IN THE EMPLOYMENT COURT OF NEW ZEALAND
AUCKLAND

I TE KŌTI TAKE MAHI O AOTEAROA
TĀMAKI MAKAURAU

[2019] NZEmpC 99
EMPC 369/2017

IN THE MATTER OF	proceedings removed from the Employment Relations Authority
BETWEEN	CLEITEST FERNANDEZ Plaintiff
AND	RAPPONGI EXCURSIONS LIMITED T/A DENNY'S RESTAURANTS Defendant

Hearing:	3-5 December 2018 and 1 March 2019 (submissions) (Heard at Auckland)
Appearances:	R M Harrison, counsel for plaintiff M G Donovan and J Williams, counsel for defendant
Judgment:	15 August 2019

JUDGMENT OF JUDGE M E PERKINS

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[1] This judgment deals with the question of a personal grievance over unjustified dismissal, and whether there has been a breach of a term of employment with regard to a 10 per cent holding in the defendant's business, which the plaintiff alleges was held out to be an employment benefit. These issues are appropriately within the jurisdiction of the Employment Court. Some counterclaims made by the defendant are less clearly separable as between those arising out of the employment agreement and those arising out of independent business arrangements; but all are addressed to ensure a complete picture of obligations arising from the employment relationship which need to be attended to (as has been acknowledged by the parties). Following the reasoning in *FMV v TZB* it can be said that the facts of this case mean the

employment relationship is a necessary component not only of the counterclaims but also in other obligations owing to Mr Fernandez.[1]

Factual Background

[2] The plaintiff, Cleitest Fernandez (also known as Peter Fernandez), began his association with Denny's Restaurants in New Zealand in 1988. At that time, he was employed as General Manager of the Denny's Manukau restaurant. The company that owned Denny's Restaurants had by late 1989 been placed in receivership. While it is the subject of some dispute, I accept Mr Fernandez's evidence that, in 1989, after the receivership had commenced, the receivers approached him and asked him to manage the company in receivership and oversee the two Denny's restaurants situated in Manukau and Pakuranga, Auckland. The intention was to continue trading for the purposes of the sale of Denny's New Zealand and the restaurants.

[3] In December 1990, the company in receivership, with its restaurant businesses, was sold to George Cannon and James (Jay) Noble III, who were business partners. The defendant company, Rappongi Excursions Ltd (Rappongi), was established as the entity that took over and operated Denny's Restaurants in New Zealand. Noble & Cannon Management Services Ltd is the sole shareholder of Rappongi. Rappongi entered into an employment agreement with Mr Fernandez, and he was appointed Operations Manager, New Zealand. Mr Fernandez remained in employment with Rappongi until termination of his employment on 15 June 2017. There was no written employment agreement entered into between the parties. At the time of termination of his employment, Mr Fernandez was running a Denny's restaurant under a sub-franchise arrangement with Rappongi.

[4] A dispute arose as to the termination of employment, with Mr Fernandez alleging an unjustifiable dismissal. In addition, Mr Fernandez claims that he was contractually entitled to a 10 per cent shareholding in Rappongi. He lodged a claim with the Employment Relations Authority (the Authority) on 17 July 2017. Rappongi denied the claim made in the Authority and made counterclaims against Mr Fernandez.

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1 See *FMV v TZB* [2019] NZCA 282 at [19].

Following the parties attending an unsuccessful mediation, the Authority issued a determination on 14 December 2017 removing the plaintiff's claims and Rappongi's counterclaims to the Employment Court pursuant to s 178(1) of the Employment Relations Act 2000 (the Act), and, on the basis that the "sub-franchise" context made it preferable to use a trial process rather than an investigative one, to separate employment and franchise issues.[2] The hearing in the Employment Court is proceeding in two stages with a finding on liability being sought first. Depending on the outcome, a hearing on quantum of remedies will proceed if not resolved on the findings on liability.

[5] During the course of the hearing of this matter, both Mr Noble III and Mr Fernandez expressed their sadness at the manner in which the long history of Mr Fernandez with Rappongi had come to an end. Clearly, each of them retained a high regard, respect and affection for the other, which I consider was genuine. Hopefully this judgment, and the discussions which now need to take place between the parties, will lead to some reconciliation. For this reason, there is a need to clarify the obligations the parties have towards each other so that their former constructive relationship might be restored.

The pleadings

[6] Following the determination removing the proceedings to the Court, the pleadings were settled in the form of an amended statement of claim and an amended statement of defence and counterclaim. Mr Fernandez filed a statement of defence to the counterclaim.

[7] Mr Fernandez seeks a declaration from the Court that his dismissal was unjustifiable. He seeks reimbursement of the sum equal to the remuneration lost by him as a result of the grievance. He also seeks compensation pursuant to s 123(1)(c)(i) of the Act in the sum of $35,000. In addition, he seeks a declaration that he was entitled to receive a 10 per cent shareholding in Rappongi as a term of his employment,

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2 *Fernandez v Rappongi Excursions Ltd (t/a Denny's Restaurants)* [2017] NZERA Auckland 387 at [18]-[19].

or an amount equivalent to the fair value of a 10 per cent shareholding in Rappongi. He also seeks interest and costs.

[8] In the amended statement of defence, the defendant denies liability. An affirmative defence relating to contributory conduct is raised. In addition, the defendant has commenced counterclaims against the plaintiff based on breach of good faith and breach of confidence and fidelity.

[9] By way of remedies, the defendant seeks penalties and an order that any penalty be paid to Rappongi. In addition, Rappongi is claiming against Mr Fernandez compensatory damages amounting to $30,324.43, and special damages totalling $62,299.27, together with GST where applicable. Interest and costs are also claimed. During the hearing, Rappongi made some modifications to the amounts claimed in the counterclaims.

The 10 per cent shareholding claim

[10] Mr Fernandez's claim, as expressed in the pleadings, is that he is entitled to a 10 per cent share of Rappongi. The evidence upon which he bases the claim indicates that the shareholders and directors of Rappongi agreed to him having a 10 per cent share in the operating assets of Rappongi. These were to be transferred to another trading company, with Rappongi retaining its land and buildings. The settling of the assets in this way was to be achieved by a restructuring of Rappongi. Mr Fernandez does not dispute that this was the position in relation to the offer to him of a 10 per cent share, rather than a 10 per cent share in Rappongi in its entirety.

(a) *The meeting in 2000*

[11] Mr Fernandez stated in evidence that in 2000 he had a meeting with the directors of Rappongi who were Mr Noble III and Mr Cannon. Mr Fernandez stated that at the meeting they indicated that they wished to give him 10 per cent of the business in recognition of the work that he had done for them, so that he could share in the returns. They indicated they were both grateful for the effort that he had put in and his contribution to building the businesses. During the period Mr Fernandez was

Operations Manager New Zealand, the total number of Denny's restaurants in New Zealand increased to eight, with the owners of Rappongi enjoying improving sales and returns. They acknowledged that he had worked hard for them, and this was their way of recognising that.

[12] Mr Fernandez stated that Mr Noble III said he would put something in writing and that would be sent to Mr Cannon to confirm.

[13] Mr Noble III's response to this evidence was that, while he conceded there had been discussions over the years between himself and Mr Cannon as to recognising Mr Fernandez's contribution, there was never any agreement to give him a 10 per cent shareholding in Rappongi's operating business. Mr Noble III could not recall the meeting which Mr Fernandez referred to as taking place in 2000, and considered it unlikely in view of the fact that he and Mr Cannon lived in different countries at the time. Mr Noble III stated that there was discussion as to recognising Mr Fernandez's contribution. What in fact was suggested, however, to Mr Fernandez over the years was that, if the business of Rappongi was sold to a third party, Rappongi would pay Mr Fernandez 10 per cent of the value of the sale price of the operational side of the business (that is not including real estate). Alternatively, if Mr Fernandez ever purchased the operational business from the shareholder, they would discount the purchase price by 10 per cent of the value of that business.

[14] This suggestion was emphasised by Mr Noble III in his evidence, but I consider it unlikely in view of what was contained in contemporary documents created in the course of Mr Fernandez's employment. In addition, Mr Noble III's assertion as to this gloss on the proposal is inconsistent with other parts of his own evidence. Elsewhere in his evidence, he conceded that there were discussions around the prospect of Mr Fernandez obtaining a 10 per cent share in the operating side of the business which would be created in a new company by restructure, but, as the restructure never occurred, there was never any transfer of shares or suggestion that Mr Fernandez was entitled to shares. The fact that the restructuring never occurred did not seem to be a valid reason for disputing the claim which Mr Fernandez now makes. Mr Noble III's evidence in this regard is not consistent and is unlikely.

