

**IN THE EMPLOYMENT RELATIONS AUTHORITY  
AUCKLAND**

[2015] NZERA Auckland 152  
5431580

BETWEEN SURENDER SINGH  
Applicant

A N D CORPORATE ENERGY  
LIMITED trading as CALTEX  
GLENBROOK  
Respondent

Member of Authority: Anna Fitzgibbon

Representatives: Simon Laurent, Counsel for the Applicant  
Ray Roussell, Representative for the Respondent

Investigation Meeting: 28 and 29 April 2015 at Auckland

Submissions received: 8 May 2015 from the Applicant  
15 May 2015 from the Respondent

Date of Determination: 27 May 2015

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**DETERMINATION OF THE AUTHORITY ON A PRELIMINARY ISSUE**

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- A. The underlying and true nature of the relationship between Mr Surender Singh and Corporate Energy Limited trading as Caltex Glenbrook (Caltex) from 23 April 2012 to 29 November 2012 was that of employment.**
- B. Accordingly, the Authority has jurisdiction to investigate Mr Singh's employment related claims against Caltex.**
- C. Costs are reserved.**

**Employment relationship problem**

[1] The applicant, Mr Surender Singh, claims he was employed as a motor mechanic by the respondent, Corporate Energy Limited trading as Caltex Glenbrook (Caltex) from 23 April 2012 to 29 November 2012.

[2] Caltex denies Mr Singh's claim and says it made a conditional offer to employ Mr Singh. Caltex says until such time as Mr Singh fulfilled the preconditions to employment, he was not its employee, rather, he performed services for Caltex as an independent contractor.

### **Issue**

[3] The issue for determination by the Authority is whether an independent contractual relationship or an employment relationship existed between Mr Singh and Caltex between the dates 23 April 2012 and 29 November 2012.

[4] If an employment relationship existed, then the Authority has jurisdiction to determine various claims by Mr Singh against Caltex.

[5] If no employment relationship existed, then the Authority has no jurisdiction to investigate Mr Singh's claims against Caltex.

### **Was Mr Singh an employee or an independent contractor?**

[6] The statutory test for determining the jurisdictional issue is set out in s.6 of the Employment Relations Act 2000 (the Act). Section 6 of the Act states:

#### **6. Meaning of employee**

(1) *In this Act, unless the context otherwise requires, **employee** –*

(a) *means any person of any age employed by an employer to do any work for hire or reward under a contract of service;*

...

(2) *In deciding for the purposes of subsection (1)(a) whether a person is employed by another person under a contract of service, the court or the Authority (as the case may be) must determine the real nature of the relationship between them.*

(3) *For the purposes of subsection (2), the court or the Authority –*

(a) *must consider all relevant matters, including any matters that indicate the intention of the persons; and*

(b) *is not to treat as a determining matter any statement by the persons that describes the nature of the relationship.*

[7] The leading case on s.6 of the Act is the Supreme Court decision of *Bryson v. Three Foot Six Ltd*<sup>1</sup>. Chief Judge Colgan in *Singh v. Eric James & Associates Ltd*<sup>2</sup> states at para.[16] that the inquiry in each case involving section 6 of the Act is “*intensely factual*” and at para.[17] sets out a number of principles derived from the *Bryson* decision.

[8] The Employment Court in *Poulter v. Antipodean Growers Ltd*<sup>3</sup> at para.[20] summarised the applicable principles derived from *Bryson* and earlier judicial decisions as follows:

1. *The Court must determine the real nature of the relationship.*
2. *The intention of the parties is still relevant but no longer decisive.*
3. *Statements by the parties, including contractual statements, are not decisive of the nature of the relationship.*
4. *The real nature of the relationship can be ascertained by analysing the tests that have been historically applied such as control, integration and the “fundamental” test.*
5. *The fundamental test examines whether a person performing the service is doing so on their own account.*
6. *Another matter which may assist in a determination of the issue is industry practice although this is far from being determinative of the primary question.*

[9] The Employment Court in its judgment in *Poulter* concluded that ultimately the approach necessary to be taken under s.6 is for the Authority, or the Court, to gain an overall impression of the underlying and true nature of the relationship between the parties.

