

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

**AA 205/10
5133363**

BETWEEN DENISE CUE
Applicant

AND ISS FACILITIES SERVICES LIMITED
Respondent

Member of Authority: Leon Robinson

Representatives: Glenn Finnigan, Counsel for Applicant
Shannon Kelly, Counsel for Respondent

Investigation Meeting: 4 August 2009

Submissions Received: 21 August 2009
4 & 11 September 2009

Determination: 3 May 2010

DETERMINATION OF THE AUTHORITY

The problem

[1] The applicant Ms Denise Cue ("Ms Cue") claims she was unjustifiably dismissed and unjustifiably disadvantaged by the respondent ISS Services Limited ("ISS"). She also claims a penalty against ISS. ISS denies Ms Cue's claims.

[2] The parties were unable to resolve the problem between them by mediation.

The facts

[3] ISS is a limited liability company which provides cleaning and security services to commercial customers. It formerly employed one Mr Singleton as its General Manager Health and Support Services ("Mr Singleton"). Mr Singleton and Ms Cue previously worked together for one of Mr Singleton's companies "Edserv". Ms Cue left that employment apparently owed wages by Edserv. In May 2008 Ms Cue made

demand of Mr Singleton for the wages owing to her. She also lodged proceedings in the Employment Relations Authority pursuing the arrears.

[4] By email of 5 May 2008 Ms Cue enquired of Mr Singleton as to whether he could get her a job at ISS. Ms Cue and her son called on Ms Singleton in person that same day apparently to serve him with the application to the Employment Relations Authority. Ms Singleton promised to pay Ms Cue what she was owed as arrears of wages. The Authority finds he also offered her employment with ISS in a role at Waikato Hospital and a further role on the West Coast. ISS was contracted to provide cleaning services to the Waikato District Health Board. Ms Cue resides in Auckland.

[5] The Authority finds that in early June 2008, Ms Cue accepted an offer of employment with ISS, made to her by Mr Singleton, as *Quality and Training Officer* at Waikato Hospital with a salary of \$45,000.00 a car and a phone. Mr Singleton confirmed a salary commencement date of 9 June 2008 but Ms Cue did not commence employment until 13 June 2008. Ms Cue produces a payslip headed "Health Waikato" in respect of the payment of salary to her as evidence of her employment with ISS.

[6] Mr Singleton instructed ISS contract manager Mr Ashby ("Mr Ashby") to set up Ms Cue as an employee on the pay roll. Mr Ashby says Mr Singleton told him that Ms Cue was a casual employee.

[7] Despite Mr Singleton's promises to Ms Cue, she was not provided with a written individual employment agreement, a vehicle or a phone. She was also unhappy that she was not being paid the correct salary. She continued to make request of Mr Singleton for resolution. She was uncomfortable with the lack of certainty in relation to her employment. On 6 July 2008 she emailed Mr Singleton:-

[Mr Singleton]

After a lot of thought and consideration I have decided not to take the position offered at the West Coast. At the moment I cannot help but feel I am going down the same track as I did when I was employed with Edserv. For three weeks you have told me I would have a company vehicle and phone. And then you pay me for one week when it was clearly was not my fault. However now as employee of

ISS I feel this action is totally illegal. I have personally suffered a huge financial lost through my dealings with you, not to mention the stress. I now feel so mentally stressed at this point I need to see my Doctor and will do this first thing Monday morning. And of course will keep you informed [Mr Singleton] can tell you with all honesty my health has been suffering and I cant carry on in this manner any longer. Personally feel life is hard enough without adding more stress than needed for both parties.

Denise Cue

[8] Mr Singleton responded as General Manager ISS Health and Support Services on 7 July 2008. That advice confirmed Ms Cue's employment at Waikato, that she reported to Mr Ashby and that she was entitled to a vehicle and a phone.

[9] The Authority finds that Mr Singleton authorised the payment of salary to Ms Cue. The Authority also finds Ms Cue attended work at Waikato only sporadically between 13 June 2008 and 16 July 2008.

