

**IN THE EMPLOYMENT RELATIONS AUTHORITY
WELLINGTON**

[2018] NZERA Wellington 72
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: 22 and 23 March 2018 at Hastings

Submissions Received: 17 April and 7 May 2018 from Applicant
2 May 2018 from Respondent

Determination: 20 August 2018

DETERMINATION OF THE AUTHORITY

Employment relationship problem

[1] The applicant, Debbie Marshall, claims she was both unjustifiably dismissed and unjustifiably disadvantaged by the respondent, R J Flowers Limited (RJF). The claim of unjustified disadvantage relates to an alleged suspension.

[2] RJF denies the claims have validity. It says Ms Marshall resigned and denies she was suspended with that period being one of agreed paid leave.

[3] In the claim originally lodged with the Authority Ms Marshall also claimed a breach of the duty of good faith and sought penalties. This claim was withdrawn during a telephone conference on 22 November 2017.

Background

[4] RFJ operates an orchard and fruit supply business. Ms Marshall commenced her present period of employment in 2013 having previously worked for RJF. She was, at the time leading to these events, considered a senior employee and team leader.

[5] From Ms Marshall's perspective what had been a good environment began to sour with the appointment of Tracie Jones as RJF's human resources manager. Ms Marshall attributes this to on-going tensions between Ms Jones and a friend who then departed. She seems to think her friendship with her ex-colleague tainted Ms Jones view of her (Ms Marshall) which led to a souring in their relationship and with it the relationship with RJF as a wider entity.

[6] Things came to a head in or around mid-April 2017 when RJF convened an urgent meeting of team leaders while Ms Marshall was absent from work. The absence was to attend to, and assist, her daughter who was seriously ill at the time. Ms Marshall initially claimed she returned to be told of a decision to remove her from supervisory duties allegedly because of purported issues with her paperwork.

[7] RJF says that upon her return Ms Marshall expressed dissatisfaction at not having been asked to the meeting and then, several days later, advised she wished to cease being a team leader. At that point she is said to have handed her work phone to Ms Jones. It is also alleged at around that time Ms Marshall commenced telling other employees she wished to leave RJF's employ to work with the recently departed colleague.

[8] Ms Marshall goes on to say that on Monday 22 May 2017 Ms Jones referred to her as the *tea lady*. Ms Marshall says she found this offensive and challenged Ms Jones about how or why she could make such a statement. Ms Marshall said she also asked where in her contract it stated she was to complete such duties. She goes on to say Ms Jones then asked *when are you are looking at leaving*. Ms Marshall says at that point she felt she had no option but to remove herself from this situation and she departed the workplace.

[9] RJF has a different view. It says Ms Marshall was asked to assist in serving refreshments as both the employee who usually performed the task and the normal replacement were away on leave. RJF says Ms Marshall, who had previously

performed the task and is even said to have enjoyed it and the interaction with other staff, took exception to what a lawful and reasonable request then left without notice or authorisation.

[10] Subsequent to departing Ms Marshall called John Evans, a director and shareholder of RJF, to advise of the incident. She says Mr Evans said there would need to be a meeting to discuss the situation for the purpose of *finding a way through*.

[11] That evening Ms Marshall sent Ms Jones a text advising she would return the next day. Ms Marshall claims she was told, in a subsequent telephone conversation, she was not to return till after the meeting but would be paid. Ms Marshall considers that constituted the unjustified suspension.

[12] The meeting was scheduled for Thursday 25 May 2017 and Ms Marshall was accompanied by her husband. Also attending were Mr Evans and Ms Jones.

[13] Ms Marshall complains the meeting was disciplinary and she was not advised of that. Ms Marshall says she tried to put her side across but Ms Jones would not let her speak and she felt she was being talked at and attacked. She complains bitterly that her daughters' health was raised and says the meeting then deteriorated further. She says she started to cry, made a negative observation about the meeting and left.

[14] RJF says the purpose of the meeting was primarily to hear Ms Marshall's concerns with a view to seeing how they could be resolved and Ms Marshall accepts she was told this. It denies the meeting was disciplinary and/or disciplinary action was either underway or proposed.

[15] RJF says Ms Marshall was pretty fired up. It says the albeit relatively brief meeting saw Ms Marshall airing some grievances and it briefly replying. RJF accepts it questioned Ms Marshall about the impact of her daughter's health and her own resulting absences in order to gain a better understanding about whether or how it could assist. RJF says at this point Ms Marshall became angry, defensive and no longer appeared willing to listen or participate. She left. Mr Marshall stayed a short while longer, apologised for his wife's behaviour then left.

