IN THE EMPLOYMENT RELATIONS AUTHORITY
WELLINGTON

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

[2025] NZERA 69
3284679

	BETWEEN	THI KIM CHUNG 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 Chung, worked for the respondent Ms Huynh (known as Amy) in 2023 at her nail salon, and was a Vietnamese national who had been recruited by Ms Huynh in Vietnam to come to New Zealand for work. She was dismissed on 26 December 2023 under a 90-day trial period after she had been working for 100 days.

[2] Ms Chung and other staff gave evidence that before being offered employment by Ms Huynh, they had had to demonstrate their skills as Nail Technicians either by in person demonstration, or video footage. In addition, they all had to spend two days in

Ho Chi Minh City being trained by and demonstrating their skills to Ms Huynh 's niece. Having successfully proven their skills, they were offered employment and came to New Zealand once they had received a working visa.

[3] The applicants gave evidence that they worked long hours in the salon, and that once they had arrived in New Zealand, they were required to perform additional tasks, particularly massage, waxing, and preparatory work for haircuts including hair washing.

[4] All of them were terminated from their employment at around 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 Dung Tran in particular. In addition, Mr Myles Norris, Ms Huynh's partner, assisted 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 4 days. At the investigation meeting, Ms Huynh was able to respond to the evidence of each applicant after each applicant had given her evidence.

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

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

(d) If any remedies are awarded, should they be reduced (under s 124 of the Act) for blameworthy conduct that contributed to the situation giving rise to her grievance?

(e) Was there a breach of good faith or of the employment agreement, and should penalties be awarded?

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

Thi Kim Chung Nguyen's evidence

[12] Ms Chung owned her own beauty salon in Vietnam together with her sister. She worked as a nail technician, and also provided facials and eyelash services. She provided videos of her work to Ms Huynh to demonstrate her skills.

[13] She was provided with an employment agreement in English dated 19 December 2022. She believes that the agent's administrative assistant copied the signature on her marriage certificate (which she had also provided to the agent) on to the employment agreement.

[14] Ms Chung also met Amy when Ms Huynh came to stay at her house for two days in March 2023, and she demonstrated her skills by performing a facial and a head massage on Ms Huynh's sister.

[15] Ms Chung arrived in New Zealand on 15 September, and says she started working in the salon on 16 or 17 September giving pedicures to clients and had several clients that first day. Ms Huynh rejects this, and says she only started working on 2 October 2023, and any time spent at the salon before this was only for training purposes.

[16] Ms Chung said she worked 7 days per week, and for the first three months, there were no days off. She started at 9.00 am Monday to Saturday, and on Sunday she started at 10.00 am so she had time to go to church. Ms Chung said that she had to take her lunch break when there were no customers, but there was no rush and sufficient time. She said that at first, there was no place to eat, but later on, after Ms Huynh's office moved, one of the rooms became available for use by the staff.

[17] For the first 4 weeks, Ms Chung was paid $300 per week in cash. Her employment agreement promised that she would be paid $29.66 per hour, for a guaranteed minimum of 40 hours per week. As of 14 October 2023, she began receiving pay into her bank account. Her first pay fortnight was for 80 hours, at the rate of $27.76 (I was advised that the rate had been increased since the agreement was signed due to immigration requirements). For the next 3 fortnights, Ms Chung was paid only 36 hours per fortnight. In the month of December 2023, Ms Chung received 2 payments of 60 hours per fortnight.

[18] Ms Chung said that she had asked Ms Huynh to pay her in accordance with her employment agreement, into a bank account, and with tax accounted for, so that she could create a record of her earnings and support her husband and children's visas so they could come to New Zealand. Their visas were granted on 18 October 2023, 4 days after the only payslip that showed Ms Chung being paid her full guaranteed hours in a fortnight.

[19] Ms Huynh agreed that Ms Chung had asked her to make payment in full at the contractual rate into a bank account to assist with the visas for her husband and child, and said that she had had to ask for the tax back. Ms Chung's evidence was that in relation to that first fortnightly payment of $1,789.06, she had to repay $1,100 to the store manager. Ms Huynh says she did not know what happened between Ms Chung and the store manager.

[20] On 26 December 2023, Ms Chung received an email from Ms Huynh at 11 pm, terminating her employment on the basis of a 90 day trial period. She said she was shocked and confused, as she had been working for 100 days by that point. She remained confused about why Ms Huynh had fired her.

[21] Ms Huynh's evidence was that Ms Chung was friends with Ms Lien, and they (and others) had created trouble by asking for their strict contractual rights, not being flexible in the work they did, and taking videos in the workplace which caused Ms Huynh to lose customers. None of this was discussed with Ms Chung at the time. She said that the "whole group" had created a "very bad and mixed up atmosphere".

