

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

[2018] NZERA Auckland 77
3016091

BETWEEN FARINIA FREDERICKS
Applicant

AND MADISON QUALITEX
LAUNDRY SERVICES
LIMITED
First Respondent

AND SYLVIA WOOD
Second Respondent

Member of Authority: Vicki Campbell

Representatives: Applicant in person
Ashley Sharp for First and Second Respondents

Investigation Meeting: 21 November 2017

Submissions Received: 13 December 2017 from Applicant
29 November 2017 from Respondents

Determination: 2 March 2018

DETERMINATION OF THE AUTHORITY

- A. One or more conditions of Ms Fredericks' employment were not affected to her disadvantage by unjustified actions of Madison Qualitex Laundry Services Limited.**

- B. Ms Fredericks has not established her claim that she was discriminated against and her claim for penalties is declined.**

- C. Madison Qualitex Laundry Services Limited did not breach its statutory obligations of good faith.**

- D. Madison Qualitex Laundry Services Limited breached two terms of the employment agreement. Ms Fredericks' claim for penalties is declined.**
- E. Ms Fredericks was not unjustifiably constructive dismissed.**
- F. Ms Fredericks' application for a penalty against Ms Wood is declined.**
- G. Costs are reserved.**

Employment relationship problem

[1] As the name suggests Madison Qualitex Laundry Services provides commercial laundry services to its clients. Mr and Mrs Robertson own and manage the business which operates seven days a week. Ms Fredericks worked for Madison as an Administrator from 6 January 2014 until April 2017. Ms Fredericks was employed to work 30 hours each week working six hours each day on five days of the week Monday to Friday inclusive.

[2] Ms Fredericks' tasks included accounts payable, month end reporting, dealing with customer enquiries and other day to day administrative tasks. During her employment Ms Fredericks' role expanded to include visiting customers, attending meetings and dealing with staff and stock issues.

[3] As Ms Fredericks' role expanded so did the number of hours required of her to complete her tasks. She made herself available to answer customer enquiries outside her ordinary hours of work and was happy to do so. There is no dispute that Ms Fredericks enjoyed her work and was a loyal employee.

[4] In April or May 2016 Ms Fredericks approached Mr Robertson and enquired about whether he was considering giving her a wage increase. After some discussion Mr Robertson told Ms Fredericks that he would look at increases for the management team. Ms Fredericks told Mr Robertson that if she was to receive an increase she would also like to receive feedback on her performance so that she would know of any areas requiring improvement.

[5] In December 2016 Ms Fredericks approached Mr Robertson again enquiring about a pay increase.

[6] In January 2017 Ms Fredericks says she noticed that another employee was not talking to her and customer calls were not being put through to her. Mr Robertson says he noticed a change in Ms Fredericks' behaviour which was concerning. It is common ground that the relationship between Mr Robertson and Ms Fredericks began to break down from January.

[7] In February 2017 Madison engaged Ms Sylvia Wood, an HR consultant, to meet with Ms Fredericks to discuss and work through concerns Mr Robertson had about Ms Fredericks' changed behaviour.

[8] Ms Fredericks attended her doctor on 15 February and commenced a period of extended sick leave and did not return to work.

[9] Ms Fredericks claims that one or more conditions of her employment were affected to her disadvantage by the unjustifiable actions of her employer and that she was discriminated against. Ms Fredericks resigned from her employment on 27 April 2017 and claims her resignation was in fact a dismissal which was unjustified.

[10] Ms Fredericks says Madison breached the terms of her employment agreement and claims the Second Respondent Ms Wood aided and abetted those breaches.

[11] Madison and Ms Wood deny the claims.

Issues

[12] In order to resolve Ms Fredericks' employment relationship problems I must determine the following questions:

- a) Were one or more conditions of Ms Fredericks' employment affected to her disadvantage by unjustified actions of Madison?
- b) Did Madison breach any terms of the employment agreement and if so what if any penalties should be imposed?

- c) Did Madison breach its statutory duty of good faith and if so what if any penalties should be imposed?
- d) Was Ms Fredericks constructively unjustifiably dismissed?
- e) Did Ms Wood aid and abet any breaches of the employment agreement?

[13] As permitted by s 174E of the Employment Relations Act 2000 (the Act) this determination has not recorded all the evidence and submissions received from Ms Fredericks and Madison but has stated findings of fact, expressed conclusions on issues necessary to dispose of the matter and specified orders made as a result.

Disadvantage grievance

[14] Ms Fredericks claims one or more conditions of her employment have been affected to her disadvantage as a result of the treatment she received from Mr Robertson. The actions Ms Fredericks says caused her disadvantage include:

- a) Lack of a wage increase;
- b) Refusal to alter hours of work to accommodate study at University;
- c) Bullying behaviour; and
- d) Lack of role clarity.

Lack of a wage increase

[15] Ms Fredericks says that during her employment her role increased to include management responsibilities including attendance at meetings with Mr Robertson and his two senior managers and contact with customers and suppliers outside her normal working hours. Ms Fredericks was happy with the growth in her role because she believed that at some stage she would receive financial recognition for her efforts.

