Determination Number: CA 107/06
File Number: CEA 266/05

Under the Employment Relations Act 2000

BEFORE THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH OFFICE

BETWEEN	Strait Freight Limited (Applicant)
AND	Daryl John Shackleton (First Respondent) **AND** Angela Elizabeth Harwood (Second Respondent) **AND** South Tranz Limited (Third Respondent)
REPRESENTATIVES	Peter Barrett, Advocate for Applicant Simon England, Counsel for Second Respondent Simon England, Counsel for First Respondent Simon England, Counsel for Third Respondent
MEMBER OF AUTHORITY	Paul Montgomery
INVESTIGATION MEETING	27 October 2005
DATE OF DETERMINATION	24 July 2006

DETERMINATION OF THE AUTHORITY

Employment relationship problem

[1] The applicant, the former employer of Mr Shackleton and Ms Harwood, seeks a compliance order requiring the respondents and their company, South Tranz Limited, to comply with a record of settlement signed by the parties on 14 February 2005. Further, it seeks an order that the respondents account for all profits earned as a result of the alleged breaches of the restraint of trade clause in the individual employment agreements, or to pay compensation to the applicant for losses suffered, and an order that the respondents pay penalties for the alleged breaches of the restraint of trade. The applicant also seeks costs.

[2] The respondents deny they are in breach of the terms of their employment agreements and the terms of the settlement signed on 14 February 2005. Accordingly, they have declined to meet the remedies sought.

[3] The parties attended mediation in mid-June 2005 to resolve their differences and it appeared they had succeeded. Alas, not so. The present dispute centres on clause 5 of the record of settlement. It reads –

> *The respondents are to be subject to a restraint of trade for the period of two years commencing 18 January 2005 worded as follows:*
>
> *For a period of two years commencing 18 January 2005 the respondents and/or the respondents' group of companies, either alone or with others, or as manager, agent, director, shareholder or employee shall not:*

(1) be interested in any business of line haul transport, chilled transport or the carriage of general freight in competition with the applicant or the applicant's group of companies; and shall not

(2) solicit contracts for line haul transport, chilled transport or the carriage of general freight from customers of the applicant or the applicant's group of companies.

PROVIDED THAT the respondents and/or the respondents' group of companies may:

(1) transport, on behalf of any person, stock, logs, other bulk produce or any other product which any employee manufactures and carts on their own behalf; and may

(2) undertake any king pin towing work in an owner/driver and/or subcontractor capacity for any third party other than work involving the transport of chilled or frozen freight and other than work for the following named third parties:

- *Road Freighters*
- *Super Freight*
- *ECL (Express Cargo Logistics)*
- *FliAway*
- *Turner's Transport*

in the period in question.

The parties specifically acknowledge that subparagraph (2) of the proviso contained in the restraint of trade, which allows the respondents to complete king pin towing work in an owner/ driver and/or subcontractor capacity (potentially in competition with the applicant) has been included to allow the respondents to operate four trucks. The respondents acknowledge that they shall not, during the restraint of trade period, operate more than four trucks in competition with the applicant in reliance on the rights provided by subparagraph (2) of the proviso.

By way of clarification the respondents may have as many trucks as they wish undertaking the operations described in subparagraph (1) of the proviso but may only use four trucks to undertake the operations allowed by subparagraph (2) of the proviso.

…

(6) For the sake of clarification the parties confirm that the restraint above does not prevent the respondents from:

(i) completing owner/driver and/or subcontractor work with TNL on the Nelson/Christchurch route; and

(ii) completing owner/driver and/or subcontractor work with Four D Freight within the South Island; and

(iii) *completing bread delivery work in the central North Island.*"

A brief history

[4] The personal respondents operated companies involved in transportation of goods. Those companies were South Tranz Limited, Tranz Freight Limited and Bulk Freight Limited. In September 2003 an approach was made to Mr Shackleton, a director and shareholder in all three companies, by Mr John Cullen, a director of the applicant company, Strait Freight Limited, who expressed interest in purchasing the trucks owned by Tranz Freight and Bulk Freight. Accord was reached and a sale and purchase agreement was signed by both parties.

