement of her employment, less any amount already paid.²⁵ I have calculated Ms Buthkanha's gross earnings in this period as \$67,007.50,²⁶ meaning her total holiday pay should have been \$5,360.60.

[120] According to her payslips, Ms Buthkanha received holiday pay in April (\$1,663.20) and September 2023 (\$1,200.70) totalling \$2,863.90. There is a shortfall of **\$2,496.70 (gross)** and I order that to be paid.

Interest

[121] The Authority has the power to order interest under clause 11 of Schedule 2 of the Act. Ms Buthkanha seeks interest on the money outstanding.

[122] Bai Bua says it has dealt with Ms Buthkanha's pay on the basis of her being in a hybrid employment and contractor arrangement and it would put an unfair burden on Bai Bua if it was required to pay interest on amounts it did not believe it owed. It says there was no wilful or intentional breach, it has paid some of Ms Buthkanha's holiday pay and accordingly no interest should be awarded.

[123] There is merit in Bai Bua's submission that it genuinely disputed Ms Buthkanha's claims including her status as an employee for all hours worked, and it would be unduly punitive for the Authority to exercise its discretion to award interest. Accordingly, I decline to exercise my discretion and no interest is awarded.

²⁴ Holidays Act 2003, s60(2).

²⁵ Holidays Act 2003, section 23.

²⁶ Gross earnings based on payslips and cash payment of \$34,137.50, plus calculated wages shortfall of \$30,735.00, plus alternative holiday payment of \$2,135.00.

Did Bai Bua breach its duty of good faith and employment standards, and should it be ordered to pay penalties?

[124] The Authority is able to impose penalties for certain breaches of the duty of good faith²⁷, failure to comply with record-keeping requirements²⁸, making unlawful deductions²⁹, breaching an employment agreement³⁰, and failing to comply with the Holidays Act.³¹

[125] Ms Buthkanha seeks penalties for the following:

- (a) Breach of good faith (s 4 of the Act).
- (b) Failure to keep wage and time, and holiday and leave records (ss 4B and 130 of the Act).
- (c) Making deductions from wages without consent (Wages Protection Act 1983, ss 4 and 5).
- (d) Breaching the employment agreement (s 134 of the Act).
- (e) Failing to pay wages in compliance with the employment agreement.
- (f) Failing to pay holiday pay correctly (Holidays Act 2003, ss 16 and 23)
- (g) Failing to pay wages correctly for working on public holidays and not providing alternative holidays.

[126] Ms Buthkanha says she was deprived of using the money she was entitled to and Bai Bua has gained an undue financial advantage as a result. She also says the breaches were ongoing and repeated during the entire duration of her employment with Bai Bua.

[127] Bai Bua says that if the Authority finds Ms Buthkanha was an employee for all hours worked, a penalty would not be appropriate because the arrangement was at Ms Buthkanha's insistence. It says it has not breached its duty of good faith and it has acted reasonably based on information and resources available. It also says Ms Dokhantod is a new migrant to New Zealand and has comparatively few resources and that should be taken into account.

²⁷ Employment Relations Act 2000, s 4A.

²⁸ Employment Relations Act 2000, s 130(4).

²⁹ Wages Protection Act 1983, s 13 (1)(b).

³⁰ Employment Relations Act 2000, s 134.

³¹ Holidays Act 2003, s 75.

[128] In deciding whether to impose a penalty, and if I decide to, how much that penalty should be, I need to consider the factors in s 133A of the Act and the approach set out by the Full Court in *Borsboom v Preet PVT Limited and Warrington Discount Tobacco Limited*.³²

[129] These principles have been elaborated on and followed since. The law in respect of quantification is well established given the content of s 133A of the Act. In determining the penalty claim, I have had regard to the object of the Act; the nature and extent of the breaches; whether the breaches were intentional, inadvertent or negligent; the nature and extent of any loss or damage; steps taken to mitigate the effects of the breach; circumstances of the breach, including vulnerability of the employee; and previous conduct of the employer.

[130] The purpose of penalties is punitive. They are not imposed to remedy a loss, but to punish the person who has breached a duty under the Act and to condemn that behaviour. Ms Buthkanha says it is important that Ms Dokhuntod, as the director of Bai Bua is held accountable for the harm done to her and acknowledges her responsibilities.

[131] The breaches in this matter were serious. However, I accept Bai Bua genuinely disputed aspects of Ms Buthkanha's status and entitlements. I consider that the breaches have been considered and addressed in terms of the context for Ms Buthkanha's personal grievance and arrears claims. In deciding not to impose a penalty, I accept and take into account that the breaches were not intentional, and Bai Bua made genuine mistakes in discharging its obligations as an employer. Ms Buthkanha was Bai Bua's first employee. There is no history of previous poor conduct by Bai Bua. I am not persuaded Bai Bua needs to be punished for breaching its duties to deter it (or others) from future non-compliance.

[132] For the reasons given above, I decline to order any penalties.

Should leave be granted for Ms Buthkanha to pursue claims against Ms Dokhuntod as a person involved in breaches?

[133] Ms Buthkanha submits Bai Bua has breached the Wages Protection Act 1983, the Holidays Act 2003 and the Employment Relations Act 2000 by failing to pay her

³² [2016] NZEmpC 143.

wages for all hours worked, failing to pay holiday pay and other statutory entitlements accurately, and reducing her hourly rate without her consent. She says Ms Dokhuntutod is the sole director of the company and is responsible for management and administration of the business. Ms Buthkanha says Ms Dokhuntutod has been directly or indirectly knowingly concerned in or party to breaches of employment standards and has aided or abetted the breaches because she has knowledge of the essential facts that establish contravention by Bai Bua.

