New Zealand Employment Relations Authority Decisions

Transpacific Industries Group Limited v Green (Auckland) [2010] NZERA 971 (24 December 2010)

Last Updated: 22 June 2011

IN THE EMPLOYMENT RELATIONS AUTHORITY AUCKLAND

AA 529/10 5329630

BETWEEN

AND

TRANSPACIFIC INDUSTRIES GROUP
LIMITED
Applicant

STEPHEN GREEN Respondent

Member of Authority: Representatives:

Investigation Meeting: Determination:

K J Anderson

G Bevan, Counsel for Applicant G Stone, Counsel for Respondent

22 December 2010 at Auckland

24 December 2010

DETERMINATION OF THE AUTHORITY

Employment Relationship Problem

[1] By way of an urgent application received by the Authority on 10th December 2010, the applicant, Transpacific Industries Limited ("TPI") seeks an interim injunction preventing the respondent, Mr Stephen Green, from commencing employment with a competitor company, Smart Environmental Limited ("SEL"), in alleged breach of the restraint of trade provisions contained in Mr Green's employment agreement.[1]

[2] In addition to the *Statement of Problem* and *Statement in Reply* from the respective parties, the Authority has received an initial affidavit, a supplementary affidavit and an affidavit in reply, from Mr Dean Brown, Northern Regional Manager of TPI. There is also a further affidavit from Ms Philippa McKegg, Corporate Counsel for TPI. There is an affidavit from Mr Green and a further affidavit in support from

Mr Grahame Christian, the sole shareholder and one of four directors of SEL. As is usual with interim proceedings, the affidavit evidence is considered on the basis that it remains to be placed under closer scrutiny, tested and weighed at a future substantive hearing.

The background to the dispute

[3] According to the first affidavit of Mr Brown, TPI is one of the leading providers of comprehensive waste and environmental services in Australia and New Zealand. The evidence of Mr Brown is that a significant component of TPI's

business is managed under the Transpacific Waste Management brand ("TWM") and that this brand operates the solid waste aspects of TPI's business. TWM also accounts for a significant amount of TPI's revenue and profit. Mr Brown says that competition in the solid waste industry is particularly aggressive.

[4] Mr Green commenced employment with TPI in the role of Business Development Manager, Auckland, on 19th April 2010. Mr Green worked from the Penrose office in Auckland. He reported to Mr Gary Richardson, the Northern Regional Sales Manager.

[5] The terms and conditions of Mr Green's employment are provided for by an employment agreement. The copy provided to the Authority is not signed but the parties accept that it applies. The relevant clauses of the employment agreement for the purposes of the matters before the Authority are:

6. CONFIDENTIALITY

6.1 As a member of our staff, you may have access to confidential information.

6.1.1 Confidential information refers to all non-public information about Transpacific Industries, its parent, subsidiaries and affiliates. It includes, without limitation, information about our costs, profit margins, markets, sales, technical processes, trade secrets, business contacts, customer details, waste acceptance policies, plans and business strategies.

6.2 You understand that if such confidential information were to be disclosed it could result in serious and irreparable financial harm to the Employer. You therefore agree that you will keep secret all confidential information. You will not disclose confidential information to anyone outside the Company during or after the term of this Employment Agreement.

6.3 Upon termination of employment, if so requested by the Employer, the Employee shall provide to the Employer a comprehensive and accurate written report of the position of all matters relating to the Employee's employment, including the matters or projects upon which the Employee is working at the time of termination, the state of development of such matters or projects, any current problems which have arisen in relation to the matters or projects, any efforts undertaken by the Employee to solve such problems and all other information as may be required by the Employer.

6.4 Upon termination of employment, or at any time during the course of the Employee's employment, at the request of the Employer, the Employee must immediately return all Company property that may be in the Employee's possession, including, but not limited to such items as uniforms, mobile phones, lap top computers, company files, confidential information, fuel card etc,

6.5

7. COVENANT NOT TO COMPETE

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 then 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.

