

**IN THE EMPLOYMENT RELATIONS AUTHORITY
WELLINGTON**

[2015] NZERA Wellington 111
5464004

BETWEEN DAVID SAVAGE
 Applicant

AND CAPITAL & COAST DISTRICT
 HEALTH BOARD
 Respondent

Member of Authority: Trish MacKinnon

Representatives: Geoff O’Sullivan, Counsel for Applicant
 Hamish Kynaston and Jen Howes, Counsel for
 Respondent

Investigation Meeting: On the papers

Submissions Received: 10 and 24 July 2015 in writing and 7 August 2015 orally
 for the Applicant
 17 July 2015 in writing and 7 August 2015 orally for the
 Respondent

Determination: 13 November 2015

DETERMINATION OF THE AUTHORITY

Employment relationship problem

[1] David Savage is a registered nurse (RN) who claims to be a permanent full time employee of Capital & Coast District Health Board. He says his employer has treated him as a casual employee and has rostered him off work since 27 May 2014. Mr Savage claims this is not in compliance with the terms, both express and implied, of his employment agreement.

[2] Capital & Coast District Health Board (CCDHB) says Mr Savage is, by his own choice, a casual employee in its casual pool. It says it is under no obligation to offer him work and has chosen not to do so since 27 May 2014.

[3] In the course of a telephone conference with the parties, it was decided the matter of Mr Savage's employment status would be determined on the papers by way of affidavit evidence and submissions. If it is determined that Mr Savage is a permanent employee, the Authority will investigate his application for a compliance order under s. 137(2) of the Employment Relations Act 2000 (the Act). The order he seeks would restore Mr Savage to the roster at the same number of hours he was previously working and would require CCDHB to pay him the wages he has lost in the intervening period.

[4] Mr Savage provided two affidavits and accompanying documents to the Authority. CCDHB provided an affidavit from Mr Lewis Cate, the Nurse Coordinator for the Mental Health, Addiction & Intellectual Disability Services (MHAIDS) Casual Resource. Mr Cate also provided documentation relevant to Mr Savage's employment.

[5] Mr O'Sullivan and Mr Kynaston provided comprehensive written submissions and presented oral submissions at a short meeting convened specifically for that purpose. While I have considered all of their submissions, I have not referred to them all in this determination.

Background

[6] Mr Savage has worked for CCDHB in different capacities since being appointed as a permanent RN in August 2006. He resigned from that employment effective from 11 January 2009, citing family reasons for wanting flexibility around shifts. At that time, and at his request, Mr Savage was appointed to CCDHB's casual pool commencing 14 January 2009.

[7] He applied for, and was appointed to, a fixed term RN role with CCDHB on 27 May 2010. That role was due to expire in August 2010. However, Mr Savage was offered, and accepted, a permanent RN role in July 2010. On 20 January 2011 he notified his intention to give one month's notice if his current application for a position in the DHB's casual pool was successful.

[8] His application succeeded and CCDHB formally offered Mr Savage the position of casual mental health staff nurse by letter dated 7 February 2011. He commenced employment in that capacity on 21 February 2011. The reason Mr

Savage gave for seeking the change was once again related to his family and his wish for flexibility in the shifts he worked.

[9] Mr Savage's terms of employment were governed by the letter of offer of employment that he signed on 21 February 2011, and the New Zealand (except Auckland Region) District Health Boards/PSA Mental Health and Public Health Nursing Multi-Employer Collective Agreement (the MECA)¹.

[10] He was frequently offered work by CCDHB between 21 February 2011 and 25 May 2014. On 27 May 2014 CCDHB wrote to inform him it would not be rostering him for duty until further notice because of a staff complaint against him which was the subject of a Police inquiry. He was paid for, but not required to work, four shifts for which he had already been rostered.

Terminology from the MECA

[11] Clause 3 of the MECA contains definitions of various terms used in the document. The definition of a casual employee is:

"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."

[12] The definition of a permanent employee is:

"an employee who is employed for an indefinite term; that is, an employee who is not employed on a temporary or casual basis".

[13] A part time employee is defined as one who:

"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."

¹ By virtue of his membership of the NZPSA.

Submissions

[14] Mr O'Sullivan submits that the true nature of the employment relationship between CCDHB and Mr Savage is that of permanent employment. He refers to the collective employment agreement applicable to the parties and submits that elements of the letter of offer of 21 February 2011 do not comply with the provision for casual employees under the collective agreement.

