

**IN THE EMPLOYMENT RELATIONS AUTHORITY  
AUCKLAND**

**I TE RATONGA AHUMANA TAIMAHI  
TĀMAKI MAKĀURAU ROHE**

[2021] NZERA 352  
3066375

BETWEEN	BANANAWORKS COMMUNICATIONS LIMITED Applicant
AND	YUNGU (JAMES) SHI First Respondent
AND	ZICHENG (BRICK) ZHANG Second Respondent
AND	IM DISTRIBUTION LIMITED Third Respondent
AND	SHU WANG Fourth Respondent
AND	HONGMEI HU Fifth Respondent

Member of Authority:	Eleanor Robinson
Representatives:	Geoffrey Jenkin, counsel for the Applicant Jessie Lapthorne and Caitlin Sargison, counsel for the First and Second Respondents Mark Tan, Royal Reed and Dylan Pine, counsel for Third, Fourth & Fifth Respondents
Investigation Meeting:	1 and 2 July 2020, 16 December 2020, and 22 June 2021, at Auckland
Submissions [and further Information] Received:	15 and 29 June 2020, and 22 June 2021 from Applicant 15 and 29 June 2020 and 22 June 2021 from First and Second Respondents 16 and 29 June 2020 and 22 June 2021 from Third, Fourth and Sixth Respondents
Date of Determination:	10 August 2021

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**DETERMINATION OF THE AUTHORITY**

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### **Employment Relationship Problem**

[1] The Applicant, Bananaworks Communications Limited (BWC), claims that Mr Yungu Shi, First Respondent, and Mr Zicheng Zhang, Second Respondent, have breached their respective employment agreements and fundamentally the implied duty of fidelity entered into with BWC by:

- (a) Setting up the Third Respondent, IM Distribution Limited (IMD,) and in its name have engaged in direct and/or indirect competition with BWC during the course of their employment with BWC;
- (b) Alternatively, they have entered into employment agreements with IMD and have engaged as such in direct and indirect competition with BWC during the course of their employment with BWC;
- (c) During the course of their employment with BWC they have solicited business from existing clients of BWC on their own behalf, or alternatively, on behalf of the IMD, and they have used confidential client information in order to do so;
- (d) They solicited other employees of BWC to resign from BWC and join IMD;
- (e) They deleted a significant amount of data relating to their employment with BWC from their computers prior to leaving BWC.

[2] BWC claims that the Third Respondent, IMD, the Fourth Respondent, Ms Shu Wang, and the Fifth Respondent, Ms Hongmei Hu, have aided and abetted the breaches by Mr Shi and Mr Zhang.

[3] The First Respondent, Mr Shi, and the Second Respondent, Mr Zhang, deny the allegations by BWC and state that:

- (a) They did not set up IMD and accordingly the provisions of the employment agreements which purport to prohibit them from setting up a competing business for two years following the end of their employment with BWC do not apply;
- (b) Mr Shi and Mr Zhang did not enter into employment agreements with IMD during the course of their employment with BWC and accordingly they have not engaged in direct or indirect competition with BWC during the course of their employment with BWC;
- (c) Mr Shi and Mr Zhang's communications with clients of BWC during employment were intended to inform those clients that they were leaving and outlined the handover arrangements. Mr Shi and Mr Zhang denied that they used confidential client information to solicit clients of BWC on their own behalf or on behalf IMD;

- (d) Mr Shi and Mr Zhang admit that they have taken up employment with IMD following the termination of their employment with BWC but deny that they were prohibited from doing so;
- (e) Mr Shi and Mr Zhang deny they solicited other employees of BWC to join them at IMD; and
- (f) Mr Shi and Mr Zhang deny they deleted information relating to their employment at BWC prior to the termination of their employment.

[4] Mr Shi and Mr Zhang considered the restraint of trade provisions in their employment agreement to be unenforceable.

[5] The Third Respondent, IMD, denies that it aided or abetted any breaches of their employment agreements with BWC by Mr Shi and Mr Zhang.

[6] The Fourth Respondent, Ms Wang, and the Fifth Respondent, Ms Hu, deny that they personally aided and abetted any breaches of their employment agreements with BWC by Mr Shi and Mr Zhang.

### **Issues**

[7] The issues for determination are:

[8] **Did Mr Shi and Mr Wang:**

- Breach the express terms of the restraint of trade clauses in their Employment Agreements?
  - Breach their duty of fidelity and the terms of their Employment Agreements with BWC?
- **Did IMD and/or Ms Wang and/or Ms Hu aid and abet any breaches by Mr Shi and Mr Wang?**

### **Background Facts**

[9] BWC is a marketing communications agency which carries out advertising campaigns for businesses. Mr Kenneth Xiaoxuan Wang is the sole director of BWC which he said specialises in the targeting of Asian consumers both on-shore and off-shore, but mainly in China, and mainly by New Zealand based clients. He explained that BWC creates messaging to suit the clients' needs for the Asian market by tailoring and designing media plans which it then implements on the client's behalf.

*Mr Shi*

[10] Mr Shi was employed by the company as Account Manager and marketing consultant on 12 January 2015. He joined BWC as a part of an internship after he finished a post-graduate course of study and was appointed initially as an account manager which involved some operational work and translation of materials. He worked closely supervised by Mr Wang.

[11] Mr Shi said the first individual employment agreement with which he was provided by BWC contained confidentiality, conflicts of interest and restraint of trade clauses. The clauses stated:

**Confidentiality and No Disclosure**

As part of normal duties, the employee will obtain, or have access to confidential information, such as the Employer's clients/customers, projects, techniques, or any information concerning or related to the Employer and employer's interests (the information). Under no circumstances is any use to be made of this information except for purposes directly related to furthering the business objectives of the Employer, as provided within the Employee's job position description. This applies to any period of both during the course of and after the termination of the employment.

After the termination of the employment with the employer, the Employee shall not either use any of the information gained during the course of employment to compete with the Employer from his/her own business set up, or disclose the information to any other Employer who has conflict interests with the Employer. The Employee may be requested to sign an agreement for the assignment of inventions and covenant against disclosure.