[16] By 2015 Ms Fredericks was considered to be part of the management team. This finding was supported by the evidence of the Operations Manager at the investigation meeting and by Mr Robertson in his letter to Ms Fredericks dated 15

February where he confirmed she was considered to be a member of the management team.

[17] Throughout the documents and statements provided by Ms Fredericks in these proceedings Ms Fredericks is highly critical of the fact that she was not receiving the same remuneration package as the Operations Manager.

[18] I am satisfied the evidence shows that the Operations Manager role was at a different level to the role undertaken by Ms Fredericks. The Operations Manager was responsible for all of the production and distribution aspects of the business including management of all the production staff, whereas Ms Fredericks' role was concerned with administrative aspects of the business and she had no direct reports.

[19] In July 2015 Ms Fredericks' car broke down. Mr Robertson offered her the use of the company vehicle which she used to travel to and from work and for work purposes during normal working hours. Ms Fredericks' use of the company vehicle benefited both parties. Ms Fredericks did not have to spend her own money on fuel to travel to and from work and could use the car for personal use out of work hours. Mr Robertson did not have to be concerned about parking facilities for the car overnight or at weekends.

[20] Ms Fredericks approached Mr Robertson in April or May 2016 and asked Mr Robertson if he was considering a wage increase for her. Mr Robertson told Ms Fredericks he would look into increases and reminded her that she was using a company vehicle which was viewed by him as a financial benefit to her. This explanation was accepted by Ms Fredericks at the time.

[21] During a meeting between Ms Fredericks and Mr Robertson on 16 October 2016 Ms Fredericks says Mr Robertson made a note in his diary about wage increases for her and two other management employees. I have viewed Mr Robertson's diary for that date. At the top of the page Mr Robertson has recorded the initials 'M E F'. Ms Fredericks says this was what Mr Robertson recorded when he told her he would look into wage increases for her and the two senior managers.

[22] At the meeting on 16 October Ms Fredericks suggested Mr Robertson could give her more hours. He acknowledged that he could do that and told Ms Fredericks

that when they moved into the new building in early 2017 her role could become full time and he would consider a wage review at that time.

[23] Ms Fredericks became unhappy when she discovered the Operations Manager was receiving a fuel allowance for use with his private vehicle. Mr Robertson told me the Operations Manager was reimbursed for making his own car available for work purposes including out of normal working hours. This arrangement had been in place for about five years.

[24] A further discussion took place on 30 December. Ms Fredericks told Mr Robertson she was aware the Operations Manager received a fuel allowance for use with his own vehicle. She was concerned she was treated differently to the Operations Manager in relation to their remuneration. Mr Robertson's response was to the effect that the Operations Manager's remuneration package was none of her business. Mr Robertson reminded Ms Fredericks that she also had the use of a company car as part of her remuneration package.

[25] Ms Fredericks says the meeting ended abruptly when Mr Robertson walked out of the meeting and in a threatening tone of voice told her that she had sold herself short. Mr Robertson denies categorically that this happened.

[26] Ms Fredericks raised the 30 December interaction with Ms Wood in her meeting on 3 February. Ms Fredericks told Ms Wood that she gave the keys of her company car back to Mr Robertson and told him she did not want the car and he would have her resignation. Ms Fredericks arranged for her husband to pick her up from work. While Ms Fredericks was in her husband's car Mr Robertson returned the car keys to her. Taking her husband's advice not to make any hasty decisions, Ms Fredericks returned to work later that day and picked up the company car.

[27] On Ms Fredericks' next day of work on 4 January she approached Mr Robertson to discuss the 30 December meeting. That discussion did not resolve matters between them. Indeed both Ms Fredericks and Mr Robertson gave evidence that from 4 January the relationship between them altered significantly. Mr Robertson says Ms Fredericks' behaviour became unpleasant to the point of being disruptive in the workplace. Ms Fredericks says Mr Robertson's conduct became intimidating and condescending.

[28] Ms Fredericks commenced a period of three weeks' leave on 9 January. Mr Robertson told me that before and after Ms Fredericks' return on 30 January his attempts to communicate with her became extremely difficult. He said it was so bad he needed assistance and so he contracted with Ms Wood to meet with Ms Fredericks to establish what was behind the change in behaviour.

[29] Ms Wood met with Ms Fredericks during February to try and establish what had gone wrong in the employment relationship. During the first meeting on 3 February Ms Fredericks raised a number of concerns including her concern that she had not received a pay increase.

[30] When the two met again on 14 February Ms Wood had market payroll data available which she shared with Ms Fredericks. Ms Wood explained to Ms Fredericks that the market data for roles of a similar nature to her role indicated her hourly rate of \$25 per hour, plus the provision of the use of a company car, provided a remuneration package commensurate with the market.

[31] Ms Fredericks has not established to my satisfaction that the lack of a salary increase in 2016 has resulted in one or more conditions of her employment being affected to her disadvantage. There was no contractual entitlement to a wage increase and after raising the issue with Madison, it took steps to check that her remuneration package was properly aligned to the market for the role she undertook. It was common ground that neither of the two senior managers received wage increases during the period of Ms Frederick's employment.