[22] On 27 December 2023, Ms Chung returned to the workplace to advocate for two friends of hers, who she said had paid money to Ms Huynh to secure jobs in New Zealand but those jobs had never eventuated. Ms Huynh said that she recalled these two friends, and had talked with them about coming to New Zealand and employing them in a new salon which she had planned on opening in Newmarket. This had not eventuated, as the building turned out not to be habitable, and those plans had to be put on hold. Ms Huynh denied receiving any money, and upon further questioning, Ms Chung said that the money had been paid to Ms Huynh's nephew.

Ms Huynh 's Position Overall

[23] Ms Huynh gave evidence at the end of the third day of hearing that she was very distressed about having to fire so many people. She explained that she had to fire the applicants, because they all knew each other, and all of them created trouble by asking for what was strictly in their contracts, trying to do only the type of work they were first hired for, videoing her in the salon and also videoing when clients were around. Ms Huynh said that the videos of her in particular caused her much distress, and that she had also lost customers who were not happy with the videos (as well as other quality of work issues and raised voices in the salon). Ms Huynh said that this had been distressing for her to do, as she had been an immigrant herself, but she felt the group of applicants had left her with no other choice. Now, staff were happy, things were peaceful, and she was building her business back up.

[24] Ms Huynh explained further that she was able to fire the applicants because they all had 90-day trial periods in their employment agreements. When describing how and when these agreements were signed, Ms Huynh explained that she had provided the agent in Vietnam with an employment agreement for each applicant written in English. She then received the agreement back from the agent with a signature in the "employee" field. She did not know how or when the agreement was signed as she relied on the agent to arrange this. She did not know when the agreement was provided to each applicant, what the agent told them about the terms of the agreement, or their ability to understand and agreement written in English, although it was common ground that none of the applicants were fluent in English and spoke with Ms Huynh in Vietnamese.

[25] 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.

[26] 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.

[27] Ms Huynh claimed that the applicants owed her rent and in some cases, a bond. She accepted that there was no written record showing the applicants were liable to pay rent or bond to her. Ms Huynh said that she had arranged shared accommodation for the newly arrived staff, with the expectation that they would move out after about three months so that newer staff could move in. This was because if their employment continued after three months, Ms Huynh would then start paying them the wages set out in the employment agreement. Up until then, they would only be receiving $200 or $300 per week, which was not enough to support their own rent payments.

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

[28] Ms Huynh's written submissions state that she was entitled to dismiss Ms Chung in accordance with the 90-day trial period in her employment agreement. Her in-person evidence at the investigation meeting was that Ms Chung was friends with another employee who she had dismissed for seeking advice on New Zealand employment laws, and Ms Chung was part of that "whole group", who had been fired

because they all knew each other and had sought advice from an employment advocate. Ms Huynh considered them all to be connected and creating difficulties for her.

[29] For reasons unknown to Ms Chung, she was emailed a termination letter at 11.00 pm on 26 December 2023. She had no reason to expect this and did not know why, as Ms Huynh did not speak with her before sending the email. Although the letter of termination provided for the payment of one weeks' notice, there is no dispute that the one weeks' notice was paid to Ms Huynh's bank account.

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

[31] The Court has held in respect of 90-day trial periods that:[2]

> 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

[32] These provisions are to be interpreted strictly. They have no effect beyond the 90-day period set out in statute.

[33] Ms Chung provided an employment agreement dated 4 August 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". There is a dispute as to the day Ms Chung started work. She says she started work on 17 September 2023. Ms Huynh says she did not start working until 2 October 2023, and although Ms Chung was in the salon from 18 September, she was only observing and "practicing" not working.

[34] I prefer Ms Chung's evidence on this point. She says that she was required to be in the salon at certain hours set by the salon manager, and was performing work including work on clients. Ms Huynh's evidence on this point is not convincing, as she

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

says that she could not charge out Ms Chung's work at the full rate, rather than any denial of the tasks that Ms Chung gave evidence of. Ms Huynh also accepts that Ms Chung was "required" to be in the salon during this time and received cash payments in exchange.

[35] I find that it is more likely than not that Ms Chung started work on 17 or 18 September 2023. She was given notice of termination of employment on 26 December 2023, some 100 days later. As this notice was given outside the 90-day period, the protections in that clause do not apply. Ms Chung may pursue her claims.

