

**IN THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH**

**I TE RATONGA AHUMANA TAIMAHI
ŌTAUTAHI ROHE**

[2021] NZERA 13
3083253

BETWEEN SHIRLEY BRUNNING
 Applicant

A N D RICCARTON FLORIST LTD
 Respondent

Member of Authority: Peter van Keulen

Representatives: Paul Mathews, advocate for the Applicant
 Kelly Rushton, representative for the Respondent

Investigation Meeting: On the papers

Submissions Received: 24 December 2020 from the Applicant
 31 December 2020 from the Respondent

Date of Determination: 15 January 2021

COSTS DETERMINATION OF THE AUTHORITY

The substantive determination

[1] In a determination dated 22 December 2020¹, I determined that Riccarton Florist Ltd had unjustifiably dismissed Shirley Brunning. I ordered Riccarton Florist Ltd to pay

¹ *Shirley Brunning v Riccarton Florist Ltd* [2020] NZERA 532.

\$13,000.00 compensation pursuant to s 123(1)(c)(i) of the Employment Relations Act 2000 (the Act) and \$1,482.00 for lost remuneration pursuant to s 123(1)(b) of the Act.

[2] I also reserved costs so that the parties could try to agree costs. The parties have not been able to agree costs and Ms Brunning seeks costs.

Application for costs

[3] The advocate for Ms Brunning seeks an award of costs of \$8,000.00 plus disbursements of \$224.89. In support of this Mr Mathews says costs should follow the event and as Ms Brunning was successful she should be awarded costs. And the award of costs should simply be based on applying the daily tariff for a two day investigation meeting, which is \$8,000.00.

[4] The representative for Riccarton Florist Ltd does not accept that Ms Brunning should be awarded any costs. Mr Rushton says costs should lie where they fall because:

- (a) Ms Brunning failed to accept offers made by Riccarton Florist Ltd which would have put her in a better financial position had she accepted them.
- (b) That Ms Brunning's claim for lost remuneration was fraudulently and knowingly exaggerated to be for three months when she knew she had been working during this time and her actual lost remuneration was lower – this caused additional work both before and in the investigation meeting.
- (c) That Ms Brunning's evidence was deficient in many respects including her evidence of lost remuneration and additional witness evidence about events that occurred – this also caused additional work for the parties.
- (d) I found that Ms Brunning had contributed to her unjustified dismissal grievance, warranting a 35% reduction in her remedies.

- (e) Riccarton Florist Ltd has suffered significant financial losses as a result of closing its floristry business in the Palms, which it did in response to the behaviour of Ms Brunning.

Analysis

Costs in the Authority

[5] The power of the Authority to award costs is set out at clause 15 of Schedule 2 of the Act. In *PBO Ltd (formerly Rush Security Ltd) v. Da Cruz*² and other relevant Employment Court and Court of Appeal decisions,³ the Employment Court and the Court of Appeal set out the principles I should apply and the approach I should adopt when exercising my discretion to award costs under clause 15 of Schedule 2 of the Act.

Costs should follow the event

[6] The first principle I should apply is that costs should follow the event, unless there is some accepted reason why this should not happen. This includes where a party has unreasonably rejected a Calderbank offer and not bettered that offer in the determination.

[7] In the memorandum Mr Rushton has referred to offers made by Riccarton Florist Ltd which were better than the remedies I awarded, including:

- (a) an offer made in mediation but given the without prejudice and confidential nature of mediation I cannot consider that offer when determining the application for costs; and
- (b) an exchange of emails over a Calderbank offer made by Ms Brunning to Riccarton Florist Ltd. This email exchange shows that Riccarton Florist Ltd

² *PBO Ltd (formerly Rush Security Ltd) v. Da Cruz* [2005] 1 ERNZ 808.

³ *Blue Star Print Group (NZ) Ltd v. Mitchell* [2010] NZCA 385; *Booth v. Big Kahuna Holdings Ltd* [2015] NZEmpC 4; *Stevens v. Hapag-Lloyd (NZ) Ltd* [2015] NZEmpC 28; *Davide Fagotti v. Acme & Co Ltd* [2015] NZEmpC 135; and *GSTech Limited v A Labour Inspector of MBIE* [2018] NZEmpC 127.

rejected Ms Brunning's Calderbank Offer but did not make a counter offer; rather Riccarton Florist Ltd simply invited Ms Brunning to make a further offer to it to settle all matters between the parties. This email exchange does not amount to a Calderbank offer from Riccarton Florist Ltd that it can use in its cost memorandum.

[8] So in this case, the offers referred to by Mr Rushton are not relevant to my consideration of costs and that leaves me with no reason to depart from the principle that costs should follow the event.

[9] Ms Brunning was successful in her claim and my starting point is she is entitled to an award of costs in her favour.

Applying the daily tariff

[10] The next principle to apply is that quantum of any costs award should be based on the daily tariff; this is a set amount for each day of the investigation meeting used to calculate quantum based on the time spent in the investigation meeting.

[11] Using the daily tariff is the standard approach in the Authority. In some rare cases the Authority can award costs on a different basis. For example, indemnity costs may be appropriate if a losing party's behaviour in its conduct of the claim was particularly bad.

[12] None of these exceptions apply in this case and there is no reason to depart from the usual approach of awarding costs on the basis of applying the daily tariff.

Length of the investigation meeting

[13] The investigation meeting was conducted over two days but neither day was a full day. In my view the daily tariff should be applied for one and a half days which represents the actual time of my investigation meeting.

[14] Applying the standard rate of the daily tariff to one and a half days is \$6,250.00.

Adjusting the daily tariff

[15] The final principle to apply is to consider if the daily tariff should be adjusted for the reasons advanced by Mr Rushton.

Offers to settle

[16] I have already considered the offers made by Riccarton Florist Ltd and have concluded they are not relevant for my consideration of the costs application.

Conduct of the case by Ms Brunning

[17] I accept there were some evidential issues in terms of Ms Brunning's claim for lost remuneration, without accepting that the claim was fraudulent as stated by Mr Rushton. I also accept that some of the witnesses who gave evidence added very little to the investigation as they did not have first-hand experience of the matters in issue.

[18] Whilst I do not accept that the conduct of Ms Brunning's case was as poor as Mr Rushton submits, I am persuaded by his submission that the investigation meeting was extended by some of the evidential failings and this warrants a reduction in the daily tariff.

[19] However, this does not warrant a complete reduction in the daily tariff so that costs lie where they fall. Rather it warrants a small reduction of \$500.00 per day so \$750.00 in total.

Reduction for contribution

[20] Contributory behaviour by a successful applicant impacts on remedies and not costs. My finding of contributory conduct by Ms Brunning is not a basis for reducing the daily tariff.

Financial impact on Riccarton Florist Ltd due to Ms Brunning's behaviour

[21] Any alleged losses accruing to Riccarton Florist Ltd because of Ms Brunning is not a matter that is relevant to my consideration of costs and it cannot be a basis for reducing the daily tariff.

Conclusion

[22] I award costs to Ms Brunning based on the daily tariff for a one and a half days of investigation meeting, reduced by \$750.00. This is \$5,500.00.

[23] Ms Brunning is also entitled to be paid for the disbursement she has incurred in this matter, being the filing fee and hearing fees totalling \$224.89.

Order

[24] Riccarton Florist Ltd must pay Shirley Brunning \$5,500.00 plus disbursements of \$224.89 as a contribution to her costs in this matter.

Peter van Keulen
Member of the Employment Relations Authority