

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

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

[2025] NZERA 788
3165881

BETWEEN	FREEDOM TRADES LIMITED (TRADING AS FREEDOM) Applicant
AND	YIQUAN NOEL JIAN First Respondent
	XUBEN TRADING LIMITED Second Respondent

Member of Authority:	Marija Urlich
Representatives:	Ashley Sharp, counsel for the Applicant May Moncur, advocate for the Respondents
Investigation Meeting:	22 March, 12 – 13 June 2024 and 14 - 15 May 2025
Submissions and further information received:	Up to and including 4 September 2025, from the Applicant Up to and including 4 September 2025, from the Respondents
Determination:	5 December 2025

DETERMINATION OF THE AUTHORITY

Employment Relationship Problem

[1] Freedom Trades Limited (Freedom) employed Yiqian Noel Jian as its strategic procurement manager from 2 December 2020 until her resignation in December 2021 with an effective date of 23 February 2022. Freedom imports and retails furniture. Part of Ms Jian's role was to find new furniture sources and products. There is no dispute Ms Jian's was a senior role with extensive responsibilities.

[2] In June 2021 Ms Jian introduced Freedom to a furniture wholesaler, Torya Furniture Limited (Torya). Over the next few months Freedom engaged with Torya – it considered and assessed the furniture Torya had to offer, negotiated pricing, sought and confirmed a quote and placed an order. Ms Jian was involved in all these steps. She did not disclose to Freedom the nature of her involvement with Torya including her father was a 50% shareholder in that company, she had assisted Torya in registering the company, helped Torya draft correspondence with Freedom including a quote and provided Torya with Freedom pricing information and marketing material.

[3] In March 2022 Freedom became aware of Ms Jian's involvement with Torya. On 8 March it lodged an application for an urgent interlocutory injunction which was resolved on 25 March by way of written undertakings provided by Ms Jian and Torya.

[4] Freedom's substantive application is now before the Authority for determination. Freedom says Ms Jian acted in concert with Torya to covertly and unlawfully springboard a business in breach of the obligations of confidentiality and non-competition contained in the parties' individual employment agreement (the employment agreement) and obligations of fidelity, trust and confidence, equitable fiduciary duties and breach of statutory good faith. Freedom says these breaches involved Ms Jian's use of its marketing and advertising material, customer base and knowledge of suppliers and that this knowledge was acquired in her role as Freedom's strategic procurement manager.

[5] In respect of Torya, Freedom says it acted in concert with Ms Jian to undermine and breach the provisions of the employment agreement. Freedom says Torya acted in concert with Ms Jian to facilitate, engineer and participate in the breach by Ms Jian of her contractual and equitable obligations to Freedom for their respective pecuniary benefit. Torya was removed from the companies register on 25 May 2023 by shareholder resolution and after these proceedings had been initiated. The removal from the companies register means the proceedings against Torya cannot proceed.

[6] Xuben Trading Limited (Xuben) was incorporated on 3 March 2022. Like Torya it operates and continues to operate a furniture wholesaler business. Third party information before the Authority shows the assets of Torya were transferred to Xuben in or around March 2022. Xuben was joined as the third respondent following

application by Freedom filed 24 May 2024. Freedom says Xuben is a device for preventing liability falling on Torya.

[7] Ms Jian says her failure to disclose her father's business interests in Torya to Freedom was a misjudgement as was the assistance she provided to Torya and Xuben's owners but denies any breach of obligations owed to Freedom or, if any breaches are found, says the breaches are not of sufficient seriousness to warrant any order for damages.

[8] Xuben says the claim against it is commercial in nature and falls outside the scope of the Authority's jurisdiction.

The Authority's investigation

[9] In the course of investigating this employment relationship problem the Authority heard evidence from Shiqi Kuffy Fan, Freedom managing director, Sherry Lu, Freedom merchandising lead, Ms Jian, Haiyan Liu, the owner of Torya and Xuben and Shan Shi, a shipping agent employee. The Authority's investigation was assisted by an interpreter of the Mandarin language.

