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CASUAL EMPLOYMENT - A MODIFIED FORM OF DISMISSAL AT WILL?

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FIONA MELANIE MILLS

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CASUAL EMPLOYMENT - A MODIFIED FORM OF DISMISSAL AT WILL?

Submitted for the LLB (Honours) Degree at Victoria University of Wellington

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1 SEPTEMBER 1997

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CASUAL EMPLOYMENT - A MODIFIED FORM OF DISMISSAL AT WILL?

I. INTRODUCTION

Not true. See Blackstone in the 18th century; Elizabethan laws.

Employment law is a relatively new field of law. Most of the development of employment law has been during the last century. As a result many significant areas in this field have yet to be considered.

In general, the law has only been concerned with regular employment, that is to say continuous work between the hours of nine and five, Monday to Friday. However, recently there has been growth in areas of atypical employment. Atypical employment includes part-time, casual, seasonal and short term employment. As the law has been developed to deal with "typical" employment it sometimes does not apply well to "atypical" employment. An area where this is particularly notable is in the area of casual employment.

Common in agricultural England for centuries.

Employers may use casual employment contracts to respond to genuine operational requirements, or to try to avoid the personal grievance provisions and redundancy obligations. On the other hand employees have a strong interest in job security.¹ It is unclear whether a casual employment contracts can be used to avoid such provisions. This is the area that I will be addressing. This area is of major concern to all employees, as allowing such contracts to avoid the provisions of the Employment Contracts Act 1991 will effectively allow a modified form of dismissal at will in New Zealand. *Explain.*

II. CASUAL CONTRACTS

A. Definition of Casual Employment

In the past the courts have tended not to consider casual employment as a category. Courts have generally classified employment as seasonal or permanent. This is evident in *Central Clerical Workers Union v Wooltan NZ Ltd*.² In this case the issue was whether the employee was a seasonal employee. It was assumed that if she was not then she must

Not true. "Casual" was always in Awards under the CA system established in 1896.

¹ This was recognised in *Telecom South Ltd v Post Office Union* [1992] 1 ERNZ 711, 715.
² [1990] 1 NZLR 28.

Short-term; Casual; part-time; intermittent; women work; is the typical mode today. Permanent, full-time employment is disappearing around the world.

be a permanent employee.³ Because of this the courts have not set out a definition of casual employment.

Under the old system of Industrial Conciliation and Arbitration, industrial awards often set out categories of employment. These did include casual employees. However, most of the definitions of casual employee found in awards are quite arbitrary and therefore are likely to be of little use in clarifying what casual employment is. One such award⁴ was set out in *Actors etc Equity of NZ IUOW v Auckland Theatre Trust*.⁵ Cooke P noted that “Casual Worker” was defined by the award as a worker other than a permanent worker who was employed by the hour and worked less than 28 hours per week”.⁶ Yet, the award did not give a definition for a permanent worker.

*Plus ca change*⁷ identifies six categories of employment relationship.⁸ These are permanent workers, fixed term workers, apprentices, temporary workers, casual workers, and contractors/consultants. The key definitions are:⁹ permanent workers which are “employees who work all year and have [an] expectation of ongoing work” and casual workers who are defined as “employees hired on a periodic basis as need arises”. Following this definition, 5.4% of the New Zealand workforce were in casual employment in 1995.¹⁰ This would mean that over 50, 000 New Zealanders have casual employment. This is a significant figure.

From the above it is clear that while casual employment is not easily defined it is categorised with working hours “as needed”, such as on a roster system, where work is not expected to be ongoing. This essay will also consider the position of workers who are

³ Above n2, 31.

⁴ The Northern, Wellington, Nelson, Canterbury and Otago, and Southland Production Workers Engaged in Community Theatre Award, doc no 1427, dated 28 January 1983.

⁵ *Actors etc Equity of NZ IUOW v Auckland Theatre Trust Inc* [1989] 1 NZLR 463, 2 NZLR 154.

⁶ Above n5, 157.

⁷ P Brosnan and P Walsh *Plus ca change...: the Employment Contracts Act and non-standard employment in New Zealand, 1991-1995*. Working Paper 96/4 (Victoria University of Wellington, Industrial Relations Centre).

⁸ Above n7, 7.

⁹ Other definitions are:

Fixed term workers: Employees on a contract with a specified expiry date or employed to complete a specific task

Apprentices: Indentured employees receiving craft training

Temporary workers: Employees taken on for a relatively short but unspecified period

Contractors/consultants: Persons [who are not] direct employees who contract to provide labour services to [the] organisation.

¹⁰ Above n8, 8.

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partly casual, that is, they work on a roster system but may have some expectation of ongoing employment.

B. *The Contract*

In considering the current status of casual employment contracts under New Zealand law I will consider both the theory and principles and their application to a specific contract¹¹ and the practice which accompanies it. The contract is an individual employment contract and has no fixed date of termination. The relevant provisions of the contract are:

- Either party can terminate the contract with one hours notice.
- The employee is to have no "expectation of any further employment beyond each engagement".
- Holiday pay is to be paid "at the expiration of each period of casual employment".

