



New Zealand Employment Relations Authority Decisions

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Tres Marias Trading Limited v Maximo (Auckland) [2017] NZERA 18; [2017] NZERA Auckland 18 (20 January 2017)

Last Updated: 6 March 2017

IN THE EMPLOYMENT RELATIONS AUTHORITY AUCKLAND

[2017] NZERA Auckland 16
5638161
5638180

BETWEEN TRES MARIAS TRADING LIMITED

Applicant

AND ASHLEY MAXIMO First Respondent

CARL MENDOZA Second Respondent

Member of Authority: Eleanor Robinson

Representatives: Doug Cowan & Callum McLean, Counsel for Applicant

Douglas Mitchell, Counsel for Respondents Investigation Meeting: 29 & 30 November and 1 December 2016 at Auckland

Submissions received: 7 & 23 December 2016 from Applicant and from Respondent Determination: 20 January 2017

DETERMINATION OF THE AUTHORITY

Employment Relationship Problem

[1] The Applicant, Tres Marias Trading Limited (Tres Marias) is seeking a compliance order requiring the First Respondent, Mr Ashley Maximo, to comply with clause 6, Confidentiality, of the individual employment agreement which he signed on 30 March 2014 (AM Employment Agreement).

[2] Tres Marias is also seeking a compliance order requiring the Second Respondent, Mr Carl Mendoza, to comply with clause 7, Confidentiality and Non-Disclosure, and clause 8, Intellectual Property, of the individual employment agreement he signed on 1 March 2013 (CM Employment Agreement).

[3] The First and Second Respondents deny that they have breached clause 6 and clauses

7 & 8 respectively of their individual employment agreements.

Note

[4] At the Authority's investigation held on 25 October 2016 the witnesses answered questions on the witness statements they had provided and – under oath or affirmation – answered questions from me and the parties' representatives. The representatives have also submitted closing submissions on the facts and law.

[5] I have considered those submissions and the evidence, including relevant documents provided by the parties, but, as permitted by s.174 of the [Employment Relations Act 2000](#) (the Act) this determination has not recorded all the evidence and submissions received. Instead the determination has stated findings of fact and law, expressed a conclusion on the issue necessary to dispose of the matter, and specified orders made as a result.

Issues

[6] The issues for determination are whether or not:

- Mr Maximo has breached clause 6 of AM Employment Agreement , and Mr Mendoza clause 7, of CM Employment Agreement, not to disclose confidential information
- Mr Mendoza breached clause 8 of the CM Employment Agreement by failing to disclose intellectual property rights owned by Tres Marias which he discovered during the course of his employment with Tres Marias.

Background Facts

[7] Tres Marias imports goods and food products including snacks, canned food, sweets, desserts and dried fish from the Philippines (Filipino food products) into New Zealand. Mr Oscar Catoto and his wife, Ms Mercedes Catoto, are the owners and directors, Mr Catoto being the Chief Executive Officer of Tres Marias.

[8] Mr Maximo and Mr Mendoza, ex-employees of Tres Marias, are directors and shareholders of Infinity NZ 1821 Trading Limited (Infinity). Infinity imports and distributes Filipino food products and other Asian food products, trading under the name Maharlika Trading Limited (Maharlika).

Mr Ashley Maximo

[9] Mr Maximo is the nephew of Mr and Mrs Catoto. In June 2012 Mr Maximo, who at that time was living in the Philippines, discussed his coming to New Zealand with Mr Catoto with a view to studying, working and gaining residency. He had owned and operated businesses in the Philippines.

[10] He said Mr Catoto offered him work and he sold his Philippine-based tailoring company to Mr Catoto in order to fund his studies in New Zealand for a Diploma in Business Studies. He arrived in New Zealand on 11 September 2012 and started working at Tres Marias as soon as he arrived in accordance with a Student Visa which permitted him to work

20 hours per week.

[11] Mr Maximo confirmed that he worked in excess of the hours permitted on his Student Visa and lived rent-free at the home of Mr and Mrs Catoto, who also provided him with food and free use of facilities.

[12] During the period 11 September 2012 to 31 October 2013 his role at Tres Marias was that of a General Assistant with duties commensurate with that role. He was paid \$100.00 per week, but was not provided with a written employment agreement.

[13] Mr Maximo said that on 1 November 2013 he was offered and accepted a full-time position with Tres Marias as an Operations Analyst on an annual salary of \$40,000.00. In that position he worked long hours and his duties included:

- Gathering data, preparing reports and presentation in addition to providing analysis to resolve business-related issues;
- Evaluating business operations and recommending possible redesign processes;
- Developing projects, identifying resources and estimating operational cost;
- Establishing relations with clients and providing references by writing documentation, giving support and assistance;
- Developing project management and process improvement both for business organisation and human resource management; and
- Identifying system improvements and working with operations team to enact change.

[14] The individual employment agreement relating to the Operations Analyst position in which the details of duties were included was not signed by either Mr Maximo or Tres Marias. However during March 2014 Mr Maximo said Mr Catoto offered him a promotion to the position of Chief Operating Officer.

[15] He was provided with the AM Employment Agreement which had been signed by Mr Catoto and Mr Maximo on 30 March 2014. The AM Employment Agreement provided the following clauses:

1. Position: *Chief Operating Officer (COO)*

3. Work Schedule: *minimum of 40 hours per week*

5. Salary:

The Employee will receive \$55,000 annually, and be compensated for transportation and other business related expenses in the conduct of your duties and responsibilities.

6. Confidentiality:

You must not disclose any confidential information or knowledge which you may acquire or have acquired during your employment with Tres Marias Trading Ltd concerning the business affairs, trade secret, business opportunities, property, intellectual property, customers, clients or employees of the company.

The above restrictions apply both during employment and after termination for a period of 2 years. However, such restrictions shall not apply to confidential information, which may become publicly known without you breaching these.

....

Confidential information gained during the course of your employment must not be released to persons who could materially affect the Company's interest.

Sales Procedure:

...

You are authorised to change price to benefit the company position in the market at all times

. ...

12. Effective Date: *If you accept this offer, these arrangements will be effective from the **1st of April 2014.***

[16] Mr Catoto said that Mr Maximo had drafted the AM Employment Agreement to meet the requirements of Immigration New Zealand (NZ Immigration) relating to visa applications. He confirmed at the Investigation Meeting that the AM Employment Agreement contained fraudulent information in order to mislead the Immigration Authorities, and that although Mr Maximo was paid a salary of \$55,000.00 p.a. through the Tres Marias payroll system, from which PAYE was deducted, and he was required to remit \$380.00 of that remuneration in cash per week to Mr Catoto.