(b) The letter of 13 March 2005

[15] It is agreed that the 15th anniversary of Denny's New Zealand Restaurants being taken over by Rappongi was in 2005. Mr Fernandez stated in evidence that a celebration was held at Alexandra Park in April 2005. Mr Cannon was in attendance at this celebration, but Mr Noble III was not. Mr Fernandez stated that, on this occasion, an announcement was made that he would be receiving a 10 per cent shareholding in the business and he was presented with a letter which he takes to be the letter which Mr Noble III had referred to in their meeting in 2000. It was signed by Mr Cannon and Mr Noble III. The original of this letter does not appear to be available. A photocopy of a letter exists. Whether or not this is the letter received by Mr Fernandez at the celebration is a matter of dispute. The letter is signed by Mr Noble III on 15 June 2000, and Mr Cannon's signature has the date 13 March 2005 written in block capitals beneath the signature. Apparently, this document came to light during the disclosure process in the present proceedings. It is contained in the agreed bundle of documents, and its admissibility is not the subject of dispute.

[16] Because of its importance in this matter, the contents of the letter (unamended) are set out in full as follows:

> Dear Clietest
>
> This is to record the following:
>
> Effective April, 2000, you are the owner of 10 % of the Operating Company that is Today part of Rappongi Excursions.
>
> The operating company is to be defined as the assets and liabilities of the company exclusive of the Wairau Park. Christchurch and Manukau properties.
>
> The liabilities of the Operating Company consist of all trade liabilities of the company, plus $300,000 in liabilities currently due the BNZ. It is impossible at this point to determine how much of the liabilities of the company are due to investments in property And how much are due to investments in chattels, food equipment and the like, but the purpose of this is to fix an amount that can be converted into an accounting statement. Presently, $1500,000 is owed to the BNZ; therefore, $1.2 million in debt and interest Expense is related to this property as is all the N-C liability.
>
> Should it be determined that it is best for all bank liabilities to be placed into the books of the property company rather than allocated on an 80-20 split, then your share in the company will not be affected.

> Until such time as the property company and operating company are divided, we will make up once a quarter at the most and once a year at the least, two separate statements Indicating what the income of the operating company was and what the income of the property company was. Dividends, rentals, management fees and other forms of distribution will be at my discretion, but you will be treated as equal to all other shareholders with respect to distributions for income related to the operating company Or its sale to third parties.
>
> I will circulate this to George Cannon for his review and reserve the right to make alterations should he desire within the next 30 days.
>
> At the present time, it appears as if the operating company is worth between $1 to 1.5 million dollar NZ... I will look at the figures again and come up with an exact amount. Your cost will be 50% of the market value to be paid over 5 years from your bonus potential. Should you be able to increase the company's return on assets in a significant Way, I will waive any payment for these shares or I will refund whatever money you Paid. I will calculate the current return on assets and set a target for improvement. This will take at least one month because 1 need the final return from Hart and Co.

(c) *Solicitor's letter 15 April 2005*

[17] Mr Fernandez's evidence as to the celebration taking place in April 2005 and what transpired during the celebration, and the contents of the letter signed by Mr Cannon on 13 March 2005, are corroborated by a letter from the New Zealand solicitor acting for Rappongi dated 15 April 2005. The particularly relevant portions of that letter are as follows:

> 15 April 2005
>
> Cleitist Fernandez
> Denny's New Zealand
> 27 Aviemore Drive
> Highland Park
> Auckland
>
> By Email: Fernandez@dennys.co.nz
>
> PRIVATE AND CONFIDENTIAL
>
> Dear Cleitist
>
> Re: Denny's Company Restructure
>
> As you know, Jay and George have decided to restructure their business so that all land and buildings remain with Rappongi Excursions Limited ("REL") and all operating assets are held by the new company, Denny's Restaurants (NZ) Limited ("DRL"). They would also like to give you 10% of DRL in recognition of your valuable contribution to the business.

...

[18] Following the first paragraph, the letter sets out the methodology by which the restructuring will take place. In the concluding paragraph of the letter, the solicitor states that no fixed date for the restructure is to occur; however, it was anticipated that it would be sometime in May, obviously meaning May 2005.

[19] The restructuring did not take place, and accordingly shares in the operating company were not issued at that time to Mr Fernandez.

(d) Email – Rappongi solicitors to Mr Fernandez dated 3 February 2010

[20] It is clear that there was a continuing intention on the part of the shareholder and directors of Rappongi for Mr Fernandez to have a 10 per cent shareholding in Denny's Restaurants NZ Ltd, which was to be the company operating the business. Further confirmation of Mr Fernandez's assertions is contained in an email which was sent by Rappongi's solicitor to Mr Fernandez dated 3 February 2010. This email also has substantial importance in corroborating Mr Fernandez's claims, and it is set out in full as follows:

> ...
>
> Dear Cleitest
>
> Further to our several telephone conversations, I confirm we are in the process of reorganising the assets and business of Denny's to minimise potential tax implications that could accrue after 1 April.
>
> As you know, and by way of a very simple explanation, it is intended that the land will be owned by Rappongi Excursions Limited and the trading business owned by Denny's Restaurants NZ Limited.
>
> Further to discussions that have taken place over the years between you and Jay, it has been suggested that you should hold 10% shareholding in Denny's Restaurants NZ Limited – the operating business company - and it is a question of what is the best legal vehicle for you to own those shares in?
>
> Against the background of your current matrimonial property impasse, and Jay's previous experience overseas with shares held by minority shareholders and the problems that matrimonial property issues can cause, there are two possible scenarios for you to consider:
>
> 1. That we simply do the company restructuring work and leave all the shares with George and Jay, who will hold their shares through

New Zealand domiciled trusts and they "look after" you in the future; or

2. We form a separate trust for you to hold 10% of the shares in Denny's Restaurants NZ Limited but in a discretionary family trust.

To overcome as far as possible any possible matrimonial property claims that your wife may or may not be able to bring against you and therefore your shares in the company, we have advised Jay that you should hold the shares in a separate trust with independent trustees. The beneficiaries of that trust can be you, your children or any other person or entity that you nominate. Therefore, you would have the say as to who gets the benefit from the trust but the trustees would be making the decisions ln respect of "your" shares but obviously considering the best interests of the beneficiaries.

I appreciate you currently have a family trust but I suspect that your wife is a discretionary beneficiary, and you have advised that you are a trustee together with your lawyer Peter Chamberlain.

As Jay is going to be in New Zealand on 14 February, we need to move with some haste to complete considerable legal work and therefore the issue of your shareholding must be resolved as a matter of some urgency.

From my observations and with my long relationship with Jay, George and yourself, I think Jay will only have some level of comfort if the trustees of your trust are someone like myself and Jay or Raewyn which means the trusts have a commonality of trustees. Raewyn, Grant Pearson of our firm, and myself are George and Jays trustees. I accept there is always a potential for conflict of interest, and we would need to be alert to that as trustees. However, given the longstanding relationship you have all had, over 20 years, I personally take some level of comfort that any conflict would be minimal, if any at all.

In summary, please confirm by return email that you are happy for your shares to be held in a trust and that you are happy for independent trustees, such as Raewyn, myself together with Jay, as your trustees, or whether you would like to use alternative trustees.

Please feel free to contact Peter Chamberlain to have him discuss this with me or Raewyn - we do not want to "cut across" your relationship with Peter. Given we have had a long relationship with you, we are sending this letter direct to you.

Please reply by return email, as we will need your consent in writing.

Yours sincerely

...

[21] There is no evidence of any response to this email by Mr Fernandez.

(e) Evidence generally

[22] Both Mr Noble III and his son Mr James Noble IV in their evidence refer to the termination of Mr Fernandez's employment and the circumstances surrounding and leading up to it. This will be discussed more fully in this judgment when dealing with Mr Fernandez's personal grievance claims. However, in discussing Mr Fernandez's move into a sub-franchise of Rappongi's trading business and subsequently his own Lincoln Road, Henderson restaurant, both Nobles freely refer to the entitlement of Mr Fernandez to a 10 per cent interest in the shareholding of Rappongi's trading business. In the discussions over whether Mr Fernandez would purchase the business, and subsequently the issue of termination, a payment of the 10 per cent interest features in the calculation of any purchase price or termination payment.

(f) *The inconsistent nature of Mr Noble III's evidence*

[23] As indicated earlier, Mr Noble III contradicts himself even between paragraphs in his own brief of evidence. His evidence is also inconsistent with clear statements made by him and his legal advisors in the contemporary documents. Some examples of such conflicts can be taken from his brief of evidence when compared with statements in the documents.

[24] Firstly, Mr Noble III ignores the content of the letter addressed to Mr Fernandez dated 13 March 2005, when he states:

> 16. I understand that in these proceedings Mr Fernandez alleges that he is entitled to a 10% shareholding in Rappongi as a term of his employment, or an amount equivalent to the fair value of such a shareholding.
>
> 17. That is not correct. Mr Fernandez was never entitled to a 10% shareholding in Rappongi, or its equivalent value, whether as a term of his employment or otherwise.

