

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

[2016] NZERA Auckland 38
5431580

BETWEEN SURENDER SINGH
Applicant

A N D CORPORATE ENERGY
LIMITED (IN LIQUIDATION)
formerly known as CORPORATE
ENERGY LIMITED t/a CALTEX
GLENBROOK
Respondent

Member of Authority: Anna Fitzgibbon

Representatives: Simon Laurent, Counsel for Applicant
No appearance for Respondent

Investigation Meeting: On the papers

Date of Determination: 10 February 2016

**DETERMINATION OF THE EMPLOYMENT RELATIONS AUTHORITY
ON A PRELIMINARY ISSUE (No.2)**

- A. Corporate Energy Limited (In liquidation) formerly known as Corporate Energy Limited t/a Caltex Glenbrook (Corporate Energy) is struck out as a respondent to the proceedings in the Authority.**
- B. The former directors of Corporate Energy, Mr Deepak Khurana and Mr Jagat Mohan Singh Rawat are joined as respondents to the proceedings in the Authority.**
- C. The Authority will continue its investigation into the applicant, Mr Surender Singh's personal grievance claims against the joined respondents, Mr Khurana and Mr Rawat.**

D. Costs are reserved.

Application for strike out and joinder of parties pursuant to s.221 of the Employment Relations Act 2000 (the Act) and for continuation of Authority's investigation.

[1] On 21 December 2015, Mr Laurent, Counsel for the applicant, Mr Surender Singh, filed an application that:

- due to the appointment of Mr Clive Johnson as liquidator of Corporate Energy, Corporate Energy be removed as a respondent to the proceedings,
- the former directors of Corporate Energy, Mr Khurana and Mr Rawat, be joined to the proceeding as respondents, and
- the Authority continue its investigation into personal grievance claims made by Mr Singh (file 5431580).

[2] The application was served contemporaneously on the liquidator, Mr Johnson.

[3] On 11 January 2016, the Authority sent Mr Singh's application and relevant correspondence to Mr Johnson. Mr Johnson was requested to respond within 14 days and was informed that the Authority proposed dealing with Mr Singh's application on the papers.

[4] No response to Mr Singh's application was received from Mr Johnson. However, the Authority was provided with a copy of a letter dated 21 December 2015 from Mr Johnson to Mr Laurent, that pursuant to s.248 of the Companies Act 1993, as liquidator, he would not consent to the proceedings against Corporate Energy continuing.

[5] On 01 and 02 February 2016, a copy of the Memorandum of Counsel for Mr Singh seeking that the Authority continue its investigation and for joinder of respondents was served on Mr Rawat and Mr Khurana respectively. Mr Rawat and Mr Khurana were given 7 days in which to respond to the Memorandum.

[6] On 9 February 2016, Mr Rawat and Mr Khurana each responded opposing Mr Singh's application to have them joined as parties. No grounds for their opposition or further information was provided to the Authority by Mr Rawat and Mr Khurana.

[7] This determination deals with the application made on behalf of Mr Singh seeking the Authority to continue its investigation into Mr Singh's employment related claims and seeking the joinder of Mr Khurana and Mr Rawat as respondents.

First Determination of the Employment Relations Authority on a preliminary matter - 27 May 2015

[8] Following a two day investigation meeting in the Authority on 28 and 29 April 2015 at Auckland, the Authority determined¹ that the underlying and true nature of the relationship between Mr Singh and Corporate Energy was that of employment and that accordingly it had jurisdiction to investigate Mr Singh's employment-related claims against Corporate Energy. Costs were reserved.

[9] Paragraph [67] of the Authority's determination stated that:

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 an investigation meeting in respect of the substantive matter.

Challenge by Corporate Energy

[10] On 24 June 2015, prior to the continuation of the Authority's investigation, Corporate Energy filed a challenge in the Employment Court to the Authority's determination.

[11] The hearing of the challenge was due to proceed in the Employment Court on 7 December 2015. On 3 December 2015, a notice of discontinuance was filed in the Employment Court by Mr Johnson on the basis that he had been appointed liquidator of Corporate Energy.

[12] In an oral judgment of the Employment Court on 7 December 2015², the Court confirmed that the proceedings were discontinued. Judge Perkins stated that an award of costs against Corporate Energy was appropriate and awarded costs of \$8,920.

