IN THE EMPLOYMENT COURT
CHRISTCHURCH

[2011] NZEmpC 103
CRC 7/11

IN THE MATTER OF	a challenge to a determination of the Employment Relations Authority
BETWEEN	BRIAN MULDOON Plaintiff
AND	NELSON MARLBOROUGH DISTRICT HEALTH BOARD Defendant

Hearing: 18 and 19 July 2011
(Heard at Nelson)

Counsel: Anjela Sharma, counsel for plaintiff
Bruce Corkill QC and Guido Ballara, counsel for defendant

Judgment: 10 August 2011

JUDGMENT OF CHIEF JUDGE GL COLGAN

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[1] Brian Muldoon says he was dismissed unjustifiably from his employment as a nurse with Nelson Marlborough District Health Board in early August 2009. The Board says Mr Muldoon was not dismissed by it; rather, it says he was a casual employee who did not seek re-engagement as such by the Board as he was entitled to do. The Employment Relations Authority, in its determination[1] issued on 28 January 2011, found for the Board and dismissed Mr Muldoon's grievance. He has elected to challenge that determination by hearing de novo.

[2] The relevant facts are largely uncontroversial. Although both parties tendered extensive evidence about related events (such as Mr Muldoon's applications for permanent positions with the Board and the reasons for his non-appointment), they are not material to the Court's determination of the essential

[1] [2011] NZERA Christchurch 16.

issues in the case. Nor, too, is the extensive evidence led by the Board about whether Mr Muldoon was aware informally and anecdotally about both the employment status of another employee and of the Board's view that he was a casual employee. Mr Muldoon's employment status at pertinent times is a matter of law applied to the relevant facts and is not what either party now says he or it may have believed the position to have been. Frequent repetition by the Board of its view of Mr Muldoon's employment status does not cause that status to change in law or assist the Court to determine it.

[3] Mr Muldoon is a registered nurse and first worked for the Board as a casual employee on 10 March 2008. This was on an "as and when required basis" and his nursing work was undertaken within the Board's Mental Health Admissions Unit (MHAU).

Relevant contractual provisions

[4] Mr Muldoon's employment was subject to the provisions of the then applicable New Zealand (except Auckland Region) District Health Boards/PSA Mental Health & Public Health Nursing Multi-Employer Collective Agreement 01 November 2007 to 31 October 2010.

[5] Clause 3 of the collective agreement defined "Casual employee" as meaning:

> … an employee who has no set hours or days of work and who is normally asked to work as and when required. Casual agreements shall not be used to deny staff security of employment. The employer reserves the right however, to employ casual employees where necessary to meet the demands of service delivery.

[6] Clause 3 also defined "Fixed term employee" as follows:

> **Fixed term employee** as defined by Sec. 66 of the Employment Relations Act 2000 means a full time or part time employee who is employed for a specific limited term for a specified project or situation or, for example, to replace an employee on parental leave or long term accident or sickness. There is no expectation of ongoing employment. Fixed-term agreements shall not be used to deny staff security of employment.

[7] Each of the definitions of "Casual employee" and "Fixed term employee" contains a guide to its interpretation and application. Both provide that the relevant employment status "… shall not be used to deny staff security of employment." That means that district health boards must not engage staff either as casual or fixed term employees other than for bona fide purposes as contemplated by the employment agreement. In the case of casuals, the common law of employment and, in the case of fixed term employees, s 66 of the Employment Relations Act 2000 limit district health boards as employers from misusing casual or temporary staffing for the inherent advantages of those arrangements to employers and corresponding disadvantages to employees. This constraint is intended to encourage boards to engage permanent employees while still allowing for appropriate use of casual and temporary staff. In the case of nurses, the evidence establishes that there is at least an informal career structure with the defendant by which nurses wishing to be appointed to permanent positions can progress from casual and/or temporary assignments to full time or part time permanent status, albeit on merit rather than simply by seniority.

