



New Zealand Employment Relations Authority Decisions

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Cuthill-Coutts v Employment Dispute Services Limited WA166/10 (Wellington) [2010] NZERA 842 (18 October 2010)

Last Updated: 22 November 2010

IN THE EMPLOYMENT RELATIONS AUTHORITY WELLINGTON

WA 166/10 5309087

BETWEEN ANTONETTE CUTHILL-

COUTTS Applicant

AND EMPLOYMENT DISPUTE

SERVICES LIMITED

Respondent

Member of Authority: Representatives:

Investigation Meeting: Determination:

P R Stapp

Gary Tayler for the Applicant David Feist for the Respondent

6 October 2010 at Napier

18 October 2010

DETERMINATION OF THE AUTHORITY

Employment relationship problem

[1] These parties have a different interpretation on whether or not Ms Cuthill-Coutts was an employee or a contractor in the role of Employment Relations Consultant for Employment Disputes Services Limited (EDS). They have a dispute about whether or not her resignation on 14 May, which was accepted by David Feist, director of EDS, was a constructive dismissal

[2] On 31 May 2010 Ms Cuthill-Coutts's representative wrote to EDS raising a personal grievance and a claim for wage arrears and costs. The letter informed EDS that Ms Cuthill-Coutts would not work for it any longer.

[3] Ms Cuthill-Coutts has claimed compensation, lost wages and arrears of wages. Also, claims have been made for breaches and penalties for EDS failing to provide an employment agreement.

[4] EDS denied all Ms Cuthill-Coutts's claims. In response EDS has made a claim for losses caused by Ms Cuthill-Coutts's alleged negligence. These claims relate to an EDS client not paying \$750 fees and an estimated sum of losses due to Ms Cuthill-Coutts not settling at a sufficiently high enough sum in mediation.

The issues

[5] The issues in this matter are:

- (i) Whether or not Ms Cuthill-Coutts was an employee and/or a contractor.
- (ii) If Ms Cuthill-Coutts is an employee, did she resign with notice on 14 May 2010?

- (iii) What was the reason she decided not to continue to work for EDS? In this light does Ms Cuthill-Coutts have a constructive dismissal claim and is she entitled to remedies?
- (iv) Has EDS been able to prove that Ms Cuthill-Coutts caused any losses as claimed?
- (v) Does Ms Cuthill-Coutts owe EDS any damages?

The facts

[6] Ms Cuthill-Coutts applied through the Student Job Search programme (SJS) for a position as an Employment Relations Consultant in the Hawkes Bay with EDS, which has its office in Auckland. The job involved advocacy for dismissed employees and this included the requirement to prepare and attend mediations with the Department of Labour in and around Napier. Ms Cuthill-Coutts applied for the position to gain experience in the field and to complement her qualifications in employment relations and dispute resolution. She believed she would receive training.

[7] Mr Feist interviewed Ms Cuthill-Coutts by telephone. They dispute whether or not there was any mention made of wages and whether or not a reference was made to contractor arrangements during that telephone interview. Mr Feist offered Ms Cuthill-Coutts the role and she accepted it. There was no signed agreement.

[8] It is common ground that the Employment Relations Consultant role would be casual and irregular, to represent EDS's clients and to undertake preparation and attendance at mediation services provided by the Department of Labour. There were a minimum number of hours that would be required and there would be a payment of \$15 per hour plus a commission.

[9] Ms Cuthill-Coutts claimed that she applied for the role as an employee to be paid "wages" as she has interpreted the SJS job advertisement. Although there was an hourly rate provided in that advertisement, there was no reference to "wages". That was her inference, I hold.

[10] Ms Cuthill-Coutts referred to the word "wages" twice in her written statement when she recalled the telephone interview held with Mr Feist. Ms Cuthill-Coutts was adamant that Mr Feist used the word "wages" to her being paid \$15 per hour during their telephone interview. She conceded that another reference she made to "wages" in the telephone conversation was her conclusion that she would be paid "wages", as opposed to him actually saying that during the telephone interview. This leads to a possible contradiction and lack of reliability about what she recalled, I hold.

