

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

[2017] NZERA Auckland 39
5431580

BETWEEN

SURENDER SINGH
Applicant

AND

CORPORATE ENERGY
LIMITED (IN LIQUIDATION)
Respondent

Member of Authority: Vicki Campbell

Representatives: Simon Laurent for Applicant
No appearance for Respondent

Submissions Received: 16 February 2017 from Applicant
15 February 2017 from Respondent

Investigation Meeting: 17 February 2017

Oral Determination: 17 February 2017

**RECORD OF ORAL DETERMINATION OF THE
EMPLOYMENT RELATIONS AUTHORITY**

- A. One or more conditions of Mr Singh's employment were affected to his disadvantage by the unjustifiable actions of Corporate Energy Limited (in liquidation).**
- B. Corporate Energy Limited (in liquidation) is ordered to pay to Mr Singh the sum of \$7,000 under section 123(1)(c)(i) of the Employment Relations Act 2000 within 28 days of the date of this determination.**
- C. Corporate Energy Limited (in liquidation) is ordered to pay to Mr Singh the sum of \$35,251.20 under section 131 of the Employment Relations Act 2000 for unpaid wages and holiday**

pay within 28 days of the date of this determination.

D. Costs are reserved.

Employment relationship problem

[1] Mr Surender Singh claims one or more of his terms and conditions of employment were affected to his disadvantage by the unjustified actions of his employer Corporate Energy Limited (in liquidation) (Corporate Energy) and claims arrears of wages including minimum wages and holiday pay. In its statement in reply Corporate Energy denied the claims.

[2] As permitted by s 174E of the Employment Relations Act 2000 (the Act) this determination has not recorded all the evidence and submissions received from Mr Singh and Corporate Energy but has stated findings of fact and law, expressed conclusions on issues necessary to dispose of the matter, and specified orders made as a result.

Procedural background

[3] Mr Singh lodged his statement of problem in the Authority on 6 September 2013. At that time Corporate Energy denied Mr Singh was an employee. In a preliminary determination the Authority held that Mr Singh was an employee and the Authority had jurisdiction to investigate Mr Singh's claims against it.¹

[4] In a second preliminary determination the Authority struck out Corporate Energy as a respondent and joined as respondents the former directors, Mr Deepak Khurana and Mr Jagat Mohan Singh Rawat.²

[5] Mr Khurana and Mr Rawat challenged the Authority's determination to the Employment Court³ and orders were made by consent that the challenges to the Authority's determination joining Mr Khurana and Mr Rawat be allowed and the

¹ *Surender Singh v Corporate Energy Limited trading as Caltex Glenbrook* [2015] NZERA Auckland 152.

² *Surender Singh v Corporate Energy Limited (In Liquidation) formerly known as Corporate Energy Limited trading as Caltex Glenbrook* [2016] NZERA Auckland 38.

³ *Deepak Khurana v Surender Singh* EMPC 59/2016; *Jag Rawat v Surender Singh* EMPC 61/2016, Order of the Court dated 23 November 2016.

determination put aside. By consent the Court confirmed Corporate Energy as the sole respondent and the proceedings should now continue in the Authority.

[6] The Authority has been advised by Mr Clive Johnson, liquidator of Corporate Energy, that he was unable to instruct anyone to act as Counsel for the Company because of its financial position. Mr Johnson has advised that no witnesses or other representative of the respondent will appear at the investigation.

[7] In consideration of my obligation to adhere to the principles of natural justice in carrying out my role, copies of the applicant's witness statements of evidence have been made available to Mr Johnson. Likewise Mr Johnson has been provided the opportunity to make submissions on behalf of his client which have been taken into account in reaching my conclusions in this matter.

Background

[8] In December 2011 while working for European Auto, Mr Singh applied for a position with Corporate Energy that had been advertised on Trade Me jobs. Mr Singh attended an interview and provided Corporate Energy with a copy of his curriculum vitae.

[9] Mr Singh was successful in his interview and was called back and trialled for two days on 7 and 8 January 2012. On 11 January 2012 Mr Singh was requested to undertake a warrant of fitness inspector course which he completed at UNITEC between 6 and 17 March 2012.

[10] While Mr Singh was completing the course he was offered and accepted employment and signed an employment agreement on 9 March 2012. At this time Mr Singh held a work visa conditional on him working for European Auto. On the basis of the job offer he had received from Corporate Energy he applied to Immigration New Zealand for a variation of conditions.

[11] Mr Singh continued to work for European Auto.