### **Investigation meeting**

[10] As permitted under s.174 of the Act, this determination has not set out all the evidence received, which was copious. The determination states findings and relevant facts and legal issues in relation to the preliminary matter and makes conclusions in order to efficiently dispose of the matter.

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<sup>1</sup> [2005] ERNZ 372

<sup>2</sup> [2010] NZEmpC 1

<sup>3</sup> [2010] NZEmpC 77

[11] The investigation of this preliminary matter took two full days in the Authority. Closing submissions were subsequently filed on behalf of both parties.

[12] For the Authority's investigation, the applicant, Mr Surender Singh, his wife, Ms Rita Verma, and his brother, Mr Manvinder Singh, all provided written statements. Ms Zida Khan gave evidence by telephone.

[13] Mr Deepak Khurana and Mr Jag Mohan Rawat, both of whom were directors of Caltex at the relevant time, Mr Graham Thomas, a longstanding employee of Caltex and Ms Jennifer Tims, Immigration officer, provided written statements on behalf of the respondent.

[14] Each witness confirmed either under oath or by affirmation that their evidence was true and correct. Each witness had the opportunity to provide any additional comments and information and did so.

### **Credibility**

[15] At Caltex's request, at the commencement of the Investigation Meeting all witnesses, except those giving evidence, were excluded from the meeting.

[16] There were a number of conflicts of evidence between witnesses for both parties. In addition there were conflicts of evidence between Mr Khurana and Mr Rawat for Caltex and between Mr Khurana and Mr Rawat on the one hand and Mr Thomas, a witness for Caltex on the other hand.

[17] The Authority may draw inferences and fill gaps in evidence by application of common sense, knowledge of human affairs and the state of the industry and any matter that seems capable of being taken into account as indicating the probabilities of the situation<sup>4</sup>.

### **Relevant facts**

#### **Mr Singh's work visa**

[18] Mr Singh is an Indian immigrant who came to New Zealand in December 2007 with his daughter. Mr Singh's wife, Ms Rita Verma, subsequently followed. Mr Singh's brother, Mr Manvinder Singh, and his family live in New Zealand.

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<sup>4</sup> *Brook v. Macowan & Ors* [2013] NZERA Auckland 15

[19] Mr Singh obtained a work visa to work as a motor mechanic for European Autospares (1999) Limited (European Autospares). Mr Singh started working for European Autospares in 2008 and worked there for just over four years.

[20] Mr Singh's final work visa to work for European Autospares was from 16 September 2011 until 16 September 2012. INZ became concerned by certain documents filed on behalf of Mr Singh in support of his visa application and began an investigation in 2011.

[21] It was a requirement of Mr Singh's work visa that he be employed by European Autospares as a motor mechanic. INZ determined that Mr Singh's role at European Autospares was in fact that of an automotive dismantler, not a motor mechanic.

[22] Mr Singh did not wish to jeopardise his work visa and so decided to look for another position elsewhere as a motor mechanic. In order to work at a place other than European Autospares as a motor mechanic, Mr Singh had to apply to INZ to vary the conditions of his visa (VOC).

### **Caltex**

[23] Caltex is a small business located in the rural community of Glenbrook, Auckland. Caltex operates a petrol station and a shop with a mechanical workshop adjacent. Mr Deepak Khurana and Mr Jag Mohan Rawat took over the Caltex business from its previous owners in 2008.

[24] Mechanical work on vehicles owned by Caltex's customers is carried out in the workshop. A major activity of the workshop was undertaking warrant of fitness (WoF) inspections and issuing WoFs to customers.

[25] Mr Graham Thomas had been the mechanic and WoF inspector at Caltex for approximately 19 years. Mr Thomas remained employed by Caltex when the business was purchased by Mr Khurana and Mr Rawat.

### **Changes in the workshop- late 2011**

[26] In November 2011, Mr Thomas, who was nearing retirement age, informed Mr Khurana and Mr Rawat of his wish to retire when he turned 65 on 15 December 2011.

[27] The workshop could not function properly without a motor mechanic who could perform WoF inspections and issue WoFs.

### **Advertisement for motor mechanic on Trade Me**

[28] On 5 December 2011, shortly after the discussion with Mr Thomas about retirement, Mr Khurana and Mr Rawat placed an advertisement on Trade Me for a full-time permanent automotive mechanic to replace Mr Thomas. The advertisement stated:

*W.O.F. Inspector, Must have repairing knowledge and exp plus liaison with customer and supplier plus ordering parts and quotation. Applicants for this position should have NZ residency or a valid NZ work permit.*

[29] Mr Rawat was the contact person in respect of the advertisement.

