

**ATTENTION IS DRAWN TO THE ORDER
PROHIBITING PUBLICATION OF CERTAIN
INFORMATION**

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

[2017] NZERA Auckland 82
3015031

BETWEEN ZONGLIANG JIANG
Applicant

A N D ONO
Respondent

Member of Authority: Eleanor Robinson

Representatives: Nathan Santesso, Advocate for Applicant
Mere King, Counsel for Respondent

Investigation Meeting: 10 and 11 January 2018 at Auckland

Submissions Received: 12 January 2018 from Applicant
8 December 2017 & 15 January 2018 from Respondent

Date of Determination: 13 March 2018

**DETERMINATION OF THE
EMPLOYMENT RELATIONS AUTHORITY**

- A. Permanent non-publication orders will apply to the names of the Respondent and its officers and employees, and any information leading to their identification. The Respondent and its officers and employees are to be referred to by letters bearing no relationship to their actual names.**

- B. Permanent non-publication orders will apply to any financial documents or evidence that contains personal information relating to any of the Respondent's clients and/or commercially sensitive information of the Respondent.**

- C. No person is to access the Authority's file without the consent of the Authority.**

- D. These orders are made pursuant to Schedule 2 clause 10(1) of the Employment Relations Act 2000.**

Employment relationship problem

[1] A Record of Settlement (the Settlement Agreement) dated 20 September 2016 was signed under s.149 of the Employment Relations Act 2000 (the Act). The parties to the Settlement Agreement were the Applicant, Mr Zongliang Jiang and the Respondent, ONO. The Settlement Agreement was signed by Mr Jiang and by AKM, General Manager of ONO.

[2] The Settlement Agreement was signed by a Mediator from the mediation services of the Ministry of Business Innovation and Employment.

[3] The issue now brought before the Authority by Mr Jiang is that ONO has breached the Settlement Agreement by not fully complying with term 3 of the Settlement Agreement.

[4] At the Authority's investigation meeting held on 10 – 11 January 2018 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:

- The interpretation of clause 3 of the Settlement Agreement

Whether or not:

- the terms of the Settlement Agreement prevent ONO from recovering damages from Mr Jiang for any losses it incurred
- A penalty should be awarded in respect of Mr Jiang's conduct

Background facts

[7] At the time Mr Jiang was employed in 2014, ONO was seeking to expand its home loan mortgage business. Mr Jiang had been employed by a number of leading New Zealand

banks before joining ONO. SEY, Head of HR and Admin, said ONO, based on Mr Jiang's previous experience, considered him to be an experienced mortgage manager.

[8] The curriculum vitae he provided to ONO included his experience as a mobile mortgage manager with one leading New Zealand bank, and experience in the areas of migrant banking and lending with two other leading New Zealand banks. Mr Jiang's Curriculum Vitae also set out the awards he had received whilst employed at the three leading New Zealand banks. In addition Mr Jiang had a BA degree and a LLB degree awarded by a New Zealand university.

[9] ONO employed Mr Jiang in 2014 as a Senior Retail Manager. He reported to PNX, Head of Retail Banking, and worked with the assistance of two Bank Tellers. PNX was primarily responsible for the ONO branch at which PNX and Mr Jiang were located.

[10] SEY said that Mr Jiang was the only employee in the ONO Retail Banking Team with New Zealand retail banking experience and as a consequence ONO was heavily reliant upon him to generate home loan transactions.

[11] His duties included assisting PNX to modify ONO's Credit Policy and Home Loan Policy/Procedures; and developing the home loan business and meeting annual targets.

[12] Mr Jiang was employed pursuant to an individual employment agreement (the Employment Agreement) which included at clause 11 the requirement to comply and familiarise himself with all policies and procedures of ONO. He signed the Employment Agreement below the statement:

Acceptance

I have read and understood this Agreement and I accept the offer of employment with the Subsidiary on the terms contained in it.

[13] Mr Jiang thereby also confirmed that he had read, understood and accepted the clauses:

- 23 Resignation termination
- The subsidiary may terminate your employment at any time without notice or payment in lieu of notice in the case of serious misconduct, including, but not limited to the following circumstances:
- (c) Engaging in conduct which the subsidiary reasonably considers is likely to damage the subsidiary's reputation;
 - (d) In any way acting in the manner considered to be in competition with the subsidiary's business;
 - (e) Committing an act of dishonesty such as embezzlement, theft or fraud involving the subsidiary's assets or property;
- or

- (f) Conviction of an offence which in the reasonable opinion of the subsidiary brings the subsidiary into disrepute.

