IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND

[2011] NZERA Auckland 267
5345527

	BETWEEN	TRANSPACIFIC INDUSTRIES GROUP (NZ) LIMITED Applicant
	AND	KAINE HARRIS First Respondent
	AND	SMART ENVIRONMENTAL LIMITED Second Respondent

Member of Authority:	Dzintra King
Representatives:	Daniel Erickson, Counsel for Applicant Gretchen Stone, Counsel for Respondents
Investigation Meeting:	20 June 2011
Determination:	21 June 2011

DETERMINATION OF THE AUTHORITY

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[1] The applicant, Transpacific Industries (NZ) Group Limited ("TPI"), seeks an interim injunction. It says that Mr Kaine Harris, the first respondent, has breached his post-employment contractual obligations:

- He started employment with the second respondent, Smart Environmental Limited ("SEL"), a competitor of TPI, in breach of a restraint of trade provision – clause 7.1 of the individual employment agreement.
- He has actively solicited work from TPI's customers in breach of a non-solicitation provision – clause 7.2.

[2] There are three questions to be decided. First, whether TPI has an arguable case for enforcement of the restraint if and when that question is tried, and also an arguable case for a permanent (as opposed to an interlocutory) injunction restraining

the first respondent from competitive economic activity until the expiry of the restraint.

[3] The second question is where the balance of convenience may lie until the substantive proceedings can be heard and decided. The Authority must decide whether it will be more just to grant an injunction restraining Mr Harris from working for SEL in the event that the contractual restraint is set aside or so modified that it would not have been enforceable in practice, or, on the other hand, whether it will be more just that Mr Harris should be permitted to continue his employment with SEL when that may later be found to be have been unlawful. The question of alternative remedies available to the company is an aspect of the balance of convenience.

[4] Thirdly, because the remedy of interlocutory injunction is discretionary, the Authority should stand back from the minutiae of the first two tests and determine where the overall justice of the case lies until trial. The Authority should take into account any further considerations such as delay, bad faith conduct on the part of either of the parties, and any other discretionary factors.

[5] Mr Harris commenced employment with TPI as its Auckland Business Development Manager on 14 June 2010. He signed an individual employment agreement on 14 May 2010. The agreement had provisions relevant to this case. These included a requirement that TPI's confidential information must be preserved and not disclosed, both during and after the period of his employment. The contract also set out what was described as a "*Covenant Not To Compete*" as follows:

> *7.1 You acknowledge that the services that you are to perform for us may be of a special, unique, unusual, extraordinary and intellectual character. You appreciate that we may suffer serious injury if you took the knowledge and skills acquired during your employment with us and applied them for the benefit of a competitor of ours. Accordingly you agree that you shall not work for a Competitor either directly or indirectly for that period of time (plus any period not worked out), and in that area, as set out in Schedule C after the termination of this Employment Agreement.*
>
> *For the purposes of this clause:*
>
> ***"Competitor"** is an individual (including you), business, organisation or enterprise that offers services of a similar nature to the services provided by Transpacific Industries Group (NZ) Limited, including but not limited to, those services described elsewhere in this Agreement; and*

"directly or indirectly" *means you on your own account, or as a consultant or other contractor to, or a partner, joint venturer, agent, advisor, beneficiary, shareholder or director of, or equity participant with, any other person or entity.*

7.2 During the term of your employment with us and for the periods and areas set out in Schedule C following the termination of employment you shall not (except on behalf of or with the prior written consent of the Employer, which will not unreasonably be withheld), either directly or indirectly on your behalf or on behalf of others:

- *Solicit, divert, appropriate to or accept on behalf of any competing business; or*

- *Attempt to solicit, divert, appropriate to or accept on behalf of any competing business;*

any business from a customer or actively sought prospective customer of the Employer with whom you have dealt, whose dealing with us you have supervised or about whom you have acquired confidential information in the course of your employment.

7.3 During the term of your employment by us, and at any time following the termination of employment, you shall not (except with our prior written consent) either directly or indirectly, on your behalf or on behalf of others, solicit, divert or hire, or attempt to solicit, divert or hire any person employed by us.

7.4 You acknowledge that the above restrictions are reasonable for the following reasons:

7.4.1 The periods, and areas, specified are appropriate to the nature and/or seniority of your position with us.

7.4.2 In respect of Clause 7.1, your knowledge and skills are easily transferable to positions with companies that do not compete with us.

7.5 Since we may suffer immediate and irreparable injury if you breach the above restrictions, we reserve the right to seek injunctive relief against you, besides our other legal rights.