[8] So, in the case of casual nurses, the definition of "Casual employee" denies the Board the ability to engage a nurse who works set hours or days of work, or otherwise than as and when required, on what I would describe as an ongoing casual basis. To do so would be to deny such staff security of employment.

[9] In the case of fixed term employees, to engage nurses (or other affected staff) on a series of temporary or fixed term agreements otherwise than for a specified project or situation, or without complying with s 66 of the Act, would amount to a denial of security of employment to such staff.

[10] In the case of a "Casual employee", the definition also reserves to the employer the entitlement to employ casuals "where necessary to meet the demands of service delivery." That focuses on patient or user needs and permits the employer to use casual staff otherwise than on set hours or days of work, and as and when required, to provide for sometimes unforeseen service delivery demands. Although not applicable to this case, which deals with mental health services, I imagine this

proviso would be applicable, for example, in the case of an epidemic requiring the engagement of more staff for unforeseen shift needs.

[11] The definition of "Fixed term employee" refers expressly to the situation that applied here, "to replace an employee on … long term accident or sickness." The collective agreement contemplates that fixed term engagements are the appropriate way to deal with such events rather than bringing in casual employees on a more than occasional basis.

[12] "Full time employee" is defined as meaning "… an employee who works not less than the ordinary or normal working hours set under the hours of work clause in this Agreement."

[13] "Part time employee" is defined as meaning:

> … an employee, other than a casual employee, employed on a permanent basis but works less than the ordinary or normal hours set out in the hours of work clause. Any wages and benefits e.g. leave; will be pro rata according to the hours worked unless specifically stated otherwise in this Agreement.

[14] Finally, "Permanent employee" is defined as meaning "an employee who is employed for an indefinite term; that is, an employee who is not employed on a temporary or casual basis." So a permanent employee is defined by a combination of the absence of a definition of the temporal term of employment and is a catch-all in the sense of encompassing employees who are neither temporary nor casual employees.

[15] The collective agreement is otherwise unhelpful in the sense that, while it defines the foregoing terms for its purposes (that included Mr Muldoon's employment), it does not refer again to those of them at issue in this case in a substantive way. That is with one exception at cl 21.0 ("ANNUAL LEAVE"). This provides relevantly (although decision of this case does not turn on this):

> 21.1 Casual employees shall be paid 8% of gross taxable earnings in lieu of annual leave to be added to the salary paid for each engagement. No other parts of this clause apply to casual staff.
>
> 21.2 Employees other than casuals, shall be entitled to 4 weeks annual leave paid in accordance with the Holidays Act 2003 …

[16] So, although a casual or fixed term employee is defined, there is, apart from cl 21, no other reference in the instrument to the terms and conditions of employment of such an employee. These must be ascertained from individual employment agreements that were not in conflict with other provisions in the collective or otherwise unlawful. Mr Muldoon's employment agreement was constituted by a series of letters written to him by the Board (and countersigned by Mr Muldoon) on each occasion when it wished to appoint him to a role or to vary the terms of that appointment.

Relevant facts

[17] For the first period of his casual employment from 10 March to 7 July 2008, Mr Muldoon worked for the Board on between three and six days per week although, over four weeks of that period, he worked two days or less. There was a regular pattern of engagement of Mr Muldoon although the duration of those engagements varied. There is no dispute (and I agree) that he was a casual employee for this period.

[18] Because of a prospective extended absence from work of another nurse (to whom I will refer as "R"), Mr Muldoon was offered and accepted what was described by the Board as casual employment on a full time basis for a finite period. Mr Muldoon's letter of engagement in this role from the Board dated 2 July 2008 describes his appointment as being "to the temporary full time position of Registered Nurse … commencing on Monday 7 July 2008." The fortnightly working hours of that engagement were 80 and it was acknowledged by the Board as being a "temporary change in status from casual to full-time" meaning that he would be entitled to sick leave and would accrue annual leave under the collective agreement. The offer (which was accepted expressly by Mr Muldoon) continued:

> 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.