Set out in Schedule C is:

Period and Area of Restraint
The area and its corresponding period of restraint referred to in Section 7 of this agreement is as follows:

Relevant Area:
New Zealand, North Island
Relevant Period:
3 months

Then at subclause 7.1 there is a definition of "Competitor" and "directly and indirectly." Then following is:

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

7.7

21. TERMINATION AND SUSPENSION

21.1 You may cancel this Employment Agreement, with or without cause, upon providing the period of written notice to us as specified in Schedule C[2], or in lieu thereof the equivalent period of salary shall be forfeited or paid by you.

21.2 On receiving notice of termination we may, at our sole discretion, elect to pay the equivalent salary in lieu of notice for all or any part of the remaining part of the notice period specified in Schedule C.

21.3 At our discretion we may suspend you from the performance of all or any of your duties or for such periods of time as we consider expedient, including a term that you are excluded from all or any of our premises, and/or that we will not assign you any duties or provide you with any work, and/or that you will have no contact with any of our suppliers, distributors, customers or employees.

21.3.1 If we invoke clause 21.3 then unless and until your employment is terminated under this Agreement:

- your remuneration will not cease to be payable by reason only of the suspension or exclusion from work;
- the employment relationship will continue; and
- you will continue to be bound by this agreement.

Mr Green's resignation

[6] On 3rd November 2010 Mr Brown became aware (via Mr Richardson) that it was necessary to meet with Mr Green as Mr Richardson had become aware that Mr Green was reconsidering his position and possible further career options within TPI. A meeting took place on 12th November 2010 with Mr Brown, Mr Richardson and Mr Green involved. At this meeting Mr Green informed that he had been offered a role with a competitor that was "too good to pass up."

[7] On 16th November 2010 Mr Green emailed his resignation and a meeting took place between Mr Green and Mr Richardson at 2:30p.m. that day to discuss the circumstances. Also present was Ms Fiona Mackenzie (Senior Human Resources Advisor) who took notes. Mr Green confirmed that he was going to work for SEL as the Northern Area Manager. The notes of the meeting record that Mr Green confirmed that he was aware of the restraint provisions in his employment agreement and he enquired if the restraint period of three months commenced immediately or at the end of the notice period (16th December 2010). It was confirmed by Mr Richardson that the three month period would commence at the end of the notice period and would apply until 16th March 2010. Mr Green was advised that he was not required to attend work for the one month (paid) notice period but he needed to be available if required. Effectively, Mr Green was placed on what is commonly referred to as "garden leave." A handover process relating to Mr Green's work was agreed. The restraint provisions contained in Mr Green's employment agreement were discussed. Mr Green expressed his dissatisfaction that TPI had not met his expectations in regard to the commission scheme that had been discussed with him when he commenced his employment and this was part of the reasons why he was leaving. Mr Green also expressed his concern at the restraint provisions and that he would, as a result, be without income for three months.

Post-resignation
[8] The evidence of Mr Brown is that in late November 2010 he became aware (via a former director of SEL) that Mr Green had begun working for SEL and that Mr

Green had the use of a cell phone that had previously been used by another employee of SEL. Mr Green acknowledges that upon accepting employment with SEL he was given "an old" cell phone to use in the event that SEL wished to make contact with him and he did not feel comfortable with using the TPI cell phone as he no longer worked for them.

[9] Subsequently, as a result of concerns about Mr Green's actions, the lawyers for TPI wrote to Mr Green on 2nd December 2010. Mr Green was informed that TPI had concerns that Mr Green was breaching the duties that he owed TPI as an employee and that TPI believed that Mr Green intended to breach the restraint of trade provisions of his employment agreement. TPI also requested Mr Green to attend a meeting on 9th December 2010 and he was "required" (by 7th December) to provide details of any contact that he may have had with SEL during the garden leave period as well as any contact that he may have had with actual or potential customers of TPI or SEL. Mr Green was also requested to provide his understanding of the restraint provisions of his employment agreement. He was also informed that TPI was preparing injunction proceedings. However, if Mr Green was prepared to comply with his "contractual obligations" and provide undertaking that are acceptable, TPI was prepared to resolve matters on the basis of such undertakings.

