

**IN THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH**

[2011] NZERA Christchurch 140
5340675

BETWEEN BRENDAN CLARK BENJAMIN
 Applicant

A N D EUROPEAN WOODWORKS
 LIMITED t/a EUROTECH
 WINDOORS
 Respondent

Member of Authority: M B Loftus

Representatives: Rhonda Harris, Counsel for the Applicant
 Diana Hudson, Counsel for the Respondent

Investigation Meeting 20 September 2011 at Dunedin

Submissions Received: At the investigation

Date of Determination: 23 September 2011

DETERMINATION OF THE AUTHORITY

Employment relationship problem

[1] The applicant, Brendan Benjamin, claims that he was dismissed by the respondent, European Woodworks Limited t/a Eurotech Windoors (Eurotech) on or about 20 August 2010. He claims the dismissal was effected by his being told he could no longer start in a position that he had been offered, and accepted, on 26 July 2010.

[2] Eurotech denies that it dismissed Mr Benjamin. It denies the alleged offer and its position is that you cannot dismiss someone you never employed.

Issue to be determined

[3] Whilst this is a dismissal claim, the issue to be determined is whether or not Eurotech made an offer of employment which was accepted by Mr Benjamin on 26 July 2010.

[4] If it did, then he became a person intending to work and therefore an employee for the purposes of the Employment Relations Act 2000 – refer section 6. The fact he then found himself unable to commence will undoubtedly constitute a dismissal, which Eurotech does not attempt to justify.

[5] If there was no offer, Mr Benjamin’s claim must fail as the Authority does not have jurisdiction to consider it as Mr Benjamin is not an employee as defined by the Act and incapable of bringing a personal grievance.

Background

[6] Eurotech is in the business of manufacturing European-style timber doors and windows from premises in Dunedin. On 21 June 2010, it placed an advertisement for a window and furniture polisher/spray painter on TradeMe. Mr Benjamin responded by email the following day. The email advises that he was a tradesman painter with some 15 years’ experience currently owning and running his own business. It outlines his skills before concluding, without saying why, that *“I’m available Monday to Saturday including overtime. Have a reliable car and phone. Available to start asap”*.

[7] Eurotech considered the applications but did not pursue Mr Benjamin’s for two reasons. The email did not, in Eurotech’s view, constitute a full CV and the skills outlined did not align with those it sought. It ultimately selected another candidate and he was offered the position on 16 July.

[8] The successful candidate was, however, required to give notice to his then current employer and could not commence until mid-August. In the interim, Eurotech had an order that it had to progress and insufficient staff to do so. It considered that Mr Benjamin had skills that could assist and, given the existence of his own business, thought he may be available as a contractor. It considered Mr Benjamin a better prospect than the inexperienced workers they normally obtained through labour hire companies.

[9] Accordingly Mr Chris Rampe, a director of Eurotech, telephoned Mr Benjamin. There is some uncertainty as to whether this occurred on 25 or 26 July but that need not be resolved for the purposes of this determination. Mr Rampe says:

... I telephoned [Mr Benjamin] to ask if he would be interested in doing some work for us as a sub contractor completing an order.

This conversation was brief, the Applicant agreed to come and discuss this with me.

[10] Mr Benjamin agrees that the conversation was short but his recollection as to what was said is hazy. All he could say was that Mr Rampe said come in for what he claims was a job interview. He accepts the term job interview was not used but is of the view there could be no other purpose given his earlier application. He can not explain why Eurotech would have waited five weeks before making contact.

[11] The 'interview' occurred on 26 July 2010. There is, however, some debate as to who participated. Mr Benjamin states that the discussion was between him and Mr Rampe, though he accepts that another director of Eurotech, Ms Sandra Habermann, was in the room and whilst she did not participate she could undoubtedly have heard what was said. Both Mr Rampe and Ms Habermann claim that she was an active participant.

[12] It is this conversation, and what was said therein, that is pivotal to the determination of this matter.

[13] Mr Benjamin says:

5. *At that interview Chris Rampe, ... told me the position was mine and, discussed with me the terms and conditions of my employment and what would be expected of me. Terms and conditions were as follows:*

- *that I was to work as a contractor on an 'on call' basis for a two month period starting the day following the interview being 27 July 2010 until the workload increased as the company was anticipating; and*
- *that I would be paid a contract rate of \$35 per hour; and*
- *following that two month period I would go on to wages.*

6. *I agreed to the above terms and was told by Chris that he was impressed with my attitude and enthusiasm and he told me that the position advertised was mine. Chris shook my hand and welcomed me on board.*

[14] Mr Benjamin expanded on this in oral evidence. He says that they discussed what he would expect to be paid using, as a basis, his current earnings from which they subtracted various costs and overheads that would not be incurred while Mr Benjamin was performing work for Eurotech before settling on the rate of \$35 per hour for work performed as a contractor. Mr Benjamin also says in both written and oral evidence that he told Mr Rampe that he sought work as an employee in order to obtain a consistent and reliable income stream and that, in response, Mr Rampe

referred to his belief that the workload would increase but that they would have to wait until it did.