[12] Mr Singh had been advised that the variation to his work visa would be issued shortly and on 20 April 2012 he resigned from his employment with European Auto and agreed to start work for Corporate Energy on 23 April 2012.

[13] Mr Singh continued working for Corporate Energy until 5 September 2012 when he was advised by Immigration New Zealand that his application for a variation to his visa had been declined. Mr Singh has not been paid at all for his work for Corporate Energy between 23 April and 5 September 2012.

[14] Mr Singh advised Mr Khurana that his application for a variation to his work visa had been declined and that he had been advised not to continue working until a new application had been processed and approved.

[15] Mr Khurana gave Mr Singh two options:

- a) Carry on working for free; or
- b) Pay Corporate Energy \$25,000 for the job offer.

[16] Mr Singh became upset at Mr Khurana's attempts to exploit him and did not return to work for the next two days. Mr Khurana then contacted Mr Singh by telephone and told him that if he did not return to work the job offer would be withdrawn and he [Mr Khurana] would notify Immigration New Zealand.

[17] Mr Singh felt he had no choice and so returned to work the next day. He continued to work for Corporate Energy without pay until October 2012 when he raised concerns with Mr Khurana about his ability to pay for rent, food, water and power expenses. Mrs Singh worked in a part time job and they had exhausted their savings to cover living expenses.

[18] Mr Khurana told Mr Singh that he and his wife should send their children back to India and that he and his wife could live in free accommodation above the petrol station. Mr Singh would not do this and was told he was still expected to work or Corporate Energy would withdraw the job offer.

[19] Mr Singh continued to work under these circumstances until Immigration New Zealand visited the premises where the officers in attendance issued Mr Singh with a Deportation Liability Notice due to him breaching the conditions of his work visa.

[20] In reaching my conclusions in this matter I have preferred the evidence given by Mr Singh. I have taken into account the findings of the Authority's preliminary investigation into whether Mr Singh was an employee. In reaching conclusions in

that matter the Member had the benefit of seeing and hearing from witnesses for both parties. Where the evidence of the witnesses was in conflict the Member preferred the evidence of Mr Singh. In particular the Member relied on evidence given on behalf of Corporate Energy by Mr Graham Thomas who largely corroborated Mr Singh's evidence of his hours of work and the work he completed on behalf of Corporate Energy.

Issues

[21] The issues for determination are whether:

- a) Mr Singh was unjustifiably disadvantaged in his employment and, if so, what if any remedies should be awarded; and
- b) any arrears of wages and holiday pay are owed to Mr Singh.

Unjustified disadvantage

[22] Mr Singh claims one or more conditions of his employment were affected to his disadvantage by the unjustifiable actions of Corporate Energy when it failed to pay him wages and intimidated him into working for Corporate Energy without the necessary work visa.

[23] Mr Singh bears the onus of establishing on the balance of probabilities that he was disadvantaged in his employment. If Mr Singh discharges that onus then the burden of proof moves to Corporate Energy to establish on the balance of probabilities that any disadvantage Mr Singh may have suffered was justified.

[24] The justification test in section 103A of the Act is to be applied by the Authority in determining justification of an action or dismissal. This is not done by considering what the Authority may have done in the circumstances. The Authority is required under section 103A of the Act to consider on an objective basis whether Corporate Energy's actions and how it acted were what a fair and reasonable employer could have done in all the circumstances.

[25] For the following reasons I have no hesitation in finding one or more conditions of Mr Singh's employment were affected to his disadvantage. The

disadvantage arose when Corporate Energy failed to pay him for all hours worked at the agreed rate, and when Mr Khurana intimidated Mr Singh into continuing to work unlawfully.

[26] Corporate Energy was well aware of Mr Singh's immigration status when it offered employment to him. Mr Khurana and Mr Rawat were well aware that Mr Singh needed a variation to his work visa to be approved before he could be employed by Corporate Energy. Pressure was brought to bear on Mr Singh to work illegally for Corporate Energy and hiding behind the lack of a valid work visa, Corporate Energy refused to pay him for his work.

[27] When Mr Singh raised concerns in September 2012 with Mr Khurana about the declination of the variation to his work visa, Mr Khurana responded by intimidating Mr Singh into continuing to work for Corporate Energy.

[28] Corporate Energy has failed to establish that its actions were what a fair and reasonable employer could have done in all the circumstances. An employer acting fairly and reasonably could have paid Mr Singh in accordance with the terms of the employment agreement which both parties had signed.

[29] The conduct of Mr Khurana in intimidating Mr Singh into continuing to work illegally under the threat that he would contact Immigration New Zealand and withdraw the offer of employment is contemptible conduct.

