

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

[2015] NZERA Auckland 392
5540307

BETWEEN JIN HYUN LEE
 Applicant

AND Y & B INVESTMENT
 LIMITED
 First Respondent

AND MYONG SOO LEE
 Second Respondent

Member of Authority: Robin Arthur

Representatives: Himanshu Trivedi for the Applicant
 Myong Soo Lee, in person as Second Respondent and as
 director of First Respondent

Investigation Meeting: 8 December 2015

Determination: 10 December 2015

DETERMINATION OF THE AUTHORITY

- A. Jin Hyun Lee was employed by Myong Soo Lee, not Y&B Investment Limited.**
- B. Ms Lee's employment was ended by an unjustified dismissal of her as a result of actions by Mr Lee.**
- C. In settlement of her personal grievance for unjustified dismissal, and within 28 days of the date of this determination, Mr Lee must pay Ms Lee the following sums:**
- (i) \$8000 as lost wages; and**
 - (ii) \$8000 as compensation for humiliation, loss of dignity and injury to her feelings.**
- D. Within 28 days of the date of this determination Mr Lee must also**

pay:

- (i) A further \$1480 to Ms Lee as wage arrears for the month of December 2014 and holiday pay on her earnings; and**
- (ii) A further \$1000 to the Authority, for transfer to the Crown Account, as a penalty for not providing Ms Lee with a written employment agreement.**

E. Costs are reserved, with a timetable for memoranda set.

Employment Relationship Problem

[1] Jin Hyun Lee worked as floor manager at the VIP Karaoke Bar from 17 November 2014 to 24 December 2014. The bar was in the Auckland suburb of Wairau Valley. It was a business operated by Y & B Investments Limited (YBIL) under the trading name of VIP Karaoke Bar. The owner of the business was Myong Soo Lee who also uses the name Alex Lee. He has since sold the business.

[2] Ms Lee raised a personal grievance on 14 January 2015. Her lawyer's letter raising the grievance alleged Ms Lee's employment was terminated by Mr Lee assaulting Ms Lee at the bar in the early hours of the morning of 24 December 2014. It also alleged Mr Lee had sexually harassed Ms Lee during her employment by demanding sexual favours and "at least twice by touching the back side" of Ms Lee. The letter also stated Ms Lee was not provided with a written employment agreement, was not provided details about who was her employer, was not paid holiday pay and was not paid for duties done between 20 December and 24 December 2014.

[3] Ms Lee lodged a statement of problem in the Authority on 5 February 2015 seeking findings about who was her actual employer, the imposition of penalties on YBIL and Mr Lee, and an order for compensation to be paid to Ms Lee.

[4] A statement in reply, lodged on 25 February 2015 by the legal representative acting for Mr Lee then, said Mr Lee "was the employer of the applicant during the relevant time". Mr Lee accepted he had assaulted Ms Lee on 24 December 2014 by throwing a plastic water bottle at her resulting in a cut to Ms Lee's face and advised the matter was being dealt with through the Police diversion scheme.

[5] Mr Lee stated Ms Lee gave notice in a text, sent on 29 November 2014, that she was resigning from her job at the bar. He stated she and he agreed at a meeting on 12 December that she would stop working at the bar before Christmas. He denied the allegations of sexual harassment and confirmed he had not provided a written employment agreement. He accepted he had paid Ms Lee's wages of \$1000 a week in cash but said those payments were accounted for to the Inland Revenue Department (IRD).

The Authority's investigation

[6] The parties were referred to mediation but the matter was not resolved. In accordance with directions of the Authority set during a case management conference both Ms Lee and Mr Lee lodged written witness statements (in the form of affidavits) and Ms Lee's representative lodged a common bundle of documents. At the Authority's investigation meeting Ms Lee and Mr Lee, under oath or affirmation, each confirmed those witness statements and answered questions with the assistance of professional interpreters of the Korean language. Both answered questions partly in English and partly in Korean – Ms Lee with the assistance of an interpreter provided by the Authority and Mr Lee with the assistance of an interpreter who attended the investigation meeting with him. The parties also had the opportunity to ask further questions and make closing submissions on the issues for determination.

[7] As permitted by 174E of the Employment Relations Act 2000 (the Act) the written determination has stated findings of fact and law, expressed conclusions on issues necessary to dispose of the matter and specified orders made but has not recorded all evidence and submissions received.