In practice there are a number of points to be noted:

- In practice a rostering system is used. Rosters are put up for a month usually around two weeks in advance. Once the roster has been determined it will only be changed in special circumstances.
- The parties do not sign the employment contract more than once.
- Holiday pay is paid on 31 March each year.
- Employees who work the same hours each week are employed on this contract.

The main concern of an employee would be whether their employment is protected by the law.[?] Possible grounds where the law would protect casual employees will be considered. For simplicity these have been broken down into two main areas; firstly the common law and secondly the Employment Contracts Act.

¹¹ The contract is set out in full in the Appendix. The employer's identity has been deliberately omitted at the request of the employee who provided the contract. The employee is concerned about how her employment will be affected if the company is aware that she provided the contract for this analysis.

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III. COMMON LAW

A. *Wrongful dismissal*

A claim for wrongful dismissal will usually be limited to a claim that the notice period specified in the contract was not observed. In the past the view was that damages were limited to wages for the notice period, damages and could not be claimed for distress etc.¹² This would mean that under the contract a dismissal would only be wrongful if the employee was not given at least one hour's notice. Damages would be limited to wages for that hour.

This position has changed. A dismissal is still wrongful at common law only if the notice period in the contract is not observed.¹³ However, damages can now be awarded for undue distress, humiliation etc. Damages may even be partly exemplary as the employer's behaviour may be taken into account when determining the level of damages.¹⁴ Such damages may still only be claimed by an employee who has not been given the correct notice.

B. *Implied terms*

Terms are implied into employment contracts in the same manner as ~~to~~ any contract. However, the terms which are implied may differ from those implied into commercial contracts.¹⁵ Most implied terms relate to the conduct of the employee.¹⁶ Conduct of the employer is limited by the term that requires employees to be treated fairly and reasonably.

1. *Fair and reasonable treatment*

This term has been implied by the Court of Appeal in a number of cases. In *Malborough Harbour Board v Goulden*¹⁷ the court held that an employer had an obligation to treat an employee fairly when considering dismissal. It held this term could

¹² *Addis v Gramophone Co Ltd* [1909] AC 488.

¹³ *Waugh v Coleman Consolidated Business Ltd* [1995] 2 ERNZ 251.

¹⁴ *Whelan v Waitaki Meats Ltd* [1991] 2 NZLR 74.

¹⁵ *Attorney-General v New Zealand Post Primary Teachers' Association* [1992] 2 NZLR 209.

¹⁶ For example the implied terms of fidelity and confidentiality.

¹⁷ [1985] 2 NZLR 378.

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only be excluded by very clear statutory or contractual language.¹⁸ Another case which required the employer to treat an employee fairly and reasonably was *Auckland Shop Employees Union v Woolworths (NZ) Ltd*.¹⁹ In this case it was held that an employer had a duty to conduct an inquiry into dishonesty in a fair and reasonable manner.

In *Telecom South Ltd v Post Office Union*²⁰ it was suggested that a dismissal which breached the implied term of fairness might be wrongful at common law. This would be based on the "implied term...that employers will not, without reasonable and proper cause, conduct themselves in a manner calculated or likely to destroy or seriously damage the relationship of trust between employer and employee."²¹ *ECA of common law?*

This means that the manner of the dismissal might be taken into account when considering whether a dismissal is wrongful. This would make it much easier for a casual employee to claim wrongful dismissal. A claim for wrongful dismissal would still be limited by the term of the contract which expressly states that there is to be no expectation of ongoing employment. This would mean that no longer giving an employee work would not in itself be a breach of the implied term of fair treatment.

IV. THE EMPLOYMENT CONTRACTS ACT 1991

Legislation further limits an employer's power to dismiss. Under the Employment Contracts Act, a dismissal must be justified. *Explain*

The Employment Contracts Act 1991 significantly changed employment law in New Zealand. The legislation has made a number of substantive changes to the way employers and employees negotiate. *consistency of individual cases?* The main aim of the legislation was to make the labour market more flexible and thus increase productivity in the workforce and at the national level. The need for flexibility was identified in the National Party Policy on Industrial Relations on May 8 1990,²² which stated that "[t]o provide dramatically improved productivity, income and employment, we must bring a far more flexible structure into industrial relations..."

¹⁸ Above n17, 383.

¹⁹ [1985] 2 NZLR 372.

²⁰ Above n1.

²¹ Above n1, citing Sir Nicolas Browne-Wilkinson VC in *Imperial Group Pension Trust Ltd v Imperial Tobacco Co Ltd* [1991] 2 All ER 597, 606.

²² Cited in Plus ca change, above n8, p7.

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The Act was drafted with typical employment in mind. It does not particularly take into account part time work, casual employment or fixed term contracts. In *Drake Personnel (NZ) Ltd. v Taylor*²³ it was accepted that the Holidays Act 1986:

had been developed in times where full permanent employment predominated, but that times had changed and today many types of different employees work in a variety of employment arrangements, including a growing number of short term temporary or casual assignments.

While the Employment Contracts Act is a more recent ^A act many similar considerations apply.