[25] As already set out, the first line of the letter of 13 March 2005 which he himself signed on 15 June 2000 states:

Effective April 2000, you are the owner of 10% of the Operating Company that is Today part of Rappongi Excursions.

[26] Mr Noble III then discusses what his view of the deal was, which is that Mr Fernandez would only get 10 per cent of the value of the operating company if he was the one that purchased the company, or he was employed when the business was sold to a third party:

> 18. What was in fact suggested to Mr Fernandez over the years was that if the business of Rappongi was sold to a third party, Rappongi would pay Mr Fernandez 10% of the value of the sale price of the operational side of the business (that is, not including real estate). Alternatively, if Mr Fernandez ever purchased the operational business from NCMS, we would discount the purchase price by 10% of the value of that business.
>
> ...
>
> 20. My business partner, Mr Cannon, and I had suggested that we would likely do this because we wanted to recognize Mr Fernandez's contribution to the business. But it was not a term of his employment. It was something that we suggested we might do in the event the operational business was sold, or if Mr Fernandez purchased the operational business.

[27] These are firm statements on Mr Noble III's part. They suggest that Mr Fernandez would never receive any shares in Rappongi. This is more explicitly stated in Mr Noble III's brief:

> 25. Nor do I recall that either Mr Cannon or I made such a promise to him. As I have already described, the only discussions I recall were about Mr Fernandez receiving 10% of the value of the operational side of the business if the business of Rappongi was sold to a third party, or an equivalent discount being given to Mr Fernandez if he made an acceptable offer to buy the operational business.

[28] Mr Noble III's brief also states:

> 22. At times, there were discussions around the prospect of Mr Fernandez obtaining a 10% share in DRL as part of a proposed restructure, where the operational side of the business would be transferred to DRL and Rappongi would retain the real estate holdings. But these plans to restructure were never put into effect, and so there was never any transfer of shares in DRL to Mr Fernandez.

[29] Whereas earlier Mr Noble III stated that Mr Fernandez was never entitled to a 10 per cent shareholding in the company, it was then being conceded that there was such a prospect and that the way that would be achieved was different from the conditions which Mr Noble III mentions in paragraphs [18] and [20] of his brief. If Mr Fernandez was only to receive a 10 per cent share in the value in the event of a purchase or sale, there would appear to be no need for a separate discussion about receiving a 10 per cent share in the form of shares on a restructure.

[30] Later in the brief, Mr Noble III acknowledges the possibility that Mr Fernandez could own the beneficial interest in the shares, but not the shares themselves. However, he refutes the possibility by pointing out that Mr Fernandez never paid for them.

> 28. By the year 2000, I had many years of experience of owning a beneficial interest in shares as opposed to the shares themselves, and I knew that in some cases, it is possible to have a claim to own something without having the shares themselves. However, as stated earlier, we paid for our interest in the Hong Kong business and Mr Cannon paid for his interest in the company we operated in Guam. Mr. Fernandez has never paid us, or NCMS, anything.

[31] All this, however, does not fit in well with Mr Noble III's understanding of the content of the letter of 13 March 2005 about which he states:

> 32. I make the following observations about this document ... :
>
> 32.1 The document refers to the possibility of Mr Fernandez having to pay for the shares at 50% of their market value. Mr Fernandez never made any such payment; ...

[32] In other words, Mr Noble III acknowledges that the letter did include a method for payment to be made for the shares: that is, through reduction in bonus payouts over a period of five years. There is insufficient evidence as to whether there were reductions made in the bonuses for this purpose. Mr Noble III's statement that Mr Fernandez cannot own the shares because there was no payment for them is again inconsistent with his statement that Mr Fernandez was never entitled to a shareholding.

[33] Mr Noble III is incorrect to assert that Mr Fernandez's failure to directly pay for the shares vitiates the agreement. As the letter of 13 March 2005 makes plain, he

did not need to pay directly, but rather his bonuses would be decreased to the extent that 50 per cent of the value of the shares would be covered. Mr Noble III himself acknowledges that Mr Fernandez had no control over his bonuses, in the following statement from his brief of evidence:

> 15. From time to time, Mr. Fernandez was also paid a discretionary bonus by Rappongi based on his performance and the performance of the business generally. However, this was never a contractual term. Rappongi had a discretion whether a bonus would be paid and when, and if one was paid, what the amount of the bonus would be.

[34] A further inconsistency arises from the evidence relating to the discussions around Mr Fernandez leaving his employment. It is clear that the company considered the value of the operating company was only $340,000, meaning 10 per cent of the shares would be worth $34,000. Mr Noble IV admitted that this amount was offered to Mr Fernandez during a meeting in May 2017. He stated in his evidence:

> 51 During his stay, we also discussed my proposed visit to New Zealand to attend Mr Fernandez's meeting regarding Denny's new menu. It was agreed that after this meeting Mr Fernandez would resign from Rappongi and accept a retirement payment of $34,000 plus three months' pay.

[35] Mr Noble III stated:

> 104. At paragraph 44 of his brief of evidence, Mr Fernandez says that during that trip I offered him:
>
> 104.1 Three months' pay to exit business; and
>
> 104.2 $34,000. This was not something that Mr Fernandez was entitled to but was based on 10% of the value of the operating company as Mr Fernandez had valued it when he made his offer to purchase the entire business in July 2016.

[36] It is difficult to understand why Mr Fernandez was offered 10 per cent of the value of the operating company if the company suggests he was not entitled to it.

[37] It is also hard to reconcile the Nobles' assessment of value of the operating company with two other pieces of evidence. The first piece of evidence is the letter of 13 March 2005 itself, which in the final paragraph denotes the value of the operating company at that date as worth between $1 million to $1.5 million New Zealand dollars. In view of the fact that the company prospered, it is difficult to see how the valuation

of the operating company would have decreased to a mere $340,000. The second piece of evidence is that Mr Noble III stated as follows:

> 67. When Mr Fernandez met with myself and my son James Noble IV (**James**) in USA in July 2017, I told Mr Fernandez that we did not agree to his offer to buy the entire business of Rappongi. However, I said that we might be open to an offer from him to buy the operating business.
>
> 68. In the course of our discussions it was clear that Mr Fernandez would not be able to fund any purchase himself. One option was for Rappongi to fund the purchase by allowing Mr Fernandez to pay back the purchase price over time.

[38] This suggestion as a reason for not proceeding to allow Mr Fernandez to buy the business seems untenable where the company accepted that 10 per cent of the value was $34,000 meaning the total value was only $340,000. It is unlikely Mr Fernandez would have resisted such a bargain.

[39] The point to be made is that there arise significant inconsistencies in the evidence of Mr Noble III and Mr Noble IV over the question of whether there was agreement to offer Mr Fernandez a 10 per cent shareholding. These inconsistencies are understandable in view of Mr Noble III's illness and the time which has elapsed since material events occurred. Mr Fernandez's assertions, however, are corroborated by the contemporary documents, and I prefer his evidence.

A valid contract

[40] In his submissions, Mr Donovan, counsel for Rappongi, entered into debate as to why the contract is unenforceable. He raised three points as follows:

(a) the decision of *Paterson v Sports Abroad Ltd* suggested an offer to sell shares can be unenforceable when viewed in context;[3]

(b) the fact that the letter sent to Mr Fernandez reserved the right to make changes within the next 30 days suggests a lack of intention for it to be binding;

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3 *Paterson v Sports Abroad Ltd* EmpC Auckland AC33/00, 9 May 2000.

(c) there is a condition in the letter that has not been satisfied.

[41] The first point is the comparison Mr Donovan made between this case and *Paterson*. He argued that *Paterson* held that a document purporting to be an offer to sell shares can be unenforceable when considered in context. In the context in the present case, he submitted there was a letter from solicitors, sent on the same day as the offer, confirming that it was conditional.

[42] There are two issues with the comparison to *Paterson*. The first is that, in that case, there was a more traditional 'offer' to sell shares. In the *Paterson* case, the letter containing the offer started with "I would like to take this opportunity to offer you the chance to buy some shares in Sports Abroad Limited".[4] This contrasts with the beginning of the letter to Mr Fernandez:

> This is to record the following:
>
> Effective April, 2000, you are the owner of 10% of the Operating Company that is Today part of Rappongi Excursions.

[43] Taking it at face value, this is not a traditional offer so much as a record of the fact that Mr Fernandez owns 10 per cent of the shares in what is to be regarded as the operating portion of Rappongi. As discussed below, in the employment context this can be considered an offer, but it differs substantially to *Paterson*.

