

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

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

[2021] NZERA 425
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 Laphorne and Caitlin Sargison, counsel for the First and Second Respondents
Investigation Meeting:	22 September 2021 by Zoom
Submissions and/or further evidence	20 and 22 September 2021 from the Applicant 22 September from the Respondent
Determination:	01 October 2021

SECOND DETERMINATION OF THE AUTHORITY

Employment Relationship Problem

[1] This determination addresses the quantum of any damages and penalties sought by the Applicant, Bananaworks Communications Limited (BWC), against the First Respondent, Mr Yungu Shi, and the Second Respondent, Mr Zicheng Zhang,

[2] Counsel for both parties have filed written submissions in respect of these issues which they presented orally in a Zoom investigation.

The Authority's investigation

[3] As permitted by s 174E of the Employment Relations Act 2000 (the Act) this determination has stated findings of fact and law, expressed conclusions on issues necessary to dispose of the matter and specified orders made. It has not recorded all evidence and submissions received.

Issues

[4] The issues requiring investigation are the quantum of any damages and penalties to be made payable by Mr Shi and/or Mr Zhang.

Relevant Facts

[5] In determination [2021] ERA 352 dated 10 August 2021 I found that:

- (i) Mr Shi and Mr Zhang had both breached their implied duties of fidelity and good faith by deleting work related data from BWC computers;¹
- (ii) Mr Shi had breached the implied duty of fidelity by sending emails to clients of BWC whilst still employed at BWC indicating that future work on the projects would be handled and completed by a team at his new employer which would also take responsibility for any future projects;²
- (iii) Mr Shi breached the duty of good faith he owed to BWC by his actions of offering to continue working on the existing New Zealand Food Basket (NZFB) project at no costs and to assist Mr Wang which was belied by his deliberate deleting of emails and deceitful;³
- (iv) Mr Shi and Mr Zhang had both breached their implied duties of fidelity and good faith by using client information obtained during their employment with BWC to solicit clients for their new employer;⁴

[6] BWC is now seeking damages and penalties in respect of these breaches.

¹ Determination ERA Auckland 352 at [122].

² Above n1 at [129].

³ Above n1 at [131].

⁴ Above at [139] and [140].

The Law in respect of damages and penalties

[7] Damages and penalties have different purposes. As stated in *Medic Corporation Ltd v Barrett (No 2)* the purpose of damages is not punitive but to: “compensate a plaintiff for the loss it has sustained”.⁵

[8] Penalties by contrast do have a punitive, in addition to a deterrent, purpose. The Authority has a discretion to impose penalties for a breach of an employment agreement pursuant to s 134 of the Act. Factors taken into consideration when determining whether or not a penalty should be awarded and in what sum, include the extent of the breach, the conduct of the wrong-doer, the effect on the victim, and the deterrence impact.

Should damages be awarded and if so, in what quantum?

[9] BWC is seeking a damages award in the total sum of \$3,170.95 based upon the value of the invoices rendered by Mr Shi and Mr Zhang operating as The Marketing Plus Limited (TMPL), a part of IM Distribution Limited (IMD), to AsureQuality Asia Pacific Limited and K J Bas. The invoices issued by TMPL during the period April – June 2019 are for a total amount of \$3,170.95, calculated as :

- a) Invoices No: 0014, 0015, 0041, 0055 and 0077 to AsureQuality Asia Pacific totalling the sum of \$2,514.30; and
- b) An invoice to K J Bas Limited in the sum of \$656.64.

[10] Ms Laphorne submits for the First and Second Respondents that there must be a causative link between the breach and the damage caused. In the circumstances of this case it is submitted that BWC has failed to show any legitimate loss it has incurred as a consequence of the First and Second Respondents’ breaches. No assessment has been made of the value of ‘diverted’ or solicited business.

[11] The Respondents submit that applying the test for causation set out in *EIL Brigade Road Ltd v Brown* none of the breaches give rise to a causative link to damages as there is no evidence of diverted or solicited business.⁶ The High Court set out the two parts of the test for causation in that case as:

[203] ... The first question is whether the plaintiff has proved in a sufficiently material way that the defendant’s breaches were a substantial factor in causing the plaintiff to lose the customers and their revenue?

⁵ *Medic Corporation Limited v Barrett (No 2)* [1992] 3 ERNZ 977 at [983].

⁶ *EIL Brigade Road Ltd v Brown* High Court, Christchurch, 5/8/2004, CIV-2001=409-000733.

[204] The second question, where the onus is firmly on the defendants, is to examine whether the defendants have shown that the plaintiff would have lost the customers anyway? This is a question of fact to be decided by inference and no speculation. ...

