

**IN THE EMPLOYMENT RELATIONS AUTHORITY  
AUCKLAND**

**AA299A/10  
5166325**

BETWEEN COLM LENIHAN  
Applicant  
AND CONSPEC CONSTRUCTION  
LTD  
Respondent

Member of Authority: James Wilson  
Representatives: Max Whitehead for the applicant  
Adam Hopkinson for the respondent  
Costs submissions received: No submission from the applicant  
23 July 2010 from the respondent  
Determination: 24 September 2010

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**COSTS DETERMINATION OF THE AUTHORITY**

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**The substantive determination**

- [1] In a determination dated 25 June 2010 I found that:
- a. Mr Lenihan was a casual employee and;*
  - b. He was not unjustifiably dismissed.*
  - c. Mr Lenihan does not have a personal grievance against Conspec;*
  - d. Mr Lenihan is not entitled to further holiday pay;*
  - e. I have declined to impose a penalty on Conspec for not providing Mr Lenihan with a written employment agreement.*

[2] In that determination I reserved the question of costs and requested that the parties attempt to resolve the issue between themselves in the first instance. They have been unable to do so and Mr Hopkinson, on behalf of Conspec, has filed submissions seeking an award of costs against Mr Lenihan.

## **The submissions**

[3] In his submissions Mr Hopkinson says that he suggested to Mr Whitehead that Mr Lenihan should contribute \$3000 towards Conspec's legal costs. However Mr Whitehead advised Mr Hopkinson that he was unable to contact Mr Lenihan and therefore unable to obtain instructions regarding Conspec's claim.

[4] Mr Hopkinson says that Conspec's legal costs in defending this matter amounted to a total of \$14,948.17 including GST and disbursements. Of these costs \$10,882 were incurred following mediation. He also reveals that Conspec made a *Calderbank offer* to Mr Lenihan to settle the dispute for \$1500. This offer was not accepted and the company incurred a further \$8708 after the Calderbank offer was made. He submits that, as Mr Lenihan was entirely unsuccessful in his claims against Conspec, it seems fair and reasonable that he make a contribution to Conspec's costs. He suggests that in line with other recent awards of the Authority against unsuccessful applicants an award of \$3000 seems fair.

[5] By way of response Mr Whitehead advised the Authority that he had been unable to contact Mr Lenihan as he has left all known addresses and Mr Whitehead has not been able to contact him by phone or e-mail.

## **Discussion**

[6] The principles to be applied by the Authority in determining the appropriate level of costs are well established and were set out by the Employment Court in *PBO (formerly Rush Security Ltd) v Da Cruz* [2005] 1 ERNZ 808.

[7] The investigation meeting in this matter took just over half a day and, as Mr Hopkinson rightly points out Mr Lenihan was entirely unsuccessful. It is appropriate that costs should follow the event and that Mr Lenihan should make a contribution towards Conspec's costs. Had he chosen to accept the company's Calderbank offer he would have saved both the company and himself a good deal of time and expense. The fact that Mr Lenihan appears to have disappeared (at least from his representatives' view) and has therefore not taken the opportunity to file submissions

opposing Conspec's request for a cost award, should not penalise the company. The company's suggestion that Mr Lenihan's contribution should be \$3000, is in my assessment, both fair and reasonable under the circumstances and consistent with the principles set out by the Court in *Da Cruz*.

### **Determination**

**[8] Mr Lenihan is ordered to pay Conspec Construction Ltd \$3000 as a contribution towards its costs.**

James Wilson

Member of the Employment Relations Authority