IN THE EMPLOYMENT COURT
AUCKLAND

[2011] NZEmpC 76
ARC 120/10

IN THE MATTER OF	a challenge to a determination of the Employment Relations Authority
BETWEEN	RUSH SECURITY SERVICES LIMITED TRADING AS DARIEN RUSH SECURITY Plaintiff
AND	JAMES VAINUU SAMOA Defendant

Hearing: 24 June 2011
(Heard at Auckland)

Appearances: Larissa Rush, agent for plaintiff
Kenyon Stirling, counsel for defendant

Judgment: 1 July 2011

JUDGMENT OF CHIEF JUDGE GL COLGAN

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[1] The issues for decision on this non-de novo challenge to a determination[1] of the Employment Relations Authority are:

- whether James Samoa was dismissed from employment by the plaintiff (RSSL) or not engaged by RSSL for further casual employment;
- if dismissed, whether Mr Samoa was dismissed unjustifiably;
- if so, whether Mr Samoa's lost income was attributable to the unjustified dismissal;

[1] AA251A/10, 14 October 2010.

- if so, whether the award of reimbursement for lost income should be reduced because of any failure by Mr Samoa to mitigate his loss.

[2] Although the Authority, and the parties in their presentation of their cases on appeal, addressed as the essential question whether casual employment had mutated to ongoing employment, I consider the preferable approach is to consider that as a subsidiary of the fundamental question whether Mr Samoa was dismissed. That is because, as I raised with the parties during the hearing to enable them to make submissions, there is an alternative case for the defendant that he was dismissed unjustifiably from casual employment.

[3] If Mr Samoa's employment with RSSL was as a casual employee, a failure or refusal by the employer to engage the employee for a further period of employment will not, without more, amount to a dismissal. If, however, the employment is terminated in the course of a casual engagement, that will constitute a dismissal.

[4] Mr Samoa worked as a security officer for RSSL for about eight months until, on 20 July 2009, he was told there was no further work for him. After an investigation meeting held on 12 October 2010, the Employment Relations Authority very promptly (two days later) determined on the facts before it that, by the time of the end of Mr Samoa's employment, he had become a 'permanent' employee of RSSL. On this basis, the Authority found that the company's advice to him, without more, that there would be no more work for him, was a dismissal and that this was unjustified in all the circumstances.

[5] The Authority awarded Mr Samoa three months' lost remuneration ($7,647.24), which included wages for what it concluded would have been one week's reasonable notice of termination of his employment. The Authority also awarded Mr Samoa compensation under s 123(1)(c)(i) of the Employment Relations Act 2000 (the Act) of $5,000. RSSL was also ordered to reimburse Mr Samoa the sum of $70 for the Authority filing fee but, because he represented himself in that forum, no costs were awarded.

[6] The parties had a written "INDIVIDUAL EMPLOYMENT AGREEMENT CASUAL EMPLOYMENT". Included in this short agreement were the following provisions:

> **CASUAL EMPLOYMENT**
>
> It is agreed that employment shall be on an "as and when" required basis. The employer is not obliged to offer you work at any time. Similarly you are under no obligation to accept such work when it is offered.
>
> 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.
>
> Each time you are employed on a casual basis the following conditions will apply.
>
> **POSITION:**
>
> You will be employed as a Static Security Guard and will be required to work in this capacity as and where directed by the Employer.
>
> **HOURS OF WORK:**
>
> (a) The number of hours worked in each day and the start and finish times each day will be as agreed for each work period. These times may be varied as required by the Employer.
>
> (b) You are entitled to two paid 10 minute breaks in any 8 hour work period to be taken at times determined by the Employer and one unpaid lunch break of half an hour.
>
> **WAGES:**
>
> (a) You will be paid $13 for each hour worked, which shall include 8% allowance for the Holiday Pay.
>
> (b) If you are required to work on a statutory holiday you will be paid at the same hourly rate but will not be entitled to a paid day in lieu as it is not a day that would otherwise be a working day for you.
>
> (c) Wages will be paid weekly no later than Wednesday direct into a bank account nominated by you.