[15] In particular Mr O'Sullivan draws attention to that part of the letter that states the role/position description would be reviewed with the applicant on a regular basis and mutually agreed changes would be made as appropriate to keep it up to date.

[16] Mr O'Sullivan also points to the proviso in the collective agreement that casual agreements will not be used to deny staff security of employment. He submits CCDHB's action in respect of Mr Savage amounts to precisely that. Other features of the employment relationship that in Mr O'Sullivan's submission point to a permanent relationship are the evidence provided by Mr Savage that his roster was always pre-booked, often up to two months in advance. His overtime was also pre-booked and scheduled on the roster. Mr Savage always had an expectation that work would be provided and he regularly worked between 30 and 50 hours each week.

[17] Mr O'Sullivan cites instances of Mr Savage's treatment by his employer which he submits is different from that of a casual employee, examples being his eligibility for sick leave and ACC leave. It was Mr Savage's evidence that he was entitled to annual leave and was required to give one week's notice of his intention to take such leave. Apart from periods of annual leave, Mr Savage's name was always on the roster. He was not employed to fill staffing gaps as the consistency of hours he worked demonstrated.

[18] In support of Mr Savage's claim to be a permanent employee Mr O'Sullivan cites *Jinkinson v Oceana Gold (NZ) Ltd*². The Employment Court in that case referred to a series of indicia developed to determine whether or not an arrangement could be described as casual. The Court noted that the real nature of the relationship between the parties, as evidenced by their conduct, was essentially different in nature to what was described in the agreement and fundamentally inconsistent with it.

² [2009] ERNZ 225 (EmpC).

[19] Mr O’Sullivan submits that in the applicant’s case, the wording of the applicable collective employment agreement tended to suggest permanent employment with no fixed hours but that, in any event, the behaviour of the parties over the course of the agreement showed that the arrangement had changed to something that was anything but casual. He cites the six criteria referred to in *Jinkinson* which were:

- (a) The number of hours worked each week;
- (b) Whether the work is allocated in advance by a roster;
- (c) Whether this is a regular pattern of work;
- (d) Whether there is a mutual expectation of continuity of employment;
- (e) Whether the employer requires notice before an employee is absent or on leave;
- (f) Whether the employee works to consistent starting and finishing times.

[20] In his submission, Mr Savage worked a significant number of hours each week; that work was usually allocated in advance by roster; there was a regular pattern of work; there was a mutual expectation of continuity of employment; the applicant was required to give notice; and starting and finishing times were consistent with normal shift duties.

[21] Mr O’Sullivan also submits the relevance of the Court’s decision in *McDonald v. Ontrack Infrastructure Ltd*³. The Full Court noted that in order to determine the real nature of the relationship, it must consider all relevant matters including those that indicate the intention of the parties and is not to treat any statement by the parties describing the nature of their relationship as determinative.

[22] In Mr O’Sullivan’s submission, the regularity of Mr Savage’s employment over a three year period for what he termed significant hours per week, makes it difficult to argue that the relationship was one of casual employment. He notes that, although the starting point in the matter is the contractual documentation between the parties, that is not determinative of the real nature of the relationship between them.

³ [2010] NZEmpC 132

He submits that the applicant has continuing and permanent employment with CCDHB, likening the arrangement to permanent employment with flexible shifts.

[23] Mr Kynaston, for CCDHB, submits the parties entered into, and remained in, a casual employment relationship from 21 February 2011. He acknowledges that aspects of the DHB's letter of offer to Mr Savage and the role description appear to be at odds with a casual relationship. He submits, however, that such irregularities are not determinative and have arisen in the process of adapting documents that were drafted for all RNs in the Mental Health Directorate, rather than being specifically formulated for casual RNs.

[24] In his submissions Mr Kynaston stresses how essential it is for the provision of CCDHB's services on a 24/7, 365 days a year basis, that it has access to a pool of casual employees in MHAIDS who can be called on in advance or at short notice to fill the gaps in its rosters. He also notes that the casual nature of Mr Savage's employment enabled him to determine where, when and how often he worked, matters which were important to him and were the reason he requested his employer for the change from permanent to casual employment in 2011.

