

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

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

[2023] NZERA 410
3148403

BETWEEN	TRANG THI THUY TRAN Applicant
AND	AMIT DIWAN First Respondent
AND	INTERNATIONAL BROTHERS LIMITED Second Respondent

Member of Authority:	Nicola Craig
Representatives:	Thomas Tran, advocate for the applicant Pankaj Kumar, counsel for the respondents
Investigation Meeting:	1 and 2 August 2022 in person in Auckland 25 August 2022 by audio-visual link
Submissions (and further information) received:	25 August and 7 September 2022 from the applicant 29 August 2022 from the respondents
Date of determination:	1 August 2023

DETERMINATION OF THE AUTHORITY

Employment relationship problem

[1] Trang Thi Thuy Tran (also known as Helen) had an association with International Brothers Limited (IBL or the company) from May 2020. This included in a marketing capacity. IBL ran a factory making beds and sold the beds and other products through Budget Beds Auckland stores in Onehunga and Henderson.

[2] Ms Tran argues that she was employed from an earlier date than is accepted by IBL and that wages are owing. She also claims to have been constructively dismissed by IBL. IBL accepts that it employed Ms Tran but denies any grievances.

The Authority's investigation

[3] The introduction of extra issues in the lead up to, at and after the investigation meeting are outlined below.

[4] An investigation meeting was held on 1, 2 and 25 August 2022 where oral evidence was heard from Ms Tran, her husband Viet My Nguyen (also known as Alex), three of Ms Tran's friends or acquaintances, IBL's Amit Diwan and his wife Rosy Diwan (also known as Anjali). Witnesses had also provided written witness statements or affidavits.

[5] As permitted by s 174E of the Employment Relations Act 2000 (the Act) this determination has not recorded everything received from the parties but has stated findings of fact and law, expressed conclusions and specified orders made as a result.

[6] This determination has been issued more than three months after the date on which the last information was received. When I advised the Chief of the Authority that this would likely be the case, he decided that s 174C(4) of the Act was applicable.

The issues

[7] The identification of the issues the parties wished the Authority to investigate was not as straightforward here as is in some matters.

[8] Prior to the investigation meeting the following issues were identified by the Member then responsible for the file:

- (a) When did the employment relationship begin?
- (b) Is Ms Tran owed arrears of wages and holiday pay and if so, at what rate, for work done from:
 - (i) 17 May 2020 until 19 July 2020; and
 - (ii) 19 July 2020 until 13 December 2020?
- (c) Was Ms Tran disadvantaged by unjustified actions of her employer in:
 - (i) Not providing an employment agreement;
 - (ii) Not agreeing hours of work and rates of pay;
 - (iii) Not providing a job description; and
 - (iv) Not providing a record of hours worked?

- (d) Was Ms Tran constructively dismissed by IBL and if so, was that dismissal unjustified?
- (e) If Ms Tran establishes a grievance, what remedies (if any) should be awarded, including consideration of contribution?

[9] For Ms Tran, instead of a witness statement in reply being provided prior to the investigation meeting, a lengthy document entitled “Submissions of the Applicant” was filed. It contained a mixture of submissions and evidence. Another case management conference was held and additional issue added:

- (a) Did Mr Diwan breach good faith obligations under s 4 of the Act by misleading Ms Tran and if so, should he be subject to a penalty?

[10] Unfair bargaining, presumably under s 68 of the Act, was later mentioned. Reference is made below to issues raised in closing submissions.

[11] It also became clear that Ms Tran was seeking payment of arrears at specific dollar rates which was not discussed or agreed by the parties. Different rates were claimed over the course of time.

[12] At the start of the investigation meeting counsel for Mr Diwan and IBL, who was relatively new to the case, mentioned a new argument that the disadvantage grievances were not raised in time under s 114 of the Act. This issue was also investigated.

[13] Mr Diwan objects to his inclusion as a party in this proceeding and seek that he be struck out. The Authority indicated that that would be part of this substantive determination.

Ms Tran’s background

[14] In Vietnam Ms Tran completed a bachelor’s degree in business administration, including marketing. She had about three years’ experience, primarily in social media marketing work for service companies, before coming to New Zealand.

[15] On her arrival here in 2019, Ms Tran studied English for six months and then obtained a job in a café. She resigned from that job in April 2020 and was looking for a job suitable to her marketing background. In the course of the Authority’s investigation it was argued that she needed work and income urgently, although that did not fit

particularly well with a decision to resign from the café without having other work to go to.

The meeting of the parties

[16] On 9 May 2020 Mr Diwan posted a Facebook advertisement for someone who was “very good and experienced” in social media marketing and content marketing. The role was identified as currently being casual. “After performance review” the work was said to be changeable to part time or full time.

[17] Mr Diwan saw the job as applying after the Covid lockdown was lifted and the business got going again. The first full day at Covid Alert level 2, allowing the stores to open, was 14 May 2020. Previously Mr Diwan had been doing some IBL marketing work himself, supplemented by occasional online outsourcing. The ad did not refer to work in the store/s. However, given that IBL was not a large business, Mr Diwan saw the role as a junior one which relieve him of design responsibilities and cover shop work, particularly at Henderson.

[18] Ms Tran responded to the ad, sending in her CV and information about her work experience. Mr Diwan made contact to arrange an interview, with some discussion occurring on the phone.