**Other Employment and Conflicts of Interest**

The Employee shall not, for the duration of this agreement, set him/herself up or engage in private business or undertake other employment in direct or indirect competition with the Employer during the course of the employment with the Employer. However, the Employee may undertake other employment or engage in other activities so long as it is in his/her own time and does not conflict with the Employer's business interest.

**Restraint of Trade**

For a period of two months after termination of employment with the Employer, if the termination is initiated by the Employee, the Employee shall not take up in employment with a new Employer which is either directly or indirectly in competition with the Employer in New Zealand.

For a period of two years after termination of employment with the Employer, the Employee shall not set up a business which is either directly or indirectly in competition with the Employer in New Zealand.

[12] In Schedule 2 of the employment agreement Mr Shi's salary was stated as \$48,000.00 per annum.

[13] Mr Shi said he had read the employment agreement when he had signed it. He had noticed the restraint of trade clauses, but when he asked about them he had been told by Mr Wang that it was a standard format.

[14] He said he had been surprised to see the clauses in the BWC employment agreement because although he had been aware of them in China, they normally applied to employees in senior positions and came with a payment by way of compensation for being bound by the restraint. However, because he had wanted to obtain the job with BWC he had signed the agreement.

*Mr Zhang*

[15] Mr Zhang said that when he applied to BWC he had needed employment in order to obtain a twelve month work visa. He had been appointed a Business Developer, commencing work in 2015. He had been provided with a written employment agreement which contained the restraint clauses in the same format as those in the employment agreement provided to Mr Shi. At the time of signing the first employment agreement on 11 January 2016 Mr Zhang's salary had been \$48,000.00 per annum.

[16] Mr Zhang said he had not read the employment agreement or taken independent advice on it before signing it because of his need for a work visa.

[17] Subsequent employment agreements were issued to Mr Shi and Mr Zhang and they signed these on 4 April 2018 (the Employment Agreements).

[18] Mr Shi was subsequently appointed to the position of Account Director on or about 3 April 2018, however there was no salary increase at that time.

*Work Duties*

[19] Mr Shi and Mr Zhang said that they often worked in excess of their normal hours of work and that they were made to work in Mr Wang's other kumara chips business which was in the same building as BWC. In that position they were required to help wrap large palettes roughly two to three times a week and assist with food shows in Auckland by setting up a booth at the venue, transferring products to the venue and repacking everything after the food show had finished.

[20] The food shows often fell at weekends so they worked from Friday until Sunday. Mr Shi and Mr Zhang said they were not remunerated for the additional hours worked.

[21] Mr Wang confirmed that Mr Shi and Mr Zhang would work in his other business, on occasion assisting with some physical handling, however if work was required by any of his clients who were not BWC clients, Mr Shi and Mr Zhang would be reimbursed for their time by way of time in lieu.

*2017 Proposal*

[22] Mr Shi said that at the end of 2017 he and Mr Zhang proposed to Mr Wang that they take greater control over BWC. As part of the proposal they put to Mr Wang, Mr Wang would receive a guaranteed dividend at the end of each year but not be required to carry out any duties.

[23] Mr Wang said he was happy to agree to the concept proposed, but his view was that while Mr Shi could assume the position of internal CEO, he was too inexperienced to become a full CEO without training which he would provide.

[24] Mr Shi said the position of internal CEO was not radically different from what he had been doing. He continued to lead the team in BWC and to develop a good relationship with clients. The main difference was that he obtained the right to advise on the team members' salaries. He requested a salary increase for himself, Mr Zhang, and the other team members and that this was agreed to by Mr Wang. As a result his salary and that of Mr Zhang had increased to \$56,000.00 per year.

[25] Mr Shi was provided with an amendment to the Employment Agreement recognising the new salary and his title as Accounts Director which he and Mr Wang signed on 3 April 2018.

[26] Although Mr Wang said that he had agreed to a budget of \$20,000.00 for entertainment of clients, Mr Shi denied this had been the case, and said there had been a \$50.00 budget per client for entertainment purposes which equated to approximately \$1,500.00.

[27] Mr Shi said that Mr Wang did not provide the training he said Mr Shi needed before he could be allowed to assume the role of CEO.

*IMD Introduction*

[28] Mr Shi and Mr Zhang said that they met IMD principals, Miss Shu (Irene) Wang and Ms Hu (Michele) Hongmei, at a trade show organised by Douglas Pharmaceuticals Ltd (DPL) for companies which provided it with marketing support in May 2018. Ms Wang was the sole director and a shareholder and Ms Hu was a shareholder, of IMD, however was active in some aspects of IMD's operation.

[29] Ms Wang said that IMD had, since its inception in February 2018, provided distribution and marketing services in addition to brand marketing services.

[30] Ms Wang said that Mr Shi and Mr Zhang presented a business review on DPL at the trade show, and they had been impressed with the presentation and their skills as marketers.

[31] During the period December 2018 and February 2019 she and Ms Hu had held discussions with Mr Shi and Mr Zhang on the possibility of them joining IMD as shareholders on the basis that they recognised that they had client interests in common and they viewed them as suitable people to enhance IMD's capacity to provide marketing services.

[32] Miss Wang said she was unaware of any restraint of trade provisions in Mr Shi and Mr Zhang's employment contracts. Ms Hu agreed that she had not been aware of the restraint of trade provisions either. Moreover they had understood Mr Shi and Mr Zhang were junior marketers who worked as a small marketing agency and therefore did not anticipate that they would have been subject to restraint of trade provisions.

[33] Mr Shi said that he and Mr Zhang agreed to work with IMD provided that they could manage the business whilst Ms Wang and Ms Hu remained as shareholders.

[34] Miss Wang said that it was agreed in March 2019 that Mr Shi and Mr Zhang would join IMD as shareholders for a payment of \$11,127.76 each. She added them as shareholders on the Companies Office website on 1 March 2019. This was prior to receiving their payments for the shares which were paid on 26 April 2019 and 9 April 2019 respectively.

