

Construst Limited (Construst) and its then director, who is the second respondent Mr Yuhang (Derek) Dai.¹

The Authority's investigation

[3] The investigation into Mr Jiao's claims against the respondents were not completed during the two-day Authority investigation meeting that was held in February 2024. The parties lodged further information and evidence after the February investigation meeting, which was adjourned part heard, to new dates in August 2024.

[4] The Authority continued investigating Mr Jiao's claims after the February investigation meeting by calling for further information/evidence. Shortly before Mr Jiao's outstanding employment premium claims were due to be heard he withdrew them, so the rescheduled August 2024 investigation meeting was vacated.

Claims Mr Jiao succeeded on

[5] Mr Jiao succeeded with most, but not all, of his claims that were investigated by the Authority in February 2024. He succeeded with claims that:

- (a) Construst had breached s 130 of the Employment Relations Act 2000 (the Act) by failing to keep wage and time records for him;
- (b) Construst had breached his employment agreement, and Mr Dai had aided and abetted those breaches;
- (c) Construst had breached s 27 of the Holidays Act 2003 (the HA03), by failing to pay him his annual holiday pay when his employment ended. Mr Dai was a person involved in that breach;
- (d) Construst had breached the Minimum Wage Act 1983 (the MWA) and Mr Dai was a person involved in that default;
- (e) Construst owed him wage arrears;
- (f) Construst breached its good faith obligations to him;
- (g) Construst had breached employment standards, and Mr Dai was a person involved in Construst's breach of employment standards;

¹ *Jiao v Construst Ltd and Dai* [2024] NZERA 530.

- (h) Leave should be granted to him to recover any wage arrears and other money Construst owed him, but was unable to pay, from Mr Dai personally;
- (i) Construst unjustifiably disadvantaged and constructively dismissed him;
- (j) Penalties should be imposed on Construst and Mr Dai.

Material background

[6] Mr Jiao currently resides in China. He lived in New Zealand from 22 February 2023 to 31 July 2024.

[7] On 17 January 2023 Mr Jiao obtained a three year work visa from Immigration New Zealand (INZ) to work for Construst, which was an accredited employer under the Accredited Employer Work Visa (AEWV) scheme.

[8] Mr Dai was the sole director of Construst from 12 September 2017 until 1 October 2023. He was also Construst's sole shareholder up until 1 February 2022. Mr Dai is also the sole director and shareholder of 0429 Trustee Company Limited, which was Construst's sole shareholder from 1 February 2022 to 23 April 2024.

[9] Mr Ross Ogotau became Construst's sole director on 2 October 2023 and he became its sole shareholder on 23 April 2024. He was not personally involved in the Authority's investigation into Mr Jiao's claims, as Mr Dai and his counsel represented Construst's interests during these Authority proceedings.

[10] Mr Jiao worked 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, based on allegations of "migrant exploitation". The Authority was not provided with a copy of this second work visa until 19 August 2024.

[11] Mr Jiao withdrew his illegal premium claims on 31 July 2024. This was 13 working days before the investigation meeting into the employment premium claims was due to resume, on 20 August 2024.

[12] The Authority had expressed concern to Mr Jiao's advocate during the case management conference (CMC) held on 28 July 2023 that the detailed information it would have expected to have seen in support of the employment premium claims had

not been provided. Mr Jiao was encouraged to ensure he produced relevant evidence to support his employment premium claims prior to the investigation meeting.

[13] At Mr Jiao's request, the Authority issued two witness summons. The first was for Mr Jiayuan (Michael) Hu, who is the sole director of Alphabet Consulting NZ Limited (formerly named Asia Pacific International Consulting Limited trading as APIC Immigration (APIC)). The second summons was for Jane Zu, who had previously worked for APIC, but was no longer employed by it. Ms Zu was Mr Jiao's immigration agent for this first work visa with Construst.

[14] However, Mr Jiao failed to serve the summons on Mr Hu within the required time period. He also failed to serve the summons on Ms Zu at all.

[15] Although the summons was not properly served on Mr Hu, he nevertheless contacted the Authority and agreed to voluntarily attend the investigation meeting on 15 February 2024 and to bring relevant documents with him.

[16] Mr Hu was called to give evidence on the employment premium claims. The Authority spent almost all of the second day of the investigation meeting questioning Mr Hu, who brought documents and other information to the investigation meeting with him.

[17] At the conclusion of the February investigation meeting, the Authority expressed concern to Mr Jiao and his advocate that the evidence to date had not supported his employment premium claims against the respondents. Mr Jiao was therefore asked if he wanted to continue pursuing his employment premium claims.