[10] Upon the receipt of the above letter Mr Green obtained legal advice and on the basis of this advice, he cancelled his employment agreement via an email dated 10th December 2010. The email advises TPI that Mr Green wished to cancel his employment agreement on the basis that "there have been fundamental breaches of the [employment] agreement" because (in essence):

1. TPI failed to allow him to participate in a performance based commission scheme or incentive compensation scheme as provided at schedule C of the agreement; and
2. TPI had placed him on garden leave for the period 16th November to 16th December 2010 without any contractual right to do so.

Mr Green concluded his email by informing that it was his understanding that due to the cancellation of his employment agreement, the obligations (including the restraint provisions), "have no application."[11] On 14th December 2010 TPI responded in writing informing that TPI did not accept that Mr Green had any grounds to "effect the legal cancellation" of his employment agreement. Nonetheless, TPI accepted that there is a cancellation under clause 21.1 of the employment agreement whereby Mr Green is required to give one month's notice of such cancellation and given that the appropriate period had not been adhered to, Mr Green was required to forfeit the appropriate amount of salary for the reduced period of notice given.

[12] On 16th December 2010 Mr Green provided a statutory declaration in regard to undertakings in respect of his employment with SEL. He declared that in the course of his employment with SEL, he would not:

1. Work within the Auckland Metropolitan area;
2. Solicit or accept any business from any prospective clients of TPI;
3. Solicit or accept any business from any prospective clients of TPI (as identified in the list prepared during the handover process); or
4. Solicit, divert or hire (or attempt to do so) any employee of TPI.

[13] In a letter dated 21st December 2010, to Mr Green's lawyer , TPI informed that the undertakings provided by Mr Green are unacceptable, particularly because:

(a) The nature of the information accessible by Mr Green, as Business Development Manager, is of national significance; and
(b) The scope and nature of Mr Green's position necessitated significant involvement outside the Auckland region.

TPI also informed that Mr Green was well aware of his contractual obligations while still employed (on garden leave) but he seemed to consider it appropriate to continue to be paid by TPI while simultaneously learning about and spending time with SEL people, directing SEL phone calls to appropriate SEL staff and; based on a phone call to Ms McKegg, returning calls to an SEL mobile phone.

[14] The company now seeks that the Authority issues an interim injunction restraining Mr Green until 10 March 2011[3] from:

(a) working either directly or indirectly for a competitor[4] (as defined by his employment agreement) in the North Island of New Zealand; and

(b) approaching or soliciting, or in any way assisting another person to approach or solicit, business from any customers, who to his knowledge, were customers of TPI in the twelve months prior to 10th December 2010.

The Legal Principles

[15] TPI has the onus of proving, on the balance of probabilities, that the terms of the restraint are reasonable and that it goes no further than is reasonably necessary to protect its interests. It is also recognised that restraints of trade in employment agreements are prima facie unlawful and therefore void because they interfere with the freedom to work.

[16] The law regarding interim injunction proceedings and the matters that the Authority must examine is well established: [5]

(a) Is there an arguable case?
(b) If so, is there an adequate alternative remedy available to the applicant, for example; damages?
(c) If not, where does the balance of convenience lie?
(d) What is the overall justice of the case?

[17] In respect to contractual restraints of trade, there is probably no better summary than the twenty seven propositions set out by Chief Judge Goddard in *Airgas Compressor Specialists v Bryant* [1998] NZEmpC 45; [1998] 2 ERNZ 42 at 53-55. In regard to the circumstances of this matter, the following are particularly relevant:

(1) A covenant in restraint of trade in an employment contract is void as being contrary to the public interest and being void, is incapable of being enforced unless one of two conditions is satisfied.
(2) First, a covenant in restraint of trade can be enforced if it is found to be reasonable as between the parties and with reference to the public interest.
(3) Secondly, such a covenant (although unreasonable) is capable of being enforced if the [Authority] is prepared under the Illegal Contracts Act 1970,[6] to give effect to the contract of which the restraint is a part after so modifying the restraint that it would have been reasonable when the contract was entered into. However, modifying and giving effect to the contract is not the only option that the [Authority] has to consider. It may also:

(i) Delete the provision and give effect to the contract as so amended; or

(ii) Where the deletion or modification of the provision would so alter the bargain between the parties that it would be unreasonable to allow the contract to stand, decline to enforce the contract.

