Powers of the Employment Relations Authority: Anton Piller Orders

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I INTRODUCTION

The Employment Relations Authority ("Authority") is a specialist employment institution created by the Employment Relations Act 2000 ("ERA"). The Authority replaces the Employment Tribunal under the previous regime,[1] but exists with markedly different functions to those of the Tribunal. Its unique inquisitorial approach and the broad powers granted to it by the ERA raise some important issues that need to be addressed.

This article will begin by examining the objects of the Authority and the nature of its jurisdiction. The main focus will be on aspects of the Authority's jurisdiction that overlap with the High Court, and the practical implications of these overlaps. In particular, I will discuss and attempt to resolve the controversial issue of whether the Authority has jurisdiction to make Anton Piller orders.

Anton Piller is an invasive search and seizure order. It is an equitable remedy that was traditionally available only in the High Court. Since its inception, the Authority has issued several Anton Piller orders on application, and these have been upheld by the Employment Court. However, the jurisdictional basis for making such an order remains unclear. I will examine the Authority's jurisdiction under the statute and relevant case law to determine whether it has the power to make such orders, and further discuss whether it is desirable for the Authority to have this power.

II EMPLOYMENT RELATIONS AUTHORITY

Employment Relations Act 2000

The Employment Relations Act came into force in October 2000. One of the main objects of the Act is "to build productive employment relationships through the promotion of mutual trust and confidence in all aspects of the employment environment and of the employment relationship".[2] This object is to be achieved by, inter alia, "promoting mediation as the primary problem solving mechanism",[3] and "reducing the need for judicial intervention".[4]

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[1] Employment Contracts Act 1991.

[2] Employment Relations Act 2000, s 3(a).

[3] Ibid s 3(a)(v).

[4] Ibid s 3(a)(vi).

Employment Relations Authority

1 Objects

The Employment Relations Authority is a new institution that took over the adjudication function of the Employment Tribunal. The focus is on informality and flexibility, the purpose of which is to achieve an effective resolution to the problem at hand. This is reflected in section 143 of the ERA, which sets out the objects of the institutions established by the Act:

> **143 Object of this Part**
> (f) recognise that judicial intervention at the lowest level needs to be that of a specialist decision-making body that is not inhibited by strict procedural requirements.

The ERA represents an attempt to de-legalise employment matters. The term "employment contract" was replaced by the terms "employment agreement" and "employment relations". It is believed that problems in employment relationships are best resolved by the parties themselves,[5] but even where some judicial intervention is necessary, it should be kept at the lowest level. A pragmatic approach is desirable, with the focus on a satisfactory resolution, and not on procedure.

In 2004, the Employment Relations Amendment Act added the following objective:

> **143 Object of this Part**
> (fa) ensure that investigations by the specialist decision making body are, generally, concluded before any higher court exercises its jurisdiction in relation to the investigation.

This amendment emphasises Parliament's intention to give the employment institutions full investigative powers, and to ensure that the investigations are not interfered with by higher courts before they are concluded. It can be viewed as a reiteration of the overall aim of the statutory regime, or as an indication that perhaps there was too much interference by higher courts prior to the amendment.

As a result of these statutory objectives, the Authority is given considerably more powers than the Tribunal. A lot of the powers that previously belonged to the Employment Court have now been transferred to the Authority. The Employment Court established under the Employment Contracts Act 1991 ("ECA") is still in place, but retains very little of its original jurisdiction.[6] The Court has largely become confined to hearing challenges of a determination by the Authority. In such cases, the Court must "make its own decision on that matter and any relevant issues".[7] This is not an appellate jurisdiction. The Court must decide the case afresh, instead of deciding whether the Authority had come to the correct conclusion.

[5] Employment Relations Act 2000, s 143(b).

[6] The Employment Court does retain original jurisdiction for torts relating to strikes and lockouts, see ss 99 & 100 of Employment Relations Act 2000. But other than these very narrow sections, the Court's jurisdiction is derivative of the Authority, either by removals or challenges.

[7] Employment Relations Act 2000, s 183.

2 Inquisitorial Approach

An interesting feature of the Authority is that it is an investigative body with "the role of resolving employment relationship problems by establishing the facts and making a determination according to the substantial merits of the case, without regard to technicalities".[8] This is an inquisitorial approach, which is a major change from the adversarial system that operates in most courts in New Zealand.

When the ERA first came into force, there was speculation as to how active the Authority would be in its investigations. There are two possible models. In the first model, the Authority is a truly proactive investigative body, whereby Authority members would act as investigators who "follow lines of inquiry, take notes of interviews and generally drive the investigation".[9] This would be a major departure from the adversarial model that our legal system is accustomed to.

In practice, the Authority members' jobs would begin as soon as the statement of problem is received. After gathering the basic details, the member involved in the case would physically drive to the workplace concerned, and interview people who may be able to provide relevant information. This way, the Authority member becomes very active in each case, and physically gathers relevant evidence. The work is quite different from, and is probably a lot heavier than a judge in an adversarial court waiting for parties to bring forth all evidence.

In the second model, the Authority takes a more passive role, and permits the applicant to initiate a meeting at the Authority's premises.[10] However, it may be that the Authority would take a more active role in the meeting than if it was operating under an adversarial system. It was suggested that the second model is more likely, and that despite the major change in the system, the Authority's role will remain mostly passive.[11]

In July 2001, the Authority issued a practice note, which outlined the steps to be taken in proceedings in the Authority.[12] Applicants commence proceedings by lodging a statement of problem and the respondents respond through a statement of reply. An Authority member will then hold a preliminary conference to identify factual and legal issues, discuss details of information to be presented, and fix a date for a meeting to start the investigation.

During the investigation meeting, the Authority member will commence with a general outline, and no formal opening is required by the parties. The Authority may question the witnesses and permit parties to question them. Parties may also propose further inquiries for the Authority to make. The Authority will consider the proposal and make the inquiries that it thinks are necessary. At the end of the meeting, the Authority will either issue a determination in writing, or a reserved decision within six weeks.

According to the practice note, the Authority's operation is more consistent with the second proposed model. The Authority member is passive to the extent that he or she does not go out to do the actual investigation and collection of evidence.

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[8] Ibid s 157(1).

[9] Hodge, "The Institutions under the ERA 2000" (Paper presented at NZLS Employment Law Conference, Wellington, 24 November 2000).

[10] Ibid.

[11] Arthur, *The Employment Relations Authority : aspects of the introduction, role and powers of a new institution* (LLB(Hons) Dissertation, University of Auckland, 2001) 101.

[12] Dumbleton, "Employment Relations Authority – Steps to be taken in proceedings" (Employment Relations Authority, 2001).

However, there are certainly changes from the Tribunal procedure. There are now no strict procedural requirements, and the process is quite informal. The approach taken by the Authority is a problem solving one. The whole situation is looked at as an employment relationship problem, instead of individual causes of action. The aim of the investigation is not to decide who 'wins' on each legal issue, but to examine the problem, and to find ways of resolving it in the quickest, fairest, and most efficient way possible.

3 Exclusive jurisdiction

The jurisdiction of the Authority is set out in section 161 of the ERA. "The Authority has exclusive jurisdiction to make determinations about employment relationship problems generally, including":[13]
(a) Interpretation, application or operation of an employment agreement;
(b) Breach of an employment agreement;
(c) Whether a person is an employee;
(d) Unfair individual bargaining;
(e) Personal grievances;
(f) Good faith obligations;
(g) Recovery of wages;
(h) Jurisdiction relating to unions;
(i) Proceedings relating to strikes or lockouts (except those founded in tort); and
(j) Recovery of penalties under certain statutes.
Sections 161(1)(n)-(q) list some other orders that the Authority may make under specific provisions of the Act.

Section 161(1)(r) contains a general provision:

> **161 Jurisdiction**
> (1)(r) Any other action (being an action that is not directly within the jurisdiction of the Court) arising from or related to the employment relationship or related to the interpretation of this Act (other than an action founded on tort).

