

**IN THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH**

[2017] NZERA Christchurch 12
5464598

BETWEEN LESLIE ALEXANDER WATT
 Applicant

A N D NELSON/MARLBOROUGH
 DISTRICT HEALTH BOARD
 Respondent

Member of Authority: Helen Doyle

Representatives: Steven Zindel, Counsel for Applicant
 Paul McBride, Counsel for Respondent

Investigation Meeting: 18 and 19 October 2016 at Nelson

Submissions Received: 19 and 28 October 2016, from the Applicant
 19 and 25 October 2016, from the Respondent

Date of Determination: 23 January 2017

DETERMINATION OF THE AUTHORITY

- A Leslie Watt was a casual employee with Nelson/Marlborough Health Board at 2 April 2014.**
- B Leslie Watt was not unjustifiably dismissed from his employment with Nelson/Marlborough Health Board.**
- C Leslie Watt was not unjustifiably disadvantaged when he was not offered further shifts.**
- D Costs are reserved and failing agreement a timetable has been set for an exchange of submissions.**

Employment relationship problem

[1] The statement of problem lodged in this matter referred to two personal grievances. The first was an unjustified dismissal Mr Watt said arose on 2 April 2014 when NMDHB failed to roster him on for further shifts. The second was an unjustified action causing disadvantage claim for the actions of NMDHB leading to the situation, potentially a claim of a wide ranging nature.

[2] Mr Watt wanted the problem to be resolved by an award of lost wages from 3 April 2014 for a minimum of 27 hours at \$33 per hour and compensation in the sum of \$12,000 together with costs.

[3] NMDHB in its statement in reply said that the unjustified action grievance occurred earlier than the 90 day statutory timeframe. Further it did not consent to the late raising of the matters as a personal grievance and there were no exceptional circumstances to justify that. It was accepted that a grievance for an unjustified dismissal had been raised within the statutory timeframe although the view of NMDHB was that the claim was without merit as Mr Watt was a casual employee and had not been dismissed but was medically unfit to continue to undertake duties that a registered nurse in the Mental Health Unit would have to perform.

[4] A preliminary investigation meeting was held to consider what events gave rise to the alleged personal grievance of unjustified disadvantage and whether for each of these events a grievance was raised within the 90 day statutory timeframe and, if not, whether leave should be granted for the grievance to be raised outside of the 90 day timeframe. Member Peter van Keulen undertook the investigation into the preliminary matter and issued a determination dated 15 April 2016.¹

[5] Member van Keulen concluded in his preliminary determination that there were two grievances for the Authority to investigate. The first was the claim for unjustified dismissal and in the alternative, if Mr Watt was not found to be unjustifiably dismissed and remained a casual employee, there remained a personal grievance for unjustified action causing disadvantage pertaining to the failure to roster Mr Watt onto further shifts appropriately. It was stated in the preliminary determination that the events set out in evidence may be relevant to the question of whether Mr Watt was in fact a permanent employee rather than a casual employee.

¹ [2016] NZERA Christchurch 46

[6] At the start of the first day of the substantive investigation meeting Mr Zindel raised an issue not contemplated by the preliminary determination. At the expiry of an unofficial fixed term agreement in 2012 he claimed that Mr Watt became a permanent employee and his employment was open-ended because the fixed term agreement did not comply with s 66 of the Act. Mr Zindel said that under s 66(6)(a) or s 66(6)(b) of the Act which deal with the consequences of non-compliance, there is no 90 day or other limitation to the election Mr Watt could and had made that the ineffective nature of the term of the fixed term agreement can be raised even years after it came to an end.

[7] Mr McBride took exception to the late raising of this new claim on the morning of the investigation meeting. Whilst it did not to any significant degree change the nature of the evidence, it raised some legal issues and required additional submissions to be provided by counsel.

[8] The purpose of the preliminary investigation meeting was to identify what the Authority properly could and then would, investigate. The only reason it would seem the matter now advanced was not raised at that time was because it had only belatedly been identified as a potential claim.

[9] In my investigative role I will have regard to the new issue raised but additional submissions have been provided which may have cost implications.

The issues

[10] The Authority is required in this matter to determine the following issues:

- (a) What was the nature of Mr Watt's employment relationship with NMDHB in March/April 2014;
- (b) Was there an unofficial six month fixed term agreement from in or about May 2012;
- (c) If there was then what is the effect of Mr Watt now electing to treat the term as ineffective;
- (d) Was there a verbal offer made to Mr Watt in or about August/September 2012 that he would be appointed for a guaranteed three shifts a week permanently;

- (e) Was Mr Watt dismissed from his employment;
- (f) If he was dismissed, then was this dismissal unjustified;
- (g) If he was unjustifiably dismissed, then what remedies is he entitled to and is there an issue about his continued fitness to work in light of his medical condition and/or issues about mitigation;
- (h) If Mr Watt was not unjustifiably dismissed, then was he disadvantaged unjustifiably when he was not offered casual shifts after March/April 2014.

What was the nature of Mr Watt's employment relationship with NMDHB

[11] Mr Watt was offered a casual position of Registered Nurse – Mental Health Unit with NMDHB by letter dated 13 February 2012. A commencement date of 20 February 2012 was proposed. Nathan Davis who at that time was Unit Manager, Inpatient Mental Health Unit was involved in the engagement of Mr Watt. Mr Davis is currently employed as a unit manager of Wahi Oranga - Mental Health Admissions Unit (MHAU), Older Persons Mental Health and Tipahi Mental Health (Tipahi).

