

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

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

[2019] NZERA 169
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3028052

BETWEEN KYLE DONEGAN
Applicant

AND G2 VENTURES LIMITED
Respondent

AND

BETWEEN BRADLEY WOODS
Applicant

AND G2 VENTURES LIMITED
Respondent

Member of Authority: Nicola Craig

Representatives: Debra Law, Counsel for the Applicants
John Rooney and Mary Breckon, Counsel for the
Respondent

Investigation Meeting: 11 and 26 September and 9 October 2018

Submissions received: 11 and 17 October and 20 December 2018 from the
Applicants
15 October 2018 from the Respondent

Date of determination: 21 March 2019

DETERMINATION OF THE AUTHORITY

A. Kyle Donegan and Bradley (Brad) Woods were unjustifiably

dismissed by G2 Ventures Limited (G2). G2 is to pay the following sums within 28 days of the date of this determination:

- (a) Mr Donegan \$17,307.69 gross as lost wages and \$22,000.00 as compensation under s 123(1)(c)(i) of the Employment Relations Act 2000 (the Act); and**
 - (b) Mr Woods \$18,211.54 gross as lost wages and \$18,000.00 as compensation under s 123(1)(c)(i) of the Act.**
- B. G2 is to pay, within 28 days of the date of this determination, Mr Donegan the sum of \$1,933.72 and Mr Woods the sum of \$1,933.72, as special damages.**
- C. G2 is to pay the following sums as wage arrears within 28 days of the date of this determination:**
- (a) Mr Donegan the sum of \$3,975.00 gross, together with interest on that sum at the rate of 5% per annum from 19 April 2018; and**
 - (b) Mr Woods the sum of \$10,166 gross, together with interest on that sum at the rate of 5% per annum from 19 April 2018.**
- D. G2 breached its obligations to keep and provide wages and time records and to pay wages without deduction and is to pay, within 28 days of the date of this determination, the sum of \$1,000.00 to the Employment Relations Authority for payment into the Crown account, \$1,000.00 to Mr Donegan and \$1,000.00 to Mr Woods.**
- E. A timetable is set for submissions on costs, in the event that the parties are not able to resolve the issue themselves.**

Employment relationship problem

[1] Kyle Donegan was employed as Chief Strategy Officer at G2 Ventures Limited (G2 or the company) from 26 February 2018. Bradley (Brad) Woods was employed as G2's Chief Marketing Officer from 12 February 2018.

[2] G2 was established by Paul Grey in 2015. He brought his father Brent Grey into G2 in a management role in February 2018. Brent Grey, on behalf of G2, declared Mr Donegan and Mr Woods redundant in early April 2018.

[3] Mr Donegan and Mr Woods claim, amongst other things outlined below, that their redundancies were not genuine and, in any event, the process used was unfair. G2 denies the claims.

[4] I decided to hear Mr Donegan's and Mr Woods' claims together.

[5] There appeared to be some difficulties with getting documents served at G2's registered office. Brent Grey initially represented G2 and had some spasmodic communication with the Authority but failed to file a statement in reply. An investigation meeting set for 24 July 2018 was adjourned after the Authority could not be satisfied that service of the notice of investigation meeting had properly occurred within the required time. An investigation meeting set for 3 August 2018 was adjourned on G2's application, with counsel only being instructed on 1 August 2018.

[6] An investigation meeting was held on 11 and 26 September and 9 October 2018. I heard from Mr Donegan, Mr Woods and a woman involved in finance who Mr Donegan dealt with when he was at G2. I refer to her as Mr Donegan's contact. Witness statements were also received from Mr Donegan's sister and personal trainer but by consent their attendance was not required. I also heard evidence from Paul Grey and Brent Grey from G2.¹

[7] 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 of fact and law, expressed conclusions on issues necessary to dispose of the matter, and specified orders made as a result.

Issues

[8] The issues for determination are:

- (a) Were Mr Donegan and/or Mr Woods unjustifiably dismissed by G2, and if so what remedies, if any, should they receive?
- (b) Did G2 breach its duty of good faith to Mr Donegan and/or Mr Woods, and if so, should it be penalised?
- (c) In calculating Mr Donegan and/or Mr Woods' final pay, was G2 entitled to take into account payments which it says were salary paid in advance, or were those payments agreed for pre-employment work,

¹ First names will continue to be used to distinguish Paul Grey from Brent Grey.

with G2 making unlawful deductions for which the men are owed salary?

- (d) Did G2 breach its obligations under the Act and/or the Wages Protection Act 1983 and if so, should it be penalised?

[9] A number of penalty claims were made which at times were described, or grouped, for the applicants as good faith matters. However, some appeared to the Authority to relate to provisions in the Wages Protection Act or to s 130 of the Act regarding failure to keep or provide records. I have dealt with them as such.

[10] Mr Donegan's claim to various lost benefits, including equity in businesses potentially funded by G2, was withdrawn at the investigation meeting.

[11] Mr Woods' claim regarding Kiwisaver was withdrawn after the investigation meeting, following him obtaining further information about his Kiwisaver account.

Evidential issues

[12] There were a number of conflicts of evidence between Mr Donegan and Mr Woods on the one hand and Brent Grey, and to some extent Paul Grey, on the other hand.

[13] I have concerns with the evidence of Paul Grey and Brent Grey. Paul Grey had some difficulties with recall, at times relying on his statement and not appearing to be able to remember events referred to in that statement.

[14] Brent Grey on occasions gave persistent generalised evidence that he had done things, such as met with the applicants about a particular subject, but was unable to provide specific dates or circumstances, or any documentary evidence to back up his claim. As the Authority's hearing dates ended up being spaced over a period, there were opportunities to check records. However, I did not find that the evidence which Brent Grey provided after breaks supported his position, and in some cases no evidence was provided. An example was his assertion that he had requested proof from Mr Donegan and Mr Woods of work done prior to their employment commencing.

