



Company Limited, which was Construst's sole shareholder from 1 February 2022 to 23 April 2024. Mr Ross Ogotau became Construst's sole director on 2 October 2023 and its sole shareholder on 23 April 2024.

[3] The applicant, Mr Xiang Jiao, arrived in New Zealand from China on 22 February 2023. He returned to China on 31 July 2024.

[4] While still living in China, Mr Jiao signed an individual employment agreement with Construst on 5 November 2022, which he used to obtain a work visa from Immigration New Zealand (INZ). The employment agreement was signed by Mr Dai, but was presented to Mr Jiao by a China based agent he (Mr Jiao) had engaged to get him work in New Zealand.

[5] On 17 January 2023 INZ granted Mr Jiao a three year work visa under the AEWV scheme to work as a Construction Worker in Auckland for Construst, on the basis he was to be paid no less than \$27.76 per hour. This first work visa did not permit him to work for anyone else.

[6] Mr Jiao performed work for Construst from 2 to 23 March 2023. He obtained a second work visa on 4 August 2023, which was valid until 4 February 2024. The Authority was provided with a copy of this second work visa on 19 August 2024.

#### *The claims*

[7] Mr Jiao initially claimed that the respondents, via Mr Jiao's agent in China, had required him to pay an employment premium of RMB 87,000.00 for his job and work visa, in breach of s 12A of the Wages Protection Act 1983 (the WPA). Mr Jiao sought to recover the alleged employment premium from the respondents and he wanted penalties to be imposed on them for breaches of the WPA.

[8] Mr Jiao claimed he was not provided with work or paid in accordance with the terms of his employment agreement for the work he did for Construst. After his employment had ended he was eventually paid his wage arrears for the work he had actually done for Construst. However, he did not receive any holiday pay, in breach of the Holidays Act 2003 (the HA03). Mr Jiao sought that penalties be imposed on the respondents for breaches of the HA03 and of his employment agreement.

[9] Mr Jiao claimed he had been unjustifiably disadvantaged in his employment and that he had been unjustifiably constructively dismissed.

[10] Mr Jiao alleged that Mr Dai was ‘a person involved in a breach of employment standards’. Mr Jiao sought leave from the Authority to recover from Mr Dai personally any wage arrears or other money which Construst owed him but was unable to pay.

[11] Mr Jiao in his submissions for the first time claimed new breaches of employment legislation and sought new penalties for those breaches. These new claims had not been recorded in a statement of problem. These new claims were therefore not properly before the Authority, so it lacked jurisdiction over these new claims, because they were not made in a statement of problem.

#### *The respondents’ position*

[12] The respondents admitted that Mr Jiao worked from 2 to 23 March 2023 for Construst. However, they disputed all of the employment premium related claims against them. They said they had not requested or received an employment premium and they were not connected to the agent/individual/entity in China who Mr Jiao claimed he had paid the employment premium to.

[13] The respondents acknowledged Mr Jiao had not been paid his wages while employed, but said that was his fault because he had not provided his bank account or IRD number. They also acknowledged that Mr Jiao has not been paid annual holiday pay.

[14] The respondents denied that Mr Jiao had been disadvantaged or dismissed. They said he simply disappeared, then on 28 March 2023 he sent a WeChat message to Mr Dai saying he had gone to Hamilton to work for another employer. The respondents also disputed that any penalties should be imposed on them.

#### **Relevant background**

[15] Mr Jiao said that in November 2022 he was introduced by a friend to Zhengyi Intermediary Company (which he said is a company based in China) which promised to help him find employment in New Zealand for a fee of RMB 87,000.00.

[16] Mr Jiao said he made five payments, amounting to RMB 87,000.00 into a personal account of the China based agent. Mr Jiao said he used WeChat and bank transfers for those transactions, and that he was not provided with a receipt or a proper breakdown of what these charges consisted of.

[17] Mr Jiao submitted an application for a work visa under the AEWV scheme on 9 January 2023 via the New Zealand based licensed immigration agent, Jane Zu. Mr Jiao's application for a work visa included the offer of employment from Construst for employment as a Construction Worker and a copy of the employment agreement the parties had signed.

[18] On 3 February 2023 a different China based agent whom Mr Jiao knew as "Peter Pan" added him (Mr Jiao) to a WeChat group which consisted of ten members. With the exception of Mr Pan and another person with the WeChat identification name "M Woo", all members of this WeChat group were fee paying migrants like Mr Jiao, who had obtained work visas under the AEWV scheme.

[19] In a WeChat message to Mr Pan on 10 February 2023, Mr Jiao said he had paid RMB 87,000 to the agency in China. Mr Jiao said he also paid Mr Pan another RMB 5,643 into his personal account before he arrived in New Zealand.

[20] Mr Pan's contact details were not provided to the Authority. He is not a licensed immigration agent in New Zealand. Mr Jiao said that all interactions he had with Mr Pan occurred solely via WeChat, so he had no details about Mr Pan's company (if any) phone numbers or physical address. Mr Jiao said he thought that Mr Pan was his employer, but after taking legal advice said he realised Construst was his employer.

[21] Mr Jiao said that after his arrival in New Zealand, Mr Pan continued to coordinate with him and other workers through the WeChat group, handling employment related matters for them, such as concerns they had about a lack of work being provided to them and regarding the failure to be paid for work they had done.

[22] Between 2 and 23 March 2023 Mr Jiao said he worked for a total of 105 hours, which was spread over 11 working days. His shortest day of work was seven hours, his longest work day was 13.5 hours and he worked for 9.5 hours on five of the eleven days he worked for Construst. Mr Dai accepted during the investigation meeting that the hours of work Mr Jiao had recorded were correct.

[23] Mr Jiao said that on 26 March 2023 he asked Mr Dai via a WeChat message for work, but did not get a response from him. Mr Jiao raised concern about the lack of work and need for income with Mr Pan, who told him there was work for him in Hamilton.

[24] Mr Jiao said he was sent by Mr Pan to work in Hamilton where he worked for nine days at an agreed rate of \$21.50 per hour. Mr Jiao claimed he was not paid for the work he did in Hamilton. However, Mr Jiao also said that Mr Pan paid him RMB 5,500 for that work in Hamilton after these proceedings had been commenced. In another version of his evidence, Mr Jiao said the RMB 5,500 from Mr Pan was paid to him to withdraw his claims, although he did not withdraw them.

[25] Mr Jiao also travelled to Napier and worked there for seven days, but again said he was not paid any wages for the work that he had done there. However, in evidence lodged after the investigation meeting Mr Jiao disclosed he had received a number of cash payments for work he had done in Napier and Gisborne.

