

# Casual or Fixed Term? – Compare and Contrast

Issue 200 of *The Advocate* dealt with the distinction between casual and permanent employees. A recent decision, **Brian Muldoon v. Nelson Marlborough District Health Board** (18 July 2011) the Chief Judge compared Fixed Term Agreements with Casual Agreements.

Muldoon (not sure about the relationship!) worked as a casual nurse with the DHB from March 2008, working on an *'as and when required basis'*. The relevant collective agreement defined casual as someone employed on such a basis. It defined a fixed term relationship in terms of s.66 of the Employment Relations Act 2000 as one for a specific limited time for a specific project or situation.

The agreement expressly stated that neither types of contract could *'be used to deny staff security of employment'*. Without further comment the Chief Judge went on to suggest that this was reflected, in common law for casuals and s.66 for fixed terms, existing restraints intended to encourage (employers) to engage permanent employees while still allowing the appropriate use of casual and temporary staff.

Muldoon was employed initially on a basis that all parties agreed was casual in that there were no set patterns of work. He was subsequently employed to cover for an ill colleague. The Board referred to this as *'casual employment on a full time basis for a finite period'*. The letter of appointment referred to a *'temporary change in status from casual to full time'*. This full time work continued for an extended period while the person for whom he was relieving extended their absence.

Eventually the person for whom Muldoon relieved resigned and at the same time the Board restructured. Muldoon sought a permanent role, was unsuccessful and returned to the casual pool. Little or no casual work was available.

The Authority determined that the question was whether Muldoon was casual or permanent and concluded that his employment never changed from casual. The Court however determined that the matter lay in the intersection between casual and fixed term employment and went on to examine this issue in some depth.

Both casual and fixed term, it said, are temporary in the sense that they are both for a specified period, ending in a manner agreed in advance. In these circumstances the *'ending'* of the employment relationship would not constitute a dismissal. The Chief Judge went on to spell out a number of perceived differences between the two types of temporary agreement:

1. The difference between these temporary agreements included the absence (in the case of casual) or the presence of predictability and regularity in the case of fixed term. Casual employment, the Court stated, is *'characterised by irregularity of engagements and the shortness of their limited durations'*, as contrasted with fixed term which has set hours and days of work, albeit for a finite period, so both parties can predict and rely on when the employee will be at work.

## Christmas Shutdown

After an extraordinary year we hope you all have a great Christmas and are able to *"put your feet up"* and relax for at least some part of the break. We look forward to turning the calendar over to a New Year.

Our office will be unattended from midday on Wednesday 21 December 2011 until Wednesday 4 January 2012.

If you require assistance during this period please feel free to contact us on the following numbers:

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2. The Court acknowledged that while a fixed term engagement may be for a specific project such as replacement of an employee on parental leave or long term sickness, some casual contracts are similarly engagements to cover short and unexpected periods of sickness and other absences. With casual employees, the Chief Judge stated, the employer need not justify to the employee why it needs him or her for a proposed assignment. This is different from the fixed term arrangement which requires justification under s.66 of the Employment Relations Act 2000.
3. Another difference between the two types of employment lies in the legitimate expectation of certainty of work. Fixed term employees can have an expectation to work for the whole of the contractual period with the consequential certainty of income and unavailability for other social activities. With casual work neither party can have any legitimate expectation of offer or acceptance of a further engagement.
4. At the conclusion of a fixed term agreement, the relationship between the parties ends. In a casual relationship however, at the end of each assignment, there is nevertheless an ongoing relationship between the employer and those persons in its pool of available casuals. Casual staff, he stated, continue to retain some of the obvious indicia of the employment relationship. In the case at hand for example, Muldoon as a casual nurse retained keys and uniform; presumably awaiting the next assignment.

Chief Judge Colgan went on to look at the complexity of definition of that ongoing relationship in terms of the s.5 definition of an employee as a person who has been offered and accepted work. For example, he stated, if Muldoon was offered one shift in a week but was not offered any other work in a period of two weeks, he would as defined in the Act, only be an employee during the one shift, despite the fact that he may continue to hold the above indicia of employment.

Chief Judge Colgan's comparative consideration of fixed term and casual employment agreements assists with a definition of casual employment, a concept that has been largely undefined in the Courts. It is important for employers to understand the difference. An employee, although defined as a casual in an agreement, may in fact be a fixed term employee as defined by the law. In such a case the requirements of section 66 of the Employment Relations Act 2000 to have a written explanation of the term will apply. More significantly if the provisions of s.66 are not complied with, a fixed term employee may, at the conclusion, claim permanent employment.

This is what happened in this case. The Court determine that Mr Muldoon was ultimately (and after a number of changed arrangements) employed on a fixed term agreement which did not meet the requirements of s.66. Mr Muldoon was therefore a permanent employee and his dismissal was therefore unjustified.

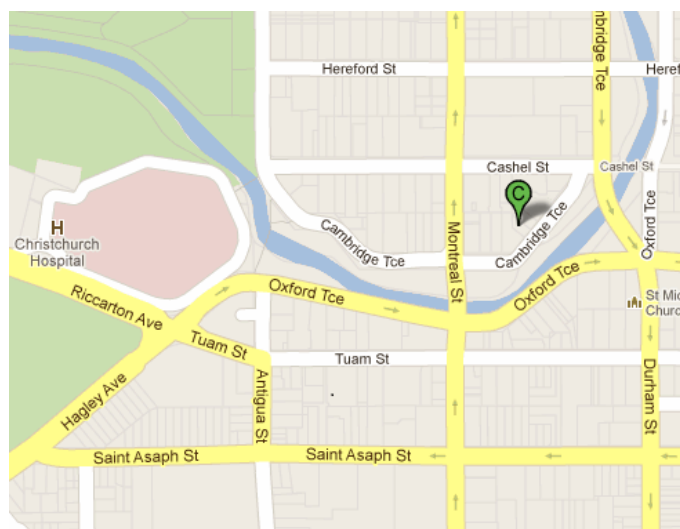
If you are in any doubt about your existing or proposed casual arrangements, call us to discuss them.

## MGZ ARE ON THE MOVE !

After availing ourselves of the generous hospitality of Anne and Peter Zwart since February, McPhail Gibson & Zwart Ltd are moving into temporary offices.

From Monday 12 December 2011 our new address will be, Ground Floor, 71 Cambridge Terrace, Christchurch (between Cashel and Montreal Streets).

We anticipate being there until our building in Kilmore Street is rebuilt. Postal address, phone and fax numbers and email addresses remain the same.



This newsletter is not intended as legal advice but is intended to alert you to current issues of interest. If you require further information or advice regarding matters covered or any other employment law matters, please contact Neil McPhail, Raewyn Gibson, or Peter Zwart.

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