[12] It is accepted that the actions of the Respondents must have been causative of the Applicants loss. In this case BWC is seeking damages in respect of losses it submits it sustained in regard to two companies which had been clients and which became clients of IMD after the Respondents had left its employ.

[13] In *Medic Corporation* the Court stated in regard to the loss sustained:

It is for the plaintiff to prove, not for the defendants to disprove, that loss has been sustained that is not too remote to be taken into account and the extent of that loss, but only on a balance of probabilities and not beyond reasonable doubt. While the plaintiff must prove the extent of its losses, in some areas it will be neither necessary nor possible to do so with great precision and the Court must then do its best, upon the material presented, to make an assessment using its general knowledge of human and business affairs and common sense. Some kinds of conduct are by their nature likely to cause certain types of loss; so that if the conduct has taken place and the loss has been sustained, it is not a large step to conclude that the one has occasioned the other without any more specific or concrete evidence to that effect.⁷

[14] The invoice to K J Bas Limited and two of the invoices to AsureQuality Asia Pacific were raised in April 2019, that is within weeks of the First and Second Respondents commencing working for IMD. In that case I find that it is a small step to conclude that one of the two events occasioned the other i.e. the termination of the Respondents employment with BWC and commencement with IMD occasioned the speedy issuing of invoices to these two previous clients of BWC by IMD.

[15] In the case of the two other invoices issued by IMD to AsureQuality Asia Pacific in June and August 2019, it is possible that the initial work undertaken by IMD created a business relationship which encouraged AsureQuality Asia Pacific to approach IMD.

[16] However even if that were so, I find that the connection had been established arising from the circumstances which created the first batch of invoices, that is arising from the termination of the Respondents employment and the knowledge of this client which they had gained as a result of their employment at BWC.

[17] I determine that the loss suffered by BWC as a result of the First and Second Respondents employment at IMD is not too remote.

⁷ Above n 5 at [984].

[18] As stated in *Medic* damages are not a ‘windfall’ but are: “an award of a sum of money which will place the plaintiff back in the position in which it can be supposed that it would have been if the defendants had acted correctly towards it.”⁸

[19] I find that the amount claimed as damages by BWC are only those based upon the amounts invoiced to AsureQuality Asia Pacific and K J Bas Limited by Mr Shi after his employment at BWC had ended.

[20] I determine that BWC is entitled to an award of damages in the total sum of \$3, 170.95.

Should penalties be awarded and if so, in what quantum?

[21] As observed, the primary purpose of a penalty is to punish the wrongdoing and to act as a deterrent to further breaches by the relevant party and the deterrence of others with respect to obligations of good faith and fidelity.

[22] Section s.133A of the Act outlines the matters the Authority and Court must have regard to in determining the amount of penalty, these are:

- (a) The object stated in s.3; and
- (b) The nature and extent of the breach or involvement in breach; and
- (c) Whether the breach was intentional, inadvertent or negligent; and
- (d) The nature and extent of any loss or damage suffered by any person, or gains made or losses avoided by the person in breach or the person involved in the breach, because of the breach or involvement in the breach; and
- (e) Whether the person in breach or the person involved in the breach has paid an amount of compensation, reparation, or restitution, and has taken other steps to avoid or mitigate any actual or potential adverse effects of the breach; and
- (f) The circumstances in which the breach, or involvement in the breach, took place, including the vulnerability of the employee; and
- (g) Whether the person in breach or the person involved in the breach has previously been found by the Authority or the Court in proceedings under this Act, or any other enactment, to have engaged in any similar conduct.

⁸ Above n5 at [983].

[23] Mr Shi and Mr Zhang did not act in good faith. In *Tan v Yang & Zhang* it was noted that: “The maximum penalty of \$10,000 in the case of an individual must be reserved for the most serious cases.”⁹ I am not persuaded that this is a case in which the level of offending, though serious, is of the most serious type.

[24] In determination [2021] ERA 352 I found Mr Shi to have committed four breaches of his employment agreement with BWC in respect of the duties of fidelity and/or good faith. Mr Zhang was found to have committed two breaches of his employment agreement with BWC in respect of fidelity and good faith.

[25] The maximum penalty for each breach of the employment agreement by an individual is \$10,000.00 pursuant to s 135(2)(a) of the Act. This means that Mr Shi could be liable for a maximum penalty amount of \$40,000.00 and Mr Zhang for a maximum penalty amount of \$20,000.00.

