IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND

[2011] NZERA Auckland 466
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:	19 August 2011	
Determination:	28 October 2011	

DETERMINATION OF THE AUTHORITY

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[1] This is an application for removal of to the Employment Court. The applicant, Transpacific Industries Group (NZ) Limited ("Transpacific") seeks to have the following matters removed:

- The applicant's claim for a declaration and penalties arising out of the first respondent's breaches of an individual employment agreement.
- The applicant's claim for penalties arising out of the second respondent's actions in inciting, instigating, aiding and/or abetting the first respondent's breaches of his individual employment agreement.

[2] The applicant filed a Statement of Problem on 2 May 2011 seeking:

- A permanent injunction preventing the first respondent from working for the second respondent for the period to 7 July 2011.
- Penalties against the first and second respondents.
- An interlocutory injunction preventing the first respondent from working for the second respondent until the substantive resolution of the applicant's claims.

[3] On 21 June the Authority issued a determination finding that the restraint of trade in the first respondent's employment agreement was unlawful and unenforceable: [2011] NZERA Auckland 267.

[4] On 28 June 2011 the applicant filed a removal application and withdrew the substantive claims in relation to the covenant not to compete.

[5] The applicant relies on s 178 (2) (a) Employment Relations Act 2000. It says that an important question of law arises, that being the enforceability of the restrictive covenants set out on the first respondent's individual employment agreement.

[6] The applicant says the question of law is other than incidental. A determination on the issue of enforceability will be decisive in relation to the remaining substantive claims.

[7] In the course of its decision the Authority held at [25] that it was obliged to follow an earlier decision of the Employment Court regarding a provision very similar to clause 7.1 of the first respondent's individual employment agreement. The Court decision was *Green v Transpacific Industries Group (NZ) Limited* [2011] NZEmpC 6.

[8] The applicant submits that in light of the Authority's finding that it considers itself bound by the *Green* case it will almost certainly find against the applicant in relation to the enforceability of clause 7.1.

[9] The applicant wishes to have the Court reconsider the enforceability of clause 7.1 and would therefore challenge any such finding in the Court.

[10] The applicant submits that the likelihood that proceedings will ultimately require determination by the Court has been found to be a factor strongly favouring removal.

[11] The respondents submit that the applicant has failed to identify how or why an important question of law is likely to arise other than incidentally. They say the issue for determination is simply the enforceability of clause 7.1. This is a straightforward interpretation of a contractual term.

[12] The enforceability of the restraint is neither new nor likely to have application beyond its specific facts. The consequences of the answer would not be of major significance to employment law generally.

[13] Either party would be entitled to challenge the decision and removal would deprive the parties of a general right of appeal, which would be inappropriate.

Decision

[14] In *Hanlon v International Educational Foundation (NZ) Inc* [1995] 1 ERNZ 1 at 7:

> *It goes without saying that every question of law that needs to be resolved in the course of deciding a case is important in the sense that the fate of the case may depend upon the way in which the question of law is resolved. That is not enough by itself to render the question of law an important one foe the purposes of [s178]. On the other hand, a question of law will obviously be important if its resolution can affect large numbers of employers or employees or both, or if the consequences of the answer to the question are of major significance to employment law generally.*

[15] The legal principles relevant to the question of law issue in removal applications were summarised in *NZ Tramways and Public Passenger Transport Employees Union v Wellington City Transport Ltd* [2011] NZEmpC 78 at [10]. The applicant has the burden of persuading the Authority that there is an important question of law; and it is necessary to identify the question. It is necessary to decide the importance of the question but not necessary that the question should be difficult or novel.

[16] I accept that the enforceability of a restrictive covenant is a question of law. However, I am not persuaded that it is an important question of law which would permit me to order removal to the Court. A decision on the enforceability of clause 7.1, while determinative of the outcome, does not therefore per se create an important question of law. It will not affect large numbers of employees or employers or be of major significance to employment law generally.

[17] I decline to remove the matter to the Employment Court.

[18] Costs are reserved. Unless the parties wish me to make a costs decision at this stage, it would seem more expedient to determine costs after the substantive matter has been heard.

Dzintra King
Member of the Employment Relations Authority