The courts have had some difficulty applying the Act to atypical work relationships. In particular fixed term contracts have caused difficulty for the courts and therefore an upcoming reform aims to address this issue.²⁴ However, casual employment ^{u?} does not seem to have become an issue yet. There are few cases or articles in this area. ^{FN} It is unclear whether this is because there are no problems or whether problems have simply not been brought before the courts.

The main provisions relating to employment protection are found in Part III of the Act, which deals with personal grievances. This part may limit an employer's right to unilaterally terminate the contract or otherwise disadvantage an employee. Section 27 states that an employee has a personal grievances if they claim:²⁵

- (a) That the employee has been unjustifiably dismissed; or
- (b) That the employee's employment, or one or more conditions thereof, is or are affected to the employee's disadvantage by some unjustifiable action by the employer (not being an action deriving solely from the interpretation, application, of operation, or disputed interpretation, application, or operation, of any provision of any employment contract); or
- (c) That the employee has been discriminated against in the employee's employment; or
- (d) That the employee has been sexually harassed in the employee's employment;...

I will deal with each of these grounds for claiming a personal grievance separately.

A. *Unjustifiable dismissal*

For an employee to successfully claim that they have been unjustifiably dismissed they must show:

²³ [1996] 2 NZLR 644.

²⁴ See G Anderson "The Coalition Government's Policy on Industrial Relations" [1997] (2) March ELB 28.

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- 1) that they have been dismissed; and
- 2) that the dismissal was unjustifiable.

In most cases the requirement on the employee to prove that a dismissal has occurred will not present any problems. However, this has caused difficulties in relation to atypical employment. When an employee is in the middle of a shift and is told to simply leave in one hour (the notice period) and to not come back, this is clearly a dismissal. However there may be no dismissal where an employee is no longer rostered on to work.

In the past the term "dismissal" has been interpreted widely. In *Wellington (etc) Clerical Workers Union v Greenwich*²⁶ the judge stated, " 'Dismissal' is a word with a wide meaning. It should not be construed narrowly. The word "dismiss" is derived from two words meaning "send" and "apart". A dismissal is a "sending apart" or "sending away" or "sending forth". In *Actors etc Equity of NZ IUOW v Auckland Theatre Trust Inc*²⁷ Cooke P expanded on this view, making some important observations concerning dismissal in general. After dealing with the employer's arguments he stated "I am disposed to think that the expression "dismissal" has in contemporary industrial law a wide meaning corresponding to its literal one of "sending away".²⁸

1. Casual employment cases

In the past the courts have not dealt with the issue of whether it is possible to dismiss a casual employee. They have proceeded on the basis that there is a dismissal.²⁹ A case where dismissal was made an issue is *Avenues Restaurant v Northern Harbour IUOW*.³⁰ This case was decided under the Labour Relations Act 1987, but much of the analysis is still relevant under the Employment Contracts Act. The grievant was employed in the appellant's restaurant. The workers in the restaurant were employed under a weekly roster system. After a change of management, the grievant turned up at work to ask if she could go home sick, but prepared to work if necessary. She was then told that she would not be

²⁵ Section 27 re-enacts s 210 of the Labour Relations Act 1987.

²⁶ [1983] ACJ 965. *at p ... per?*

²⁷ Above n5.

²⁸ Above n5, 158.

²⁹ See *N.Z. (with exceptions) Food Processing Chemical etc Factory Employees IUOW v Sealord Products Ltd* [1996] 2 NZLR 644 and *Otago Hotel etc IUOW v Sheil Hill Tavern Ltd* [1990] 2 NZLR 160.

³⁰ [1991] 1 ERNZ 421.

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required for the next two weeks. She was later told that she had been "laid off" and that she would be re-engaged if the employer needed her again.

Under the grievance procedures of the relevant award, the grievant complained that she had been unjustifiably dismissed. The employer's primary claim was that the employee had not been dismissed. It argued that as a casual worker she had merely been rostered off, therefore no question of dismissal could arise. The court concluded "that what occurred was a unilateral termination by the employer of a contract of employment. In brief, it was a dismissal".³¹ The court found that even though she was a casual employee her employment was regular in nature. It noted that "she had continuity of employment and was a regular employee. Her employment was not casual in its essence. Nor was it seasonal".³² Because of the regular nature of the work the court found that the employer by terminating the contract had dismissed the employee. This suggests that the factual regularity of the work may be important. It should be noted that when the court considered regular work, it did not mean certain fixed shifts, but a reasonably continuous and steady pattern of work.

A situation where regular work is supplied can be compared with that of "temporary" workers as illustrated by *Drake Personnel (NZ) Ltd. v Taylor*.³³ At page 645 The judge stated that:³⁴

It is clear that once an assignment has been completed Drake has no obligation to offer any further assignments, and the employee has no obligation to accept any further assignment. In such a situation it cannot be said that there is a continuing contractual relationship of employment... The position would be different if a further assignment was offered and accepted before the completion of the first, as in such case the employment period would be extended.

This work is therefore truly casual.