[15] In some instances I found Brent Grey's evidence was misleading. He said that he was unable to get information about pre-employment work done, implying that he

had nothing to do with payment for that work. However, it became apparent at the investigation meeting that he had in fact arranged for that payment to Mr Donegan.

[16] At the investigation meeting attempts were made by G2 to denigrate Mr Donegan and Mr Woods but I did not find those efforts compelling. For example, Brent Grey attempted to discredit Mr Woods' work at G2 by attaching to his statement what he said were photos from Mr Woods' presentation regarding a tour company, when at G2. Brent Grey regarded the tour company as unsuitable.

[17] On questioning, and with Mr Woods providing his record of the presentation, it became apparent that Brent Grey had provided an email coversheet which attached the presentation and then pages taken from the tour company's website. The actual presentation and what Brent Grey filed are not similar. I found Brent Grey's evidence misleading in this regard.

[18] An approach was taken by G2's witnesses that exchanges between G2 people on the Telegram messaging service, were unreliable as they included social exchanges and were relatively informal by traditional standards. The Authority obtained a sheet which Paul Grey was checking during the investigation meeting which set out this line of argument. This did not assist in establishing G2's witnesses' credibility.

[19] In conclusion I prefer Mr Donegan and Mr Woods' evidence, which was more consistent with the documentary evidence, including email exchanges. G2 sought the exclusion of Mr Donegan during Mr Woods' evidence as he gave evidence first. Exclusion was granted and the two applicants gave consistent evidence. Both gave appropriate concessions on occasions.

[20] Although the G2 Telegram communications included some social material and jokes in a way that business letters would not have, I find that it was a means of communications which G2 staff and associates were using to communicate for business purposes. This included the giving of work instructions.

Paul Grey and G2

[21] Paul Grey had made money through previous business ventures, mainly in the tech field, and owned significant amounts of cryptocurrency. In 2015 he decided to establish G2. In January 2018 he was the sole director and shareholder of the company.

[22] G2 was a venture capital business, which included provided funding and support to start-up businesses. The focus was on net applications and emerging technologies.

[23] Certainly G2 did not operate a traditional corporate environment. Prior to January 2018 it appears to have had no one working for it who was an employee. A number of people working at the G2 office were referred to by Paul Grey as ninjas. The environment was social as well as project related. There was little in the way of orthodox documentation, systems or policies.

[24] By the time discussions began between G2 representatives and Mr Donegan and Mr Woods, the company had representatives referred to as CEO and Head of Human Resources, who now appear to have been contractors or had status other than as employees. However, I do not consider that details regarding people's employment status were apparent to the applicants when they were considering work opportunities at G2.

[25] Mr Donegan and Mr Woods were aware that G2's ventures were not in early 2018 generating substantial revenue. Both men's positions were part of a plan to grow the revenue generating businesses which G2 had already invested in and to source new investments. I accept that these were never going to generate substantial earnings in the very short term. However, the two were assured that the immediate lack of income was not an issue as Paul Grey was funding G2 with his resources. They were satisfied with the representations by Paul Grey and his CEO that the company was well funded, held multiple cryptocurrencies, but was expanding beyond cryptocurrencies and that their roles were to be long term. They moved from stable employment to take up the G2 roles, which were not subject to 90 day trial periods.

[26] G2 suggested that Mr Donegan and Mr Woods engineered their own positions at G2. I do not accept this. Whilst they were both enthusiastic about the prospects of being involved, I am satisfied that Paul Grey was involved in their appointments to a significant extent and convinced them that they should move to G2. They, along with an administrator, appear to have been G2's first employees.

Mr Donegan's appointment

[27] Mr Donegan had a lengthy meeting with Paul Grey on 14 January 2018 and the two had a number of exchanges on Telegram. Another meeting was held on 24 January 2018.

[28] His employment agreement records a salary of \$150,000 per annum, along with other benefits. It also records a pre-approved holiday to Europe. The agreement was signed by Paul Grey on 31 January 2018, who also initialled each page.

[29] Paul Grey pressed Mr Donegan to start work sooner than planned. Mr Donegan undertook some after-hours work for G2 prior to his commencement. An offer was made by the CEO that G2 would pay him two weeks' wages for that work. This was confirmed in an email from the G2's Head of Human Resources to Mr Donegan on 21 February 2018.

Mr Woods' appointment

[30] Mr Woods' employment agreement was signed on 7 January 2018 by Paul Grey. His commencement date was 12 February 2018. There was a verbal agreement that he would be paid \$10,166 to make himself available after hours whilst he was completing the notice period for his old position and this was paid to him within a day or two of signing his employment agreement.

The applicants' start at G2

[31] The applicants found that the work environment at G2 was not as formal and structured as other businesses which they had worked for. Promises made to them and, in some cases, captured by their employment agreement, such as the provision of a work car and cell phones, were not executed as expected. Systems were not in place to ensure that they were paid in an orderly and recorded manner.

Brent Grey's involvement

[32] Brent Grey became involved in G2 for the first time in early 2018. Paul Grey gave evidence that he was burnt out. There was no supporting medical evidence provided. However, I accept that Paul Grey felt the need to approach his father, who he appears not to have been particularly close to at that time, to assist him with the G2 business which he felt unable to control alone.

[33] The timing and extent of Paul Grey's reduced level of connection with the business, and Brent Grey's involvement and taking over responsibility, is disputed. Paul Grey mentioned via Telegram on 1 February 2018 that his father had the role of CFO (Chief Financial Officer). However, Brent Grey's signed consent to appointment as director is dated later, on 21 February 2018. He suggested that the Companies Office had done something wrong which meant that his place in the company was not formalised earlier. However, I am satisfied that he was not put in the position as Managing Director until this was announced at a 27 February 2018 meeting. The CEO was sent away from G2 at the same time.