#### *Termination of employment with BWC*

[35] Miss Wang said that during their discussions with Mr Shi and Mr Zhang they had told her and Miss Hu that their employment with BWC would end prior to March 2019.

[36] Mr Wang said he had been overseas during early 2019 and on his return in February 2019 he was surprised to receive resignations in writing from Mr Shi and Mr Zhang dated 18 February 2019.

[37] He said that when Mr Shi had given him his resignation letter he (Mr Shi) had told him he would work out the notice and assured him that he would honour the terms of his Employment Agreement with BWC. Mr Wang said both he and Mr Zhang emphasised that they were resigning in order to join a distribution company, namely IMD, which they insisted was not in competition with BWC.

[38] Mr Wang said Mr Shi had offered to work beyond 18 March 2019 without pay for a New Zealand Trade and Enterprises (NZTE) project, the New Zealand Food Basket (NZFB), which assists more than a dozen well known New Zealand companies and brands to extend their products into China. He said Mr Shi agreed to continue to look after the accounts from his desktop and laptop until such time as Mr Wang was able to find staff to replace him and he had been happy to agree to the proposal.

[39] Mr Shi and Mr Zhang said they were presented with termination agreements on 18 March 2019 which Mr Wang asked them to sign (the Termination Agreements). The Termination Agreement presented to Mr Shi stated:

This is to confirm that (James) Yungu Shi applied for termination of his employment with Bananaworks Communications Limited (BWC) on 19th Feb 2019. BWC acknowledged and agreed to his application.

The last payable working day of Yungu Shi's employment with BWC is 18<sup>th</sup> March 2019 (the Termination Day).

Yungu Shi will abide by the clauses regarding termination, on and after the Termination day, as specified in his employment agreement with BWC signed by both parties.

Yungu Shi employment termination calculating sheet, including the last payment in a holiday payment with BWC is correct and complete.

[40] The Termination Agreement for Mr Zhang was identical and both were signed by them and Mr Wang.

[41] Mr Shi and Mr Zhang said that they felt that they had no alternative but to sign the Termination Agreements in order to receive their holiday pay and final pay.

[42] Mr Shi said he realised that the clause referring to: "will abide by the clauses regarding termination" in the Termination Agreement related to the restraint of trade clauses but he believed they were not enforceable.

[43] Mr Zhang said on his last day with BWC Mr Wang presented the Termination Agreement to him and said it was the last step before leaving.

[44] Mr Wang said that the final salary and holiday payments to Mr Shi and Mr Zhang were not dependent on them signing the Termination Agreements.

*Events prior to the termination date*

[45] Ms Lucy Ong, Accounts Director at BWC, said that shortly before their employment came to an end, she had heard Mr Shi and Mr Zhang talking about their intention to leave BWC and join IMD. They had told her they would be working in distribution and she had overheard them talking to some of the other employees in the staff meeting room, although she had not been present in the meeting room at the time of the conversation. She said she had the impression that all the employees would be leaving BWC together.

[46] Another employee of BWC said she also had overheard Mr Shi and Mr Zhang talking about their intention to leave BWC. She said they had been 'chatting' and during their conversation they

asked if she wanted to join them at IMD, but there had been no formal offer of employment made to her.

[47] Mr Shi and Mr Zhang agreed they had spoken to the other employees about their intention to resign and plan to join IMD, and said they wanted to inform the team members because they had worked together for some time and felt this was respectful. However they were not in a position to offer employment with IMD because they had not been engaged as employees with IMD themselves at that stage.

[48] Mr Wang said he had been informed by one of the BWC employees and by Ms Ong that Mr Shi had offered her and other BWC employees a job at IMD. In addition Ms Ong had told him that the weekend prior to 18 March 2019 she had gone to the BWC offices and had seen Mr Shi and Mr Zhang together at a computer and they had told her they had been deleting personal data from the BWC computers.

[49] After Mr Shi and Mr Zhang had left BWC, Mr Wang said that he carried out a forensic search of the computers allocated to them by BWC and discovered that all of Mr Shi's, and a large proportion of Mr Zhang's, work-related data files had been deleted.

#### *Employment at IMD*

[50] Mr Shi and Mr Zhang commenced employment with IMD on 19 March 2019. It had been agreed with IMD that they would be paid a salary of \$80,000.00 each.

[51] Ms Wang said she was unaware that Mr Shi and Mr Zhang had a restraint of trade clause in their Employment Agreements, nor did they inform her of such restraints. Moreover it did not occur to her that such would be the case given that Mr Shi and Mr Zhang were junior marketers who worked at a small marketing agency. This was because in her experience only employees in the top management of major marketing agencies would be subject to any such restraint.

[52] Ms Hu confirmed that this had been her understanding also.

[53] In or around April 2019 Ms Wang said that Mr Shi and Mr Zhang asked her and Ms Hu if the name of IMD could be changed to The Marketing Plus Limited (TMPL). Ms Wang did not agree to change the name of IMD but did agree that the trading name could be changed to TMPL.

[54] Ms Wang and Ms Hu said that after they had agreed to the name change to TMPL they entrusted IMD's provision of marketing services to them. They were aware that Mr Shi was taking active steps to obtain marketing clients for IMD, but as they did not micromanage him, they were unaware of the steps he was taking in that regard.

[55] Mr Shi drafted employment agreements for himself and Mr Zhang with a commencement date stated as being 18 March 2019. The employment agreement for Mr Shi stated that he was employed as the Managing Director of IMD Distribution Limited (trading name: The Marketing Plus Limited) and was unsigned.

[56] Mr Zhang's employment agreement stated that he was Strategy & Innovation Director, and was signed by him and Mr Shi on 17 March 2019. Mr Zhang said that he had pressed Mr Shi to sign the employment agreement because he was needing to renew his home loan.

[57] Ms Wang said that she and Ms Hu were unaware of the employment agreements drafted by Mr Shi until the commencement of the proceedings in the Authority. Mr Shi confirmed this was correct at the Investigation Meeting in July 2020.

