IN THE EMPLOYMENT RELATIONS AUTHORITY
WELLINGTON

I TE RATONGA AHUMANA TAIMAHI
TE WHANGANUI-Ā-TARA ROHE

[2023] NZERA 149
3210099

BETWEEN	HELEN WIN Applicant
AND	TE WHATU ORA/HEALTH NEW ZEALAND, CAPITAL COAST AND HUTT VALLEY Respondent

Member of Authority:	Michael Loftus
Representatives:	Karen Glass, Erika Whittome and Liz Lambert, advocates for the Applicant Hamish Kynaston, counsel, Rhona Wallace and Raukura Doyle, advocates, for the Respondent
Investigation Meeting:	23 March 2023 at Wellington
Submissions Received:	At the investigation meeting
Date of Determination:	27 March 2023

DETERMINATION OF THE AUTHORITY

Employment Relationship Problem

[1] The Applicant, Helen Win, claims she was unjustifiably dismissed by the Respondent, Te Whatu Ora/Health New Zealand, on or about 23 November 2022.

[2] Te Whatu Ora denies dismissal on the grounds Ms Win was engaged as a casual employee to whom it had no it had no obligations with respect to ongoing employment.

Identity of the Respondent

[3] In the statement of problem as originally lodged the respondent was identified as Capital and Coast District Health Board (CCDHB). CCDHB ceased to exist with effect 1 July 2022 when its functions and responsibilities were transferred to Te Whatu Ora/Health New Zealand. As a result the citation was altered by consent.

[4] Te Whatu Ora/Health New Zealand continues to identify constituent parts in a way that resembles their previous identity as a DHB with, in this case, the relevant one being Capital Coast and Hutt Valley (CCHV).

Background

[5] Ms Win was employed as a nurse some ten years ago by CCDHB and her employment transferred to Te Whatu Ora/Health New Zealand upon its establishment on 1 July 2022. She was, according to both her Statement of Problem and written affidavit, engaged as a casual employee. Notwithstanding that status she asserts she has, for the last few years, averaged approximately 40 hours a week. Whilst not expressly stated, it is clearly implied she believes that now means she is a full-time employee and it is that belief that forms the basis for her claim for reinstatement.

[6] As part of its response to the COVID-19 pandemic, CCHV required its staff wear face masks. It was possible for an employee to obtain an exemption from CCHV's Occupational Health Team though this would, if granted, see them engaged on "back-room" non-patient contact tasks. CCHV's mask wearing policies have been developed and amended since Covid-19 arrived with the current near universal requirement at the heart of this claim being introduced on 1 August 2021 though it has recently been relaxed (February 2023).

[7] The evidence is that upon the policy's introduction in August 2022 Ms Win complied and she probably wore a mask for some time prior.

[8] On 23 November 2022, however, Ms Win reported for a shift with CCHV and advised she would no longer wear a mask. The evidence is she did so on the basis of a mask exemption pass issued by the Ministry of Health pursuant to s 7 of the COVID-19 Public Health Response (Masks) Order 2022. Here it should be noted there is no apparent debate that the exemption pass is proper and valid.

[9] Notwithstanding that, CCHV refused to accept the pass on the basis it was irrelevant to Ms Win's work setting and she must still apply for an exemption from CCHV's Occupational Health Team.

[10] An impasse then developed with Ms Win refusing to adopt that approach and CCHV refusing to offer any further engagements. That said, it is CCHV's evidence it remains willing to consider rosters that would see Ms Win engaged in non-patient facing duties, but which she is not willing to accept.

[11] It is Ms Win's position that, as already said and notwithstanding her status as a casual, her employment has effectively become permanent. It follows the refusal to offer work constitutes a dismissal and one of the remedies she seeks in respect of that is reinstatement. That is a remedy she also seeks on an interim basis and it is that which this determination addresses.

Analysis

[12] Applications for interim relief involve the exercise of a discretion. The answer comes not from the rigid application of a formula but from a consideration of various questions which culminate with a conclusion about what the overall justice requires.[1]

[13] There are four broad areas of inquiry which are considered on the basis of untested affidavit evidence. They are:

(a) Is there an arguable case for both a finding of unjustified dismissal and permanent reinstatement?

(b) Is there an adequate alternative remedy available, such as damages?

(c) Where does the balance of convenience lie?

(d) What does the overall justice of the case require?

[14] In most such cases the respondent concedes there is an "arguable case' if only to the extent it is arguable but weak. In this instance CCHV has taken the uncommon step of challenging that and it does so on the ground reinstatement, be it on either an interim or

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[1] *Klisser Farmhouse Bakeries Ltd v Harvest Bakeries Ltd* [1985] 2 NZLR 129 (CA)

permanent basis, is unobtainable. At the heart of that position is Ms Win's status as a casual employee.

[15] Casual employees are engaged via "casual pools" which are well established in the hospital environment. While CCHV, and most other hospitals, would prefer its nursing workforce be engaged on a permanent basis so that it can roster at will, a number of nurses prefer the flexibility offered via the casual pool. Common reasons are that individuals don't wish to make themselves available during school holidays or for night shifts, or they might wish to otherwise work around study or secondary employment commitments. Some go as far as using engagement via the casual pool to manage which team or ward they might work in. These nurses advise when they are available and CCHV then engages them to fill gaps in the nursing roster that arise at short notice.

