

ATTENTION IS DRAWN TO THE
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NAMES REFERRED TO IN THIS
DETERMINATION

Determination Number: AA 232/06
File Number: 5043923

Under the Employment Relations Act 2000

**BEFORE THE EMPLOYMENT RELATIONS AUTHORITY
ER AUTHORITY AUCKLAND OFFICE**

BETWEEN A (Applicant)
AND X (First Respondent)
Y (Second Respondent)
Z (Third Respondent)
REPRESENTATIVES John Hannan, Counsel for Applicant
MEMBER OF AUTHORITY Leon Robinson
CONSIDERATION OF PAPERS 5 July 2006
DATE OF DETERMINATION 5 July 2006

PRELIMINARY DETERMINATION OF THE AUTHORITY

The Problem

[1] The applicant (A) applies to the Authority for an investigation of claims against the various respondents. It says that the second and third respondents have wrongfully taken confidential information belonging to it, and that the first respondent has received from the second respondent, and retains, such confidential information. It says the second and third respondents have breached their duty of fidelity and good faith owed to it. It asks the Authority to investigate and resolve the problem by formal orders for compliance, penalties, damages and costs. This Determination concerns its preliminary application, made *ex parte*, for an Anton Piller order.

[2] I consider that mediation will undermine the urgent nature of the preliminary application.

Anton Piller orders

[3] An Anton Piller order directs a respondent to allow an applicant entry to premises in order to establish the presence of items and to remove them. Its main purpose is to preserve evidence which might otherwise be removed, destroyed or concealed.

[4] The Courts accept that they are invasive and extreme orders, not lightly made and are warranted only if the circumstances require and only to the extent absolutely necessary to meet the exigencies of the case.

[5] An applicant for an Anton Piller order must establish:-

- (a) a sufficiently strong prima facie case to justify an extreme remedy;
- (b) the damage, potential or actual, must be very serious for the applicant;

- (c) clear evidence that the respondent must have in her possession the applicant's confidential information and/or intellectual property in some physical form; and
- (d) a real possibility that such material may be destroyed before an *inter partes* application can be made.

The Authority's jurisdiction

[6] The Authority has since its inception granted Anton Piller orders, invariably on the basis of sections 162 and 221 of the Employment Relations Act 2000 ("the Act"). An Anton Piller order is an interim injunction.

[7] In *Jerram v Franklin Veterinary Services (1977) Ltd*¹, the Employment Court confirmed that where the Authority has jurisdiction to grant relief by way of injunction, it must also have power to issue interim injunctions. Recently, there have been expressions of doubt as to the Authority's jurisdiction to grant injunctive relief at all.

[8] The issue was considered by the High Court in *BDM Grange Ltd v Parker*². The High Court rejected the proposition that the Authority had jurisdiction to grant Anton Piller orders. The Court did not accept that section 221 of the Act conferred the jurisdiction to make Anton Piller orders. The Court said that the principle of legality meant that jurisdiction for such an invasive power could not be taken to be conferred under section 161(1)(r) of the Act in the absence of express language or necessary implication.

[9] The Court was uncomfortable with the notion that the "lay Authority" should possess an invasive power that causes professional judges themselves anxiety. The result is apparently that the Authority, having no express power or any inherent jurisdiction, has no jurisdiction to issue Anton Piller orders. This has raised some doubts as to the extent of the Authority's jurisdiction to grant injunctive relief.

[10] That view has found support very recently from the Employment Court in *Greenlea Premier Meats Limited -v- New Zealand Meat & Related Trades Union Inc*³. The Court takes no issue with the Authority's power to grant reinstatement said to resemble an injunction, but it expresses doubt that the Authority has power to grant other injunctive relief. The Chief Judge says at paragraph [5]:-

[5] I consider the Employment Relations Authority was right to doubt its power to make the injunctive orders claimed by the plaintiff. Although it can, undoubtedly, direct compliance with the Employment Relations Act 2000 if it is satisfied that there has been a breach, the Authority does not seem to be able to make interim compliance orders, or to do so without notice to one party and without providing an opportunity for that party to participate in its investigation. The making of a compliance order depends upon a finding of a breach, not merely an arguable case of breach. I agree, also, that the Authority does not appear to have express or implied powers to make injunctive orders. It does, of course, have an express power to direct interim reinstatement in employment in a procedure that resembles closely an injunction. But that apart, the Authority, as a creature of statute, is not empowered to grant orders for injunctive relief.

[11] The Members of the Authority, as they are expressly required to do, routinely apply the law relating to injunctions when considering applications for reinstatement.

[12] There can be no doubt that the Authority is not possessed of any inherent jurisdiction to make injunctive orders. But it is arguable in my view that jurisdiction to make injunctive orders, is delegated to the Authority expressly by section 162 of the Act.

¹ [2001] ERNZ 157, Colgan J.

² [2006] 1 NZLR 353, Baragwanath and Courtney JJ.

