IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND

I TE RATONGA AHUMANA TAIMAHI
TĀMAKI MAKAURAU ROHE

[2025] NZERA 119
3159748

	BETWEEN	TIM JENNISON Applicant
	AND	ACG EDUCATION LIMITED Respondent

Member of Authority:	Nicola Craig
Representatives:	Stephen Langton and Emma Crowley, counsel for the applicant Penny Swarbrick and Kirsti Laird, counsel for the respondent
Investigation Meeting:	16 and 17 October and 26 November 2024 in Auckland and by audio-visual link
Submissions received:	11 November 2024 and at the investigation meeting from the applicant 11 November 2024 and at the investigation meeting from the respondent
Determination:	27 February 2025

SECOND DETERMINATION OF THE AUTHORITY

Employment relationship problem

[1] Tim Jennison held the position of Chief Financial Officer (CFO) ACG Schools, a private education provider. He was most recently employed by ACG Education Limited (ACG).

[2] Inspired Education Holdings Limited (IEHL) is a company resident in the United Kingdom and the holding company of the Inspired Education group (Inspired Group or the Group) of which ACG is now a part.

[3] In August 2021 Mr Jennison's employment was terminated after his role was declared redundant. He challenges whether he was genuinely redundant, saying another person was appointed to what was effectively his role as CFO-APAC (Asia Pacific), albeit based in Sydney, Australia and employed by another Inspired company. He also questions the process used.

[4] ACG says the Inspired Group made the decision to establish and appoint to the Australian position and this had the effect of meaning Mr Jennison's job was no longer needed. It asserts it undertook a proper process in making Mr Jennison redundant, including providing him with his contractual in lieu of notice and redundancy payments.

The Authority's investigation

[5] Mr Jennison lodged his claim in the Authority immediately before Christmas 2021, along with an application to join IEHL as a controlling third party.[1]

[6] In October 2022 ACG lodged an application to remove to the Employment Court Mr Jennison's application to join IEHL. The removal application was granted.[2]

[7] The Authority was advised that Mr Jennison had withdrawn his application to join IEHL, with him lodging an amended statement of problem in early 2024. ACG replied.

[8] An investigation meeting began on 16 and 17 November 2024 in Auckland with the Group's Alexander Clement giving evidence by audio-visual link from London. Evidence was heard under oath or affirmation from Mr Jennison and his wife, ACG and Inspired's Arie Willem (Clarence) van der Wel (previously ACG/APAC CEO and now a consultant) and Group Financial Controller Mr Clement.

[9] Written submissions were later filed. The investigation meeting concluded on 26 November with the hearing of oral submissions.

[10] As permitted by s 174E of the Employment Relations Act 2000 (the Act) this determination has not recorded everything received from the parties but has stated findings and conclusions and specified orders made as a result.

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[1] Employment Relations Act 2000 (the Act), s 5 definition.
[2] *Tim Jennison v ACG Education Limited* [2023] NZERA 222.

Issues

[11] The issues for determination are:

(a) Did ACG breach Mr Jennison's employment agreement regarding a 2020 incentive bonus and if so, is it liable to pay damages for that?

(b) Was Mr Jennison unjustifiably dismissed by ACG?

(c) If so, what remedies should he receive considering:

(i) lost wages;

(ii) compensation for humiliation, loss of dignity and injury to feelings; and

(iii) lost benefits or other money owing - holiday pay on lost wages; an incentive bonus payment for 2021 along with holiday pay on that amount; and IEHL G Shares (allocated to staff at Mr Nsouli's discretion)?

(d) Should ACG have to pay special damages regarding the incentive bonus for 2021 and legal costs?

(e) Did ACG breach its duty of good faith to Mr Jennison and if so, should it be penalised?

[12] ACG disputes that the Authority has jurisdiction to make orders regarding the G shares as they relate to IEHL. It was agreed at the meeting that this determination would only deal with whether the Authority could and would find that Mr Jennison had any entitlement as a remedy in that regard. If an entitlement was established, the valuation of the shares would be dealt with later, if necessary.

The parties

[13] Mr Jennison is a chartered accountant with a history of international work, including in investment banking.

[14] Back in New Zealand, Mr Jennison began with the Academic Colleges Group in 2011 as CFO. At that time Mr van der Wel was Deputy CEO and the two worked together well.

[15] In 2016 the Academic Colleges Group was sold to Pacific Equity Partners (PEP). Mr Jennison became the Chief Investments Officer.

[16] A couple of years later another takeover began. Mr Jennison and PEP agreed that he would become the CFO of the Schools Division on completion of any sale and purchase agreement. During the extended sale process Mr Jennison acted as the CFO of ACG Schools, which at that point covered New Zealand and Asian schools.

[17] Mr van der Wel was not aware of any performance issues with Mr Jennison prior to the Inspired Group taking over.

Inspired Group

[18] The Group owns schools around the world. Its founder, Chairman, CEO and shareholder is Nadim Nsouli, who according to witnesses and ACG has full control of the board. Mr Nsouli did not give evidence at the investigation meeting.