[44] The second issue with the comparison is that, while both cases involve a letter from a solicitor providing further context, the further context in *Paterson* was unequivocally making the offer conditional. It was conditional upon "…concluding… negotiations with third parties regarding the acquisition of their interests in the company…".[5] Those conditions did not occur. The letter from the solicitor in the present case certainly does not make the transfer of shares conditional. A close reading of it reveals repeated use of the word 'will' but never the word 'if'; it describes things that will happen, not things that might happen provided certain conditions are met.

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4 *Paterson v Sports Abroad Ltd* Auckland AET 364/98, 26 July 1999 at 4.
5 *Paterson v Sports Abroad Ltd* (EmpC), above n 3, at 7.

[45] *Paterson* can be considered sufficiently distinguishable as to provide little guidance in the present case. *Paterson* is ultimately an example of a conditional offer spread out over two different letters, with the only complication being that one letter made it sound unconditional. In the present case there is simply a recording that Mr Fernandez is the owner of 10 per cent of a company. Nothing in that letter, or the accompanying one from the solicitors, makes this conditional.

[46] The second point raised by Mr Donovan was that the right to alter the agreement within 30 days suggested there was no intention to create legal relations. To some extent, it suggests exactly the opposite, as it implies that the agreement is binding provided no alterations are made, and, in fact, no alterations were made, at least not in the evidence presented to the Court.

[47] The final point made by Mr Donovan is that the letter did, in fact, include a condition in the last paragraph of the letter where it stated:

> Your cost will be 50% of the market value to be paid over 5 years from your bonus potential.

[48] There are two reasons I do not read this as a condition. The first is that the wording does not suggest it is a condition which Mr Fernandez has to meet, but rather an explanation of something that will occur. That is, Rappongi is saying that it will reduce Mr Fernandez's bonus over the next five years, until 50 per cent of the market value of the shares is paid off. There is no condition involved, as the sentence specifically says this "will be" what happens.

[49] The second reason is that it was entirely within the company's control whether or not this would happen. Mr Noble III, in his written evidence, made it clear that the bonus Mr Fernandez would receive was entirely at the company's discretion.[6]

[50] It was therefore clearly up to the company to deduct any amount it wanted from the bonuses. It may well have paid out smaller bonuses for a while to account for 50 per cent of the value of the shares – there is no evidence on this one way or the other. On one view, it could be assumed it had done so, since the letter made clear that

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6 Mr Noble III, brief of evidence at [15]. See above at [33].

it would. In either case, though, it is simply another obligation on the company, not on Mr Fernandez.

[51] Finally, in relation to enforceability, Mr Donovan submits that there are four requirements to create an enforceable contract:

(a) an intention to create legal relations;

(b) offer and acceptance;

(c) consideration given for the promises; and

(d) certainty of terms.

[52] The first requirement is clearly satisfied in the present case. Rappongi instructed its solicitors to begin discussions about effecting the transfer of the shares. This would not have been done unless there had been an intention to create legal relations. The fact that the parties were already in a business relationship is also a factor pointing strongly towards such an intention.

[53] The second and third requirements are a little more complex in the context of this case and employment relationships in general. Previous decisions of the Court suggest that the ordinary rules of offer, acceptance, and consideration apply in a varied way in the employment context. In the decision of *Owen v McAlpine Industries Ltd*, the Court found that the employment contract had been mutually varied to include compensation entitlements when the general manager simply wrote that office workers would receive that entitlement.[7] It was held that this advice from the general manager was an offer and that, by continuing to work as usual, the employees accepted that offer. This was consistent with the common situation where employers periodically offer increased remuneration; no formal acceptance is required each time remuneration increases.[8]

[54] *Owen* also discussed the question of consideration. The Court held that continuing to work does amount to consideration. The Employment Court cited an

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7 *Owen v McAlpine Industries Ltd* [1999] 2 ERNZ 819 (EmpC).
8 At 837.

earlier Court of Appeal decision, *United Food & Chemical Workers Union of NZ v Talley* where the Court held:[9]

> We are disposed to think that the continued performance of the contract following a variation such as a voluntary pay increase, or the practical benefit to the employer of the employee's willingness to continue to serve in the light of the incentive, should be seen as consideration sufficient for the change to become incorporated into the contractual terms.

[55] The facts in the present case align closely with those in *Owen*. In *Owen*, the general manager of the company simply announced that office workers were entitled to additional compensation. This was held to amount to an offer, which was accepted by those workers simply continuing in their usual roles. In the present case, Rappongi announced that Mr Fernandez would be entitled to 10 per cent of the operating company. This too would amount to an offer which was accepted by Mr Fernandez continuing his normal work duties.

[56] The final requirement as to certainty of terms is also fulfilled in this case. The Court of Appeal described this requirement in *Wellington City Council v Body Corporate 51702 (Wellington)*:[10]

> The essence of the common law theory of contract is consensus. It follows that for there to be an enforceable contract, the parties must have reached consensus on all essential terms; or at least upon objective means of sufficient certainty by which those terms may be determined. Those objective means may be expressly agreed or they may be implicit in what has been expressly agreed. Taking price as an example, for a contract to be enforceable the parties must have agreed upon the price, or at least they must have agreed upon objective means of sufficient certainty whereby the price can be determined by someone else, or by the Court. If the price is left for later subjective agreement between the parties, the contract is not enforceable.

[57] In other words, the exact value of the 10 per cent shareholding of the operating company in Rappongi does not necessarily need to be ascertained immediately. It is enough that there are "…objective means of sufficient certainty by which [that value] may be determined…". In this case, 10 per cent of the operating company is something that can be determined objectively. The actual valuation will be considered by the Court at a later hearing if the parties are not able to base an agreement upon the

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9 At 839, citing *United Food and Chemical Workers Union of NZ v Talley* [1993] 2 ERNZ 360 (CA) at 376.

10 *Wellington City Council v Body Corporate 51702 (Wellington)* [2002] 3 NZLR 486 (CA) at [30].

findings of liability in this judgment. The initial letter dated 13 March 2005 helps to define the meaning by defining the operating company "as the assets and liability of the company exclusive of the Wairau Park, Christchurch, and Manukau properties". It also estimated the worth at the time as being "between $1 to 1.5 million dollar NZ".

[58] In summary, in the employment relationship there was a binding agreement between the parties such that Mr Fernandez can be said to be entitled to 10 per cent of the operating side of the company. The two letters addressed to him satisfy all the requirements of an enforceable contract, and none of the issues raised by Mr Donovan affect that. This 10 per cent share will need to be valued and the amount paid to Mr Fernandez. Since restructuring to create a separate trading company did not take place, there is no way of Mr Fernandez receiving a 10 per cent shareholding in a trading company. In view of the asset holding position in Rappongi, it would not be appropriate for him to now receive a shareholding in that company. His entitlement will now need to be satisfied by a monetary payment.

Other potential remedies available to Mr Fernandez

[59] There are two further potential causes available to Mr Fernandez. The first is that, in all the circumstances, Rappongi held the shares for Mr Fernandez under a constructive or express trust. The second is that, in view of what transpired between the original offer and Mr Fernandez's dismissal, Rappongi is estopped from denying the entitlements.

[60] These potential causes were raised with counsel at the hearing. Mr Donovan submitted they had not been pleaded. On the basis of decisions in *Re Vandervell's Trusts (No 2)*, *Ford v Strangwick*, and *Benge v Air New Zealand Ltd*, I do not accept Mr Donovan's submission in this regard.[11] Sufficient necessary facts are pleaded in the statement of claim to give rise to these causes being considered.[12]

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11 *Re Vandervell's Trusts (No 2)* [1974] 3 All ER 205 (CA); *Ford v Strangwick* [2019] NZHC 614; *Benge v Air New Zealand Ltd* [2011] NZEmpC 26.

12 See *Re Vandervell's Trusts (No 2)*, at 213.

[61] I have decided, however, in view of the findings in contract, there is no need to consider these further causes of action. Also, to be fair to the parties, a further hearing would be necessary to enable the parties to specifically deal with the two further potential causes of action by way of evidence and properly directed argument. At the moment, while the pleadings are sufficiently wide to contemplate the causes of action, in view of the fact that they were not specifically before the Court during the hearing, it is clear that sufficiently extensive evidence has not been presented to prove the necessary elements of each of the causes.

The sequence of events leading to dismissal

[62] After being employed by Rappongi for 26 years, Mr Fernandez made a decision that he wished to run his own restaurant. On 19 July 2016, he made a proposal to purchase Rappongi's business. Mr Fernandez provided information to Mr Noble III in support of his proposal. The proposal did not proceed, as Mr Noble III considered that the offer was too low. Following discussion between the two of them, however, the proposal eventuated whereby Mr Fernandez would own and operate his own Denny's restaurant by way of a sub-franchise arrangement with Rappongi. This was to be established in premises which had been leased in Lincoln Road, Henderson.

