

**IN THE EMPLOYMENT RELATIONS AUTHORITY  
WELLINGTON**

Determination number:  
WA 23/08  
5042383

BETWEEN RACHAEL MILLER  
Applicant  
AND SWAZI APPAREL LIMITED  
Respondent

Member of Authority: James Crichton  
Representatives: Mike Andrews, Counsel for Applicant  
Andru Isac , Counsel for Respondent  
Investigation Meeting: 25 September 2007 at Palmerston North  
Determination: 20 February 2008

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**DETERMINATION OF THE AUTHORITY**

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**Employment relationship problem**

- [1] The applicant (Ms Miller) alleges that she was unjustifiably dismissed by the respondent, Swazi Apparel Limited (Swazi) on 19 April 2006.
- [2] Swazi resists that claim contending that the decision to dismiss Ms Miller was procedurally fair and substantively justified.
- [3] Ms Miller was employed by Swazi as a part-time dispatcher. She joined the firm in March 2004 and worked an average of between 24 and 30 hours per week. At the time of her dismissal she was earning \$12.50 per hour. The employment was governed by an individual employment agreement; the copy provided to the Authority was both unsigned and undated but it is common ground between the parties that this is the document that applies.
- [4] The employer's evidence is that Ms Miller's behaviour in the workplace was always in issue, although it was acknowledged by Swazi that up until the incident which led to her dismissal, Ms Miller was never dealt with in a disciplinary context.

[5] Ms Hughes, a director of Swazi and the person directly responsible for personnel matters, said in her brief of evidence:

*On numerous occasions I had to defuse situations where Rachael (Ms Miller) had behaved inappropriately towards others. ... I always tried to counsel her to improve with a view to maintaining her employment. We did not address issues in a disciplinary context, preferring to try to help her modify her behaviour.*

[6] In answer to a question from me at the investigation meeting, Ms Hughes elaborated on that passage and referred to a number of previous incidents involving Ms Miller and work colleagues. Ms Hughes described Ms Miller as *a very strong person* who was *over loud about her opinions*. It was Ms Hughes who had recruited Ms Miller to the firm; Ms Hughes described Ms Miller as *a fit and confident person* and she clearly thought that Ms Miller would be an asset to the business at the time that she was recruited.

[7] Further, the documentary evidence before the Authority supported the conclusion that there had been numerous examples of Ms Miller *clashing* with other staff.

[8] By letter dated 27 March 2006, Mr Steven Knight, Ms Miller's immediate manager, complained to Swazi about Ms Miller's *attitude towards him*.

[9] Swazi wrote to Ms Miller by letter dated 30 March 2006 setting out the nature of the allegation and convening a meeting to discuss the issues. Ms Miller was advised the matter was serious and could result in her dismissal, and was encouraged to bring a support person to the meeting.

[10] The meeting just referred to took place as scheduled with Ms Miller having with her as a support person, Ms Paula Batchelar. Ms Batchelar's evidence of the 31 March 2006 disciplinary meeting is at odds in a number of significant respects from the evidence of Mr and Mrs Hughes, the directors of Swazi who attended the meeting on Swazi's behalf.

[11] Both Mr and Mrs Hughes allege that Ms Batchelar was unhelpful at the meeting; Ms Batchelar for her part contends that the meeting notes which were prepared by Swazi after the meeting do not accurately record the nature of the meeting and its flavour.

[12] There is no dispute that Ms Miller's response to the allegation from her manager, Mr Knight was to read her own letter, a copy of which was put into evidence, which is in effect a complaint against Mr Knight by her.

[13] Ms Miller also tabled with Swazi copies of letters from workmates which supported her position and did not support the allegations made by Mr Knight.

[14] Two of those three workmates gave evidence before the Authority. Their evidence that they had been spoken to by Ms Miller and were aware of the complaint against Ms Miller by Mr Knight, but they said they had not been asked by Ms Miller to write letters of support. Although they said they had been shown the letter of complaint, they also said they did not have the letter of complaint in front of them when they wrote their letters.