[34] Once Brent Grey became MD he told those working in the G2 office, including Mr Donegan and Mr Woods, that his son was "on sabbatical" and was not to be bothered with "work stuff" and everything had to go Brent Grey.

[35] Brent Grey found the G2 environment far from what he was used to in more corporate organisations, with little in the way of policies, documented procedures or clear lines of authority. He became concerned about G2's expenditure with little in the way of income.

[36] Mr Donegan and Mr Woods found it challenging to keep doing their jobs, without direction from Brent Grey who stopped holding weekly strategy meetings and did not spend much time in the office.

[37] Brent Grey gave the impression that he had a higher level of involvement in G2 earlier on than that outlined by Mr Donegan and Mr Woods. However, Brent Grey also said when questioned that he did not question payments made to the applicants as he did not know them from a bar of soap. I did not find convincing Brent Grey's other evidence that he sought to clarify Mr Donegan and Mr Woods' roles over a number of meetings with them.

[38] Although Paul Grey was referred to as being on sabbatical he was not overseas and continued to have some involvement in the company. He continued to be sent email and Telegram messages and to be involved in some decision making in March 2018. He also remained living upstairs from the G2 office.

Inquiries into additional payments

[39] Brent Grey's evidence was that whilst Mr Donegan and Mr Woods were employed, he sought evidence of services provided by the two for which additional payments were made, but he was not provided with anything. The implication was that the payments were nothing to do with him. Having not received anything he did not consider the payments to be valid.

[40] However, Brent Grey's evidence was not well supported by other evidence. It was Brent Grey who paid the funds into Mr Donegan's bank account, however when he processed Mr Donegan's pay he missed the additional payment. A message exchange on 2 March 2018 makes it clear that Brent Grey was told that Mr Donegan was seeking the two weeks' pay which had been promised to him. Brent Grey agreed to pay and then did so.

[41] Brent Grey says that there were a huge number of payments to be made, but denied when questioned that he was paying on a pay now and question later basis. I can only conclude that he knew that the payment was a bonus, as referred to in his own notation, and that he was satisfied that it should be paid.

[42] Mr Woods was asked by Brent Grey about what the payment he had received was for, but says that he was not challenged on the validity of it.

[43] Brent Grey says that he had asked Mr Woods by email for details of the work. However Brent Grey was unable, despite the Authority seeking the email, to locate one. Emails which he did provide did not support his evidence as they related to other issues. I was unable to follow his explanation for their supposed relevance. Brent Grey then said that he made verbal requests but could not give any details of when he did so. He then said he had pursued it with the HR person and another G2 representative rather than with Mr Donegan and Mr Woods as he did not know them from a bar of soap.

Conflicts of interest

[44] Shortly before the restructuring was announced two matters arose where Brent Grey believed that Mr Donegan or his contact in finance had a conflict of interest.

[45] The first concerned Mr Donegan's pursuit for G2 of an investment prospect in a business known as Stasis Gaming. Despite earlier indications from Paul Grey for G2 supporting that investment, on 12 March 2018 Brent Grey turned down the involvement in Stasis Gaming.

[46] Although not raised with Mr Donegan during his employment, G2 claims that Mr Donegan had a conflict of interest as regards Stasis Gaming for two reasons. Firstly, Brent Grey admitted under cross examination that he had found out about Mr Donegan having a role in founding Stasis Gaming before he talked to Paul Grey about restructuring. Secondly, Brent Grey believed that Stasis Gaming conflicted with G2 Gaming Limited. The truth of these allegations will be considered later in relation to contribution. For the moment they are noted as matters which were in the minds of G2 directors.

[47] The other matter concerned Mr Donegan's contact in finance. On 19 March 2018 Brent Grey phoned her and asked her to deal solely with him from now on. Brent Grey says that he raised serious concerns with her regarding a conflict of interest. Having heard her evidence, I accept her evidence that those issues were not raised with her. However, those issues may still have been in Brent Grey's mind at this point.

Restructuring announcement

[48] On Tuesday 20 March 2018 at 11.46 am Brent Grey sent an email announcing the company had "resolved" to restructure itself. The email went to G2 staff, contractors and associated enterprises. The resolution was said to be "primarily" due to:

- (1) refocusing on Paul's original vision for the company;
- (2) alleviate the huge financial burden put on G2 by previous mismanagement of the company.

[49] Other than a note about meeting individually for discussion, no further details were provided.

[50] The following events had occurred shortly before that announcement:

- (a) On 19 March 2018 the employment of the administrative employee had been terminated;

- (b) On 19 March Brent Grey spoke to Mr Donegan's contact instructing her that he was the only one at G2 to be involved with any future discussions regarding a project. The instruction was subsequently confirmed by email.
- (c) On 20 March at 6.20am Paul Grey messaged Mr Donegan to saying "I'm absolutely disgusted with your behaviour" without further detail. Paul Grey then did not respond to Mr Donegan's surprised response and suggestion to meet.
- (d) Shortly after at 9.12am Brent Grey removed Mr Donegan from the G2 terminal. Although Brent Grey questioned whether he was capable of this, the alternative appears to be that Paul Grey undertook the action.

[51] Then three quarters of an hour after the resolution of restructuring announcement, Paul Grey posted a message on his public Facebook page:

We are currently restructuring G2 Ventures – it has become apparent that there are a select few that have chosen to spread rumours for whatever reason. ...

G2's process with Mr Donegan and Mr Woods

[52] Mr Donegan and Mr Woods were invited to attend a "company restructure meeting" on Thursday 22 March 2018 at 10am. At that meeting Brent Grey gave them letters with the same content headed "Restructuring of G2 Ventures Limited". The single page letter refers to the two reasons given in the 20 March email and states:

"...[Paul's] vision was demonstrably destroyed with extreme mismanagement of the Company by someone Paul had put his trust in. Your employment contract was prepared and set in motion under the direction of that same person.