[14] The Employment Agreement provided that Mr Jiang was eligible to receive an annual discretionary performance based bonus, based on the home loan transaction amounts achieved by him in each year. The terms and conditions of the discretionary bonus were set out in Schedule 2, clause 4, of the Employment Agreement which included:

- 4.1 Any entitlement to a bonus payment is conditional and it's at bank's discretion, on the home loan draw down amounts set out below, and on clause 4.1 and 4.2 below. Any bonus payment will be paid annually.

According to 4.1 above, the bonus is calculated as follows:

....

- 4.2 Any bonus payment is conditional upon the achievement of the deposit target, and it's at bank's discretion assigned by the Head of Retail Banking. ...
- 4.3 If there are any losses incurred after any mortgage sale on the loan drawdowns achieved by the employee, the bonus elated to the loan will be withheld.

Serious Fraud Office (SFO) Involvement

[15] DNG, Country Compliance Manager, said he received a letter from the SFO on 10 April 2015 which was seeking information on approximately 40 named individuals, one of whom was Mr Jiang. DNG said that as the SFO's information gathering exercise was confidential and although Mr Jiang's name was included on the list, he did not know why it was there.

[16] As part of the information request, the SFO required ONO to undertake a review of the mortgages initiated by Mr Jiang. DNG explained that due to the complexity of reviewing the transactions, the review did not uncover any issues at that time.

[17] DNG had been granted permission by the SFO to inform a limited number of the management team in ONO about its request, including AKM; however no action had been taken at the time in relation to Mr Jiang by ONO as it had no knowledge as to why his name had been included on the SFO's list.

Events September 2016

[18] On 13 September 2016 Mr Jiang advised that he could not attend work due to illness and he completed a written leave request form. Mr Jiang explained at the Investigation Meeting that he had attended work that day, but felt ill during the morning, leaving and returning to the workplace later that day. He completed a written leave form the following day for a half day absence.

[19] ONO had become aware of an article which had appeared in the NZ Herald newspaper on 15 September 2016. It referred to four people appearing in the Auckland District Court on 13 September 2016 in connection with charges of providing false information or withholding details to obtain \$40 million of property loans. The article referred to one of the accused being a banker.

[20] ONO had become concerned and checked to see whether any members of the retail banking team had been away from work on 13 September 2016. It identified that Mr Jiang had been absent.

[21] During the Investigation Meeting Mr Jiang confirmed that he had not applied for leave to attend the compulsory District Court hearing on 13 September 2016, nor had he informed ONO that he would be doing so.

Meetings 16 and 20 September 2016

[22] AKM and SEY met with Mr Jiang on 16 September 2016 to discuss his absence, and he advised them that he had been required to attend a court hearing, however due to name suppression orders made by the District Court, he could not provide ONO with further details as to the identity of the other parties involved.

[23] On 20 September 2016 ONO met with Mr Jiang and wrongly formed the impression from what he told them that he was a witness rather than a defendant in the impending court case brought by the SFO. SEY said this impression had been strengthened when Mr Jiang told them that he was allowed to leave New Zealand.

[24] Mr Jiang said he had told ONO at the meetings that when he had been asked if he was allowed to leave the country if he was charged, he had confirmed he was allowed to travel because the SFO required him as a witness.

[25] However during the Investigation Meeting Mr Jiang said he was clear that he had told AKM and SEY that he was one of the four people charged. He explained that the advice he had been given by the lawyer representing him in the criminal matters was to offer to act as a witness for the SFO and seek indemnity on the charges against him as a result.

[26] He confirmed that he had not told AKM and SEY that he had had to provide surety of \$500,000 to the court for permission to travel and said at the Investigation Meeting that he had not been aware of the surety being required as a condition of permission to travel until late September 2016.

After consultation during the meeting on 20 September 2016, Mr Jiang was suspended on that date.

Settlement Agreement

[27] On 28 September 2016 the parties signed the Settlement Agreement which provided for Mr Jiang's resignation to be effective on 30 September 2016. The Settlement Agreement contained the following clauses:

2. Within 20 days of this agreement being executed by a mediator, the company will pay to the employee the following sums (less any applicable taxes or deductions required by law);
 - a. All outstanding salary and accrued annual holiday pay to the termination date; and
 - b. Three months base salary on an ex-gratia basis.

