IN THE EMPLOYMENT RELATIONS AUTHORITY
WELLINGTON

I TE RATONGA AHUMANA TAIMAHI
TE WHANGANUI-A-TARA ROHE

[2025] NZERA 68
3283559

	BETWEEN	THI KIM CUC NGUYEN 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 Cuc, 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 Cuc 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 Cuc 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 time in Ho Chi nh 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 her for part of the investigation meeting. All witnesses answered questions under oath or affirmation from me and the parties' representatives. The representatives also gave closing submissions.

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

The issues

[8] The applicants each raise claims of unjustified disadvantage and unjustified dismissal[1] as well as breaches of good faith in relation to their treatment by the respondent. They seek compensation for hurt and humiliation, and penalties for the breaches of good faith. Counsel for the applicants advises that they have chosen not to raise claims for wages or holiday pay, as it is intended to put these claims in the hands of the Labour Inspectorate.

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

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

[11] The issues requiring investigation and determination in relation to Ms Cuc 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 Cuc 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?

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

(f) Should either party contribute to the costs of representation of the other party.

Thi Kim Cuc Nguyen's evidence

[12] Ms Cuc gave evidence that she had previously run her own small business in Vietnam, selling milk, coffee, and other essentials. She heard that a local employment agent had opportunities for employment in New Zealand for Nail Technicians. She practiced at a local salon to prepare to demonstrate her skills. She met with Ms Huynh in Vietnam in person, together with several other woman. She demonstrated her skills by doing nails for Ms Huynh to view. Sometime after this, Ms Huynh invited her to go to Ho Chi Minh City for two days for more training with Ms Huynh's niece. Ms Cuc went and understood that her skills had been deemed acceptable by Ms Huynh's niece, as she was offered employment by Ms Huynh, conditional upon her obtaining a New Zealand work visa and paying fees both to the agent and to Ms Huynh.

[13] She said that Ms Huynh had said her skills were okay, and that it was easy work, and Ms Huynh would support her to learn to do better once she started work in New Zealand. Ms Huynh said that her view was that Ms Cuc's skills were poor, but that she could help her improve, which was why she offered her employment. She says that she told Ms Cuc that she would need to do other work such as massage and waxing, and Ms Cuc agreed.

[14] Ms Cuc says that she received a copy of her employment agreement from the agent just before she got on the plane together with other relevant documents. She says that the agreement had her name written on it (not her signature) and she assumed that the agent had completed/written this, as she had never seen the document before. The document provided by her states she is employed as a Nail Technician and does not have a job description. It also states that she is to work 40 hours per week. Ms Cuc is not fluent in English.

[15] Ms Huynh says that she asked the agent to provide a copy of the agreement to Ms Cuc and explain it to her and get her to sign. She says she relied on the agent to get Ms Cuc to sign the agreement.

[16] On arrival in New Zealand, Ms Cuc took between 2 and 3 days to recover from jet lag, before attending the salon on 28 October 2023. She says she started work immediately, and almost immediately she was asked to do other work such as massage, waxing, and shampooing in for clients who had come for haircutting services. She says she was not trained for this and was not comfortable doing this work.

[17] Ms Huynh says that Ms Cuc did not start working at the salon until 5 November 2023, and that although she was in the salon before this, it was not for work, it was for training and/or because she was bored at home.

[18] Ms Huynh says that she gave Ms Cuc a second employment agreement on or around 5 November 2023, which is the date recorded in that agreement. That agreement states that Ms Cuc is to have "30-40 guaranteed hours of work each week" as opposed to the 40 guaranteed hours provided in the earlier agreement, and it also has an attached job description with the last bullet point referring generally to other tasks including massage and waxing. Ms Huynh says that she sent this agreement to the agent in Vietnam electronically, asked him to affix her electronic signature, and to get Ms Cuc's signature as well. He then returned it the next day with Ms Cuc's electronic signature (it is somewhat blurry), which Ms Huynh took as Ms Cuc agreeing to the new agreement. Ms Cuc was not aware of the second agreement.

[19] On 17 December 2023, Ms Cuc was told by Ms Huynh that her employment was at an end. This was confirmed in writing by way of an undated letter, stating that she was being dismissed in accordance with the trial period in her employment agreement, and would receive one week's notice. Ms Cuc says she never worked again after this date, and never received any further payments.