[58] Ms Wang said that when she and Ms Hu had become aware of the Authority proceedings in July 2019 they extensively reviewed the IMD situation in respect of Mr Shi and Mr Zhang.

[59] Ms Wang said that she and Ms Hu were unaware of the communication between Mr Shi and NZFB, had not authorised it. When they had become aware, they acted promptly in informing NZFB that such communications were made without IMD's authorization and knowledge.

[60] Ms Wang said that she and Ms Hu were unaware of the communication between Mr Shi and Lewis Road Creamery Limited and had not authorised it. When they did become aware, they acted promptly in informing Lewis Road Creamery Limited that such communications were made without IMD's authorization and knowledge.

[61] In regard to DPL Ms Wang and Ms Hu said that IMD had an ongoing business relationship with DPL, and the latest agreement with DPL was dated 1 April 2018. Once notified of statements allegedly made by Mr Zhang to DPL, it acted promptly in advising DPL that incorrect statements had been made by Mr Zhang without its knowledge.

[62] Once made aware of the proceedings against Mr Shi and Mr Zhang by BWC, on 19 July 2019 IMD had emailed identified other identified clients of BWC, including Aotearoa Nutrients Limited, Asurequality Asia Pacific Limited, DPL, Hui Maori Collective Limited, Intenza NZ Limited, KJ Bas Limited, Parrs Products Limited, Prolife Foods Limited, CNS Laboratories NZ Limited, Comvita Limited, Ctomi Limited, Linden Leaves Limited, and Miss Currant (Oceanwin).

[63] Ms Wang said that marketing services were provided by TMPL to five of the companies: Asurequality Asia Pacific Limited, Intenza NZ Limited, KJ Bas Limited, Comvita Limited and NZTE and invoices issued to them for fees in the sum total of \$16,631.47.

[64] They had subsequently become aware of an email chain between Mr Shi and a client of IMD, Long Entertainment Company Limited. Included in the email chain was a draft agreement which required Long Entertainment Company Limited to make payment to MKTG Partner Limited (MKTG). The current sole director and shareholder of MKTG is Ms Jung Liu, Mr Shi's wife. Mr Zhang's wife, Ms Yemin Liu, was listed as a previous director and shareholder of MKTG. Ms Wang said the agreement had been made without her knowledge or authority.

[65] Mr Zhang said that MKTG had been set up when a friend who knew he was experiencing financial difficulties as a result of the proceedings in the Authority offered him some translation work.

[66] The employment of Mr Shi and Mr Wang at IMD was terminated in August 2019.

[67] Ms Wang said she further discovered in August 2019 after the termination of Mr Shi and Mr Zhang's employment at IMD that some 15,008 data files belonging to IMD had been deleted from its cloud-based server. The deleted files included information on IMD's clients and work in progress in relation to those clients. Ms Wang said the deletions had been made without her knowledge or authority.

[68] Mr Shi agreed during cross examination at the Investigation Meeting that he had deleted files entitled 'Clients and Projects' before finishing his employment at IMD without informing Ms Wang.

#### *Solicitation of Clients*

[69] Mr Wang said that Mr Shi and Mr Zhang solicited work from clients of BWC on their own behalf, or on behalf of IMD.

#### *NZTE*

[70] Mr Wang said NZTE which had set up NZFB, had been an important client for BWC. It had been allied to the e-commerce giant, Alibaba, and through the relationship BWC had been exposed to the exporters, several of whom had become important clients themselves.

[71] Mr Shi had been the main contact point for NZFB and had built up strong personal relations with the NZFB companies.

[72] Mr Wang said that on 2 April 2019 he had been accidentally forwarded emails between Mr Shi and Daniel Zou at NZFB dated 7 March 2019 which was during Mr Shi's notice period with BWC. The email from Mr Shi to Mr Zou stated:

As briefly discussed during the meeting today, I would like to explain my next move from 'Bananaworks' to "Marketing Plus".

#### **Background**

I am opening a new company called “The Marketing Plus Limited” and has already got into operation right now. Marketing Plus is evolved from the growing demands of exporting NZ consumer products we received in Bananaworks, with the inhouse team becomes strong enough, we decide to form the new company. So it can be treated as a team of Bananaworks expansion with full capacity other than a brand new company starting from nothing.

We have in-house designed, project manager, strategist, operation staff like copywriter, and a resource pool already standby. ....

### **Impact**

To make sure there won't be any negative effect on the current job, my offer to New Zealand Food Basket would be –

Website project shall be taken care of by Bananaworks ... I will be responsible for the outcome and Bananaworks team will work with me on it.

The other on-hand and future job of NZFB will be taken over by The Marketing Plus Limited if all parties agree. This will include current translation, future social media operation and other marketing support. Actually the team doing translation at the moment is from Marketing Plus.

The new Marketing Plus team for NZFB has the same capacity as most of key staff are from Bananaworks. My mobile contract remains the same and my new email address is – [james@themarketingplus.co.nz](mailto:james@themarketingplus.co.nz). I will use Bananaworks email and the new email in the same time during the transition.

[73] Mr Wang said he had been shocked by the email which he considered suggested that: (i) The Marketing Plus Limited was a project driven by BWC; (ii) Mr Shi was being joined by BWC's in-house team; and (iii) there was a direct solicitation for all future work.

[74] He had contacted NZFB and informed it that Mr Shi had left BWC.

[75] On or about the same time Mr Wang said he had been sent a chain of emails between Mr Shi and an employee of Lewis Road Creamery Ltd which was a company associated with NZFB. The employee was making enquiries regarding some work to be carried out on the Lewis Road Creamery Ltd's website. The email reply from Mr Shi was similar to that which had been sent to NZFB.

[76] Mr Wang said he subsequently discovered an email chain between Mr Shi and an employee of NZFB, and an employee from Future Cuisine, a new client of BWC. Mr Shi had said in an email dated 12 March 2019 to the Future Cuisine employee:

...The Bananaworks team I was in has moved to this new company called Marketing Plus. We are continue working on the NZFB project and happy to discuss other opportunities with you.