Section 161(2) provides that the Authority has no jurisdiction to make a determination about a matter relating to bargaining or the fixing of new terms, except as provided in subsections (1)(d) and (1)(f).

In the Employment Relations Amendment Act (No 2) 2004 ("ERAA"), the Authority is given further jurisdiction to:[14]
(a) Facilitate bargaining under sections 50A – 50I;[15]
(b) Fix the provisions of a collective agreement under section 50J;[16]
(c) Investigate bargaining under section 69J, and if necessary, determine redundancy entitlements under that section.[17]

Correspondingly, section 161(2) was amended to include sections 161(1)(ca), (cb) and

[13] Employment Relations Act 2000, s 161(1) (a) - (m).
[14] See s 55 of Employment Relations Amendment Act (No 2) 2004.
[15] Ibid s 161(1)(ca).
[16] Ibid s 161(1)(cb).
[17] Ibid s 161(1)(da).

(da) as exceptions. While the Authority's jurisdiction to fix provisions of a collective agreement under section 50J is very limited,[18] it is still a major change from the previous regime. The Authority has been equipped with some powers to deal with disputes of interest. It is somewhat a move back to the central wage fixing function that had been abolished under the ECA. It is the first time that an employment law institution at this level has been given such broad and extensive powers.

To make it clear that the Authority's jurisdiction is completely exclusive, section 161(3) provides that, except as provided in the Act, no court has jurisdiction in relation to any matter that is within the exclusive jurisdiction of the Authority under section 161(1).

Section 161(1) is based on the terms "employment relationship" and "employment relationship problems". "Employment relationship" is defined in section 4(2), and includes employer and employee; union and employer, union and a union member, and certain relationships between unions. "Employment relationship problem" is defined in section 5 in the following way:

> **5 Interpretation**
> **Employment relationship problem** includes a personal grievance, a dispute, and any other problem relating to or arising out of an employment relationship, but does not include any problem with the fixing of new terms and conditions of employment.

The definition is broad and the focus is on the employment relationship and problems related to the entire relationship, rather than the contract itself. This is very different to the ECA, where the exclusive jurisdiction of the Tribunal and the Court were limited to proceedings founded on an employment contract. The Tribunal was confined mainly to personal grievances and adjudications on the terms and conditions of the employment contract itself. The powers of the Authority are much more extensive than the Tribunal. Not only does section 161(1) provide a list of employment matters that go well beyond personal grievances and terms of the employment agreement, section 161(r) offers additional powers for the Authority to deal with matters relating to an employment relationship even if it is not directly within the jurisdiction.

In addition to section 161, section 162 provides the Authority with powers 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 an order that the High Court or the District Court may make under any enactment or rule of law relating to contracts.

Section 162 is quite similar to section 104(1)(h) of the ECA, which was a power given to the Employment Court. In *Conference of the Methodist Church of New Zealand v Gray*,[19] it was held that section 104(1)(h) was limited to remedies, and was not itself a source of jurisdiction. In other words, to make an order under section 104(1)(h) the Employment Court must first establish that it had jurisdiction over the subject matter

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[18] Fixing provisions of a collective agreement is not a process that follows on from facilitation. Under s 50J, there needs to be a serious and sustained breach of duty of good faith, which is unlikely in most cases.

[19] [1996] 2 NZLR 554, 561. [*"Methodist Church"*]

itself. The section did not permit any orders relating to contracts, when the matter was not related to employment law.

Therefore, section 162 is better seen as a remedial provision. The Authority must first establish that it has jurisdiction under section 161, and if so, it may make an order relating to contracts to deal with the employment relationship problem. It must also be noted that the Authority is only permitted to make an order to cancel or vary an individual employment agreement if the section 164 requirements are complied with.

In the context of a breach of employment agreement, a combination of section 161(b) and section 162 would provide the Authority with the ability to award damages against an employee.[20] This overcomes the problem faced by the Tribunal, which was held by the Court in *Lewis* not to have powers to make such awards.[21] In a personal grievance claim, the Authority can now hear counter-claims by the employer for a breach of employment agreement, without having to remove the matter to the Employment Court.

An example of the application of section 162 is the case of *Lal v Applied Instruments Group Ltd*.[22] The employee claimed that he had been unjustifiably dismissed and that he was owed holiday pay and bonus payments. The employer counter-claimed for repayment of travel allowances and the return of company property. After an investigation meeting, the Authority determined that there was no unjustified dismissal, but holiday pay was owing to the employee. The employer's counter-claims were successful. As a result, the employee was ordered to pay the employer $560.06 and to return company property.

Section 162 also means that employers are now able to initiate a proceeding against an employee for the breach of an employment agreement, even when the employee has not raised a personal grievance claim. The open question is whether Parliament anticipated this occurring. The Authority is intended to be a low-level informal employment institution. Once employers are permitted to initiate claims, it is inevitable that the cases and issues involved would be a lot more complicated than general personal grievance claims brought by employees. This is because employers generally have more time, resources, and expertise to bring forward complex claims. They are also more likely to seek extensive legal remedies such as Anton Piller orders and Mareva injunctions. This brings up the issue of whether it is appropriate, or even permissible, for the Authority to deal with such claims and remedies. This issue will be discussed further in Part III of this article.

In 2004, Alistair Dumbleton of the Authority wrote a report outlining the nature of the cases being determined by the Authority between October 2000 and December 2003. Almost 80% of cases were personal grievances and claims for the recovery of wages, which could only be brought by an employee.[23] So while the Authority is faced with some claims from employers due to its broader jurisdiction, on the whole, proceedings initiated by the employer still only constitute a small minority of cases.

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[20] See *Northland Pathology Laboratory Ltd v Vermeulen* (28 March 2001) unreported, Employment Relations Authority (Auckland), Decision No 25/01, where a South African doctor abandoned a 2-year fixed-term contract after 2 weeks.

[21] *Lewis v Davis Trading Company* [1992] 1 ERNZ 421, 427.

[22] (2 July 2002) unreported, Employment Relations Authority (Auckland), Decision no 195/02.

[23] Dumbleton "The Employment Relations Authority" (Report made by the Employment Relations Authority, Auckland, March 2004) para 32.

III COMPETING JURISDICTIONS: ANTON PILLER ORDERS

Introduction to Anton Piller Orders

1 Anton Piller KG v Manufacturing Processes[24]

The plaintiff in this case supplied the defendant with confidential information about the plaintiff's machines and later found that the defendant had been in secret communications with rival companies. The plaintiff wished to apply for an injunction to restrain the defendant from infringing copyright and using confidential information. However, the plaintiff was fearful that if the defendant got notice of the application, they would take steps to destroy the documents or send them elsewhere, so that there would be none left by the time of discovery.

The plaintiff sought an order to permit the plaintiff to enter premises occupied by the defendant between 8.00 a.m. and 9.00 p.m. for the purposes of inspecting documents relating to the plaintiff's equipment, and removing documents supplied to the defendant from the plaintiff, to be kept in the custody of the plaintiff's solicitor.

For 18 months prior to the *Anton Piller* case, the Chancery Division had been granting orders similar to the one sought.[25] This was the first case that came to the Court of Appeal, because the judge had refused to grant the order. The Court of Appeal allowed the appeal and granted the order. In doing so, the Court set out guiding principles for future cases to follow.

There are no express rules governing an order of this kind, so it is based on inherent jurisdiction. The order is made ex parte, and is only to be made where it is essential that the plaintiff should have inspection so that justice can be done between the parties. Also, if the defendant is forewarned, there is grave danger that vital evidence will be destroyed. Finally, the inspection must do no harm to the defendant.[26]

Lord Denning emphasised that the order is not a search warrant. It does not authorise the plaintiff to enter the defendant's premises against their will. The plaintiff cannot break any doors, or get in through the back door or open windows. "It only authorises entry and inspection by the permission of the defendants".[27] However, the defendant is required to give permission, otherwise they will be found to be in contempt of court.

