

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

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

[2024] NZERA 185
3278360

BETWEEN CONSTRUST LIMITED
First Applicant

YUHANG DAI
Second Applicant

AND XIANG JIAO
Respondent

Member of Authority: Rachel Larmer

Representatives: Zhenzhen Chen, counsel for the Applicants
May Moncur, advocate for the Respondent

Investigation: On the papers

Submissions Received: 12 March 2024 from the Applicants
26 March 2024 from the Respondent

Date of Determination: 28 March 2024

DETERMINATION OF THE AUTHORITY

Employment Relationship Problem

[1] Mr Xiang Jiao was employed by Construst Limited (Construst) as a carpenter from 2 to 23 March 2024. Mr Jiao is a migrant, so was granted a work visa in order to be able to work for Construst, which was an “Accredited Employer”.

[2] The second respondent, Mr Yuhang (Derek) Dai, was Construst’s director from 12 September 2017 to 1 October 2023. He is also the sole director and shareholder of the company that is the sole shareholder of Construst.

[3] Mr Jiao lodged an Amended Statement of Problem (ASoP) on 13 October 2023 in which he claimed:

- (a) He was owed wage arrears;
- (b) He had been required to pay an unlawful employment premium by Construst and Mr Dai;
- (c) He sought recovery of the premium he had paid;
- (d) He had been unjustifiably disadvantaged;
- (e) He had been unjustifiably dismissed;
- (f) Penalties be imposed on each respondent for breaching his employment agreement;
- (g) He should be granted leave to recover any wage arrears and other money from Mr Dai personally, if Construst was unable to pay him.

[4] The Authority held a two-day investigation meeting (IM) on 14 and 15 February 2024. At the conclusion of the IM the Authority directed Mr Jiao to provide additional information about the evidence he had given about his post-termination earnings.

[5] Mr Jiao lodged two additional witness statements and associated documents. A telephone conference was held on 11 March 2024, during which Mr Jiao affirmed the evidence he had lodged after the IM.

[6] That was necessary because Mr Jiao had told the Authority he had left New Zealand on 3 February 2024 to return to China after his visa had expired. He said that because he was in China he could not provide an affidavit. The Authority therefore arranged for him to lodge witness statements, which it had him affirm by telephone on 11 March 2024, instead of an affidavit.

[7] As it turned out, Mr Jiao had not left New Zealand on 3 February 2024, or thereafter. He had been seen in New Zealand by one of Mr Dai's associates, so his counsel raised that with the Authority as a concern. The issue of Mr Jiao's whereabouts was therefore also addressed with him by the Authority during the telephone conference that was held on 11 March 2024.

[8] Although Mr Jiao affirmed he had left New Zealand and had been in China since then, on 14 March 2024 he admitted that he had lied to his advocate and the Authority about that.

Mr Jiao also admitted he had submitted a false visa document to the Authority to prove he was in China when he was actually still in New Zealand.

[9] Some of that information Mr Jiao provided after the February IM about his lost remuneration claim was unsatisfactory. Mr Jiao has therefore been asked to respond to specific questions the Authority had about a lack of clarity or contradictions that arose from the evidence he has provided about his post-termination earnings.

[10] Mr Jiao was asked to provide that additional information by 15 April 2024. However, he requested and was granted an extension of time until 15 May 2024 to do so. Construst and Mr Dai have also been given an opportunity to respond to any new information that Mr Jiao lodged.

[11] Once that has occurred then all of Mr Jiao's claims, with the exception of the unlawful premium and associated penalty claims, will be determined by the Authority. The Authority told the parties it would issue its determination on the claims it had completed investigating, as Mr Jiao said he was in a dire financial situation. The Authority did not want him to have to wait until after the resumed August IM (discussed later) to get a determination on most of his claims.

[12] Accordingly, at the end of the February IM the Authority gave the parties a preliminary indication, based on the evidence it had heard, about the outcome of Mr Jiao's claims, apart from the unlawful premium and associated penalty claim.

[13] This indication was in Mr Jiao's favour and it was done in an attempt to encourage the parties to resolve these claims by agreement. Although the parties have now agreed on the amount of wage arrears Mr Jiao was owed while employed, the other claims are still disputed so will require determination by the Authority.

[14] The Authority did not complete its investigation into the unlawful premium and associated penalty claims during the February IM, so those claims were adjourned part heard.

[15] The Authority has called for additional information, including from a summonsed witness, relating to the part heard unlawful premium and associated penalty claims. Some of that additional evidence was lodged today and Construst and Mr Dai are expected to lodge their additional information shortly.

