New Zealand Employment Relations Authority Decisions

Samoa v Rush Security Services Limited AA251A/10 (Auckland) [2010] NZERA 773 (14 October 2010)

Last Updated: 18 November 2010

IN THE EMPLOYMENT RELATIONS AUTHORITY AUCKLAND

AA 251A/10 5290191

BETWEEN JAMES VAINUU SAMOA

Applicant

AND RUSH SECURITY SERVICES

LIMITED Respondent

Member of Authority: Robin Arthur

Representatives: Applicant in person

Larissa Rush for Respondent

Investigation Meeting: 12 October 2010
Determination: 14 October 2010

DETERMINATION OF THE AUTHORITY

[1] James Samoa worked as a security officer for Rush Security Services Limited (RSSL) from late December 2008 until 20 July 2009. On 24 July 2009 he was told there was no work for him.

[2] By Authority determination AA251/10 (24 May 2010) Mr Samoa was granted leave to bring a personal grievance application out of time.

[3] The matter was directed to further mediation but not resolved. The Authority has now investigated the following issues for determination:

> (i) was Mr Samoa's employment truly casual, as RSSL claims, or had it become ongoing as he claims; and
> (ii) was Mr Samoa dismissed on 24 July 2009 when he was told there was no more work for him; and
> (iii) did RSSL act in good faith in telling Mr Samoa that there was no more work available for him; and
> (iv) was Mr Samoa subsequently replaced in the role that he had carried out

for RSSL; and

> (v) whether, dependent on the findings on the foregoing issues, Mr Samoa was unjustifiably dismissed; and
> (vi) if so, what remedies are due to him, considering lost wages, compensation for hurt and humiliation; and
> (vii) costs.

The investigation

[4] Written witness statements were lodged by Mr Samoa; his friend and workmate at previous employment, Mohamed Shamaail Peer Mohamed; RSSL guard manager Frans van Wijk and RSSL general manager Larissa Rush. Each witness, under oath or affirmation, confirmed their evidence and answered questions from the Authority. The parties had an opportunity to put additional questions and to provide an oral closing summary of their argument.

[5] In preparing this determination I have considered the witnesses' evidence, the parties' closing submissions, and relevant background documents provided. As allowed for under s174 of the Employment Relations Act 2000 (the Act), I have not recorded here all evidence and submissions received but state findings of facts and issues of law and express conclusions on the issues for determination.

The nature of the employment

[6] Mr Samoa applied for a job with RSSL in December 2008. He was interviewed by Mr van Wijk and offered casual work. He signed an individual employment agreement bearing the heading *"casual employment"*. That agreement stated the employment was "on *an 'as and when' required basis'"* with no obligation on RSSL to offer work or for Mr Samoa to accept work offered. It also stated that *"nothing in this contract shall expressly or by implication be read as providing an entitlement to or expectation of any further employment beyond each engagement"*. Termination of employment was stated to be on one hour's notice by either party.

[7] Mr Samoa says Mr van Wijk referred to a three-month trial period after which he would become a permanent worker but Mr van Wijk denies saying that.

[8] Mr Samoa was initially assigned to work at a school in Ellerslie over the Christmas period in 2008 until 6 January 2009. The following week he started work at Felix Donnelly College (FDC) in Otara. All his remaining work for RSSL was carried out at FDC except for seven additional single shifts he worked at four other locations between January and April 2009.

[9] In early January RSSL had taken over the work of providing security services at FDC from another security firm that went out of business. Those services were paid for by the Ministry of Education but FDC and the Ministry had no formal, signed service contract with RSSL. Rather services were provided on an 'until further notice' basis with the Ministry eventually cancelling day security in December 2009 and ending night security in March 2010. Ms Rush says that throughout 2009 RSSL was unsure how long it would retain the FDC contract. She says security services at FDC were provided by a mixture of RSSL's permanently-employed security officers and others, such as Mr Samoa, who were casual employees only.

[10] In the period between 12 January and 20 July 2009 Mr Samoa worked 103 shifts at FDC. Apart from one day he worked every one of the 27 Saturdays in that period. Apart from four days in late February and early March he worked every Sunday in the same period. On the week days he usually worked between two and four days, with the actual days worked varying from week to week. His weekend hours were worked on a mixture of night and day shifts while his weekday hours were mostly night shifts. With an occasional variation of one hour either side, Mr Samoa almost always worked 12 hour shifts.