Mr Carl Mendoza

[17] Mr Carl Mendoza arrived in New Zealand in July 2011 in accordance with a Student Visa. On or about April 2012 when he was about to graduate he approached Tres Marias for employment via a minister at the Filipino church which Mr and Mrs Catoto attended.

[18] Prior to his employment at Tres Marias, Mr Mendoza said he had worked in the Philippines as an Information Technology Specialist. He had been employed in that capacity at Universal Robina Corporation (URC) for approximately 7 years.

[19] He was interviewed by Mr Catoto during April 2012, at which time Mr Catoto agreed to employ him at a salary of \$80.00 per week. He commenced working at Tres Marias in May 2012 in the position of merchandiser and Delivery Person, receiving a payment of

\$80.00 in cash each week.

[20] Mr Mendoza's Student Visa was due to expire in March 2013, and on or about February 2013 he asked Mr Catoto if Tres Marias would support his application for a Work Visa by offering him permanent employment. Mr Catoto agreed to do so and offered him the position of Database and Website Administrator.

[21] He was provided with the CM Employment Agreement which he signed on 1 March 2013, and which was signed by the General Manager for Tres Marias: "*... on behalf of Tres*

Marias Oscar Catoto as Employer"

[22] The CM Employment Agreement included the following clauses:

1. Position: *Database and Website Administrator*

4. Remuneration:

The Employee will receive \$22 per hour as salaries and wages as remuneration, but will be compensated for transportation and other related expenses in the conduct of his duties and responsibilities.

5 Hours of Work: *minimum of 40 hours per week*

7. Confidentiality and Non-Disclosure:

As part of your normal duties the Employee will obtain or have access to confidential information concerning the Employer and the Employer's customers. Under no circumstances is any use to be made of such information nor any disclosure of it to be made except for purposes directly relating to furthering the business objectives of the Employer.

8. Intellectual Property

The Employer acknowledges that any intellectual property rights owned by the employer at the Commencement Date or any intellectual property discovered by the Employer during the term of this agreement shall remain the absolute property of the employer. Furthermore the Employee shall disclose to the Employer any intellectual property which he discovers during the term of this agreement. For the purposes of this clause "intellectual property rights" means know how, trade secrets, technical information, and formulae.

Duties of the Employee

Job Title: Database and Website Administrator

The duties and responsibilities for this position include:

- 1. Planning, developing, configuring, maintaining and supporting the company's database system*
- 2. Ensure integrity, security, backup, reliability and performance of database system*
- 3. Set up and maintain hardware and software requirements to run database system*
- 4. Oversee set up and maintain hardware and software required to run websites and coordinate and maintain creation of content*

[23] Mr Catoto said that Mr Mendoza had drafted the CM Employment Agreement to meet the requirements of NZ Immigration. He confirmed at the Investigation Meeting that it contained fraudulent information in order to mislead the Immigration Authorities and that although it stated that Mr Mendoza was to be paid an hourly rate of \$22.00 per hour for a 40 hour week, he was required to remit \$230.00 per week in cash to Mr Catoto.

[24] Mr Oscar Catoto Jnr, son of Mr and Mrs Catoto, had been appointed to have day to day control of Tres Marias in 2012; however Ms Joy Catoto, the daughter of Mr and Mrs Catoto, said he was very young, did not have a strong interest in the business and struggled to have control of it. It was Mr Maximo and Mr Mendoza who were in fact managing the business.

Events post August 2015

[25] Joy Catoto commenced employment as General Manager of Tres Marais in October

2015. In August 2015 she met with Mr Maximo and Mr Mendoza to discuss her intention to join Tres Marias and to ask for their support. Mr Maximo and Mr Mendoza said they agreed to support her.

[26] Mr Mendoza said that Joy Catoto asked him to confirm his duties and responsibilities, and during October and November 2015 began to work alongside him, taking orders and being introduced to Tres Marias customers. Mr Mendoza said he showed Joy Catoto the Auckland accounts and tried to explain to her the full extent of his duties and responsibilities.

Mr Mendoza: proposed employment agreement

[27] Mr Mendoza said he had been excited in December 2015 when Mr Catoto and Joy Catoto told him he was to receive a new individual employment agreement as he had been requesting a salary increase. In early January 2016 Joy Catoto presented him with a proposed individual employment agreement.

[28] Mr Mendoza said he had been very upset when he read the proposed employment agreement which he said constituted a demotion in his current position from that of Database and Website Administrator to a Sales Consultant/Purchasing Coordinator, and a salary of

\$38,500.00 per annum which was a decrease in the amount of \$22.00 per hour (reflecting an annual salary of \$45,760 per annum in the CM Employment Agreement).

[29] Mr Mendoza said that he had been qualified to carry out the duties of the Database and Website Administrator as set out in the CM Employment Agreement, and had done so. He had not been aware that there had been any concern about the performance of his duties in that position.

[30] He had expected that the proposed employment agreement would also mean that he would be able to retain the salary as set out in the CM Employment Agreement without having to remit part of it in cash to Mr Catoto.

[31] The proposed employment agreement contained comprehensive and significantly extended clauses relating to non-competition and confidentiality to those contained in the CM Employment Agreement.

[32] Although clause 13.2 of the proposed employment agreement stated that the salary contained consideration for the restraint Joy Catoto confirmed at the Investigation Meeting that no consideration in respect of the proposed restraints had been provided to Mr Mendoza.

[33] Joy Catoto said that she did not accept that the salary amount stated in the proposed employment agreement represented a decrease on the basis that there would no longer be an expectation that Mr Mendoza would have to repay \$380.00 per week to Mr Catoto.

[34] Mr Mendoza said he had asked Joy Catoto why she was demoting him and she responded that upon signing the proposed employment agreement he would no longer be performing any IT duties and be employed in a purely sales role. He told her that he could not accept the proposed position offered, and explained that if he wanted to leave Tres Marias, it would be difficult for him to obtain a new job commensurate with his experience without a job with 'IT' in its title.

[35] Joy Catoto confirmed that Mr Maximo and Mr Mendoza had been unhappy about the proposed employment agreements.

[36] She said that although Mr Maximo had refused to sign it, Mr Mendoza had said he was happy to sign the proposed employment agreement. Mr Mendoza disagreed and said he

had refused to sign the proposed employment agreement despite her (Joy Catoto) repeated requests for him to do so.