[19] On 16 May 2020 Mr Diwan met with Ms Tran. Their discussion included IBL needing a marketing and branding strategy including social media work. Mr Diwan describes Ms Tran as very enthusiastic and active.

[20] Ms Tran indicated she could undertake market research, prepare strategies and a marketing plan. She showed him her projects in Vietnam. Mr Diwan opened the store’s Facebook app on his laptop and asked her to do some work on it so he could check her skills. Ms Tran created an advertisement as an example. She recalls the interview lasting more than two hours.

[21] In terms of pay Ms Tran recalls Mr Diwan saying he would pay for her work and after he had seen her skill and performance he would pay her what she deserved. No figure was mentioned and no hours discussed. Ms Tran acknowledges that she knew it was a casual role at that point but she offered to start work the next day doing some market research.

[22] Mr Diwan remembers mentioning Ms Tran's lack of New Zealand marketing experience and verbal English expertise although Ms Tran particularly disputes that language was mentioned. Mr Diwan did not recall the discussion getting to the point of him offering her a job. Rather he said something like "let's see what we can do, I'll let you know".

[23] After the meeting Ms Tran told her husband that the owner was happy with her and had hired her. Mr Nguyen confirmed his wife saying she would be paid what she deserved.

[24] That night Ms Tran told friends she had secured a job in her area of work. She also told another friend and family members in the next few days that she had obtained work.

Ms Tran undertakes tasks in May 2020

[25] On 17 May 2020 Ms Tran emailed Mr Diwan with a question list seeking answers about the business.

[26] On about 18 and 20 May 2020 Ms Tran went into the Onehunga store, spending time talking to Mr Diwan. She was there for most of those days. They discussed the questions she had asked. She presented her branding strategy and marketing plan for IBL. They discussed an action plan.

[27] On 20 May Mr Diwan made Ms Tran administrator of the company's advertising account on Facebook for her to manage.

[28] On 23 May Ms Tran sent Mr Diwan a photo concept. She also commented that after:

“... working with you for some days I feel so interested in working with you and really want to develop your business. Therefore, could you please make me an offer letter and labour contract so that I can feel more pleased to work with you?”

[29] At some point Mr Nguyen came to the store to take photos to assist with Ms Tran's project.

[30] Late in the month Ms Tran emailed Mr Diwan, sending him some comment about the website. She was to rewrite the information about the company and send it back. By late May Ms Tran was posting on Facebook for IBL.

Continuation in June and July 2020

[31] Ms Tran continued to undertake tasks related to IBL. In June she began working on the design of signs for IBL's Henderson store. Mr Diwan approved these and the signs were installed in October.

[32] On 16 June Ms Tran sent through her suggestions for a promotion that month, seeking feedback.

[33] When out shopping for materials for IBL, Ms Tran met her former manager from the café and mentioned starting a new job for a bed company. On being asked if she had an employment agreement, Ms Tran replied "not yet". Her former manager's sense was Ms Tran was on the minimum wage at the start but if the owner liked her work, he was going to raise the rate.

[34] Actually, Ms Tran had yet to be paid by IBL. She took up some shifts for another company from about 18 June 2020. She describes working full time for IBL and adding on part time work for the other company.

[35] Ms Tran let IBL know she could not come in on a particular day. Mr Diwan messaged, asking if she was working somewhere else. Ms Tran replied that she had a part time job:

... I just work 20h/week with them, and I still mainly work with you.

[36] Mr Diwan replied that that was good. He then asked Ms Tran to let him know her days off "so we could plan accordingly". A meeting was arranged.

[37] By 4 July 2020 Mr Diwan messaged that he wanted to meet and "[a]lso have to make your job agreement." It appears that the meeting was to be around 8 or 10 July.

[38] Mr Diwan acknowledges that he called Ms Tran and offered her work. He says this was on 16 July although that does not fit well with Ms Tran emailing him on 13 July with information to build her contract – her IRD and bank account numbers and visa.

[39] On 15 July Ms Tran resigned from the other company.

[40] IBL acknowledges that Ms Tran worked for the company from 23 July 2020. She worked between the company's stores, doing store manager work and sales to customers as well as online work.

[41] On 27 July Ms Tran messaged Mr Diwan:

Ah there is a thing I need to talk to you, I have been working for you since May and now I have some finance problem. I don't feel easy to talk about that but can you pay me according to my effectiveness from May? If you need I can send you my work checklist.

[42] Mr Diwan does not respond in a negative or questioning way. Rather he messaged:

Helen I'll give you contract on Wednesday for sure and we'll sort everything out dear. This is confirmed.

The rest of 2020

[43] Ms Tran continued a mixture of IBL work in the stores and online.

[44] On 25 August 2020 Ms Tran messaged Mr Diwan:

Can I discuss with you about my position and job description tomorrow before we do another thing.

My current job description, position and salary are far from what we met and made the first deal. And I hope that with 3 months of probation including 2 months of unpaid work and 1 month of working with a salary of \$400/week is good enough for you to evaluate my capacity. ...

So I just want to discuss with you to clarify the job description, salary and contract before I start a new position and work full time at Henderson store.

Please do not serious (*sic*), this is not a big deal, please understand for my situation.

[45] Mr Diwan replied "Sure thing will do" but no employment agreement document was offered.