[20] Ms Cuc says that Ms Huynh had never raised any concerns with her about her work. She gives firm evidence that she was dismissed because she was too outspoken and asked Ms Huynh for her rights and raised complaints about her employment. She says she raised concerns about an incident when a male client had asked to receive an intimate massage which she had refused. Ms Huynh and all the applicants considered this to be unwelcome and uncouth behaviour by the client. When Ms Cuc complained about this to Ms Huynh, Ms Huynh held a staff meeting where she said that staff could

refuse such requests, but that the refusal should be couched in such a way as to not offend the customer, and the customer was free to return on other occasions. Ms Cuc thereafter refused to provide massage services to male clients.

[21] Ms Cuc said she had also raised concerns that she was being paid only $350 a week in cash, and she asked for her full wages to be paid into a bank account, with tax accounted for. Ms Huynh together with two of her family members, had come to see Ms Cuc at her home, and had told her to go back to Vietnam and do more training. This was to be at Ms Cuc's expense, with no wages paid during this time.

[22] Ms Cuc felt pressured and that Ms Huynh was potentially threatening to deport her. She was concerned about how this would affect the status of her husband and 2 children, who were in New Zealand with her. She went to see a lawyer (I understand Community Law) on Dixon Street. Ms Cuc understood that a lawyer or similar person phoned Ms Huynh and discussed with her that her visa could not be changed without a proper and lengthy process.

[23] Finally, Ms Cuc accepted that she, along with other staff, had gone to visit a Vietnamese advocate who had a Facebook page, to ask about their labour rights. Ms Cuc says she was concerned to know what might happen to the visa status of her husband and her children if she was no longer working for Ms Huynh.

[24] The following day, on 17 December 2023, Ms Huynh held a meeting with all (or at least, most) staff. At that meeting, Ms Huynh said "those who are going against me, I will fire them". [2] Ms Cuc's evidence was that she told Ms Huynh at this meeting that she had gone to ask for advice about the visa of her husband and children, but Ms Huynh indicated that she did not believe Ms Cuc was "on her side anymore".

[25] After this general meeting, Ms Huynh told Ms Cuc that her employment was at an end and handed her an undated letter confirming this.

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[2] This is supported by a translation of a recording taken by Thi Thanh Thuy Doan, applicant 3290820.

[26] Ms Huynh accepts that Ms Cuc did not work after this but says that she was paid for her one week notice period. Ms Cuc says she received no further monies. Ms Huynh says that this was because by this time, Ms Cuc owed her $3,500. Ms Cuc's final wages including holiday pay and notice were paid into Ms Huynh's bank account in satisfaction of this debt. Ms Huynh says that she paid Ms Cuc $350 per week as a loan or advance on wages, and that once a bank account had been set up, payment of Ms Cuc's wages in full would be made into that. Ms Cuc's view is that this $350 per week was her wages, and she does not agree that she owed money to Ms Huynh.

[27] There are 3 payslips which show only one payment being made to Ms Cuc's bank account, with the other 2 payslips showing payment supposedly to Ms Cuc but in fact paid into Ms Huynh's account. Ms Huynh accepts this is so, and says this was in repayment of the debt. There are no documents establishing this debt, or that Ms Cuc agreed to deductions from her wages.

Ms Huynh's Position Overall

[28] 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.

[29] 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 an 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.

[30] 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.

[31] 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.

[32] 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. Some of the applicants paid rent to Ms Huynh. None of them understood that they owed her on-going or additional rent payments.

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

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

[34] Ms Huynh does not deny the comments attributed to her by Ms Cuc and others at the staff meeting on 17 December 2023, that she was going to fire or dismiss Ms Cuc and others for "going against her" by speaking to an employment advocate about their employment rights, nor does she deny that she specifically told Ms Cuc at that meeting that she believed Ms Cuc was not "on her side" anymore. A letter of termination was given to Ms Cuc that day, ending her employment with provision for the payment of one week's notice. There is no dispute that the one week's notice was paid to Ms Huynh's bank account.

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

[36] Ms Cuc provided an employment agreement dated 5 June 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 17 July 2023. This did not occur, and there is a dispute between the parties as to whether Ms Cuc started work on 28 October 2023 as she claims, or on 5 November 2023 as Ms Huynh claims.

[37] Ms Huynh refers to a second employment agreement which she says was signed on 5 November 2023, being the day that Ms Cuc first started work. Ms Cuc says she did not see this second agreement, and disputes that she signed the first agreement.