You can find the new contact details in my signature. ...

[77] In relation to the emails to NZFB and Lewis Road creamery Limited Mr Shi said that in hindsight the wording was not the best he could have done, but his intention had been to have the project completed smoothly. He had intended to provide his new email address for contact purposes, but his

BWC email address was also in the email and he wanted to convey that he still had a team to complete its project. He was to be the contact point but the BWC team would be doing the work.

[78] In regard to the email to Future Cuisine, Mr Shi said that was related to NZFB's work project.

[79] Mr Wang said it was after Mr Shi and Mr Zhang had left BWC that he caused a search to be made of Mr Shi's and Mr Zhang's computers from which it was ascertained that they had deleted work-related data from his computer.

[80] Mr Shi confirmed that he and Mr Zhang had deleted data from the BWC computers allocated to them, but said this were personal data, not work related.

[81] Mr Wang said that the emails to NZFB he had discovered dated 7 March 2019, to Lewis Road Creamery Ltd dated 14 March 2019, and to Future Cuisine dated 12 March 2019, were not on the computers of Mr Shi and Mr Zhang when he searched them.

[82] On 2 April 2019 Mr Wang had sent an email to Mr Shi in which he stated:

We have taken over all of the projects previously handled by you, including those projects for NZTE, New Zealand Food Basket, Douglas etc.

I appreciate your contributions made while employed at Bananaworks. As you are no longer employed at this company, please immediately stop contacting or communication with all the clients of Bananaworks.

[83] Mr Shi said that after he received the email dated 2 April 2019 from Mr Wang, he had not performed any work for NZTE or Lewis Road Creamery Limited.

[84] On 4 April 2019 solicitors engaged by BWC sent letters to Mr Shi and Mr Zhang, advising that in light of information that they were employed by IMD trading as TMPL and the fact that BWC had become aware of : "email correspondence which provides both false and misleading information in order to lure Bananaworks' customers to your new venture with IM Distribution" which it alleged had resulted in a decline of BWC's business volume.

[85] The letters requested that Mr Shi and Mr Zhang immediately desist and provide a list of BWC clients approached and a list of any BWC client who had given them work.

[86] Mr Shi and Mr Zhang both responded by denying each and every allegation in the cease and desist letters.

**Did Mr Shi and Mr Wang breach the express restraint terms of their Employment Agreements and are the restraint clause in those agreements reasonable and enforceable against them?**

[87] Both Mr Shi and Mr Zhang were provided with employment agreements which contained confidentiality and non-disclosure, conflict of interests and non-solicitation of clients, and restraint of trade clauses.

[88] At the time of entering into the clauses Mr Shi was employed as an accounts manager and marketing consultant. He had joined BWC straight after university and worked initially on an internship. Mr Zhang was engaged as a Business Developer, and required employment in order to obtain a twelvemonth work visa.

[89] Both Mr Shi and Mr Zhang were paid \$48,000.00 per annum. Apart from their duties in BWC, they also completed manual tasks in Mr Wang's kumara chips business. Restraint of trade clauses are not unusual in employment agreements when the employees operate at a senior level, however Mr Shi and Mr Zhang were not engaged nor employed at a senior level and had performed work of a manual nature in Mr Wang's other business.

[90] English was not their first language of either Mr Shi or Mr Zhang, however the Employment Agreements which they were written in English. Whilst Mr Wang's evidence was that he, Mr Shi and Mr Zhang all spoke Mandarin, no version of the Employment Agreements was provided to Mr Shi or Mr Zhang in that language.

[91] I consider that there was a significant imbalance in power at the time the Employment Agreements were entered into by the parties.

[92] The legal position is that covenants in restraint of trade are *prima facie* unenforceable but may be upheld if it is reasonable in the interests of the parties to the contract and with reference to the interests of the public. As stated by Judge Goddard in *Medic Corporation Ltd v Barrett and Ors* the rational for the approach is:

Covenants in restraint of trade, by their very nature, suppress competition and this is seen as potentially harmful to the public interest and as potentially unfair because at the time when such a provision is negotiated it is often the case that the party demanding the covenant is in a stronger bargaining position than the party on whom it is imposed. Therefore the law starts with an assumption that a covenant in restraint of trade is unenforceable unless the party seeking to enforce it can show that the covenant was reasonable with reference to the private interests of the parties concerned and the interests of the public at large.

[93] It is therefore incumbent given the significant imbalance of power at the time the Employment Agreements were entered into that BWC had a legitimate proprietary interest which the covenants were necessary to uphold rather than them being intended merely to suppress competition.

[94] The relevant part of the restraint of trade clause in Mr Shi and Mr Zhang's employment agreements states:

For a period of two months after termination of employment with the Employer, if the termination is initiated by the Employee, the Employee shall not take up an employment with a new employer which is directly or indirectly in competition with the Employer in New Zealand.

For a period of two years after termination of employment with the Employer, the Employee shall not set up a business which is either directly or indirectly in competition with the Employer in New Zealand.

[95] I consider that the wording of the clause points to an intention to restrict competition, Mr Wang confirmed when cross-examined that he was primarily concerned in limiting competition. In *Cooney v Welsh* the Court of Appeal quoted with approval a statement made by Lord Wilberforce in a judgment of the Privy Council:

The accepted proposition that an employer is not entitled to protection from mere competition by a former employee means that the employee is entitled to use to the full any personal skill or experience even if this has been acquired in the service of his employer.<sup>1</sup>

[96] It is also more easy to infer protection against competition if a number of employees are asked to sign the same covenant with the same scope and for the same period of time.<sup>2</sup> The clauses in the Employment Agreements provided to Mr Shi and Mr Wang were identical. It is an accepted proposition that employees are not entitled to protection from mere competition by an employee.<sup>3</sup> It is therefore necessary that something more than trying to protect from mere competition is required to uphold restraint of trade clauses.