[63] Entering into the lease by Mr Fernandez had been the subject of some disagreement between him and Mr Noble III. Mr Fernandez, as the Manager of the New Zealand operation for Denny's restaurant, considered the Lincoln Road premises to be an opportunity for a Denny's restaurant in West Auckland. Mr Noble III, after considering the premises, had indicated that he did not wish to enter into a lease. Without informing Mr Noble III, Mr Fernandez entered into the lease. Apparently, his intention was that if Rappongi did not open a Denny's restaurant there, then he would open his own restaurant on the site. Eventually, however, the dispute was resolved on the basis that Mr Fernandez would operate the Denny's restaurant sub-franchise on Lincoln Road.

[64] Mr Harrison, counsel for the plaintiff, in his opening submissions, set out a chronology of events relating to the Lincoln Road restaurant which concluded with

apparently irreconcilable differences between Mr Fernandez, Mr Noble III and his son, Mr Noble IV.

[65] The sequence relating to the Lincoln Road site was set out by Mr Harrison as follows:

> 13. The Lincoln Road restaurant came about as the plaintiff considered the premises to be an opportunity for a Dennys restaurant in West Auckland. The documentary trail involving this site is summarised as follows:
>
> (a) 25 September 2015, a memorandum of proposed terms for lease of rental premises was entered into by the plaintiff;
>
> (b) 16 October 2015, the defendant's lawyers engage with the landlord's lawyers to start the process of agreeing a lease for the premises;
>
> (c) 14 December 2015, a lease agreement entered into for the Lincoln Road site on behalf of Dennys or nominee, the rental for this lease not commencing until November 2016;
>
> (d) 13 September 2016, Mr J Noble Ill proposed that the plaintiff become a subfranchisee and operate the Lincoln Road restaurant as a Dennys. The plaintiff agreed to this proposal and from there steps were taken towards this end;
>
> (e) 30 November 2016, the Lincoln Road premises opened as a Dennys restaurant, trading through the books of KD (NZ) Limited which was a company the plaintiff established to operate this restaurant.
>
> (f) In order to operate a Dennys restaurant as a subfranchise to the defendant, this required the permission of Dennys USA (Dennys DFO, LLC).
>
> (g) The plaintiff completed a franchise application on 14 March 2017.
>
> (h) 20 April 2017, Dennys DFO, LLC sought further information from the plaintiff, which he says was provided to them.

[66] Mr Fernandez had been of the view that everything was in order for the approval of the sub-franchise by Denny's USA. The restaurant, by this stage of course, was operating as a Denny's restaurant sub-franchise. Mr Fernandez who was still an employee of Rappongi and was still the manager of Denny's restaurants in New Zealand, was acting under the belief that all was on track. This included his accessing equipment, services and staff, as well as purchases of food supplies through the

Denny's commissary. The transactions were recorded, and Mr Fernandez, as was required, had arranged payment of the franchisee approval fee of US$10,000 through Rappongi to Denny's USA. Royalties were being paid to Rappongi at 3 per cent of sales as had been agreed.

[67] Denny's USA had intervened in the matter when it became aware that the Lincoln Road restaurant was already being operated under a sub-franchise. It inquired into Mr Fernandez's position as part of considering an application, which by this stage had been formally made to Denny's USA, to agree to the sub-franchise.

[68] Mr Noble III gave evidence that, in view of Mr Fernandez's experience with Rappongi in New Zealand, he anticipated that there would be no difficulty in the sub-franchise being granted. Mr Fernandez, however, came to appreciate that, as a consequence of the disclosure process requested by Denny's USA, there was limited, if any, prospect of them agreeing to the sub-franchise. Without his knowledge, Denny's USA had informed Mr Noble III and Mr Noble IV that Denny's USA did not regard Mr Fernandez as meeting the financial qualifications of a Denny's restaurant franchise. On 4 May 2017, Denny's USA advised the Nobles that the Lincoln Road restaurant should be folded into the Rappongi portfolio of restaurants. There was further correspondence on 2 and 9 June 2017 confirming that Mr Fernandez did not meet the qualifying requirements as a franchisee. The Nobles were given two options: either to bring the organisation in as an eighth restaurant, or close it, and Denny's USA would refund the initial approval fee of $10,000.

[69] Mr Fernandez stated in his evidence, which I accept, that this information which was in the hands of the Nobles and therefore Rappongi was never disclosed to him. In fact, he stated that he had been assured by Mr Noble III that the situation was in hand and that he would be able to operate the Lincoln Road restaurant as a Denny's sub-franchise. He stated that he was misled by the defendant, and this had significant consequences for him following termination of employment when he was required to dismantle the Denny's livery and continue operating the business as his own restaurant which eventually folded financially without Denny's support.

[70] This unfortunate sequence of events had been preceded by discussions and meetings taking place between Mr Fernandez, Mr Noble III and Mr Noble IV. Mr Harrison, in his opening submissions, has conveniently set out a chronology of the sequence of events which took place between May 2017 and 15 June 2017 leading to Mr Fernandez being summarily dismissed by Mr Noble IV. That sequence of events confirmed in evidence is as follows:

> 17. In May 2017 the plaintiff visited Mr J Noble III in the United States. In the course of this visit they discussed the subfranchise arrangement and Mr J Noble III proposed an exit package to the plaintiff of:
>
> (a) Three months' pay; and
>
> (b) $34,000, based on Mr Noble III's calculation of 10% of the value of the operating company.
>
> 18. The plaintiff says he did not agree with this proposal and it was conditional on agreeing a subfranchise agreement. There were still issues with the royalty (for the subfranchise agreement) and the value of his 10% that had been promised to him. The plaintiff accepted that he would stand down and resign from the company, however, this was always on the understanding that there would be an operative sub-franchise agreement and agreed exit plan.
>
> 19. On 24 May 2017 Mr James Noble IV travelled to New Zealand with the intention of discussing details about handover and circulated a notice to all employees and managers advising that the plaintiff would be operating the Dennys on Lincoln Road as a franchise.
>
> 20. The subsequent meetings between the plaintiff and Mr James Noble IV did not go well and the plaintiff was shut out of the office. It appears that Mr James Noble IV was working on the assumption that there was an agreed exit following the plaintiff's visit to the United States, while the plaintiff maintained that there were still outstanding items to be agreed - in particular, royalties and the value of the 10% payment. This caused the plaintiff to write to both Nobles on 25 May 2017.
>
> 21. On 28 May 2017 the plaintiff met with Mr James Noble IV at the Manukau Westfield Mall, the plaintiff was accompanied by Mr Pritesh Patel who at that time was the plaintiff's accountant. Mr Patel summarised what he thought were the key points from the discussion.
>
> 22. The discussion at Manukau Westfield Mall appears to have deteriorated with accusations being made about the plaintiff having a gambling problem and, along with other claims, caused a number of acrimonious exchanges. The outstanding issues were not resolved and the meeting ended with Mr James Noble IV saying that he would speak to his family members and it was understood there would be a further meeting.

23. On 8 June 2017 the defendant's lawyer, [...], then wrote to the defendant setting out what she described as serious concerns about actions during the plaintiff's employment which she outlined in broad terms. This letter then withdraws the offers regarding the exit agreement and subfranchising arrangements and advises the plaintiff that as a consequence, he was not able to operate the Lincoln Road restaurant as a Dennys [...] restaurant and was to immediately remove all signage and branding.

24. The plaintiff sought the assistance of [a lawyer] who responded by letter dated 13 June 2017. In this letter [the lawyer] provides a general response to the concerns, in some cases putting these in context and encouraging a conversation around completing the subfranchise agreement.

25. The response from the defendant was to summarily terminate the plaintiff's employment on 15 June 2017. The reason[s] given for this termination is expressed in this letter to be:

    (a) The plaintiffs decision to operate a restaurant which competes with the defendant (in reference to the Dennys Lincoln Road restaurant);

    (b) The inability of the parties to agree the terms of a sub-franchise agreement; and

    (c) The defendant does not agree to the plaintiff owning and operating a competing restaurant at the same time as being employed by the company, a state of affairs said to have been agreed to by the plaintiff previously.

26. At the same time as his dismissal, the defendant's lawyers insisted on the removal of Dennys signage and other material, including menus and other features, by Friday, 23 June 2017.

27. There were attempts subsequently [...] to try and retrieve the situation, including the suggestion of mediation, but to no avail. This correspondence is set out in the agreed bundle.

28. The plaintiff without notice, suddenly found himself having been summarily dismissed and struggling to operate the Lincoln Road restaurant, rebranded as the "Lincoln Family Restaurant". His evidence is that this rebranding exercise was a disaster and patronage fell off significantly, eventually the restaurant has had to close and KD (NZ) [Ltd] went into liquidation on 19 March 2018.

