

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

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

[2025] NZERA 741
3353481
3357243

BETWEEN YIFAN ZHANG 3353481
Applicant

AND FORD STEEL
ENGINEERING LIMITED
First Respondent

AND FUTURE SUSTAINABLE
DESIGN LIMITED
Second Respondent

AND XIAOJIANG CHEN (LUBAN
CHAN/CHEN)
Third Respondent

BETWEEN FORD STEEL 3357243
ENGINEERING LIMITED
First Applicant

FUTURE SUSTAINABLE
DESIGN LIMITED
Second Applicant

YIFAN ZHANG
First Respondent

YUZHONG MA
Second Respondent

Member of Authority: Simon Greening

Representatives: Aimee Cai, advocate for the Applicant and Second
Respondent
May Moncur, advocate for the First, Second and Third
Respondents

Investigation Meeting: 28 and 29 October 2025, at Auckland

Submissions received: 29 October 2025 from Applicant
29 October 2025 from Respondent

Determination: 17 November 2025

DETERMINATION OF THE AUTHORITY

Employment Relationship Problem

[1] Yifan Zhang was employed by Ford Steel Engineering Ltd (FSEL) and Future Sustainable Design Ltd (FSDL), the respondents, from 2018 until 2020.

[2] On 17 April 2024, Yifan Zhang and the respondents concluded a Record of Settlement (settlement agreement). The terms of settlement were agreed by the parties pursuant to section 149 of the Employment Relations Act 2000 (the Act) and certified by a mediator on the same date.

[3] FSEL and FSDL refer to themselves as the FS Group.

[4] Mr Chen is the CEO of the FS Group. Mr Chen's Chinese name is Xiaojiang Chen. He also refers to himself as Luban Chan.

[5] Mr Chen signed the settlement agreement on behalf of FSEL and FSDL.

[6] On 28 January 2025, Ms Zhang lodged a statement of problem with the Authority alleging FSEL, FSDL and Mr Chen had breached various clauses in the settlement agreement. This application is file number 3353481.

[7] Yuzhong Ma, also referred to as Mark Ma, is Ms Zhang's husband.

[8] On 13 February 2025, FSEL and FSDL lodged a counterclaim with the Authority alleging Ms Zhang and Mr Ma had breached various clauses in the Settlement Agreement. This application is file number 3357243.

[9] The parties seek a compliance order and penalties against each other.

The Authority's investigation

[10] For the Authority's investigation written witness statements were lodged by Ms Zhang, Mr Ma, and Mr Chen. All witnesses answered questions under oath or affirmation from me and the parties' representatives. The representatives also gave oral closing submissions.

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

The Settlement Agreement

[12] Relevant clauses in the settlement agreement are set out below:

(2) Both parties agree to file a joint notice to discontinue proceedings CIV 2021-404-564 in the High Court, with no issue as to costs.

...

(7) The parties agree that the following message will be published on the SkyKiwi channel in Chinese within 14 days of the notice of discontinuance being filed in the High Court (and proof of the discontinuance is provided to the Employee) and the Agreement being signed by the mediator. The parties agree that the translation of the above, in English is as follows:

"I Yifan Zhang hereby formally withdraw the publications between January to March 2021 which were published on SkyKiwi about untrue information about Luban Chan. I formally apologise for the impact and reputational damage caused. We have reached a mutual agreement."

...

(11) These terms of settlement and all matters discussed in settlement shall remain confidential to the parties, save for their solicitors or authorised representatives and/or as may be required by law.

The issues

[13] The issues requiring investigation and determination were:

- (a) Did any of the respondents, including Mr Chen, breach any clause in the settlement agreement?
- (b) If so, should a penalty be imposed?
- (c) Should a compliance order be issued against any of the respondents?

- (d) Did Ms Zhang and/or Mr Ma breach any clause in the settlement agreement?
- (e) If so, should a penalty be imposed?
- (f) Should a compliance order be issued against either Ms Zhang and/or Ma?
- (g) Should either party contribute to the costs of representation of the other party?

Did any of the respondents breach any clause in the settlement agreement?

[14] Ms Zhang's statement of problem sets out the alleged breaches of the settlement agreement. I will work through each allegation in turn.