Infinity

[37] Mr Mendoza continued to work at Tres Marias throughout January 2016 whilst considering his options. He had a conversation with Mr Maximo and told him he was considering setting up his own company. He said he would be registering a company and asked Mr Maximo if he wanted to be a director and shareholder. Mr Maximo had agreed to be a director and shareholder, but not to join the proposed company at that stage.

[38] Mr Mendoza registered Infinity on 22 January 2016, and he and Mr Maximo signed consents to be directors and shareholders on that date.

[39] Mr Mendoza said Joy Catoto continued to insist that he sign the proposed employment agreement, sending him a text message on 2 February 2016 stating: "*I won't be able to pay you think (sic) week unless I have received a employment agreement ...*".

[40] On 10 February 2016 Mr Mendoza said he decided to resign and sent a message to Mr Catoto via Facebook informing him that he had resigned because he could not agree to the terms of the position that had been offered. He also provided a letter of resignation via Mr Maximo which stated:

Dear Mr Catoto,

I hereby tender my resignation as I.T. Administrator/Sales & Data

Analyst effective February 10, 2016.

I would like to thank you for the opportunities I have had with this organisation. Unfortunately, I cannot sign the new contract that you have laid upon me and it seems that there's no room for improvement and personal/professional growth on my behalf on the said contract.

[41] Mr Mendoza said he returned all property belonging to Tres Marias upon termination.

Mr Maximo: proposed employment agreement

[42] Mr Maximo said that he had a meeting with Joy Catoto on 8 January 2016 in which she verbally asked for his resignation. He had been totally shocked that she was asking him

to resign, and declined to do so. He said that he had been happy working at Tres Marias and had no intention of leaving, but had intended to remain there until retirement.

[43] A few days later Joy Catoto presented him with a proposed employment agreement, which she had already signed. Mr Maximo said the proposed employment agreement was for the position of Warehouse Supervisor with a remuneration of \$40,000.00 gross per annum. He was very upset at the proposed employment agreement as it represented a total change of job and a significant demotion.

[44] Mr Maximo said he was devastated and could not see any future for him at Tres Marias. He refused to sign the proposed employment agreement.

[45] Shortly after this Mrs Catoto was leaving for a trip to the Philippines and also asked him for his resignation. She had told him that if Mr Mendoza was unhappy he could leave, and he (Mr Maximo) could do so also.

[46] The following day, Joy Catoto again had asked him to sign the proposed agreement. He again declined to do so and requested a three month notice period in order that he could find alternative accommodation, a vehicle and alternative employment.

[47] Joy Catoto said she had wanted to restructure Tres Marias and create more robust procedures. She explained that the previous salary of \$55,000 p.a. specified in the AM Employment Agreement was not the correct amount as Mr Maximo had been required to make cash payments from that salary to Mr Catoto and that the salary stated in the proposed Employment Agreement was the accurate salary.

[48] Mr Maximo said that during late February 2016 Mrs Catoto had returned from the Philippines. She had asked him why he was still at Tres Marias and told him that: "*Oscar does not want to see your face when he returns to New Zealand*", and that if he wanted to resign he should leave Tres Marias immediately and not wait until the end of the 3 month notice period.

[49] Mrs Catoto confirmed that she had asked Mr Maximo to resign and to leave Tres Marias immediately after she had discovered whilst she had been in the Philippines that he and Mr Mendoza had registered Infinity.

[50] Mr Maximo handed in his resignation to Tres Marias on 1 March 2016.

Intellectual Property

[51] Joy Catoto said that after Mr Mendoza left Tres Marias she had Fuji Xerox access Tres Marias's computer system. She was advised that Mr Mendoza would have access to all Tres Marais' emails as the administrator and have access over the domain and the Tres Marais website.

[52] She said that she did not have the login information as the administrator contact details were the personal telephone and email of Mr Mendoza, and without the login information, she could not access the server/domain or the website.

[53] As a result, Tres Marais had engaged Fuji Xerox to redevelop a new email network for Tres Marais and to install the Fuji Xerox OptimiseIT software, the cost of which was approximately \$5,008.25.

[54] Ms Catoto had also commissioned a new website to be created since she did not have access to the previous website at a cost of \$2,195.00.

[55] Mr Mendoza said that he had returned all information belonging to Tres Marias on the work desktop computer which he used in the Tres Marias warehouse. He denied having retained any passwords, confidential information or data belonging to Tres Marias after he had left his employment.

[56] Mr Mendoza said that he had provided the password to Joy Catoto whilst still employed at Tres Marais because she had wanted to revamp the Tres Marais computer system, and moreover Mr Catoto had access to the Tres Marais computer system as his email was also a power user.

[57] Ms Catoto said she had asked Mr Reyes to contact Mr Mendoza after he had left Tres Marais and ask for the computer system access information. Mr Reyes said he had called Mr Mendoza on three occasions; however Mr Mendoza had not returned his calls. He had not left a message on any occasion, nor had he emailed Mr Mendoza.

[58] Mr Mendoza said that he was aware that Mr Reyes, who had been a work colleague at Tres Marais but not his supervisor, had called him, however Mr Reyes had not left a message and he did not know why he had called him.

[59] Ms Catoto said she had also asked Mr Maximo, who was still employed by Tres Marais at the time, to contact Mr Mendoza, however he had not done so. Mr Maximo denied that Ms Catoto had asked him to contact Mr Mendoza in connection with the computer system access information.

Subsequent contact with wholesalers, distributors and suppliers

[60] Joy Catoto alleged that following the termination of their employment Mr Mendoza and Mr Maximo had approached a number of Tres Marias wholesalers, distributors and suppliers.

[61] Mr Loh owns and operates Big T Asian Supermarket (Big T) which was Tres Marias largest customer. Joy Catoto said she had become aware while Mr Mendoza and Mr Maximo were both still working at Tres Marias that Mr Loh and Big T were not being charged freight for their orders. Big T was also being given preferential rates on products. In some cases, she said that Tres Marias was losing money by providing products to Mr Loh and Big T.

[62] She did not understand why Mr Mendoza and Mr Maximo had given Mr Loh and Big T preferential treatment and she would not have approved of such treatment had she been aware of it. Her view now was that Mr Mendoza and Mr Maximo had been offering Big T and Mr Loh preferential treatment with a view to obtaining Big T's business when they set up Infinity.