[32] Madison was moving into new premises and Mr Robertson had previously explained to Ms Fredericks that after the move had been completed her remuneration would be addressed to take into account the increased workload. In his evidence he told me this would be sometime in early 2017.

[33] I am satisfied declining Ms Fredericks request for a wage increase was not unreasonable and was a decision Madison could make in all the circumstances.

University study

[34] During the meeting with Ms Wood on 3 February Ms Fredericks told Ms Wood she had asked Mr Robertson to approve her to undertake a course of study at

university. Ms Fredericks told Ms Wood that she needed to have the matter resolved so that she could confirm her course by 23 February.

[35] In order to accommodate her study in the first semester Ms Fredericks needed to change her hours of work so that she worked Monday and Wednesday to Friday inclusive. She needed to have Tuesday free to undertake lectures and tutorials. Ms Fredericks indicated she would do three papers in the first semester and one in the second semester.

[36] On 13 February Ms Fredericks decided to attempt to resolve the issues relating to her request for a change in her hours directly with Mr Robertson instead of waiting for her meeting with Ms Wood the following day.

[37] Ms Fredericks attended Mr Robertson's office and asked if she could show him something. Ms Fredericks says Mr Robertson refused to discuss anything about her studies insisting that she do so through Ms Wood. Ms Fredericks says Mr Robertson used a rude and abrupt tone and she left Mr Robertson's office feeling humiliated.

[38] Mr Robertson acknowledged he told Ms Fredericks to discuss the matter with Ms Wood. He denies using a rude and abrupt tone.

[39] Ms Fredericks met with Ms Wood again on 14 February. During this meeting Ms Wood explained to Ms Fredericks the concerns Mr Robertson had raised about the change in Ms Fredericks' behaviour. After the meeting Ms Fredericks attended Mr Robertson's office waving a white napkin and apologised for any behaviour that had hurt him or was disrespectful. Mr Robertson thanked her.

[40] At a meeting the following day on 15 February Ms Fredericks was advised her request for a change to her hours of work may not be agreed due to concerns held by Mr Robertson. Ms Fredericks was given a letter setting out that advice together with Mr Robertson's concerns.

[41] In the letter given to Ms Fredericks on 15 February Mr Robertson reminded Ms Fredericks of their previous discussions that he was looking to develop her role to become a full time role which he envisaged would happen within the next 9-12

months. The increased role would require more customer contact, additional accounting responsibilities and back up for payroll, production work and stock control work.

[42] Mr Robertson was concerned that moving towards a full time position did not fit in with Ms Fredericks desire to reduce her hours of work. Mr Robertson acknowledged that for the first semester Ms Fredericks had structured her lectures to impact on only one day of work but was concerned that from the second semester that would not be possible.

[43] Mr Robertson acknowledged that Ms Fredericks would work hard to ensure her work was not affected but he needed to be confident it would be manageable for both Ms Fredericks and Madison. In particular he was concerned that reducing her hours to working four days each week in a seven day a week operation would adversely impact on the administrative support Ms Fredericks provided.

[44] Mr Robertson invited Ms Fredericks to consider the points he made and provide him with feedback or alternative options for his consideration. Mr Robertson advised Ms Fredericks he had not made a final decision and that a meeting was scheduled for the following Monday.

[45] Ms Fredericks met with Ms Wood on 20 February. While Ms Fredericks was at pains to make Ms Wood understand that her family would support her studying, she did not address any of the concerns raised by Mr Robertson in his letter.

[46] Study leave is provided for in the employment agreement but is subject to a course of study being approved by Madison. Ms Fredericks required a change to her hours of work to accommodate her study in the first semester.

[47] Ms Fredericks claim that Madison did not respond to her before her deadline of 23 February has not been substantiated. Madison responded to Ms Frederick's request for a change of hours to allow her to study at university more than a week before her deadline of 23 February and confirmed its decision on 20 February.

[48] Taking those factors into account, together with the stated intention that Madison was looking to increase the number of hours Ms Fredericks worked, it was

not unreasonable for Madison to decline Ms Fredericks' request for a change in her hours of work and was an action Madison could take in all the circumstances.

Bullying behaviour

[49] Ms Fredericks says Mr Robertson's behaviour toward her from 4 January until she went on sick leave on 15 February was rude, abrasive, condescending and disrespectful. She said things had turned bad in a very short space of time.

[50] Mr Robertson's view is that in the period 4 – 6 January and then after her return to work on 30 January Ms Fredericks was sullen, uncooperative, extremely grumpy and confrontational. He told me at times she was openly hostile.

[51] I have categorised the issues raised by Ms Fredericks under three main headings:

- Exclusion from meetings;
- Removal of duties;
- Rude aggressive behaviour, intimidating and condescending manner.

Exclusion from meetings

[52] Ms Fredericks commenced a period of three weeks' annual leave on 9 January 2017. Ms Fredericks says on 6 January Mr Robertson called a meeting with his two senior managers and excluded her from the meeting. Ms Fredericks says this was a change in behaviour because she had previously been part of business meetings. Ms Fredericks considered her exclusion from the meetings was equivalent to removing part of her duties.

