

**IN THE EMPLOYMENT RELATIONS AUTHORITY  
WELLINGTON**

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

[2024] NZERA 531  
3272039

BETWEEN JANE BORIBOON  
Applicant

AND LOCTUN DELUXE NAIL &  
BEAUTY SALON LIMITED  
Respondent

Member of Authority: Sarah Kennedy-Martin

Representatives: Kevin Murray, advocate for the Applicant  
No appearance for the Respondent

Investigation Meeting: 21 May 2024 in Nelson

Submissions and Information Received: Up to and including 28 August 2024

Determination: 5 September 2024

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**DETERMINATION OF THE AUTHORITY**

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**Employment Relationship Problem**

[1] Jane Boriboon was employed by Loctun Deluxe Nail & Beauty Salon Limited (LDNBSL) as a Nail Technician. LDNBSL is a limited liability company, having its registered address in Nelson, and Loc Thi Hong Vo is the sole director and shareholder.

[2] Ms Boriboon worked for LDNBSL from 2 November 2022 until August 2023.

[3] Ms Boriboon's main issues were that she was provided with less than her agreed hours, not paid annual holiday or public holiday pay and was unjustifiably dismissed by Ms Vo, on behalf of LDNBSL.

[4] There was no written individual employment agreement (IEA).

[5] The issues for investigation and determination are:

- (a) Was Ms Boriboon dismissed and if so whether her dismissal and how it was carried out was what a fair and reasonable employer could have done in all the circumstances at the time?
- (b) Was Ms Boriboon disadvantaged in her employment by the actions of LDNBSL, in particular when it changed her employment to a casual arrangement and failing to pay her sick leave when she was entitled to it?
- (c) Has LDNBSL breached its duty of good faith to Ms Boriboon by failing to be active and constructive in maintaining the employment relationship?
- (d) Is Ms Boriboon due wage arrears under s 131(1)(b) of the Act for:
  - Underpayment due to receiving less than the minimum wage;
  - Unpaid holiday pay;
  - Unpaid sick leave entitlements;
  - Underpayment resulting from failing to provide minimum agreed hours.
- (e) If LDNBSL is found to have acted unjustifiably (by disadvantaging and/or unjustifiably dismissing Ms Boriboon), what remedies should be awarded to her, considering:
  - Lost wages; and
  - Compensation under s123(1)(c)(i) of the Employment Relations Act 2000 (the Act).
- (f) Should LDNBSL be ordered to pay employer contributions to KiwiSaver?

- (g) Should any penalties be awarded for breaches of good faith, failing to provide wage and time records, breaching the employment agreement and failing to provide a written employment agreement?
- (h) Should interest be awarded?
- (i) If any remedies are awarded, should they be reduced (under s 124 of the Act) for blameworthy conduct by Ms Boriboon that contributed to the situation giving rise to her grievance?

[6] Should either party contribute to the costs of representation of the other party?

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

[7] No statement in reply or evidence was lodged by LDNBSL or Ms Vo and LDNBSL did not participate in the Authority's investigation but I am satisfied the company was served the relevant documents at its registered office and address for service. The start of the investigation was delayed in case Ms Vo wished to attend. An Authority officer telephoned the business premises on the morning of the hearing and was unable to reach Ms Vo. In the absence of any information from LDNBSL, including a statement in reply or an indication about whether it wished to attend the investigation meeting, the Authority proceeded.

[8] The Authority has the power to proceed if any party without good cause, fails to attend, and may act fully in the matter before it as if that party had duly attended or been represented.<sup>1</sup>

[9] A written witness statement was lodged from Ms Boriboon and she answered questions under oath from me. Her representative made written and oral submissions.

### **Ms Boriboon's employment at LDNBSL**

[10] Ms Boriboon began her employment working five days a week. She said she wanted 40 hours a week but the most she ever did was 35 hours per week and her hours both decreased in the quieter periods and increased at busy times. Ms Vo would email

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<sup>1</sup> Employment Relations Act 2000, Schedule 2, clause 12 and Employment Relations Authority Regulations, Schedule, form 8.

her on a Friday setting out the days and hours she was required. Ms Boriboon also gave evidence she needed to fit her work hours around childcare arrangements.