[19] The letter alerted Mr Muldoon to the possibility of R's earlier return to work in which case it said he would "be given 21 days notice of the termination of this temporary contract."

[20] Initially, however, from mid-July to mid-October 2008, Mr Muldoon was asked by the Board to work a three month block on night duty to cover for another employee (not R) who was absent on sick leave. After completing that three month block of night duty in mid-October 2008, Mr Muldoon went onto the Board's rotating duty roster which involved a range of afternoon, night and day shifts. These were rostered and posted in advance in the same way as was the work of permanent employee nurses. Although R had been working a 64 hour fortnight in the MHAU, Mr Muldoon worked an 80 hour fortnight there as her replacement.

[21] R did not return early or indeed ever return to work for the Board as a nurse except for some occasional part time work that she performed before retiring in late 2009.

[22] On 13 January 2009, that is about nine days after the anticipated approximate expiry of Mr Muldoon's full time work, the Board wrote to him advising:

> … 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 5th January 2009, your temporary position will terminate on 6th February 2009 at which time this position will be reviewed.
>
> All other terms and conditions of employment will remain the same.

[23] Mr Muldoon accepted this variation to his employment agreement, as he was asked to, on 18 January 2009.

[24] Notwithstanding the Board's intention set out in its letter of 13 January 2009, the previous arrangement of full time temporary employment continued beyond 6 February 2009 and in fact until 1 August 2009. No review of his position was undertaken by the Board, at least of which he was advised, and no new temporary employment agreement was put to Mr Muldoon by the Board for the period after 6 February 2009.

[25] On 7 February 2009, R suffered an accident which made her incapable of working. The issue of her not returning to work was not resolved until late May when she determined to retire. Mr Muldoon was informed of these events affecting the other nurse, at least anecdotally, rather than formally.

[26] In February 2009, following a period of full time work including substantial night shift work over the previous six months or so, Mr Muldoon applied to take annual leave as he was entitled to under his fixed term agreement. Although the Board claims that this was an indication by a casual employee of his unavailability to work for that period, I have concluded that this was not the nature of his absence. Nor was the Board's change of holiday pay arrangements covering that period for Mr Muldoon, lawful or effective. Whilst, during the period of the initial two fixed term agreements (to 6 February 2009), Mr Muldoon's remuneration did not include pay-as-you-go holiday pay, the Board unilaterally reverted to this casual employee arrangement at some specified time after 6 February 2009 so that for the period of his annual leave shortly thereafter, Mr Muldoon was not paid for his holiday. He has not claimed for this payment as he would have been entitled to and so it is unnecessary to do more than record that the Board's unilateral change of holiday pay provisions was unlawful but does not affect the outcome of this case.

[27] By late May 2009 the Board had concluded its review affecting employment in the MHAU. The result was that there were either three or at least 2.5 full time equivalent (fte) nursing vacancies in that department, one of which was created by R's retirement. The Board took the view that because these were vacancies for "permanent positions" they were to be advertised with successful candidates being chosen on merit. Mr Muldoon was advised accordingly, initially by email of 27 May 2009, which included the following statement: "… this will mean that all interim positions being covered by casuals will come to an end when these are filled."

[28] On 5 June 2009, Mr Muldoon and other staff were sent a copy of the advertisement for 3 or 2.5 fte positions by email. He applied for one of the positions but was advised on 24 June 2009 that his application was unsuccessful. Mr Muldoon continued to work as he had previously for the balance of June and throughout July 2009.

[29] After 1 August 2009, Mr Muldoon's name ceased to feature in nursing rosters and although he was offered some casual placements thereafter, these opportunities arose much less often than previously. This was because some of the nursing work that had previously been done by casuals was undertaken by the newly augmented permanent staff. Upon legal advice and because he had other nursing work elsewhere, Mr Muldoon chose to decline those offers of casual assignments and his employment relationship(s) with the Board did not resume.