Allegation 1 - On 26 October 2024 Mr Chen circulated screenshots of the apology post to various people

[15] Clause 7 in the settlement agreement required Ms Zhang to post an apology on the Skykiwi social media channel. The wording of the apology was a term of settlement, which follows:

I Yifan Zhang hereby formally withdraw the publications between January to March 2021 which were published on Skykiwi about untrue information about Luban Chan. I formally apologise for the impact and reputational damage caused. We have reached a mutual agreement.

[16] On 7 May 2024 Ms Zhang posted the apology on the Skykiwi Channel.

[17] On 14 May 2024 Ms Zhang emailed the respondents' legal representative to confirm she had posted the apology and completed all the required terms of settlement.

[18] However, the post was removed by Skykiwi on 14 May 2024. In his evidence Mr Chen said the post was removed by Skykiwi because it did not comply with Skykiwi's posting policies.

[19] On 21 October 2024 Mr Chen emailed Ms Zhang asking her to repost the apology on Skykiwi. In the email Mr Chen confirmed his belief that either party could repost the apology, that he would consider a publication period of 3 months, and that he would contact Skykiwi after 23 October 2024 if the apology was not reposted by Ms Zhang by this date.

[20] The parties agree the settlement agreement did not include a term specifying the period of time the post would remain on Skykiwi.

[21] Ms Zhang replied to this email on the same day confirming she had posted the apology on Skykiwi on 7 May 2024.

[22] On 21 October 2024 Mr Chen emailed Ms Zhang:

As you already rejected my kind offer clearly, there is no point to wait. I will directly publish the message specified in the agreement.

[23] On 26 October 2024 Ms Zhang's apology was reposted on the FS Group RedNote account. RedNote is a Chinese social media platform.

[24] Mr Chen says the apology was then reposted a few days later on the FS Group RedNote account. However, this time, the post did not just include the apology but additional information:

FS Group withdraws defamation lawsuit against Zhang Yifan in the High Court

Since January 2021, our former employee Zhang Yifan (Eva Zhang) has posted false statements about the company and its management online, resulting in significant losses. In April 2021, FS Group, along with its subsidiaries Future Sustainable Design Ltd, Ford Steel Engineering Ltd, and the company's management, filed a defamation lawsuit against Ms Zhang in the Auckland High Court. Both parties have now reached an out-of-court settlement, and Ms. Zhang has fulfilled her obligations by issuing the following apology statement. Therefore, the company has decided to withdraw the defamation lawsuit against the individual in the High Court. This is an official statement. Below is the apology statement issued by Ms Zhang online.

[25] Mr Chen says in October 2024 the FS Group reposted the original apology post, and then subsequently an additional post explaining the apology post, in response to what he described as an escalating campaign of misinformation against him and the FS Group.

[26] Mr Chen says this campaign of misinformation included videos posted on various social media platforms involving accusations about his personal and professional conduct.

[27] Mr Chen was concerned that Skykiwi had removed the apology post and therefore Ms Zhang had not complied with the terms of settlement.

[28] I need to consider whether the second post on the FS Group RedNote account which included an explanation regarding Ms Zhang's apology, disclosed a term of settlement and thereby breached clause 11 of the settlement agreement.

[29] Clause 7 of the settlement agreement makes clear the apology was issued by Mr Zhang to settle High Court proceedings.

[30] I find this post disclosed the contents of clause 7 of the settlement agreement. This is because the post went further than reposting Ms Zhang's apology. It identified Ms Zhang as a former employee and stated Ms Zhang provided the apology to settle a High Court defamation lawsuit.

[31] Clause 2 of the settlement agreement refers to the discontinuance of proceedings in the High Court. I also find this post was a disclosure of clause 2 of the settlement agreement because it referred to the withdrawal of the defamation lawsuit in the High Court.

[32] Clause 11 requires the terms of settlement remain confidential between the parties and their advisors. I find FS Group disclosed clauses 2 and 7 of the settlement agreement and therefore breached the confidentiality clause.

Allegation 2 – On 23 November 2024, Mr Chen posted the apology letter on their WeChat moments

[33] The parties confirmed at the investigation meeting this allegation is the first allegation with a different date. Therefore, it is not a separate allegation and does not need to be considered.

Allegation 3 – On 25 December 2024 the respondents published the apology letter on their Red Note account

[34] There was no evidence to support this allegation. Therefore, this allegation is unsuccessful.