[46] On 18 September 2020 Ms Tran messaged that she needs her contract to buy a car, asking Mr Diwan to prepare it and send it to her on Monday. Mr Diwan replies "On Tuesday for sure if that's ok". He later suggests she can take a company letter for the car and he will write it. Ms Tran's response suggests she was pleased.

[47] The letter provided confirms Ms Tran is working as a marketing executive, 35 to 40 hours a week on \$20 an hour.

Employment finishes

[48] Ms Tran's work visa was based on her partnership and was to expire soon so she applied for an MBA course. There appears to have been no thought that her IBL work would form the basis of a work visa application.

[49] The training institute was to apply for a student visa for Ms Tran. Proof of work experience was needed. Ms Tran refers to agreeing with Mr Diwan that she would maintain part time work of up to 20 hours a week with IBL whilst she undertook the course.

[50] On 18 November 2020 Ms Tran messaged Mr Diwan:

I had a plan to go back to school in February (I am sorry, we have no choice, I hope you will understand our decision), I was very happy, relaxed and learned a lot from you and Anjali. When Alex and I make this decision, I choose to tell you as soon as possible so we can have time to prepare for your decisions in the future.

I will take the final test with the school on Thursday 3 December 2020. If everything good I will begin my course on 2nd February (under student visa). I have 2 months left to be able to work full time for you and I am trying my best to complete the work that we discussed with each other.

[51] Mr Diwan replied "no worries" and he will sort everything out. He indicated Ms Tran will always be a part of their family and business.

[52] At some point in November Ms Tran told friends, she was working more than 60 hours a week but not being paid enough. Her friend was concerned.

[53] On 4 December Ms Tran messaged Mr Diwan saying her school would apply for her new visa and has sought her contract and payslip. She asked Mr Diwan to prepare those two documents and a reference letter as proof of her experience in New Zealand. Mr Diwan replied in the affirmative. She later provided the text of the reference she was seeking.

[54] On 9 December 2020 Ms Tran followed up about the documents, noting that her school was waiting for these to finish her visa process.

[55] The following day Ms Tran sent through her resignation letter. She started by thanking Mr Diwan for giving her a chance to join the organisation, but continues:

But until now, there is no reason for me to continue working with you but heaps of reasons to stop.

-I can't remember how many times I have asked for my contract and reference letter but you always ignored them from May 2020. As a result, I am working with a totally unclear position although I can't remember how many positions you have promised, eg. social media, marketing, sales + marketing, stock manager and GM etc. And also the first two months working without salary. In summary, I had to do lots of things and couldn't focus on anything.

-Secondly, you always look down me in my English and you use it as a reason for everything. If you can look at the sales from May to November, if I couldn't speak English fluently, how come the sales increased so quickly, if you know how to compare. From the day I started to work, there was not a single customer complained about my English, and when I go for the English test, my scores was high ...

-Thirdly, there is no specific roster. If I am not wrong, I am working as a full time employee not a casual or on-call staff that I just got to know if I would work and where to work in just 1 night in advance. I had requested to have a final roster for the following week before weekend so I could organise my week, but nope, it was too bad-organised for me.

-Fourthly, there is no clear payslip as you promised. The same, I couldn't remember how many times I asked for it and it is still being ignored. And today I received the salary less than normally without any inform and reason. As a result, you may pay me whatever you want, there is no payslip to prove the amount. I came to work and get paid for what I do. I wasn't coming to beg for money.

-Fifthly, from when you had the right to ask me to do the job at home? You have no right to use my personal time, working at home is my choice if I feel it necessary.

Finally, due to no contract I don't think I have responsibility to give leave notice and also the work briefing, so I stop working now.

Anyway, I want to thank you for your and Anjali's kindness. Best wishes for you and your company.

[56] Mr Diwan recalls being surprised to see the resignation and trying to call Ms Tran unsuccessfully. He ended up emailing, including:

It will be really sad to see you going.

I've always admired your work ethic, attitude, experience and knowledge.

While I appreciate the concern you have raised in your email but at the same time, you will have to trust me that I'm putting my best efforts to streamline these operational flaws. I'm very hopeful that all these issues will be resolved in next few weeks if not month.

Not sure what happened today as Anjali and I couldn't come to work for some health reasons.

As you know we are going away for a week on Saturday. Would you like to come and meet me tomorrow and have a discussion to see if we can find solutions to your concerns.

Subsequent to our discussion, if you still want to leave, I'll respect your decision.

[57] The following day questions arose about IBL's online documents. Ms Tran refers to using her own Google Drive to save IBL documents, with Mr Diwan's approval, as the company did not have an online platform. Mr Diwan was then unable to access those company documents on 11 December and became concerned. He suggested some deliberate action on Ms Tran's part to delete or withhold information. She says she was arranging for a transfer but the quantity of information meant it took a long time to prepare. Her husband was contacted by IBL.

[58] Ms Tran sent files to staff when they requested them. Mr Diwan sent through his version of a reference letter to Ms Tran. She knew he was going away and, recognising the large quantity of material sent, offered to help staff if they had difficulty while the Diwans were away.

[59] On 12 December Mr Diwan threatened legal action given difficulties with opening some files and lack of certainty about whether everything had been provided. He indicated to Ms Tran he was thinking about complaining to Immigration New Zealand. Mr Diwan told the Authority this was a heat of the moment action which he now regrets. Ms Tran responded in detail about what had been supplied and how things were accessible.