[12] The letter of appointment referred to the following:

As a casual employee you have no guaranteed hours of work but will be called to work on an “as and when required” basis. You have no entitlement to leave, but in lieu of leave you will receive 8% of gross earnings added to your wage payment for each engagement. Each period of employment is treated as a discrete and separate engagement with no ongoing entitlement to employment.

Whilst this position is based on the Nelson Hospital site you may be required to work in other areas of NMDHB as the service need requires.

The terms and conditions of employment for this position will be covered by the New Zealand (except Auckland Region) District Health Board/ PSA Mental Health & Public Health Nursing Multi-Employer Collective Agreement (MECA) dated 1 April 2010-30 April 2012. Please note that although this is an expired Agreement, your terms and conditions of employment will remain covered by this document. Your salary will be set at Step 5 of the Mental Health Inpatient Nurses salary scale being \$62,498 (pro rata) per annum.

[13] The collective agreement in clause 3 provides the following definition of a casual employee:

Casual employee means 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.

[14] Fixed term employee is defined in clause 3 as:

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.

[15] Part time employee is defined in clause 3 as :

Part time employee means 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.

[16] There were at the material time two separate mental health units at NMDHB. The first was the Mental Health Admission Unit (MHAU) which Mr Davis managed. The second was the Tipahi Mental Health Unit which was managed at that time by Rita Van Iddekinge. Mr Davis explained that Mr Watt was employed into the MHAU casual pool and casuals were utilised from that pool by both MHAU and Tipahi.

[17] Mr Watt duly commenced work on 20 February 2012. NMDHB says that throughout his employment Mr Watt was a casual employee except for a period when he was engaged as a fixed term part-time employee between 28 January and 4 August 2013 covering an employee on long-term sick leave. At the conclusion of that NMDHB say that Mr Watt reverted to being a member of the casual pool.

[18] The Employment Court in *Jinkinson v Ocean Gold (NZ) Ltd*² referred to a series of indicia developed to determine whether or not an arrangement could be described as casual. These include considering the number of hours worked each week, whether the work is allocated in advance by a roster, whether there is a regular pattern of work, whether there is a mutual expectation of continuity of employment, whether the employer requires notice before an employee is absent or on leave and whether the employee works to consistent starting and finishing times.

² [2009] ERNZ 225

[19] There are two recent judgments of the Employment Court which have considered the status of nurses who were offered positions as casual registered nurses; *David Savage v Capital & Coast District Health Board* and *Bay of Plenty Health Board v Rahiri*.³

[20] Before I consider the various legal tests set out in the above judgments I want to set out what happened in the relationship. In this case this will require an assessment of some verbal agreements which Mr Watt said he entered into in 2012. Mr Watt's recollection of these are disputed and/or denied by NMDHB. Mr Watt says that these agreements shaped and informed his employment status and his view that he was other than a casual employee.

Unofficial offer of fixed term employment to Mr Watt

[21] Following commencement at NMDHB Mr Watt worked at MHAU. He had two days of orientation there on 20 and 21 February 2012 and then worked there the next four days, a combination of morning and afternoon shifts. Mr Watt does not suggest his employment at that stage was other than on a casual basis. Mr Watt says that he was later offered an unofficial fixed term engagement at Tipahi and that changed the nature of the relationship.

[22] The unit co-ordinator at Tipahi at that time was Michael Staite. Mr Staite resigned from that role in October 2012 and returned to a nursing role at Tipahi. The roster was not managed or overseen by Ms Van Iddekinge but undertaken by Mr Staite before November 2012 with some changes able to be made by the nurse-in-charge.

[23] Mr Staite said he had met Mr Watt in 2012 during a restraint at MHAU and was impressed with him. The two men have of more recent times become friends as Mr Staite explains in his written evidence with shared interests in nursing.

[24] Mr Staite asked Mr Watt in or about April/May 2012 if he would like to undertake some work at Tipahi. Mr Watt undertook some initial shifts at Tipahi which Mr Staite accepted in his oral evidence were in all likelihood in the nature of casual shifts.

³ [2016] NZEmpC 83 and [2016] NZEmpC 67

[25] Mr Staite said that he then offered to Mr Watt what he called a six month unofficial position in Tipahi with regular shifts and hours each week to help out another employee at Tipahi, who I shall call X, who was struggling. Mr Staite in his written evidence described the role as a “new” programme nurse position at Tipahi. Mr Staite accepted that he had no authority to offer Mr Watt a role but said that he was authorised to do so on this occasion by Ms Van Iddekinge.

[26] In his written evidence Mr Watt suggests that such offer was before May 2012 because he says that in May 2012 he was then offered a permanent part-time position based on what he had been doing. In his oral evidence he said the commencement date of the unofficial fixed term position was 23 May 2012 and I accept the morning shifts did seem to increase at Tipahi at or about that date.

[27] Ms Van Iddekinge did recall discussions with Mr Staite with respect to X struggling and feeling unsupported. The first discussion she could recall was about an expectation that X’s programme be supported. She said she was looking to Mr Staite to step up in his role as co-ordinator and make sure this happened. The second meeting she recalled was when the issue was still not resolved and she discussed Mr Staite using casuals to give X some support which she said was not an unusual practice. Under questioning she said that the support was not to be provided on an individual basis but as a team with Mr Staite in particular to help out and that any registered nurse was capable of supporting X’s work. She did not accept that she suggested only one casual should help out. Her evidence was that a programme nurse was not a recognised position and as to why that description of the role had been referred to, said that there was a possibility Mr Staite and Mr Watt could have made the role up, or, that perhaps the description had crept in whilst she was away overseas shortly after that time.