3. If an audit of the employee's home loan transactions in the period 1st January 2016 to the Termination Date ("**bonus period**") reveals to the company's satisfaction no existing or potential issues or problems, the company will agree to pay the employee a bonus calculated based on the employee's total home loan amount during the bonus period and in accordance with clause 4, Schedule 2 of the employee's IEA. The total bonus payable amount is \$89,436. Any payments under this clause will be made according to the following timeframe:
 - a. 30% of the total bonus amount paid together with the payments described in clause 2 above;
 - b. 30% of the total bonus amount paid before the end of February 2017; and
 - c. the final 40% of the total bonus amount paid before the end of June 2017.

8. The terms of this agreement are reached on a no admission of liability basis and are in full and final settlement of all and any claims whatsoever that the employee and the company have or may have against the other (including in the case of the employee any claims he may have against any director, agent or employee of the company or any of its related entities) arising from or related to his employment with the company, including the termination thereof.

[28] The Settlement Agreement was certified under s.149 of the Act by the Mediator and signed on 29 September 2016. That certification confirmed that before making the Settlement Agreement, the parties were advised and accepted that they understood the agreed terms of settlement in light of the effect of s.s148A, 149(1) and (3) of the Act which included the advice to the parties that they had been advised and accepted that the agreed terms included the fact that they were:

- (i) final, binding and enforceable;
- (ii) could not be cancelled; and
- (iii) could not be brought before the Authority or the court for review or appeal, except for the purposes of enforcing those terms.

[29] The Mediator in signing the Settlement Agreement noted that he was satisfied that the parties understood the effects of s.s148A, 149(1) and (3) and had affirmed their request that he should sign the Settlement Agreement.

[30] SEY said that the reasons for ONO entering into the Settlement Agreement with Mr Jiang included Mr Jiang's level of seniority and the wish to avoid reputational risk as ONO was relatively new to the home loan mortgage market.

[31] He explained that the staggering of Mr Jiang's bonus payment in the Settlement Agreement was because ONO was concerned that further investigation could uncover issues or problems in the home loans approved by Mr Jiang so it staggered the bonus payments to ensure it could undertake inquiries.

[32] SEY further explained that an audit of home loan mortgage transactions was slow and time consuming, and therefore ONO agreed to stage the bonus payments for 2016 to Mr Jiang over a period of nine months.

[33] ONO made the first stage payment due under clause 3(a) of the Settlement Agreement being within 20 days of the parties and the Mediator signing the Settlement Agreement because the audit process was ongoing and at that stage it was too early to identify any issues or problems.

Events during October - December 2016

[34] SEY said he was first alerted to the criminal charges laid against Mr Jiang on 4 October 2016 when he attended the District Court with DNG.

[35] On 10 October 2016 ONO requested its internal auditor to conduct a special review on the adequacy and effectiveness of ONO's internal controls, and of the overall risks associated in retail mortgage loan process.

[36] DNG said the report was completed on 21 November 2016. Although DNG had not been involved in the completion of the review, he was aware of its findings as these were presented to the Senior Management Team (SMT) of which he was a member.

[37] The special review identified issues with 7 mortgage transactions about which the SFO had requested information, and with an additional 18 transactions that fitted similar criteria for investigation by the SFO.

[38] The special review completed 21 November 2016 identified under the heading "*Operational Risk*" that "*Retail is highly reliant on a sole person (senior retail manager) to*

generate residential mortgages for the bank. During the review it was noted that more than 95% of the mortgages was generated by the senior retail manager.”

[39] On 5 December 2016 the SMT requested that the Internal Audit and Compliance Department (IACD) conduct a review on loans initiated and/or approved by Mr Jiang when he was the Senior Retail Manager. That audit was commenced on 7 December 2016. DNG was involved in, and oversaw the operations and work performed by the IACD.

[40] DNG said the audit process was slow for a number of reasons including that it was:

- (a) being performed over the Christmas/New Year period which had less working days and many staff taking additional leave;
- (b) the IACD had a high workload in December due to year end related tasks;
- (c) the volume of loans initiated by Mr Jiang was high. He had initiated 172 loans in total from 2014 to 2016, of which 84 loans were initiated in 2014 and 2015, and 88 were initiated in 2016;
- (d) the IACD required additional support to review non-English documents;
- (e) the nature of the audit meant the process was slow;
- (f) the IACD was also responding to ongoing SFO requests to provide additional information;
- (g) the time period contained an increase in suspected money laundering activity in the retail mortgage loan portfolio and the increase in filing of Suspended Transaction Reports with NZ Police Financial Intelligence Unit; and
- (h) IADC was also busy dealing with Overseas Investment Office queries.

