

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

[2011] NZERA Auckland 358
5308721

BETWEEN WENXIAN JIANG
Applicant

AND KVB KUNLUN NEW
ZEALAND LIMITED
Respondent

Member of Authority: Robin Arthur

Representatives: Richard Zhao for the Applicant
Jo Douglas for the Respondent

Submissions: 22 July 2011 from the Respondent and 9 August 2011
from the Applicant

Determination: 11 August 2011

COSTS DETERMINATION OF THE AUTHORITY

[1] When the personal grievance application of Wenxian Jiang was declined, the Authority reserved costs and set a timetable for memoranda should the parties not be able to resolve that matter themselves.¹

[2] KVB Kunlun New Zealand Limited (KVB) has sought an award of costs of \$4000. No copies of invoices were provided but counsel stated actual costs and disbursements totalled \$10,648. That amount included costs associated with mediation preparation and attendance, which are not included for the purposes of a cost award in the Authority.

[3] KVB sought an award above the usual nominal daily tariff of \$3000 because of additional time taken during the one day investigation meeting on an unexpected issue concerning the admissibility of one document in its evidence.

¹ [2011] NZERA Auckland 281.

[4] Mr Jiang's memorandum in reply opposed an award above the usual tariff. He submitted the evidence admissibility issue was better dealt with at the investigation meeting rather than by having incurred further costs through seeking to have that matter dealt with earlier as a preliminary matter. Other than that he relies on the familiar principles regarding the Authority's discretion to award costs, saying he should not be punished for bringing unsuccessful proceedings.² He submitted that he suffered financial hardship following his dismissal by KVB and had to move countries for work. His evidence at the Authority investigation was that he now had a job in China.

[5] I agree there is no need for an upward adjustment of the usual daily rate due to the admissibility issue dealt with at the investigation meeting. It concerned a document said to be a transcript of a telephone conversation between Mr Jiang and a customer of KVB from a recording of a work call and about which there was no issue that KVB was entitled to monitor. The document had been attached to KVB's statement in reply lodged in 11 October 2010. No challenge to its admissibility was raised by Mr Jiang's representative during the Authority's case management conference held on 15 November 2010. When the objection concerning the document was raised for the first time during the 24 March 2011 investigation meeting, I heard submissions from counsel and ruled that the document was admissible although, as it turned out, I did not need to rely on the contents of that document as Mr Jiang and the customer gave better oral evidence about the conversation to which it referred. I do not accept KVB's costs increased as result because its representative was well able to deal with the issue 'on the hoof' during the meeting.

[6] However I do agree the usual daily rate should be increased due to a 'knock on' effect caused by the time taken on the admissibility issue. The directions for the investigation meeting – issued on 15 November 2010 after discussion with counsel – included provision for the representatives to give oral closing submissions, speaking to a written synopsis if they wish to provide one. But time ran out for the representatives to do so because of the extra time unexpectedly taken up on earlier ad hoc submissions about the admissibility issue. The result was that arrangements needed to be made for a less efficient subsequent exchange and lodging of written

² *PBO Limited v Da Cruz* [2005] ERNZ 808.

submissions. I accept that this then required some additional preparation and review work for KVB's representative and a small increase in actual costs incurred. Accordingly I consider the appropriate daily rate for this particular meeting, which required KVB to lodge three witness statements, prepare a bundle of documents and lodge written legal submissions, is \$3500. That is the amount awarded to KVB in costs.³

[7] Although there was no evidence about Mr Jiang's actual means, I consider the level of costs he is now required to pay KVB remains modest, both for him to meet and in comparison with the actual level of costs incurred by KVB.

Robin Arthur
Member of the Employment Relations Authority

³ Clause 15 of Schedule 2 of the Employment Relations Act 2000.