IN THE EMPLOYMENT COURT
AUCKLAND

[2012] NZEmpC 17
ARC 96/11

IN THE MATTER OF	an application for special leave for removal of a matter to the Employment Court
BETWEEN	TRANSPACIFIC INDUSTRIES GROUP (NZ) LIMITED Applicant
AND	KAINE HARRIS First Respondent
AND	SMART ENVIRONMENTAL LIMITED Second Respondent

Hearing: 2 February 2012
(Heard at Auckland)

Counsel: Stephen Langton and Alex Chadwick, counsel for the applicant
Gretchen Stone, counsel for the respondents

Judgment: 9 February 2012 at 11:30 AM

JUDGMENT OF JUDGE A A COUCH

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[1] The issue decided in this judgment is whether the Court should order a matter which is currently before the Employment Relations Authority to be removed into the Court for hearing and decision without further investigation by the Authority.

Facts and the history of litigation

[2] Transpacific Industries Group (NZ) Ltd (Transpacific) operates a waste management business. It is one of the largest operators in that field in New Zealand. Mr Harris was employed by Transpacific in Auckland. Clause 7 of their employment agreement was headed "COVENANT NOT TO COMPETE". It contained several paragraphs. Clause 7.1 purported to comprise an agreement that

Mr Harris would not work for any competitor of Transpacific in the Auckland region for a period of three months after he left the employment of Transpacific. Clause 7.2 imposed a restraint on Mr Harris soliciting the business of any customer of Transpacific.

[3] In March 2011, Mr Harris gave Transpacific notice of his resignation. On 11 April 2011, he commenced employment with Smart Environmental Ltd (Smart), which operates a waste management business in competition with Transpacific.

[4] Transpacific applied to the Authority for an interim injunction. It alleged that, by accepting employment with Smart, Mr Harris was in breach of clause 7.1 of the employment agreement. It also alleged that, by actively soliciting business from Transpacific's customers on behalf of Smart, Mr Harris was in breach of clause 7.2.

[5] In addition to that interim relief, Transpacific also sought permanent relief in the form of a declaration that Mr Harris had breached the terms of the employment agreement and penalties for those breaches pursuant to s 134(1) of the Employment Relations Act 2000 (the Act). Transpacific sought to have penalties imposed on Smart pursuant to s 134(2) of the Act.

[6] The background to these claims against Mr Harris was a series of similar claims made against another former employee of Transpacific, Stephen Green. The employment agreement between Transpacific and Mr Green contained provisions identical to those in the agreement with Mr Harris. Mr Green also left Transpacific to work for Smart and Transpacific initiated very similar proceedings in the Authority against him.

[7] The Authority granted an interim injunction requiring Mr Green to comply with the terms of all aspects of clause 7, including clauses 7.1 and 7.2.[1] Mr Green challenged that determination and the matter came before the Chief Judge. Allowing the challenge in part, he decided[2] that an interim injunction should be issued in

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[1] AA 529/10, 24 December 2010.
[2] [2011] NZEmpC 6

reliance on clause 7.2 of the employment agreement but not clause 7.1. His reasons were:

> [26] I now move to the grounds for the claim to injunctive relief. I have concluded that Transpacific has a sufficient arguable case for breach of cl 7.2 of the employment agreement but no arguable case of liability by Mr Green for breach of cl 7.1. In this latter regard I respectfully disagree with a part of the conclusion of the Employment Relations Authority.
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> [27] Clause 7.1 set out earlier in this judgment purports to prohibit Mr Green from engaging in competitive economic activity with Transpacific both for the period of three months following the end of his employment and within the geographic area of the North Island of New Zealand. The effect of cl 7.1 is that all that the company is required to establish is the fact of competition in business. As it stands, cl 7.1 purports to prohibit competition by Mr Green even in respect of customers or potential customers who are or were not customers of Transpacific. Whilst a restraint may be lawful to the extent that it protects reasonably a proprietary interest that the employer has, including in business with its customers, the law does not extend to prohibiting competition alone as cl 7.1 purports to do. Clause 7.1, if it were valid, would prohibit Mr Green from engaging in economic activity (including being an employee of another waste disposal enterprise) if that entity competes for business with Transpacific irrespective of whether there was an actual or had ever been a previous commercial relationship between Transpacific and the potential customer of Mr Green or his new employer. The title to cl 7 of the employment agreement ("COVENANT NOT TO COMPETE") illustrates the misunderstanding of what the law allows and prohibits: competition per se is not able to prohibited. The preamble to that prohibition in cl 7.1 also reinforces its flaw. It expresses Transpacific's concern that it might suffer "serious injury" if Mr Green were to use "the knowledge and skills acquired during your employment with us and apply [them] for the benefit of a competitor of ours". "[K]nowledge and skills acquired" are much broader than proprietary interests in recognised business assets including confidential information about business plans, pricing details, marketing strategies and the like. Knowledge and skills acquired during employment cannot generally be prohibited from being exercised by a former employee. Skills, and indeed much knowledge, are not the property of the former employer. Clause 7.1 of the agreement is very arguably void in contravention of the public policies of competition in commerce and freedom to work.
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> [28] The defendant does, however, have a sufficiently arguable case of reasonableness of the restraints set out in cl 7.2 of the agreement addressing, as they do, the business of "a customer or actively sought prospective customer of the [defendant] with whom you have dealt, whose dealings you have supervised or about whom you have acquired confidential information in the course of employment". Those are proprietary interests that the employer is very arguably entitled to protect by a reasonable restraint.

[8] In its determination of Transpacific's claim for interim relief against Mr Harris,[3] the Authority referred to the Court's decision in *Green*. Later, the Authority said:

> **Arguable Case**
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> [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.
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> [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.
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> [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.
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> [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.
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> [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.

[9] On 28 June 2011, Transpacific made an application to the Authority to remove the substantive proceedings before the Authority to the Court. The Authority dismissed that application.[4]

[10] On 16 December 2011, Transpacific applied to the Court for special leave to have the matter removed to the Court. That application is opposed by Mr Harris and Smart.

Statutory provisions

[3] [2011] NZERA Auckland 267, 21 June 2011.
[4] [2011] NZERA Auckland 466, 28 October 2011.

[11] Section 178 of the Act confers the jurisdiction to remove matters from the Authority to the Court. The relevant parts of that section are:

> **178 Removal to court**
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> (1) The Authority may, on its own motion or on the application of a party to a matter, order the removal of the matter, or any part of it, to the court to hear and determine the matter without the Authority investigating it.
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> (2) The Authority may order the removal of the matter, or any part of it, to the court if—
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> (a) an important question of law is likely to arise in the matter other than incidentally; or
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> (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
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> (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
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> (d) the Authority is of the opinion that in all the circumstances the court should determine the matter.
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> (3) Where the Authority declines to remove any matter on application under subsection (1), or a part of it, to the court, the party applying for the removal may seek the special leave of the court for an order of the court that the matter or part be removed to the court, and in any such case the court must apply the criteria set out in paragraphs (a) to (c) of subsection (2).

Discussion

[12] The case for removal relies on s 178(2)(a) of the Act - that an important question of law is likely to arise in the matter other than incidentally. The principles applicable to such an application have been considered by the Court in a number of cases but a convenient summary may be found in *McAlister v Air New Zealand Ltd*:[5]

> [9] The principles to be applied in such an application were discussed by the Chief Judge in *Hanlon v International Educational Foundation (NZ) Inc*.[6] In summary these are:

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[5] AC 22/05, 11 May 2005.

6 [1995] 1 ERNZ 1.