[11] Based on Ms Boriboon's evidence I find there was a verbal agreement for 5 days a week, Monday to Friday, six hours a day at an hourly rate of \$21.20 at the start of the employment relationship. Her payslips show she was not always provided with 30 hours and only paid for the hours she worked. Ms Boriboon's hours increased when she was required to work seven days a week over the Christmas period because it was busier. She said she did increase her days but could not always do seven days because of health issues and she found this hard.

[12] In the New Year Ms Boriboon says her work pattern went back down to five days per week 9:00am or 9.30am to 4.30pm. In February Ms Vo dropped Ms Boriboon to four days per week (Tuesday to Friday) because it was quieter.

[13] Ms Boriboon's hours were emailed to her before the start of the week. She said she was not asked about any changes. She thought she was a permanent employee but did not feel she could speak to Ms Vo about why she was not always given her agreed hours. A family connection between Ms Boriboon and Ms Vo meant Ms Boriboon let things drift. Ms Boriboon asked for a written employment agreement.

[14] In approximately June 2023 Ms Boriboon was given a draft individual employment agreement which she never signed because she says it was incorrect. Although it provided for 40 hours full time work, which she wanted, it provided a much lower hourly rate of \$17.70. There were other inaccuracies with it. Ms Vo said she would email her accountant to sort it out.

[15] In July 2023, Ms Boriboon noticed incorrect wage payments. Ms Vo was mistaken in thinking Ms Boriboon could not have paid sick leave to care for a dependent child. While trying to resolve that issue Ms Boriboon became concerned. Ms Vo claimed to have no knowledge of the unpaid sick leave but the accountant told Ms Boriboon Ms Vo had instructed them not to pay Ms Boriboon.

[16] Ms Boriboon said although she was frustrated and alarmed she continued to work. On Sunday 30 July, Ms Vo messaged her about her work hours for the upcoming

week saying she would call Ms Boriboon if they needed her because they were not currently busy. Ms Boriboon was very concerned and sent several messages. Ms Vo messaged explaining again they were not busy, said Ms Boriboon was “casual at the moment” and then stopped communicating.

[17] Ms Boriboon said she did not know what to think. She did not know whether her employment had ended and tried to get answers to her questions. Ms Vo stopped returning her messages. She thought she had been fired, although Ms Vo would not confirm that, saying only that Ms Boriboon was casual now. On 3 August Ms Boriboon emailed her resignation after taking advice because she needed to find new work and could not get a clear answer from Ms Vo.

#### *The draft employment agreement*

[18] Ms Boriboon did not sign the draft written IEA provided by Ms Vo because it was full of errors. It recorded the wrong commencement date, position and hourly rate. It included a trial period, recorded the hours as “6 hours of work” as well as “40 hours + per week between Monday and Friday” and included an incomplete holiday pay clause referring to 8 per-cent. The sick leave clause had not been updated with the change in May 2021 from 5 days to 10 days annual leave for each 12-month period.<sup>2</sup>

[19] Other than 6 hours per day, the agreement did not appear to reflect what Ms Boriboon believed had already been agreed and to a certain extent was already in place. Ms Boriboon was however paid pay as you go annual leave. The trial period provision could not apply given Ms Boriboon had already commenced employment.

[20] The pay slips show Ms Boriboon’s annual leave was paid on a pay as you go basis and her hours fluctuated consistent with casual employment but her evidence of the verbal agreement at the start of employment was that it was to be a permanent position with set hours and I have accepted that evidence.

[21] The IEA was not specific about whether the position was permanent or casual. In any event, it was not signed so the employment agreement between the parties was

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<sup>2</sup> Holidays Act 2003, s 64(2).

the verbal agreement they had entered into at the start. The role was a permanent position in which Ms Boriboon was to work six hours per day, five days per week (30 hours per week) at the rate of the applicable minimum wage which was \$21.20 when her employment commenced. The minimum wage increased on 1 April 2023 to \$22.70 and Ms Boriboon's hourly rate increased at that time.<sup>3</sup>

*Was Ms Boriboon dismissed or did she resign?*

[22] Towards the end of July when Ms Boriboon raised concerns about her pay, she entered into a series of communications with Ms Vo telling Ms Boriboon firstly not to come to work because there was no work and then that she was now a casual employee. Ms Vo then stopped communicating.

[23] On 30 July, Ms Vo's last text message to Ms Boriboon advised "you are casual at the moment you know that Jane". Ms Boriboon sent three long text messages trying to establish what was happening. On 3 August, after receiving no responses she emailed a resignation letter.

