

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

[2017] NZERA Auckland 387
3015394

BETWEEN CLEITEST PETER
 FERNANDEZ
 Applicant

A N D RAPPONGI EXCURSIONS
 LIMITED (trading as DENNY'S
 RESTAURANTS)
 Respondent

Member of Authority: Anna Fitzgibbon

Representatives: Richard Harrison, Counsel for Applicant
 Raewyn Lovett, Counsel for Respondent

Investigation Meeting: On the papers

Date of Determination: 14 December 2017

**DETERMINATION OF THE
EMPLOYMENT RELATIONS AUTHORITY**

- A. The claims of the applicant, Mr Cleitest Peter Fernandez and the counterclaims of the respondent, Rappongi Excursions Limited (trading as Denny's Restaurants) under file no. 3015394 are removed to the Employment Court pursuant to s.178(1) of the Employment Relations Act 2000 (the Act).**
- B. There is no issue as to costs.**

Employment relationship problem

[1] The applicant, Mr Fernandez says that; (a) he was unjustifiably dismissed by the respondent, Rappongi Excursions Limited (Rappongi) on 15 June 2017; (b) Rappongi breached its obligations of good faith owed to him by failing to provide him with a written employment agreement; and (c) he has a dispute with Rappongi over an agreement with him that he have the opportunity to purchase a 10% stake in Rappongi's business or to receive payment of an equivalent sum.

[2] Rappongi denies the claims made by Mr Fernandez and has raised counterclaims against Mr Fernandez in respect of his actions in establishing a competing restaurant at 301 Lincoln Road, Henderson (Lincoln Road restaurant).

Background facts

[3] Rappongi has a license to operate Denny's restaurants in New Zealand. There are currently seven Denny's restaurants owned and operated by Rappongi throughout New Zealand.

[4] Mr Fernandez was employed by Rappongi as Director of Operations from 1990 until the termination of his employment on 15 June 2017.

[5] In 2015, there were discussions and negotiations between the parties concerning the establishment of the Lincoln Road restaurant by Mr Fernandez as a Denny's franchise.

[6] There is a dispute between the parties as to whether agreement was reached about the establishment of the Lincoln Road restaurant as a Denny's franchise. Mr Fernandez says agreement was reached regarding the establishment of the Lincoln Road restaurant using the Denny's brand. However, Mr Fernandez says a dispute arose about the terms of the franchise agreement and the valuation of his option to acquire a stake in Rappongi's business.

[7] Rappongi denies that an agreement was reached with Mr Fernandez about the establishment of the Lincoln Road restaurant. It says it decided not to proceed with the establishment of the Lincoln Road restaurant and that Mr Fernandez was informed of this decision in December 2015.

Sub-franchise negotiations between Mr Fernandez and Rappongi

[8] During 2016 the parties held sub-franchise negotiations regarding the Lincoln Road restaurant and whether it could be operated as one of Rappongi's sub-franchises. In December 2016, Mr Fernandez opened the Lincoln Road restaurant and continued to operate while conducting sub-franchise negotiations with Rappongi.

Exit agreement between Mr Fernandez and Rappongi - 25 May 2017

[9] The parties reached an agreement on 25 May 2017 in respect of Mr Fernandez's resignation from Rappongi and his operation of the Lincoln Road restaurant. There is disagreement about the terms of the exit.

Termination of Mr Fernandez's employment – 15 June 2017

[10] Mr Fernandez claims that he was unjustifiably dismissed by Rappongi and seeks remedies as a result including the value of the 10% stake in Rappongi's business he says he was promised. Rappongi denies the claims saying Mr Fernandez was aware he was not able to remain employed by Rappongi while operating a business in competition with it. Mr Fernandez had agreed to resign but when the exit agreement did not proceed, Rappongi had no option but to terminate his employment.