> 1. An applicant for special leave under s 178 of the Employment Relations Act 2000 carries the burden of persuading the Court that an important question of law is likely to arise in the matter other than incidentally, or the case is of such a nature and of such urgency that the public interest calls for its immediate removal to the Court.
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> 2. It is necessary to identify a question of law arising in the case other than incidentally.
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> 3. It is necessary to decide the importance of the question.
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> 4. It is not necessary that the question should be difficult or novel.
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> 5. The importance of a question of law can be gauged by factors such as whether its resolution can affect large numbers of employers or employees or both. Or the consequences of the answer to the question are of major significance to employment law generally. But importance is a relative matter and has to be measured in relation to the case in which it arises. It will be important if it is decisive of the case or some important aspect of it or strongly influential in bringing about a decision of the case or a material part of it.
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> [10] Even if an important question is likely to arise, the removal of a matter to the Court is discretionary. Factors which have been considered relevant to the exercise of that discretion have been whether any useful purpose would be served by ordering the removal to the Court; whether the case is one which turns on a number of disputed facts which can be more properly dealt with in the Authority; whether the case is of such urgency that it should be dealt with properly in the Employment Relations Authority; and whether this is a case which will inevitably come to the Court by way of a challenge in any event.

[13] Transpacific seeks substantive remedies against Mr Harris in reliance on both clauses 7.1 and 7.2 of the employment agreement. The focus of the current application, however, is on clause 7.1. It is common ground that Mr Harris became employed by Smart within the three month period following the end of his employment by Transpacific. The principal issue regarding clause 7.1, therefore, will be whether it is enforceable. That will involve not only construction of the contractual clause but also issues of public policy. It is undoubtedly a question of law.

[14] Turning to the importance of that question of law, Mr Langton submitted that the answer to it will determine whether Transpacific can have any prospect of enforcing clause 7.1. That must be so. In the sense that it may be decisive of an important part of the case, therefore, it is an important question of law.

[15] The case for Transpacific also relied on evidence that many of its other employees have an identical clause in their employment agreements. In his affidavit, Mr Bonniface, a senior manager within Transpacific, said that there were 1400 such other employees. While it must be highly questionable whether a restraint of competition clause could ever be justified in all of those cases, I accept for present purposes that there are numerous other employees of Transpacific who are potentially in a position comparable to that of Mr Harris. I also accept the evidence of both Mr Boniface and Mr Christian, a director of Smart, that there is a good deal of movement between employers of staff in this industry. In the sense that the substantive decision in this case may affect a substantial number of other employees of Transpacific, it is also an important question.

[16] While Ms Stone accepted that there was a question of law involved in deciding whether clause 7.1 should be enforced against Ms Harris, she submitted that it was incidental and that the issue would largely turn on questions of fact. The irony of this submission, which Ms Stone graciously accepted, is that the best outcome for Mr Harris will be that clause 7.1 is found to be entirely unenforceable as contrary to public policy and that will be a finding of law.

[17] I find that an important question of law will arise in this matter other than incidentally.

[18] I turn then to factors affecting the Court's residual discretion whether or not to order removal. In support of the application for removal, Mr Langton focused on the following passage in paragraph [25] of the Authority's first determination:

> 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.

[19] Mr Langton submitted that this passage amounted to a final conclusion by the Authority that clause 7.1 was unenforceable and that the Authority regarded itself as bound by the construction of clause 7.1 adopted by the Chief Judge in *Green*. That being so, he submitted that Transpacific could not possibly succeed in obtaining

substantive remedies based on clause 7.1 from the Authority. There is force in this submission.

[20] In response, Ms Stone submitted that every restraint of trade provision had to be interpreted and applied in context and was therefore highly fact dependent. Accordingly, she submitted that it was impossible to predict what conclusion the Authority might reach after considering the evidence in a substantive investigation. While those submissions are sound as a matter of general principle, this case seems to be an exception. In the passage relied on by Mr Langton and set out above, the Authority apparently reached a final conclusion about the enforceability of clause 7.1. I note also that in its determination of the application for removal, the Authority confirmed that it regarded itself bound by the Court's decision in *Green*[7] which was that clause 7.1 was "very arguably void".