The Authority's determination

[30] The Authority identified the real issue in the case, as being whether, at the beginning of August 2009 Mr Muldoon, was either a permanent employee or casual. It concluded that if he had then been a casual, "that action [his removal from the rosters] becomes perfectly permissible and the [relationship's] cessation must then be attributed to Mr Muldoon's decision to refuse offers of work."[2]

[31] The Authority determined that Mr Muldoon's status had not changed from casual to "permanent full time employee".[3] It concluded that, as from the start of the period of R's absence, the arrangement between the parties was "initially temporary"[4] and that upon her return to work Mr Muldoon would revert to casual employment. The Authority found it significant that the employer had never suggested that Mr Muldoon's status had changed or made any offers that could be construed as implying that he was then a full time permanent employee. The Authority found Mr Muldoon simply assumed that a change of status had occurred once the date specified in the letter of 13 January 2009 had passed.

[32] Acting on Mr Muldoon's concession in evidence that, had his indisposed colleague returned to work after 6 February 2009, he would have accepted the situation and returned to the casual pool, the Authority found that he had accepted the continuation of a casual arrangement and the reasons for it. The Authority then focused on the colleague's decision to retire and whether that changed the situation. It found that it did not.

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[2] At [24].
[3] At [27].
[4] At [28].

[33] The Authority determined that Mr Muldoon's real complaint was that he had not been appointed to one of the vacancies but that this, in the absence of a clear contractual right or promise of employment, could not found a personal grievance. The Authority summarised its decision as follows at paragraph 32 of its determination:

> 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.

[34] Although the volume of cases that Authority Members must hear and decide is substantial and unremitting, so that not every issue can always be covered in a determination, it is surprising that the Authority made no reference in its reasoning either to the collective agreement's definitions of work, or to s 66 of the Act governing fixed term employment, both of which are at the heart of this case.

Fixed term employment – the statute

[35] Section 66 of the Act provides (with passages pertinent to this case underlined):

> **66 Fixed term employment**
>
> (1) An employee and an employer may agree that the employment of the employee will end—
> (a) at the close of a specified date or period; or
> (b) on the occurrence of a specified event; or
> (c) at the conclusion of a specified project.
>
> (2) Before an employee and employer agree that the employment of the employee will end in a way specified in subsection (1), the employer must—
> (a) have genuine reasons based on reasonable grounds for specifying that the employment of the employee is to end in that way; and
> (b) advise the employee of when or how his or her employment will end and the reasons for his or her employment ending in that way.
>
> (3) The following reasons are not genuine reasons for the purposes of subsection (2)(a):
> (a) to exclude or limit the rights of the employee under this Act:
> (b) to establish the suitability of the employee for permanent employment.

(c) to exclude or limit the rights of an employee under the Holidays Act 2003.

(4) If an employee and an employer agree that the employment of the employee will end in a way specified in subsection (1), the employee's employment agreement must state in writing—

(a) the way in which the employment will end; and
(b) the reasons for ending the employment in that way.

(5) Failure to comply with subsection (4), including failure to comply because the reasons for ending the employment are not genuine reasons based on reasonable grounds, does not affect the validity of the employment agreement between the employee and the employer.

(6) However, if the employer does not comply with subsection (4), the employer may not rely on any term agreed under subsection (1)—
(a) to end the employee's employment if the employee elects, at any time, to treat that term as ineffective; or
(b) as having been effective to end the employee's employment, if the former employee elects to treat that term as ineffective.

The intersection of casual and fixed term employment

[36] Although not the case in which to determine this important question, if only because it was not so argued, this case does highlight some difficult questions about the distinctions between casual and fixed term employment and indeed what those are. Case law has yet to tackle the not altogether easy question of where casual and fixed term employment intersect. That will always depend upon the parties' definitions of these employment relationships where, as here, they have been provided for expressly. Therefore I will only venture comment on these questions in the context of this case. It does not depend for its decision on them.