[7] This was an inadequate and inapt employment agreement and Ms Rush told me that the company's form of casual individual employment agreement has since been revised. The inadequacies of Mr Samoa's employment agreement are probably attributable in part to the fact that it was on a New Zealand Retailers Association template developed for employees in a different sort of employment. Other failures

included the agreement's non-compliance with s 65(2) of the Act requiring it to set out an explanation of dispute resolution procedures.

[8] The evidence establishes that the agreement was presented to and signed by Mr Samoa without the statutory opportunity for the employee to take independent advice about the agreement. The agreement was not signed by the employer and several of its provisions were never followed in practice. These included the manner in which individual casual engagements would be recorded, and the payment provision. Whereas the agreement provided that Mr Samoa would be paid $13 per hour worked inclusive of an eight per cent allowance for holiday pay, in practice he was always paid at the statutory minimum wage without a front-loading holiday payment. When Mr Samoa inquired about his leave entitlements, he was simply fobbed off by the plaintiff on the basis that he was a casual. Although the individual agreement's provisions would have been consistent with that status, RSSL's performance of the remuneration elements of that agreement were more consistent with ongoing or 'permanent' employment than with casual.

[9] In these circumstances, it is unnecessary for me to determine whether Mr Samoa ever received a copy of his individual employment agreement: he claimed he did not but the plaintiff said he did.

[10] There is no disagreement that when he began work on 23 December 2008 Mr Samoa was a casual employee. The plaintiff's practice with its casual static guard workforce, and which was followed in the case of Mr Samoa, was to contact casual staff by the Wednesday before the start of each working week on a Monday, to offer them a shift or series of shifts for that following week. If casual employees agreed, a schedule of their work for the following week would be prepared and either delivered to them and, in the case of Mr Samoa, also posted at the site where he was regularly a static guard.

[11] Although until mid-January 2009 Mr Samoa worked principally as a static guard at one school site, thereafter the vast majority of his work was undertaken at the site known as Felix Donnelly College (FDC) in Otara. This was a derelict school site owned by the Ministry of Education and in respect of which decisions for its

future were expected but not forthcoming. RSSL did not have a long-term or fixed contract with the Ministry to provide security services at the FDC site. Its contract with the Ministry was very short-term, probably on the evidence a week by week contract that was evidenced by the provision of guard services and the payment of RSSL's invoices by the Ministry. The FDC site required the constant presence of a static security guard and RSSL provided guards there on 12 hour, back to back shifts.

[12] From mid-January 2009 until 20 July 2009, the vast majority of the work performed by Mr Samoa for RSSL was on one or other of those day or night shifts at FDC. With one or two rare exceptions, Mr Samoa never turned down the shift work offered to him by the company and worked predominantly on Saturdays and Sundays. Over that period he worked on average more than 50 hours per week and there is no suggestion of any dissatisfaction by RSSL with his work performance.

[13] Although RSSL's security contract with the Ministry of Education for the FDC site in fact continued until the end of 2009, in early to mid-July the company lost two other security contracts in the sense that these were not renewed by the customers. This resulted in a staffing surplus and RSSL determined to allocate some of its 'permanent' security guards to the work undertaken previously by what it regarded as casual guards including Mr Samoa in respect of the FDC site.

[14] Although in the week before the week beginning 20 July 2009 Mr Samoa had agreed to work four 12 hour FDC shifts during the following week, at the end of his first shift on 20 July 2009 he was told by RSSL not to come in to work on the following shifts that week. Upon inquiry by Mr Samoa on 24 July 2009, he was told by RSSL that it would not require his services again and although he subsequently sought further employment with the company, this was declined.

[15] Although Mr Samoa is an experienced static security guard with relevant industry qualifications, he was unable to obtain further work in this field after his employment with RSSL ended on 20 July 2009. I accept, despite the absence of corroborative evidence as should have been provided, Mr Samoa's statement that he searched for further static security guard work but unsuccessfully. As Mr Stirling submitted, the reduction in work for RSSL in July 2009, which brought about the

cessation of Mr Samoa's employment, may, together with the well-known economic recession beginning at about that time, have contributed to a lack of static security guard work across the industry.