*Is there a proprietary interest?*

[97] I find it significant that the nature of the work undertaken by BWC which was a marketing and communications company was on an intermittent rather than an ongoing basis from clients. BWC was engaged when the client had work which it required to be done, but there was no guarantee of work from one project to the next. Mr Wang's evidence was that only very few clients were on a retainer basis. Clients would often be dormant for a period of time, and make contact when they next required assistance on another project.

[98] In these circumstances it is difficult to ascertain a legitimate proprietary interest at the time the Employment Agreements were entered into, particularly given that Mr Shi and Mr Zhang were junior employees at the relevant time.

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<sup>1</sup> *Cooney v Welsh* [1993] 1 ERNZ 407, 409.

<sup>2</sup> *Candle v New Zealand Ltd v Thompson* (Employment Court, Wellington WC 54/98, 7 August 1998, Chief Judge Goddard.

<sup>3</sup> See n1 above.

[99] BWC claims it has a proprietary interest in Douglas Pharmaceuticals Limited (DPL).

[100] Mr Zhang said DPL was an account which he and Mr Shi secured for BWC. They had approached DPL in 2016 to discuss ideas for the Chinese market. They had presented a number of proposals to DPL and worked on a number of small jobs before one of their proposals was accepted in March 2018.

[101] Mr Zhang said he had become the key contact person for DPL in BWC.

[102] On 28 February 2019 Mr Zhang, who had been the main contact between BWC and Douglas Pharmaceuticals Limited (DPL), had emailed his contacts at DPL and provided them with contact details for Mr Wang and the BWC Key Accounts Manager. Mr Wang emailed the DPL contacts on 28 February 2019 stating:

As assured, our agency services to Douglas will be continued by a newly formed service team. And all the current and future projects will be taken care by this dedicated Bananaworks team.

[103] Mr Wang had subsequently met with Mr Zhao and Scott Sherriff from DPL on 2 April 2019, but was unable to secure work for BWC. Mr Sheriff had told Mr Wang: “whether we give you the work depends on your price as with any other projects”.

[104] I further note that IMD had a pre-existing relationship with DPL dating from April 2018 which had no connection with Mr Shi and Mr Zhang.

[105] I find in these circumstances in which DPL chose not to provide any work to BWC after Mr Shi had provided contact details for the key people in BWC and Mr Wang had met with Mr Zhao that the claim to a proprietary interest in DPL is not supported.

[106] In consideration of all the factors outlined in the preceding paragraphs, I am not persuaded that the restraint of trade clauses in Mr Shi and Mr Zhang’s Employment Agreements are valid or enforceable.

[107] I therefore turn to the issues of a breach of fidelity and/or the terms of the Employment Agreements.

**Has there been a breach of the terms of the Employment Agreements and the duty of fidelity by Mr Shi and Mr Zhang?**

[108] Once they enter into an employment relationship employers and employees owe each other certain duties and obligations. Some of these are express terms which are incorporated into the employment agreement, some are implied duties. Employees have an implied obligation to be honest

in their work-related activities and a statutory duty to act with good faith towards the employer and its business.

[109] The duty of good faith in s 4 of the Employment Relations Act 2000 requires employers and employees to deal with each other in good faith, and not to:<sup>4</sup> “*whether directly or indirectly, do anything ... to mislead or deceive each other*”.

*Did Mr Shi and Mr Zhang breach the terms of the Employment Agreements by setting up IMD?*

[110] IMD was set up by Ms Wang and Ms Hu in 1 February 2018. Mr Shi and Mr Zhang did not meet Ms Wang and Ms Hu until May 2018 at the trade show organised by DPL.

[111] I find that Mr Shi and Mr Zhang did not breach the terms of their Employment Agreements by setting up IMD.

*Did Mr Shi and Mr Zhang commit a breach by entering into shareholder agreements with IMD?*

[112] Mr Shi and Mr Zhang entered into discussions with Ms Wang and Ms Hu during the period December 2018 until February 2019 which cumulated in Mr Shi and Mr Zhang becoming shareholders in IMD. They were added as shareholders on the IMD website on 1 March 2019 although the monies for the shares were not provided until sometime later.

[113] I find that holding a shareholding in another company was not prohibited by the Employment Agreements and did not therefore constitute a breach.

*Did Mr Shi and Mr Zhang commit a breach by solicitation of each other and other employees?*

[114] The evidence of Ms Wang and Ms Hu was that they had met Mr Shi and Mr Zhang at a trade show in May 2017 and commenced discussions with them subsequently with a view to them joining IMD as shareholders. Following the discussions Mr Shi and Mr Zhang resigned from BWC.

[115] It is extremely probable that Mr Shi and Mr Zhang discussed their intention to resign from BWC and join IMD with each other, however there is no evidence that one solicited the other to do so. Mr Shi and Mr Zhang also resigned on the same day, however I do not find this to be evidence of solicitation of each other.

[116] Neither Mr Shi nor Mr Zhang informed Mr Wang of the intention of the other to resign from BWC and join IMD. I do not find a failure to inform an employer of another employee’s intention to

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<sup>4</sup> S.4(1)(a) &(b) Employment Relations Act 2000.

resign, or of their intended new employment, is a breach of fidelity nor of their respective employment Agreements. As stated in *Rooney Earthmoving Limited v McTague (Rooney)*:

As to the extent of that duty and the particular circumstances of this case, I am not persuaded that the law has reached a point that the duty includes disclosing either one's own or one's fellow employee's intention to simply leave and compete. To so hold would be to undermine the freedom of movement of employees and be contrary to the authorities which allow preparatory competitive steps to be taken, provided these are not in breach of the obligation not to compete or to damage the employer, whilst the employee is still under the duty of fidelity, trust and confidence.<sup>5</sup>

[117] The evidence of Ms Ong was that towards the end of their employment she had overheard a conversation between Mr Shi and Mr Zhang and some other BWC employees. Ms Ong was not present during the conversation, and no offer of employment with IMD was made to her personally.

[118] The BWC employee who also overheard the conversation said that there was an informal discussion and she was asked to join them at IMD by Mr Shi and Mr Zhang.

