

**IN THE EMPLOYMENT RELATIONS AUTHORITY
WELLINGTON**

[2017] NZERA Wellington 10
5646910

BETWEEN HOME DIRECT LIMITED
Applicant

AND AMOL ROSARIO
Respondent

Member of Authority: M B Loftus

Representatives: Sylvia Wood, Advocate for Applicant
Paul McBride and Guido Ballara, Counsel for
Respondent

Investigation Meeting: On the papers

Submissions Received: 2 and 16 February 2017 from Respondent
8 and 17 February 2017 from Applicant

Determination: 28 February 2017

**COSTS DETERMINATION OF
THE EMPLOYMENT RELATIONS AUTHORITY**

[1] This is an application for costs in respect to a matter that was never heard by the Authority.

[2] On 25 October 2016 the applicant, Home Direct, lodged an application alleging Mr Rosario had breached various non-solicitation, restraint and confidentiality covenants in his employment agreement.

[3] A Statement in Reply was filed on 16 November 2016. Mr Rosario denied the allegations but offered to attend mediation. The parties were subsequently ordered to mediation which was scheduled for 27 January 2017.

[4] On 20 January Ms Wood advised the claim was being withdrawn. Mr Ballara responded by e-mail on 24 January. He acknowledged the withdrawal but noted a

residual issues as to costs given Home Direct's ... *decision to commence its (in our view unmeritorious) claim against our client [which] necessarily required him to incur legal costs to defend the same.*¹

[5] Mr Ballara raised the prospect of a costs application to the Authority but prior to doing so sought a *realistic proposal to address* Mr Rosario's then costs of \$2,886.50 plus GST. There was no response hence the current application.

[6] For Mr Rosario it is argued Home Direct's application must, as a result of the withdrawal, be deemed to have been pursued unsuccessfully and that constitutes an event from which costs should follow. A contribution of \$2,500.00 is sought.

[7] It is submitted:

*... in all of the circumstances, including the unannounced, unilateral withdrawal of an application alleging serious impropriety/conduct and seeking damages, and the Applicant's failure to raise mediation prior to lodging that, such a contribution is just.*²

[8] Home Direct's initial response dated 8 February reiterates its view Mr Rosario was in breach of his obligation but asserts the matter was dropped as the covenants in question were close to their expiry dates. It goes on to say:

A claim of \$2500 as a contribution toward costs when there has been no mediation and no hearing preparation in this matter is both bewildering and excessive.

[9] That brought an observation from Mr Rosario that Home Direct's comments ... *fail to recognise that there is no (determination of any) breach (which was otherwise denied), because the claim was withdrawn.*³

[10] That led to a further memorandum from Home Direct the following day. Again Home Direct asserts Mr Rosario was in breach of his obligations and claims elements of his defence as advised in the Statement in Reply are wrong. It says it also incurred expense and more would follow had it attended mediation. This caused it to question whether the cost was justified given little remained of the restraint period. Home Direct closes by again asserting Mr Rosario did wrong and as a result his application for costs lacks merit.

¹ E-mail Ballara to Wood dated 24 January 2017

² Memorandum of Counsel at [12]

³ E-mail Ballara to Authority copied to Wood dated 16 February

[11] The principles regarding the award of a contribution toward costs are well established.⁴ Essentially costs follow the event with the event being success or otherwise with an application.

[12] In this instance Home Direct chose to initiate proceedings and while it is established a respondent's first awareness of a claim may be imparted via a claim in the Authority it is an approach that ensures costs will be incurred. A statement of reply is required within 14 days. Home Direct chose to adopt this approach thus ensuring Mr Rosario incurred costs.

[13] It then chose to withdraw the application and, as a result, failed to gain a declaration Mr Rosario had breached his obligations. The effect, as Mr Rosario asserts, is that he successfully resisted the claim. That is an outcome, or as he puts it, an *event* from which costs flow.

[14] Home Direct offers two reasons as to why this should not occur but both fail to convince. The first is Mr Rosario had breached his obligations. As he says the withdrawal means there is no such finding. The second is it was not worth proceeding as there was little to be gained given the restraints Mr Rosario allegedly breached were approaching their expiry. This approach fails to recognise the original claim. It did not ask that Mr Rosario comply with his obligations but that he pay damages. Time is irrelevant to such a claim and it could have proceeded regardless of when the covenants expired.

[15] This is, I conclude, a circumstance where Home Direct's decisions forced Mr Rosario to incur costs and as a result of its failure to successfully pursue the matter a contribution toward the cost of the defence is justified. The question is how much.

[16] A costs award is a contribution and not full indemnification which is close to what Mr Rosario seeks. The accounts attached to the application indicate costs of \$2,185 were incurred up to and including the filing of the Statement in Reply. This included initial advice which would have been required if Home Direct had adopted an alternate approach as Mr Rosario asserts it should and would not have been recoverable had the matter resolved at mediation.

⁴ *PBO Ltd (formerly Rush Security Ltd) v Da Cruz* [2005] ERNZ 808 and *Fagotti v ACME* [2015] NZEmpC 135

[17] Having considered the account and the submissions before me I conclude a contribution of \$1,000 appropriate.

Conclusion

[18] For the above reasons Home Direct Limited is ordered to pay Amol Rosario the sum of \$1,000.00 (one thousand dollars) as a contribution toward the costs Mr Rosario incurred in defending the claim.

M B Loftus
Member of the Employment Relations Authority