[19] The Inspired Group signed an agreement with PEP in August 2018. Due to approval being needed from the Overseas Investment Office, the transaction was not completed until May 2019.

Mr Jennison's employment agreement

[20] Mr Jennison signed an employment agreement dated 1 August 2017 in PEP's time.

[21] ACG Education 2018 Limited (which was later renamed ACG Education Limited) offered Mr Jennison continuity of employment with his PEP terms, which he accepted. Some additional or improved terms were agreed to be implemented once the transfer to the Inspired Group was completed. Mr Jennison's new terms included that he was CFO ACG Schools, which he sees as additional to the CFO APAC role.

[22] From then Mr Jennison reported directly to Mr van der Wel and also, in a functional sense, to the Inspired Group CFO based in London.

What was Mr Jennison's role?

[23] During this proceeding, there was a level of dispute about whether Mr Jennison was APAC CFO once Inspired bought the business. His employment offer did not record that title. By the close of the investigation meeting ACG acknowledged Mr Jennison did use the title of CFO – APAC, being held out both internally and externally

as having that title. This regional CEO and CFO model (Mr van der Wel and Mr Jennison) was used elsewhere in the world by the Inspired Group.

[24] There are a number of indicators that Mr Jennison was operating and recognised as the APAC CFO – a business card provided to him, an email footer drafted by the Group's London IT team, reporting to the APAC CEO and the Inspired Group CFO and attending regional CFO group calls with the Group's CFO. Further support comes from organisational charts and directorships Mr Jennison was appointed across the region.

[25] I conclude Mr Jennison was operating with the Group's agreement as APAC CFO.

What were the arrangements about short term incentives?

[26] Mr Jennison's 2017 ACG employment agreement specified:

> **4. Performance objectives and review**
> 4.1 Each year we will set, in discussion with you a series of performance objectives and these will be taken into account in the annual assessment of your performance and remuneration. …
>
> **SCHEDULE 2** …
> - **Short term Incentive (STI)**
>
> In each financial year (year ending December), you will be eligible to receive a Short Term Incentive per annum of up to 50% of the Total Fixed Remuneration on achievement of key performance indicators (KPIs) determined by the Board in its sole discretion. …
>
> For the avoidance of doubt, the terms of any incentive are discretionary and subject to Board approval, do not form part of the Employee's Total Remuneration Package and may be cancelled, deferred, or otherwise varied at any time at the sole discretion of the Board.

[27] Mr van der Wel describes this formal bonus arrangement as being part of the original ACG. Mr Jennison's KPIs were traditionally based wholly or very substantially on EBITDA[3]. Mr van der Wel says the Inspired Group does not operate a formal bonus scheme.

[28] This STI benefit was repeated in the letter transferring Mr Jennison's employment to ACG Education Limited dated 27 November 2018, noting employment

[3] EBITDA – Earnings after interest, taxation, depreciation and amortization.

is offered on "the same as or substantially similar terms" to those contained in his current agreement with some variations noted below. Later it stated:

> **To clarify the treatment of your STI in 2018 and 2019:**
>
> **2018 STI:** Your 2018 STI (potential to earn 50% of gross annual salary) will remain in place… considered in line with ACG Education STI Rules for 2018. For clarity, this is against Group EBITDA and agreed KPIs ….
>
> **2019 STI:** Your 2019 STI (potential to earn 50% of gross annual salary) be set with the single assessment criteria being the achievement of the Schools' Budgeted EBITDA for 2019.

[29] Mr van der Wel describes this as relating to the fact the sale and purchase could not complete for some time whilst approval was obtained. He reports that Mr Nsouli did not think it was appropriate to change the arrangement already in place for 2019.

[30] Ongoing, Mr van der Wel's view is that the board, controlled by Mr Nsouli, at its sole discretion, could set or not set KPIs and there is no entitlement to receive a particular amount, or any, STI payment at all.

[31] Mr van der Wel considers Mr Jennison as CFO would have been aware that bonuses were discretionary and did not seemingly mention any concern about KPIs or bonuses at the time. Mr Jennison says there was budget availability for bonuses.

[32] The EBITDA target was exceeded in 2019 and Mr Jennison received that year's STI in full, in early 2020. At that point ACG was owned by the Inspired Group.

What happened later about STIs?

[33] No (new) KPIs were set for Mr Jennison in the 2020 or 2021 years. His evidence was he assumed and believed that his STI KPIs would remain as they had been for the 2019 financial year, that is, achieving the budgeted EBITDA. He describes EBITDA as the focus at Inspired with budgets set based on that. ACG questions such an assumption being made, particularly by a CFO.

[34] Mr van der Wel told the Authority that he and the Group CFO were informed by Mr Nsouli that Mr Jennison would not receive a 2020 bonus as Mr Nsouli did not consider Mr Jennison's overall performance sufficiently good to warrant one.

[35] However, the Authority did not receive evidence that Mr Nsouli, the Group CFO or Mr van der Wel told Mr Jennison about any assessment or decision that no KPIs

would be set and/or he would not be paid a bonus for the calendar years 2020 or 2021, until a discussion in about early 2021.