[38] It is submitted for Ms Cuc 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. If there was a second employment agreement between the parties as of 5 November 2023, this agreement replaces the first agreement, but the

trial period in it cannot be valid as Ms Cuc had already started work by this time and was therefore not a new employee as s 67A requires; or

c. 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

d. The clause is unenforceable because Ms Cuc did not sign the agreement herself.

[39] Standing back and considering these issues, I find that the most directly relevant matter is the one on which there is the least dispute. The 90-day trial period clause (in both agreements) provided for one week's notice to be given or paid. This is referenced in the termination letter given to Ms Cuc, which letter goes on to state "I have elected to pay this in lieu of having your [sic] work out the notice period".

[40] It is common ground that Ms Cuc 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 Cuc. It is submitted this does not invalidate the termination.[3]"

[41] The Court has held in respect of 90-day trial periods that[4]:

> 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.

[42] The Court then considered the impact of short-paid notice, and found that[5]:

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[3] Paragraphs 73 and 74 of the respondent's submissions dated 6 November 2024.
[4] *Smith v Stokes Valley Pharmacy (2009) Ltd,* [2010] NZEmpC 111, at para [48]
[5] Ibid, at paragraph [97].

> 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.

[43] This is also the case here. When relying on the clause to dismiss Ms Cuc, Ms Huynh did not comply with her own obligations under that clause to pay one week's notice. I do not consider that payment which was not made to Ms Cuc is payment of the required notice period, in circumstances where there is no documentary evidence to support Ms Huynh's contention that she thought she was entitled to offset amounts supposedly owed to her, and Ms Cuc's evidence that Ms Huynh told her not to worry about accommodation, and that this would be taken care of for her.

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

[45] Given my conclusion, I have not found it necessary to reach a finding on the other matters raised on behalf of Ms Cuc about the validity of the 90-day trial period.

Was Ms Cuc unjustifiably dismissed?

[46] On its face, Ms Cuc'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 Cuc's employment was terminated because her employer was uncomfortable that she had sought advice about her employment rights under the law. Ms Cuc is entitled to seek such advice. She committed no breach of her employment obligations by doing so. Her termination was substantively unjustified.

[47] I have also considered whether Ms Cuc'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

[48] There is limited evidence as to what investigation Ms Huynh did to form the view that Ms Cuc was "going against her" and/or was "not on her side anymore", apart from evidence that Ms Huynh was aware that several employees had gone to hear a third party speak about New Zealand employment rights.

[49] Ms Huynh did not raise her concerns with Ms Cuc before dismissing her. In relation to the statements that Ms Cuc was going against her, Ms Huynh did not explain to Ms Cuc what was meant by this, what she considered Ms Cuc had done wrong, or how Ms Cuc had allegedly breached her employment obligations. Ms Cuc was not given a reasonable opportunity to respond to the allegation that was raised. Rather she was put on the spot by being singled out in a meeting with other staff, and then told that she specifically was "not on [the employer's] side". No further discussion occurred prior to dismissal, and accordingly, there was no opportunity for Ms Huynh to genuinely consider any explanation that Ms Cuc might have made either.

[50] In her written submissions following the investigation meeting, Ms Huynh states that Ms Cuc's performance at work was poor, and she had not improved after training. However, this was not raised with Ms Cuc either prior to her dismissal, or on the 17th of December when dismissal occurred. As these potential matters were not raised with Ms Cuc prior to her dismissal, it follows that Ms Cuc 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.

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

Was Ms Cuc unjustifiably disadvantaged?

[52] It is submitted for Ms Cuc 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.

[53] There are aspects of the employment that are not in dispute. Ms Cuc's original employment agreement had no job description. Her evidence is that she met Ms Huynh in Vietnam and demonstrated her skills by painting nails. 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. Ms Cuc expected to do this work in New Zealand. Once Ms Cuc had arrived in New Zealand, Ms Huynh prepared a further employment agreement dated 5 November 2023, which had a job description requiring Ms Cuc to "provide other beauty services such as: body massage, washing hair, hair assistant."

[54] Ms Huynh accepts that she amended the duties once Ms Cuc was in New Zealand and says this was to make sure the description of duties was "correct".

[55] Ms Huynh accepts that Ms Cuc was not paid her contractual wage. She says this was because Ms Cuc's skills did not justify her being paid more than the minimum wage, and also because when she first arrived in New Zealand, Ms Cuc did not have a New Zealand bank account. She says that she "loaned" Ms Cuc $1,600 in various cash payments which she seeks repayment of. Ms Cuc believed these cash payments were her wages. Ms Huynh did not attempt to pay any back pay to Ms Cuc (either at the rate of minimum wage, or at her contractual wage rate) once Ms Cuc had opened a New Zealand bank account. Ms Huynh maintains that Ms Cuc owes her the sum of $7,800 for rent and food, although she is unable to point to any documents setting out an agreement by Ms Cuc to pay her.