[16] A further three-day IM has been set down for 20, 21 and 23 August 2024, in order to complete the Authority's investigation into the unlawful premium and associated penalty claims. One of the witnesses who was witness summonsed to the February IM agreed to return to the August IM to give further evidence on the unlawful premium claims. The August IM dates were the first available dates that the parties could attend a resumed IM.

[17] On 12 February 2024 Construst applied for an order that Mr Jiao provide it with "security for costs". This application was declined, as recorded in the Authority's determination dated 13 February 2024.¹ This preliminary determination has not been challenged.

[18] On 13 February 2024 Construst and Mr Dai lodged this removal application, that requested the substantive matter AEA 3225359 be removed to the Employment Court. The grounds for removal in the application were stated to be:

- (a) Whether the Authority had jurisdiction to order security for costs;
- (b) If so, whether an order for security for costs was justified;
- (c) If not, whether security for costs is available to a party in the Authority.

[19] The grounds relied on were that:

- (a) There was an important question of law that would have been significant for employment law generally; and
- (b) The matter was of such a nature and urgency that it was in the public interest to have it removed to the Court.

[20] Mr Jiao's position was that there were no grounds for removal. He believed the removal application was another attempt to improperly pressure him, as a vulnerable migrant worker who was experiencing serious financial challenges, to forgo his claims.

The Authority's investigation

[21] The parties agreed for the removal application to be determined 'on the papers'.

¹ *Jiao v Construst Ltd & Dai* [2024] NZERA 82.

[22] Neither party considered there was a need to file affidavit evidence, and the Authority agreed with that. Construst and Mr Dai lodged written submissions, and Mr Jiao replied to that.

Relevant law

[23] The Employment Relations Act 2000 (the Act) sets out four grounds on which the Authority may order removal of a matter to the Employment Court in the first instance. Section 178 of the Act states:

178 Removal to Court

- (1) The Authority may, on its own motion or on the application of a party to a matter, order the removal of the matter, or any part of it, to the court to hear and determine the matter without the Authority investigating it.
- (2) The Authority may order the removal of the matter, or any part of it, to the court if—
 - (a) an important question of law is likely to arise in the matter other than incidentally; or
 - (b) the case is of such a nature and of such urgency that it is in the public interest that it be removed immediately to the court; or
 - (c) the court already has before it proceedings which are between the same parties and which involve the same or similar or related issues; or
 - (d) the Authority is of the opinion that in all the circumstances the court should determine the matter.

[24] If a removal application satisfied one or more of the grounds set out in s 178 of the Act, then the Authority must exercise its residual discretion by considering whether there may be a good reason not to remove the particular matter, despite the establishment of one or more of the grounds for removal in s 178(2) of the Act.²

[25] The “important question of law” ground in s 178(2)(a) of the Act has two limbs to it. First, an important question of law must be likely to arise. Second, that question must arise “*other than incidentally*”, in the sense of not being a minor or chance connection.

² *Auckland District Health Board v X (No 2)* [2005] ERNZ 551 at [29]-[31].

[26] The nature or character of an important question of law was summarised by the Employment Court in *Auckland District Health Board v X* as follows:³

A question of law need not be complex, tricky, or novel to warrant use of the descriptor “important”. It may be important if the answer to the question is likely to have a broad effect, or assume significance in employment law generally. Previous cases have made it clear that it is not necessary for resolution of the question to have an impact beyond the particular parties. Rather, a question may be regarded as important if it is decisive of the case or some important aspect of it, or strongly influential in bringing about a decision in the case or a material part of it. The latter point cannot, of course, be taken too literally. For example, a legal question as to whether a dismissal is justified under s 103A may well not suffice. Nor is it necessary for there to be an absence of previous authority on the particular point.

The issues

[27] The following issues are to be determined:

- (a) Have any of the grounds for removal in s 178(2) of the Act been established?
- (b) Should removal be granted?
- (c) What costs should the successful party be awarded?

Have any of the grounds for removal in s 178(2) of the Act been established?

Is there an important question of law that is likely to arise other than incidentally?

[28] Construst said the important question of law that required removal of this matter was whether the Authority had jurisdiction to impose security for costs.

[29] The Authority did not accept that was an important question of law because the Employment Court addressed that in *Reid v NZ Fire Services Commission*.⁴ Although the *Reid* decision related to the Employment Tribunal’s jurisdiction, that decision is equally applicable to the Authority. Accordingly, there is no need for this matter to be removed in order to address that question.

[30] The security for costs jurisdiction issue has also already been determined by the Authority, so will not arise again in these proceedings. Accordingly, there is no ‘live issue’ for the Court to decide regarding the Authority’s security for costs jurisdiction.