[36] The EBITDA target was exceeded in 2020 but Mr Jennison was not paid any STI. He raised it with the Group CFO in about early 2021. According to Mr Jennison, the response was that no senior finance staff or regional CFO received any bonus for 2020. Thus he understood he was not getting a STI payment. Mr Jennison recalls the Group CFO telling him that he should not be concerned or raise displeasure about the STI as the bigger prize was the G Share potential.

[37] In early 2021 Mr Nsouli announced to the global management team a plan to sell or IPO the business.[4] This "Exit" could have given payment to G shareholders.

[38] Mr van der Wel could not understand why Mr Jennison would not have pursued the STI as well as a G shares payment. Mr Jennison however describes a confluence of three factors in late 2020/early 2021 – a discussion with the Group CFO about the G share value, the Exit plan announcement and being told no regional CFOs were receiving STIs. These were set against a background of Mr Nsouli's controlling strength in the Group.

[39] The Group CFO sent Mr Jennison a calculation model where the Group CFO attempted to assess the value of his own G shares under various scenarios. Mr Jennison understood his shares might be worth around NZD 2,000,000. By contrast, if KPIs were used and the full STI amount paid, Mr Jennison's STI bonus would have been around $196,000 for 2020 and potentially the same again for 2021.

[40] It was credible that Mr Jennison would not have pursued with Mr Nsouli the 2020 STI, which he thought others were not getting, when a much larger payment was on the horizon.

Did ACG breach the employment agreement or its good faith obligations regarding STIs?

[41] Mr Jennison seeks to be paid for an STI for 2020 and at least a prorated STI for 2021, along with holiday pay on those figures. The 2021 STI is part of the grievance remedies sought.

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[4] IPO – Initial Public Offering.

[42] In interpreting the employment agreement, the following summary of the principles from Judge Holden in *E Tū Inc v New Zealand Steel Limited*, citing from *Firm PI 1 Limited v Zurich Australian Insurance Limited* and *Bathurst Resources Limited v L&M Coal Holdings Limited:*

> The proper approach is an objective one, the aim being to ascertain the meaning the written agreement would convey to a reasonable person having all the background knowledge that would reasonably have been available to the parties at the time of the agreement. This objective meaning is taken to be that which the parties intended. The context provided by the agreement as a whole and any relevant background informs meaning. Nevertheless, while context is a necessary element of the interpretative process, and the focus is on interpreting the document as a whole, rather than particular words, the text remains centrally important. If the language at issue, construed in the context of the whole agreement, has an ordinary and natural meaning, that will be a powerful, albeit not conclusive, indicator of what the parties meant, But the wider context may point to some interpretation other than the most obvious one and may also assist in determining the meaning intended in cases of ambiguity or uncertainty.[5]

[43] For Mr Jennison it is submitted that the correct interpretation of the STI clause is that for each calendar year:

(a) ACG must set KPIs for him to achieve;

(b) On completion of the year, ACG has a discretion to determine whether or not he has achieved them, including, if relevant, the extent to which he has achieved them; and

(c) Where it determines he has achieved them he is entitled to up to 50% of his total remuneration as an STI.

[44] Submissions continue that there is no discretion whether or not to pay him an STI, nor whether to set KPIs or not.

[45] ACG's submission is that the payment of any incentive was discretionary and Mr Jennison had no entitlement.

[46] Any discretion in an employment relationship must be exercised in good faith, reasonably and not capriciously. Examining the agreement, supplemented by good faith obligations, I conclude that unless the board exercised its discretion and, in good faith, notified Mr Jennison that it was considering cancelling, deferring or otherwise

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[5] *E Tū Inc v New Zealand Steel Limited* [2024] NZEmpC 29 at [16].

varying the scheme, it was required to set KPIs. I was not taken by Mr van der Wel's evidence under cross examination that "no KPI was the KPI".

[47] ACG relies on the provision in Schedule 2 of Mr Jennison's agreement that the STI was subject to the Board's approval.

[48] It faces the substantial difficulty that there was no evidence that ACG or IEHL's board, controlled by Mr Nsouli, had cancelled Mr Jennison's STI scheme. From its incorporation in 2018 until 17 August 2021 Mr Jennison was a director of ACG and was unaware of any changes to his STI arrangements until early 2021.

[49] In the 2020 year ACG or Inspired had not exercised any discretion not to pay 100% of the STI. Rather it breached the terms of Mr Jennison's agreement by failing to set KPIs for the 2020 year, failing to exercise its discretion reasonably to determine whether those KPIs were achieved and pay him the STI for KPI achievement.

[50] Mr Jennison suffered loss by not being paid his 2020 STI and ACG should remedy that.

[51] The 2019 KPI was binary in the sense that EBITDA was either achieved or it was not. There is little or no room for discretion there in assessing some partial level of achievement. There is no other calculation basis proposed other than the full STI. On the payslip information Mr Jennison's 2021 salary was $392,538. At the rate of 50 % of his salary, ACG owes him $196,269. He is also entitled to holiday pay on that amount, being $15,701.52.

