

**IN THE EMPLOYMENT RELATIONS AUTHORITY  
AUCKLAND**

[2011] NZERA Auckland 218  
5339566

BETWEEN                      HALLY LABELS LIMITED  
Applicant

AND                              KEVIN POWELL  
Respondent

Member of Authority:      Alastair Dumbleton

Representatives:            Chris Patterson, counsel for Applicant  
Andrew Gallie, counsel for Respondent

Determination  
(On papers):                 23 May 2011

---

**DETERMINATION OF THE AUTHORITY**

---

**Application to remove matter to Court**

[1] Through counsel Mr Patterson and Mr Gallie, the parties have jointly applied under s 178 of the Employment Relations Act 2000 to have a matter removed to the Employment Court for it to be heard and determined without the Authority investigating the matter. The application results from the following situation.

[2] Under an express term of an employment agreement between the applicant Hally Labels Limited and the respondent Mr Kevin Powell, upon termination of their employment relationship Hally had the ability to invoke a provision restraining Mr Powell from becoming involved in any business competing with Hally. That provision was invoked by Hally when Mr Powell resigned on notice in December 2010.

[3] Mr Powell tried unsuccessfully to negotiate a reduction from 12 months to six months in the term of the restraint. In March 2011 he purported to cancel the restraint provision, pursuant to s 7 of the Contractual Remedies Act 1979, and advised Hally that he considered himself no longer bound by the provision. The purported

cancellation was on the ground alleged that Hally had breached a requirement of the restraint provision to provide consideration in return for Mr Powell becoming bound by the provision. Following the purported cancellation Mr Powell commenced employment with Geon Group Ltd, a firm competing in business with Hally.

[4] Hally applied to the Authority at the end of March 2011 for relief or remedies as follows:

- A declaration that Mr Powell's purported cancellation of the restraint pursuant to the Contractual Remedies Act was invalid and of no effect;
- An interim injunction restraining Mr Powell from breaching the restraint provision;
- A permanent injunction restraining Mr Powell from breaching the provision;
- An order, in the event of any breach, that Mr Powell pay damages resulting from his wrongful cancellation of the restraint under the Contractual Remedies Act;
- An order for legal costs against Mr Powell;
- An order requiring Mr Powell to pay a penalty for wilful breach of his employment agreement, pursuant to s 134 of the Employment Relations Act.

[5] Hally's application for an interim injunction was investigated by the Authority and declined in a determination given on 5 May 2011; *Hally Labels Ltd v. Kevin Powell* [2011] NZERA Auckland 181.

[6] The remaining remedies sought by Hally are to be investigated on 26 May 2011, after which a determination will be issued.

[7] Hally challenged *de novo* the Authority's refusal to grant it an interim injunction. After a hearing the Court gave judgment on 13 May 2011 declining the application for an interim injunction; *Hally Labels Ltd v. Kevin Powell* [2011] NZEmpC 43.

[8] The parties jointly applied on 13 May for removal and as they did not wish to be heard in person their application has been considered on the papers.

[9] The application is made on the grounds that important questions of law are likely to arise in the matter set to be investigated by the Authority other than incidentally. Those questions, which have not been previously determined, are:

- (i) *Does the principle (established in Hunt v. Wilson [1978] 2 NZLR 261 and confirmed in Steele v. Serepisos [2006] NZSC 67) that where a contract is silent as to the time of completion of payment there is a requirement under which a party will not be allowed to treat a contract as having come to an end without giving notice stipulating a certain time for performance apply to restraint of trade provisions in employment agreements?*
- (ii) *If consideration is payable for restraint of trade, should the time for that payment impliedly be considered to be an essential term of the agreement?*

[10] I agree with the parties that they are important questions of law and are likely to arise in this matter other than incidentally. Accordingly, the removal application is granted. The entire matter is removed to the Court, for it to be heard and determined without the Authority investigating on 26 May 2011.

A Dumbleton  
**Member of the Employment Relations Authority**