

**IN THE EMPLOYMENT RELATIONS AUTHORITY  
CHRISTCHURCH**

[2011] NZERA Christchurch 16  
5275176

BETWEEN

BRIAN MULDOON  
Applicant

AND

NELSON MARLBOROUGH  
DISTRICT HEALTH BOARD  
Respondent

Member of Authority: M B Loftus

Representatives: Angela Sharma, Counsel for the Applicant  
Paul McBride, Counsel for the Respondent

Investigation Meeting: 13 August 2010 at Nelson

Submissions received: At the Investigation Meeting

Determination: 28 January 2011

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**DETERMINATION OF THE AUTHORITY**

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**Employment Relationship Problem**

[1] The applicant, Mr Brian Muldoon, claims he was unjustifiably dismissed from his employ with the respondent, Nelson Marlborough District Health Board (NMDHB) on or about 2 August 2009.

[2] The respondents' position is that Mr Muldoon could not have been dismissed given his status as a casual employee.

[3] Mr Muldoon disputes that he was a casual. He claims to have become a permanent full time employee as of February 2009 (or thereabouts) and therein lies the real issue. Ms Sharma puts it as follows:

*The issue for determination is what was the status of the applicant's employment relationship with the respondent following his removal from the full time roster on the 2<sup>nd</sup> of August 2009?*

[4] Mr McBride's version is more detailed, yet confirms there is no real dispute as to the true issue:

*The fundamental issue in this case is whether a casual employee, for a period performing work on a full time basis in the absence of the incumbent, becomes entitled as of right to ongoing permanent full time employment when the underlying role later becomes vacant, is advertised and filled.*

## **Background**

[5] There is little dispute about what occurred, though the parties disagree about the implications.

[6] Mr Muldoon is a Registered Nurse and first worked for NMDHB on a casual basis on 10 March 2008. As a casual employee Ms Muldoon was engaged on an as and when required basis though he was offered a reasonable number of engagements which were all worked within NMDHB's Mental Health Admissions Unit (MHAU).

[7] At the time MHAU had a number of staffing issues due to an employee (Ms Rowe) being absent for an extended and undefined period and a prohibition on recruitment due to a review then being undertaken for financial reasons.

[8] To assist in covering Ms Rowe's absence Mr Muldoon was offered, and accepted, what NMDHB called *casual employment on a full time basis for a [finite] period*. Mr Muldoon labels the arrangement *temporary*.

[9] The letter confirming the arrangement advises:

*... I am pleased to offer you appointment to the temporary full time position of Registered Nurse ... commencing Monday 7 July 2008...*

*The hours of work for this position are working 80 hours per fortnight.*

*This temporary change in status from casual to full time means that you will be entitled to sick leave and will accrue annual leave on all hours worked as per your collective agreement... However, upon returning back to your casual position, the annual leave that you have accrued will be paid out and the 8% holiday payment will re-commence.*

*This offer is temporary covering an employee on leave without pay. Your temporary period of employment ... is expected to end on approximately 4 January 2009 at which time this temporary contract will expire and you will return to your casual position. However, this employee may advise us that she*

*wishes to return to work earlier. If this happens you will be given 21 days notice of the termination of this temporary contract...*

[10] As events transpired Ms Rowe did not return earlier. Indeed, the opposite happened and while she briefly performed some work on a casual basis, she never returned to her full time position.

[11] On 13 January 2009 NMDHB wrote to Mr Muldoon advising:

*... I wish to advise that your temporary position is to be extended to assist in cover for the unit while positions are being reviewed and staff issues remain. With effect from Monday 5<sup>th</sup> January 2009, your temporary position will terminate on 6<sup>th</sup> February 2009 at which time your position will be reviewed. All other terms and conditions will remain the same.*

*...*

*To indicate your acceptance of the above, please sign the attached copy of this letter and return to me.*

[12] Mr Muldoon notified his acceptance on 18 January.

[13] Notwithstanding the letter of 13 January, the arrangement continued beyond the agreed termination date with Mr Muldoon remaining rostered on a full time basis until 2 August 2009.

[14] The continuation resulted from the fact that Ms Rowe had not returned and the review of the unit and its staffing was ongoing. Ms Rowe had arranged to return on 9 February (which is consistent with the letter sent to Mr Muldoon on 13 January), but on 7 February suffered an accident rendering her incapable of working. The issue of her possible return was not resolved until late May when she decided to retire.

[15] Mr Muldoon claims

*I was not informed by the NMDHB at the time or even later down the track that [the absent employee] had fractured her arm and/or that she would not be returning to work as planned.*

[16] MHAU's manager, Mr Nathan Davis, does not recollect a one on one discussion with Mr Muldoon about the issue at the time but denies that he could have been unaware of the situation. Mr Davis refers to regular staff meetings held within the unit, and that Ms Rowe's absence and the reason(s) for it was an item discussed at some of them. He notes that even if Mr Muldoon had not attended a given meeting he

would have been sent a copy of the minutes, though it should also be noted that the minutes indicate he was present on some of the occasions the issue was discussed.

[17] By the time Ms Rowe confirmed her intention to retire, the review had been concluded and that left MHAU with three vacancies. One was the vacancy created by Ms Rowe's retirement, one was the result of a promotion and the other was generated through earlier attrition with the resulting work being performed by casual staff.