[18] When Mr Jiao confirmed he did, the Authority issued further detailed directions to the parties, and to Mr Hu, regarding the provision of additional evidence relevant to the employment premium claims. The Authority also made further inquiries with INZ.

[19] The parties provided further information, as did INZ and Mr Hu, regarding the employment premium claims after the February 2024 investigation meeting. Although considerable additional information was subsequently provided to the Authority, none of it supported Mr Jiao's employment premium claims.

[20] The parties also lodged submissions on the other claims that Mr Jiao had mostly succeeded on.

[21] Mr Jiao for the first time in his submissions that the respondent had breached the Minimum Wage Act 1983 (MWA) and its good faith obligations to him. He also sought penalties for these breaches against both respondents.

[22] However, these new claims had not been raised in a statement of problem, they had not been identified as issues to be determined during the CMC held in July 2023 and they had therefore not been recorded in the directions of the Authority dated 31 July 2024 that set out the claims that would be investigated at the February 2024 investigation meeting.

[23] Accordingly, these new claims raised in Mr Jiao's submissions were not before the Authority for determination.

[24] Mr Jiao gave contradictory and confusing evidence during the February investigation meeting regarding his lost remuneration claim. He was therefore given an opportunity after the investigation meeting to lodge further evidence to clear up those ambiguities.

[25] Because Mr Jiao said he was in China and could not swear or affirm an affidavit, the Authority arranged to have a telephone conference with Mr Jiao and the parties' representatives, to enable him to affirm the additional evidence he had lodged after the investigation meeting regarding his lost remuneration claim.

[26] Prior to this telephone conference to affirm Mr Jiao's evidence, the respondents raised concern with the Authority that he had been seen in New Zealand, so could not be in China, as he had told the Authority he was. Mr Jiao confirmed via his advocate that he was not in New Zealand as he had returned to China on 3 February 2024.

[27] The respondents did not accept this denial. Mr Jiao was asked to provide passport stamps to show when he departed New Zealand and entered China. He provided the Authority with a visa stamp which he said was an entry visa for China from his own passport. The respondents again disputed the accuracy of that information, as they maintained Mr Jiao had been seen in New Zealand after 3 February 2024.

[28] The parties were told prior to the telephone conference to affirm Mr Jiao's additional lost remuneration evidence that the Authority would also use that time to address the dispute between the parties regarding his whereabouts.

[29] The Authority held a telephone conference on 11 March 2024 to take an affirmation from Mr Jiao regarding the additional lost remuneration evidence he had lodged with the Authority subsequent to the investigation meeting on 15 February 2024.

[30] Mr Jiao, his advocate, and the respondents counsel attended the telephone conference, along with the Member, an Authority Officer and a Mandarin interpreter, who provided full translation of everything that was discussed.

[31] The respondents' counsel provided further details of why they believed Mr Jiao was still in New Zealand, describing the circumstances in which he had been seen here by someone who knew him. 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.

[32] The Authority explained to Mr Jiao that he was under affirmation, so had to be truthful. He was then given an opportunity to respond 'on the record' to the allegations that had been made against him. Mr Jiao was asked under affirmation to confirm his current location (which he said was China) and to confirm the visa stamp was his entry stamp for China (which he confirmed).

[33] Mr Jiao specifically confirmed under affirmation 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 to New Zealand. Mr Jiao also affirmed that the passport stamp he had provided to the Authority were Chinese entry stamps from his own passport.

[34] 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.

[35] Mr Jiao lodged a new witness statement in which he admitted that he had lied to the Authority under affirmation. He also admitted that the passport stamp he provided was not his, but belonged to one of his friends. He was advised by the Authority of his right to silence and directions dated 25 March 2024 were issued by the Authority regarding the next steps in the investigation.

[36] After reviewing the additional witness statements that Mr Jiao had lodged since the February investigation meeting, it was clear that a number of material issues still arose from the new lost remuneration evidence and information he had provided.

[37] 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 provided to the Authority, as it had remained contradictory and unclear, notwithstanding his subsequent witness statements.

[38] Despite this additional time (and associated delay) Mr Jiao failed to fully address the specific unresolved issues the Authority had identified in the directions it issued on 25 March 2024. On 28 August 2024 Mr Jiao's advocate said no further information on the lost remuneration issues would be provided.

Legal position

[39] The Authority derives its power to award costs from clause 15 of Schedule 2 of the Act. Costs are discretionary, with the discretion to be exercised by the Authority on a principled basis. Costs must not be used to punish a party, but conduct that has unreasonably increased the other party's costs may be reflected in the amount of costs awarded.

[40] The Authority usually adopts a 'notional daily tariff' based approach to costs. The current tariff is \$4,500 for the first day of an investigation meeting and \$3,500 for each subsequent day. The notional starting tariff is then adjusted to reflect the particular circumstances of each case.