[15] Mr Benjamin accepts that there was no discussion about what wages would be payable as an employee and that no commencement date was ever discussed or agreed.

[16] Mr Rampe has a different view. In written evidence he says:

7. [Mr Benjamin] *met with me and Sandra Habermann It was agreed that [he] would carry out the necessary work as a subcontractor and that:*

- *He would work on an 'on call' basis;*
- *He would be paid a contract rate of \$35.00/ hour;*
- *He would assist with completion of an order that would take 2/3 weeks;*
- *His services would consist mainly of surface paint preparation.*

8. [He] *agreed to these terms and advised that he would need at least two days' notice of any work as he had other jobs he was working on for his own business. He confirmed he could start immediately as he had a friend who was available to carry out his current work.*

9. *At no time did I discuss with [Mr Benjamin] that he would have work beyond the contracting period or that we would take him on as an employee. While [he] did advise that he would like a steady job as an employee, we were not in a position to offer this, and made this clear to him. We also told him that we had a qualified person (as per the advertised job vacancy) starting in mid-August.*

10. *At no time did I advise that work was increasing as claimed...*

[17] Ms Habermann's written evidence is consistent with that of Mr Rampe.

[18] Mr Rampe added little in the way of oral evidence, other than to accept that there was a discussion about possible work in the future but he says that it was made very clear that if any such work became available it would be offered to Mr Benjamin as a sub contractor and not as an employee. Again, Ms Habermann, in her oral evidence, concurs.

[19] As agreed, Mr Benjamin commenced as a contractor the following day. Upon commencement Mr Benjamin was shown around the premises and saw a job which was awaiting spray painting. Mr Rampe claims Mr Benjamin immediately asked if he could do the painting and while Eurotech considers he was engaged to prepare joinery, Mr Rampe conceded with the view that it was a trial. Mr Benjamin did not

see it that way and considers he was simply doing one of a range of tasks he was engaged to perform. As events transpired, it was the only spray painting performed by Mr Benjamin as, in Eurotech's view, the result was not up to its standards. There is a debate as to whether or not Mr Benjamin was informed of this – he says no; Mr Rampe says yes though he concedes he may not have been explicit in his criticism given it was Mr Benjamin's first day.

[20] Between that first day, 27 July, and 14 August Mr Benjamin completed some 82.5 hours work for Eurotech. He invoiced Eurotech on a weekly basis and was paid accordingly. There is no debate between the parties that this work was performed as a contractor.

[21] 14 August turned out to be Mr Benjamin's final day at Eurotech. About that, Mr Rampe says:

The order [Mr Benjamin] was working on was completed on Saturday 14th August 2010 and I thanked [him] for accommodating the work in between the work he was doing for his own clients, and advised him that if we had work again in the future then we would contact him.

[22] Mr Benjamin accepts Mr Rampe's description of their conversation as reasonably accurate but says that he was totally bemused by what was being said. He disputes that the order had been completed, saying that whilst the preparation was over it was yet to be sprayed. He says he was confused about why he was not being asked to do that, when spraying was one of the tasks contemplated by the job he had applied for, been offered, and accepted. He does, however, accept that he never questioned Mr Rampe's comments but instead concluded that he could raise his concerns when he came to work on the following Monday.

[23] On the following Monday, he telephoned Eurotech to ascertain whether or not work was available as was his normal practice. He spoke to Tony, a colleague, and was advised that the answer was no. Mr Benjamin continued to ring over the next couple of days and, in each case, spoke to Tony. The answer remained the same, though Mr Benjamin claims that he continuously ask that Tony get Mr Rampe to ring him which did not occur.

[24] On the Thursday (20 August), in what would appear to have been a terse conversation, Mr Benjamin spoke to Mr Rampe. In that conversation it became clear to Mr Benjamin that Eurotech had no further work available at that time. Mr Rampe

claims that he advised that should a future opportunity arise, Mr Benjamin would be considered as a contractor but Mr Benjamin denies this. He claims he was told he would no longer be engaged and that decision was a result of what Eurotech considered his pestering of Tony.

[25] The parties agree that the conversation ended with Mr Benjamin advising that he would be seeking legal advice and taking the matter further. That advice constituted a final parting of the ways and led to the present hearing.

Determination

[26] As said earlier (paragraphs 3 to 5 above) and as agreed by Counsel, the issue to be determined by the Authority is a narrow one. Did, during the conversation of 26 July, Eurotech offer Mr Benjamin a position which he then accepted?

[27] If it did, then he was a person intending to work and therefore an employee as defined by sections 5 and 6 of the Employment Relations Act 2000. He would then have the ability to pursue a personal grievance for unjustified dismissal which would undoubtedly succeed as, had Eurotech agreed to employ him, it did not and there is no attempt to justify the change.

