

**Attention is drawn to the  
order prohibiting publication  
of certain information in this  
determination**

**IN THE EMPLOYMENT RELATIONS AUTHORITY  
CHRISTCHURCH**

CA 3A/07  
5042307

BETWEEN	JIENJU CHEW Applicant
AND	ASLAN CONSULTING GROUP LIMITED First Respondent
AND	TRINITY SYSTEMS LIMITED Second Respondent
AND	HAMISH HOWARD Third Respondent

Member of Authority: Helen Doyle

Representatives: Wiman and Rose Chew, Counsel for Applicant  
Susan Rowe, Counsel for Respondent

Investigation Meeting: 12 July 2007 at Christchurch

Determination: 5 October 2007

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**DETERMINATION OF THE AUTHORITY**

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**Prohibition from publication**

[1] Except to the extent that it is necessary to disclose information in this determination, I prohibit from publication under clause 10(1) of Schedule 2 of the Employment Relations Act 2000 documents of a commercial nature including accounts, provided to the Authority on behalf of the respondents.

**Employment relationship problem**

[2] The applicant, Jienju Chew, was employed by the first respondent, Aslan Consulting Group Limited (Aslan) from June 2001 until 31 October 2005 as an IT technician.

[3] Aslan is a duly incorporated company having its registered office at Christchurch. It carried on the business of providing IT network support, development and solutions. The assets and business of Aslan were sold to Trinity on 31 October 2005.

[4] Mr Chew was employed by the second respondent Trinity Systems Limited (Trinity) from 31 October 2005 until 24 April 2007 as an IT Technician.

[5] Trinity is a duly incorporated company having its registered office at Christchurch. It carries on the business of providing IT network support, development and solutions.

[6] The third respondent, Hamish Howard, is a director of Aslan and General Manager of Trinity.

[7] An amended statement of problem was lodged with the Authority on 15 March 2007. The lodging of the amended statement of problem followed investigation and determination of a preliminary matter, when the second respondent made application to strike-out some of the employment relationship problems alleged against it. The application was made on the basis that some of the problems should have been lodged against the first and/or third respondent and/or that the problems were not within the jurisdiction of the Authority to investigate. The Authority made directions for, amongst other matters, the lodging and serving of an amended statement of problem in determination CA3/07.

**The problems that require determination**

[8] Problems alleged against Aslan:

- That Aslan, in salary negotiations prior to the sale to Trinity, breached the provisions of ss.4 and 60 of the Employment Relations Act 2000 by failing to act in good faith.

- That Aslan breached the provisions of s.69M of the Employment Relations Act 2000.
- That Aslan failed to consult or adequately consult with Mr Chew in terms of the sale to Trinity.
- That there was a breach by Aslan of the employment agreement with Mr Chew when it did not:
  - (i) Explain the terms and conditions of Mr Chew's employment to Trinity; and
  - (ii) Adhere to the following process when negotiating with Trinity about the sale, transfer or restructuring to the extent that it related to Mr Chew when Aslan failed to discuss:
    - (a) Whether Mr Chew would transfer to Trinity on the same terms and conditions of employment;
    - (b) Whether Trinity could offer alternative positions to Mr Chew; and
    - (c) Whether redundancy compensation, if any, would be available to Mr Chew.
- That Aslan breached obligations of good faith including the provisions of s.4(1A)(c) of the Employment Relations Act 2000.
- That Mr Chew was disadvantaged with respect to a pay cut and non-disclosure of the salary of Trinity employees and non-disclosure that Trinity employees had not been required to reduce their pay.

[9] The allegation in clause 1.10 of the amended statement of problem that Aslan, by paying Mr Chew \$5,000 less than the receptionist, was guilty of discrimination was withdrawn at the start of the substantive investigation meeting.

[10] Aslan denies the allegations that Mr Chew makes against it and further says that the setting of terms and conditions between it and Mr Chew prior to 31 October 2005 is time-barred and/or falls outside the jurisdiction of the Authority.

[11] Problems alleged against Trinity:

- That Trinity, in salary negotiations following the purchase of Aslan, breached ss.4 and 60 of the Employment Relations Act 2000 by failing to act in good faith.
- That Trinity bargained unfairly in breach of s.68(1)(b)(i) and (ii) and s.68(2)(b) and (d) of the Employment Relations Act 2000.
- That Trinity discriminated against Mr Chew under s.104 of the Employment Relations Act 2000 on the basis of his race.

[12] Trinity denies the allegations that Mr Chew makes against it. It says the conduct complained of primarily concerns the setting of terms and conditions of employment which falls outside the jurisdiction of the Authority.

[13] Problems alleged against Mr Howard:

- That Mr Howard was acting in a conflict of interest situation when, as a director of Aslan, he negotiated on behalf of Aslan's employees with Trinity when he was either already a director or promised a directorship or subsequently made a director of Trinity.
- That Mr Howard instigated, aided and abetted the breach of the employment agreement or the Employment Relations Act 2000 and practised racial discrimination for which there should be an order for a penalty.

[14] Mr Howard denies the allegations made against him. He says that he was not the employer of Mr Chew and never held himself out as such. In terms of the allegation that he was acting in conflict of interest when he negotiated with Trinity for the transfer of Mr Chew, he says that the Authority does not have jurisdiction to deal with such a complaint. He denies that race had any bearing with respect to the salary paid to Mr Chew and says that Mr Chew had less experience, responsibility and different qualifications than the other technician at Trinity.

**The factual background to the claims before the Authority**

[15] In or about May/June 2001, Mr Chew was a student studying at the Polytechnic. Mr Chew knew Simon Scarff who was at that time the other director of Aslan. Mr Chew asked Mr Scarff if he could work at Aslan on an unpaid basis. It was understood that if a position did become available with Aslan, Mr Chew could then be employed.

[16] Aslan was suffering losses at this time and was unable to employ many staff. Whilst Mr Chew started working on an unpaid basis on or about 25 June 2001, it was not until September 2001 that a position at Aslan became available. Mr Chew was then employed as an IT technician at Aslan and paid 30% of every billable hour.

[17] Although it would seem that Mr Chew was not employed until September 2001 by Aslan, Mr Howard seemed to accept [document Chew 10.2] that he was employed by Aslan from 25 June 2001. On that basis, I have taken that date to be when Mr Chew commenced employment with Aslan.

[18] Mr Chew was 19 years old when he commenced his employment with Aslan.

[19] From March 2002 to March 2004, Mr Chew was paid a salary of \$20,000. From 19 March 2004 to 30 March 2005, Mr Chew was paid a salary of \$25,000 and a company car was provided for his use.

[20] From 1 April 2005 to 31 October 2005, Mr Chew was paid a base salary of \$25,000 plus allowances of \$165 per fortnight which, when combined with his base salary of \$25,000, gave an annual remuneration package of \$29,290.

[21] Mr Chew was not Microsoft certified. He explained in his evidence that he had obtained NZQA Level 2, 3 and the highest level 5 which is a diploma in IT computing. He also had an internationally recognised IT qualification known as A Plus Technician (Comp TIA).