[53] It continues with reference to the mismanagement putting "huge financial burden" on G2. Salary payments were described as putting "substantial financial strain" on G2. The proposed action is for G2 to no longer have any staff "on [s]alary in nebulous positions within the company which are not aligned to Paul's original

vision.” Reference is made to the possibility of having specific tasks undertaken by contractors on a “contract only” basis.

[54] Mr Donegan and Mr Woods were offered the opportunity to provide Brent Grey with “any alternative options” in writing. Due to “urgency” comment was sought by 4pm on Monday 26 March 2018 at the latest. Time off work was granted. The letter identifies that the restructuring would mean that there would be no position available for them.

[55] On Monday 26 March 2018 Mr Donegan, on behalf of both, emailed Brent Grey at 10.11 am identifying that they were finding the timeline challenging and requesting to move the deadline to Wednesday at 4pm. Brent Grey did not reply until over 24 hours after the original deadline, accepting the request the following day at 4.49pm.

[56] Just before 4pm on Wednesday 28 March Law & Associates, representing Mr Donegan and Mr Woods, emailed a lengthy letter to Brent Grey. The letter included a concern that the reasons given for the restructuring were wrongly based and that the restructure itself was too vague to be able to provide a meaningful response. Further information about the restructure and the reasons for it was sought. This included for example, clarification of what the original vision was, details of the contract-only work, cost savings to the company and full details of the company’s financial position.

[57] The letter refers to s 4(1A)(c) of the Act and confirms that once the information was received, Mr Donegan and Mr Woods would be in a position to more fully provide their feedback.

[58] Shortly thereafter Mr Donegan and Mr Woods’ access to G2 emails and G2 groups on Telegram were stopped by the company. G2 did not inform the men what had been done or why. They were therefore largely unable to carry on working. G2 did not reply to the Law & Associates letter.

[59] On 29 March 2018 Law & Associates emailed another letter to Brent Grey, referring to the removal of access and strongly suggesting that G2 seek legal advice. Authorities were provided for Mr Donegan and Mr Woods, and a copy of their time and wage records sought. No response was received although the following day their

names and photos were removed from the company's website page depicting the G2 team.

Notification of decision

[60] On the morning of 4 April 2018 Brent Grey emailed Law & Associates, saying that having granted the extension of time (for consultation) “[n]othing was forthcoming”. There is no explicit reference to the request for information in the letter of 28 March. However, there is a reference to what Brent Grey saw as “quite bizarre allegations in your emails” and his intention to forward these to “our lawyers tomorrow and they will provide you with a future contact point”. There was no contact from any lawyer until August. The reference to “emails”, supports Brent Grey having seen the 28 March request for information.

[61] However, the letter states that G2 has “now made the appropriately considered decision to restructure G2 Ventures affairs”. Brent Grey writes that he will instruct the accountants to verify and make up final amounts due to Mr Donegan and Mr Woods. No reference is made to notice issues.

[62] On the following day, 5 April 2018, at 9.45pm, Brent Grey sent a group email to various G2 connected people, including some working outside the group, announcing that Mr Donegan and Mr Woods' positions had been done away with and:

Because of recent events, both Kyle and Brad will not be working out their notice period and will no longer have any representation on behalf of or for G2...

[63] There was no explanation of what the phrase “recent events” referred to.

[64] Law & Associates sent letters on 5 April 2018 raising personal grievances for Mr Woods and Mr Donegan and proposing mediation. No response was received. Later attempts to contact G2 regarding mediation were unsuccessful.

Final pay

[65] On 12 April 2018 Brent Grey sent a short email to Law & Associates referring to unidentified “specific information” requested from Mr Donegan and Mr Woods which had not been received, was being investigated and would reflect on their final pay. Reference was made to G2's legal counsel being in contact to formally advise

Law & Associates of G2's position on "these matters", however, no contact was received from any legal counsel.

[66] Mr Donegan and Mr Woods contacted Brent Grey on several occasions attempting to get their final pay but with little response.

[67] On 17 April 2018 Brent Grey emailed Law & Associates asking for the attached payslip to be forwarded to the clients and advising that the final pay had been verified by G2's accountant and paid. No further explanation was given but the final pay slips referred to "Payments made in advance for salary" and deducted \$3975.00 gross from Mr Donegan's final pay and \$10,166.00 gross from Mr Woods' final pay. The final pay was not received until almost two weeks after the announcement of their redundancies.

[68] There was no response to a Law & Associates email of 18 April 2018 seeking payment of those "unauthorised deduction" amounts.

Dismissal

[69] Were the dismissals what a reasonable employer could do in all the circumstances at the time of the dismissals, taking into account the minimum procedural standards set out in s 103A of the Act?

[70] I conclude that redundancy was not the real reason for the dismissal of Mr Donegan and Mr Woods. Although Brent Grey had concerns about the financial state of the business, the real reason for terminating Mr Donegan's and Mr Woods' employment was that the Greys had decided that Mr Donegan and Mr Woods had engaged in misconduct and inadequate performance.

[71] Firstly there is Paul Grey's message to Mr Donegan about being disgusted with him. Then the Facebook entry regarding rumours being spread, which Paul Grey accepts referred to Mr Donegan and Mr Woods. Mr Donegan's contact was spoken to, very shortly before the restructuring was announced, about only dealing with Brent Grey. Mr Donegan was believed to have a serious conflict of interest regarding Stasis.

[72] Support for the alleged misconduct and poor performance being the real reason for dismissal came strongly also from G2's presentation of its defence to the

grievance claims. This included allegations of the applicants creating their own jobs, arranging to be paid too much salary, receiving payments they were not entitled to, doing very little work and doing sub-standard work.

