

IN THE COURT OF APPEAL OF NEW ZEALAND

I TE KŌTI PĪRA O AOTEAROA

**CA462/2019
[2020] NZCA 37**

BETWEEN RAPPONGI EXCURSIONS LIMITED
 Applicant

AND CLEITEST PETER FERNANDEZ
 Respondent

Court: Brown and Clifford JJ

Counsel: M C Donovan and J M Laphorne for Applicant
 R M Harrison for Respondent

Judgment: 3 March 2020 at 3 pm
(On the papers)

JUDGMENT OF THE COURT

- A The application for leave to appeal is declined.**
B The applicant is to pay the respondent costs for a standard application on a band A basis and usual disbursements.
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REASONS OF THE COURT

(Given by Clifford J)

[1] Between 1988 and June 2017 the respondent, Cleitest Fernandez, worked for the Denny’s restaurant business in New Zealand owned by the applicant, Rappongi Excursions Ltd, and its principals. From late 2015 until his dismissal by letter on 15 June 2017, Mr Fernandez had been exploring with Rappongi various ways in which he might set up his own restaurant and, at that point, leave his employment. Initial difficulties were caused by Mr Fernandez entering a lease of the proposed

premises at Lincoln Road, Auckland, before all arrangements had been agreed. Those difficulties were resolved by Rappongi agreeing Mr Fernandez could operate a Denny's sub-franchise at the Lincoln Road premises. Mr Fernandez did just that from November 2016 onwards. Matters came to an abrupt halt, however, when Rappongi's franchisor, Denny's USA, concluded that Mr Fernandez did not meet the requirements to be a franchisee in New Zealand.

[2] The 15 June 2017 dismissal letter was issued to Mr Fernandez by one of the United States representatives of Rappongi. Around the same time he was also told the franchise deal was off. It was following those events that Mr Fernandez brought proceedings in the Employment Court alleging breach of a term of employment and unjustified dismissal.

[3] In an amended statement of claim Mr Fernandez sought a declaration his dismissal was unjustifiable; reimbursement for lost remuneration; compensation of \$35,000 pursuant to s 123(1)(c)(i) of the Employment Relations Act 2000; and a declaration he was entitled to receive a 10 per cent interest in Rappongi or an equivalent amount as a term of his employment.

[4] Rappongi counterclaimed, including for damages for breach of good faith and breach of obligations of confidence and fidelity.

[5] At a hearing concerning issues of liability only, Judge Perkins found for Mr Fernandez.¹ In doing so, the Judge proceeded on the basis that all aspects of the dispute between Mr Fernandez and Rappongi, including those relating to his claim to a share of the business and Rappongi's counterclaims, arose out of the employment relationship. Hence, they all fell within the Employment Court's jurisdiction.²

[6] The Judge concluded that Mr Fernandez had been unjustifiably dismissed.³ That finding was essentially based on the consensual dealings between Mr Fernandez, Rappongi and United States representatives of Denny's prior to the summary termination in June 2017. Rappongi does not challenge that finding. The Judge also

¹ *Fernandez v Rappongi Excursions Ltd* [2019] NZEmpC 99.

² At [1].

³ At [81].

found that Mr Fernandez was, as he had claimed, entitled to a 10 per cent share in Rappongi's business, or the fair value thereof.⁴ Rappongi does not challenge that finding either. The value of the 10 per cent share in the business was to be determined. As best as we understand matters, that process for that is underway, albeit incomplete because of this application.

[7] The Judge then turned to Rappongi's counterclaims. As the way in which the Judge dealt with those counterclaims gives rise to the points of law said to merit an appeal, some detail is called for. The Judge was critical both of the lack of substance of those claims, which he characterised as Rappongi's attempts to reduce the value of Mr Fernandez's claim for 10 per cent of the business, and of the obvious lack of understanding Rappongi's United States representatives had of New Zealand labour law.⁵ It emerged during cross-examination that they were quite ignorant of the requirement to act as a fair and reasonable employer in all the circumstances.⁶

[8] Mr Fernandez accepted he owed amounts to Rappongi which would need to be taken account of. Given the events that had occurred, in particular as a result of Mr Fernandez having run the Denny's business at Lincoln Road for a period of time, an accounting between the two parties would be reasonably complex.