[22] Mr Chew was advised that Aslan would pay for the Microsoft certified course provided he passed on the first attempt. If Mr Chew did not pass, then the cost to resit would fall on him.

[23] Mr Chew said that there were difficulties for him because there were insufficient staff at Aslan to cover for him whilst he studied or attended courses.

Mr Chew did not sit the Microsoft course examination. He accepted though in his evidence that Aslan wanted him to become Microsoft certified.

**Individual employment agreement dated 21 February 2005 between Aslan and Mr Chew**

[24] Mr Chew was party to an individual employment agreement with Aslan. The employment agreement contained the following clause 37 in the event of sale and purchase of the business:

37. *Sale and purchase of business*

37.1 (a) *If the Employer is proposing a sale, transfer or restructuring of its business so that Employees' work may be performed for a new employer, the Employer shall negotiate with the new employer about the sale, transfer or restructuring to the extent that it relates to affected employees.*

(b) *In this clause, restructuring, new employer and affected employee have the meanings given to them by the Employment Relations Act 2000 (as amended).*

(c) *The Employee hereby consents to the Employer disclosing personal information to the new employer regarding the Employee's employment for the purposes of complying with the Employer's obligations under this clause.*

(d) *The Employer will adhere to the following process when negotiating with the new employer about the sale, transfer or restructure to the extent that it relates to affected employees:*

- *The Employer will consult with affected employees regarding the proposed sale, transfer or restructuring.*
- *The Employer will negotiate with the new employer regarding the possible transfer of affected employees.*
- *The Employer will explain the terms and conditions of each Employee's employment to the new employer.*
- *The Employer will explain how many employees work in the business and what role each one occupies.*
- *The Employer will discuss whether the affected Employees will transfer to the new employer on the same terms and conditions of employment, whether the new employer can offer alternative positions to Employees and whether redundancy*

*compensation, if any, will be available to those who do not transfer.*

- *The Employer will alert the new employer to any questions or concerns that affected employees may have regarding the sale, transfer or restructuring.*

### **Sale to Trinity**

[25] Mr Howard had discussions with Anthony Edwards who was the director and owner of Trinity, from about August 2005 onwards. Trinity and Aslan were at that time two quite separate entities.

[26] Trinity employed two technicians, Michael and Andrew. Andrew was a senior technician. Michael had initially been working as a contractor for Trinity on the basis of \$40 per hour for each chargeable hour of work. At or about the time that Aslan was sold to Trinity, Michael became an employee of Trinity and was then paid a salary of \$40,000. Mr Edwards was a director and part-time manager of Trinity.

[27] Trinity had lost staff and Aslan employees, including Mr Chew, had been assisting Trinity with its work before the sale took place. It was agreed, after comparison of turnover, previous results, staff levels and future prospects, that the two businesses were close in size and value. Aslan had systems and management which would allow a company to grow but limited customers. Trinity had customers but did not have the systems and management to handle growth. The purchase price was a 50% shareholding in Trinity issued to the shareholders as nominees of Aslan. No written sale and purchase agreement was entered into. On or about 31 October 2005, the assets and business of Aslan were sold to Trinity.

[28] It was originally intended that Mr Howard would become a director of Trinity. For reasons that I do not consider need to be set out, Mr Howard was not a director of Trinity at the time of the investigation but was an employee of Trinity.

### **What Mr Chew knew about the sale**

[29] Mr Chew said that he was aware of the possibility that the two companies may merge a few months before 31 October 2005 following a discussion with Mr Scarff. Mr Chew said after his discussion with Mr Scarff, Mr Howard talked to him about the possibility of a merger with Trinity and said that they were throwing some numbers in the air.

[30] Mr Chew thought the possibility of a merger was a positive step as Aslan wanted work and Trinity *manpower*.

[31] At that time, Aslan had four employees. Mr Chew was employed as a technician. Mr Scarff was no longer a director of Aslan in 2005 but was employed as a senior technician on a salary of \$55,000. Another employee, Colin, was employed as an experienced software developer and he was paid 40% of each billable hour recovered. Mr Howard, as well as being a director, was employed as a business development manager on a salary of \$55,000.

[32] Mr Edwards agreed on behalf of Trinity to offer employment to all the existing employees of Aslan. Trinity had suffered a loss of approximately \$55,000 during the year ended 31 March 2005.

[33] About six weeks prior to 31 October 2005, Mr Howard and Mr Chew discussed an offer of employment from Trinity. Mr Chew saw the offer, which is set out in the following paragraph, as a pay cut.

[34] The initial offer to Mr Chew from Trinity was:

- (i) A base salary of \$20,000
- (ii) An incentive payment of \$9 per hour, for every billable hour recovered;
- (iii) A car;
- (iv) A phone;
- (v) IT hardware and software at cost;
- (vi) Allowances of \$15 per week.

[35] The incentive payment of \$9 per hour for every billable hour recovered was a new type of payment that had not been a condition of Mr Chew's employment at Aslan. Mr Howard prepared and showed Mr Chew a schedule that set out what Mr Howard thought Mr Chew would receive under the incentive payment scheme. Mr Howard thought that Mr Chew would more often than not achieve 25 billable hours per week. I accept Mr Howard genuinely believed that Mr Chew would earn at least as much as he had at Aslan based on the spreadsheet. Mr Chew said he did not

think too much about the new system at the time or any impact that it may have on his income.

[36] The evidence does not support Mr Howard or Mr Chew at any stage contemplating that employment for Mr Chew would not continue with Trinity.

[37] On or about 25 October 2005, Mr Chew was handed a proposed individual employment agreement between him and Trinity.

### **Commencement of employment with Trinity**

[38] On 31 October 2005, Mr Chew commenced working for Trinity but did not accept the terms and conditions which were offered to him in the individual employment agreement.

[39] Mr Chew's father, Wiman Chew is a solicitor. He wrote to Trinity on Mr Chew's behalf and requested in his letter dated 3 November 2005 a number of changes to the terms and conditions of employment in the proposed individual employment agreement.

[40] I find, on the balance of probabilities, that a letter was prepared by Mr Howard to deal with some issues raised by Mr Wiman Chew on 7 November 2005. I am not satisfied that such letter was, as alleged by Mr Chew, backdated. It is more probable that Mr Chew did not see the letter at the time which, Mr Howard said, was clipped to the back of the employment agreement.

[41] The letter advised that Mr Chew's holiday pay and days in lieu would be sorted out. It also clarified the period Mr Chew had been employed by Aslan which I referred to in this determination earlier. Mr Howard also invited Mr Chew to discuss his terms and conditions of employment.

[42] The pay records from the time Mr Chew commenced with Trinity show that he was paid on the basis of \$25,000 per annum rather than \$20,000 per annum.

[43] Mr Howard said that it became apparent to Trinity that paying staff an additional \$9 per hour for each hour billed was not financially viable as Trinity did not break even and make a profit until around 20 hours were billed. On or about 6 December 2005, Mr Howard emailed all staff and said that the new plan was that employees would only be paid \$9 per hour if 20 hours or more of recoverable work

per week was produced. Mr Howard invited employees to see him if there were questions about the change or issues with it.