[60] Both parties obtained advice but agreed it would better if they met without advisors. At the meeting on 22 December 2020 Ms Tran confirmed that she had passed on all IBL files. Mr Diwan explained about her holiday pay. That afternoon Ms Tran confirmed to her current representative that she wished him to represent her.

Inadequate employment documents

[61] I start the analysis by examining records of work.

No employment agreement

[62] IBL never provided an employment agreement despite at least five written requests. When asked by the Authority about this, Mr Diwan said it was probably careless. He describes being busy but says he is not making an excuse. Other IBL employees had employment agreements so it was not as if the company had to start from scratch. Mr Diwan expressed his regret and sorrow about this.

[63] It was put to Mr Diwan that he may have chosen not to provide an employment agreement so Ms Tran's rights were not identified or she was not informed of them. He pointed to the September letter identifying employment, role, hours and pay.

[64] Ms Tran was not offered a written agreement. That was in breach of s 63A(2)(a) of the Act. No penalty was sought until closing submissions filed after the investigation meeting was complete. That is not satisfactory as penalties are a quasi-criminal matter and IBL participated in the meeting not knowing that a penalty was being sought. There is also a limitation period question as the submissions were filed in August 2022, well over 12 months after the May or even July 2020 discussions.¹

Inadequate wages and time records

[65] There was some difficulty post-employment with Ms Tran's representative obtaining wages and time records. It took around six weeks for documents to be provided. It is hard to see, even with a change in IBL's representation during this time, how this satisfies the requirement under s 130(2) of the Act to provide these records immediately.

[66] What was provided were pages from the Apple Notes app. Each page covers what appears to be a month's worth of weekly wage payments. In some instances there is simply one figure for the week, sometimes with a reference to wage subsidy. In others there is what appears to be a weekly total of hours multiplied by an hourly rate with a figure likely to be tax deducted and a resulting total.

¹ Employment Relations Act 2000 (the Act), s 135(5).

[67] There is an argument raised that the documents provided were not legitimate. During the investigation meeting IBL agreed to provide the Authority with documents showing time and date of creation of the pages, in hard and soft form. Hard copies were provided. These appear to show a creation date around the first pay of each month, suggesting the Notes pages were created at the right time for the start of that month's wages. There were difficulties with accessing the soft versions although Ms Tran was able to do so on a Mac computer.

[68] In any event, even accepting the records show what was actually paid, it is clear that they do not come from a system for properly capturing hours actually worked. They show a total number of hours for the week but Mr Diwan:

- Referred to noting down hours but could not provide details of the hours worked each day. Any notes he made seemed to relate to store opening hours only with there being no written roster system
- Acknowledged that, other than through occasional messages, he had no idea what hours Ms Tran put into IBL business at home. He did know she was answering customer enquires from home but did not think she would be working until 10pm at night for example.

[69] The Notes pages are inadequate for wages and time records purposes under s 130 of the Act. They do not show a number of the required items from s 130(1). Particularly important for current purposes is a failure to identify the number of hours worked each day, as per s 130(1)(g). This is in keeping with the evidence that Mr Diwan did not ask Ms Tran to keep a precise record of her hours of work nor to provide him with her hours.

[70] IBL did not provide Ms Tran with payslips. She did not know how the wages she received in 2020 were calculated. The hourly rate for most of the paid period appears to have been \$20.

[71] In the submissions on behalf of Ms Tran in reply a penalty is sought regarding the failure to provide genuine or adequate records. Regardless of the genuineness, the records are inadequate but the limitation period for penalties is a difficulty.

[72] Even if the provision of records is focused on, rather than the keeping of them, the time should run from the earlier of when it first became known to Ms Tran, or should

reasonably have become known to her, that they were not provided as required.² The records were requested by way of a letter emailed on 22 February 2021. They were sent to Ms Tran's representative on 8 April 2021. No penalty for this was sought in the statement of problem, it is not in the 24 March 2022 list of issues identified for the investigation meeting nor the additional issue noted from a case management conference held on 21 July 2022.

[73] The claim for a penalty was not made within the 12 month limitation period and thus no penalty can be imposed.³

Signs that there was employment from May 2020

[74] The question is when did Ms Tran's employment begin - May or July 2020? Ms Tran puts her start at 17 May, whereas IBL says it was not until late July.

[75] Ms Tran provides extensive documentary evidence of her work, including messages with IBL personnel (particularly Mr Diwan), marketing work and training. Much of this material is from the second half of 2020 but some is earlier.

[76] The following factors suggest employment from May 2020 onwards:

- The 9 May 2020 advertisement for a casual job while performance was reviewed, then part or full time
- IBL's handing over of its advertising accounts on Facebook on 20 May for Ms Tran to manage. Previously on occasions this work was outsourced to people who were paid
- Ms Tran sending through a photo concept in May 2020
- the establishing of Ms Tran's IBL email address in June
- photos from June of the Henderson store in preparation for Ms Tran's involvement in the design of new signage and from the first week of July of the proposed signs

² The Act, s 135(5).

³ The Act, s 135(5).