Rappongi's counterclaims against Mr Fernandez

[11] Rappongi has filed a counterclaim in the Authority against Mr Fernandez in which it claims that by establishing a competing restaurant Mr Fernandez breached obligations owed to it to act in good faith. Rappongi also claims breach of confidence and fidelity by Mr Fernandez. Rappongi seeks remedies including damages arising out of Mr Fernandez's conduct in setting up a competitive restaurant using the Denny's name.

[12] The overall thrust of the dispute between the parties and the proceedings currently before the Authority arise out of sub-franchise discussions/negotiations in respect of the establishment of the Lincoln Road restaurant.

[13] The Authority is being requested to determine whether the termination of Mr Fernandez's employment, which arose during the course of the sub-franchising discussions, was unjustified. The Authority is also being asked to determine issues as

to whether Mr Fernandez was promised a stake in Rappongi's business and if so the value of that share.

[14] Both parties have filed memoranda in the Authority on the issue of whether or not the matter is a commercial dispute and not suitable for investigation by the Authority.

[15] Rappongi accepts that some of the matters arising out of the Statement in Reply and counterclaim arise out of the sub-franchise negotiations concerning the establishment of the Lincoln Road restaurant.

[16] In addition to remedies for alleged breaches of employment related duties to it by Mr Fernandez, Rappongi is seeking damages "on account of goods delivered to [Mr Fernandez's] new business from the commissary", "on account of the unauthorised valuation of [Rappongi's] real estate..."

Removal of the matter to the Employment Court

[17] Section 178(1) of the Act enables the Authority to:

... on its own motion or on the application of a party to a matter, order the removal of the matter, or any part of it, to the court to hear and determine the matter without the Authority investigating it.

[18] It is my view that the entire dispute between the parties has arisen in the context of sub-franchise negotiations between the parties concerning the establishment of the Lincoln Road restaurant.

[19] It is my view that this type of dispute would be more appropriately dealt with by the Employment Court utilising its trial process, rather than by the Employment Relations Authority's investigative process.

[20] On this point, Chief Judge Inglis in *Johnston v The Fletcher Construction Company Limited*¹ stated:

[38] As I have said, parliament has made it clear in s.178 that there are many cases which are more appropriately dealt with by way of investigation in the Authority and some which are more appropriately dealt with by way of a more formal court hearing. It is not, as was pointed out in *X (No2)*, a matter of patch protection². Rather it is a matter of directing cases to either forum applying the criteria set by the statute. Section 178 does not, either expressly

¹ [2017] NZEmpC 157

² *Auckland District Health Board v X (2)*, above *N3*, at [41] [2005] ERNZ 551 EmpC

or impliedly, contain a presumption that cases will generally be heard in either institution and such a presumption should not be read in. To do so runs the risk of undermining parliament's intent.

[39] Section 178(2)(d) leaves open the possibility that there will be some cases, not clearly falling within (a) – (c) which might otherwise appropriately be removed to the Court where the Authority considers it appropriate to do so. Section 178(2)(d) is to be interpreted in light of its text and its purpose³. The overarching point will be whether a particular case is best suited for resolution by the Authority's investigative processes or by the more formal adversarial processes of the Court. This may engage issues of cost and proportionality. A case which, for example, is likely to consume weeks of hearing time in the Authority, requiring a more formal, procedure-laden approach, and where the unsuccessful party is likely to wish to pursue their statutory right of de novo challenge, may well be better suited for hearing in the Court. Much will depend on the circumstances of each case.

[21] I am satisfied that the nature of this matter is such that it requires a more “formal, procedure-laden approach” than the approach taken by the Authority. It seems also likely that the unsuccessful party is likely to wish to pursue the statutory right of de novo challenge. I am satisfied that this matter is more suited for hearing in the Court.

[22] Accordingly, this matter is removed to the Employment Court pursuant to s.178(1) of the Act.

Anna Fitzgibbon
Member of the Employment Relations Authority

³ Interpretation Act 1999, s.5