[30] Mr Singh saw the advertisement on Trade Me and applied for it. Mr Singh initially met with Mr Rawat about the job on about 21 December. Mr Singh gave Mr Rawat a copy of his CV. Mr Rawat asked Mr Singh to try out for the position, which he did on 7 and 8 January 2012. Following this two day trial, Mr Rawat asked Mr Singh to meet with him and his business partner, Mr Khurana to discuss a job offer. Mr Singh and his brother, Mr Manvinder Singh, met with Mr Khurana and Mr Rawat at Mr Khurana's home on 11 January.

[31] The evidence from both parties differed considerably as to what was discussed at the 11 January meeting and with regard to the subsequent working relationship between them. For reasons which become apparent in this determination, I prefer the evidence of Mr Singh.

### **Employment discussions**

[32] At the meeting on 11 January, Mr Singh explained his situation with INZ and that he had been declined permanent residence. Mr Singh explained that he needed to apply to INZ for a VOC to enable him to take up the role with Caltex. Mr Rawat and Mr Khurana agreed to offer Mr Singh employment on two conditions. Firstly, Mr Singh was to complete a WoF inspector course and secondly obtain the VOC.

[33] Until he was able to fulfil those 2 conditions, Mr Singh was to work for Caltex and would be paid petrol money to travel to and from his home to Caltex. Mr Singh

would also receive a gas bottle each month and various food items from the Caltex shop. Caltex say this work was that of an independent contractor, not an employee.

[34] Mr Singh and his brother say the arrangement discussed and agreed was that Mr Singh was to be employed by Caltex and once the VOC came through from INZ, Caltex would calculate and pay wages owing to Mr Singh for his work in the interim.

[35] A job offer and an employment agreement were prepared. The employment agreement was signed by Mr Rawat and Mr Singh on 9 March 2012. Mr Singh immediately went on the Vehicle Inspectors Preparatory Course which he completed on 19 March 2012.

### **Written employment agreement- 9 March 2012**

[36] The employment agreement states that Mr Singh's position with Caltex is that of a Motor Mechanic, his duties are to be performed in the workshop and his hours of work are 35 hours a week from 9am to 4pm. Schedule A of the employment agreement describes the duties of the motor mechanic position. There is no reference to WoF inspections or that the position required a WoF inspector's certificate.

[37] The employment agreement does not specify that Mr Singh's employment is conditional on Mr Singh obtaining a WoF inspector's certificate or obtaining the VOC. The employment agreement contains usual provisions for holidays, sick leave and termination of employment.

[38] Mr Singh says he was contacted by Mr Rawat on a number of occasions following the meeting on 11 January asking that he start at the workshop as soon as possible. Mr Rawat and Mr Khurana were concerned that Caltex have a motor mechanic able to perform work in the workshop because Mr Thomas wished to reduce his hours of work and retire when his replacement was employed.

[39] Mr Singh says he was reluctant to commence work because he had not received his VOC. Following considerable pressure by Mr Rawat, Mr Singh consulted his immigration lawyer and was assured by him that the VOC was imminent and that he could start at Caltex. Based on this advice, and based on his understanding that both Mr Rawat and Mr Khurana had been in regular contact with his lawyer, he decided to commence work.

[40] Accordingly, Mr Singh resigned from his position with European Autospares on 6 April with effect from 20 April, to start at Caltex on 23 April.

[41] In my view, it is clear from the job advertisement on Trade Me, the discussions on 11 January, and from the written employment agreement prepared between the parties, that Mr Singh was to be employed by Caltex as a motor mechanic. Mr Singh and his brother's evidence was that until the VOC issued, Mr Singh would work as a motor mechanic for Caltex, would be paid fuel and other expenses and once the VOC came through his wages would be calculated and paid to him.

### **Conditional employment**

[42] Caltex asserts that the employment relationship was not to take place until Mr Singh was certified as a WoF inspector and he obtained the VOC. Until those conditions were met, Caltex asserts that Mr Singh was an independent contractor, not an employee. This is the issue: was Mr Singh an employee or an independent contractor during the time he was waiting for his VOC?

