SPC Guiding Case No. 190: Wang Shan v. Wind Information Co., Ltd. (Non-compete Dispute)

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Keywords

Civil / non-compete restriction / standard of review / business scope

Holding

When trying a non-compete restriction dispute, in reviewing whether a worker's self-operated business or new employing unit forms a competitive relationship with the original employer, the people's court should not determine it solely based on whether the lawfully registered business scopes overlap, but should also make a comprehensive determination by considering whether the actual business content, service recipients or product audience, corresponding markets, and other aspects overlap. Where a worker provides evidence proving that the actual business content, service recipients or product audience, corresponding markets, and other aspects of the self-operated business or new employing unit and the original employer are different, and claims that no competitive relationship exists, the people's court shall support the claim.

Basic Facts

Wang Shan entered Wind Information Co., Ltd. (hereinafter "Wind Company") on July 2, 2018. The parties entered into a labor contract for the period from July 2, 2018 to August 31, 2021, stipulating that Wang Shan would work in the position of intelligent data analysis, with a monthly base salary of RMB 4,500 and a post allowance of RMB 15,500, totaling RMB 20,000.

On July 23, 2019, Wang Shan and Wind Company entered into a Non-compete Restriction Agreement, stipulating the non-compete conduct, the non-compete restriction period, the non-compete compensation, and other contents. On July 27, 2020, Wang Shan filled out a Resignation Application Form, terminating his labor contract with Wind Company on the ground of personal reasons.

On August 5, 2020, Wind Company sent Wang Shan a Reminder Letter on Non-compete Restriction, stating: "...You (that is, Wang Shan) shall bear the non-compete obligation from the date of resignation, July 27, 2020, and shall not work or hold a position within the scope of non-compete enterprises. From this month, we will pay you non-compete compensation. Please, within 10 days of receiving the non-compete compensation, provide the labor contract and social insurance records signed with your new unit; if you are unemployed, please have your sub-district office or other state organ issue a certificate of your employment status. If you violate the non-compete obligation or other obligations, please make corrections within 10 days; if you continue to violate the non-compete agreement, the company has the right to again require you to bear liquidated damages in accordance with the Non-compete Restriction Agreement, with the liquidated damages standard being more than RMB 200,000, and you shall return in full the non-compete compensation paid by the company after your resignation..."

On October 12, 2020, Wind Company sent Wang Shan a Legal Affairs Letter, again requiring Wang Shan to perform the non-compete obligation.

It was further ascertained that Wind Company's business scope included: the development and sale of computer software and hardware, and the technical development, technical transfer, technical consultation, and technical services of computer professional technology fields and products.

Wang Shan joined Shanghai Bilibili Technology Co., Ltd. (hereinafter "Bilibili Company") on August 6, 2020. According to the business license, the company's business scope included: technical development, technical transfer, technical consultation, technical services, and the like in the fields of information technology, computer software and hardware, and network technology.

Wang Shan and Wind Company unanimously confirmed: Wang Shan's non-compete restriction period was from July 28, 2020 to July 27, 2022; Wind Company had paid Wang Shan non-compete compensation of RMB 6,796.92 for the period from July 28, 2020 to September 27, 2020.

On November 13, 2020, Wind Company applied for arbitration before the Labor and Personnel Dispute Arbitration Commission of Pudong New Area, Shanghai, requiring Wang Shan to: 1. perform the non-compete obligation in accordance with the Non-compete Restriction Agreement entered into between the parties; 2. return the non-compete compensation of RMB 6,796 paid in August and September 2020; and 3. pay non-compete liquidated damages of RMB 2 million. On February 25, 2021, the arbitration commission rendered an award: Wang Shan shall continue to perform the non-compete obligation in accordance with the Non-compete Restriction Agreement entered into between the parties; Wang Shan shall return to Wind Company the non-compete compensation of RMB 6,796 paid in August and September 2020; and Wang Shan shall pay Wind Company non-compete liquidated damages of RMB 2 million. Wang Shan, dissatisfied with the arbitral award, filed a lawsuit with the court.

Judgment

On June 29, 2021, the Pudong New Area People's Court of Shanghai rendered Civil Judgment (2021) Hu 0115 Min Chu No. 35993: first, Wang Shan and Wind Company shall continue to perform the non-compete obligation; second, Wang Shan shall return to Wind Company, within ten days from the date this judgment takes effect, the non-compete compensation of RMB 6,796 for the period from July 28, 2020 to September 27, 2020; and third, Wang Shan shall pay Wind Company, within ten days from the date this judgment takes effect, liquidated damages of RMB 240,000 for violating the non-compete restriction. Wang Shan, dissatisfied with the first-instance judgment, filed an appeal. On January 26, 2022, the Shanghai First Intermediate People's Court rendered Civil Judgment (2021) Hu 01 Min Zhong No. 12282: first, affirming item 1 of Civil Judgment (2021) Hu 0115 Min Chu No. 35993 of the Pudong New Area People's Court of Shanghai; second, revoking items 2 and 3 of Civil Judgment (2021) Hu 0115 Min Chu No. 35993 of the Pudong New Area People's Court of Shanghai; third, the appellant Wang Shan need not return to the appellee Wind Company the non-compete compensation of RMB 6,796 for the period from July 28, 2020 to September 27, 2020; and fourth, the appellant Wang Shan need not pay the appellee Wind Company liquidated damages of RMB 2 million for violating the non-compete restriction.