[24] The law in relation to dismissals says there must be a clear statement of dismissal. The classic definition of dismissal is found in *Wellington, Taranaki & Marlborough Clerical v Greenwich*.<sup>4</sup> That case makes it clear the termination of employment must be at the initiative of the employer and this approach has been followed in many cases since.

[25] Submissions were made on Ms Boriboon's behalf that Ms Vo's messages on 30 July 2023 contain a very a clear sending away. I have reviewed the exchange of messages Ms Boriboon provided to me and the most relevant are as follows:

Ms V Hi Jane Good morning We will call you if we need you because we are not too busy the moment thanks you!

Ms B What do you mean you will call me if you need me? I work Tuesday-Friday 9.30-4.30. I'm not scheduled to work weekends.

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<sup>3</sup> Minimum Wage Act 1983, s 6.

<sup>4</sup> *Wellington, Taranaki & Marlborough Clerical v Greenwich* (1993) ERNZ Sel Cas 95 AC at 103

Ms V We are not busy at the moment so we don't need employee! I will call you to work if we are busy

Ms B So you're telling me not to come in Tuesday?

Ms V Yes

Ms B And how am I supposed to make money if I don't work? You cannot do this

Ms V I will pay you any sick day left ok Sorry Jane

Ms B Hi Loc After giving your text so much thought and worry. Please I need to know where I stand from here on with my employment situation? Where you are saying I have no work this Tuesday and you have offered me a paid sick day for not work this Tuesday, you have not indicated when I can come back to work? Can I come back the following day please as we are struggling for income, you know we are a married couple with 2 young children. I'm so stress now whether I'm only going to be on call for you when there is only work available? Or You are not going to offer me any further employment form here on? Are you going to terminate me? Can you please reply to this text no later than tomorrow because we are so stressed, about my employment situation?? Thank you

Ms V You're a casual at the moment you know that Jane.

[26] I have found above Ms Boriboon was a permanent employee so the instruction not to come on Tuesday, referring to the start of Ms Boriboon's work week because she was no longer needed, was an instruction to Ms Boriboon not to come back to work. Ms Vo sent Ms Boriboon away. The fact Ms Vo unilaterally changed the agreement to a casual agreement and then stopped communicating with Ms Boriboon also supports that conclusion. I find Ms Boriboon was dismissed.

### **Unjustified action - dismissal**

[27] Given I have found Ms Boriboon was dismissed, LDNBSL would have been required to act as a fair and reasonable employer could in the same circumstances and in good faith when it took any action likely to have an adverse effect on the continuation of Ms Boriboon's employment. There are mutual obligations on parties in employment relationships to deal with each other in good faith which requires them to be active and constructive in establishing and maintaining productive employment relationships in which the parties are responsive and communication.

[28] With no reasons justifying a dismissal, no consultation, access to information or opportunity to comment and the sudden way in which Ms Boriboon's employment came to an end, LDNBSL's actions were a breach of the good faith obligations it had towards Ms Boriboon.

[29] When I compare the test in s 103A of the Act to how LDNBSL acted towards Ms Boriboon, the steps taken and decisions made were not what a fair and reasonable employer could have done in all the circumstances at the time the dismissal occurred. There was no process, Ms Boriboon was dismissed by way of a series of messages and was not given a chance to respond before being dismissed.

[30] Ms Boriboon's claim of unjustified dismissal has been successful and Ms Boriboon is entitled to an assessment of remedies.

### **Unjustified action - disadvantage**

[31] I also find Ms Boriboon was disadvantaged by not being given a written employment agreement at the start and for not being provided and paid for the agreed amount of hours per week. The reference in the messages to casual employment is slightly confusing but came after the instruction not to come to work which I have found was a sending away by the employer. The reference to being "casual at the moment" implies a change from a permanent position and is consistent with Ms Boriboon's evidence. There was no evidence of any discussion or agreement with Ms Boriboon about changing her terms and conditions of employment from permanent to casual.

[32] Based on Ms Boriboon's evidence she needed consistent hours and would have preferred 40 hours, but I have found 30 hours of work per week was agreed because of her evidence about needing to collect children at the end of the day. That means 30 hours per week was a term and condition of her employment and Ms Vo adjusting hours unilaterally both up and down and then changing the agreement to casual employment to suit the employer's needs was unjustifiable. Ms Boriboon was affected to her disadvantage by having the agreement changed to casual and not being paid for the minimum number of agreed hours.

