

**IN THE EMPLOYMENT RELATIONS AUTHORITY
WELLINGTON**

[2011] NZERA Wellington 12
5285235

BETWEEN

HAYDEN NASH
Applicant

AND

BUSINESS CAPABILITY
NEW ZEALAND SOCIETY
INCORPORATED
Respondent

Member of Authority: P R Stapp

Representatives: Ben Paradza, for the Applicant
Blair Scotland, for the Respondent

Investigation Meeting: 18 November 2010 at Wellington

Determination: 28 January 2011

DETERMINATION OF THE AUTHORITY

Employment relationship problem

[1] Mr Nash and the Wellington Regional Chamber of Commerce Limited (WRCC) signed off fixed term employment agreements prior to the Respondent, Business Capability New Zealand Society Incorporated (*Capability NZ*), coming into existence. Mr Nash had responsibility for work with what was called the Business Capability Partnership until *Capability NZ* was incorporated under the Incorporated Societies Act 1908 on 6 November 2008. The former partnership was not a legal entity in its own right and had no operational capability. It was not a partnership within the meaning of the Partnerships Act 1908.

[2] The Business Capability Partnership was collaboration between public and private sector organisations to investigate how industry and government could help New Zealand businesses to develop their capabilities through the provision of high

quality, accessible and appropriate services. This involved WRCC and New Zealand Trade and Enterprise (NZTE).

[3] The partnership's first project had been to develop a business assessment tool. This tool is an online assessment for businesses designed to improve their capability and profitability, and to assist owners to identify and realise business potential.

[4] *Capability NZ* had no employees until August 2009 when Ms Roisin King commenced employment on 3 August 2009 as the Chief Executive Officer, and it took over the running of the assessment tool. Upon her appointment, she conducted an assessment of the respondent's requirements that involved the positions, resources, finances etc. Ms King advised Mr Nash of her review on 7 August 2009 and by email dated 12 August 2009 and involving his work associated with the assessment tool.

[5] Mr Nash and *Capability NZ* have an issue about whether or not his employment, as he has claimed involved him being an employee of Business Capability New Zealand Business Society Incorporated. *Capability NZ* says it never employed him at any time. It claimed it never:

- (a) Offered him employment, either verbally or in writing;
- (b) Entered into any employment agreement(s) with him;
- (c) Paid any wages or salary to him;
- (d) Paid any taxes, ACC levies, Kiwisaver payments;
- (e) Provided him with a place of work or resources to perform his role;
- (f) Managed his health and safety or performance;
- (g) Dismissed him from employment.

[6] Mr Nash claimed that despite signing off fixed term employment agreements with the Chamber of Commerce, the incorporation of the respondent meant that WRCC would cease his employment and that the respondent would assume responsibility over it. He says this was a matter of intention and that from 6 November 2008 when *Capability NZ* came into existence, it took over responsibility for his employment. He claims that he never had an employment relationship with the WRCC. He relies on *Capability NZ* taking over, amongst other things, the

obligations, responsibilities and the role of the Business Capability Partnership that included the project that he had been working on called the business assessment tool. Mr Nash argues that WRCC was the conduit for the payment of his wages. He has relied on working with *Capability NZ's* chief executive when she assumed office that involved meeting together and exchanging notes, information, reports and emails.

[7] Mr Nash claimed that he raised with Ms King the need to have a new contract in place to formalise their employer/employee relationship. A new contract did not eventuate.

[8] On 27 August 2009, Mr Nash was advised by WRCC that the systems administrator role was to be disestablished. This was because WRCC had been advised by the respondent that it no longer wished to employ Mr Nash.

[9] Mr Nash has claimed 20 weeks' loss of wages from 3 October 2009 to 1 March 2010 (\$23,076 gross). He is also seeking \$10,000 compensation for hurt, humiliation and injury to feelings. Both parties are claiming costs.

Issues

[10] The issues for determination by the Authority are:

- (a) Whether Mr Nash was employed by New Zealand Business Capability Society Inc. His entire claim rests on this finding;
- (b) If he does not establish that New Zealand Business Capability Society Inc was his employer, then there is an issue about costs. The issues will be whether this is an issue for costs. If so, who gets a sum and how much?

Was Mr Nash employed by New Zealand Business Capability Society Inc.

[11] Ms King was employed as the Chief Executive of *Capability NZ* from 3 August 2009. Her role was to carry out the operational duties delegated to her by the Board and Council, to advance/accelerate progress in helping Small and Medium Enterprises to build their business capability through the business assessment tool and managing relationships and to conduct marketing and communications to advance the aims of *Capability NZ*. Also, her role included managing human resources functions for the employees of *Capability NZ*. This included aspects of recruitment,

employment agreements, performance reviews and day-to-day management, managing all issues and grievances raised by staff and ensuring a safe work environment.

[12] Part of the tasks of *Capability NZ* involved taking over the development and running of the online business assessment tool that had been in the Business Capability Partnership.