[15] The significant thing about the letters of two of the support people, namely Ms Bignall and Ms Walker, is that their letters are so similar in structure and content as to suggest the one may have copied the other. Despite that appearance of similarity, both witnesses were adamant that they were not physically together (although they were in the same house) when the two letters were composed. Ms Walker wrote hers first and Ms Bignall's evidence is that she (Ms Bignall) saw Ms Walker's letter before she wrote her letter.

[16] Mr Hughes who, on behalf of Swazi, did the investigation and made the final decision in respect to the dismissal of Ms Miller, discounted the evidence provided by Ms Walker and Ms Bignall not on the basis of what they said, but on the basis of the very strong evidence that they had colluded. Mr Hughes interviewed both Ms Bignall and Ms Walker and established accurately the circumstances in which the two letters had been written.

[17] Mr Hughes also interviewed the two previous managers who had had Ms Miller working for them and they confirmed to Mr Hughes that they had had similar problems with Ms Miller to the problems that Mr Knight had complained to Swazi about.

[18] Accordingly, Swazi formed the view that Ms Miller had been guilty of serious misconduct and that dismissal was the likely disciplinary response. A letter dated 6 April 2006 was prepared and sent to Ms Miller which sets out the nature of the findings against her and proposed a further meeting at which the issue of penalty and the other findings that the employer had made, could be the subject of further submissions from Ms Miller.

[19] There was a further meeting arranged between the parties for 12 April 2006. In this second meeting, both parties were represented by counsel. After further exchanges between counsel the dismissal was subsequently confirmed by letter dated 19 April 2006.

[20] That was the date the parties had previously agreed that the matter would be resolved by. The letter from counsel for Swazi indicates that Swazi *stands by (its) findings that Ms Miller is*

*guilty of serious misconduct in failing to maintain a relationship of respect and courtesy with her manager, and/or engaging in conduct towards her manager that amounts to intimidation.*

[21] Ms Miller then, through counsel, notified her personal grievance.

### **Issues**

[22] The only issue to require consideration by the Authority is whether it was available to Swazi to dismiss Ms Miller from her employment in these circumstances. The test is that set out in s.103A of the Employment Relations Act 2000 and in effect requires that the Authority apply an objective standard to the conduct of the employer so as to inquire whether a fair and reasonable employer, having conducted a proper investigation, would reach a decision to dismiss in the particular circumstances of this case.

### **The employment relationship before March 2006**

[23] It is common ground that Ms Miller was not warned or subject to any disciplinary consequences prior to the incident in March 2006 which led to her dismissal.

[24] However, what is evident from the material before the Authority is that Ms Miller's way of interacting with co-workers created some stress and strain. Her last performance appraisal, before the March 2006 incident, records that her relationships with customers were excellent but that there were issues about the way that she related to colleagues.

[25] In other evidence, Mrs Hughes for example referred to the need to provide *coaching* to Ms Miller, and there is correspondence before the Authority from Swazi to Ms Miller which refers to the need for Ms Miller to be sensitive to colleagues in her interactions with them.

[26] It is clear that there was a particular issue about Ms Miller's interactions with Steven Knight, her immediate manager, and that was the subject of some discussion between Ms Miller and Swazi in December 2005 when her last performance review was dealt with.

[27] In the letter to Ms Miller from Swazi summoning her to the initial disciplinary meeting about the Steven Knight complaint in March 2006, Swazi commence the letter with the following paragraph :

*You will recall that your disrespectful attitude towards Steven (Mr Knight) was raised in your performance review in December last year. You were alerted to the potential for it to be a serious problem as it undermined workplace relationships and the relationship of trust and confidence we must have with you. You were advised in writing that we would be looking for a marked improvement in your behaviour.*

[28] That March 2006 letter, which I have just quoted from, refers to an earlier communication from Swazi to Ms Miller consequent upon her December performance review. That earlier communication is dated 6 December 2005 and that letter makes clear to Ms Miller that her attitude is a problem but that Swazi does not regard the issue as a disciplinary one at that stage. Amongst other things, the December 2005 letter has this to say :

*We propose at this stage to talk to you about this issue (her attitude) while working through your performance review with you, to listen to your thoughts on this situation. We would like to plan a way forward with you. While this is not a disciplinary matter at this stage, we will be looking for a marked improvement in your behaviour.*

[29] It is a natural reaction for an employment relationship to be influenced and coloured by the history of that relationship and it is appropriate that, in reviewing the decision to dismiss, there be some consideration of the previous context of the relationship. The history of the relationship, on the evidence before the Authority, was troubled.

