



CASUAL EMPLOYMENT CONTRACTS AND THEIR STATUS IN THE CURRENT CLIMATE. SUMMARY OF A WORKSHOP

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Abstract

Judith Ferguson led a workshop on casual employment, focussing on the legal implications surrounding the status of a casual worker. The workshop was concerned with legal access to personal grievance procedures and, by implication, the right to fair and reasonable treatment from an employer, particularly at the end of the employment relationship.

Casual workers can be seen as the epitome of what the Employment Contracts Act 1991 was designed to achieve - full flexibility of the workforce. Yet the uncertainty surrounding their status and the ambivalence with which they have been dealt with in the personal grievance area illustrate the contradictions inherent in the Employment Contracts Act itself. Although it is an Act designed to promote efficiency and flexibility through a free market, contractual process, it still retains the traditional protections for workers incorporated in the personal grievance procedures now extended to all employment contracts.

There has not yet been a comprehensive examination of casual employment in the specialist employment courts, although there have been grievances and other claims in which issues of casual employment status have been raised. When the results of these cases are examined, it can be concluded that there are important consequences flowing from such a status.

Definition

The theoretical definition suggested for a casual employment contract was one under which a worker is employed from time to time by an employer as the need arises and intrinsic to the arrangement is the reciprocal absence of obligation - the employer does not guarantee the availability of future work nor does the worker guarantee the availability of labour; the employer is not obliged to provide ongoing work nor is the worker obliged to accept work when it is offered.

While this may be the theoretical position, it was acknowledged that the reality was usually somewhat different. Often casual workers are in fact obliged to accept any offers of casual work - or the simple consequence will be that there will be no further offers of work in the future. There is an

ongoing relationship between many 'casual' workers and their employers, a relationship which may last many years although each separate casual engagement may last only a matter of hours or days.

Implications of the status 'Casual Worker'

When it comes to the end of the employment relationship the implications for casual workers of their status may be quite serious. Casual employment contracts are usually interpreted as stand-alone, single engagement contracts entered into by the parties at the beginning of each engagement and lasting only for the length of that engagement. Like fixed term contracts, they come to an end at the end of the term or agreed period, be it the hour, the day or the week for which the worker has been called in. This interpretation has two consequences for workers complaining that their employment relationships have ended unfairly and wanting to turn to the remedies provided for in the personal grievance procedures.

The two main grievances are claims of unjustified dismissal or unjustifiable disadvantage to one's employment. The threshold argument confronting casual workers are as follows:

1. If casual workers are not offered further work or are 'rostered off', they have not been dismissed at all and cannot make a claim for unjustified dismissal. Simply their contracts expired at the end of the last engagement and they have not been offered any future contracts. The relationship with the employer may have come to an end, but there was never any obligation to provide ongoing work and the employer is not required to justify the decision not to offer further work.
2. In order to bring a grievance, or for that matter a breach of contract claim, workers must be employees at the time the

unfair treatment being complained about takes place. If the complaints relate to denial of future work, then at the time this denial takes place the workers have no status to bring the claim. Although the Employment Contracts Act defines an employee as one either employed or intending to work, it also makes it clear that one intending to work is one who has already entered into a contract - "a person who has been offered, and accepted work" (s.2). Casual workers, between engagements, who have not yet been offered further work, do not have this status and so do not have standing to bring a personal grievance claim.

It would appear, then, that employers are not shackled with the obligations to justify the end of casual employment relationships as is the case with permanent employment contracts, nor do they have to comply with obligations to treat workers fairly and reasonably at the end of an employment contract. They are free to decide not to re-employ casual workers for any or no reasons. Again the reality for the workers is often that their employment has ended - that they have lost their jobs - that they have been dismissed. But they may be denied the rights made available to all other regular employees.

Application

The members of the workshop discussed factual scenarios which had been the bases of personal grievance claims brought before the Employment Tribunal. These illustrated the rather pragmatic approach of the Tribunal and maybe in some situations the desire to achieve some sort of fair resolution rather than an outcome determined by the application of a strictly consistent theoretical analysis. It was noted that a common approach in cases in which casual employment status was raised was to look to the reality of the employment contract rather than the 'casual' label. If, in fact, a regular pattern of ongoing employment over time could be discerned, the employee was held to be a permanent part time - or full time - worker rather than a casual worker. Thus the denial of further work was a dismissal and had to be justified substantively and procedurally by the employer. This had occurred even in cases when the written contracts had labelled the workers 'casuals', although it was also noted that the power to ignore such a label had not yet been addressed directly at the higher court levels, particularly in the current Court of Appeal. There was a clear overlap between casual workers and seasonal workers in those situations where work became available on a periodic basis coinciding with seasonal work fluctuations. It was noted that the employment courts had rejected the notion that just because workers had been employed on a seasonal basis regularly in the past, they could argue they had a legitimate expectation, or were entitled to expect employment in ensuing seasons. Some evidence of a specific promise or offer of a new employment contract was needed before denial of such future work could be seen as a dismissal. The same approach had been taken where casual employment was involved.

However, it was suggested that maybe if employers had in past years forgone their strict legal rights to comply with the

terms of the contract, for example, by not formalising offers of employment for each season, then they could not fall back on such requirements in rejecting dismissal claims. In other words, a form of the principle of estoppel (the principle whereby a person is prevented from resorting to strict legal rights if earlier conduct has led others to believe those rights have been waived) might come into play.