[44] On 13 December 2005, Mr Wiman Chew wrote to Trinity and advised it of four personal grievances on behalf of Mr Chew. The grievances were:

- The transfer of employment from Aslan to Trinity;
- The employment agreement with Trinity;
- Reduction of pay under the new agreement;
- Further reduction of pay as per email of 6 December 2005.

[45] Mr Howard responded to the letter and advised that he would be happy to sit down and discuss the concerns so that issues could be resolved. In his letter to Mr Wiman Chew, he advised that Mr Chew was a valuable employee.

[46] On 19 December 2005, Mr Wiman Chew suggested a meeting time of 21 December 2005 and requested details of Mr Chew's weekly wages for 2001, 2002, 2003, 2004 and 2005 for the discussion. Mr Howard provided the details as requested and confirmed the meeting time.

[47] On 21 December 2005, a meeting took place between Mr Howard and Mr Wiman Chew and Ms Rose Chew who were representing Mr Chew to discuss the issues. Mr Chew's representatives requested amendments to Mr Chew's terms and conditions. They requested removal of a restraint of trade, an increase in base salary to \$25,000, payment of \$9 per hour in addition to Mr Chew's salary regardless of billable hours worked, payment of overtime and time off in lieu. Mr Howard, on behalf of Trinity, agreed to all of the requests except for the payment of overtime which was to be discussed at a later time. Mr Chew was back paid \$9 per hour for hours performed under 20 hours per week to the time that he commenced at Trinity.

[48] By letter dated 12 May 2006, Mr Wiman Chew on behalf of Mr Chew wrote to Trinity and raised, amongst other matters, an issue of overtime. Mr Wiman Chew also said that Mr Chew was discriminated against when he was paid \$25,000 whilst other staff were paid *much more for doing the same work*.

[49] Mr Howard responded to these matters in writing. There was another meeting between Mr Wiman Chew and Ms Rose Chew as Mr Chew's representatives and Mr Howard on behalf of Trinity on 23 May 2006. There was some agreement reached during that meeting about overtime. Mr Howard was advised that he had not acted in good faith during the discussions on 21 December 2005 and had misled Mr Chew in that he had withheld information about other employees' remuneration at Trinity. The meeting ended somewhat abruptly when Mr Howard asked whether he was being called a liar and it was confirmed at that time that he was.

[50] Mr Howard agreed on behalf of Trinity to attend mediation to resolve any issues arising from the employment relationship.

[51] There was further correspondence between the parties and a mediation. Matters were not resolved at mediation.

[52] In June 2006, a performance review was held with Mr Chew. Mr Chew's salary was reviewed and increased from 3 July 2006 to a base salary of \$32,000 plus 10% of all billable work.

[53] For the first year of Mr Chew's employment with Trinity he received a gross amount of \$35,301.98.

### **Determination of employment relationship problems against Aslan**

#### **Whether in the salary negotiations prior to the sale to Trinity, Aslan breached the provisions of ss.4 and 60 of the Employment Relations Act 2000**

[54] This allegation concerns bargaining about Mr Chew's terms and conditions of employment when he was employed by Aslan. The allegation was not dealt with in the applicant's final submissions. I have proceeded to determine this allegation as it was not formally withdrawn and Ms Rowe dealt with it at some length in her final submissions.

[55] I have considered this allegation separately to any obligations Aslan had at the time it decided to sell to Trinity and Aslan's conduct in terms of ss.4(1A)(a), (b), (c) and 4(4)(ba) and (bb) which were inserted by the Employment Relations Amendment Act (No 2) 2004 effective from 1 December 2004.

[56] Aslan was a small company and struggled to make much of a profit. Mr Chew had not worked elsewhere in the industry and it was his first job.

[57] For the year ending 31 March 2002, Aslan made a loss. The financial performance did improve somewhat after that and Mr Chew received a salary increase from early 2004 together with some other benefits.

[58] There is no satisfactory evidence for me to conclude that Aslan did not act in good faith in salary negotiations or in bargaining for Mr Chew's terms and conditions prior to 1 December 2004.

[59] This allegation against Aslan does not succeed and is dismissed.

**Did Aslan breach the provisions of s.69M of the Employment Relations Act 2000?**

[60] Part 6 of the Employment Relations Act 2000 deals with continuity of employment if an employer's business is restructured. Mr Chew was not an employee in one of the specified categories in Schedule 1A to the Employment Relations Act 2000 so Subpart 1 of Part 6 does not apply to him. Subpart 2 of Part 6 did apply to Mr Chew. For completeness, there have been some subsequent amendments to Part 6 of the Employment Relations Amendment Act 2000.

[61] At the material time, the object of Subpart 2 was set out in s.69K and provided:

*The object of this subpart is to provide protection to employees to whom subpart 1 does not apply if their employer restructures its business so that their work is to be performed for a new employer and, to this end, to require their employment agreements to contain employee protection provisions relating to negotiations between the employer and new employer about the transfer of affected employees to the new employer.*

[62] Aslan was required to have in every individual employment agreement entered into after 1 December 2004 an employee protection provision. An employee protection provision was defined at the material time in s.69L as meaning a provision:

- (a) *the purpose of which is to provide protection for the employment of affected employees if their employer's business is restructured; and*
- (b) *that includes -*

- (i) a process that the employer must follow in negotiating with a new employer about the restructuring to the extent that it relates to affected employees; and*
- (ii) the matters relating to the affected employees' employment that the employer will negotiate with the new employer, including whether the affected employees will transfer to the new employer on the same terms and conditions of employment; and*
- (iii) the process to be followed at the time of the restructuring to determine what entitlements, if any, are available for employees who do not transfer to the new employer.*

[63] I find that Aslan had an employee protection provision that satisfied the requirements of Subpart 2 of the Employment Relations Act 2000. The final submissions of the applicant go further than to allege a breach of s.69M and are to the effect that there was also a breach of ss.69N and 69O of the Employment Relations Act 2000. I do not find a breach of those sections.

[64] The employee protection provision was included in Mr Chew's employment contract prior to the transfer to Trinity.

[65] Mr Wiman Chew and Ms Rose Chew negotiated with Aslan on Mr Chew's behalf other changes to the individual employment agreement dated 21 February 2005. The only change requested to clause 37 in the agreement was to remove clause 37(e) which related to redundancy compensation in the event of a transfer. There was no suggestion during negotiations that the clause was inadequate in terms of that agreement.

[66] In conclusion, I do not find there was a breach of s.69M, s.69N or s.69O of the Employment Relations Act 2000. For completeness, there was no penalty provided in the Act for a breach of these provisions in Subpart 2 of Part 6 at the material time. This allegation against Aslan does not succeed and it is dismissed.

**Did Aslan comply with the procedures set out in clause 37 of Mr Chew's individual employment agreement?**

[67] Clause 37 required Aslan to consult with Mr Chew regarding the proposed sale to Trinity.

[68] Mr Chew was told a few months in advance about Aslan's proposal with Trinity. There were regular weekly meetings in the small business. Mr Chew

accepted that Mr Howard talked about what was happening and Mr Chew's evidence was he thought it was a positive step because of the different needs of each business.

