

**IN THE EMPLOYMENT COURT
AUCKLAND**

**[2011] NZEmpC 46
ARC 120/10**

IN THE MATTER OF point of law challenge to a determination of
the Employment Relations Authority

BETWEEN RUSH SECURITY SERVICES LIMITED
Plaintiff

AND JAMES VAINUU SAMOA
Defendant

Hearing: 19 May 2011

Counsel: Larissa Rush, plaintiff
Kenyon Stirling, counsel for defendant

Judgment: 19 May 2011

ORAL INTERLOCUTORY JUDGMENT OF JUDGE M E PERKINS

[1] On 14 October 2010 the defendant in the present proceedings before this Court, Mr James Samoa, received an award from the Employment Relations Authority (the Authority) in a determination on that date relating to an employment dispute which he had commenced against the plaintiff in the present proceedings, Rush Security Services Limited. The determination of the Authority is to the effect that the plaintiff has to reimburse Mr Samoa for wages of \$7,647.24. In addition he was awarded compensation of \$5,000 and there was an order that Rush Security Services Ltd is to reimburse Mr Samoa in the sum of \$70 for the filing fee which he paid in bringing his proceedings to the Authority.

[2] Since that determination on 14 October 2010, Rush Security Services Ltd has appealed against the determination by way of a challenge non de novo in this Court and the statement of claim specifies the areas of dispute to the determination. Rush Security Services Ltd has now brought to this Court an application for stay of

enforcement of the determination of the Authority pending the outcome of the challenge.

[3] In support of the application there is an affidavit from Mrs Larissa Rush who describes herself as Corporate Affairs Manager for the plaintiff. She has chosen today, in respect of this application, to represent the plaintiff, as she is entitled to do.

[4] Mr Samoa filed a notice of opposition to the stay accompanied by his own affidavit. He is represented today by Mr Stirling. In the notice of opposition, the affidavit in support and in submissions from Mr Stirling today, Mr Samoa has responsibly suggested that if a stay is granted that it be on the condition that the amounts awarded by the Authority be paid into Court on an interest bearing account. That is in keeping also with a directions minute of Chief Judge Colgan dated 21 March 2011, when he dealt with the application for stay. He indicated, for the assistance of the parties, that if a stay is granted it is often made on the condition that the applicant for the stay pay into either a solicitors' trust account upon undertakings or to the Registrar of the Employment Court, the amount in dispute, which is then held in an interest bearing account pending the outcome of the proceedings in the Court. In the face of those concessions by Mr Samoa, and the clear statement in the minute from Chief Judge Colgan, the plaintiff has nevertheless proceeded with the application for stay today, and has submitted that no payment should be made on the stay. Thereby, the plaintiff has put the defendant, Mr Samoa, to the cost of having to instruct his solicitors to come here today and oppose the application. I should add that Mr Samoa has indicated that he is in receipt of a grant of legal aid in respect of these proceedings and I must say that is not surprising having regard to his financial position, which he has partly referred to in his affidavit.

[5] Insofar as the application today is concerned it is clear that the plaintiff should have a stay of enforcement. That is because it is clear that if payment was made of the awards by the Authority directly to Mr Samoa, in the light of his financial position, he would be likely to dissipate the amounts so that if the appeal by challenge by the plaintiff was successful it would probably be rendered nugatory in the sense that the payment would be unlikely to be recoverable immediately from Mr Samoa. That is not to say that he would not eventually reimburse it. But he would

be entitled if he received the fruits of his award from the Authority to deal with the money as he chose to do. There could then be difficulties if the Authority's determination was set aside as a result of the challenge.

[6] It is for that reason that the Court makes these stay orders on the basis that payments are made into Court, because that is the fair position. It preserves the fund and a plaintiff is not prejudiced if it succeeds. If it does succeed then there is obviously a fund available to be reimbursed to the successful plaintiff.