[37] The difficulty is that both casual and fixed term employment are 'temporary' employment in the sense of being an engagement by the employer of the employee for a specified period at the conclusion of which that employment will end in a way that is agreed in advance, does not amount to a dismissal of the employee and does not entitle the employee to unjustified dismissal personal grievance rights. Given that temporariness is a common feature of both types of employment, their distinguishing characteristics include both the length of the arrangement but, most importantly, the absence or presence of predictability and regularity. Casual employment is characterised by irregularity of engagements and the shortness of their limited durations, in this case being potentially as short as a shift or a few

shifts. That is to be contrasted with fixed term employment which has set hours and days of work (albeit for a finite period) so that the employee and the employer may predict and rely upon when the employee will be at work.

[38] The other difference is that, unlike casual employment, fixed term employment must be related to a specified project or situation such as the replacement of an employee on parental leave or long term accident or sickness. That said, however, some short casual engagements are to cover short and unexpected periods of sickness and like absences from work.

[39] Although for fixed term employment, as provided in cl 3 of the collective agreement, there can be no expectation of ongoing employment beyond the conclusion of the specified project or situation, there is no such requirement for a specified project or situation for casual employment. The employer need not justify to the employee why it needs him or her for the proposed work assignment.

[40] Another difference between these types of temporary work lies in the legitimate expectation of certainty of work. In the case of a fixed term arrangement, the employer can have an expectation of work by the employee for the whole of the contracted period and the employee can likewise have that expectation with the consequences of certainty of income, unavailability for social activities during work time, and the like. In the case of casual engagement, that certainty is much more limited temporally. So although, for example, if an employee nurse is offered work on a shift and accepts, the employer can expect that the nurse will work that shift and the nurse can expect to retain the remuneration and other benefits of it, that is the end of those expectations unless and until there is express agreement on a further engagement. Neither party can have any additional legitimate expectation of offer or acceptance of such further engagement.

[41] It is clear from the definition of fixed term employment in the collective agreement and in s 66 of the Act, that a contract of employment is created between the parties for the duration of the fixed term. At its conclusion, unless other express arrangements are made between the parties for ongoing employment, the employment relationship between them ends. That is not so in relation to casual

employment, however. That is because, in addition to each casual assignment being, in law, a separate contract, there is nevertheless an ongoing relationship between the employer and those persons in its pool of available casuals. These are people who agree to be on a list of nurses able to be contacted by the Board for the purpose of making offers of casual engagement. Such persons will also, as a matter of commonsense, continue to retain some of the obvious indicia of an employment relationship whilst a member of the pool but not engaged for a casual assignment.

[42] In this case there was reference to Mr Muldoon's retention of a set of keys to the MHAU which he would use as and when he was at work as a casual, but would otherwise keep at home. Although the evidence did not touch on this, there are others of such persons in a pool retaining their work uniforms rather than handing such items back at the end of each assignment (which may be as short as one shift) and being reissued with them at the start of the next. Similar such arrangements would doubtlessly be made for fixed-term, part time and full time (the latter both permanent) employees.

[43] The Act identifies employment relationships but does not define them. The interpretation of "employment relationship" set out in s 5 of the Act is "any of the employment relationships specified in section 4(2)". These include, at s 4(2)(a) the employment relationship between "an employer and an employee employed by the employer". That definition is not particularly helpful in the case of a casual employee because "employee" is defined in s 6(1) as meaning "any person of any age employed by an employer to do any work for hire or reward under a contract of service … and … a person intending to work". Section 5 defines "person intending to work" as meaning "a person who has been offered, and accepted, work as an employee". However, in the case of a casual employee and, in this case, the difficulty is with the person's status before an offer of casual engagement is made and accepted. So if, for example, Mr Muldoon had been offered one night nursing shift of eight hours in a week but not offered any other work for the following week, he would, by statutory definition, only have been an employee of the Board for the period of that eight hour shift but not otherwise during that period of two weeks. That would be so despite the fact that he may have been telephoned several times and asked to work but declined, that he continued to hold a set of keys to a secure

unit, and even that he might not have worked as a nurse for any other employer during that period.