In Australia, cases have varied widely. In *Hendy v Esquire Motor Inn*³⁵ the Full Industrial Commission simply assumed that a casual worker could be dismissed and did not address the issue. In *Hotels, Clubs, etc Award (Question of Law) Case*³⁶ the Full Industrial Court emphasised that the main issue was whether the employment was continuous or regular, or reasonably expected to be so. It found that a dismissal would not

³¹ Above n30, 422.

³² Above n30, 423.

³³ Above n23, 644.

³⁴ Above n23, 645.

³⁵ (1987) 54 SAIR 54, 215.

³⁶ (1980) 47 SAIR 345, 402.

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occur if the employment was so spasmodic and of such occasional incidence that there was no continuity at all.

Applying the principles of these cases to the contract there is one main issue. Whether the employment is regular or continuous. There is a term in the contract which expressly states that the employee is not to have any expectation of ongoing work. If the court were to apply these principles to the contract it would have to consider whether the ongoing and regular nature of the employment would be enough to override the contractual provision. If the employment was regular in practice this would probably be enough.

2. Fixed term contracts

It has been suggested that casual employment is simply a series of short fixed term contracts. If this is correct the law applied to fixed term contracts must be considered in any analysis of casual employment. Even if casual employment is regarded as continuous, similar principles may apply to both types of employment ~~a~~ due to their atypical nature.

The situation where a worker is simply rostered off could be compared to the situation where a fixed term contract has not been renewed. There have been a number of cases in this area. An analysis of these cases and a comparison with the situation of a casual worker follows.

The first important case in this area is *Actors etc Equity of NZ IUOW v Auckland Theatre Trust Inc.*³⁷ Cooke P held that not renewing a fixed term contract could potentially amount to a dismissal in certain circumstances. He gave the term dismissal a wide meaning. He emphasised that a relevant consideration is whether the reason for the employee's employment had genuinely ended.³⁸ However, the majority judgment held that failing to renew the contract in these circumstances did not amount to a dismissal. Both judgments did leave room for the argument that failure to renew a fixed term contract might form the basis of a personal grievance in some circumstances. McMullin J suggested that the use of a fixed term would be substantially fair, although it might become unfair if the employer brought about the termination of the contract for the wrong reasons.³⁹ Barker J emphasized that there was no express or implied promise of renewal.⁴⁰

³⁷ Above n5.

³⁸ Above n37, 158.

³⁹ Above n37, 160.

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In *NZ (except Northern etc) Food Processing, etc IUOW v ICI (NZ) Ltd*⁴¹ Goddard CJ found that the employer's motive in using fixed term contracts would be relevant and stated that:⁴²

It is not a proper motive to employ a whole workforce in the absence of purely seasonal or temporary requirements when it was all along known and intended that some part of that workforce would be required on a permanent basis...[g]enuine seasonal or temporary needs have to be recognised but it is not open, in general, for an employer to employ workers under a fixed term temporary contract on a "just in case" basis.

In this case he held that while fixed term contracts might be valid, this would only be where they genuinely relate to the operational requirements of the employer, and that the burden is on the employer to show that the purpose of the contract is not simply to deprive the worker of protection of the relevant award. The emphasis of the judgment was on the lack of operational need for fixed term contracts. It held that the court is entitled to examine the reasons for the fixed term contract.⁴³

*Smith v Radio i Ltd*⁴⁴ followed the approach taken in *NZ (except Northern etc) Food Processing, etc IUOW v ICI (NZ) Ltd*. It adapted this approach to the law under the Employment Contracts Act. It summarised the law relating to fixed term contracts as:⁴⁵

- (a) Fixed-term contracts of employment are valid unless prohibited expressly or impliedly by an applicable collective employment contract.
- (b) A fixed-term contract will not automatically expire on the date specified in it for the purpose against the will of the employee if:
 - (i) It does not genuinely relate to the operational requirements of the undertaking or establishment of the employer; or
 - (ii) If the employer fails to discharge the burden of proving, in each case, that there was a genuine reason for the seasonal or other fixed-term contract of employment and that the purpose of the contract is not to deprive the employee of the protection of an applicable collective employment contract or of the benefits of the personal grievance procedure required to be inserted in the contract by the Act.
 - (iii) The employer failed to consider whether the genuine need at the time of the creation of the contract for its termination on a particular date still existed when the expiry of the contract was imminent and considered whether the genuine need at the time of its creation for its termination on a particular day still existed; or
 - (iv) There has been an express or implied promise of renewal that has not been kept or the termination of the contract was brought about in defiance of the employee's legitimate expectations of renewal; or

⁴⁰ Above n37, 162.

⁴¹ [1989] 3 NZLR 24.

⁴² Above n41, 34.

⁴³ Above n41, 37.

⁴⁴ [1995] 1 ERNZ 281.

⁴⁵ Above n44, 309.

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- (v) The termination of the contract was brought about by any wrong motive or unfairness on the part of the employer.

In this case the court decided that as it was the employee who had insisted on a fixed term contract, she could not base a claim on its expiry. In making its decision the court was influenced by the fact that the employee's bargaining power was at least the same as that of the employer.