[73] Details of the alleged misconduct were not supplied to Mr Donegan or Mr Woods by G2 prior to their termination. According to Brent Grey he was too busy dealing with loose cannons and a “plethora” of unidentified things to actually address any of this with Mr Donegan and Mr Woods during their employment.

[74] Having found that the real reason for the dismissal was not a genuine redundancy, I find that Mr Donegan and Mr Woods were unjustifiably dismissed by G2.

[75] Had I found that redundancy was the real reason for the dismissal, I would still have found that the dismissal was unjustified.

[76] The decision to dismiss was pre-determined. The announcement of 20 March 2018 was that G2 “has resolved to restructure the company”. This was in keeping with Paul Grey’s evidence that over the weekend of 17 and 18 March, in discussions between himself and his father, G2 resolved to restructure. The restructure was focused on removing Mr Woods and Mr Donegan. As outlined above, several actions of Brent Grey both before and during the period allocated for consultation, support the decision having already been made. Mr Donegan’s and Mr Woods’ email account and Telegram access was removed once the request for information was made through their lawyer. Some five days before their representative was informed that Mr Donegan and Mr Woods no longer had positions, they had been removed from the company’s team on its website.

[77] In addition, if, as G2 maintains, this was a redundancy for genuine commercial reasons based on its financial position/lack of income, it would reasonable be expected to produce evidence of that. However, there was a distinct paucity of financial evidence even during the investigation meeting regarding G2’s actual position. The lack of income was stressed with little disclosure about the company’s asset base.

[78] No financial information was provided with the pre-prepared letter at the 22 March 2018 meeting. The meeting lasted about quarter of an hour. The applicants had limited access to G2’s financial information. There was an absence of proper

consultation, and an ignoring of requests for documents and information from the employees' representative. The requirement to provide sufficient information in a timely manner was not met.²

[79] G2 suggested that Mr Donegan and Mr Woods had elected not to engage in consultation. I do not accept that. They were entitled to seek representation and their representative sought further information, which relates to the restructuring. G2 completely ignored that request, not even entering into discussion about whether what was sought was reasonable or necessary. At the investigation meeting Brent Grey expressed a view that he should not have to provide full details of the company's financial position as was sought. However, he made no attempt to provide some, if not all, details or to discuss with the representative what would or would not be provided. That was not a reasonable approach.

Lost wages

[80] Having found that Mr Woods and Mr Donegan were unjustifiably dismissed by G2 I move on to consider remedies. Mr Donegan seeks three months' lost wages, amounting to \$37,500 gross. Mr Woods seeks \$50,000 gross lost wages less the \$20,250 which he earned, leaving \$29,750 claimed.

[81] G2 opposes a lost remuneration award on the basis that as it was a redundancy situation they did not lose any wages as a result of the dismissal. I have not accepted that. Alternatively, G2 says that any award should reflect the absences due to the overseas holidays, both in terms of their availability to work and lack of attempts to find other work.

[82] Both men had pre-arranged overseas travel before they started at G2 and for which they gained approval from G2. This affected their ability to secure employment before their return from overseas. It was not suggested for G2 that they should have cancelled their travel. However, they were not able to work during that period. Neither man would have been in employment for 12 months at the time of their holiday and would not have been entitled to paid holidays.

² *Stormont v Peddle Thorp Aitken Ltd* [2017] NZEmpC 71 at [55]

Mr Donegan

[83] G2 submits that Mr Donegan did not mitigate his loss and points out that neither applicant produced evidence that they had sought employment. However, there was some limited evidence of attempting to find other work as Mr Donegan gave evidence of the personal and professional embarrassment of seeking new employment after a handful of weeks at G2. No particular evidence was sought on behalf of G2 in terms of job applications or the like. I note the statement in *Xtreme Dining Ltd (t/a Think Steel) v Dewar*³ that the employer has the legal burden regarding mitigation. I am not satisfied that Mr Donegan failed to mitigate his loss.

[84] However, the loss of wages for Mr Donegan's time overseas was not caused by the dismissal. Mr Donegan went to Europe from around 27 April until June 2018, then was in New Zealand for three weeks before leaving for the United States at the end of June 2018. Using 5 April 2018 as the date of dismissal, Mr Donegan was present in New Zealand for three weeks in April and three weeks in June. I therefore find that he would be entitled to six weeks' lost remuneration, which at a weekly rate of \$2884.62 gross, amounts to \$17,307.69 subject to the consideration of contribution below.

Mr Woods

[85] Mr Woods says that he had to hold off looking for other work due to his holiday booked in June 2018 and could not look for other work before his claim in the Authority had been heard. He attempted to mitigate his loss by providing his services as a contractor and filed invoices for that work. I am not satisfied that Mr Woods failed to mitigate his loss.

[86] Mr Woods went to Europe on a pre-planned holiday leaving in mid-June 2018. On the basis of a 5 April 2018 termination date, he lost ten weeks' income before leaving for his trip. His loss after that was not caused by his dismissal. I consider that Mr Woods is entitled to ten weeks' salary, which calculated at a weekly rate of \$3,846.15 gross amounts to \$38,461.54, less the \$20,250 earned, amounts to \$18,211.54 subject to the consideration of contribution.

³ *Xtreme Dining Ltd (t/a Think Steel) v Dewar* [2016] NZEmpC 136 at [100]

Compensation for non-pecuniary loss

[87] There are some factors which are the same or similar in the assessment of Mr Donegan's and Mr Woods' non-pecuniary loss. However, there are also some individual factors. I will deal with the similarities together first.

[88] For the applicants, G2's behaviour is characterised as high handed and outrageous, justifying a substantial awards of damages. Further, the distress was exacerbated by the employer's vindictive and retaliatory action, lack of communication, failure to pay wages, failure to provide wages and time records until 17 April 2018 and the significant and unauthorised deductions from their final pay. Further, both were induced to leave their former employment to work for G2 and were dismissed a matter of weeks later. Both had made it clear that they had financial commitments and stability were major factors for them. Remedies are sought at the higher end of the range.

