# New Zealand Employment Relations Authority Decisions



## Fredericks v Madison Qualitex Laundry Services Limited (Auckland) [2018] NZERA 137; [2018] NZERA Auckland 137 (2 May 2018)

Last Updated: 18 May 2018

**IN THE EMPLOYMENT RELATIONS AUTHORITY AUCKLAND**

[2018] NZERA Auckland 137
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 Respondents

Submissions received: 12 April 2018 from Applicant

29 March 2018 from Respondent

Determination: 2 May 2018

**COSTS DETERMINATION OF THE AUTHORITY**

A. **Ms Fredericks is ordered to pay the following costs within 28 days of the date of this determination:**

a) **to Madison Qualitex Laundry Services Limited the sum of**

**$5,000; and**

b) **to Ms Sylvia Wood the sum of $1,000.**

[1] In a determination dated 2 March 20181 I found one or more conditions of Ms Fredericks' employment were not affected to her disadvantage and neither was she unjustifiably constructively dismissed. I declined to impose penalties against either of the respondents.

1 [2018] NZERA Auckland 77.

[2] I reserved costs, indicating that if the parties were unable to resolve costs, both parties would have the opportunity to file cost memoranda and evidence. The parties have been unable to resolve the matter. Madison Qualitex Laundry Services Limited and Ms Wood have applied for costs.

[3] The discretion to award costs, while broad, is to be exercised in a principled way. The primary principle is that costs

follow the event. Under normal circumstances the Authority would apply a starting point of a notional daily tariff for quantifying costs.

[4] The Authority has the power to order any party to pay to any other party such costs and expenses as the Authority thinks is reasonable.2 The principles applying to costs are well settled and do not require repeating.3

[5] An assessment of costs will normally start with the notional daily tariff which is $4,500 for the first day of an investigation meeting and $3,500 for each subsequent day.4

[6] The investigation meeting took one day. The starting point for calculation of the daily tariff is $4,500. Madison seeks an uplift to the daily tariff on the basis that it made a settlement offer to Ms Fredericks which she unreasonably rejected. Madison also claims a contribution to the costs it incurred in retaining the services of Ms Wood as an HR consultant, while trying to resolve the matters between it and Ms Fredericks when the employment relationship was ongoing.

[7] I decline Madison's application for a contribution to its costs associated with engaging an HR consultant to assist it with resolving its difficulties with Ms Fredericks. The costs incurred are part of ordinary business expenses associated with dealing with employees particularly where, as in this case, the employer does not have

its own in-house expertise.

2 Employment Relations Act 2000, Schedule 2, clause 15.

3 *PBO Ltd v Da Cruz* [2005] NZEmpC 144; [2005] 1 ERNZ 808, 819-820 and *Fagotti v Acme & Co Limited* [2015] NZEmpC

135 at [106] – [108].

4 Practice Note 2, Costs in the Employment Relations Authority.

**Ability to pay**

[8] The Authority is able to take into account Ms Fredericks financial circumstances as described in her costs memoranda. Costs orders should not cause undue hardship to the party required to pay.5

[9] As explained by the Employment Court in *Stevens v Hapag-Lloyd (NZ) Ltd*:6

...Proceedings in the Authority are intended to be low level, cost effective, readily accessible and non-technical. It is a first instance hearing that is not intended to have the trappings of the more formal, procedurally constrained processes of the Court. It is plain (including from the Authority's informed assessment of an appropriate notional daily rate [...]) that the Authority is not intended to be an overly legalistic or costly forum. This ought, in ordinary circumstances, to reduce the amount parties may reasonably be expected to expend on legal resources. While it is each party's right to instruct counsel and (if they do) to instruct counsel of their choosing, and to apply significant legal resources to the pursuit or the defence of a claim in the Authority at first instance, that is a choice they make including having regard to the generally applied daily rate. ...

In my view it will generally be inconsistent with the statutory imperatives underlying the legislation for significant costs awards to be imposed on unsuccessful litigants in the Authority.

[10] In her memorandum Ms Fredericks says she is studying part time while she recovers from ill health. Ms Fredericks has provided evidence of attendances to her general practitioner. Ms Fredericks says she has had to apply for a hardship loan from her kiwisaver fund and a "payment holiday" for a current bank loan.