[33] Ms Boriboon was also disadvantaged by Ms Vo failing to pay sick leave in the first instance. Whether or not Ms Vo was mistaken as to the reason why sick leave was not paid, Ms Boriboon was distressed and received significantly less in wages that week, impacting on her financially.

### **Remedies**

[34] *Compensation:* Ms Boriboon seeks compensation for humiliation, loss of dignity and injury to feelings caused by the grievances. Ms Boriboon gave evidence of the hurt and distress caused to her by the sudden way her employment came to an end. Her financial situation was impacted. She was already stressed about how the family were going to make ends meet and support her children which was evident in her texts to Ms Vo when she was trying to establish why she was not required at work. Ms Boriboon sought assistance from the Ministry of Social Development because of the financial situation she found herself in after Ms Vo ended the employment relationship suddenly.

[35] Ms Boriboon reported sleepless nights and becoming tearful easily. Family members suggested she needed to seek medical advice. She says she just carried on because she needed to keep going for her children.

[36] Given the suddenness of the employer's actions ending her employment with little warning and purporting to change the agreement from permanent to casual from that point, and then ending all communication I consider an award of compensation under s 123(1)(c)(i) of the Act in the amount of \$18,000.00 to be appropriate for both the unjustified dismissal and the disadvantage.

[37] *Wage arrears:* I have found above Ms Boriboon was employed to work 30 hours per week. She should have been paid a total of \$26,295.00 from 2 November 2022 to 13 August 2023.<sup>5</sup> This includes a two week notice period. Based on the calculations

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<sup>5</sup> 30 hours x \$21.20 from 2 November 2022 to 31 March 2023 = \$13,356.00 and 30 hours x \$22.70 from 1 April 2023 to 13 August 2023 = \$12,939.00.

provided to me she received \$17,946.90. Under s 131 of the Act, Ms Boriboon is entitled to the shortfall of \$8,349.00 in wage arrears.

[38] *Sick leave:* Ms Boriboon's final pay slip records payment for two days of sick leave on 24 and 25 July 2023 which were the two days she queried just before she received the text telling her not to come into work. No wage arrears are due for these two days because they were paid.

[39] *Lost wages:* Ms Boriboon seeks lost wages. The Act permits reimbursement to the employee of lost wages in an amount that is the lesser of the sum equal to lost remuneration or to three months ordinary time remuneration. Ms Boriboon's employment ended on 31 July 2023. Ms Boriboon's ordinary time remuneration for three months is calculated as \$8,853.00.<sup>6</sup>

[40] Ms Boriboon commenced new employment on 1 September 2023 and her Inland Revenue (IR) income breakdown from January 2023 to November 2023 was provided. Thirteen weeks from 31 July to 30 November 2023. Comparing what Ms Boriboon should have earned at LDNBSL (\$8,853.00) with what she did earn in the three months after dismissal (\$3,229.09), her loss was \$5,624.00.

[41] I find Ms Boriboon's loss was caused by LDNBSL's actions and she took steps to mitigate her loss by seeking new employment. It is appropriate to make an order for 13 weeks lost wages calculated on the basis of Ms Boriboon actual loss which amounts to \$5,624.00.

[42] *Annual holidays entitlement:* Having found Ms Boriboon's position was permanent rather than casual, she was not paid her annual leave correctly because it was paid with her wages. Employers can pay annual leave in wages when the preconditions in s 28 of the Holidays Act 2003 apply and the employee agrees in his or her employment agreement.<sup>7</sup> The preconditions were not met and there was no evidence of agreement.

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<sup>6</sup> \$22.70 x 30 = \$681.00. \$681.00 x 13 = \$8,853.00.

<sup>7</sup> Holidays Act 2003, s 28 (1).

[43] Despite Ms Boriboon receiving holiday pay in her wages incorrectly, had she been employed for 12 months or longer the Act stipulates she would have become entitled to payment of holiday pay in the usual way, in spite of the earlier payments. Given she was not employed for 12 months or longer, she is not entitled to any holiday pay arrears.