[21] In his affidavit, Mr Bonniface says that, in order to achieve certainty for the company and its employees, Transpacific wishes to have a fully argued substantive decision on the enforceability of clause 7.1. Mr Langton submitted that this could only be achieved in a forum in which the view expressed by the Chief Judge in *Green* might be challenged. He submitted that this could only be the Court. If the matter did proceed to a substantive determination by the Authority, Mr Langton suggested it would inevitably be challenged.

[22] Ms Stone disagreed. She noted that Transpacific had not pursued the substantive aspects of its claims against Mr Green and had not challenged the Authority's determination on interim relief in this case. She submitted that what this showed was that Transpacific would not necessarily challenge an adverse determination of the substantive issues and favoured the matter remaining before the Authority. In response, Mr Langton said that a challenge on the interim issues would only have produced, at best, two inconsistent interlocutory decisions. He stressed that Transpacific wanted a single substantive decision and had elected to seek it in this case rather than in Mr Green's case.

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[7] At [7] of that determination.

[23] I am satisfied that Transpacific is committed to obtaining a fully reasoned substantive decision by the Court on the enforceability of clause 7.1. That being so, it is obviously more economical for this to be done in one hearing of the matter removed to the Court rather than an investigation meeting and a hearing de novo of a challenge.

[24] Ms Stone properly raised the other side of that proposition which is that removal into the Court would deprive the parties of a "right of appeal". That is undoubtedly correct but, as the Court has observed on previous occasions, that occurs whenever a matter is removed under s 178 and the legislature must have regarded it as an acceptable consequence.

[25] Ms Stone questioned whether there was jurisdiction to remove this matter to the Court in its current state. She noted that s 178(1) conferred jurisdiction on the Authority to remove a matter or part of a matter to the Court "without the Authority investigating it". Ms Stone submitted that, as the Authority had already investigated Transpacific's claim for interim relief, it had begun investigating the matter as a whole. On that basis, she submitted that the jurisdiction conferred by s 178 could not be exercised.

[26] This proposition was discussed by the Judge Colgan in *Auckland District Health Board v X (No 2)*[8] where he said:[9]

> It is significant, in my view, that Parliament did not qualify the right to apply under s 178(1) by use of a phrase such as "before the Authority investigates the matter". Rather, it used the words "without the Authority investigating the matter". Use of that phrase does not fix in time when an application can or cannot be made. Rather, the phrase is intended to convey that a matter removed will not require an Authority investigation or certainly a concluded Authority investigation so that it will, in effect, be heard by the Court at first instance.

[27] I agree. I note also that the situation in that case was the same. An application for interim relief had been determined but investigation of the substantive claims had not begun. The Authority had declined an application for removal and special leave was sought.

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[8] [2005] ERNZ 551
[9] At [21].

Decision

[28] Overall, I am satisfied that the grounds for removal in s 178(2)(a) are made out and that the factors affecting the residual discretion favour removal. Accordingly, there will be an order removing the matter to the Court. I note that the matter to be removed includes Mr Harris' claim for unpaid commission.

[29] Transpacific is directed to file and serve within 20 working days after the date of this judgment a statement of claim complying with regulation 11 of the Employment Court Regulations 2000. The usual period for filing and serving statements of defence will then apply.

Comment

[30] 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. Mr Harris swore an affidavit about the effect on him of the prolonged stress caused by this case and I accept what he says. It is a matter of concern to me that Transpacific have delayed the progress of this case on at least two occasions to date. In the course of the hearing, I sought and obtained from Mr Langton an assurance that there will be no further unnecessary delay by Transpacific.

Costs

[31] Costs are reserved.

A A Couch
Judge

Signed at 3.00pm on 9 February 2012.