[16] I should deal with one element of the defendant's case in which I find against him. He says that, at the time of his first engagement in December 2008 by RSSL, he was told that he would be a casual employee for the first three months and would thereafter be a permanent employee. The plaintiff denies any such advice. I have concluded that Mr Samoa is probably mistaken for several reasons. First, such an employment arrangement was inconsistent with the agreement the parties signed at the time. Next, although Mr Samoa had, in previous employments with other security companies, undertaken initial three month probationary periods after which he became a 'permanent' employee, this was not RSSL's practice. Mr Samoa may have assumed, erroneously, that this was industry practice or conflated other beliefs or advice known to him. Commencement as a casual security guard is one pathway to permanent employment with RSSL; that is some permanent staff began work as casuals and were later promoted permanently to the company's permanent staff. Mr Samoa may have assumed, and perhaps even have been told, that this applied to RSSL. But that is not the same thing as a representation that after a three month probationary period as a casual he would be moved to the permanent staff.

[17] There is one other evidential disagreement which it was necessary to resolve in deciding the facts found at para [14]. That relates to the schedule of Mr Samoa's work during the week beginning 20 July 2009. The company's case was that the only shift agreed to by Mr Samoa during the previous week, and scheduled for him, was that which he performed at FDC on 20 July 2009. Mr Samoa's case is that he agreed to work four shifts at FDC that week but was only permitted to complete one of those shifts.

[18] I find Mr Samoa's evidence to be more probably correct and reject the company's. That is for the following reasons. Mr Samoa's account of his shifts for that week is more consistent with the pattern of regular employment up to that point. If, as the plaintiff claims, Mr Samoa had only been offered one 12 hour shift for that week and agreed to perform it, that would have been unprecedented. There was no

company record, electronic or paper based, produced that would have assisted in determining this disagreement. The records produced were historic in the sense that they only recorded what work had been performed so that the fact that Mr Samoa only worked on Monday 20 July 2009 does not corroborate the company's case that he was only scheduled to work on this date. Relevant, too, is some of Mr Samoa's evidence that he initiated contact with the company on Thursday 24 July 2009 which would have been the first free day that week after four scheduled working shifts. Mr Samoa inquired why he was being given no more work. His inquiry on that day is more consistent with his account of having been provided with four days' work on the previous week. If, as is the necessary implication of the company's case, Mr Samoa had only been assigned one day's work, it is more likely that he would have queried this or even protested at the time of the assignment on the previous week.

Casual or permanent employment?

[19] Whether casual employment can mutate to employment of continuous and indefinite duration (sometimes called 'permanent' employment) and, if so, whether that happened in the case of Mr Samoa, was the heart of the case in the Authority and remains so on this challenge to its determination. I am grateful to Judge AA Couch for the careful and detailed examination of this question that he undertook in his judgment in *Jinkinson v Oceana Gold (NZ) Ltd.*[2] I will not reiterate passages from that judgment with which I respectfully agree but, rather, attempt to state the principles for which it stands.

[20] First, it is necessary to establish whether, at the end of the employment relationship with RSSL, Mr Samoa was an employee. That is determined principally by applying s 6 of the Act which, in turn, depends upon the existence of a contract of service at common law. This is relevant not only in determining whether someone is an employee as opposed to being of another status (for example an independent contractor) but also in determining whether someone is an employee of indefinite duration or a casual employee.

[2] [2009] ERNZ 225.

[21] As the judgment in *Jinkinson* highlights, an important element of whether someone is an employee, is the statutory definition of that word which includes "a person intending to work" which phrase is further defined in s 5 of the Act as "a person who has been offered and accepted work as an employee". That would appear to support the categorisation of 'casual' as an employee if such person had been offered and accepted an independent work assignment. As Judge Couch noted at para [36] of *Jinkinson*:

> Thus, whether or not there may be other mutual obligations sufficient to create an ongoing employment relationship, the worker will be an "employee" for the purposes of the Act from the time each offer of a period of work is made and accepted until that work is completed. This may be of particular significance where a roster is used to effectively offer periods of work to a worker well in advance of the time at which the work is to be performed.