[89] G2's actions exacerbated Mr Donegan and Mr Woods' humiliation. The restructuring and dismissal was broadcast outside the company. Paul Grey's Facebook communication linked the restructuring with people spreading rumours. Brent Grey's announcement of the termination, referring to recent events meaning that the two would not be working out their notice or be able to represent G2, suggests some kind of misconduct. Both employees gave evidence of significant embarrassment and loss of dignity.

[90] Both Mr Donegan and Mr Woods had overseas holidays booked which added to the stress of losing their jobs.

[91] The short length of employment is an aggravating factor. Here both Mr Donegan and Mr Woods had given up well paid positions elsewhere and were enthusiastic about starting at G2, only to have their employment terminated within a few weeks of starting work

Post-employment conduct?

[92] An issue arose about whether some of G2's conduct, which the applicants raise as justifying higher awards of compensation, was post-employment. The

question of whether such conduct may be taken into account in assessing compensation was described as not straightforward by Chief Judge Inglis in *Richora Group Limited v Cheng*.⁴

[93] However, I find that probably the most significant communication relied on was not post-termination. On 5 April 2018 Brent Grey sent an email to internal and external G2 associates informing them of Mr Donegan's and Mr Woods' redundancies and stating that they would not be allowed to work out their notice due to "recent events".

[94] Mr Donegan and Mr Woods had only been informed on the night of 4 April 2018 that their positions were redundant. They had received no notification of when their employment would finish and their agreements provided for four weeks' notice. They learned for the first time that they were not to serve out their notice period "because of recent events" when they received comments from the recipients of the group emails. That email significantly added to their humiliation.

Mr Donegan

[95] In addition, Mr Donegan consulted with his personal trainer who describes him as presenting with high levels of anxiety, weight loss and lack of sleep which Mr Donegan attributed to the stress from his redundancy. Mr Donegan felt unsure about his future and what he could do for employment.

[96] Mr Donegan's sister described his dismissal was leading to him becoming very quiet and not his usual happy self for a long time after it happened. Having been an enthusiastic and energetic person he shut down and became inward focused. She also mentions the financial stress he was under.

[97] Mr Donegan also provided evidence of his financial difficulties. He had to apply for a mortgage payment break meaning when he had to sell his house as a result of losing his job, he earned over \$10,000 less than he would otherwise have.

[98] I consider that \$22,000 is a fair compensation amount for Mr Donegan, subject to my assessment of the issue of contribution below.

⁴ *Richora Group Limited v Cheng*[2018] NZEmpC 113 at [46]

Mr Woods

[99] In addition to the matters outlined above, Mr Woods suffered from loss of sleep and embarrassment amongst his peers as a result of his dismissal. He was worried about his financial situation.

[100] For Mr Woods \$18,000 would be an appropriate amount of compensation subject to a consideration of contribution.

Contribution

[101] G2 submits that a significant deduction should be made for contribution by Mr Donegan and Mr Woods. This argument is based on three grounds. The first is that they chose not to provide feedback to the restructuring proposal. As outlined above, Mr Woods and Mr Donegan decided to use a representative during the redundancy process, which is a legitimate decision. The representative requested information very shortly prior to the expiry of the feedback deadline, saying that feedback will be provided having received that information. There was no immediate objection to that approach by G2 nor any enquiry seeking any other response. In these circumstances I do not regard the absence of feedback, except to the extent that that was in the representative's initial letter, as being unreasonable or blameworthy.

[102] The second ground for contribution is said to be that Mr Donegan and Mr Woods made disparaging remarks about G2 and Paul Grey. Law & Associates sought, without result, prior to the investigation meeting, particulars of the disparaging comments to be provided by G2's representatives.

[103] At the investigation meeting the reliability of evidence for any such comments being attributable to Mr Donegan and/or Mr Woods was tenuous. Paul Grey said that he had heard through the grapevine that people were speculating about himself and G2 although nothing specific. He described it as talking smack. He said Mr Donegan and Mr Woods' names had been mentioned. No other witnesses were called by G2 on this issue.

[104] In any event Paul Grey also gave evidence that he hears lots of rumours and everyone close to him and G2 should have known that he was not in a fit state at this

time. It is hard to see how discussion about it could therefore be blameworthy. I do not accept contributory conduct is established.

[105] The third ground concerned only Mr Donegan and related to Stasis Gaming. In relation to Mr Donegan, G2 discovered on 28 March 2018 that Stasis Gaming Limited was incorporated on 14 March 2018, with the former G2 HR Manager as sole director and shareholder. That person ceased being connected with G2 some weeks prior to Mr Donegan's dismissal. G2 considers that Mr Donegan was a co-founder and is now listed as a co-founder and chief strategy officer on Stasis Gaming's website.

[106] As regards Stasis Gaming, Mr Donegan accepted that he had involvement in Stasis Gaming but only from a point after his termination. Mr Donegan acknowledges that he was recorded as co-founder on the website to give him credibility when dealing with people on behalf of Stasis Gaming. Although such an action was probably unwise, I found this explanation credible. The Companies Office Register shows no reference to Mr Donegan.

[107] But even if Mr Donegan did have earlier involvement with Stasis Gaming, I did not find the evidence that that was a conflict with G2's business to be credible. It appears that Brent Grey thought it was a conflict given the reference to gaming and one of G2's associated companies had gaming in its title. However, the evidence was that G2's associated company was established for a limited purpose of sponsoring gaming events, rather than being in the gaming business. Any conflict was not satisfactorily established.