[26] Mr Jiao sought assistance from his advocate in mid-April, and a personal grievance was raised on his behalf on 19 April 2023 with Construst. Mr Jiao's statement of problem was lodged with the Authority on 22 April 2023. An amended statement of problem, that joined Mr Dai as the second respondent, was lodged on 3 October 2023.

[27] Mr Jiao sent Mr Pan a WeChat message on 26 March 2023 that said that they were working on a job site that belonged to a friend of "Boss Chen", when the supervisor cut the reinforcing bars for the extended beam at the site. After that the client told the Construst workers he did not want them working on his property anymore.

[28] Although Mr Jiao said he "was fired" due to that error, during the investigation meeting he acknowledged that Mr Dai had not told him he "was fired". It was the client whose property the Construst workers had been working on who had said he did not want the workers to continue working on his job after the error had occurred. The reference to being "fired" was therefore to the property owner banning the Construst workers from their property.

[29] On 26 March 2023, Mr Jiao sent a WeChat message to Mr Dai asking "Boss, where are we going to work tomorrow". Mr Dai did not reply. Mr Jiao also said that he spoke to Mr Pan asking for more work, but was told by Mr Pan that Construst did not have any work for him to do.

[30] On 28 March 2023 Mr Jiao sent Mr Dai another message saying:

Boss, the agent has brought me to Hamilton. I will be working here for a few days. The agent mentioned that they've already informed you.

[31] Mr Jiao's reference to "the agent" was to Mr Pan. Mr Dai responded to Mr Jiao's 28 March 2023 message in two consecutive WeChat messages:

Alright, no problem.

Work hard. Finding a job isn't that easy these days.

[32] Mr Dai further said that between 23 and 29 April 2023 he attempted to contact Mr Jiao to obtain his work hours, bank account details and IRD number without success but Mr Jiao did not reply until 29 April 2023.

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

[33] The Authority held a two day in-person investigation meeting in Auckland on 14 and 15 February 2024. The Authority was assisted by a Mandarin interpreter during the investigation meeting.

#### *AVL attendance*

[34] Mr Jiao asked for permission to attend the investigation meeting remotely, which was originally declined on the basis there were too many material conflicts in the evidence, which meant an in-person assessment of the witnesses was necessary. The Authority was not told that Mr Jiao's second work visa was due to end on 4 February 2024 or that he had to leave the country by that date.

[35] However, after this request was declined Mr Jiao subsequently advised the Authority that he had left New Zealand on 3 February 2024 due to visa issues. Given Mr Jiao said he was already overseas, he was therefore permitted to attend the investigation meeting via AVL (a Teams link was used).

#### *Witness summonses*

[36] The Authority issued witness summonses for two witnesses, as per Mr Jiao's request. However, he failed to serve and pay conduct money to these witnesses within the required timeframe.

[37] The first summonsed witness was Jiayuan (Michael) Hu. Mr Hu's WeChat name was "M Woo". Mr Hu is the sole director and shareholder of Alphabet Consulting

NZ Limited (formerly named Asia Pacific International Consulting Limited from 11 February 2019 to 1 April 2023) t/a APIC Immigration (APIC). The second summonsed witness was Jane Zu, the New Zealand based immigration agent for Mr Jiao who at the material time had worked for APIC.

[38] Ms Zu did not attend the investigation meeting. Mr Hu, in communications with the Authority, agreed that he would present himself voluntarily on 15 February 2024 to assist the Authority with its investigation.

#### *Witnesses*

[39] One of Construst's employees, Mr Ming Lau, attended the investigation meeting. He worked as a foreman for Construst, and had supervised staff on the worksite during the short period that Mr Jiao had worked for Construst.

[40] Mr Lau criticised Mr Jiao's performance. However, the Authority noted that there was no written evidence of any performance concerns having been raised with Mr Jiao while he was employed. Mr Jiao also denied that he had worked with Mr Lau.

[41] Mr Dai gave evidence for the respondents. Mr Jiao gave evidence from China via a Teams link.

#### *IM adjourned part-heard*

[42] The two-day investigation meeting was insufficient time to have completed the Authority's investigation into Mr Jiao's employment premium claims. Those claims were therefore adjourned part-heard, and rescheduled for a further investigation meeting that was set down in August 2024.

#### *INZ information*

[43] The Authority sought relevant information from INZ on two occasions.

#### *Directions to Mr Hu to provide information*

[44] After the February investigation meeting but before the August investigation meeting, Mr Hu was directed to provide specific information and documents so that the Authority could fully and properly investigate the employment premium claims.

[45] Mr Hu agreed to voluntarily cooperate regarding the provision of that information and he also agreed to present himself at the rescheduled August investigation meeting to discuss the information he had provided.

*Issues arising from Mr Jiao's lost remuneration evidence*

[46] The respondents identified a number of issues with the contradictory and unclear evidence Mr Jiao had given during the February investigation meeting about his lost remuneration claim. He was therefore given an opportunity to provide further evidence about that. Mr Jiao did that by lodging witness statements after the February investigation meeting.

[47] Because Mr Jiao said that he was in China and did not have the ability to swear or affirm an affidavit, a telephone conference was arranged for the Authority to take an affirmation from him regarding the truthfulness of the evidence (witness statements and other information) he had lodged after the investigation meeting.

*Respondents' concerns about Mr Jiao's truthfulness*

[48] Prior to this telephone call to affirm Mr Jiao's evidence, the respondents raised concern with the Authority that he was not in China because he had been seen in New Zealand. That allegation was denied by Mr Jiao, but the respondents did not accept his denial.

[49] Mr Jiao was therefore asked by the Authority to confirm his current location and to provide his passport stamps to show when he left New Zealand and entered China. He did so, but the respondents again disputed the accuracy of that information, as they maintained Mr Jiao had been seen in New Zealand after the date he said he had left the country.

*Telephone conference – 11 March 2024*

[50] The Authority held a telephone conference on 11 March 2024 to take an affirmation from Mr Jiao regarding the evidence he had lodged with the Authority since the investigation meeting on 15 February 2024. A Mandarin interpreter assisted the Authority during this call.

[51] During the telephone conference the respondents again raised concern with the Authority that Mr Jiao was still in New Zealand, and had not returned to China on 3 February 2024, contrary to what he had told the Authority. That allegation was based

on him being seen by someone who knew him here in New Zealand, who had reported the sighting to Mr Dai. Ms Chen also challenged the legitimacy of the Chinese visa stamps that Mr Jiao had provided the Authority saying it was an exit stamp, not an entry stamp.

[52] The Authority explored these allegations with Mr Jiao while he was under affirmation. He confirmed that he had left New Zealand on 3 February 2024, that he was still in China and had not returned to New Zealand and would not be returning. Mr Jiao affirmed that the passport stamps he had provided to the Authority were Chinese entry stamps from his own passport.