[11] In making my orders for costs I have taken into account the statements made by Ms Fredericks in her memorandum to the Authority.

**Settlement offer**

[12] Madison wrote to Ms Fredericks on 29 June 2017 on a without prejudice basis, and offered to resolve all its obligations arising out of the employment relationship by:

a) payment of $3,000 under s 123(1)(c)(i) of the Employment Relations Act

2000; and

b) contribution to Ms Fredericks' costs in the sum of $4,500 plus GST; and

c) provision of a positive reference.

[13] The offer was made through counsel representing Ms Fredericks at the time. [14] The Authority will take into account any offers made by the parties to settle

matters:[7]

The public interest in the fair and expeditious resolution of disputes would be undermined if a party were able to ignore a Calderbank offer without any consequences as to costs.

[15] The Employment Court has stated:[8]

Where an offer of settlement has been made by a party to litigation and the other party unreasonably rejects that offer that should be taken into account in assessing costs. That is because costs have been wasted going to trial. This principle has been endorsed by the Court of Appeal as appropriate in assessing costs in litigation in the Employment Court and that a "steely approach" ought to be adopted. No such statement of approval has yet been made by the Court of Appeal in relation to the assessment of costs in the Authority. It may be that a somewhat diluted approach is appropriate in that forum having regard to the statutory imperatives identified above, and in light of the Court's observation in Da Cruz that Authority awards will be "modest". What is clear, however, is that the effect of an offer is ultimately at the discretion of the Authority, and the Court on a de novo challenge, having regard to the circumstances of the particular case.

[16] Ms Fredericks says she rejected the offer because at the time of the offer her own costs exceeded the offer. I find the offer to resolve all Ms Fredericks claims was reasonable. At the time the offer was made Ms Fredericks had not lodged her statement of problem in the Authority and so Madison's legal fees would have been significantly less than they finally incurred.

[17] The offer was made after the parties had attempted two mediations. From that I have assumed Ms Fredericks would have had the benefit of two assessments of the risks she faced in establishing her claims and relative success. In light of the eventual outcome in the Authority's determination Madison's offer was reasonably made and Ms Fredericks' rejection of it was unreasonable. I have allowed an uplift of $500 to account for the unreasonable rejection of the settlement offer.

**Madison Qualitex Laundry Services Costs**

[18] Madison incurred actual legal costs totalling $15,553.75 including GST in dealing with Ms Fredericks' claims. I am satisfied the costs were reasonably incurred.

[19] In all the circumstances I consider an appropriate contribution to Madison's costs to be $5,000.

**Ms Wood's costs**

[20] Ms Wood had to defend Ms Fredericks' application that she had aided and abetted breaches of the employment agreement. I found no evidence of any wrong doing by Ms Wood. Ms Wood entered into an arrangement with Mr Sharp that limited her exposure to $7,500 plus GST for costs. Ms Wood seeks a contribution to her costs in the amount of $4,500 plus GST on the basis that she is not registered for GST.

[21] The claim for GST is founded on the determination of the court in *Stormont v Peddle Thorp Limited*[9] where the Chief Judge awarded costs in the Authority based on the daily tariff plus GST on the basis that Ms Stormont was not registered for GST. Unlike *Stormont* this is not a situation where the party paying costs can claim the GST as she is also not GST registered.

[22] The preparation Ms Wood would have made in relation to the claim of aiding and abetting would have been minimal. Her evidence was largely responding to Ms Fredericks' substantive claims against Madison. Ms Wood was present at the investigation meeting principally as a witness for Madison. Even if Ms Fredericks had not made her claims against Ms Wood personally, Ms Wood would still have been required as a witness. Madison has been charged for its lawyer's full attendance at the investigation meeting. It is not appropriate to allow a double dip situation to arise.

[23] In all the circumstances I consider an appropriate contribution to Ms Wood's costs to be $1,000.

9 *Stormont v Peddle Thorp Limited* [2017] NZEmpC 159.

[24] Ms Fredericks is ordered to pay the following costs within 28 days of the date of this determination:

a) to Madison Qualitex Laundry Services Limited the sum of $5,000; and b) to Ms Sylvia Wood the sum of $1,000.

Vicki Campbell

Member of the Employment Relations Authority