[10] Mr Ashby became suspicious of the situation concerning Ms Cue's employment and so he contacted ISS's chief executive officer Mr Brian Young ("Mr Young"). He told Mr Young he had no idea what Ms Cue was doing onsite at Waikato and that she was being paid to work a role that appeared to him not to exist. Mr Young said he would meet with Ms Cue. Mr Ashby told Ms Cue of his discussion with Mr Young.

[11] Mr Young phoned Ms Cue on 11 July 2008. She confirmed to him that Mr Singleton had employed her as Quality Assurance Training manager at Waikato Hospital.

[12] Ms Cue met with Mr Young on 16 July 2008. Mr Young informed Ms Cue that Mr Singleton had been suspended concerning unrelated matters. He asked Ms Cue how she knew Mr Singleton. She told him of her previous involvement with Mr Singleton, that she was owed wages by Edserv and that she had lodged an application in the Employment Relations Authority. Mr Young asked if the job at Waikato was a trade off for the money owed to her. She said it was not. She told Mr Young she had declined a position on the West Coast that Mr Singleton had offered her.

[13] Mr Young said the Quality and Training role was yet to be set up and did not have a car. Ms Cue said that she could not afford to use her own vehicle to commute to Hamilton daily especially if she had to pay for fuel.

[14] The Authority finds that Ms Cue handed Mr Young the petrol card Mr Singleton had given to her and said that she was no longer interested in the role at Waikato, either then or in the future because it did not have a car.

[15] Mr Young at that point told Ms Cue he would do his best to find her a suitable role within ISS. Ms Cue told Mr Young she was owed one weeks wages and he told her he would remedy the situation for her. Ms Cue then left.

[16] The following day on 16 July 2008 Ms Cue emailed Mr Young:-

Brian

Good morning, I am sending you this email to seek clarification on the outcome of yesterday's meeting at your office. As discussed, I am currently employed by ISS Ltd Employee number 10909 and now after our meeting I wish to know exactly what my current position and future is within the company. Could you please inform me of this as I am a little confused re my current status. Denise Cue

[17] Mr Young emailed Ms Cue on 21 July 2008:-

Hello Denise

Thank you for the email and thank you for taking the time to come into the office and meet with me last week. The following are the points that I took from the meeting and if your views are different the please advise me as a matter of urgency.

1. Owing to a range of issues that exist between yourself and [Mr Singleton] going back over a period of time, and under the threat of legal action by you, [Mr Singleton] offered you (so that you would not serve the Edserv/[Mr Singleton] Personal Grievance) a position with ISS at the Hamilton Hospital as a QA person. No written offer was made, nor was internal approval obtained, however you have attended the site over the last 2-4 weeks at various times and dates.

2. While at the site you have stated that you are totally unaware of what you are employed to do, what the terms of your employment are and you also stated at the site that you were there for training prior to moving to West Coast to run the ISS contract there, when it starts in September. You also confirmed all this to me at the meeting yesterday.

3. Also discussed was the position at Greymouth Hospital which was also considered by you and since declined by you.

4. *At our meeting yesterday you advised that you were no longer interested in the Hamilton or Greymouth positions.*

5. *I accepted this and I have given you a firm undertaking to work with my Auckland team in finding employment for you (based on your own merits and not as a result of your previous relationship with [Mr Singleton] outside of ISS) in Auckland.*

6. *This will be on the basis of what opportunities are available within ISS.*

7. *All outstanding issues outside of ISS (Edserv) are between you and ISS is only looking to help as you have previously been offered a position in ISS, and we will work to find a more suitable one now that we are aware that you do not wish to commute between Auckland and Hamilton on a daily basis.*

If you have any comments please contact me directly.

Regards

Brian

[18] Ms Cue's lawyers wrote to Mr Young on 24 July 2008 asking that Ms Cue's status be clarified.

[19] ISS's lawyers wrote to Ms Cue's lawyers by letter dated 1 August 2008 stating that there was no employment or alternatively that Ms Cue had voluntarily resigned on 16 July 2008. The lawyers further advised that if Ms Cue had been employed and had not resigned, the position she claimed to have occupied would be disestablished.

[20] Mr Singleton was dismissed for unrelated matters on 30 July 2008. ISS chose not to involve him in relation to matters concerning Ms Cue.