Decision

[44] Neither the Authority's determination nor, initially at least, the cases for the parties, addressed the existence of fixed term periods of full time employment and the effect of s 66 of the Act, as well as the collective agreement's definitions. This is at the heart of the case and counsel addressed the issue having been alerted to it by me during the hearing.

[45] On 7 July 2008, Mr Muldoon's employment by the Board ceased to be casual because he became a full time employee as defined in the collective agreement. He then became a fixed term employee as well, also as defined in both the collective agreement and under s 66 of the Act.

[46] Because it was not argued otherwise by Mr Muldoon, I assume that the statutory prerequisites for fixed term employment under s 66 were satisfied by the Board. The requirement under s 66(1)(a) that there was agreement that the employment would end at the close of a specified date or period, was met by the parties' express agreement that his temporary period of employment was expected to end on approximately 4 January 2009. The requirement under s 66(2)(a) that the Board had genuine reasons based on reasonable grounds for specifying that the employment of the employee was to end in that way was met because a permanent employee, R, was to be on long-term leave and the Board needed a full time employee to cover for her but also in the expectation that she might later return to work. The requirement under s 66(2)(b) that the Board would advise Mr Muldoon of when or how his employment would end and the reasons for it ending in that way was met by its advice to him in its letter of 4 July 2008. There is no allegation by Mr Muldoon that the Board's reasons for engaging him for a fixed term were not genuine reasons. Also, I am prepared to accept, for the purpose of this case, that s 66(4) was complied with in July 2008 in that the parties agreed in writing the way in which the employment would end and the reasons for it ending in that way.

[47] So, too, do I accept that the variation to, or extension of, Mr Muldoon's fixed term employment for the period from the expiry of the first fixed term (with effect from 5 January 2009) to 6 February 2009, complied with the requirements of s 66.

[48] The difficulties for the defendant come with the expiry of that second fixed term on 6 February 2009 and the failure by the Board to address the requirements of s 66 if it wished to engage Mr Muldoon for a further fixed term. That was no mere formality which the defendant omitted because the Board's advice to Mr Muldoon on 13 January 2009 was that not only would his temporary position cease on 6 February 2009 but at that time his "position would be reviewed". That was a new factor which had not been a feature of the two previous periods of fixed term employment. Nor was this a mere formality because of the Act's stringent requirements on employers engaging fixed term employees which the defendant failed to meet.

[49] In these circumstances, s 66(6) came into play. This meant that the Board's non-compliance with subss (1), (2) and especially (4) meant that it was not entitled to rely upon the expiry provisions of the previous fixed term agreements to justify ending Mr Muldoon's employment.

[50] Because of the Board's non-compliance with s 66 in respect of Mr Muldoon's employment for the period from 6 February to the end of July 2009, his employment was not fixed term employment as defined by the collective agreement. Nor was it casual employment as that term was also defined. By default, therefore, for that period and, in particular, at its end, Mr Muldoon's employment was "permanent employment" as defined by the collective agreement.

[51] It was not a matter, as the Authority determined, of whether the parties' intentions about, or views of, their relationship had changed but, rather, whether the nature of Mr Muldoon's employment had altered by operation of law so that it was no longer casual employment (as the Board contended) justifying its termination.

[52] I have concluded that, at the relevant time, Mr Muldoon was a permanent employee. As such, his employment ceased by unilateral decision of the Board and

so was a dismissal. In these circumstances Mr Corkill for the Board conceded, fairly and realistically, that the Board could not justify its dismissal of Mr Muldoon in terms of s 103A of the Act and so it follows that the plaintiff was dismissed unjustifiably.

