

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

AA 220/07
5073661

BETWEEN Jakub Ploszaj Applicant

AND Rush Security Services Ltd
 Respondent

Member of Authority: Yvonne Oldfield

Representatives: Jakub Ploszaj in person
 Larissa Rush for Respondent

Investigation Meeting: 29 May 2007

Submissions received: 29 May 2007

Determination: 26 July 2007

DETERMINATION OF THE AUTHORITY

EMPLOYMENT RELATIONSHIP PROBLEM

[1] This is a problem about an employment relationship that lasted less than a week. Mr Ploszaj was employed by the respondent between 4 September 2006 and 9 September 2006 when he resigned. He did not work out any notice. In reliance on provisions in Mr Ploszaj's employment agreement the respondent withheld all wages and holiday pay. Mr Ploszaj now seeks recovery of these payments.

[2] Mr Ploszaj applied for the position with the respondent after seeing it advertised on the 'Seek' website. He was interviewed by Managing Director, Darien Rush and Supervisor, Barry Hannah on 28 September 2006, and was offered a cross-functional role which included both security and control room duties.

[3] Mr Hannah's evidence is that he told Mr Ploszaj that he would be working night and evening shifts during the week and a mixture of shifts on the weekends and

“we would do our best to ensure that everyone got at least a day off on the weekend.”

Ms Rush explained this saying that the respondent conducted a 24 hour operation and at that time there was no need for further day shift workers.

[4] Mr Ploszaj disputes this evidence. He says that he was told at his interview that he would be working a mixture of shifts and understood this to mean that he would get day shifts during the week

[5] On 2 October Mr Ploszaj was provided with an employment agreement which he signed and returned on 4 October, the day he commenced work. He was not provided with and did not request a copy to keep. Ms Rush told me that it was normal practice for the respondent to send out a copy to new employees but the speed of Mr Ploszaj’s departure meant that this had not happened when he resigned. He received one later.

[6] The employment agreement is a lengthy and detailed document. The relevant provisions for our purposes are as follows:

“7.5

In the event of termination of employment the Employer is authorised to deduct from the final pay whatever monies it may be owed under the employment relationship.

...

15.7

For employment to be able to commence and continue, Employee must be able to obtain a Security Licence as required under the Private Investigators and Security Guards Act 1974 throughout the course of employment. The costs of that licence are to be met by the Employee.

...

36. Termination of Employment

36.0

Either party may terminate this agreement on not less than 1 weeks notice in writing to the other party.

36.1

Where the Employee terminates this agreement under this clause, the Employer may pay wages/salary in lieu of the Employee having to work the notice period.

36.2

The Employee may give no more than one weeks notice of terminating this agreement.

36.3

Should the Employee leave without the required notice period being given, the Employer may deduct pay for the period of notice not actually worked from the Employee's final pay (including holiday pay.)"

[7] English is not Mr Ploszaj's first language and so when he took his agreement home on 2 October his partner went through it with him before he signed it. He told me that he made himself familiar with key provisions such as remuneration and health and safety.

[8] At the start of my meeting Mr Ploszaj expressed a view that he was required to give "no more than" one weeks notice. I asked Mr Ploszaj to explain to me his understanding of clause 36 and other key provisions of the agreement. Although he appeared to have mastery of conversation level English he demonstrated very poor understanding of the provisions and their effect. I am not confident that his command of the language was sufficient for him to understand his obligations pursuant to the employment agreement.

[9] The roster for Mr Ploszaj's first week at work was follows:

- Wednesday 4 October : 2.00pm to 10.00 pm (8 hours)
- Thursday 5 October: 2.00pm to 10.00pm (8 hours)
- Friday 6 October 4.00pm to midnight (8 hours)
- Saturday 7 October 7.00am to 6.00pm (11 hours)

[10] Ms Rush told me that this roster was designed for training purposes and did not necessarily reflect a typical pattern of work. However, it was not inconsistent with what the respondent says would have been expected of Mr Ploszaj in the future: a mixture of evening shifts and night shifts.

[11] Each of Mr Ploszaj's shifts ran a little over the rostered times for the first week and it is not in dispute that in total he worked 38.75 hours.

[12] On or about the Thursday the roster for the next week came out. As for the previous week Mr Ploszaj's roster was designed for training purposes. Mr Ploszaj was

to have Sunday and Monday off. He was then rostered to work 6.00pm Tuesday 10 October to 7.00 am Wednesday 11 October and 4.00pm to midnight on Wednesday 11 October. For the rest of the week he was to work unspecified hours in the control room. Mr Hannah told me that he anticipated that having spent his first six shifts training on patrol, Mr Ploszaj would then be ready to start training in the control room however he had yet to finalise the details of this with the control room supervisor.

[13] After seeing the roster, Mr Ploszaj approached Mr Hannah and queried his hours. Mr Hannah told me that he was “*mystified*” by this as it “*was discussed and agreed in great detail during the interview process.*” Mr Hannah told me that there was no day work available during the week and was never going to be and he thought he had made this clear to Mr Ploszaj. He was surprised that he had not understood. Mr Darien Rush expressed the same view.

[14] On Sunday 9 October Mr Ploszaj telephoned Mr Hannah and told him that he was resigning. Mr Hannah did not want to lose Mr Ploszaj and suggested he come in to talk to him but Mr Ploszaj told Mr Hannah that he planned to visit family in Australia that week and would not be returning to work. Mr Hannah gained the impression, which he relayed to Ms Rush in an email, that there was an emergency with Mr Ploszaj’s family there. He accepted Mr Ploszaj’s resignation and did not remind him of his contractual obligations.

