

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

AA 43/10
5157927

BETWEEN ANDREW NICHOLS
Applicant

AND TIMBERTECH (2004)
LIMITED
Respondent

Member of Authority: R A Monaghan

Representatives: A Nichols in person
M Ralph, advocate for respondent

Investigation Meeting: 23 September 2009

Determination: 3 February 2010

DETERMINATION OF THE AUTHORITY

Employment relationship problem

[1] Andrew Nichols says he entered into an employment relationship with his former employer, Timbertech (2004) Limited (“Timbertech”), on the condition and in reliance on representations regarding his obtaining an equity share in the company. He said in the statement of problem that he accepted a reduction in the level of salary he could have obtained elsewhere in reliance on an offer of the gifting of a 30% (later reduced to 25%) ‘equity share’ in Timbertech. He has not received any shares.

[2] Accordingly Mr Nichols seeks an order for the settlement of his entitlement to a shareholding in Timbertech calculated as the greater of:

- a. an amount equivalent to the net reduction in salary over 18 months, estimated as \$118,000; or
- b. an amount equivalent to 25% of two current independent valuations of Timbertech’s shares, estimated at \$110,000.

[3] Timbertech says there has been no breach of the terms and conditions of Mr Nichols' employment. It said in its statement in reply that the shares were to be part of a commission package and were subject to the sale of Timbertech franchises.

Agreement regarding an equity share

[4] Timbertech is in the business of maintaining cedar cladding on houses, and refurbishing other housing-related timber products such as doors, decking and outdoor furniture. It planned to franchise its business, and by about August 2007 had completed a feasibility study and established systems for its franchising model. Mr Nichols answered its advertisement for a franchising manager.

[5] Timbertech planned to offer a salary in the region of \$60,000 pa, but it was apparent from Mr Nichols' CV that his expectation would be for far more than that. The parties acknowledged the difference, but pursued the possibility of Mr Nichols' employment anyway.

[6] Mr Nichols advised Mark Ralph, one of Timbertech's directors and a shareholder, that he had received another offer of employment with a salary of \$180,000 pa plus a vehicle. Mr Ralph knew Timbertech could not match such remuneration directly, so sought to structure a package that might deliver that level of reward in another way. It was common ground that the result was agreement on a (for Mr Nichols) reduced salary of \$100,000 pa. The possibility of a shareholding was discussed as a way of addressing the shortfall, but it was common ground that no details of any shareholding were agreed during the recruitment process.

[7] Discussions advanced to the point that Timbertech appointed Mr Nichols to the position of franchise manager commencing on or about 23 August 2007. The role included the development of a national franchise network, franchise recruitment, the development of a franchise marketing plan, and management support for the franchises.

[8] The parties' written employment agreement included the following provision:

“Remuneration

In consideration for the satisfactory provision by you of the services agreed to, TIMBERTECH shall pay to you an all inclusive gross annual salary of \$100,000.

In addition to your salary a bonus of \$7,000 shall be paid on the sale of each franchise. Paid upon receipt of full franchise fee.”

[9] The bonus (or commission) payment had been agreed in the course of discussing ways of boosting Mr Nichols’ remuneration.

[10] There was no mention in the agreement of share equity, and a number of associated matters remained to be resolved. Hence although I find the prospect of a shareholding as part of Mr Nichols’ package was discussed and agreed in principle at the time of recruitment, such few details as might also have been raised amounted to no more than starting points for further discussion. Mr Ralph described the discussions as a process, which on an overview of the evidence I find apt.

[11] It was common ground in the oral evidence that a shareholding of 30% was discussed, although not clear whether that percentage was first mentioned before or after the commencement of employment. It was also common ground that there was no agreement that a 30% shareholding be available to Mr Nichols immediately, and that a 3-year timeframe for his acquiring the shareholding was discussed. Finally, it was common ground that the timeframe was intended to correspond with expected, or hoped-for, growth in the franchise network. Mr Nichols was confident such growth could be achieved. It is likely these matters were discussed after employment began.

[12] For his part Mr Ralph sought specialist advice on a mechanism for transferring a 30% shareholding to Mr Nichols over a 3-year period and in association with whether or not sales targets were met. There was discussion between the parties about transferring shares by gifting them at the end of each of the three years in question. If expected franchise sales were not met there would be no transfer.