The issues

[8] The issues for determination were:

- (i) Who was the employer of Ms Lee – YBIL or Mr Lee in person?
- (ii) Did Mr Lee sexually harass Ms Lee on any occasion?
- (iii) Did Mr Lee's actions (comprising his admitted assault of Ms Lee on 24 December 2014 and, to the extent established, the alleged harassment) amount to unjustified disadvantage and/or unjustified dismissal of Ms Lee from her employment?

- (iv) If actions of Mr Lee were unjustified, what remedies should be awarded considering:
 - (a) Lost wages (if an unjustified dismissal was established and subject to evidence of reasonable endeavours by Ms Lee to mitigate her loss); and
 - (b) Compensation for humiliation, loss of dignity and injury to feelings?
- (v) If any remedies were awarded, was any reduction required due to conduct by Ms Lee contributing to the situation giving rise to her grievance (s124 of the Act)?
- (vi) Should the employer pay a penalty for not providing Ms Lee with a written employment agreement, and, if so, of what amount?
- (vii) Should the employer pay a penalty for breaching Ms Lee's terms of employment (by acts of harassment and/or abuse, if that's established)?
- (viii) Was Ms Lee owed any outstanding amounts as wages arrears (including holiday pay)?
- (ix) Should either party contribute to the costs of representation of the other party?

Identity of the employer

[9] Although the statement in reply accepted Mr Lee was the employer, by the time of the Authority investigation meeting Mr Lee disputed that he, in his personal capacity, was Ms Lee's employer and insisted that the employment relationship was with YBIL.

[10] His argument was that Ms Lee must have known that YBIL was the employing entity because the name of the company was printed on eftpos receipts given to customers at the bar and was also used on invoices for the business. No such documents were produced in support of that evidence.

[11] The underlying point or purpose of the argument was that, having sold the bar business, YBIL was also in the process of being liquidated. If YBIL were established as the employer and was liable to pay remedies to Ms Lee, liquidation would effectively negate her ability to recover any such remedies. A letter from a firm of chartered accountants tabled at the start of the investigation meeting advised that YBIL had ceased trading, had no assets remaining and was "waiting for the Companies Office completion of the liquidation". At the date of issue of this

determination the Companies Office register, accessed online, showed YBIL remained registered.

[12] Throughout Ms Lee denied any knowledge of YBIL as her employer. She understood she was employed by Mr Lee. She had no written employment agreement that identified her employer. She was paid in cash and got no pay slip. Unlike employees paid by direct credit to their bank account, with the name of the employer identified as the payer, Ms Lee did not get any such form of information that might have identified the company (if it truly was her employer).

[13] In that light, and as I advised Mr Lee during the investigation meeting after having heard his evidence on the point, Ms Lee's evidence that she understood Mr Lee was her employer was to be preferred. If Mr Lee was, as a director of YBIL, acting as its agent in employing Ms Lee, he had not discharged his onus of making the identity of YBIL as the employer plain to Ms Lee at the outset of the employment.¹ If Mr Lee had complied with the statutory obligation to provide a written employment agreement, and YBIL had been identified in such a document as the employer, the issue would not have been in doubt.² Consequently I have found Mr Lee and not YBIL was the employer of Ms Lee and even if that were not so, YBIL was an undisclosed principal so that personal liability as the employer lay with Mr Lee in that event anyway.

Was Ms Lee sexually harassed by Mr Lee?

[14] Ms Lee's letter raising her grievance referred to a number of instances of alleged sexual harassment including twice being touched on "the back side" by Mr Lee. In her witness statement Ms Lee did not repeat that particular allegation but said Mr Lee had harassed her in the following ways:

- (i) In the early hours of 24 November 2014 Mr Lee had touched her right breast when they were watching dancers perform at The White House (a place described on its website as an adult entertainment centre with services including choreographed shows and private lap dances).
- (ii) On 26 November 2014 Mr Lee had tried to kiss her when she had driven him home in her car after work and had attempted to do so on two other occasions when she dropped him off at his home (which was near hers).

¹ *Cuttance v Perkis* [1994] 2 ERNZ 321, 333.

² *Weston v Fraser* (2008) 5 NZELR 575 at [45].

- (iii) During a meeting on work matters Mr Lee had referred to a former male manager of the bar having sex with female employees, a former female manager having sex with customers of the bar, and a female employee “finding man for getting sex like you”. Ms Lee said she found the stories disrespectful and the comment “like you” offensive.
- (iv) Mr Lee had asked her whether she had slept with a particular customer.
- (v) Mr Lee had hit her on her hip when she was bending over a desk and asked her “don’t you wear underwear”.