Allegation 4 – On 13 January 2025 both the FS Group account and Mr Chen's personal account posted a statement and released evidence that included personal attacks against the applicant and her company

[35] I have reviewed the posts referred to by Ms Zhang. The posts on the FS Group Red Note account channel, on 13 January 2025, all refer to allegations regarding invalid contracts and negotiating projects.

[36] A post on “Luban Luban Chan’s” Red Note account on 13 January 2025, records:

I hope you learn your lesson and don’t bring shame to Tsinghua University again!

[37] None of these posts breach any of the terms of settlement because the settlement agreement does not contain a non-disparagement clause.

Allegation 5 – On 15 January 2025, the FS account made further statements, publicly mentioning the applicant’s name, her husband’s name, and the name of her company

[38] On 15 January 2025 a post was made on the FS Group Red Note account. The relevant extract of the post:

Ms Zhang was indeed an employee of our company’s design department. In April 2021, our company filed a defamation lawsuit against the couple, Yifan Zhang and Yuzhong Ma, in the New Zealand High Court. In 2024, Ms Zhang issued a real-name apology letter to Luban Chan online and signed an out-of-court settlement agreement with the company.

[39] I need to consider whether this post breached clause 11 of the settlement agreement. Clause 11 requires the terms of settlement remain confidential between the parties and their advisors.

[40] Clause 7 of the settlement agreement makes clear the apology was issued by Mr Zhang to settle High Court proceedings.

[41] I find this post breached clause 11 of the settlement agreement. The post identified Ms Zhang as a former employee and stated Ms Zhang provided the apology to settle a High Court defamation lawsuit. This was a confidential term of settlement.

Allegation 6 – Breach of non-disparagement clause

[42] In her statement of problem, the applicant identifies four alleged breaches of the non-disparagement clause by the respondents and Mr Chen.

[43] The settlement agreement does not contain a non-disparagement clause.

[44] The applicant submits a non-disparagement clause should be an implied term of the settlement agreement because of clause 3 in the settlement agreement which records:

The Parties agree to resolve all disputes directly and indirectly concerning the above by way of entering into this Agreement.

[45] In *Vulcan Steel Limited v Manufacturing Construction Workers Union*¹ the Employment Court set out the legal principles for the implication of terms as discussed by the Supreme Court in *Bathurst Resourced Ltd v L & M Coal Holdings Ltd*:²

For a term to be implied, the following conditions (which may overlap) must be satisfied:

- (1) It must be reasonable and equitable;
- (2) It must be necessary to give business efficacy to the contract, so that no term will be implied if the contract is effective without it.
- (3) It must be so obvious that “it goes without saying”;
- (4) It must be capable of clear expression;
- (5) It must not contradict any express term of the contract.

[46] Clause 3 is designed to ensure settlement of all disputes between the parties including the defamation case in the High Court.

[47] It would not be reasonable to imply a non-disparagement term into the settlement agreement because parties should be aware upon signing a s 149 settlement agreement, what their obligations are, and who might be bound by important clauses such as a non-disparagement clause. Neither would it be equitable to imply a non-disparagement term because of the penalty regime which is used to hold parties to account for breaching a term of settlement. A non-disparagement clause is not so obvious that it “goes without saying”, at the very least because it is not clear whether it would be a mutual non-disparagement clause or only apply to one party.

[48] Furthermore, clause 13 of the settlement agreement makes it clear that the obligations contained in the agreement are effective and binding. The parties agreed on their respective obligations, had the opportunity to seek advice, then signed the settlement agreement knowing what those obligations were.

[49] There is no legal or factual basis to imply a mutual non-disparagement clause into the settlement agreement. Accordingly, no breaches can be established.

¹ *Vulcan Steel Limited v Manufacturing & Construction Workers Union* [2022] NZEmpC 78 at [90].

² *Bathurst Resourced Ltd v L & M Coal Holdings Ltd* [2021] NZSC 85 at [116].

Allegation 7 – Breach of settlement terms in relation to the apology letter

[50] Ms Zhang says Mr Chen required her to repost the apology, and then subsequently reposted the apology on the FS Group RedNote account. Clause 7 of the settlement agreement does not record which party is responsible for posting the apology.

[51] Clause 7 records:

“The parties agree that the following message will be published on the Skykiwi channel...”

