

**IN THE EMPLOYMENT RELATIONS AUTHORITY  
AUCKLAND**

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

[2025] NZERA 129  
3278619

BETWEEN                      BAOGEN ZHANG  
Applicant

AND                              CONSTRUST LIMITED  
Respondent

Member of Authority:        Rachel Larmer

Representatives:              Lennon Xi, advocate for the Applicant  
No appearance for the Respondent

Investigation Meeting:        26 November 2024 at Auckland

Submissions and Other  
Information Received:        10 December 2024 and 11 February 2025 from the  
Applicant  
19 December from Immigration New Zealand

Determination:                4 March 2025

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**DETERMINATION OF THE AUTHORITY**

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**Employment Relationship Problem**

[1]     The applicant, Mr Baogen Zhang, was recruited while he was living in China by an agent based in China from XuZhou Hengnuo Construction Labour Recruitment Limited (the recruitment company). Mr Zhang dealt with Xiao Haidi, who was the director of the recruitment company. He did not have their phone number or email as all communications occurred via WeChat using Xiao Haidi's WeChat contact details.

[2]     On 28 July 2023 Construst Limited (Construst) signed an employment agreement with Mr Zhang which recorded his position as a Construction Worker on a wage of \$27.76 per hour. Xiao Haidi claimed to have obtained a work visa for Mr Zhang from Immigration New Zealand (INZ). The IEA signed by Construst was used to obtain Mr Zhang's work visa.

[3] Mr Zhang arrived in New Zealand on 2 November 2023. Xiao Haidi arranged for Mr Zhang to be picked up from the airport by a Chinese man named Angus (surname unknown) who had a WeChat contact number which Mr Zhang used to communicate with him.

[4] After arriving in New Zealand, Mr Zhang asked Xiao Haidi to contact his employer, Construst so he could start work. Xiao Haidi expressed surprise Construst had not contacted Mr Zhang. Xiao Haidi then told Mr Zhang that Construst did not have any work available for him.

[5] Mr Zhang claimed he was unjustifiably dismissed because Construst supported his work visa but then did not provide him with any work after he arrived in New Zealand. Mr Zhang was ready, willing and available to work from 6 November 2023.

[6] Construst did not respond to Mr Zhang's claims.

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

[7] Construst did not participate in the Authority's investigation.

[8] The statement of problem was served on Construst on 17 February 2024 by email to its then acting counsel, Zhenzhen Chen, of Righteous Law, after Ms Chen had advised the Authority she was authorised to accept service on Construst's behalf.

[9] There was a problem with the transmission of the statement of problem, so it was re-served on Righteous Law by email on 22 February 2024. Because of that, the time for Construst to lodge its statement in reply to 7 March 2024.

[10] No statement in reply was lodged.

[11] On 4 April 2024 Righteous Law advised that they were no longer acting for Construst, so it gave the Authority the email address and phone number for Mr Ross Ogotau, who is Construst's sole director and shareholder.

[12] The Authority contacted Mr Ogotau by phone and email about Construst's failure to lodge a statement in reply, but he did not respond. Voicemails were also left for Mr Ogotau, none of which he has responded to.

[13] On 13 May 2024 the Authority requested information directly from INZ. A copy of this letter was sent to the parties, with the copy for Construst being sent by track and trace courier to its registered address as recorded on the Companies Register.

[14] On 13 May 2024 the Authority directed the parties to attend mediation, as mediation had not occurred because Construst had not engaged with Mediation Services. The direction to mediation required mediation to occur on or before 17 June 2024. Mediation did not occur, because the Construst again did not engage with Mediation Services.

[15] On 13 May 2024 the Authority issued Directions of the Authority (DoA) which scheduled a case management conference and identified the matters that would be discussed. Construst was also given leave to lodge a statement in reply out of time, provided it did so by 12pm on 23 May 2024.

[16] That did not occur. No leave application or statement in reply has been lodged by Construst.

[17] The DoA dated 13 May 2024 expressed concern about Construst's non-engagement. The Authority expressed a preference to hear from both parties, but confirmed that Construst's failure to engage in the Authority's investigation process would not stop the investigation from proceeding. Construst was directed to disclose relevant documents, which were set out in the DoA dated 13 May 2024. Construst did not provide any of the requested documents.

