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Can an Employee Have Two Jobs ?

Case summary

Mr Tian started his job in 2011. His employer's internal regulations clearly stated that (i) employees were not allowed to work for other companies without the Employer's prior written consent; and that (ii) if an employee was directly or indirectly employed by another company or organisation or provided services to another company or organisation without the Employer's prior written consent, then the Employer was entitled to unilaterally terminate the employment contract without compensation.

In April 2018, Mr. Tian set up a company ("Newco") without first informing his Employer. Mr Tian was the only shareholder of Newco and acted as executive director and legal representative. In addition, it turned out that Mr Tian had, on several occasions, used the professional email address provided by his Employer to pursue business opportunities, provide quotes and discuss business projects on behalf of Newco. He also entered into commercial agreements with his Employer, its suppliers and competitors on behalf of Newco.

The Employer set up a meeting with Mr Tian regarding Newco, which resulted in a written report being established and signed by Mr Tian. The Employer eventually decided to terminate Mr Tian's employment contract on the basis of a serious breach of its internal regulations as a result of Mr Tian engaging in a second professional activity that was not first approved by the Employer.

Mr Tian then claimed that he was not informed of the content of the interior regulations and that his dismissal was unjustified, and brought the matter before the competent labour law arbitration commission.

Judge's opinion

The judge noted that Mr Tian had signed a receipt confirming that he had received the internal regulations, and that, in addition, he had confirmed at the meeting that he had been informed of their content. Under these circumstances, the judge concluded that the internal regulations did apply to Mr Tian.

Furthermore, the written report of the meeting submitted by the Employer clearly showed that Mr Tian admitted that he had set up Newco and actively participated in its commercial activities without first obtaining his Employer's permission.

In conclusion, the judge declared valid the termination of Mr Tian's employment contract on the basis of a serious breach of the provisions of the internal regulations and therefore rejected all of Mr Tian's claims.

Our analysis

It is not rare for a part-time employee to work simultaneously for several employers, and this arrangement is legal. However, a more careful look needs to be taken at what happens when a full-time employee has a second job or a secondary business activity.

The term "second job" is very general and refers to both (i) an employee entering into a second employment contract with another employer in addition to the existing employment contract with the first employer, and to (ii) an employee carrying out professional activities without entering into a new employment contract, but rather working on his/her own behalf, as in Mr Tian's case, by setting up his/her own company, for example, or selling services or products online on WeChat, TMall, etc.

Generally, employers hesitate to allow their employees to have a second job, fearing that this new activity would have negative consequences on their performance and commitment and/or productivity at the company, given that they would not be able to devote all their working time to the company and would be less focused on their usual duties.

From a legal perspective, the law does not directly prevent full time employees from having a second job. However, article 39.4 of the employment contract law of China ("article 39.4") provides employers with the option of unilaterally, without notice and without compensation, terminating the employment contract of an employee who has entered into a second employment contract with another company if:

- (i) this second job has a significant impact on the employee's ability to carry out the duties assigned by the first employer;
or
- (ii) the employee refuses to remedy this situation after being expressly requested to do so by the employer.

Generally, it is often difficult for an employer to prove that one of its employees has a second employment contract. Even if it is able to prove that there is a second contractual relationship, in practice it is extremely difficult to show that the employee falls into the first category described above in (i), but much easier to show that the second case (ii) applies, as this option simply requires the employer to make an express request to its employee.

In most cases, however, employees who have a second job do not have a second employment contract. Generally, they set up their own companies (as in Mr Tian's case) or are involved in a company set up by family or friends, or they set up online stores selling products or providing services. Article 39.4 does not apply to these different cases. This is why, in order to be able to effectively counteract these relatively frequent arrangements, the only option available to employers is to insert specific provisions into their internal regulations that allow them to make disciplinary punishment or even terminate employment contracts due to the employee's fault should the latter have a second job. Please see our recommendations below.

You should however be very careful about how this clause is actually applied, as not all secondary jobs necessarily have a negative impact on the employer, and so the clause may not be held up by the competent judge in the event of a dispute with the employee.

For example, we advise you not to dismiss a full-time employee if:

- The employee has a second job in his/her spare time;
- The employee only very occasionally works at a second job;
- The employee is only a shareholder in another company, or simply a director or supervisor, and it is impossible to prove that he/she is actually involved in the company's commercial or industrial activities. On the other hand, if the employer is the general manager, then he/she is deemed to be in charge of the company's commercial and industrial activities and can therefore be punished or dismissed.

Lastly, it is important to note that according to the provisions of article 91 of the employment contract law of China, the new employer is jointly liable for the losses suffered by another company as a result of its recruitment of an employee whose employment contract with this other company is not terminated or expired.

Our recommendations

- **Avoid, as much as possible, hiring an employee who is still bound by another employment contract.** To this end, we recommend that (i) when recruiting, you systematically ask candidates to submit a certificate confirming the termination of contractual relations with their previous employer; and (ii), that you include the following clause into the employment contract: “The employee declares and acknowledges that he/she is not subject to any commitments that may prevent or restrict him/her from being engaged by the Company under the terms of the present employment contract, and that prior to this employment contract coming into effect, he/she has fulfilled all of his/her obligations towards his/her previous employer.”
- **Insert a specific clause into the internal regulations** that prevents employees from having a second job for the duration of their employment contract without first obtaining the employer’s written consent.

This clause must also provide the employer with the option to terminate the employment contract without notice and compensation in certain cases, such as when:

- The employee works at his second job during his/her working hours at the employer’s company; or
- The employee’s second job presents a conflict of interest with his/her job with the employer, is likely to result in the disclosure of the employer’s confidential information, or competes with the employer’s activities; or
- The employee works at his/her second job during sick leave, maternity leave, or during medical leave following a workplace accident, etc.

Lastly, we recommend that you ensure that the internal regulations are valid, meaning they are developed through a democratic procedure, then submitted to all employees, and that there is proof of them being received by all employees.

- **Collecting and keeping evidence:** all evidence showing that the employee had a second job is crucial in justifying a dismissal. Organising a surprise meeting like in Mr Tian’s case may be a good option, if it results in a signed report, or if the discussion is recorded.

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