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THE ADVOCATE

EMPLOYMENT LAW · EMPLOYMENT AGREEMENTS · DISPUTE / GRIEVANCE RESOLUTION · TRAINING

Issue 200 | November 2011

When Casual Agreements Mutate

A recent judgment of the Employment Court, ***Rush Security Services Ltd (t/a Darien Rush Security) v. James Vainuu Samoa*** dated 1 July 2011, has reaffirmed the difficult issues surrounding the ending of casual employment and the fine line between casual and permanent employment.

James Samoa was employed as a "*Casual*" Security Officer by Rush Security Services Ltd ("*RSSL*") for approximately 8 months. On 20 July 2009, he was told there was no further work for him. The Employment Relations Authority investigated his personal grievance claim and found that he had become a '*permanent*' employee of RSSL and that when he was told there was no further work, this amounted to an unjustified dismissal. Mr Samoa was awarded 3 months lost wages ($7,647.24) and $5,000.00 compensation for hurt and humiliation.

RSSL appealed the decision to the Employment Court. In considering the case, the Chief Judge considered that there were two issues to consider. One was whether Mr Samoa's employment had "*mutated*" into permanent employment; the other was whether, even as a casual, he had been unjustifiably dismissed. The Court said:

"[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."

The Court examined the casual employment agreement, which defined the employment in the following terms:

"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."

The Court accepted that Mr Samoa had commenced work as a casual, but went on to examine the nature of the employment. It found that from January until July 2009, Mr Samoa had worked an average 50 hours per week, predominantly 12 hour shifts, and that when his employment ended he had been scheduled to work 4 shifts but was only allowed to complete the first of those.

The Chief Judge next examined whether the employment had "*mutated*" into permanent employment. He examined the factors relevant to determining whether a person is an employee pursuant to s.6 of the Employment Relations Act 2000, including assessing "*the real nature of the relationship*", and then referred to a passage from another recent decision:

*"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."*

He then said:

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

The Chief Judge next examined a series of previous cases on casual employment, including some tests set out in Australian cases, summarised as:

"• *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."*

He also referred to some Canadian cases:

"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****:*

"… 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*** *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. …

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." "

The Chief Judge concluded:

"[20] 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."

As an alternative, the Chief Judge considered that Mr Samoa could have been dismissed from a period of 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."

The result was that the Court found that while RSSL may have been entitled to offer no further work to Mr Samoa due to a downturn in business, it nevertheless had to comply with the good faith obligations in the Employment Relations Act 2000 (s.4(1A)(c)) and had to act in a procedurally correct manner. The appeal was therefore dismissed.

This case is a timely reminder that labelling an employee as casual may not stand scrutiny if over a period of time the employment starts to resemble that of a permanent employee. McPhail Gibson & Zwart Ltd can assist you with appropriate employment agreements and advise on the ending of casual employment relationships.

This newsletter is not intended as legal advice but is intended to alert you to current issues of interest. If you require further information or advice regarding matters covered or any other employment law matters, please contact **Neil McPhail**, **Raewyn Gibson**, or **Peter Zwart**.

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