7.6 The restriction in Clause 7.1 does not prohibit you from holding up to 5% of a publicly traded company that is a Competitor.

7.7 You must not after the end of your employment with us represent yourself as being in any way connected with or interested in the Employer, unless expressly authorised by us to do so.

[6] The period of restraint referred to in Schedule C is three months in the Auckland region.

[7] On 7 March Mr Harris advised TPI he was considering an offer from a competitor. He did not say who the competitor was. He confirmed his resignation in a letter dated 7 March. He started working for SEL on 11 April 2011.

[8] Mr Harris' role focused on the acquisition of new business which was acquired by following up queries directed to the contact centre or by "cold calling".

[9] TPI says that Mr Harris had access to a significant amount of TPI's confidential information. This material encompassed customer requirements in terms of products and services, pricing details and the expiry date of contracts.

[10] Mr Gary Richardson, the Northern Sales Manager, said all sales staff had access to information regarding various contracts. As a result of the legal matters arising regarding Mr Green Mr Richardson changed the system so that full customer details were only made available to the relevant sales representative. Each representative had his own spreadsheet as opposed to the previous system where all customers were on one spreadsheet that everyone could access. He made that change on 12 November 2010.

[11] Mr Richardson said Mr Harris would have had access to the earlier system until that date. Mr Richardson would also have had access to AS400, an earlier version of the current software, which contained the full details of all customers. However, it would not be possible to access all customers' details at one time. A particular customer's details would have to be entered in order for the information to be accessed. Mr Richardson accepted that the company could not ascertain whether Mr. Harris had in fact done so.

[12] Mr Richardson asked in a letter dated 18 March that Mr Harris reveal the identity of his new employer. Mr Harris replied saying he did not want any unpleasantness and confirmed that he would comply with his legal obligations. The reference to unpleasantness refers to Mr Green, who was the plaintiff in *Green v Transpacific Industries Group (NZ)* Ltd [2011] NZEmpC 6.

[13] Mr Richardson sent Mr Harris a statutory declaration which Mr Richardson said asked Mr Harris to confirm that he would adhere to his post employment

obligations. The statutory declaration requires Mr Harris to confirm that he would comply with clause 7 of his employment agreement, although the Employment Court had found that clause 7.1 was very arguably unenforceable. Mr Harris said he would not sign without legal advice and asked the company to pay for the legal advice, which it refused to do.

[14] Nothing was heard from the company until 18 May.

[15] It appears that on 10 May Mr Harris had visited Ven-Lu-Ree, a client of Transpacific's, although not a client with whom Mr Harris had had dealings.

[16] Mr Richardson said Mr Harris would have been aware that the contract with Ven-Lu-Ree was due to expire on 19 May. The company considers he breached clause 7.2 by attempting to solicit business from Ven-Lu-Ree. That Mr Harris would have been aware of the expiry date of the contract is supposition on Mr Richardson's part.

[17] In order for Mr Harris to have breached clause 7.2 he would have had to have dealt with, supervised the company's dealings with Ven-Lu-Ree or acquired confidential information about it in the course of his employment.

[18] In correspondence between the parties' solicitors Mr Harris denied that had breached clause 7.2 and considered clause 7.1 was unenforceable because of the decision of the Employment Court.

[19] In *Green* (supra) at [27] the Employment Court held that clause 7.1 was unreasonable and therefore unenforceable because it purported to prohibit competition per se. As to clause 7.2, the Court held that there was a sufficiently arguable case of reasonableness of the restraints set out therein.

[20] On 20 May Ms Stone stated that Mr Harris was prepared to provide an undertaking that he would not solicit Auckland TPI customers (or actively sought prospective customers of TPI) with whom he had dealt or about whom he had confidential information; and that Smart Environment Ltd was prepared to provide an undertaking in support.

[21] Mr Erickson replied stating that while the Chief Judge had identified the clause as being unreasonable, in his view the concerns could be met by modifying the definition of "*competitor*" in clause 7.1 pursuant to s 8 Illegal Contracts Act 1970 so that it read:

> *"Competitor" is an individual (including you), business, organisation or enterprise that offers services of a similar nature to the services provided by Transpacific (NZ) Ltd, including but not limited to, those services described elsewhere in this Agreement,* ***to customers or prospective customers of Transpacific Industries Group (NZ) Ltd."***

[22] The company did not accept the undertaking and filed proceedings.

[23] On 25 May TPI was given notice of termination by Multi Spares. When Ms Martin visited Multi Spares she was told that Mr Harris had made an offer and left his business card.