[11] The days of work at FDC were set by a roster issued on a Wednesday for the following Monday to Sunday week. Mr van Wijk said work for Mr James was set after talking to him each week, either by telephone or on some occasions having a supervisor visit him at home or work. Mr van Wijk says he offered certain days of work and on each occasion Mr Samoa accepted those days. Mr van Wijk recalls Mr Samoa referred to himself as a *"hunter"* who would not turn down any work offered to him. Mr Samoa confirmed that was what he told Mr van Wijk but disputes whether he was spoken to each week about the days or times at which he was to work. Mr

Samoa says he found out his days for the following week by looking at the roster when it was delivered to FDC each week.

[12] RSSL submitted the express terms of the employment agreement indicated there was no intention to create on-going employment and Mr van Wijk's regular inquiries of Mr Samoa as to his availability indicated there was no expectation or obligation to work, unlike RSSL's permanent staff.

[13] I find that, even preferring Mr van Wijk's evidence over Mr Samoa's about how the roster was arranged, the employment of Mr Samoa changed from being truly casual once a regular and reliable pattern was established of him doing Saturday and Sunday shifts even though the weekdays on which he worked varied. Although Mr van Wijk now denies it, I find that Mr Samoa's availability for that work created a mutual expectation of continuity of his employment at FDC while RSSL retained a contract with the Ministry to provide services there.

[14] This was a situation of the kind explained in this way by Judge Couch in *Jinkinson v Oceana Gold (NZ) Limited* EC, CC9/09, 13 August 2009 at [42]:

It is important to recognise that an employment arrangement may be varied over a period of time to the extent that its essential nature changes. Occasionally, such change will be the result of an explicit agreement between the parties. Much more often, changes occur in day to day conduct which justify the conclusion that the parties have implicitly agreed to vary their original agreement. Many of the decided cases deal with this sort of implied variation.

[15] Regularity of work and continuity of the employment relationship is indicative of ongoing employment as opposed to casual employment.

[16] The pattern of Mr Samoa's shifts at FDC - anchored by regular and continuing Saturday and Sunday shifts through six months - was conduct, I find, justifying a conclusion that RSSL and Mr Samoa had implicitly agreed to vary their originally

casual employment agreement.

[17] The arrangements were also consistent with other indicia referred to in *Jinkinson* at [47]. Mr Samoa worked around 36 or more hours in all but three weeks in the six month period. He averaged more than 45 hours a week over the 31 weeks inwhich he was employed by RSSL. His work at FDC was confirmed in advance by a roster. He never sought leave so whether notice would be required by RSSL was not tested. And while he worked a mixture of day and night shifts, the starting and finishing times for those shifts were consistent.

[18] RSSL's need for staff at FDC, and Mr Samoa's availability, lacked the element of chance or unforeseen nature identified in the analysis of the Canada Labour Relations Board, as referred to in *Jinkinson* by the Employment Court:[1]

What is a genuine casual employee? In the notion of casual work, there is an element of chance or a chance factor which requires that the voluntary and immediate availability of a potential employee coincide with the unforeseen need of an employer to have work done. Conversely, as soon as the need is foreseeable, only part-time work is automatically created: the employee is not a casual worker but a part-time one.

[19] RSSL doubts about how long it would retain a service contract at FDC is a matter which could have been dealt with by way of a fixed-term employment agreement under s66 of the Act rather than insisting Mr Samoa remained a 'casual'. In the absence of such an arrangement he had become an ongoing or 'permanent' employee for the purposes of work at FDC.

The end of the employment

[20] On 24 July 2009 Mr van Wijk arranged a meeting with Mr Samoa to tell him that there was no more work for him at FDC and no alternative work at other RSSL sites. That decision was the result of RSSL having lost two service contracts elsewhere and reallocating work to what it deemed as its permanent, rostered staff. The shifts previously done by Mr Samoa - which RSSL considered to be on a casual basis - were from that point on done by those other security officers.

[21] Mr Samoa was told that if further work became available he would be considered and in the following weeks he contacted Mr van Wijk by telephone to see if there was any work for him. There was not.

[22] I find that Mr Samoa was dismissed on 24 July 2009 from his regular, ongoing work at FDC. However RSSL actions, through Mr van Wijk, were not carried with a lack of good faith in the sense that Mr Samoa was provided with accurate information in an open manner about why the employer was ending his employment. It was, however, effectively a redundancy situation. If Mr Samoa had been treated, as I have found that he should have been, as an ongoing employee rather than a casual, he should have been consulted about the decision rather than simply informed of it and more consideration given to alternatives and measures to soften the blow to him of losing his job.

[23] He was also entitled to reasonable notice, and to be paid for the period of that notice rather than instantly dismissed.