[41] When assessing costs in this matter the Authority had regard to the costs assessment principles identified by the Employment Court in *PBO Limited (formerly Rush Security Limited v Da Cruz and Fagotti v Acme & Co. Limited)*.²

Should Mr Jiao be awarded costs?

[42] There is no reason to depart from the usual principle that a successful party is entitled to a contribution towards their actual legal costs by the unsuccessful party/parties.

² *PBO Limited v Da Cruz* [2005] ERNZ 808 and *Fagotti v Acme* [2015] NZEmpC 135.

Issues

[43] The following issues are to be determined:

- (a) What costs and disbursements were sought?
- (b) What is the notional starting tariff for assessing costs?
- (c) Should the notional starting tariff be decreased?
- (d) Should the notional starting tariff be increased?
- (e) How should costs be apportioned?
- (f) What costs and disbursements should the applicant be awarded?

What costs and disbursements were sought?

[44] Mr Jiao claimed costs for the two-day investigation meeting that was held in Auckland on 14 and 15 February 2024, which he had attended remotely because he had incorrectly told the Authority that he had returned to China on 3 February 2024. He sought a fifty percent uplift to the notional daily tariff plus reimbursement of his filing fee.

[45] The notional starting tariff for a two-day investigation meeting is \$8,000, so fifty percent of that is another \$4,000. Mr Jiao therefore sought a costs order in his favour of \$12,000. He did not apportion the costs he had sought between the two respondents.

What is the notional starting tariff for assessing costs?

[46] This matter involved a two-day investigation meeting, so the notional starting tariff for assessing costs was \$8,000, being \$4,500 for the first day and \$3,500 for the second day of the investigation meeting.

Should the notional starting tariff be decreased?

[47] The notional starting tariff has to be reduced to \$4,500, to reflect the daily tariff for a one day investigation meeting, because the claims Mr Jiao succeeded on did not take more than one day of investigation meeting time. The second day of the investigation meeting was entirely taken up by the employment premium claims, which were withdrawn by Mr Jiao, so he cannot be said to have succeeded on them.

[48] Further decreases to the notional starting tariff also needed to occur to reflect that Mr Jiao's conduct unreasonably and unnecessarily increased the respondents actual legal costs. In particular:

- (a) Mr Jiao's employment premium claims lacked supporting evidence from the outset, so he must have known they were very weak claims;
- (b) Considerable time and resources was devoted to investigating the employment premium claims to see if the Authority could obtain information that supported them. This included obtaining information from INZ on two separate occasions, issuing witness summons for two witnesses, and issuing lengthy directions and orders to produce evidence to those who may have evidence about the employment premium claims. These steps did not uncover any evidence that supported Mr Jiao's claims;
- (c) Mr Jiao withdrew his employment premium claims at a late stage, only 13 working days before the investigation meeting was due to have resumed. The respondents were therefore put to the additional unnecessary expense of reviewing information that had been lodged after the February investigation meeting and preparing and lodging evidence to defend those claims, which were not pursued;
- (d) Mr Jiao's evidence regarding his lost remuneration claim was inadequate and he should have known that from the outset. Mr Jiao was granted an indulgence by the Authority, because he was given additional time after the February investigation meeting to clarify the ambiguous and contradictory evidence he had given during the investigation meeting. However, the additional evidence and information he lodged just raised more confusion and contradictions. It took the respondents considerable time to address those deficiencies in their response;
- (e) Mr Jiao misled the Authority about having left New Zealand on 3 February 2024. Mr Jiao's untrue statements that he was in China meant a telephone conference had to be held on 11 March 2024, so he could affirm the additional evidence he had lodged after the investigation meeting. The respondents' were put to the cost of their counsel attending

the telephone conference, when Mr Jiao could and should have provided a sworn or affirmed affidavit because he was still in New Zealand;

- (f) The respondents had to raise issues about Mr Jiao still being in New Zealand after he had told the Authority he was in China. Mr Jiao disputed the respondents' allegations about that, so this turned into another dispute the Authority had to investigate and resolve. The respondents expended time and resources on this when they should not have had to do so;
- (g) The respondents were put to additional unnecessary legal costs as a result of the information Mr Jiao subsequently lodged with the Authority (memorandum and witness statement) and regarding the additional communications that were required as a result of Mr Jiao admitting he had lied under affirmation to the Authority, because he had not left New Zealand, and the visa he had provided was his friend's, not his;
- (h) Mr Jiao raised new claims of the first time in his final submissions, which the respondents incurred costs responding to. Mr Jiao should not have done that as those claims had not been put before the Authority to investigate and determine.