[41] The internal audit was not completed by 28 February 2016, and as a result ONO decided to pay the second tranche of the bonus payment due before 28 February because of the delay in the audit of the home loan transactions initiated and/or approved by Mr Jiang which meant it had not by that date identified any: “*existing or potential issues or problems*”.

Events 2017 and non-payment of the third tranche of the bonus payment

[42] DNG said that on 7 June 2017 the IACD considered it had sufficiently completed its audit to be able to issue a memorandum to the SMT and to ONO’s Human Resources

department (the SMT memorandum) in which was summarised its findings on the home loans transactions initiated and approved by Mr Jiang in 2016. It stated in conclusion:

Considering the above mentioned suspected activity, we believe that the [ONO] NZ ex-staff member (Charly) [Mr Jiang] had some knowledge of the customer activities and fraudulent nature of the supporting mortgage loan documents.

[43] The SMT memorandum was supported by a memorandum (the Risk Management summary) provided to ONO's Risk Management Committee on 7 June 2017 which set out in detail the suspected fraudulent documents and activity in loans initiated and approved by Mr Jiang in October 2016.

[44] The confidential and commercially sensitive client information which was contained in the Risk Management summary) was not disclosed in the SMT memorandum.

[45] The Risk Management summary set out suspicions related to four 2016 home loan transactions and recorded that the suspicious activity was in line with the charges laid against Mr Jiang by the SFO. These included issues and/or problems of various mortgage loan transactions initiated or approved in 2016. In particular:

- (a) Mortgage documents that Mr Jiang had verified for the transactions appeared to be fraudulent;
- (b) There was evidence of non-related third party funding to service a loan repayment;
- (c) There was no actual evidence of declared income sources;
- (d) Suspected transaction reports filed with NZ Financial Intelligence Unit on customer payment were not in line with declared income sources; and
- (e) NZ Overseas Investment Office approval had not been obtained on a property exceeding the land area allowed for non-NZ residents.

[46] After receiving the summary reports, ONO decided that it had fair and reasonable grounds for concluding in accordance with clause 3 of the Settlement Agreement that there were: "*Existing or potential issues or problems*" with Mr Jiang's 2016 home loan transactions.

[47] As a result it wrote to Mr Jiang on 12 June 2017, enclosing a copy of the memorandum from ONO's Head of internal Audit and DNG, advising him that it had:

“chosen to exercise its discretion to withhold from you any further bonus payments for the Bonus Period”.

[48] Mr Jiang replied on 17 June 2017 stating that two home loan transactions for customers did not fall into the bonus period (January 2016 to September 2016), and that it had been suggested to him by his lawyer that he make a claim to the Authority.

[49] ONO responded on 21 June 2017, acknowledging that the home loan transactions referred to in its letter dated 12 June 2017 fell outside the bonus period. However it advised that it had decided, in light of its concern about Mr Jiang’s potentially fraudulent behaviour, to exercise its discretion in accordance with Schedule 2, clause 4 of the Employment Agreement to withhold the final tranche of the bonus payment due to Mr Jiang in accordance with clause 3 of the Settlement Agreement.

Determination

Interpretation of clause 3 of the Settlement Agreement

(i) Meaning of clause 3 of the Settlement Agreement

[50] The parties signed a Settlement Agreement pursuant to s 149 of the Act. The Mediator had signed below the section that confirmed that he had explained the effects of sections 148A, 149(1) and (3) of the Act and satisfied himself that the parties to the Settlement Agreement understood the effects of those sections and affirmed their request that he sign it.

[51] The relevant sections of the Act explained by the Mediator set out, among other things, that no party may seek to bring the terms of the Settlement Agreement before the Authority or the court: *“whether ... for review or otherwise”*, except for enforcement purposes.

[52] Pursuant to s 149(3)(b) it is not for me to review the terms to which the parties agreed and confirmed with the Mediator, but to determine the meaning of clause 3 of the Settlement Agreement.

[53] When determining the meaning of a contractual clause the starting point was set out by the Employment Court in *New Zealand Tramways and Public Transport Union Inc v Transportation Auckland Corporation Ltd* which stated¹.