[15] Mr Lee’s conduct or comments were said by Ms Lee to have occurred in circumstances fuelled by the use of alcohol. Mr Lee’s evidence, in part, confirmed this. For example, the alleged incident at The White House occurred after he, Ms Lee and another male manager had been at a Korean restaurant where he drank soju (a potent distilled liquor popular in Korea) and later, at The White House, a well-known brand of bourbon whiskey.

[16] Mr Lee emphatically denied each of Ms Lee’s allegations and said the events either did not happen or, in reference to conversations in which he had mentioned sex, said what he meant was misunderstood or misdescribed. He also alleged that Ms Lee had attempted to kiss him on 3 December. Ms Lee denied doing so but accepted she had hugged Mr Lee because she was “very thankful” when she was paid on that day and while doing so said “thank you boss, I will do my best”.

[17] The events that Ms Lee alleged were harassment of her fell within the part of the Act’s definition of sexual harassment that refers to the use of language of a sexual nature and physical behaviour of a sexual nature. Such language and behaviour may be found to be sexual harassment where the employee is directly or indirectly subjected to behaviour that is unwelcome or offensive and, by its nature or through repetition, has a detrimental effect on that employee’s employment or job satisfaction.³

[18] The only evidence about the alleged events was from Ms Lee and Mr Lee. In that respect it was a ‘she said, he said’ contest. By their nature events such as the conversations (held in Mr Lee’s office at the bar) and the alleged attempts to kiss Ms

³ Employment Relations Act 2000, s 108(1)(b).

Lee (in her car) were unlikely to have been observed or overheard by others. One other person, a male manager, was with Mr Lee and Ms Lee at The White House on 24 November but had since returned to Korea and no evidence was provided from him about what he saw that night.

[19] The Authority's determination of facts is made on the balance of probabilities. It must decide what was more likely than not to have occurred. It is a civil standard, not the criminal standard of being beyond reasonable doubt. Inferences may be drawn from surrounding events and available evidence.

[20] In Ms Lee's case a strong pointer towards the probability of her account being correct was a text message that she sent Mr Lee, which his evidence said he received on 29 November 2014. The words were translated into English in slightly different ways by Ms Lee and both the interpreters present at the Authority investigation meeting. The content of four texts she sent to Mr Lee that night during the space of four minutes read (more or less):

I am sorry boss.

I am suffering in my working hours. Even out of work hours I feel I am not good at this type of job. Now I feel I want to run off somewhere.

Sorry to be disappointing you.

I think I was happier with chef's job now. Please understand me. I can give you two or three weeks' notice. Boss please tell me when is a good time for me to quit. Sorry.

[21] Asked why Ms Lee would have said she wanted to resign so soon after she began the job if she had not been harassed (as she alleged) by him, Mr Lee said he did not know. He suggested it was because she was depressed that she had failed to achieve an increase in customer numbers and sales revenue at the bar (in the 12 days since she had started working there).

[22] However I have not accepted that as the more probable explanation. Ms Lee left a job in a pizza restaurant working for \$17 an hour to start work at the bar where she was paid \$1000 each week (which on the hours she worked was an effective net hourly rate of more than \$25). She had an ill father in Korea and wanted to save money to visit him. It was more likely than not, on the basis of her sworn evidence, that her texts about her intention to resign resulted from behaviour and language used

by Mr Lee that was unwelcome and offensive to her and had a detrimental effect on her employment and her job satisfaction. There was no apparent reason she would otherwise have said she wanted to leave the job but for how she said Mr Lee had treated her. Rather than confront his behaviour she felt, at the time of sending the 29 November text, she had to leave the employment although she had no job arranged to go to.

[23] I found Mr Lee's evidence less compelling for two reasons. Firstly, he demonstrated little understanding as to why Ms Lee might not find the environment of The White House appealing or enjoyable. He said he took her and the male manager to that club to thank them for coming into Auckland city that evening to visit Japanese and Korean restaurants where they might find "girls" who would be interested in working as hostesses at his bar. He said he gave Ms Lee and the other manager \$200 to use for tips at the club. He denied Ms Lee's account that he rubbed his face into the breasts of a dancer at the club, then whispered to Ms Lee about the dancer's breasts, before touching Ms Lee's right breast. Mr Lee's statement did say servers at the club "performed around customers for tips and they came around us too".