[28] The first shift for Mr Watt at Tipahi started on 28 March 2012 when he worked there 3 shifts that week and then another shift the same week at MHAU. He undertook some shifts at Tipahi in April but more that month at MHAU. In May 2012 the number of shifts undertaken at Tipahi increased although he worked some night shifts at MHAU each week for that month. I have analysed the period between June and the end of November 2012 and what shifts Mr Watt undertook.

[29] X was on sick leave from 7 June to 6 July 2012. In June/July 2012 the number of shifts Mr Watt worked at Tipahi increased. During the period they were

usually morning shifts which X would have but for sick leave been present for and/or needed support for. The shifts were worked on days between Monday to Friday at Tipahi except for the occasions I set out below.

June/July 2012

[30] Mr Watt worked 4 shifts in the first week of June 2012 and 5 shifts the second week with a further night shift at MHAU. He worked 4 shifts the following week and then two weeks of 3 shifts into early July. For the next three weeks in July 2012 Mr Watt worked 5 shifts. For the last week in July 2012 which included dates in early August Mr Watt worked 3 shifts.

August/September 2012

[31] For the first full week in August 2012 Mr Watt worked 5 shifts and then 4 shifts for the last two weeks of August 2012. For the first week in September Mr Watt worked 4 shifts and then 2 shifts for the second week, 4 shifts for the third week and for the last week of September 2012 Mr Watt worked 3 morning shifts and an afternoon shift on the Saturday at Tipahi.

October/November 2012

[32] For the first week of October 2012 Mr Watt worked 3 morning shifts at Tipahi and one night shift. For the second week he worked 4 shifts and for the third week 2 shifts. For the fourth week he worked 4 shifts and for the last week in October which included some days in early November he worked 5 shifts. By the end of that week Mr Staite had resigned from his co-ordinator role.

[33] For the second week in November Mr Watt worked 3 morning shifts and 1 night shift at Tipahi. For the third week in November he worked 4 morning shifts and 1 afternoon shift and for the fourth week Mr Watt worked 3 morning shifts and one afternoon shift. For the final week of November Mr Watt worked 3 shifts.

[34] There was some suggestion on behalf of Mr Watt that the electronic records attached as "B" to Mr Davis's evidence may not accurately reflect his actual work for the material period. I am satisfied they do. I requested and was provided with every roster for the material period and was able to compare the two sets of records. Mr Staite accepted in his evidence that permanents were typed onto the roster and non-

permanent staff are handwritten. He accepted that he did not regard Mr Watt as permanent in May/June 2012 but said that Mr Watt was “*more permanent*”. Mr Watt’s name I can confirm was handwritten not typed onto the rosters for the period between May and November 2012.

[35] Ms Van Iddekinge was overseas in Spain from 7 June to mid-August 2014 which leave in part coincided with X’s period of sick leave. She said that to the best of her recollection she did not meet Mr Watt until after she returned. The evidence does not satisfy me that was unlikely. Mr Staite in his evidence said that in his presence Ms Van Iddekinge on her return to NMDHB offered Mr Watt a permanent part-time position along the lines he had been performing which Mr Staite understood superseded the unofficial agreement he had entered into with Mr Watt.

Unofficial fixed term superseded by offer of permanent part-time position

[36] The evidence of Mr Watt and Mr Staite about what occurred at this meeting and what was promised is disputed by Ms Van Iddekinge. I find that the meeting in all likelihood took place from mid-August to September 2012.

[37] Mr Watt says that the discussion was pre-empted by the possibility that he would be leaving for work in Auckland. He said in his oral evidence that he was officially at that time a casual and he wanted to clarify what would happen when the unofficial fixed term could come to an end. In his oral evidence he said that he told Ms Van Iddekinge that he would like a permanent position of 3 days per week and that Mr Staite supported him and said that he would be happy with Mr Watt having a permanent part-time position 3 days a week.

[38] Mr Watt said Ms Van Iddekinge advised she would immediately make what he had been doing a permanent part-time role guaranteed 3 days a week. He referred to the agreement in his oral evidence as “*casual guaranteed hours*” and said that he regarded it as an increased offer [to the unofficial fixed term] because he was guaranteed shifts with flexibility. He said that they then shook hands on the verbal agreement and Ms Van Iddekinge asked that it remain confidential amongst them for the time being. Mr Watt who has been employed elsewhere as a nurse understood that new employees are usually employed through a process of advertisement and formal interview but said that Ms Iddekinge told him she had the discretionary resources to employ staff in such a way. He understood that Ms Van Iddekinge was

going to have provided him with an agreement in writing although in his written statement of evidence said that what we had agreed was *not expressed as subject to a written contract*. That was because Mr Watt said there had been a shaking of hands.

[39] Mr Staite supported Mr Watt in his evidence although he could not recall a shaking of hands or all the details about what was discussed. In his oral evidence Mr Staite said that he thought Ms Van Iddekinge would formalise the position and he thought that it would be permanent. He also thought a contract had been discussed. Mr Staite understood that the General Manager had to authorise a new position but said that Ms Van Iddekinge would have to come up with a case to make a position permanent.

[40] Mr Staite had also been approached and asked about any job offer to Mr Watt by the Human Resources Manager at NMDHB, Peter Van Dijk, after the personal grievance letter was received from Mr Watt on 8 May 2014. Mr Van Dijk said that Mr Staite was quite vague about the offer of a permanent position to Mr Watt by Ms Van Iddekinge. He felt that Mr Staite had an expectation in the future that Mr Watt would get a permanent role because of his abilities as a nurse. Mr Staite did not accept that he told Mr Van Dijk that he could not recall any offer of a permanent position by Ms Van Iddekinge. Mr Zindel suggested that this interaction was “off the record” although it is difficult with respect to see how a discussion between the human resources manager and the previous co-coordinator of the unit about whether there had been an offer of permanent employment to an employee could or indeed should be such a conversation.