The consequences for workers regarded by the Tribunal as falling within the casual category were not encouraging. As such they could not expect future work and in fact were not even entitled to notification that there would be no future work. Such notification was a generous courtesy on the part of the employer. Although often analogous to redundancies in that the jobs were no longer there, the principles which have developed in the area of redundancy - fair treatment including consideration of compensation if appropriate - have no application to the disappearance of a casual employee's job.

Analysis

Several possible analytical approaches were considered briefly.

- a) Each casual employment contract might be characterised as a separate contract, but exist within the framework of an overall umbrella contract which governs the whole employment relationship.

This approach seems to accord with the reality experienced by many casual workers. They do have an ongoing relationship with the employer and both workers and employer may regard them as part of the staff of the enterprise, even if not currently employed under a specific employment contract.

However, so far, such an analysis has not received favourable consideration by the courts in the analogous area of seasonal employment.

- b) The public law concept of legitimate expectation would seem applicable - past patterns of behaviour and a developing reasonable reliance on this pattern leading to an expectation that the pattern will continue in the future. If a worker has been called on to do casual work in the past in a predictable way, this might form the basis of an expectation that such patterns will continue.

Again, however, this analysis has not yet achieved favourable attention in either casual or seasonal employment cases.

- c) Principles have been developed in the employment courts giving protection to workers on fixed term contracts and, in some circumstances, rights to ongoing employment in spite of the fixed term nature of the contract. Employers cannot easily use such contracts as devices to avoid obligations attaching to ongoing employment. Fixed term contracts are valid, but only when their use can be justified by the employer and they relate to the operational requirements of the enterprise. Even if the contract specifies an end date to the contract, there are situations in which an

employee may argue that there is a right to ongoing employment.

It was suggested that similar principles might be developed for casual employment, whereby a worker might be entitled to re-employment, all things being equal, and any refusal to re-employ might be challenged if the refusal was based on improper motives or entered into unfairly.

While at present such development was possible, it was acknowledged that there was a reluctance to pursue such a course at present, in light of the apparent doubt surrounding the future of the fixed term principles and the real possibility that the Court of Appeal might re-evaluate the area in the near future.

d) The most useful approach appears to be to examine the reality of the employment relationship and confine the label 'casual' to the smallest possible group of workers. The reality behind the contractual label should be examined.

This may leave the true casual workers without recourse to personal grievance procedures, but such recourse may not be appropriate if the relationship really is one of freely negotiated discrete engagements and the ongoing relationship does not involve obligations on either party to either offer or accept work.

Conclusion

The workshop agreed that most casual workers regarded themselves as having jobs, even if they were merely on call. These workers were particularly vulnerable to exploitation. While there was some reassurance to be had from the way some grievances were treated in specific situations, overall the prospects of casual workers having access to fair treatment under the Employment Contracts Act were not encouraging. The degree of uncertainty in the area and the nature of the casual workforce now generally without union protection, mean many casual workers may continue to be at risk of unfair treatment.

The cementing of the label 'casual' to workers would not be to their advantage, in terms of access to personal grievance procedures and to any assurance of a right to fair treatment from employers, particularly at the end of the employment relationship. Maybe in the absence of any recognition of the ongoing employment relationship being given contractual status, the best strategy for those concerned with the vulnerability of casual workers, would be to work towards removing the label altogether.

Future research

There has been some adoption of the 'umbrella' contract notion in England in cases dealing with contracts for service and contracts of service. It might be useful to examine those in more depth in order to determine whether the same reasoning could be promoted more vigorously in our own courts.

Ongoing monitoring of new decisions will obviously be important, particularly of any cases that reach the Court of Appeal. The overlap between the issues raised in the area of casual employment and those in seasonal, fixed term or temporary employment could also be explored in more depth.

From a less legal point of view, it would also be helpful to have more information on just what constitutes the workforce in New Zealand labelled 'casual' either by employers, by statisticians or by the workers themselves. Anecdotal comments suggest there is a vulnerable group out there, but it seems difficult to obtain much information on its real size or nature. Of course, what would be really valuable - but no doubt very difficult to achieve - would be to find out if there are casual workers who have in fact been exploited, who have been treated badly by employers but who have been unable to find a way of obtaining any remedy.

References

Cases from which the factual scenarios were taken:

- a) *Avenues Restaurant Ltd t/a Avenues Restaurant & Wine Bar v Northern Hotel etc IUOW* [1991] 1 ERNZ 420
- b) *Gray v Hawkes Bay Racing Centre Ltd* unrep 11/2/94, D E Hurley, WT 25/94
- c) *Porter v Falloon* unrep 1/8/95, G M Teen, CT 109/95
- d) *Omarama Motor Lodge Ltd v Burnard* unrep 31/5/96, Palmer J, CEC 14/96

Fixed Term Principles

- Smith v Radio i* [1995] 1 ERNZ 281
NZ (except Northern etc) Food Processing IUOW v ICI [1989] 3 NZLR 24

Redundancy Principles

- Brighouse v Bilderbeck* [1994] 2 ERNZ 243

Wages and Holiday Pay Issues

- Drake Personnel (New Zealand) Ltd v Taylor* [1996] 1 ERNZ 324

Author

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