[52] Either party was at liberty to post the apology. Accordingly, I find there was no breach of the terms of settlement regarding Mr Chen’s decision to repost the apology on the FS Group RedNote account. I accept there were issues with posting the apology on Skykiwi due to the platform’s internal posting policies. These issues were outside the control of the parties. For completeness, I note the settlement agreement does not state which Skykiwi account Ms Zhang was required to use to post the apology.

[53] Therefore, this allegation has not been established.

Allegation 8 – Breach of good faith and fair dealing clauses

[54] The settlement agreement does not contain a good faith or fair dealing clause.

[55] Ms Zhang submits these clauses should be implied terms of the settlement agreement because of clauses 9, 10, and 11 in the settlement agreement.

[56] Clauses 9 and 10 in the settlement agreement confirm the agreement was made in full and final settlement of all claims between the parties.

[57] The parties agreed, in signing the settlement agreement, to resolve all matters arising out of the employment relationship. However, it does not follow that this clause requires the parties to act in good faith or otherwise in a fair manner towards each other following the conclusion of the employment relationship.

[58] It would not be reasonable to imply fair-dealing or good faith because the settlement agreement is explicit that upon signing, parties are bound by the express terms.

[59] It is also not clear what “fair-dealing” or “good faith” might have meant in the context of parties’ obligations post settlement. Neither are these suggested clauses so obvious they “go without saying”.

[60] There is no legal or factual basis to imply a good faith and/or fair dealing clause into the settlement agreement. Accordingly, no breaches can be established.

Should a compliance order be issued against any of the respondents?

[61] The summary of my findings in respect of Ms Zhang’s claims:

(a) FSEL and FSDL breached clause 11 of the settlement agreement by its post on or about 26 October 2024 which disclosed the settlement of High Court proceedings, withdrawal of proceedings and the apology which followed. In substance, this post disclosed clauses 2 and 7 of the settlement agreement.

(b) FSEL and FSDL breached clause 11 of the settlement agreement by its post on 15 January 2025, which disclosed the settlement of High Court proceedings, withdrawal of proceedings and the apology which followed. In substance, this post disclosed clauses 2 and 7 of the settlement agreement.

[62] For completeness, I find that Mr Chen did not breach the settlement agreement.

[63] The genesis of this employment relationship problem was the apology post and its removal from the Skykiwi account.

[64] At the investigation meeting, Mr Chen confirmed the apology post along with the explanation, which I found to be in breach of the settlement agreement, remains on the FS Group RedNote account.

[65] The apology is also currently posted on the FS Group website.

[66] According to the settlement agreement, the apology post was to be published on the Skykiwi channel. The parties did not agree the apology could be posted on any other social media platform including the FS Group’s website.

[67] The apology should be posted on the Skykiwi channel in accordance with clauses 7 and 8 of the settlement agreement. However, information explaining the

apology and/or any other information as to why the apology was made, must be removed from all social media platforms.

[68] Therefore, pursuant to section 137 of the Act I make the following compliance orders:

- (a) Within 3 working days of the date of this determination, FSEL and FSDL are jointly and severally ordered to comply with the settlement agreement by taking all reasonable steps to remove all posts on all media platforms which disclose any terms of settlement.
- (b) Within 3 working days of the date of this determination, FSEL and FSDL are jointly and severally ordered to comply with the settlement agreement by removing the post, referred to in paragraph [24] of this determination, from all media platforms.
- (c) Within 3 working days of the date of this determination, FSEL and FSDL are jointly and severally ordered to remove the apology post from the FS Group website, RedNote account, and any other media platform.

Should penalties be imposed on the respondents?

[69] Section 149(4) of the Employment Relations Act 2000 enables a party to seek a penalty against any person who breaches a section 149 agreement.

[70] Section 133A sets out a number of factors the Authority must have regard to in determining an appropriate penalty. In addition, the full Court in *Borsboom v Preet PVT Ltd*³ has set out other factors that must be considered when determining a penalty application.

[71] I am satisfied that a penalty is justified in the circumstances. There is a significant public interest in ensuring terms of settlement are honoured by parties. Confidentiality provisions are a key feature of settlement agreements, with confidentiality often being a key motivation for parties to settle.

³ *Borsboom v Preet PVT* [2016] NZEmpC 143 at [141]-[148].

