

**IN THE EMPLOYMENT RELATIONS AUTHORITY  
WELLINGTON**

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

[2025] NZERA 72  
3290719

BETWEEN                      THI QUYNH TRANG BUI  
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

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**DETERMINATION OF THE AUTHORITY**

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**Employment Relationship Problem**

[1]     The applicant, who I will refer to as Ms Trang Bui, 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 Trang Bui 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 Trang Bui gave evidence that before being offered employment by Ms Huynh, they had had to demonstrate their skills as Nail Technicians either by in person demonstration, or video footage. In addition, they all had to spend two days in Ho Chi Minh City being trained by and demonstrating their

skills to Ms Huynh 's niece. Having successfully proven their skills, they were offered employment and came to New Zealand once they had received a working visa.

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

[4] All of them were terminated from their employment at the same time, after they had visited a Vietnamese person active on Facebook to discuss their employment rights, and I am told, asking for various things including having their wages paid into a bank account with tax accounted for, the provision of rosters for certainty of work hours, and the ability to refuse clients who made inappropriate requests.

[5] Ms Huynh says that the applicants were all dismissed because there were problems with their work, and in any case, they cannot bring claims because they were subject to a 90-day trial period which prevents them from bringing claims of unjustified dismissal.

### **The Authority's investigation**

[6] For the Authority's investigation, each applicant lodged a written witness statement. Ms Huynh lodged two witness statements, one a general statement and one responding to Ms Thi Dung Tran (applicant 3290799). In addition, Mr Myles Norris Ms Huynh 's partner, represented 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<sup>1</sup> as well as breaches of good faith in relation to their treatment by the

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<sup>1</sup> Although claims of discrimination were initially raised, these were not pursued.

respondent. They seek compensation for hurt and humiliation, and penalties for the breaches of good faith. Counsel for the applicants advises that they have chosen not to raise claims for wages or holiday pay, as it is intended to put these claims in the hands of the Labour Inspectorate.

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

[10] Given that the applicants all worked for the respondent over a short period of time, the similarities in their claims, and the need for a translator, it was agreed at a case management conference that the matters would be heard consecutively over four days. At the investigation meeting, Ms Huynh 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 Trang Bui 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 Trang Bui 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 Quynh Trang Bui's Evidence**

[12] Ms Trang Bui was employed at Ms Huynh's salon between 30 October 2023 and 17 December 2023.

[13] Ms Trang Bui had experience working at a nail salon in Vietnam. After speaking with a friend about opportunities in New Zealand, she visited an employment

agent and learned about Ms Huynh's salon. She then attended training with Ms Huynh's niece in Ho Chi Minh City. Ms Trang Bui obtained her visa, and messaged Ms Huynh to confirm she could come to New Zealand at the end of October. Ms Huynh said yes, so she came.

[14] Ms Trang Bui was provided with a copy of her employment agreement shortly before she left Vietnam. This was the first time she had seen it. Her evidence is that the copy given to her by the agent was already signed, although she had not done this. She believes the agent took her signature from another document and copied it for this purpose. She was not told about pay rates or hours until she was in New Zealand, and could not read the employment agreement which was provide in English.

[15] Ms Trang Bui arrived in New Zealand on 25 October 2025, with her husband and two children. She was shown to a shared house, with one bedroom and a double mattress provided for them.

[16] Ms Trang Bui started working at the salon on 30 October. On the first day, she was told by Ms Huynh to learn massage, and that she would need to do hair washing and waxing also, which surprised her as she had been expecting work as a nail technician. She said she had to work from 9 am until 7pm, or until closing which could be earlier or later depending on clients. Lunches were taken hurriedly, when there were no customers in the salon. Ms Trang Bui says that initially she did not have any days off, apart from 2 sick days. She was paid \$200 per week.

[17] In November 2023, Ms Trang Bui and some other employees met with Ms Huynh and asked for more pay, and one day off each week. After that, Ms Trang Bui's pay increased to \$300 per week, and she received a day off each week.

[18] Ms Trang Bui followed a Facebook page named "Protecting the rights of Vietnamese Workers". She and other staff discussed going to an event organised by the person who ran this page on 17 December 2023, and was added to a message chat group about that event along with other staff. Ms Trang Bui attended the event, which was about employment rights in New Zealand, then carried on to work as her shift started at 12 noon that day.