[71] The context of Mr Fernandez's long history with Rappongi, where he virtually managed the business in New Zealand on his own, as well as the discussions relating to the Lincoln Road restaurant as a sub-franchise operation, and Mr Fernandez's desire to run a restaurant of his own, made this sequence of events most unfortunate. In that context I do not consider that Rappongi's actions towards Mr Fernandez were what a

fair and reasonable employer could have done in all the circumstances at the time the dismissal occurred. Having set out allegations against Mr Fernandez through the letter from its solicitor, the appropriate course, despite the disagreements which existed, would have been to enter into negotiations with Mr Fernandez so that steps he had taken in respect of the Lincoln Road restaurant could be considered as part of a package, so that he could leave with dignity and carry out his intention of running a restaurant on his own. The final termination had been preceded by Rappongi, despite its stated concerns, keeping Mr Fernandez on as the New Zealand manager to suit itself because it was not able to take over management itself. Despite the stated concerns, it did nothing about them until it had in place a management regime that meant they could then conveniently terminate Mr Fernandez's employment. Following the letter from Rappongi's solicitors to Mr Fernandez setting out the concerns, Mr Noble IV then acted peremptorily by issuing a letter summarily dismissing Mr Fernandez. This was not a proper response on his part to the situation which existed at that point. The 15 June 2017 termination letter which he issued reads as follows:

> ...
>
> Dear Cleitest
>
> **Termination of Employment**
>
> As you know, we have serious concerns arising from your conduct during your employment with Rappongi Excursions Limited ("the Company").
>
> Although we remain concerned about a number of aspects of your conduct, the purpose of this letter is to highlight our concerns about the current situation, in particular the conflict of interest arising from your decision, without our consent, to operate a restaurant which competes with the Company.
>
> As you know, we have had discussions about the possibility of your restaurant being operated under a sub-franchising agreement, which would enable you to operate this venture as a Denny's restaurant. As part of our discussions in relation to this, we agreed that whether or not a sub-franchise agreement was put in place, your employment with the company would come to an end, given the conflict of interest arising from the situation.
>
> Unfortunately, we have been unable to reach agreement on the terms of a sub-franchise agreement, and there is now no prospect of any such agreement being put in place.
>
> As previously discussed with you, the Company does not agree to you owning and operating a competing restaurant, at the same time as being employed by

> the Company. You have accepted this, both verbally and in writing, and have stated in writing that it is appropriate to bring your employment to an end. Accordingly we therefore write to confirm, in line with our previous discussions, that your employment with the Company will come to an end, with effect from today's date.
>
> For the avoidance of doubt, with respect to the other concerns the Company has, the Company expressly reserves all rights and remedies it may have in relation to your conduct as an employee of the Company.
>
> Yours faithfully
>
> James A. Noble IV

Conclusions on the termination and grievance claims

[72] It was not appropriate for Rappongi to cut Mr Fernandez off in this way based on matters in which on its own admission it had previously acquiesced to suit its own convenience. In evidence, Mr Noble IV agreed that he was ignorant of the requirements of New Zealand employment law when he wrote the letter. While the substantive issues raised needed to be resolved, procedural fairness towards Mr Fernandez appears to have been abandoned. Appropriate proposals from Mr Fernandez's own lawyer to resolve matters were not responded to in a proper manner.

[73] When the directors of Rappongi were faced with the prospect of Mr Fernandez leaving employment after all the years he had been with it, they needed to arrange a managed exit so that alternatives could be put in place. Mr Fernandez was not averse to that; hence the negotiations which were commenced to arrange his appropriate exit and agreement to proper financial arrangements for him taking account of his entitlements. All of this also arose in the context where, for many years as Operations Manager New Zealand, Mr Fernandez had been in an almost autonomous position and left to his own devices as to day-to-day management of Denny's restaurants. He was obviously under the control of Mr Noble III. It could not be said that Mr Fernandez let the directors down in view of the development of the business over the years in his role as their New Zealand Operations Manager.

[74] Complicating the circumstances of Mr Fernandez's departure was the fact that there was agreement to his running the Lincoln Road restaurant as a sub-franchise. In

fact, whilst still an employee, Mr Fernandez set up and ran that restaurant as a sub-franchise for quite a period. That sub-franchise foundered as a result of Denny's USA insisting that Rappongi put it onto a formal footing and then in that process declining to agree to Mr Fernandez being given the sub-franchise. The emphasis subsequently placed upon a conflict of interest arising from Mr Fernandez operating his own restaurant is somewhat fatuous in the context of these events. The Nobles failed in their obligations to Mr Fernandez during what had transpired. They did not give information to Mr Fernandez about the Denny's USA attitude, nor, in my view, did they press the matter to a further stage as they should have done to try and persuade Denny's USA to change its mind. By not giving Mr Fernandez information, he also lost the opportunity to try to comply with the demands of Denny's USA which may have seen the sub-franchise arrangement being granted approval. The fact that this could have been possible is confirmed by the evidence of both Nobles that they were surprised that Mr Fernandez, with his many years of experience with Denny's restaurants, was not regarded as suitable as a sub-franchisee to Rappongi.

[75] Another contextual matter was that, over the many years in his role with Rappongi, Mr Fernandez had been involved in the opening of several new Denny's restaurants. The logistics involved in equipping the restaurants, employing and training staff, menu development and so on would have been very familiar to him. This context gives some explanation to the methods he adopted in setting up the Lincoln Road sub-franchised restaurant, which became the subject of dispute and form part of the counterclaims Rappongi now makes against him. The counterclaims will be dealt with shortly.

[76] During cross-examination, it became clear that Mr Noble IV was completely unfamiliar with the requirements on Rappongi as Mr Fernandez's employer to comply with s 103A of the Act. That provision required Rappongi's actions and how Rappongi acted towards Mr Fernandez to be what a fair and reasonable employer could have done in all of the circumstances at the time the dismissal or action occurred. The provision also requires certain minimum procedural standards. In a situation such as that which had occurred, where serious allegations were being made by Mr Noble IV and Rappongi's solicitors against Mr Fernandez, he needed to be given a reasonable opportunity to respond to the concerns before disciplinary action was taken. I also

consider from the inconsistent, confused and contradictory nature of Mr Noble IV's evidence under cross-examination, that he did not sufficiently investigate the allegations he was making against Mr Fernandez. Without proper verification, he used the allegations to dismiss Mr Fernandez summarily. That was totally inappropriate.

[77] As I have already indicated, the directors of Rappongi knew that, once Mr Fernandez had indicated that he was likely to leave the employment, they needed time to put in place alternative management systems in New Zealand. The position was difficult because Mr Noble III had become too ill to travel to New Zealand, which he would probably be required to do, to be able to put the new management system in place. Mr Noble IV had also suffered an injury, which meant that he could not immediately travel to New Zealand either. This is why it was convenient that they keep Mr Fernandez on for the period it took to arrange for the business in New Zealand to be taken over by Mr Noble IV when he recovered from his injury and with the assistance of two former employees of Rappongi who were made directors. Once Rappongi was in the position to do that, it then started to raise the allegations against Mr Fernandez. It is clear also that the directors knew that there was an arrangement with Mr Fernandez for him to receive a 10 per cent shareholding in the operating side of Rappongi. What transpired has all the hallmarks of Rappongi trying to renege on that obligation.

[78] As Mr Fernandez said on more than one occasion during his evidence, he acknowledged that, arising out of the setting up of the Lincoln Road restaurant, he had obligations to reimburse Rappongi for certain matters. He had a financial advisor assisting him with the negotiations, but clearly Mr Noble IV got into conflict with them. I am of the view also that Mr Noble IV had not been properly briefed on all that transpired between his father Mr Noble III and Mr Fernandez. At one point in the context of all of that is the somewhat surprising correspondence from Rappongi's solicitors setting out the allegations against him and indicating that he was not entitled to a 10 per cent interest in the operating side of the business when the very same solicitors had, back in 2005, confirmed that entitlement in a letter, the relevant parts of which have already been set out in this judgment.

[79] While there were clearly areas of conflict which needed resolving in order for Mr Fernandez to leave the employment on a proper basis, Rappongi fell short of the requirements to act as a fair and reasonable employer in all of the circumstances. It failed to adopt fair and reasonable procedures in dealing with Mr Fernandez's departure, so that a resolution could be reached which was fair and just to him having regard to the many years of service that he had given to Rappongi and which were very much to the company's financial advantage.