[11] Mr Feist was equally adamant that he had referred to her being engaged as a contractor, although there was no record, minutes or a document supporting that. Mr Feist, in EDS's statement in reply, produced a letter dated 24 February 2010 that was a template for engagements which referred to contractor. Ms Cuthill-Coutts adamantly denied that she had ever seen that letter before these proceedings. Mr Feist claimed that that was not plausible and or credible because a mediation file was sent at the same time as the letter, and Ms Cuthill-Coutts received that mediation file.

[12] Firstly, I have no doubt that that letter was created for the purpose of a contractor engagement. This was supported by an affidavit Mr Feist supplied from Sasha Thom, a Legal Executive. However, the affidavit, whilst it refers to the letter being forwarded and created, does not prove that it was actually received by Ms Cuthill-Coutts who denied receiving it before getting it in the statement in reply. Also, during my scrutiny of the affidavit in the Authority's investigation meeting Mr Feist disclosed that he had written it and it was his signature as a Solicitor of the High Court witnessing it being signed off by the deponent.

[13] Secondly, and although the 24 February letter refers to Ms Cuthill-Coutts's first mediation, it does not say that the file was attached or sent at the same time. Thus, I can not accept Mr Feist's claim that Ms Cuthill-Coutts's evidence is not plausible and or credible.

[14] However, Ms Cuthill-Coutts says she received her first case on or about 26-27 February when she was sent an interview sheet and a letter sent by EDS to the other party outlining the grievance, which was to go to mediation. Also, she says that later Mr Feist sent her a copy of an "invoice" to invoice clients for him and a copy of a record of settlement to include the method of payment of the settlement.

[15] During the course of her role, Ms Cuthill-Coutts found it increasingly difficult to communicate and obtain responses from Mr Feist. She referred to an attempt to get feedback on difficulties with a particular mediation and that Mr Feist never responded. Also she says she contacted him twice about her hours and he did not reply. She complained about not being paid on time. She was able to contact him by telephone and a payment was subsequently made into her bank for her pay, three weeks after her initial email. It is common ground that she had been paid \$210. In another instance an arrangement was made for Ms Cuthill-Coutts to go to Taupo to work on a case, but the paperwork did not arrive on time and it was cancelled. Ms Cuthill-Coutts says that she made telephone calls to Mr Feist about this and left messages for him to contact her. She was never paid for this work.

[16] Ms Cuthill-Coutts sent Mr Feist an email on 13 May that said "*Canyon please send me the papers for this as I have no idea what Tere is talking about. Oh Yeah, your communication is shocking (don't take that personally, but true)*" On 13 May 2010 Mr Feist replied: "*Allyou need to do is agree to a date! Do not ever insult me by email again!!*". She emailed him back saying "*It*

would help if I knew what Tere is talking about as she assumes that I do". She says she had to withdraw from the case because she did not have any information about it.

[17] In reply to the above she emailed Mr Feist on 14 May in the following terms:

Do you have any other advocates in Hawkes Bay? If you do could you pass on next week's mediation to them, if not I will do them then I cease my employment with you.

[18] Mr Feist replied:

No I don't. Do next one then leave.

[19] After that Ms Cuthill-Coutts became concerned about whether or not other clients would be represented by EDS at mediations scheduled in the Hawkes Bay with the Department of Labour. She planned to attend to these and sought information about representation for these people from Mr Feist, but did not receive any reply from him. Mr Feist says he did not reply because he believed, from her email dated 14 May, that she had resigned with notice.

[20] None of Ms Cuthill-Coutts's emails before 14 May make a claim for any outstanding wages, for example the work in Taupo, but there was reference made to communication allegations.

