IN THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH

CA 51/07
5048052

	BETWEEN	NEVILLE JOHN MILLER Applicant
	AND	NICHOLS GARDEN GROUP LIMITED Respondent

Member of Authority:	James Crichton
Representatives:	Mary Jane Thomas, Counsel for Applicant Rachel Brazil, Counsel for Respondent
Investigation Meeting:	7 March 2007 at Invercargill
Determination:	10 May 2007

DETERMINATION OF THE AUTHORITY

Employment Relationship Problem

[1] The applicant, (Mr Miller) alleges that he has been unjustifiably dismissed.

[2] The respondent, Nichols Garden Group Limited (Nichols) resist Mr Miller's claim on the footing that Mr Miller was a casual employee and was not unjustifiably dismissed.

[3] Mr Miller responded to an advertisement in the Southland Times from Nichols seeking applications for roles as a garden centre assistant (full time) and a delivery driver (casual). Mr Miller's evidence was clear that he applied only for the garden centre assistant position and not the delivery driver position.

[4] The advertisement, a copy of which was put into evidence, had applications closing on Friday, 1 April 2005. The evidence was that Mr Miller was unsuccessful in his application. However, Mr Miller was telephoned by Nichols Invercargill

Manager, Ms Margery Elliotte sometime later to ask if he was still interested in working for Nichols. It is common ground that this telephone call by Ms Elliotte to Mr Miller took place in October 2005, some seven months after the initial advertisement, which Mr Miller had applied to, had closed.

[5] While it is common ground that Ms Elliotte telephoned Mr Miller to ask if he was still interested in working for Nichols, there is dispute about the detail of the conversation. Mr Miller's evidence is that he was offered the full time permanent garden centre assistant position, that being the position that he had previously applied for. He was very clear in his evidence and quite unshaken by cross examination. Mr Miller was reinforced in his view that that was the position he was being offered by his understanding from the telephone discussion with Ms Elliotte that *Greg Wilson had walked out.* Mr Miller knew that Greg Wilson was the person who had been appointed to the permanent garden centre assistant position that he had applied for in response to the April 2005 advertisement.

[6] Ms Elliotte, on the other hand, said that she did not give Mr Miller any reason to think that she was *offering him Greg's position.*

[7] In her oral evidence at the investigation meeting, Ms Elliotte agreed that she may not have said that the position was *casual* during the telephone discussion. She says that she gave no details about what the job actually entailed during the telephone discussion.

[8] Both Ms Elliotte and Mr Miller agree that, as a consequence of that telephone discussion, there was a formal interview at the garden centre in Invercargill the following day. At this interview, there was an exchange of information, in particular the provision by Ms Elliotte to Mr Miller of an employment agreement for Mr Miller to peruse. There was also, by both parties' accounts, a discussion about the nature of the responsibilities of the position.

[9] What is critical however to an understanding of that interview is that on Mr Miller's evidence, during the telephone conference the previous day he had been offered the position by Ms Elliotte and had accepted it. In his oral evidence at the investigation meeting, Mr Miller recalled Ms Elliotte saying something to the effect that she was *in a bind* because *Greg had walked out* and she offered the job to Mr Miller which he said he understood was both the job that had previously been

occupied by Greg Wilson and the job that he himself had previously applied for in April 2005.

[10] What Mr Miller says happened at the interview at the workplace is that he was told that if there was not sufficient work outside in the yard then alternative work would be provided for him in the shop or in the nursery.

[11] Mr Miller says that at no stage was he told by Ms Elliotte that the position was *casual.* Mrs Miller, who gave evidence at the investigation also, attended the job interview. Her evidence is the same as her husband's to the effect that there was no mention of the position being casual and indeed she says that she remembers Ms Elliotte referring to the position as *a permanent one*. Mrs Miller also gave evidence that when there was not enough work for her husband in the yard he was told that he might be offered work in the nursery or in the shop.

[12] Conversely, Ms Elliotte gave evidence that she had described the position to Mr Miller as a *casual yard sales person.* She said that she was absolutely certain that she had made clear to Mr Miller the *seasonal* nature of the work and that at no time would she have referred to the position as either *permanent* or *full time*.