[24] Secondly, Mr Lee's later and admitted assault on Ms Lee (by throwing a bottle and a box of chocolates at her) made it more likely that he would act inappropriately – when affected by tiredness and alcohol – on other occasions.

[25] Accordingly I concluded Ms Lee was subject to language and behaviour that amounted to sexual harassment of her in her employment by Mr Lee.

Did Ms Lee's employment by dismissal or by resignation?

[26] The finding that Mr Lee had more likely than not acted towards Ms Lee as she alleged had an effect on the legal analysis of how her employment came to end. Whichever way conflicts in the evidence of Mr Lee and Ms Lee on this point were resolved, the result was that her employment ended due to actions by Mr Lee that were not what a fair and reasonable employer could have done in all the circumstances at the time. In short, her employment ended by what amounted to an unjustified dismissal.

[27] Mr Lee insisted that the employment ended by Ms Lee's resignation. He said he confirmed in a meeting with her on 12 December that her employment would end

on 24 December but asked her not to tell anyone about it. Ms Lee denied any such discussion took place. Instead she said Mr Lee did not reply to her 29 November text about wanting to resign but when she asked him about it he told her it would be irresponsible to leave the job and she kept working because she could not quit without getting a replacement job. She said the employment ended because Mr Lee sent her a text on 24 December – later in the day on which he had assaulted her – telling her to return her work mobile phone and the bar keys to him (which she took to confirm the termination of her employment). Mr Lee insisted the request to return the phone and the keys (which he accepted was made) was because her employment had ended by her resignation and which he said was earlier agreed as ending that day.

[28] If Mr Lee's evidence was correct about having confirmed a date for resignation, the finding that he had more likely than not subjected Ms Lee to behaviour amounting to sexual harassment meant her resignation really resulted from his breach of the trust that she was entitled to have had in the employment relationship. In that light such a resignation was not freely given by her but was a reasonably foreseeable response to a breach of the implied term of her employment to be treated fairly. The breach, through Mr Lee's actions, induced her resignation. In law such a resignation is regarded as a constructive dismissal resulting from an unjustified action of the employer.

[29] However if Ms Lee's evidence was correct (and no resignation date was confirmed), the events of 24 December and the admitted assault on her by Mr Lee was an unjustified action that breached the trust she was entitled to have that she would not be physically harmed by a deliberate action of her employer. In those circumstances it was reasonably foreseeable that she could not tolerate continuing to work for Mr Lee so the employment relationship was effectively broken by his actions, not hers.

[30] Alternatively, if Ms Lee's evidence was correct that Mr Lee sent her a text requiring the return of her work phone and the bar keys, the request and her compliance with it amounted to him sending her away from her workplace. In the circumstances in which that occurred, following an assault on her, the action was an unjustified dismissal. Ms Lee was not able to produce the text in question because it was sent to the work mobile she had returned to Mr Lee. Mr Lee had produced printed copies of some earlier texts to and from Ms Lee in October and November.

They were texts that, from his point of view, supported his account of events. They were texts in which he first contacted Ms Lee about the job and in which she accepted it and the 29 November texts in which she had referred to resigning. He did not produce a copy of the text about returning the phone, which he said was sent on 26 December. When asked why not he replied that he had not thought it was important.

[31] Although those various analyses led to a conclusion that an unjustified dismissal – actual or constructive – occurred, the assault on 24 December was (on any view) the act that irreparably damaged the trust and confidence in the employment relationship. Mr Lee, quite properly, admitted in his sworn affidavit that his behaviour that resulted in physical injuries to Ms Lee were “absolutely unacceptable”. Notes from examination of her by doctors on the afternoons of 24 and 25 December and photos taken on both days confirmed Ms Lee suffered a cut to her face, below her right eye, and bruising and swelling of her face that lasted more than a week. Those injuries were the result of being hit by the plastic bottle of water thrown by Mr Lee. She also had bruising to her shoulder, probably from being hit by the box of chocolates Mr Lee also threw at her. On those grounds alone a finding of unjustified dismissal was warranted.

Remedies

[32] Because of the finding that Ms Lee’s employment ended by way of unjustified dismissal, she was entitled to an assessment of remedies.