### **The March 2006 incident**

[30] Mr Knight, Ms Miller's immediate superior, wrote to Swazi by letter dated 27 March 2006 complaining about Ms Miller's *disrespectful attitude* to him, noting that this was having an impact on his health and seeking an urgent response from Swazi.

[31] Swazi wrote to Ms Miller three days later by letter dated 30 March 2006, put her on notice about the complaint and summoned her to a meeting to discuss it. At that meeting, Ms Miller responded to the complaint from Mr Knight by effectively making a complaint of her own against Mr Knight. There had been previous history between Mr Knight and Ms Miller in October 2005 when each had complained about the other but the matter had been successfully resolved by Swazi. It seems that there was then a further deterioration from that point to December 2005 when Ms Miller's performance appraisal was completed and her attitude to Mr Knight was again in issue.

[32] As I have already noted, at the first disciplinary meeting on 31 March 2006, there is conflict in the evidence between Ms Batchelar, Ms Miller's support person, and Mr and Mrs Hughes, the directors of Swazi. Amongst other things, Ms Batchelar says that the notes of the meeting prepared by Swazi do not accurately reflect the nature of the meeting and she denies various of the assertions made by Mr or Mrs Hughes about her behaviour at the meeting.

[33] I accept that meetings of this kind are stressful for all of the participants and it may well be that that is the explanation for the different recollections of the parties. On this particular occasion,

I prefer Mr and Mrs Hughes' recollection of the events and their version of the process of the meeting in particular.

[34] I reach the conclusion of preferring Mr and Mrs Hughes' evidence to Ms Batchelar's for a number of reasons. The first is that one of Ms Batchelar's allegations, that Ms Miller was patted on the bottom by Mrs Hughes when she left the 31 March meeting is contradicted not only by Mrs Hughes, but also by Ms Miller herself. Second, Ms Batchelar's contention that she did in fact identify herself properly is contradicted by both Mr and Mrs Hughes, and, in writing to Ms Miller by letter dated 6 April 2006 to give Swazi's preliminary conclusions, and to seek a further meeting, Swazi uses these words :

*Please note, that any support person or representative you bring must sign in, and we wish to be advised of their full name.*

If there had not been a problem with the support person identifying herself at the first meeting, that observation would be an extraordinary way to end a letter of this kind.

[35] For those reasons then, I prefer the evidence of Mr and Mrs Hughes as to what transpired at the 31 March meeting and it follows that I also accept their record of the nature and extent of the discussions at that meeting.

[36] In the notes of the meeting of 31 March 2006, Ms Miller is recorded as accepting that she behaved inappropriately towards a former manager, Ms Felicity Short. However, in her brief of evidence, Ms Miller denies that she made that concession and denies that her behaviour towards Ms Short (whatever it was) would be relevant to her behaviour towards Mr Knight.

[37] I am satisfied, on the balance of probabilities, that the notes of the meeting of 31 March 2006 do accurately record the nature of the meeting between the parties and that it is appropriate to rely on that concession recorded as having been made by Ms Miller during the course of the meeting. At no stage did Ms Miller's counsel then acting quarrel with the notion that Ms Miller had accepted that she had behaved inappropriately in the past.

[38] In order for Swazi to properly investigate the issue, particularly in the light of the admission which I have just found was made by Ms Miller at the 31 March 2006 meeting, it would be necessary for Swazi to speak with Ms Short and presumably any other former managers of Ms Miller. In the result, those discussions did take place and Ms Short and another former manager of Ms Miller both confirmed that Ms Miller's behaviour had been inappropriate while they were managing her.