[13] In para.[12] of the Employment Court's judgment, Judge Perkins stated:

Mr Laurent will probably need to seal that order for costs because he, on behalf of Mr Singh will want to pursue the liquidator and possibly the directors and shareholders of Corporate Energy Limited for those costs. Later on Mr Singh will be wanting to pursue any award by the

¹ [2015] NZERA Auckland 152

² [2015] NZEmpC218

Authority against Corporate Energy Limited or any other party joined to the proceedings in the Authority. That will all be considered in the further investigation meeting which will now take place in the Employment Relations Authority.”

Applicant’s memorandum seeking to continue investigation and for joinder of parties

[14] In his memorandum filed in the Authority on 21 December 2015, Mr Laurent relies on s.221(a) of the Act to have the former directors of Corporate Energy joined to the current proceeding. Section 221(a) of the Act states:

Joinder, waiver and extension of time

In order to enable the court or the Authority, as the case may be, to more effectually dispose of any matter before it according to the substantial merits and equities of the case, it may, at any stage of the proceedings, of its own motion or on the application of any of the parties, and upon such terms as it thinks fit, by order, -

(a) Direct parties to be joined or struck out;

...

[15] Mr Laurent refers in his memorandum to the following factors in support of his application for joinder of parties and for the continuation of the Authority’s investigation:

- (a) Mr Khurana and Mr Rawat as directors of Corporate Energy were the ones with whom Mr Singh negotiated his employment;
- (b) Mr Khurana and Mr Rawat both gave evidence before the Authority at its investigation meeting on 28 and 29 April 2015;
- (c) Without the joinder, Mr Singh will not be able to proceed with his personal grievance and the Authority’s initial determination will be rendered worthless;
- (d) The interests of justice demand it. Mr Laurent referred to the timing of the appointment of the liquidator, Mr Johnson, just two days before the Employment Court was due to hear the challenge which he said appeared coincidental and was possibly a tactic to avoid potential liability by Corporate Energy;
- (e) The Employment Court decision in para.[12] implied that joinder of parties was foreseeable if the proceedings continued before the Authority.

[16] Mr Laurent attached to his memorandum details from the Companies Office which confirmed Corporate Energy was placed into liquidation on 1 December 2015, a matter of days before the Employment Court hearing was scheduled to take place on 7 December 2015.

[17] The preliminary issue for determination by the Authority in its investigation meeting held on 28 and 29 April 2015 and the subject of the determination on 27 May 2015 was whether or not Mr Singh was an employee of Corporate Energy. The Authority determined that he was.

[18] Mr Khurana and Mr Rawat were the main witnesses for Corporate Energy and each gave evidence in relation to pre-employment and employment discussions with Mr Singh. During the course of the investigation meeting, both Mr Khurana and Mr Rawat argued strongly that Mr Singh was not an employee of Corporate Energy but was rather a conditional employee or, in the alternative, an independent contractor.

[19] Corporate Energy is now in liquidation, from just days before the Employment Court hearing. The liquidation of Corporate Energy means that Mr Singh's proceeding in the Authority against it cannot continue without the liquidator's consent. The liquidator, Mr Johnson has refused his consent.

[20] It is my view that for the reasons advanced by Mr Laurent in support of the application, that the substantial merits and equities of the case weigh in favour of joining Mr Khurana and Mr Rawat as respondents to the proceeding.

[21] The Court of Appeal in *Auckland Regional Services Trust v Lark*³ in considering s.140 of the Employment Contracts Act 1991, the predecessor to s.221 of the Act and in very similar terms, stated:

The purpose of joinder rules is to secure the determination of all disputes relating to the same subject-matter without the delay and expense of separate proceedings. The general test is whether the proposed party will be directly affected by any order which may be made in the proceedings and the general rule is that it is for the plaintiff to decide who he or she will sue and for any person named defendant to take striking-out proceedings if it is considered by them that there is no arguable cause of action.

³ [1994]2 ERNZ 135(CA) page 138

[22] The Authority will now continue its investigation into Mr Singh's employment related claims. A telephone conference will be convened shortly to timetable any further documentation required for an investigation meeting in respect of the substantive matter.

Costs

[23] Costs are reserved. Mr Laurent has 14 days from the date of this determination within which to file a memorandum as to costs. Mr Khurana and Mr Rawat have a further 14 days within which to respond.

Anna Fitzgibbon
Member of the Employment Relations Authority