[19] After 7pm that evening, Ms Huynh called a meeting with all staff. Ms Trang Bui recalls that Ms Huynh took the view that some staff were "against her" and had

“reported her”. She asked a number of staff directly to confirm whether they had met with the organiser of the Facebook group. When asked, Ms Trang Bui confirmed that she had. Ms Huynh then told staff to go home and wait for her email.

[20] Later that evening, Ms Trang Bui received an email from Ms Huynh, terminating her employment on the grounds of a 90-day trial period, as of that day. Ms Trang Bui never returned to the salon, and did not receive the one-week notice payment mentioned in the letter. Ms Trang Bui used Google translate to read the letter which was written in English, but did not understand what she had done wrong to justify her termination.

[21] On 21 December 2023, Ms Huynh told Ms Trang Bui and her family to vacate the property they were living in by 24 December. Ms Trang Bui told Ms Huynh she needed 90 days, and after discussions, Ms Huynh agreed to give them one month to vacate. She then asked for rent and issued a 14-day notice for rent arrears. Ms Trang Bui said she had not agreed with Ms Huynh to pay rent, rather Ms Huynh had said that she (not Ms Trang Bui) would be responsible for rent payments.

[22] Ms Trang Bui found another job at nearby nail salon working 2 to 3 days per week, but shortly after she started, Ms Huynh appeared at that salon and videoed her while she was working. The owner of that salon was unhappy with the disruption to customers, and did not allow Ms Trang Bui to continue working. Ms Trang Bui eventually found a new job on 15 March 2024 at another salon in Lower Hutt.

[23] She described this as the worst period of her life, losing her job, being evicted, and being unable to comfort her husband and children even though she was scared herself.

[24] Ms Huynh says that she was able to rely on the 90-day trial period in her employment agreement with Ms Trang Bui to end her employment. She also accepts that she found out where Ms Trang Bui was working after termination, and went to that salon and filmed her working there without the consent of the salon owner or Ms Trang Bui. She says this was because she was concerned about Ms Trang Bui’s visa.

### **Ms Huynh ’s Position Overall**

[25] 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.

[26] 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.

[27] 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.

[28] 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.

[29] 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?**

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

[31] Ms Huynh does not deny the comments attributed to her by Ms Trang Bui and others at the staff meeting on 17 December 2023, that staff were “against her”, had “reported her” and had gone to meet with an employment advocate about their employment rights. Ms Huynh listed Ms Trang Bui as a person who had (supposedly) “reported her”. She then asked Ms Trang Bui if she had met with an employment advocate, saying “Is that right Trang”. Ms Trang Bui replied “yes” and was told to go home and wait for an email. A letter of termination was given to Ms Trang Bui later that day, ending her employment with 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.

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

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

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

[35] It is submitted for Ms Trang Bui that the 90 day trial period is not valid because:

- a. She was not paid one week's notice as required by the trial period; or
- b. The business employed more than 19 employees at the time, therefore the 90-day trial period was not available to an employer of that size; or
- c. The clause is unenforceable because Ms Trang Bui did not sign the agreement herself.

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

[37] It is common ground that Ms Trang Bui 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 Trang Bui. It is submitted that this does not invalidate the termination.<sup>2</sup>"

[38] The Court has held in respect of 90-day trial periods that:<sup>3</sup>

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.

[39] The Court then considered the impact of short-paid notice, and found that:<sup>4</sup>

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.

[40] This is also the case here. When relying on the clause to dismiss Ms Trang Bui, 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 Trang Bui is payment of the required notice period, in circumstances where there is no documentary evidence

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<sup>2</sup> Paragraphs 76 and 77 of the respondent's submissions dated 6 November 2024.

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

<sup>4</sup> *Ibid*, at paragraph [97].

to support Ms Huynh’s contention that she thought she was entitled to offset amounts supposedly owed to her, and Ms Trang Bui’s evidence that had not agreed with Ms Huynh to pay rent, rather Ms Huynh had said that she (not Ms Trang Bui) would be responsible for rent payments.

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

### **Was Ms Trang Bui unjustifiably dismissed?**

[42] 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 Trang Bui’s employment was terminated because she told her employer when asked that she had attended a public meeting to seek advice about her employment rights under the law and was part of a group message chat discussing this. She committed no breach of her employment obligations by doing so. Ms Huynh had also formed the view that Ms Trang Bui had “reported her” although it is not clear what such a report would be about or why it would amount to any breach of employment obligations, particularly if Ms Huynh believed she was complying with her obligations as an employer. Ms Trang Bui’s termination was substantively unjustified.