[18] NMDHB states that as the vacancies were permanent positions, DHB policy required an advertising process with the successful candidates being chosen on merit and that staff, including Mr Muldoon, were advised accordingly. The initial advice was through an e-mail dated 27 May. Contained therein was advice that:

*... this will mean that all interim positions being covered by casuals will come to an end when these are filled*

[19] On 5 June staff, including Mr Muldoon, were sent a copy of the advertisement by e-mail. The issue was also raised at two staff meetings during June though the minutes indicate Mr Muldoon was absent both times. Applications were to close on 19 June.

[20] Mr Davis states that the day before applications were scheduled to close (18 June) Mr Muldoon approached him and asked about the process for short listing, interviewing and appointment. He says that Mr Muldoon expressed the view that he would be appointed given the time he had spent in the casual pool and the fact that it was "his time". Mr Nathan says he responded by reinforcing that the process was an open one and that MHAU needed to appoint the best applicants before discussing what would occur should Mr Muldoon be unsuccessful – namely that he would continue as a member of the casual pool.

[21] Mr Muldoon denies that the discussion occurred though he did accept under questioning from Mr McBride that his recollection of events was hazy and that was especially true in respect to his denial that he was unaware of Ms Rowe's continuing absence and the reasons for it.

[22] As events transpired Mr Muldoon applied for a permanent position but was advised shortly thereafter (24 June) that his application was not going to be

successful. Mr Nathan puts that down to the fact that NMDHB received sixteen high calibre applications of which six were shortlisted. Mr Muldoon was not one of the six though three were, at the time, members of MHAU's casual pool.

[23] From NMDHB's perspective the filling of the vacancies meant that its temporary arrangement with Mr Muldoon had come to an end and his name ceased to feature full time on the roster as of 2 August. He was offered some casual placements thereafter though the filling of the vacancies meant that these opportunities arose far less often than they had previously. In any event, Mr Muldoon chose to accept legal advice to refuse any offers received and so ended his relationship with NMDHB.

### **Determination**

[24] As said earlier, the parties agree that the real issue is what was Mr Muldoon's status as at the beginning of August – permanent employee or casual. If permanent then his removal from the roster would clearly constitute a dismissal. If casual, that action becomes perfectly permissible and the relationships cessation must then be attributed to Mr Muldoon's decision to refuse offers of work.

[25] Mr Muldoon's view is that as he continued to work on a full time basis in the absence of any discussion of consultation his status had altered permanently. This is due to the fact that the temporary arrangement had ended and that in the absence of any change to the pattern of work (namely full time) he could no longer be considered a casual as his hours met neither the contractual or legal definitions of the term. He therefore had to have become a full time permanent.

[26] The respondent argues that notwithstanding the rostering, Mr Muldoon had returned to his casual status in accordance with the parties agreement on 6 February and that the level of work being offered was being occasioned by the ongoing absence of the employee he had been replacing, albeit for a different reason than that that had applied up until 6 February.

[27] Having considered the evidence I conclude that neither is correct, though I concur with NMDHB's view that Mr Muldoon's status had not changed to that of

permanent full time employee. In reaching this conclusion I rely to a large extent on answers Mr Muldoon gave to questions posed by Mr McBride.

[28] Mr Muldoon accepts that the arrangement was initially temporary and that it was occasioned by Ms Rowe's absence. He accepts that upon her return he would revert to casual employment. He accepts that while the employer never discussed a continuation of the arrangement beyond 6 February, it never suggested that his status had changed or made any offers that could be construed as implying that he was now a full time permanent employee – he claims to have simply assumed that the change occurred once the date specified in the letter of 13 January had passed.

[29] Unfortunately for Mr Muldoon various answers he gave undermined the validity of that assumption. He accepted that had Ms Rowe chosen to return after the specified date of 6 February he would have accepted the situation and returned to the casual pool. In other words he accepted that the arrangement and its rationale continued and that that could occur is confirmed to some extent by the words of the two letters. Both infer an element of flexibility in respect to the date upon which the arrangement would end through the use of word such as *approximately* (initial letter of appointment) and *your position will be reviewed* (letter of 13 January).

[30] Did, therefore, Ms Rowe's decision to retire change the situation? The answer must be no. Aside from the fact that Mr Muldoon does not claim the change of status occurred at that point he accepts, absolutely, that it was not only prudent for NMDHB to advertise all full-time permanent positions, he felt it was obliged to do so.

[31] That raises the real nature of Mr Muldoon's complaint. He is dissatisfied with NMDHB's decision not to appoint him to one of the vacancies and again confirmed that in answers given to Mr McBride's questions. Unfortunately for Mr Muldoon it is well established that non-appointment can not, in the absence of a clear contractual right or promise of appointment, found a personal grievance (see for example *Southern Local Government Officers' Union v Timaru District Council* [1991] 2 ERNZ 932 or *VUW v Haddon* [1996] 1 ERNZ 139 (CA)).

[32] For the reasons above I conclude that the temporary arrangement willingly entered into by Mr Muldoon continued. He had not become a permanent employee.

He rightly reverted to casual status when the need giving rise to the arrangement ceased and was not, therefore, dismissed. He does not, therefore, have a personal grievance and his applications must fail.

### **Costs**

[33] I reserve the issue of costs. I ask that the parties try to resolve the issue but failing that, and in the event NMDHB wishes to seek costs, it is required to lodge and serve an application within 28 days of this determination. The applicant is to file any response within 14 days of the respondent's application.

Mike Loftus  
Member of the Employment Relations Authority