[22] Further, as the judgment in *Jinkinson* confirms, another significance of s 6 of the Act is the emphasis upon what is described as "the real nature of the relationship" between the parties when determining whether there is a contract of service between them and, therefore, whether they were employer and employee. All relevant matters are to be taken into account and the parties' description of their relationship is not to be treated as determinative. As in *Jinkinson*, in this case the plaintiff points to what purported to be the written employment agreement between the parties in which Mr Samoa's employment was described as "casual". As Judge Couch held in *Jinkinson*: "If the result of that inquiry [into the true nature of the relationship] is that the nature of the relationship is at odds with the label given to it by the parties, substance should prevail over form."[3]

[23] The Court recognises that the nature of employment or working relationships may change over time, requiring the Authority or the Court to assess the nature of that relationship at the time appropriate to the proceedings. Where the claim is one of unjustified dismissal, the relevant time is when the relationship terminated and this may be different from what it was when it was first established.

[24] I respectfully agree with the judgment in *Jinkinson* that whilst such change may sometimes result in this being evidenced in explicit agreement between the

[3] At [37].

parties, more often such changes are gradual and subtle and occur in day to day conduct. These, when viewed overall, may lead to a conclusion that the parties have agreed implicitly to vary their original agreement for casual employment.

[25] The judgment in *Jinkinson* also identifies other cases that assist in determining whether employment is truly casual. In *Canterbury Hotel IUOW v Fell t/a Leeston Hotel*[4] the Arbitration Court identified the employee:[5]

> … as a regular member of the staff working, week by week, the hours set out above. There was continuity … [The employee] was not just a casual, occasionally or irregularly called in for some limited or purely casual purpose. Because of the longstanding continuity she was a regular employee and therefore in our view had to be dismissed and could not be merely rostered off.

So regularity of work and continuity of the employment relationship may be indicative of ongoing as opposed to casual employment.

[26] In *Avenues Restaurant Ltd v Northern Hotel IUOW*[6] an employee worked irregular patterns of days but at least two days every week for six months. Again, regularity of work and continuity of employment persuaded the Court that her engagement was not casual in its essence.

[27] Likewise, in *Barnes v Whangarei Returned Services Association (Inc)*[7] the Court found significant that despite a written employment contract unequivocally defining the employment relationship as casual, its real nature was changed over time during which the employee was included on a roster and worked regularly three nights a week for several months. This pattern of work was sufficiently regular and continuous to make the employment ongoing, not casual.

[28] Judge Couch in *Jinkinson*[8] helpfully sets out the indicia developed in Australian cases to determine this question. These are:[9]

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[4] [1982] ACJ 285.
[5] At 287.
[6] [1991] 1 ERNZ 420.
[7] [1997] ERNZ 626.
[8] At [47].
[9] See, for example, *Licensed Clubs Association of Victoria v Higgins* (1988) 4 VIR 43; (1988) 30 AILR 497.

- the number of hours worked each week;
- whether work is allocated in advance by a roster;
- whether there is a regular pattern of work;
- whether there is a mutual expectation of continuity of employment;
- whether the employer requires notice before an employee is absent or on leave;
- whether the employee works to consistent starting and finishing times.

As Judge Couch also noted in *Jinkinson*, Canadian decisions apply similar considerations, emphasising regularity of work as opposed to the amount of it performed. Other Canadian decisions emphasise the ephemeral or transitory or unpredictable or unreliable nature of the work to be performed for which a casual employee is called upon. Importantly for the purpose of this case, the following passage appears in the judgment of the Federal Court of Appeal in *Roussy v Minister of National Revenue*:[10]

> … if someone is spasmodically called upon once in a while to do a bit of work for an indeterminate time, that may be considered as casual work. If, however, someone is hired to work specified hours for a definite period or on a particular project until it is completed, this is not casual, even if the period is a short one.