[53] Mr Robertson denies Ms Fredericks was excluded from meetings. He told me he held different meetings to discuss issues such as production and engineering which Ms Fredericks was not required to attend. The Operations Manager gave evidence that it was not uncommon for him to meet with Mr Robertson on his own to discuss issues.

[54] At other meetings which included Ms Fredericks any issues involving Ms Fredericks' responsibilities would be dealt with first, she would then would leave the

meeting and other matters concerning production and machinery maintenance would be discussed.

Removal of duties

[55] Ms Fredericks says that when she returned from the three weeks' leave on 30 January Mr Robertson advised her he had removed some of her duties and was restructuring her role.

[56] Mr Robertson denies telling Ms Fredericks he had removed some of her duties and denies telling her he was restructuring her role. Mr Robertson told me he had indicated to Ms Fredericks earlier (in 2016) that he envisaged her role expanding when Madison moved into the new building and the intention was for Ms Fredericks to take over more of the administrative tasks that he performed, allowing him to step back from the business. He says he told Ms Fredericks that when the change occurred he would review her remuneration.

[57] In support of her claim that her duties had been removed Ms Fredericks gave me the following examples:

- a) Ms Fredericks told me it was her job to go out to customers, sometimes with Mr Robertson. She would visit customers if it was a new customer, there were serious issues or for courtesy visits. Ms Fredericks says after she returned on 30 January she was not asked to make customer visits and instead Mr Robertson and his Operations Manager did the visits. Ms Fredericks says the Operations Manager was on the road more than usual but wasn't sure whether he was sorting out customer issues or undertaking other tasks.
- b) Ms Fredericks told me after receiving an enquiry from a customer she asked Mr Robertson about it who told her the customer had an issue with their bathrobes and that his Operations Manager was looking into it. Later Ms Fredericks says she discovered the customer had been struggling with short deliveries, stains, wrong orders and no deliveries for weeks.
- c) Ms Fredericks told me it was her job to deal with service providers. By way of example she told me she worked with a supplier who attended the offices to quote on installing shading on glass panels. She told me Mr

Robertson looked annoyed when he walked past her while she dealt with that supplier and two days later he instructed her to call him when a representative from Venluree arrived for a previously arranged meeting. Ms Fredericks did as she was instructed but says the first contact with Venluree was by her and the instruction that Mr Robertson would deal with the representative was unusual.

- d) Ms Fredericks told me she noticed other employees had also changed their behaviour toward her by not putting calls through to her, not informing her of issues with stock or customers and she noticed the Operations Manager spent more time on the road and did not give her any briefings on his return to the office. Ms Fredericks says that when she raised these issues with Mr Robertson his response was dismissive and told her she was creating her own drama.

[58] The team responsible for the administration and management of the operations at Madison was a small team. I have accepted Mr Robertson's evidence that it was not unusual for him and the Operations Manager to step in to deal with customer liaison and supplier issues. The Operations Manager told me at the investigation meeting that it was his role to visit with customers and to resolve production issues and so being out meeting with customers and resolve customer complaints was not out of the ordinary for him.

Rude aggressive behaviour, intimidating and condescending manner

[59] Ms Fredericks claims Mr Robertson acted in a condescending manner toward her by purposely closing his diary or turning papers around on his desk when she entered his office.

[60] Mr Robertson accepts he may have done this but he would normally do so if he wanted to protect confidential information.

[61] Ms Fredericks says Mr Robertson swore, yelled or shouted at her on 6 January 2017 when she asked him if they could talk about what had happened on 30 December. Ms Fredericks told me Mr Robertson told her that she was going nowhere and that she would be leaving Madison. Ms Fredericks says Mr Robertson swore at her and swung his arms pointing his finger at her in an aggressive and angry way.

[62] Mr Robertson denies these claims. He says that the office is a small office and if he had acted in that way others would have noticed. No corroborating evidence has been produced by Ms Fredericks to support her claims. Mr Robertson says that the most he did was indicate he was going to get some assistance as he was at a loss dealing with her behaviour.

[63] During a discussion with Mr Robertson on 3 February, Ms Fredericks says he told her he was taking some of her duties off her and that he was restructuring her role. She says Mr Robertson told her she was a problem, that while she was away on leave, which Mr Robertson said he did not know about, the place was in a shambles and it was all Ms Fredericks' fault. Ms Fredericks says Mr Robertson told her that everything that was going wrong was her fault, that she walked around grumpy and acted like a know it all. Mr Robertson denies much of this but agrees he probably did tell Ms Fredericks that she was walking around with an attitude because that was a fact.

[64] Ms Fredericks says the Operations Manager withdrew instructions Ms Fredericks had given to despatch stock to an unhappy customer after she had promised delivery on a specified date. After being told the instruction had been cancelled Ms Fredericks sent an email to the customer and advised the customer:

I've just spoken to the team to find out why, they saying [Operations Manager] told them Hold back the FOC for you, do not know why.

