

**IN THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH**

CA 121/10
5156771

BETWEEN	BOON CHWEE TAN Applicant
A N D	CHUNG WONG First Respondent
A N D	ASHA CO LIMITED Proposed Second Respondent

Member of Authority: Helen Doyle

Representatives: John Horan, for Applicant
Rob Davidson, for First Respondent
Rob Davidson, for Proposed Second Respondent

Investigation Meeting: 12 and 13 April 2010 at Christchurch

Submissions Received: 6 May 2010 from all parties

Determination: 14 May 2010

**DETERMINATION OF THE AUTHORITY
ON A PRELIMINARY ISSUE**

[1] During the second day of a two day investigation meeting that commenced on 12 April 2010 with respect to the above matter, I advised the parties that I proposed to join Asha Co Limited as a party and that I would, following the investigation meeting, issue a Minute to that effect.

[2] Mr Wong is a director of Asha Co Limited. His evidence at the investigation meeting was that from August 2003 the restaurant at which Ms Tan worked was owned and operated by Asha Co Limited and the employment of staff was from August 2003 undertaken through the company. In addition there were two

employment agreements dated 13 June 2006 and 25 January 2008 between Ms Tan and Asha Co Limited trading as Asha Restaurant.

[3] Mr Davidson indicated during the investigation meeting that he did not know whether he would be instructed by Asha Co Limited.

[4] On 15 April 2010 the Authority duly issued a Minute advising Asha Co Limited that under s.221 of the Employment Relations Act 2000 it proposed that the company be joined as a party to the above proceedings before the Authority. The Authority gave the basis for such a proposal in its Minute. That was so that the Authority could more effectively and efficiently dispose of the above matter before it according to the substantial merits and equities of the case without the delay and expense of separate proceedings.

[5] In terms of whether Asha Co Limited would be affected by any order made in the above matter, the Authority in its Minute concluded that it would be. It set out the reasons for that in its Minute being that there was a substantial claim against Mr Wong who is a director and shareholder of Asha Co Limited. Mr Wong's evidence was that Asha Co Limited employed Ms Tan for a substantial part of her employment which includes that for which she is claiming unpaid wages, holiday pay, statutory entitlements and a personal grievance.

[6] Asha Co Limited, Mr Horan and Mr Davidson were given until 6 May 2010 to make any submissions they wished with respect to the proposal of joinder.

[7] Submissions were duly received from Mr Horan and Mr Davidson on 6 May. Mr Davidson stated in an email accompanying his memorandum that he had now been instructed to act on behalf of Asha Co Limited in respect to this matter.

[8] Mr Horan made submissions that the proposal to join Asha Co Limited to the proceedings was pertinent to the action and he referred to various correspondence and the two employment agreements in 2006 and 2008 of which Ms Tan was a party. Mr Horan relies on some of his own correspondence with the Employment Relations Authority and Department of Labour in which he refers to the respondent as *Mr Chung Wong of Asha Restaurant Limited*.

[9] Mr Davidson in his submissions says that his client objects to the proposal on the grounds that *it is inherently unfair to the company*. He further submits that the

directors of Asha Co Limited are of the view that the Authority provided many opportunities for the applicant to join the company in the proceedings by bringing it to her attention that the company had employed her. Mr Davidson submits that when the Authority raised the issue in terms of Asha Co Limited Mr Horan strongly asserted that Ms Tan's cause of action was against Mr Wong.

[10] Mr Davidson makes other submissions about timing of the joining of the company in terms of the six year limitation for any action for recovery of money and also in terms of whether a personal grievance was raised with the company. I am of the view that these matters are more properly dealt with in final submissions if a direction is made to join Asha Co Limited.

Determination

[11] Both parties were quite clear that there was always going to be an issue as to the identity of Ms Tan's employer. The Authority raised this as an issue at an early stage. Mr Horan did have an opportunity to join Asha Co Limited to the proceedings but I am not of the view that should prevent joinder now being directed. The role of the Authority is to establish the facts and make a determination according to the substantial merits of the case, without regard to technicalities. The Authority is able, if it considers that a matter would be more effectively disposed of at any stage of a proceedings, of its own motion, direct parties to be joined.

[12] In this case the Authority was of the view during the investigation meeting, and remains of the view after carefully considering the submissions, that joinder of Asha Co Limited is necessary in this case to avoid the delay and expense of separate proceedings. This is in circumstances where Mr Wong who is both a party and a director of that company maintains that Ms Tan's employment for much of the material time relating to the claim was with Asha Co Limited.

[13] Ms Tan has made a substantial claim against Mr Wong for alleged salary shortfalls, holiday, public holiday and alternative day payments, interest and a personal grievance relating to the way in which the relationship ended. The total claim made is \$141,571.21.

[14] It was necessary for the Authority during the investigation meeting to hear evidence about the basis for Mr Wong's view that Asha Co Limited employed Ms Tan. The Authority also heard from Asha Co Limited's accountant in relation to

payment of wages, attendance to tax matters and other matters in relation to the trading of the restaurant.

[15] The Authority remains of the view that Asha Co Limited would be affected in the event that the Authority was to make findings that it was Ms Tan's employer.

[16] If Asha Co Limited is not joined to the proceedings at this stage then it is almost inevitable there would have to be separate proceedings against the company which would be expensive for all parties and there would also be delay.

[17] In conclusion, therefore, I direct that Asha Co Limited be joined to the proceeding between Boon Chwee Tan and Chung Wong as a second respondent. This is the proceeding in Authority file no.5156771.

[18] As I indicated to the parties, I now set out when final submissions are to be lodged:

- Mr Horan on behalf of the applicant has until 21 May 2010 to lodge and serve final submissions; and
- Mr Davidson on behalf of the first and second respondents has until 28 May 2010 to lodge and serve any submissions in reply;
- Mr Horan has one further week until 4 June 2010 to respond to those submissions if he so wishes.

I also note that Mr Davidson was to provide copies of records pertaining to Asha Co Limited and Ms Tan from the accountant. I do not seem to have received these.

Costs

[19] I reserve the issue of costs.

[20] Mr Davidson indicated that Asha Co Limited seeks full reimbursement of the costs in terms of the joinder proposal and the preparation of lodging of the submissions. In making this submission he refers to the applicant having opportunity to join the company at an earlier stage.

[21] Notwithstanding this, I am of the view that this is a preliminary matter and that in terms of costs they should be dealt with following the determination of the substantive matter.

Helen Doyle
Member of the Employment Relations Authority