[63] Mr Maximo said he was aware that when he was working with Tres Marias that Mr Catoto and Mr Loh had an understanding between them that Tres Marias would be Big T's sole supplier.

[64] Mr Maximo said that Big T needed volume and he had authorised special discounts to Big T, but only with Mr Catoto's consent. He denied that he had given preferential treatment to Big T during his employment other than as authorised by Mr Catoto and pointed out that there would be no benefit for him in doing so as prior to the events in January 2016, he had had no intention of leaving his employment at Tres Marias.

[65] He had been aware that the relationship between Mr Catoto and Mr Loh had become strained when Ms Catoto had started implementing new operating procedures in late 2015.

[66] During December 2015, Mr Loh had told him he was concerned about the new processes at Tres Marias and Mr Maximo promised to forward his concerns to Mr Catoto and Joy Catoto which he had done.

[67] Mr Maximo said that Mr Loh had also asked if he would work for him, however, he declined as he wanted to continue working at Tres Marias. Nothing further was said about Mr Loh's job offer after that.

[68] After he had ceased working at Tres Marias, Mr Maximo said it was Mr Loh who had contacted him by telephone and asked what he was doing since leaving his employment at Tres Marias and Mr Maximo told him he had set up Maharlika in conjunction with Mr Mendoza and its business was importing Filipino and Asian food products.

[69] Mr Loh had said that he would like to purchase some products from Maharlika. Mr Maximo said neither he nor Mr Mendoza suggested to Mr Loh that he should stop trading with Tres Marias.

[70] Mr Maximo said he did not discuss any confidential information about Tres Marias with Mr Loh. Contact details for Mr Loh and Big T were available from public sources such as its website and Facebook page and this was the information he used, not any information belonging to Tres Marias in his dealings with Mr Loh.

[71] Mr Mendoza explained that he had not had any contact with Mr Loh when he was at Tres Marias. He had become involved only after Mr Loh had contacted Mr Maximo after their resignations, and had spoken to them both during a telephone conference call. During the telephone conference, Mr Loh told them about the disagreement he had had with Tres Marias and said he wanted to use Maharlika for importing and distributing some of his products.

[72] Mr Mendoza said that initially Mr Loh was concerned that Tres Marias was not going to be able to provide him with the stock that he needed given their disagreement so he asked Mr Mendoza to obtain one container of stock directly from the Philippines to Christchurch. The value of that shipment was \$67,834.26.

[73] Following the initial shipment, he said that Maharlika did not provide much product to Big T and they concluded that Mr Loh must have been obtaining stock from other suppliers or even directly importing products himself. At the time of the Investigation Meeting, Maharlika was buying stock from Big T rather than supplying stock to Big T.

[74] Mr Mendoza confirmed that he had posted a comment on Big T's Facebook site on

27 May 2016. He said Mr Loh had asked him to do so and explained that Big T's Facebook page is open to the public and that he had not breached any confidentiality clauses in his employment agreement by making the Facebook post.

Mr Loh's evidence

[75] Mr Loh said he had been doing business with Mr Catoto for several years prior to

Mr Catoto employing Mr Maximo. He said Big T's average monthly order of product with

Tres Marias was over \$100,000.00 depending upon Tres Marias stock levels and what they could supply.

[76] He had believed Big T to be Tres Marias principle customer and the sole distributor of its products in Christchurch and in the South Island. He said he and Mr Catoto had agreed that the freight charges would be borne by Tres Marias. They had

further agreed that Big T would not pay for any product until after it had been received from Tres Marias and he had checked it off against an invoice and ensured all items were correct. He would then check that the pricing was correct and then pay Tres Marias. He said he always paid the price that had been agreed on before the due date.

[77] If the pricing was higher than he had expected it should be or higher than what his customers expected, Mr Loh said he would negotiate with Mr Maximo for a better price so as to meet the market price. This was a process which had been followed for many years until Joy Catoto had wanted to change the arrangement during early 2016.

[78] He said Joy Catoto had asked him to pay for the stock before the products arrived which he found to be an unreasonable request and as if she no longer trusted him. Joy Catoto had also decided that she wanted Big T to cover freight charges about which he had been most unhappy.

[79] Mr Loh said his concern increased and he had asked Joy Catoto to confirm if Big T was the sole distributor of Tres Marias products in the South Island because he had become aware that she had been contacting Big T's customers. He also asked Joy Catoto if Big T could sell Tres Marias products to mainstream supermarkets in the South Island, however Joy Catoto did not respond to his request.

[80] Subsequently, he said Joy Catoto asked him to concentrate his operation in Christchurch which would limit the growth of Big T's business. He discovered that Joy Catoto was contacting Big T's customers in order to do business with them directly and he said he began to lose trust in Tres Marias.

[81] Mr Loh had telephoned Mr Catoto and told him that Joy Catoto's new payment processes and her contacting Big T's customers was not in line with their long-standing agreement. Mr Catoto told him he would discuss it and resolve it with Joy Catoto.

[82] In March 2016, Mr Loh discovered that Mr Maximo had left his employment at Tres Marias. He said he had been disappointed because he enjoyed dealing with Mr Maximo who was fast and efficient in dealing with him, sorting out his issues, and sent the Big T products on time.

[83] He said that after Mr Maximo had left, he repeatedly tried to contact Tres Marias in order to pay his bills, but was never told how much he owed. He also said that Joy Catoto wanted him to make partial payments in advance in breach of the previous long-standing arrangement.

[84] Mr Loh said he felt his business relationship with Tres Marias was deteriorating.

[85] He had telephoned Mr Maximo on his mobile number to see if he could resolve the invoicing problem but Mr Maximo had told him he had to deal with Mr Wally Reyes who was responsible for the Tres Marias invoicing following the termination of his employment.

[86] Mr Loh had asked Mr Maximo what he was doing following the termination of his employment, and he told him he had started up his own distribution company with Mr Mendoza. Mr Loh said this was the first time he had heard about Maharlika.

[87] Mr Loh said he had become concerned that Tres Marias was not able to provide the stock Big T required and was worried about his business because of the invoicing problem and delays and he was losing customers as he had no stocks to offer.

[88] As a result he had called Mr Maximo and asked him to arrange a shipment of an entire container of products from the Philippines to be sent directly to Christchurch. He had called Mr Catoto and complained about the way Joy Catoto was treating him and he raised the issue at a meeting with them when they had visited him in Christchurch at the Big T office in June 2016.

[89] Mr Loh said he felt he could no longer trust Tres Marias and decided to undertake the Big T operation himself directly.