- in June Ms Tran sending through material on a proposed promotion, looking for Mr Diwan's feedback
- in late June Ms Tran and Mr Diwan starting to work together on Trello, a web-based project and task management app
- Mr Diwan replying positively to Ms Tran's message that although she was working part time for another company, she still mainly worked with him/IBL
- on 7 July Mr Diwan emailing a sign maker telling him to direct any questions to Ms Tran, "our designer". The same day her emailing another design to the sign maker asking him to make it up from hard material
- on the same day Ms Tran sending a logo to IBL's website and IT person
- on 27 July Ms Tran's message to Mr Diwan including mention of her working for him/IBL "since May". He does not object or otherwise comment on that reference in his reply.

[77] Of particular significance is Mr Diwan's acknowledgement there was work done before July 2020.

[78] Factors which suggest employment did not start in May are:

- no employment agreement offered at that time although this is not particularly persuasive as there was no employment agreement offered later when Mr Diwan accepts there was employment for almost half a year
- Ms Tran not being paid and the Notes not covering the period before July 2020
- the reference letter Ms Tran drafted for Mr Diwan to sign in December 2020 referring to a July start. However, I accept her explanation that she felt it necessary to match the reference with her bank account records showing IBL payments starting only in July.

Ms Tran was not a volunteer

[79] If Ms Tran was volunteering for IBL in the early period, she would fall outside the employee definition. This includes consideration whether she did not expect to receive any reward for volunteer work and did not receive such reward.⁴

[80] It is possible Ms Tran may have been willing to undertake work for a time voluntarily without pay to gain New Zealand marketing experience and that Mr Diwan let this arrangement continue for a while as it was to IBL's advantage. However, his position is that she volunteered occasional time as a friend. He accepts that he should have documented her volunteering.

[81] The Diwans identify a fairly close friendship with Ms Tran and her husband Mr Nguyen.

[82] There was some level of connection between Ms Tran (and to a lesser extent her husband) and the Diwans. Mr Diwan and Ms Tran had extensive communications and a shared purpose in progressing IBL. They used expressions such as "dear" to each other although I took this as a matter of politeness rather than necessarily supporting a close connection.

[83] In the second half of 2020 Ms Tran spent time with Ms Diwan at the Onehunga store and they communicated in a friendly collegial way not unusual in a retail context. The Diwans' family members came into the store at least once.

[84] The Diwans emphasise a dinner they and their daughter attended, with Mr Nguyen and Ms Tran inviting them to a Vietnamese restaurant. Ms Tran describes this as coming after Mr Diwan told her repeatedly that his daughter liked Vietnamese food. There was a suggestion of a follow up at an Indian restaurant but it did not eventuate.

[85] Mr Diwan suggests Ms Tran did not need to work and so might have agreed to volunteer. Given Ms Tran's April resignation from the café without other work, I accept there might not have been immediate pressure. However, she took up other part time paid work in June, so was seemingly in need of an income.

[86] Ms Tran repeatedly denied to the Authority that she had agreed to work unpaid. She described her relationship with the Diwans as purely professional. Her husband

⁴ The Act, s 6(1)(c).

reported her saying she had asked Mr Diwan many times about being paid and receiving positive responses. Most of the text material refers to Ms Tran seeking a contract rather than specifically to pay, although a contract identifying a pay rate would likely have put her in a stronger position to ensure she received pay.

[87] The timing does not support the Diwans' argument. Some degree of connection between the parties developed later but not in the period in question. Ms Tran and Mr Diwan had not met before the 16 May interview. Mr Diwan accepted that it was hard to see a friendship developing within four days after the interview, to the extent that Ms Tran would provide a branding strategy for IBL.

[88] I conclude that Ms Tran was not a volunteer from May to July 2020. I find that Mr Diwan said enough for a reasonable observer to conclude that he was agreeing Ms Tran could go ahead and undertake work for him, initially on a casual basis as advertised and at a rate deserved. He did not put in place parameters about how much work was required and did not attempt to stop Ms Tran working once she was underway.

[89] I conclude that Ms Tran was in the employment of IBL from 17 May 2020 onwards.

Bargaining and related arguments

[90] Here I cover several arguments raised on Ms Tran's behalf. There was a difficulty with the failure to have a written employment agreement being equated with a failure to conclude any employment arrangement. I have found that there was an employment relationship in place from May to December 2020.

[91] Submissions for Ms Tran argue that she was never given the opportunity to seek advice about her employment agreement and that meant there was unfair bargaining.

[92] The requirement to advise an employee that she is entitled to legal advice is in the context of providing her with an intended agreement.⁵ As noted above, that first step did not occur.

[93] Unfair bargaining was not raised explicitly in the issues identified by the Authority after discussions with the representatives, prior to the investigation meeting so was not fully explored at the meeting. It appears to have been raised after the

⁵ The Act, s 63(A)(2)(b).

Authority had identified that it could not set terms and conditions of employment except in identified situations.⁶ However, looking at the criteria in s 68 of the Act it is not evident that Ms Tran had diminished capacity, reasonably relied on Mr Diwan for IBL or was induced to enter the agreement by oppressive means, undue influence or duress. Ms Tran was keen to gain some New Zealand experience in her chosen field but rather more would need to be established for an unfair bargaining claim to succeed.

[94] On a different note, Ms Tran's representative suggested that the employment agreement was illegal under the Contract and Commercial Law Act 2017. This appears to be on the basis that the promise to pay what she deserved not being met. Non-compliance with terms of an agreement would usually amount to a breach of the agreement but does not make the agreement itself illegal.

