

**IN THE EMPLOYMENT RELATIONS AUTHORITY  
AUCKLAND**

**AA 299/10  
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  
Investigation Meeting: 11 March 2010 in Tauranga  
Submissions received: 18 March 2010 from the applicant  
18 March 2010 from the respondent  
Determination: 25 June 2010

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**DETERMINATION OF THE AUTHORITY**

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**Colm Lenihan's employment relationship problem**

[1] Colm Lenihan says that he was unjustifiably dismissed, without notice, by Conspec Construction Ltd (Conspec). Mr Lenihan is seeking compensation for the hurt and humiliation his dismissal has caused him, recovery of 3 months lost earnings, payment in lieu of notice, outstanding holiday pay, "compensation for no written agreement" and legal costs.

[2] Conspec say that Mr Lenihan was a casual employee, he was not dismissed but rather there was no further work available for him; he was given an employment agreement but did not return it and he was paid all of the wages and holiday pay owing to him.

### **The issues for determination**

[3] The parties agree that the primary issue for determination by the Authority is whether Mr Lenihan was a casual employee. If he was not Conspec accept that they followed no formal process in terminating his employment and that his dismissal was almost certainly therefore unjustified. If he was unjustifiably dismissed then he would be entitled to be compensated for the wages he has lost as a result of that dismissal and for the hurt and humiliation the dismissal caused him. Secondary issues, irrespective of whether his dismissal was justified, are whether Mr Lenihan has received his proper holiday pay and whether Conspec should pay a penalty because they did not supply Mr Lenihan with a written employment agreement.

### **Discussion and determination**

*What was Mr Lenihan's employment status?*

[4] Conspec's Managing Director, David Flaws, says that he made it clear to Mr Lenihan, at the time he offered him employment, that the position he was being offered was casual, initially for six weeks on a contract in Auckland and, after that, as work was available. Conspec's Contract Supervisor, Mr Wayne Smith says that he was present when the offer was made to Mr Lenihan and supports Mr Flaws evidence. Mr Flaws also says that on several subsequent occasions it was made clear to Mr Lenihan that he would continue to be employed only as long as work was available. Two other Conspec employees also gave evidence that they recall Mr Lenihan telling them that he was a casual employee. Mr Lenihan says that he *does not recall being told* that the work was casual and he believed that his appointment was on a permanent basis.

[5] In support of their position Conspec point out that Mr Lenihan's payslips all included payment for holiday pay, at 8%, and that such payment would not have been made to a permanent employee. Mr Flaws also points to his contemporaneous, handwritten interview notes clearly stating that Mr Lenihan also offered *work on a casual basis for 4 to 6 weeks for Auckland culvert job*.

[6] Conspec also question Mr Lenihan's credibility, pointing out that when he was asked at his initial interview whether or not he *had any criminal convictions or had even been on periodic detention*, he stated that he had been convicted of drinking and driving some five years previously but had no other convictions and received *a couple of thousand dollars* in fines for driving related offenses. He omitted to tell Mr Flaws that in fact he had had received \$43,000 in traffic related fines and that \$20,000 of these fines had been waived in return for community work.

[7] Having questioned both Mr Lenihan and the Conspec witnesses I have come to the very clear view that **Mr Lenihan was a casual employee**. I have no doubt whatsoever that what he was offered was employment as and when work was available. Conspec made all reasonable efforts to find ongoing work for Mr Lenihan but I accept that there was no further work available at the time Mr Lenihan's employment was terminated.

*Was Mr Lenihan unjustifiably dismissed?*

[8] Mr Lenihan was a casual employee. No further work was available for him at Conspec. **He was not unjustifiably dismissed**

*Is Mr Lenihan entitled to further holiday pay?*

[9] Mr Lenihan commented, in response to questioning at the Authority's investigation meeting, that he was not aware that he was being paid holiday pay each week. However copies of Mr Lenihan's payslips produced by Conspec clearly show that Mr Lenihan's weekly pay included holiday pay calculated at 8 %. Mr Lenihan accepted that he had been given the originals of these payslips at the time. This method of payment of holiday pay, on a *pay as you earn* basis, is provided for in the Holidays Act for casual employees and I have found that Mr Lenihan was employed on a casual basis.

[10] **Mr Lenihan has received holiday pay, at the appropriate rate, for all of the time he worked for Conspec and is not entitled to any further payment in this regard.**

*Was Mr Lenihan given a written employment agreement?*

[11] I accept Conspec's evidence that Mr Lenihan was given an employment agreement. It is regrettable that they were not more vigilant in ensuring that Mr Lenihan signed and returned that agreement. Had they done so the dispute regarding Mr Lenihan's employment status would almost certainly not have arisen. However I accept that this was an oversight on Conspec's part and not a deliberate attempt to circumvent the statutory obligation to provide a written employment agreement nor to disadvantage Mr Lenihan. I also accept that Conspec have processes in place to ensure that all employees receive a written employment agreement but that these processes failed on this occasion.

[12] It is an employer's obligation to ensure that an employee has a written, signed, employment agreement. Technically Conspec did not fulfil its obligation in this regard. However under all circumstances this **is not a case where a penalty should be imposed and I decline to do so.**

### **Costs**

[13] Costs are reserved and the parties are requested to attempt to resolve this matter between themselves in the first instance. If they are unable to do so Conspec may file and serve a submission in respect to costs within 28 days of the date of this determination. Mr Lenihan will then have 14 days in which to reply.

## Summary

[14] By way of summary of the findings set out of this determination:

- 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.**
- f. Costs are reserved.**

James Wilson

Member of the Employment Relations Authority