What about the longer term incentive – G Shares?

[52] Selected senior employees across the Inspired Group were given opportunities to participate in the executive share scheme. The share terms were governed by the IEHL's Articles of Association.

[53] It appears there was no contractual right to participate, with questions about who was selected and the extent of shareholding being solely within the discretion of Mr Nsouli. The purpose of the scheme was to incentivise senior employees, so that they could participate in the growth and development of the Group if and when all the shares in Inspired are sold or listed on a stock exchange (an Exit event).

[54] Mr Jennison was given the option to participate and chose to do so, being allocated G shares. He sees this as an employment benefit.

[55] As a pre-condition of an allocation, staff including Mr Jennison, had to execute an irrevocable power of attorney in favour of Mr Nsouli and other IEHL directors. This permits the attorney to execute certain documentation, including regarding the sale of the shares.

[56] Mr Clement told the Authority that:

(a) G-shareholders have very limited rights – they largely cannot vote and the circumstances in which the shares can be transferred are very limited. Shareholders can be required to transfer their shares when their employment terminates and Mr Nsouli usually does so;

(b) The price they receive depends on the circumstances of termination and the terms of the articles of association at that time;

(c) There is no right to receive any financial return, such as dividends; and

(d) The shares have very little material financial benefit.

[57] On the evidence, the only time some, but not all, G shareholders continuing in employment were able to realise the value of their shares was in 2022 when a fundraising, referred to as Project Indigo, was undertaken. With board approval, Mr Nsouli, at his discretion, gave some the opportunity to sell some or all of their shares.

[58] All regional CFOs were invited to participate at share percentages set by Mr Nsouli. Mr Clement speculated, without having been involved in discussions with individuals, that the assessment was based on what was seen as their contributory value to the Group. Those seen as having contributed more were offered an opportunity to sell more of their shares. His view was that due to the limitations on sale, people would sell as much as they were permitted to.

[59] Mr Clement's understanding was that every person, except one, who left employment received only their nominal value, effectively the consideration they had paid. This was seen as fair value. Mr Clement viewed market value as negligible,

given the discretionary elements and significant uncertainty about the timing of any benefit.

[60] Mr Jennison's shares were seemingly transferred on 6 August 2021, under the power of attorney. The shares were transferred to an employment benefit trust according to Mr Clements.

Decision to appoint CFO in Australia

[61] Events which would lead to Mr Jennison's termination, unbeknownst to him, were kicking off in early 2021. Submissions on his behalf describe it as a secret plan, seemingly to recruit and appoint an APAC CFO in an Australian Inspired Group company based in Sydney and keep it secret from Mr Jennison so he could not assert any right to the role.

[62] Mr Nsouli, Mr van der Wel, the Group CFO and Mr Jennison were all directors of ACG. The first two were also directors of the Australian Inspired holding company.

[63] In March 2021 Mr Nsouli shared his plan for an Australian appointment with Mr van der Wel and the Group CFO, telling them to keep it confidential. Mr van der Wel understood Mr Nsouli saw it as better to have the CFO-APAC role based in the larger country, which was more central to the region but acknowledged that if Mr Nsouli had seen Mr Jennison as a good fit Mr Nsouli would have asked Mr Jennison if he was prepared to move. That did not happen.

[64] Mr van der Wel told the Authority he took in-house HR advice on the plan and was satisfied it was ok. That advice was not provided to the Authority.

[65] Mr Jennison was unaware of the plan for four months, only finding out about it when the new APAC CFO was appointed. Mr van der Wel informed him on 15 July 2021. Mr Jennison was not consulted about the decision nor was he offered the role. When he asked Mr van der Wel why the decision had been made, the answer was he should have known Mr Nsouli did not rate his performance highly given he had not received a bonus that year.

[66] Mr van der Wel's evidence was that he understands there is generally a consultation obligation but in this particular case there was nothing to consult Mr

Jennison about – the decision to introduce the Sydney-based role had already been made and there were no suitable alternative roles for him.

[67] In the absence of direct evidence to the contrary, I accept Mr Jennison's evidence that he was not aware at this stage that Mr Nsouli had particular concerns about his performance. He had had no performance appraisal. The fact Mr Jennison was granted additional G shares in September 2020 suggests Mr Nsouli did not have any concerns of significance about Mr Jennison at that point. Being told by the Group CFO that no regional CFOs were receiving a bonus would not have triggered any concern for Mr Jennison about how he was perceived.

[68] On 15 July 2021 Mr Jennison also spoke to the Group CFO who told him there had not been a single event that resulted in the new appointment but Mr Jennison was not considered the right fit for Inspired. The Group CFO said Inspired would be generous with his exit package in the circumstances.

[69] On 22 July 2021 Mr Jennison had a follow up call with the Group CFO who told him he would receive nine months' compensation. Also, it was Mr Nsouli's call whether he would be considered a "good" or "bad leaver" in terms of the articles of association and the decision was he would be a "bad leaver". This impacted substantially on the amount he would be paid for his G shares.