[95] A further argument was Mr Diwan misled and deceived Ms Tran in breach of the Fair Trading Act 1986 by telling her he was going to give her a contract and not doing it. Under s 12 of the Fair Trading Act no person shall, in relation to employment that is offered, engage in conduct that is misleading or deceptive as to any matter relating to employment. No particular remedy sought under that Act is identified. Any argument seeking payment at a higher rate in keeping with Ms Tran's skills faces difficulties identified in the section below. Given that a good faith argument is also raised and that good faith includes a duty not to mislead or deceive I will focus my other comments there.

Pay rate difficulties

[96] Ms Tran seeks payment for work hours she was not paid for at all and a top up to wage payments actually received.

[97] Her wage claims involved increasing rates from \$28.84 per hour in a February 2021 letter, \$39 an hour in the statement of problem and \$58 per hour in the submissions provided before the investigation meeting. This is said to be because evidence was collated over time showing Ms Tran's skills justified the claimed wage rates.

[98] I have found that there was an agreement about wage rates but it was that Ms Tran would be paid what she (or her work) was worth.

⁶ The Act, s 161(2)(b).

[99] Only minimal wage and salary comparison information was provided on Ms Tran's behalf - a few pages from a government careers website. This outlined that sales managers usually earn salaries between \$100,000 and \$200,000 a year with marketing managers earning \$96,000 to \$230,000.

[100] Ms Tran sees herself as being mid-point in the \$100,000 to \$200,000 salary range for a sales manager. Heavy reliance in submissions is placed on positive comments about her in the reference letter Mr Diwan provided in December 2020.

[101] Ms Tran did sales and marketing work for IBL but there was insufficient evidence to satisfactorily assess whether her work was substantially within the work range undertaken by a sales manager or marketing manager. Even if it was, there was no adequate way to establish where she may have been within the broad ranges of rates specified.

[102] There is also the complication of an uncertain proportion of Ms Tran's work being selling in the stores, which seems unlikely to attract the same rate as that of a sales or marketing manager.

[103] Material provided for IBL suggested a pay range of \$20 to \$25 an hour for a digital marketing assistant, although again there is difficulty assessing how Ms Tran's job matched the example.

[104] The final problem is that under s 162 (2)(b) of the Act the Authority cannot fix new terms and conditions of employment except in identified situations. As stated elsewhere, I am not persuaded that this situation is one where those exceptions apply.

[105] Alternatively, I have considered whether this might be a situation allowing for an unjust enrichment quantum meruit claim. That could require payment of what the work was worth. However, Ms Tran faces the same difficulty in that there is insufficient evidence on which to assess what the appropriate pay rate should be.

[106] So I move on to look at what can be ordered. Two calculations are needed – for the May to July 2020 period when Ms Tran was not paid at all and the July to December 2020 period when she was paid but for less hours than she says she worked. The first period should be paid at the minimum wage as there is no satisfactory basis on which to set another rate. The second period is to be paid at \$20 an hour, being the pay rate for most of the period.

Arrears owing for May to July 2020

[107] In the statement of problem 318 hours are claimed to have been worked between 17 May and 19 July 2020. There is little documentary evidence of work as Ms Tran accidentally deleted what would have been her evidence when cleaning out her iCloud storage. She worked at home on IBL business and also estimates that over half of her time was spent working in the shops and at the factory. The work included dealing with customers on-line, creating marketing and branding material and discussions with Mr Diwan.

[108] At the investigation meeting Ms Tran claimed that she worked at least 30 hours a week when considering her time and the scope of the work she did. This included the period when she had the other part time work – she was able to work 20 to 30 hours a week in the other job along with at least 30 hours for IBL. Her husband described her working at the other business in the mornings, going to IBL in the afternoon and then coming home and working late into the night. This included marketing work.

[109] Mr Diwan ultimately accepted that Ms Tran did some work before July 2020 but denied she worked 30 hours a week.

[110] Under s 132 of the Act if the employer failed to keep a wages and time record and that prejudiced the employee's ability to bring an accurate wages claim the Authority may accept the employee's claimed work time.

[111] I accept Ms Tran's claim to have worked 30 hours a week for a nine week period between 17 May and 19 July 2020, totalling 270 hours. At the applicable minimum wage rate of \$18.90 gross an hour, this totals \$5,103.00 gross.

Arrears owing for July to December 2020

[112] From 20 July to 10 December 2020 Ms Tran estimates she worked 1,174.42 hours. This is based on evidence she kept of hours worked.

[113] Ms Tran described to the Authority using what material she had from various sources to calculate how many hours she worked. For example, on the first day of the period, 20 July 2020, she claims from 12 noon as she had a photo from that time. She acknowledged that she might have started earlier that day but only claims from the time

of the first photo. By at least July 2020 Ms Tran was taking many photos and screenshots of her work, often hourly, to establish when she was working.

[114] Ms Tran was operating as the Henderson store manager in around August and September as well as undertaking online sales and marketing functions. For some of this period the store was closed to the public due to a Covid lockdown but online sales went ahead.

[115] At points Ms Tran also worked in the Onehunga store. She described to the Authority working seven to eight hours in an IBL shop then around four to six hours doing marketing and related work. Although a shortage of store staff improved in November, Ms Tran was not immediately relieved of work as she had to train the new people and answer their questions.