[9] Rappongi's first monetary counterclaim was for \$30,000 Mr Fernandez was alleged to have taken from Rappongi without consent or authority.⁷ The claim was initially said to relate to legal fees Mr Fernandez had reimbursed himself after successfully defending fraud charges which arose from a complaint arising out of the ordinary course of Rappongi's Denny's business. It was subsequently specified as a claim for special damages, being an overpayment of bonuses. Rappongi disputed any liability to indemnify Mr Fernandez for those legal fees. The Judge rejected that argument, based on the principles enunciated in *Attorney-General v Jones*.⁸ Whilst Mr Fernandez had not himself claimed for those legal fees, the Judge observed:⁹

⁴ At [58].

⁵ At [82]–[84].

⁶ At [76]; citing Employment Relations Act 2000, s 103A.

⁷ At [89].

⁸ *Attorney-General v Jones* HC Wellington M73/79, 16 June 1981.

⁹ *Fernandez v Rappongi Excursions Ltd*, above n 1, at [92].

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.

[10] The Judge, rejecting Rappongi's attempts to bring further evidence on the issue, ruled that the matter required quantification in the account which was to be taken between the parties.¹⁰

[11] After considering Rappongi's other counterclaims, many of which Mr Fernandez did not dispute, the Judge turned to quantification. In summary:¹¹

- (a) as noted, the value of the 10 per cent share in the business was to be determined;
- (b) as to unjustified dismissal, the Judge said he would not set the level of compensation at that stage but that it would "fall within the middle-band category of such claims as enunciated in the decision of *Waikato District Health Board v Archibald*";¹² and
- (c) as to the loss of income associated with the unjustified dismissal, a reasonable period of notice of six months was set by the Judge and the order made that Mr Fernandez should be "reimbursed together with interest accordingly".¹³ The Judge did not accept Mr Fernandez's claim for loss of business income in his restaurant business associated with the way matters turned out. Mr Fernandez was, the Judge concluded, determined to run the Lincoln Road restaurant as his own if it was not to be a Denny's. The subsequent loss of income associated

¹⁰ At [93].

¹¹ At [101]–[103].

¹² At [102]; citing *Waikato District Health Board v Archibald* [2017] NZEmpC 132, [2017] ERNZ 791.

¹³ At [103].

with the termination of the Denny's franchise was not, therefore, caused by the unjustified dismissal.

Proposed appeal

[12] Rappongi says the Judge's liability findings, as summarised above, give rise to questions of law which it formulated in its submissions as follows:

- (a) If it is determined that an employee has a personal grievance for unjustifiable dismissal, can legal costs incurred by an employee in defending criminal charges be awarded to that employee as compensation for a loss of a benefit under s 123(1)(c)(ii) [of the Employment Relations Act]?
- (b) Can legal costs incurred by an employee in defending criminal charges be awarded to that employee in circumstances where a cause of action seeking those costs as a remedy is not pleaded?
- (c) Can an employee be indemnified by their employer for legal costs incurred in defending criminal charges where there is insufficient evidence those costs were incurred by the employee as an agent of the employer in the reasonable performance of the employee's duties?
- (d) Can an employee who is unjustifiably dismissed be reimbursed, with interest, for a reasonable period of notice without regard to the employee's duty to mitigate their loss or their actual loss suffered?

[13] Leave may only be granted from a decision of the Employment Court on a point of law and then if that point of law is one that, by reason of its general or public importance or for any other reason, ought to be submitted to this Court for decision.¹⁴ Rappongi says the questions of law it advances meet that threshold because:

- (a) The Employment Court's judgment suggests a broad application of the remedy provided for under s 123(1)(c)(ii), which provides for payment for loss of any benefit which the employee might reasonably have expected to obtain absent the grievance. Appellate guidance to clarify in what circumstances the remedy is available would be beneficial.
- (b) The question of whether a remedy may be awarded though not pleaded affects all parties that appear before that Court.

¹⁴ Employment Relations Act, s 214(3).