[80] The way Rappongi, and Mr Noble IV in particular, acted towards Mr Fernandez in this entire sorry episode is not what a fair and reasonable employer could have done in all of the circumstances. Quite apart from that, the procedural deficiencies were of such a serious nature as to disentitle Rappongi from relying on s 103A(5) of the Act. Mr Fernandez was clearly treated unfairly, and the procedural deficiencies were not minor. Summary dismissal in all of the circumstances was an inappropriate response particularly when it closely followed the raising of allegations with Mr Fernandez without giving him the opportunity of properly responding.

[81] The dismissal of Mr Fernandez was unjustifiable, and he is entitled to remedies arising from that.

The counterclaims

[82] The counterclaims are based on allegations that Mr Fernandez breached his obligations of good faith, confidence and fidelity owed to Rappongi during the course of employment. The particulars concern the sequence of events following Mr Fernandez signing the lease at the Lincoln Road site. The counterclaims appear to be claims to financial reimbursement from Mr Fernandez in an attempt to whittle down remedies he may succeed in recovering.

[83] I do not accept that the circumstances discussed earlier in this judgment mean that Mr Fernandez breached obligations of good faith, confidence or fidelity. In any event, such obligations were mutual, and Rappongi's directors themselves did not always act towards Mr Fernandez in compliance with good faith in the events leading to his dismissal. Certainly, this is not a case where penalties would be appropriate.

[84] I will deal with each of the counterclaim particulars in turn, but as I have already stated, Mr Fernandez agreed in evidence that he needed to reimburse Rappongi for such of the items as were appropriate and properly insisted that there needed to be an entire exit package. By far the largest financial consequence to Rappongi of Mr Fernandez's departure was going to be the obligation to pay for his agreed interest in the operating side of the business. I cannot help but gain the impression that the way he was treated was coloured by Rappongi's attempts to relieve itself of this obligation. Mr Fernandez's attitude was that he wished to reach agreement as to his financial package on departure, including a proper accounting for money that he himself owed to Rappongi. It seems inexplicable, therefore, that Mr Noble IV would respond in the way he did with a summary dismissal instead of negotiating a dignified departure recognising all the years of Mr Fernandez's contribution.

[85] Mr Donovan submitted that the failure to disclose the signing of the Lincoln Road lease amounted to breach of good faith. This, however, is an attempt to resurrect a claim which had been long since remedied and resolved by the agreement that Mr Fernandez would have a sub-franchise for the Lincoln Road property. He had indicated that, if that was not possible, then he would run a restaurant of his own on the site.

[86] I also do not accept the claim made by Rappongi that one of the reasons for his dismissal was that he was in a conflict of interest situation running his own restaurant in competition with the Denny's restaurants. This is a misrepresentation of Rappongi's position as matters emerged. The evidence on this is clear. Once the lease was signed, whatever the feeling of disapproval on Mr Noble III's part was, he agreed to the Lincoln Road restaurant becoming a sub-franchised operation. It was he who made this proposal to Mr Fernandez. Mr Noble III also knew of Mr Fernandez's wish to have his own restaurant, as that was discussed when they visited the Lincoln Road site. The Nobles, in the face of that knowledge, kept Mr Fernandez in employment because they needed him for the reasons earlier specified in this judgment, and the sub-franchised restaurant was up and running for a lengthy period while Mr Fernandez, to meet Rappongi's convenience, remained in employment and was at

the same time continuing on as Operations Manager, New Zealand. In that role, he would have continued to manage all the other Denny's restaurants in New Zealand.

[87] Apart from the allegations relating to the signing of the Lincoln Road lease, where only a penalty is being claimed, the balance of the claims under both heads of breach of good faith and breach of duty, confidence and fidelity, relate to monetary claims. These are specified in the claim for remedies under the counterclaims. Mr Harrison indicated in his submissions that more than one of these monetary claims could only be made against the company which Mr Fernandez established to operate first as the Denny's restaurant and subsequently his own restaurant at Lincoln Road. These, he argued, were therefore outside the Court's jurisdiction. Mr Fernandez, in his evidence, however, indicated that he was prepared to personally resolve these claims as part of the accounting needed to arrive at a sensible exit package from employment.

[88] I do not agree that the counterclaims involving debts allegedly owing by Mr Fernandez's company are outside the Court's jurisdiction. This matter has been presented to the Court as an employment relationship problem. While the company was established to operate the Lincoln Road restaurant (regardless of how it was eventually structured), the claims and counterclaims arose from Mr Fernandez's actions whilst still an employee. Mr Fernandez has, appropriately in my view, agreed that matters validly arising from the counterclaims (subject to quantification disputes) should be considered in arriving at the appropriate exit payment to him. Similarly, there are matters such as a remaining issue relating to indemnification of Mr Fernandez's legal costs in criminal proceedings and reimbursement of the sub-franchise approval fee upon the failure of the sub-franchise application. These should be included in the equation. It would be unfair to consider such of Rappongi's counterclaims as are considered valid in isolation from benefits and entitlements Mr Fernandez may have. As it has been determined that Mr Fernandez has a personal grievance, these claims can be considered pursuant to s 123(1)(c)(ii) of the Act.

[89] The first monetary claims contained in the counterclaim relate to an allegation that Mr Fernandez took a sum of $30,000 from Rappongi without consent or authority. It is first described in the pleadings as being taken by Mr Fernandez in order to pay

for legal fees associated with his arrest on fraud charges in 2015. Later in the relief sought in the statement of defence and counterclaim, it is specified as special damages as being an overpayment of bonus to Mr Fernandez in the sum of $31,505.78.

[90] This claim relates to Mr Fernandez being charged with fraud using credit cards of customers of some of Denny's restaurants. The fraudulent card transactions were made by a former employee who falsely implicated Mr Fernandez. The charges were withdrawn, but Mr Fernandez incurred substantial legal costs in defending the charges. Mr Fernandez claimed that Mr Noble III agreed to cover the legal costs. This appears to be disputed by Mr Noble III who speaks of money being lent to Mr Fernandez for the legal fees together with an arrangement of repaying the loan from Mr Fernandez's bonus entitlements.

[91] The evidence, as far as it goes on this issue, indicates that the total legal fee incurred by Mr Fernandez in defending the charges was approximately $80,000. Mr Noble III made reference to this figure in his evidence. As Mr Fernandez faced charges arising out of his employment with Rappongi, it would be required to indemnify him in respect of the legal fee if he was cleared of the charges. In this case, Mr Fernandez was vindicated. The allegations made against him by the former employee who was guilty of the charges were false. The entitlement to indemnity for the legal fees arises from the principles enunciated in *Attorney-General v Jones*.[13]

> The general rule is that an employee is to have indemnity where he has acted in obedience to his orders or in execution of his authority or in the reasonable performance of the duties of his employment. Plainly that indemnity ought not to extend to the case of an employee who has committed an act involving moral turpitude on his part.

[92] Mr Donovan submitted that Mr Fernandez may not be entitled to such indemnity on the basis of this Court's decision in *Katz v Mana Coach Services Ltd*.[14] In that decision, Judge Ford distinguished *Jones* on the basis that the indemnity will not be available where the employee had breached their duty, was negligent or there was some other fault on the part of the employee. I do not accept that that distinction is available in the present case, as there is no evidence at all that Mr Fernandez in any

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13 *Attorney-General v Jones* HC Wellington M73/79, 16 June 1981 at 9.
14 *Katz v Mana Coach Services Ltd* [2011] NZEmpC 49, [2011] ERNZ 94.

way breached his obligations to Rappongi. No such allegations were made by Mr Noble III at the time, and indeed financial arrangements were entered into to enable Mr Fernandez to pay the legal fees that he had incurred. His employment continued. The fact, however, that he was required to repay the advance and indeed, as it appears, lose his entitlement to some bonuses in doing so, must lead to the conclusion that Rappongi has an obligation to reimburse Mr Fernandez. While the counterclaim relating to the legal fees was withdrawn during the course of the hearing when counsel were apprised of the principles in *Jones*, the Pandora's box has been opened. This issue has not been properly resolved by simply withdrawing this part of the counterclaim. If there is to be a proper accounting between Mr Fernandez and Rappongi as part of the employment relationship problem, which has been referred to the Court, what transpired in respect of the criminal proceedings against Mr Fernandez and the costs he incurred need to be further investigated and taken into account. This is certainly so if he has lost the benefit of bonuses he would otherwise have received.

[93] Mr Donovan appears to be seeking the Court's indulgence on this point to lead further evidence. However, counsel should have been aware of the principles applying under *Jones* having raised the substantial counterclaim against Mr Fernandez which relates directly to the arrangements unfairly entered into when he faced the legal fees as quantified by Mr Noble III in his evidence. I do not accept that the matter should be re-opened, apart from it being taken into account in the quantification issues which need to be resolved between the parties.

