

**IN THE EMPLOYMENT RELATIONS AUTHORITY  
AUCKLAND**

[2016] NZERA Auckland 30  
5540307

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| BETWEEN | JIN HYUN LEE<br>Applicant                       |
| AND     | Y & B INVESTMENT<br>LIMITED<br>First Respondent |
| AND     | MYONG SOO LEE<br>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

Determination: 22 January 2016

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**COSTS DETERMINATION OF THE AUTHORITY**

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**A. The application by Jin Hyun Lee for an order for costs was lodged out of the time set by the Authority's directions for her to do so. Accordingly the Authority has declined to consider the application.**

[1] By determination issued on 10 December 2015 the Authority found Jin Hyun Lee was unjustifiably dismissed by Myong Soo Lee.<sup>1</sup> Mr Lee was ordered to pay Ms Lee lost wages, compensation and wage arrears. A penalty was also imposed for having failed to provide Ms Lee with a written employment agreement.

[2] The determination reserved costs and made timetable directions on when Ms Lee should apply to the Authority for an order on costs if that issue could not be resolved directly between the parties. It indicated costs would likely be set at the

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<sup>1</sup> *Lee v Y&B Investments Limited and Lee* [2015] NZERA Auckland 392.

Authority's usual daily tariff of \$3500 unless any particular factors were identified as requiring an upward or downward adjustment of that rate.<sup>2</sup> The directions made required any application for a costs order to be made within 14 days of the date of issue of the determination, that was by no later than 24 December 2015. They also included the following statement: "Costs will not be considered outside this timetable unless prior leave to do so is sought and granted."

[3] Ms Lee's representative, Mr Trivedi, contacted the Authority's Auckland office on 5 January 2016 to enquire about lodging a memorandum on costs. He lodged a memorandum later that day, seeking an order for costs of at least \$3721.50.

[4] Because the application for costs was made outside the date set by the timetable directions, and without prior leave to do so having been sought, it appeared the application should not be accepted for consideration. Before resolving that point I advised (by Minute issued to the parties on 6 January 2016) that Mr Trivedi had the opportunity to advise (i) whether there was any reason the application was not made on or before 24 December 2015 or (ii) whether there was any reason leave should now be given to consider the costs application.

[5] By email on 6 January Mr Trivedi responded that he would make his submissions "as soon as possible, ideally by the end of the day today if possible". As of the date of this determination – more than 14 days later – the Authority appears to have received no further communication or any such submissions from Mr Trivedi.

[6] In those circumstances, having provided an opportunity not taken, I concluded it was appropriate to determine the costs application.

[7] Normally a successful party is entitled to an order for costs. But the application for such an order must be made in accordance with any timetable directions given. The timetable gives the parties a timeframe in which to resolve costs themselves or to proceed with the further necessary steps to have the Authority impose an outcome. In order to provide some measure of certainty and finality to the parties, the Authority's directions must be taken by the parties to say what they mean and mean what they say. If a party has not sought costs by the date given in timetable

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<sup>2</sup> *PBO Ltd v Da Cruz* [2005] 1 ERNZ 808, 819-820 and *Fagotti v Acme & Co Limited* [2015] NZEmpC 135 at [106]-[108].

directions (or sought an extension of time), it must ordinarily be taken to have forfeited its opportunity to have the Authority impose an order for costs.

[8] In this case directions were given and not complied with but no leave was sought to vary the direction, either in time or out of time. Consequently it was necessary, in accordance with those directions, to decline to consider the application for costs. Accordingly no order for the payment of costs has been made with the effect that, unless some other arrangement has been or is made between the parties, costs are to lie where they fell.

Robin Arthur  
Member of the Employment Relations Authority