[65] The customer emailed Ms Fredericks with a copy to Mr Robertson and the Operations Manager asking Ms Fredericks to find out why the FOC had been stopped and seeking clarification about credits for future reject linen. Mr Robertson emailed the customer and advised the FOC was packed and the customer would receive the pack that same day.

[66] After responding to the customers email Mr Robertson attended Ms Fredericks office. Ms Fredericks says Mr Robertson told her it was a "dumb" email. Ms Fredericks says Mr Robertson stood over her, shouted and pointed his finger at her while telling her she was stupid and unprofessional.

[67] Mr Robertson then left Ms Fredericks' office and she says she could hear him telling the Operations Manager that it was a dumb email. Ms Fredericks believes she heard Mr Robertson say to the Operations Manager that he was letting Ms Fredericks go.

[68] Mr Robertson says the email contained negative aspersions about the Operations Manager. He said the customer was a difficult customer and he viewed the email as an inappropriate response. Mr Robertson told me he explained to Ms Fredericks that she should have sorted the matter out and not simply gone back to the customer telling the customer she did not know why the FOC had been held back. Mr Robertson acknowledged in his evidence that he did tell Ms Fredericks it was a stupid and unprofessional response.

[69] At the investigation meeting the Operations Manager could not recall this incident or being told anything by Mr Robertson in relation to the email.

[70] Ms Fredericks then attended a meeting with a customer who had arrived while Mr Robertson was in her office. After meeting with the customer Ms Fredericks says she approached Mr Robertson and asked him to tell her what was going on. She says Mr Robertson again blamed her for everything, told her that her body language was a problem, that she had an attitude, and that everything that was going wrong was her fault.

[71] Ms Fredericks says she told Mr Robertson that she didn't think there was anything wrong with her body language and that he needed to change his mindset so that they could move on.

[72] Ms Fredericks says that on 10 or 13 February she overheard a conversation Mr Robertson was having by telephone. She says Mr Robertson asked the person he was speaking to if they would like to do office work and advised the person he might have something quite substantial coming up and he would let them know the following Tuesday.

[73] Mr Robertson told me he is responsible for recruiting staff but could not recall the specific conversation Ms Fredericks referred to. He told me if he spoke to someone about a possible job it could have been a production or engineering process role.

[74] Ms Fredericks text Mr Robertson on Wednesday 15 February and advised him she was ill and would not be at work that day, but would attend the pre-arranged meeting with Ms Wood. Ms Fredericks says she attended the meeting feeling exhausted from lack of sleep, was suffering pains in her stomach, felt depressed and had a headache.

[75] The meeting was for the purpose of discussing Ms Fredericks request to alter her hours of work to enable her to undertake study at university. At the end of the meeting Ms Fredericks advised Mr Robertson that she was unwell. Mr Robertson sought clarification as to how long she would be away. Mr Robertson asked about what cover he needed in her absence and whether the invoicing had been completed (the invoicing was to be completed by Wednesday each week). The meeting ended with an agreement that Ms Fredericks would attend her doctor to find out when she would return to work.

[76] Ms Fredericks says Mr Robertson's insistence on knowing about the invoicing is evidence of his condescending and intimidating behaviour.

[77] Ms Fredericks has provided snippets of the meetings she attended with Ms Wood in February. The recordings were done covertly and because they are only extracts they have not been of much assistance to me in investigating Ms Fredericks' claims.

[78] One snippet covered the discussion at the end of the 15 February meeting. I am satisfied, having heard that part of the meeting that there was nothing untoward in Mr Robertson's tone or in the way he expressed his need for information about the invoicing. The invoicing was due to be done that day and Mr Robertson was clearly seeking clarification about whether bills would be sent out to his customers. Ms Fredericks did not come across as overly helpful when he asked her the first time and this necessitated Mr Robertson asking several times for the same information.

[79] I find the incidents highlighted by Ms Fredericks have been adequately explained by Madison.

[80] Bullying behaviour usually takes place over a reasonable period of time. In this case Ms Fredericks points to two and a half weeks during which time she says she

was subject to bullying. Ms Fredericks raised her concerns about Mr Robertson's conduct with Ms Wood for the first time on 3 February. At that point in time she had worked only eight days after the 30 December meeting.

[81] I have concluded Ms Fredericks became extremely unhappy on learning that the Operations Manager was receiving a benefit as part of his remuneration package. Ms Fredericks saw this as a slight on her and her family. Her unhappiness with Mr Robertson's response to her request for a wage increase motivated her own behaviours and her perception of Mr Robertson's behaviours toward her during those eight days.

[82] In relation to the request for a change of hours I am satisfied Mr Robertson carefully considered her request, set out his concerns and invited Ms Fredericks to address them. She did not address those concerns to Mr Robertson's satisfaction and he did not agree to the change in hours of work.

[83] Ms Fredericks has not established any bullying conduct by Mr Robertson toward her. His written communication was polite and factual. He categorically denied and I have accepted his evidence having observed him during the investigation meeting that he never swore at work. I accept he felt frustrated in trying to deal with Ms Fredericks to such an extent that he engaged the services of Ms Wood to help him get to the bottom of what was going wrong in the employment relationship.

