IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND

[2015] NZERA Auckland 54
5517908

	BETWEEN	KVB KUNLUN NEW ZEALAND LIMITED Applicant
	A N D	ANDRE DE WET Respondent

Member of Authority:	James Crichton
Representatives:	Jo Douglas, Counsel for the Applicant Tim Oldfield, Counsel for the Respondent
Submissions Received:	27 January 2015 from the Applicant 12 January 2015 from the Respondent
Date of Determination:	23 February 2015

COSTS DETERMINATION OF THE AUTHORITY

The substantive determination

[1] In the substantive determination issued as [2014] NZERA Auckland 513 on 15 December 2014, I dismissed the applicant's application under clause 12A of the Second Schedule to the Employment Relations Act 2000 (the Act).

[2] In that substantive determination, I also reserved costs.

The claim for costs

[3] The respondent (Mr de Wet) seeks full indemnity costs after his successful defence of the application from the applicant, KVB Kunlun.

[4] Mr de Wet's argument proceeds on the footing that because KVB Kunlun's application was dismissed as frivolous and KVB Kunlun was put on notice at an early stage that its attack on a prior settlement agreement was bound to fail, full indemnity costs are appropriate.

[5] Moreover, Mr de Wet points out that he, an individual, and with an individual's limited resources, had to defend himself against a corporate with significantly greater resources and that that fact ought to sound in costs.

The response

[6] KVB Kunlun argues that all Mr de Wet is entitled to by way of contribution is a half days costs calculated at half of the Authority's daily tariff rate, because the investigation meeting was concluded within half a day and there is no reason in principle to depart from the Authority's normally held view that the starting point for any costs fixing exercise ought to be the daily tariff.

[7] In particular, KVB Kunlun maintains that it was entitled to test the veracity of its claim in the Authority and the fact that the Authority has determined that its claim was frivolous and that it was warned about the risks of proceeding, does not disentitle it to access to justice.

Legal principles

[8] Both parties quite properly refer to the leading case in costs setting in the Authority, *PBO Ltd v. Da Cruz* [2005] 1 ERNZ 808. In that judgment, the Full Bench of the Employment Court enunciates the principles that the Authority ought to apply in a costs setting environment. Amongst other things, the Court mandates the use of the daily tariff approach which the Authority has regularly used as a starting point, identifies the traditional legal principle that costs normally follow the event, but also notes that costs will be more modest in the Authority because of the nature of its proceeding and that the application of the costs regime must be undertaken in accordance with principle.

[9] I am satisfied that the costs incurred by the successful party, Mr de Wet, are reasonable in all the circumstances and the only issue for the Authority to consider then is what proportion of those costs ought to be met by the unsuccessful party.

[10] The appropriate starting point is the daily tariff and given that this matter was dealt with in a half day's hearing time, the starting figure ought to be $1,750.

[11] That brings us squarely to Mr de Wet's argument that by virtue of the nature of the Authority's determination in the substantive matter, a departure from the usual tariff approach is appropriate.

[12] Certainly, the Authority's regular practice is to consider an uplift or a diminution in the daily rate depending on the particular circumstances of the case and in the present matter, the argument essentially is that by virtue of the Authority's finding in the substantive case, there ought to be an uplift in the daily tariff than would otherwise apply.

[13] It is the case that KVB Kunlun was warned by the other side that it was challenging a prior settlement agreement, that that was precluded by statute, and that therefore it was at risk of a finding by the Authority that the case should be struck-out by reason of being either frivolous or vexatious.

[14] In the result, I did find that KVB Kunlun's application was frivolous in the sense that the application was futile, and that it was futile because there was no basis in law on which it could proceed because it was barred by statute.

[15] Mr de Wet says that I should discourage other litigants from proceeding in the Authority where they were at risk of strike-out because of frivolous or vexatious claims. KVB Kunlun says in response that it was entitled to test the position in the Authority and that it used its best endeavours to get Mr de Wet to engage with it about the issues of concern and yet he refused absolutely to take that opportunity. KVB Kunlun goes so far as to say that had Mr de Wet engaged with it appropriately, the application to the Authority may have been avoided altogether.

[16] Those arguments by KVB Kunlun are attractive arguments, but of course once the employment relationship has ended, Mr de Wet is probably entitled to say that he has no further obligation to the former employer although, as a matter of common courtesy, one might have expected him to want to try to assist his former employer if he could.

Determination

[17] Having given the matter earnest consideration, I think the proper course is to add to the daily tariff figure of $1,750 but not to apply full indemnity costs as Mr de Wet submits I should. I do think Mr de Wet needs to have come to the Authority

with clean hands and his apparent failure to helpfully engage with his former employer seems to me to be an appropriate matter for the Authority to take into account in exercising its discretion in a costs setting environment. Were it not for that failure, I might well have been persuaded to apply full indemnity costs because it seems to me that it is appropriate that costs in a clause 12A situation ought to reflect the greater risk that an unsuccessful applicant party must take in such cases.

[18] But here, it seems to me Mr de Wet's failure to engage sets off KVB Kunlun's failure to perceive the extent of its risk; in the absence of any engagement from Mr de Wet as to the position, KVB Kunlun may well have felt it had no other alternative but to apply to the Authority.

[19] In all the circumstances then, I think the proper course is to fix costs at $4,000 and direct that KVB Kunlun is to pay to Mr de Wet that sum as a contribution to the costs that he reasonably incurred, that figure reflecting the balance between the parties I have just identified, and the apparent financial imbalance between a corporate such as KVB Kunlun and an individual such as Mr de Wet where the proceedings were, by their very nature, more risky than would normally be the case.

James Crichton
Member of the Employment Relations Authority