

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

AA 251/10
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: 20 May 2010

Determination: 24 May 2010

DETERMINATION OF THE AUTHORITY

[1] The Authority has investigated whether James Samoa raised a grievance against Rush Security Services Limited (RSSL) within the required period or, if not, should now be granted leave to do so.

[2] On 11 December 2009 Mr Samoa lodged an application in the Authority alleging he was treated unfairly during his employment as a security officer with RSSL. He said this included not being treated as a permanent employee after working six or seven months, not getting two weeks notice of his job ending and not being paid what he understood was the agreed hourly rate of pay. In a witness statement prepared for the Authority investigation Mr Samoa also raised an allegation that while he was told there was no more work for him to do, he was then replaced by another guard who had only recently started work for RSSL.

[3] RSSL says Mr Samoa's employment was on a casual basis only, with his last shift worked on 20 July 2009. While Mr Samoa was advised on 24 July 2009 that

there was no further work for him at that time, he had then not raised a grievance about how RSSL treated him within the 90-day statutory period for doing so. It does not consent to Mr Samoa raising his grievance out of time.

[4] Mr Samoa says he did raise the grievance within 90 days or that if he did not, there were exceptional circumstances such that he should now be given leave to raise the grievance. He had spoken to a lawyer about raising his grievance. He had also asked RSSL for a copy of his employment agreement but the agreement said nothing about the timeframe for raising a grievance.

[5] Section 114(4) of the Employment Relations Act 2000 (the Act) allows the Authority to grant leave if delay was “*occasioned by exceptional circumstances*” and the Authority “*considers it just to do so*”. If leave is granted, the Authority must direct Mr Samoa and RSSL to use mediation to seek to mutually resolve the grievance.

[6] In the particular circumstances of this case the Authority must determine:

- a. whether Mr Samoa did raise the grievance within 90 days; or
- b. if not, did he make reasonable arrangements for it to be raised on his behalf by an agent who unreasonably failed to raise the grievance within the required time; or
- c. whether, contrary to the requirements of the Act, his employment agreement did not contain an explanation about resolving employment relationship problems (including the requirement to raise a grievance within 90 days); and
- d. if there are exceptional circumstances, it is just to grant Mr Samoa leave to raise his grievance now.

[7] For the purpose of determining these issues I received written witness statements from Mr Samoa and RSSL guard manager Frans Van Wijk. I also heard oral evidence, under oath or affirmation, from Mr Samoa, Mr Van Wijk and RSSL general manager Larissa Rush. Mr Samoa gave his evidence with the assistance of an interpreter of the Samoan language but spoke mostly in English.

[8] I also heard oral submissions from Mr Samoa and Ms Rush and reviewed

written submissions provided by Ms Rush.

Mr Samoa's employment

[9] Mr Samoa worked for RSSL from late December 2008 until 20 July 2009. He signed a two page employment agreement headed "*Individual Employment Agreement Casual Employment*". It stated employment was on an "*as and when required basis*" with no obligation on the employer to offer work or for the employee to accept work when offered. It also stated that nothing in the agreement should be read as providing an entitlement or expectation of any further employment beyond each engagement.

[10] Mr Van Wijk says he gave Mr Samoa a copy of the agreement after it was signed but Mr Samoa denies this.

[11] Mr Samoa accepts he was told the job was casual but says Mr Van Wijk referred to a three-month trial period and that he understood the job would be permanent after that period. Mr Van Wijk denies giving Mr Samoa any such hope.

[12] Between January and July 2009 Mr Samoa worked between two and six days each week. All but a few days of this work was at Felix Donnelly College in Otara where RSSL had a contract with the Ministry of Education to provide security services. Each shift was 12 hours long – either through the night or all day. Pay records show Mr Samoa was paid for as few as 24 hours in some weeks and up to 72 hours in others. During 18 of those weeks he worked more than 40 hours.

[13] On 24 July 2009 Mr Van Wijk spoke to Mr Samoa and told him that RSSL had no more work for him at that time.

Was the grievance raised within 90 days?

[14] In his written witness statement Mr Samoa referred to telling Mr Van Wijk on 24 July that he was "*very sad and very unhappy*" about having his work terminated. He also wrote that "*my unhappy face was a symbol of raising my grievances*".

[15] However neither those words nor an unhappy face are sufficiently specific to

meet the requirements for raising a personal grievance under the Act.

[16] Mr Samoa did telephone RSSL's offices on 12 October 2009. The call was within the 90-day period, if 24 July is taken as the day on which Mr Samoa's cause for grievance occurred. He spoke with Ms Rush because Mr Van Wijk was in a meeting.

[17] During that telephone call Mr Samoa asked for a copy of his employment agreement (which Ms Rush sent to him by post that day). Mr Samoa says he also referred again being sad about the way his employment had ended but Ms Rush insists Mr Samoa did nothing more than ask for a copy of his employment agreement.