[25] Additional factors that pointed to Mr Savage having a casual employment relationship with CCDHB, and supported by evidence from Mr Cates, in Mr Kynaston's submission were:

- a. his name was not included on any unit's roster;
- b. he was not regularly offered work more than one week in advance;
- c. he did not require approval or need to take any holidays;
- d. he could, and did, limit the days, shifts and hours he was available to work;
- e. unlike permanent employees, he was not required to work shifts rotating through various days and times, including mornings, afternoons and nights, weekdays, weekends and public holidays;
- f. he had no obligation to accept work from CCDHB;
- g. he was free to accept other work from other employers, and he exercised that right, working for a period at Hutt Valley DHB (HVDHB).

[26] Furthermore, in Mr Kynaston's submission, if the Authority determined that CCDHB was obliged to guarantee Mr Savage work for a set number of hours each week, this would fundamentally change the bargain between the parties and the real nature of their relationship. It would also be inequitable as Mr Savage had made the change from permanent to casual employee to suit his own purposes. A determination by the Authority that he was permanent would result in him having received all the benefits of the casual employment he had sought as well as all the benefits of permanent employment.

[27] As did Mr O'Sullivan, Mr Kynaston has cited *Jinkinson*, but submits Mr Savage's situation can be distinguished from that of Ms Jinkinson and an examination of the indicia identified in that judgment supports CCDHB's position.

Discussion

[28] There is no definition of "*casual employee*" or "*casual employment*" in the Employment Relations Act 2000 (the Act). In the absence of definition, Couch J in *Jinkinson* found a sound approach was to look at the obligations assumed by the parties and then decide the nature of the relationship created.

[29] This included considering whether the employment relationship continued between periods of employment. I shall return to this later. The Judge identified six indicia which had been developed in a line of Australian cases "*to determine whether there was an ongoing employment relationship in an employment arrangement otherwise described as casual*".⁴

[30] The first of the six indicia is the hours worked each week. Evidence from Mr Savage is that he never failed to have "*between 30 and 50 hours each week*", including regular work on weekends, and scheduled overtime. He described his work as having a strong degree of continuity and regularity.

[31] Mr Cate was Mr Savage's Nursing Line Manager over the two periods of Mr Savage's employment in the casual pool at the MHAIDS. His duties include the coordination, placement and line management of over 100 casual Mental Health Support Workers and Registered Nurses. Mr Cates would frequently contact Mr Savage to offer him work when gaps appeared on the various MHAIDS units' rosters.

⁴ n2 at [47].

[32] The evidence provided by Mr Cates of Mr Savage's hours and days of work shows that Mr Savage worked fewer than 30 hours per week for 80 of the 170 weeks between February 2011 and 27 May 2014. During that time, his total weekly hours ranged from zero to 69.5.

[33] Further analysis shows that Mr Savage's hours varied, often considerably, from week to week. Only once in the 170 weeks of his employment to 27 May 2014 were the number of hours he worked exactly the same for two consecutive weeks. Sometimes the variation might be less than an hour but, discounting the weeks when he worked no hours, at other times there could be a variation of 20 or more hours.

[34] Information supplied by Mr Savage of salary payments he received from CCDHB between May 2013 and May 2014 supports the evidence of CCDHB regarding Mr Savage's hours of work. Contrary to Mr Savage's assertion, he frequently did work fewer than 30 hours per week. The information regarding his hours and variation in salary payments is more indicative of a casual, rather than permanent, employment relationship.

[35] The next factor relates to whether the work was allocated in advance by a roster. Mr Savage says his roster was always pre-booked, often up to two months in advance. He deposes that 90% of his shifts were pre-booked, with the remaining 10% being as needed or to cover for other employees. Generally his hours were split between three wards.

[36] Mr Cate has given detailed evidence about the formulation of rosters which I have found helpful in providing an understanding of how the system works. Rosters are generated for each of the 11 units in MHAIDS several months in advance. Weekly rosters are then generated weekly by CCDHB's computer system and are automatically populated with permanent employees' (full-time and part-time) shifts. Where a permanent employee is unable to work a shift because of scheduled leave, or training or for any other pre-arranged absence, this shows up on the roster for the particular unit and the gaps in staffing levels are identified.

[37] Those gaps are filled in the first instance by other permanent staff and, where that is not possible, Mr Cate will be asked to engage casual employees or the Clinical Nurse Manager/Team Leader or Unit Coordinator from the particular unit will contact employees in the casual pool. When an employee from the casual pool accepts a shift,

that employee's name would normally be included in the unit's roster by hand. This would usually happen no more than a week in advance of the shift.