[41] Ms Van Iddekinge confirmed that on her return, she recalled Mr Staite briefing her about what was happening. She recalled in or about August 2012 that that was the first time she had met Mr Watt although she did not accept that there was any discussion about his personal life or any plans to travel to Auckland as he had suggested there was. She said that she would never stop a casual employee from seeking opportunities elsewhere. She did not accept that she had made any verbal offers to Mr Watt. Ms Van Iddekinge said that she did not, and would not, offer a permanent appointment to any employee without going through a proper process which would include advertising, shortlisting, interview and appointment based on merit and said that she did not shake hands with Mr Watt as that is not her “*modus operandi*.” She did not accept that she said that she had discretionary resource to

employ staff because she did not have any such ability and did not say that she did. She did not accept that she guaranteed the number of shifts for a casual employee and said that she could not do that. Ms Van Iddekinge said that she recalled the actual discussion was not to do with permanent employment at all but about Mr Watt's interest in family counselling and its effectiveness in the inpatient unit.

[42] Parties to a conversation can, and often do, recall what was said differently. That does not mean in recalling it differently there is deliberate untruthfulness by any party to that conversation. There can be confusion about what was said and sometimes a party to a conversation may take what they want to hear from that conversation when that may not have been said or meant in that particular way.

[43] Having heard the evidence I find it less likely on the balance of probabilities, that Ms Van Iddekinge, an experienced manager who knew the proper process for permanent appointment, would, at an unplanned meeting with Mr Watt and Mr Staite offer Mr Watt a permanent part-time role with flexibility on the basis of a hand shake. It is more likely I find that Mr Watt took something different, or perhaps more, from the conversation than was intended in concluding from that point on there was a guarantee to him of three shifts per week. As I shall go on to set out however the matter was not left there.

[44] There is a suggestion that NMDHB is now estopped from denying that offer because Mr Watt had relied on it by not taking a position in Auckland and lending some money to his son. I do not find that argument available on the facts in front of me. For completeness the evidence about how Mr Watt relied on any representation he says was made was very limited.

Meeting in November/December 2012

[45] Mr Staite resigned from the unit co-ordinators role in October 2012 to take up a staff nurse role at Tipahi. Rosemary Allen applied for and was appointed to the temporary co-ordinator position at Tipahi. Ms Van Iddekinge was at that time Unit Manager but then the overall management of Tipahi became shared between Ms van Iddekinge and Mr Davis. Ms Allen started in the co-ordinator role in late November 2012.

[46] Ms Allen said that when she commenced in the temporary role she noted that Mr Watt's name had been added to the roster in handwriting. The patient numbers

were down and with him being given the shifts it meant the unit was over staffed. She could not understand why this was happening. Ms Allen was then advised by Mr Watt and other staff that Mr Watt was told that he was to be given 3 shifts a week to help out with the unit programme. Ms Allen said that she was unaware of the role that Mr Watt said he was covering of “programme coordinator” and she recalled other casual staff thought it was unfair that Mr Watt was getting these shifts. Ms Allen said that when she attended the weekly co-ordinators meeting with Mr Davis, Ms Van Iddekinge and the other co-ordinators she asked Mr Davis and Ms Van Iddekinge whether Mr Watt was rostered or a casual. They confirmed to her that he was a casual. Ms Van Iddekinge offered to meet with Mr Watt about the issue.

[47] It is common ground that there was a meeting between Ms Van Iddekinge, Mr Watt and Ms Allen. Mr Watt in his written evidence thought it took place in August 2012. Ms Allen commenced her role at Tipahi on 26 November 2012 and said that the meeting with Mr Watt took place between that date and the end of 2012 but quite soon she thought after she started. I put the likely meeting date in late November or early December 2012. There is some disagreement about exactly what was said during the conversation. Mr Watt placed some reliance on the phrase “dropped the ball” that he said Ms Van Iddekinge used in respect of a failure to complete the necessary paperwork to ensure the position was secure. Ms Iddekinge could not recall using the phrase “dropped the ball” at all.

[48] I have placed weight on Ms Allen’s recollection of what was said as the most likely account. I found her to be a straightforward witness. Ms Allen recalled the meeting was in the upstairs office and Mr Watt indicated that he understood he was to get 3 shifts a week. She recalled Ms Van Iddekinge told Mr Watt that she could not guarantee shifts and there was a process to be followed to give people a role and that Mr Watt was a casual nurse. Mr Watt she recalled questioned why the shifts were not continuing. Ms Allen did recall Ms Van Iddekinge saying that she dropped the ball but was very clear that this was in respect of a lack of awareness that Mr Staite had continued to put Mr Watt on the roster.

[49] Mr Watt said that Ms Van Iddekinge reassured him that future vacancies would be available and that he would be all right. Ms Van Iddekinge did not accept that she made any promises about any permanent roles and Ms Allen could not recall

any discussion about other positions for Mr Watt. She did think she may have said not a huge casual pool and that it would not be a problem getting shifts.

[50] I accept as Ms Allen said in her evidence that the key elements from the discussion were clarification that Mr Watt was a casual nurse and what his role in the roster was. Ms Allen felt that Mr Watt understood but was disappointed.

[51] Mr Watt said that he was aware at that time that he could have pursued a personal grievance at that time but elected not to for a number of reasons.

