

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

[2012] NZERA Auckland 302
5361593

BETWEEN	BING CHEN Applicant
A N D	NEW HOME GROUP LIMITED First Respondent
AND	NEIL GONG Second Respondent

Member of Authority: James Crichton

Representatives: May Moncur, Advocate for Applicant
Veronica Ceponis, Counsel for First Respondent
No appearance for Second Respondent

Submissions Received: 13 June 2012 from Applicant
31 May 2012 from First Respondent
No submissions received from Second Respondent

Date of Determination: 3 September 2012

COSTS DETERMINATION OF THE AUTHORITY

The substantive determination

[1] By determination dated 16 May 2012, the Authority disposed of the applicant's claim that he was employed by either of the respondents.

[2] Costs were reserved.

The claim for costs

[3] By memorandum from counsel for the first respondent, a contribution to costs in the sum of \$3,250 is sought.

[4] Counsel notes the prevailing daily tariff rate commonly used by the Authority, notes that the investigation meeting in the instant matter took a half day, but contends

that because of the additional costs incurred by the first respondent in resisting Bing Chen's claim, additional costs are appropriate.

The response from the unsuccessful party

[5] Submissions filed for Bing Chen resist the claim made by the first respondent that additional costs ought to be added to the notional daily rate calculation, and also contends that because Bing Chen has not been paid moneys owed to him for work that he has done, irrespective of whether as an employee or otherwise, he is significantly out of pocket and, while not impecunious, would be placed in significant financial hardship were he to have to meet a significant costs award.

[6] Further, it is submitted on behalf of Bing Chen that neither of the respondents would engage with him in respect of the issues (or indeed the money owed to him) until he filed his proceedings in the Authority and even then, it was not until the investigation meeting that Bing Chen was able to get any real understanding of his position by listening to the evidence of the first respondent.

Determination

[7] The law on this subject is well settled. The principles that ought to apply have been clearly enunciated by the Full Bench of the Employment Court in the leading case of *PBO Ltd v. Da Cruz* [2005] 1 ERNZ 808.

[8] Amongst other things, that decision approves the Authority's common practice of applying a daily tariff, but also lists various other principles which ought to apply such as the Authority's discretion to grant costs or not, the fact that costs will typically follow the event, the fact that costs in the Authority will typically be modest and that the behaviour of the unsuccessful party may sound in costs.

[9] In the particular circumstances of this case, the Authority is persuaded that costs should lie where they fall. While it is usual for costs to follow the event, the Authority does have a discretion. That discretion must be exercised in a principled way and in the particular circumstances of this case, the Authority is persuaded by Bing Chen's argument that he was literally unable to understand what his position was or indeed get either respondent to engage with him at all, until he filed his proceedings in the Authority. Furthermore, the fact that, through no fault of his own, he is owed a significant amount of money for work that he has performed (albeit not

as an employee) by one of the respondents, is again a factor that the Authority thinks it appropriate to take into account.

[10] Not only is that money owed by one of the respondents, but the fact that the money is owed, and that it is a significant amount of money, puts pressure on Bing Chen's financial circumstances and therefore his ability to meet an award of costs.

[11] While normally costs should follow the event in a litigation setting, this is a case where, while Bing Chen has been completely unsuccessful in his claim before the Authority, he came to it with clean hands and in circumstances where he was simply unable to get any sense from either of the respondents, either about his status or about the money owed to him, without issuing the proceedings that he did.

[12] In all the circumstances, the Authority thinks that costs should lie where they fall and that is the decision of the Authority.

James Crichton
Member of the Employment Relations Authority