[39] Those inquiries and the results of them were properly disclosed to Ms Miller in the employer's letter of 6 April 2006 and an opportunity to comment on the intelligence obtained was provided to Ms Miller in that same letter.

[40] Also in the letter of 6 April 2006 was the employer's provisional response to the material which Ms Miller had put before the first disciplinary meeting on 31 March 2006. This material comprised first her letter which she read at the disciplinary meeting which was in effect a cross complaint by her against Mr Knight. Second, Ms Miller put in front of the employer letters from colleagues which were supportive of her.

[41] Of those letters of support, two came from colleagues who worked directly with Mr Knight and Ms Miller. However, those two letters were in such similar terms as to encourage the employer that there had been collusion in their preparation. Indeed, when Mr Hughes for Swazi spoke with the authors of those two letters, he was able to obtain evidence which rather tended to confirm that there had indeed been, if not collusion, then some distinct collaboration. Certainly, Swazi formed the view that the supporting letters were *not persuasive* and I find it was available to it to reach that conclusion.

[42] In essence then, the investigation which Swazi had to undertake was an investigation to establish if Ms Miller had indeed been guilty of a disrespectful attitude to her immediate manager Mr Knight. That allegation was put to Ms Miller in a proper way and a properly organised and conducted disciplinary meeting followed at which Ms Miller denied the allegation absolutely and made a cross complaint of her own against Mr Knight tabling at the same time letters of support from co workers designed to assist her position.

[43] Swazi would have reviewed the letter in the context of knowing that there had been similar allegations made against Ms Miller by the same manager very recently indeed. Ms Miller's supportive colleagues would have been discredited early on by the appearance of collusion. The inquiries which Swazi undertook to review Ms Miller's conduct with other managers would have revealed similar problems to the ones complained about in the instant case.

[44] The letter of 6 April 2006 from Swazi to Ms Miller sets out the provisional conclusions the employer has reached; the inquiries with previous managers, the discounting of the evidence from co-workers, a provisional view is formed that dismissal is the disciplinary sanction that ought to apply to this finding of serious misconduct for failing to maintain *a relationship of respect and courtesy* with Mr Knight, and a finding of having engaged in *a pattern of conduct that amounts to intimidation*.

[45] There was a further meeting between the parties on 12 April at which Ms Miller's then counsel argued that the problem was with Mr Knight rather than with Ms Miller and, at that late stage, Ms Miller's then counsel sought further and better particulars about the earlier differences between Ms Miller and Mr Knight.

[46] Swazi reluctantly agreed to provide that information and it was agreed and that the matter be concluded one way or the other a week hence, ie on 19 April 2006.

[47] When there had been no further response from Ms Miller's then counsel by that date, counsel for Swazi wrote to counsel for Ms Miller and indicated that her employment relationship was at an end.

[48] I am satisfied that there were delays from 6 April 2006, when the preliminary findings letter from Swazi was sent to Ms Miller down to the termination of employment on 19 April 2006, but I am equally satisfied that the only explanation for those delays was Ms Miller's counsel's inability to deal with the matter in a more timely fashion. Certainly there can be no criticism whatever of Swazi or its legal advisers.

## **Discussion**

[49] Swazi urges on me the contention that Ms Miller's behaviour toward Mr Knight was that of a bully. That description is not used in the evidence as Ms Miller's counsel is quick to point out. It does not seem to me necessary to label the behaviour in order to assess it; the question still remains whether Ms Miller's behaviour, properly investigated, ought to have resulted in her dismissal.

[50] Swazi quite properly draws my attention to the employer's obligations towards Mr Knight. Broadly stated, Swazi has an obligation to provide Mr Knight with a safe workplace. Mr Knight formally advised his employer of the medical consequences for him of the behaviour he was complaining about. Swazi clearly had an obligation to protect him from harm, if that was in their power, just as they had an obligation to conduct a proper investigation to ensure the allegations against Ms Miller were, in truth, made out.

