IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND

[2013] NZERA Auckland 223
5394259

	BETWEEN	ELECTRICAL UNION 2001 INCORPORATED First Applicant
		DEAN COWELL Second Applicant
	AND	MIGHTY RIVER POWER LIMITED Respondent

Member of Authority:	R A Monaghan
Representatives:	L Yukich, advocate for applicants D France, counsel for respondent
Memoranda received:	26 April 2013 from applicant 7 January and 24 April 2013 from respondent
Determination:	4 June 2013

COSTS DETERMINATION OF THE AUTHORITY

A. The applicants are ordered jointly and severally to contribute to the respondent's costs in the overall sum of $2,300.

[1] In a determination dated 28 March 2013 I addressed a dispute about the application of a provision in the parties' employment agreement, which arose when Mighty River Power Limited (MRP) required Dean Cowell to undergo a random drug and alcohol test. The provision related to fitness to work, and I found it did not apply to prevent random drug and alcohol testing at the workplace. In a determination of a preliminary matter, dated 17 October 2012,[1] I found Mr Cowell's workplace was a safety sensitive site for the purposes of random drug and alcohol testing.

[1] *Electrical Union 2001 Limited & Anor v Mighty River Power Limited* [2012] NZERA Auckland 375

[2] Costs were reserved, and the parties have filed memoranda on the matter.

[3] Mr France sought an award of costs in the total amount of $4 – 5,000, covering costs in respect of both determinations. He relied on the principles in *PBO Limited (formerly Rush Security Limited) v da Cruz*[2] and the notional daily rate in the Authority of $3,500.

[4] Both of the investigation meetings preceding the determinations lasted for one half day, so that the total amount sought is a slight increase on the notional daily rate. In support, Mr France said the following actions of the applicants increased MRP's costs unnecessarily:

- despite the matter being a dispute about the interpretation and application of the cea, MRP was obliged to respond to three witness statements and to provide additional evidence for the second investigation meeting;
- compensation was sought on behalf of Mr Cowell when there were no grounds for such a claim;
- the applicants attempted to argue against random drug and alcohol testing in safety sensitive areas in principle, when the law in that respect is settled;
- there was no evidential basis for saying the workplace in question was not a safety sensitive site; and
- the lack of clarity in the statement of problem meant MRP was obliged to prepare more expansive submissions than should have been necessary.

[5] Mr Yukich submitted that, because the matter concerned the disputed interpretation of an employment agreement, costs should lie where they fall.

Determination

[6] MRP was the successful party in both determinations. Because of the way this matter was argued, I approach costs on an overall basis rather than with reference to each of the investigation meetings separately. I begin with a notional daily rate of $3,500 in favour of the successful party, and for a total meeting time of one day.

[2] [2005] 1 ERNZ 808

[7] The only factor raised in support of a decrease in the notional daily rate concerned the submission that this was a matter of the interpretation of the employment agreement, and that costs be allowed to lie where they fall. The matter of interpretation concerned the relationship between random drug and alcohol testing, and fitness to work. I accept it was in the interests of both parties to have the matter clarified, but not, in the circumstances of this employment relationship problem, to the point that no order for costs should be made. I take the matter into account as supporting a more modest reduction.

[8] The more important of the factors Mr France raised concerned the applicants' attempts during both investigation meetings to argue in principle against random drug and alcohol testing on safety sensitive sites, by asserting that the law on the matters of principle they raised is no longer good law. However the arguments they invoked in support are addressed in existing law, the current state of which was endorsed relatively recently by the Supreme Court. No real grounds beyond disagreement with it were advanced for revisiting the state of the law.

[9] Secondly, there was no evidential basis for denying that the site in question is safety sensitive. Despite this an investigation meeting was required to determine the matter.

[10] On balance, the applicants are ordered jointly and severally to contribute to MRP's overall costs in the sum of $2,300.

R A Monaghan
Member of the Employment Relations Authority