[72] I have used the four-step process outlined by the court in *Borsboom* in determining the appropriate penalty.⁴ The breaches are materially similar; I have therefore decided to impose one penalty on FSEL and FSDL jointly. Section 135(2)(b) provides that a company in breach of a section 149 agreement is liable to a penalty up to \$20,000.

[73] My provisional starting point is \$500. I have considered deterrence, both specifically and more generally, having regard to the context in which the posts were made. I accept there was a dispute about how long the post would remain on the Skykiwi social media channel. The FS Group expressed frustration about the apology being removed from the Skykiwi channel after a short time. However, the FS Group did not just repost the apology. The FS Group posts explained why the apology had been made, that Ms Zhang was a former employee, and defamation proceedings had been withdrawn from the High Court because of a “out of court settlement” between the parties. This post amounted to an intentional breach of the terms of settlement. I therefore make an uplift of \$500 on my provisional starting point.

[74] The provisional penalty is \$1000. I have concluded this provisional penalty is proportionate to the seriousness of the breaches and harm occasioned by the respondents’ actions. This result is also consistent with similar cases involving the disclosure of terms of settlement and breaches of confidentiality provisions in settlement agreements. For example, in *Bidvest New Zealand Limited v Graeme Vivian* the Authority ordered the former employee of the company to pay a penalty of \$3,000 for breaching the confidentiality provision in a settlement agreement by dint of a Facebook post.⁵ In *Ross Pullen v Agrissentials NZ Limited* the Authority ordered the company pay a penalty of \$1,500 for breaching the confidentiality provision in a settlement agreement by disclosing information to ACC.⁶

[75] I consider that a penalty of \$1,000 is a proportional outcome when considering the circumstances and context of this case.

[76] Within 21 days of the date of this determination I order FSEL and FSDL jointly and severally to pay the Crown a penalty of \$1,000.

⁴ Above, at [151].

⁵ *Bidvest New Zealand Limited v Graeme Vivian* [2015] NZERA 101.

⁶ *Ross Pullen v Agrissentials NZ Limited* [2015] NZERA 145.

Did Ms Zhang and/or Mr Ma breach any clause in the Settlement Agreement?

[77] At the investigation meeting Ms Moncur clarified the counterclaims advanced against Ms Zhang and Mr Ma. There were four allegations.

Ms Zhang

[78] The first allegation is that Ms Zhang breached the confidentiality provision in the settlement agreement by posting a screenshot of a redacted version of the settlement agreement in 2024. Clause 11 of the settlement agreement was the only clause that was that was not redacted. Clause 11 records:

These terms of settlement and all matters discussed in settlement shall remain confidential to the parties, save for their solicitors or authorised representatives and/or as may be required by law.

[79] On or about 18 January 2025, the redacted version of the settlement agreement was posted on the GEAR Architecture Design Ltd (GEAR) RedNote account.

[80] Ms Zhang is the sole director of GEAR. Ms Zhang accepts she posted a redacted version of the settlement agreement on the GEAR Architecture Design Red Note social media channel but says she did so only in response to the posts made by the respondents.

[81] I find Ms Zhang's post on the GEAR RedNote account on 18 January 2025 disclosed a term of settlement regarding confidentiality, and this in turn breached clause 11 of the settlement agreement.

[82] The second allegation is that Ms Zhang's post on the GEAR RedNote account, on or about 15 January 2025, disclosed a term of settlement. Ms Zhang accepted that she was aware of the post.

[83] The post states:

4 years ago I resigned from Luban's company FS. Because of certain actions Luban took as an employer, I had a dispute with him...we ended up suing each other...I accepted Luban's suggestion and settlement conditions

[84] The settlement agreement requires the parties to keep the terms of settlement, and all matters discussed in settlement confidential. The settlement agreement does not require the parties to keep the fact of settlement confidential.

[85] I find this post does not disclose a term of settlement, it only refers to the existence of an employment dispute and settlement of that dispute.

Mr Ma

[86] Section 149 and s 137 of the Act grants power to the Authority to order penalties and/or compliance for breach of a settlement agreement by any “person”. A “person” is someone who knows of the fact of settlement, and relevant terms, and then breaches an agreed term of settlement.⁷

[87] Mr Ma accepts that he was involved in settlement discussions and was aware of the terms of settlement.