[134] Ms Buthkanha asks the Authority to grant her leave under s 142Y(2) of the Act to recover outstanding wages and other money including holiday pay and other statutory entitlements from Ms Dokhuntutod personally, to the extent that Bai Bua is unable to pay.

[135] Ms Dokhuntutod says the only losses claimable against her personally are limited to amounts payable as wage arrears and leave entitlements, and do not extend to penalties, compensation or lost wages (definition of employment standards) and only to the extent the employer is unable to pay.

[136] To decide whether I should grant leave, I must answer the following:

- (a) Has there been a default in the payment of wages or other money payable to the employee?
- (b) If so, is the default due to a breach of employment standards?
- (c) If so, is Ms Dokhuntutod a person involved in a breach of employment standards?
- (d) If so, is the employer unable to pay the arrears in wages or other money?

Analysis

[137] I have found there was a default in the payment of wages and holiday pay to Ms Buthkanha. Bai Bua's failures to have paid wages and holiday pay appropriately are breaches of employment standards as defined in s 5 of the Act. The Wages Protection Act 1983 requires an employer to pay the entire amount of wages to a worker when they become payable (s 4). The provisions of the Wages Protection Act 1983 are covered by the definition of 'employment standards' and therefore the failure to pay a worker's wages is a default due to a breach of employment standards. The Holidays Act 2003 provides for minimum entitlements and payments for holidays including annual holidays and alternative holidays. These minimum entitlements and payments

are also covered by the definition of ‘employment standards’ and therefore the failure to correctly pay holiday pay to an employee is also a default due to a breach of employment standards.

[138] Ms Dokhuntutod’s status as the director of Bai Bua means she may be a person involved in a breach of employment standards by Bai Bua (s 142W of the Act) if she aided and abetted the breaches or was directly or indirectly knowingly concerned in, or party to, the breaches. The level of knowledge required to establish liability for a person involved in a breach of employment standards is knowledge of the essential facts that establish the contravention by the employer. In this case, Ms Dokhuntutod has not submitted she has a legal defence of reasonable reliance on information supplied by another person, or taking all reasonable and proper steps to ensure compliance (s 142ZD of the Act) and no evidence is before the Authority to support that the legal defence is available.

[139] Based on the evidence before the Authority, I find Ms Dokhuntutod was a person involved in the breaches of employment standards in terms of s 142W of the Act because she was the sole director and the “hands and mind” of the company. Ms Dokhuntutod controlled all aspects of Bai Bua’s operations including creating Ms Buthkanha’s employment agreement, keeping Bai Bua’s records, paying wages, directing hours of operation and the nature of the work to be done. She was deeply and personally involved in the day-to-day management of the company with limited outside assistance. Ms Dokhuntutod had direct knowledge of the wage and holiday pay issues, and therefore had the requisite knowledge to establish liability as a person involved in any breaches of employment standards by the company.

[140] There is no evidence before the Authority to suggest the company is going to be unable to pay the amounts ordered to be paid to Ms Buthkanha. Ms Dokhuntutod’s evidence is that the business is profitable and continuing in operation and is not likely to cease operation any time soon. However, I consider it appropriate to grant the application made by Ms Buthkanha so that if Bai Bua is unable to pay the wage and holiday pay arrears, Ms Buthkanha is granted leave to seek to recover the debt from Ms Dokhuntutod personally. For the removal of doubt, leave to recover is only in respect of breaches of employment standards so does not include compensation ordered by the Authority under s 123(1)(c)(i) of the Act.

[141] The Authority grants leave under s142Y(2)(a) of the Act for Ms Buthkanha to seek to recover personally, unpaid wages and unpaid holiday pay that Bai Bua Limited is ordered to pay for breaches of employment standards, but which the company is unable to pay.

Orders

[142] Ms Buthkanha has been successful in her personal grievance claims in that she was unjustifiably dismissed and unjustifiably disadvantaged in her employment, and she is entitled to remedies. She is owed wage and holiday pay arrears.

[143] I order within 28 days of the date of this determination Bai Bua Limited is to pay Wannee Buthkanha the following amounts:

- (a) Compensation for humiliation, loss of dignity and injury to feelings under s123(1)(c)(i) of the Act in the amount of **\$17,000.00**.
- (b) Arrears for:
 - (i) Wages totalling **\$30,735.00** (gross).
 - (ii) Payment for alternative holidays of **\$2,135.00** (gross).
 - (iii) Annual holiday pay of **\$2,496.70** (gross).

[144] The Authority grants leave under s142Y(2)(a) of the Act for Ms Buthkanha to seek to recover personally, unpaid wages and unpaid holiday pay that Bai Bua Limited is ordered to pay for breaches of employment standards, but which the company is unable to pay.

Costs

[145] Costs are reserved. The parties are encouraged to resolve any issue of costs between themselves.

[146] If the parties are unable to resolve costs, and an Authority determination on costs is needed, Ms Buthkanha 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 Bai Bua 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.

[147] 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.³³

Natasha Szeto
Member of the Employment Relations Authority

³³ For further information about the factors considered in assessing costs see:
www.era.govt.nz/determinations/awarding-costs-remedies/#awarding-and-paying-costs-1