[119] I find that whilst Mr Shi and Mr Zhang, as agreed, told their colleagues that they were intending to leave BWC and to join IMD there is insufficient evidence that they did so prior to informing Mr Wang of their resignations. The evidence of Ms Ong infers that the discussion she overheard is likely to have occurred during the notice period.

[120] I also find no evidence that Mr Shi and Mr Wang solicited other employees of BWC to accept employment with IMD. In reaching this view I have taken into consideration the fact that at the time of the alleged conversation Mr Shi and Mr Zhang were minority shareholders of IMD. They were not employees nor did they hold managerial positions in IMD and had been given no authority to offer employment at IMD to BWC employees by Ms Wang, the majority shareholder.

[121] I do not find that Mr Shi and Mr Zhang committed a breach by solicitation of each other and other employees.

*Did Mr Shi and Mr Zhang commit a breach by deleting data from the BWC computers?*

[122] Work related data on company computers is the property of the employer. Mr Shi and Mr Zhang denied that they had deleted work-related data, however I find that their credibility in this respect is undermined by the evidence of Ms Wang and the confirmation of Mr Shi that he had also deleted data files belonging to IMD from its computers.

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<sup>5</sup> *Rooney Earthmoving Ltd v McTague & Ors* Chch 10/09, 24 August 2009 at [142].

[123] Moreover Mr Wang's evidence was that he had been sent copies of emails sent by Mr Shi to NZFB, to Lewis Road Creamery, and to Cuisine Limited, however when he searched for the originals on the BWC computer, he discovered that the originals had been deleted.

[124] I find that intentionally deleting work related data from the BWC computers by Mr Shi and by Mr Zhang was a breach of the implied duty of fidelity and of the duty to act in good faith implicit in the employment relationship.

*Did Mr Shi and Mr Zhang commit a breach by Solicitation of Clients?*

[125] Preparations for life after the ending of an employment relationship are not necessarily inconsistent with a duty of fidelity, but preparations to go into business in ways that would be contrary to the interests of the current employer are inconsistent with the duty<sup>6</sup>.

[126] In *Rooney Earthmoving Ltd v McTague* the defendants were found to have acted in breach of core employment obligations by acting in concert to secure clients for their new venture while still in employment.<sup>7</sup>

[127] Mr Shi offered to work for a NZTE project post-employment after his employment with BWC ended. Mr Wang had agreed to this proposal. The wording of the email sent by Mr Shi on 7 March 2019 to Mr Zou at NZFB clearly states that:

- a) Mr Shi was opening a new company, TMPL;
- b) It was to be treated as a team of BWC expansion
- c) That TMPL already had a full team available;
- d) On-hand and future jobs of NZTB would be taken over by TMPL rather than handled by BWC;
- e) TMPL was staffed by the same staff who were from BWC;
- f) The email address for Mr Shi was Mr Shi's TMPL email address.

[128] The 12 March 2019 email from Mr Shi to a contact at Future Cuisine also stated that the BWC team in which Mr Shi had worked had moved to TMPL and that he was happy to discuss other opportunities with Future Cuisine.

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<sup>6</sup> *Space Industries (1979) Ltd v. McKavanagh* [2000] 1 ERNZ 490, at p.503.

<sup>7</sup> *Rooney Earthmoving Ltd v. McTague* [2009] ERNZ 240.

[129] Mr Shi's evidence was that the emails were poorly worded, but even taking into account the fact that English was not Mr Shi's first language, I do not find this to explain the information provided, which viewed objectively was that the BWC team which had been handling the NZFB and the Future Cuisine projects would be employed at TMPL, and would not only complete existing projects but would be responsible for taking on any future projects.

[130] I find this to be a significant breach of the duty of fidelity.

[131] Mr Shi had agreed to work on the existing NZFB project at no cost to BWC, an offer which Mr Wang had accepted. By deleting the emails of 7 and 12 March 2019 I find Mr Shi had deceived Mr Wang as to his intentions of doing so to assist BWC. This was a breach of the duty of good faith.

[132] Mr Wang said that whilst at BWC Mr Zhang had complete autonomy in his work and DPL was a key client with whom he forged a good relationship.

[133] Mr Zhang said that after he joined IMD the Managing Director of DPL asked him to do more work for it, although he said this work was different in nature to the work he had carried out for DPL whilst employed at BWC.

[134] There is no evidence that Mr Zhang approached DPL during his employment at BWC to obtain future work for TMPL or IMD. In those circumstances, whilst Mr Zhang will have made the connection with the Managing Director at DPL through his work at BWC, there is no breach of his obligations of fidelity and good faith if the provision of marketing services by IMD to DPL was made at the instigation of DPL after he had ceased employment at BWC.

[135] Moreover whilst still employed at BWC Mr Zhang had provided Mr Wang with the wherewithal to continue the relationship with DPL he had established during his employment with BWC. I find that the fact that this was not successful cannot be attributed to Mr Zhang.

[136] Whilst working at IMD, as confirmed in a list provided by Mr Shi, Mr Shi and Mr Zhang provided marketing services via TMPL to AsureQuality Asia Pacific Limited, Intenza NZ Limited, K J Bas Limited, NZTE and Comvita Limited. These were companies with which BWC had a prior relationship, with whom Mr Shi and Mr Zhang had worked at BWC, and which became clients of IMD.

[137] Mr Shi's evidence was that Comvita Limited was never a client of BWC because an agreement was never reached. It was after May 2019 when a friend had joined Comvita Limited that Mr Shi had asked her to ascertain if work might be available.

[138] Mr Shi stated that he had not contacted Intenza Limited after he left BWC.

[139] It appears that AsureQuality Asia Pacific Limited and K J Bas Limited became clients of TMPL and IMD after Mr Shi and Mr Zhang became employees. There is no evidence that Mr Shi or Mr Zhang were approached by these businesses after they had joined IMD and therefore it is reasonable to conclude that Mr Shi and Mr Zhang used client information for these clients, obtained when employed at BWC, and used it at IMD for the benefit of IMD. I find this was a breach of fidelity and good faith.