[88] The third allegation is that on 15 January 2025, Mr Ma disclosed a term of settlement through a video posted on his RedNote account. The relevant part of the translated English transcript records:

Later, after we signed a settlement agreement regarding our employment and defamation dispute with Luban, we just wanted to stay away from him and live our own lives.

[89] Clause 11 of the settlement agreement requires the parties to not disclose terms of settlement. Clause 2 makes it clear the high court proceedings involving defamation would be withdrawn because the parties had settled both the civil proceedings and employment related claims.

[90] I find Mr Ma was a person required to comply with the terms of settlement, including the confidentiality clause. I find Mr Ma breached clause 11 by disclosing the substance of clause 2 of the settlement agreement through the video posted on 15 January 2025.

[91] The fourth allegation is that on 28 January 2025, Mr Ma disclosed a term of settlement and/or referred to settlement discussions, through a post on his RedNote account. The relevant part of the post records:

During the mediation process, the other party suggested that we write an apology letter, but we refused...next because of the employment relationship, because Eva..(Ms Zhang)

⁷ *Culturesafe NZ Limited v Turuki Healthcare Services Charitable Trust* [2020] NZEmpC 165 at [53].

[92] Clause 11 of the settlement agreement requires the parties to not only keep the terms of settlement confidential, but “*all matters discussed in settlement*”.

[93] The parties were involved in several mediations and negotiated without prejudice discussions over a period. I find that the phrase “all matters discussed in settlement” covered all of the without prejudice discussions leading up to the settlement agreement being concluded.

[94] The fact that an apology was offered and accepted was a term of the Settlement Agreement. It was therefore a matter discussed as part of settlement related discussions. The parties expressed different views as to the timing of these discussions, however there is no dispute these settlement related discussions occurred on a without prejudice basis.

[95] I find Mr Ma disclosed a topic of settlement discussion between the parties with reference to the apology letter, on 28 January 2025, by his post on RedNote.

Should a compliance order be issued against Ms Zhang and/or Mr Ma?

[96] The summary of my findings in respect of FSEL and FSDL’s claims against Ms Zhang and Mr Ma:

- (a) I find Ms Zhang’s post on the GEAR RedNote account on 18 January 2025 disclosed a term of settlement regarding confidentiality, and this in turn breached clause 11 of the settlement agreement.
- (b) I find Mr Ma was a person required to comply with the terms of settlement, including the confidentiality clause. I find Mr Ma breached clause 11 by disclosing the substance of clause 2 of the settlement agreement through the video posted on 15 January 2025.
- (c) I find Mr Ma disclosed a topic of settlement discussion between the parties with reference to the apology letter, on 28 January 2025, by his post on RedNote.

[97] I accept that Ms Zhang was attempting to limit her disclosure to avoid breaching the settlement agreement. Ms Zhang thought matters between the parties had been resolved because the settlement agreement had been signed, and she had complied with the terms. Ms Zhang says she only disclosed the term of settlement referring to confidentiality because FSEL and FSDL had not complied with the terms of settlement.

[98] While I understand why Ms Zhang took the step she did, there was no justification for disclosing a term of settlement.

[99] Mr Ma was aggrieved with Mr Chen in regard to a number of alleged matters. These matters are outside the jurisdiction of the Authority.

[100] Settlement agreements contain enforceable promises between parties with consequences for either party in the event of a breach. Taking this important premise into account and the circumstances of this particular matter, I find a compliance order is justified.

[101] Pursuant to section 137 of the Act I make the following compliance orders:

- (a) Within 3 working days of the date of this determination, Mr Ma is ordered to comply with the settlement agreement by taking all reasonable steps to remove all posts on all media platforms which disclose any terms of settlement.
- (b) Within 3 working days of the date of this determination, Ms Zhang is ordered to comply with the settlement agreement by taking all reasonable steps to remove all posts on all media platforms which disclose any terms of settlement.
- (c) Within 3 working days of the date of this determination, Ms Zhang is ordered to repost the apology on Skykiwi and to do so in a manner that complies with Skykiwi's internal posting policies.

Should penalties be imposed on Ms Zhang and/or Mr Ma?

[102] Section 149(4) of the Employment Relations Act 2000 enables a party to seek a penalty against any person who breaches a section 149 agreement.