(4) To determine whether a covenant is reasonable with reference to the interests to the parties, several questions must be asked. First, does the employer have a proprietary interest which is entitled to protection or is the covenant merely an attempt to limit or reduce competition? Secondly, are the duration, geographical ambit and scope too broad? Thirdly, is the covenant prohibitive of competition generally, or is it limited to proscribing the solicitation of clients of the employer? Fourthly, is the net cast wide or confined to a named competitor or reasonably compact class of competitors?
(5) The employer may possess a proprietary interest in trade secrets, confidential information, and its business and trade connections. The employer is entitled to protect its business connection - that is, to prevent the departing employee from enticing its clients or customers. These are the most obvious but not the only examples of legitimate proprietary interest.

(8) The permissible area and duration of the restraint will vary according to the circumstances of each case, and no generalisations are possible.
(9) The nature and extent of the employer's business, the nature of the employee's employment in it, and the range of business activities covered by the covenant should be considered together when examining the time and spatial limits of the covenant. The protection afforded the employer must be no more than adequate for the purpose.

(17) The party relying on a restrictive covenant must establish its reasonableness as between the parties. Once this is achieved the onus of proving that the covenant is contrary to the public interest rests on the party attacking the covenant.

Is there an arguable case?

[18] On the evidence currently before the Authority, it appears that TPI has a prima facie arguable case. This is particularly so because Mr Green has acknowledged that he has accepted employment with SEL (a competitor with TPI) and that he wishes to commence that employment on 10th January 2011. Mr Christian, SEL, has attested in his affidavit that SEL is a "very small player" in the waste management industry in New Zealand. But Mr Brown, for TPI, says that while SEL is a smaller competitor, because it has lower costs and lower margins it is able to move in and pick out business from TPI "fairly easily."

[19] Notwithstanding that further and substantive examination of the matters going to the enforceability of the restraint provisions of the agreement is required, the forceful reality is, that Mr Green is shortly due to take up his employment with SEL, despite the incontrovertible fact that his employment agreement contains a restraint that has not been tested as to its enforceability. Therefore, Mr Green is prima facieabout to breach subclause 7.1 of his employment agreement, whereby he has agreed not to work, directly or indirectly, for a competitor of TPI for a period of three months. And upon the evidence before the Authority, there is a very real concern on the part of TPI that Mr Green will, if not purposely, then inadvertently, provide SEL with information that will increase its competitive edge with consequent damage to the business interests of TPI.

[20] In response to the concerns of TPI, the general tenor of Mr Green's evidence is that he does not have sufficient knowledge of the overall operation of the business of TPI to such degree, that should he even inadvertently impart to SEL what he does know, it is unlikely to assist their competitive aspirations. In a similar vein, Mr Christian attests that while Mr Green would work for SEL as the Northern Regional Manager, there is "no interest in what little information" Mr Green may recall from his short period of employment with TPI. But this response is questionable given that Mr Green informed Mr Richardson that SEL offered him a salary increase of $60,000 to work for them.[7] Mr Green was only employed by TPI for approximately

eight months. Nonetheless, the evidence of Mr Brown is that Mr Green was involved at a significant strategic level, particularly in more recent times.