[18] The Authority was advised by Mr Chen that because Construst had not been engaging with Mediation Services no mediation date could be agreed. The parties were therefore directed mediation to occur on a specific date to ensure it occurred. However, despite this second direction to mediation, Construst still did not engage with Mediation Services. Accordingly, mediation has not occurred for this matter.

[19] The notice of the case management conference was couriered to Construst at its registered address for service by track and trace courier. The information that was received from INZ on 22 May 2024 was sent to Construst by track and trace courier at its registered address for service.

[20] From 10 October 2023 until 15 April 2024 Construst's registered address for service was D6/5 Douglas Alexander Parade, Albany, Auckland, 0632. From 16 April

2024 onwards Construst's registered address for service on the Companies Register was 25 Archibald Road, Kelston, Auckland, 0602. That is the same address that Mr Ogotau has listed for him as Construst's director and sole shareholder on the Companies Register.

[21] On 21 June 2024 the owner of Construst's registered address for service at its Kelston address called the Authority to advise that he had been receiving multiple couriers for Construst, but there was no-one by that name in the building. It was up to Construst to ensure that its registered address for service information on the Companies Register is accurate.

[22] The Authority has communicated with Construst by sending service documents via track and trace courier to its registered address for service. If Construst is no longer at that address then it needed to update the information about its registered address for service that was recorded on the Companies Register. Unless that occurred, then service on Construst at the address it has listed on the Companies Register was sufficient to ensure that Construst had been served with the relevant documents for this investigation.

[23] The INZ documents, the DoAs, Mr Zhang's evidence and the notice of investigation meeting were all served on Construst at its registered address for service. Construst was therefore made aware of these proceedings. It must therefore have elected not to particulate in the Authority's investigation.

[24] The case management conference was held on 24 June 2024.

[25] The Authority attempted to contact Mr Ogotau on the mobile number provided by his former counsel for the case management conference. However, the calls went to voicemail. An email was also sent to Mr Ogotau advising that although he had not answered the Authority's phone call the case management conference was still proceeding so he could email the Authority Officer if he wanted to be joined to the call. No response was made to these emails or to the voicemails the Authority Officer had left for Mr Ogotau.

[26] The Authority issued DoA dated 24 June 2024. The DoA recorded that there had been no statement in reply and that the leave to lodge a statement in reply out of time had not been complied with.

[27] The Authority again expressed concern about Construst's non-engagement in its investigation process, and repeated its preference to hear from both parties. It also reiterated that the investigation would continue notwithstanding Construst's non-engagement. Construst was also put on notice that its failure to engage in the Authority's investigation process could result in the Employment Court calling for a good faith report, which could potentially limit the respondent's challenge rights.

[28] The Authority shared with the parties the information it had received from INZ about the work visa Mr Zhang had obtained to work for Construst. This information included the individual employment agreement (IEA) that had been signed by Construst on 28 July 2023 and which had Mr Zhang's signature on it beside the date of 27 July 2023.

[29] Construst was directed to advise the Authority by 2 July 2024 of the name and position of the person who had signed the IEA on its behalf, and the name and position of the person who submitted the work visa application to INZ for Mr Zhang on 28 July 2024, because it had used one of Construst's job tokens. That information was not provided. Construst was also directed to provide other specific information that was relevant to the Authority's investigation. None of the requested information was provided.

[30] On 6 August 2024 the Authority Officer called Mr Ogotau to remind him that Construst's evidence was due on 30 August 2024. However, the call was disconnected, so the Authority Officer left him a voicemail. The Authority also sent a letter via track and trace courier to Construst's registered office reminding it that its evidence was due on 30 August 2024.

[31] No evidence was lodged by Construst.

[32] The Authority Officer called Mr Ogotau on 29 August 2024 but the call was again disconnected. The Authority Officer left another voicemail reminding him Construst's evidence was due the next day and that there was an investigation meeting in Auckland on 26 November 2024.

[33] An Authority Officer attempted to contact Mr Ogotau by phone on 22 October 2024, without success. The Authority put together another pack of all the relevant documentation for its investigation. This included the statement of problem, the notice of the case management conference, all of the various directions that had been issued

by the Authority, the notice of the investigation meeting and a copy of the applicant's evidence consisting of his witness statement and relevant documents (the service documents).

