

**IN THE EMPLOYMENT RELATIONS AUTHORITY  
AUCKLAND**

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

[2022] NZERA 503  
3173683

BETWEEN                      GANG CHEN  
   Applicant  
  
AND                                CHULONGJI NZ LIMITED  
   Respondent

Member of Authority:        Peter Fuiava  
  
Representatives:              David Kim, advocate for the Applicant  
   Martin Lyttelton, advocate for the Respondent  
  
Investigation Meeting:        On the papers  
  
Submissions received:        5 September 2022 from Applicant  
   13 September 2022 from Respondent  
  
Determination:                4 October 2022

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**PRELIMINARY DETERMINATION OF THE AUTHORITY**

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**Employment Relationship Problem**

[1]     Gang Chen lodged a statement of problem in the Authority in which he seeks wage arrears including public holiday pay and annual leave against his former employer Chulongji NZ Limited (Chulongji) which traded as a Chinese restaurant in Auckland. Mr Chen was employed as a chef from 11 June 2018 until 8 March 2020 when he resigned from his employment.

[2]     On 20 May 2022, Mr Chen's representative Mr Kim was provided with a copy of Mr Chen's individual employment agreement with Chulongji. After reviewing its contents, Mr Chen states that the clauses beside where he signed the agreement relating to the start date of his employment, his hours of work, and the provision relating to overtime have all been changed subsequent to Mr Chen's signing. It is alleged that the person involved in what are alleged to be breaches of employment standards is Dewei

Yang, a citizen of China who was Chulongji's company director at the time of Mr Chen's employment.

[3] Initially Mr Chen's statement of problem named Chulongji as the sole respondent. However, on 18 July 2022, Mr Kim lodged with the Authority an amended statement of problem which sought to join Xingtao Zheng who is current director of the company and Mr Yang as second and third respondents respectively. It appears that the amended statement of problem has been prompted by the fact that Chulongji is in the process of going into voluntary liquidation or is likely to be removed from the Companies Office register in the near future.

[4] However, before Mr Zheng and Mr Yang can be joined as respondents, natural justice requires that they be given an opportunity to provide further comment, which they have through Mr Lyttelton. The essential issue therefore is whether Mr Zheng and Mr Yang can be joined as respondents under s 221 of the Employment Relations Act 2000 (the Act) which relevantly states:

**221 Joinder, waiver, and extension of time**

In order to enable the court or the Authority, as the case may be, to more effectually 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; and
- ...

[5] For the reasons that follows, the Authority finds that only Mr Yang should be joined to the present proceedings as a second respondent.

**The Authority's investigation**

[6] On 1 September 2022, the Authority held a case management conference with the representatives during which the joinder issue was discussed. Timetabling directions for the filing of written submissions were made with which both Mr Kim and Mr Lyttelton have complied. It was further agreed that once submissions were lodged, the joinder issue would be determined on the papers.

[7] As permitted by s 174E of 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 submissions received.

### **Mr Kim's submissions**

[8] Mr Kim's submissions were silent concerning Mr Zheng's involvement (if any) and as such the Authority does not join him as a respondent. Moreover, he was not a company director or officer at the time of Mr Chen's employment. Mr Kim's submissions instead concentrated on Mr Yang and I pause here to record that in determining this preliminary issue, the Authority has proceeded on untested submissions and evidence which will be properly explored at the investigation meeting.

[9] Briefly stated, Mr Kim submits that Mr Yang asked Mr Chen to confirm some of the terms and conditions of his individual employment agreement by signing his name to various clauses relating to the start date of his employment, his work hours and provision for overtime. Mr Kim further submits that it was not until he himself was provided with a copy of Mr Chen's employment agreement in May 2022 did Mr Chen realise that the abovementioned provisions had either been varied or deleted altogether.

[10] It is asserted that Mr Yang deceived Mr Chen by getting him to sign his name besides the above terms and conditions which Mr Yang later changed without Mr Chen's knowledge or agreement. Mr Kim asserts that Mr Yang's breach was deliberate and conducted solely for maximising business profit in defiance of employment standards under the Minimum Wages Act 1983 (MWA) and the Holidays Act 2003 (HA).