An Arguable Case - The Enforceability of the Restraint of Trade

[21] Clearly, if the Authority is to restrain Mr Green, on an interim basis, as sought by TPI, the onus is upon TPI to show, at least to the level that an arguable case is established, that the restraint of trade provision is reasonable. In determining the reasonableness of the restraint, as it pertains to the interests of both parties, a number of questions must be asked:

1. **Does TPI have a proprietary interest which is entitled to protection?**
In *Airgas*[8] the Employment Court held that an employer may possess a proprietary interest in trade secrets, confidential information and its business or trade connections. Apart from the evidence of Mr Brown, it is reasonable to conclude that as a substantial business operating in a competitive environment, requiring strategic decision making and a high degree of business management, TPI has all of the necessary components of a proprietary interest that can be protected under the restraint of trade. There is a conflict in the evidence (which remains to be tested) from Mr Brown and Mr Green, as to how much knowledge Mr Green has of the information pertaining to those matters which TPI regards as key to its business and which it wishes to protect from its competitors. However, I accept that Mr Green held a reasonably senior position and that he, more probably than not, had access to and was responsible for, various matters pertaining to sales strategy and obtaining business for TPI. In particular, TPI are concerned about Mr Green's knowledge of and involvement in "Project Broadsheet" a project involving the development of a specific new market retention and growth strategy. Mr Brown says that the strategy is unique in the industry and will not be implemented until the second quarter of next year. Mr Brown says that Mr Green was one of a small team that met on Monday of each week and that discussions within the team were "highly confidential" and strategic, with sensitivity being emphasised; with the Managing Director of TPI having an active interest. Conversely, Mr Green says that while he attended these meeting he had no input and nor did he take away anything. Mr Green says that he is "struggling" to recall what Mr Brown is referring to. Further, Mr Green says that he has his own way of doing things and he brought his own skills and knowledge to TPI and that his achievements are based on his particular expertise in logistics hence there is nothing that he learned at TPI that he could or would use with SEL.

[22] However, even taking into account those areas, where the evidence as to Mr Green's knowledge of the strategies and operations of TPI is concerned is in conflict, and subject to testing (in a substantive hearing), I conclude that the weight of the evidence is, that Mr Green was more closely involved in the sales and customer retention strategies of TPI than he is prepared to acknowledge.

[23] I conclude that not only does TPI have a proprietary interest that it is entitled to protect under a restraint of trade, but also, Mr Green had a sufficient involvement in the operations of the business to warrant the restraint being included in his employment agreement, to which he appears to have willingly agreed .

2. **Is the geographical ambit of the restraint reasonable?**
[24] The geographical ambit of the restraint is for the North Island of New Zealand. The evidence of Mr Brown is that TPI has branches spread throughout the North Island, namely: Kerikeri, Auckland, Whanganui, Tauranga, Hamilton, Rotorua,

Napier, Taranaki, Palmerston North and Wellington. Mr Brown also attests to Mr Green's involvement and association with "key national accounts" namely: Greenstone Energy (Shell Service Stations), Fonterra and Infratil, albeit Mr Brown was only able to identify the involvement of Mr Green with Fonterra accounts in Auckland at Takanini and Tip Top (Mt Wellington) and there was a mention of a meeting at Matamata. Conversely, Mr Green points to his position title: Business Development Manager - Auckland and that he reported to the Sales Manager -Auckland. In essence, while Mr Green acknowledges that there was involvement with national clients, it was minimal. Mr Green also attests that if he was involved at a national level he would have been located with the National Sales Group which is located at Mt Wellington, rather than him being located at Penrose. However, Mr Brown points to an email dated 13th October 2010 where Mr Green is identified as the Business Development Manager, Transpacific Industries Group, 86 Lunn Ave, Mt Wellington. There is a further email dated 19th October 2010 from Mr Green to Mr Richardson with the same information as to Mr Green's title and location. Mr Brown also says that Mr Green had aspirations to be involved more on a national level as evidenced by a meeting with Ms Judi Burgess on 9th November 2010.

[25] While the overall involvement of Mr Green in TPI's North Island sales strategies remains to be tested in a substantive hearing, it seems to me that at the time that Mr Green entered into the employment agreement, and subsequently, it was intended by both parties that he would have more exposure to the business of TPI throughout the North Island and possibly on a national basis. Indeed, if Mr Green had remained employed by TPI, I believe that it is more probable than not that he would have had a more active role throughout the North Island and possibly with national accounts. In summary, given the geographical spread of TPI's business, I find that the North Island ambit is reasonable and I am not inclined to modify that provision of the restraint pursuant to the Illegal Contracts Act 1970.

