

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

[2012] NZERA Auckland 188
5329630

BETWEEN	TRANSPACIFIC INDUSTRIES GROUP (NZ) LIMITED Applicant
AND	STEPHEN GREEN First Respondent
AND	SMART ENVIRONMENTAL LIMITED Second Respondent

Member of Authority:	K J Anderson
Representatives:	S Langton, Counsel for Applicant S Green, In person (First Respondent) G Stone, Counsel for Second Respondent
Investigation:	On the papers
Submissions/Replies Received:	28 May 2012 from Applicant 20 April 2010 from First Respondent 4 April 2012 from Second Respondent
Determination:	5 June 2012

DETERMINATION OF THE AUTHORITY

Application for Removal of a Matter to the Employment Court

[1] In a determination issued on 24th December 2010¹ the authority issued an interim injunction requiring Mr Green to comply with terms and conditions of the restraint of trade clause contained in his employment agreement with Transpacific Pacific Industries (NZ) Limited (TPI). Mr Green challenged the determination of the Authority in the Employment Court and in a subsequent judgment² the Court found that clause 7.1 of the restraint of trade provisions in the employment agreement could

¹ AA 529/10, Member Anderson

² *Green v Transpacific Industries Group (NZ) Ltd* [2011] NZEmpC 6, Colgan C. J. (unreported 3 February 2011)

not be enforced against Mr Green; but there was “a sufficiently arguable case of reasonableness” in regard to the restraints set out in clause 7.2 of the agreement.

[2] It was the understanding of the Authority that given that it had been confirmed by the Court that Mr Green was required to adhere to the substance of the restraint provisions in his employment agreement (albeit on an interim basis) for the reasonably short relevant period remaining (approximately five weeks) and hence the parties did not require a substantive determination from the Authority, this was the end of the Authority’s role in this matter.

[3] However notwithstanding the dicta of the Chief Judge,³ arguments about the enforceability of clause 7.1 of the agreement arose in a further matter before the Authority; as it applied to another person employed by TPI (Mr Kaine Harris). In its determination⁴ the Authority member expressed a view that she was bound to follow the earlier decision of the Employment Court in regard to the application of clause 7.1. In regard to the application of clause 7.2 of the employment agreement, the Authority held that there was not a “strongly arguable” case for the injunctive relief sought by TPI. The Authority dismissed a subsequent application to remove the substantive proceedings to the Court.

[4] Upon a challenge to the Court, the decision⁵ was to remove the substantive matter from the Authority to the Court. The Court (among other matters) observed that:

This matter has become a test case about whether clause 7.1 is generally unenforceable. Mr Harris has been chosen by Transpacific as the individual defendant. That is unfortunate for him. While the outcome of a test case may be of wider importance and value to Transpacific, it is of no importance to Mr Harris beyond his own circumstances.

[5] While at the time, following the conclusions of the Court, TPI appeared not to require a substantive determination from the Authority in regard to the *Green* matter, it now seems that following the findings in *Harris*, TPI have some unfinished business with Mr Green (first respondent) and Smart Environmental Limited (second

³ Ibid

⁴ *Transpacific Industries Group (NZ) Ltd v Harris & Ors* [2011] NZERA Auckland 267, Member King, 21 June 2011.

⁵ *Transpacific Industries Group (NZ) Ltd v Harris & Ors* [2012] NZEmpC 17, Couch J. (unreported 9 February 2012)

respondent) as on 29th March 2012, an amended statement of problem and an application for removal to the Court were lodged with the Authority. In regard to the problem lodged with the Authority, TPI seeks the following relief against the first and second respondents:

a. Determinations that:

Either:

i. Clauses 7.1 and 7.2 of the IEA are reasonable and enforceable against the first respondent and that he breached them;

Or:

ii Clauses 7.1 and/or 7.2 are modified pursuant to section 8 of the Illegal Contracts Act 1970 so that they are reasonable and enforceable against the first respondent and a declaration that the first respondent breached the modified clauses;

And:

iii The first respondent breached the duty of fidelity which he owed to the applicant; and

iv The second respondent aided and/or abetted the first respondent's breaches of clauses 7.1 and 7.2 of the IEA and of his duty of fidelity to the applicant.

b. Orders:

i That there is an enquiry into damages suffered by the applicant as a result of the first respondent's breaches of the IEA;

ii That the first respondent pay the maximum penalty of \$10,000 in respect of each of his breaches of the IEA;

iii That the second respondent pay the maximum penalty of \$20,000 in respect of each of the first respondent's breaches of the IEA that the second respondent aided and/or abetted, pursuant to section 134(2) of the Employment Relations Act 2000;

iv That the whole of any penalties recovered against the first and/or second respondent be paid to the applicant pursuant to section 136(2) of the Employment Contracts Act 2000; and

c. Solicitor/client costs

[6] Upon seeking a statement in reply from Mr Green, his response to the Authority (20th April 2012) was that: "*Thank you but I am in the USA and don't care to reply.*" It is unclear if Mr Green is simply visiting the USA or if he is living there.

In a reply received by the Authority on 4th April 2012, Ms Stone informed that Harrison Stone continued to act for Smart Environmental Limited (SEL) but it did not have any instructions to act for Mr Green. Ms Stone informed that having taken instructions from SEL the company did not wish to be heard on the matter of the application for removal to the Court and that SEL will abide by the decision of the Authority in regard to whether removal is appropriate.

The grounds for the removal

[7] The power of the Authority to remove a matter to the Court emanates from s.178 of the Employment Relations Act 2000 (“the Act”) whereby the Authority may order the removal of the matter or any part of it, to the Court, if:

- (a) an important question of law is likely to arise in the matter other than incidentally; or
- (b) the case is of such a nature and of such urgency that it is in the public interest that it be removed immediately to the Court; or
- (c) the Court already has before it proceedings which are between the same parties and which involve the same or similar or related issues; or
- (d) the Authority is of the opinion that in all the circumstances the Court should determine the matter.⁶

[8] The application for removal is made on the ground that: *the Court already has before it proceedings which are between the same parties and which involve the same or similar or related issues.*⁷ A statement of claim, pertaining to the actions against Mr Harris, was lodged with the Employment Court on or about 8th March 2012. Via an affidavit sworn by Ms Philippa McKegg, Corporate Counsel for TPI, the applicant says that it believes that there are overlapping and important questions of law in the Harris and Green proceedings concerning the interpretation and enforceability of clauses 7.1 and 7.2 of the TPI employment agreement, as these provisions applied to Mr Harris and Mr Green

Determination

[9] While the position of the second respondent has been made clear, via its counsel, Ms Stone, I am cognisant that Mr Green is unrepresented at this point in the

⁶ Section 178(2) Employment Relations Act 2000

⁷ Section 178(2)(c)

proceedings. Nonetheless, I am satisfied that given the trail of litigation in this matter, as it has pertained to him, I can reasonably conclude that he is quite familiar with the nature of the proceedings against him and that representation in the Court is most likely to be forthcoming for him in due course. Given the nature and continuity of the matters that are before the Court in relation to the restraint of trade provisions at issue, I conclude that it is appropriate that the proceedings related to Transpacific Industries Group (NZ) Limited v Stephen Green and Smart Environmental Limited should be removed to the Court pursuant to s. 178(2)(c) of the Employment Relations Act 2000. It is so ordered.

Costs: Given the nature of the proceedings related to the application for removal, it is appropriate that costs should lie where they fall. It is so ordered.

K J Anderson
Member of the Employment Relations Authority