Lost wages

[33] Ms Lee sought an order for lost wages. She said, but for Mr Lee’s actions towards her, she would likely have worked for the business until the middle of July 2015 when she planned to visit Korea. She looked for work during January and February 2015, without success, and then spent the period from 15 March to 6 July in Korea before returning to New Zealand and searching for further work. Since October 2015 she has worked as a chef in a North Shore café.

[34] While Ms Lee’s loss of wages resulting from her unjustified dismissal stretched from late December 2014 to early October 2015, her job search was broken by a decision to visit Korea for family reasons (including her father’s illness). She had however maintained diligent efforts to find work in January and February, with

evidence provided of her job search for restaurant work in which she had experience and qualifications. But for her unjustified dismissal she would likely have been paid \$4000 a month nett in January and February 2015, at least, and that was the appropriate period (in her light of job search activities and later travel to Korea) to award reimbursement under s 123(1)(b) of the Act for wages she lost as a result of her personal grievance. Her remedy for lost wages totalled \$8000 (nett).

Compensation for humiliation, loss of dignity and injury to feelings

[35] Ms Lee gave evidence of the distress and sense of shame she felt in how she was treated by Mr Lee, both in the instances of harassment prior to 24 December and from the assault on her on 24 December.

[36] Under the criminal system of justice Mr Lee was, after a police investigation and his acknowledgement that what he did was wrong, dealt with by way of diversion. He was not fined. In his affidavit for the Authority investigation he said he had completed a CADS programme (that relates to alcohol use) and 20 sessions of a “Without Violence” Programme. He deposed to both programmes being very helpful and providing him with useful tools to deal with negative emotions.

[37] Ms Lee’s claim for compensation for humiliation, loss of dignity and injury to feelings addresses the emotional consequences to her of Mr Lee’s actions, not punishing him for what he did. She gave evidence of being tearful and feeling distressed as a result of what happened during her employment and at its end. She was also embarrassed by the cut and bruising to her face immediately afterwards and, later, by having to make excuses to her family in Korea about a small scar on her face. She gave evidence of feeling that she wanted to “escape my life” rather than wake up each day.

[38] On the basis of Ms Lee’s evidence, and balancing the judicially-recognised needs not to keep compensatory payments artificially low with moderation in making such awards (and mindful of the total remedial outcome of the determination), I concluded \$8000 was the appropriate award under s 123(1)(c)(i) of the Act for the particular circumstances of her case.⁴

⁴ *Hall v Dionex Pty Limited* [2015] NZEmpC 29 at [87] and [90].

Any reduction for contributory conduct?

[39] As required by s 124 of the Act I considered whether any of the remedies awarded to Ms Lee required reduction due to conduct by her that contributed in a blameworthy way to the situation giving rise to her grievance.

[40] The evidence did not support any finding that Ms Lee had contributed in any way to the occasions or manner in which she was subjected to harassment. Rather she had sought to minimise or avoid the circumstances in which it could occur. For example she made excuses to avoid having to give Mr Lee a lift to his home in her car.

[41] Mr Lee suggested his actions on 24 December were provoked by Ms Lee swearing at him. His statement in reply had stated he “had a few drinks” on the night of 23 December but finished drinking and work around 2.30am on 24 December and had gone to sleep in his office. In his affidavit he said he was woken at least twice by Ms Lee who wanted him to give her money to pay some of the employees before they went home. The last occasion she woke him was around 6am. He said there was no cash and that “it was difficult to transfer via internet banking as I was so sleepy” and he “begged her to let me get back to sleep”. When Ms Lee persisted with the request, he said he thought of and then mentioned an earlier incident when she had accepted a cheque for \$1500 given to Ms Lee by a customer which the bank later refused to cash. He said when he referred to that cheque Ms Lee started to swear at him. Ms Lee denied swearing at him but accepted she had lost her patience after he began abusing her and had shouted at him after he threw the objects at her and she had run out of his office back to the bar area of the premises.

[42] Her actions in trying to arrange payment for employees who, at 6am, were waiting to be paid before they went home before the start of a two holiday period (Christmas Day and Boxing Day) was part of her duties as a manager. It was not blameworthy conduct to ask the proprietor about paying staff. If Ms Lee did swear at Mr Lee, either before he threw the bottle or afterwards, it was not conduct that was so blameworthy that a reduction of remedies was required.

A penalty for not providing a written employment agreement?