At this point the law would not treat a fixed term contract as ending if the employee had reasonable expectations of ongoing employment or if the contract was not for genuine operational reasons.

However, the law has been changed significantly by the Court of Appeal decision in *The Principal of Auckland College of Education v Hagg*.⁴⁶ Mr Hagg had been employed as a mathematics lecturer by the college. It employed him on a series of fixed term contracts; firstly for two years, then as a full time relieving teacher for two months, then on a second two year contract and finally for a one year relieving position. It was held that he was not given any basis to expect ongoing employment.

The majority judgment⁴⁷ first considered the status of this contract in the state sector, and the relevance of the State Sector Act. This Act required the college to advertise any vacancies⁴⁸ and to appoint the person who is best suited to the position.⁴⁹ The court held that due to the public sector appointment process the college could not convert Mr Hagg's contract to one with an indefinite term without going through the statutory procedures. Therefore the college could not be said to have dismissed him.⁵⁰

While it decided the case on this basis the court went on to consider the law relating to fixed term contracts in the private sector. While such statements are obiter dicta, they indicate the approach that the court would take in future cases.

The Court of Appeal confirmed its approach to the construction of contracts of employment, stating that there are no special rules applying to employment contracts. It cited *TNT Worldwide Express (NZ) Ltd v Cunningham*,⁵¹ noting that when the contract is in writing, the nature of the contract depends on the rights and obligations in the

⁴⁶ Unreported, CA 230/96, 26 March 1997.

⁴⁷ The judgment of Richardson P, Gault, Keith and Blanchard JJ was delivered by Richardson P.

⁴⁸ Section 77H of the State Sector Act 1988 (as amended by the State Sector Amendment Act 1989).

⁴⁹ Section 77G of the State Sector Act 1988 (as amended by the State Sector Amendment Act 1989).

⁵⁰ Above n46, 14.

⁵¹ [1993] 3 NZLR 681.

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contract. Factual circumstances will only be relevant in relation to the construction of the written terms. This excludes situations where the contract is a sham.

The court did consider some situations where other considerations might apply:⁵²

In our view, given the subject matter and the commercial realities, there is scope within conventional contract interpretation principles for considering whether, although in form a limited term contract, it was all along intended, or in the operation of the contract it became intended, that the employment relationship should be ongoing and the stated term limit masked that reality. In some cases the reality may be that a representation inconsistent with the termination of the relationship by expiry of the term has been made by the employer by word or conduct and relied on by the employee so as to deprive the employer of the ability to take advantage of the expiry date.

The court emphasised that merely allowing a fixed term contract to come to an end does not amount to a dismissal.⁵³ It recognised the possibility of the use of a series of nominally fixed term contracts being used to avoid the personal grievance provisions. It also noted that article 2(3) of ILO Convention 158⁵⁴ states that adequate safeguards need to be provided against such use of fixed term contracts. However, it held that to decide that expiry of a fixed term contract could amount to a dismissal would alter the meaning of the term 'dismissal'. It stressed that any changes in this area should be made by Parliament.⁵⁵

Thomas J while also allowing the appeal delivered a separate judgment.⁵⁶ He agreed that the Employment Contracts Act does not preclude fixed term contracts, and that ordinary principles of contract law apply to employment contracts. However, he held that "[i]n certain circumstances the failure to renew a fixed or short term contract when it expires may constitute a dismissal in terms of s 27(1)(a) of the Employment Contracts Act". This might occur in situations where the written agreement does not represent the true legal position between the parties, or when the employer is estopped because of a

⁵² Above n46, 23.

⁵³ Above n46, 22.

⁵⁴ Convention concerning Termination of Employment at the Initiative of the Employer 1982. Article 2(3) states: Adequate safeguards shall be provided against recourse to contracts of employment for a specified period of time the aim of which is to avoid the protection resulting from this Convention.

⁵⁵ This ignores the fact that the law was regarded as certain in this area prior to the passing of the Employment Contracts Act, and that the legislature chose not to amend the law at that point.

⁵⁶ Unreported, CA 230/96, 26 March 1997, Thomas J.

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representation or promise. This means that a fixed term contract must be genuine, otherwise it will be "classified as...in substance and reality, a form of permanent employment."⁵⁷

He suggested that a fixed term contract might be found to be permanent where there is an express or implied promise of renewal, a legitimate expectation of renewal on the part of the employee, where the contract is a sham or where evidence reveals that the substance of the employment is actually ongoing.⁵⁸

In summary, he accepted that non-renewal of a fixed term contract would not amount to a dismissal. But indicated that the contract must be analysed to ascertain whether the employment is really for a fixed term or whether it is ongoing.

The law relating to fixed term contracts has been substantially altered by this case. Effectively the law will now allow fixed term contracts in most circumstances. Freedom of contract was emphasised. This would suggest that a similar approach might be applied to casual contracts.

The main effect of this case on the law relating to casual employment is that the court is likely to place more emphasis on the contract itself. Applying the principles of the judgment to the contract, the employer would have the right to simply allow the contract to end in accordance with its terms. The employee would need to show either that the fixed term is a sham, or that the employer had made representations inconsistent with the fixed term.⁵⁹ A reasonable expectation of renewal will not be enough on its own to challenge a termination.

