

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

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

[2021] NZERA75
3066375

BETWEEN	BANANAWORKS COMMUNICATIONS LIMITED Applicant
AND	YUNGU (JAMES) SHI First Respondent
AND	ZICHENG (BRICK) ZHANG Second Respondent
AND	IM DISTRIBUTION LIMITED Third Respondent

Member of Authority:	Eleanor Robinson
Representatives:	Geoffrey Jenkin, counsel for the Applicant Jessie Laphorne and Tanzam Hossain, counsel for the First and Second Respondents Royal Reed and Dylan Pine, counsel for Third Respondent
Investigation Meeting:	1 and 2 July, 5 August and 16 December 2020 at Auckland
Submissions [and further Information] Received:	23 December 2020 and 26 January 2021 from Applicant 20 January 2021 from Respondent
Date of Determination:	26 February 2021

PRELIMINARY DETERMINATION OF THE AUTHORITY

Employment Relationship Problem

[1] The Applicant, Bananaworks Communications Limited (BWC), claims that Mr Yungu (James) Shi, First Respondent, and Mr Zicheng (Brick) Zhang, Second Respondent, have breached their respective employment agreements entered into with BWC.

[2] BWC also claims that the Third Respondent, IM Distribution Limited (IMD) aided and abetted the breaches by Mr Shi and Mr Zhang pursuant to s 134 of the Employment Relations Act 2000 (the Act).

[3] BWC has lodged an application dated 23 December 2020 seeking to join Ms Shu Wang and Ms Hongwei Hu as Fourth Respondents in this matter. This followed an oral indication of its intention to do so during the investigation meeting held on 16 December 2020.

[4] This application for joinder is dealt with as a preliminary matter.

Issue

[5] The preliminary issue for determination is whether or not the application by BWC to join Ms Shu Wang and Ms Hongmei Hu, IMD Principals, as Fourth Respondents to the proceedings brought by BWC.

Brief Key Facts

[6] BWC is a marketing communications agency. Mr Kenneth Xiaoxuan Wang is the sole director of BWC. Mr Shi was employed by the company as Account Manager and Marketing Consultant on 12 January 2015. Mr Zhang was employed as a Business Developer, commencing work in 2015. Both Mr Shi and Mr Zhang had restraint of trade clauses in their employment agreements.

[7] Mr Shi and Mr Zhang met IMD principals, Miss Shu (Irene) Wang and Ms Hu (Michele) Hongmei, at a trade show May 2018. Ms Wang was the sole director and shareholder of IMD, and Ms Hu was a shareholder.

[8] During the period December 2018 and February 2019 she and Ms Hu held discussions with Mr Shi and Mr Zhang about the possibility of them joining IMD as shareholders.

[9] In March 2019 Mr Shi and Mr Zhang purchased shares in IMD.

[10] Discussions were also held with Ms Wang and Ms Hu about the possibility of Mr Shi and Mr Zhang working for IMD.

[11] Mr Wang received written resignations dated 18 February 2019 from Mr Shi and Mr Zhang.

[12] Mr Shi and Mr Zhang commenced employment with IMD on 19 March 2019.

Joinder Application pursuant to s 221 of the Act

[13] Section 221 of the Act states:

221 Joinder, waiver, and extension of time

In order to enable the court or the Authority, as the case may be, to more effectively dispose of any matter before it according to the substantial merits and equities of the case, it may, at any stage of the proceedings, of its own motion or on the application of any of the parties, and upon such terms as it thinks fit, by order, -

(a) Direct parties to be joined or struck out ...

[14] The parties have filed submissions in respect of this matter these are summarised below.

The Applicant's submissions

[15] BWC submits that the cause of action against IMD is founded upon allegations that Ms Wang and Ms Hu as agents of IMD, and therefore IMD itself, knowingly or recklessly allowed Mr Shi and Mr Zhang to solicit, endeavour to entice away, or discourage clients from remaining as clients of BWC, for the benefit of IMD and/or Mr Shi and Mr Zhang.

[16] Whilst penalties are sought pursuant to s 134 of the Act against IMD, it is submitted that any penalties imposed against IMD, which is not trading and may not have any money, would be unlikely to be satisfied, and on that basis the interests of justice require that Ms Shi and Ms Wang should be personally joined to the action.

[17] BWC submits that Ms Wang was a director of IMD during the relevant period. Although Ms Hu was not expressly a director, it is submitted that by her own evidence she clearly acted in a capacity as Ms Wang's co-director.

[18] It is submitted as well-established that whether a person is a director or not of a limited liability company, that person will nevertheless be liable for his or her actions or inactions if those actions or inactions amount to tortious misconduct. It is submitted that Ms Wang and Ms Hu were: "at least negligent, deliberately obtuse or more likely reckless".