[34] The service documents were again served by track and trace courier on Construct at its registered address for service on 29 October 2024. The service documents were sent to the Douglas Alexander Parade address in Albany and to the Archibald Road in Kelston address which were the previous and current addresses for service that Construst had recorded on the Companies Register.

[35] The Authority held an in-person investigation meeting in Auckland on 26 November 2024. The Authority was assisted by a Mandarin interpreter.

[36] Mr Zhang and his advocate attended the investigation meeting. Mr Zhang was questioned under oath about his evidence. The investigation meeting started half an hour later than scheduled to give Construst time to attend but it did not turn up.

[37] Mr Zhang lodged some information relating to his communications with Xiao Haidi (the agent in China) after the investigation meeting. The Authority also asked for additional information from INZ, which was provided in late December 2024.

[38] This additional INZ information was sent to the parties, who were given an opportunity to comment on it. This INZ information was sent by track and trace courier to Construst's registered address for service, as recorded on the Companies Register. Mr Zhang responded but Construst did not.

[39] Construst has not participated in the Authority's investigation at all. This determination was therefore based on Mr Zhang's uncontested evidence, which was tested by the Authority during the investigation meeting.

## **Issues**

[40] The following issues are to be determined:

- (a) Did Construst employ Mr Zhang?
- (b) If so, what date was Mr Zhang due to start work?
- (c) Was Mr Zhang dismissed?
- (d) If so, was his dismissal justified?

- (e) If not, what remedies should he be awarded?
- (f) What costs and disbursements should be awarded?

### **Material background**

[41] Construst was “an Accredited Employer” under the Accredited Employer Work Visa (AEWV) scheme. Construst used a licensed New Zealand immigration advisor, Crystal Li, of Veritas Immigration Limited (Veritas) to submit Construst’s employer accreditation declaration form dated 17 January 2023.

[42] The job check application submitted by Veritas recorded that Construst sought 20 permanent construction workers/employees to work in the Auckland region who did not need any work experience or minimal qualification level for the job. The minimum hourly rate would be \$27.76 and the maximum hourly rate would be \$35.00. Construst guaranteed these employees a minimum of 30 hours per week and a maximum of 60 hours work per week.

[43] Construst said it had advertised the Construction Worker job on MyJobSpace between 1 November and 16 November 2022 and no applications had been received. The Construction Worker employment agreement template and job description for the Construction Worker position were attached to the online immigration job check application. This Construction Worker employment agreement was the same template as the IEA Mr Zhang had been given and which Construst had used to get its INZ employer accreditation under the AEWV scheme.

[44] On 31 January 2023 INZ approved Construst to recruit twenty construction workers to work in Auckland with a job check start date of 31 January 2023 and a job check expiry date of 31 July 2023. The workers that Construst employed did not have to meet any minimum qualification or work experience standards.

[45] The job check approval from INZ set out “important information” which required Construst to ensure the employment agreement they provided to their prospective migrant employee for their work visa application met all of the specified requirements (which were set out in the INZ document).

[46] Mr Zhang’s job check request was sent on 28 July 2023 (as the job token used for him had an expiry date of 31 July 2023). The candidate’s name was identified as “Baogen Zhang” and “the candidate email” was nzveritasimmigration@[redacted by

the Authority.] This is the email that Veritas used, and which had been associated with Ms Li in Construst's employer accreditation declaration form. It was not Mr Zhang's email and he had not instructed Veritas to act for him.

[47] Construst's licensed immigration advisor had therefore applied for the job token for Mr Zhang to use for his visa application, so was therefore aware of his employment, the terms of his IEA, and the terms of his work visa which was granted by INZ based on Construst's job token.

[48] Mr Zhang did not have anything to do with Veritas and he did not have any communications with Ms Li. His only interactions were with Xiao Haidi, so that person and the China based company, XuZhou Hengnuo Construction Labour Recruitment Limited, must have been in communication with Construst and/or Veritas in order to be able to pass Mr Zhang's personal information for his visa application on to Veritas use to get a work visa for him. This would have occurred behind the scenes, without Mr Zhang's knowledge.