[24] On 28 May TPI received a fax from Safco advising that it wished to terminate its contract. When Ms Martin visited Safco she was told that Mr Harris had said that Safco could terminate its contract on a month's notice. Ms Martin said this was incorrect as 60 days' notice was needed. This would tend to indicate that Mr Harris did not have accurate knowledge regarding Safco's contract.

Arguable Case

[25] Mr Erickson submitted that I should not apply the Court's finding of unreasonableness to the circumstances in this case as the particular factual setting needed to be considered. I have taken account of Mr Erickson's submissions. My view is that clause 7.1 is anti-competitive and therefore unreasonable and unenforceable. Even if that were not my view, I would not be persuaded by the applicant's arguments that I could do other than follow the Employment Court's finding.

[26] It is highly unlikely that the applicant would be successful in obtaining a permanent injunction in relation to clause 7.1. In reaching that view I have taken account of the proposed modification of that clause.

[27] I find it difficult to accept that there is a strongly arguable case that Mr Harris breached clause 7.2. The businesses approached by Mr Harris were not businesses that Mr Harris had dealt with. Mr Erickson maintained that it was strongly arguable that Mr Harris had acquired confidential information about those businesses.

[28] TPI did not provide evidence that Mr Harris had acquired such information. There was no evidence from the businesses that he had approached that he had given them information that he could have only obtained from TPI.

[29] While I accept that there is an arguable case, I do not accept that it is strongly arguable and therefore permanent injunctive relief is unlikely.

[30] In reaching this conclusion I have taken cognisance of the argument regarding inadvertent disclosure. The evidence does not show that Mr Harris had information that he could inadvertently disclose; and such information as he may have had would not appear to fall within the ambit of a trade secret.

Balance of Convenience

[31] I accept that establishing liability for financial loss and quantifying this would not be an easy exercise. There may be potential loss of custom or of business relationships as well as loss of particular contracts. Damages would not be an adequate remedy for TPI.

[32] However, TPI does not have a strongly arguable case of breach, so it cannot be said that it is more just that Mr Harris should be restrained by injunction for the relatively short balance of the restraint than that TPI should be required to prove its loss and damages at trial.

[33] The relative inconvenience to Mr Harris if the injunction were granted would not be substantial. He would be prohibited from approaching businesses in the

Auckland region with which he has previously dealt and about which he has confidential information. Mr Harris would be able to work without any prohibition in the Coromandel area, where he has carried out work for SEL. Also, the period of restraint would be short.

[34] The balance of convenience favours neither TPI nor Mr Harris.

Overall Justice

[35] TPI denies that it has unreasonably delayed taking action regarding what is says are breaches by Mr Harris. TPI did not know who the new employer was until the cancellation of the Ven-Lu-Ree contract was brought to its attention in May. Although the company was aware he had gone to work for a competitor it could not be certain that work was being carried out in the Auckland region. Ms Martin had heard he was working for SEL in the Coromandel region. TPI did act on a timely basis in raising its concerns.

[36] Mr Harris complains that he was placed on alternative duties his notice period but he agreed to that and clause 21.3 permits the placing of an employee on alternative duties during the notice period.

[37] Mr Harris asserts that TPI unreasonably rejected his proposed undertakings. TPI says he would not give one regarding clause 7.1 Given the Employment Court's finding regarding that clause it was reasonable of Mr Harris not to make an undertaking to that clause. As to clause 7.2, the applicant says that even after proposing the undertaking Mr Harris continued to make approaches in breach of clause 7.2.

[38] TPI says that his failure to give the identity of his new employer was a breach of the duty of fidelity and the statutory duty of good faith.

[39] Mr Harris would suffer financial and personal distress as he would not be able to meet mortgage payments and SEL would suffer business disruption if Mr Harris were prevented from continuing to look after its existing clients. This would, however, be for a very short period.

[40] Mr Harris says the public interest in allowing competition is served by allowing him to work for SEL.

[41] The fact that the applicant is unlikely to obtain permanent injunctive relief means that the overall justice of the case favours Mr Harris.

[42] I decline to award the injunctive relief sought.

Costs

[43] If the matter proceeds to a substantive hearing (I have indicated that I could accommodate a hearing prior to the expiry of the restraint period) then costs will be reserved pending the substantive determination. If the matter does not proceed to a substantive hearing, costs are reserved and the respondents should file a memorandum within 28 days of the date of this determination, with a memorandum in reply to be filed within 14 days of receipt of the respondents' memorandum.

Dzintra King
Member of the Employment Relations Authority