After the November/December 2012 meeting

[52] Ms Allen said that she then rostered Mr Watt on as she did any other casual. She did not intentionally give him a particular number of shifts. He was keen on day shifts and if that worked in with the gaps in the roster she was happy to offer those shifts to him. There was a short period before Mr Watt obtained a six month fixed term agreement commencing on 28 January 2013. Until that period over December 2012 and early January 2013 Mr Watt undertook a range of shifts at both Tipahi and MHAU.

Six month fixed term 28 January to 4 August 2013

[53] Mr Watt was then interviewed for and obtained a six month fixed term contract (0.8 FTE) position of registered nurse at Tipahi commencing on 28 January 2013. The fixed term agreement was recorded in a letter dated 24 January 2013 as replacing his current casual position whilst a staff member was on sick leave for a period of up to six months. Although it was noted that as a casual employee Mr Watt had no entitlement to leave, as a fixed term employee his annual leave would accrue at four weeks per annum pro rata. The hours of work for the fixed term were 64 per fortnight rostered and rotating shifts any days Monday to Sunday. It was anticipated that the fixed term would be due to end on 4 August 2013 where the letter expressly provided that Mr Watt would *“revert back to your casual position as Registered Nurse on the casual pool for Mental Health Unit”*.

End of fixed term agreement

[54] The fixed term agreement ended and under the fixed term agreement Mr Watt reverted back to the casual pool. Mr Zindel in submissions stated that Mr Watt did

not think this reversion applied to him because he was covered by the guarantee of three shifts a week. That submission does not take into account the advice given to Mr Watt in November/December 2012 at the meeting with Ms Van Iddekinge and Ms Allen.

[55] Mr Watt applied for advertised permanent positions at NMDHB but was not successful in obtaining a position. In applying for those roles he noted that he was a casual. He also confirmed in a performance review undertaken in July 2013 he was a casual nurse. The evidence supported Mr Watt requested this review. He did not set out in the review any goals for the next 12 months aside from the finding of permanent work because of that status and not knowing what employment opportunities may arise.

[56] There was some restructuring at NMDHB in 2013 at or about the time the fixed term agreement ended in August 2013. These affected some positions in that part time roles were consolidated into full time roles and permanent nursing staff was used across the mental health units to improve resource management and client care.

[57] Ms Allen said that her interactions with Mr Watt were consistent with an understanding that he was a casual nurse. She produced an email dated 20 December 2013 that she sent to Mr Watt about his plan to start up private practice and continue with some casual work. She noted Ms Van Iddekinge had advised a conflict of interest declaration form would need to be done.

[58] In or about February/March 2014, Mr Watt said that he noticed a decrease in the number of shifts he was receiving and he said that he concluded his agreement with Ms Van Iddekinge was breached. His last shift worked was on Wednesday 2 April 2014. I was provided with an email from Mr Watt dated 31 March 2014 in which he advises Ms Allen that he was happy to do a couple of shifts a week at Tipahi ongoing although he could see the staffing situation had been made top heavy currently.

[59] On or about 14 April 2014 Mr Watt attended a doctor about a knee injury and his knee was x-rayed that same day. Mr Watt advised the injury date was 16 April 2012, some two years earlier, and the explanation was that he was injured whilst restraining a patient. NMDHB is an accredited employer and the claim was provided to WorkAon for management.

[60] NMDHB say that when it was advised that Mr Watt was not fit to attend at work and perform all work because of his knee condition, that was the reason that he has not been able to be rostered. Mr Watt does not accept that he is not fit to return to work at Tipahi.

[61] Mr Davis said that there were no records of Mr Watt being involved in restraints around the time Mr Watt said that the injury occurred and that all restraints because they are otherwise viewed as assault must be and are fully documented. WorkAon declined Mr Watt's claim for cover for a work-related right knee injury and Mr Watt reviewed that decision. The Reviewer in a decision under the Accident Compensation Act 2001 dated 23 July 2015 concluded the evidence supported that Mr Watt did not sustain an acute traumatic injury to his knee between February and May 2012. The Reviewer concluded that the ongoing symptoms were substantially, if not wholly, caused by the underlying osteoarthritic condition in Mr Watt's knee.

[62] Mr Zindel in his submissions suggests although the medical claim was advanced as the reason for no further offers of shifts to Mr Watt; in fact NMDHB did not have knowledge of that until after 14 April 2014. What I could not rule out though is a possibility that Mr Watt was offered shifts in MHAU but did not accept them over that time because of his knee. I note in an email from Mr Watt to Mr Davis dated 25 April 2014 he noted that he had not been able to accept work at MHAU recently as his knee is not currently up to the ongoing stress and strain there – *getting sore if I'm walking on it all day and certainly not much good in a physical restraint*. Mr Watt as previously set out did refer in an email to Ms Allen to the staffing situation having been made top heavy in or about March 2014. That seemed to coincide with some reduction in the shifts that he was offered as a casual from that time.

[63] Mr Davis responded to Mr Watt's email of 25 April 2014 and advised that a medical certificate was required that Mr Watt is able to work safely at either MHAU or Tipahi and there would be no further shifts until then.

[64] Mr Watt then raised a personal grievance in a letter dated 8 May 2014 seeking 3 shifts a week at Tipahi again.

[65] Mr Davis said that the letter raising the grievance was the first time he had ever heard Mr Watt suggest he was a permanent employee.

Was there an informal fixed term agreement entered into in or about May 2012

[66] Section 66 of the Act refers to fixed term employment and provides:

- (1) An employee and an employer may agree that the employment of the employee will end –
 - (a) at the close of the 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 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.