[49] This additional time and cost that Mr Jiao unreasonably and unnecessarily put the respondents to would have amounted to at least an extra day of investigation time. A further reduction of \$4,500 was therefore appropriate, thereby reducing the notional starting tariff to zero.

Should the notional starting tariff be increased?

[50] Ms Moncur submitted the notional daily tariff should be increased to reflect the respondents' unreasonable rejection of a without prejudice except as to costs settlement offer, which is also known as a "Calderbank offer".

[51] This was made on 15 March 2024, so it occurred a month after the February investigation meeting and after the 11 March 2024 telephone conference with the parties.

[52] The Calderbank offer was also made after Mr Jiao had admitted lying to the Authority about being in China and to providing a passport stamp to the Authority which he falsely claimed was his entry stamp to China, when it was not. At this time

the Authority had also put the parties on notice that Mr Jiao's actions in this regard had undermined his credibility, which was a factor that would be taken into account when the material disputes in the evidence were being assessed.

[53] The Authority's determination dated 4 September 2024 ordered Construst to pay Mr Jiao \$29,322.08 and Mr Dai to pay him \$1,000.³ Mr Dai was also ordered to personally pay Mr Jiao within 60 days of the date of the determination any wage arrears or other money that Construst was unable to pay him within 30 days of the date of the Authority's determination.⁴

[54] At the time this Calderbank offer was made Mr Dai was no longer a director of Construst. The settlement offer did not distinguish which respondent was required to pay what amount.

[55] The settlement offer provided for distress compensation and wage arrears payments which were less than Mr Jiao recovered from the Authority's determination. It also made provision for a contribution towards his legal costs to be paid, based on the notional daily tariff for a one day investigation meeting.

[56] Mr Jiao will recover less legal costs than the settlement offer provided for him to be paid. Again, there was no proposed apportionment of the contribution towards the requested legal costs between the respondents.

[57] The problem with this Calderbank offer is the timing of it. Mr Jiao's successful claims had already been heard by the Authority.

[58] The additional evidence that was lodged on the claims that Mr Jiao succeeded on should have been available during the investigation meeting (at the latest) as an agreed timetable had been set as far back as July 2023 for the parties to lodge their evidence in advance of the February 2024 investigation meeting. The additional evidence Mr Jiao lodged subsequent to the February investigation meeting was also incomplete and therefore to a large extent unhelpful.

[59] In terms of the employment premium claims, the Authority continued investigating these by calling for evidence from the parties, INZ and Mr Hu. None of

³ Above n1, at [201]-[204].

⁴ Above n1, at [203].

this additional evidence supported Mr Jiao's claims, so this work objectively ended up being unnecessary. Mr Jiao's withdrawal of the employment premium claims effectively recognised that.

[60] That left just the submissions the parties had lodged on the claims Mr Jiao succeeded on as work, and therefore the legal costs incurred in preparing these submissions, which would have been avoided had the respondents accepted the 15 March 2024 Calderbank offer.

[61] However, the notional daily tariff has been set to include the cost of lodging submissions within the daily tariff, so only a minimal adjustment would be appropriate to reflect the costs associated with lodging submissions.

[62] The rejection of a Calderbank offer is a factor relevant to the assessment of costs. However, the amount that was recoverable by Mr Jiao is limited to the amount of legal costs that were reasonably and necessarily incurred after the Calderbank offer was not accepted.

[63] That meant everything other than the parties' final submissions on the claims Mr Jiao succeeded on needed to be excluded, because all of Mr Jiao's other legal costs were not reasonably incurred. These additional legal costs had only become necessary because of Mr Jiao's unreasonable conduct, which the Authority has already found had unnecessarily increased the respondents' actual legal costs.

[64] It was appropriate for the notional daily tariff to be increased from zero to \$600 to compensate Mr Jiao for the submissions he lodged regarding the claims he succeeded on. The Authority considered that was the realistic amount of costs Mr Jiao could reasonably be said to have incurred after the Calderbank offer was not accepted by the respondents.

How should costs be apportioned?

[65] Construst should bear a greater proportion of the legal costs as more time was spent on the claims it did not succeed on than the claims Mr Dai did not succeed on. Costs should therefore be apportioned three quarters to Construst and one quarter to Mr Dai.

Orders

[66] Within 28 days of the date of his determination:

- (a) Construst is ordered to contribute \$450 to Mr Jiao's actual legal costs;
- (b) Mr Dai is ordered to contribute \$150 towards Mr Jiao's actual legal costs;
- (c) The respondents are jointly and severally liable to reimburse Mr Jiao \$71.55 for his filing fee.

Rachel Larmer
Member of the Employment Relations Authority