[16] While there is, as the Court observed in *Muldoon v Nelson Marlborough DHB*[2] the retention of "obvious indicia of an employment relationship" nurses in a DHB's casual pool remain casual employees even when not engaged on a casual assignment. That means, as the Court said in *Muldoon*, that notwithstanding the above indicia each casual engagement is, in law, a separate contract and there is no obligation on either party to either offer or accept a further one.

[17] That Ms Win was engaged as a casual is, as already said, expressly conceded in both her statement of problem and evidential affidavit. That she operates as a member of the casual pool would normally operate is also conceded with her affidavit noting "I mark myself available on a planning roster in advance to being rostered as a casual nurse".[3]

[18] It is for this reason Ms Win faces an insurmountable obstacle given Ms Win has offered no evidence to suggest her engagement as a casual is by anything other than her own choice. A casual employee is, by definition, someone employed on an engagement by engagement basis. There is no ongoing responsibility upon the employer to offer work and, conversely, no duty upon the employee to accept work or otherwise be available. This was pointed out during a telephone conference called to plan the investigation of this claim and Ms Win was given a chance to reframe both her statement of problem and affidavit so as to address this obvious impediment. She did not do so retaining the assertion she is engaged as a casual employee.

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[2] *Muldoon v Nelson Marlborough DHB* [2011] NZEmpC 115 at [41]

[3] Affidavit of Ms Win dated 9 February 2023 at [7]

[19] Nor did she take the opportunity to advance the argument her employment status had changed to permanent, as it is possible for it to do, and offer evidence to support that contention. That this might yet happen means there is a possibility Ms Win has an arguable case but given the evidence currently before me I must agree with CCHV that that is not presently the case and she cannot satisfy the key requirement she has an arguable case for reinstatement. She cannot be reinstated to a position the evidence shows she does not, and never has, held and her application cannot succeed.

[20] That conclusion means the other components of the test need not be considered but notwithstanding that I consider further comment appropriate. The first relates to Ms Win's assertion the *Muldoon* case assists her. I cannot agree if for no other reason it had, at its heart, a consideration of fixed term contracts and the rules pertaining to those as opposed to casual employment.[4]

[21] There is then Ms Win's argument the contractual arrangement is null and void as it is a zero hour one. That is not a contention with which I can agree.

[22] That which is colloquially known as a zero hour contract is one that contains an availability provision.[5] An availability provision is one under which the employee's performance of work is conditional on the employer making work available to an employee who is required to be available to then accept that work.

[23] This is not an availability provision. Indeed, it is the opposite that applies. Here, the employee's performance at work is conditional on the employee making themselves available and the employer then offering work. There is no obligation on the employee to accept and a pre-condition to the arrangement is that the employee has declared availability.

[24] Turning now to alternate remedy. CCHV has made it very clear Ms Win is a good nurse and is free to return should she either wear a mask or attain an exemption issued by its Health and Safety team. There is nothing in the evidence which leads me to conclude CCHV cannot impose the mask wearing requirement as it has. It follows that even were Ms Win to ultimately succeed she could not be returned to the workplace until she accedes to CCHV's requirements. Her unwillingness to do so means there is only one possible remedy which is a

[4] Above n 2 at [2]
[5] Section 67D of the Employment Relations Act 2000

monetary reimbursement. In other words there is, as a result of the choices Ms Win has made, an adequate alternate remedy.

[25] With respect to balance of convenience I note Ms Win's prime, indeed only, argument relates to her financial state and the difficulties she now faces. That must be considered weak given she works in a profession where it is well known there is significant demand and she could accordingly address that, especially given CCHV's willingness to engage her should she comply with its perfectly legal mask policy. It pales into insignificance when considered against CCHV's evidence about the veracity of, and continuing need for, its mask policy to protect both staff and patients.

[26] Given Ms Win cannot establish she has an arguable case, that there is an adequate alternate remedy and the balance of convenience strongly favours CCHV it would follow that overall justice would also favour CCHV.

Conclusion

[27] As already said Ms Win's application must fail as the evidence she has offered fails to convince me she can satisfy the key requirement she has an arguable case for permanent reinstatement.

[28] Even if that were not the case, and for reasons briefly explained, I would conclude the overall justice would also favour CCHV and again Ms Win's application would fail.

[29] An Authority Officer will soon contact the parties regarding progression of Ms Win's substantive application.

[30] In the interim CCHV asked that cost be determined in respect to this interim application and that was not opposed by Ms Win. It follows costs are reserved. The parties are encouraged to resolve this issue between themselves but if they are not able to do so and an Authority determination on costs is needed CCHV may, as the successful party, lodge a memorandum on costs within 28 days of the date of issue of this determination. From that date Ms Win will have 14 days to lodge any reply memorandum.[6]

[6] **www.era.govt.nz/assets/Uploads/practice-note-2.pdf**

Michael Loftus
Member of the Employment Relations Authority