[13] Work began on agreeing a suitable structure and procedure for achieving this. Unfortunately few of the documents relevant to discussions in late 2007-early 2008 were produced. However Timbertech’s accountants prepared a share valuation and forwarded their associated report in a letter dated 9 October 2007, which was

produced. The accountants' purpose was to arrive at a market value for the sale of a 30% shareholding which was acceptable to the IRD. The letter recorded that Mr Nichols was 'the proposed purchaser of the shares' and said: "a bonus scheme will be put in place with LML [Little Men Limited] to enable Andrew to have the funds to complete the TT share purchase over time." The valuation was earnings-based, with reference to expected franchise sales at a specified price over the next three years. The recommended figure was \$7.85 per share.

[14] A subsequent change in the expected franchise sale price led to the reduction of Mr Nichols' proposed shareholding to 25%.

[15] Nothing had been finalised by about the beginning of 2008, and as discussions progressed the developments were as I now set out.

[16] Exchanges of email messages in May 2008, involving the parties and their accountants, indicate the progress made by then. Difficulties identified during those exchanges included the value to be placed on the company (the October 2007 valuation being considered out of date during those discussions), whether and how Mr Nichols would pay for the shares, and tax issues. A letter dated 20 May 2008, to Mr Nichols from his accountant, summarised the 'current situation' as:

- a. Mr Nichols was being offered 25% of Timbertech to be transferred to him at market value, with terms of payment to be negotiated although possibly payment would be made over time from Mr Nichols' salary;
- b. the business was being operated by Timbertech, but the associated intellectual property was owned by another company, Little Men Limited (Little Men);
- c. it was proposed that a new entity be formed to own both the Timbertech business and the intellectual property – and this would be the entity in which Mr Nichols would hold shares.

[17] The letter went on to sketch a suggested approach, noting the approach had tax implications for the existing shareholders. An emailed reply from Timbertech's accountant commented on the approach, adding to it in part, and saying the accountant was 'not against the proposal'.

[18] In a more formal letter of comment and advice to Mr Ralph, dated 11 June 2008, Timbertech's accountant addressed the proposed restructuring of Timbertech and Little Men and gave more detailed information and advice about the tax implications. The advice covered aspects of the sale of Timbertech and Little Men, and the registration of a new company, Ralph Petersen Nichols Group Limited (RPNG), in which Mr Nichols or his trust would have a 25% shareholding. Valuations would be required for both the business and the intellectual property. Although figures were mentioned from time to time, there was no evidence any independent valuations were subsequently obtained.

[19] An email message from Timbertech's accountant dated 8 August 2008, and copied to Mr Nichols, commented on a meeting between the parties that day. It referred to matters under discussion such as whether Mr Nichols should have a salary increase to provide him with funds to purchase shares - a proposal which was discarded. It also discussed the involvement of the parties' trusts, and arrangements for different classes of shares. The contents of the message suggest there had been detailed discussion about classes of shares, and the rights and obligations to be attached to the various classes. Since the message ended by suggesting a different arrangement, I infer that matter had not been finalised either. Lastly, there were unresolved discussions about the value of the intellectual property.

[20] There was nothing to identify precisely how any of those matters were resolved, but the contents of documents prepared for the companies office in association with the registration of RPNG indicate there were to be four classes of shares. Mr Nichols was to hold 10 ordinary C shares, while his family trust was to hold 240 ordinary C shares. On the face of the matter, this amounted to 25% shareholding in RPNG for Mr Nichols and his interests.

[21] Some of the documents for the companies office were not signed and dated until 18 December 2008. In addition a letter from Timbertech's accountant to Mr Ralph, also dated 18 December 2008, indicated that the final overall corporate restructuring had not been completed, and that various sale and purchase arrangements including the sale of Little Men's intellectual property had not been completed either.

The termination of Mr Nichols' employment

[22] Mr Nichols has not raised a personal grievance in respect of the termination of his employment. Instead the termination of his employment, and the reason for it, are relevant to the fate of his expected shareholding.

[23] Mr Nichols was contacted over the Christmas period in 2008 and told Timbertech could no longer pay his salary. By memorandum dated 28 January 2009 he was given written confirmation that: "It is no longer viable to continue the position you currently hold with Timbertech (2004) Ltd as national franchise manager." I did not understand the adverse financial position then facing Timbertech to be in dispute.