And in *Bank of Montreal v United Steelworkers of America*[11] the Canadian Labour Relations Board wrote:

> 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. …

[10] (1992) 148 NR 74.
[11] 87 CLLC 16,044.

> Casual employment is therefore the product of a given employer's unforeseen need to have work performed and the chance, random and voluntary availability of a given employee.

[29] Applying those principles, I agree with the Authority that, although Mr Samoa's work started out as casual, by the time of its cessation almost eight months later, it had become employment of indefinite duration. This occurred over the period of six months until mid-July 2009 during which Mr Samoa worked on average more than 50 hours per week including most Saturdays and Sundays on 12 hour shifts as a static security guard at FDC. His employment lost its casual nature. It might perhaps have been or become fixed term in nature but that was not how the plaintiff chose to categorise it under s 66 of the Act as it was incumbent on the employer to do if the statutory tests for fixed term employment were met. In the absence of application or compliance with s 66 and having lost its casual nature, the default position, and indeed the real nature of the employment, was of indefinite duration, ongoing or 'permanent'. That analysis of the position on the facts is supported by the approach to such questions by this Court and its predecessors in New Zealand and internationally.

[30] The plaintiff sought to categorise its justified use of Mr Samoa as a casual guard on the FDC site because the commercial nature of its relationship with the Ministry of Education was likewise 'casual', but that is not so. While it is true that there was no certainty of the duration of the security arrangement with the Ministry, it was one of constancy in the sense that security protection was needed for the derelict school site for as long as the Ministry was responsible for it. This was not a casual arrangement in the sense that it was irregular and unpredictable and spasmodic. As the Authority noted, rather than treating its employment relationship with one of the guards (Mr Samoa) assigned to that site as casual, it would have been more appropriate for the defendant's employment to have been for a fixed term as permitted in the Act, with the term ending coincidentally with the cessation of RSSL's contracted security services on that site. Had RSSL so treated Mr Samoa as an employee, it is unlikely that he could have claimed that he was unjustifiably dismissed if he was no longer employed after the plaintiff's contract with the Ministry of Education concluded.

[31] I have reached the same decision as did the Authority on the nature of Mr Samoa's employment at the time of its termination. There was, therefore, a dismissal.

Dismissal from casual employment?

[32] Even if I am wrong that, at the time of the ending of the employment relationship, Mr Samoa was a 'permanent' employee, I find that he was nevertheless dismissed from casual employment. That is because each assignment or series of shifts that the parties agreed he would work constituted his employment. As a matter of fact I have determined that RSSL and Mr Samoa agreed that he would work four 12 hour shifts at FDC beginning on Monday 20 July 2009 and covering each of the succeeding three days. There is no argument that, after he had completed the shift on 20 July 2009 Mr Samoa was told there was no more work for him. He was dismissed. This was not a failure or refusal by the employer to enter into a further casual engagement that would not have amounted to a dismissal.

[33] Questions of justification for Mr Samoa's dismissal are the same, whether he was dismissed from casual employment or, as is his case and, as the Authority found, from ongoing or "permanent" employment. I will therefore deal with those issues of justification together.

A justified dismissal?

[34] There is no challenge to RSSL's assertion that a static security guard or static security guards became surplus to its requirements after it lost security contracts in mid-July 2009. That may have amounted to a redundancy situation in which the company was entitled to reorganise its business including, if undertaken fairly and reasonably, by ending the employment of one or more of its employees. That is, in effect, what it did in relation to Mr Samoa.