3. Constructive dismissal

An employee might also be able to claim constructive dismissal. If a constructive dismissal is accepted by the court, then the employer will have to prove that the dismissal is justified.

*NZ Amalgamated Engineering etc IUOW v Ritchies Transport Holdings Ltd*⁶⁰ sets out the requirements for there to be constructive dismissal. This follows *Auckland Shop*

⁵⁷ Above n56, 3.

⁵⁸ Above n56, 4.

⁵⁹ This might include promises of future work such as holiday employment.

⁶⁰ [1991] 2 ERNZ 267.

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*Employees Union v Woolworths (NZ) Ltd*⁶¹ in which the Court of Appeal sets out three possible categories of constructive dismissal. These categories are where an employer gives the employee the option of resigning or being dismissed, where an employer follows a course of conduct aimed at coercing the worker to resign or where a breach of duty by the employer leads a worker to resign.⁶² It was suggested by the court that such a breach might include a breach of the implied term of confidence and trust, or the implied term of fair and reasonable treatment.

In *Bongard v Universal Business Directories*⁶³ an employee refused to sign a new fixed term contract which did not provide for the statutory minimum holidays and other rights, and claimed that she was constructively dismissed when her fixed term contract was not renewed. However, the employer after realising that the contract he was offering did not comply with the legislation, offered the employee a new contract which did comply. The Tribunal decided that this would only have been a situation of constructive dismissal if the employer had persisted in denying the employee her legal rights. This conclusion was approved by the Employment Court.

In *Nelson (t/a Nelson & Associates) v Auckland Dental, etc, IUOW*⁶⁴ it was held that:

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To require an employee to accept an unlawful position asserted by an employer will rarely, if ever, allow the employer to discharge the burden of justifying the dismissal of the employee, who has refused to accept the unlawful position.

Applying these principles to the contract. A situation where an employer threatens stop rostering the employee on unless the employee agrees to waive certain legal rights, might amount to constructive dismissal, if the employee pointed out the illegality of the employer's demands. Other conduct which breached implied terms such as fairness might also be found to have caused a constructive dismissal. This might include situations where the employer deliberately gives the employee too many or too few shifts in the hope that they would leave.

⁶¹ [1985] 2 NZLR 372.

⁶² Above n61, 374-375.

⁶³ [1995] 1 ERNZ 393, 399.

⁶⁴ [1989] 2 NZLR 304.

⁶⁵ Above n64, 307.

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4. General principles of dismissal

The law as it has been applied to casual contracts in the past would suggest that a casual employee can be dismissed. This would mean that casual employees would be protected by the provisions relating to unjustifiable dismissal.

However, this approach may need to be modified to take account of the approach of the Court of Appeal in *The Principal of Auckland College of Education v Hagg*.⁶⁶ This judgment is particularly relevant given that the Court of Appeal has not made any significant observations concerning casual employment.

The relevance of the law relating to fixed term contracts depends mainly on whether casual employment is categorised as a series of contracts or a continuous one. In Australia it has been decided that although an employee is employed as a "casual employee" it does not necessarily mean that there is not one continuous contract of service.⁶⁷

Practice will be especially relevant to this issue. A key factor is the payment of holiday pay yearly. This would suggest that both parties treat the contractual relationship as continuous. The parties do not sign a new contract for each "engagement", which also suggests a continuous relationship. In this situation it would be artificial to say that parties entered into a new contract for each "period of work".

This would suggest that the law relating to fixed term contracts does not apply to casual employment. However, following a similar analysis to that taken by the Court of Appeal would suggest that in general termination of a casual contract would not amount to a dismissal. This would be on the basis that the parties intended the contract to end when no more work was available. Similar or greater limitations would need to be applied to casual employment in recognition of the continuous nature of the employment relationship.

In summary, a casual worker is unlikely to succeed in a claim of unjustifiable dismissal without fitting into an exception such as being able to rely on a representation made by the employer.

⁶⁶ Above n46.

⁶⁷ *Port Noarlunga Hotel v Stewart* [1981] 48 SAIR 220.

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B. *Unjustifiable disadvantage*

An alternative claim which might arise under the contract is a claim of unjustifiable disadvantage under section 27(b). This may arise where the unjustifiable action of an employer affects the employee's employment or conditions to the employee's disadvantage.

In the past the grievant had to show some material or financial loss. However, since *Alliance Freezing Co (Southland) Ltd v NZ Engineering Union*⁶⁸ it has been clear that a claim of unjustifiable disadvantage need not rely on a material loss. This case also interpreted the requirements that the grievance relates to their "employment or one or more conditions thereof".⁶⁹ It requires a breach of a contractual obligation or contractual entitlement. In this case it was decided that the court has the jurisdiction to enquire into whether a warning is justified on the basis that a warning affects the employee by making their employment less secure. This would mean that an unjustified warning would disadvantage the employee.

