

**IN THE EMPLOYMENT RELATIONS AUTHORITY  
WELLINGTON**

WA 23A/08  
5042383

BETWEEN                      RACHAEL MILLER  
   Applicant  
  
AND                              SWAZI APPAREL LIMITED  
   Respondent

Member of Authority:      James Crichton  
  
Representatives:            Michael Andrews, Counsel for Applicant  
   Andrew Bell, Counsel for Respondent  
  
Submissions received:      7 May 2008 and 16 May 2008 from Applicant  
   3 April 2008 and 15 May 2008 from Respondent  
  
Determination:              23 June 2008

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**COSTS DETERMINATION OF THE AUTHORITY**

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**The application for costs**

[1] By determination dated 20 February 2008 the Authority resolved the employment relationship problem between these parties by determining that Ms Miller did not have a personal grievance by reason of having been unjustifiably dismissed by Swazi.

[2] Costs were reserved.

**The claim for costs**

[3] Swazi Apparel Limited, as the successful party, seek a contribution to their costs in the sum of \$8,000. This represents a contribution of about 40% of the actual costs incurred of \$21,172.

[4] In response, counsel for Ms Miller indicates that the claim for costs is excessive, that there are calculation difficulties with the amount claimed as well, that

Ms Miller is in no position to make any contribution to costs and that in any event, Ms Miller is making an application for legal aid which would effectively cap the costs that might be awarded in any event. In addition, counsel for Ms Miller argues that the case was in the nature of *a test case*.

[5] Responding specifically to some of those claims, counsel for Swazi suggested there was no evidence before the Authority to confirm that Ms Miller was unable to meet an award of costs, that the matter was not a test case, and that Ms Miller could not apply for legal aid retrospectively she having not applied for it in advance of the investigation meeting, or at least not notified the Authority and the respondent that such an application had been made.

[6] A further response from Ms Miller reiterated the point that Ms Miller was impecunious, confirmed her willingness to provide evidence of that to the Authority should it be requested and indicated that her application to the Legal Services Agency encompassed her challenge to the Employment Court in respect to the Authority's substantive determination, as well as the issue of the costs in the Authority.

### **The legal principles**

[7] The recent decision of the full bench of the Employment Court in *PBO Ltd v. Da Cruz* ACA 2A/05 sets out the relevant principles.

[8] In particular Judge Shaw in giving the decision of the Court makes it clear that the principles usually identified by the Authority in making costs awards are *consistent with (the Authority's) functions and powers*.

[9] In addition, Her Honour observes that there is *nothing wrong in principle with the Authority's tariff based approach* so long as it is not applied rigidly and without regard to the facts of the particular case.

### **Discussion**

[10] It is appropriate to note first that the Authority does not accept any suggestion that this matter was in any sense a test case. This was no more and no less than a consideration of the propriety of a dismissal applying the usual statutory test. It follows that in the Authority's judgment, there was nothing out of the ordinary about this particular issue.

[11] That brings into sharp focus the issue of the reasonableness of the claim for costs sought by the successful party Swazi. In the absence of any breakdown of the actual costs charged, the Authority must use its own judgement to determine the reasonableness of the claim for costs.

[12] If the matter is looked at on the basis of the *daily tariff approach* commonly used by the Authority for matters of this kind a costs award of perhaps \$2,500 to \$3,000 might be contemplated on the basis that this matter was dealt with in a single day's hearing and an award of that magnitude would commonly be applied for a one day fixture.

[13] The Authority is, as counsel for the applicant remarks, a low level informal institution operating without excessive legal formality. Counsel for the applicant also remarks that an award of the magnitude sought by Swazi would be out of step with other costs awards made by the Authority in recent times and I agree with that submission.

[14] Indeed, nothing in the submissions persuades me that this matter is anything other than a straightforward personal grievance, which, in the particular circumstances of this case, the employer party was able to successfully defend. A daily tariff based approach is in my view an entirely appropriate way to set costs in a matter of this kind.

[15] The only remaining consideration is the financial ability of Ms Miller to pay. The Authority is entitled to consider the ability or otherwise of an unsuccessful litigant to contribute to the costs of the successful party. Counsel for Swazi maintain that there is no evidence as to Ms Miller's financial position. I do not agree. Evidence was given about Ms Miller's domestic circumstances and the hours that she was now engaged in remunerative work. Her family circumstances were also made clear in the hearing. In any event, this is a matter where I am perfectly comfortable taking judicial notice of Ms Miller's counsel's submission as to her financial position and I see no reason to trouble her with the provision to the Authority of evidence as to her financial state.

[16] I accept the submission that Ms Miller is in no position to pay a contribution to costs. Were she in a position to make a contribution to Swazi's costs, I should have been minded to make an award of \$3,000 being at the upper limit of an award using the daily tariff approach, for one day hearings. However, given Ms Miller's financial position, I consider this is a case where costs should lie where they fall.

[17] For the sake of completeness only I mention that the issue about whether or not Miss Miller is or may become legally aided is no longer an issue as she is no longer proceeding with her challenge to the Employment Court.

**Determination**

[18] Having considered the submissions as to costs in this matter, I have decided that in the particular circumstances of this case, costs are to lie where they fall and there will be no order for costs against Ms Miller.

James Crichton  
Member of the Employment Relations Authority