Determination Number: AA 264/05
File Number: AEA 689/05

Under the Employment Relations Act 2000

BEFORE THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND OFFICE

BETWEEN	Johnson Diversey New Zealand Limited (Applicant)
AND	Gary Dougan (Respondent)
REPRESENTATIVES	Mr J Roberts, Counsel for Applicant
MEMBER OF AUTHORITY	Dzintra King
INVESTIGATION MEETING	7 July 2005
DATE OF DETERMINATION	13 July 2005

DETERMINATION OF THE AUTHORITY

The applicant applied ex parte for an Anton Pillar order. The requisite documents and undertakings were supplied to me and I had a telephone conversation with Mr Roberts.

The principles relating to Anton Pillar orders are well settled. In Busby v Thorn EMI Video Programmes Ltd [1984] 1 NZLR 461 Cooke J said at p 467 that the jurisdiction had to be exercised cautiously and that it was "an extreme remedy for extreme cases". He further said there was a need for the applicant to make a sufficiently strong case to justify the remedy. The Court referred to McGechan on Procedure and said the Court had to be satisfied of the existence of three criteria:

1. An extremely strong prima facie case;
2. Very serious potential or actual damage to the applicant; and
3. Clear evidence that the defendants have the relevant evidence in their possession and a real possibility that they may destroy such material before an inter partes application can be heard.

I read the two affidavits supplied to me. Mr Miles Masters, the Customer Group Manager, deposed to Mr Dougan's history of employment with Johnson Diversey and also with Ecolab Limited, which had employed Mr Dougan prior to his taking up employment with Johnson Diversey. Prior to employing Mr Dougan Mr Masters asked him whether he was bound by a restraint of trade clause with Ecolab. Mr Dougan said he was not. This was not true. Mr Dougan gave Johnson Diversey information relating to Ecolab, at which stage Mr Masters again queried whether Mr Dougan had any obligations to Ecolab in respect of the information. Mr Dougan said he did not. Mr Masters asked Mr Dougan whether the pumping mechanism belonged to Ecolab and was assured that it did not and he claimed that the engineer who had designed the Ecolab system was not an employee of Ecolab but was independent and owned the system. That was also not true. As a result of information provided by Mr Dougan Johnson Diversey spent $750,000 to $800,000 designing and manufacturing pumping systems.

In April 2002 Ecolab alleged that Johnson Diversey had breached its copyright in the pumping systems and unlawfully used its intellectual property. After being reassured by Mr Dougan that the design was not Ecolab's Johnson Diversey initially defended the action. It then became apparent that Mr Dougan had been bound by a restraint of trade and a successful action was taken against him. Mr Dougan also undertook that he no longer held any Ecolab property. Johnson Diversey concluded a confidential settlement with Ecolab.

Mr Dougan took Johnson Diversey information home and worked on it on his home PC. Mr Masters said he knew that Mr Dougan had information that included client proposals, work sheets, client usage data, global case studies, client contract details and wash programmes because Mr Dougan had discussed the fact that he had that information with Mr Masters. Mr Masters said that when Mr Dougan left Johnson Diversey he was asked to return the front door key which had not been returned.

Mr Neville Kapadia, the Managing Director, said Mr Dougan had knowledge of products and chemical properties and formulations, of pricing and design delivery systems, product specifications and the sources of the products. Mr Kapadia was of the view that Mr Dougan had intellectual property and confidential information of a nature that would allow him to provide any competitor with the formulations right through to delivery systems so as to enable a competitor to emulate products and services without the competitor being aware that it was using Johnson Diversey information, which is what had happened when Mr Dougan came from Ecolab to Johnson Diversey.

Mr Dougan resigned on 2 May 2005. Mr Kapadia asked him where he was going to work and Mr Dougan said it was for a competitor but would not name the company. Mr Dougan was paid out and not required to work out his month's notice as Mr Kapadia did not want him gaining access to any additional information. Mr Kapadia asked that all company information be returned and that he be told what information Mr Dougan had on his computer, to provide Mr Kapadia with a copy of it and to remove it from his computer. Certain hard copy information was returned. Mr Dougan said he had no further information and nothing on his computer as the hard drive had crashed the week before, losing all his data. He confirmed that he had returned all the information in his possession.

Among the information returned was material belonging to Ecolab, some of which was confidential to Ecolab. This was despite the fact that Mr Dougan had entered into an agreement that he no longer held any Ecolab material.

In mid June Mr Kapadia became aware of the identity of Mr Dougan's new employer. He also became aware that Mr Dougan had visited clients of Johnson Diversey's.

The above material convinced me that the applicant had an extremely strong prima facie case which is based on the respondent's previous history. I am aware and have taken into account that the evidence I have at this stage has not been able to be contested but much of it is documentary evidence which speaks for itself. I accept that serious damage may ensue should Mr Dougan chose to act in a manner consistent with his previous behaviour and inconistent with his obligations to Johnson Diversey.

I accept the evidence relating to material belonging to Johnson Diversey that Mr Dougan had on his computer. I think that given the history Johnson Diversey is right to be highly suspicious of the claim that the hard drive conveniently crashed losing all stored information. There can be no positive proof that a person intends to destroy information but I am of the view that the circumstances brought to my attention raise a real risk that information may be destroyed or concealed if this order is not made and the application proceeds on an inter partes basis.

I am satisfied that the requisite undertakings have been given and the requisite High Court Rules abided by. Mr Roberts has supplied me with a draft order. I have signed that order in the terms sought.

Costs are reserved.

Dzintra King
Member of Employment Relations Authority