[49] Mr Zhang's job token was sent by INZ to Veritas and not to Mr Zhang personally. Veritas must have passed Mr Zhang's job token for his work visa application to Construst and/or Xiao Haidi, who then passed it on to Mr Zhang. As far as Mr Zhang was aware Xiao Haidi had arranged for his work visa and for him to travel to New Zealand to start work for Construst.

[50] Mr Zhang only dealt with Xiao Haidi. Mr Zhang had been sent the recruitment company's business licence which named Xiao Haidi as its director. Mr Zhang did not meet Xiao Haidi in person as their communications occurred via WeChat only. Mr Zhang told the Authority he knew "quite a few people" who were in the same situation as him who had also been deceived by Xiao Haidi.

[51] Mr Zhang said he paid Xiao Haidi RMB 78,000.00 to get his New Zealand work visa. His monthly wage at that time as a contractor worker in China was RMB 10,000.00, so it was a significant amount for him to pay.

[52] Mr Zhang told the Authority he did not think he was "buying a job" by paying RMB 78,000.00 because that is the amount Xiao Haidi told him it would cost to get a New Zealand work visa. He was told that amount would "include everything", apart from flights, medical check fees and documentation fees. The "documentation fees" he

referred to related to Police clearance from the China Police, which required them to provide an official record of Mr Zhang's movements in and out of China.

[53] Mr Zhang said he paid another approximately RMB 10,000.00 in additional costs that were not covered by the RMB 78,000.00 he had paid Xiao Haidi.

[54] Mr Zhang said when Angus picked him up from the airport after his arrival in New Zealand, Angus charged him \$160.00 to take him to the bank to get a bank card. Mr Zhang said while he was still in China he was also required to pay four weeks' rent in advance for accommodation in New Zealand. This rent amounted to RMB 3,200.00, consisting of two weeks' bond and two weeks' rent, in addition to the other upfront costs he had paid Xiao Haidi.

[55] Although Mr Zhang had paid in advance for four weeks' accommodation, he left after two weeks, but did not get his bond refunded to him. The New Zealand accommodation Mr Zhang had paid for while he was still in China was for a room in a shared house with other migrant workers.

[56] Mr Zhang did not personally sign Construst's employment agreement. Xiao Haidi asked him to sign a blank page of paper which they said was needed for his visa application. Mr Zhang said he signed a piece of paper, took a photo of it and then sent the photo of his signature to Xiao Haidi. Mr Zhang was also required to sign a document that said that if he cancelled his visa application then he would not be refunded any of the money he had paid.

[57] Mr Zhang was not aware INZ had an online portal for him to complete a visa application himself. Mr Zhang also did not have an iPad, laptop or computer that would have allowed him to log on to the INZ portal had he known about it. He used WeChat on his phone to communicate with others.

[58] Mr Zhang had not seen the IEA before it was provided to him by the Authority, as a result of its request to INZ for a copy of all documents relevant to Mr Zhang's visa application. The IEA was sent by the Authority to Mr Zhang's advocate, who passed it on to him. That was the first time that Mr Zhang had seen the employment agreement.

[59] Mr Zhang said the first time he found out the name of his employer in New Zealand was "Construst" was when he was at Shanghai International Airport in China. Mr Zhang told the Authority that as he was leaving China, Xiao Haidi phoned him and

said, "If you are asked questions when you arrive in New Zealand then tell them that your boss's name is Mr Dai" and she sent him details of the employer.

[60] However, Xiao Haidi also told Mr Zhang he had to delete her message with his employer's contact details on it after he entered New Zealand and that he should just remember the name and phone number she had given him to tell INZ. Xiao Haidi also asked Mr Zhang to prove to her that he had actually deleted the employer information she had sent him, which he said he did.

[61] The contact information for the employer passed on by Xiao Haidi was the company's name and possibly the phone number. Mr Zhang said he was not concerned as he expected the employer (Construst) to contact him when he arrived in New Zealand, as that is what he had been told would happen. However, that did not occur.

[62] Because Mr Zhang had followed Xiao Haidi's instruction to delete his employer's information after he had entered New Zealand, he said he had not retained his employer's contact details. Mr Zhang therefore had to contact Xiao Haidi to ask how to get hold of his employer.