[26] It is submitted by BWC that the breaches are very serious as each contain elements of dishonesty. The breaches were flagrant and the deletion of BWC’s work-related data was particularly despicable. BWC submits that penalties at the maximum level would be justified.

[27] Counsel for Mr Shi and Mr Zhang submits that Mr Zhang was not involved in the breach of the misleading communications to the four clients (NZFB, NZTE, Lewis Road Creamery Limited and Future Cuisine) which received communications from Mr Shi. Given that this was set out as being most serious in determination [2021] ERA 352, Mr Zhang should not be subject to any penalty award.

[28] In respect of Mr Shi, it is submitted that any penalties awarded should be at a low level.

[29] In considering this issue, I have regard to the fact that in addition to the s133A considerations, the Employment Court has given guidance on the factors to be taken into account when assessing penalties in *Borsboom and Preet PVT Limited*.¹⁰ I shall follow these steps when considering what penalties may be appropriate in this case.

The objects stated in s 3 of the Act

[30] The object stated in s 3 of the Act is: “to build productive employment relationships through the promotion of good faith ...” I find that Mr Shi and Mr Zhang failed to act in good faith when they deleted BWC’s work-related data and used BWC client data as a means to solicitation of clients. Mr Shi failed to act in good faith when he offered to work for BWC at

⁹ *Tan v Yang & Zhang* above n9 at [36].

¹⁰ *Borsboom v Preet PVT Limited* [2016] NZEmpC 143 .

no cost after his employment with it ended and sent emails to clients which were subsequently deleted.

The nature and extent of the breaches

[31] The nature of the breaches was serious, particularly the deletion of BWC's work related data and the misleading information in the emails sent to BWC clients, although I accept this latter breach relates only to Mr Shi.

Whether the breaches were intentional, inadvertent, or negligent

[32] I found that the restraint of trade clauses in Mr Shi and Mr Zhang's employment agreements with BWC were not valid or enforceable, however they were still required to act in accordance with the contractual duty of fidelity and the statutory duty of good faith.

[33] The acts of deleting work-related data and the sending of emails were deliberate acts and not committed inadvertently or negligently. I observe that Mr Zhang when presenting his notice to Mr Wang assured him he would honour the terms of his employment agreement but subsequently failed to do so. I find the breaches were intentional.

The nature and extent of any loss or damage suffered

[34] The loss of any client income has been addressed by the award of damages and is not excessive, and there is no evidence of loss to BWC's ongoing business as a result of the actions of the First and Second Respondents although I acknowledge the submission by BWC that it has been impossible to calculate the financial impact of the data deletion on its business.

[35] I do acknowledge that BWC has incurred legal costs in bringing this case as a means to protect its interests in addition to expending resources. Not all these costs will be recoverable.

Whether there has been any mitigation

[36] It is submitted for the First Respondent that the work he undertook to complete the client project which he did without payment for BWC benefitted BWC which was able to invoice for Mr Shi's time in completing the project.

The circumstances of the breach and any vulnerability

[37] The breaches were committed after Mr Shi and Mr Zhang decided to leave their employment at BWC. There is no aspersion cast on the actions of an employee in seeking alternative employment during their employment, unless in so doing he or she acts against the interests of the employer.

[38] The breaches committed by Mr Shi and Mr Zhang did act against the interests of BWC, and especially so in circumstances in which Mr Wang trusted them and so was vulnerable.

Previous conduct

[39] There is no evidence of relevant previous conduct.

Preet step 1: nature and number of the breaches

[40] This step relates to assessing whether or not it is appropriate to regard breaches of the same nature as one claim in order that they may be globalised in order to ensure that they are both reflective of the nature of the breach and set at a realistic level.

[41] In the circumstances of this case Mr Shi committed three breaches of the statutory duty of good faith by:

- i. deleting work related data from BWC computers;
- ii. offering to continue working on the existing New Zealand Food Basket (NZFB) project at no costs and to assist Mr Wang which was belied by his deliberate deleting of emails the deliberate deleting of emails; and
- iii. using client information obtained during his employment with BWC to solicit clients for their new employer.

[42] Mr Shi also committed two breaches of the duty of fidelity:

- i. by deleting work related data
- ii. by sending emails to clients of BWC whilst still employed at BWC indicating that future work on the projects would be handled and completed by a team at his new employer which would also take responsibility for any future projects.

[43] For globalisation purposes these breaches of a contractual and of a statutory duty can be regarded as two breaches. Based on this the starting point for quantification of penalties for Mr Shi is \$20,000.00.