[35] However, in doing so, it did not follow the well known statutory and common law obligations of employers in such circumstances. No consideration was given to the good faith obligations required of an employer under s 4(1A)(c) of the Act as

those requirements have been interpreted and applied in a number of redundancy cases including, for example, *Simpsons Farms Ltd v Aberhart.*[12] Applying the statutory tests of justification for a dismissal under s 103A of the Act (as applicable at the time), RSSL did not treat Mr Samoa in the way that a fair and reasonable employer would have done in all the circumstances. There was, for example, no discussion with him about the circumstances in which the company found itself, with an opportunity for him, as a loyal and willing employee, to have had input into the company's decision about what would happen to his job. Instead, Mr Samoa was simply told peremptorily not to come back to work despite the fact, as he knew, that RSSL continued to supply static guards on the FDC site for many months after he ceased to work there, doing precisely the same job.

[36] Once it is concluded, as I have, that Mr Samoa was dismissed by RSSL, the absence of justification for that dismissal is really axiomatic in the particular circumstances.

Excessive remedies?

[37] The plaintiff also challenges the monetary remedies allowed by the Authority in the event that the Court finds, as I have, that Mr Samoa was dismissed unjustifiably. The Authority awarded him three months' ordinary time remuneration and a modest amount of compensation for distress and humiliation of his unjustified dismissal. RSSL's major criticism of the award for lost remuneration is that Mr Samoa did not attempt to mitigate his loss or at least he did not establish in evidence, as he ought to have, that he attempted to mitigate his loss by finding other employment.

[38] I agree that there is some but not a lot of evidence from Mr Samoa about his attempts to obtain other work in his field of expertise and training, static security guarding. It seems that Mr Samoa pursued his personal grievance without assistance or representation, even to the stage of the Employment Relations Authority's investigation. Had he taken advice, I imagine he would have been told that he might need to establish with corroborative evidence his attempts to obtain alternative

[12] [2006] ERNZ 825.

employment. On the other hand, there is really no challenge to the evidence Mr Samoa has given about his unsuccessful attempts to obtain alternative employment which included those that would have been expected of him in all the circumstances.

[39] The Authority limited Mr Samoa's remedies for lost remuneration to the equivalent of three months' pay although his claim was to more remuneration lost beyond that period. The Authority was obliged by statute to award compensation for lost remuneration for the lesser of a sum equal to that lost remuneration or three months' ordinary time remuneration, s 128(2) of the Act. I agree with the Authority that it is reasonable to conclude that Mr Samoa's efforts at obtaining alternative employment in all the circumstances would not have succeeded during the period of three months immediately after his unjustified dismissal. Three months' ordinary time remuneration therefore becomes the extent of the compensable loss and I would not deviate from the Authority's award.

[40] Turning to the award of distress compensation, and although this has not been attacked by the plaintiff specifically as being excessive, I nevertheless consider that it was an appropriate award in all the circumstances. Mr Samoa was a mature man with qualifications and experience for other employers as a static security guard. He holds a number of relevant qualifications in the field. His dismissal was completely unexpected and news of it was delivered to him peremptorily without explanation, and harshly. There had been no criticism of his work previously and indeed I accept that he had gone out of his way to accept almost all assignments offered to him by RSSL. The Authority's award of $5,000 is modest compensation in all the circumstances and should not be reduced.

[41] For the sake of completeness and although not argued strongly, if at all, by the plaintiff, I conclude that Mr Samoa's losses of income after 20 July 2009 were attributable to his dismissal on that date.

Decision – Summary

[42] Because of s 183(2) which automatically sets aside the Authority's determination, even where this is upheld on a challenge, I conclude that the

defendant was dismissed unjustifiably by the plaintiff. The defendant is entitled to the same monetary remedies as were awarded by the Authority as set out at para [5] of this judgment. These sums have been held on interest bearing deposit under the control of the Registrar of the Employment Court at Auckland. After 28 days from the date of this judgment, the Registrar is to pay those sums, including accumulated interest, to the defendant.

[43] The defendant is entitled to costs on this challenge. If the parties cannot agree such costs between themselves, the defendant may have the period of 30 days from the date of this judgment to apply to the Court by memorandum for these costs to be fixed, with the plaintiff having the period of 14 days after service of the memorandum upon it to respond by memorandum.

GL Colgan
Chief Judge

Judgment signed at 9 am on Friday 1 July 2011