The starting point is to examine the words used to see whether they are clear and unambiguous and to construe them according to their ordinary meaning. Consideration must be given to the whole of the contract. The circumstances

¹ [2006] ERNZ 1005 at [16]

of entering into the transaction may be taken into account, not to contradict or vary the written agreement, but to understand the setting in which it was made and to construe it against that factual background having regard also to the genesis and, objectively, the aim of the transaction ...

[54] The involvement of Mr Jiang in an investigation brought by the SFO came to the attention of ONO on 10 April 2015 when the SFO contacted DNG who subsequently informed AKM. ONO was also aware from the article in the NZ Herald newspaper on 15 September 2016, and from what Mr Jiang had told them at the meeting on 16 September 2016, that he had been required to attend the compulsory District Court hearing in connection with the charges brought by the SFO on 13 September 2016.

[55] The Settlement Agreement was entered into by the parties as a means of resolving fully and finally all and any claims that either party may have against the other as stated in clause 8. That was on the basis that Mr Jiang would resign his employment effective 30 September 2016, and ONO would make certain financial payments to him, including a bonus payment as set out in clause 3.

[56] Clause 3 of the Settlement Agreement states:

If an audit of the employee's home loan transactions in the period 1st January 2016 to the Termination Date ("**bonus period**") reveals to the company's satisfaction no existing or potential issues or problems, the company will agree to pay the employee a bonus calculated based on the employee's total home loan amount during the bonus period and in accordance with clause 4, Schedule 2 of the employee's IEA. The total bonus payable amount is \$89,436. Any payments under this clause will be made according to the following timeframe:

- a. 30% of the total bonus amount paid together with the payments described in clause 2 above;
- b. 30% of the total bonus amount paid before the end of February 2017; and
- c. the final 40% of the total bonus amount paid before the end of June 2017.

(i) *An audit and Timeframe*

[57] The clause includes the statement: "*if an audit of the Employee's home loan transactions in the period 1 January 2016 to the Termination Date ...*".

[58] An Audit is defined by the Oxford English Dictionary online as: "*A systematic review or assessment*".²

[59] The clause refers to: "*an audit*" rather than '*the audit*'. I find that the meaning of the clause refers to: "*A systematic review or assessment*" of Mr Jiang's home loan transactions which occurred during the period 1 January 2016 to 30 September 2016. This does not limit

the review procedure to one audit but encompasses the potential for ongoing audits taking place to examine Mr Jiang's home loan transactions which occurred during the Bonus period.

[60] Accordingly if any one of those audits revealed an existing or potential issue or problem, it would become: "*an audit*"

[61] Examining the sentence structure, I find that the reference to the Bonus Period (the period of 1 January 2016 to the Termination Date, i.e. to 30 September 2016) refers to such an audit being to systematically review or assess Mr Jiang's home loan transactions which occurred in the Bonus Period.

[62] There is no time period specified in the Settlement Agreement within which an audit must be undertaken. However it could not be commenced until at the earliest the date of signing the Settlement Agreement and, given that payment of the final tranche of the Bonus Payment must take place before 30 June 2017, I find that the audit process needed to be completed by that date.

[63] I find that the effective timeframe for the audit to be undertaken was between 28 September 2016 and 30 June 2017.

(ii) Basis of the bonus, its calculation and payment

[64] Clause 3 provides that if an audit reveals: "*to the company's satisfaction*" no existing or potential problems or issues, then the company will pay a bonus to Mr Jiang: "*calculated based on the employee's total home loan amount during the bonus period and in accordance with clause 4, Schedule 2 of the employee's IEA. The total bonus payable amount is \$89,436.00*".

[65] Therefore the agreement by ONO to pay the bonus has four components: (i) an audit of Mr Jiang's home loan transactions does not reveal to the company's satisfaction any existing or potential issues or problems; (ii) the bonus is calculated based upon Mr Jiang's total home loan transactions during the bonus period; (iii) any payment due is to be made in accordance with clause 3 (a) (b) and (c); and (iv) this had been agreed to be one total bonus of \$89,436.

[66] The reference in the Settlement Agreement to clause 4 Schedule 2 is for reference to the calculation parameters only as the total amount of bonus payable has been agreed between the parties as \$89,436.00.