[10] This matter has a long history before the Authority. Following the parties' resolution of the injunction application, on 4 May 2022 a timetable for filing evidence was agreed and an investigation meeting scheduled for 24 and 25 November 2022. On 4 November Freedom sought an adjournment which was granted. The parties then advised of their wish to explore resolution, and the matter was further adjourned to dates in August 2023. On 23 June Torya was removed from the companies office. On 12 July Freedom filed witness summons for Torya's external accountant and shipping agent to attend the investigation meeting with information relevant to matters for investigation, including the distribution of Torya's assets. A case management conference was held on 13 July and the investigation meeting dates were adjourned to deal with the request for third-party information. The Authority directed Torya to remain on the intituling subject to further application.¹² On 6 September directions were issued to third parties, the shipping agent who provided services to Freedom and Torya

¹ To the Authority's knowledge Freedom has not applied for Torya to be reinstated to the Companies office register.

² *Lawton v Steel Pencil Holdings Limited (in liq)* [2021] NZEmpC 199.

and Torya's chartered accountant, to provide identified information having heard from the parties' on relevance.³ On 4 October Torya's chartered accountant provided the requested information. By agreement an investigation meeting was then scheduled for March 2024 to allow the shipping agent to attend the Authority with the relevant information and answer questions. Further delay was occasioned by party availability.

[11] As permitted by s 174E of the Employment Relations Act 2000 (the Act) this determination has stated findings of fact and law, expressed conclusions on issues necessary to dispose of the matter and specified orders made. It has not recorded all evidence and information received.

Issues

[12] The issues identified for investigation and determination are:

- (i) has Ms Jian breached obligations owed to Freedom including:
 - (a) express provisions of her employment agreement of confidentiality and non-competition;
 - (b) implied obligations of fidelity and fiduciary;
 - (c) statutory obligation of good faith?
- (ii) if breaches are established, is Freedom entitled to recover costs from Ms Jian under the terms of the parties' employment agreement?
- (iii) is an award of a maximum penalty against Ms Jian warranted for breach of good faith?
- (iv) is an award of a maximum penalty against Xuben warranted?
- (v) is any party entitled to an award of costs?

Parties' employment agreement

[13] On 30 November 2020 the parties entered an individual employment agreement (the employment agreement) the terms of which included Ms Jiang would:

³ Employment Relations Act 2000, s 160(1)(a).

- Ms Jiang worked for Freedom as the strategic procurement manager. report to the managing director (cl 3.1);
- during and after her employment “...keep confidential information private and not directly or indirectly use, copy, share, or permit the use or copying of any confidential information owned by, or in the possession of, the employer unless they get written permission.” (cl 14.5);
- during and for one year after her employment ended would not, directly or indirectly act or conduct herself in any manner which is contrary to the best interest of Freedom (cl 16.1(d));
- pay any and all reasonable attorney fees sustained by Freedom in connection with any breach of the employment agreement (cl 16.2);
- not engage in any other employment or business or activity, without the prior written consent of Freedom, which may interfere, conflict or otherwise affect the performance of her duties and responsibilities (cl 16.3);
- immediately notify Freedom of any potential or actual conflict of interest (cl 16.3).

Background

[14] Freedom operates a business retailing furniture. It imports flatpack furniture from China which it sells through an online store. Ms Fan is the sole director and shareholder and has owned and operated the business since 2009.

[15] Ms Jian has a tertiary qualification in marketing and operations management. Prior to her employment with Freedom she had worked as a procurement manager and opened a childcare business having developed the brand and business case and met the necessary regulatory requirements including securing a license.

[16] As the strategic procurement manager part of Ms Jian’s role was, as set out in her job description, to identify and source products globally in line with the specifications of the marketing and merchandising team, find products and vendors and onboard them, contribute to the business’ growth and carry out all strategic procurement functions. A particular focus of her role was to implement Freedom’ business strategy to move away from a focus on a particular brand of furniture.

[17] Ms Jian accepted that in her role with Freedom she had access to confidential information including purchasing and marketing strategy, challenges to the business, both immediate and longer term, supplier information and connections, shipping and warehousing processes and information and pricing information including how quotations were put together and issued.