[108] In conclusion I do not find that Mr Donegan's or Mr Woods' actions to have contributed to their dismissal. I therefore order that G2 make the following payments within 28 days of the date of this determination:

(c) To Mr Donegan, \$17,307.69 gross as lost wages and \$22,000.00 as compensation under s 123(1)(c)(i) of the Act; and

(d) To Mr Woods, \$18,211.54 gross as lost wages and \$18,000.00 as compensation under s 123(1)(c)(i) of the Act.

Special damages claim

[109] Mr Donegan and Mr Woods claim a joint total of \$3,867.45 as special damages relating to legal costs incurred for representation during the flawed redundancy process and in respect of G2's failure to pay their final pay. A 50% allocation to each applicant is sought.

[110] They rely on the Employment Court's decision in *Stormont v Peddle Thorp Aitken Ltd*⁵. There a "bright line" was described as being able to be drawn between the legal costs for representation during a redundancy process which had been found to be fundamentally flawed and instigated for the dominant purpose of securing a departure and costs in respect of the proceedings. Special damages were awarded under the personal grievance claim for legal costs.

[111] G2 opposes the awarding of costs, outlining decisions of the Authority and the Court rejecting such an approach.⁶ However, those submissions do not deal with the *Stormont* decision, which supports the availability of special damages in these relatively unusual circumstances.

[112] A Law & Associates' invoice sets out the work undertaken from 26 March to 18 April 2018. I am satisfied from the descriptions that the work captured by that invoice relates solely to the redundancy process and issues regarding the final pay.

[113] I have found that the purported redundancy was motivated by the dominant purpose of getting rid of the applicants because of concerns about alleged misconduct which were not raised with them. The failure, without clear explanation, to pay final pay for two weeks after the dismissal announcement also places the case outside the usual.

[114] I order G2 to pay, within 28 days of the date of this determination, Mr Donegan the sum of \$1,933.72 and Mr Woods the sum of \$1,933.72 as special damages.

⁵ *Stormont v Peddle Thorp Aitken Ltd* [2017] NZEmpC 71

⁶ Including *Binnie v Pacific Health Ltd* [2002] 1 ERNZ 438 at [17] – [18], *Harwood v Next Homes Ltd* [2003] 2 ERNZ 433, *Moxon v Pathways Health Ltd t/a Pathways* [2011] NZERA Christchurch 151, *Frainch v Vodafone New Zealand Ltd* [2016] NZERA Auckland 7.

Good Faith

[115] Mr Donegan and Mr Woods allege that G2 breached its duty of good faith to them throughout the redundancy process, including by failing to provide information about the redundancy so they could meaningfully be consulted.

[116] I accept that G2 failed to provide information to Mr Donegan and Mr Woods. However, this is a matter which has already been considered in the unjustifiable dismissal claim. I have awarded Mr Donegan and Mr Woods remedies for their grievance claims. To award a penalty for some of the same conduct would be double-dipping and so I make no award of penalties under this head.

Payments for pre-employment work

[117] Mr Donegan and Mr Woods claim that they are entitled to payment for deductions to their final pay for payments for pre-employment work. `

[118] G2 submits that the sums paid to the applicants were wages in advance as it never agreed to pay these additional payments. It was thus entitled to take into account these advance payments when calculating what final pay was due. Therefore it denies that deductions as such were made.

[119] G2 says that acts done outside an agent's authority are not binding on a principal with respect to persons having notice that the agent in doing the act is exceeding their authority. Mr Donegan and Mr Woods were said to have knowledge that the CEO and HR manager did not have authority to bind G2 because they knew Paul Grey was the sole director, had signed their employment agreements and said that he was G2.

[120] Both the Greys gave evidence that the CEO was entitled to make payments. He therefore had some authority in that regard. The limits of the HR and CEO's respective authorities were not demonstrated by G2.

[121] I do not accept that knowledge that only the director could sign employment agreements was sufficient to establish knowledge that the CEO lacked authority to make these payments. The payment to Mr Woods was made at a time when Paul Grey was the sole director and oversaw payments. The payment to Mr Donegan was

made at a time when Brent Grey had told Mr Donegan and others to deal directly with him, and it was he who made the payment.

[122] G2 says that Mr Donegan's employment agreement requires variations to be in writing and signed by both parties.⁷ However, this was a bonus payment and did not require a variation.

[123] G2 also argued that no, or inadequate paid work was performed prior to commencement of employment. I am satisfied that both Mr Woods and Mr Donegan undertook some work for G2 prior to formal commencement. There was also an availability aspect to Mr Woods' payment. G2's representatives agreed what was to be paid for that and it was paid. I do not consider that whether sufficient work was undertaken to justify that amount of payment is a matter which I need consider.

[124] In conclusion I am satisfied that the payments made were not salary paid in advance. G2 was therefore not entitled to take those payments into account in determining the final pay. There are thus wages owing for those deductions. As regards interest, Law & Associates challenged the non-payment or deduction from 18 April 2018.

[125] I order G2 to the following sums as wage arrears within 28 days of the date of this determination:

(c) Mr Donegan the sum of \$3,975.00 gross together with interest on that sum at the rate of 5% per annum from 19 April 2018; and

(d) Mr Woods the sum of \$10,166.00 gross, together with interest on that sum at the rate of 5% per annum from 19 April 2018.

Wages Protection Act claim

[126] Penalties were sought for failure to pay final pay. Under s 4 of the Wages Protection Act wages are to be paid without deductions except as provided in that Act.

[127] There was no consent from Mr Donegan or Mr Woods to these particular deductions. Mr Donegan's employment agreement contained a provision whereby he agreed to deductions from final pay for money owing to the employer, with "amounts

⁷ Clause 26 of Mr Donegan's employment agreement

must be discussed and agreed". There was no such discussion or agreement here. Mr Woods' employment agreement contained no similar provision.

[128] The Wages Protection Act does not provide for deductions in those circumstances, and therefore G2 breached s 4 of the Wages Protection Act.