² <http://en.exforddictionaries.com>

(iii) Staged nature of the bonus payments and refusal to pay

[67] Clause 3 of the Settlement Agreement sets out the total bonus amount payable agreed at \$89,436.00. It is clearly one bonus that will be made in three tranches at the dates set out in clause 3(a)(b)(c) as agreed by the parties.

[68] I find that if, at the date when a staged payment was due, an audit, ongoing or otherwise, had revealed no existing or potential problems or issues with Mr Jiang's home loan transactions within the designated Bonus Period, then the relevant tranche of the payment due under clause 3(a)(b)(c) of the Settlement Agreement would be made before the date specified.

[69] At 30 June 2017 the date when the third tranche of the bonus payment fell due in accordance with clause 3 (c) of the Settlement Agreement, ONO considered that an audit had revealed to its satisfaction that there were existing or potential problems with Mr Jiang's home loan transactions during the Bonus period.

[70] There are no requirements in the terms of the Settlement Agreement which require any consultation with Mr Jiang as to verification of the existing or potential issues or problems: it simply states: *"If an audit of the employee's home loan transactions in the period 1st January 2016 to the Termination Date ("bonus period") reveals to the company's satisfaction no existing or potential issues or problems,..."*

[71] However, I note that ONO carried out a detailed and thorough investigation into Mr Jiang's home loans in the Bonus Period, and on 12 June 2017 made a copy of the management report available to Mr Jiang, who queried only two transactions. In an email dated 21 June 2017 ONO acknowledged Mr Jiang's response stating: *"Further, since our initial letter ONO has continued its audit of the Bonus Period and has found a number of concerning home loan transactions you have undertaken."* The findings are detailed and ONO states *"As a result ONO is not satisfied that there are no existing or potential problems with your home loan transactions."*

[72] In light of this concern, ONO considered that it had the right in accordance with clause 3 of the Settlement Agreement not to make the Bonus Payment of \$89,436.00 and therefore as two tranches had already been paid, to withhold payment of the final tranche of the bonus.

[73] I find that ONO's concern that there were existing or potential problems or issues with Mr Jiang's home loan transactions to have been reasonably based.

[74] I determine that ONO was within its rights to refuse to make the third tranche of the bonus payment.

(iv) Has ONO complied with the obligation to make the bonus payment?

[75] ONO completed payment of the first two tranches of the bonus. I find that this was in accordance with clause 3 of the Settlement Agreement as at the time the stage payments were due there had been no audit findings to provide the basis for not paying the total bonus and thereby withholding the agreed stage payments which were due.

[76] In respect of the third tranche of the bonus payment, before the date of the stage payment on 30 June 2017 I find that ONO has reasonable concerns that an audit had disclosed existing or potential problems or issues with Mr Jiang's home loan transactions. Acting in accordance with clause 3 of the Settlement Agreement ONO determined not to pay the total bonus thereby withholding the final stage payment.

[77] I determine that ONO has complied with the obligation to make the bonus payment.

Did the terms of the Settlement Agreement prevent ONO from recovering damages from Mr Jiang?

[78] Clause 8 of the Settlement Agreement stated:

The terms of this Agreement are reached on a no admission of liability basis and are in full and final settlement of all and any claims whatsoever that the Employee and the Company have or may have against the other arising from or related to his employment with the company, including the termination thereof.

[79] Above the parties signatures on the Settlement Agreement it states:

1. The settlement is final and binding on and enforceable by us; and
2. Except for enforcement purposes, neither of us may seek to bring these terms before the Authority or the court whether by action, appeal, application for review, or otherwise; and
3. The terms of settlement cannot be cancelled under section 7 of the contractual Remedies Act 1979; and
4. That section 149(4) of the Employment Relations Act 2000 provides that a person who breaches an agreed term of settlement to which subsection (3) applies is liable to a penalty imposed by the Authority.

[80] In *8i Corporation v Marino* Chief Judge Inglis observed:

... while the term "final and binding" in s 149(3)(a) may appear, on its face, to be unambiguous, the courts have long seen such faces to be multi-faceted. For example, in the law on compromise agreements it is well established that

the phrase “full and final” is subject to exceptions (such as where a party deliberately withholds information about an issue which, if it had been known” would have affected the agreement).³

[81] In relation to s 149 settlements Judge Inglis held that the lawfulness or otherwise of a term of a record of settlement will be relevant to the question of its enforceability, noting at [48] that: “*Properly interpreted, a 149(3) does not prevent the court from inquiring into the enforceability of the terms of an agreement*”.