[16] Ms Marshall says she expected to hear from RJF following the meeting but had not done so by Saturday 27 May. She then sent a text to Ms Jones asking for an

update. It reads *Morning Tracey can u plez tell me the outcome of yourself and johns meeting regarding me or what happens next; thank you?*

[17] Ms Marshall claims the reply came via a telephone call from Ms Jones in which she was told she had lost her job. She says she asked why and was told it was because she had left the meeting.

[18] Ms Jones says she was surprised to get the text as they had not discussed the possibility of an *outcome* and were doing no more than trying to talk things through. Ms Jones says she rang Ms Marshall and said just that. She says Ms Marshall then said she wasn't happy to which Mr Jones asked what can we do for you? The response was advice Mr Marshall was resigning and Mr Marshall would return company property the next week. Ms Jones denies telling Ms Marshall she had lost her job and says she did not question the resignation as she concluded it was well thought out given her understanding Ms Marshall had already been telling other staff she intended going at Queen's Birthday weekend which was the only a week away. Ms Jones adds Ms Marshall has also told her resignation was imminent when she returned the phone a month or so earlier.

[19] Ms Marshall maintains she was dismissed and says she was devastated to hear that. She also sent a text to her husband in which she says she had just been told ... *there's no job there for me*. That was not raised with RJF at that point with Ms Marshall's daughter, who was also told, advising her not to telephone Mr Evans as she said she would, but calm down first.

[20] On 29 May Ms Marshall telephoned Mr Evans. She says she did so to discuss *what Tracie has told me* and during the call Mr Evans confirmed the dismissal.

[21] Mr Evans accepts the call occurred but denies confirming a dismissal. He says he didn't have to given the resignation about which he had already been advised. Mr Evans says Ms Marshall raised her resignation and said she was having second thoughts. He says he advised RJF was willing to discuss that and told her to arrange a further meeting through Ms Jones.

[22] Ms Marshall did not do that and RJF did not follow up. Mr Evans says previous attempts to get to address Ms Marshall's concerns had not gone well and he was of the view the resignation meant the onus was now on her *to come to us*.

[23] The following day Ms Marshall sent a text to Ms Jones. It advises *I'm gutted to have been fired like this* before asking about a final pay and whether or not it would be possible to get a reference. Ms Marshall was already seeking alternate employment and had a job interview arranged for the following day.

[24] Ms Jones advised Mr Evans of the text. When asked why was there no response he says he was confused given his belief there had been a resignation and his view it was for Mr Marshall to now advance any initiative which might see her retained. He was still thinking about it when matters were, in his view, taken out of his hands by the tendering of Ms Marshall's personal grievance the next day (31 May).

Determination

[25] This determination has not been issued within the three month period required by s 174C(3) of the Act. As permitted by s 174C(4) the Chief of the Authority decided exceptional circumstances, or more correctly a series thereof, existed to allow a written determination of findings at a later date.

[26] As said in opening Ms Marshall raised two grievances: namely that she had been unjustifiably suspended then unjustifiably dismissed by RJF.

[27] RJF claims the alleged suspension was an agreed period of paid leave pending a meeting at which it could discuss various issues Ms Marshall sought to raise and at which they could agree a solution which would see her return to the workplace in what it hoped would be a more convivial frame of mind.

[28] Ms Marshall's evidence also suggests the possibility she may now be implying the cessation of her team leader role may constitute an unjustified action but that will be taken no further as there is not, and has not been, a formal claim.

[29] It has long been held in respect of a claim of unjustified dismissal it is for the applicant to establish, on the balance of probability, a prima facie case before the respondent is required to justify the purported dismissal.¹

[30] In this instance Ms Marshall asserts she was dismissed. RJF denies doing anything that could be construed as a sending away and maintains Ms Marshall

¹ *NZ Woollen Workers IUOW v Distinctive Knitwear Ltd* [1990] 2 NZILR 438 at 447

resigned. Here it should be noted the above chronology primarily reflects the content of the written briefs. While the evidence of RJF's witnesses remained consistent with those briefs the same could not be said of Ms Marshall with some of her assertions being undermined by various statements made in response to questioning. It is those inconsistencies, along with the evidence of others which largely supported RJF's version of events, which will determine the outcome.

[31] For example and with respect to the alleged demotion Ms Marshall accepted there were some issues but none had led to any formal inquiry or investigation. More importantly she accepted she was reluctant to do the paperwork and when this was raised, as it was around the time she returned the supervisors phone, she may well have said she no longer wished to be a supervisor as alleged by RJF. She attributes that to a fit of anger.

[32] Similarly there the evidence about the tea incident. A number of witnesses gave evidence the request Ms Marshall perform that function was not out of the ordinary and she had previously done so. All who witnessed the event also said Ms Jones' request was cordial but there was general agreement Ms Marshall was not in a good mood and that had been the case for a while.

