

**IN THE EMPLOYMENT RELATIONS AUTHORITY  
AUCKLAND**

AA 82A/08  
5031090

BETWEEN                      RICHARD POTTER  
   Applicant  
  
AND                              AUSTRALIAN CONSOLIDATED  
   PRESS NEW ZEALAND LIMITED  
   Respondent

Member of Authority:      Vicki Campbell  
  
Representatives:            Applicant in person  
   Doug Alderslade for Respondent  
  
Submissions Received:    Applicant in Person  
   8 April 2008 from Respondent  
  
Determination:              8 July 2008

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**COSTS DETERMINATION OF THE AUTHORITY**

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[1]        In a determination dated 11 March 2008 I found that Mr Potter was not constructively dismissed and that he was not entitled to arrears of wages for unpaid commission payments.

[2]        In my determination I reserved the question of costs and invited the parties to resolve the matter between them. They have been unable to do so and I am now in receipt of memorandum from the Respondent. I am satisfied Mr Ryan and Mr Potter have had adequate opportunity to lodge submissions on the matter of costs, but have not done so.

[3]        Mr Ryan was advised via email on 7 April 2008 that lodge any reply to the respondent's submissions on costs within 14 days of that date. On 8 April 2008 Mr Ryan advised the Authority that he did not have instructions from Mr Potter in relation to costs and that he will forward the email directly to Mr Potter. No reply submissions have been lodged in the Authority.

[4]        I have considered the submissions made by the Respondent and I am satisfied that the discretion under clause 15 of Schedule 2 of the Act ought to be exercised in favour of Australian Consolidated Press New Zealand Limited.

[5] The following principles are appropriate where the Authority is exercising its discretion in relation to costs (*PBO Ltd (formerly Rush Security Ltd) v Da Cruz*, [2005] 1 ERNZ 808):

- There is a discretion as to whether costs should be awarded and what amount;
- The discretion is to be exercised in accordance with principle;
- The statutory jurisdiction to award costs is consistent with the equity and good conscience jurisdiction of the Authority;
- Equity and good conscience is to be considered on a case by case basis;
- Costs are not to be used as a punishment or as an expression of disapproval of an unsuccessful party's conduct although conduct which increases costs unnecessarily can be taken into account in inflating or reducing an award;
- It is open to the Authority to consider whether all or any of the parties costs were unnecessary or unreasonable;
- That costs generally follow the event;
- That without prejudice offers can be taken into account;
- That awards will be modest;
- That frequently costs are judged against a notional daily rate;
- The nature of the case can also influence costs and this has resulted in the Authority ordering that costs lie where they fall in certain circumstances.

[6] The Respondent has not provided me with the actual costs incurred, rather Mr Alderslade on behalf of the Respondent has asked the Authority to calculate reasonable costs using a notional daily rate. While I accept that in some cases the Authority will use a notional daily rate to assess reasonable costs, as Mr Alderslade points out in his submissions, that notional rate is then assessed against actual costs incurred. As I have not been provided with the information as to actual costs I am unable to make that comparison.

[7] This matter required a large amount of work and rework from both sides in an endeavour to establish what, if any, commission payments were outstanding to Mr Potter. A large number of spreadsheets and other documents were lodged in the Authority to assist me in that regard.

[8] Further, while the Respondent did not accept Mr Potter had a legitimate claim to unpaid commissions, on 3 May 2007 via Mr Alderslade, the respondent made calderbank offer to settle Mr Potter's for \$7,500. Mr Alderslade made the offer prior to commencing preparation for the Investigation Meeting.

[9] The respondent seeks costs of \$7,500. The hearing lasted one day, however, as mentioned earlier, further information had to be provided in December and January. Given the nature of the problem, and the complexities of the case, and also taking into consideration the calderbank offer made by the Respondent before incurring further costs, Mr Potter is required to pay to Australian Consolidated Press the sum of \$4,000.00.

[10] An order is made accordingly.

Vicki Campbell  
Member of Employment Relations Authority