[56] Standing back and considering this, I find that Ms Cuc was employed as a Nail Technician. These were the skills she demonstrated to Ms Huynh in person 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 Cuc 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 Cuc's work performance as a defence against paying her wages at all, paying her contractual rate, and to justify her summary

dismissal. The unilateral change of job description at a late stage when Ms Cuc had already made significant personal and financial commitments to come to New Zealand on the basis of the previous arrangement, 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 Cuc about what duties she wished Ms Cuc to perform at an early stage.

[57] In addition, Ms Huynh admits that she did not pay wages in full when due. She paid a weekly sum of $350 instead, which she 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 Cuc her wages in full until Ms Cuc had a New Zealand bank account and IRD number, this does not explain why Ms Cuc 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. I find that the failure to pay wages in full and when due was unjustified and disadvantaged Ms Cuc in the terms and conditions of her employment. I accept Ms Cuc's evidence of the practical difficulties as well as the stress and distress that the failure to pay wages caused her.

[58] There are also the concerns raised by Ms Cuc that she was approached by male clients and asked to perform inappropriate tasks. When she raised this with Ms Huynh, she was told she was able to refuse, but that she should do so politely, and that these requests were a normal part of doing business. Ms Cuc raised concerns that she was not authorised to respond more strongly and that Ms Huynh did not take any steps to prevent this from happening or at least reduce occurrences, such as making it clear what services were offered. She says she felt unsafe and this reduced her trust and enjoyment in the workplace.

[59] It is submitted for Ms Huynh that there was no evidence of recurring instances, or that the steps taken were inadequate in the circumstances. I am not persuaded that it is adequate or appropriate to respond to staff who have been sexually harassed by clients by telling them to be polite to those clients. I accept that Ms Huynh supported staff to

a degree by advising them they could refuse/say no, but Ms Cuc's concern was that there were steps which could have been taken to help reduce or prevent this from happening in the first place, such as clarifying services that would not be offered up front, and on a practical level, setting rules around clothing to be worn by customers. Section 117 of the Act sets out that an employer in this position must inquire into the facts, and then "must take whatever steps are practicable to prevent any repetition". Ms Huynh did not do this. This failure is an unjustified disadvantage in employment.

[60] Ms Cuc experienced unjustified disadvantages in her employment, by way of unilateral changes to her job description, failures to pay wages in accordance with her employment agreement, and a failure to take practicably steps to prevent recuring harassing behaviour. She is entitled to remedies accordingly. I make no findings on other matters raised in the circumstances.

Remedies

[61] Ms Cuc is entitled to remedies in respect of her personal grievances. She claims eight 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 Cuc 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.

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

[63] Ms Cuc gave evidence that when she told people she previously worked for Ms Huynh during her job search, this made it harder for her to get jobs in the Vietnamese community. She then took up fruit picking in Nelson, before taking a job as a Nail Technician in Taupo, resulting in her quantified claim for eight weeks lost wages. I consider this to be direct evidence of steps taken in mitigation, including

evidence that Ms Cuc was willing to move cities on two occasions to secure other employment. 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 employee to pay the employee a sum equal to that lost remuneration. Ms Cuc has lost eight weeks wages and is entitled to be reimbursed for this.

[64] Ms Cuc's first employment agreement dated 5 June 23 provided that she would work 40 hours per week, at $29.66/hour. Ms Cuc's second employment agreement dated 1 November 2023 provided that she would be "guaranteed 30 – 40 hours each week", at the rate of $29.66 per hour. The salon was open 7 days, 8 hours per day except on Fridays when it was open for 10 hours. Given Ms Cuc's evidence that she had to arrive 1 hour prior to the salon's opening time and that she worked 6 days per week, 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 eight weeks, this amounts to $9,491.20 gross. Orders are made accordingly.

[65] 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 Cuc was only employed for approximately two months, I accept Ms Cuc's evidence of the impact on her, including the on-going stress of the working conditions and lack of wages, and the increased stress including her need to take sleeping pills following her dismissal.

