

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

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

[2024] NZERA 82
3225359

	BETWEEN	XIANG JIAO Applicant
	AND	CONSTRUST LIMITED First Respondent
	AND	YUHANG DAI Second Respondent
Member of Authority:	Rachel Larmer	
Representatives:	May Moncur, advocate for the Applicant Zhen Zhen Chen, counsel for the Respondents	
Investigation:	On the papers	
Submissions and other information received:	12 February 2024	
Determination:	13 February 2024	

PRELIMINARY DETERMINATION OF THE AUTHORITY

Employment Relationship Problem

[1] Mr Jiao says he has been the subject of migrant exploitation by the respondents. Mr Jiao claimed he was unjustifiably disadvantaged, unjustifiably dismissed and is owed wage arrears by the First Respondent, Construst Limited (“Construst”). He claimed the Second Respondent, Mr Yuhang Dai, was a ‘person involved in the breaches of employment standards’ that he alleged had occurred.

[2] Mr Jiao claimed both respondents were involved in requiring him to pay an unlawful employment premium for his employment, in breach of s 12A of the Wages Protection Act 1983 (“the WPA”). He seeks penalties be imposed on both respondents for the various breaches he alleged had occurred.

Authority’s investigation

[3] This matter was investigated on the papers, so the parties could receive this determination before the investigation meeting starts at 10am tomorrow. The Authority's view on the security for costs application was initially communicated to the parties in an email sent earlier today.

Material facts

[4] The respondents deny the applicant's claims.

[5] Just after 10am on 12 February 2024, the respondents sought an order for \$10,000 as security for costs, to be lodged by the applicant before the investigation meeting that commences at 10am tomorrow. This application was made shortly after the Authority declined the respondents' request to adjourn the investigation meeting that starts tomorrow.

Issues

[6] The following issues require determination:

- (a) Does the Authority have jurisdiction to order security for costs?
- (b) If so, should such an order be made?
- (c) What costs should the successful party be awarded?

Findings

Does the Authority have jurisdiction to order security for costs?

[7] The respondents' application for security for costs has been declined, on the basis the Authority was not satisfied it had jurisdiction to impose security for costs on the applicant.

[8] The Employment Court in *Reid v NZ Fire Services Commission* decided the Employment Tribunal did not have jurisdiction to make an order for security for costs.¹ Although the *Reid* decision was about the Employment Tribunals' powers the Court's reasoning is equally applicable to the Authority.

¹ [1996] 1 ERNZ 228.

[9] Accordingly, the *Reid* decision has been applied by the Authority in *Merennage v Ritchies Transport Holdings Limited*²; *Gomez v Rappongi Excursions Limited t/a Denny's Restaurant's New Zealand*³ and *Villavicencio v Grant James Limited*.⁴

[10] Other Authority determinations are not binding, but there is no good reason to depart from that case law in this matter. The Authority agreed with, and so has adopted, the detailed analysis previously undertaken by another Authority Member in *Gomez* regarding the jurisdiction issue.⁵

Should an order for security for costs be made?

[11] The respondents' application for security for costs has been declined for want of jurisdiction. However, even if the Authority is wrong on the jurisdiction issue it still would have declined to order security for costs in this matter.

[12] Even if the Authority had jurisdiction, the application for security for costs has been made at the last minute, being twenty four hours before the investigation meeting was due to start tomorrow.

[13] The original Statement of Problem was served by track and trace courier on 2 May 2023 at the address for service Construst had recorded on the Companies Register. The Amended Statement of Problem that joined Mr Dai was served on him on 13 October 2023. The respondents have also been aware that the applicant is overseas since 2 February 2024.

[14] If the Authority did have jurisdiction to impose an order for security for costs, then it would have declined to do so. The applicant is a vulnerable migrant worker. He said he was not immediately given work by the respondents when he arrived in New Zealand, as agreed.

[15] Mr Jiao claimed he was required to purchase a vehicle and tools himself before the respondents would let him start work. That requirement was denied by the

² [2014] NZERA Auckland 247.

³ [2014] NZERA Auckland 78.

⁴ [2017] NZERA Christchurch 196.

⁵ Above n 3.

respondents, but they have not yet explained the delay between Mr Jiao's arrival in New Zealand and his start date.

[16] Mr Jiao also claimed he was also not paid for the work he did do for Construst, at the time he did it, which he said was Mr Dai's fault. Mr Dai blamed the applicant for the lack of payment, citing incomplete information from him.

[17] On the face of it, based on as yet untested evidence lodged by the parties for this investigation meeting, there appears to be some obvious breaches of minimum employment standards that have occurred.

[18] Mr Jiao's employment agreement stated he was to be paid into his bank account weekly, but in the Statement in Reply Construst recognised that did not occur. The applicant worked for Construst from 2 to 23 March 2023, but was not paid until 1 May 2023. Construst blamed the applicant for that, when payment of wages is the employer's legal obligation.

[19] The applicant is currently in China as he was told by his immigration advisor he had to leave New Zealand before his visa expired on 4 February 2023. The applicant advised the Authority that as soon as he gets a new visa he intends to return to New Zealand. His financial position is unknown, but based on what his advocate has conveyed to the Authority, is likely not strong.

[20] It would be contrary to the objectives of the Authority's role to impose a heavy financial burden on an applicant who claimed he has been subjected to migrant exploitation by, among other things, not being paid for work he did and by allegedly being required to pay RMB 87,000 for his employment by Construst.

[21] This matter involves serious allegations that require investigation by the Authority, regardless of whether or not the applicant may be in a position to pay any costs he is ordered to pay if his claims do not succeed.

[22] Such an approach is consistent with the Authority's intended purpose as a low level, speedy and cost effective jurisdiction. Due to the Authority's investigative powers and unique role, there is also no need for a party to be represented at an investigation meeting. The respondents could elect to self-represent if they are concerned about recovering costs from Mr Jiao, in the event they are successful and are awarded costs.

What costs should be awarded?

[23] Costs should lie where they fall. This application was determined on the papers, based on the respondents' memorandum. The applicant was not required to expend costs addressing it and he did not do so.

Outcome

[24] The respondents' application for security for costs does not succeed.

[25] No award of costs is appropriate.

Rachel Larmer
Member of the Employment Relations Authority