[69] Closer to the time Mr Chew knew that he would be offered employment by Trinity. He was told what the offer would be and there was a spreadsheet prepared and discussed with him about what the \$9 per billable hour scheme would mean for him in actual terms. Mr Chew was also given, on or about 25 October 2005, a written individual employment agreement with respect to the terms and conditions at Trinity.

[70] It was alleged in the applicant's submission that the only consultation Mr Howard had with Mr Chew was that he had to take a pay cut and further that Mr Chew was given an impression that if he did not accept it he would be out of a job. Mr Chew commenced employment with Trinity but did not accept the terms and conditions of the individual employment agreement he was offered by Trinity. The negotiation process about his terms and conditions of employment then commenced.

[71] I do not find in those circumstances an allegation that Mr Howard, acting on behalf of Aslan, insisted Mr Chew take a pay cut and/or gave the impression to him that otherwise he would be out of a job, has any foundation. Mr Chew gave me the clear impression during his evidence that he was quite comfortable with the process.

[72] I find that Aslan adequately consulted and gave Mr Chew sufficient information in the circumstances about the proposed sale to Trinity with one exception, and that is, with respect to whether redundancy compensation would be payable to Mr Chew if he did not transfer.

[73] Aslan was required to negotiate with Trinity about the possible transfer of Mr Chew. Mr Howard on behalf of Aslan met with Mr Edwards and negotiated about the possible transfer of Mr Chew. That requirement, in clause 37, was therefore met.

[74] Aslan was required to explain the terms and conditions of Mr Chew's employment and I am satisfied that Mr Howard, on behalf of Aslan, advised Mr Edwards about Mr Chew's terms and conditions of employment. That requirement in clause 37 was therefore met.

[75] Aslan was required to explain to Trinity how many employees worked in its business and what role they occupied. I am satisfied that Trinity was advised of this and therefore that requirement in clause 37 was also met.

[76] Aslan was required to discuss:

- Whether Mr Chew would transfer on the same terms and conditions of employment;
- Whether the new employer could offer alternative positions to employees; and
- Whether redundancy compensation, if any, would be available to those who did not transfer.

[77] I am satisfied from the evidence that there was discussion with Trinity about whether Mr Chew would transfer on the same terms and conditions of employment. Mr Howard, on behalf of Aslan, also discussed that matter with Mr Chew and made it clear that the offer of employment from Trinity would not be on the same terms and conditions. The important point here is that clause 37 required Aslan to discuss whether Mr Chew would transfer on the same terms and conditions of employment. There is nothing in clause 37 to the effect that Aslan must obtain, in its negotiations with Trinity, identical terms and conditions of employment for its employees. Aslan was required to tell Mr Chew what terms and conditions Trinity was offering and it met that requirement in this case.

[78] The obligation to discuss whether Trinity could offer alternative positions did not, I find, arise in this situation because there was an offer of employment by Trinity to Mr Chew to the same technician role that he had performed in Aslan. If I am wrong in terms of that matter there was no evidence that there was an alternative position at Trinity.

[79] There was no discussion with Mr Chew about whether redundancy compensation would be available to him if he did not transfer. That requirement in clause 37 was not met. Both parties I accept were focused on Mr Chew continuing on his employment with Trinity.

[80] Aslan was also required to alert Trinity to any questions or concerns regarding the sale which Mr Chew may have. Mr Chew did not put to Mr Howard any questions or concerns that Aslan was then required to alert Trinity to. There was no breach, therefore, of clause 37 in that respect.

[81] I have considered whether Mr Chew had an entitlement to redundancy compensation.

[82] Clause 36 in Mr Chew's agreement with Aslan provided, with respect to redundancy:

*If an Employee's employment is terminated because their position has become redundant, in lieu of compensation, the Employee will be given 4 weeks notice in writing or payment in lieu of such notice or according to such periods or compensation as the statutory legislation then existing requires.*

[83] There was no statutory requirement in October 2005 that applied to Mr Chew so as to require payment of redundancy compensation or a longer notice period.

[84] Ms Rowe submits that Mr Chew was *technically redundant because Trinity offered him employment in a similar capacity*. Aslan was selling its business to Trinity and its employment agreement with Mr Chew was not transferable. It was clear before the transfer that Mr Chew was not going to be employed by Trinity on the same conditions of employment that he had received at Aslan. In terms of Mr Chew's base salary, the conditions offered by Trinity were less favourable and Mr Chew's tax-free allowances had been reduced as well.

[85] Clause 36.1 of Mr Chew's individual employment agreement with Aslan provides:

*No redundancy will arise by reason of the sale or transfer of the whole or part of the business where the person acquiring the business offers the Employee employment in a similar capacity, on substantially similar conditions of employment [excluding superannuation] and agrees to treat the Employee's service as being continuous. This also applies if the Employer offers the Employee employment on these terms with a related Employer.*

[86] Whilst Mr Chew was offered employment in the same capacity as a technician and service was treated as continuous, I do not find that he was offered substantially similar conditions of employment.

[87] The technical redundancy provision required Mr Chew to be offered substantially similar conditions of employment by Trinity if no redundancy was to arise by reason of the sale of Aslan. Mr Chew was not offered substantially similar conditions of employment. Mr Chew's position at Aslan was redundant because his position had become superfluous to the requirements of Aslan when it sold its business to Trinity.

[88] In terms of clause 36 of his individual employment agreement he should have been given four weeks' notice in writing of that or payment in lieu of such notice.

[89] If Mr Chew had been given four weeks' notice in writing, then he would not have been entitled, under his employment agreement, to any redundancy compensation. Written notice would have made it very clear to Mr Chew that his employment was ending with Aslan as his services were no longer required by that company and that the Trinity offer was a new offer of employment and not a pay cut.

[90] Mr Chew was not given the required notice under his employment agreement. I am of the view that this employment relationship problem should be resolved by a finding that Mr Chew is entitled to a payment in lieu of notice. I have calculated that payment for four weeks' notice to be \$2,253.07.

[91] There is also a claim for a penalty for breach of the employment agreement with respect to failing to discuss Mr Chew's entitlements if he did not transfer to Trinity.

[92] Neither Mr Chew nor Aslan contemplated a situation where Mr Chew would not be employed by Trinity. I do not find this is a situation where Aslan tried to avoid contractual obligations to pay redundancy and/or intentionally decided not to discuss the issue of whether Mr Chew would be entitled to redundancy compensation in the event that he did not accept an offer of employment from Trinity. This is not a situation where I am of the view that a penalty should be awarded.

[93] There is also a difficulty in this case with respect to whether the claim for a penalty was made against Aslan within the required statutory time period.

[94] Section 135(5) of the Employment Relations Act 2000 requires that an action for recovery of a penalty under the Act must be commenced within 12 months after the earlier of .....