[24] The arrangements apparently agreed in the latter half of 2008 were not put into effect, and RPNG is not registered as a company. Timbertech and Little Men remain registered. Discussions between the parties continued in an attempt to resolve matters after Mr Nichols' employment ended, but were unsuccessful.

Determination

[25] No law was referred to by either party, and the legal basis for Mr Nichols' request for remedies was difficult to discern, but the Authority must determine this matter with reference to legal principle.

[26] The employment relationship problem was very broadly stated. It is in effect that Mr Nichols entered into employment with Timbertech because he believed he would acquire a shareholding in it, no shareholding was obtained, he believes he has suffered a loss and now seeks a remedy in the nature of damages. In the absence of any more specific indication the representation (or misrepresentation) of concern to him appeared to be simply that he would acquire a shareholding, but that has not eventuated.

[27] I find there was an oral term of employment to the effect that a shareholding be part of Mr Nichols remuneration package. That no shareholding was subsequently acquired does not necessarily mean there was a misrepresentation in that regard. At most the failure to acquire a shareholding might found an allegation of breach of the

employment agreement, but this problem has not been framed in that way at all¹. To the extent that I can comment on the matter I would say that at or about the commencement of employment - being the period on which Mr Nichols' claim is focussed - no further terms or conditions of employment in relation to the acquisition of a shareholding had been agreed, and the agreement as it stood was probably too vague to be enforceable.

[28] If any agreement on the detail of the acquisition of shares was ever reached, it would appear that occurred in or about late 2008 although the terms of the agreement were not put into effect. For his part Mr Nichols has not alleged an agreement was reached at that time, and has not sought any remedy in respect of the matter.

[29] Mr Nichols may still be entitled to a remedy if he could identify an actionable misrepresentation concerning details of the shareholding - beyond the bare fact that a shareholding was to be part of his remuneration package - or if he otherwise pointed to misleading or deceptive conduct on Timbertech's part.

[30] However he has not identified a particular misrepresentation, or any misleading or deceptive conduct. Rather he said in evidence that he had an expectation at or about the commencement of his employment that his equity share would be 9000 of 30000 shares in Timbertech (being 30%), valued at \$70,650. The detail of that position seems to be based on the 9 October 2007 document and associated discussions.

[31] Such matters were canvassed in the discussions in or about the end of 2007, but the discussions moved as on as I have set out. Moreover the avowed expectation does not acknowledge numerous additional aspects of the corresponding and subsequent discussion - not least of them concerning the discussions about a reduction to 25%, Mr Nichols' accountant's suggestion in May 2008 regarding another way of providing him with a shareholding, revisiting the valuation, and that tax implications were part of the discussions throughout.

[32] Further to that, Mr Nichols also said he expected the shares to be gifted to him. That matter was discussed soon after his employment began, in the context of

¹ Ref *Sinclair v Webb & McCormack Ltd & Anor* (1990) 3 NZELC 97,405 (HC)

discussions about various mechanisms for achieving a transfer of the shares. The mechanisms included adjustments to his remuneration to permit him to purchase the shares, and that the transfer would be effected over three years. Identifying a suitable transfer mechanism was not without technical difficulty, and Mr Nichols was aware of that. Again I find that Mr Nichols' avowed expectation regarding the prospect of the shares being gifted does not properly take into account the entirety of the discussions on the matter.

[33] Finally on the evidence I heard there was no express discussion to the effect that without more Mr Nichols would be gifted 9000 shares in Timbertech, having a value of \$7.85 per share. Nothing in the evidence identified any reasonable ground for such an expectation - as distinct, at most, from a hope. Even that hope occurred at a point on the continuum of the discussions. It is not open to Mr Nichols to identify that point, stop there and effectively disregard the rest of the continuum.

[34] For similar reasons I find there was no evidence that Mr Ralph in particular engaged in misleading or deceptive conduct, or misrepresented to Mr Nichols the details of the shareholding arrangement.

[35] I conclude that Timbertech has no liability to Mr Nichols in respect of the matters he has raised. Since there is no liability it is not necessary to further address the orders sought, except to say I decline to make them.

Costs

[36] Costs are reserved.

[37] If either party seeks an order from the Authority the party shall have 28 days from the date of this determination in which to file in the Authority and copy to the other party a written request setting out what is sought and why. The other party shall have a further 14 days in which to file and copy a written response.

R A Monaghan

Member of the Employment Relations Authority