[90] Mr Loh said that Mr Catoto had told him he did not mind if Mr Loh purchased from other competitors or even went to the Philippines directly for supplies. However, he did not want him to buy from or support Maharlika. This was not a promise he felt he could make as he needed to keep his options open to meet market demands.

[91] Mr Loh said that Mr Catoto had subsequently sent him a text message to say that he had turned over all management rights to Joy Catoto and that if Big T could not comply with the requirements of Tres Marias that would be his choice.

[92] Mr Loh said he concluded that that was Mr Catoto's way of saying that their business relationship had ended. As a result, he decided to proceed and start doing business in the Philippines himself.

[93] He confirmed he had not done much business with Maharlika as he had been able to get a lot of his product directly from

the Philippines. On or about June 2016 Big T stopped trading with Tres Marias.

Monde M.Y. San Corporation

[94] Joy Catoto said that after Mr Maximo and Mr Mendoza had left Tres Marias, she was approached by a supplier, Ms Dinglasan of Monde M.Y. San Corporation, who confirmed that she had been emailed and invited to have a meeting with Mr Mendoza and Mr Maximo.

[95] The purpose of the meeting being to discuss the possibility of using a company called Emart Company Limited (Emart) to distribute Monde M.Y. San Corporation products in New Zealand. Ms Dinglasan said she had met with Mr Mendoza and Mr Maximo who had told her that Big T and Mr Ken Loh were the parties interested in Monde M.Y. San Corporation.

[96] Ms Dinglasan had said that upon her return to Manila, she had been contacted numerous times by Mr Loh and was sent photographs of his warehouse in Christchurch.

[97] Mr Mendoza and Mr Maximo said that Emart imports Korean foods which Maharlika distributes. Mr Loh had introduced Maharlika to Emart and they agreed that they had done business with Emart subsequently.

Universal Robina Corporation (URC)

[98] Joy Catoto said on 4 September 2016, Mr Albert Francis Fernandez of URC emailed her with details of a meeting he had had with Mr Mendoza and Mr Maximo on 27 May 2016. Mr Fernandez is the Vice-President of URC, a leading branded snack food and beverage company in the Philippines. Tres Marias is the official distributor of URC products in New Zealand.

[99] The email from Mr Fernandez had confirmed that Mr Mendoza had emailed the Australasian account holder and the President at URC on several occasions prior to his arrival in New Zealand saying he was a representative of Emart and that the company was seeking to distribute URC products in New Zealand.

[100] Mr Mendoza said he had contacted URC on behalf of Maharlika. He had worked for URC for approximately 7 years when he lived in the Philippines prior to coming to New Zealand and when he was at URC's trade marketing group, his direct manager and report was Ms Gokongwei who is the daughter of the owner of URC, Mr John Gokongwei.

[101] He had been Facebook friends with Ms Gokongwei and asked her if URC was still accommodating distributors in New Zealand as he had started a new business and wanted to become a distributor. He asked her for an introduction to the person responsible for selling products in New Zealand. Mr Mendoza said he did not use any confidential information belonging to Tres Marias when contacting URC.

[102] Mr Fernandez was travelling to New Zealand and he had agreed to meet with Mr Mendoza and Mr Maximo briefly during his trip. When they had met on 27 May 2016, Mr Fernandez had told them that at that moment they would not be able to accommodate new distributors. Mr Mendoza confirmed that Maharlika had not done any business with URC.

Lim Chhour Supermarket

[103] Joy Catoto said that a contact from Lim Chhour Supermarket had informed her that on or around September 2016 he had been approached by Mr Mendoza to stock Maharlika products.

[104] Mr Mendoza had said he had obtained the contact for Lim Chhour Supermarket by carrying out a shop visit; however, Maharlika had not obtained any business from it.

Master Produce

[105] Ms Catoto said that a contact from Master Produce informed her that on or around September 2016 he had been approached by Mr Mendoza to stock Maharlika products.

[106] Mr Mendoza said he had visited the Master Produce shop, obtained its details as a result and approached it that way. Maharlika had subsequently done some business with it.

Fresh and Save Birkenhead

[107] Ms Catoto said that 'Wayne' from Fresh and Save Birkenhead had informed her that in or around September 2016 he had been approached by Mr Mendoza to stock Maharlika products.

[108] Mr Mendoza confirmed that he had paid a shop visit to Fresh and Save Otahuhu but Maharlika had not obtained any business as a result.

Philippine Pacific Products Limited

[109] Ms Catoto said that Ms Cyrell Waite from Philippine Pacific Products Limited told her that she had been contacted by Mr

Maximo on her cell phone, the number of which was not publicly available. Ms Waite told her that she had subsequently received an email from

Mr Mendoza saying “*Thank you for contacting us*” and attaching the Maharlika price list, however, she had not contacted them. Ms Waite confirmed that she had purchased some food products from Mr Maximo and Mr Mendoza.

[110] Mr Maximo explained that on 24 February 2016 he had sent an email to customers of Tres Marias, including Philippine Pacific Products Limited, informing them that he would be leaving Tres Marias and that Mr Reyes would be carrying out his responsibilities. He said that Ms Catoto had been aware of the email.

[111] He said after he had left Tres Marias it had been Ms Waite who had contacted him when she had heard that he and Mr Mendoza had started Maharlika. As a result, he had asked Mr Mendoza to forward the Maharlika price list to Ms Waite.

Fresh and Save Otahuhu

[112] Joy Catoto said that Mr Erick Sia, a sales representative employed by Tres Marias, had informed her by text message that he had encountered Mr Mendoza and Mr Maximo at Fresh and Save Otahuhu and that he had seen Mr Mendoza have a meeting with Mr Ratha Cheak, the owner.

[113] Mr Mendoza said that the contact details for Fresh and Save Otahuhu are on its website. He had telephoned and asked to speak to the owner and was put onto Mr Cheak whom he had informed about Maharlika and asked if he was interested in purchasing food products from it. Mr Cheak did not commit to purchasing food product, however, he did offer Maharlika some pallets to help store and transport products as he had spare pallets to offload.

[114] Mr Mendoza said on 6 July 2016 he and Mr Maximo had visited Fresh and Save Otahuhu to meet with Mr Cheak and collect the pallets. When they had arrived, Mr Sia was also there. He and Mr Sia whom he knew quite well from working with him at Tres Marias had a conversation during which Mr Cheak had come over and asked him (Mr Mendoza) and Mr Maximo to join him in his office for a quick discussion.