[13] Mr Miller commenced employment with Nichols on 14 October 2005 and on 18 October 2005 he appears to have signed an individual employment agreement. The evidence suggests and on the balance of probabilities I find that on the day of his interview, Mr Miller was shown and read through a generic individual employment agreement which probably was in similar, perhaps even exactly similar terms, to the individual employment agreement which Mr Miller subsequently signed. The individual employment agreement which was signed by Mr Miller comprises two pages of reasonably brief generic provisions followed by a third page which is described inter alia as *Schedule One Job Description.* It is critical to an understanding of Mr Miller's claim before the Authority that he stoutly maintained that at no stage before the commencement of his proceedings had he seen the completed version of *Schedule One Job Description* that attached to his employment agreement. Mr Miller is adamant that when he signed the employment agreement on 18 October 2005, the Schedule which Mr Miller referred to throughout his evidence as *the back page* was not completed.

[14] The document filed with the Authority as the individual employment agreement covering the employment of Mr Miller includes a *back page* which names Mr Miller, describes his position as casual yard sales person, notes some specific tasks, records hours of work as *whatever required* and then by the ticking of two boxes identifies that *the above days and hours may vary according to store roster requirements and may alter according to seasonal requirements*. No-where on this *back page* does Mr Miller's signature appear nor it seems does the writing conform to examples of Mr Miller's writing, which I have seen.

[15] Mr Miller's evidence is that he worked variable hours between his start day of 14 October 2005 and March 2006 but that usually he worked about 42.5 hours per week. Sometimes he worked as few as 34 hours and sometimes as many as 59.5 hours per week. There was a roster prepared by the employer which came out on a monthly basis and he simply consulted that roster to see what shifts he was working.

[16] In March 2006 the whole system changed and Mr Miller was rostered to only work 4-6 days per month. Mr Miller rang the general manager of Nichols Mr Gibbs and asked him about the change in hours and Mr Gibbs told Mr Miller that the work was seasonal and that this change happened every year. Mr Miller says in his evidence that this was the first occasion that he had ever been told that his work was seasonal. Ms Elliotte of course was quite explicit in her evidence that Mr Miller had been told right at the outset of the employment relationship that his employment was seasonal and there would be a fall off in work during the winter months. Mr Miller denies having been told that.

[17] During the period that Mr Miller was being employed on short hours, there occurred an incident which resulted in Mr Miller receiving a written warning from his employer. Mr Miller was alleged to have *bad mouthed* Nichols to Nichols customers. For his part, Mr Miller said that he was given *no opportunity to give my explanation* and Ms Elliotte was honourable enough to accept that she did not follow the appropriate procedure in administering the warning.

[18] On 17 May 2006, two days after the warning had been administered, Mr Miller received a letter from Mr Gibbs saying that Mr Miller's employment agreement had been terminated. The letter referred to the time of year as a quiet period and indicated that all casual staff had their hours reduced or were not called on at all.

[19] The 17 May 2006 letter of termination to Mr Miller does not conform to the requirements of Mr Miller's employment agreement in that that agreement provides for two weeks notice of termination of employment or two weeks pay in lieu of such notice. The termination letter does not refer to that payment of notice.

Issues

[20] There are two issues that fall for determination. The first is whether in truth this is a casual employment relationship and the second is whether Mr Miller was unjustifiably dismissed or not.

Is this casual employment?

[21] I am satisfied on the evidence before me that Mr Miller's employment is best characterised as a permanent part time position with no fixed hours. It follows that I am satisfied on the balance of probabilities that Mr Miller was not employed as a casual worker or indeed as a casual seasonal worker as the respondent Nichols sought to argue.

[22] The characteristics of casual employment are well known. I would characterise the essential features of casual employment as follows:

(a) Each period of work is a discrete engagement;

(b) There is no expectation on the part of either party for ongoing employment;

(c) Because each period of work is a separate engagement and there is no expectation on either party that the employment relationship will continue, payment is typically completed for each work engagement, often inclusive of holiday pay;

(d) Often there is a pool of workers of casual labour maintained by the employer such that, if one worker refuses to accept an engagement on a particular occasion, there is another worker who can be approached by the employer to fulfil that same engagement.

[23] In my judgment, the evidence before me does not support the view that any of these elements of casual employment are present in the instant case save for the general contention that Mr Miller knew or ought to know that he was a casual worker.