[21] During the relationship Ms Cuthill-Coutts emailed Mr Feist on various occasions and Mr Feist has challenged her behaviour in writing to him in terms such as:

- *Can you please send me the papers for this as I have no idea what Tere is talking about. Oh Yeah, your communication is shocking (don't take that personally, but true) (13 May 2010)...*
- *I am not sure about your business ethics as I feel you are dumping on me which is no way to support someone... and This is not to insult you as you will probably take it, but this is speaking from an HR perspective that encourages retention*

(18 May 2010).

- *The current situation is childish on your part (23 May*

2010).

[22] Mr Feist has taken exception to the above email comments, and he has claimed they amount, in an employment setting, if there was one, to serious misconduct. His counter claims arise out of his criticisms of Ms Cuthill-Coutts's performance of her work.

[23] The parties have not attended mediation with the Department of Labour. It now falls to the Authority to determine the matter.

Determination

[24] There is conflicting evidence from both parties as to their intentions regarding the employment relationship. I therefore have to assess the real nature of the relationship having regard to the usual tests that apply. These include the amount of control, the integration of the position and the fundamental economic test. There is also the industry practice that I was referred to by Mr Feist.

[25] Dealing with the last factor first, I find that this is not determinative of the relationship between Ms Cuthill-Coutts and EDS. This is because Mr Feist was only able to draw on the experience of EDS, and he did not produce any independent evidence of industry practice on employment relations advocacy arrangements elsewhere. He referred to hairdressing as an example of an industry contracting arrangement, which I conclude has nothing to do with this matter.

[26] In considering the control that EDS had over Ms Cuthill-Coutts in her role with EDS I find that there was sufficient control for the role to be an employee. This is despite her role being at a distance from Auckland, where EDS has its office, and that she was expected to conduct mediations without any direct supervision. My finding is based on the EDS client contract that required Ms Cuthill-Coutts to follow certain procedures and with a fixed arrangement for fees that remained the responsibility of EDS to collect. Ms Cuthill-Coutts was required to submit her time for attendance at mediation and her preparation to get paid. I accept that she submitted (to get paid) what purported to be an "invoice", but it was based on a set arrangement for hours, work and preparation dictated by EDS. Thus, distance and supervision are subsumed by the requirements that EDS had for Ms Cuthill-Coutts to conduct her role. There was sufficient control, I hold for the role to be that of an employee.

[27] Ms Cuthill-Coutts expected to get training and despite a difference of opinion with Mr Feist on the time the telephone call for training took place, she did not challenge that he explained how she was to conduct herself and the processes to follow. I also conclude that Mr Feist provided some training.

[28] The distance from the EDS office in Auckland and there being no office in the Hawkes Bay explains why Ms Cuthill-Coutts had to use her own transport, use her own computer and obtain her own supplies and do her own research. However, EDS sent her the files/paperwork which she had to attend to and which contained the necessary information to act on, including the fee arrangement that had to involve EDS. There were no signed contractual arrangements over any expenses. There was no practice for any of them to be reimbursed, however. Ms Cuthill-Coutts's research would be considered part of any role an employee would be required to do, I hold. For instance using the computer to look up and download a copy of the [Employment Relations Act 2000](#) (the Act), as she did; and preparing by reading the paperwork provided by EDS and making any arrangements with the Department of Labour.

[29] Ms Cuthill-Coutts was not in business on her own account. She was not running a business. This is supported by her intention to get experience and applying for what she considered was a job. Furthermore she was not GST registered and she was a student. She informed me that she had never been self employed and applied for the position on the understanding that she would be an employee and be paid wages of \$15 per hour. There were no breakdown details in regard to the components of the hourly rate. There were no details about tax, and it emerged during the Authority's investigation that no tax was deducted, which Mr Feist says was Ms Cuthill-Coutts's responsibility. I accept that in the absence of any explanation from EDS and any details on the payments that Ms Cuthill-Coutts received that she had no knowledge of the tax. Indeed I accept that if Ms Cuthill-Coutts did not receive the letter of 24 February she would not have had any knowledge of a contracting arrangement and this would explain why she had no questions arising in regard to tax matters at the time. There was no arrangement for her to be able to work as a consultant elsewhere. Indeed she had no intention to do that because she was a student during her remaining time and her decision to take on the role with EDS was to get experience.