[15] Mr Ploszaj told me that his principal reason for resigning was that he had worked mostly night shifts during his first week and was rostered to do much the same in the second week. He said this was contrary to what he believed were the agreed terms between him and the respondent. He also felt that the fact that he had a break of only seven hours between his evening shift on Friday 6 and his day shift on Saturday 7 October left him with insufficient time to rest. In addition he was dissatisfied with the uniform that had been provided to him, which he said did not fit properly. He also told me that it was not imperative for him to travel to Australia immediately and he would have postponed it he had understood that he was required to give a week’s notice. He told me, and I accept that this was his genuine view, that he thought he was required to give no more than one week’s notice. (A maximum notice period being commonplace in this industry for security reasons.)

[16] Two days later Mr Ploszaj sent Mr Hannah a fax confirming his resignation in the following words:

“I would like to thank you for the opportunity you gave me to work at Darien Rush however when accepting the position I was not aware that I would only be rostered to work night shifts.”

[17] Mr Hannah replied the same day, requesting that Mr Ploszaj return his uniform as a matter of urgency. Still on the same day, Mr Ploszaj’s partner responded saying she would return the uniform as Mr Ploszaj was *“in Australia for the week.”*

[18] On 12 October Ms Rush wrote to Mr Ploszaj as follows:

“We are disappointed with the way you handled your exit from the Company...

Your final pay has been calculated in accordance with your Employment Contract. According to the terms and conditions of our Employment Contract you are required:

- *To return the Company’s property immediately on termination (clause 36.6)*
- *To give a minimum of 1 weeks notice of termination of your employment with us (clause 36.00)*
- *To meet the costs of your Security Licence (clause 15.7.)*

If no notice period has been given to the Employer, the Employer is entitled to make a deduction for the period of notice not actually worked (clause 36.3) The Employer is authorized to deduct whatever money is owed under the employment relationship upon termination (clause 7.5.)

[19] Total gross earnings for the 38.75 hours he had worked were \$523.13 plus six percent holiday pay of \$31.39. From this Ms Rush deducted one weeks pay in lieu of notice (at 40 hours) as well as the cost of Mr Ploszaj’s security licence (\$20.00) and concluded that Mr Ploszaj owed the respondent the balance of \$7.83.

[20] After his return from Australia, in an attempt to resolve the problem, Mr Ploszaj offered to work for a further week. The respondent declined on the basis that his position had been filled. Ms Rush told me that she wanted a determination from the Authority about the effect of the provisions of the agreement so that she would know whether they were enforceable.

[21] Speaking on Mr Ploszaj's behalf, his partner, Ms Vega, told me that she believed the contract was misleading since it referred to both "not more than" and "not less than" one week's notice being given. She also noted that Mr Ploszaj did not have a copy to refer to when he resigned.

Determination

[22] The principal issues in this case are how the employment agreement is to be applied and whether the applicant is entitled to arrears of wages. However, because they are matters of concern to both parties I begin by making some comments about the other issues which arose during the week of Mr Ploszaj's employment.

[23] I accept that at the interview Mr Hannah and Mr Rush explained to Mr Ploszaj what hours they could offer him, and that this did not include day shifts during the week. I also accept that he genuinely misunderstood them and that this was a result of his English being less fluent than might have appeared. No fault attaches to either party for this situation. However Mr Ploszaj did not want to work nights since his partner worked days and he had come to this country to be with her. Once the misunderstanding had come to light the employment relationship was not going to be able to continue.

[24] As for the issues around the uniform I note that the applicant did not bring these formally to the respondent's attention. Had the employment continued this matter could easily have been resolved, as things stood, no blame attaches to the respondent for the allegedly ill fitting uniform.

[25] Turning now to the key issues, I note that Ms Rush has asked for a determination as to whether the relevant provisions of the employment agreement are enforceable. Very simply, I consider that they are. Mr Ploszaj was obliged to give no more and no less than one weeks notice and, should he fail to do so, to forfeit a weeks pay in lieu of that notice.

[26] Nonetheless, on this occasion the applicant's case succeeds, for the following reasons.

[27] It was up to the respondent to provide Mr Ploszaj with a copy of the employment agreement. Because it did not, Mr Ploszaj was unable to check the notice provisions when he resigned. He made what I believe to be a genuine mistake about his obligations, based on his recollection of reading through the document one week earlier. As I have indicated already, it is a lengthy and detailed document. I conclude that without a copy of the agreement to refer to, he cannot be held responsible for his mistake.

[28] In addition, when Mr Ploszaj tendered his resignation to Mr Hannah, Mr Hannah did not take the opportunity to remind Mr Ploszaj of his obligations. This appears to have been because he believed that Mr Ploszaj's trip to Australia related to a family emergency. While no blame can attach to Mr Hannah for that, it nonetheless meant that Mr Ploszaj continued in his ignorance of his obligations and lost an opportunity to put things right.

[29] The outcome (based on these particular facts only) is that the respondent erred in withholding Mr Ploszaj's final pay. However I note that the respondent is entitled to deduct the \$20.00 cost associated with the transfer of Mr Ploszaj's certificate.

[30] **Rush Security Services Ltd is therefore ordered to pay to Mr Ploszaj \$523.13 wages plus six percent holiday pay of \$31.39, less the cost of the security licence.**

Yvonne Oldfield

Member of the Employment Relations Authority