*Subsequent admission by Mr Jiao that he had misled the Authority*

[53] On 14 March 2024 Ms Moncur informed the Authority that Mr Jiao had not left New Zealand, he was still in New Zealand, and that the Chinese entry visa he had provided the Authority was not his, but belonged to a friend of his who was currently in China.

[54] Ms Moncur was shocked to receive this information, and she dealt with it appropriately by bringing it to the Authority and the respondents' attention as soon as she found out about it.

[55] Mr Jiao admitted that he had lied to the Authority under affirmation. He also admitted that the passport stamps he provided were not his, but belonged to one of his friends.

[56] The Authority identified that Mr Jiao had a right to silence, given the potential criminal implications of his admissions, so Ms Moncur was asked to advise him of that. The full circumstances of this situation were set out in the Authority's directions dated 25 March 2024.

*Additional information and submissions*

[57] After reviewing the additional witness statements that Mr Jiao had lodged since the February investigation meeting had been adjourned part heard, it was clear that a number of issues still arose.

[58] Mr Jiao was therefore given another opportunity to address those specific issues in a sworn or affirmed affidavit, given he was still in New Zealand. The questions

related to further clarification of the lost remuneration evidence that he had already provided to the Authority, as it had remained contradictory and unclear, notwithstanding his subsequent witness statements.

[59] The parties provided further information, as did INZ and Mr Hu, regarding the employment premium claims subsequent to the February 2024 investigation meeting. The parties also lodged submissions on the employment standards related claims.

*Withdrawal of employment premium related claims.*

[60] On 31 July 2024 Mr Jiao informed the Authority that he withdrew his alleged breaches of the WPA claims that related to his employment premium allegations.

*New claims made in submissions*

[61] Mr Jiao claimed in his submissions that the respondent had breached the Minimum Wage Act 1983 (MWA) and good faith. He also sought penalties for these breaches against both respondents.

**Issues**

[62] The following issues are to be determined:

- (a) Assessment of credibility;
- (b) Did Construst fail to provide Mr Jiao with a copy of his wage and time records on request?
- (c) Did Construst breach Mr Jiao's employment agreement by:
  - (i) Failing to provide him with work for his contracted hours of work; and/or
  - (ii) Failing to pay him in accordance with the payment terms in his employment agreement?
- (d) If so, did Mr Dai incite, instigate, aid or abet Construst's breaches of Mr Jiao's employment agreement?
- (e) Should penalties be imposed on the respondents for any breaches of the employment agreement that occurred?
- (f) Did Construst breach the HA03?

- (g) If so, was Mr Dai a person who was involved in Construst's failure to comply with the HA03?
- (h) Should penalties be imposed on the respondents for breaches of the HA03?
- (i) Is Mr Jiao owed wage arrears?
- (j) Should interest be awarded on any wage arrears Mr Jiao is owed?
- (k) Did Construst breach the MWA?
- (l) If so, was Mr Dai 'a person who was involved in a default' under the MWA?
- (m) Should a penalty be imposed on the respondents for breaching the MWA?
- (n) Did Construst breach its duty of good faith to Mr Jiao?
- (o) If so, should a penalty be imposed on it for a breach of good faith?
- (p) Has there been a breach of employment standards?
- (q) If so, was Mr Dai "a person involved in a breach of employment standards"?
- (r) If so, should Mr Jiao be given leave to recover any wages or other money Construst was unable to pay from Mr Dai personally?
- (s) Did Construst unjustifiably disadvantage Mr Jiao in his employment?
- (t) Did Construst constructively dismiss Mr Jiao?
- (u) If so, was Mr Jiao's dismissal justified?
- (v) If not, what remedies should Mr Jiao be awarded?
- (w) Should remedies be reduced on the grounds of contribution?
- (x) What penalties should be imposed on each respondent?
- (y) Should any penalties that are imposed on the respondents be paid to Mr Jiao instead of, or as well as, the Crown?
- (z) What costs and disbursements should be awarded?

## **Assessment of credibility**

[63] Mr Jiao was not a credible witness. Mr Jiao claimed Mr Dai had required him to provide his own tools before he was allowed to start work. However, under cross examination Mr Jiao accepted that was not correct, and Construst provided workers with tools if needed.

[64] Mr Jiao claimed Mr Dai had required him to purchase his own safety equipment, but admitted in cross examination that was not correct.

[65] Mr Jiao claimed Mr Dai would not let him start work until he had purchased his own vehicle. Under cross examination Mr Jiao accepted that was incorrect. There were also WeChat messages produced to the Authority that showed Mr Dai had arranged transportation for Mr Jiao to and from his work sites. There was no evidence that Mr Jiao had purchased a vehicle.

[66] Mr Jiao provided contradictory evidence regarding his lost remuneration claim, and despite a number of opportunities being given to him to clarify his evidence, his further statements only increased the contradictions in his evidence. These inconsistencies were set out in the submissions the respondents lodged on 28 August 2024.

[67] Mr Jiao said that he did not know that he was not permitted to work for other employers apart from Construst. However, that condition was written in his work visa, so he should have been aware of it.

[68] Mr Jiao said he was not paid for work he did in Hamilton. He also said Mr Pan paid him RMB 5,500 for the work he (Mr Jiao) did in Hamilton. However Mr Jiao also said Mr Pan paid him the RMB 5,500 to withdraw his claim, which did not happen. These inconsistencies were not resolved.

[69] Mr Jiao claimed that Construst and Mr Dai failed to offer him work when he arrived in New Zealand. However, the evidence established that he had no direct contact with either of the respondents regarding the date he was scheduled to arrive in New Zealand. The first contact Mr Jiao had with Mr Dai occurred after he had arrived in New Zealand and he started work soon after that.

[70] Mr Jiao was directed by the Authority to provide information about his bank accounts. However, he only provided details for the period after 24 June 2023.

Although Mr Jiao told the Authority that he did not open a bank account until 24 June 2023, the respondents said he gave them his bank account details on 29 April 2023.

[71] During the investigation meeting Mr Jiao was unable explain how he had supported himself to live in New Zealand when he had only \$3.53 in his bank account and there were no fund movements showing in his bank account over the period 24 June to 10 August 2023.

[72] However, it subsequently came out in information Mr Jiao lodged after the February investigation meeting that he had received cash payments from a number of different sources that he had not disclosed when giving his evidence during the February investigation meeting.

[73] Mr Jiao claimed that Mr Dai had told him that there was no work for him to do. However, under cross examination he accepted that Mr Dai had never said that to him.

[74] Mr Jiao failed to comply with directions to provide the Authority with a print out of his IRD earnings record for the period for which he was seeking lost remuneration.