[129] I consider that a penalty is appropriate. At some point Brent Grey developed concern about the payments for pre-employment work to the applicants. However, he authorised Mr Donegan's payment. Also, other than the oblique reference in his 13 April 2018 email, there is no documentary evidence of him attempting to obtain further information regarding the payments. He did not attempt to gain Mr Donegan and Mr Woods' agreement to deductions. There was no attempt to explore the issue with the applicants' representative. I consider that a penalty is appropriate with the quantum considered below.

Wages and time records

[130] A penalty of \$20,000 for each applicant was sought for failure to provide wages and time records under s 130 of the Employment Relations Act. At the time the statements of problem were filed such records had not been received by the applicants' representative. G2 opposes a penalty on the basis that it provided payslips shortly thereafter, namely on 17 and 18 April 2018.

[131] Law & Associates requested in writing on 29 March 2018 the applicants' wages and time records. There was no reply to this request by Brent Grey. No such records were held by G2 at that point. Earlier, on 13 March 2018, Brent Grey had instructed an accountants firm to review employee payments and prepare payslips but these appear not to have been available at the time of the request.

[132] The request from Law & Associates was repeated on 12 April 2018. This was not promptly responded to. It was not until 17 April 2018 that G2 provided payslips for employees whose employment had finished almost two weeks earlier.

[133] There is no requirement in the Act or the employment agreements to provide payslips as such. However, payslips may possibly amount to a wages and time record.

[134] The payslips provided here do not meet all of the requirements of s 130(1) of the Act. They do not refer to the employee's postal address. The address specified was the G2 office, which was not the applicants' residential address, and was not even where they worked at the time the payslips were finalised and provided to the applicants. They had been dismissed by that time. The payslips also did not identify the kind of work on which the employees were usually employed and whether they were employed under an individual or collective agreement.⁸

[135] Aside from that, proper wages and time records were not kept at all prior to the involvement of the accountancy firm. The records could therefore not be provided "on request" as is required by s 130(2) of the Act. I consider that it is appropriate to impose a penalty on G2 regarding its failure to keep and provide wages and time records, although its subsequent provision of the payslips will be considered as regards the quantum.

Penalties

[136] I have found that G2 breached the Wages Protection Act regarding deductions made and breached s 130(1) of the Employment Relations Act regarding failure to keep wages and time records.

[137] In accordance with *Borsboom (Labour Inspector) v Preet PVT Ltd & Warrington Discount Tobacco Ltd*⁹ I consider the four step process to assess the penalties. Under step one the maximum penalty for each employee is \$20,000 for a company. The deductions and records are different matters and should not be globalised for the purposes of assessing penalties. However, globalisation regarding the two employees is appropriate. Thus there is a provisional penalty for each of the two breaches of \$20,000, totalling \$40,000.

[138] Under step two of the process I assess the seriousness of the breaches, taking into account aggravating and mitigating factors. Unlawful deductions are a serious matter as employees are deprived of their wages. In this case substantial amounts of money were involved. I accept that Brent Grey had some question about the basis for the payments, but he made inadequate attempts to clarify entitlements, including once Mr Donegan and Mr Woods were represented. The two were not vulnerable

⁸ As required by s (1)(d) and (e) of the Act

⁹ [2016] NZEmpC 143

employees as that phrase is usually understood although they had been dismissed and had to wait two weeks for their final pay to be deposited.

[139] The failure to keep wages and time records appears to have delayed prompt payment of the final pay and the failure to provide records made it difficult to establish whether the applicants had been properly paid. It was not until a spreadsheet was provided with Brent Grey's witness statement that it was relatively clear why the applicants had received less final pay than expected. I take into account in G2's favour the instruction of accountants in an attempt to formalise records although it is unfortunate that it was not clearly identified that the payslips were created after the applicant's employment finished.

[140] I assess the G2's provisional total as a \$2,000 penalty for the deductions and a \$1,000 penalty for the failure to keep adequate records.

[141] Step three concerns G2's ability to pay. There was some evidence of lack of revenue in March 2018 as related to the redundancy proposal, but there was insufficient evidence regarding the company's overall financial position, particularly in more recent times, to enable a reduction to be justified.

[142] Standing back under step four, I consider that a penalty of \$2,000.00 for the deductions from wages and \$1,000.00 for the failure to keep adequate records is appropriate. I consider that some of those amounts should go to the applicants, although they have already been compensated by the awards of arrears regarding the deductions. I order G2 to pay within 28 days of the date of this determination the sums of \$1,000.00 to the Employment Relations Authority for payment into the Crown account and \$1,000.00 each to Mr Donegan and Mr Woods.

Other penalties sought

[143] Penalties of \$10,000 for each applicant are sought for failure to respond to the grievances. That matter was not much explored during the meeting and thus I am not satisfied that G2 should be penalised in this regard.

[144] Penalties were also sought for failure to provide a statement in reply to the Authority, which was not done until after counsel was instructed. Potentially this could have been considered under s 134A of the Act concerning obstructing or delaying an Authority investigation. However, there were difficulties with

establishing clearly what was received when on behalf of G2. This was also not fully explored during the investigation meeting and thus I do not make a finding under that section.

[145] Reference was made in closing submissions for the applicants to a penalty for failure to provide employment benefits promised. However, Mr Donegan's claim to lost employment benefits was withdrawn at the start of the investigation meeting and thus not traversed at the meeting. I make no order in this regard.

Costs

[146] Costs are reserved. The parties are invited to resolve the matter. If they are unable to do so Mr Donegan and Mr Woods shall have 28 days from the date of this determination in which to file and serve a memorandum on the matter. G2 shall have a further 14 days in which to file and serve a memorandum in reply. Submissions seeking costs must include a breakdown of how and when the costs were incurred and be accompanied by supporting evidence.

Nicola Craig

Member of the Employment Relations Authority