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Marshall v R J Flowers Limited (Wellington) [2018] NZERA 2091; [2018] NZERA Wellington 91 (24 October 2018)

Last Updated: 29 October 2018

IN THE EMPLOYMENT RELATIONS AUTHORITY WELLINGTON		
		[2018] NZERA Wellington 91 3019096
	BETWEEN	DEBBIE MARSHALL Applicant
	AND	R J FLOWERS LIMITED Respondent
Member of Authority:	M B Loftus	
Representatives:	Alex Kersjes, Advocate for Applicant	
	Kate Ashcroft, Counsel for Respondent	
Investigation Meeting:	On the papers	
Submissions Received:	19 September and 9 October 2018 from Respondent	
	2 October 2018 from Applicant	
Determination:	24 October 2018	
COSTS DETERMINATION OF THE AUTHORITY		

[1] On 20 August 2018 I issued a determination in which I dismissed Ms Marshall’s claim she had been both unjustifiably disadvantaged and unjustifiably dismissed by R J Flowers Limited (Flowers).¹

[2] Costs were reserved and Flowers, as the successful party, now seeks a contribution toward those it incurred defending the claims.

[3] Normally the Authority will use a daily tariff approach when addressing a costs claim.² From there adjustments may be made depending on the circumstances.

[4] The investigation took a day which would, applying the tariff, see a contribution in the order of \$4,500.

1 [2018] NZERA Wellington 72

2 *PBO Ltd (formerly Rush Security Ltd) v Da Cruz* [\[2005\] NZEmpC 144](#); [\[2005\] ERNZ 808](#) and *Fagotti v Acme & Co Ltd*

[\[2015\] NZEmpC 135](#)

[5] Flowers seeks an increase and asks I award \$6,000 as a contribution toward actual costs which were

significantly greater.

[6] It is argued the uplift is justified:

... to account for the Applicant's failure to accept the offers extended to it by the Respondent, to agree costs at the daily tariff rate, which is unreasonable given the Authority's indication. The Respondent has now had to incur additional costs and it now seeks the uplift to account, in part, for those additional costs.³

[7] The response is costs should lie where they fall or, if I reject that, Ms Marshall's liability be limited to the nominal amount of \$500.

[8] In support of that position is said the tariff is no more than a guide⁴ and account should be made for the fact Ms Marshall genuinely believed her claim had merit. It is also said it would be unjust to make a costs award against Ms Marshall as she has been under tremendous strain since her employment with Flowers ended and alternate employment opportunities have been sporadic. It is said *It would not be just to further burden a destitute Ms Marshall with what will be a tremendous strain upon her.*⁵

[9] The submission goes on to say Ms Marshall would have preferred to avoid the investigation but Flowers refused to engage beyond suggesting she walk away. It is also submitted that an uplift of \$1500 to recognise the cost for producing what is a fairly sparse costs application is unreasonable.

[10] Finally it is argued:

[The Respondent's costs are ones] they could have easily avoided if they had been minded to a resolution. They, as it transpires, were correct to seek a determination but the added cost of this should sit with the Respondent. Commercially, it did not make sense to progress given their financial cost so they must have taken a principled view. There is a cost to that decision, which should rest solely with them.

[11] Little need be said about Flowers application. It is well accepted that except in rare circumstances costs follow the event and, while a guide, the tariff is seen as a reasonable starting point especially where actual costs exceed that amount by some

3 Respondent's application at [2.2]

4 Employment Relations Authority Practice Note 2 at [9]

5 Applicant's submission at [6]

margin as occurred here. That, with the exception of the uplift attributable to the costs application, is the approach taken by the respondent here.

[12] Opposing that is Ms Marshall's argument costs should lie where they fall. With one small exception her arguments fail to convince.

[13] The issue of the tariff's status as a guide has already been addressed. The argument Ms Marshall believed in the veracity of her claim carries little weight. Costs follow the event and in this case the event was Ms Marshall's failure to confirm her belief with a successful application.

[14] The argument it would be unjust to make a costs award against Ms Marshall given the strain she had been under and the lack of employment opportunities fails for two reasons. The first is no evidence was tendered in support of the assertion Ms Marshall is impecunious. The second is there was considerable evidence during the substantive investigation that suggests a considerable portion of Ms Marshall's strain is attributable to her private circumstances and cannot be visited upon Flowers.

[15] There is then the argument Ms Marshall would have preferred to avoid the investigation and the submission Flowers could have avoided its costs had it been minded to accept some form of resolution.

[16] This submission is of concern. Essentially Mr Kersjes is saying his client can bring whatever claim she likes, regardless of merit, and the respondent should then be required to pay if it means a commercially positive outcome. That proposition is akin to extortion. The simple fact is, as Mr Kersjes says, the result proved Flowers to

be right. Its decision to establish that should not be categorised as a matter of principle for which it should then be penalised. Flowers has a right to defend itself against a claim that was subsequently found to have no merit.

[17] One thing for which Ms Marshall should be thankful is this submission does not result in her incurring an additional penalty. It simply means she fails with the argument she not be held responsible for costs she imposed upon Flowers by pursuing her unsuccessful claim and for which she would normally be held accountable.

[18] The one argument with which Ms Marshall should have some success applies to the amount sought by Flowers in respect to preparation of the costs submission. I agree the documentation before me is sparse and does not appear to support an

increase of the magnitude sought. That said there should be some recompense given the evidence shows Flower's position in relation to costs was reasonable. It should have been accepted thus negating the need for this application.

[19] Finally I note Ms Ashcroft's offer of further and more comprehensive submissions. That has been noted but not accepted as I consider enough has been spent and it inappropriate the parties be burdened with further costs.

[20] For the above reasons I conclude it appropriate Flowers be awarded, in respect to the substantive investigation, a contribution toward costs in accord with the normal daily tariff. I also consider it appropriate to add an additional \$500 toward the cost of this application, the preparation of which I believe should have been unnecessary.

[21] Accordingly I order the applicant, Ms Marshall, pay the respondent, R J Flowers Limited, the sum of \$5,000.00 (five thousand dollars) as a contribution toward the costs it incurred in defending Ms Marshall's claims.

M B Loftus

Member of the Employment Relations Authority

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