[75] Mr Jiao also told the Authority that he had been required to leave New Zealand at short notice on 3 February 2024 for visa reasons, when he had not actually left New Zealand. When Mr Jiao was challenged about that evidence, he confirmed under affirmation that he had left the country on that date, he was in China, he would not be returning to New Zealand. That evidence was untrue.

[76] Mr Jiao also presented what he said was an entry stamp for China from his own passport. Although the respondents had challenged the accuracy of this, Mr Jiao affirmed that the Chinese entry stamp was his, and he said it proved that he was in China from 3 February 2024. That evidence was also untrue.

[77] For these reasons where there has been a conflict in the evidence, Mr Jiao's version of events has not been preferred, on the basis that he has given demonstrably incorrect evidence to the Authority about a number of matters. However, for many of the claims in this matter there was independent evidence which did not require the Authority to rely on Mr Jiao's credibility.

**Did Construst fail to provide Mr Jiao with a copy of his wage and time records?**

[78] Construst admitted it failed to keep wage and time records for Mr Jiao, in breach of s 130 of the Employment Relations Act 2000 (the Act). There was no penalty claim before the Authority for that breach.

[79] Construst's breach of s 130 of the Act meant the Authority could rely on s 132(2) of the Act to accept Mr Jiao's evidence about the hours, days and times he worked for Construst and about the wages that were actually paid to him.

**Did Construst breach Mr Jiao's employment agreement?**

*Did Construst fail to provide Mr Jiao with work for his contracted hours?*

[80] Mr Jiao was granted a work visa with Construst by INZ on the basis that he would be provided with not less than 30 hours per week and not more than 50 hours per week at the specified rate of pay.

[81] The hours of work clause in Mr Jiao's individual employment agreement guaranteed him a minimum of 35 hours per week, from Monday to Saturday, between the hours of 7.30am and 5.30pm.

[82] Mr Jiao's first day of work for Construst was 2 March and his last day of work was 23 March 2023. This was three weeks of employment, so he should have worked at least 35 hours per week for each of these three weeks.

[83] Mr Jiao worked 47.5 hours for the first week, from 2 to 9 March 2023. He worked 47.5 hours in his second week, from 10 to 17 March 2023. However, in his third week of employment (from 18 to 23 March 2023) he was only provided with 10 hours work.

[84] Construst knew the employment agreement required it to provide Mr Jiao with at least 35 hours work a week. Construst therefore breached his employment agreement in the third week of his employment, by only giving him 10 hours work over the period 18 to 23 March 2023.

*Did Construst fail to pay Mr Jiao in accordance with his employment agreement?*

[85] Mr Jiao was to be paid not less than \$27.76 gross per hour. He was to be paid weekly into his nominated New Zealand bank account. The hourly rate was a term of his work visa, which Construst knew. The hourly rate, method of payment, and

frequency of payment were also contractual terms, as recorded in the employment agreement the parties signed.

[86] Mr Jiao was not paid at all while employed. The respondents' excuse that he had not provided his bank account or IRD number did not entitle it to avoid paying him his wages.

[87] If those matters had been important to the respondents, then Mr Jiao should have been prevented from starting work until he had provided that information. Alternatively, Mr Jiao still could have been paid weekly, but in cash until he got a bank account, with Construst holding back his PAYE to remit to IRD once he had an IRD number.

[88] Construst breached Mr Jiao's employment agreement three times, because he should have been paid for the three weeks that he worked, but he did not receive any wages until 2 May 2023.

**Did Mr Dai instigate, incite, aid or abet Construst's breaches of Mr Jiao's employment agreement?**

[89] Mr Dai, at the material time, was Construst's sole director. He had complete control over it in terms of the engagement and payment of employees.

[90] Mr Dai was the person who supported Mr Jiao's work visa on behalf of Construst, so he was aware of the terms of the work visa regarding the minimum number of hours that Mr Jiao had to be provided per week and regarding the payment obligations on which the work visa had been based. Mr Dai had also signed the employment agreement for Construst, so he must have known what was in it.

[91] Mr Dai was personally responsible for Construst's breaches, as he could and should have taken steps to ensure Construst did not breach Mr Jiao's employment agreement. Mr Dai therefore directly instigated, incited, aided and abetted Construst's breaches of Mr Jiao's employment agreement.

**Should penalties be imposed on the respondents for breaches of the employment agreement?**

[92] These are breaches of employment standards, which warrant penalties being imposed. Penalties are assessed later in this determination.

### **Did Construst breach the Holidays Act 2003?**

[93] Section 27 of the HA03 required Mr Jiao to be paid his holiday pay in the pay period that followed the ending of his employment. His last day of work was 23 March 2023, so he should have been paid his holiday pay by 30 March 2023, at the latest.

[94] However, Mr Jiao has still not been paid his holiday pay, even though the respondents acknowledged he was owed it.

[95] Because Mr Jiao had been employed for less than 12 months, s 23 of the HA03 required his annual holiday pay to be calculated as 8% of his total gross earnings for the three weeks' period that he was employed, based on a minimum number of working hours of 35 per week.

[96] Because Mr Jiao worked 47.5 for his first two weeks of employment his annual holiday pay should be based on 130 hours total (47.5 for the first week, 47.5 for the second week plus 35 hours for his third week of employment, because that was the contractual minimum number of hours of work he was entitled to).

[97] Any outstanding annual holiday pay entitlement therefore is based not on Mr Jiao's actual hours of work, but on his hours of work for the first two weeks he worked and on what he should have been paid (as a minimum) for the third week he was employed.

[98] Mr Jiao's total gross earnings for the three weeks he was employed should therefore have been \$3,608.80, so 8% of that amount is \$288.70.

[99] Construst is ordered to pay Mr Jiao annual holiday pay arrears of \$288.70.

### **Was Mr Dai a person who was involved in Construst's failure to comply with the HA03?**

[100] At the material time Mr Dai was Construst's sole director, and the person who was responsible for ensuring that employees were paid. He was therefore directly involved in Construst's failure to comply with its obligations under the HA03.

[101] Mr Dai's excuse that Mr Jiao was not in contact with him after he went to Hamilton was not accepted. Mr Dai was in WeChat communication with Mr Jiao and there was no evidence that he had attempted to contact him via WeChat or to pay him.

[102] Mr Dai was ‘a person who was involved’ in Construst’s failure to comply with the HA03, as per s 75(3) of the HA03, because he was “a person involved in a breach of employment standards”, as defined by s 142W of the Act.

**Should penalties be imposed on the respondents for breaches of the HA03?**

[103] The failure by an employer to pay annual holiday pay when it becomes due and owing is a breach of employment standards, so it should attract a penalty. Penalties are addressed later in this determination.