3. **Is the term of the restraint reasonable?**
[26] While Mr Green appears to accept that the three month term of the restraint is reasonable, for completeness I record that

I find that such term is reasonable.

[27] There is one other matter that has been argued for Mr Green and while it has been raised in the form of a counter-claim, which I believe is inappropriate give the interim nature of the proceedings I accept that it is a matter that can be addressed within the arguable case ambit. As set out earlier in this determination, Mr Green cancelled his employment agreement, citing that the agreement had been breached by TPI on two grounds. Firstly, that TPI failed to allow him to participate in a performance based payment scheme as provided within Schedule C of the agreement, and that it was a breach of the express and implied terms of the agreement when TPI placed Mr Green on garden leave and effectively withdrew all work from him. In essence the argument advanced for Mr Green is that because he cancelled the employment agreement and TPI accepted the cancellation, the agreement as a whole becomes void, including the restraint provisions.

[28] While this is a novel argument I do not accept it. Apart from the fact that TPI do not accept that there were grounds for Mr Green to cancel the agreement and only sought to draw the attention of Mr Green to his notice obligations under clause 21.1 of the agreement and the forfeiture provision, I find that the provisions of clause 21.3 of the agreement are sufficiently broad to allow TPI to place Mr Green on garden leave, given his stated intention to take up employment with a competitor. And in any event, it is a commonly accepted practice in such circumstances for employees, such as Mr Green, to be placed on paid garden leave for the for the duration of a period of notice.

[29] In regard to the matter of the commission scheme, the evidence for TPI is that Mr Green was paid an interim quarterly bonus payment. But in any event, the overall evidence is inconclusive as to what payments Mr Green might have been entitled to. That is something that perhaps remains to be argued on another day. It is enough for me to conclude that the employment agreement remains intact for the purposes of these interim proceedings.

4. **Was there adequate consideration for the restraint?**
[30] The matter of consideration for the restraint is not contested by Mr Green and it appears to be acknowledged that given the findings of the Court of Appeal in *Fuel*
Expresso Ltd v Hsieh [2007] 3 ERNZ 60, the salary level of Mr Green satisfies the consideration criteria.

Arguable case summary
[31] On the basis of the above findings, I find that the restraint of trade is reasonable and that TPI has established to a sufficient degree that there is an arguable case for enforcing the restraint.

Is there an alternative remedy available?

[32] Having found that there is an arguable case the question then arises as to whether there is another remedy available to TPI other than restraining Mr Green as sought. Given that Mr Green has not yet taken up his employment with SEL it is not possible to identify any damages that may be incurred by TPI in anticipation of the predicted breach by Mr Green of the restraint provisions of his employment agreement. However, given the seriousness with which TPI appear to view the consequences for the company related to the potential loss of business due to the impending departure of Mr Green to a competitor, it can reasonably be assumed that it would be beyond the financial means of Mr Green to repair in the form of monetary damages, hence I must conclude that there is not an alternative remedy available to

TPI.

Where does the balance of convenience lie?

[33] Any assessment of the balance of convenience must weigh up the respective hardships that may arise if the interim relief sought by TPI is granted or not. It has been submitted for TPI that if the restraint is not enforced, it will suffer loss in respect of which it will not be adequately compensated for by an award of damages. And even if Mr Green is eventually found to have contributed substantively to any damages (which are notoriously difficult to identify[9]), by the imparting of his knowledge of TPI's strategic information, even inadvertently, to SEL, it is unlikely he will be able to pay for any such damage. On the other hand, TPI has provided an undertaking as to any damages that may be warranted following a substantive hearing of the matters at issue, and as a substantial company, it is able to pay these.