³ *Johnston v The Fletcher Construction Co. Limited* [2017] NZEmpC 157 at 80 [22].

⁴ [1996] 1 ERNZ 228.

[31] The Authority's determination dated 13 February 2024 involving these parties stated it did not have jurisdiction to impose security for costs on Mr Jiao.⁵ Construst and Mr Dai had the right to challenge that determination, had they wanted the Employment Court to address the Authority's security for costs jurisdiction. However, they have not done so.

[32] The Authority was not satisfied that there was an important question of law that would arise other than incidentally in this matter. Accordingly, the ground for removal in s 178(2)(a) of the Act was not established.

Is the matter of such a nature and urgency that removal is in the public interest?

[33] Construst and Mr Dai did not explain why they believed this matter was of such a nature and urgency that it was in the public interest for it to be removed to the Court.

[34] However, it could possibly be implied from Ms Chen's submissions that Construst and Mr Dai wanted this matter removed because it involved a work visa that was issued under the Accredited Employer Work Visa Scheme (the AEWVS).

[35] That is not a ground in itself for removal. The fact that Mr Jiao was issued with a work visa did not make this matter urgent, to the point removal was in the public interest. There was no merit in Ms Chen's submission that "with the problems imposed by the AEWVS, it is necessary to re-examine the current approach to the investigative powers of the Authority."

[36] Construst failed to identify any factors to establish this matter was of such a nature and urgency that it was in the public interest for it to be removed to the Court, even though the Authority is already part way through its investigation.

[37] Construst has not treated this matter as if it was urgent, as it failed to respond to the Authority's calls for information in a timely manner. It has also breached timetable directions. While urgency can potentially develop over time, there was no explanation as to why this matter has supposedly now become so urgent it required removal to the Court.

[38] Removing this matter would restart the litigation clock back to zero, which is fundamentally inconsistent with submissions that this matter is so urgent the public interest required removal of it to the Court.

⁵ Above n1.

[39] The Authority is halfway through the investigation of Mr Jiao's unlawful premium and associated penalty claims and it has almost completed its investigation of all of his other claims, except for the unlawful premium and associated penalty claims. There have been two telephone conferences, two days of investigation meeting time have already been held, multiple directions have been issued, witness summonses have been issued and specific IM dates have been agreed for the resumption of the part-heard claims.

[40] Removal of this matter will result in all of these efforts being rendered nugatory, as the Court will start its own process. That will necessarily result in additional time, costs and delay for the parties.

[41] The Authority finds that Construst and Mr Dai have not acted with an urgency that would bring them within the grounds of s 178(2)(b) of the Act. Nor is it in the public interest for this matter to be removed to the Court.

[42] Accordingly, Construst and Mr Dai were unable to establish that the s 178(2)(b) ground for removal in the Act existed.

Should removal be granted?

[43] The Authority is not of the opinion that the circumstances of this matter required removal to the Court. To the contrary. This matter is part heard. A substantive determination on the claims that involve allegations of breaches of employment standard breaches is not far away.

[44] One of the express objects of the Act is to recognise that resolution of employment relationship problems at the lowest level by the Authority, as a specialist decision making body. The Authority has expended considerable time calling for evidence and directions are in place regarding the evidence needed for the resumed investigation meeting to be held in August 2024.

[45] It is generally preferable for the Authority to issue a determination in the first instance, which means that the parties are not deprived of the rights of challenge if they are unhappy with the outcome. That is the case here.

[46] There did not appear to be any useful purpose served by ordering a removal of these proceedings to the Court, when the disputed questions of fact are more appropriately determined by the Authority in the first instance.

[47] Removal to the Court in the first instance would likely increase the costs for the parties, because they would have to re-do the two day investigation meeting that the Authority had already completed. It will also result in a significantly delayed substantive hearing date, as this matter has already been set down for a resumed investigation meeting by the Authority in August 2024.

Outcome

[48] The Applicants have been unable to establish that any of the grounds in s 178(2) of the Act for removal have been established. Even if they had been able to do so, the Authority would have exercised its discretion against removal because of how far through its investigation it is.

[49] Accordingly, it is not appropriate to remove this matter to the Court in the first instance, so the removal application did not succeed.

What costs should be awarded?

[50] Mr Jiao as the successful party is entitled to a contribution towards his legal costs. Accordingly, within 28 days of the date of this determination Construst and Mr Dai are jointly and severally ordered to pay Mr Jiao \$500 towards his legal costs.

Rachel Larmer
Member of the Employment Relations Authority