**Is Mr Jiao owed wages arrears?**

[104] Mr Jiao was not paid correctly for his last week of employment. He was paid for 10 hours work when he should have been paid for 35 hours, which was the minimum number of hours work he was contractually entitled to be paid for. Mr Jiao was therefore owed wage arrears of \$694.00 for the period 18 to 23 March 2023.

[105] Mr Jiao is owed total wage arrears of \$982.70, consisting of \$694.00 wage arrears for the failure to pay him correctly for his third week of employment (from 18 to 23 March 2023) plus \$288.70 for his outstanding holiday pay.

[106] Construst is ordered to pay Mr Jiao wage arrears of \$982.70.

**Should interest be awarded on Mr Jiao’s wage arrears?**

[107] Construst has had the benefit of the use of Mr Jiao’s money, which should have been paid to him by 30 March 2023 at the latest, being the week following his last day of employment on 23 March 2023.

[108] Accordingly, Construst is ordered to pay Mr Jiao interest of \$81.22 for the period 30 March 2023 to the date of this determination, as calculated in accordance with the Civil Debt Calculator on the Ministry of Justice website.

[109] Interest continues to accrue until Mr Jiao has been paid his outstanding wage arrears and interest in full. Interest from the date of this determination until the full amount has been paid is also to be calculated in accordance with the Civil Debt Calculator on the Ministry of Justice website.

### **Did Construst breach the Minimum Wage Act 1983?**

[110] The MWA requires employers to pay employees not less than the minimum wage for every hour that they worked. Mr Jiao worked without being paid at all, which was a breach of sections 4 and 6 of the MWA.

### **Was Mr Dai ‘a person who was involved in a default’ under the MWA?**

[111] Mr Dai was Construst’s sole director at the material time. He was also the person responsible for ensuring that Mr Jiao was paid correctly and on time. Mr Dai was therefore directly responsible for Construst’s breach of the MWA.

[112] In accordance with s 10(4) of the MWA, Mr Dai was therefore ‘a person involved in a default’ of the MWA, because he was “a person involved in a breach of employment standards”, as per s 142W of the Act.

### **Should a penalty be imposed on the respondents for breaches of the MWA?**

[113] In his submissions dated 1 March 2024 Mr Jiao for the first time sought that penalties be imposed on the respondents for breaches of the MWA.

[114] These penalty claims were not before the Authority, because they had not been “commenced”, because his statement of problem and amended statement in reply had not recorded a breach of the MWA as a claim, nor had a penalty been claimed for any breaches of the MWA that may have occurred.

[115] A party facing a penalty claim must have it properly put to them, in order that they can respond to it. A penalty claim cannot be raised solely in submissions lodged after an investigation meeting has been held, because that deprived the party facing a potential penalty from being able to appropriately respond to it.

[116] Regulations 5(2) and 5(3) of the Employment Relations Authority Regulations 2000 (the Regulations) provides that a “proceeding is commenced” by lodging an application that complies with the Regulations, which means it must be in Form 1.<sup>1</sup>

[117] In the case of breaches of the MWA, and any penalty claim based on a breach of the MWA, an applicant was required to lodge a Statement of Problem, as provided for in Form 1 of Schedule 1 of the Regulations. Mr Jiao has not done that. The 12

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<sup>1</sup> Form 1 is the Statement of Problem form.

months' time-limit specified in s 135(5) of the Act for a penalty to be commenced has also elapsed.

[118] The Authority also did not have jurisdiction to impose a penalty on Mr Dai under the MWA. Although Mr Dai was “a person involved in a default” of the MWA, Mr Jiao may only recover a penalty from his employer, which in this case was Construst.

[119] Only a Labour Inspector may recover a penalty from someone other than the employer, such as Mr Dai. No such penalty claim has been made and the time for commencing a penalty claim against Mr Dai personally has elapsed.

[120] Mr Jiao's penalty claims under the MWA therefore did not succeed.

### **Did Construst breach its duty of good faith to Mr Jiao?**

[121] Section 4 of the Act imposes mutual good faith obligations on those parties who are in an employment relationship. This includes, but is not limited to, a requirement for the parties to be:

Active and constructive in establishing and maintaining a productive employment relationship in which the parties are, among other things, responsive and communicative.

[122] Failing to comply with Mr Jiao's employment agreement and work visa was a breach of good faith.

[123] There was no evidence produced to the Authority that either of the respondents had attempted to obtain Mr Jiao's bank account and/or IRD number before he started work, or prior to his first wages payment becoming due after his first week of employment. Nor did they attempt to make any other arrangements to ensure that Mr Jiao was paid weekly, which was the contractual payment requirement. That was a breach of good faith by Construst.

### **Should a penalty be imposed for a breach of good faith?**

[124] Mr Jiao did not record a breach of good faith claim in his statement of problem or amended statement of problem. Nor has he “commenced an action” for a penalty to be imposed on Construst for a breach of good faith within 12 months of the breach arising or coming to his attention (whichever was the earlier), as required by s 135(5) of the Act.

[125] The Authority therefore did not have jurisdiction to award a penalty for a breach of good faith on Construst, as this penalty claim was not properly before it for determination. Raising a penalty claim for the first time in submissions failed to meet the requirements of regulations 5(2) and 5(3) of the Regulations.

**Has there been a breach of employment standards?**

[126] Section 5 of the Act defines employment standards. This definition included breaches of s 130 of the Act which requires an employer to keep wage and time records for an employee, and to provide them upon request. The respondents accepted that Construst had not kept wage and time records for Mr Jiao.

[127] The definition of employment standards in the Act also included breaches of minimum entitlements under the MWA as well as the HA03. The failure to pay Mr Jiao his annual holiday pay in the week following the end of his employment was a breach of the HA03. The failure by Construst to pay Mr Jiao at all for the work he did while he was employed was also a breach of the MWA.

[128] Accordingly, Construst has breached employment standards, and in particular minimum code legislation regarding the Act, the HA03 and the MWA.

**Was Mr Dai “a person involved in a breach of employment standards”?**

[129] Section 142W of the Act sets out when “a person is involved in a breach of employment standards”. This includes where the person has aided, abetted, counselled or procured the breach, or has induced the breached, or has been in any way, directly or indirectly, knowingly concerned in or a party to the breach.

[130] All of these circumstances apply to Mr Dai. As the sole director at the material time, Mr Dai was the person responsible for ensuring that Construst met its minimum code obligations to Mr Jiao. He was therefore directly involved in the breaches that occurred.

[131] Accordingly, Mr Dai is “a person involved in a breach of employment standards”, as defined by s 142W of the Act.