[140] I determine that Mr Shi and Mr Zhang breached the duty of fidelity, and the duty of good faith which they owed to BWC by soliciting clients for IMD.

**Did IMD and/or Ms Wang and Ms Hu aid and abet Mr Shi and Mr Zhang to breach their Employment Agreements with BWC?**

[141] Section 134 (2) of the Employment Relations Act 2000 (the Act) is relevant to the issue of inciting, instigating, aiding and abetting:

**Section 134 Penalties for breach of employment agreement**

(2) Every person who incites, instigates, aids or abets any breach of an employment agreement is liable to a penalty imposed by the Authority.

[142] The wording of s134 (2) is generally accepted as clearly deriving from s 66 of the Crimes Act 1961. A leading commentary on employment law<sup>8</sup> states of s 134(2):

The concept of inciting, instigating, aiding and abetting has been interpreted extensively in cases turning on the liability of secondary parties in criminal law ... In Attorney-General's Reference (No 1 of 1975) [1975] QB 773, Lord Widgery CJ said that the words should be given their ordinary meaning, although their common use as synonyms has led to a tendency to construe the phrase as a whole as connoting every form of actual assistance or encouragement committed before or during the act of the principal (Martyn v Police [1967] NZLR 396, Larkins v Police [1987] 2 NZLR 282 (CA)).

...

The particular knowledge required to be proved against an alleged party to a breach of contract under subs (2) is that the defendant must have known of the contract and deliberately intended to interfere with it, although knowledge of the exact terms is not required; it is sufficient that the defendant "knew of the general contractual situation or practice in a particular field" (Credit Consultants Debt Services NZ Ltd v Wilson Employment Court, Wellington WC 12B/07, 1 May 29007, Judge Shaw)).<sup>9</sup>

<sup>8</sup> Andrew Gray (ed) *Mazengarb's Employment Law* (loose leaf ed, LexisNexis).

<sup>9</sup> Ibid at ERA134.9.

[143] In *Musa v Whanganui District Health Board*<sup>10</sup> the Employment Court observed that for a party to be liable under s 134(2), there must be a breach of an employment agreement by a primary breacher.

[144] If it is determined that a party to an action has incited, instigated, aided or abetted a breach of an employment agreement, a penalty may be awarded pursuant to s 135 of the Act.

[145] I have found that Mr Shi and Mr Zhang breached the implied duty of fidelity and the duty of good faith by deleting work related data from the BWC computer files.

[146] I have found that the restraint clauses were unenforceable, but even were that not the case, there is no evidence that IMD and /or Ms Wang or Ms Hu knew of the breach or acted in such a way as to encourage Mr Shi and Mr Zhang to commit the breach because they were not informed of the restraint clauses by Mr Shi or Mr Zhang. Nor did they make enquiry because it did not occur to them that there would be such clauses given Mr Shi and Mr Zhang's status as junior marketers.

[147] I have found that Mr Shi and Mr Zhang acted in breach of the implied duty of fidelity and of the duty of good faith by soliciting clients for TMPL, including NZFB, Lewis Road Creamery Limited and Future Cuisine.

[148] Ms Wang said that whilst she and Ms Hu were aware that Mr Shi was taking active steps to secure clients for IMD, they were unaware of the actual steps being taken because they did not manage Mr Shi, giving him a wide degree of autonomy.

[149] There is no evidence that IMD and/or Ms Wang and Ms Hu knew of the breach prior to the commencement of proceedings in the Authority, or acted in such a way as to encourage Mr Shi and Mr Zhang to commit the breach by solicitation of BWC clients NZFB, Lewis Road Creamery Ltd, Future Cuisine and/or any others.

[150] Indeed, once they became aware of the proceedings in the Authority in July 2019 they had instructed solicitors to notify Mr Shi and Mr Zhang to cease any representation that they were associated with BWC, and emailed not only NZFB, and Lewis Road Creamery Limited but also identified clients of BWC from a list provided by Mr Shi, stating that IMD trading as TMPL was not associated with or affiliated to BWC.

[151] In addition IMD terminated the employment relationship with Mr Shi and Mr Zhang in August 2019.

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<sup>10</sup> [2010] NZEmpC 120, (2010) 7 NZELR 710 at [66].

[152] In these circumstances, whilst Ms Wang and Ms Hu may have acted naively in failing to scrutinise the activities of Mr Shi and Mr Zhang, I find no evidence that they intended to interfere in the contractual obligations owed by Mr Shi and Mr Zhang to BWC, and once made aware of the Authority proceedings, they acted promptly by advising clients of IMD's position in not condoning any breach by Mr Shi or Mr Zhang and terminating the employment relationship.

[153] I determine that IMD and/or Ms Wang and Ms Hu did not aid and abet Mr Shi and Mr Zhang to breach their Employment Agreements with BWC.

### **Remedies**

[154] I have found that Mr Shi and Mr Zhang breached their employment agreements with BWC.

[155] Penalty awards against them are therefore appropriate in respect of the identified breaches and will be addressed as part of the investigation meeting set down on 22 September 2021 to address quantum.

[156] In regard to the claim of damages, I have determined that the restraint of trade clause in the Employment Agreements of Mr Shi and Mr Zhang was not enforceable.

[157] In respect of the breach of fidelity in respect of the clients NZTE, NZFB, Lewis Road Creamery Limited and Future Cuisine, the issue of any loss being experienced by BWC as a result of breach of fidelity by Mr Shi and Mr Zhang and the extent of that loss will need to be established as part of the investigation meeting on 22 September 2021.

[158] I note however that has been submitted on behalf of Mr Shi and Mr Zhang that NZTE, NZFB and Lewis Road Creamery Limited are retained clients of BWC and that others named as clients are either retained or were never clients of BWC. If that is the case, it is possible that the loss, if any, would be negligible.

[159] If the parties consider that a return to mediation might assist to resolve the outstanding issues, the Authority can facilitate that.

### **Costs**

[160] Costs are reserved.

**Eleanor Robinson**  
**Member of the Employment Relations Authority**