[44] Mr Zhang committed two breaches of the statutory duty of good faith by:

- i. deleting work related data
- ii. using client information obtained during his employment with BWC to solicit clients for their new employer

[45] Mr Zhang also committed two breaches of the implied contractual duty of fidelity:

- i. by deleting work related data
- ii. by using client information obtained during his employment with BWC to solicit clients for his new employer.

[46] For globalisation purposes these breaches of contractual and statutory duty can also be regarded as two breaches. Based on this the starting point for quantification of penalties for Mr Zhang is \$20,000.00.

Preet Step 2: Severity of the breaches

[47] In accordance with this step I must also consider additional factors of culpability and deterrence. I note the following as relevant to this step:

- a) The breaches involved dishonesty and breach of trust;
- b) The breaches were intentional
- c) BWC has incurred the cost of resources in light of the steps taken to limit the damage caused by the breaches; and
- d) Deterrence

[48] I accept that Mr Zhang was not involved in the most serious breach involving communications to the named BWC clients and reduce the maximum amount pertaining to him by 35% to reflect this.

[49] I accept that there was some benefit to BWC from Mr Shi completing the work on the NZFB project and reduce the maximum by 15% to reflect this.

[50] There has been an award of damages against the First and Second Respondents.

[51] I also accept that the restraint of trade clauses were not held to be valid and that neither Mr Shi nor Mr Zhang were in receipt of legal advice during the events that form the basis of this determination.

[52] There is also a need for deterrence. Employees and employers should behave towards each other in a contractual duty of good faith and employees should behave in accordance with the statutory duty of fidelity. The imposition of a penalty for failures to do so act as a deterrent both against any future similar offending by them, and to others.

[53] Having considered the severity of the breaches and any mitigation by Mr Shi and Mr Zhang, the penalty assessment for Mr Shi is \$17,000.00 and for Mr Zhang is \$13,000.00.

Preet Step 3 – Ability and ability of the respondents to pay

[54] Whilst there is no specific evidence of the First and Second Respondent's ability to pay any penalty award I note that since this proceeding commenced the First and Second Respondents have left their employment with the Third Respondent due to a breakdown in their relationship, undoubtedly caused by this litigation which also involved the Third, Fourth and Fifth Respondents.

[55] Both Mr Shi and Mr Zhang had invested in IMD, the Third Respondent, by the purchase of shares in the approximate sum of \$11,000.00 each, which amounts they have lost.

[56] Due to the protracted nature of the proceedings which included the joining at a late stage of the Fourth and Fifth Respondents, they have incurred significant legal costs.

[57] I consider at this stage that a reduction of 30% each is appropriate.

[58] *Preet Step 4 - Proportionality*

[59] At this step I consider whether the final amount of any penalty is proportional to the breaches and with other penalty actions for similar breaches.

[60] I have considered two Authority determinations which addressed issues of a similar nature.¹¹ Having considered the penalties awarded in these cases, I reduce the penalties ordered by a further adjustment of 25% for Mr Zhang and 20% for Mr Shi.

[61] I therefore impose a penalty of \$6,825.00 against Mr Zhang and a penalty of \$9,520.00 against Mr Shi. The penalties are to be paid to BWC.

Orders

[62] Mr Shi and Mr Zhang are ordered on a joint and several basis to pay the sum of \$3,170.95 to BWC as damages within 28 days.

[63] Mr Zhang is ordered to pay the sum of \$6,825.00 to BWC by way of a penalty.

[64] Mr Shi is ordered to pay the sum of \$9,520.00 to BWC by way of a penalty.

Costs

[65] The parties have indicated that they wish to be heard on the issue of costs.

¹¹ Tradestaff Group Limited v Bailey and Motion Recruitment Limited [2019] NZERA 658; Spirax Saro Limited v Scott Hewitt [2021] NZERA 246.

[66] The Applicant may lodge, and then should serve, a memorandum on costs within 14 days of the date of issue of the written determination in this matter. From the date of service of that memorandum the Respondents would then have 14 days to lodge any reply memorandum. Costs will not be considered outside this timetable unless prior leave to do so is sought and granted.

[67] All submissions must include a breakdown of how and when the costs were incurred and be accompanied by supporting evidence.

[68] The parties could expect the Authority to determine costs, if asked to do so, on its usual notional daily rate unless particular circumstances or factors required an upward or downward adjustment of that tariff.¹²

Eleanor Robinson
Member of the Employment Relations Authority

¹² *PBO Ltd v Da Cruz* [2005] 1 ERNZ 808, 819-820 and *Fagotti v Acme & Co Limited* [2015] NZEmpC 135 at [106]-[108].