**Should Mr Jiao be given leave to recover any default in payment of wages or other money Construst was unable to pay from Mr Dai personally?**

[132] To the extent that Construst defaults on paying Mr Jiao his wages or other money that is due to him in accordance with this determination, then he is granted leave under s 142Y(1) and (2) of the Act to pursue Mr Dai personally for any outstanding amounts.

**Did Construst unjustifiably disadvantage Mr Jiao in his employment?**

[133] There was no dispute that Mr Jiao was entitled to receive work and be paid in accordance with the terms of his employment agreement.

[134] Construst unjustifiably disadvantaged Mr Jiao in his employment by not providing him with at least 35 hours work in the third week of his employment and by failing to pay him at all while he was employed.

[135] Mr Jiao's unjustified disadvantage personal grievance claim therefore succeeded.

**Did Construst constructively dismiss Mr Jiao?**

[136] A constructive dismissal is a dismissal that occurs at the employer's initiative.

[137] In this case Construst defaulted on fundamental terms of the employment agreement, which it knew from the terms of Mr Jiao's work visa were critical to the granting of the work visa by INZ. Construst failed to provide Mr Jiao with at least 35 hours work per week in his last week of employment.

[138] It was also a fundamental breach of the trust and confidence inherent in the employment relationship for Construst to fail to pay Mr Jiao at all while he was still employed for the work he had already done.

[139] Mr Jiao was new to New Zealand, had arrived with minimal funds, so he needed his wages in order to sustain himself as a recent migrant. The respondents knew that, so the failure to pay Mr Jiao at all for the work he had done was a very serious breach that fundamentally undermined the trust and confidence in the employment relationship.

[140] In addition to these fundamental breaches, Mr Jiao emailed Mr Dai on 26 March 2023 to ask, "where are we going to work tomorrow". At that point all work on the

client's worksite he had been working on had been cancelled by the client, who did not want Construst's workers back on his property.

[141] Mr Jiao was understandably concerned about continuing to receive work and income due to that client's decision. Mr Dai should have responded to Mr Jiao's enquiries about where he was to work, but did not do so. That was another fundamental breach that undermined trust and confidence in the employment relationship.

[142] These circumstances, namely the failure by Construst to meet its contractual obligations and Mr Dai's failure to respond to Mr Jiao's WeChat messages about when he would be working and where he would be working, made it reasonably foreseeable that Mr Jiao would not continue working for Construst.

[143] Mr Jiao was not given any assurances that Construst would meet its contractual obligations to him. Nor was he given any indication as to when (if at all) he would be paid for the work he had already done. Mr Jiao said he was desperate for money. He therefore had to work in order to be paid. Construst had failed to provide him with work and had failed to pay him for the work he did. Those fundamental breaches made it reasonably foreseeable that Mr Jiao would not continue working for Construst in such circumstances.

[144] The respondents' claim that Mr Jiao had simply disappeared was not accepted. There were WeChat messages from him on 23 and 26 March 2023 asking for work, which Mr Dai had not responded to. There was also a WeChat message from him on 28 March 2023 advising that Mr Pan had sent him to work in Hamilton, which Mr Dai acknowledged.

[145] The respondents, due to their involvement in obtaining accredited employer status under the AEWV, knew that Mr Jiao was not legally permitted to work for anyone apart from Construst, but Mr Dai did not tell Mr Jiao that. Instead Mr Dai encouraged Mr Jiao to work elsewhere. When Mr Jiao said in his WeChat message that he was in Hamilton, and that he believed Mr Pan had already told Mr Dai that, Mr Dai responded via WeChat "Alright, no problem."

[146] Mr Jiao's departure from Construst occurred at the initiative of the respondents. It therefore amounted to a constructive dismissal. Accordingly, Mr Jiao's constructive dismissal claim succeeded.

### **Was Mr Jiao's dismissal justified?**

[147] Justification is to be assessed in accordance with the justification test in s 103A of the Act. This required the Authority to objectively assess whether Construst's "actions, and how it acted", were what a fair and reasonable employer could have done in all the circumstances at the time Mr Jiao was constructively dismissed.<sup>2</sup>

[148] A fair and reasonable employer is expected to comply with its statutory and contractual obligations. Failure to do so may undermine its ability to justify its actions and/or dismissal of an employee.

[149] That was the case here. Construst breached its statutory, good faith and contractual obligations to Mr Jiao. Construst's "actions and how it acted", were not what a fair and reasonable employer could have done in all the circumstances.<sup>3</sup> It was therefore unable to justify Mr Jiao's constructive dismissal.

[150] Accordingly, Mr Jiao's unjustified dismissal personal grievance claim succeeded.

### **What remedies should Mr Jiao be awarded?**

#### *Distress compensation*

[151] Although Mr Jiao claimed \$40,000 distress compensation, the evidence did not support an award at that level.

[152] Mr Jiao gave evidence of the distress he suffered as a result of his successful personal grievance claims. It was clear he was put under significant financial pressure, and so was his family because he was unable to send money home to them. He also had to attempt to find other employment with an employer that would support him to obtain a new work visa, because his first work visa limited him to working for Construst.

[153] Construst is ordered to pay Mr Jiao \$18,000.00 under s 123(1)(c)(i) of the Act compensating for the humiliation, loss of dignity and injury to feelings his two successful personal grievance claims have caused him.

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<sup>2</sup> Section 103A(2) of the Act.

<sup>3</sup> Above n2.

[154] The Authority has not made separate awards of distress compensation for Mr Jiao's successful unjustified disadvantage and unjustified dismissal personal grievance claims. The facts that gave rise to these personal grievances were so closely connected, and arose out of essentially the same actions, that it would be artificial to attempt to extrapolate out which injury to Mr Jiao's feelings related to which personal grievance.

[155] Instead, the Authority has taken a globalised approach to assessing one overall remedy for distress compensation for both successful personal grievance claims.

#### *Mitigation of loss*

[156] Mr Jiao was limited in terms of his ability to mitigate his loss, because his original work visa was restricted to the position of a Construction Worker in Auckland with Construst.

[157] After his employment with Construst had ended Mr Jiao was therefore not legally permitted to work in New Zealand until he obtained his second work visa on 4 August 2023. Despite that, he did attempt to find alternative work, and as a result of that he undertook a number of cash jobs in Hamilton, Napier and Gisborne.

#### *Lost remuneration*

[158] There are 100 days over the period 24 March 2023 to 2 July 2023, which was the period for which Mr Jiao sought lost remuneration. This amounts to a fourteen week period for the purposes of assessing his lost remuneration claim.

[159] After providing contradictory information about his actual earnings in the period following his constructive dismissal, Mr Jiao communicated (on a final updated basis) to the Authority on 26 August 2024 that his total cash earnings over the 14 weeks period from 24 March 2023 to 2 July 2024 was \$4,409, which he said would have amounted to \$5,344.25 gross.