[5] This agreement included a restraint of trade relating to the South Tranz trucks. However, as both Mr Shackleton and Ms Harwood were offered, and accepted, employment with the applicant company, their employment agreements were to include, and in fact did include, a restraint of trade clause in the event that either left the employment of the applicant company. The restraint clause in each of the employment agreements reads as follows –

29. ***Restraint of trade***

29.1 During the five years from the date of this agreement (regardless of whether the employee is employed by the employer or not), the employee shall not either alone or with others, nor as manager, agent, director, shareholder or employee be interested in any business of line haul, king pin towing, chilled transport or general freight in competition with the employer or the employer's group of companies.

29.2 The restraint in clause 29.1 shall not govern the contracting of T904 to Transport Line Haul Limited, but no other exceptions or waivers shall be granted.

29.3 *The employee acknowledges that the above restraint is reasonable and necessary to protect the assets of Tranz Freight Limited and Bulk Freight Limited which have been purchased or transferred to the employer and the employer's group of companies.*

[6] The two individual employment agreements were signed by the respondents and returned by the respondents' solicitor accompanied by a letter dated 25 May 2003. In that letter Mr Winkelmann sought confirmation that –

(1) The restraint of trade did not include operations in respect of stock, logs or other bulk produce or any other products which the employee manufactures and carts on their own behalf;

(2) Owner/drivers' positions with the likes of Main Freight, TNL, Lynfox etc were also excluded.

(3) *Confirmation that it was agreed that the restraint of trade would only apply provided the two tractor units operated by South Tranz were contracted to Tranz Freight 2004 Limited (or an affiliated company) during the five year period and that if for some reason Tranz Freight 2004 Limited terminates that contract then the restraint of trade will also terminate.*

[7] Two days later Mr Barrett wrote to Mr Winkelmann and advised in respect to the restraint of trade –

> *Our clients accept that the restraint of trade does not include operations in respect of stock, logs or other bulk produce or any other products which any employee manufactures and carts on their own behalf. Our clients also agree that the length of the restraint of trade will only apply provided the two tractor units operated by South Tranz Limited are contracted to Tranz Freight 2004 Limited (or any affiliated company) during the five year period provided, of course, that your client does not cancel the contract. However, as your client well knows, the term "king pin towing" covers any owner/driver position with the likes of Main Freight, TNL, Lynfox, etc. The restraint of trade was, not surprisingly, an integral part of the purchase agreement to prevent your clients undertaking work in direct competition with our client. Our client cannot compromise any more.*

[8] Following ongoing difficulties between the parties Mr Shackleton resigned from the applicant company on 8 June 2004 giving four weeks' notice. Ms Harwood gave notice of her resignation on 13 November 2004 effective on 17 December 2004.

[9] The applicant lodged an application for injunctive relief against Mr Shackleton and Ms Harwood in respect of the above matters. The Authority held its investigation meeting on 13 December 2004, releasing its determination on 17 December 2004. The determination resulted in an order being made in respect to Mr Shackleton but not to Ms Harwood.

[10] The parties were directed to mediation which took place on 18 January 2005 and on 14 February 2005. The parties reached agreement and signed a record of settlement. The relevant section of that document is quoted above.

[11] Central to the issue is the use of the term "king pin towing". The respondents' position was that the term was redundant and/or unnecessary in the record of settlement and referred to articulated towing of any type. The applicant's position is that the phrase is slang in the transport industry for a particular type of articulated towing. Mr Cullen said in his evidence –

> *King pin towing occurs when an owner/driver exclusively tows a transport company's freight on a round trip basis. The transport company is responsible for loading and unloading the freight, thus leaving the owner/driver to solely cart the trailers from one of the transport company's depots to another. The owner/driver may not consolidate freight from other organisations, and the transport company pays the owner/driver a rate based on the distance travelled regardless of the freight's cubic volume or tonnage.*

[12] Having considered the matter at some length and consulted others on the matter, I accept that the term is slang for articulated towing under the specific conditions set out in Mr Cullen's evidence.