In *Wellington Area Health Board v Wellington Hotel etc Union*⁷⁰ the Court of Appeal noted that obligations under the employment contract may continue after the obligations to work and pay wages end. However it found that a term in a redundancy agreement for preferential re-employment was a term or condition of employment within the requirements of s210 or s 211(1) of the Labour Relations Act 1987.⁷¹ It found that these sections referred only to conditions or terms which apply to the "on the job" situation.⁷² It decided that a remedy for such a breach would be available through the Contracts (Privity) Act 1982, which would simply limit the remedies available for such a breach.

If an employee wanted to claim unjustifiable disadvantage under the contract they would need to rely on implied term such as fair and reasonable treatment. A claim founded on the terms of the contract would not be relevant to this analysis.

An example of unjustifiable action might be where the employer deliberately chooses to give the employee very short shifts, e.g. an hour, or at particularly unpleasant times. It is arguable whether this is unjustifiable however, as in the contract the employer has the

⁶⁸ [1989] 3 NZLR 785.

⁶⁹ Employment Contracts Act s27(1)(b).

⁷⁰ [1992] 3 NZLR 658.

⁷¹ These sections are reproduced as ss27 and 28 the Employment Contracts Act 1991.

⁷² Above n70, 662.

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and time and place.

right to set the dates which the employee is to work. Another potential claim for unjustifiable disadvantage might arise where the employer unilaterally reduces the number of hours an employee is rostered on each week. An expected number of hours is not expressed in the written contract, despite these matters being discussed before the contract is signed.

It would seem very odd if an employee could claim unjustifiable disadvantage in either of these situations but not be able to claim to have been unjustifiably dismissed if the contract is terminated by the employer.

C. *Other Grounds*

will depend on the manner of the termination

1. *Discrimination*

Under section 27(c) an employee has a personal grievance if they have been discriminated against in their employment. Section 28 sets out what constitutes discrimination for the purposes of the Act. Section 28 states that:

[A]n employee is discriminated against in that employee's employment if the employee's employer or a representative of that employer-

- a) Refuses or omits to offer or afford to that employee the same terms of employment, conditions of work, fringe benefits, or opportunities for training, promotion, and transfer as are made available for other employees of the same or substantially similar qualifications, experience, or skills employed in the same or substantially similar circumstances; or
- b) Dismisses that employee or subjects that employee to any detriment, in circumstances in which other employees employed by that employer on work of that description are not or would not be dismissed or subjected to such detriment- by reason of the colour, race, ethnic or national origins, sex, marital status, or religious or ethical belief of that employee or by reason of that employee's involvement in the activities of an employees organisation.

This cause of action is an alternative to a claim under the Human Rights Act 1993; an employee may not make a claim under both Acts.⁷³ An employee must elect under which

⁷³ Section 145 of the Employment Contracts Act 1991 and Human Rights Act 1993, Schedule 2.

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legislation they wish to proceed. Under the Employment Contracts Act the employee has the burden of proof, that is the employee must prove that the discrimination actually occurred. In *NZ Workers IUOW v Sarita Farm Partnership*⁷⁴ it was noted that the grievant must prove the discrimination. It is enough to prove that any explanation by the employer is not satisfactory, and that the only explanation is discrimination. This is to be compared with unjustifiable dismissal cases where the onus is on the employer to prove that the discrimination was justifiable.⁷⁵

Since it is particularly difficult to prove discrimination, it is likely to be a better option for an employee in this category to proceed under the Human Rights Act. This will not be possible if the discrimination was because of union activities, as this ground is not listed in the Human Rights Act. The employer can not use the provisions of the contract to justify discrimination.

2. Sexual Harassment

A personal grievance based on a sexual harassment claim may arise under section 27(d) of the Employment Contracts Act. What constitutes sexual harassment is set out in sections 29 and 36. In many ways a sexual harassment claim is very similar to a discrimination claim. In *H v E*⁷⁶ it was decided that sexual harassment was a type of sex discrimination, and a complaint could therefore be brought to the Human Rights Commission. As such, a claim of sexual harassment can also be brought in either the Employment Tribunal or Court, or in the Human Rights Commission. The employee must again make an election. For similar reasons to discrimination cases, the Human Rights Commission may be a better forum for many employees.

As in cases of discrimination the burden of proof is on the employee to prove that the harassment has occurred. It is clear that the view taken in *NID Distribution Workers IOUW v AB Ltd*⁷⁷ that the burden is the same as in contested paternity cases is no longer the correct law. Especially following the condemnation by Goddard CJ in *Z v A*⁷⁸ of such behaviour. In this case he held that an employee claiming to have been sexually harassed

⁷⁴ [1991] 1 ERNZ 510.

⁷⁵ Above n74, 516.

⁷⁶ (1985) 5 NZAR 333.

⁷⁷ [1988] NZILR 761

⁷⁸ [1993] 2 ERNZ 469.

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should not have to start on the premise that the complaint is "more likely to be untrue than true".⁷⁹ Thus the standard to be applied is simply the balance of probabilities.