[115] He said that during the discussion, Mr Cheak had offered them some advice on managing their new business and wished them well. However, Maharlika did not get any business from Fresh and Save Otahuhu until September 2016.

Feed Your Budget

[116] Mr Catoto said that Mr Alan Weng, Managing Director of Feed Your Budget, had emailed him stating that he had been approached by Mr Maximo. Mr Weng said that

Mr Maximo had personally called him and asked if he wanted to source Ding Dongs, snacks such as mixed nuts, from another supplier.

[117] Mr Maximo said he had contacted Feed Your Budget through publicly listed details and had spoken to Mr Weng to see if Feed Your Budget was interested in buying products from Maharlika, however, Feed Your Budget had not done any business with Maharlika.

[118] Mr Weng confirmed that the Feed Your Budget details were publicly listed and that his mobile telephone number was listed publicly. He also confirmed that the products stocked by Feed Your Budget identified on them the name of the supplier and his mobile number and that anybody visiting the shop could obtain that information. He confirmed that Feed Your Budget had not done any business with Maharlika.

[119] Mr Maximo and Mr Mendoza confirmed that they had contacted all the suppliers and customers using their own resources and denied that they had needed any information from Tres Marias to do so.

[120] They denied that they had committed to memory a list of Tres Marias contacts or that they had kept any confidential information belonging to Tres Marias. They stated that they had simply used information available in the public domain and their own skill and knowledge.

Determination

Has Mr Maximo breached clause 6, and Mr Mendoza breached clause 7, of their

Employment Agreements not to disclose confidential information?

Are the clauses in the Employment Agreements enforceable? A. Status of the Employment Agreements

[121] The relevant Employment Agreements are the AM Employment Agreement and the CM Employment Agreement which have been signed by the parties.

[122] The AM Employment Agreement states Mr Maximo’s position as Chief Operating Officer, and his salary as \$55,000.00

per annum. The AM Employment Agreement states Mr Mendoza's position as Database and Website Administrator on a salary of \$22.00 per hour, an annual salary of \$45,760.00.

[123] It is the evidence of Mr Catoto that the position titles and salaries are fraudulent. He stated that he had agreed to provide the AM and CM Employment Agreements solely for the

purposes of deceiving NZ Immigration into accepting Mr Maximo and Mr Mendoza's applications for work visas. He stated that he had agreed to the terms and conditions as stated because he had: "*a big heart*", and accepted that he had no qualms about erroneous information being provided by him to NZ Immigration.

[124] Mr Maximo and Mr Mendoza confirm Mr Catoto's evidence that they did not receive the salaries as stated in the AM and CM Employment Agreements in that they received the amounts as stated, however they were expected to, and did, remit part of the sums received back to Mr Catoto in the form of cash payments.

[125] Despite the fact that Tres Marias's evidence is that the AM and CM Employment Agreements as entered into are documents containing fraudulent information, it is nonetheless seeking to enforce the confidentiality clauses.

[126] Whilst Mr Catoto's evidence was that the job titles in the AM and CM Employment Agreements were fraudulent, Mr Maximo and Mr Mendoza claim that the job positions were genuine, and they carried out the associated duties of the positions as set out in the Employment Agreements.

[127] I accept Mr Maximo and Mr Mendoza's evidence on the basis that, based on their previous experience in the Philippines, and subsequent studies in New Zealand, they would have had the skills necessary to perform the roles as stated in the Employment Agreements.

[128] In addition, Mr Catoto's evidence was that Mr Maximo was responsible for managing Tres Marais in his absence, and Joy Catoto's evidence was that Mr Maximo and Mr Mendoza were together managing Tres Marias prior to her commencing employment in October 2015.

[129] Moreover Mr Maximo and Mr Mendoza believed that their positions and performance merited the salaries as stated in the AM and CM Employment Agreements, although they had accepted and acquiesced to Mr Catoto's requirement that they were pay a significant portion of it in cash to him. I find that their position as immigrants who needed to retain Mr Catoto and Tres Marais' assistance in obtaining work visas led to what represented exploitation of immigrant workers and breaches of the [Wages Protection Act 1983](#).

[130] Despite the evidence of Mr Catoto that the AM and CM Employment Agreements were intended to serve a fraudulent purpose, I find that they are valid in terms of the positions occupied and wages paid, and therefore proceed to consider whether they are unenforceable on other grounds.

B. Unenforceable due to a lack of independent advice

[131] Mr Maximo and Mr Mendoza were immigrant workers at the time they commenced employment with Tres Marias, neither had been provided with employment agreements at the time they commenced employment with Tres Marias. At the time they each received and signed the AM and CM Employment Agreements, they were seeking work visa status in New Zealand based upon their employment at Tres Marias. As observed, they were therefore in a position in which they were open to exploitation by Tres Marias.

[132] The [Employment Relations Act 2000](#) (the Act) promotes an expectation that productive employment relationships will be built upon the promotion of good faith in all aspects of the employment relationship. That expectation is built upon an express acknowledgement in [s 3\(a\)\(ii\)](#) of the Act of the: "*inherent inequality of power in employment relationships*". That inequality has even greater weight when the employee is an immigrant worker dependent on the employer's assistance in seeking immigration status and the maintenance of good faith is particularly important in such a situation.

[133] One aspect of that requirement of good faith is that it is a requirement that employers advise an employee that: "*he or she is entitled to seek independent advice about the intended agreement*" ¹

[134] In the case of Mr Maximo whose evidence at the Investigation Meeting was that he was not advised that he could obtain independent advice prior to signing the Employment Agreement, I note that he has signed the Employment Agreement below his confirmation that he accepted the terms and conditions of employment and the express statement that: "*I was given a reasonable opportunity to seek independent advice prior to signing the agreement*". I am therefore not persuaded that he did not have the opportunity to seek that advice.

[135] I do however observe that the Employment Agreement does not contain, as required in [s 65\(2\)\(a\)\(vi\)](#) of the Act:

a plain language explanation of the services available for the resolution of employment relationship problems, including a reference to the period of 90 days in section 114 within which a personal grievance must be raised

[136] The CM Employment Agreement does not contain a declaration that he was advised that he could obtain independent advice on it, or any indication that he did so. Although it

contains a clause (clause 11) entitled 'Dispute And Personal Grievance Procedures' this refers

1 [Section 63A](#) (2)(b) of the [Employment Relations Act 2000](#)

to the provisions of the Act rather than setting out a plain language explanation of the services available for employment dispute resolution.