[36] In addition, it is common ground that Ms Chung did not receive her final pay, but that the entire amount was directed by Ms Huynh into her own bank account. It is submitted for Ms Huynh that "the wages were paid into the respondent's rent account under the mistaken belief that she was able to off-set money owed by Ms Chung. It is submitted that this does not invalidate the termination.[3]"

[37] The Court has also considered the impact of short-paid notice, and found that: [4]

> Deficient notice was not lawful notice so that Ms Smith was not dismissed on notice as 67B requires….For this reason, also, she is not precluded from challenging her dismissal by personal grievance.

[38] This is also the case here. When relying on the clause to dismiss Ms Chung, 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 Chung 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 she would not have to pay rent for the first 3 months while she was on trial, with no follow up.

[39] As the 90-day trial clause must be interpreted strictly, this failure would also invalidate the protections that might have been available for the employer.

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[3] Paragraphs 72 and 73 of the respondent's submissions dated 6 November 2024.
[4] Ibid, at paragraph [97].

Was Ms Chung unjustifiably dismissed?

[40] 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 Chung's employment was terminated because her employer had formed an adverse view of her. This was on the basis of assumptions about Ms Chung being part of a group of staff who had recently been fired because they were seeking advice on New Zealand employment law and creating an "atmosphere" by doing so. This was Ms Huynh's in-person evidence at the investigation meeting, although she did not tell Ms Chung any of this at the time. Ms Chung committed no breach of her employment obligations that would support her termination. Her termination was substantively unjustified.

[41] I have also considered whether Ms Chung'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

[42] There is no evidence as to what investigation Ms Huynh did to form an adverse view of Ms Chung. As Ms Huynh did not speak with Ms Chung at any point before sending her an email at 11.00 pm at night terminating her employment, it follows that none of the other requirements of s 103A have been met either. Essentially, Ms Chung needed to bring these proceedings to find out why she had lost her job.

[43] Although Ms Huynh has raised general claims that there was poor performance by Ms Chung, these allegations were not raised at the time either, and so cannot be relied on to justify her dismissal.

[44] It follows that Ms Chung's dismissal was procedurally unjustified also, and her personal grievance claim of unjustified dismissal is made out.

Was Ms Chung unjustifiably disadvantaged?

[45] It is submitted for Ms Chung 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.

[46] There are aspects of the employment that are not in dispute. Ms Huynh's in-person evidence was that she paid Ms Chung $350 per week for the first weeks of her employment and that this included an accounting for rent. When her New Zealand bank account was open (in October 2023), she was paid at the rate of either $27.76 per hour, or $22.70 per hour. Ms Huynh says the contractual rate of pay was $27.76 per hour, but the employment agreement provided by Ms Chung with her name on it and dated 11 September 2023 states an hourly rate of $29.66 gross. In addition, her last two payslips were paid into Ms Huynh's bank account in full.

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

[48] Ms Huynh says that Ms Chung is owed $417 in unpaid wages[5], but that Ms Chung owes her $9,000 for rent and food costs, and $1,200 as a cash loan. Ms Huynh is unable to point to any documents setting out an agreement by Ms Chung to pay or repay these monies. Ms Chung believed the cash given to her in the first weeks of her employment was wages.

[49] What is clear is that once Ms Chung had arrived in New Zealand, Ms Huynh unilaterally changed her rate of pay and how she was paid. There is also a dispute about a change in job description and increase in hours of work and duties imposed on

[5] It is not set out how this is calculated. I have concerns that the amount is incorrect given the dispute over when Ms Chung started working, and what her contractual hourly rate was, with the employer using a lower hourly rate than was in the signed contract Ms Chung provided to me.

Ms Chung at the same time. Ms Huynh has then proceeded to critique Ms Chung's attitude and alleged poor performance as a defence against paying her wages at all, paying her contractual rate, and to justify her summary dismissal.

[50] 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 Chung her wages in full until Ms Chung had a New Zealand bank account and IRD number, this does not explain why Ms Chung was not paid her arrears in full once she had set up her bank account, or why she was paid at a lower hourly rate than in her employment agreement. I find that the failure to pay wages in full and when due was unjustified and disadvantaged Ms Chung in the terms and conditions of her employment. I accept Ms Chung's evidence of the practical difficulties as well as the stress and distress that the failure to pay wages caused her.

[51] For completeness, I note that the written submissions in relation to Ms Chung refer to "claims" being raised out of time, but as it is not stated which claims the respondent objects to, I am unable to take this further. In any case, my view is that these disadvantages were ongoing and sufficiently canvassed in the personal grievance letter of 2 February 2024.

[52] Ms Chung experienced unjustified disadvantages in her employment by way of unilateral changes to her job description and failures to pay wages in accordance with her employment agreement. She is entitled to remedies accordingly. I make no findings on other matters raised in the circumstances.

