

Employees' obligation to safeguard employers' confidential information

June 20, 2019

In the recent case, *Hong Kong Exchanges and Clearing Limited v. Shi Huaifang* [2019] HKCFI 1212, the court was asked to continue an injunction obtained by an employer against a former employee to prevent him from disclosing the employer's confidential information.

The Hong Kong Exchanges and Clearing Limited (HKEC) had employed Mr. Shi, a PRC-qualified lawyer, via a qualified labor dispatching company called Beijing Foreign Enterprise Human Resources Services Company Limited (FESCO), for a fixed term of two years with the title of senior vice president, legal (grade B), to perform services in relation to a project HKEC was engaged in, involving the development of a reliable commodities exchange in the Qianhai-Hong Kong Modern Services Industry Cooperation Zone via a PRC JV entity called Qianhai Mercantile Exchange Co. Ltd. (QME). QME was 90.01 percent owned by HKEC and 9.99 percent owned by a subsidiary of a state enterprise in the PRC. The arrangement was that FESCO would employ Mr. Shi, and "dispatch" him to HKEC.

In addition to a letter of agreement which set out the terms of Mr. Shi's appointment, a separate non-disclosure agreement (NDA) was also signed by HKEC and Mr. Shi, given the highly confidential nature of the information Mr. Shi would receive, in order to perform his services in relation to the commodities exchange project.

Within a month of commencing work at the Beijing representative office of HKEC, Mr. Shi refused to sign a written employment agreement with FESCO, and sought to renegotiate his package, seeking a more senior title and an increase in his monthly salary. Some 11 months later, when negotiations failed, FESCO sought to terminate Mr. Shi's employment. Mr. Shi failed in two employment claims filed with the Shenzhen Labor Arbitration Commission and then appealed to the Qianhai court in a claim totaling ¥9 million, based on his assertion that he had been properly employed by QME. Undeterred, Mr. Shi lodged a third labor claim against QME in the PRC, which was stayed pending his further appeal of the Qianhai court decision.

In the meantime, Mr. Shi began to threaten to disclose to the Hong Kong media HKEC's confidential information. On HKEC's case, Mr. Shi had made extortionate demands to secure a settlement sum higher than that to which he would otherwise be entitled upon his termination by FESCO. Mr. Shi on the other hand accused QME of dishonest conduct in the PRC labor proceedings and threatened to take his grievances against QME and HKEC to the SFC, the financial secretary of Hong Kong, members of Legco and the media.

HKEC obtained an injunction to stop Mr. Shi from carrying out his threats of disclosure and the injunction order was continued by the court, finding that HKEC had raised a serious question to be tried in respect of its claims for breach of confidence against Mr. Shi in tort/equity, which was separate to any claim HKEC had against Mr. Shi based on the employment relationship, or arising from the letter of agreement and/or NDA, for which HKEC had also established a serious issue to be tried.

The use of employment intermediaries such as FESCO is common in the context of foreign-invested companies doing business in China. This decision highlights the importance, when structuring an employment arrangement through an

intermediary, of properly documenting the employment relationship through back-to-back contracts. In this case, Mr. Shi maintained that since he never signed a labor contract with FESCO, he was not employed by FESCO but by QME (even though both the PRC court and the HK court found to the contrary). Furthermore, the decision demonstrates that even in the absence of any contractual claim by an employer, a separate and independent claim may exist based on the tort of breach of confidence, giving rise to an obligation to maintain confidentiality of information a person is given during the course of performing a service, whether under a contract of employment or otherwise. In arrangements like these, notwithstanding that any employment contract may be signed with an intermediary, the ultimate employer may still bring claims in Hong Kong against an employee for breach of confidence.

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