IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND

[2013] NZERA Auckland 18
5318156

	BETWEEN	ROBERT LEWIS Applicant
	A N D	JP MORGAN CHASE BANK, N.A. Respondent

Member of Authority:	James Crichton
Representatives:	Applicant in person Rob Towner, Counsel for Respondent
Submissions Received:	20 November 2012 from Applicant 24 October 2012 from Respondent
Date of Determination:	21 January 2013

COSTS DETERMINATION OF THE AUTHORITY

The substantive determination

[1] The Authority issued a determination on the substantive matter on 11 October 2012. Mr Lewis' claim was rejected by the Authority.

[2] Costs were reserved.

The application for costs

[3] The respondent bank (the Bank) seeks "substantial" costs. The Bank maintains that it acted reasonably in endeavouring to resolve matters by agreement and acted promptly, just as soon as the issue was first brought to its attention. Despite those efforts, Mr Lewis rejected the Bank's proposals and it is contended that in resisting those proposals, Mr Lewis acted unreasonably and sought to re-litigate matters that had already been comprehensively disposed of.

[4] Of particular importance to the Bank's submission in this regard is the length of time involved during which it continued to make efforts to deal appropriately with Mr Lewis' issues. A period in excess of two years was involved.

[5] In addition, the Bank reminds the Authority that in its statement in reply filed as long ago as 21 September 2010, it put the issue of costs squarely in focus in the following terms:

> *The respondent wishes to record and put the applicant on notice at an early date that if he continues to refuse to make a genuine effort to resolve the two alleged breaches of the settlement agreement, it will seek full solicitor/client costs against him for any costs incurred in relation to this employment relationship problem.*

[6] Almost a year later, an amended statement in reply was necessary because of an amended statement of problem being filed and that subsequent statement in reply also contained an exhortation relevant to the matter to the extent that Mr Lewis was reminded that both the Authority and the Bank had told him that his claim could not succeed, he was invited to withdraw it but he had chosen not to do so.

[7] It is relevant to the Bank's claim for costs that, as has just been referred to above, it was not just the respondent bank which drew Mr Lewis' attention to the difficulties with his case; the Authority had also urged Mr Lewis to reflect on his position because the Authority's considered view was that it was unable to grant the relief which he sought: Authority memorandum of 30 March 2011.

[8] Again, there was further relevant correspondence between the parties by email dated 2 May 2011 from the Bank's solicitors to Mr Lewis in which he was invited to withdraw his claim without costs being sought. Conversely, the email continued, if he chose to continue with the claim, then an application for *"increased costs"* would be made.

The response

[9] By email dated 20 November 2012, Mr Lewis indicated simply that he was *"not happy to pay the costs"* incurred by the Bank. He noted that the Authority's substantive determination has been challenged to the Employment Court and he indicated that he was happy for the Court to determine *"what costs shall apply"*. He trusted that *"this email suffices as my reply to this claim"* (that is the claim for costs).

[10] The usual practice in the fixing of costs is that the Authority fixes costs for its proceeding, even if the matter is going on challenge, as is the case here. The Authority sees no reason to depart from that principle in the present case.

The law

[11] The law concerning the fixing of costs in the Authority is well settled and is best encapsulated in the decision of the Full Bench of the Employment Court in *PBO Ltd v. Da Cruz* [2005] 1 ERNZ 808.

[12] In addition, the Bank relies on two decisions of the Authority viz *Oxygen Business Solutions Ltd v. Eduardo Martinez Garcia* [2012] NZERA Auckland 227 and *Tobin v. Stay in Front Inc* (AA31/4A/05, 25 October 2005).

[13] The effect of the general rules of law are that the granting of costs is a discretionary matter, that costs usually follow the event, that costs in the Authority tend to be modest and that, while the Authority frequently adopts a "daily tariff" approach to costs fixing, that is not always an appropriate strategy and the Authority can fix costs at a higher or lower level than might otherwise be indicated, where the behaviour of the parties warrants such a decision.

Determination

[14] This was a case where Mr Lewis persevered with an application to the Authority over an extended period of time despite the clearest intimations both from the Bank and indeed from the Authority itself that his claim was misconceived.

[15] Mr Lewis claimed there had been a breach of a settlement agreement between himself and the Bank. As such, that claim was unremarkable; there are numerous such claims before the Authority. However, what is unusual in Mr Lewis' claim is his contention that if there were a breach of the settlement agreement, he is entitled to damages. As the Authority noted in the substantive determination, the usual remedy for breach of a settlement agreement is compliance, but because of the particular nature of the settlement agreement entered into by the parties, the Authority would not have been able to order compliance either, in the present case. Furthermore, Mr Lewis' claim for damages for breach cannot be sustained because the Authority has no power to grant that relief.

[16] Those considerations as to the extent of the Authority's remit aside, it is appropriate for the Authority to again observe that there is simply no evidence to suggest that there had been a breach of the settlement agreement of the sort complained of by Mr Lewis. Indeed, the reverse is the case. The evidence available to the Authority in an investigation on the papers, which the parties accepted and agreed to, was that there had been no breach of the settlement agreement.

[17] But even if the Authority's conclusions, both in respect to jurisdiction and the evidence around a breach are put to one side, there is also the fact that, as the Authority has already observed in this determination and made more extensive observations about in the substantive determination, just as soon as the Bank became aware of Mr Lewis' concerns, it promptly engaged with him and endeavoured to find a basis for resolving matters by agreement. Despite those efforts, which on the face of it appeared to deal appropriately with the complaints which Mr Lewis has pleaded, he decided to press on with his claim in the Authority.

[18] In the Authority's judgment, there is nothing in the present matter which obviates the desirability of dealing with costs in the usual way. As costs follow the event, Mr Lewis is obligated to make a contribution to the Bank's costs and, given the Authority's usual principle of dealing with costs in its jurisdiction even where the matter goes on challenge, it is appropriate that those costs be fixed now.

[19] The Bank refers the Authority to two decisions justifying a higher than normal award of costs. There are others. The fixing of costs is an exercise to be informed by principle and there is nothing in the present factual matrix which would discourage the Authority from a significant costs award. Mr Lewis has chosen to persevere with a claim in the Authority which has put the Bank to significant expense. The Bank seeks a contribution to its significant costs in the order of around 40% of the total costs incurred. There was no hearing in person and so the notional daily rate approach does not avail.

[20] The Authority takes into account the efforts made by the Bank to settle the matter at first instance and subsequently, as well as the information from the Authority itself that a central basis of Mr Lewis' claim was *ultra vires* the Authority's remit.

[21] There were numerous points in this saga where Mr Lewis could have withdrawn his proceedings, either without cost or with the ability to negotiate a cost-free outcome with the Bank. Indeed, the Bank made precisely that offer during the two year period that this matter has continued.

[22] The Authority is satisfied that Mr Lewis would have had the resources and the opportunity to seek professional legal advice about the merits of his application and that that advice, if taken, would likely have confirmed the outcome Mr Lewis now faces.

[23] Having considered the matter in the round, the Authority's considered view is that the Bank is entitled to have Mr Lewis contribute to it the sum it seeks of $15,000 as a contribution to the costs it incurred in successfully defending itself against Mr Lewis' claim.

James Crichton
Member of the Employment Relations Authority