[19] It is submitted as irrelevant whether or not they were directors of IMD, but the issue is that as individuals, they are guilty of aiding and abetting within s 134(2) of the Act. They are also agents of IMD which is therefore vicariously liable for their aiding and abetting.

[20] It is submitted that it is not a requirement that Ms Wang and Ms Hu were directors of IMD to be liable for their own tortious actions or inactions provided that they acted under the authority of IMD.

The Respondent's submissions

[21] Counsel for the Third Respondent submits that the late nature of this application for joinder, which occurred following a protracted investigation which was part-heard over several days and the evidence concluded, has all the appearances of a fishing expedition in search of a party with funds to meet any penalties the Authority may award. It is submitted that the interests of justice and financial security are different concepts which BWC has attempted to conflate.

[22] In respect of the submission by BWC that the Joinder parties acted as agents for the Third Respondent, IMD (as controlling parties), and cannot therefore extricate themselves from the actions of IMD, it is submitted that the role of the Joinder parties in IMD were known to BWC at the time proceedings were commenced.

[23] It is submitted that in *Mammoet Shipping BV v Compter* in which the Court heard an application by the defendant to join the Watersider's Union as a respondent, the Court listed delay and the strength of the applicant's case as factors to consider.¹ These same factors apply in these proceedings.

[24] It is submitted that if the Authority allows the Joinder Application, there is a risk for a significant delay in disposing of the matter and an inflation of issues for the Authority to determine. It is further submitted that there is a notable lack of evidence to which BWC can point to demonstrate the strength of its case.

[25] It is submitted that BWC has overlooked the evidence of Mr Shi and Mr Zhang that they had not informed Ms Wang and Ms Hu of their restraints of trade and therefore they had no knowledge of them.

[26] It is submitted that as in *Tradestaff Group Limited v Bailey & Anor* the evidence does not enable a conclusion that IMD or Ms Wang and Ms Hu had knowledge of the restraint of trade in Mr Shi and Mr Zhang's employment agreements with BWC, and the Authority cannot conclude that IMD or Ms Wang and Ms Hu took steps to aid and abet a breach of the employment agreements.²

Submissions of the Applicant in Reply

[27] It is submitted in reply that if there are sufficient findings of fact by the Authority of aiding and abetting within s 134(2) of the Act, then findings can be made against the directors/employees responsible and against the company vicariously.

¹ *Mammoet Shipping BV v Compter* HC Whangarei CP13/86, 6 July 1987.

² *Tradestaff Group Limited v Bailey & Anor* [2019] NZERA 658 at [69] – [74].

Should Ms Shi and Ms Wang be joined to the action brought by BWC?

[28] Section 134(2) of the Act states: “Every person who incites, instigates, aids, or abets any breach of an employment agreement is liable to a penalty imposed by the Authority.”

[29] Section 221 of the Act gives the Authority power at any stage of the proceedings to join any party to an action if satisfied that it enables the Authority : “to more effectively dispose of any matter before it according to the substantial merits and equities of the case”.

[30] I accept that the application for the joinder has been made at a very late stage in the proceedings and has arisen principally from the knowledge by BWC that IMD is to be struck off the Companies Office Register.

[31] The application has also raised further delay in what has been a protracted matter and that is regrettable.

[32] I find that Ms Wang was a director of IMD at the time of the arrangement entered into with Mr Shi and Mr Zhang, and that the evidence supports Ms Hu acting as *de facto* co-director, or as an agent of IMD.

[33] No findings as to liability of any of the defendants in this matter have yet been made. However a determination in the substantive matter will need to be address whether or not IMD aided and abetted Mr Shi and Mr Zhang to breach their restraint of trade clauses. That will necessarily involve an examination of the knowledge of Ms Wang and Ms Hu as to the existence of the restraint of trade by at the time of entering into the arrangements with Mr Shi and Mr Zhang.

[34] Should it be determined that IMD did aid and abet Mr Shi and Mr Zhang to breach their employment agreements with IMD, and that Ms Wang and Ms Hu had the requisite knowledge of the restraint of trade clauses, liability may be found that they participated in the s134 breach by IMD.

[35] On that basis I determine that Ms Shi and Ms Wang be joined to the action brought by BWC.

Next Steps

[36] The Authority will contact the parties to arrange a case management conference to confirm timetabling of evidence and arrangements for a further investigation meeting in order that Ms Wang and Ms Hu may give evidence in their capacity as the Fourth Respondents in this matter.

Costs

[37] Costs of this application are reserved pending at the conclusion of the substantive matter.

Eleanor Robinson
Member of the Employment Relations Authority