[43] Caltex relies on a determination of the Authority in *Scorringe v Freedom Air Ltd*<sup>5</sup> for the proposition that the Authority does not have jurisdiction over this case. Mr Roussell for Caltex contends that the offer of employment was a conditional one. Namely, the offer was conditional on Mr Singh obtaining a WoF Inspector's certificate and the VOC. Until these preconditions were satisfied, Mr Roussell contends an employment agreement could not be created.

[44] The facts in *Scorringe* differ from those in the current case. In *Scorringe*, unlike in the current case, there was no written employment agreement between the parties and Mr Scorringe did not commence employment or perform any work for Freedom Air.

[45] I accept the following submissions made on behalf of Mr Singh as an accurate reflection of what occurred between the parties:

4.2 *What really happened here was that the parties agreed for the Applicant to work for the Respondent under a contract of service. It was intended to be immediately effective because everyone expected the Variation of Conditions to be approved*

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<sup>5</sup> ERA, AA291/05. 12 August 2005

*without delay, and because it sufficed for the Respondent that the Applicant was getting his WoF certification and had started the process a month before he began work.*

4.3 *Further, the Applicant in reliance upon the promise of work from the Respondent by resigning from the job he had with European Auto Spares ...*

4.4 *... not only was an employment relationship formed, but also the Applicant did the work of an employee in pursuit of that relationship.”*

### **Employment relationship in practice**

[46] Mr Singh’s first day of work at Caltex was on 23 April 2012.

[47] Mr Khurana and Mr Rawat were adamant that Mr Singh was engaged by Caltex as an independent contractor. However, it was clear to me that neither understood what the term “independent contractor” meant. Indeed, it was not until after Mr Singh’s working relationship with Caltex ended and the current issues arose concerning Mr Singh’s work at Caltex, that Mr Rawat or Mr Khurana first heard about the term “independent contractor”. Neither Mr Rawat nor Mr Khurana ever discussed an independent contractor relationship with Mr Singh nor was a written independent contract presented by them to Mr Singh. It seems highly unlikely in my view given Mr Singh’s desire to become a permanent resident in New Zealand that he would jeopardise this by resigning from European Autospare to take up an independent contractor position with Caltex while waiting for the VOC.

[48] Mr Khurana said that Mr Singh came and went from the workshop as and when he wished and performed mechanical work at the workshop on the odd occasion. Mr Khurana said that neither he nor Mr Rawat were motor mechanics and were not responsible for the work performed by Mr Thomas who worked independently. Similarly, Mr Khurana claimed Mr Singh was independent and not accountable to Mr Thomas or to Mr Khurana or Mr Rawat for his work.

[49] Mr Rawat said that Mr Singh worked irregularly at the workshop and only on vehicles owned by his family and friends and not on the vehicles of Caltex’s customers.

[50] Mr Rawat and Mr Khurana say that in the seven months between 23 April 2012 and the time Mr Singh left Caltex on 29 November 2012, he was paid the

equivalent of \$3,000 for his services. The \$3,000 was made up of petrol, gas bottles and various items of food, and a 50% share of work he brought in to the workshop. Neither Mr Rawat or Mr Khurana could provide details of what jobs Mr Singh had received a 50% share of. Nor did they have any idea of who or the number of customers Mr Singh introduced to the workshop, they each vaguely referred to Mr Singh's friends and family friends.

[51] These factors and the fact Mr Singh had his own tools were advanced by Caltex as indicators of an independent contractor relationship.

[52] Mr Singh disputes the evidence of Mr Khurana and Mr Rawat. Mr Singh says he worked regularly at Caltex's workshop from 23 April and was paid petrol money, the odd food item from the shop and a gas bottle each month. Mr Singh says he did not agree to an independent contract relationship whereby he was to be paid a 50% share of any invoices issued to customers he brought in to the workshop and he was not paid as such.

[53] Mr Singh did some repair work on his own motor vehicle and on the vehicles of three or four family friends and family members. This work, Mr Singh says, was done by him free of charge and he was reimbursed for any parts required by him to undertake the work. Mr Singh did not issue Caltex with GST invoices for work he performed because the arrangement was that once his VOC came through he would be paid wages for the work he had been doing for Caltex.