[116] When some sample days I picked were examined, there was substantial evidence of numerous activities being carried out during the day and into the evenings. Messages and customer liaison covered a wide period of the day.

[117] There is certainly evidence of Ms Tran working vigorously at times. In September 2020 she outlines to Mr Diwan the number of Facebook accounts she is running for the business. Mr Diwan replies that this is too much and would make her exhausted. He directs that they need to make it simple and get other staff to reply to customer queries when at work.

[118] I am satisfied that Ms Tran has made an effort to genuinely identify the hours she worked. Taking into account s 132 of the Act and the absence of adequate records from IBL, I accept her claimed hours of 1,174.42.

[119] A calculation of 1,174.42 hours at \$20 an hour totals \$23,488.40. From that is deducted Ms Tran's actual earnings in this period of \$14,459.10 gross. This leaves \$9,029.30 gross to be paid.

Payment of arrears, holiday pay and interest

[120] IBL owes Ms Tran the sums of \$5,103.00 and \$9,029.30 gross, totalling \$14,132.30 gross.

[121] Holiday pay at the rate of 8% should be added to those amounts, being \$1,130.58 gross.⁷

[122] IBL must also pay interest on the sums outstanding, which should have been paid some time ago now.⁸ Interest is to be paid from the date when Ms Tran was paid for her last work - 17 December 2020. It is to be calculated as per the Ministry of Justice's civil debt calculator.⁹

[123] Within 28 days of the date of this determination, IBL is to pay Ms Tran the following:

- (a) \$14,132.30 gross as arrears of wages;
- (b) \$1,130.58 gross as holiday pay on that sum; and
- (c) Interest on both sums from 17 December 2020 until the date of payment.

[124] Ms Tran claims to have been paid well below the minimum wage and that is the case, based on the above findings. The payments ordered above ensure that the minimum wage will be paid and so no further award is needed. No penalty is sought.

No constructive dismissal

[125] There is no argument of a failure to raise this grievance in time.

[126] Constructive dismissal covers situations where although the employee resigns the impetus for the termination comes from the employer. Of the three categories of constructive dismissal set out by the Court of Appeal in *Auckland Shop Employees Union v Woolworths (NZ) Limited* the last one is potentially applicable here - a breach of duty by the employer leading the employee to resign.¹⁰

[127] In this category it is not sufficient for the employer's conduct to be inconsiderate and cause some unhappiness to the employee.¹¹ What is required is dismissive or repudiatory conduct; a breach of the employer's duty to the employee. If that is established, I then examine whether:

- (a) the conduct caused the resignation; and

⁷ Holidays Act 2003, s 23.

⁸ The Act, Sch 2, cl 11.

⁹ <https://www.justice.govt.nz/fines/civil-debt-interest-calculator>

¹⁰ *Auckland Shop Employees Union v Woolworths (NZ) Limited* [1985] 2 NZLR 372 (CA) at 374-375.

¹¹ *Wellington etc Clerical Workers etc IUOW v Greenwich* (1983) ERNZ Sel Cas 95 (AC).

- (b) the breach of duty was sufficiently serious to make it reasonably foreseeable by the employer that the employee would not be prepared to work under the conditions prevailing? Or, was there a substantial risk of resignation?¹²

[128] As identified above, IBL failed to provide Ms Tran with an employment agreement despite many requests. The company breached its duty to her.

[129] The resignation letter includes a number of factors in her decision but first and last mentioned, and also relevant to some of the other reasons, is the lack of a contract.

[130] Had Ms Tran resigned at an earlier point, particularly after yet another unsuccessful attempt to obtain an agreement, it may well readily have been concluded to be foreseeable. However, I have difficulty saying that was the case as at 10 December 2020.

[131] On 18 November 2020 Ms Tran messaged Mr Diwan about going back to study. She paints a positive picture of being happy and relaxed and notes that she has learned a lot from the Diwans. Ms Tran discussed continuing part time work after her study began.

[132] In early December Ms Tran messaged Mr Diwan about her school applying for her new visa and needing documents. She asks him to prepare the documents. Mr Diwan replied in the affirmative.

[133] On 9 December 2020 Ms Tran followed up seeking the documents, noting that her school was waiting for these to finish her visa process. No specific deadline is identified. The following day Ms Tran sent through her resignation letter.

[134] There was no evidence of any relevant events which Mr Diwan was aware of making this change of heart from the 18 November position evident. From Ms Tran and her husband's evidence there was no particular event which triggered the resignation, simply a sense of unfairness. What seems to have happened is that having either bottled up or tried not focused on problematic issues, Ms Tran had finally had enough. I do not see the resignation as reasonably foreseeable at that point.

¹² *Auckland Electric Power Board v Auckland Provincial District Local Authorities Officers IUOW* [1994] NZLR 415 (CA).

Unjustified action to Ms Tran's disadvantage grievances

[135] The unjustified actions which Ms Tran sought to pursue in the Authority were identified as IBL not:

- (a) providing an employment agreement;
- (b) agreeing hours of work and rates of pay;
- (c) providing a job description; and
- (d) providing a record of hours worked.

[136] Under s 114 of the Act grievances must be raised within 90 days of the action occurring or coming to the employee's attention, whichever is later. IBL disputes that happened with these grievances.