[38] One of the units in which Mr Savage was frequently offered work had a different system according to Mr Cate and might book a casual employee some weeks in advance.⁵ This would only occur where it was known there would be a gap, such as that caused, for example, by the annual leave of a permanent employee. Mr Cate's evidence is that this would be the only occasion where casual employees would be offered work more than a week in advance.

[39] Mr Cate also deposed that in some instances a casual employee might simply be called on the day to check their availability. He says Mr Savage was often contacted in this way and that occasionally he would agree to work. Often, however, he would say he was not available even when he had previously indicated his availability for that day.

[40] Mr Cate has provided evidence of a "running sheet" he kept in which he noted on a week to week basis the days casual employees had indicated their availability and unavailability. The information would come to him by way of text, email, telephone or voicemail from employees in the casual pool and he would use it as a management tool.

[41] Mr Cate notes that, while Mr Savage worked frequently, his shifts were based around CCDHB's needs and his (Mr Savage's) availability. Mr Savage had informed Mr Cate he preferred shifts in the latter part of the week and weekends and would frequently decline work that was offered to him earlier in the week. He also preferred daytime to night shifts. Mr Savage's ability to choose which shifts to accept contrasts with the situation of permanent employees who work rostered and rotating shifts with no choice of the days/shifts they work.

[42] Mr Savage and Mr Cate have presented different evidence over how far in advance Mr Savage was rostered. I am persuaded by Mr Cate's evidence that, other than the shifts he performed on the Rangatahi unit, Mr Savage is unlikely to have been rostered on for his shifts more than a week in advance.

⁵ The Rangatahi unit.

[43] The third factor is whether there is a regular pattern of work. An analysis of the records of hours Mr Savage worked per week shows that most of his shifts were concentrated between Friday and Sunday but he also worked on every other day of the week at different times throughout his employment. I can discern no real regularity in his pattern of work, other than that he worked more regularly on weekends than weekdays, and fewer Mondays than any other day of the week. According to Mr Cate's evidence this reflected the preferences Mr Savage had indicated.

[44] The greatest number of hours he worked in any one week was 69.5 (over 5 days), and the greatest number of days he worked in any one week was all 7. The smallest number of hours he worked in a week was 6 (ignoring the weeks he did not work any hours at all). There did not appear to be any marked change in the regularity (or lack of regularity) of days or hours Mr Savage worked in any of the years between February 2011 and May 2014. The lack of a regular pattern of work indicates a casual employment relationship.

[45] The issue of whether there was a mutual expectation that Mr Savage's employment would continue has yielded different views from the parties. Mr Savage has stated he always had an expectation that work would be provided to him. Mr Cate's evidence is that, there frequently was work available for Mr Savage (until May 2014) and that there is work for other RNs in its casual pool because "*there is a perpetual shortage of RNs throughout the service at CCDHB*".

[46] I am not persuaded that the frequent staffing shortfalls CCDHB experiences can be taken to indicate the DHB had an expectation that Mr Savage's employment would continue. It is reasonable to assume that, in times where there are shortfalls in availability of permanent staff, CCDHB will continue to offer shifts to RNs in its casual pool. That is not the same as having an expectation that the employment of all, or any, of the members of that casual pool will continue.

[47] It is likely Mr Savage would have continued to be offered casual shifts by CCDHB had it not been for the issue that arose in May 2014. However, that likelihood arises from the DHB's ongoing need to fill the gaps in its rosters. I do not regard it as being as a result of any expectation on CCDHB's part that Mr Savage would continue working for it. I find there no mutuality of intention in that regard.

[48] Mr Cate's evidence regarding a period during which the number of casual shifts reduced supports the view that I have reached. During this time when the work "dried up" Mr Cate said Mr Savage told him he had joined HVDHB's casual pool to pick up some shifts there. Mr Savage confirmed in his affidavit in reply that he had worked "several shifts" at HVDHB, although he gave a different explanation for this.

[49] On the issue of whether Mr Savage was required to give notice before taking leave, Mr Savage says CCDHB had an expectation he would be available to work set hours each week, and he was telephoned in advance for confirmation of that. If a situation arose making him unable to attend a shift, he says he was required to advise of the cancellation well in advance. If he wished to take annual leave Mr Savage says he had to provide at least one week's notice. If he was sick and unable to attend work he was required to advise the DHB "as soon as possible".