[30] Mr Singh has established a personal grievance and is entitled to the consideration of remedies.

Remedies

[31] I have dealt with the wages issues later in this determination. This leaves the claim for compensation for hurt and humiliation. Mr Singh seeks the payment of \$15,000 for humiliation, loss of dignity and injury to feelings plus compensation for the loss of a sponsored work and residence visa.

[32] In proceedings lodged in the High Court by way of application to proceed against a company in liquidation Mr Singh acknowledged that it would be unlikely that the company had any assets over which he might exert a claim if he was successful in the Authority so that seeking or obtaining any award of compensation

would be nugatory. Notwithstanding that concession I have proceeded to deal with remedies for the sake of completeness.

[33] I am declining the application for compensation for loss of the sponsored work and residence visa. Immigration New Zealand had considered Mr Singh's application for a variation to his work visa with the benefit of the support of Corporate Energy and declined the application. Corporate Energy's support was never withdrawn and indeed, a new employment agreement and application were lodged with Immigration New Zealand after Mr Singh had been found to be working unlawfully.

[34] I have found that the actions of Mr Khurana in threatening to withdraw Corporate Energy's support was behaviour designed to intimidate Mr Singh and which led him to undertake work unlawfully. I have taken those actions into account when dealing with the claim for compensation for hurt and humiliation.

[35] I accept Mr Singh suffered hurt and humiliation after Immigration New Zealand discovered him working for Corporate Energy unlawfully. His feelings of hurt were exacerbated by Corporate Energy's denials that he was working for it. An appropriate award in all the circumstances of this matter is \$7,000.

[36] Section 124 of the Act requires me to consider the extent to which Mr Singh's actions contributed towards the situation that gave rise to the personal grievance. I have found the grievance arose from Corporate Energy's failure to pay Mr Singh for the hours he worked and its intimidation of him when he notified Corporate Energy of the declination of his application for a variation to his work visa.

[37] I find Mr Singh did not contribute to the actions giving rise to his grievance. It was always open to Corporate Energy to pay Mr Singh for his work even though he was not legally entitled to work for it. Mr Khurana was fully aware of Mr Singh's legal status and proceeded to require him to work anyway.

[38] Corporate Energy Limited (in liquidation) is ordered to pay to Mr Singh the sum of \$7,000 under section 123(1)(c)(i) of the Act within 28 days of the date of this determination.

Arrears of wages

[39] Mr Singh claims payment of unpaid wages and holiday pay for the period 23 April to 29 November 2012 totalling \$41,600.

[40] In its statement in reply Corporate Energy denies Mr Singh worked the hours and days he claims. I have accepted Mr Singh's evidence in this matter due to the fact that no witnesses for Corporate Energy have attended the investigation meeting and therefore there is no evidence to contradict that given by Mr Singh.

[41] Mr Singh signed a written employment agreement on 9 March 2012. The employment agreement states that his hours of work are 35 hours per week with a starting and finishing time of 9.00am and 4.00pm respectively. The employment agreement provided for Mr Singh to be remunerated at the rate of \$20 per hour worked. The employment agreement contains the usual provisions for holidays, sick leave and termination of employment.

[42] I am satisfied Mr Singh worked regularly from 8.00am to 5.00pm each day Monday to Saturday inclusive with appropriate tea and lunch breaks. Allowing for a 30 minute unpaid lunch break each day Mr Singh worked at least 8.5 hours each day. Over six days each week this amounts to 51 hours per week for a period of 32 weeks making a total of \$32,640 gross in unpaid wages.

[43] Holiday pay is calculated at the rate of 8% of gross earnings. This is an additional \$2,611.20.

[44] In total Mr Singh is owed \$35,251.20 gross in arrears of wages and holiday pay. Corporate Energy Limited (in liquidation) is ordered to pay this sum to Mr Singh under section 131 of the Act within 28 days of the date of this determination.

Costs

[45] Costs are reserved. The parties are invited to resolve the matter. If they are unable to do so Mr Singh shall have 28 days from the date of this determination in which to file and serve a memorandum on the matter. Corporate Energy Limited (in liquidation) shall have a further 14 days in which to file and serve a memorandum in reply. All submissions must include a breakdown of how and when the costs were incurred and be accompanied by supporting evidence.

[46] The parties could expect the Authority to determine costs, if asked to do so, on its usual ‘daily tariff’ basis unless particular circumstances or factors require an adjustment upwards or downwards.

Vicki Campbell
Member of the Employment Relations Authority