[82] In this case ONO submits that exceptions to enforceability have arisen on the basis of (i) unforeseen claims, and/or (ii) public policy.

(i) Unforeseen claim

[83] ONO submits that it did not know of the alleged fraud or the nature of Mr Jiang’s involvement in the SFO proceedings at the time of Settlement Agreement was entered into. Both the alleged fraud and the actions being investigated by the SFO relate to unlawful actions by Mr Jiang and others.

[84] In this respect I note that DNG was approached by the SFO on 10 April 2015 and required by the SFO to undertake a review of the mortgage loans initiated by Mr Jiang.

[85] DNG shared that information with some of the management team, including notably AKM.

[86] At the date the Settlement Agreement was signed by the parties on 28 September 2016 AKM was aware that:

- the SFO had sought information relating to mortgage loans undertaken by Mr Jiang;
- the article in the NZ Herald on 15 September 2016 had referred to four people having appeared the District Court of 13 September 2016 on charges relating to providing false information to obtain more than \$40 million in property loans, and that one of the accused was a banker; and
- Mr Jiang had attended the District Court hearing on 13 September October 2016.

[87] ONO had wanted to enter into the Settlement Agreement in order to limit or avoid reputational risk and staggered the bonus payments in order to conduct audits and carry out investigation that might uncover issues or problems in the home loans approved by Mr Jiang.

³ *Si Corporation v Marino* [2-17] NZEmpC 69 at [32]

[88] Whilst I accept that at the time of entering into the Settlement Agreement AKM and SEY believed that Mr Jiang was a witness rather than a defendant in the SFO proceedings, I consider that ONO may have had a mixed motivational basis for entering into the Settlement Agreement. These motives being (i) avoidance of reputational damage as a result of an employee being involved in SFO court proceedings; and (ii) the possibility of existing or potential problems or issues with Mr Jiang's home loan transactions, as indicated by the audit provision and the splitting of the agreed bonus payment of \$89,436.00 into three separate tranches spread over a 9 month period.

[89] I find that ONO had sufficient information at the time of entering into the Settlement Agreement for ONO to comprehend there might be issues uncovered by an internal audit, and that such issues would be related to the home loan transactions conducted by Mr Jiang.

[90] I am supported in this conclusion by the fact that (i) ONO suspended Mr Jiang on 20 September 2016, the letter of suspension included the statement "*We will contact you as soon as possible to provide you with full details of the allegations against you....*"; and (ii) that SEY's evidence is that the staggering of the bonus payments in the Settlement Agreement were made to allow ONO time to audit Mr Jiang's home loan transactions.

[91] I find therefore that ONO entered into the Settlement Agreement knowing of the alleged fraud and Mr Jiang's involvement in the SFO proceedings and cannot therefore claim this to be an unforeseen event.

(ii) Public Policy

[92] ONO submits that this is one of the very exceptional circumstances in which a settlement agreement can be set aside for fraud or deceptive conduct, citing *Hildred v Strong* in support.⁴

[93] It further submits that Mr Jiang deliberately withheld information and engaged in criminal and/or fraudulent behaviour. As such, fraud should trump other public policy arguments regarding the finality of settlement agreements, noting that it is permissible for the Authority to intervene in settlements induced by fraud.

[94] When ONO wrote to Mr Jiang on 21 June 2017 it advised him that it had decided to exercise its discretion not to pay him the third tranche of the bonus payment on the basis of his: "*potentially fraudulent behaviour*". This perception had been reached on the basis of the investigation carried out by the IACD that Mr Jiang: "*had some knowledge of the customer activities and fraudulent nature of the supporting mortgage loan documents*". However this

⁴ *Hildred v Strong* [2007] NZCA 475

is not definitive proof of Mr Jiang's having carried out his duties in a manner that was fraudulent.

[95] The criminal prosecution by the SFO in which Mr Jiang is a defendant and in which he has pleaded not guilty to the charges brought against him, has not yet been heard and a decision on the charges reached by the High Court.

[96] In the absence of definitive proof of Mr Jiang's fraudulent behaviour concerning the customer loans I find I am unable to set aside the Settlement Agreement for Mr Jiang's criminal or fraudulent behaviour.

[97] I determine that at this stage the Settlement Agreement does prevent ONO from recovering damages from Mr Jiang on the basis of fraudulent behaviour.

Should a penalty be awarded in respect of Mr Jiang's conduct?