[43] Mr Lee accepted he had failed to meet his statutory obligation to provide Ms Lee with a written employment agreement. He said he had operated the business since 2003 and employed around 15 staff from then until late 2014 but had not provided any with written agreements as he regarded the relationship as one of trust in which that was not necessary. After Ms Lee raised her personal grievance Mr Lee had a manager newly-employed at the bar prepare a written employment agreement for herself from one she had in a previous job.

[44] In the circumstances of a long-standing statutory obligation to provide a written employment agreement, and an admitted failure to do so for Ms Lee and other employees over such a long period, a penalty of \$1000 was warranted under s 63A(3) and s 135 of the Act. Within 28 days of the date of this determination Mr Lee must pay the penalty to the Authority for transfer to the Crown Account.

A penalty for breach of Ms Lee's terms of employment?

[45] Ms Lee also sought a penalty be imposed on Mr Lee for the breaches of her terms of employment. While such a penalty was arguably well-warranted, I concluded the need for deterrence and punishment was sufficiently addressed through how the Police had dealt with the assault and the practical consequences for Mr Lee of the remedies awarded in this determination to Ms Lee in person. The overall justice of the case did not require more in the particular circumstances.

Wage arrears

Was Ms Lee paid for the days between 20 December and 24 December 2014?

[46] The terms of employment orally agreed, as confirmed by the evidence of both Mr Lee and Ms Lee, were for Ms Lee to be paid \$4000 (nett) a month. On 26 December Mr Lee met with Ms Lee, apologised for assaulting her, collected her work mobile phone and paid her \$1000 in cash. The payment was the third instalment of \$1000 she had received for work in the month of December. She did not receive a fourth payment of \$1000 for that month. Consequently she was not paid for work on 23 and 24 December or for the public holidays on the following two days. She was entitled to a fourth payment of \$1000 for that month. Accordingly, Mr Lee owed her \$1000 as arrears of wages for the month of December.

[47] Mr Lee paid PAYE on the cash instalments of the salary paid to Ms Lee. In the period from 17 November to the week ending 20 December 2014 IRD records showed he paid \$900 tax on payments of \$5000 made to Ms Lee. He would need to attend to PAYE payments due on the additional payments to her ordered in this determination.

Was Ms Lee entitled to an order for holiday pay?

[48] Mr Lee said the \$4000 per month payment he agreed with Ms Lee was intended to include all holiday pay entitlements. Such an arrangement was permissible under s 28 of the Holiday Act 2003 but the circumstances of Ms Lee's employment by Mr Lee failed to meet the criteria for such an arrangement. She was not on a fixed term agreement to work less than 12 months. She was not working so intermittently or irregularly that it would have been impracticable for Mr Lee to have provided her with ordinary annual holidays. She had no written employment agreement so no agreement to such an arrangement could be confirmed and she had no pay slips or other payment records that identified annual holiday pay as a component of the cash payments she received.

[49] Consequently Ms Lee was entitled to an order for holiday pay on her gross earnings. Taking Mr Lee's record of Ms Lee's gross earnings of \$5900 (comprising \$5000 paid to her and \$900 paid to IRD as PAYE deductions) and applying the same ratio allowed for tax to the further \$1000 (nett) ordered in wage arrears, Ms Lee's gross earnings appeared to be \$7080. Application of the eight per cent rate for holiday pay to that total gave an amount of \$566.40 due as a holiday pay. Using the nett rate paid to her, the nett amount due to Ms Lee as holiday pay on her total nett earnings of \$6000 was \$480. It was that amount that Mr Lee owed her as holiday pay, in addition to other amounts due. He was also responsible for reconciling and paying the appropriate tax deductions to IRD.

Costs

[50] Costs are reserved. The parties are encouraged to resolve any issue of costs between themselves.

[51] If they are not able to do so and an Authority determination on costs is needed Ms Lee may lodge, and then should serve, a memorandum on costs within 14 days of the date of issue of the written determination in this matter. From the date of service of that memorandum Mr Lee would then have 14 days to lodge any reply memorandum. Costs will not be considered outside this timetable unless prior leave to do so is sought and granted.

[52] The parties could expect the Authority to determine costs, if asked to do so, on its usual notional daily rate – currently \$3500 for the one day investigation meeting held – unless particular circumstances or factors required an upward or downward adjustment of that tariff.⁵

Robin Arthur
Member of the Employment Relations Authority

⁵ *PBO Ltd v Da Cruz* [2005] 1 ERNZ 808, 819-820 and *Fagotti v Acme & Co Limited* [2015] NZEmpC 135 at [106]-[108].