[51] Ms Miller says she has nothing specific to answer, just a broad accusation which lacks specificity of the *time, date and event* kind. Swazi says it provided Ms Miller with what it had, via a written complaint from her manager, to which they invited her response. That complaint evidences a course of conduct rather than an event or series of events as the focus of the complaint.

[52] It is axiomatic that disciplinary consequences can flow from an allegation that a course of conduct has been destructive of the necessary relationship of trust and confidence that must exist between employer and employee. However, the very absence of specificity in the complaint causes its own difficulties and requires great care by the employer in ensuring that the subject employee has been given a proper opportunity to be heard and is not simply the victim of a smear.

[53] In this case, Ms Miller hotly denied the allegation, made her own counter-allegation, produced witnesses who supported her, made some admissions about the quality of her earlier behaviour in the workplace and denied that Mr Knight was indeed suffering the negative health consequences he himself claimed. The sheer quantity of Ms Miller's responses to the allegation rather weakens the submission that she could not deal properly with the allegation because of the lack of specificity.

[54] Swazi makes the point, tellingly in the Authority's view, that Ms Miller's various responses to the allegation do not sit well together. First, her denial of the allegation flies in the face of the recent history of the employment relationship where, not three months before, she had been counselled by Swazi about her inappropriate behaviour toward Mr Knight. Second, her counter-allegation sits uneasily with the flat denial and, if the complaint about the lack of specificity in Mr Knight's complaint has any force or effect, exactly the same charge can be levelled at Ms Miller.

[55] Third, the witnesses in support were, with the greatest respect to them, a mixed blessing. One of them, Ms Spark, confirms that there were issues in the recent past between Ms Miller and Mr Knight (although without apportioning blame) and the other two produced letters of support which were in such similar language as to raise the prospect of collusion. Fourth, Ms Miller acknowledged she had behaved badly toward a previous manager who also gave evidence to Swazi and the Authority to confirm that negative behaviour. Finally, Ms Miller's view that Mr Knight was not unwell was contradicted by, amongst others, his doctor, Mr and Mrs Hughes and at least some of Ms Miller's colleagues.

[56] Swazi considered the substance of what Ms Miller said in her defence but was not convinced. Given the number of grounds she advanced in her defence, and the uneasy relationship between them and the fact her position was often contradicted by other evidence readily available to the employer, I am satisfied that a fair and reasonable employer would have reached a decision to dismiss in such a case as this.

[57] Nothing I have heard in the evidence satisfies me that the employer's process was anything other than fair. The allegation was put to Ms Miller fairly, she was given a proper opportunity to respond, encouraged to seek support, and had her views considered. Swazi then investigated further by speaking with Ms Miller's witnesses and her former managers and then formed provisional conclusions which it advised to her in writing. In my view, there was then ample opportunity for Ms Miller to challenge key findings but her response through her counsel was not timely.

[58] In the end, the decision to use summary dismissal as the sanction to the conduct complained of, is a judgment call. In the Court of Appeal decision *Northern Distribution Union v. BP Oil NZ Ltd* [1972] 3 ERNZ 483, the Court considered what was required to constitute serious misconduct or to justify summary dismissal and reached the conclusion that it was:

*... conduct that deeply impairs or is destructive of that basic confidence or trust that is an essential of the employment relationship.*

[59] Applying that well known test, I conclude that it was available to the employer, in the present case, to reach the conclusion that summary dismissal ought to be the sanction applied.

### **Determination**

[60] I am satisfied on the balance of probabilities that Swazi conducted a full and fair investigation of the complaint received against Ms Miller from Mr Knight and that a fair and reasonable employer would have reached the conclusion which Swazi did, namely that, in the context of this particular employment relationship, Ms Miller had indeed been guilty of serious misconduct by reason of her pattern of intimidation of Mr Knight and her failure to be respectful and courteous to him, and that her dismissal consequent upon those findings was the appropriate response.

[61] It follows that I do not find Ms Miller's claim of a personal grievance by reason of an unjustified dismissal made out and her claim fails in consequence.

### **Costs**

[62] Costs are reserved.

James Crichton  
Member of the Employment Relations Authority