[63] Mr Zhang attempted to contact Xiao Haidi via voice messages sent by WeChat. Xiao Haidi told him that Construst did not have any work for him, so Mr Zhang would need to look for a new job now he was in New Zealand. Xiao Haidi said their job (getting him work and a work visa) was completed because they had they got Mr Zhang a work visa.

[64] When Mr Zhang raised issues with Xiao Haidi, they said he had not signed a contract with either the recruitment agent or the employer. Xiao Haidi said that normally an employer and employee needed to sign an employment agreement and that because Mr Zhang had not done that, there was nothing he could do.

[65] Xiao Haidi sent Mr Zhang screenshots of jobs on Skykiwi and told him he should look for new work himself.

[66] Xiao Haidi must have passed Mr Zhang's signature on a blank document to Construst and/or its immigration advisor, Veritas, to use for his visa application and job check with INZ. Veritas used its email for Mr Zhang's visa application, so it was apparently involved in what has occurred.

[67] Construst’s licensed immigration advisor Veritas submitted an employment agreement which had Mr Zhang’s signature attached to it alongside a date of 27 July 2023 and a signature that was said to be “the employer’s signature” with a date alongside it of 28 July 2023. The successful job token for Mr Zhang’s visa was returned to a Veritas email. The job check had Ms Li’s name associated with it.

### **Did Construst employ Mr Zhang?**

[68] The definition of an employee in s 6(1)(b)(ii) of the Employment Relations Act 2000 (the Act) includes a person who is intending to work for hire or reward under a contract of service. That definition included someone in Mr Zhang’s situation.

[69] Mr Zhang was therefore employed by Construst in terms of the s 6 definition of employee, even though he had not actually undertaken work for Construst.

### **What date was Mr Zhang due to start work?**

[70] Mr Zhang was ready and available to start work from 6 November 2023, after having arrived in New Zealand on 2 November 2023. His IEA stated:

The employee will start working for the employer on the next working day after the signing of this agreement (subject to visa approval and the employee physically present in New Zealand (sic))...

[71] Under the terms of the IEA Mr Zhang was ready, willing and available to start work from 6 November 2023, so Construst should have been providing him with at least 30 hours work and pay per week from that date.

### **Was Mr Zhang dismissed?**

[72] An employer has a legal obligation to provide an employee who is ready, willing and available to work with work to do, and the agreed with wages, in accordance with the terms of the applicable employment agreement.

[73] Mr Zhang’s employment agreement provided that he would be paid \$27.76 gross per hour and that he would be provided with at least 32 hours work each week from Monday to Friday. Construst was legally required to comply with those obligations. However, that did not occur. Nor did Construst attempt to, or agree on, an alternative suitable start date for Mr Zhang. It simply had no contact with him.

[74] Construst prevented Mr Zhang from actually starting work, and therefore being paid, by not communicating with him after he arrived in New Zealand.

[75] Construst, as an “Accredited Employer” that had used one of its job tokens (via a licensed New Zealand immigration advisor) to obtain a work visa for Mr Zhang to work for it, had a legal obligation to engage directly with him to ensure that he could start work promptly after arriving in New Zealand.

[76] That did not occur. The failure of Construst to engage directly with Mr Zhang prevented him from actually starting work for it. Because Mr Zhang did not undertake any work for Construst, he was not paid any wages.

[77] Xiao Haidi had told Mr Zhang Construst had no work for him so he needed to find alternative work himself in New Zealand. That established Xiao Haidi and Construst likely had contact. Mr Zhang had no way of communicating with Construst and Construst had not communicated with him.

[78] This advice that Construst had no work for Mr Zhang was a fundamental breach of the terms and conditions of the IEA, which made it reasonably foreseeable that Mr Zhang would not continue working for Construst in such circumstances. It therefore amounted to a constructive dismissal, because the ending of Mr Zhang’s employment occurred at Construst’s initiative. Had Construst provided Mr Zhang with work, then he would have undertaken it, as agreed.

### **Was Mr Zhang’s dismissal justified?**

[79] Justification is to be assessed in accordance with the justification test in s 103 of the Act. This requires 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 Zhang was dismissed.<sup>1</sup>

[80] A fair and reasonable employer is expected to comply with its contractual and statutory obligations. This includes the good faith obligations in s 4(1A)(c)(i) of the Act to provide an employee with access to relevant information and opportunity to comment on it if their ongoing employment may be at risk. It also requires Construst to comply with each of the four procedural fairness tests in s 103A(3) of the Act.