June 2021

[18] In early June Ms Jian met Mrs Liu and her husband through her father. Ms Jian's father, who is a carpenter by trade, had met the couple in April 2021 when he installed a flatpack pergola for them. Ms Jian's father told her he was going to form a business with Mrs Liu and her husband to wholesale furniture into the New Zealand market and asked her to assist them to register a company because they did not read English. Her father also told her the couple had a sole distribution agreement with a furniture manufacturer in China, that the distribution agreement covered New Zealand and Australia and that the couple and the owner of the manufacturer were longstanding family friends. The manufacturer is a large, well-established business. Part of its range includes the type and style of furniture Freedom wished to sell.

[19] Mrs Liu sent Ms Jian by WeChat a catalogue of the products purportedly under the distribution agreement. Ms Jian said this was the first she was aware of the products. On 9 June Ms Jian sent the catalogue to Ms Fan asking what she thought of the furniture and identifying three items which may be of interest to Freedom. Ms Fan asked where the products came from and commented "good". Ms Jian replied to Ms Fan's query [in translation] "I know these products sole agency in New Zealand and Australia". Ms Fan acknowledged this and asked [in translation] "Which one is this?". To which Ms Jian replied [in translation] "They just come in".

[20] Ms Fan was interested in the furniture and authorised Ms Jian's suggestion that she ask the distributor to send some samples of the identified products to Freedom's warehouse in China. Ms Jian says because Ms Fan selected the items from the catalogue it cannot be correct that she was of the identity of the sole distributor for the products.

[21] In her affidavit 18 March 2022 Ms Jiang did not tell Ms Fan her father was to be a shareholder in the company because:⁴

...the company was yet to be incorporated. Secondly I thought that they were going to do furniture wholesale which was very different from [Freedom]. I did not see any direct competition and even I felt very happy and pleased that I had an opportunity to help [Freedom] to achieve its expansion strategies. It did not cross my mind that I needed to disclose to [Ms Fan] my father's involvement in the business.

[22] In mid-June Ms Fan asked Ms Jian to get a quote from the distributor and ask whether Freedom could pick up the goods directly from the manufacturer in China. Ms Jian asked Ms Liu for, as she put it in her affidavit, this assistance and describes Ms Liu's response as follows:

As a matter of good gesture, we were granted this special request on a one-off basis, however Ms Liu told me that any orders in the future must be purchased from the sole distributor in New Zealand. I told [Ms Fan] about this and she did not seem concerned.

[23] On 15 June Ms Jian took further steps to action Ms Fan's directions in respect of the samples including that selected items from the provided product catalogue be sent to the Freedom China warehouse for inspection. On behalf of Freedom Ms Jian emailed Mrs Liu's nephew, who in due course became a Torya shareholder, providing introductory information about Freedom, attaching product photos from the catalogue for which extensive product information was sought in a particular format either directly from the distributor or and ordering four of each item to be provided to Freedom China warehouse.

[24] Between 24 and 28 June Ms Jian received quotations from Mrs Liu which she on sent to Ms Fan. Ms Jian wrote these quotes for Mrs Liu because:

Ms Liu did not know how to write a formal commercial email for quotation as particularly requested by [Freedom], she asked me to help her to draft a sample and told me the amount and discount she wanted to offer. I didn't think that there could be any issue, so I prepared the draft and sent it to her.

[25] Torya Limited was incorporated on 29 June 2021. Ms Jian used her RealMe verified identity to set up a company called Torya Furniture Limited (Torya). Ms Jian is recorded in the companies register as the presenter of the necessary documents – the

⁴ Yiquan Noel Jian affidavit [19] 18 March 2022.

registration document, shareholder consent forms for the four shareholders one of whom was her father who held a 50% shareholding and a consent form for the sole director, Mrs Liu's husband. At this time Mrs Liu was a shareholder in two other New Zealand incorporated companies. Ms Jian was not directly paid for the work involved in incorporating the company. She said she undertook the tasks as requested by her father from a sense of filial piety.

