

Employment & Safety Alert

Costs order puts bite back into restraint actions

May 2013

In a very important decision of the New South Wales Supreme Court published on 1 May 2013, a recruitment company seeking to enforce a post-employment restraint was successful in gaining a costs order against a competitor.

In *HRX Pty Ltd v Scott*, the NSW Supreme Court ordered that Talent2 (a direct competitor of HRX) pay HRX's legal costs of commencing and successfully resolving an injunction application to enforce a post-employment restraint.

Facts

In January 2012, a senior sales and business development executive of HRX, Stuart Scott, resigned his employment to take a new position with Talent2. However, post-employment restraints in Mr Scott's contract of employment with HRX prohibited him from working with competitors and soliciting clients of HRX for a period of 12 months, i.e. up to January 2013.

In breach of those post-employment restraints, Mr Scott commenced with Talent2 in April 2012. Shortly

afterwards, HRX commenced proceedings seeking an injunction to restrain Mr Scott from working for Talent2 and soliciting clients. The new employer, Talent2, agreed to fund Mr Scott's legal costs as he did not have the financial capacity to defend himself.

Injunction proceedings took place through July and August 2012. After some robust litigation, it became apparent to Talent2 that Mr Scott had not fully disclosed the extent of his post-employment restraints and had taken confidential information of HRX. Mr Scott then agreed to resign from his employment with Talent2. Talent2 withdrew its funding of his defence. Mr Scott eventually capitulated in the court proceedings, agreeing to various undertakings sought by HRX.

The Application and Decision

In October 2012, HRX commenced an application for costs against Talent2. This was a significant move because Talent2 was not a direct party to the litigation. However, the evidence revealed that Talent2 had funded all of the litigation and had been actively involved in the direction of the defence of the proceedings.

HRX based its application on NSW legislation that allows for an order for costs against a non-party. There are similar provisions in most other jurisdictions. The Court noted the power to award costs in such circumstances is

used 'sparingly'. In deciding to award costs against Talent2, the Court considered the following factors to be relevant:

- Talent2 played an active part in the conduct of the litigation;
- Talent2 funded the litigation;
- If it had not been for Talent2's intervention, the litigation probably would not have taken place;
- The unsuccessful party (Mr Scott) was a man of 'straw' who did not have financial capacity of his own; and
- Talent2 had a substantial interest and stood to benefit from the outcome of the litigation.

In reaching its decision to order costs against Talent2, the Court made the following sobering observation that should be borne in mind by all businesses seeking to employ new personnel who may have a post-employment restraint.

'It is incumbent upon employers who effectively poach their competitor's employees to ensure that those employees are not acting in breach of their obligations to their former employers, particularly where the consequence of such breach is to the benefit to the new employer. When a new employer stands up to and funds litigation brought by the former employer against its new employee.... the new employer may be at risk of a cost order being made against it'.

Observations

This case provides encouragement to businesses seeking to enforce post-employment restraints. It demonstrates the risks that new employers face in supporting an employee who joins from a competitor and fails to comply with post-employment restraints.

It is also illustrative of the consequences that can flow to a new employer where the employee has taken confidential information or acted in breach of their contract.

Finally, this case demonstrates a willingness by Courts to take a hands-on approach to identifying the 'real' parties to litigation. It is no longer sufficient for a new employer to stand by and proclaim innocence when it is in reality an active and aggressive player behind the scenes.

Drafting and enforcing restraints are notoriously difficult tasks. We strongly recommend that employers obtain specialist advice on these issues.

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