[54] Mr Singh says he worked in the workshop with Mr Thomas undertaking mechanical work on the vehicles of Caltex's customers. When he first started at Caltex before Mr Thomas reduced his hours, Mr Singh said he worked with him almost every day.

[55] Mr Singh agrees he brought his own tools to the workshop but says this is not unusual especially in a small workshop like the one operated by Caltex.

[56] Mr Thomas, one of the witnesses for Caltex, did not appear familiar with his witness statement. When questioned at the investigation meeting about his working relationship with Mr Singh, Mr Thomas corroborated Mr Singh's evidence. This evidence was considerably at variance with the evidence of Mr Rawat and Mr Khurana. This is a factor I have taken in to account in assessing the credibility of Mr Rawat and Mr Khurana.

[57] On 1 December 2012, a matter of days after Mr Singh finished at Caltex, Mr Thomas provided Mr Singh with a reference. The contents of the reference were consistent with the evidence given by Mr Thomas at the investigation meeting and in my view confirms Mr Thomas's understanding that Mr Singh was an employee. The reference states:

*I first met and worked with Lucky in April 2012. During this time he proved to be a trustworthy, reliable, hardworking member of staff with good customer communications. He has always conducted himself in the best possible manner. Therefore I would not hesitate in recommending him to any future employer.*  
*Workshop Manager, Graham Thomas*

[58] Mr Thomas said he was the workshop manager and he made the decision about whether or not he could repair a car or whether it should be repaired elsewhere.

[59] Mr Thomas said he reported to Mr Khurana and Mr Rawat for the work he performed in the workshop, they were his bosses and if there were any employment related matters they were their responsibility not his.

[60] For approximately one month after Mr Singh started at Caltex in April 2012, Mr Thomas said that they worked together regularly. Mr Thomas described Mr Singh and himself as a team and that they regularly took tea and lunch breaks together.

[61] Mr Singh would start work almost every day at 8am or earlier and would finish at 5pm but often Mr Thomas said Mr Singh remained working there after he left. Mr Thomas said Mr Singh was a good worker and knew more about European vehicles than he did. Mr Thomas trained Mr Singh and understood he was to replace him when he retired.

[62] Mr Thomas said he supervised and gave instructions to Mr Singh during the time he was at Caltex. Mr Thomas would give Mr Singh work to do for example, to do a full service on a vehicle, a tune up and so forth.

[63] Mr Thomas recalled Mr Singh working on his own vehicle and doing some work on the vehicle of a family friend, Ms Zida Khan. Mr Thomas said this was not unusual and he also worked on his own car at lunch time from time to time. Mr Thomas also said that Mr Singh used his own tools but that this practice was not unusual for motor mechanics, especially in small workshops such as the one operated by Caltex.

[64] After about a month working with Mr Singh, Mr Thomas said he began reducing his hours to two days a week. Mr Thomas said Mr Singh continued to work every day undertaking mechanical repair work in the workshop and Mr Thomas would undertake the WoF inspections and issue WoF's for Caltex customers on the days he came into the workshop. Mr Thomas said that the WoF sheets were usually completed by both Mr Singh and himself, but that he always signed the certificates off. I had the opportunity to view the WoF sheets at the investigation meeting and viewed the different handwriting of Mr Singh and Mr Thomas along with Mr Thomas' signature certifying the WoFs.

[65] I prefer Mr Thomas's evidence to that of Mr Rawat and Mr Khurana. Mr Thomas was Caltex's own witness, he had no vested interest in misleading the Authority and in my view truthfully told the Authority of his experience working with Mr Singh and how the relationship worked on a day to day basis. Mr Thomas' evidence confirms, in my view, that there was an employment relationship in practice between 23 April and 29 November 2012.

[66] It is my finding that Mr Singh regularly worked for Caltex between 23 April and 29 November 2012. Mr Singh was employed to replace Mr Thomas who trained and supervised his work. The underlying and true nature of the relationship was that of an employment relationship.

[67] The Authority accordingly has jurisdiction to investigate Mr Singh's substantive claims. A telephone conference will be convened shortly to timetable any further documentation required for the investigation meeting in respect of the substantive matter.

### **Costs**

[68] Costs are reserved and will be dealt with following the investigation meeting in respect of the substantive matter.

**Anna Fitzgibbon**  
**Member of the Employment Relations Authority**