[26] Mrs Liu chose the company name Torya. In her evidence to the Authority she said she knew Ms Jian worked for a furniture retailer because Ms Jian's father had told her.

[27] In September Freedom set up a WeChat group titled "[furniture manufacturer's] distributor Torya Furniture] On 24 September 2021 Freedom purchased a consignment of furniture from Torya. The payment was made to Ms Liu's personal bank account in China.

[28] On 8 December Ms Jian advised Ms Fan she was resigning and her last day of employment would be 25 February 2022. On 25 December Ms Jian tendered her written resignation and worked through her notice period.

[29] In early 2022 the Torya furniture arrived in New Zealand and sold well. In early February Ms Fan discovered Ms Jian's father was a shareholder in Torya and on 8 February she sought advice from her business advisor because she had concerns about Ms Jian's involvement with Torya and her business Freedom. On 10 February Freedom representatives including Ms Fan and Ms Jian met with Mrs Liu and over the next few days Ms Fan placed a second order of furniture with Torya. The price Torya set for the second order was significantly higher than the first. Freedom said it had to place an order with Torya because it had committed to back orders of the furniture based on the success of the first order.

Events in March 2022

[30] On 2 March companies office records show Ms Jian's father transferred his shares in Torya to Mrs Liu. Also in early March Freedom sought to deal directly with the furniture manufacturer.

[31] Ms Jian's last day of employment was Wednesday 23 February 2022. She then attended a 10-day yoga retreat. During this period she said she did not have access to her business phone or email. She returned home on 6 March and later that day called Ms Fan to check in on work and arrange the return of work property still in her possession. Ms Fan did not pick up the call.

[32] Later on 6 March Ms Fan and Ms Lu attended Ms Jian's home. They accept they were angry. They said they felt their friend and co-worker, Ms Jian had betrayed their trust. During the exchange which followed Ms Jian accepted she had provided Torya with Freedom advertising material. She said she told them she was helping them because they did not speak English. She also said her husband had placed orders for Torya with the shipping agent and had helped sell Torya products on Trade Me.

[33] On 8 March Freedom lodged an application in the Authority seeking an urgent interlocutory injunction against Ms Jian and Torya. The parties resolved the injunction by way of written undertakings provided by Ms Jian and Torya. The undertakings dated 25 March confirm:

- (i) Ms Jian would not provide Torya in any capacity with business information of Freedom;
- (ii) all property or information in their control or possession of Freedom's would be deleted including Freedom's advertising material which had appeared on Torya's website;
- (iii) Torya acknowledged the obligations Ms Jian owed Freedom post-employment and undertook not to interfere or subvert those obligations or attempt to do so; and
- (iv) Torya had taken down its website removing Freedom's advertising copy and undertook not to use Freedom's advertising material to market or sell its products; and
- (v) costs were stood over for later determination by the Authority.

Discussion

Did Ms Jian breach obligations owed to Freedom?

[34] Freedom says Ms Jian has breached express terms of the parties' employment agreement. In addition, Freedom says Ms Jian has breached implied obligations of fidelity and the statutory duty of good faith, which includes the obligation not to directly or indirectly do anything to or is likely to mislead or deceive that other party to the employment relationship. The asserted terms, both express and implied, are accepted as binding and enforceable.

[35] Ms Jian says the alleged breaches, if established are not serious and caused no harm or loss to Freedom. She accepts the following actions:

- (i) using her RealMe account to assist Torya in registering a furniture company;
- (ii) failing to disclose to Freedom her father was a shareholder in Torya;
- (iii) recommending a logistics company to Torya which was used by Freedom; and
- (iv) scheduling and attending meetings with the logistics company with Mrs Liu.

[36] Ms Jian says these tasks were administrative, that she had no decision-making control or authority for Torya and all business decisions of Torya's were made by Mrs Liu.

