

**IN THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH**

CA 136A/10
5160304

BETWEEN ANDREW JOHN KEACH
Applicant

A N D BROWN & SON CONSTRUCTION
LIMITED FORMERLY OTAGO
BUILDING SERVICES LIMITED
Respondent

Member of Helen Doyle
Authority:

Representatives: David McAuslin, Counsel for Applicant
Nathan Brown, Advocate Respondents

Submissions 19 July 2010 from Applicant
Received:

No submissions from Respondent

Determination: 30 September 2010

COSTS DETERMINATION OF THE AUTHORITY

[1] In my determination dated 29 June 2010 I found that Mr Keach was an employee of the respondent and not an independent contractor. I reserved the issue of costs. Mr Keach had until 19 July 2010 to lodge and serve submissions as to costs and Mr Brown on behalf of the respondents until 9 August 2010.

[2] Submissions were received on behalf of Mr Keach in accordance with the timeframe set. The Senior Support Officer at the Authority sent the submissions to Mr Brown advising him to respond to them. No response has been received on behalf of the respondent as at the date of this determination and the Authority now intends to proceed to determine the issue of costs.

Determination

[3] Mr Keach is legally aided and his actual costs, Mr McAuslin advises, amount to \$3,920.07 which sum does not include the cost of drafting the costs submissions of \$309 for which an additional claim will be made.

[4] Mr McAuslin refers to the leading Employment Court judgement of *PBO Ltd v. Da Cruz* [2005] 1 ERNZ 808 and the main principles set out in that case that apply to the Authority in the exercise of its discretion as to costs.

[5] Mr McAuslin submits that the respondent failed to resolve matters at an earlier stage and by not doing so caused the applicant to incur additional costs. He refers to an offer to settle and inflammatory allegations.

[6] Mr McAuslin relied on the fact that the respondent was represented at some stages of the process although not for the purposes of the investigation meeting.

[7] Answering the question as to whether a person is employed by another person under a contract of service or engaged under a contract for services is not straightforward. In this case there was evidence of agreement initially to an independent contractor relationship. When all relevant matters were considered that was not found to be the real nature of the relationship. There are some cases where a determination is necessary.

[8] I did not find the conduct of the applicant or respondent during the investigation meeting unduly increased costs. Although there were some issues in statements of evidence on behalf of the respondent that arguably were not on point they were able to be dealt with in a fairly efficient manner.

[9] This is the sort of case where the costs should be awarded on the basis of an average daily tariff. Mr McAuslin submitted this is now recognised up to \$3500. That however that depends on the matter before the Authority. I think the average daily tariff for a matter of this nature should be 3,000. That therefore is the starting point to assess costs. The investigation meeting took half a day between 9.30am and 1.12pm. I make a downward adjustment to the daily tariff to reflect that of \$1200. In doing that I recognise that the work required and therefore costs incurred by a party is not always reflected by the time taken to investigate by the Authority and it would not be fair in my view to simply halve the rate.

[10] I order Brown & Son Construction Limited formerly Otago Building Services Limited to pay to Andrew John Keach costs in the sum of \$1,800 and disbursements of \$70.

Helen Doyle
Member of the Employment Relations Authority