- (a) *the date when the cause of action first became known to the person bringing the action; or*
- (b) *the date when the cause of action should reasonably have been known to the person bringing the action.*

[95] Mr Chew lodged his statement of problem claiming a penalty for a breach of clause 37 of his individual employment agreement on 20 July 2006. The respondent

named in the statement of problem was Trinity and not Aslan. An amended statement of problem was not lodged until 15 March 2007 which named Aslan as the first respondent. I do not find, therefore that the action for recovery of the penalty was commenced within 12 months from when it could be argued the breach first became known to Mr Chew or when it reasonably would have been known to Mr Chew which would have been a few weeks after commencement of employment at Trinity.

[96] I have also considered this breach of the employment agreement in terms of the overarching obligation of good faith. Not every breach of an employment agreement will mean an employer has breached an obligation to act in good faith. Although there was a breach of a requirement to discuss whether Mr Chew would receive redundancy compensation in terms of clause 37 of his employment agreement, I do not find that there was also a breach of Aslan's obligation to act in good faith.

[97] In conclusion, therefore, I have found the only breach of Aslan's obligations under clause 37 was a failure to discuss whether redundancy compensation, if any, would be available to Mr Chew if he did not transfer to Trinity. I have not found this is a situation where a penalty should be awarded for the breach.

[98] I have found that Mr Chew's position with Aslan was redundant. There was no entitlement for Mr Chew in the employment agreement to compensation in the event of redundancy except for four weeks' notice in writing or payment in lieu of notice. I have concluded that to resolve the employment relationship problem Mr Chew should be awarded a payment amounting to four weeks salary.

**Whether Aslan breached good faith obligations at the time of the sale of its business to Trinity**

[99] Section 4(1A)(a) of the Employment Relations Act 2000 provides that the duty of good faith is wider in scope than the implied mutual obligation of trust and confidence. It requires the parties to be active and constructive in establishing and maintaining a productive employment relationship in which the parties are responsive and communicative – s.4(1A)(b).

[100] Without limiting this provision, s.4(1A)(c) provides that an employer who is proposing to make a decision that will, or is likely to, have an adverse effect on the continuation of employment, is required to provide to the employees affected:

- (i) *access to information, relevant to the continuation of the employees' continued employment, about the decision; and*
- (ii) *an opportunity to comment on the information to their employer before the decision is made.*

[101] The duty of good faith extends to bargaining over an individual employment agreement and matters that arise under or in relation to an individual employment agreement while it is in force – s.4(2)(ba) and (bb).

[102] Ms Rowe submits that s.4(1A)(c) did not apply to Mr Chew because he was not going to face redundancy due to the sale of Aslan.

[103] Aslan no longer required Mr Chew's services and his position therefore was superfluous. The new position he was offered was not on the basis of substantially similar conditions of employment. In those circumstances I find that s.4(1A)(c) applies.

[104] Mr Chew was told that Aslan proposed the sale to Trinity. In terms of the continuation of his own employment, he knew that he was going to be offered employment with Trinity and the nature of that offer. Some emphasis was placed in the applicant's final submissions on the requirement that Mr Chew be given an opportunity to comment on that information before a decision was made.

[105] Mr Chew thought combining both companies, given their different needs, would be a positive step. In my view, this demonstrated that Mr Chew did understand, although perhaps not in a strict legal sense what was to take place between the two companies. I conclude therefore that there must have been information provided by Aslan. There was some discussion about what Trinity was offering Mr Chew and a schedule was prepared setting out what the package would mean for Mr Chew.

[106] I do not find in the circumstances of this case that it was a breach of good faith for Aslan not to disclose the consideration for the purchase and the assets of Trinity and its financial state.

[107] In the circumstances, I am satisfied that Mr Chew did have sufficient information and an opportunity to comment on the information that was relevant to the continuation of his employment.

[108] Aslan did not have a statutory or contractual obligation to ensure that Trinity offered Mr Chew exactly the same terms and conditions that he had at Aslan. Mr Chew's occupation is not in the defined group of vulnerable employees and there can be no breach of good faith in that respect.

[109] Aslan in my view was responsive and communicative with Mr Chew. Mr Howard prepared a spreadsheet and discussed it with Mr Chew to make sure that he was not going to be worse off. I also find, considering the good faith obligations overall, that Aslan was responsive in terms of negotiating the 21 February 2005 individual employment agreement with Mr Chew's representatives prior to the sale to Trinity. That agreement assumed some importance as a result of the subsequent sale to Trinity.

[110] It is alleged that there was a breach of good faith because Mr Chew was told that all Aslan staff were required to take pay cuts but Mr Howard continued to receive the same salary he had received at Trinity.

[111] Mr Chew was not getting a pay cut. His position at Aslan was redundant. He was being offered new employment at Trinity on different conditions than he had been receiving at Aslan. Mr Howard said in his evidence that Mr Chew's statement that he was required to take a pay cut was misleading because Mr Chew was being presented with a brand new offer. I need to determine what Mr Howard, on behalf of Aslan, told or led Mr Chew to believe.

[112] Mr Howard discussed verbally with Mr Chew the nature of the offer from Trinity. This was then followed up by a written individual employment agreement which contained the offer. Mr Howard genuinely believed that Mr Chew would earn the same, if not more, at Trinity. I think it less likely in those circumstances that Mr Howard actually told Mr Chew that the pay of all Aslan staff had been cut or reduced.

[113] Mr Chew made inquiries of Mr Scarff who confirmed that the offer to him by Trinity would result in a reduction in his base rate that he had received at Aslan. Mr Chew may well have gained an impression on that basis about what Trinity was paying Aslan staff. I am not satisfied from the evidence that Mr Howard either directly or indirectly misled Mr Chew about the conditions Trinity was offering other Aslan staff. I do not find there is a breach of good faith with respect to that matter.

[114] I have then considered whether Aslan breached its duty of good faith in not disclosing to Mr Chew whether employees at Trinity had been required to reduce their salary at the time that Aslan was sold to Trinity. There is no evidence that it was put directly to Mr Chew that Trinity staff had been required to reduce their salary. The only complaint therefore can be about silence or omission with respect to that matter. This is one of the main issues for Mr Chew. An employer must observe confidentiality and privacy duties in terms of its employees. Clause 37 of Mr Chew's employment agreement with Aslan, for example, gave Aslan permission to disclose personal information about Mr Chew to Trinity so it could comply with its obligations under clause 37. The Act also recognises the need for employers to keep some matters confidential – s.4(1C). It would also be unusual for current employees of an organisation to be required to reduce their pay.

[115] In those circumstances, I do not find silence about or omission to disclose the individual circumstances of Trinity employees' amounts to a breach of good faith by Aslan.

[116] I have not found there to have been a breach of the duty of good faith by Aslan when there was a failure to discuss whether or not Mr Chew was entitled to redundancy compensation in terms of clause 37 of his individual employment agreement.

[117] In conclusion, I do not find there were breaches of a duty of good faith by Aslan after 1 December 2004 and in particular in terms of the sale of its business to Trinity on 31 October 2005. This allegation against Aslan does not succeed and is accordingly dismissed.

### **Unjustified actions causing disadvantage**

[118] I do not find that the failure by Aslan to secure an offer from Trinity for transfer of Mr Chew on identical terms and conditions of employment was an unjustified action for reasons I have set out earlier. Mr Chew earned more money in the first year with Trinity than he had in the previous year with Aslan so I do not find that the move disadvantaged him in a financial sense.