Lack of role clarity

[84] Ms Fredericks says she worked in the role for three years without a job description. Her workload increased and she was referred to as part of the management team and this should have been reflected in a job description.

[85] The employment agreement signed by Ms Fredericks did not contain a job description or an outline of the duties required of Ms Fredericks. Ms Fredericks says this has contributed to the failure to increase her wages.

[86] I am satisfied the lack of role clarity did not cause Ms Fredericks to be disadvantaged in her employment. Madison considered her request for a pay increase and advised her that when her role expanded in 2017 her wages would be reviewed at that time. Also, the market data sourced by Ms Wood and discussed with Ms Fredericks indicated that her remuneration package was in line with similar

comparable roles. Further, Madison also gave careful consideration to Ms Fredericks request for a change to her hours of work and consulted with her over its decision to decline her request.

Conclusion

[87] There is no doubt Ms Fredericks had become unwell. Her medical certificates attest to this. However, I am not satisfied Ms Fredericks has established that Mr Robertson's conduct caused her to become unwell. Mr Robertson was so concerned about Ms Fredericks' behaviour following the 30 December meeting that he arranged for an HR specialist to meet with Ms Fredericks to establish what was wrong.

[88] The Operations Manager gave evidence that he noticed a change in Ms Fredericks and decided to give her space. He said he was very busy and did not have time to be involved in Ms Fredericks' issues.

[89] Ms Fredericks has failed to establish to my satisfaction that one or more conditions of her employment were affected to her disadvantage by unjustified actions of Madison. Her application for remedies is declined.

Discrimination

[90] Ms Fredericks claims she was discriminated against during her employment on the basis of her sex or her ethnic or national origins.

[91] To establish her claim Ms Fredericks must show that a material factor in the decisions made by Madison to decline her request for a wage increase and her request for a change in her hours of work included that she was a woman or migrant.¹

[92] As set out earlier, neither of the two senior managers at Madison received wage increases during the period of Ms Fredericks' employment. While the Operations Manager had an enhancement to his remuneration package that had been in place for at least five years and before Ms Fredericks started working for Madison.

[93] There is no evidence that the decision not to agree to a change to Ms Fredericks' hours was based on anything other than genuine needs of the business and

¹ *McAllister v Air New Zealand Limited* [2009] NZSC 78.

the need for the role undertaken by Ms Fredericks to move to a full time role in the near future.

[94] Ms Fredericks has not established her claim that she was discriminated against and her claim for remedies is declined.

Breaches of good faith

[95] Ms Fredericks claims Madison breached its obligations of good faith in that it failed to be communicative and responsive as required under s 4 of the Act.

[96] Madison engaged Ms Wood eight days after the relationship between Ms Fredericks and Mr Robertson began to show signs of deterioration. Ms Wood then met with Ms Fredericks on four occasions to discuss her issues, in particular the most pressing issues at that time which was her request for a wage increase and the change to her hours of work which needed to be resolved before 23 February.

[97] On 15 February Ms Fredericks commenced a period of extended sick leave. This did not prevent the parties from meeting to discuss Ms Fredericks' concerns, particularly her request regarding her hours of work. The final decision about the hours of work was given to Ms Fredericks in person on 20 February.

[98] From 20 February to 27 April Madison wrote to Ms Fredericks requesting information about her medical prognosis so that it could make appropriate business decisions on tasks that Ms Fredericks would normally undertake and which needed to be covered by others. Ms Fredericks was unresponsive to these requests.

[99] Madison and Ms Fredericks met in mediation on 30 March but were unable to resolve their differences.

[100] Ms Fredericks has failed to establish any breach of good faith on the part of Madison toward her and her claim for a penalty is declined.

[101] Good faith is a mutual obligation. Both parties are required to act toward each other in good faith. In criticising Madison for its actions toward her, Ms Fredericks has failed to take into account her own actions when she failed to respond to requests for information relating directly to her ongoing employment.

Breaches of the employment agreement

[102] Ms Fredericks says Madison breached the following terms of her employment agreement and seeks penalties for the breaches:

- a) Clause 2.3 – alteration of duties
- b) Clause 2.4 – written job description
- c) Clause 4.3 – Times and Hours of Work
- d) Clause 22.1(b) – Monitoring of health
- e) Clause 32.2 – Redundancy
- f) Clause 49 – Good faith

Clause 2.3 – alteration of duties

Clause 2.3 provides for Ms Fredericks' duties to be amended after consultation with her and with one week's notice in writing. Clause 2.4 provides for Ms Fredericks duties to be set out in a job description and attached to the employment agreement.

[103] It was common ground that Ms Fredericks' duties changed incrementally over a period of time as a result of the growth in the business. Ms Fredericks was happy with the increases in her duties and never raised any concerns about this during her employment.

[104] Madison has breached the employment agreement. However, I am satisfied the breach was not significant and Ms Fredericks has consented, albeit not in writing, to the various changes to her duties.

