

**IN THE EMPLOYMENT RELATIONS AUTHORITY  
CHRISTCHURCH**

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BETWEEN

MALCOLM BURNS  
Applicant

LYNNE BURNS  
Applicant

ANGUS BURNS  
Applicant

AND

RELIANCE TRANSPORT  
LIMITED  
Respondent

Member of Authority: Paul Montgomery

Representatives: Paul Brown, Advocate for Applicants  
Rod Ewen, Counsel for Respondent

Investigation Meeting: 11 June 2007 at Christchurch

Submissions received: 25 June and 9 July 2007 from Applicant  
27 June and 9 July 2007 from Respondent

Determination: 10 August 2007

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**DETERMINATION OF THE AUTHORITY**

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**Introduction**

[1] Each of the above applicants lodged his or her personal grievance separately. At the pre-investigation teleconference, the representatives concurred with the Authority's proposition that the actions be consolidated. Because the computer system now in use appears unable to accommodate consolidation, this determination carries three file numbers.

**Employment relationship problem**

[2] The applicants allege they were unjustifiably dismissed on both substantive and procedural grounds on or about 8 August 2005. Each seeks remuneration lost from that date until the date of the Authority's determination, interest at the rate of 7.5% on the lost remuneration, \$20,000 compensation for hurt and humiliation and legal costs.

[3] The respondent resists every claim of the applicants on the basis of a protest as to jurisdiction. It also challenged the applications under the 90 day rule. However, this challenge was withdrawn formally at the investigation meeting.

[4] The respondent says that none of the applicants was employed by the cited respondent but by a company registered as BCT Limited (Big Country Transport). It says that BCT, as a newly established entity, did not hold a Goods Service Licence, and it utilised the licence of Reliance Transport Limited (Reliance) to enable it to commence operations.

[5] The respondent says that to the extent only of allowing BCT to utilise its Goods Service Licence, Reliance was not a party to any employment agreement with any of the applicants.

[6] Given the protest as to jurisdiction, there is a preliminary issue to be determined. The question is simply, who was the employer of the three applicants? Was it the cited respondent, or was it BCT Limited?

**Discussion and analysis of the preliminary issue**

[7] The applicants say that BCT was only a trading name for what they say was essentially a division of Reliance.

[8] As a matter of fact, established by the documents in front of the Authority, Reliance was not the sole owner of BCT. Reliance held a 50% shareholding in BCT. Swanson Transport Limited held the balance of 50%. That indicates that BCT was a properly registered company in its own right which is confirmed by the Certificate of Incorporation dated 18 April 2005.

[9] What is also clear from the documents placed before the Authority is that BCT had its own GST number, its own PAYE records and its own aged creditor schedule. The applicants say that BCT work was invoiced through Reliance which indicates that in fact it was operating as a subsidiary company.

[10] The respondent explains the situation saying that this was simply BCT utilising the Reliance administration systems and personnel which it points out is not uncommon in associated businesses.

[11] Further, in support of their claims, the applicants point to BCT not having a Goods Service Licence but was operating using that licence held by Reliance.

[12] The respondent does not deny that this was so. It points to a meeting between Mr Darrah and Mr Peter Stevenson, the Regional Transport Adviser of the Land Transport Authority on 31 May 2005 to discuss the application on behalf of BCT. The letter from Mr Stevenson following that meeting is dated 13 June 2005 which expresses concerns that Mr Malcolm Burns was a person *in control* of the service being run out of Wyndham. The letter raises 10 issues in relation to the involvement of Mr Malcolm Burns and then sets out 24 questions it requires to be answered prior to considering the issue of a licence to BCT.

[13] It needs to be recognised that BCT faced considerable hurdles in establishing operations in Southland largely due to the perception of the local business community regarding the involvement of Mr Malcolm Burns in the new company. Two companies over which Mr Malcolm Burns had previously held control, namely Rural Haulage Limited and Forest One Limited both failed leaving a large number of significant creditors unpaid and staff without holiday pay payments.

[14] The respondent says that due to these circumstances, the Southland business community was reluctant to deal on a credit basis with BCT. As a result, many of the purchases made initially for the benefit of BCT were done using facilities arranged with local suppliers through the Reliance connection. Further, the respondent says that this was simply a pragmatic approach while establishing the BCT operations in the region.

[15] Turning to the issue of the payment of wages, Reagan Brown gave evidence to the Authority in which he confirmed that in March 2005, following the collapse of Forest One Limited, drivers' wages were paid by Nigel Stewart Limited and *this changed in April when we were then paid by BCT Limited.*

[16] In a statement provided to the Authority, Mr Nigel Stewart, who operates a business, Southland Truck and Trailer Spares, said

*Malcolm was successful with a North Island logging company Forest One, which Malcolm Burns managed from mid 2004 until Forest One went into receivership in February 2005. I then supported Malcolm whilst he became involved with Mark Darrah and assisted their start up.*

[17] In the course of the investigation meeting, it was confirmed that part of the assistance offered by Mr Stewart was the payment of staff wages.

[18] I have also considered other aspects of documents supplied in the course of the investigation. Email traffic from Malcolm Burns to Mr Darrah is signed off, Malcolm Burns BCT Limited. Further, in response to a question, Mrs Lynne Burns told the Authority she was instructed from the start to answer the office telephone *BCT*.

[19] Two other matters are also relevant. Mr Malcolm Burns oversaw the repainting of a tractor unit, a photo of which was emailed to Mr Darrah in Auckland and a copy of which was supplied to the Authority. Emblazoned on the driver's door in large letters is the logo *BCT* and underneath in a slightly smaller, but readily recognisable Letraset, is the word *Limited*. The second matter relates to the initial notification of the alleged grievances by the advocate for the applicants. That letter is addressed:

*To Mr Mark Darrah  
BCT Ltd  
P O Box 71-075  
Rosebank  
Auckland*

[20] That, it seems to me, establishes that at the time the grievances were raised, the applicants were in little doubt as to whom their employer had been. The attempts to involve Reliance and the attempt to persuade the Authority that *to serve documents on BCT was effectively serving documents on Reliance* was resorted to when the extreme financial position of BCT became apparent.

### **The determination**

[21] I am thoroughly satisfied from the evidence put before the Authority that BCT Limited is a separate entity from Reliance and not merely a trading name of Reliance.

[22] I am further satisfied that the three applicants were employed by BCT Limited, there being no evidence of any wages paid to them by Reliance.

[23] Accordingly, I uphold the respondent's protest as to jurisdiction. The Authority is unable to assist the applicants further.

**Costs**

[24] Costs are reserved. The parties are to attempt to resolve this issue between themselves. If that is not possible, Mr Ewen is to lodge and serve a copy of his memorandum 30 days from the date of issue of this determination. Mr Brown is to lodge and serve his memorandum in reply 14 days thereafter.

Paul Montgomery  
Member of the Employment Relations Authority