[119] I do not find that it was an unjustified action for Aslan not to disclose Trinity employees' terms and conditions of employment or whether or not they were required to have their pay cut.

[120] These allegations do not succeed against Aslan and are dismissed.

### **Determination of claims against Aslan**

[121] Aslan did not, as it was required to in terms of clause 37 of Mr Chew's individual employment agreement, discuss with Mr Chew whether he was entitled to redundancy compensation in the event that he did not transfer to Trinity.

[122] Mr Chew was not entitled, under the terms of his employment agreement, to any redundancy compensation except for four weeks' written notice or payment in lieu of notice.

[123] In terms of this breach, it is unlikely that a penalty action was commenced against Aslan within the required 12 months in relation to this matter, but in any event an award of a penalty would not have been justified in the circumstances of this case.

[124] Mr Chew was not offered employment with Trinity on the basis of substantially similar conditions to those he had received at Aslan. Aslan cannot therefore rely on the technical redundancy provision in clause 36 and maintain that no redundancy has arisen. Mr Chew's position at Aslan was redundant. He should have received four weeks' written notice.

[125] I order Aslan Consulting Group Limited to pay to Jienju Chew the sum of \$2,253.07 being four weeks' pay in lieu of notice.

[126] All other claims against Aslan are dismissed.

### **Allegations against Trinity**

**That Trinity, in salary negotiations following the purchase of Aslan, breached ss.4 and 60 of the Employment Relations Act 2000 by failing to act in good faith and that Trinity bargained unfairly in terms of s.68 of the Employment Relations Act 2000**

[127] Section 60 of the Employment Relations Act 2000 provides that the matters that are relevant as to whether an employee and employer bargain for an individual employment agreement and deal with each other in good faith include the circumstances of the employee and employer. The circumstances in this respect include the operational environment of the employee and employer and the resources available to them.

[128] The salary to be paid to Mr Chew was a matter for Trinity to determine in accordance with the requirements of Mr Chew's employment agreement and the minimum rights contained in employment-related statutes. There are limitations to the Authority's jurisdiction to make a determination about any matters relating to bargaining or the fixing of new terms and conditions of employment -s.161(2) of the Employment Relations Act 2000 and *Ruddleston v. Unisys New Zealand Ltd* (unreported, WC16/04, 22 September 2004).

[129] Mr Chew was provided with a copy of his individual employment agreement with Trinity while he was still at Aslan. He was advised to, and did seek, independent advice about the agreement. His representative, Mr Wiman Chew wrote to Trinity on 3 November 2005 and requested changes to Mr Chew's agreement.

[130] Mr Howard undertook the negotiations on behalf of Trinity as its new general manager. Mr Howard was required to obtain the authorisation of Mr Edwards as director of Trinity to any changes in the terms and conditions of Trinity's employees. Trinity was a small business that had suffered a reasonably substantial loss as at March 2005. Trinity hoped that its situation would improve after the purchase of Aslan on 31 October 2005.

[131] I find that Mr Howard was responsive and communicative with Mr Chew's representatives throughout the negotiations including those in May 2006. He promptly provided information when requested and attended meetings with Mr Chew's representatives at a venue of their choice. Mr Chew's representatives were committed in terms of the negotiations on behalf of Mr Chew to obtain the best conditions that they could.

[132] On 21 December 2005, it was agreed, as a result of negotiations, that Mr Chew would be paid \$25,000 and on top of that, that the payment of \$9 for every billable hour would be reinstated. As I have referred to earlier, even after the transfer, Mr Chew continued to be paid on the same base salary rate of \$25,000 per annum that he was receiving at Aslan. Mr Chew was only paid non taxable allowances of \$15.00 per week by Trinity compared with \$165.00 per fortnight as Aslan. Mr Chew therefore received \$67.50 less per week in terms of allowances. He did however get paid a sum for every billable hour which he was not paid at Aslan.

[133] A new individual employment agreement with all the changes was never finalised and signed. This should have been done as a matter of good practice by Trinity although I do not see this omission as a breach of good faith.

[134] One of the allegations by the applicant was that it was a breach of good faith for Trinity to fail to disclose to Mr Chew's representatives what other Trinity employees were receiving. Mr Chew said in evidence that if he knew what the other technicians were getting, and that Trinity staff had not had pay cuts, then his representatives would never have limited their request that his salary increased to \$25,000.

[135] I do not find the failure by Trinity to disclose that Trinity staff had not had pay cuts and/or what their salaries were to be breaches of good faith. There is no evidence that these details were ever requested by Mr Chew's representatives and there are issues of confidentiality and privacy in respect of these matters.

[136] I have also considered whether, as alleged, Trinity bargained unfairly in breach of s.68(1)(b)(i) and (ii) and s.68(2)(b) and (c) of the Employment Relations Act 2000.

[137] Although this was a claim in the amended statement of problem against Trinity, Mr Wiman Chew sought to amend the allegation on the day of the investigation meeting so that it was against Aslan.

[138] The applicant's submission is that Aslan should have, but failed to, provide details of the structure of Trinity, consideration for the purchase, details of the assets of Trinity, whether there was enough work at Trinity for Mr Chew, and the details of the agreement for sale and purchase between Aslan and Trinity.

[139] I accept Ms Rowe's submissions that the allegation with respect to s.68 must relate to bargaining between Trinity and Mr Chew for an individual employment agreement and that there was no bargaining between Mr Chew and Aslan about an employment agreement with Trinity that could result in a breach of s.68. The allegation should properly be against Trinity.

[140] Ms Rowe suggested in her supplementary submissions that the terms of s.68 may not extent to prospective employees although she did not expand on that matter.

Mr Chew was employed by Trinity when the bargaining took place between his representatives and Trinity and s.68 does apply to that bargaining.

[141] Section 68(1)(b)(i) and (ii) and s.68(2)(b) and (d) provide:

*68(1) Bargaining for an individual employment agreement is unfair if-*

...

*(b) the other party to the agreement (**person B**) or another person who is acting on person B's behalf -*

*(i) knows of the circumstances described in the paragraph or paragraphs that apply to person A; or*

*(ii) ought to know of the circumstances in the paragraph or paragraphs that apply to person A because person B or the other person is aware of facts or other circumstances from which it can be reasonably inferred that the paragraph or paragraphs apply to person A.*

*68(2) (b) reasonably relies on the skill, care, or advice of person B or a person acting on person B's behalf or*

...

*(d) where section 63A applied, did not have the information or the opportunity to seek advice as required by that section.*

[142] I am satisfied that Mr Howard made it clear at all times that he was acting on behalf of Trinity. I accept Ms Rowe's submissions that it cannot be said in negotiating with Trinity that Mr Chew reasonably relied on Mr Howard's skill, care or advice. Mr Chew relied on the skill, care and advice of his own representatives who, on his behalf, bargained in a firm and committed manner and negotiated an agreement that was no less favourable than the one he had at Aslan.

[143] Mr Chew had information under s.63A to seek advice, the opportunity to do so and he did seek advice.