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<sup>1</sup> Section 103A(2) of the Act.

[81] Construst's failure to meet minimum good faith requirements and its failure to comply with any of the minimum procedural fairness requirements in s 103A(3) of the Act fundamentally undermined its ability to justify Mr Zhang's dismissal.

[82] There was also no evidence, other than the Xiao Haidi's WeChat message to Mr Zhang that Construst did not have any work available for Mr Zhang, to establish that Construst did not have work available for him to do.

[83] Construst should not have instructed its licensed New Zealand immigration advisor (Veritas) to use a job token for Mr Zhang to obtain a work visa to work for it for at least 32 hours per week as a Construction Worker on 27 July 2023 if, by 6 November 2023, Construst did not have sufficient work available.

[84] Even if Construst did not have sufficient work available, then it was under an obligation to communicate and consult with Mr Zhang about that and it failed to do so.

[85] Accordingly, Construst was unable to establish that it was substantively justified in dismissing Mr Zhang by failing to provide him with any work or wages. Construst's failure to follow a fair and proper process or to comply with minimum good faith obligations before Mr Zhang was constructively dismissed fundamentally undermined its ability to justify his dismissal.

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

[86] Mr Zhang withdrew his lost remuneration claim once the Authority established from his evidence that he had actually earned the same or more via obtaining other employment.

[87] Mr Zhang was entitled to an award of distress compensation.

[88] Mr Zhang gave evidence to the Authority about how stressful his constructive dismissal had been for him. He was a low paid employee who had paid considerable money to come to New Zealand for better job prospects. Mr Zhang came to New Zealand to earn \$27.76 an hour which was approximately 2.5 times what he could earn in China, so he could provide for his son and father who lived in China.

[89] Mr Zhang's family had not wanted him to come to New Zealand, so he felt deeply ashamed and he had suffered a "loss of face" when he arrived in New Zealand

and found that there was no work for him to do. He said he had found it extremely stressful trying to find new work when his work visa was tied to Construst.

[90] Based on the evidence Mr Zhang gave the Authority, Construst is ordered to pay him \$20,000.00 under s 123(1)(c)(i) of the Act to compensate him for the humiliation, loss of dignity and injury to feelings he has suffered as a result of his unjustified dismissal.

[91] Section 124 of the Act required the Authority to assess whether Mr Chen had contributed to the situation that had given rise to his dismissal grievance, and to reduce remedies accordingly. Contribution denotes blameworthy conduct which has been provided on the balance of probabilities. No such contributory conduct had been established in this case.

[92] Accordingly, Mr Zhang's award of distress compensation was not to be reduced under s 124 of the Act.

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

[93] Mr Zhang as the successful party is entitled to a contribution towards his actual legal costs. This matter involved a half-day investigation meeting, which will be treated as a one-day investigation meeting because of the receipt of additional information after the investigation meeting regarding Mr Zhang's communications with Xiao Haidi and from INZ.

[94] The notional starting point for assessing costs is therefore \$4,500.00. There are no factors that should result in the notional daily tariff being decreased. Mr Zhang's advocate said there had not been any Calderbank settlement offers. The notional daily tariff should be increased to reflect that Construst's non-engagement in the Authority's process unnecessarily increased Mr Zhang's actual legal costs.

[95] There have been additional communications that have been sent to Construst and the investigation meeting start time was delayed by 30 minutes to give Construst a further opportunity to attend. There should be an uplift of \$500.00 to the notional daily tariff, thereby raising it to \$5,000.00, to reflect that Construst's non-engagement in this process has unnecessarily and unreasonably increased Mr Zhang's actual legal costs.

## **Orders**

[96] Within 28 days of the date of this determination Construst is ordered to pay Mr Zhang \$20,000.00 distress compensation plus \$5,000.00 contribution towards his actual legal costs. Construst is also ordered to reimburse Mr Zhang \$71.55 for his filing fee.

[97] Accordingly, Construst is ordered to pay Mr Zhang \$25,071.55 within 28 days of the date of this determination.

Rachel Larmer  
Member of the Employment Relations Authority