[70] On 3 August 2021 Mr van der Wel met with Mr Jennison and formally told him his role was redundant. Mr Jennison also received a letter that day giving him notice of termination on the grounds of redundancy, effective Friday 6 August 2021. That afternoon, as the APAC CEO, Mr van der Wel announced by email that the Sydney based CFO- APAC would start on Monday 9 August 2021.

[71] Mr Jennison was paid his contractual entitlements of six months' pay in lieu of notice and six months' pay as redundancy compensation.

What were ACG's obligations regarding dismissal?

[72] ACG's actions are assessed against what a fair and reasonable employer could have done in the circumstances.[6] This imposes obligations to have a substantive reason for dismissal, or redundancy in this case and to follow a fair process.

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[6] The Act, s 103(1) and (2).

[73] In redundancy cases the focus is often on whether the procedure used was fair. However, the Court of Appeal in *Grace Team Accounting Limited v Brake* observed

> … we do not dismiss the importance of the Employment Court addressing the genuineness of a redundancy decision. If the decision to make an employee redundant is shown not to be genuine (where genuine means the decision is based on business requirements and not used as a pretext for dismissing a disliked employee), it is hard to see how it could be found to be what a fair and reasonable employer would or could do.[7]

[74] A genuine reason is needed for the redundancy.

[75] The parties must meet their usual good faith obligations, including being active and constructive in maintaining a productive employment relationship and not misleading or deceiving the other.[8] In redundancy situations specific good faith obligations apply under s 4 of the Act, requiring the employer to consult with the employee before a decision is made.[9] Redeployment is to be considered.

Group of companies

[76] Submissions for Mr Jennison examine the situation where the employer entity is part of a group of companies and another company makes a decision which means the employer has no choice but to make the employee redundant. It is submitted that case law establishes that if the employer entity and the other group company are controlled by a common director and/or the other group company, the actions of the controlling director/other company are attributed to the employer.

[77] In *New Zealand Seaman's IUOW v Gearbox Shipping (New Zealand) Limited* the Labour Court distinguished an arms-length relationship between the employer and the perpetrator of the events which brought about the redundancy, from a situation where an executive/company made or significantly participated in the decisions which lead to the dismissal.[10] In the later situation resulting redundancies were seen as contrived.

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[7] *Grace Team Accounting Limited v Brake* [2014] NZCA 541 at [85].
[8] The Act, s 4(1)(b) and (1A)(b).
[9] The Act, s 4(1A)(c).
[10] *New Zealand Seaman's IUOW v Gearbox Shipping (New Zealand) Limited* [1990] 1 NZILR 688 at 704.

[78] ACG sees this as a situation of Mr Nsouli wearing different hats and able to make decisions when wearing one hat even though they will impact on someone in the organisation where he wears another hat.

[79] From the *Gearbox c*ase I conclude it cannot be right that a director in charge of one company, by knowingly using an appointment to another company he is in charge of, is able to avoid any issue being raised about the genuineness of an anticipated resulting redundancy in the first company.

Redeployment

[80] There is authority that when a position is disestablished and a new position created, the employer must offer the incumbent employee redeployment to that role if they are capable of performing the role and are suitable for it.[11] Whether an incumbent employee is capable and suitable is to be assessed as part of the consultation process rather than unilaterally by the employer outside that process.[12]

[81] Where an employer is part of a large international business operation, a fair and reasonable employer could be expected to look for other roles within that operation.[13]

[82] A failure to consider redeployment opportunities may cast doubt on the genuineness of a redundancy.[14]

Good faith

[83] ACG argues that because the decision to appoint had already been made by the Australian company and Mr Nsouli it could not consult without breaching its good faith obligation. I do not accept that the requirement not to mislead or deceive Mr Jennison should be seen as giving an exemption to consult.

Was Mr Jennison unjustifiably dismissed?

[84] On the evidence before the Authority:

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[11] *Wang v Hamilton Multicultural Services Trust* [[2010] NZEmpC 142.
[12] *Gafiatullina v Propellerhead Limited* [2021] NZEmpC 146 at [11] *and New Zealand Steel Limited v Haddid* [2023] NZEmpC 57 at [44].
[13] *Stellar Elements New Zealand Limited v Amesbury* [2024] NZEmpC 136 at [75].
[14] *Gafiatullina* above at [112] and [148] and *Haddad* at [44].

(a) Mr Nsouli had concerns about Mr Jennison's performance and his fit for the APAC CFO role that he undertook;

(b) Those concerns were not passed on to Mr Jennison;

(c) A decision was made by Mr Nsouli to recruit for an APAC CFO role based in Sydney;

(d) A decision was made to deliberately keep confidential, and ask Mr Jennison's managers to keep confidential, from Mr Jennison until the process was complete; and

(e) As ACG accepts, there was no consultation about the disestablishment of Mr Jennison's role as that decision had already been made by the appointment of an APAC CFO based in Sydney; and

(f) There was no discussion with Mr Jennison about whether he was interested in moving to Australia to take up a role there.