Remedies

[53] Ms Chung is entitled to remedies in respect of her personal grievances. She claims eight week's 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 Chung 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.

[54] 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.

[55] Ms Chung gave evidence that she actively applied for many jobs and "went everywhere" in her job search but found this very hard with her limited English. She found this physically and mentally exhausting, and it was difficult providing food and warm cloths and bedding for her children. She found a new job as a beauty therapist after two months. This is direct evidence of steps taken in mitigation, and as a result, Ms Chung has quantified her claim as being for eight weeks lost remuneration. Section 128(2) of the Act provides that where an employee has a personal grievance and has lost remuneration as a result, the Authority must order the employer to pay the employee a sum equal to that lost remuneration. Ms Chung has lost eight weeks wages and is entitled to be reimbursed for this.

[56] Ms Chung's employment agreement was for a "guaranteed minimum 40 hours each week", at $29.66/hour. 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.

[57] 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 Chung was only employed for four months, I accept Ms Chung's evidence of the impact on her, including her surprise and distress at the suddenness of her termination, her distress at being unable to understand why when the reason given (reliance on the 90-day trial period) was inaccurate, and her difficulties sleeping as a result.

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

[59] The statement of problem sets out a claim for breach of good faith, being that Ms Chung was exploited by being grossly underpaid, that her terms of employment were unilaterally varied, she was dismissed, she did not receive her notice payment.

[60] 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.

[61] Ms Chung also claims a penalty for breaches of her employment agreement. There are several terms which Ms Chung says were breached including failure to pay the contractual wage rate, failure to pay wages when due and into a bank account, failure to provide rest and meal breaks (which is disputed), and requiring Ms Chung to carry out additional duties that she was not trained for.

[62] 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 Chung by way of both verbal and written terms in December 2022, and then in the employment agreement I have referred to. 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 Chung 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 Chung and others to accept very low rates of pay and long hours for the first 3 months while they were being trained.

[63] The submissions made for Ms Huynh support this, saying it is "not credible" that Ms Chung would be paid well above the minimum wage as a nail technician and her food and living costs would be effectively free."[6]

[64] Although Ms Huynh says now that Ms Chung owes her money for accommodation, she is unable to point to any written agreement about this and says the

[6] Paragraphs 127 and 128of the respondent's submissions dated 6 November 2024.

sums are taken from memory only. The evidence of Ms Chung is that she was never told rent was owed until this claim was raised in answer to her grievances and at one point, she and her family were sleeping in the living room of a shared house. On balance, I prefer Ms Chung's evidence and do not accept there was any agreement to pay more as Ms Huynh now claims.

[65] Ms Huynh made explicit written commitments to Ms Chung 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 is warranted in the circumstances.

[66] 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.

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

[68] The requirement of intention is not necessarily about whether the party was aware they were breaching the law. Instead, it is about whether they acted intentionally, in the sense of intending to do the act in question[11], or failed to take reasonable steps to fulfil their legal obligations.[12] Here the evidence leads to a conclusion the failure is

[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].
[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

deliberate given the non-compliance with the terms of the employment agreement was to Ms Huynh 's financial benefit.

[69] 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.

[70] Having weighed these factors I conclude the respondent should be required to pay a penalty of $2,500, which is half of that requested by Ms Chung. 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

[71] It is submitted for Ms Huynh that any remedies be reduced by 50%, due to Ms Chung's "conduct and poor performance". There is no evidence of any conduct by Ms Chung that was untoward, or which might have contributed to her dismissal or unjustified disadvantages. Allegations of poor performance were only raised after Ms Chung was dismissed rather than during her employment.

[72] In any event, these matters would not relieve the employer of its obligations to both comply with the employment agreement and follow a fair process when considering dismissal. No actions by Ms Chung contributed to the situation that led to her grievances. No deductions for contribution are made.

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

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

[74] I do not accept that there is any reliable evidence of this. Nor do I accept that Ms Chung seeking her employment rights amounts to a "scheme" even where other staff are doing the same. Nevertheless, I consider it appropriate to record that this determination and the remedies resulting focuses on matters where there was little to no factual dispute between the parties. I have not expressed conclusions on other matters mentioned by the parties which I was not required to determine.

Orders

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

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

a. The sum of $9,491.20 gross as compensation for eight weeks lost remuneration;
b. The sum of $20,000 without deduction as compensation for hurt and humiliation; and
c. The sum of $2,500 without deduction as a penalty for breaching the employment agreement.

Costs

[77] 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 Chung's matter was approximately half a day.

[78] 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.

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

On request by either party, an extension of time for the parties to continue to negotiate costs between themselves may be granted.

[79] 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

[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