Remedies

[53] Mr Muldoon now works for another mental health care provider or providers and does not seek reinstatement as a nurse with the Board. The remedies he seeks are, therefore, compensation for loss of remuneration from 1 August 2009 to 18 July 2011 (the first day of the trial) and distress compensation under s 123(1)(c)(i) of the Act.

[54] Responsibly and helpfully, the Board does not disagree with Mr Muldoon's arithmetic calculations of what he would have earned with it had he continued to be a full time permanent nurse from 1 August 2009. Rather, it says that he failed or refused to mitigate his losses by declining further casual work assignments with the Board and, eventually, by asking that he be removed from its casual pool so that he did not receive further offers of casual engagement.

[55] The evidence establishes that the Board's appointments to its permanent nursing staff in mid-2009 reduced the amount of casual nursing work available. Mr Muldoon has established his earnings from other nursing work undertaken by him during the relevant period. Nursing being shift work, I consider it would have been difficult for Mr Muldoon to have accepted assignments from multiple employers at the same time. The coincidence of shifts falling in close proximity giving inadequate time for rest and recreation between shifts with each employer probably meant that Mr Muldoon had to elect to either accept casual work with the Board but not with other employers or vice versa. Given the downturn in the Board's casual needs from mid-2009, I do not think Mr Muldoon can be criticised for having decided not to accept a reduced number of casual assignments from the Board but electing instead to take part time work with other providers. I accept that Mr Muldoon may have told Board representatives who rang him to offer him casual assignments that he was declining on the advice of his lawyer although he now denies this. But it does not

really matter what excuse Mr Muldoon gave at the time for declining offers of casual work by the Board. I find he was justified in turning down its offers of casual shifts and that he did not thereby fail to mitigate his loss because he took other part time and probably longer and more remunerative work with other providers. There was, nevertheless, a significant shortfall between what Mr Muldoon could obtain with those other providers and what his previous full time nursing salary provided.

[56] Next, counsel for the Board submitted that if Mr Muldoon were allowed two years' loss of remuneration, this would be more than both the usual duration of income loss compensated for in New Zealand and perhaps even the most substantial award ever made when considered by the duration of the loss. In these circumstances, counsel submitted that the remuneration loss claimed should not be allowed.

[57] There is nothing objectionable in principle to a properly established remuneration loss arising from unjustified dismissal being awarded subject to the usual rules of mitigation and deduction of other earnings received during the period. The legislation (s 128) allows this. Although the starting point for lost remuneration would usually be three months' remuneration or the actual amount lost, whichever is the lesser, the statute also permits the Court to award greater sums for longer periods in appropriate cases.

[58] Where a claim to remuneration loss over a lengthy period following unjustified dismissal may become more tenuous, however, is where the Court must assess the probability of the employee continuing to receive that remuneration over that lengthy period.[5] If Mr Muldoon had not been dismissed unjustifiably at the end of July 2009, would he probably have continued to work as a full time nurse for the Board and, if so, for how long that would probably have lasted? The longer the period of the claim, the more difficult and speculative become those parts of it more removed in time from the dismissal. This consideration was not really addressed by counsel on the presentation of their cases and the Court is therefore left to make the best it can from peripheral evidence about Mr Muldoon's employment history as a guide to its potential future.

[5] See *Telecom New Zealand Ltd v Nutter* [2004] 1 ERNZ 315.

[59] First, it is clear that Mr Muldoon was intent on obtaining full time nursing employment with the Board. He applied for such positions intending to take them up if he was appointed but he was unsuccessful.

[60] Next, Mr Muldoon's working history after his dismissal establishes a pattern of gradual resumption of almost full time work in his field as might have been expected with a new employer or employers.

[61] Next, although Mr Muldoon had worked for the Board for some period as a casual, I consider this was in an attempt to improve his career prospects to part time and full time employment as a permanent employee rather than as a lifestyle choice to only work limited hours. Mr Muldoon's family circumstances were such that it was at least desirable, if not essential, that he earn a full time salary as a nurse.