Analysis and discussion

[13] At the crux of this matter now before the Authority is the applicant's evidence that the respondents honoured the terms of settlement until Strait Freight paid the $40,000 due to the respondents in accordance with clause 8 of the record of settlement. After that payment, the applicant says it received information that the respondents were undertaking consolidated freight cartage work for TNL on the Auckland to Wellington route, and for Regal South Island Limited on the Christchurch to Wellington route. The applicant conceded that upon checking with the latter

company, that company had not had South Tranz carry its freight and had no intention to have it do so.

[14] Mr Cullen's evidence, supported by copies of a number of South Tranz consignment notes, was that in July and August 2005 South Tranz had carried freight for Prism Freighters, a client of Strait Freight. Further, Mr Cullen produced manifests from Peter Baker Transport Limited indicating that the respondent company had, on five occasions in August 2005, carried freight for that client of Strait Freight. The applicant's position was clear – the respondent company was carrying out work for Strait Freight's clients and competitors which, it said, was in breach of the record of settlement.

[15] The respondents' evidence is that "king pin towing" is synonymous with "articulated towing" and therefore they were entitled to carry out any work involving articulated vehicles and thus were not in breach. The applicant's evidence is that on 30 August 2005 Mr Cullen and Mr Rule were at Bullet Freight's Auckland depot when a Mr Chapman arrived in a South Tranz truck offering to carry any surplus freight along the Auckland to Christchurch route for $65 per cubic metre. A truck is not an articulated transport unit.

[16] It appears to the Authority that having negotiated the terms of the restraints recorded in the employment agreement signed on 24 May 2004, the respondents sought to "wriggle out" of those terms enabling them to cart whatever they chose. The respondents say they signed the individual employment agreements "under duress" yet in his evidence Mr Shackleton told the Authority –

I agreed to sign the [employment] agreement simply to progress matters.

That was his decision. No evidence of duress was put before the Authority to support such a claim.

The investigation meeting

[17] At its investigation meeting the Authority heard evidence from Mr Graham Rule and Mr John Cullen for the applicant, and from Mr Shackleton with a supporting brief from Ms Harwood for the respondents. I record the Authority's appreciation for the detailed preparation and the professional presentation of evidence by counsel for both parties.

The issues in this matter before the Authority

[18] The Authority is tasked with the following issues –

- Are the respondents in breach of the record of settlement signed by each party following mediation?; and
- In the event that the applicant is successful in its claims what, if any, remedies are due to the applicant?

The determination

[19] I find that the respondents have breached the record of settlement signed by the parties on 14 February 2005 by carrying freight for clients of the applicant company.

[20] For the sake of completeness, I do not accept that the term "king pin towing" is redundant in the record of settlement. In this regard I am persuaded by paragraph 10 of Mr Cullen's evidence in reply where he says –

> *In answer to these claims I reaffirm that the term "king pin towing" is jargon: it is slang: a colloquialism. Further, Mr Rule has produced nine (9) letters from experienced operators in the industry as documentary evidence of the meaning of the term "king pin towing". But this is not the point. The point is that the respondents knew that the limitation of owner/driver work to king pin towing was a limited concession on our part to settle matters.*

[21] I accept Mr Barrett's submission that the appropriate remedy is by way of an order that the respondents account for profits where applicable because as a result of the breaches by the respondents, the applicant company has lost opportunities. Such a process is the most equitable available in circumstances such as these. However, I am mindful of another matter referred to the Employment Court on a matter of law involving jurisdiction.

Orders of the Authority

[1] The respondents are to immediately desist from undertaking cartage work which is in breach of the record of settlement including any such work booked from the date of issue of this determination.

[2] The respondents are ordered to account for profits earned between 15 February 2005 and the date of issue of this determination.

[3] The respondents are to pay the applicant the sum of the profits garnered from their unlawful transactions during this period.

[4] The respondents are to pay the applicant interest on the sum determined at a rate of 8.5% per annum.

Costs

[22] Costs are reserved.

Paul Montgomery
Member of Employment Relations Authority