[160] This final amount Mr Jiao claimed did not account for \$100.00 for a half day of work he did for a landlord in Hamilton, \$600.00 he previously said he got for tree planting in Napier or \$800.00 for more work he previously said he had done in Napier. These additional cash payments totalled \$1,500.00.

[161] Mr Jiao said his expected income over the 14 weeks from 24 March to 2 July 2023 was \$23,318.40, which he had based on him working 60 hours per week at the contractual rate of \$27.76 per hour, or \$1,665.60 gross per week. He therefore sought an award of lost remuneration of \$17,974.16, being \$23,318.40 less his earnings of \$5,344.25.

[162] The Authority did not accept that, on the basis it was unlikely that he would have worked 60 hours per week in the 14 weeks following his constructive dismissal. The “Hours of Work” clause in Mr Jiao’s employment agreement said he was guaranteed a minimum of 35 hours work per week and the maximum hours he would be offered was 50 hours per week.

[163] Mr Jiao’s lost remuneration claim has been assessed by the Authority on the basis he would have worked 35 hours a week for 14 weeks at the rate of \$971.60 per week gross, based on \$27.76 per hour. His likely earnings would have been \$13,602.40 in the 14 weeks after his dismissal. His admitted gross earnings of \$5,344.24 needed to be deducted from that amount, leaving a balance of \$8,258.16.

[164] Mr Jiao’s cash income of \$1,500.00 also needed to be deducted from that amount, and an adjustment of \$317.88 made for the PAYE that should have been paid on that amount, based on Mr Jiao’s personal income tax rate being 17.5 percent. Mr Jiao did not allow for PAYE on these cash payments, either in his evidence or submissions so this adjustment had to be made by the Authority, based on his assumed tax rate.

[165] Section 128(2) of the Act requires the Authority to order an employer to pay an employee the lesser of the sum equivalent to their lost remuneration or to three months’ ordinary time remuneration. Notwithstanding s 128(2) of the Act, s 128(3) of the Act gives the Authority discretion to award an employee more than three months’ lost remuneration.

[166] Mr Jiao has been awarded lost remuneration for the 14 weeks’ period for which he claimed it. Accordingly, Construst is ordered to pay Mr Jiao \$8,258.16 gross lost remuneration under s 128(3) of the Act.

### **Should remedies be reduced on the grounds of contribution?**

[167] Section 124 of the Act requires the Authority to assess the extent to which, if any, the remedies that Mr Jiao has been awarded should be reduced on the grounds that he contributed to the situation that gave rise to his personal grievance claims.

[168] Contribution requires blameworthy conduct which is proven on the balance of probabilities. Blameworthy conduct was not established, so Mr Jiao's remedies were not reduced.

### **What penalties should be imposed on each respondent?**

#### *Penalty jurisdiction*

[169] A penalty may only be imposed on a respondent if the Authority has jurisdiction to do so.

[170] Mr Jiao's statement of problem claimed "penalties", with the only claims recorded in the statement of problem that could potentially attract a penalty being "wage arrears" and "illegal premium". His amended statement of problem sought that penalties be imposed on the respondents for "breach of IEA" and "failure to process HP upon termination". These were therefore the penalty claims that were before the Authority, and which the respondents had addressed during the February investigation meeting.

[171] Therefore the only penalty claims currently before the Authority are those that may be imposed under s 134(1) of the Act on a party that has breached an employment agreement; under s 134(2) on a person who has incited, instigated, aided or abetted any breach of an employment agreement and on Construst under s 75(1)(b) of the HA03 for its breach of s 27(1)(b) of the HA03.

[172] However, even though Mr Dai was 'a person involved in Construst's breach of the HA03', only a Labour Inspector may bring a penalty action against someone who is not the employer.<sup>4</sup> Therefore no penalty can be imposed on Mr Dai personally arising from Construst's breaches of the HA03.

[173] Although Construst breached the MWA and Mr Dai was a person involved in that default, the Authority did not have jurisdiction to impose the penalties Mr Jiao

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<sup>4</sup> Section 6(1A) of the HA03.

sought. Likewise, although Construst breached its duty of good faith to Mr Jiao, no penalty will be imposed on it for that, due to the Authority's lack of jurisdiction.

#### *Nature and number of breaches*

[174] Construst should have penalties imposed on it for breaching Mr Jiao's employment agreement four times (three times relating to the failure to pay him weekly for the work that he had done and one breach that related to the failure to provide him with his minimum contractual work hours of 35 per week, because it only gave him 10 hours in his third week of employment).

[175] Construst also breached s 23 and s 27 of the HA03 by failing to pay Mr Jiao his annual holiday pay of \$288.70 when his employment ended. That is an ongoing breach because his holiday pay remains outstanding.

[176] Mr Dai incited, instigated, aided and abetted Construst's four breaches of Mr Jiao's employment agreement. It was therefore appropriate for a penalty to be imposed on him under s 134(2) of the Act, for aiding and abetting Construst's breaches of Mr Jiao's employment agreement.

[177] Section 75 of the HA03 enables a penalty to be imposed on "every person who is involved in a failure to comply" with the provisions of the HA03 that are listed in s 75(2) of the HA03. This includes s 75(2)(a) which covers breaches of ss 21 to 28, which relate to an employee's entitlement to, and payment for, annual holidays.

[178] However, s 76(1A) of HA03 only permits a Labour Inspector to bring a penalty action in the Authority for a penalty to be imposed on a person "involved in a failure to comply with the HA03". Accordingly, Mr Jiao's penalty claim against Mr Dai could not succeed, because the Authority lacked jurisdiction to impose the penalty that was sought on him.

#### *Potential maximum penalties*

[179] Section 135(2) of the Act provides a maximum potential penalty for each breach of s 134 of the Act by an individual not exceeding \$10,000.00 and for a company, not exceeding \$20,000.00 per breach.

*Factors relevant to the assessment of penalties to be imposed on the respondents*

[180] Section 133A of the Act sets out factors that the Authority must have regard to when assessing penalties. These include the object in s 3 of the Act which includes recognising that employment relationships must be built on mutual obligations of trust and confidence and good faith behaviour, and acknowledging the inherent inequality of power in employment relationships, and to promote the effective enforcement of employment standards.

[181] In terms of the nature and extent of the breach or involvement in the breach, the breaches by the respondents that related to breaches of Mr Jiao's employment agreement occurred over three weeks. Construst's failure to pay him each week for three weeks involved three breaches, but because it involved the same conduct it will be globalised into one representative breach for the purposes of assessing penalties.