[67] Mr Zindel submits that if there was such an offer to Mr Watt in or about May 2012 from Mr Staite for a six month period at Tipahi to cover and support X then there was no compliance with s 66(4) of the Act and therefore Mr Watt became a permanent employee in November 2012.

[68] Mr Staite says that he made an informal offer of employment for a fixed term period to Mr Watt. There is a corresponding increase in morning shifts at Tipahi worked by Mr Watt from later May 2012. Although Mr Watt says this was superseded by an offer of permanent employment I have not found that likely on the balance of probabilities so the focus is therefore on that informal offer said to be in the nature of a fixed term employment.

[69] Having heard the evidence I find it is unlikely that Ms Van Iddekinge authorised such an offer of a fixed term position by Mr Staite to Mr Watt beyond a discussion that support to X may be covered by employees from the casual pool. In contrast with the informality of such an offer there was the formal interview and appointment process undertaken before Mr Watt commenced the [formal] fixed term position in late January 2013.

[70] Mr Watt variously described the work offered by Mr Staite in 2012 as flexible but less so than before and in his letter raising the grievance a “casual” but full time position. Mr Staite confirmed in his oral evidence that at times Mr Watt did turn the work down.

[71] When the rosters are compared from later May until about November/early December 2012 there is some regularity in the morning shifts worked by Mr Watt as I have set out earlier. There is also the evidence of Ms Allen that other casual employees said that Mr Watt had some guaranteed shifts per week and the addition of Mr Watt on the roster meant an overstaffing situation at Tipahi on some morning shifts. Whilst there could be a genuine reason for any fixed term agreement because X needed support and then was off on a period of sick leave the informal fixed term agreement did not comply with the requirements in s 66(4) of the Act.

[72] Although NMDHB says that what occurred was worked in the context of Mr Watt’s casual employment Mr Staite is clear that he offered employment of an informal temporary/fixed term nature to Mr Watt to support X and cover her sick leave. There may have been an issue as to any authority on his part to offer a role of such a nature. My focus however is on what that agreement Mr Staite says he offered may mean and whether it means as Mr Zindel submits that Mr Watt’s employment became of indefinite duration.

What is the effect of any informal fixed term contract

[73] Mr Watt knew from the discussion in late November/early December 2012 that he was not a permanent employee but a casual employee. As I have set out Mr Watt referred to himself after that time as a casual employee. Although he knew he could raise a personal grievance after November/December 2012 he did not do so. The issue is whether he now has the right to make an election under s 66(6) of the Act in respect of the term of the unofficial fixed term agreement and what that would mean.

[74] Mr McBride submits that the words “at any time” in s 66(6)(a) can only mean “*at any time otherwise permitted by the Act*” and that it can only be a time during the fixed term or a date within 90 days after it has ended for a complaint by way of personal grievance. He submits that the right to make an election does not revive the employment in order to then say that it was ended by way of dismissal. In this case he submits there was no election by Mr Watt and it was overtaken by the events of the November/December 2012 clarification that Mr Watt was a casual and the January 2013 express contractual terms. Mr McBride says that if there was any right to an election, which the NMDHB deny, then Mr Watt elected not to have permanent employment but to seek a fixed term followed by casual work.

[75] Both counsel referred to a number of determinations of the Authority. *Hull v Department of Labour*⁴ is a determination in which there was specific consideration of the words “*at any time*” and an election under s 66(6)(a) of the Act. It was concluded in *Hull* that the time for making an election under s 66(6)(a) is any time during the currency of the fixed term agreement and not after it has been terminated. Mr Zindel refers to other Authority determinations that may suggest otherwise or may simply turn on their own facts but I find that the conclusion in *Hull* accords with the plain words in s 66(6)(a) of the Act.

[76] In *MacDonald v Canoe Racing New Zealand*⁵ there was reference to clauses (a) and (b) of s 66(6) addressing alternative situations.⁶ The first referring to the “*employee*” and the second “*the former employee*” with the election under s 66(6)(a) of the Act to be made at any time while the relationship is in existence and s 66(6)(b)

⁴ AA68/06 Member Dumbleton

⁵ [2011] NZERA Auckland 60

⁶ At [15]

of the Act when it has ceased for any reason. The Authority in that case did not make a declaration that the employment relationship was revived by the employee's election or remained continuous after the employment terminated on 31 August. It was held that only the remedy of reinstatement could revive the relationship.

[77] Mr Zindel has placed reliance on an Employment Court judgment in *Muldoon v Nelson Marlborough District Health Board*.⁷ In *Muldoon* the fixed term agreement, notwithstanding advice it would terminate on 6 February 2009 and be reviewed, continued in effect until 1 August 2009 without the Board addressing the requirements of s 66 of the Act. Mr Muldoon declined further casual work after 1 August 2009 and the employment relationship ended. Chief Judge Colgan considered an election under s 66(6) of the Act within the context of an unjustified dismissal grievance. The factual situation in *Muldoon* is distinguishable from this matter.

[78] Mr Zindel relies on another Authority determination *Thompson v Tauranga Environment Centre Charitable Trust*⁸ to support that successive fixed term agreements do not cure the requirement to comply with s 66. It is clear from reading that determination that Ms Thompson had advised her employer through the Community Law Centre that she was a permanent and not a fixed term employee whilst still employed. When she was then presented with a further fixed term agreement Ms Thompson was not prepared to sign it and then when her employment terminated she brought a personal grievance. The facts of that case I find are distinguishable from this matter.