In *Thermax Ltd v Schott Industrial Glass Ltd*, Browne-Wilkinson J (as he then was) said:[28]

> The procedure is very obviously draconian in its results. It is quite rightly said that it is not a search warrant in the sense that if the defendant refuses to obey the order and allow the plaintiff and his representatives to enter and search, no force can be used against such defendant. But its effect is very often similar.

Anton Piller orders fall somewhere between a compulsory warrant and a mere suggestion for the defendant to permit entry. I would suggest that it falls very close to the nature of a search warrant, which leaves the defendant with very little choice.

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[24] [1976] 1 All ER 779. [*"Anton Piller"*]
[25] Biscoe, *Mareva Injunctions and Anton Piller orders – Freezing and search orders* (2005) 225.
[26] *Anton Piller*, supra note 24, 783.
[27] Ibid 782.
[28] [1981] FSR 289, 291.

There is no physical compulsion on the defendant, but probably legal compulsion. The consequences of the defendant not giving permission are quite serious. Not only would the defendant be subject to contempt proceedings, but adverse inferences would also be made in subsequent hearings.

It had been suggested that "the form of the search order avoids a breach of the peace".[29] The search party has to depart if refused entry. But as discussed above, the power for the defendant to refuse is a very limited one.

Ormrod LJ stated that "[t]he proposed order is at the extremity of this court's powers. Such orders, therefore, will rarely be made, and only when there is no alternative way of ensuring that justice is done to the plaintiff".[30] He set out three pre-conditions for an Anton Piller order to be made: [31]

(a) An extremely strong prima-facie case;
(b) Potential or actual damage must be very serious for the plaintiff; and
(c) Clear evidence that the defendant has incriminating documents in its possession, and that they may be destroyed before proper proceedings.

"The court will not allow a search order to be used to conduct a fishing expedition, that is, to find out what claims the plaintiff can make against the defendant".[32] The plaintiff needs to convince the Court that there is a very strong case against the defendant, so that if the case goes to trial, the plaintiff would be very likely to succeed. In addition, the plaintiff also needs to convince the Court that the orders are necessary to avoid serious damage to the plaintiff, including clear evidence of possession and danger of destruction.

2 Jurisdiction in New Zealand

In New Zealand, jurisdiction for an Anton Piller order is the High Court's inherent jurisdiction and the High Court Rules, in particular rules 331 and 332. The order is also referred to in section 26J(4)(a) of the Judicature Act 1908. The District Court does not have jurisdiction to make an Anton Piller order.[33]

Busby v Thorn EMI Video Programmes Ltd[34] was the first New Zealand Court of Appeal case dealing with Anton Piller orders. In this case, the plaintiffs brought an action against the operators of videos clubs, alleging breaches of copyright in certain films. An ex parte application for an Anton Piller order was sought and granted on the same day. The order required the defendants to permit the plaintiff to enter the premises to look for and seize illicit goods (copies of film in which the plaintiff had copyright).

The Court of Appeal set out the requirements of Anton Piller orders in New Zealand, which are very similar to the list provided by Lord Justice Ormrod in the original *Anton Piller* case:[35]

(a) A strong prima facie case is needed: The standard is above a normal interim injunction. A mere arguable case is not sufficient;
(b) Potential or actual serious damage to the plaintiff if the orders are not granted:

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[29] Biscoe, supra note 25, 236.
[30] *Anton Piller,* supra note 24, 784.
[31] Ibid.
[32] Biscoe, supra note 25, 236.
[33] District Courts Act 1947, s 42(3).
[34] [1984] 1 NZLR 461. [*"Busby"*]
[35] Ibid 465.

adequacy of damages as an alternative remedy has only limited relevance. This is because the essential purpose of the Anton Piller order is to preserve and locate evidence for use at a substantial trial.[36] Therefore, damage is viewed in the form of irreparable harm as the result of destruction of evidence;[37]

(c) Evidence must be in the defendant's possession: The Court must be able to properly infer from the plaintiff's evidence that the defendant has possession of the material at a particular location; and
(d) Risk of disposal or destruction: While it is difficult to have affirmative evidence of intention to destroy material, the plaintiff needs to have evidence to show that they have reasonable grounds for fearing that the evidence will be destroyed.

3 Concerns

The Anton Piller order is very invasive. It has the potential to significantly undermine some very important civil rights and liberties. The ex parte procedure is itself against the presumption of innocence and the right not to be condemned unheard.[38] Most ex parte procedures involve temporary orders, such as an interim injunction. The consequences of a mistake made at that stage may not be very serious, and can probably be remedied when there is a full hearing for a permanent injunction.

With an Anton Piller order, the order itself goes against rights that are now protected under the New Zealand Bill of Rights Act 1990, namely the right to be free from unreasonable search and seizure (s 21). "A search of premises may involve public humiliation and, where it involves a [defendant's] home; personal and family distress".[39] It invades the privacy of the defendant and intrudes upon the sanctity of the home. The order itself, unlike an interim injunction, involves potentially significant breaches of civil rights and liberties, which makes it more problematic that the defendant does not have the opportunity to put his or her side of the case.

There are also some practical concerns. In copyright infringement cases, it is often the case that the plaintiffs are large corporations with deep pockets and the best legal support, bringing a case against much smaller defendants. In situations where the plaintiff and the defendant are competitors in the same market, the Anton Piller order is capable of being abused. A plaintiff can obtain an order which enables them to enter the business premises of a competitor and search their documents. As a result, they may be able to obtain an unfair commercial advantage.

The Anton Piller order has been said to lie close to the extremity of the Court's powers in granting civil remedies. When the order was first recognised, it was said to be an "extreme remedy for extreme cases'.[40] The pre-requisites of the order were designed to be difficult to meet. It might have been assumed that the order would rarely be granted, and only when it was absolutely necessary.

There has been judicial concern in England in regard to the frequency with which Anton Piller orders are being sought and granted. Since its introduction, Anton Piller orders have gradually become quite common, especially in intellectual property cases where clear physical evidence of infringement is best obtained through such an order.

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[36] Blanchard, *Civil Remedies in New Zealand* (2003) 313.
[37] *EMI Ltd v Pandit* [1975] 1 All ER 418, 424.
[38] Biscoe, supra note 25, 241.
[39] Ibid.
[40] *Busby*, supra note 34, 461.

In *Columbia Picture Industries Inc v Robinson*,[41] Scott J was particularly critical of the Anton Piller order. He said that citizens are deprived of their property and their business is interfered with by orders made ex parte. Moreover, they would be held in contempt for refusal, even if the order was wrongly made. Subsequent to an Anton Piller order, the case would normally evaporate. The reason for this is that once the plaintiff succeeds in finding clear physical evidence against the defendant during the search, the defendant would normally agree to settle. No case would actually go to trial; therefore it is difficult to determine the full impact of the orders.

4 Safeguards

As a result of the concerns raised, some safeguards have been developed for Anton Piller orders.[42] Where the orders are executed in a business premise, it should be in the presence of a representative of the company, and means need to be developed to ensure that the plaintiff (who is a competitor of the defendant) is not able to search all the documents of the defendant. The order should be supervised by a solicitor who is familiar with the workings of Anton Piller orders, and is not acting for the plaintiff. The solicitor should prepare a written report on what occurred during execution of the order, and serve a copy of the report on the defendant. The plaintiff must then return to the court and present the report to the judge who made the order.[43]

New Zealand has followed the English practice of requiring an independent solicitor appointed by the Court to attend, observe and report to the Court on what has occurred.[44] New Zealand courts have taken quite a conservative approach, and regard the relief as an extraordinary measure; an extreme remedy for extreme cases.[45] In *DB Baverstock Ltd v Haycock*,[46] it was said that Anton Piller orders are not to be lightly granted. It is an exceptional remedy that should only be granted if vital evidence will be destroyed and the ends of justice defeated.