[182] The breach of the HA03 is a continuing breach which has still not yet been remedied. That is more serious because the respondents acknowledged Mr Jiao had not been paid any holiday pay, so there is no excuse for them not to have paid it, particularly when the amount is so small.

[183] The breaches of Mr Jiao's employment agreement by Construst must have been intentional because it knew the terms of his work visa (having supported it and signed the relevant documentation) and it knew that he was new to New Zealand and therefore likely to be reliant on his wages to support himself.

[184] The breach involving the failure to pay Mr Jiao his holiday pay has now continued for almost 18 months, which demonstrates that it was intentional.

[185] In terms of Mr Dai's aiding and abetting of Construst's breaches of Mr Jiao's employment agreement, he personally knew the terms of the work visa and it was up to him to allocate the work and arrange for payment. These were therefore also intentional breaches.

[186] The nature and extent of the loss that Mr Jiao suffered was serious. He ended up working in breach of the terms of his work visa, which put him at risk of deportation. Because of the vulnerable nature of his status as a migrant who depended on a valid work visa, he ended up working for other employers who he claimed did not pay him, thereby exposing him to further migrant exploitation.

[187] These breaches not only unjustifiably disadvantaged Mr Jiao but also resulted in his constructive unjustified dismissal, which was reflective of their serious nature.

[188] There are no mitigating factors. It is an employer's responsibility to ensure that it has the necessary documentation to enable an employee to be paid correctly. There was no need for Construst to fail to pay Mr Jiao at all, he could have been paid in cash which would have been a much more minor breach of the terms of the employment agreement (which required payment into his nominated bank account) than not paying him at all.

[189] Aggravating factors include that the respondents have demonstrated no remorse or appreciation of the seriously adverse effects the breaches have had on Mr Jiao. These breaches also involved a vulnerable migrant employee, who has suffered as a result of the respondents' conduct.

[190] There was no evidence that either of the respondents have previously had penalties imposed on them.

[191] Mr Jiao's submission that total penalties of \$80,000.00 should be imposed on Construst and total penalties of \$40,000.00 should be imposed on Mr Dai was unrealistic, and not accepted.

[192] It is important that the Authority ensures that the penalties imposed in this matter are consistent with the level of penalties imposed in other similar cases. Penalties must also be set at an appropriate level that punishes the respondents for their conduct, deters them from acting like this in future, and also acts as a deterrent to others who may be inclined to engage in these types of breaches.

[193] The fact Mr Jiao is a vulnerable migrant worker was an aggravating factor. As was the fact that the breach of HA03 has still not been remedied.

#### *Penalties imposed on the respondents*

[194] A penalty is imposed on Construst of \$1,000.00 for its breach of s 27 of the HA03 (failure to pay holiday pay when the employment ended) and \$3,000.00 under s 134(1) of the Act for its four globalised breaches of Mr Jiao's employment agreement.

[195] Mr Dai has a penalty of \$2,000.00 imposed on him under s134(2) of the Act for aiding and abetting Construst's four breaches of Mr Jiao's employment agreement.

[196] Accordingly, total penalties have been imposed on:

- (a) Construst of \$4,000.00; and
- (b) Mr Dai of \$2,000.00.

**Should some or all of the penalties imposed be paid to Mr Jiao instead of, or as well as, the Crown?**

[197] Pursuant to s 136(2) of the Act, the Authority may order the whole or any part of any penalty imposed may be paid to any person instead of, or as well as, the Crown.

[198] It is appropriate that Construst pay \$2,000.00 of the total \$4,000.00 penalty to Mr Jiao directly, to recognise the harm he has suffered as a result of the breaches that occurred. The remaining \$2,000.00 of the total penalty that has been imposed on Construst must be paid directly to the Crown bank account.

[199] Likewise, \$1,000.00 of the \$2,000.00 total penalty imposed on Mr Dai for aiding and abetting for Construst's four breaches of Mr Jiao's employment agreement is to be paid to Mr Jiao directly, in order to recognise the harm that he has suffered and that he has had to pursue these proceedings himself in order to address the breaches that have occurred.

[200] The remaining \$1,000.00 of the total penalty imposed on Mr Dai is to be paid directly to the Crown bank account.

### **Orders**

[201] Within 28 days of the date of this determination, Construst is ordered to pay Mr Jiao \$29,322.08 gross being:

- (a) \$694.00 wage arrears for hours he worked, so should have been paid for, from 18 to 23 March 2023;
- (b) \$288.70 annual holiday pay arrears;
- (c) \$81.22 interest on his total wage arrears of \$982.70 (being \$694 wage arrears plus \$288.70 holiday pay arrears) which runs from 30 March 2023 to the date of this determination, as calculated using the Civil Debt Calculator on the Ministry of Justice website;
- (d) \$8,258.16 lost remuneration under s 128(3) of the Act;

- (e) \$18,000.00 distress compensation under s 123(1)(c)(i) of the Act for his successful personal grievance claims; and
- (f) \$2,000.00 (being half of the total \$4,000.00 penalty imposed on Construct) for its breaches of his employment agreement and the HA03.

[202] Interest continues to run on the \$982.70 total wage arrears Construct owes Mr Jiao from the date of this determination until it (along with all interest) has been paid in full.

[203] If Construct is unable to pay Mr Jiao the wage arrears and other money he is owed within 28 days of the date of this determination, then Mr Dai must pay Mr Jiao any amount that remains outstanding. Mr Dai's payment to Mr Jiao of any outstanding wage arrears and/or money must occur within 60 days of the date of this determination.

[204] Within 28 days of the date of this determination:

- (a) Construct is ordered to pay \$2,000.00 of the total \$4,000 penalty that was imposed on it for its breaches of Mr Jiao's employment agreement and of the HA03, to the Crown bank account;
- (b) Mr Dai is ordered to pay Mr Jiao \$1,000.00 (of the total \$2,000.00 penalty imposed on him) for inciting, instigating, aiding and abetting Construct's four breaches of his employment agreement;
- (c) Mr Dai is also ordered to pay the remaining \$1,000.00 (of the total \$2,000 penalty that was imposed on him) for inciting, instigating, aiding and abetting Construct's breaches of Mr Jiao's employment agreement, to the Crown bank account.

#### **What costs and disbursements should be awarded?**

[205] Mr Jiao asked for a costs timetable to be set because there has been a Calderbank offer and the parties were unlikely to be able to resolve costs between themselves.

[206] If an Authority determination on costs is needed, Mr Jiao should lodge and serve a memorandum on costs within 28 days of the date of this determination. From the date of service of that costs memorandum the respondents 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.

[207] 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>5</sup> The parties are therefore invited to identify factors that should result in the notional starting tariff being adjusted.

Rachel Larmer  
Member of the Employment Relations Authority

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<sup>5</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)