[50] Mr Cates says Mr Savage only needed to advise CCDHB one or two hours before the start of a shift if he was unavailable. That was the same as for other casual nursing staff, and there were no consequences if Mr Savage did not give longer advance notice. Permanent staff were required to give notice in advance of taking annual leave and were required to complete leave request forms. Mr Savage did not receive annual leave and was paid 8% holiday pay with his wages because of the casual nature of his employment. He was not required to, and did not, complete leave request forms.

[51] Mr Savage's evidence of giving a week's notice if he was going to be unavailable for the following week is not inconsistent with Mr Cate's evidence of how gaps in rosters are filled by the offering of shifts to employees in the casual pool a week in advance. That would be the time at which a member of the casual pool would indicate whether he or she was available for a shift. Nor is his evidence of giving notice of inability to attend work through sickness inconsistent with the Mr Cate's evidence about one or two hours' notice being required. The DHB would need to ensure a shift was filled and would require that time to contact other members of the casual pool to do so.

[52] I find CCDHB did not require the same notice of absences from Mr Savage as it does of its permanent employees.

[53] With regard to the sixth factor, Mr Savage acknowledges he did not have regular start and finish times. He attributes this to the rostered nature of his employment and the requirement to work across wards rather than being allocated to one ward. I find this factor points to a casual employment relationship.

[54] In summary, an examination of the six indicia in relation to Mr Savage's situation yields six indicators of a casual employment relationship, and none of a permanent employment relationship.

[55] In *Jinkinson*, in addition to the six indicia noted at [47] of that judgment, the Judge stated:

Whatever the nature of the employment relationship, the parties will have mutual obligations during periods of actual work or engagement. The distinction between casual employment and ongoing employment lies in the extent to which the parties have mutual employment related obligations between periods of work. If those obligations only exist during periods of work, the employment will be regarded as casual. If there are mutual obligations which continue between periods of work, there will be an ongoing employment relationship.⁶

[56] When CCDHB offered Mr Savage a position as an RN in its casual pool, at his request, in February 2011, its letter of offer explicitly stated that each engagement was a stand-alone arrangement. It described the role of a casual employee, and the obligations of the parties, in the following manner:

"A casual employee is one who is engaged to work as and when required with no set hours or days of work. Each engagement undertaken by you is a stand-alone employment arrangement which ends at the completion of the work require. No severance is payable to you when you complete any casual engagement with C&C DHB. There is no obligation on C&C DHB to offer you employment, and likewise you are under no obligation to accept offers of casual work."

[57] The reason Mr Savage relinquished his permanent RN role and sought employment in the casual pool was to gain flexibility of hours. When making the request he had said that he did not "*take this decision lightly*". He understood he could not have the flexibility of working arrangements he required under his (then)

⁶ n3 at [40].

permanent employee status which entailed working rostered shifts on a rotating basis of mornings, afternoons and nights. Both parties understood the significance of the change to their employment relationship at this time and both acknowledged the change had been initiated by Mr Savage to suit his family and personal requirements. I am satisfied there was no intention by the DHB to deny Mr Savage the security of permanent employment in February 2011.

[58] There is nothing in Mr Savage's evidence to indicate his needs changed over the three and a quarter years in which CCDHB offered him casual employment. To the contrary, he reiterates in his affidavit evidence his requirement for the flexibility of working with no fixed hours. While the nature of a relationship can change over time, this is not such an instance. I find CCDHB assumed no greater obligations to Mr Savage than those that existed at the outset when he accepted employment in the casual pool.

[59] Mr Savage says that as a CCDHB employee there was an expectation that he would maintain a proper image outside the workplace to reflect well on his profession and not reflect badly on his employer. In his view the obligation imposed on him is an indicator that he was a permanent employee.

[60] I prefer Mr Cate's evidence which is that the behavioural obligations on Mr Savage between his engagements with CCDHB arose from his status as an RN. This made him subject to the professional obligations and standards set by the Nursing Council of New Zealand. It is from that organisation's Code of Conduct that the obligation to reflect well on his profession arises and not from any requirement imposed by CCDHB.

Conclusion and Determination

[61] Mr Savage entered into a casual employment relationship at his own request in 2011. There is no evidence he sought a change to that relationship or made any claims about a change that had occurred to the relationship in the period from February 2011 to May 2014. The only time he raised that issue was after CCDHB ceased offering him work from 27 May 2014.

[62] I do not find any evidence to support Mr Savage's claim to be a permanent employee. For the reasons given above I find Mr Savage has a casual employment relationship with CCDHB.

Costs

[63] The issue of costs is reserved.

Trish MacKinnon
Member of the Employment Relations Authority