Reasoning

The court in its effective judgment held: On the question of whether Wang Shan violated the non-compete restriction agreement. The so-called non-compete restriction means that a worker bearing a confidentiality obligation to the original employer shall not, within the agreed period after resignation, produce, operate for himself, or produce or operate for others, products and business of the same kind that compete with the original employer, and shall not hold a position in an employing unit that has a competitive relationship with the original employer. The non-compete restriction system is designed to prevent a worker from using the original employer's trade secrets he has mastered to benefit himself or others, thereby seizing the original employer's market share and causing losses to the original employer. Therefore, the core consideration in determining whether a worker has violated the non-compete restriction agreement is to assess whether a competitive relationship is formed between the original employer and the unit where the worker operates for himself or is employed.

It should be noted that precisely because the non-compete restriction system, while protecting the employer's rights and interests, imposes certain restrictions on the worker's right to employment, when

reviewing whether a worker has violated the non-compete obligation, it is necessary to comprehensively and objectively review whether a competitive relationship is formed between the unit where the worker operates for himself or is employed and the original employer. On the one hand, considering that in practice there often exists the circumstance that an enterprise's registered business matters are inconsistent with its actual business matters, and on the other hand, considering that the business scope registration categories are broad categories classified by the industrial and commercial departments, the review of such a competitive relationship should not be confined to the business scope registered in the business license; otherwise, it may cause unfairness to either the worker or the employer. Therefore, in a specific case, it is also possible to review from multiple perspectives, such as whether the actual business content of the two enterprises overlaps, whether the service recipients or the audience of the products produced overlap, and whether the corresponding markets overlap, so as to restore the truth of the facts, thereby taking into account the interests of both the employer and the worker to achieve the final balance.

In this case, Wind Company's business scope was the development and sale of computer software and hardware, and the technical development, technical transfer, technical consultation, and technical services of computer professional technology fields and products. Bilibili Company's business scope included technical development, technical transfer, technical consultation, technical services, and the like in the fields of information technology, computer software and hardware, and network technology. Comparing the business scopes of the two companies, there was indeed a certain overlap. However, internet enterprises often include software and hardware development, technical consultation, technical transfer, and technical services in their business scopes when registering. If this alone were taken as the basis, it would obviously create a great obstacle to the re-employment of internet workers, especially software engineers, cause a great waste of social human resources, and also run counter to the legislative intent of the non-compete restriction system. Therefore, when determining whether a competitive relationship is formed, it is also necessary to make a comprehensive assessment in combination with the enterprises' actual business content and audience and other factors.

In this case, Wang Shan provided evidence that Wind Company, on its Wind financial mobile terminal, advertised that the Wind financial terminal was the choice of hundreds of thousands of financial professionals and the best production tool and platform for China's financial industry. Wind Company's official website also introduced: "Wind Company (hereinafter 'Wind') is a leading financial data, information, and software service enterprise in mainland China, in a leading position in the domestic financial information service industry, and is an indispensable and important partner of numerous securities companies, fund management companies, insurance companies, banks, investment companies, media, and other institutions. In the international market, Wind has likewise been favored by numerous qualified foreign institutional investors approved by the China Securities Regulatory Commission. In addition, well-known financial academic research institutions and authoritative regulatory institutions are likewise Wind's clients; authoritative Chinese and English media, research reports, and academic papers also often cite data provided by Wind..." It can be seen that Wind Company's current business model mainly provides financial information services, and its main audience is relevant financial institutions or financial academic research institutions. In contrast, Bilibili Company, as is well known, has as its main business a cultural community and video platform, that is, providing a network space for users to upload videos and communicate. Its audience is broader, and young people in particular favor it. Comparing the two, whether in terms of business model, corresponding market, or audience, there are significant differences. Even ordinary people can easily judge the difference between the two. Although Bilibili Company is also involved in gaming, music, film, and other fields, there is no evidence showing that it overlaps with the financial information services operated by Wind Company. Under this premise, Wind Company's claim that the two enterprises formed a competitive relationship solely on the ground that the registered business scopes of both parties overlapped had not completed its burden of proof. Moreover, the key restricted enterprises appended to the Non-compete Restriction Agreement by Wind Company were all in the financial information industry, which

was sufficient to show that Wind Company itself also considered that its main competitors should be financial information service enterprises. Therefore, the first-instance court's determination that Wang Shan's employment at Bilibili Company violated the Non-compete Restriction Agreement solely on the ground that the business scopes of Wind Company and Bilibili Company overlapped, and its consequent judgment that Wang Shan return the non-compete compensation and pay liquidated damages for violating the non-compete restriction, was somewhat inappropriate.

On the question of whether Wang Shan should continue to perform the non-compete restriction agreement. The non-compete restriction agreement entered into between Wang Shan and Wind Company contained no content violating the mandatory provisions of laws and regulations, and therefore the agreement was lawful and valid and binding on both parties. Since the agreement stipulated that the non-compete restriction period between the parties was from July 28, 2020 to July 27, 2022, it was still within the non-compete restriction period. Therefore, the first-instance court's judgment that the parties continue to perform the non-compete restriction agreement was not improper. Wang Shan's claim that there was no need to continue to perform the non-compete restriction agreement had no legal basis. It should be emphasized that, under the non-compete restriction agreement between the parties, Wang Shan should report his work situation to Wind Company on time for Wind Company to determine whether he had violated the non-compete restriction agreement. This case arose precisely because Wang Shan's failure to perform the reporting obligation caused Wind Company to develop reasonable suspicion. When performing the non-compete restriction agreement in the future, Wang Shan should strictly abide by the agreed obligations and perform the agreement in good faith.

Relevant Legal Provisions

Articles 23 and 24 of the Labor Contract Law of the People's Republic of China.

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