Grievances raised in time

[137] On 19 February 2021 Ms Tran's representative emailed a letter to Mr Diwan raising the disadvantage personal grievances – not providing written employment agreement; not paying wages from May to July 2020; not paying minimum wage; not providing a record of the hours worked; and not paying commensurate with the market rate for her marketing skills.

[138] There are some differences between these and the issues the Authority investigation proceeded on. However, I accept that the non-provision of an employment agreement and aspects which should have been captured in the agreement are covered.

[139] The 90 days before 19 February 2021 runs back into the period of Ms Tran's employment. Depending on the circumstances, the obligation to provide an employment agreement can be seen as running through the employment period, as does the obligation to keep and provide wages and time records. This suggests the unjustified action grievances were raised in time.

[140] If there is still a question about whether some or all of the grievances were raised in time, I also regard IBL as having consented to the raising of those grievances after the expiration of the time required.¹³ After the 19 February 2021 letter there was no objection to late raising of the grievances. IBL, again without objection, went to

¹³ The Act, s 114(1).

mediation then lodged its statement in reply. The issue was only raised at the beginning of the investigation meeting.

[141] I conclude that the grievances can be pursued.

Unjustified action grievance established

[142] I consider the best approach is to focus on the statutory obligations. Under ss 63A, 64 and 65 of the Act there are statutory requirements to provide an intended employment agreement, retain a signed copy of it and for the agreement to be in writing. The agreement must also include any agreed hours of work or if none, an indication of the arrangements relating to times of work.¹⁴ Likewise the agreement must contain a description of the work and the wages or salary payable.¹⁵

[143] Those requirements were not met here. That is an unjustified action by IBL.

[144] Ms Tran believed that if she had an employment agreement with a job description and hours of work, it would have been clear what she had to do and how long she had to work for. Instead, her sense was Mr Diwan assigned everything to her. She was willing to work hard. However, at times Ms Tran was frustrated and stressed by IBL being short staffed, having to carry out a wide variety of functions or tasks and not getting sufficient time off. She felt substantial uncertainty about her position. I accept Ms Tran was disadvantaged in her employment by not having a written employment agreement, including one containing clauses about hours of work, description of work and pay.

[145] The elements of not providing an employment agreement with each of the requisite clauses are best categorised as one grievance as they all relate to failure to set out in writing the terms of employment. Having considered the evidence of Ms Tran, her husband and her friends, I find that Ms Tran was significantly impacted by these uncertainties.

[146] Ms Tran did not contribute in a blameworthy way to the situation giving rise to this grievance. IBL is to pay Ms Tran \$10,000 as compensation under s 123(1)(c)(i) of the Act within 28 days of the date of this determination.

¹⁴ The Act, s 65(2)(a)(iv).

¹⁵ The Act, s 65(2)(a)(iii) and (v).

[147] The grievance about not providing time records seems ill-conceived. There is a requirement under s 130(2) of the Act to provide wages and time records when requested by an employee or their representative. The obligation to provide records continues after employment. Ms Tran's representative certainly requested those records in the 19 February 2021 letter. But there is no evidence that they were requested before that. At the time of request Ms Tran was no longer employed and so cannot bring a claim that her employment or a condition thereof was affected to her disadvantage, as described in s 103(1)(b) of the Act.

No penalty awarded for breach of good faith

[148] Although it was accepted on behalf of Ms Tran that IBL was her employer, a claim was pursued that Mr Diwan personally had misled Ms Tran regarding the appointment process and employment agreement, thus breaching good faith under s 4 of the Act.

[149] I find that through his frequent indications that he would provide an employment agreement but failure to provide one, Mr Diwan misled Ms Tran. IBL was not constructive in maintaining its employment relationship with Ms Tran. The company breached its duty of good faith.

[150] The employment relationships subject to good faith duties are identified in s 4(2) of the Act. These include the relationship between an employer and an employee. They do not include a relationship between the director, owner or operator of an employer and the employee. There is therefore no basis on which to require Mr Diwan to be personally responsible for any breach of good faith against Ms Tran. I conclude that Mr Diwan be struck out as a party to this proceeding.

[151] There is also a limitation problem with a penalty against IBL. The events which are the subject of this argument occurred, at the latest, in December 2020 and a penalty was not referred to until 19 July 2022. As noted above penalty claims must be brought within 12 months of when the employee knew about the cause of action or could reasonably have known.¹⁶

¹⁶ The Act, s 135(5).

Summary of orders

[152] Within 28 days of the date of this determination IBL is to pay Ms Tran:

- (a) \$14,132.30 gross as arrears of wages;
- (b) \$1,130.58 gross as holiday pay;
- (c) Interest on those sums from 17 December 2020 until the date of payment;
and
- (d) \$10,000 as compensation under s 123(1)(c)(i) of the Act for unjustified action to her disadvantage.

Costs

[153] Costs are reserved. The parties are encouraged to resolve any issue of costs between themselves. If they are not able to do so and an Authority determination on costs is needed Ms Tran may lodge and serve, a memorandum on costs within 14 days of the date of issue of the determination in this matter. From the date of service of that memorandum IBL would then have 14 days to lodge any reply memorandum. Costs will not be considered outside this timetable unless prior leave to do so has been sought and granted.

[154] The parties could expect the Authority to determine costs, if asked to do so, on its usual notional daily rate unless particular circumstances required an upward or downward adjustment of that tariff.

Nicola Craig

Member of the Employment Relations Authority