Clause 2.4 – Job Description

[105] Ms Fredericks signed the employment agreement on 6 January 2014 in the knowledge that no job description was attached. At the investigation meeting there was no dispute about the tasks required of Ms Fredericks. The only dispute was about the level of her position in the hierarchy. A job description would not have resolved that issue because Madison operates a flat structure which has the senior managers and Ms Fredericks reporting directly to Mr Robertson.

[106] The failure to provide a job description is a breach of the employment agreement. Ms Fredericks seeks a penalty to be imposed for this breach. A claim for the recovery of a penalty must be commenced within 12 months after the date the

cause of action first became known or should reasonably have become known to the person bringing the action.

[107] Based on the evidence before me I have concluded that Ms Fredericks knew either at the time she signed the employment agreement in 2014 or at least May 2016 when she was asking for a wage increase that she did not have a written job description. Ms Fredericks commenced these proceedings on 3 August 2017. Ms Fredericks' application for the recovery of a penalty is out of time and is declined.

[108] Even if I had found the proceedings had been commenced within the 12 month period required by the Act I am not satisfied this breach is so serious as to warrant the imposition of a penalty.

Clause 4.3 – Times and Hours of Work

[109] Clause 4.3 requires Madison to provide Ms Fredericks one week's notice in writing of any alteration to her hours of work after consultation.

[110] Ms Fredericks has not specified any actions on the part of Madison that are in breach of this clause and her claim has not been established to my satisfaction.

Clause 22.1(b) – Monitoring of health

[111] Clause 22.1(b) requires the employer to monitor Ms Fredericks health in relation to a hazard. I am not satisfied Ms Fredericks has established to my satisfaction a breach of clause 22.1(b).

Clause 32.2 – Redundancy

[112] This clause deals with restructuring and the obligation on Madison to advise and consult with Ms Fredericks about proposed changes to the structure of the organisation where those changes may affect her future employment.

[113] Ms Fredericks has failed to establish a breach of this clause. Madison had not embarked on a restructuring of its business, although Mr Robertson had discussed with Ms Fredericks the possibility of her role increasing after the move to the new building. At the time Ms Fredericks commenced her sick leave on 15 February there was no proposal on which Madison was required to consult.

Clause 49 – Good faith

[114] Clause 49 required both Ms Fredericks and Madison to deal with each other in good faith. Both parties were required to be active and constructive in establishing and maintaining a productive employment relationship in which they were responsive, communicative, supportive, cooperative, transparent and honest.

[115] I have already found Madison did not breach its statutory obligations of good faith and have recorded the mutuality of the obligation. I am not satisfied Ms Fredericks has established any breach of the employment agreement in relation to the stated obligations of good faith.

Dismissal grievance

[116] Ms Fredericks wrote, through her representative, on 20 April purporting to raise a personal grievance for constructive dismissal. A constructive dismissal requires a resignation. As at 20 April Ms Fredericks had not provided a resignation, which according to the terms of the employment agreement had to be in writing.

[117] Madison wrote to Ms Fredericks on 26 April setting out a proposal to end the employment relationship on the basis that Ms Fredericks had not returned to work following a medical certificate that indicated she would be fit to return to work on 25 April. In response Ms Fredericks stated that she had resigned through her representative on 20 April.

[118] Ms Fredericks claims her resignation was in law a constructive dismissal. A constructive dismissal is an apparent resignation which is, in reality, an employee's response to an act or omission of the employer of such significance that it amounts to a repudiation of the contract of the employment and entitles an employee to accept that repudiation by resigning the employment.

[119] Included in the instances of employer conduct that may amount to constructive dismissal is a sufficiently fundamental breach of duty by the employer or a course of conduct with a deliberate and dominant purpose of causing an employee to resign.²

² *Auckland Electric Power Board v Auckland Provincial District Local Authorities Officers IUOW* [1994] 1 ERNZ 168; [1994] 2 NZLR 415 (CA).

[120] The nature of a claim for constructive dismissal is dependent on the events that preceded the employee leaving their employment; the focus of such claims is on the employee's motivation for their decision to leave, and whether the motivation arises from a breach or breaches of the employer's duty or other actions by the employer.³

[121] In deciding whether an employer's conduct amounted to a constructive dismissal it is essential to examine the facts of the case to see whether the conduct of the employer can fairly and clearly be said to have crossed the line between inconsiderate conduct causing some unhappiness from dismissive or repudiatory conduct reasonably sufficient to justify termination of the employment relationship.⁴

[122] Ms Fredericks claims the cumulative effect of the conduct of Madison over a lengthy period left her with no option other than to resign. Ms Fredericks says the conduct included breaches of Madison's statutory obligations of good faith, breaches of the employment agreement and the conduct of Mr Robertson.

[123] I have found earlier in this determination that Ms Fredericks did not suffer a disadvantage as a result of any conduct by Mr Robertson. I have focussed on the conduct of Madison following the commencement of Ms Fredericks sick leave on 15 February to determine whether Ms Fredericks could rely on a repudiation of the employment agreement to found a claim of unjustified dismissal.

