

**IN THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH**

[2016] NZERA Christchurch 120
5595807

BETWEEN CHRISTOPHER DAVID
BARTHOLOMEUSZ
Applicant

A N D TRADEFOG GLOBAL CO
LIMITED
Respondent

AND TRADEFOG INTERNATIONAL
LIMITED
Proposed Second Respondent

Member of Authority: Helen Doyle

Representatives: Michael McDonald, Advocate for Applicant
Xueyuan Solomon Ye, Advocate for Respondent
Submissions for Respondent provided by David
Beard(Solicitor)

Investigation Meeting: 30 June 2016 at Christchurch

Submissions Received: 13 July 2016, from the Applicant
7 and 20 July 2016, from the Respondent

Date of Determination: 21 July 2016

**DETERMINATION OF THE AUTHORITY
ON JOINDER**

A I order that Tradefog International Limited be joined as second respondent to this proceeding.

[1] This is a determination to deal with an issue as to whether another company, Tradefog International Limited (TIL), should be joined to the matter before the Authority under s 221 of the Employment Relations Act 2000 (the Act) as a second respondent.

The background against which joinder application to be considered

[2] The applicant was offered a position of salesperson with TIL in a letter of offer dated 19 June 2015. He signed an individual employment agreement with that company on 19 June 2015.

[3] Xueyuan Solomon Ye is the sole director of TIL.

[4] The applicant's employment was terminated in reliance on a 90 day trial period by letter dated 17 September 2015 which was signed by Mr Ye. Mr Beard in submissions dated 20 July 2016 writes in bold at the top of page 11 that *nowhere on the letter of the termination does it contain the words Tradefog Global Co Ltd T/A Tradefog International Limited*. On the copy of the termination letter that I have on file it does provide at the top of the letter *Tradefog Global Co Ltd T/A Tradefog International Limited*.

[5] Mr Ye is also the sole director of the respondent, Tradefog Global Co Limited.

[6] On 5 October 2015, Mr McDonald raised a personal grievance with the respondent for the attention of Mr Ye. Mr Ye duly responded to that grievance letter in an email dated 26 October 2015 that he signed as managing director of the respondent trading as TIL.

[7] On 18 November 2015, the applicant lodged with the Authority his statement of problem naming the respondent.

[8] On or about 3 December 2015, Mr Ye lodged a statement in reply on behalf of the respondent. Nothing was said in the reply that the respondent was not the employer of the applicant.

[9] Neither party had attended mediation. On 4 December 2015 notes from the Authority Officer record a call from Mr Ye and his business adviser, Hans, with advice that they would attend the mediation.

[10] Both parties were referred to mediation by letter dated 7 December 2015. Relevant documents attached to the statement of problem and the statement in reply were also referred to the mediation service.

[11] On 26 February 2016, the Authority was advised that the matter did not resolve at mediation and the Authority duly held a telephone conference with the parties on 29 March 2016 where the issues were discussed with the parties and the matter set down for an investigation meeting on 30 June 2016. No mention was made at any time that the respondent was not the employer of the applicant.

[12] The Authority Officer on 29 March 2016 sent to both parties a copy of the notice of direction with the notice of investigation meeting and advised that if there were any queries she could be contacted. Statements of evidence for the investigation meeting were duly lodged by both parties and the matter proceeded to an investigation meeting on 30 June 2016. There was no mention in any of the statements of evidence that the respondent was not the employer of the applicant.

[13] At the investigation meeting Mr McDonald represented the applicant and Mr Ye appeared for the respondent. The Authority opened the meeting after introductions with a discussion about the issues that it was to consider and asked whether there were any other matters that the parties wished to discuss. There were no such matters raised by Mr McDonald or Mr Ye. The Authority proceeded with its investigation meeting.

[14] At the end of the meeting Mr McDonald, on behalf of the applicant, provided some submissions and the Authority gave Mr Ye an opportunity as he was without an advisor to provide written submissions within a few days of the end of the investigation meeting if he wished. There were no directions made and Mr Beard is incorrect in his submission that there were.

[15] On 7 July 2016 the Authority received closing submissions from Mr Beard on behalf of the respondent company and further submissions from Mr Ye's business adviser, Hans. Those submissions stated that the respondent did not employ the applicant and therefore the application must be dismissed with costs. Mr Beard correctly points out; the name of the employer in the employment agreement signed by both parties on or about 19 June 2015 is TIL.