[44] *Public holidays:* Ms Boriboon says prior to each public holiday Ms Vo instructed her not to work. She provided a message showing she questioned Ms Vo on why she was not paid for Good Friday, noting it was a public holiday for which she was scheduled to work. This supports her evidence she was regularly asked not to work public holidays when they fell on ordinary workdays. As I understood the evidence, this became a problem after the Christmas break. Had Ms Boriboon been provided with her agreed hours there were seven public holidays in 2023 after the Christmas period that would have otherwise been ordinary workdays:

- (a) Waitangi Day (Monday 6 February 2023) - \$127.20
- (b) Good Friday (7 April 2023) - \$136.20
- (c) Easter Monday (10 April 2023)- \$136.20
- (d) Anzac Day (Tuesday 25 April 2023) - \$136.20
- (e) Kings Birthday (Monday 5 June 2023) - \$136.20
- (f) Matariki (Friday 14 July) - \$136.20

[45] Adding these public holidays up at their individual rates calculated at six hours per day amounts to \$808.20.

[46] *Penalties:* Penalties were sought for the breach of good faith and failing to provide wage and time records. Section 4A of the Act provides liability for a penalty for good faith breaches only if the failure was deliberate, serious and sustained or the failure was intended to undermine the employment relationship. I am satisfied the combination of Ms Vo's actions on behalf of LDNBSL were intended to undermine the employment relationship. What emerges from the information available is a failure to be active and constructive in maintaining a productive employment relationship.

Changing Ms Boriboon's role from permanent to casual had an obvious adverse effect and impacted on trust and confidence.

[47] I note the purpose of penalties is punitive. They are not imposed to remedy a loss but to punish the employer who has breached a statutory duty and to denounce the employer's breaches. One of the objects of the Act is to promote the effective enforcement of employment standards. There is a duty to keep compliant wage and time and holiday and leave records and to provide these on request.

[48] In relation to the statutory breaches, the Acts allow for penalties to be imposed with the maximum penalty for a single breach by a company of \$20,000.00. With two types of breaches there is potential liability of \$40,000.00 for LDNBSL, but in this case it is appropriate to globalise to one breach of \$20,000.00.

[49] There is no previous conduct the Authority is aware of. These penalties were applied for within 12 months of the action. Penalties are punitive and designed to deter poor conduct by employers. Having considered the matters the Authority must have regard to in s 133A of the Act when determining the amount of penalty, and the relevant cases, I consider a penalty of \$5,000.00 against LDNBSL to be appropriate in this case. The conduct represents two breaches and the company is a small company with a sole director and shareholder.

[50] Under s 136 of the Act, I consider this to be an appropriate case to order part of the penalty be paid directly to Ms Boriboon because of the impact on her.

[51] *Interest:* Ms Boriboon is entitled to an award of interest on the total arrears claimed. The Authority has the power to award interest.<sup>8</sup> Interest is to reimburse someone for the loss of the use of monies, to which there is an established entitlement.

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<sup>8</sup> Employment Relations Act 2000, Schedule 2, clause 11 and Interest on Money Claims Act 2016, Schedule 2.

[52] LDNBSL will be ordered to pay interest using the civil debt interest calculator<sup>9</sup> on the total amount of arrears outstanding (\$9,157.20) from the end of employment (31 July 2023) until the date the money is paid in full.

[53] There was insufficient evidence in relation to KiwiSaver contributions to make an order in relation to those.

### **Orders**

[54] Loctun Deluxe Nail & Beauty Salon Limited is ordered to pay Jane Boriboon the following sums:

- (a) Compensation for hurt and humiliation in the amount of \$18,000.00.
- (b) Lost wages in the amount of \$5,624.00.
- (c) Wage arrears in the amount of \$8,349.00.
- (d) Public holiday arrears in the amount of \$808.20.
- (e) A penalty in the amount of \$5,000.00 with \$1,000.00 payable to Ms Boriboon and the remainder payable to the Crown.
- (f) Reimbursement of the filing fee in the amount of \$71.55.

### **Costs**

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

[56] If the parties are unable to resolve costs, and an Authority determination on costs is needed, Ms Boriboon 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 Loctun Delux Nail & Beauty Salon 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.

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

[57] 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>10</sup>

Sarah Kennedy-Martin  
Member of the Employment Relations Authority

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<sup>10</sup> <https://www.era.govt.nz/determinations/awarding-costs-remedies>