[85] Mr Nsouli was the controlling director and decision maker. He controlled the decisions of Inspired Australia and ACG that resulted in Mr Jennison being made redundant. His actions are attributed to both companies. I do not accept that ACG can be seen as exempt from its legal obligations to Mr Jennison simply because Inspired Australia became the employer of the APAC CFO appointee. The companies were not at arms-length. ACG, through Mr Nsouli and arguably Mr van der Wel, knew that the idea was that Mr Jennison would be made redundant before the formal decision was made months later.

[86] Given the deliberate decisions to recruit in Australia and not tell Mr Jennison about that process, I must conclude he was not wanted. Even if he was not given preference for what may have been described as a new position (being Sydney-based), he should still have been offered the opportunity to apply. He had lived and worked in various countries during his career and his evidence was he would have taken up the Sydney role if offered. There was no evidence that an objective assessment of his suitability was made.

[87] There was an absence of direct evidence to justify the approach that was taken. Mr van der Wel was not the decision maker and there was little or no documentation provided regarding the events.

[88] Mr Jennison was misled when he was left in the dark for an extended period about a decision to replace him. He was not consulted about a proposal to make his role and himself redundant, contrary to s 4 (1A)(c) of the Act.

[89] In conclusion Mr Jennison's dismissal was not for genuine reason of redundancy and was carried out in breach of the duty of good faith. ACG unjustifiably dismissed Mr Jennison.

What remedies are sought?

[90] Mr Jennison seeks the following remedies:

(a) lost wages;

(b) compensation for humiliation, loss of dignity and injury to feelings;

(c) lost benefits or other money owing - holiday pay on lost wages; an incentive/bonus payment for 2021 along with holiday pay on that amount; and Inspired G Shares.

Should lost wages be awarded?

[91] Mr Jennison seeks reimbursement of lost wages from the date of dismissal, 6 August 2021, to the date he started to obtain some work, November 2022, totalling $490,672. He argues this amount should not be reduced by the notice or redundancy compensation paid to him. Holiday pay of $39,253.80 is sought on the lost wages figure.

[92] ACG does not accept that Mr Jennison adequately mitigated his loss and also should not be entitled to lost wages due to the payouts made to him by it on termination.

[93] Initially Mr Jennison needed time to get over the shock and immediate effect of the dismissal on him. He went out of Auckland and was unable to return when the long Covid lockdown began in August 2021.

[94] Mr Jennison describes being restricted in his job applications in his most recent area of experience by his six-month non-compete restraint of trade. ACG suggested it could have agreed to waive that restraint, if it had been approached, but it was not. Mr Jennison gave evidence that the Group CFO told him it would never be lifted. The restraint applied to involvement with private school education in the Asia-Pacific

region, including New Zealand. Private education had been Mr Jennison's area of operation for the last ten years.

[95] Mr Jennison applied for a number of roles and was interviewed for some. He sent information about his availability to private schools which led to involvement in one recruitment process but no offer. Mr Jennison had overseas experience in investment banking but points out that the New Zealand market is small and he had been out of that sector for some time.

[96] Submissions for Mr Jennison argue that where an employer plots in secret to remove an employee from their employment to serve their own purpose and then terminates their employment unjustifiably, the employer has committed an "efficient breach" (or an opportunistic breach) of the employment agreement. Then the Authority should be quick to exercise its discretion to award Mr Jennison the full amount of his lost income and slow to limit recovery of his actual losses. Otherwise there is a cheap licence fee type approach for efficient breaches.

Deduction for notice period and compensation

[97] Mr Jennison was paid what he was contractually entitled to. ACG seeks to have these amounts set off against what would otherwise be any lost wages award.

[98] Submissions for Mr Jennison argue the notice period is a liquidated amount which the parties agreed would be paid where ACG elected for Mr Jennison not to work out his notice period and redundancy compensation is the amount agreed to compensate him for the loss of his role not his employment. Reliance is placed on *Muru v Coal Corp of NZ Limited* where the Employment Court said a reduction would require more than mere compliance with contractual obligation to pay.[15]

[99] It is not the Authority's practice to deduct notice paid from the entitlement to lost wages.

[100] Regarding redundancy compensation, the statement in *Muru* - "If the redundancy is never reversed, why should one ever contemplate the repayment of the money?" – was noted without objection by Judge Beck in *New Zealand Steel Limited v*

[15] *Muru v Coal Corp of NZ Ltd* EmpC, Auckland, AEC 19/97, 12 March 1997 at p 13.

Haddad[16]. I conclude no deduction should be made here as Mr Jennison is not reinstated.

Conclusion

[101] I conclude that on the basis of unchallenged evidence before me Mr Jennison took satisfactory steps to mitigate his loss. The suggestion that he would have lost his job in the near future anyway due to inadequate performance must be weighed against the absence of his managers, Mr van der Wel and the Group CFO, having or raising any concerns with Mr Jennison about his performance. There was no written evidence of anyone raising concerns with Mr Jennison.