[18] RSSL was not notified in any formal way of Mr Samoa's grievance until it received a copy of the application he had lodged in the Authority on 11 December 2009.

[19] I find Mr Samoa did not raise his grievance within the required 90-day period.

No reasonable arrangement

[20] During October 2009 Mr Samoa also made inquiries at the Manukau Law Centre about the prospect of taking some action over the end of his employment with RSSL. He was referred to a lawyer to whom he says he explained his circumstances and was told he had a "*good case*". However Mr Samoa also says the lawyer said he was "*too busy*" to do anything for him at that time. This occurred around one week before the 90-day period expired.

[21] Mr Samoa says he could not afford to pay another lawyer and did nothing further due to other demands on his time.

[22] While Mr Samoa had made some efforts to get some advice about his situation, he cannot be said to have made "*reasonable arrangements*" to have his grievance raised. The lawyer he spoke to had not agreed to do anything for Mr Samoa and cannot be said to have "*unreasonably failed*" to raise the grievance within the required time.

Failure to explain employment resolution services

[23] Section 65 of the Act requires an individual employment agreement to include a plain language explanation of the services available for the resolution of employment relationship problems. This must include a reference to the period of 90 days within which a personal grievance must be raised.

[24] A failure to include such an explanation in an employment agreement is accepted as an exceptional circumstance which may delay raising a personal grievance.

[25] RSSL's employment agreement with Mr Samoa had no reference to employment resolution services or the requirement to raise a grievance within 90 days.

[26] RSSL submitted that this omission did not occasion Mr Samoa's delay in raising his grievance. It points to an employment agreement with a previous employer that Mr Samoa provided as part of his evidence. That agreement referred to the time limit for raising a grievance. RSSL suggests Mr Samoa should have known about the limit from that agreement.

[27] I reject that submission. Mr Samoa said he had never had occasion to raise a grievance with any previous employer and had no reason to check the time limit in previous employment agreements.

[28] I do not accept RSSL can rely on another employer's compliance to satisfy its own statutory obligation to include that information in every employment agreement. Its failure amounts to an exceptional circumstance under s115 of the Act. The Employment Court has expressed the following presumption regarding a worker in such circumstances:¹

“Because of the absence of the required explanation of his rights in his employment agreement, he cannot be presumed to have had knowledge of those rights to raise his employment issues in the

¹ *Bryson v Three Foot Six Limited* [2006] ERNZ 781 (EC, Shaw J) at [51].

correct manner and within the correct time-frame. I am therefore satisfied that the lack of the explanation of rights occasioned his delay in bringing the personal grievance.”

[29] Accordingly I am satisfied Mr Samoa's delay in raising his grievance was occasioned by an exceptional circumstance and now must consider whether it is just to grant leave for him to raise the grievance outside the 90-day period, subject to any conditions that the Authority thinks fit.

Whether just to grant leave?

[30] RSSL submitted it would be prejudiced by the delay in having to address Mr Samoa's grievance. It also submitted his case was weak and unclear.

[31] I do not accept that the substance of Mr Samoa's grievance is unclear. His case is that his job had become permanent after six months of regular, full-time work. He was dismissed on 24 July because there was no more work but believes he was subsequently replaced by another newly-employed guard.

[32] Neither is RSSL truly disadvantaged in being able to provide its evidence in response those allegations. Mr Van Wijk was the manager who dealt with Mr Samoa throughout his employment. He is available to give evidence. While Ms Rush says she doubts RSSL still employs the guard whom Mr Samoa believes he was replaced by, it will have work and pay records which can address whether that allegation has any substance.

[33] In those circumstances I consider it just for leave to be granted to Mr Samoa. In doing so I note RSSL's submission seeking conditions be set on that leave. Ms Rush sought orders that Mr Samoa be required to get legal representation to assist him revise and provide greater clarity in his grievance application and that he be required to provide security for costs. Section 236 of the Act allows him the freedom to choose a representative but I cannot require Mr Samoa to engage one. Neither do I consider any security for costs is necessary in circumstances where neither party has been legally represented to date.

[34] However the leave now granted to Mr Samoa to raise his grievance outside the 90-day period is subject to the following condition. The grievance he may now pursue is limited to the issues identified in this determination. Those issues are (i) whether his employment was truly permanent or casual; (ii) whether he was dismissed; (iii) whether RSSL acted in good faith in telling him on 24 July that no more work was available; (iv) whether he was subsequently replaced; and (v) if he was unjustifiably dismissed, what remedies are due to him.

[35] In accordance with the requirements of s115(4) of the Act RSSL and Mr Samoa are now directed to use mediation to seek to mutually resolve the grievance.

Robin Arthur
Member of the Employment Relations Authority