[103] Section 133A sets out a number of factors the Authority must have regard to in determining an appropriate penalty. In addition, the full Court in *Borsboom v Preet PVT Ltd*⁸ has set out other factors that must be considered when determining a penalty application.

Ms Zhang

[104] I am satisfied that a penalty is justified in the circumstances, especially given the public policy interest in ensuring settlement agreements are adhered to by parties.

[105] I have used the four-step process outlined by the court in *Borsboom* in determining the appropriate penalty.⁹

[106] My provisional starting point is \$500. I have considered deterrence, both specifically and more generally, having regard to Ms Zhang's post. I have concluded this provisional penalty is proportionate to the seriousness of the breach and harm occasioned by Ms Zhang's post. Ms Zhang felt she needed to defend herself. I have considered Ms Zhang's point of view the matter had been settled, and she was only responding to the post on the FS Group Rednote account. I have also considered the point made by Mr Chen that Ms Zhang did not follow up with Skykiwi to ensure her apology post complied with their internal posting policies.

[107] I consider a penalty of \$500 is a proportional outcome when considering the circumstances and context of this case.

Mr Ma

[108] Mr Ma was not a party; however, he was aware of the terms of settlement. It is important that an individual who is aware of the terms of settlement, complies with those terms. I am satisfied that a penalty is justified. I have used the four-step process outlined by the court in *Borsboom* in determining the appropriate penalty.¹⁰ My provisional starting point is \$1,000. I have decided to issue one penalty against Mr Ma, although I have found there were two breaches of the settlement agreement. I have considered aggravating and mitigating factors. There are two aggravating features. Firstly, Mr Ma referred to settlement discussions. He was privy to these discussions and

⁸ *Borsboom v Preet PVT* [2016] NZEmpC 143 at [141]-[148].

⁹ Above, at [151].

¹⁰ Above, at [151].

should have been alive to the importance of keeping matters discussed between parties, confidential. Secondly, Mr Ma was upset with Mr Chen about a number of matters which are not within the jurisdiction of the Authority. These other matters seem to have been the driving force behind Mr Ma's decision to disclose the terms of settlement.

[109] I consider a penalty of \$1,000 is a proportional outcome when considering the circumstances and context of this case.

Orders

[110] Pursuant to section 137 of the Act I make the following compliance orders:

- (a) Within 3 working days of the date of this determination, FSEL and FSDL are jointly and severally ordered to comply with the settlement agreement by taking all reasonable steps to remove all posts on all media platforms which disclose any terms of settlement.
- (b) Within 3 working days of the date of this determination, FSEL and FSDL are jointly and severally ordered to comply with the settlement agreement by removing the post, referred to in paragraph [24] of this determination, from all media platforms.
- (c) Within 3 working days of the date of this determination, FSEL and FSDL are jointly and severally ordered to remove the apology post from the FS Group website, RedNote account, and any other media platform.
- (d) Within 3 working days of the date of this determination, Mr Ma is ordered to comply with the settlement agreement by taking all reasonable steps to remove all posts on all media platforms which disclose any terms of settlement.
- (e) Within 3 working days of the date of this determination, Ms Zhang is ordered to comply with the settlement agreement by taking all reasonable steps to remove all posts on all media platforms which disclose any terms of settlement.

- (f) Within 3 working days of the date of this determination, Ms Zhang is ordered to repost the apology on Skykiwi and to do so in a manner that complies with Skykiwi's internal posting policies.

[111] Within 21 days of the date of this determination I order:

- (a) FSEL and FSDL jointly and severally to pay the Crown a penalty of \$1,000.
(b) Ms Zhang pays the Crown a penalty of \$500.
(c) Mr Ma pays the Crown a penalty of \$1,000.

Costs

[112] Costs are reserved. The parties are encouraged to resolve any issue of costs between themselves. Both parties have breached the Settlement Agreement. I am therefore minded to let costs lie where they fall.

[113] If the parties are unable to resolve costs, and an Authority determination on costs is needed, either party may lodge, and then should serve, a memorandum on costs within 28 days of the date of this determination. From the date of service of that memorandum, the other party then have 14 days to lodge any reply memorandum. On request by either party, an extension of time for the parties to continue to negotiate costs between themselves may be granted.

Simon Greening
Member of the Employment Relations Authority