[94] The next item in the counterclaim relates to the valuer's fees amounting to $7,222. This relates to a valuation of the property holdings of Rappongi which Mr Fernandez obtained from a valuer, Seagar & Partners Limited. It is alleged that Mr Fernandez obtained this valuation without authority and then arranged for Rappongi to pay the valuation fees. It is alleged that Mr Fernandez obtained this valuation for his own purposes of making an offer to purchase Rappongi in its entirety. Mr Fernandez alleges that he was authorised by Mr Noble III to obtain the valuation for the purposes of Rappongi itself selling the company. This is also consistent with evidence from Mr Noble III and Mr Noble IV. The directors were, at the time, considering selling the business. Mr Noble III does not respond in his evidence to the assertions of Mr Fernandez. In the circumstances, it is one word against the other as

to the purpose of the valuation, and I find that this counterclaim item was not proved to the required degree.

[95] The next item in the counterclaim is the claim for damages in respect of equipment taken and claimed to amount to $30,324.43. This relates to Mr Fernandez using Rappongi's equipment which was in store from a restaurant which had been closed in Wellington. The true value of the equipment at the time of its use would need to be established, but Mr Fernandez does not dispute that this is one of the items which needs to be taken into account in assessing the exit payment. Obviously, the usual principles will need to be applied in valuing the items which were used. Using book value for the items would not be adequate, and, as the items were from a closed-down restaurant and had previously been used, it may well be that some of the items claimed have no value whatsoever.

[96] The next item in the counterclaim also relates to use of the equipment from the closed restaurant. This is the cost of transporting the equipment from Wellington to Auckland. The sum claimed is $3,674.25. Once the value of this item is verified, it is again a matter which Mr Fernandez agrees needs to be taken into account.

[97] Rappongi also makes a claim against Mr Fernandez relating to canola oil which was invoiced by Mr Fernandez's company through Rappongi. The sum claimed under this head is $3,102.32. Mr Fernandez stated in evidence that the arrangement for the sale of the canola oil to Rappongi through his own company was to take advantage of a discount price being agreed with the supplier. The invoicing shows that there has been a doubling-up of the GST charged, and once again Mr Fernandez agrees that this is a matter which needs to be accounted for.

[98] At the time that Mr Fernandez opened the Lincoln Road Denny's Restaurant as a sub-franchise, he used Rappongi's staff to train new staff and work in the restaurant during its initial stages. Rappongi counterclaims for the wages paid to its staff for which Rappongi received no benefit while they worked for Mr Fernandez's company operating the sub-franchise business. The sum claimed is $10,794.92. To verify the quantum of this claim, some investigation would be needed. Once again,

this is an item which Mr Fernandez seems willing to have taken into account in the overall accounting exercise.

[99] The final item in the counterclaim is the sum of $6,000 plus GST being the cost of a blast-freezer which a third party paid to purchase the freezer from Rappongi. There does not appear to be any dispute that the freezer was in a state of disrepair. Mr Noble III claims that he directed Mr Fernandez to have it repaired so that it could be used by Rappongi. Mr Fernandez was of the view that the freezer was beyond repair and agreed to it being sold in this state to the third party. Obviously, as it was owned by Rappongi, the funds should have been credited to Rappongi's account, but instead are alleged to have been paid into the account of Mr Fernandez's company. This is a matter which also needs to be taken into account once the claim and quantum are verified. Once again, Mr Fernandez does not appear to dispute that this is an item which must form part of the accounting between himself and Rappongi.

Contributing conduct

[100] Rappongi has pleaded that Mr Fernandez should have any remedy reduced for contributory conduct. The Court is required to consider such conduct exists and whether remedies should be reduced.[15] Mr Donovan, in his submissions, relates this to Mr Fernandez's decision to run his own restaurant, and he was therefore "the author of his own misfortune". He further submits that this should result in a reduction of 75 per cent to any remedies awarded to Mr Fernandez. There is no proper basis for alleging contributing conduct in this case, and that pleading by the defendant and the submissions based on it are rejected.

Conclusion and disposition

[101] To summarise the position, Mr Fernandez is entitled to a 10 per cent share in the operating business of Rappongi. The valuation of that share will need to be ascertained using proper principles for valuation of a business. Mr Fernandez was required to purchase the shares on a discounted basis and the cost of that purchase and

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15 Employment Relations Act 2000, s 124.

the date when it was to be acquired will need to be ascertained. It would appear from the letter dated 13 March 2005 that Mr Fernandez's entitlement arose in 2000 when it was signed by Mr Noble III. The other alternative is that the entitlement arose in 2005, when the letter appears to have been signed by the second director and given to Mr Fernandez. Following on from ascertaining that value, the operating business of Rappongi will need to be valued at the date of termination of Mr Fernandez's employment, as that would be when his entitlement to demand payment crystallised. Obviously for the years of employment when Mr Fernandez did not receive his entitlement, he would be entitled to interest and his share of any dividends declared. Interest is to be calculated on the basis of sch 3, cl 14 of the Act. It is clear from Mr Noble III's evidence that issues arise as to reimbursement to the shareholder of the costs of financing the operating side of the restaurants. Mr Noble III spoke of advances made to the company over the years. The company accounts will disclose advances made by the shareholder.

[102] I have found that Mr Fernandez was unjustifiably dismissed. He has given evidence as to the humiliation, loss of dignity and injury to his feelings as a result of the timing and manner of the termination of the employment. He is entitled to compensation for this. In view of the fact that a quantification of the claims is to be finally determined at a further hearing, I will not set the level of compensation at this stage. It would, however, fall within the middle-band category of such claims as enunciated in the decision of *Waikato District Health Board v Archibald*.[16]

[103] Insofar as loss of income is concerned, it was inevitable and is really not the subject of dispute that Mr Fernandez was going to leave the employment with Rappongi to run his own restaurant. Nevertheless, if the manner of Mr Fernandez's departure had been properly handled, he would have been entitled to payment for a reasonable period of notice and has lost income as a result of not being given an adequate period. I assess that under this head a reasonable period of notice having regard to his seniority and length of service would be six months and he should be reimbursed together with interest accordingly. While it is not covered in the pleadings or in Mr Fernandez's evidence, Mr Harrison in submissions specified a claim for

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16 *Waikato District Health Board v Archibald* [2017] NZEmpC 132 at [62].

reimbursement of lost income from termination of employment until the date of judgment in this matter as the loss of the sub-franchise at Lincoln Road led to the decline of that business and caused Mr Fernandez's loss of income. However, Mr Fernandez had expressed a determination to run the Lincoln Road restaurant as his own restaurant if it was not to be a Denny's restaurant. He formed that view when he signed the lease. He would have pursued that option even if the sub-franchise had not been offered as an alternative. The causative effect on his loss of income after the financial decline of the Lincoln Road restaurant did not emanate from actions of Rappongi. Accordingly, I do not make any further award of loss of income beyond the six-month notice period.

[104] For reasons discussed in this judgment, the claims to penalties are rejected. Nevertheless, it is necessary for the parties to reach finality on all matters outstanding under the employment relationship problem between them. Insofar as the monetary claims under the counterclaim are concerned, there is a need for an accounting between the parties. The question of the legal fees incurred by Mr Fernandez in defending the criminal charges gives rise to the need for a consideration of bonuses which may have been improperly withheld from him in repayment of a loan which was apparently made to him to assist with the legal fees. He was entitled to indemnity in respect of the legal fees. There will still be an entitlement in respect of that, but in addition, there would be no basis for the withholding of the bonuses. In respect of the other counterclaims, the claim to reimbursement of the valuer's fees is not upheld. In respect of the remaining monetary claims under the counterclaim, a proper assessment and valuation of the quantum of those claims needs to be made. As part of that accounting exercise, it appears that Rappongi has received a refund from Denny's USA for the sub-franchise approval fee. If this was paid by Mr Fernandez, then it needs to be refunded to him. He has also raised a potential claim in respect of royalties which he paid to Rappongi during the course of the sub-franchise. During the period when he operated the franchise, he was receiving the benefits of his restaurant being connected to the Denny's restaurant franchise. There is no basis for him to be entitled to a refund of those royalties.

[105] As indicated, the Court has been asked at this stage to make findings only on liability. If based on these findings the parties are not able to reach agreement on

quantum then a further hearing will be convened. Counsel should in that case contact the Registrar to arrange a directions conference so that the matter may be progressed to a hearing. Such conference should take place at the expiry of four weeks from the date of this judgment. If agreement is reached, then the Court is to be notified.

Costs

[106] Costs should follow the event. Mr Fernandez is the successful party in these proceedings and is entitled to an award of costs. It is appropriate that the quantum of any costs be reserved at this stage until it is known whether a further hearing is going to be necessary on the matter of quantification of the awards.

M E Perkins
Judge

Judgment signed at 4 pm on 15 August 2019