[34] Mr Green has attested to his financial situation and the consequences for him if the restraint were to be enforced and he is unable to work for SEL. I accept that thisis a particularly compelling factor and if it was just about the respective resources of the parties, the balance of convenience must favour Mr Green. However, I must also take into account that he has made a conscious decision to commit a prima facie breach of the restraint provision of his employment agreement by taking up employment with SEL. And whether deliberately or inadvertently, he imparts knowledge to SEL that has the potential to damage the business interests of TPI and the opportunity for it to obtain redress is problematic. In the round, I find that the balance of convenience is marginal either way.

What is the overall justice of the case?

[35] The remedy of injunction is discretionary and so at this point the Authority must stand back from the overall detail of the

tests of arguable case and balance of convenience and assess whether the overall justice of the case warrants the making of the injunction sought.[10]

[36] Mr Green draws attention to the confidentiality clause in the agreement (clause 6) and the undertakings that he has given. As I understand it, his position is that this should give TPI all the protection it needs. At first glance this appears to be a reasonable argument. However, TPI says that clause 6 and/or the undertakings that Mr Green has given, do not provide it with sufficient protection against the potential damage that might flow from Mr Green being employed by SEL during the restraint period. The experience of the Authority is that it is difficult to quantify actual damage in such cases and then to recover such, hence I must accept that there is some merit in TPI's arguments also, albeit at this point in the proceedings all potential actions and effects are speculative.

[37] Finally, in regard to the overall justice of the case, I am cognisant of the findings of the Court of Appeal in *Fuel Expresso[11]* in regard to the enforceability of a restraint of trade. Having found that the restraint was "plainly reasonable" the Court went on to state that:

Agreements are made to be kept. Mr Hsieh was employed and trained, but then left in the face of a clear contractual provision preventing him from doing what he has done.

In the absence of an interim injunction, any relief to Fuel will, in the time-honoured phrase, be nugatory. This is a clear case for an interlocutory injunction.

[38] And so it is with Mr Green, I conclude. He leaves the employment of TPI "in the face of a clear contractual provision" preventing him from doing what he intends to do. Perhaps he relied on advice from various sources that there would not be any serious consequences by doing so because the restraint could not be enforced in total. Whether it was a calculated gamble by Mr Green that the restraint was not totally enforceable and hence he would be secure in taking up employment with SEL, I do not know, but if this is so, it seems to me that it was rather foolhardy for him to take such a gamble without putting the enforceability of the restraint to the test. An avenue was available to him via s.161 of the Employment Relations Act 2000 to do so, prior to giving notice of his intention to leave his employment with TPI.

[39] Looking at the overall justice of the case, I conclude that it is both just and equitable to grant the interim order

Order of the Authority

[40] I have found the evidence going to the applicable legal tests is, on balance, established to a sufficient degree that an interim order is appropriate. It is the order of the Authority that Mr Green must, from the date of this determination, adhere to the terms and conditions of the restraint provisions as set out in clause 7 and Schedule C of the employment agreement until the 10th of March 2011, or until such time as a substantive investigation meeting is held and a final determination is issued, whichever is the earliest; or such other time as the Authority may order upon the application of the parties.

Costs: Costs are reserved pending a final determination on the substantive matter.

K J Anderson

Member of the Employment Relations Authority

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[1] The parties attended urgent mediation but were unable to reach a resolution.
[2] The period of notice is one month.
[3] Which is 3 months from the date of Mr Green cancelling his employment agreement.
[4] Including Smart Environmental Limited.
[5] *Airgas Compressor Specialists v Bryant* [1998] NZEmpC 45; [1998] 2 ERNZ 42.
[6] Via s.162(f) of the Employment Relations Act 2000.
[7] If this is correct the new salary level for Mr Green would be $180,000.
[8] [1998] NZEmpC 45; [1998] 2 ERNZ 42.
[9] Credit Consultants Debt Services v Wilson [2007] ERNZ 252.
[10] *Century Yuasa Batteries (NZ) Ltd v Johnson* 11 November 2004, unreported, Colgan J, AC 65/04.
[11] Ibid