In deciding whether to grant an Anton Piller order, the Court has to balance the threat to the defendant and possible prejudice to the plaintiff. The Court should employ a graduated response, so that if there are less drastic orders available, those should be made instead of the Anton Piller.[47] There is almost a presumption that most people will do the right thing; that is, comply with an ordinary interlocutory order.[48]

5 Documents

To apply for an Anton Piller order, the following documents should be prepared and filed:[49]

(a) A notice of proceeding;
(b) A statement of claim;
(c) An interlocutory application for the orders sought;
(d) An affidavit in support;
(e) A draft order;

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[41] [1987] Ch 38.
[42] *Universal Thermosensors Ltd v Hibben* [1992] 1 WLR 840.
[43] Blanchard, supra note 36, 321.
[44] Ibid.
[45] *Busby*, supra note 34, 467.
[46] (1986) 1 PRNZ 139. ["*DB Baverstock*"]
[47] *Lock International plc v Beswick* [1989] 3 All ER 373.
[48] *DB Baverstock*, supra note 46, 145.
[49] Blanchard, supra note 36, 322.

(f) An undertaking as to damages, costs, and manner of execution;
(g) An undertaking from the plaintiff's solicitors as to the manner of execution, advising the defendant as to the effect of the order, to record and retain items taken;
(h) A memorandum of counsel (optional, but advisable); and
(i) Other relevant papers such as a draft explanatory notice to the defendant.

Anton Piller Orders in Employment Institutions

1 Breach of Confidence and Implied Duty of Fidelity

Anton Piller orders are most relevant in intellectual property cases. For example, a plaintiff believes that the defendant is very likely to be making infringing copies of works that are protected by the Copyright Act 1994. While the plaintiff has some evidence to suggest that the defendant is infringing the Act, there is no actual physical evidence. The plaintiff has reasonable grounds to believe that the defendant has pirated copies at a particular location, and that if the defendant is notified of the plaintiff's intention to commence proceedings, the pirated copies will be removed or destroyed. In such a situation, an Anton Piller order would be of great assistance to the plaintiff.

While intellectual property cases have been the focus of Anton Piller orders, another appropriate situation for such orders is where the plaintiff alleges that the defendant has taken information in breach of confidence. There are three basic requirements for establishing a successful cause of action in breach of confidence:[50]
(a) The information must have the necessary quality of confidence;
(b) The information must have been communicated in circumstances importing an obligation of confidence; and
(c) There must be an unauthorised use of the information to the detriment of the person communicating it.

A breach of confidence can occur in the employment context where an employee obtains confidential information during the course of his or her employment, and uses the information for purposes other than what the employer intended it to be used for.

The case which establishes the principles for a breach of confidence in employment is *Faccenda Chicken v Fowler*.[51] One of the causes of action was a breach of an implied term of the contract that the employee would faithfully serve Faccenda and would not use confidential information or trade secrets gained while in Faccenda's employment, to the disadvantage or detriment of Faccenda, whether during the employment or after its cessation.[52]

Faccenda Chicken sets out the test to apply for determining whether an employee has breached confidence:[53]
(a) The nature of the employment. Employment in a capacity where "confidential" material is habitually handled may impose a higher obligation of confidentiality because the employee can be expected to realise its sensitive nature to a greater

[50] *Coco v Clark* [1969] RPC 41, 47.
[51] (1985) 6 IPR 155.
[52] Ibid 167.
[53] Ibid 165-166.

extent than if he were employed in a capacity where such material reaches him only occasionally or incidentally.

(b) The nature of the information itself. Information can only be protected if it can properly be classed as a trade secret or material of a highly confidential nature.

(c) Whether the employer impressed on the employee the confidentiality of the information. The attitude of the employer towards the information provides evidence which may assist in determining whether or not the information can properly be regarded as a trade secret.

(d) Whether the relevant information can be isolated from other information which the employee is free to use or disclose.

In *Faccenda Chicken*, the facts clearly supported a cause of action in breach of confidence. However, the case was based in contract. Faccenda Chicken, as the employer, alleged that Fowler (and other employees) breached the implied term of the contract of employment to serve the employer faithfully, and not to use trade secrets to the detriment of the employer. In other words, it was an alleged breach of the implied duty of fidelity. In the New Zealand context, this means that the plaintiff would have a choice whether to bring the case in the High Court or the Employment Relations Authority.

In a situation where an employee has taken away trade secrets or other confidential material, it would greatly assist the employer to obtain an Anton Piller order to preserve evidence of misused confidential information. If the case is brought in the High Court, the High Court has inherent jurisdiction to make Anton Piller orders if the pre-requisites are met. However, if the case is brought in the Authority, the critically important question is: does the Authority have jurisdiction to issue Anton Piller orders?

2 Jurisdiction of the Employment Court (under the ECA)

The leading application for an Anton Piller order under the ECA regime was made in 1996 in the case of *NZ Food Industries Ltd v Suckling*.[54] The plaintiff made an ex parte application for an injunction prohibiting the use of confidential information, and for an Anton Piller order to seize and detain documents. The defendants were former employees of the plaintiff and the new employer of those former employees. The Employment Court held that the plaintiff had established that there was a risk of destruction or disposal of the evidence, and ordered that the information sought should be detained under the supervision of an independent solicitor and given into the custody of the Deputy Registrar of the Employment Court.

The problematic aspect of this case is that there was no discussion of the jurisdictional basis for making such an order. There was limited jurisdiction for the Employment Court to make property preservation orders in an action related to strikes and lockouts,[55] but because this case did not involve any strikes or lockouts, it clearly fell outside of those statutory provisions.

Subsequent discussions have focused on the possible jurisdictional basis of the Employment Court to issue Anton Piller orders. The possibility of reliance on an

[54] (29 August 1996) unreported, Employment Court, Auckland Registry, AEC52/96. ["*NZ Food Industries*"]

[55] Employment Contracts Act 1991, ss 73 & 74. Now ss 99 & 100 of the Employment Relations Act 2000.

inherent jurisdiction was rejected in *Attorney General v Reid*.[56] The Employment Court, being a creature of statute, did not have the High Court's inherent jurisdiction. Its jurisdiction and powers were limited by the statute itself.

Another possible source of the Employment Court's jurisdiction was section 104(1)(h) of the Employment Contracts Act. Section 104 states:

> **104 Jurisdiction of Court**
> The Court shall have jurisdiction-
> (1)(h) Subject to subsection (2) of this section, to make in any proceedings founded on or relating to an employment contract any order that the High Court or a District Court may make under any enactment or rule of law relating to contracts.
> (2) Where the Court has under subsection (1)(h) of this section the power to make an order cancelling or varying a contract or any term of a contract, it shall, notwithstanding anything in subsection (1)(h) of this section, make such an order only if satisfied beyond a reasonable doubt that such an order should be made and that any other remedy would be inappropriate or inadequate.

This section had been discussed in the High Court in *Medic Corporation Ltd v Barrett*,[57] and the Court of Appeal in *Conference of Methodist Church of New Zealand v Gray*.[58] Section 104(1)(h) was described as a remedial section, which the Employment Court could only utilise if it already had jurisdiction to deal with the substantial cause of action. MacKay J in *Methodist Church* gave some examples of the types of orders that may be made under section 104(1)(h): "This would include orders by way of declaration, injunction, judicial review or prerogative writ, and such orders as can be made under the Contractual Mistakes Act 1977 and the Contractual Remedies Act 1979".[59]

Therefore, if the Employment Court had jurisdiction over the substantial cause of action, that is, if it was dealing with a cause of action founded on an employment contract, it could make any order that a High Court or District Court can make "under any enactment or rule of law relating to contracts". The power is general and broad.

Section 104(1)(h) is subject to section 104(2). The Employment Court was only to exercise an order to cancel or vary a contract if it was satisfied beyond reasonable doubt that no other remedy was adequate. In the case of *Medic Corporation Ltd v Barrett*,[60] the High Court interpreted section 104(2) to mean that the Employment Court's powers were actually very narrow, because no such restriction applied to either the High Court or the District Court.

However, the section 104(2) restriction is only invoked if the order is to cancel or vary a contract, which does not apply to an Anton Piller order. The important issue is whether section 104(1)(h) could be construed to authorise the issue of Anton Piller orders by the Employment Court. This issue will be discussed below with respect to the similar provision in the ERA.