### **Mr Lyttelton's submissions**

[11] Mr Lyttelton's submissions set out Chulongji's statement in reply to Mr Chen's statement of problem. It is not necessary to set these out in detail but to observe that Chulongji and Mr Yang deny Mr Chen's claims for alleged wage arrears, holiday pay, annual leave and for various penalties under the MWA, HA and the Act.

[12] It was further submitted that the changes to Mr Chen's employment agreement regarding the start date of his employment, his hours of work, and the removal of the clause regarding overtime were agreed to by Mr Chen as evidenced by his initials and

dates as recorded by Mr Chen himself. Moreover, it was asserted that Mr Yang had emailed a copy of the amended employment agreement to Mr Chen on 15 November 2019 which was well before Mr Chen's employment came to an end in March 2020. It has only been since May 2022, has Mr Chen raised a complaint about not being paid correctly.

[13] Mr Lyttelton advises that Mr Yang is willing to appear as a witness at any hearing to provide evidence in this case and that he understands why it would make sense for him to be joined as a second respondent to this case. This is because Chulongji will either be struck off from the Companies Office register or is put into liquidation. For this reason, Mr Lyttelton concedes that it is sensible for Mr Yang to be joined as a second respondent in the event that the company is unable to appear for the reasons given above.

### **Discussion**

[14] According to the Companies Office website, Mr Yang is currently not a director of Chulongji. He was appointed a director on 15 May 2017 and his directorship of the company ceased on 20 May 2020. However, even so, the period during which Mr Yang was Chulongji's director covers the entirety of Mr Chen's employment which was from June 2018 to March 2020. It is noted that Mr Zheng was appointed director on 20 November 2020, some eight months after Mr Chen's resignation.

[15] Mr Kim seeks to join Mr Yang to the proceedings pursuant to s 142W of the Act which relevantly states:

#### **142W Involvement in breaches**

- (1) In this Act, a person is **involved in a breach** if the breach is a breach of employment standards and the person—
  - (a) has aided, abetted, counselled, or procured the breach; or
  - ...
- (2) However, if the breach is a breach by an entity such as a company, partnership, limited partnership, or sole trader, a person who occupies a position in the entity may be treated as a person involved in the breach only if that person is an officer of the entity.
- (3) For the purposes of subsection (2), the following persons are to be treated as officers of an entity:
  - (a) a person occupying the position of a director of a company if the entity is a company;
  - ...

[16] While Mr Yang is no longer a company director of Chulongji he was at the material time of Mr Chen's employment, its sole company director. The purpose of s 142W of the Act is deterrence by holding not only corporate entities to account for breaches of employment standards but other persons involved in breaches as well. By increasing individual accountability, corporate compliance is also increased.

[17] Whether Mr Yang is a person involved in a breach of employment standards remains to be seen. This is the function of the investigation meeting to come. That being said, given the main plank of Mr Chen's claim allegedly involves Mr Yang changing an employment agreement without his knowledge or consent, it would be prudent to include Mr Yang as a second respondent until the facts can be established.

[18] Put differently, the assessment at this stage is not whether Mr Yang was a person involved as defined in s 142W of the Act. Rather it is whether there is a sufficient basis for him to be a party to this proceeding based on the allegation regarding s 142W.

### **Conclusion**

[19] Mr Lyttelton concedes that there is a case to answer but even if that sensible concession had not been made, I would still have found a sufficient basis for Mr Yang to be joined as a party here. For the reasons given above, under s 221(a) of the Act, the Authority orders that Dewei Yang be joined as a second respondent to this proceeding.

### **Costs**

[20] I consider this preliminary determination as being incidental to the substantive and a necessary preparatory step for it to progress to an investigation meeting. Costs associated with the preliminary determination should therefore lie where they fall.

Peter Fuiava  
Member of the Employment Relations Authority