[62] Finally, there was not such criticism of Mr Muldoon's performance of his job that there is any suggestion that his job may have been in jeopardy for those reasons. Although the Board assessed Mr Muldoon as being only a satisfactory employee, he brought particular value to it as a male psychiatric nurse prepared to work night shifts. It is, after all, significant that the Board offered him temporary employment to cover R's absence and then continued to provide him with ongoing employment for almost six months more without any suggestion that he was not up to the job.

[63] In all these circumstances, I think it is probable that if he had not been dismissed unjustifiably, Mr Muldoon would have continued to work as a permanent full time psychiatric nurse for the defendant on a long-term basis. I should, however, allow for the possibility, increasing with time, that such an employment relationship would not have endured. The fairest way to do so in the absence of evidence that might have allowed a more principled and mathematical calculation of those exigencies, is to limit Mr Muldoon's claim to lost income to a period of 18 months after his dismissal. He may have worked full time for the Board longer than that but he may have either resigned or made other working arrangements with it before the end of that period. Had he not been dismissed unjustifiably, Mr Muldoon might well have still been working for the Board at the date of the trial although the claim was limited to that date in any event.

[64] I have therefore allowed Mr Muldoon compensation for remuneration loss for the period of 18 months from 1 August 2009 to 1 February 2011.

[65] Although Mr Muldoon's evidence about his remuneration loss was carefully calculated, explained in detail and its accuracy unchallenged by the defendant, it nevertheless assumed an end date of 18 July 2011 which is later than the date I have decided it should conclude. In these circumstances, I propose to set out my re-calculation of Mr Muldoon's figures but reserve leave to the parties for the period of two weeks after the date of this judgment to advise the Registrar if either disagrees with my arithmetic calculations.

[66] I assess Mr Muldoon's remuneration loss to 1 February 2011 as being the sum of $19,584.33 on the following basis. Adopting the plaintiff's figures for different periods, depending upon the annual salary payable for those periods under the relevant collective agreements, and including a shift allowance, Mr Muldoon would have earned the sum of $83,863.50 had he not been dismissed unjustifiably. In the same period, however, Mr Muldoon earned a total of $64,279.17 with two other employers ($7,167 with Wood Lifecare and $57,112.17 with Whareama Limited). I have arrived at the compensation figure of $19,584.33 by deducting the sum of $64,279.17 of alternative earnings from the figure above of $83,863.50.

[67] As to compensation under s 123(1)(c)(i) of the Act, I have concluded that a modest award is both established on the evidence of loss and is appropriate in the general circumstances of what was, until the final six months, clearly fixed term employment and, before that, casual engagement. As Mr Muldoon conceded readily, if his fixed terms had concluded in early February as he had agreed with the Board, he could not have complained of dismissal, let alone unjustified dismissal, and the evidence establishes that he would have been treated thereafter as part of the casual pool of nurses and received offers of work from time to time. Up to that point, Mr Muldoon had no legitimate expectation of ongoing work for the loss of which he should be compensated. Any loss under this head must relate, therefore, to the expectation of ongoing employment that was allowed to build up during the period from early February to 1 August 2009 and of which he was deprived by his

unjustified dismissal at that time. In these circumstances, I consider that a just award of compensation under this section is the sum of $4,000.

[68] The formal result of the challenge is that the Authority's determinations (both substantive and on costs) are set aside and Mr Muldoon is declared to have been dismissed unjustifiably and to be entitled to the foregoing remedies.

[69] Mr Muldoon is entitled to costs in both the Authority and this Court and if the amount of these cannot be agreed between the parties within one month of the date of this judgment, he is entitled to apply by memorandum with the defendant having the period of one month to respond by memorandum.

GL Colgan
Chief Judge

Judgment signed at 3 pm on Wednesday 10 August 2011