[137] I find that the Employment Agreements provided to Mr Maximo and Mr Mendoza are deficient in respect of the aspects set out above. However I do not find that this renders them unenforceable by either party.

C. Unenforceable due to a constructive dismissal

[138] It is submitted on behalf of the Respondents that they were constructively dismissed in that their resignations were the result of a constructive dismissal situation. On that basis any restraint clauses may become unenforceable.

[139] A constructive dismissal occurs where an employee appears to have resigned, but the situation is such that the resignation has been forced or initiated by an action or actions of the employer.

[140] In the Court of Appeal case *Auckland Shop Employees Union v Woolworths (NZ) Ltd*²

Cooke J listed three situations in which a constructive dismissal might occur, although he noted that these were not exhaustive. The three situations were:

1. Where the employees is given a choice of resignation or dismissal;

2. Where the employer has followed a course of conduct with the deliberate and dominant purpose of coercing an employee to resign; and

3. Where a breach of duty leads a worker to resign.

[141] I accept that had it been pleaded, Mr Maximo and Mr Mendoza may have had an arguable case that a constructive dismissal had occurred in the circumstances which included the expectation that they would agree to the proposed employment agreements which they regarded these as representing a demotion in status and remuneration, and as a consequence resigned rather than accept them.

[142] I further note that in Mr Maximo's case there had been a clear repudiation of the employment relationship by Tres Marias as a result of Joy and Mrs Catoto asking for his

resignation.

2 [\[1985\] 2 NZLR 372](#)

[143] However that has not been pleaded, and even were I to find that was in fact the case, whether or not it would render the restraint clauses unenforceable is not certain. As stated by Judge Inglis in *Pottinger v Kelly Services (New Zealand) Limited* :³

I conclude that while it is arguable that an established repudiation would result in a finding that the restraints contained within the plaintiffs' employment agreements were void following General Billposting, that argument is weak.

[144] I therefore proceed to consider whether or not the clauses were unenforceable on the basis that they were not necessary to protect a legitimate proprietary interest of Tres Marias.

D. Unenforceable due to a lack of proprietary interest

[145] The starting point for any determination regarding a restraint of trade application is as stated by Judge Inglis in *Pottinger v Kelly Services (New Zealand) Limited*⁴

Contractual provisions restricting the activities of employees after termination of their employment are, as a matter of legal policy, regarded as unenforceable unless they can be justified as reasonably necessary to protect proprietary interests of the employer in the public

[146] The law in this area has been summarised by the High Court case of *The Broadcasting Corporation of New Zealand v Nielsen (Nielsen)*:in which Hardie Boys J

stated:⁵

Such a covenant is prima facie unlawful, but will be upheld to the extent that the employer is able to establish that it is reasonably necessary for the protection of the proprietary interest which the law recognises he has in what may be called his trade secrets and his trade connections: and provided further that the covenant is not unreasonable from the point of view of the employee and that it is not in conflict with appropriate considerations of public interest.

[147] It is accepted that Tres Marias has a proprietary interest in (i) its customer lists, (ii) supplier lists, (iii) pricing formulae, (iv) emails, (v) database, (vi) website, and (vii) email and website administration passwords.

[148] In *Faccenda Chicken Ltd v Fowler* the English Court of Appeal set out three categories of information to be considered:⁶

³ *Pottinger v Kelly Services* [2012] NZEmpC 101 at [40]

⁴ [2012] NZEmpC 101 at para [16]

⁵ *Nielson* at pg 14

⁶ *Faccenda Chicken Ltd v Fowler* [1087] Ch 117 at [pg 731

(i) Information which is trivial or public knowledge: an employee is free to use this information as he or she sees fit;

(ii) Information which the employee must treat as confidential: by virtue of the fact that the employee has been told it is confidential or by virtue of its character :*it goes without saying*”, but once learned it becomes part of the employee’s skill and knowledge;

(iii) Information which is a ‘trade secret’ and so confidential that it must be kept secret both during and after employment.

[149] Tres Marias proprietary interest will be protected if it is deemed to be confidential.

Customers and Suppliers

[150] I find that the names of Tres Marias customers and suppliers were not a trade secret or of a highly confidential nature. There is no evidence that either Mr Maximo and Mr Mendoza had been advised by Tres Marias that the information was confidential, and it was easily accessible information via internet search engines to identify retailers which stocked Asian and/or Filipino products followed by a store visit, which Mr Maximo and Mr Mendoza said they had done.

[151] Moreover I find that Mr Maximo and Mr Mendoza would have been familiar with the identity of Tres Marias customers and suppliers by virtue of the nature of their jobs, they had used them on a regular basis to perform their work duties.

Pricing Formulae

[152] Mr Catoto’s evidence was that he trained Mr Maximo and Mr Mendoza in the use of the pricing system he had devised for Tres Marias.

[153] I accept that this was the case, however I note that both Mr Maximo and Mr Mendoza had had previous work experience prior to joining Tres Marias, in particular Mr Maximo had operated two businesses and his evidence was that he had used this previous business experience in formulating the price of products in Maharlika.

[154] Mr Maximo and Mr Mendoza’s evidence was that a number of factors were taken into account in arriving at a price, including the wholesale cost, the landing cost, the exchange rate, the cost of transportation, competitors prices following which a margin would be applied. Although there were a number of factors, a basic formula was applied.

[155] Mr Maximo’s evidence was that the cost of competitors’ products was a significant factor when setting the price as Mr Catoto would instruct him to adjust the price in light of customer concern. I note that this is reflected in the AM Employment Agreement which states: “*You are authorised to change price to benefit the company position in the market at all times.*”

[156] I accept that competitors’ prices are easy to obtain, pricing lists being accessible via the competitors directly, or from other competitors.

[157] I find that Mr Maximo and Mr Mendoza did not need to use Tres Marais pricing formulae since it was of a general nature and their pricing knowledge obtained and developed at Tres Marais had legitimately become part of their own skill and knowledge.

Information Technology

[158] Whilst the passwords to Tres Marais website, emails and computer system

technology is confidential information, I find there is no evidence to substantiate that either Mr Maximo and Mr Mendoza used Tres Marais confidential email, software or associated products in breach of the AM and CM Employment Agreements.

[159] There is no evidence that they downloaded confidential information onto flash drives, or retained or obtained database lists.

[160] I discuss this aspect in further detail in respect of Mr Mendoza below.