³ unreported, AC27/06, 9 May 2006, Colgan CJ

[13] The High Court decision in *BDM Grange* does not on my reading, fully address whether section 162 allows for injunctive relief. Earlier the High Court had granted an Anton Piller order between those parties in that matter. Section 162 expressly states that, in matters related to employment agreements the Authority may make any order that the High Court may make relating to contracts:-

162. *Application of law relating to contracts—*

Subject to sections 163 and 164, the Authority may, in any matter related to an employment agreement, make any order that the High Court or a District Court may make under any enactment or rule of law relating to contracts, including—

- (a) *the Contracts (Privity) Act 1982;*
 - (b) *the Contractual Mistakes Act 1977;*
 - (c) *the Contractual Remedies Act 1979;*
 - (d) *the Fair Trading Act 1986;*
 - (e) *the Frustrated Contracts Act 1944;*
 - (f) *the Illegal Contracts Act 1970;*
 - (g) *the Minors' Contracts Act 1969.*
- cf 1991 No 22 s 104(1)(h)*

[14] The Authority is intended to be the first port of call for the resolution of employment relationship problems. As the former Chief Judge of the Employment Court has said "*It is quite clear that the Government's intention is that the low level institutions should mop up the bulk of employment problems.*"⁴ As a specialist body, its problem-solving function ought to be exhausted before involvement of higher judicial institutions. That object was emphasised by the amendment of section 143 of the Act:-

(fa) ensure that investigations by the specialist decision-making body are, generally, concluded before any higher court exercises its jurisdiction in relation to the investigations; and

[15] The object aims to reduce legalism in the employment institutions and provide parties to employment relationships with an institution sufficiently and appropriately empowered to provide effective and conclusive remedies to resolve their employment relationship problems. Similar amendments relating to restriction on review and challenges in relation to the Authority's procedure, underscore the objective of section 143(fa)⁵.

[16] Section 162 confers necessary legal jurisdiction on the Authority consistent with that objective. It is intended to arm the Authority with the necessary powers to deal effectively with employment relationship problems, in its role as a specialist investigate body with unique problem-solving techniques. It is undesirable and unnecessary duplication for parties to employment relationship problems to have to seek relief from multiple institutions. That is inconsistent with the function of the Authority as the first instance exclusive specialist investigative body for resolution of such problems.

[17] An application for an Anton Piller order is invariably sought *ex parte*. The element of secrecy is usually critical to ensure the purpose of the order is not defeated. The Authority has express power to deal with such *ex parte* applications as confirmed by the Legislature's amendments to the principal Act in December 2004:-

173. *Procedure—*

- (1) *The Authority, in exercising its powers and functions, must—*
 - (a) *comply with the principles of natural justice; and*
 - (b) *act in a manner that is reasonable having regard to its investigative role.*
- (1A) *Subsection (1)(a) does not require the Authority to allow the cross-examination of a party or person, but the Authority may, in its absolute discretion, permit such cross-examination.*
- (2) *The Authority may meet with the parties at such times and places as are from time to time fixed by*

⁴ Goddard CJ, *The Only Constant is Change ...*, [2000] ELB 115

⁵ See *Keys v Flight Centre (NZ) Ltd* 22/6/05, Travis, Colgan and Shaw JJ, CC9/05

a member of the Authority or an officer of the Authority.

(2A) The Authority may exercise its powers under section 160(1) in the absence of 1 or more of the parties.

(2B) However, if the Authority acts under subsection (2A), the Authority must provide to an absent party—

(a) any material it receives that is relevant to the case of the absent party; and

(b) an opportunity to comment on the material before the Authority takes it into account.]

(2C) To avoid doubt, subsections (2A) and (2B) do not limit the powers of the Authority to make ex parte orders.

[18] The emphasis is mine. In my view, the *ex parte* orders referred to is a legislative recognition of the *ex parte* injunctive relief, and in particular Anton Piller orders and Mareva injunctions, the Authority has issued since its inception. That recognition is further support for my view that the Legislature intended to clothe the Authority with the power of injunctive relief.

[19] The issue as to the Authority's power to grant injunctive relief requires some clarity. See the editorial by Bill Hodge in *Brookers Employment Law*, August 2005, *Forum Shopping: the Employment Institutions and the High Court* and the commentary by the learned authors at para 221.06:-

Accordingly, until such time as the question of the Authority's jurisdiction to make such orders has been considered authoritatively by a higher court, it must be taken that the Authority's case law on that subject has been overruled.

[20] The matter requires clarification either by the higher Courts, although having regard to the illegality argument raised by the High Court in *BDM Grange*, it may be best resolved by the Legislature.

[21] Having expressed these views, I am bound to say that I must stand by what has already been decided. The principles which apply in assessing the merits of this present application are those determined by the higher judicial institutions. It has been held by the High Court that the Authority has no jurisdiction to grant injunctive relief. There has also been doubt expressed by the Employment Court in that regard too, although there is no conclusive decision on the matter from that Court. **Accordingly, I conclude there is not sufficient certainty to safely grant the *ex parte* application now sought by the applicant and I decline to grant that order.**

[22] Because of the view I have reached above, I have not proceeded to consider the present application on its merits. The applicant should not be without relief and I expect that it will now pursue the relief sought elsewhere. Although the substantive matters remain properly within this jurisdiction, caution is required so as to preserve the applicant's remedies that it may elect to seek elsewhere. **Pursuant to clause 10 Schedule 2 of the Act, I order that the names of the parties be prohibited from publication.**

[23] I think it appropriate then that this Determination lie in the Authority while further steps in relation to its application for Anton Piller order are taken. It is to be provided only to Mr Hannan. I ask that Mr Hannan advise the Authority when the applicant is ready for the Authority to proceed to investigate the substantive employment relationship problem. I also direct that the application lodged in the Authority not be served on the respondents until there is a direction by the Authority for that to occur.

Leon Robinson

Member of Employment Relations Authority