- (c) The question of what evidence is required to establish an employee was acting in the reasonable performance of their duties so as to entitle them to indemnification for their legal costs in defending criminal charges is of importance for employers and employees.
- (d) Whether the Employment Court's approach of ordering payment for reasonable notice without establishing an employee's actual loss or steps in mitigation was correct is a question of general importance for employment disputes.

Analysis

[14] We are satisfied that none of the proposed questions of law merit a grant of leave.

[15] The first three questions of law relate to the Employment Court's finding that Rappongi was to reimburse Mr Fernandez for the cost of defending criminal charges. Although not pleaded by Mr Fernandez, the point arose because Rappongi made various counterclaims against him. The Judge considered the claims should be dealt with as part of broader "wash-up" exercise that would have taken place at the end of his employment.¹⁵

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.

[16] Rappongi first contends that s 123(1)(c)(ii) of the Employment Relations Act is purely prospective and any entitlements in relation to reimbursement had, by that point, already arisen and therefore fell outside the scope of the section.¹⁶ We see little

¹⁵ *Fernandez v Rappongi Excursions Ltd*, above n 1, at [88].

¹⁶ See *Telecom South Ltd v Post Office Union (Inc)* [1992] 1 NZLR 275 (CA) at 284.

in this point. While the need for an accounting exercise can be traced to events that preceded the personal grievance, it was Mr Fernandez's hasty dismissal that precluded the expected "wash-up" payment. Mr Fernandez's benefits under the accounting exercise were therefore not the continuation of an existing benefit (such as remuneration) but one that he anticipated would arise in time when his relationship with Rappongi was wound up.

[17] Rappongi next argued that the Judge erred in awarding reimbursement of the legal costs where they were not pleaded (at least by Mr Fernandez). As recorded above, the issue arose because Rappongi counterclaimed for approximately \$30,000 that the company advanced to Mr Fernandez to help defray legal fees, though it did not cover the total bill, which was nearer \$80,000.¹⁷ Again, we do not see a reasonably arguable error. An accounting between the parties was clearly required. Although Mr Fernandez did not expressly plead for recovery of his legal fees, it would have been wholly artificial for the Judge to have excluded them from determination of the appropriate settlement amount when assessing Rappongi's counterclaim.

[18] Turning to the proposed third question of law, it is clear from the premise embedded within it that Rappongi's real challenge to the Judge's reasoning is that he did not have enough evidence before him to reach the conclusion that Mr Fernandez was acting in reasonable performance of his duties. There is no real suggestion that the Judge misinterpreted *Jones* or that there is a question of broader legal significance that ought to be resolved. Rappongi did not provide us with an explanation of what information the Judge had before him and what evidence (if any) suggested Mr Fernandez had acted in breach of his duties or was negligent. The Judge assessed that there was none.¹⁸ It is difficult to identify any arguable error in his analysis, and moreover, we are not prepared to grant leave on what is a largely factual issue.

[19] Finally, Rappongi challenged the Judge's decision to award Mr Fernandez six months' notice plus interest. Considering Mr Fernandez was a very senior employee managing Denny's New Zealand operations for nearly 30 years, we do not see such an award as falling outside the Judge's discretion. As to the questions of mitigation

¹⁷ *Fernandez v Rappongi Excursions Ltd*, above n 1, at [89] and [91].

¹⁸ At [92].

and actual loss, we note that the Judge did in fact give careful attention to Mr Fernandez's attempts to operate what was to be his new Denny's as an unbranded family restaurant, which ultimately struggled and went into liquidation. Although Rappongi was not ultimately responsible for all the losses suffered by Mr Fernandez,¹⁹ we understand that the evidence before the Judge was that Mr Fernandez suffered significant loss of income as a result and ultimately used the unemployment benefit to support himself. In any case, we again see this as an attempt by Rappongi to reopen what is a primarily factual issue inappropriate for reconsideration on appeal to this Court.

Result

[20] The application for leave to appeal is declined.

[21] The applicant is to pay the respondent costs for a standard application on a band A basis and usual disbursements.

Solicitors:
Duncan Cotterill, Auckland for Applicant
Harrison Stone, Auckland for Respondent

¹⁹ At [103].