

**IN THE EMPLOYMENT COURT
WELLINGTON REGISTRY**

**[2013] NZEmpC 101
WRC 8/13**

IN THE MATTER OF a challenge to a determination of the
 Employment Relations Authority

BETWEEN HAYDEN NASH
 Plaintiff

AND NEW ZEALAND TRADE AND
 ENTERPRISE
 First Defendant

AND WELLINGTON REGIONAL
 CHAMBER OF COMMERCE
 Second Defendant

Hearing: 31 May 2013
 (Heard at Wellington)

Appearances: plaintiff in person
 Maria Berryman, counsel for the first defendant
 Susan-Jane Davies, counsel for the second defendant

Judgment: 5 June 2013

JUDGMENT OF JUDGE A D FORD

Introduction

[1] The background to this proceeding was explained in a minute I issued to the parties on 15 May 2013. The plaintiff, Mr Hayden Nash, has commenced a non de novo challenge to a determination¹ of the Employment Relations Authority (the Authority) dated 25 March 2013. The challenge relates to that part of the determination in which the Authority struck out the first defendant, New Zealand Trade and Enterprise (NZTE), as a party to the proceeding. That step was taken on

¹ [2013] NZERA Wellington 31.

the basis that in an earlier determination² dated 28 January 2011, another Authority Member had found that the second defendant, the Wellington Regional Chamber of Commerce (WRCC), had been Mr Nash's employer.

[2] In its most recent determination, the Authority explained the nature of Mr Nash's employment relationship problem. It stated that Mr Nash claimed that he was employed by both NZTE and WRCC from 23 January 2008 until his employment was terminated for redundancy on 2 October 2009. He claims that he was unjustifiably disadvantaged and unjustifiably dismissed by both organisations.

[3] NZTE maintained that it had never been Mr Nash's employer and that it had no responsibility or obligation in relation to his employment relationship problem. It also claimed that Mr Nash was prevented by operation of s 114(6) of the Employment Relations Act 2000 (the Act) from commencing proceedings in the Authority as it was more than three years since he had first raised his personal grievance with NZTE.

[4] WRCC maintained that it was Mr Nash's sole employer during the period in question but it also claimed that Mr Nash was barred by operation of s 114(6) of the Act from bringing proceedings and asked the Authority to dismiss them.

Background

[5] From the pleadings and the Authority's original determination, it would appear that in about 2007 the two defendants, WRCC and NZTE, collaborated in what could probably be described as a rather informal joint-venture type arrangement. The joint-venture was referred to as the "Business Capability Partnership" although it was not a legal entity. The objective of the partnership was 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. The first project undertaken by the partnership was the development of a business assessment tool which was described in the Authority's determination as "an online assessment for businesses designed to improve their

² [2011] NZERA Wellington 12.

capability and profitability, and to assist owners to identify and realise business potential.”

[6] Mr Nash claims that he was employed by WRCC and NZTE jointly as a systems administrator. In his statement of claim, he referred to meetings and contacts he had in November and December 2007 with people from or representing NZTE and he alleges that in December 2007 he entered into a renewable fixed term employment agreement which was “conjointly signed” by WRCC and NZTE which took effect from 23 January 2008. Mr Nash claims that it was explained to him at the time that his employment arrangement was “temporary” pending the incorporation of a legal entity which was to assume “the responsibilities of the partnership.”

[7] In its determination of 28 January 2011, the Authority recorded that in August 2008, the Business Capability Partnership formed a separate entity, Business Capability New Zealand Society Inc, (Capability NZ) which was subsequently incorporated under the Incorporated Societies Act 1908. Capability NZ took over the development and running of the online business assessment tool that had been previously been operated by the Business Capability Partnership.

[8] In his original claim before the Authority, Mr Nash contended that from the date Capability NZ was incorporated, it took over responsibility for his employment. That was the issue before the Authority in the first proceeding. As the Authority Member expressed it in its determination dated 28 January 2011:

[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;

...

[9] Neither WRCC nor NZTE were parties to that proceeding. The sole respondent was Capability NZ. The Authority concluded that Capability NZ had never offered Mr Nash employment and had never been his employer. Without appearing to give any consideration to the role of NZTE, the Authority stated:

[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.

Discussion

[10] In the present case the parties are WRCC and NZTE. Mr Nash claims that he was employed by both organisations prior to the incorporation of Capability NZ but in its determination under challenge, the Authority struck out NZTE as a party on the basis that in the earlier determination WRCC had been found to be Mr Nash's employer.

[11] In his challenge, Mr Nash takes issue with that assertion and claims that the original Authority determination dated 28 January 2011 did not give any consideration to the role of NZTE in his employment. In his statement of claim, Mr Nash requests the Court look substantively into the issues to determine the real nature of the employment relationship and seeks an order that if NZTE is found to be a joint employer, that it be rejoined in the proceedings currently underway in the Authority against WRCC.

[12] The difficulty with the challenge before the Court is that it requires the Court to make a judgment call in respect of a matter which is clearly statute barred. Section 114(6) of the Act provides:

No action may be commenced in the Authority or the Court in relation to a personal grievance more than three years after the date on which the personal grievance was raised in accordance with this section.

[13] The plaintiff pleads that he raised a personal grievance against both NZTE and WRCC on 24 November 2009. The Authority records that the three-year time period within which proceedings could be commenced ended on 23 November 2012 but Mr Nash filed his statement of problem with the Authority outside that time frame on 28 January 2013. The Authority made reference to s 219 of the Act which enables the Court or the Authority in the exercise of its discretion to extend the time within which proceedings may be commenced.

[14] Having struck out NZTE as a party, the Authority indicated that it was prepared to consider an application by Mr Nash under s 219 to extend the time for

commencing proceedings against WRCC. The Court was informed that the Authority then suspended its investigation pending the outcome of this challenge.

[15] I earlier indicated to counsel that given the limitation issue identified in [12] above, I considered the appropriate course was for the Court to set aside the determination under challenge which means that NZTE will remain as a party while the Authority proceeds with its investigation and hears submissions on the critical preliminary issue of whether it should grant an extension of time under s 219 of the Act for Mr Nash to commence proceedings against the defendants. Only if such leave was granted in respect of NZTE would it be open to the Authority or the Court to proceed and determine whether that organisation was Mr Nash's joint employer, as claimed.

[16] Counsel for the defendants have filed memoranda submitting that the Court should deal with the limitation issue without referring it back to the Authority but I have not been persuaded that I should deal with the matter in that way and, in all events, no formal application has been filed seeking such an order. Mr Nash has filed a memorandum indicating his preference to have the matter referred back to the Authority as I have proposed.

[17] In terms of s 183(2) of the Act the determination of the Authority dated 25 March 2013 is set aside and this decision stands in its place.

[18] Costs are reserved.



A D Ford

Judge

Judgment signed at 11.30 am on 5 June 2013