[79] Mr Zindel is submitting in effect as was stated in the Employment Court judgment in *Schneller v Ranworth Healthcare Limited*⁹ that as the fixed term agreement did not meet the requirements of s 66 of the Act Mr Watt's employment is to be regarded as of indefinite duration and at its termination "*is amenable to consideration as a personal grievance alleging it was unjustified.*"

[80] There is a lack of clarity about the nature of the offer for the informal fixed term agreement and the exact date it commenced and when it was meant to end. Mr Watt was however specifically advised in November/December 2012 that he was not a permanent staff member and was a casual employee. From 10 December 2012 until

⁷ [2011] NZEmpC 103

⁸ Member Wilson [2011] NZERA Auckland 184

⁹ Unreported Employment Court Auckland AC 33/07 at [19]

the start of the formal fixed term agreement Mr Watt worked a variety of shifts and not predominantly morning shifts at Tipahi including various shifts at MHAU.

[81] I do not find that a right to an election under s 66 in terms of that unofficial fixed term agreement is now available to Mr Watt in the following circumstances. It was made clear to Mr Watt that he was not a permanent employee in November or December 2012. There was no election made under s 66(6)(a) of the Act by Mr Watt at or about that time to treat the end of an unofficial fixed term agreement as ineffective.

[82] I find there is weight in Mr McBride's submission that Mr Watt after that time wanted to be permanent but was not contending that he was. Mr Watt applied from time to time for permanent roles and described himself as a casual employee when doing so. Mr Watt did not raise a grievance within the statutory time frame under s 114 and the matter was not one which Member van Keulen in his preliminary determination concluded could properly be investigated by the Authority.

[83] Mr Watt then interviewed for, and was successful in obtaining, a fixed term agreement from January 2013 to cover long term sick leave. There was no suggestion that fixed term agreement did not comply with the requirements of s 66 of the Act. The express terms of that fixed term agreement provided that Mr Watt would revert back to his casual position of Registered Nurse on the casual pool for the Mental Health Unit and overtook earlier events in a way that has not been the subject of cases that have considered an election under s 66 (6) of the Act.

[84] I do not find that almost four years after what could properly be concluded was the end of the unofficial fixed term agreement Mr Watt is able to elect to treat the unofficial fixed term as ineffective and revive what has ended and been overtaken by subsequent events.

Was there a verbal offer made to Mr Watt in or about August/September 2012 that he would be appointed for a guaranteed three shifts a week as a permanent part time employee

[85] I have not found that Mr Watt on the balance of probabilities was offered a permanent part-time position for a guaranteed three shifts a week. For completeness I also do not find that he was guaranteed three shifts a week as a casual employee.

Conclusion on the contractual status of Mr Watt in or about March/April 2014*At the outset*

[86] As I have set out earlier the parties agreed at the outset of Mr Watt's employment that he was to be a casual employee and Mr Watt did not suggest that the relationship was other than casual initially. There was, as I have set out, a predominance of morning shifts worked by Mr Watt at Tipahi from about late May to November 2012. That was purportedly to support X and in June/July to cover her sick leave. I have considered that period above on the basis it was as Mr Watt and Mr Staite described an unofficial fixed term agreement.

[87] Mr Watt in his evidence concentrated, when undertaking an analysis of the work records from the rosters, on the number of shifts that he worked each week. This analysis was carried out on the basis it appeared to confirm Mr Watt's impression that Ms Van Iddekinge kept her agreement with him. Mr Zindel in his written submissions seemed to accept that Mr Watt had what he referred to as something of a last choice of hours but referred to the rosters showing an ongoing continuity of work. He submitted that even if Mr Watt did not work set days he had a guarantee of three shifts a week and worked often more than that so he had set hours. I have found that it was clear to Mr Watt by late November/December 2012 that he was not guaranteed 3 shifts a week as a casual and Ms Allen in her evidence as temporary co-ordinator and then permanent co-ordinator of Tipahi said that she did not intentionally offer Mr Watt any particular number of shifts. The hours worked by Mr Watt each week did vary from week to week even if by on occasion a moderate amount.

[88] Mr Watt for the period between May 2012 and February 2013 stated he worked 3.38 shifts per week not counting those taken due to sick or holiday leave. There was then the formal fixed term agreement and for the period between 4 August 2013 and March 2014 Mr Watt was able to assess that he worked at least 3 shifts a week for every week except for about 10 weeks although he might have had some time set down on three of those weeks to work on a Sunday and he may have had some leave.

[89] I accept Mr Zindel's submission that the important question in determining whether an employee has casual or ongoing employment is the extent to which the

parties have mutual employment related obligations which continue between periods of work. A strong indicator of ongoing employment will be where an employer has an obligation to offer the employee further work which may be available and that the employee has an obligation to carry out that work – *Jinkinson*.¹⁰

Days

[90] From late November/December 2012 except for the period of the formal fixed term agreement between 28 January and August 2013, there was no discernible pattern from the shifts worked about whether they were morning, afternoon or night or indeed the days on which the shifts were worked. Some shifts were undertaken in MHAU although considerably less in number than at Tipahi. Mr Watt preferred the day shifts and Ms Allen would offer those to him if they were available.

The roster and offering of work

[91] In terms of rostering Ms Allen explained that she is directed to only cover staff absences if it is required and she looks at client numbers and acuity and works out what cover is required. She said that it is the practice to only request cover from casual staff once part-time staff have been given the opportunity to take on extra shifts up to full time hours. A base roster is made using the permanent staff group which is printed and made available to staff. As gaps are identified and the need for cover required Ms Allen pencilled casual staff members names on and the rosters were not made with any casual staff member pre-booked or rostered.

[92] Ms Allen said that she is directed to pencil casual staff in 2 weeks in advance and not a longer period as patient numbers changed and cover may not be required when the time comes.