[33] With respect to the meeting of 25 May I note that while Ms Marshall complains she was not told it was disciplinary² she accepted, when questioned, RJF did not suggest it was and stated its purpose was to listen to her concerns, ascertain what was going on and find some way through.

[34] Ms Marshall also alleged that at the meeting *she wasn't able to speak and was unable to "get a word in" and that she as being "talked at"*.³ RJF denied that and even Mr Marshall, who attended the meeting in a support role and gave evidence at the investigation for Ms Marshall, stated it was she who did the bulk of the speaking.

[35] Mr Marshall also attributed Ms Marshall's departure to a couple of comments Ms Jones made and to which Ms Marshall reacted badly though he could not recall the actual comments. He also had no recollection of the issue to which Ms Marshall attributes her departure, namely his daughters health, being raised.

² Brief of evidence at [23]

³ Statement of problem at [27] and brief of evidence at [21]

[36] Turning to the actual proffering of the resignation. Again RJF's witnesses are adamant this occurred but there was a considerable degree of uncertainty in Ms Marshall's answers. This reflected a general uncertainty in her oral evidence and the way it was presented. Indeed it got to the point where Ms Marshall, when asked about her conversations with Ms Jones could not recollect who called who and stated she had *gone blank* in regard to the conversations.

[37] There is also the evidence of colleagues Ms Marshall was talking about leaving and here I note Ms Marshall accepts she made some comments of this nature though she debates the exact words used. Finally I note a sad reflection from Ms Marshall's daughter. She stated she noticed a change in her mum from November 2016 on and tried to encourage her to quit her job. While it was said this change was manifested in a reluctance to go to work I have to be cognizant of the fact this was when personal pressures, which were not limited to her daughters health, were escalating for Ms Marshall and RJF played no part in the causes thereof.

[38] Finally there is conclusive evidence RFJ was willing to entertain a discussion about Ms Marshall's return as late as 29 May. That is not the normal reaction of an employer which has just dismissed someone. Here I also have to note that while she originally said Mr Evans confirmed the dismissal at that point she said, when giving oral evidence the conversation canvassed nothing other than the possibility of another meeting.

[39] There are simply too many inconsistencies in Ms Marshall's evidence for me to consider it preferable to that of RJF. It follows I accept she resigned and cannot establish a cause of action in respect to the dismissal. Her claim therefore fails.

[40] Here I record this conclusion must not be construed as reflecting negatively on Ms Marshall's honesty. The evidence shows she was under extreme personal pressure. She was reacting in uncharacteristic ways and her oral evidence would strongly suggest she did not properly comprehend what was being said to her. That said I accept, given the text and her daughter's evidence, she clearly if erroneously thought she had been dismissed. Sadly her evidence would suggest her understanding was tainted by a belief, caused by the personal issues, she was worthless.

[41] The above conclusion does however raise the fact there was some discussion about reopening the discussion and perhaps facilitating Ms Marshall's return. The

Employment Court has held that where an employer learns an employee has misunderstood a communication and considered it a dismissal contrary to the employers intention an employer who does nothing to address the misconception within a reasonable time ...*must suffer the adverse consequences of passively standing by.*⁴

[42] The first indisputable intimation RFJ had that Ms Marshall though she had been dismissed came via text on 30 May. By then, and irrespective of how that had arisen, my preference for RFJ's evidence leads me to accept it was already expecting a discussion about Ms Marshall's potential return. The evidence shows this caused some confusion especially as Ms Marshall was communicating with both Mr Evans and Ms Jones. There is also the fact Mr Evans felt the onus was on Ms Marshall to advance the return discussion which, in his view, she had prompted. It must also be remembered matters were quickly escalated with the grievance being lodged the next day. From that point the employer was entitled to obtain professional assistance and the response made its position clear. By then, however, the party's positions appear to have become more entrenched and Ms Marshall already had alternate employment.

[43] Turning to the suspension. Similar concerns about the evidence again leads me to prefer RFJ's views Ms Marshall's absence from work was agreed and here I note concession she made when questioned appear to support that. The procedural requirement in respect to a suspension, if this could be so construed, is there is some form of consultation prior to its imposition. Ms Marshall agreed the issue of a paid day off was raised; that she did not challenge the suggestion and her response was a simply *thank you*.

Conclusion and costs

[44] For the above reasons I conclude Ms Marshall has failed to convince me a prima facie case requiring RFJ's response exists. Her claims fail.

[45] Costs are reserved.

M B Loftus

Member of the Employment Relations Authority

⁴ *New Zealand Cards Limited v Ramsey* [2012] NZEmpC 51 at [51]