

**IN THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH**

[2011] NZERA Christchurch 183
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

Submissions Received: 21 October 2011 from the Respondent
 10 November 2011 from the Applicant

Date of Determination: 24 November 2011

COSTS DETERMINATION OF THE AUTHORITY

[1] In a determination dated 23 September 2011 I rejected Mr Benjamin's claim that he had been unjustifiably dismissed by European Woodworks Limited (Eurotech) on the grounds that he was not an employee and therefore did not have access to the personal grievance process.

[2] The issue of costs was reserved with Eurotech, as the successful party, being advised that if it wished to seek a contribution toward its costs, it should do so via a written application. It does.

[3] Eurotech seeks *an order for full costs*, being the sum of \$4,845.00 (excluding GST), but adds that in the alternative and if I am not minded to accede to that request, it would consider \$2,000 to be a reasonable contribution.

[4] In support of the application Counsel provided a detailed breakdown of her clients' costs. She argued that Eurotech was completely successful and that the position it maintained from the outset, namely that Mr Benjamin had no prospect of

success, was upheld. Ms Hudson submits that Eurotech is entitled to *all costs incurred ... in defending [a] baseless claim.*

[5] Mr Benjamin submits that while Eurotech was completely successful, there are mitigating circumstances that *suggest ... costs should lie where they fall.*

[6] In support of this approach, it is submitted that:

- a. Notwithstanding his failure, Mr Benjamin was not pursuing a malicious or vexatious claim and, in support of this assertion, reference is made to my finding that Mr Benjamin was not seeking to mislead when pursuing his claim but had, in all probability, misunderstood the situation in which he found himself;
- b. A portion of the costs sought (approximately \$627) related to mediation and was not recoverable; and
- c. *Mr Benjamin is currently unemployed and would be unable to meet the costs of the Respondent.*

[7] Normally the Authority will assess costs on a daily tariff basis: refer *PBO Ltd (formerly Rush Security Ltd) v Da Cruz* [2005] ERNZ 808. In assessing that tariff a common starting point is \$3,000 per day: refer *Chief Executive of the Department of Corrections v Tawhiwhirangi (No 2)* [2008] ERNZ 73. From that point adjustment may occur depending on the circumstances.

[8] The hearing took approximately half a day which means, applying *Da Cruz* and *Tawhiwhirangi (No 2)*, the award would be \$1,500.

[9] Eurotechs argument that they were completely successful does not, in my view, add anything to the accepted principle that costs follow the event and does not entice me to consider an award in excess of the *daily tariff.*

[10] In the same way, I am not swayed by Ms Harris's first argument. The bottom line is that Mr Benjamin's claim failed and, all things being equal, costs follow the event. Her second point is irrefutable (refer *Trotter v Telecom Corp of NZ Ltd* [1993] 2 ERNZ 935, 937) and the counter argument that mediation was ordered is, in my view, irrelevant – the statutory scheme envisages and supports mediation. It is the third point that may have merit. I say 'may' as no evidence was proffered in its

support but, that said, the evidence proffered at the investigation meeting indicates that the assertion has a factual foundation.

[11] Given the above, I consider it appropriate to order Mr Benjamin to pay Eurotech the sum of \$1,000 (one thousand dollars) as a contribution toward its costs.

M B Loftus
Member of the Employment Relations Authority