[102] G shares were granted to him in September 2020 suggesting there were no performance difficulties identified at that point. If any arose ACG would have had to raise them with Mr Jennison and give him the chance to remedy them. The suggestion Mr Jennison would not have lasted long is speculative.

[103] Considering the impact of the dismissal on Mr Jennison, the difficult point of time at which he was initially unemployed and the fact that dismissal cannot be seen as inevitable on the evidence before the Authority, I consider that this is a case where discretion under s 128(3) of the Act should be exercised to allow a period greater than three' months lost wages. Twelve months' salary is awarded.

[104] Mr Jennison is also entitled to holiday pay on top of that lost wages sum.

Should compensation for humiliation, loss of dignity and injury to feelings be awarded?

[105] Mr Jennison seeks compensation of $50,000 under s 123(1)(c)(i) of the Act.

[106] Mr Jennison loved his job, enjoying working in the education sector and with Mr van der Wel. He had hoped that this work would take him into retirement. He was almost 60 years old at the time of his dismissal.

[107] Mr Jennison felt betrayed by the manner people dealt with his employment and termination. Being given no reason for being removed from the business, he was left feeling discarded and distrustful. This made it hard to trust another employer.

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[16] *New Zealand Steel Limited v Haddad* [2023] NZEmpC 57 at [168].

[108] Mr Jennison's confidence and health were impacted, leaving him feeling anxious and insecure. Telling others was embarrassing and he put on a brave face, covering his feelings so his family did not suffer. His failure to secure full time work after the expiry of his restraint of trade provision worsened his confidence level.

[109] Mr Jennison's wife confirmed that he found the situation very distressing particularly in terms of the denial that he had been the APAC CFO and how the situation had been handled. He suffered from a high level of stress having seen himself as having good relationships with the people he worked with and then being treated in this way. She sees the dismissal impacting for a year or so after his termination.

[110] Compensation of $25,000 under s 123(1)(c)(i) of the Act is appropriate.

Should compensation for a 2021 STI be awarded?

[111] As a remedy for Mr Jennison's personal grievance he seeks compensation for the STI payment he considers he would have received had his KPIs been set for 2021 and he was not unjustifiably dismissed.

[112] Schedule 2 of Mr Jennison's employment agreement provided for a pro rata payment in certain departure circumstances. Mr Jennison was employed for more than eight months of the applicable 12 month period.

[113] In reality decisions on bonuses were made by Mr Nsouli at a global Inspired Group level. Mr Jennison had been informed by the Group CFO (and co-director of ACG) in about early 2021 that no bonuses were being paid to regional CFOs. Regardless of whether that was 100% accurate but I see this as notification that the terms of the incentive were changing but that notification was only effective for the 2021 year onwards. No grievance remedy is thus awarded under this head.

Should Mr Jennison be compensated for G Shares?

[114] Mr Jennison argues that he lost the opportunity to derive benefit from the G shares.

[115] It earlier seemed that Mr Jennings was seeking a wider assessment of a benefit of the G shares under various scenarios. For example, whether he should have been classified as an "intermediate leaver" rather than a "bad leaver" under the articles of association. ACG argued that such questions involving articles of association of a

United Kingdom company were outside the Authority's jurisdiction for New Zealand employment relationship problems.

[116] However, closing submissions for Mr Jennison are restricted to the loss of the benefit he would have had the opportunity to receive for his G shares under Project Indigo in May 2022.

[117] Mr Clement accepted that the shares would not have been received if Mr Jennison was not an employee so in lay terms they are a benefit of employment. There was no entitlement to get shares but once Mr Jennings did receive them, they were a benefit flowing from his employment relationship. I conclude payout on the shares was a benefit which Mr Jennison had a chance of obtaining if his unjustified dismissal had not occurred, thus meeting the Act's s 123(1)(c)(ii) requirement.[17]

[118] ACG argues that the value of the shares was effectively nil. The benefit of the shares was not one which Mr Jennison was immediately entitled to realise, by selling them for example.

[119] Effectively Mr Jennison is now seeking loss of a chance that he would have got a payout during the 2022 Project Indigo payout. There is no actuarial evidence but as the investigation meeting was after the 2022 project was completed there is some evidence about the 2022 arrangements.

[120] Mr Nsouli for Inspired did not give sworn evidence but did email Mr van der Wel regarding this proceeding, declining to provide information regarding the valuation of the shares as highly commercially sensitive. He did comment that he exercised his absolute discretion determining who got paid and in what amount, based on individual performance and the employee's long term value to the business to incentivise them. Further, many got nothing and others got between 10 and 50% (of their total shares presumably).

[121] More specific evidence was also available. Mr Clements' evidence was that although not all shareholders were asked to participate, those invited were permitted to sell between 10 and 100% of their shares. All regional CFOs who held shares were asked to participate, being offered the chance to sell 10 to 75% of their shares. Four

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[17] *Walker Corporation Ltd v O'Sullivan* [1996] 2 ERNZ 513, CA at 15-25 and *Hillman v SKL8 Limited* [2012] NZERA Auckland 308.

shareholders from the APAC region were asked to participate, also being invited to sell 10 to 100% of their shares.