[7] There have been some submissions today, particularly from Mrs Rush as to the merits of the appeal. I am not really in a position without hearing all of the evidence to be able to express a view on that but certainly the plaintiff always has an entitlement to challenge the decision of the Authority as provided in the rules of Court.

[8] I note that while the determination of the Authority was dated 14 October 2010, the application for stay was not filed until 18 March 2011. Often, not always, an application for stay is an application, which is filed to meet enforcement proceedings. But I am assured by the parties that in this particular case there have been no steps taken by Mr Samoa to enforce the determination since the challenge was lodged and I accept Mrs Rush's assurance that the application is brought in good faith.

[9] However, Mrs Rush and her company, in view of what was indicated by Chief Judge Colgan, and which would be immediately apparent from perusal of previous decisions of this Court on applications for stay, should have accepted the offer clearly made by Mr Samoa to agree to a stay if the payment is made into Court. It is unreasonable for a plaintiff in this situation, when faced with that kind of concession, to then force a party to incur further legal costs in opposing an order where there is a reasonable method of resolving the matter put forward. Accordingly, in respect of the application by Rush Security Services Ltd for a stay, it is appropriate that in any event Rush Security Services Ltd reimburse to some extent Mr Samoa for the costs that have been incurred out of today's hearing.

[10] So in conclusion, therefore, the application for stay of enforcement of the Authority's determination dated 14 October 2010 is granted, but the stay is conditional upon the plaintiff, Rush Security Services Ltd paying to the Registrar of the Employment Court at Auckland the sum of \$13,244.28. This is to be held on an interest bearing deposit and then disbursed either by direction of a Judge or by way of a written agreement of the parties if settlement is eventually reached in respect of the challenge.

[11] That sum of \$13,244.28 is made up as follows:

- (a) The reimbursement of the wages of \$7,647.24 contained in the determination. That sum includes PAYE but nevertheless, Mr Samoa is entitled to have some protection that if he eventually does recover that money, that the PAYE, which would be payable to the Inland Revenue Department is also preserved and he is not then left with having to rely upon the plaintiff to deal with that issue.
- (b) Secondly, there is the sum of \$5,000 by way of compensation which has been awarded by the Authority.
- (c) Finally, there is the filing fee of \$70 awarded by the Authority.
- (d) In addition to that Mr Samoa is entitled, if he is successful, to have interest from the date of the determination. There have been 216 days since the determination on 14 October 2010 and I consider that a reasonable rate to use at this stage is 7 percent per annum. The rate prescribed in the Schedule to the Employment Relations Act is different from that, but it is a complicated calculation and at this stage I am of the view that a rate of 7 percent is a reasonable amount to use. Eventually the correct rate under the Schedule to the Act will have to be used if Mr Samoa is successful and obviously by the time that the challenge is determined a substantially greater sum of interest will be payable. But as to today's date, the amount of interest, which I order to also be paid into the Court, is \$527.04.

[12] So those figures make up that total sum of \$13,244.28 I earlier specified.

[13] That sum is to be paid into the Registrar of the Employment Court by 4pm on 23 May 2011, which is on Monday. That will give the plaintiff sufficient time to arrange for the funds to be procured and paid into Court.

[14] As I have indicated Mr Samoa is entitled to a reasonable contribution towards his costs, in respect of having to prepare for the hearing today and to have a counsel, albeit on legal aid, represent him. In my view there should be costs in any event awarded against Rush Securities Services Ltd, payable to Mr Samoa within 7 days, that is by 4pm on 27 May 2011. The costs that I award is the sum of \$500.

[15] If the sum, which I have ordered, is not paid into Court by 23 May next, then no stay will apply and Mr Samoa will be entitled to enforce the determination in whatever way he chooses. I would hope that when this matter comes back before the Court the position is not presented that the plaintiff has failed to pay to Mr Samoa the costs I have ordered.

M E Perkins
Judge

Oral judgment delivered at 10.29am on 19 May 2011