[98] I am more persuaded by ONO's submission that the misrepresentation by Mr Jiang that he was a witness rather than a defendant in the court proceedings was causative and one of the key factors that led it to enter into the Settlement Agreement.

[99] Clause 8 of the Settlement Agreement was stated to be: "*... in full and final settlement of all and any claims whatsoever that the Employee and the Company may have against the other ... arising from or related to his employment*".

[100] I find it more likely than not that if ONO had known the true nature of Mr Jiang's standing in regard to the SFO investigation it would not have entered into the Settlement Agreement.

[101] Mr Jiang was under a duty of good faith pursuant to s 4 and s 4(1A) of the Act to deal with ONO in good faith and not to do anything to mislead or deceive it, or would be likely to mislead or deceive it.

[102] Pursuant to s 4A failure to comply with the duty of good faith is liable to a penalty if the failure to comply was: "deliberate, serious, and sustained".⁵

[103] The Employment Agreement provided the following:

- Conditional offer of employment
Your employment is also conditional on us being satisfied that you do not have a criminal record that may impact on the trust and confidence that the subsidiary can have in you as an employee. ...

⁵ S 4A (a) of the Act

Your ongoing employment is also subject to you maintaining a satisfactory criminal record. It is your responsibility to let the Subsidiary know if there are any changes to your criminal record. You should inform your manager if you are charged with or convicted of any offence that could be relevant to your employment or bring the Subsidiary into disrepute.

12. Performance

In the course of your employment with the Subsidiary, you are required to do the following:

- a) Carry out all lawful and reasonable instructions given to you in relation to your employment;
- b) ...
- c) Use your best endeavours to protect and promote the Subsidiary's business, reputation and relationships and the business, reputation and relationships of the Subsidiaries Related Entities.
- d) Be open and honest with the Subsidiary and proactively advise it of any issues related to your employment;
- e) ...
- f) Act at all times in the best interests of the Subsidiary;

[104] Mr Jiang was also bound with ONO's policies and procedures. The ONO Code of Conduct required that Mr Jiang:

3. Behave in a way of honesty, integrity, quality and trust at all times (sic). Be honest and forthright in all your communications when dealing (sic) with the Bank, including your head of Department, colleagues, customers, auditors and regulators. This includes communications and dealings with a client, as well as someone who works with the Bank.

4. ...

5. Take full efforts to protect the reputation of the Bank. Avoid any actual or potential conflict of interest with the Bank. Never improperly use your position in the Bank or any information you may receive through your work at the Bank, to further your own personal interests, or help others to do so. Never help a customer or anyone else to break or evade the law ...

[105] The duty to act in good faith was complimented by the associated duty of fidelity which required him as an employee to act in ONO's best interest, however he failed to advise ONO that he required to attend court proceedings in which he was facing with criminal charges. These were charges relating to providing false information or withholding details to obtain \$40 million of property loans. I find that the association of Mr Jiang as an ONO employee clearly had the potential to bring ONO into disrepute.

[106] Pursuant to s 135 (2) (a) of the Act, an individual who breaches an employment agreement is liable to a penalty of up to \$10,000.00 per breach.

[107] In determining the appropriate penalty I must have regard to all the relevant matters including:

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

[108] These factors came into force on 1 April 2016 and essentially confirm previous judge made law. In *Tan v Yang and Zhang* Judge Inglis identified factors to be considered in when examining the imposition of a penalty which are comparable to those in s 133A of the Act, including the seriousness of the breach, the impact of the breach on the other party, the remorse shown by the party in breach, and the need for deterrence.⁶

[109] In this case I find Mr Jiang's breaches to have been flagrant and deliberate in that he initially failed to inform ONO that he had been charged with a criminal offence which required his attendance at the District Court hearing on 13 September 2016, and subsequently misled ONO into believing he was a witness rather than a defendant in the SFO proceedings prior to ONO entering into and signing the Settlement Agreement with him..

⁶ *Tan v Yang and Zhang*[2014] NZEmpC 65 at [33]

[110] Such behaviour should not be considered to be acceptable and I find there is a need for an individual and general deterrence by issuing a penalty.

[111] Mr Jiang is therefore ordered to pay \$10,000.00 as a penalty, such payment to be made to ONO.

Costs

[112] Costs are reserved. The parties are encouraged to agree costs between themselves. If they are not able to do so, the Respondent 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.

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

Eleanor Robinson
Member of the Employment Relations Authority