[122] Mr Clements told the Authority that those offered the opportunity wanted to sell what they could because the restrictions on the shares meant it was hard to get value from them. I conclude Mr Jennison would have sold what shares he was permitted to.

[123] There is a chance Mr Jennison would no longer have been employed in May 2022. That initiative was most unlikely to come from him. He enjoyed his position and was keen to stay on, not having anything additional he wanted to achieve.

[124] Mr van der Wel had doubts whether Mr Jennison would have remained in employment. However, in terms of whether ACG or Inspired would have kept him on, I must assess on the basis that any actions of theirs would have been as a fair and reasonable employer could have taken, considering good faith obligations to be active and constructive in maintaining a productive employment relationship.[18] Mr Jennison had not been the subject of any disciplinary action or negative performance appraisal. On the evidence available no specific concerns had been raised with him about his work. Taking into account all those factors there was a fairly high probability that nine months later he would remain in the job.

[125] In terms of what Mr Jennison could have been offered the position is less definite. But what must be established is that there was a chance, which may be less than a probability of a particular result being achieved.[19] The value of the lost opportunity is assessed according to the probability that the plaintiff would have obtained the benefit. Given that all other regional CFOs were offered the opportunity, along with four shareholders in the APAC region, Mr Jennison certainly had some chance of getting an offer. It seems likely that his offer would be at the lower end of the 10% upwards range.

[126] Taking into account his chance of receiving an offer and the possible amount of any offer I conclude that Mr Jennison should be compensated on the basis of the value of 5% of his G shares. The parties are to attempt to resolve the issue of the value of

[18] The Act, s 4(1A)(b).
[19] *Davies v Taylor* [1974] AC 207 at 213 per Lord Reid.

those shares between themselves. Leave is granted to return to the Authority if they are unable to do so.

Should there be a contribution deduction?

[127] I have considered whether Mr Jennison's actions can be said to be blameworthy and contributed to the situation giving rise to his dismissal and conclude on the evidence before me they do not.

Should special damages be ordered?

[128] For breaches of his employment agreement Mr Jennison seeks special damages for:

(a) ACG's failure to set KPIs for 2021, exercise its discretion reasonably to determine he had achieved KPIs and award him an STI payment; and

(b) legal costs incurred in relation to ACG's dismissal, in breach of ss 4(1A) and 103A of the Act and clause 9.1 of the employment agreement.

[129] The Authority has the power in matters relating to an employment agreement to make any order the High Court or the District Court may make under any enactment or rule of law relating to contracts - s 162 of the Act. That includes an order for damages for breach of an employment agreement.

[130] Damages are aimed at restoring the plaintiff to the position they would have been in had the breach not occurred.[20]

STI

[131] This is an alternative to the provision of grievance compensation for an STI payment for the 2021 year. For the reasons set out above I conclude Mr Jennison is not entitled to damages here.

Legal costs

[132] Breach of an employment agreement may be remedied by a special damages award for legal costs caused to be incurred by the breach or a personal grievance, where

[20] *Rooney Earthmoving Limited v McTague* [2012] NZEmpC 63 at [19].

the costs are reasonable and necessary in light of the defendant's actions.[21] In *Stormont v Peddle Thorp Aitken* a bright line was able to be drawn between costs associated with legal representation during a fundamentally flawed process and later legal costs associated with the pursuit of a bonus and unjustified dismissal claims.[22]

[133] The Authority was provided invoices to Mr Jennison for costs relating to advice in the last weeks of his employment. Given what was a fundamentally flawed redundancy process, Mr Jennison is entitled to special damages of $3,372.38 covering that period. Later invoices appear related to the raising of Mr Jennison's personal grievances and other claims so I do not see a special damages award as being relevant.

Good faith

[134] Mr Jennison seeks a global penalty for good faith breaches of $20,000 payable to him under s 136(2) of the Act.

[135] Concerns about any good faith breaches regarding STIs and the dismissal have been adequately dealt with above and I do not consider it appropriate to award a penalty here.

Orders

[136] ACG Education Limited is to pay Tim Jennison within 28 days of the date of this determination:

(a) $196,269.00 for his 2020 STI, along with holiday pay on that amount, being $15,701.52;

(b) Twelve months' lost salary being $392,538.00 gross and holiday pay on that figure, being $31,403.04 gross;

(c) $25,000.00 compensation under s 123(1)(c)(i) of the Act; and

(d) $3,372.38 as special damages regarding legal costs.

Costs

[137] Costs are reserved. In light of the remaining question of valuation of the lost benefit of the G shares no timetable is set for the filing of submissions. Once that issue

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[21] *Binnie v Pacific Healthcare Limited* [2002] 1 ERNZ 438 CA and *Stormont v Peddle Thorp Aitken* [2017] NZEmpC 71.
[22] As above.

is resolved either by the Authority or by the parties, if necessary, a timetable will be set.

Nicola Craig
Member of the Employment Relations Authority