The merits

[21] Ms Cue claims she was unjustifiably dismissed and unjustifiably disadvantaged. The test of justification is prescribed at Section 103A of the *Employment Relations Act 2000* ("the Act"). That section provides:-

103A. Test of justification

For the purposes of section 103(1)(a) and (b), the question of whether a dismissal or an action was justifiable must be determined, on an objective basis, by considering whether the employer's actions, and how the employer acted, were what a fair and reasonable employer would have done in all the circumstances at the time the dismissal or action occurred.

[22] I find that Ms Cue was employed by Mr Singleton. When he made that offer he was acting as ISS's agent. I find that he held himself out as having the authority to do

so. Ms Cue was entitled to believe that Mr Singleton had the authority to make such an offer. I find that Ms Cue accepted the offer and an employment relationship came about. There is documentary evidence corroborating an employment contract.

[23] I further find that the employment was a casual one. I am persuaded of this relying on Mr Young's evidence. I accept that Ms Cue told him she had been employed on a "turn up and get paid basis". I also find that Ms Cue did not in fact turn up for work every day. I find that Mr Singleton arranged for her to be paid as if she in fact had turned up at Waikato everyday. I find that Ms Cue was considering whether to take up the West coast role and that her engagement at Waikato hospital was in the nature of training for an intended future role.

[24] The real controversy however, is whether Ms Cue was dismissed.

[25] At the meeting between Ms Cue and Mr Young on 16 June 2008 I find that Mr Young told Ms Cue that the Quality Assurance Training role was anticipated in the future consequent upon a successful tender. I find that he expressly told Ms Cue the role would not have a motor vehicle.

[26] I find that upon being informed of that, Ms Cue resolved that the role was not feasible for her because she was not prepared to continue using her own vehicle or pay her own fuel costs. I find that at that point she told Mr Young she was not interested in the role then or in the future because it did not have a car. I find that at this point Mr Young undertook to assist Ms Cue to obtain an alternative employment with ISS and I further find that Ms Cue accepted that offer. Ms Cue then asked for to be paid wages owing to her and Mr Young undertook to remedy the situation.

[27] On the basis of these factual findings, I conclude that ISS's communicated advice that Ms Cue would not be provided with a motor vehicle constituted a unilateral variation of the terms of the agreed contract. I find that Ms Cue was entitled to regard that conduct as repudiatory.

[28] Ms Cue then had an election to make. She could either chose to affirm the repudiatory conduct or reject it. I find that she affirmed the conduct. She did not communicate any dissatisfaction or agreement. Quite the contrary. I find she accepted the decision as evidenced by her acceptance of Mr Young's undertaking to assist her to obtain alternative employment with ISS. That participation evidences her agreement or consent. She did not object or resist. She accepted the undertaking. She also asked to be paid wages promised to her and accepted Mr Young's advice that he would remedy that situation too.

[29] That situation I find was not altered by Ms Cue's email to Mr Young of 16 July 2008. I consider the situation had already been concluded and Ms Cue was not entitled to revisit her status having already entered into a compromise with Mr Young the previous day.

[30] I am led to ultimately conclude that Ms Cue voluntarily agreed to end the casual employment arrangement she had made with Mr Singleton.

The determination

[31] I determine that Ms Cue was not either unjustifiably dismissed or unjustifiably disadvantaged in her employment. **I find that she does not have a personal grievance. There will be no formal orders by the Authority.**

[32] As concerns the application for penalty, I accept that Ms Cue was not provided with a written individual employment agreement. I also accept that she was not provided with an opportunity to seek advice about a written individual employment agreement as ought to have been provided to her. I am not prepared however to exercise my discretion to impose a penalty against ISS having regard to the particular and peculiar circumstances of this case. I refer in that respect to the very unusual circumstances which preceded the offer of employment to Ms Cue. I also consider that Mr Singleton acted entirely outside his authority and ISS was not a party to the circumstances in which the employment came about. **There will be no penalty.**

The costs

[33] In the event that costs are sought, I invite the parties to resolve the matter between them, but failing agreement, Ms Kelley is to lodge and serve a memorandum as to costs within 14 days of the date of this Determination. Mr Finnigan is to lodge and serve a memorandum in reply thereafter but within 28 days of the date of this Determination.

Leon Robinson
Member of Employment Relations Authority