[43] I have also considered whether Ms Trang Bui’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

[44] There is no evidence as to what investigation Ms Huynh did to form the view that Ms Trang Bui was “going against her” and/or had reported her, or why this would be a concern to Ms Huynh as a compliant employer. An admission that Ms Trang Bui

had met with an employment advocate when she was not scheduled to work is not a sufficient investigation into different allegations.

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

[46] In her written submissions following the investigation meeting, Ms Huynh states that Ms Trang Bui was only rostered to work the minimum hours in her employment contract and had poor skills. However, this was not raised with Ms Trang Bui either prior to her dismissal, or on the 17<sup>th</sup> of December when dismissal occurred. It follows that Ms Trang Bui 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.

[47] Ms Trang Bui's dismissal was procedurally unjustified also. Ms Trang Bui's personal grievance of unjustified dismissal is made out.

### **Was Ms Trang Bui unjustifiably disadvantaged?**

[48] It is submitted for Ms Trang Bui 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.

[49] There are aspects of the employment that are not in dispute. Ms Trang Bui's original employment agreement had no job description attached, but stated she was "being employed as a Nail Technician". Her evidence is that she had previously worked in the beauty industry in a named salon in her home province. Ms Trang Bui demonstrated her skills by sending videos of her work to Ms Huynh. Ms Huynh then offered her a job and arranged for her to have training in Ho Chi Minh City with Ms Huynh's niece, again painting nails. Ms Trang Bui attended a day of training and stayed overnight with Ms Huynh's niece, before coming promptly to New Zealand. She felt the process was faster for her than for some of her colleagues. Once Ms Trang Bui

had arrived in New Zealand, Ms Huynh prepared a further employment agreement dated 30 October 2023, which had a job description requiring Ms Trang Bui to “provide other beauty services such as: body massage, washing hair, hair assistant.”

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

[51] Ms Huynh accepts that Ms Trang Bui was not paid her contractual wage, but received either \$200 or \$300 per week in cash. She further says that Ms Trang Bui’s work was good, but that she had an attitude, and took videos in the salon even after being told to stop.

[52] Ms Huynh says that Ms Trang Bui is owed approximately \$3,000 in unpaid wages, but that Ms Trang Bui owes her \$9,450 for rent and food costs, and \$1,800 loaned as a cash advance on wages prior to Ms Trang Bui having a bank account. Ms Huynh is unable to point to any documents setting out an agreement by Ms Trang Bui to pay her for rent, food, or an advance on wages. Ms Trang Bui believed the \$1,800 paid to her weekly at \$200 per week was her wages.

[53] I find that Ms Trang Bui was employed as a Nail Technician. These were the skills she demonstrated to Ms Huynh and later her niece in order to achieve a job offer. It was only once Ms Trang Bui 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 Trang Bui’s attitude and alleged poor performance<sup>5</sup> as a defence against paying her wages at all, paying her contractual rate, and to justify her summary dismissal. The unilateral changes of job description at a late stage, and the critique of her for allegedly failing to satisfactorily fulfil duties she did not agree to perform amount to an unjustified disadvantage in her terms and conditions of employment. This is exacerbated by the fact that Ms Huynh knew her own business needs, and could have been upfront with Ms Trang Bui about what duties she needed done.

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<sup>5</sup> As per written submissions dated 6 November 2024, which was contrary to the description of Ms Trang Bui’s work as “good” during the investigation meeting.

[54] For completeness, I note that the written submissions in relation to Ms Trang Bui 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.

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

[56] Ms Trang Bui 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**

[57] Ms Trang Bui is entitled to remedies in respect of her personal grievances. She claims three months 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 Trang Bui 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.

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

[59] Ms Trang Bui gave evidence that she actively applied for many jobs before securing other employment at a nail salon in Lower Hutt on 15 March 2024, and that this was stressful as many of the places she applied to did not respond. She also worked at a bakery for a short time after this. This is direct evidence of steps taken in mitigation, and as a result, Ms Trang Bui has quantified her claim as being for three months lost remuneration, which is her actual loss. 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 Trang Bui has lost three months wages and is entitled to be reimbursed for this.

[60] Ms Trang Bui's employment agreement provided that she would work 30 - 40 hours per week, at \$29.66/hour. The salon was open 7 days, 8 hours per day except on Fridays when it was open for 10 hours. Ms Trang Bui's evidence that she worked from 9 – 7, 7 days most weeks, 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 three months or 13 weeks, this amounts to \$15,423.20 gross. Orders are made accordingly.