[30] Ms Cuthill-Coutts's position was integrated in the business of EDS because of the direct linkage between her work in representing EDS's clients and in preparing and conducting mediations for EDS to generate fees for income based on settlement monies from EDS's clients. She was reliant on receiving files from EDS and EDS was reliant on her conducting mediations in the Department of Labour with its clients. This included EDS and Ms Cuthill-Coutts having to make arrangements around their cases with the Department of Labour. Ms Cuthill-Coutts had to follow EDS's policies and procedures and in particular its fees regime. Also, her work was reliant solely on clients being referred by EDS. The nature of her role meant that there was no expectation that she could generate her own cases for EDS.

[31] In the event of any complaints she had to answer to Mr Feist. As it transpires he held her responsible for the failure by EDS to collect one client's fees of \$750, when that client refused to pay. Also, Mr Feist had his own views about any level of settlement needed to attract and maximise fees to collect from clients. All this goes to show that Ms Cuthill-Coutts was integrated in EDS for it to maximise its earnings through fees.

[32] I find that Ms Cuthill-Coutts was an employee.

[33] Ms Cuthill-Coutts gave Mr Feist a notice of resignation on 14 May 2010. However, that email did not provide any reasons as to why she decided to cease her employment. There was clearly a problem that Ms Cuthill-Coutts had with her role at EDS because of earlier attempts by her to communicate by email and telephone. In particular she experienced communication difficulties relating to an attempt to get feedback on difficulties with a particular mediation and Mr Feist never responded. Also she says she contacted him twice about her hours and he did not reply. She had a complaint about her pay being late. She finally made contact with him by telephone and a payment was subsequently made into her bank for her pay, three weeks after her initial email. An arrangement was made for Ms Cuthill-Coutts to go to Taupo to work on a case, but the paperwork did not arrive on time. She made telephone calls to Mr Feist about this and left messages for Mr Feist to contact her. She was never paid for this work. Such communication difficulties would mean that it would become foreseeable she would resign, I hold. This was because the role was at a distance and she accepted the job to gain more experience. In such circumstances she would expect proper contact and communication including adequate feedback when requested. Her resignation could not relate to her late pay because she was paid when she asked for the money, albeit that was late too. She had every reason to be concerned about the Taupo work because of the arrangements she had made to do the work and an expectation to be paid. Given she had not been paid for that work, and not had proper communication with Mr Feist to discuss the matter this culminated, I hold, in her resigning.

[34] It seems that Ms Cuthill-Coutts was regarded by the Department of Labour as EDS's contact in the Hawkes Bay and the department would contact her with details of mediations (for example email dated 13 May 2010). Ms Cuthill-Coutts says she had no knowledge about the mediations. She tried to get information from Mr Feist, but to no avail. She decided to resign because of the way she felt Mr Feist was treating her. I accept that her decision related to Mr Feist's failure to reply to her emails and telephone calls, a failure by EDS to pay her for work undertaken in Taupo and his response to her on 14 May when he said: *"All you need to do is agree to a date! Do not ever insult me by email again!!"*

[35] Ms Cuthill-Coutts's representative's letter dated 31 May confirmed that she would not return to work for EDS because of the failure by EDS to pay wages, failure by EDS to return telephone calls and a refusal to communicate. Also, the email evidence produced by Ms Cuthill-Coutts suggests even the Department of Labour had difficulties with communications with EDS. This was the reason why the department seemed to continue its contact with Ms Cuthill-Coutts. The poor communication was exacerbated after 14 May and before 31 May when Ms Cuthill-Coutts, for her own professional integrity with the

Department of Labour and clients, continued to assist them. EDS had a responsibility to be active, communicative and responsive, especially given the distance EDS operates from. The failure to do so left Ms Cuthill-Coutts with a dilemma about what to do when the Department of Labour was contacting her and there were clients about whom she had no information and especially about what was happening to their representation.