[13] Ms King first met Mr Nash on 22 July 2009 and requested his CV to understand what his role was because she had not been given any information in assuming her role as Chief Executive. She says that she did not represent herself and/or introduce herself to Mr Nash as his future boss.

[14] On 7 August 2009, Ms King and Mr Nash discussed his position where Ms King explained that she was reviewing *Capability NZ's* needs going forward and that she had not finished that review. She claims that when Mr Nash asked her whether an offer of employment would be forthcoming from *Capability NZ*, she explained to him that no decisions had been made. She says she discussed with him that his CV indicated that he did not appear to have the right skills or experience for a likely role in *Capability NZ* for a relationship manager job and a business administrator job. She says she could not offer him those positions and encouraged him to actively look for other jobs given that *Capability NZ* would be assuming the responsibility for the assessment tool. Ms King confirmed in an email dated 12 August 2009 that discussion (7 August) (document 27 SOP).

[15] Mr Nash's involvement with *Capability NZ* was in the running of the business assessment tool help line and raising any reports or queries with Ms King.

[16] Ms King decided that *Capability NZ* did not need a systems administrator position and she advised the WRCC (as Mr Nash's employer as she understood it), of her decision that would impact on his role.

[17] Subsequently, WRCC conducted a restructure process regarding Mr Nash's position. This resulted in the termination of his employment on the grounds of redundancy.

[18] WRCC did ask *Capability NZ* to consider whether the organisation or a contractor (Optimation) could offer Mr Nash ongoing employment. Ms King replied that that was not feasible by letter dated 16 September 2009 (document 78 SOP).

Determination

[19] I am satisfied that at no time *Capability NZ*:

- a. Offered Mr Nash employment, whether verbally or in writing;
- b. Entered into any employment agreements with Mr Nash;
- c. Paid him any wages or salary;
- d. Paid any taxes, ACC levies, Kiwi Saver payments for Mr Nash;
- e. Provided Mr Nash with a place of work or resources to perform his role as an employee and that he used facilities as a matter of convenience and which had to be paid for;
- f. Managed anything to do with his health and safety or performance;
- g. Dismissed Mr Nash.

[20] This is because the documentation clearly establishes that he had an employment relationship with WRCC supported by fixed term employment agreements and with those that relationship continued and purportedly as a permanent relationship. There were no new contracts entered into with *Capability NZ*. In addition Mr Nash has not been able to establish that Ms King and anyone else offered him employment with *Capability NZ*. Finally There were functional arrangements between the various organisations but in the absence of sufficient evidence *Capability NZ* was not acting as an agency for third parties to imply any employment relationship, especially where there were three employment agreements between Mr Nash and WRCC, the actions of WRCC in making Mr Nash redundant and the convincing evidence from Ms King that she did not offer Mr Nash employment. Indeed I hold that her evidence contradicts Mr Nash on this point.

[21] I am satisfied that Ms King's role involved her reviewing the business assessment tool that Mr Nash worked on for the Business Capability Partnership when she became the Chief Executive of *Capability NZ*, that she made a decision that

Capability NZ did not need a systems administrator position for that role upon reviewing it, and she advised the WRCC. Her evidence was consistent with not offering Mr Nash a position to work for *Capability NZ*.

[22] Next there is evidence consistent with WRCC considering and following a process in regard to Mr Nash as its employee.

[23] Finally I am satisfied that Ms King attempted to assist in the situation involving Mr Nash's loss of employment through the loss of the business assessment tool role at *Capability NZ*, but that this had nothing to do with assuming he had been employed by *Capability NZ*.

[24] Mr Nash's belief about any intention is not enough to establish he was employed by *Capability NZ*. There were various changes through the period but none of these involve proof of a change of employer, I hold. I am supported in my conclusions by the following:

- a. At the commencement the Mr Nash was employed by WRCC.
- b. The respondent did not exist at the commencement of the period.
- c. Mr Nash had individual employment agreements with WRCC.
- d. There was evidence from Ms King and the chair of *Capability NZ* that Mr Nash was never employed by *Capability NZ*. Their evidence was convincing, plausible and compelling.
- e. There were no written agreements entered into with Mr Nash where there were organisational changes. The documents he refers to are not enough to imply any change of employer, I hold.
- f. There were organisation arrangements between WRCC, the Business Partnership and *Capability NZ* that do not support Mr Nash being employed by *Capability NZ*.
- g. Mr Nash never resigned from WRCC, but later his employment was terminated by WRCC for restructuring reasons to do with his role and position.
- h. Mr Nash raised a personal grievance against WRCC.

[25] Mr Nash was employed by WRCC and not Business Capability New Zealand Society Incorporated. His claim therefore is not able to proceed any further against Business Capability New Zealand Society Incorporated, I hold.

[26] Costs are reserved as requested.

P R Stapp
Member of the Employment Relations Authority