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[56] [2000] 2 NZLR 377, 383.
[57] [1993] 2 NZLR 122, 125. ["*Medic Corp*"]
[58] *Methodist Church*, supra note 19, 567.
[59] Ibid.
[60] *Medic Corp*, supra note 57, 125.

3 Jurisdiction of the Authority (under the ERA)

When the Authority was established under the ERA, it inherited a lot of the powers that were previously given to the Employment Court under the ECA. The issue of Anton Piller orders first came up in *AB Ltd v Brown.*[61] The Authority cited precedent such as *Busby*[62] and *NZ Food Industries.*[63] *Busby* establishes the jurisdiction in NZ for the High Court to make Anton Piller orders. The Authority, like the Employment Court, is a creature of statute and does not have the High Court's inherent jurisdiction. It cannot rely on *Busby* as confirmation of its source of jurisdiction.

NZ Food Industries is an example of the Employment Court making an Anton Piller order under the ECA. However, because the case itself did not discuss the jurisdictional basis for making the order, the issue remained unclear. Section 104(1)(h) of the ECA was discussed above as a possible source of jurisdiction for the Employment Court

Section 162 of the ERA is similar to section 104(1)(h) of the ECA, and may provide jurisdiction for the Authority to issue Anton Piller orders:

> **162 Application of law relating to contracts**
> 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; and
> (g) the Minor Contracts Act 1869

Section 162 is subject to section 164(d), which is a similar provision to section 140(2) of the ECA. The main difference between the two statutory provisions is that under the ERA, some statutes relating to contracts have been listed.

Does section 162 confer powers on the Authority to issue Anton Piller orders? The issue is one of statutory interpretation. There is no express reference to Anton Piller orders; however the provision itself is quite broad, and could encompass a broad range of remedial orders.[64]

In the situation where an employee takes and misuses the employer's trade secrets, the matter is related to an employment agreement as it is a breach of the implied term of fidelity. As part of dealing with this breach, the Authority issues an Anton Piller order, which is an order that the High Court can make, and it is related to the breach of a contract, namely the employment agreement. This interpretation means that the Authority has jurisdiction to issue Anton Piller orders in a situation where the employer alleges a breach of the duty of fidelity by the employee.

However, it is also possible to interpret section 162 more narrowly. One way of doing that would be to use the presumption of construction ejusdem generis – a

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[61] *AB Ltd v Brown* (7 May 2002) unreported, Employment Relations Authority -Auckland, Decision no AA 41/01.
[62] *Busby*, supra note 34.
[63] *NZ Food Industries*, supra note 54.
[64] As discussed by McKay J in *Methodist Church*, supra note 19, 567.

general expression is to include only things that are in the same class as the list. The list in section 162 is comprised of statutes that relate to contracts directly. Therefore, a possible interpretation of section 162 is that it only confers a very limited power, restricted to the listed statutes and any others directly related to contracts. An Anton Piller order is concerned with the protection of evidence. The order itself is not directly related to contract. Therefore, if interpreted this way, section 162 would not confer a power on the Authority to issue Anton Piller orders.

On the wording of the section, both interpretations are plausible. According to section 5(1) of the Interpretation Act 1999, "[t]he meaning of an enactment must be ascertained from its text and in the light of its purpose". Having considered the wording of the statutory provision, I will now look at its purpose.

Section 162 is intended to give the Authority powers to provide remedies for issues relating to employment agreements. The most common example is damages for a breach of an employment agreement by an employer. The provision is specifically aimed at dealing with the problem faced by the Employment Tribunal, which did not have such powers.[65] In other words, the purpose of the statutory provision is to expand the powers of the Authority. It seems more likely that the power is broad and general, rather than narrow and restrictive. The intention would be to equip the Authority with tools to provide remedial responses to problems relating to the employment agreement, and an Anton Piller order is a remedial response to a breach of a term of an employment agreement.

It also seems unlikely that the list of statutes was intended to restrict the powers that the provision would confer on the Authority had the list not been there. The list is an addition to section 162. No list was provided in section 104(1)(h) of the ECA. Both provisions are subject to a restriction that if the Court or Authority is making an order cancelling or varying a contract, there must be no other appropriate or adequate remedy in the circumstances.[66] However, the restriction in the ERA removed the phrase "satisfied beyond reasonable doubt", and instead provides only that "the Authority is satisfied". Arguably, the power that the Authority has is slightly broader or subject to fewer restrictions than under the ECA. In any case, it would be difficult to interpret the section as being narrower, or more restrictive due to the listed statutes. It is more likely that the statutes are simply there as examples of the Authority's powers under the provision.

On the other hand, it is questionable whether Parliament actually intended to confer jurisdiction on the Authority to make Anton Piller orders. It would be the first time that such a power is available to an employment institution at this level. The District Court is expressly prohibited from making Anton Piller orders.[67] While there is no such prohibition in the ERA, it is possible that Parliament did not anticipate use of the order by the Authority at the time the statute was passed.

This article will now consider the purposes of the Authority as an institution established under the ERA, and whether the purposes are consistent with the Authority having jurisdiction to issue Anton Piller orders. The Authority is "an investigative body that has the role of resolving employment relationship problems by establishing the facts and making a determination according to the substantial merits of the case, without regard to technicalities".[68] Section 143 states the objects of the institutions:

[65] See discussion under Section II (3) 'Employment Tribunal'.
[66] Employment Contract Act 1991, s 104(2) and Employment Relations Act 2000, s 164(d).
[67] District Courts Act 1947, s 42(3).
[68] Employment Relations Act 2000, s 157(1).

143 Object of this Part
(f) recognise that judicial intervention at the lowest level needs to be that of a specialist decision-making body that is not inhibited by strict procedural requirements.
(fa) ensure that investigations by the specialist decision-making body are generally concluded before any higher court exercises its jurisdiction in relation to the investigation.

The Authority was designed to be a specialist institution with wide powers, so that it could act flexibly and informally. An Anton Piller order, while remedial in nature, would not be the final remedy sought by the plaintiff. Its purpose is largely to preserve evidence for the purpose of the substantial claim itself. Like all evidence gathered or to be gathered in a case, it is part of the process. The Authority is unique in its inquisitorial nature. Parliament wished to give the Authority maximum flexibility in carrying out its investigations, without regard to technicalities, in order to arrive at an expedient and satisfactory resolution for both parties.

It would hinder the Authority's ability to carry out its investigations if it did not have jurisdiction to issue Anton Piller orders. It would face similar problems as the Employment Tribunal had earlier faced with regard to ordering damages for breach of contract. The applicant would need to file separately in the High Court in order to obtain an Anton Piller order. This would be both expensive and time-consuming, defeating the intention of Parliament of reducing the need for judicial intervention[69] and obtaining speedy resolutions of employment relationship problems.

With the wide and general wording of section 162, and in light of the objects of the Act and the institutions, it seems that it may be more appropriate to interpret section 162 as capable of including a power for the Authority to issue Anton Piller orders. However, there have been no extensive discussions on the interpretation of section 162 in the courts. This issue is not yet conclusively decided.

4 The High Court's discussion of the Authority's Jurisdiction

The latest High Court case to discuss the issue of the Authority's jurisdiction to issue Anton Piller orders was *BDM Grange Ltd v Parker*.[70] The High Court rejected the proposition that the Authority had any jurisdiction to grant Anton Piller orders. The discussion in the judgment of Anton Piller orders was very short. The Court said that "there is nothing in the ERA expressly conferring such jurisdiction on the Authority",[71] but there was no mention of section 162, and no discussion of the inquisitorial functions of an investigative body which requires investigative tools.

Section 221 was mentioned in the judgement, and its possibility of conferring jurisdiction considered. The section was titled "Joinder, waiver and extension of time", and provides:[72]

221 Joinder, waiver, and extension of time
In order to enable the Court or the Authority, as the case may be, to more effectually dispose of any matter before it according to the substantial merits and equities of the case, it may, at any stage of the proceedings, of its own

[69] See Employment Relations Act 2000, s 3(a)(vi).
[70] [2006] 1 NZLR 353. ["*BDM Grange*"]
[71] Ibid 379.
[72] Employment Relations Act 2000, s221.

motion or on the application of any of the parties, and upon such terms as it thinks fit,...
(d) generally give such directions as are necessary or expedient in the circumstances.