[28] On the other hand, and should it be concluded that there was no offer of employment and that Mr Benjamin should remain a contractor, he is not a person intending to work; has no access to the grievance provisions in the Act and the Authority has no jurisdiction to consider his claim. His application must, in such circumstances, fail.

[29] I conclude that no such offer was made and do so for the following reasons.

[30] The Court of Appeal, in *Fletcher Challenge Energy Ltd v. Electricity Corporation of New Zealand Ltd* [2002] 2 NZLR 433, held that the question of whether or not the parties intended to enter into a contract (read, in this instance, employment agreement) is:

[54] ... to be determined objectively. In considering whether the negotiating parties have actually formed a contract, it is permissible to look beyond the words of their 'agreement' to the background circumstances from which it arose – the matrix of facts.

...

[60] ... No longer should be said ... the prima facie, if something essential is left to be agreed upon by the parties at a later time, there

is no binding agreement. The intention of the parties, as discerned by the Court, to be bound or not to be bound should be paramount.”

[31] An employment agreement, when considered at its most basic level, is an agreement to exchange labour for remuneration. Whilst it is clear that Mr Benjamin was willing to provide labour, it is equally clear from his evidence that remuneration was never discussed, let alone agreed.

[32] Taking the analysis wider, there are other indicia of an employment agreement. As was said by Nicola Whittfield in *Verbal formation of an employment agreement - Part 2* [2004] ELB (33):

An analysis of case law reveals a number of factors that the Court will give weight to when determining whether an offer of employment has been made, notably:

- *Specific verbal invitation;*
- *Discussion of salary;*
- *Discussion of start date;*
- *Discussion of hours of work or rosters;*
- *Provision of, or organising, uniform;*
- *Completion of IRD tax forms or direct debit forms;*
- *Discussion of holidays.*

[33] One of the above indicia, uniform, is irrelevant and another is clearly in dispute, namely whether there was a specific verbal invitation. There was no agreement in respect to the other indicia and that, to me, is significant. There is simply no discussion, let alone agreement, about key elements of the consideration. The normal trappings of a concluded employment are totally absent.

[34] There is then the issue of intent and the more holistic approach encouraged in *Fletcher Challenge v ECNZ* (30 above). It is clear that Eurotech did not seek or intend to engage a further employee. They had just done so and had no need of further staff. The company's intent is clear – they sought a contractor to be used to address fluctuating workloads.

[35] Turning to Mr Benjamin. His goal is equally clear – he sought paid employment however, as previously observed by the Authority, *an ambition to work falls well short of an intent* (as contemplated by s.5 of the Act) *to work* (*Kernohan v Auckland University of Technology* Unreported AA133/03).

[36] Despite a clear intent, Mr Benjamin's evidence would suggest he was far from convinced that he had achieved his ambition. In this respect I note various parts of his oral evidence and, in particular, answers he gave to various questions. When I questioned the evidence reported in 14 above and suggested that the idea of waiting to see whether the workload would increase before commencing full time employment was somewhat akin to "*how long is a piece of string*", Mr Benjamin answered that whilst Eurotech could not be sure the workload would increase, he "*knew the work was coming in*". He could not, however, explain how or why he had such knowledge.

[37] Later he was asked by his own counsel during re-examination about the extent of promises regarding ongoing employment and replied:

He [Mr Rampe] said that if the workload increased they might put me on wages but couldn't in the interim. I'd have to wait and see.

[38] Words like "*might*" and "*wait and see*" are not indicative of a concluded and binding agreement. Furthermore, there is Mr Benjamin's conduct around this time. There is evidence of at least three occasions upon which he tendered for work for clients other than Eurotech in his self-employed capacity. He explained this by saying that he never intended performing the work and was simply providing those clients a benchmark by which they could judge other tenders but that view was not consistently expressed and is far from convincing.

[39] The above leads me to conclude, as indicated earlier, that the parties did not conclude an agreement under which Mr Benjamin would be engaged as an employee toward the end of September 2010.

[40] I must make it clear that I am not suggesting that Mr Benjamin was attempting to mislead – he was not and in this respect I noted during the investigation that he sometimes had difficulty with his communication and ability to understand what was being said or asked. I got the impression that comments and answers were influenced not by the evidence or questions, but by his goals and desires. I suspect the same occurred on 26 July and Mr Benjamin interpreted Mr Rampe's comments in a way that sat easily with his desires. Unfortunately for him, and as said earlier, a desire to be employed does not necessarily mean a concluded agreement.

[41] Given the above, I conclude that Mr Benjamin was not an employee, that he does not have access to the personal grievance process, and that his application must therefore fail.

Costs

[42] I reserve the issue of costs. I ask that the parties try to resolve the issue but failing that, and in the event Eurotech wishes to seek costs, it is required to lodge, and serve upon Mr Benjamin (through his counsel), an application within 28 days of this determination. Mr Benjamin is to file his response within 14 days of the application.

M B Loftus
Member of the Employment Relations Authority