[24] The contention that Mr Miller knew or ought to know that he was a casual worker is advanced first because the *back page* of Mr Miller's employment agreement refers to him as a casual worker and secondly because the nature of the industry in which Mr Miller was employed is known to be seasonal and Mr Miller ought to have understood that his employment would be treated in the same way as other employees.

[25] I am satisfied that neither of these contentions can be properly made out. First, I accept Mr Miller's evidence that he did not see the *back page* of his employment agreement when he signed it and I believe him when he maintains that he never saw that document at all until he brought his claim before the Employment Relations Authority and the document was disclosed as part of the proceedings. Further, I am satisfied on the evidence I heard that Mr Miller, in accepting the position offered to him by Ms Elliotte proceeded on the understanding which, on the evidence was a reasonable understanding, that he was not in fact a casual employee but was actually a permanent employee but with flexible hours.

[26] As to Nichols second broad contention that Mr Miller ought to have known that the employment was effectively seasonal in nature, while that expectation may on its face seem reasonable, Mr Miller had not worked for Nichols for any significant period of time and indeed had never worked for Nichols through the quiet winter period until the winter in which his employment was terminated. It follows that Mr Miller would have no extrinsic history to rely upon in relation to the custom and practice of the industry. No doubt he would have been familiar to some extent with the work environment during his short employment and no doubt he would have spoken from time to time to his work colleagues but given the very clear evidence from both Mr Miller and his wife that they understood his engagement was for a permanent position, any information given to Mr Miller by his work colleagues that would suggest a casual employment relationship would have been overborne in his mind by his conviction that he was employed on a permanent basis.

[27] Nichols asked me to prefer the evidence of Ms Elliotte who was the person who engaged Mr Miller for Nichols. I certainly found Ms Elliotte a straight forward and honourable person who gave her evidence clearly and readily made appropriate

concessions even when they were unhelpful to her. However, on the key question of whether she had created an expectation that Mr Miller was employed on a permanent or on a casual basis, I prefer the recollection of Mr Miller and his wife. I find that there was a clear intimation given during both the initial telephone discussion, where I am satisfied an offer and an acceptance existed, and in the subsequent interview, that Mr Miller had been appointed to a permanent position and not a casual one.

Was Mr Miller unjustifiably dismissed?

[28] Given the finding I have just made, to the effect that Mr Miller was not casually employed, it follows logically that the dismissal of Mr Miller by way of Nichols letter to him dated 17 May 2006 does constitute an unjustified dismissal.

[29] This is because the dismissal effected by the 17 May 2006 letter proceeds on the footing that Mr Miller's *casual contract ... has been terminated.*

[30] Given that I have found this was not a casual contract at all the dismissal effected by this letter is both substantively unjustified and procedurally unfair and cannot stand.

[31] Furthermore, the dismissal letter contains another fundamental error in that it fails to appropriately deal with the question of notice. The employment agreement clearly sets out a provision requiring two weeks notice or payment in lieu and there is no reference to notice in the dismissal letter nor was any payment made.

Determination

[32] I am satisfied that Mr Miller has made out his claim that he has been unjustifiably dismissed by Nichols and accordingly that he has a personal grievance in that regard.

[33] Having reached that conclusion, I am required by law to consider the question of whether Mr Miller contributed to the dismissal or not. Nichols urge on me the proposition that Mr Miller has in fact contributed to his own misfortunes but I do not accept that the evidence discloses any contribution.

[34] I have found that Mr Miller formed a reasonable belief that he was employed permanently by Nichols and having formed that view, he then behaved consistently with that belief. It was only when the employment relationship was brought to an end by Nichols letter of 17 May 2006 that it became crystal clear to Mr Miller that Nichols saw the status of his employment in a different way from the way that Mr Miller himself had understood it. I have not been persuaded by Nichols' evidence that the nature of Mr Miller's employment status was always casual in nature.

[35] The issue of compensation for hurt, humiliation and injury to feelings is a straight forward one. There was ample evidence before the Authority of the negative consequences of the dismissal which I must say were exacerbated in my view by the intemperate and truculent language of Nichols general manager in responding to Mr Miller's then advocate's attempts to address the wrong that had been done. In all the circumstances, I award Mr Miller the sum of $8,000 as compensation under s.123(1)(c)(i) of the Employment Relations Act 2000.