In *BDM Grange*, the Court simply stated in reference to this provision " [t]hat narrow power cannot accord an Anton Piller jurisdiction", without any discussion or explanation as to why this was so.[73]

Section 221 is a very broadly worded section. So broad in fact, that it may be possible to interpret it to include almost anything. However, the context of the provision must be taken into account. The section is part of the "Miscellaneous Provisions" at the end of Part 10 of the Act concerning institutions. It is unlikely that important substantive jurisdiction would be conferred at this stage. In addition, the heading of the section suggests orders of a miscellaneous nature. It is very unlikely that Anton Piller orders would fit into this category. I am of the opinion that the High Court was correct in holding that section 221 does not provide the Authority a jurisdictional basis for issuing Anton Piller orders.

The Court in *BDM Grange* concluded the discussion on Anton Piller orders by referring to the principle of legality. Lord Hoffmann in *R v Secretary of State for the Home Department, ex parte Simms* was quoted:[74]

> Fundamental rights cannot be overridden by general or ambiguous words. In the absence of express language or necessary implication to the contrary, the courts therefore presume that even the most general words were intended to be subject to the basic rights of the individual.

The High Court went on to say:[75]

> By the time an erroneous Anton Piller order by the Authority was reviewed by the Employment Court, irreparable injury could have been done to those affected by it. In the absence of clear, rather than merely general language, we are not prepared to impute to Parliament a purpose of according such jurisdiction to the Authority.

The Court's analysis of the principle of legality in relation to the Authority's jurisdiction for Anton Piller orders requires careful consideration. First, the *Simms* case concerned reporters' freedom of expression in a prison context, and the issue was whether a general rule prohibiting journalists from interviewing prisoners was contrary to their right to free speech. The important aspect is that the rule itself took away the fundamental right. It is in this situation that express language or necessary implication is needed for the Court to hold that Parliament has overridden the right.

Does giving the Authority jurisdiction to issue Anton Pillers override fundamental rights? The rights involved are the right to be secure against unreasonable search and seizure,[76] and the right to property and privacy. Arguably, every Anton Piller order issued, irrespective of its context, would be a potential breach of these rights. However, rights are not absolute and are subject to reasonable limitations. Section 21 of the New Zealand Bill of Rights Act states that "everyone has the right to be secure against unreasonable search or seizure, whether of the

[73] *BDM Grange,* supra note 70, 379.
[74] [2000] 2 AC 115, 131.
[75] *BDM Grange,* supra note 70, 380.
[76] As protected by s 21 of the New Zealand Bill of Rights Act 1990.

person, property, or correspondence or otherwise". Not every search and seizure will be in breach of section 21. There is no breach if the search is reasonable.

When the Anton Piller jurisdiction was first established, the courts were well aware of the extensive nature of the order and the possible invasion of the rights of citizens. Restrictions and safeguards have been implemented to prevent abuse of the procedure, and a high standard must be met by the applicant before a court is willing to grant such an order. Therefore, while the order itself is potentially invasive, it cannot be said that the jurisdiction itself overrides any fundamental rights. The Authority accepts that the order requires a cautious approach.[77] But provided that the Authority acts in accordance with the requirements set out, it cannot be said that by giving the Authority jurisdiction, fundamental rights are taken away.

It is understandable that the High Court is concerned about the inherently invasive nature of Anton Piller orders. I accept that the order itself can be extremely invasive, especially if it is issued against a private residential home. However, the jurisdiction itself does not mean that orders will necessarily be made against a private residence without regard to the rights and privacy of its inhabitants. The jurisdiction does not give the Authority absolute power to issue Anton Piller orders against a private residence.[78] In fact, the jurisdiction itself requires the Authority to take people's rights into account when deciding whether an order should be made.[79]

There would only be a breach of fundamental rights if for example, the Authority has a policy of issuing an Anton Piller order whenever an employer brings a claim against an employee for taking trade secrets, without regard to the merits of the case. Similarly, there will be a breach if the Authority simply abuses its powers and fails to issue the orders in accordance with proper procedure. Neither situation is a reality, nor did the High Court explicitly or impliedly make such assertions. Therefore, there is no breach of fundamental rights by giving the Authority jurisdiction to issue Anton Piller orders. I am of the opinion that the principle of legality is irrelevant.

5 Which Institution has Jurisdiction?

(a) Can the High Court Overrule the Authority?

The High Court in *BDM Grange* held that the Authority has no jurisdiction to issue Anton Piller orders in any circumstances. Some have treated the High Court as overruling the Authority on this issue:[80]

> 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.

There is an issue of whether the High Court can overrule the Authority. The High Court is superior to the Authority in terms of court hierarchy. However, in terms of the appellate structure, a case which begins in the Authority would never reach the

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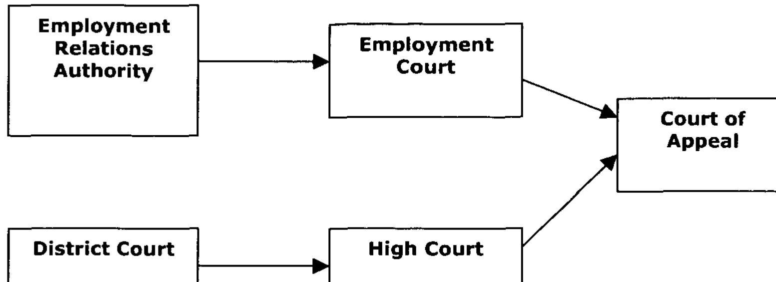
[77] *Pacific Pharmaceuticals Ltd v Kamrajan* (27 August 2002) unreported, Employment Relations Authority (Auckland), Decision No 41/01.

[78] This should be contrasted with *Simms*, where a fundamental right was taken away absolutely.

[79] For example, by providing a high threshold of pre-requisites which must be met before an order can be issued.

[80] Bartlett et al, *Employment Law* (2000) 2509.

High Court, but would instead go to the Court of Appeal directly by way of an appeal from the Employment Court. The parallel structure is illustrated below:



Cases decided in the Employment Court would override the Authority's determinations. Likewise, cases decided in the Court of Appeal would override both the Employment Court and the Authority. There have been suggestions that the Employment Court (under the ECA) was a Court of inferior jurisdiction to the High Court. This may be so in the sense that the Employment Court does not have inherent jurisdiction, and that its jurisdiction is limited to employment law. However, it does not follow that the High Court is able to overrule the Employment Court and the Authority. When the employment institutions were first established, the Court of Arbitration was intended to be at the same level as the High Court, and some judges in the Court of Arbitration were appointed from the High Court judicial pool.[81]

Whether the Employment Court and the High Court are courts in the same level under the present regime is in my opinion not relevant for current purposes. The fact that both Courts appeal to the Court of Appeal suggests that they exist as parallel systems. That being the case, the High Court cannot authoritatively override Authority determinations. This is because the Authority and the Employment Court are specialist institutions set up by Parliament to deal with employment relationship matters exclusively. Only the Court of Appeal (and not the High Court) would be able to set precedent and override cases from these institutions.

I am of the opinion that the issue of Anton Piller jurisdiction in employment matters remains unsettled until determined by the Court of Appeal, or clarified by Parliament by way of an amendment to the Employment Relations Act. Aside from the appellate structure which casts doubt on the High Court's ability to override the Authority, the High Court case of *BDM Grange* itself presented several problems.

First, the possibility of section 162 as a source of jurisdiction was not considered. Second, the High Court made a major mistake of identifying sections 99 and 100 of the ERA as sources of limited tort jurisdiction for the Authority, when those sections actually confer jurisdiction on the Employment Court instead.[82] The High Court, after mistakenly identifying those sections as conferring jurisdiction on the Authority in strikes and lockouts, carried on the discussion based on this mistake: "The text of the ERA does not confer tort jurisdiction on the authority except in the case of claims arising from strikes, lockouts or picketing (s 99)."[83] This is clearly wrong, as such jurisdiction belongs to the Employment Court, not the Authority.