Breach of Good faith

[161] In the context of proprietary interests the duty of good faith is relevant. As a result of entering into an employment relationship, employers and employees owe each other certain duties and obligations. As already observed, at the core of the employment relationship and contract of service is the good faith requirement imposed on employers and employees by s.4 of the Act and the implied relationship of trust and confidence between them. In *Telecom South Ltd v Post Office Union (inc)7* Justice Richardson said:⁸

The contract of employment cannot be equated with an ordinary commercial contract. It is a special relationship under which workers and employers have mutual obligations of confidence, trust and fair dealing.

⁷ [\[1991\] NZCA 563](#); [\[1992\] 1 ERNZ 711](#)

⁸ Ibid at pg [277]

[162] Employees' implied duties include duties of fidelity, the obligation to act loyally and in good faith, to exercise reasonable skill and care in carrying out their duties, and to act honestly by *inter alia*, protecting the employer's confidential or proprietary information and not using it for personal gain or profit of other people, and not to approach the employer's customers for business on the employee's own behalf.

[163] In the Court of Appeal case *Tisco Ltd v Communication and Energy Workers' Union*⁹ the Court of Appeal held that the employment relationship gave rise to reciprocal duties of fidelity and good faith, and that any conduct by an employee which was likely to damage the employer's business could constitute a breach of duty:¹⁰

Any conduct by an employee which is likely to damage the employer's business, for instance by impairing its goodwill, or to undermine significantly the trust the employer is entitled to place in the employee, could constitute a breach of duty.

[164] In *Rooney Earthmoving Limited v McTague*¹¹ Judge Travis observed:¹²

It appeared to be accepted by the defendants, ... that they owed an implied duty of fidelity and an obligation to act in good faith, which prevented them from making approaches to clients or potential clients of REL on behalf of BMW before they had ceased their REL employment. Before that time, if a client made an approach, the duty of fidelity obliged them to reject that offer of work and report it to REL. Further, whether or not a departing employee takes customer lists, that employee may not solicit or approach a client of that employee's former employer in respect of a transaction current at the time of departure. (Medic Corporation v Barrett [\[1992\] 2 ERNZ 1048](#))

[165] Mr Mendoza registered Infinity and he and Mr Maximo signed consents to be directors and shareholders on 22 January 2016 whilst they were still employed by Tres

Marias. Infinity was not at that time but is now a competitor of Tres Marais.

⁹ [\[1993\] 2 ERNZ 779](#)

¹⁰ Ibid at page [782]

¹¹ CC 10/09, CRC 21/07

¹² Ibid at para [120]

[166] In *Schilling v Kidd Garrett Ltd*¹³ it was held that an employee intending to go into business on their own account might take preparatory steps even where he or she intended competing against the employer, provided he or she did not do so fraudulently. This was also confirmed in *Rooney Earthmoving Ltd v McTague*¹⁴

[167] Attempts to take steps to benefit a business entered into on the employees own account may however be a breach of good faith. Tres Marais submits that Mr Maximo took steps to ingratiate himself with Mr Loh by offering Big T preferential treatment prior to the termination of his employment with a view to obtaining Big T's business after termination.

[168] Mr Maximo's evidence was that Mr Catoto authorised the price and freight payment arrangements with Big T. This was

supported by the evidence of Mr Loh, whose evidence was that it was the changes to the arrangements he had had for many years with Tres Marais after the arrival of Ms Catoto that lead to the severing of the relationship, not to any machinations by Mr Maximo and Mr Mendoza on behalf of Infinity.

[169] In the case of other customers and suppliers, I find there is no evidence that Mr Maximo or Mr Mendoza approached Tres Marias customers and suppliers prior to leaving their employment, the contact came subsequently.

[170] I have considered the email sent by Mr Maximo to various customers of Tres Marais stating that he had resigned and dated 24 February 2016. Whilst this email was sent prior to his written resignation on 1 March 2016, he had verbally resigned in January 2016. Mr Maximo's evidence was that Joy Catoto was aware of the email, and I note that it refers to the identity of the person who would be responsible for the customers' orders and inquiries following Mr Maximo's departure. This is normal business practice. I also note that the email does not provide a future contact for Mr Maximo following his resignation.

[171] I do not find that Mr Maximo and Mr Mendoza breached their duty of good faith to Tres Marias.

[172] I do not find that there were confidential proprietary interests requiring protection which were breached by Mr Maximo and/or Mr Mendoza.

[173] I determine that Mr Maximo and Mr Mendoza did not breach clause 6 and clause 7, Confidentiality, of the AM and CM Employment Agreements.

¹³ [\[1977\] 1 NZLR 243](#)

¹⁴ See N 11 above

Did Mr Mendoza breach clause 7 of the Employment Agreement by failing to disclose intellectual property rights owned by Tres Marias which he discovered during the course of his employment with Tres Marias?

[174] Having considered the matter, which relates to computer system and access to server passwords known to Mr Mendoza, I find there is insufficient evidence to establish that Mr Mendoza failed to disclose such intellectual property rights to Tres Marias. In particular his evidence was that he stated that he had provided the password to Ms Catoto prior to leaving.

[175] Although Mr Reyes telephoned Mr Mendoza as instructed by Ms Catoto he did not leave a message or send an email requesting the information, and Mr Maximo's evidence was that he had not been asked by Joy Catoto to contact Mr Mendoza.

[176] I further note that Joy Catoto made no effort to contact Mr Mendoza herself, as I would have expected if the matter had been urgent. In addition Mr Mendoza said that Mr Catoto had access to the computer system as a power user which would have provided Joy Catoto with access.

[177] There is no evidence that either Mr Mendoza or Mr Maximo accessed the Tres Marais computer system or its emails after their employment with Tres Marais had ended.

[178] I determine that Mr Mendoza did not breach clause 7 of the Employment Agreement by failing to disclose intellectual property rights when he left Tres Marais.

Costs

[179] Costs are reserved. The parties are encouraged to agree costs between themselves. If they are not able to do so, the Respondents may lodge and serve a memorandum as to costs within 28 days of the date of this determination. The Applicant will have 14 days from the date of service to lodge a reply memorandum. No application for costs will be considered outside this time frame without prior leave.

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

Direction

[181] Given the issues raised in this investigation process which relate to NZ Immigration processes and possible infringement of the taxation requirements, I direct that a copy of this determination is made available to NZ Immigration and the IRD.

Eleanor Robinson

Member of the Employment Relations Authority