[16] The Authority did not identify this prior to or during the investigation meeting. That is regretted, although sometimes the eye is not drawn to detail in matters that are not issues before the Authority.

[17] It is not an infrequent occurrence that a respondent is incorrectly named in proceedings before the Authority and when the statement in reply raises this as an issue the Authority addresses the matter. I am not aware of any situation where the respondent has attended mediation, a telephone conference and an investigation meeting and evidence has been given on behalf of the respondent of the circumstances in which the employment agreement was signed and the events leading to the dismissal without protest of any nature.

[18] Upon receiving submissions, I advised Mr Beard and Mr McDonald that I proposed joining TIL to the proceedings.

Determination

[19] Mr Beard has lodged quite extensive submissions opposing such a course of action which I have read carefully although I have not referred to all of the submissions in this determination. I am not required to under the Act. I have also considered the determinations and judgements referred to although I find they turn on their own facts. The facts of this matter are as already set out extremely unusual and consideration of joinder must be undertaken in light of them.

[20] The Authority under s 157 of the Act is an investigative body that has the role of resolving employment relationship problems according to the substantial merits of the case without regard to technicalities.

[21] As I see it there are only two reasons why Mr McDonald and Mr Ye did not alert the Authority to the issue that TIL was or may be the employer before Mr Beard did. The first is that there was a deliberate decision or strategy not to and the second was inadvertence and oversight. It does not matter particularly at this point which it was. Having got to this point the Authority needs clearly to turn its mind to how it will resolve the applicant's employment relationship problem according to its substantial merits.

[22] Section 221 of the Act provides as follows:

In order to enable the Court of 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;...

[23] Mr Beard submits that the Authority's proceedings in this matter have ended and I cannot therefore join TIL to the proceeding. With due respect to Mr Beard I do not consider the Authority proceeding is at an end, there is no substantive determination. The process is an investigative one and if the member does not consider the process is at an end then the simple answer is that it is not.

[24] Mr Beard submits that the proceedings are a nullity and for the Authority to join TIL would be an abuse of process. There has to be some reality about this matter. There is an issue I accept as to whether the correct employer was identified. Mr McDonald in light of the employment agreement may have erred and named the incorrect respondent.

[25] Balanced against that potentially serious error Mr Ye is the sole director of both the respondent and TIL. The respondent has never suggested at any time including by way of reply that it did not employ the applicant. The statement in the reply includes a statement¹ *that unless he [the applicant] signed the contract he could not be an employee of the Respondent.* The letter of termination was written on the letterhead of the respondent T/A TIL. The reply to the grievance being raised from Mr Ye had at its conclusion the name of the respondent again trading as TIL. The respondent participated fully in the claim against it.

[26] I turn then to the submission that I should simply dismiss this matter. The applicant will then bring new proceedings on the same facts. That could hardly be said to effectually dispose of the matter. It would result in waste of time and duplication of expense and the Authority has already heard evidence including from Mr Ye about the signing of the employment agreement and the justification of the dismissal.

[27] I agree with Mr Beard's submission the Authority should consider whether there has been a grievance raised with TIL within the statutory timeframe. The Authority will not join parties where it will not assist to effectually dispose of the matter

[28] Section 114(1) of the Act requires an employee wishing to raise a personal grievance to raise that with his or her employer within the period of 90 days. As to what would constitute a grievance being raised, s 114(2) provides that a grievance is

¹ Page 3 para 2 of the SIR

raised as soon as the employee has made, or has taken reasonable steps to make, the employer or a representative of the employer aware that the employee alleges a personal grievance that the employee wishes the employer to address.

[29] Mr Ye is sole director of both companies, and therefore a representative of TIL, indeed from the evidence I heard the only representative. The grievance although raised with the respondent was sent to Mr Ye and he responded to it.

[30] I am not satisfied therefore that whether or not the grievance was raised within the statutory time frame with TIL is a matter that would dissuade me from joinder of TIL.

[31] It is entirely appropriate I find that in order to more effectually dispose of this matter according to its substantial merits and equities that I direct Tradefog International Limited be joined to this proceeding for all of the above reasons.

[32] I therefore order Tradefog International Limited be joined to the matter as second respondent.

[33] An Authority Officer will arrange a telephone conference with representatives for both the applicant and respondent with the Authority to discuss whether there is any further evidence to be given by Tradefog International Limited before this matter is determined.

[34] Costs are reserved.

Helen Doyle
Member of the Employment Relations Authority