[66] Ms Cuc initially sought $20,000 in compensation. Taking into account other comparable cases, I consider this is an appropriate amount to award under s 123(1)(c)(i) of the Act, and that it reasonably reflects the impacts on Ms Cuc. 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

[67] The statement of problem sets out a claim for breach of good faith, being that Ms Cuc was exploited by being grossly underpaid, that her terms of employment were

unilaterally varied, she was dismissed, she did not receive her notice payment, and that Ms Huynh entered Ms Cuc's rental property without permission (which is disputed and which occurred after the ending of employment).

[68] 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.

[69] Ms Cuc also claims a penalty for breaches of her employment agreement. There are several terms which Ms Cuc says were breached including being required to work more than the maximum of 60 hours per week set out in her employment agreement (which is disputed) 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 Cuc to carry out additional duties that she was not trained for.

[70] 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 Cuc by way of both verbal and written terms on 6 June 2023 and again on 5 November 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 to suit herself after Ms Cuc 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 Cuc and others to accept very low rates of pay and long hours for the first 3 months while they were being trained.

[71] The submissions made for Ms Huynh support this, saying it is "not credible"… "that Cuc 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 Cuc, her husband and two children, would be provided for free."[6]

[72] Although Ms Huynh says now that Ms Cuc owes her money for accommodation, she is unable to point to any written agreement about this. The evidence of Ms Cuc and others is that they expected to receive free or heavily subsidised accommodation for the first few weeks of their employment, which they would then be able to move out of once they started receiving their full wages. On balance, I prefer their evidence, which is consistent with Ms Huynh's in-person evidence.

[73] Ms Huynh made explicit written commitments to Ms Cuc 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.

[74] 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*,[7] *A Labour Inspector v Prabh*[8] and *A Labour Inspector v Daleson Investment*.[9] 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.

[75] The Court has found a failure to provide minimum standards directly disadvantages employees, and often arises in circumstances involving a distinct power imbalance.[10] That is the case here and suggests that a penalty should be awarded.

[76] 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,

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[6] Paragraphs 112, 113, and 114 of the respondent's submissions dated 6 November 2024.
[7] *Borsboom v Preet PVT Limited and Warrington Discount Tobacco Limited* [2016] NZEmpC 143
[8] *A Labour Inspector v Prabh Limited* [2018] NZEmpC 110
[9] *A Labour Inspector v Daleson Investment Limited* [2019] NZEmpC 12
[10] *A Labour Inspector v Daleson Investment Limited,* above n 3, at para [27].

in the sense of intending to do the act in question[11], or failed to take reasonable steps to fulfil their legal obligations.[12] 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.

[77] 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.

[78] 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 the applicant. 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

[79] It is submitted for Ms Huynh that any remedies be reduced by 50%, due to Ms Cuc's "conduct and poor performance". There is no evidence of any conduct by Ms Cuc 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 Cuc was dismissed rather than during her employment, and Ms Cuc'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.

[80] 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 Cuc contributed to the situation that led to her grievances. No deductions for contribution are made.

[81] In addition, Ms Huynh has raised by way of written submissions after the investigation meeting, that Ms Cuc's claims are part of a "scheme" which has been

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[11] *Parton v Fifita*, TT 1815/00 DC Auckland, quoted in *MBIE v Sumich*, Auckland TT 4088383
[12] *El-Agez v Comprede Limited,* TT 4121553, at para 18

"concocted" to "extort money from the respondent"[13]. It is stated that a third party has convinced the applicants that they would be able to obtain substantial compensation, and that the applicant's stories are "fabricated" and they have provided false documents[14].

[82] I do not accept that there is any reliable evidence of this. Nor do I accept that Ms Cuc 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 focus 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

[83] Ms Thi Kim Cuc Nguyen has a personal grievance in that she was unjustifiably dismissed and unjustifiably disadvantaged in her employment.

[84] Ms Ngoc Tuyet Uyen Huynh is ordered to pay to Ms Thi Kim Cuc Nguyen within 28 days of the date of this determination :

a. The sum of $9,491.20 gross as compensation for 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

[85] 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 Cuc's matter was approximately half a day.

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[13] Paragraph 26 of the respondent's submissions dated 6 November 2024.
[14] Ibid, paragraphs 32 to 43 generally.

[86] If the parties are unable to resolve costs, and an Authority determination on costs is needed, the applicant[15] 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.

[87] 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.[16]

Claire English
Member of the Employment Relations Authority

[15] Where it is not clear who may be seeking costs use "the party who believes they are entitled to costs".
[16] For further information about the factors considered in assessing costs see: www.era.govt.nz/determinations/awarding-costs-remedies/#awarding-and-paying-costs-1