[36] The issue of lost wages is by no means as straight forward. I am clear that Mr Miller was not a casual employee but I am equally satisfied that his employment though permanent was also neither full time nor on fixed hours. The issue of an appropriate balance between Nichols entitlement to run its business profitably and not employ staff who were unnecessary on the one hand and Mr Miller's entitlement to reasonable wages from which he can meet his commitments on the other, is a difficult balancing act.

[37] Mr Miller urges on me the proposition that he is entitled to receive the average wage he earned over the pre March period for the subsequent post March period. The effect of this submission is that Mr Miller would receive in lost wages monies broadly equivalent to what he would have earned in the busy part of the year.

[38] Nichols invite me to conclude that even if lost wages are to be paid, they must be appropriately abated to take account of the reality that, had Mr Miller continued in employment, he would not have been enjoying the 42.5 hours per week of income in the winter months that he enjoyed in the summer months. That, Nichols say, is the reality of the garden centre industry, that it is in fact a highly seasonal business where only a skeleton staff work the whole year round.

[39] Against that argument Mr Miller says that he understood that he was full time and that he was given assurances when he started with Nichols that, in the event that work in the yard dried up, he would be found work in the shop or the nursery. But even on Mr Miller's evidence, the suggestion is not made that the hours that he would be given in the quieter winter months would equate to the hours that he would have earned during the summer months.

[40] In all the circumstances, I am not persuaded Mr Miller is entitled to receive as arrears of wages any sum equivalent to the 42.5 hours per week that he would have earned in the summer. The uncontested evidence is that Mr Miller was unemployed from 17 May 2006 down to 15 January 2007. In addition, Mr Miller makes claim to additional wages during the period from the end of March to the date of dismissal and he claims $2,990.63 lost wages for that period. I decline to order lost wages for that period. I am satisfied that Nichols provided Mr Miller with whatever hours they could during that period. There was no evidence before the Authority that the relationship during that period had soured so I think it is reasonable for Nichols to maintain, as they do, that they provided Mr Miller with whatever hours were available.

[41] In respect to the period from the date of dismissal down to 15 January 2007 I propose to adopt the same logic and award lost wages on the basis of the seasonal variations. On this basis then I award lost wages from the date of dismissal down to the middle of October a period of four months at the average that Mr Miller would have worked in the period from March to May before his dismissal namely on his uncontested evidence *4-5 days per month.* On this basis, it would be appropriate for the four months covered by the winter period to have arrears of wages apportioned at the figure of $1,955.00 gross. That figure represents four weeks wages on the footing that Mr Miller's unchallenged evidence was that over the winter period when he was still employed by Nichols he worked 4-5 days per month.

[42] Over the summer period, by which time Mr Miller had been dismissed by Nichols, I consider Mr Miller is entitled to recover arrears of wages at the average figure that he would have expected had he continued in employment, namely 42.5 hours per week.

[43] The summer months in question are from the middle of October down to the middle of January at which point he obtained fresh employment. That is a total of three months or thirteen weeks. At Mr Miller's weekly wage of $488.75, I award him

a further sum of $6,353.75 being arrears of wages which he would otherwise have earned over the period from mid October 2006 down to mid January 2007.

[44] I am satisfied on the particular facts of this case that Mr Miller is entitled to receive reimbursement of lost wages beyond the usual three month period. The evidence is clear and unchallenged that Mr Miller took all reasonable steps to obtain work after his dismissal and that it was eight months after the dismissal before Mr Miller was successful in obtaining fresh employment.

[45] I have rebated Mr Miller's claim to take account of Nichols contention (which I think is well made) that Mr Miller could not reasonably expect to work the same span of hours in the winter time as in the summer time, but having made that reduction in Mr Miller's entitlement, I still hold to the view that Mr Miller is in the particular circumstances of this case entitled to recover arrears for the whole period that he was out of work.

Summary

[46] I award Mr Miller the following sums:

(i) Compensation under section 123(1)(c)(i) of the Employment Relations Act 2000 in the sum of $8000.00.

(ii) Lost wages totaling $8,308.75 gross.

Costs

[47] Costs are reserved.

James Crichton
Member of the Employment Relations Authority