[81] The High Court was known as the Supreme Court at the time.
[82] *BDM Grange,* supra note 70, 364.
[83] Ibid 364.

BDM Grange demonstrates that it may be more appropriate for specialist institutions that are familiar with the statutory regime relating to employment matters to deal exclusively with employment relationship problems. This is only possible if full investigative powers are made available to them. I am of the opinion that section 162 should be interpreted to confer jurisdiction on the Authority to issue Anton Piller orders.

(b) Limitations of the Authority's jurisdiction

There are two limitations on the Authority's jurisdiction to issue Anton Piller orders. First, if the case is brought in the High Court for a cause of action within the High Court's jurisdiction, then only the High Court can make appropriate orders relating to the case, including Anton Piller orders. This remains true regardless of the fact that there is an employment relationship between the parties.

The second limitation relates to third parties that are not in the employment relationship. This issue commonly arises in a situation where the applicant's employee takes trade secrets belonging to the applicant, and leaves their employment to join a new employer. The applicant has reasonable grounds to believe that its former employee has made the trade secrets available to the new employer, who is the applicant's competitor in the business.

This is a typical situation where the applicant may want to seek an Anton Piller order against the new employer, in order to repossess its trade secrets before any improper use has been made of them. The applicant can bring a cause of action for the tort of inducing breach of employment agreement against the new employer. This is an action which must be brought in the High Court, because the Authority has no jurisdiction over a party who is not in an employment relationship with the applicant. Consequently, if an Anton Piller order is sought by the applicant, it must be sought in the High Court. There can be no jurisdiction for the Authority to issue an Anton Piller in this case, because it has no substantive jurisdiction over the subject matter.

There is a case on this precise issue which was heard in the Employment Court in July 2005. However, at the time this article is written, the Court was yet to deliver its judgment. *Axiom Rolle PRP Valuation Services v Kapadia*[84] is an application to discharge an Anton Piller order. The order was previously issued by the Employment Court against Equity Realty ("ER"), which is not a party to the proceedings.[85] When the plaintiff ("Axiom Rolle") attempted to execute the order, ER refused entry. ER commenced the current proceedings to have the Anton Piller order discharged, while Axiom Rolle commenced a separate contempt proceeding relating to the failure of ER to comply with the Anton Piller order.[86]

Several arguments were raised on the application to discharge. The relevant jurisdictional argument made by ER was that the Authority and the Employment Court have no jurisdiction to issue Anton Piller orders because it requires an inherent power not available to institutions created by statute. In response, the plaintiff submitted that the Authority and the Court do have jurisdiction to issue Anton Piller orders by making reference to various sections of the ERA, including section 162.

In dealing with the problem that ER was not a party to the employment relationship, the plaintiff argued that it was not required to establish a strong arguable case against ER. All that it needed to do, according to the plaintiff, was meet the

[84] (4 August 2006) unreported, Employment Court, Auckland Registry, AC43/06.
[85] This happened as the result of a challenge after the Authority refused to grant the order.
[86] This proceeding has been stayed pending outcome of the application to discharge.

requirements of an Anton Piller order against the original defendant, and to establish a connection between the defendant's unlawful activities and the premises occupied by ER. In response, ER argued that Anton Piller orders cannot bind third parties, because it is an in personam remedy and not a remedy in rem.

In my opinion, the plaintiff went too far in suggesting that the Authority has jurisdiction to issue an Anton Piller order against a third party whose premises are connected with the defendant. Given that the Authority is unable to assert direct jurisdiction over the third party due to the lack of an employment relationship, it is difficult to see how the Authority could issue an Anton Piller against it merely by connections to the physical premises.

It seems unlikely that the Employment Court in this case will be able to conclusively resolve the fundamental jurisdictional issue of whether the Authority and the Court can issue Anton Piller orders. I am of the opinion that it is not open to the Employment Court to decide that it has jurisdiction to issue Anton Piller orders, but that the Authority does not. This is because the Court's jurisdiction is derivative of the Authority. If the Authority has no such power, the Court would not have it either.

However, this issue will not be definitively resolved until either the Court of Appeal clarifies the position in an appropriate case, or Parliament provides for or excludes the power in a legislative amendment.

6 Should the Authority have Jurisdiction to Issue Anton Piller Orders?

(a) Concerns

Legal arguments aside, there are practical concerns about whether the Authority should have the power to issue Anton Piller orders. The popular view is that only people with legal training and significant legal experience should be able to make such orders. Authority members are not judges, and legal qualification is not a pre-requisite to becoming a member.

(b) The Authority's View

The Authority members are aware of the various concerns relating to Anton Piller orders. They know that the orders are invasive and require careful consideration and scrutiny. The Authority's view is that the concerns which exist in an Anton Piller application in an employment context are no different to the concerns that exist in any Anton Piller case in the High Court. There are very few Anton Piller applications in the Authority, and when they arise, the Authority can make appropriate assessments as to whether to make an order or not.[87]

(c) Discussion

The concerns raised in respect of the Authority's power to issue Anton Piller orders are two-fold. First, it may not be appropriate for a court at the Authority's level to issue such orders. Second, the Authority members may not be competent to issue Anton Piller orders. I will discuss each concern in turn.

Traditionally, the Anton Piller jurisdiction was limited to the High Court.[88]

[87] Amy Lee, Interview with Alastair Dumbleton (Employment Relations Authority, Auckland, 8 September 2005).
[88] As too higher appellate courts.

The District Court is expressly prohibited from making such orders, even though it might be useful in some circumstances for it to have this power. The fact that the Anton Piller jurisdiction is taken very seriously, and is not a power readily available to all courts, legitimizes concerns about the appropriateness of the Authority having this jurisdiction.

The Authority is very different from the District Court in that it is a specialist institution whose jurisdiction is strictly limited to employment law. The ERA transfers exclusive jurisdiction in employment law matters to the Authority and the Employment Court. The jurisdiction is not restricted by the employment contract itself, and is intended to capture all employment relationship problems.

In dealing with an employment relationship problem, the need for an Anton Piller order sometimes arises. In such circumstances, it seems more desirable for the Authority to have the power to issue the order, rather than the applicant having to make a separate application in the High Court when the substantive jurisdiction belongs to the Authority.

An Anton Piller order, while remedial in nature, is not the final remedy in itself. Its purpose is to gather evidence which is necessary to establish a successful cause of action against the defendant. To this extent, Anton Piller orders can be said to be an evidence gathering tool. The Authority has been set up as an investigative body to deal with employment relationship problems. It is possible to argue that the Authority should treat Anton Piller orders as part of its investigative process – one of the steps taken towards resolution of the employment relationship problem.

A question that arises is whether it is more appropriate for the High Court, instead of the Authority, to have jurisdiction to issue Anton Piller orders in all circumstances. My argument is that this is inappropriate in the employment context. Parliament has clearly intended to de-legalise employment relations. The aim of the ERA is to provide for effective and efficient resolution of employment relationship problems, with as little judicial involvement as possible, while recognising that sometimes it will be necessary. Mediation is a mandatory requirement in many cases before the Authority will intervene. If an Anton Piller order is requested, the best way to minimise judicial involvement is for the Authority to determine whether it should be issued, instead of requiring the plaintiff to make a separate application to the High Court, which is both expensive and time consuming.

If the High Court considers an Anton Piller application dealing with an employment relationship problem, it would have to examine the employment relationship itself, which is meant to be within the exclusive jurisdiction of the Authority. There may be problems with the High Court making judgments relating to an employment relationship. In my opinion, consistent with legislative intent, the High Court should not be deciding issues of an employment nature. Despite its judges being legally trained and experienced in the general jurisdiction, the High Court is not specialized in employment law. It is probably unfamiliar with the details of the employment statutory provisions, and should not be making judgments about employment law matters.