[144] I do not find that Trinity bargained unfairly with Mr Chew under s.68 of the act.

[145] In conclusion, I find the allegation that Trinity breached its obligations of good faith and bargained unfairly are not made out and are accordingly dismissed.

**That Trinity breached s.104 of the Employment Relations Act 2000 by paying Mr Chew \$15,000 less than another employee**

*Was the personal grievance of discrimination raised within 90 days?*

[146] Mr Chew says that it was not until May 2006 that he realised that another technician, Michael, was receiving \$40,000 together with \$9 for every billable hour.

[147] Mr Wiman Chew wrote to Trinity and gave notice of a personal grievance on behalf of Mr Chew in a letter dated 12 May 2006 as set out below:

6. *That when Aslan merged with Trinity at the end of November, 2005 he [Mr Chew] was unfairly treated and discriminated against when he was paid \$25,000 per annum when the rest of the staff were paid much, much more doing the same work.*

[148] By way of remedy, Mr Wiman Chew sought on Mr Chew's behalf that Mr Chew's annual salary be increased and backdated immediately.

[149] Mr Howard, on behalf of Trinity, answered the allegation and said in a letter dated 24 May 2006, amongst other matters:

17. *I record my view that CJ has not been discriminated against. I have already incorporated your considerable requests to increase his salary, pay overtime of \$30 per hour and provide time in lieu. Based on the hours currently worked by CJ he may well earn an equivalent salary of \$35,000-40,000 in his first 12 months with Trinity. In addition, CJ receives a car, a phone and IT hardware and software at cost. The company considers that the present remuneration package is the appropriate level for his position. You have commented that CJ did not place the value on having a car provided, as he 'already had a couple of cars that he could drive'. I do not consider that this should impact on what is a generous remuneration package offered for the position.*
18. *In addition, I note:*
  - (a) *CJ does not perform the same tasks as other technicians. The other employees working as technicians are also account managers. CJ does not carry out these tasks. I act as the account manager for all of CJ's customers.*
  - (b) *Other technicians who have a higher base salary have more experience in the industry, provide customers with more value and have better recognised qualifications.*
  - (c) *Other technicians only receive \$9 per hour for every recoverable, billable hour over 20 hours. CJ will receive \$9 per hour regardless the total hours.*

[150] Section 114(1) of the Employment Relations Act 2000 provides a grievance must be raised within 90 days beginning with the date on which the action alleged to amount to a personal grievance occurred or came to the notice of the employee, whichever is the latter.

[151] I accept Mr Chew's evidence that it was not until May 2006 that he became aware of what Michael was being paid. I am satisfied in terms of s.114(2) that Mr Wiman Chew took reasonable steps to make Trinity aware that Mr Chew alleged a personal grievance that he had been discriminated against which he wanted Trinity to address.

[152] The personal grievance was raised within 90 days from the date it first came to Mr Chew's attention with Trinity.

[153] Section 104 of the Employment Relations Act 2000 provides, with respect to discrimination:

*104. Discrimination*

(1) *For the purposes of section 103(1)(c) an employee is discriminated against in that employee's employment if the employee's employer or a representative of that employer, by reason directly or indirectly of any of the prohibited grounds of discrimination specified in section 105, or by reason directly or indirectly of that employee's refusal to do work under section 28A of the Health and Safety in Employment Act 1992, or by reason directly or indirectly of that employee's involvement in the activities of a union in terms of section 107,-*

(a) *refuses or omits to offer or afford to that employee the same terms of employment, conditions of work, fringe benefits, or opportunities for training, promotion, and transfer as are made available for other employees of the same or substantially similar qualifications, experience, or skills employed in the same or substantially similar circumstances;...*

[154] During the investigation meeting, Mr Chew confirmed that the only person he should be compared with is Michael in terms of the allegation of racial discrimination.

[155] Mr Chew was discriminated against in terms of s.104 of the Employment Relations Act 2000 in his employment if:

- Trinity by reason directly or indirectly of Mr Chew's race;

- Refused or omitted to offer him the same terms of employment or conditions of work as were made available to other employees of the same or substantially similar qualifications, experience, or skill;
- Employed in the same or substantially similar circumstances.

[156] Mr Wiman Chew and Ms Rose Chew, in submissions, referred to the rebuttable presumption that the employer discriminated against the employee in terms of s.119(1)(a) of the Employment Relations Act 2000 if the employer omitted or took any of the actions described in para.(a) to (c) of s.104(1).

[157] Mr Chew is still required to establish that Trinity took or omitted any action of the type described in s.104.

[158] Ms Rowe submitted it was questionable whether s.104 applies to prospective employees which was the case when the offer of employment was made by Trinity to Mr Chew.

[159] Mr Chew became an employee of Trinity on 31 October 2005. Section 104 does apply to Mr Chew.

[160] Michael provided a statement to the Authority although he did not attend and give evidence. His actions which led to his departure from Trinity were unusual, and in the circumstances I have not placed weight on his statement.

[161] Mr Scarff provided an affidavit. The evidence I heard from Mr Edwards and Mr Howard about some of Mr Scarff's actions would lead me to conclude that he bears ill will towards the respondents and accordingly I have not placed weight on his affidavit.

**Did Mr Chew have the same or substantially similar qualifications, experience or skills as Michael's qualifications?**

**Qualifications**

[162] Mr Edwards's evidence was that Michael represented to him that he was Microsoft certified. Mr Chew said that Michael passed a number of Microsoft courses but was not fully certified. I accept that Michael was paid on the basis of his representations to Trinity that he was Microsoft qualified.

[163] Mr Chew was not Microsoft qualified. Mr Chew accepted that a Microsoft certification is one which is respected in the IT industry. Mr Chew had left high school at the end of Sixth Form and was studying at Polytech before going to work for Aslan.

[164] There is a difference between Mr Chew and Michael in terms of their respective qualifications.

### **Experience**

[165] Michael had about seven years' experience in the IT industry. He was in his thirties. He had worked in New Zealand and Australia. He had worked at large corporations including the National Bank of Australia for about three years. Michael had operated as an independent contractor with his own business when he was first engaged by Trinity before he was offered employment.

[166] Mr Chew had started in Aslan in late June 2001, initially to get some work experience, and then a position had become available. As at 31 October 2005, he had four years four months experience and during 2006 Mr Chew's salary, following a performance review, was increased to \$32,000 plus 10% of all billable work, overtime, a car, IT hardware and software at cost.

### **Skills**

[167] It is clear from testimonials/emails from clients that Mr Chew was popular, well liked and that his work was respected. As IT technicians, Michael and Mr Chew did a similar type of work. Their charge out rates were the same although that was not, I find, reflected in what was able to be actually charged to the client.

[168] The difference in the skill level of both employees was explained to me by Mr Edwards and Mr Howard in this way. Michael would be sent to sites regardless of size to do upgrades by himself which he would then sign off. It was not thought that Mr Chew had the skills to complete more difficult tasks without assistance. Mr Howard said that he was required to redraft Mr Chew's written reports but not those of Michael's.

[169] Mr Chew and Michael were therefore viewed as having a different level of skill and this impacted on their respective responsibilities.