[61] 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 Trang Bui was only employed for approximately two months, I accept her evidence of the impact on her, including her anxiety and inability to sleep.

[62] Ms Trang Bui 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 Trang Bui. 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**

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

[64] 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.

[65] Ms Trang Bui also claims a penalty for breaches of her employment agreement. There are several terms which Ms Trang Bui 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 Trang Bui to carry out additional duties that she was not trained for.

[66] 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 Trang Bui by way of both verbal and written terms on 10 July 2023. In the event, practically none of the key terms of either agreement were honoured, with Ms Trang Bui changing the rate of pay, type and frequency of payments, duties, and minimum and maximum hours of work and premises of work to suit herself after Ms Trang Bui 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 Trang Bui and others to accept very low rates of pay and long hours for the first 3 months while they were being trained.

[67] The submissions made for Ms Huynh support this, saying it is "not credible"... "that Trang Bui 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 Trang Bui, her husband and three children, would be provided for free."<sup>6</sup>

[68] Although Ms Huynh says now that Ms Trang Bui owes her money for accommodation, she is unable to point to any written agreement about this and says the sums are taken from memory only. The evidence of Ms Trang Bui is that she was never told rent was owed until this claim was raised in answer to her grievances. On balance, I prefer Ms Trang Bui's evidence and do not accept there was any agreement to pay more as Ms Huynh now claims.

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<sup>6</sup> Paragraphs 101- 105 of the respondent's submissions dated 6 November 2024.

[69] Ms Huynh made explicit written commitments to Ms Trang Bui 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.

[70] 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*,<sup>7</sup> *A Labour Inspector v Prabh*<sup>8</sup> and *A Labour Inspector v Daleson Investment*.<sup>9</sup> 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.

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

[72] 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<sup>11</sup>, or failed to take reasonable steps to fulfil their legal obligations.<sup>12</sup> 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.

[73] 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.

[74] 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 Trang Bui. However, I

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<sup>7</sup> *Borsboom v Preet PVT Limited and Warrington Discount Tobacco Limited* [2016] NZEmpC 143

<sup>8</sup> *A Labour Inspector v Prabh Limited* [2018] NZEmpC 110

<sup>9</sup> *A Labour Inspector v Daleson Investment Limited* [2019] NZEmpC 12

<sup>10</sup> *A Labour Inspector v Daleson Investment Limited*, above n 3, at para [27].

<sup>11</sup> *Parton v Fifita*, TT 1815/00 DC Auckland, quoted in *MBIE v Sumich*, Auckland TT 4088383

<sup>12</sup> *El-Agez v Comprede Limited*, TT 4121553, at para 18

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**

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

[76] 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 Trang Bui contributed to the situation that led to her grievances. No deductions for contribution are made.

[77] In addition, Ms Huynh has raised by way of written submissions after the investigation meeting, that Ms Trang Bui's claims are part of a "scheme" which has been "concocted" to "extort money from the respondent"<sup>13</sup>. 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<sup>14</sup>.

[78] I do not accept that there is any reliable evidence of this. Nor do I accept that Ms Trang Bui 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**

[79] Ms Thi Quynh Trang Bui has a personal grievance in that she was unjustifiably dismissed and unjustifiably disadvantaged in her employment.

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<sup>13</sup> Paragraph 26 of the respondent's submissions dated 6 November 2024.

<sup>14</sup> Ibid, paragraphs 32 to 43 generally.

[80] Ms Ngoc Tuyet Uyen Huynh is ordered to pay to Ms Thi Quynh Trang Bui within 28 days of the date of this determination:

- a. The sum of \$15,423.20 gross as compensation for three months 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**

[81] 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 Trang Bui's matter was approximately half a day.

[82] If the parties are unable to resolve costs, and an Authority determination on costs is needed, the applicant<sup>15</sup> 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.

[83] 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.<sup>16</sup>

Claire English  
Member of the Employment Relations Authority

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<sup>15</sup> Where it is not clear who may be seeking costs use "the party who believes they are entitled to costs".

<sup>16</sup> For further information about the factors considered in assessing costs see: [www.era.govt.nz/determinations/awarding-costs-remedies/#awarding-and-paying-costs-1](http://www.era.govt.nz/determinations/awarding-costs-remedies/#awarding-and-paying-costs-1)