[24] There is no dispute that Mr Samoa was replaced at FDC. Mr van Wijk confirmed that permanent staff from other sites where RSSL has lost service contracts were reassigned to FDC to do shifts previously done by Mr Samoa. Mr Samoa was effectively selected for redundancy ahead of those other staff. I accept Mr van Wijk's evidence that the reallocation of working hours available for RSSL staff was carried out for genuine business reasons. However, the mischaracterisation of the nature of Mr Samoa's employment and his selection for redundancy ahead of other staff was not carried out in the manner which would be followed by a fair and reasonable employer. For that reason, it was, I find, an unjustified dismissal.

Remedies

[25] In light of the finding of unjustified dismissal, Mr Samoa is entitled to an award of lost wages and compensation for hurt and humiliation. Such awards are subject to what he did to mitigate his loss of wages and may be reduced if he contributed to the situation giving rise to his personal grievance.

Lost wages

[26] RSSL submitted no lost wages should be awarded because Mr Samoa admitted in his evidence that he had concentrated on pursuing his grievance rather than making full efforts to secure another job. I accept there was limited evidence on the extent of his job search following his dismissal in July 2009. Mr Samoa spoke of checking local newspapers for jobs and making phone calls about possible positions. Realistically, at that time, job opportunities were significantly limited by the economic recession, a factor that had also affected RSSL.

[27] In assessing the extent of Mr Samoa's loss I also need to take into account that, while the RSSL contract to provide round-the-clock security services at FDC ran to December 2009, Mr Samoa could have been fairly selected for redundancy even if RSSL had properly identified his employment status, consulted him before a decision was made and run a proper selection process.

[28] Accordingly, under s123(1)(b) and s128 of the Act, while I find Mr Samoa did lose remuneration as a result of his

personal grievance, I do not consider his loss necessarily extends until when RSSL lost part of the FDC contract in December. Rather the award for reimbursement of lost wages is limited to the lesser sum of three months' ordinary time remuneration. Based on his average weekly hours of 45.25 (as calculated from time and wage records provided by RSSL) at an hourly rate of $13 (including his holiday pay), the award for lost wages is based on weekly pay of $588.25. For a three month period (which is more than 12 weeks), the total remuneration for lost wages is $7647.24 from which the relevant PAYE deductions are to be made and paid to IRD with the remainder paid to Mr Samoa.

[29] That award includes wages for the period of reasonable notice - of one week, based on the weekly pay cycle - to which he was entitled in the absence of written terms accurately reflecting the reality of the ongoing nature of his employment.

Compensation for hurt and humiliation

[30] Mr Samoa had worked in the security industry for various periods since 1996. He had achieved qualifications at levels 1, 2, 3 and 5 of the industry's training system. At FDC he was known to family members who were children and parents of the school, friends and church members in the neighbourhood, and teachers. While relatively stoic - he described himself as *"always dealing with the hard things in life"* and being "a *strong person in my family"* - he was hurt by being replaced at the job as those people around FDC could see RSSL security officers continued to work at the school. He was also upset that he could no longer provide money to support his elderly mother and had to borrow money from family members.

[31] I accept his evidence of suffering humiliation, loss of dignity and injury to feelings as a result of his personal grievance which warrants an award of compensation under s123(1)(c)(i) of the Act. In the particular circumstances of the case and in light of the general range of awards in cases of this type, I set that compensation at $5000.

Contribution

[32] There was no blameworthy conduct by Mr Samoa which would require any reduction under s124 of the Act of the remedies awarded.

[33] There was a suggestion in the evidence that Mr Samoa had continued to receive an unemployment benefit for some of the period that he worked for RSSL and was required by Work and Income New Zealand to repay certain amounts. Whether any amount of the lost remuneration awarded to Mr Samoa - for the three month period following his dismissal in July 2009 - has any effect on benefits he received in that time is now a matter for him and WINZ to resolve, not the Authority or RSSL.

Costs

[34] Mr Samoa represented himself in this matter and is not entitled to an award of costs for legal expenses. He is entitled to be reimbursed for the $70 fee for lodging his personal grievance application. RSSL is to pay that amount to him in addition to the remedies ordered.

Summary of determination

[35] I have found that Mr Samoa's employment by RSSL had become ongoing rather than casual and he was unjustifiably dismissed in July 2009.

[36] In settlement of his grievance RSSL is to pay to Mr Samoa the following remedies:

(i) $7647.24 (less PAYE) in reimbursement of lost wages, under s123(1)(b) and s128 of the Act; and (ii) $5000 as compensation under s123(1)(c)(i) of the Act.

[37] RSSL is also to reimburse Mr Samoa the $70 fee for lodging his personal grievance in the Authority.

Robin Arthur

Member of the Employment Relations Authority

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[1] Bank of Montreal v United Steelworkers of America 87 CLLC 16,044.