[37] As the strategic procurement manager Ms Jian was charged with driving costs and efficiencies as well as identifying potential suppliers that aligned with Freedom's procurement strategy, developing relationships with new suppliers to advance sales and negotiating favourable terms. I accept central to the role was to put Freedom in position where it could source product at the best competitive price balancing product quality against pricing, design and appeal to the customer market. In this role she would be expected to seek information from new suppliers, source new product and and negotiate terms of purchase. This allowed her to acquire knowledge of Freedom's procurement and purchasing strategy including how it procured product from overseas, how the

China warehouse operated and producing marketing advertising material for the product range. I accept the position Ms Jian held was a senior role.

[38] Ms Jian did not deny forming a relationship with Mrs Liu and Torya in the context of her role with Freedom which she did not disclose to Freedom or being aware of procurement and purchasing strategy. Freedom says and it is accepted Ms Jian was responsible for and had access to its procurement strategy, the practical know-how of how it operated its offshore warehouse and brought goods into New Zealand and produced marketing and advertising material to promote sales of Freedom's products. Ms Jian appears to accept these were key parts of her job. It is accepted this was confidential information belonging to Freedom which Ms Jian was obliged to use only in the diligent execution of her duties.

[39] The information before the Authority establishes Ms Jian undertook business activities for Torya Limited and prior to its incorporation for its intended owners, Mrs Liu and Ms Jian's father - Ms Jian managed logistics for Torya, negotiated quotes, arranged shipment of goods, liaised with suppliers, drafted quotes and presented them as being from a third party, extracted discount rates from information Freedom held about other customers and presented them to Torya as if they originated from Torya. Ms Jian did not tell Freedom that she was involved in her father's establishment of Torya, Freedom did not authorise this work and performing this work was contrary to the assurances Ms Jian had given under the terms of her employment agreement that she would act in the best interest of the Freedom and disclose any conflict.

[40] The evidence shows Ms Jian used Freedom's information and confidential knowledge to assist Torya to develop its business in New Zealand and wore "two hats" in negotiating the first sale between Torya and Freedom without disclosing her involvement to Freedom. These actions have likely compromised Freedom's negotiating position in respect of Torya. In addition, and by her own admission Ms Jian's husband helped operate Torya's Trade Me store and placed orders with the shipping agent Freedom used for Torya. These actions competed with Freedom and involved use of its information gained through her employment at Freedom.

[41] Ms Jian says Freedom cannot assert a breach of the employment agreement particularly that concerning her providing images to Torya which it used on its website

because it did not have property rights in those images. Freedom says the image formatting and the wording accompanying the images were its property. It denies any unlawful use of the images or intellectual property infringement on its part.

[42] The evidence establishes Ms Jian provided Torya Freedom's marketing information intended for its website through which it sells product which Torya used on its website for the purpose of promoting its products. There is no evidence Freedom agreed to this, was aware of Torya's intention to use and then use of the material until after it had been posted. Freedom then took immediate steps to stop the use of the material and as a consequence Torya took its website down which included the images.

[43] The evidence before the Authority does not establish the subject information, including the copy writing was publicly available or that Freedom's use of the images was unlawful. I accept the images and copy writing were the property of Freedom. Ms Jian has provided that property to Torya, access to which was through her employment at Freedom and Freedom had not consented to Torya being provided or using that property. This matter arises from the parties' employment agreement.

[44] Much was made during the investigation meeting of whether Torya had a sole agency agreement with its supplier. I agree with the submissions on behalf of Freedom that nothing turns on this issue and there was no lawful restriction on Freedom contacting the supplier directly.

[45] By her own admission Ms Jian has shared with Torya information gained through her employment including shipping agent information, customer discount rates and quotation methodology and contemporaneously aroused Freedom's interest in doing business with Torya without disclosing her involvement with Torya or the nature of that involvement. She was bound, whilst employed by Freedom to act in its best interests.⁵ Ms Jian's actions in undertaking tasks for Torya from which is has gained a commercial benefit whilst in the employ of Freedom breached duties owed under the employment agreement. Further in undertaking these tasks for another business with whom Freedom was in a commercial relationship which she brokered was misleading and deceptive and has breached the statutory duty of good faith. In addition, given Ms

⁵ *Walden v Barrance* [1996] 2 ERNZ 598 at 617.