[36] Given that she resigned on 14 May and Mr Feist had made it clear that he would accept her decision, there was an issue about communications and her pay for the work in Taupo that amount to a constructive dismissal, I hold. EDS's failure to communicate on arrangements in the notice period, and not to make some attempt to determine properly what Ms Cuthill-Coutts's concerns were are matters giving rise to whether or not EDS met its obligations to act in good faith during the notice period under the Act. That is not a pleaded issue here, however.

[37] Ms Cuthill-Coutts has established her claim for constructive dismissal. Thus, it follows that as an employee she was entitled to submit a statement of problem in the Employment Relations Authority on 31 May to recover unpaid monies and to raise an employment relationship problem on her decision to resign for what she believed was genuinely a problem with EDS's communications.

[38] Ms Cuthill-Coutts was not paid for work totalling \$120 (gross) for her final week. EDS is to pay her this sum as arrears of wages.

[39] Ms Cuthill-Coutts is entitled to holiday pay based on 8% of her \$330 earnings (\$210 (gross) earnings received and \$120 above). EDS is required to pay her \$26.40 (gross) holiday pay.

[40] I assess that there was no contribution on Ms Cuthill-Coutts's part to the situation giving rise to the personal grievance. Ms Cuthill-Coutts decided to act on her own accord in the period before 31 May following the week she was asked to carry out work and then leave. Her decision to carry on, as admirable as it may have been, was her decision. I accept that it was a genuine decision and establishes a claim for lost wages. The tone of her emails was borne out of frustration, I hold.

[41] She is entitled to claim for at least three mediations. I assess her lost wages at

\$270 (gross).

[42] She is also entitled to compensation and I assess this at \$1,000 for hurt feelings which she referred to in her written statement as feeling bewildered, abandoned and unsupported. Her evidence on this was supported by the content of the email replies that were received and some of the gruff and direct comments made by Mr Feist. There were no details and corroboration of any personal stress symptoms provided. This sum also reflects the length of time Ms Cuthill-Coutts served in the role and the extent of the role.

[43] These remedies are sufficient to resolve the employment relationship problem without penalties, I hold. A penalty was sought because of EDS's failure to provide an intended employment agreement. However, it is not appropriate to apply a penalty for this because there has been a dispute over the nature of the employment. This explains why EDS did not have an employment agreement where it had an intention for a contractor arrangement.

EDS counter claims

[44] I now turn to Mr Feist's counter claims on behalf of EDS. I have no hesitation but to dismiss them. First, Mr Feist's claim for fees not received from a client could have involved him pursuing those fees either in the Disputes Tribunal and/or by Summary Judgement. There was no evidence that he attempted this. Furthermore there was no evidence that supported any hardship of the client to not make it worthwhile for EDS to pursue the fee with the client. Second, Mr Feist did not produce any independent qualitative and quantitative evidence of what an adequate level of settlement would be in mediation to try and suggest that Ms Cuthill-Coutts should pay EDS based on Mr Feist's opinion only on what constitutes a loss. Third, the information he submitted was one sided and produced without any witnesses. Indeed the cases he was referring to are all the subject of mediations, where the terms of any settlement are presumably confidential. Fourth, he had no contractual terms to rely on in trying to prove that Ms Cuthill-Coutts had been negligent in the performance of her duties. Also, he has no independent evidence from people involved and any objective outcomes to support his claims, I hold. As the employer EDS had no performance guidelines either, to manage avoiding such a situation and to be fair to Ms Cuthill-Coutts and her performance. This was always a misconceived claim, I hold.

[45] EDS's counter claims are dismissed. **Summary of Orders**

[46] Employment Disputes Services Limited is to pay Antonette Cuthill-Coutts

- a. \$120 gross arrears of wages;
- b. \$26.40 gross holiday pay;
- c. \$270 gross lost wages; and
- d. \$1,000 nett compensation.

[47] Costs are reserved.

P R Stapp

Member of the Employment Relations Authority

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