[170] I find in conclusion that Michael and Mr Chew did not have the same or substantially similar qualifications, experience or skills although they were both IT technicians.

[171] There is no evidence of a causal link between Mr Chew's salary of \$25,000 and race.

[172] The intention of Trinity is irrelevant where there is prima facie evidence that a decision was, in part, based on race. There is no prima facie evidence that race played any part in setting Mr Chew's salary and Mr Edwards and Mr Howard gave evidence that they had both understood Michael was not a Caucasian but was from Zimbabwe.

[173] Mr Howard and Mr Edwards said in their evidence that they were very offended by the allegations that Trinity and Mr Howard personally discriminated against Mr Chew because of his race. They both strenuously denied the matter. Mr Howard said that he had friends from many different races and personally found racism abhorrent. Mr Chew said in his evidence he did not think the second and third respondents were racist but had discriminated against him on the grounds of race with respect to his salary. I do not, in the circumstances of this case, intend to analyse whether there is a difference. Mr Howard said that he had always had a very good working relationship with Mr Chew and Mr Chew accepted his relationship with Mr Howard was cordial.

[174] In conclusion I do not find that Mr Chew was discriminated against in the setting of his salary on the basis of the prohibited ground of race. His personal grievance against Trinity does not succeed and is dismissed.

### **Disadvantage**

[175] Although not specifically alleged I have considered whether the change which Mr Howard on behalf of Trinity intended to implement to the \$9 per hour billable system disadvantaged Mr Chew. Trinity accepted that it should have communicated any change in a better fashion. It should not have made the change on a unilateral basis.

[176] As a result of Mr Wiman Chew and Ms Rose Chew's quick intervention, I am satisfied that Mr Chew suffered no disadvantage as all money owing was back paid.

**Failing to undertake the December performance review**

[177] Clause 8 in Mr Chew's employment agreement with Trinity provided that Mr Chew's performance would be reviewed each six months.

[178] There was no performance review carried out in December 2006. This was at or about the time the application to strike-out was investigated by the Authority. Mr Howard said that in any event by December 2006 Trinity was not in a position to increase Mr Chew's salary because of the considerable legal fees it had incurred to date in terms of Mr Chew's claims and that Mr Chew's salary had been increased earlier that year in July 2006.

[179] A performance review had not been carried out before Mr Chew left his employment with Trinity in April 2007.

[180] I have considered this matter in terms of whether Mr Chew lost a chance to have his salary increased as a result of the performance review from about January 2007. A performance review should have been carried out but I am not satisfied that even if it had it would have resulted in a further increase in salary. Mr Chew had already received an increase in his salary of \$7,000 from July 2006 and Trinity had incurred some unexpected legal costs.

[181] I am not persuaded that the failure to carry out the performance review was such that a penalty should be awarded or that there should be any award for loss of a chance in this case. I note that there was no request for the performance review to be carried out.

**Determination of claims against Trinity**

[182] I have found that Trinity did not breach its obligations of good faith or bargain unfairly.

[183] I have not found that Trinity discriminated against Mr Chew in terms of his salary level on the prohibited ground of race. I have not found that Mr Chew was disadvantaged in his employment with Trinity.

[184] All of Mr Chew's claims against Trinity are dismissed.

### **Claims against Mr Howard**

#### **Did Mr Howard act in a conflict of interest situation when, as a director of Aslan, he negotiated on behalf of Mr Chew with Trinity when he intended to become a director of Trinity?**

[185] A determination as to whether Mr Howard acted in a conflict of interest in negotiating a possible transfer to that company of Mr Chew is not a matter related to an employment agreement and therefore not an employment relationship problem that the Authority has jurisdiction to make a determination about – s.161 Employment Relations Act 2000.

[186] Mr Howard was obliged to have some negotiations with Trinity in terms of the employee protection provision in Mr Chew's individual employment agreement with Aslan. Ms Rowe submits, in my view correctly, that Parliament could not have intended that the obligation would, in some circumstances, create an actionable conflict of interest that would result in a penalty.

[187] The other matter that is important in my view is that there was no intention, following the transfer, to disadvantage Mr Chew in terms of his income. The fact is, and I have not overlooked the increase in Mr Chew's pay in July 2006, that Mr Chew was better off in his first year with Trinity than he was with Aslan.

[188] The Authority does not have jurisdiction to determine whether Mr Howard acted in a conflict of interest situation when he negotiated on behalf of Mr Chew with Trinity.

#### **Penalty for aiding and abetting the breach of an employment agreement and Mr Howard's practice of racial discrimination**

[189] I have not found that Aslan's breach of one of the requirements of clause 37 of Mr Chew's employment agreement was one that justified an award of a penalty. There is no justification for an award of a penalty against Mr Howard in respect of that matter.

[190] I have not found that Trinity discriminated against Mr Chew on the prohibited grounds of race. There is no evidence that Mr Howard discriminated against

Mr Chew. This is not a case that would have justified the piercing of the corporate veil and a finding that Mr Howard was personally liable.

### **Determination of claims against Mr Howard**

[191] The Authority does not have jurisdiction to determine whether Mr Howard acted in conflict of interest when he negotiated with Trinity on behalf of Mr Chew in terms of clause 37 of Mr Chew's employment agreement.

[192] All other claims against Mr Howard are dismissed.

### **Costs**

[193] I reserve the issue of costs. Ms Rowe made it clear that Trinity seeks full costs in terms of its application to strike-out. As at the date of the investigation meeting for the substantive matter, Mr Howard said that Trinity had incurred \$18,050 costs of which \$9,225 relate to the strike-out application. Mr Wiman Chew and Ms Rose Chew do not accept that the opposition to that application was unsuccessful. Ultimately that may be a matter for the Authority to decide.

[194] I would urge the parties to see if they could arrive at an agreement as to costs, bearing in mind the outcome of the matter, the role of the Authority and the appropriate principles in relation to costs in the Authority.

[195] If agreement cannot be reached, then both parties have leave to make further submissions as to costs.

### **Final comments**

[196] There have been references throughout the investigation on behalf of the applicant to the respondents and possibly Ms Rowe misleading the Authority. I wish to record that the Authority has not found conduct by the respondents or Ms Rowe or for that matter by the applicant that would be considered misleading.

**Summary of findings and outcomes**

[197] Aslan:

- I have found Aslan breached its obligation under clause 37 of its employment agreement with Mr Chew to discuss whether redundancy compensation would be available to Mr Chew if he did not transfer to Trinity.
- I have not awarded a penalty in terms of the breach.
- I have ordered Aslan Consulting Group Limited to pay to Jienju Chew the sum of \$2,253.07 gross being four weeks pay in lieu of notice.
- All other allegations against Aslan are dismissed.

Trinity:

- All allegations against Trinity are dismissed.

Hamish Howard:

- The Authority does not have jurisdiction to deal with the allegation that Mr Howard acted in conflict of interest negotiating on Mr Chew's behalf with Trinity.
- The other allegations against Mr Howard are dismissed.
- Costs are reserved

Helen Doyle  
Member of the Employment Relations Authority