Jian's senior role in Freedom and the access to confidential information this afforded, her actions amount to a breach of the duty of fidelity. She has used her employer's confidential information without its knowledge or approval. Ms Jian has breached express obligations owed to Freedom under the terms of her employment agreement.

Is clause 16 of the employment agreement enforceable?

[46] Ms Jian says clause 16 is unenforceable and not valid:

- (i) it lacks specificity and proportionality;
- (ii) Freedom took no steps to enforce or rely on the clause during the employment relationship;
- (iii) the significant imbalance in bargaining power between the parties weighs in favour of unenforceability; and
- (iv) to enforce the clause would set a dangerous precedent.

[47] Under the terms of the parties' employment agreement the fees Ms Jian has agreed to pay must be:

- (i) reasonable attorney fees; and
- (ii) incurred in relation to a breach by her of the employment agreement.

[48] It is not accepted the clause lacks specificity and proportionality. While the terminology attorney in this jurisdiction is unusual there was no evidence the parties did not understand it meant other than its ordinary usage of lawyer. The fees to be paid if the condition is met are further qualified by the requirement to be reasonable and are described in the clause as including injunction proceedings. There was no evidence the fees incurred by Freedom for which detailed invoices were provided are reasonable and Ms Jian had the opportunity to understand how the fees were incurred.

[49] Freedom's evidence is the injunctive proceedings were issued when it came to light Ms Jian had provided Torya its marketing material which was used to market Torya's product. That Freedom was aware of some aspects of Ms Jian's involvement with Torya before the proceedings were commenced does not mean it has compromised its position or should be estopped from enforcing the terms of the parties' agreement. The evidence is Freedom took steps to find a commercial solution to the challenge

presented by Ms Jian's then known conduct, this was unsuccessful, and further information was subsequently found as to her conduct which resulted in the injunction proceedings being issued.

[50] The imbalance of bargaining power in employment relationships is acknowledged in the Employment Relations Act and parties to those relationships are encouraged to address that imbalance.⁶ The starting point in the assessment is the parties' employment agreement. In this matter and in particular clause 16 recognises these issues and contains an express representation by Ms Jian that she can meet the obligations entered under the employment. The employment agreement also expressly contains that Ms Jian's in accepting the employment agreement she has read and understood the terms of such, had the opportunity to get independent advice and raised and received from Freedom responses to issues.⁷ There was no evidence before the Authority of Ms Jian's inability to bargain the employment agreement or that there was some unfairness in the bargaining of the employment agreement. This submission is not accepted.

[51] Ms Jian says Freedom's claim is speculative and retaliatory. She says the claim is a commercial dispute the costs of which Freedom is unfairly seeking to recover against her as an employee. The claim arises from the parties' employment agreement and alleged breaches of such by Ms Jian. The time taken to progress these proceedings reflects the parties' active attempts to try to resolve this matter. In addition, time and costs have been incurred in securing relevant information through third parties. This submission is not accepted.

[52] I am satisfied clause 16.1 was freely entered by the parties and is enforceable.

Is Ms Jian liable to pay reasonable attorney fees under clause 16.1?

[53] Freedom's detailed invoices of legal fees have been provided. In respect of the injunction proceedings the total fees incurred appear to be in excess of \$17,000.⁸ There is no information before the Authority to suggest these costs are not reasonable or reasonably incurred. Ms Jian has had this information since early 2025 and has had the

⁶ Employment Relations Act 2000, s 3(a)(ii).

⁷ Parties' employment agreement signed 30 November 2020, pg 14.

⁸ Activity summary report February and March 2022.

opportunity to test the reasonableness of the fees incurred. She has agreed to pay reasonable legal fees associated with found breaches of the employment agreement. Those fees have crystallised and but for her breaches of the employment agreement would not have been incurred. The threshold for an award of special damages for legal costs is met given the circumstances of this case including and significantly the parties' agreement under clause 16.1.⁹

[54] Ms Jian is ordered to pay Freedom the actual legal fees incurred in respect of the injunction proceedings in March 2022. If there is any issue as to the exact calculation of that sum parties have leave to seek further orders of the Authority.