In *BDM Grange*, the High Court mistakenly referred to sections 99 and 100 of the ERA as tortious jurisdiction conferred on the Authority, when these sections are in fact sources of jurisdiction for the Employment Court. The Court then formed conclusions about the Authority's jurisdiction based on the mistake: "The text of the

ERA does not confer tort jurisdiction on the authority except in the case of claims arising from strikes, lock-outs or picketing (s99)."[89]

There are some circumstances where the High Court can consider an Anton Piller application involving an employment relationship, without intruding upon the Authority's jurisdiction. The plaintiff can plead the case as so to avoid the employment relationship altogether. For example, this can be achieved by claiming breach of confidence, or a breach of directors' duties. In cases like this, the Authority has no jurisdiction over the substantial matter, and the High Court would have jurisdiction for all matters.

A question to ask is whether it defeats legislative intent to purposely avoid the employment relationship in order to obtain an Anton Piller order. While sometimes it may be appropriate for a plaintiff to make an application without reference to the employment relationship, it should be up to the plaintiff to make that decision. By restricting Anton Piller orders to the High Court only, it is essentially taking away the plaintiff's choice together with their right to get the problem resolved at the lowest possible level. Cases in the High Court are much more expensive and procedurally complicated than applications in the Authority.

I am of the opinion that despite being a lower level court, it is desirable and appropriate for the Authority to have the power to issue Anton Piller orders. The Authority was intended by Parliament to be a specialist institution that functions independently. The Anton Piller order should be treated simply as one of the measures taken by the Authority in the process of resolving an employment relationship problem. If necessary, the Authority's decision can be challenged in the Employment Court, from which point there can be a further appeal to the Court of Appeal. The entire process, just like any other employment relationship problem, should remain in the specialist institutions. The High Court should not be issuing Anton Piller orders in the employment context because it is unfamiliar with the employment jurisdiction. Having applications for an Anton Piller order heard separately in the High Court also creates significant practical problems and delays for the applicant, which defeats the purpose of the statute to enable employment relationship problems to be resolved promptly and informally.

I will now deal with the second concern, which is that the Authority members may not be competent to issue Anton Piller orders. There are two possible interpretations of this concern. First, that the Authority members are inadequate to deal with the complexity of the power; and second, that the members cannot appreciate that the power is a very invasive one, which should only be exercised with extreme caution.

Both interpretations are in my opinion, unwarranted concerns. The underlying assumption is one that judges must be legally qualified in order to be equipped with the necessary skills to issue an Anton Piller order. I would suggest that the assumption is false, for legal education itself would not provide the requisite skills and expertise to issue Anton Piller orders. The Authority is a judicial body established under statute to deal specifically with employment law issues. While a law degree is not a pre-requisite to being a member of the Authority, several members are legally qualified, and all have extensive experience working in various areas of employment law. The Authority members deal exclusively with employment law matters, and should be experts in how to best resolve an employment relationship problem.

In practice, the Authority members have received training specifically on how

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[89] *BDM Grange*, supra note 70, 364.

to issue an Anton Piller order, and they follow the High Court rules relating to the order. The few Anton Piller cases that have come through the Authority are accompanied by extensive files and documents, setting out the application, relevant facts, as well as different undertakings by the parties involved.

(d) Case study: *Knowles Consulting Ltd v Sharma*[90]

Knowles Consulting Ltd was an ex parte interlocutory application for an interim injunction and Anton Piller order. The applicant was an employer who alleged that a former employee has taken confidential information and intellectual property belonging to the employer. The employer was a consultant engineering company and the former employee was employed as a structural engineer.
The documents filed for the case includes the following:

(a) A statement of problem;
(b) An ex parte interlocutory application for interim injunctions and Anton Piller orders - relying upon sections 162 and 221(1)(d) of the ERA, Rules 235, 237-241, 246, 256 and 258 of the High Court Rules, and case law on Anton Piller orders;
(c) Affidavit of Alistair Knowles in support of the ex parte interlocutory application;
(d) Applicant's undertaking as to damages - if the order caused loss to the respondent, or if the applicant breached terms in carrying out the order, the applicant agreed to comply with any order that the Authority may make with regard to damages. The applicant agreed not to use the information obtained without leave of the Authority;
(e) Undertaking of applicant's representative – The company director would determine whether an item belongs to them and return equipment such as computers to the respondent as soon as possible. Items where ownership is in dispute would go to the applicant's solicitor for safekeeping, and all other items would be kept in safekeeping until the Authority gave directions;
(f) Supervising lawyer's undertaking - to explain to the respondent what the order means, to deliver items removed to the Authority, and to make a written report;
(g) Information technology technician's undertaking of confidentiality;
(h) Applicant's security consultant's undertaking of confidentiality;
(i) Counsel for applicant's undertaking – the same undertaking as the applicant's representative at (e) above;
(j) Memorandum of counsel - setting out the application of the relevant facts to the legal requirements of Anton Piller orders; and
(k) Index of authorities.

From this example, it can be seen that Anton Piller orders are not taken lightly by the Authority. There will always be concerns in relation to making such an order, but the concerns are no different to the concerns that would be raised in any Anton Piller case. The Authority, as a specialist employment institution, should be trusted to make competent decisions in relation to an order associated with employment matters.

The concern expressed by the High Court in *BDM Grange* may be overstated: "By the time an erroneous Anton Piller order by the Authority was reviewed by the Employment Court, irreparable injury could have been done to those affected by it".[91] If an "erroneous order" is referring to an order which, later at trial, is discovered

[90] *Knowles Consulting Ltd v Sharma*, Memorandum of counsel for the applicant in support of ex parte interlocutory application for interim injunctions and Anton Piller order (9 November 2004).
[91] *BDM Grange*, supra note 70, 380.

should not have been made, then the undertaking of damages made by the applicant would be sufficient to deal with the problem. Such a situation could occur whether the order was issued by the High Court or the Authority.

Alternatively, if an "erroneous order" is referring to an Authority member wrongly making an order on facts which do not warrant it, the accusation is not borne out in practice. So far, there is no evidence to suggest that the Authority has been making Anton Pillers without following the appropriate procedures.

There seems to be a general adverse view on the Authority having jurisdiction to issue Anton Piller orders. However, it is difficult to see why it is inappropriate for the Authority to have such jurisdiction when dealing with employment relationship problems. Even though the Authority members might not be legally qualified, they have extensive experience and expertise in employment law matters, and are familiar with the statutory regime. In my opinion, it is desirable for the Authority to have the jurisdiction in limited circumstances (where jurisdiction over the substantial matter has already been established). This would enable the Authority to deal with the employment relationship problem effectively and efficiently, consistent with the statutory objectives of the ERA.

(e) The third party problem

Another contentious issue is whether the Authority should have jurisdiction to issue Anton Piller orders in relation to a third party who is not part of the employment relationship. In most cases, this would be the new employer who may have received information from the applicant's former employee. The major concerns are problems which may arise from issuing an Anton Piller order against a respondent who is the applicant's competitor.

In my opinion, the Authority should not have jurisdiction to issue Anton Piller orders against a party who is not in an employment relationship with the applicant. The main reason for this view is that inducing a breach of an employment agreement is a tort which the Authority has no jurisdiction over. The Authority should not be permitted to issue Anton Piller orders when it has no jurisdiction over the substantial matter.

IV CONCLUSION

In this paper, I have examined the nature and scope of the powers of the Employment Relations Authority. The ERA has created an institution that operates using a unique inquisitorial approach that is flexible and relatively informal. The aim is to resolve employment relationship problems satisfactorily, with minimum judicial intervention. Therefore, despite being a low-level decision-making body, the Authority has been given exclusive jurisdiction over all employment matters.

I then discussed the issue of whether the jurisdiction of the Authority is broad enough to permit Anton Piller orders to be made. While the statute itself and case law provide no clear answers, I am of the opinion that section 162 of the ERA, read in light of the purpose of the statute and the object of the Authority as an institution, is sufficient to provide the Authority with a jurisdictional basis for issuing Anton Piller orders. I am also of the opinion that it is desirable for the Authority to have such a jurisdiction, and that it should be treated as a step in the investigative process.