[124] Ms Fredericks commenced a period of sick leave on 15 February. Clause 37 of the employment agreement provides for termination of the employment relationship where an employee is unable to carry out their duties as a result of deterioration in their health. The clause provides discretion for Madison to require Ms Fredericks, at its expense, to be examined by a medical practitioner of its choice. When she signed the employment agreement Ms Fredericks agreed to attend a medical practitioner and undergo a medical assessment for the purposes of assessing her ability to carry out her duties.

[125] By 4 April Ms Fredericks had been absent from work for seven weeks. Despite a request in March for information or advice as to the likelihood of when Ms Fredericks might return to work no information was forthcoming. Mr Robertson

³ *Commissioner of Police v Hawkins* [2009] NZCA 209.

⁴ *Wellington etc Clerical Workers Union IUOW v Greenwich*

wrote to Ms Fredericks requiring her to attend a doctor and undergo a medical assessment. No response was received from this request.

[126] Mr Robertson wrote to Ms Fredericks on 4 April advising her he was concerned that Ms Fredericks' absence was having a detrimental impact on the business. Mr Robertson had temporary cover for some aspects of Ms Fredericks' work but other employees were covering some of her duties which impacted on their ability to perform their own tasks. He was concerned that aspects of Ms Fredericks' role were not being completed and a protracted absence would further impact the business. A copy of a form for completion by Ms Fredericks' doctor was attached to the letter.

[127] In his letter Mr Robertson indicated that if the situation had not changed by 21 April Madison may have to consider terminating Ms Fredericks' employment on the grounds of ill health and in accordance with the terms of the employment agreement.

[128] In response Madison received a medical certificate that simply stated Ms Fredericks would be unable to work from 11 to 25 April. The request that Ms Fredericks obtain a medical assessment had been ignored.

[129] On 26 April Madison advised Ms Fredericks that because she had not returned to work on 25 April in accordance with her last medical certificate and because there was no certainty about when she would be fully fit and able to return to work Madison was proposing to consult with her about a proposal to terminate her employment on medical grounds in accordance with clause 37 of the employment agreement.

[130] Ms Fredericks was invited to make submissions on the proposal to terminate her employment including providing any information she wished Madison to consider prior to a decision being made. Ms Fredericks was given until 5.00pm on 1 May to make her submissions. Ms Fredericks was advised that in the absence of any submissions from her, a decision would be made without her input.

[131] The letter dated 26 April followed requests by Madison that Ms Fredericks undergo a medical assessment. The requests were made on 17 March, 4 and 13 April. All requests went unanswered.

[132] Ms Fredericks made several comments before commencing her sick leave that she would resign from her employment. The first was on 30 December when Ms Fredericks gave Mr Robertson the company car keys. The second was during her first meeting with Ms Wood on 3 February when she told Ms Wood that she would resign if she could not get the change in her hours of work. I am satisfied Ms Fredericks did not put that up as an option to antagonise but as a matter of fact.

[133] Madison was looking at increasing Ms Fredericks' role at a time when she was requesting to work less hours. At the investigation meeting Ms Fredericks told me she did not want the increased role.

[134] In all the circumstances of this case I am not satisfied Mr Robertson's conduct can fairly and clearly be said to have crossed the line between inconsiderate conduct causing some unhappiness from dismissive or repudiatory conduct reasonably sufficient to justify termination of the employment relationship. I find it is likely Ms Fredericks intended to resign from her employment to pursue full time tertiary study and this was her motivation for resigning her employment on 20 April.

Claim against Second Respondent

[135] Ms Fredericks has commenced proceedings against Ms Wood under s 134(2) of the Act claiming Ms Wood has incited, instigated, aided and abetted a breach of Ms Fredericks' employment agreement.

[136] To be successful in her claim Ms Fredericks must show that Ms Wood intended to interfere with Ms Fredericks' employment relationship with Madison.⁵

[137] Ms Wood was contracted by Madison to investigate the concerns raised by Mr Robertson about the change in Ms Fredericks' behaviour. Ms Wood acted at all times under the instructions of her client.

[138] I have found two breaches of the employment agreement. Ms Wood was not involved in either of these breaches so could not be said to have incited, instigated, aided or abetted the breaches.

⁵ *Aarts v Barnados New Zealand* [2013] NZEmpC 85.

[139] Ms Fredericks has not established to my satisfaction that Ms Wood has incited, instigated, aided and abetted a breach of Ms Fredericks' employment agreement.

Costs

[140] Costs are reserved. The parties are invited to resolve the matter. If they are unable to do so Madison will have 28 days from the date of this determination in which to file and serve a memorandum on the matter. Ms Fredericks will have a further 14 days in which to file and serve a memorandum in reply. All submissions must include a breakdown of how and when the costs were incurred and be accompanied by supporting evidence.

[141] The parties could expect the Authority to determine costs, if asked to do so, on its usual "daily tariff" basis unless particular circumstances or factors require an adjustment upwards or downwards.

Vicki Campbell
Member of the Employment Relations Authority