[55] The balance of the legal costs incurred by Freedom fall more clearly into a party-to-party costs assessment because they have been incurred in relation to substantive proceedings. They are to be dealt with as costs in the usual way. Clause 16.1 is likely to be a relevant factor in the assessment of costs.

Is Ms Jian liable for a penalty?

[56] Freedom seeks the award of the maximum penalty against Ms Jian for breach of good faith. The breach is established. Ms Jian has been found to have breached the statutory duty of good faith. She has been on notice since 8 March 2022, when the statement of problem was lodged that penalties were sought for the alleged breach.

[57] The maximum penalty against an individual is \$10,000.¹⁰ In considering whether a penalty is warranted and, if so, at what level, regard is had to the factors set out in s 133A of the Act, as well as the Employment Court decisions in *Nicholson v Ford* and *A Labour Inspector v Daleson Investment Ltd*.¹¹

[58] Freedom submits penalties are warranted because Ms Jian's actions were deliberate and sustained.

[59] I am satisfied Ms Jian failed in her duty of good faith to Freedom to disclose her dealings with Torya. These are failures to actively and constructively engage with

⁹ *Stormont v Peddle Thorp Aitken Ltd* [2017] NZEmpC 71 [2017] ERNZ 352 at [93] – [98].

¹⁰ Employment Relations Act 2000, s 135.

¹¹ *Nicholson v Ford* [2018] NZEmpC 132 and *Labour Inspector v Daleson Investment Ltd* [2019].

Freedom about matters directly relevant to the maintenance of a productive employment relationship. The matters were relevant and acute to the employment environment because Freedom was directly affected by the interactions with Torya with whom it engaged in commercial activity. In addition, these were matters entirely within Ms Jian's control which have had a significant and negative impact on Freedom. I have considered the matter of Ms Jian's duty to her family. I do not understand her evidence to be the discharge of this duty meant she was unable to discharge the good faith obligations she owed to her employer. Applying the relevant considerations in a penalty setting a penalty of \$5,000 is warranted to be paid within 21 days of today's date to be paid to Freedom.

Is Xuben liable for a penalty?

[60] Freedom seeks the award of the maximum penalty against Xuben for aiding and abetting Ms Jian's breaches of her employment agreement and implementing a process to avoid penalty liability for Torya. It says Xuben has benefited from the springboard of Torya facilitated by Ms Jian's breaches of her employment agreement and Mrs Liu is the "controlling mind" behind these actions. The evidence shows Torya benefited from Ms Jian's breaches of her employment agreement including negotiating furniture sales with Freedom using its information about pricing and quoting methodology and using Freedom's advertising material on its website. It follows that benefit has passed to Xuben. I accept Xuben has benefited from Torya's interference with Ms Jian's employment agreement. I accept also that it is likely Mrs Liu has taken steps to distance Torya from the consequences of those actions. The accounting documents provided by the third-party to the Authority show in and around early March 2022 Mrs Liu effectively shut down Torya and transferred its assets to Xuben a business which continues to sell furniture in the New Zealand market.

[61] Xuben was not incorporated until after Ms Jian's employment had ended. It was not party to the original injunction proceedings and while it has been found to have benefited from Torya's actions that does not in law make it liable for those actions. The factual findings necessary to tie Xuben to the actions of Torya cannot be made. In these circumstances the penalty sought cannot be ordered.

Outcome

[62] Within 21 days Yiquan Noel Jian she is to pay Freedom Trades Limited:

- (i) legal fees incurred in respect of the March 2022 injunction proceedings;
and
- (ii) a penalty of \$5,000.

Costs

[63] Costs are reserved. The parties are encouraged to resolve any issue of costs between themselves. If the parties are unable to resolve costs, and an Authority determination on costs is needed, Freedom may lodge, and then should serve, a memorandum on costs within 21 days of the date of this determination. From the date of service of that memorandum Ms Jian and Xuben will then have 21 days to lodge any reply memorandum. Further memoranda may be filed with leave.

[64] On request by either party, an extension of time for the parties to continue to negotiate costs between themselves may be granted. 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.

Marija Urlich
Member of the Employment Relations Authority