[93] When gaps are identified and the need for cover required Ms Allen queries a staff member's availability by writing their name on the shifts with a question mark and they then tick the shift if it suits them. The rosters I was provided with support that. Sometimes Ms Allen would text or email staff as it may be some time before they review the roster. The same use of the roster in *Savage*¹¹ to establish gaps that needed to be filled did not point to a conclusion that there was ongoing employment for Mr Savage.

¹⁰ *Jinkinson* above n 2 at [37], [40] and [41]

¹¹ *Savage* above n 3 at [80]

[94] Mr Watt did not, except for when he was on a fixed term agreement between 28 January and 4 August 2013, work on a rostered and rotating basis as permanent employees did. As Mr Davis said that structured roster pattern of either 4 on 2 off or 3 on and 3 off is one of the things that show permanence. I accept that Mr Watt was not engaged in a structured roster pattern.

[95] I do not find that Mr Watt's name was typed on the rosters in the same way as a permanent employee was expect during the formal fixed term agreement.

[96] There was no dispute that on occasions Mr Watt declined shifts offered by Mr Staite or Ms Allen for whatever reason. Not a lot of evidence was provided by Mr Watt about the provision of notice before being absent or on leave except perhaps during the time of the unofficial fixed term arrangement in 2012. Mr Watt could decline shifts and if he accepted a shift by ticking or verbal agreement and then was sick he would no doubt as a courtesy advise of that and also perhaps if he was going to be unavailable for any shifts during a particular period. I do not find that those matters mean he should be regarded as a permanent employee.

[97] Holiday pay was paid in accordance with the terms of the letter of appointment as a casual employee except for the period that Mr Watt was party to a formal fixed term agreement.

Mutuality of obligation between the parties

[98] The main factor relied on by Mr Watt in terms of a mutual expectation of employment continuing was the number of shifts worked in the context of an offer of a permanent part-time position by Ms Van Iddekinge. I have not been satisfied that there was an offer of a permanent part-time employment or a guarantee of a certain number of shifts a week as a casual. The number of shifts each week that Mr Watt worked, outside of the period of informal and formal fixed term periods, was not a predictable and regular pattern. As in *Savage* the fact Mr Watt was asked regularly if he wished to work and he accepted that work did not mean that the nature of the relationship was no longer one of casual employment in the circumstances outlined above.

[99] One of the other matters that Mr Watt relied on was the removal of his name from the list of permanent employees on Trendcare for Tipahi about a month before his last rostered shift on 2 April 2014. Mr Davis explained that there is no

relationship between Trendcare and rostering of casuals and there was a cleaning up through the hospital of the list in Trendcare in March 2014 to make sure that there were permanents only in the short list and that Mr Watt's name was in the long list. That was I find an administrative matter and not a matter that supports Mr Watt was a permanent employee.

[100] Mr Watt had attended some planning days and had reviewed some client patient programmes. Mr Watt also agreed to assist with some restraint training but that was part of a separate agreement. Mr Watt contributed and participated in a way commensurate with his experience and skills but I could not be satisfied that those matters support he was a permanent employee.

[101] I am not satisfied that the casual agreement was used to deny Mr Watt security of employment but rather to employ him where necessary to meet the demands to deliver the service in the mental health unit.

[102] I do not find when considered overall the evidence supports that Mr Watt was a permanent employee. I find that as at March/April 2014 Mr Watt had a casual employment relationship with NMDHB. NMDHB did not have an obligation to offer further work and if it did Mr Watt was not obliged to accept the work offered.

Was Mr Watt dismissed

[103] NMDHB still regard Mr Watt as being in the casual pool subject to his medical fitness to return to work. I could not be satisfied from the evidence that there was any deliberate decision made not to offer Mr Watt shifts. The evidence was somewhat unclear about when Mr Watt advised about his medical condition with his knee but it is clear that there were emails between Mr Davis and Mr Watt from 24 April 2014. Ms Allen thought that patient numbers may have decreased in Tipahi in or about March 2014 and Mr Watt in an email in March referred to the staffing situation being top heavy. It also seemed that Mr Watt because of his knee had declined offered shifts in MHAU at or about the same time. Ms Allen was very clear that no-one had told her not to roster Mr Watt on. I find it more likely that for whatever reason the need for casual employees to cover gaps in Tipahi was reduced at the start of 2014.

[104] I do not find that Mr Watt was dismissed from his employment.

Unjustifiable disadvantage in not offering further shifts

[105] There were restraints on what Mr Watt could do because of the pain in his knee from mid-April. He was not able to undertake lifting or forceful movement or heavy physical work. He was not able to undertake restraints. Mr Watt maintained that these did not present a difficulty in Tipahi because there was not a need for involvement in restraints as there was in MHAU. That was not the view of Mr Davis, Ms Van Iddekinge or Ms Allen.

[106] Mr Watt was disadvantaged by not being offered further shifts at Tipahi. I could not be satisfied, however, in circumstances where he was not fit to undertake the full range of work that there was an unjustified action on the part of NMDHB who have health and safety obligations to Mr Watt, other staff and patients not to make such an offer until Mr Watt was declared medically fit again. The evidence supported that there were no light duties for casual employees.

[107] I do not find the claim for a personal grievance that Mr Watt was disadvantaged by the unjustified action of NMDHB in not offering him further shifts is made out.

Costs

[108] I reserve the issue of costs. Mr Watt is legally aided and it may be that agreement can be reached about costs failing which Mr McBride has until 9 February 2017 to lodge and serve submission as to costs and Mr Zindel has until 21 February 2017 to lodge and serve submissions in reply.

Helen Doyle
Member of the Employment Relations Authority