

Under the Employment Relations Act 2000

**BEFORE THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND OFFICE**

BETWEEN "A" (Applicant)
AND "R" (Respondent)
REPRESENTATIVES Mr C H Toogood QC, counsel for applicant
(application heard ex parte)
MEMBER OF AUTHORITY Alastair Dumbleton
INVESTIGATION MEETING 25 June 2005
DATE OF DETERMINATION 28 June 2005

DETERMINATION OF THE AUTHORITY

[1] On Saturday 25 June 2005, the Authority made Anton Piller orders against the respondent and in favour of the applicant. They had been applied for with urgency and on an ex parte basis, and they were executed the following day at the home of the respondent.

[2] The orders permitted the applicant to enter the home of the respondent and search for specified information in relation to the business affairs of the applicant and an associated company. The orders also permitted any such information found at the respondent's home in any medium but particularly on computer, to be copied and/or seized.

[3] In making the Anton Piller orders the Authority also directed interim prohibition against publication of the names of the applicant, its witnesses and the respondent. In this regard the Authority invoked its power under clause 10 of Schedule 2 of the Employment Relations Act 2000.

[4] The non-publication order is to remain in effect until 5pm. on Friday 1 July 2005, although before that date application may be made by either party to discharge, vary or extend it.

[5] This determination is a statement of the Authority's reasons why the Anton Piller and non-publication orders were made.

[6] The applicant (referred to as "A") has legal duties in relation to the ownership of a company (referred to as "C") which trades in New Zealand. The applicant has been responsible for the planning and administration of a substantial financial restructuring of C.

[7] Until the day before the application was made to the Authority, the respondent (referred to as "R") had been employed by the applicant as a senior executive. As a necessary security measure for the financial restructuring, by deed the respondent gave the applicant particular undertakings to keep confidential all information defined as being relevant to that exercise. Others directly

involved, including those in governance positions within the applicant, also gave the same undertakings.

[8] The respondent was dismissed by the applicant at about noon on Friday 24 June 2005 after being confronted with evidence that he had breached his express undertakings of confidentiality. He admitted communicating certain information about the financial restructuring of C to a particular individual outside the applicant and C, but he denied that the information was confidential.

[9] In view of the contents of the information disclosed, particularly as contained in an email sent by him on 22 June 2005, it seems hardly surprising that the respondent's explanation was rejected and that he was dismissed straight away.

[10] The financial restructuring of C as currently being administered by the applicant is such that the process is subject to regulatory requirements. The information communicated by the respondent is in the nature of insider information capable of providing an advantage to anyone competing with others to benefit from the commercial/financial opportunities that will arise out of the restructuring.

[11] A few days after the respondent had disclosed information about the timetable for the exercise, the applicant unexpectedly received from a company engaged in a related business an offer in relation to the financial restructuring. The person to whom R directly disclosed the information is a senior executive of the offeror company.

[12] Without knowledge of the disclosure the applicant engaged an advisor to assess and report on the strengths and weaknesses of the offer it had received. On the same day the advisor's report was provided, 22 June 2005, the respondent sent a copy of it to the senior executive of the offeror company. This was the same person to whom the respondent had earlier supplied confidential information.

[13] After considering the evidence given on behalf of the applicant and after hearing the submissions of counsel Mr Toogood QC, the Authority was satisfied of the following;

(a) There was an extremely strong prima facie case that the respondent had acted in breach of his obligation of confidentiality owed to the applicant as his employer. This obligation existed as an express or implied term of the employment agreement and was also created by the deed the respondent executed expressly for the protection of company C. The substantive action brought against the respondent is a claim for damages arising from his alleged breach.

(b) The applicant and C, to which the applicant owes legal duties, are likely to suffer very serious potential or actual damage from the respondent's breach of confidentiality. He expressly acknowledged in the confidentiality deed that any breach of his undertakings could harm the commercial interests of C and have an adverse effect on the financial restructuring that the applicant has been responsible for carrying out for C. Serious commercial damage may also result to the applicant, and both it and C may have become exposed to legal action under stock exchange rules and securities legislation. Further damage likely to result from the respondent's actions includes the loss of reputation to the applicant and to C.

(c) There was strong evidence that the respondent has retained confidential information about the applicant on his home computer. It was used in communications between the

respondent and the person to whom he disclosed the confidential information. Further, there is a real possibility that the respondent will try and destroy the information he retains, if given notice of an application made against him.

[14] The above three paragraphs summarise the Authority's consideration given to the application, particularly with regard to the tests for Anton Piller orders as set out in *Anton Piller KG v Manufacturing Process Ltd* [1976] 1 CH 55 and as adopted in New Zealand by the Court of Appeal decision in *Busby v Thorn EMI Video Programmes Ltd* [1984] 1 NZLR 461.

[15] In making the orders I considered that the pursuit of normal remedies on notice given to the respondent was likely to lead to a denial of justice to the applicant in view of the need for urgency and secrecy in relation to application. The terms of the orders were no wider than necessary in the circumstances, the applicant had also given an undertaking as to damages and, further, Mr Toogood QC had certified the application as correct pursuant to the High Court Rules. In particular he certified his satisfaction that Rule 240 has been complied with, in that there was a proper basis for the application being made ex parte and that the orders sought in the application were such as ought to be made.

[16] The interim non-publication order was given in the interests of justice, as being necessary to protect the commercial interests of the applicant and C. It will also protect the respondent in case later on, after a full investigation, he is found not to have acted unlawfully towards the applicant.

[17] The Authority will arrange a telephone conference with the parties or their representatives to make arrangements for the eventual disposal, whether by mediation or investigation, of this problem arising from the employment relationship of A and R.

[18] Costs on the application are reserved.