3. Harsh and Oppressive Contracts

Under section 57 of the Employment Contracts Act the court can set aside all or part of a contract if it is harsh or oppressive⁸⁰ or if it "was procured by harsh and oppressive behaviour or by undue influence or duress".⁸¹ It is unlikely that the court would find such a contract to be harsh or oppressive as seasonal contracts are quite common. This is emphasised by the fact that this section was originally drafted to cover behaviour that was "harsh and unconscionable" then "oppressive and unreasonable" and finally "harsh and oppressive".⁸² This creates a very high threshold.⁸³

The behaviour of the employer is relevant.⁸⁴ It seems possible that the court could hold that a contract designed solely to avoid allowing employees to enforce their legal entitlements to be harsh and oppressive. However, this is unlikely to happen. Proving that this is the motivation behind the contract would be difficult.

If the employee can prove that the employers conduct fits into subsection (a) they may be able to apply to have the relevant provisions in the contract set aside, effectively creating ongoing employment.

D. Remedies

Even if a personal grievance is upheld, in particular, if it is found that a casual employee has been unjustifiably dismissed, the casual nature of their employment may be relevant to the remedies available to them.

Section 40(1) of the Employment Contracts Act provides that the court or tribunal may award one or more of:

⁷⁹ Above n78, 475.

⁸⁰ Section 57(b) of the Employment Contracts Act 1991.

⁸¹ Section 57(a) of the Employment Contracts Act 1991.

⁸² NZPD, vol 514, 1443, 23 April 1991.

⁸³ This was emphasised by Goddard CJ in *Adams and Ors v Alliance Textiles (NZ) and Ors* [1992] 1 ERNZ 982.

⁸⁴ See *Talley v United Food and Chemical Workers Union of NZ* [1993] 2 ERNZ 360. The Court of Appeal upheld the Employment Court's description of the defendant as behaving with "oppressive and tyrannical" arrogance.

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- (a) The reimbursement to the employee of a sum equal to the whole or any part of the wages or other money lost by the employee as a result of the grievance:
- (b) Reinstatement of the employee in the employee's former position or the placement of the employee in a position no less advantageous to the employee:
- (c) The payment to the employee of compensation by the employee's employer, including compensation for-
 - (i) Humiliation, loss of dignity, and injury to the feelings of the employee; and
 - (ii) Loss of any benefit, whether or not of a monetary kind, which the worker might reasonably have been expected to obtain if the personal grievance had not arisen:...

Subsection 2 provides that an award may be reduced if the employee contributed towards the situation.

Section 41 provides for reimbursement of remuneration for three months or remuneration which is actually lost.

Remedies for a casual worker under ss40(1)(a) and 41 are likely to be less than for a permanent worker. A casual employee will not be able to show such a great loss of wages and such loss is also likely to be particularly hard to quantify. It should be noted that claims for lost wages are not limited to wages which would be earned following the correct period of contractual notice.⁸⁵ An award for damages based on loss of earnings is discretionary.⁸⁶

Under the Labour Relations Act 1987 section 228, reinstatement was to be the primary remedy. But there are substantial difficulties in putting a casual employee back in the same position. Their position is that of being available to be rostered on. This situation arose in *NZ (with exceptions) Food Processing Chemical etc Factory Employees IUOW v Sealord Products Ltd.*⁸⁷ The court found that three casual employees had been dismissed and ordered reinstatement to their previous position of being available for work. There is not such a problem if an employee is classed as a regular casual with certain minimum hours of work in a week. As the ECA no longer requires reinstatement to be treated as the primary remedy a casual employee who is dismissed is unlikely to be awarded reinstatement due to the practical difficulties involved.

For a casual employee to get a reasonable level of damages they are likely to have to claim under s40(1)(c). This requires the employee to show humiliation, loss of dignity or

⁸⁵ This was the common law position following *Addis v Gramophone Co Ltd* [1909] AC 488.

⁸⁶ *Horsburgh v NZ Meat Processors IUOW* [1988] 1 NZLR 698. In this case the employee (aged 55) who lost his employment because he was unlawfully expelled from a union, claimed wages until the age of retirement.

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injury to feelings. An award under this head is not automatic. There is no jurisdiction for the court or Tribunal to award exemplary damages.⁸⁸ When assessing damages under s40(c)(ii) the emphasis is on the effect on the worker, not the conduct of the employer.⁸⁹ The main implication of this is that even if the employer uses this type of contract to 'victimise' employees or force them to accept lower terms, then this would not be relevant to an award of damages, except in considering the effect of the dismissal on the employee. In effect the employer's conduct is only relevant to the degree to which it has affected the employee.

V. POLICY

The main aim in this area should be that summarised in a quote from *Terry v East Sussex County Council*,⁹⁰ which stated:⁹¹

On the one hand, employers who have a genuine need for a fixed term employment, which can be seen from the outset not to be ongoing, must be protected. On the other hand, employees have to be protected against being deprived of their rights through ordinary employment being dressed up in the form of temporary fixed term contracts. (Emphasis of Thomas J)

be ?

While it seems quite reasonable to allow fixed term contracts for genuine operational reasons, it does not seem reasonable to enforce contracts of which the sole aim is to avoid the provisions of the Act. This has been reflected in the past by the courts' emphasis on the rationale behind the contract.⁹² However, *The Principal of Auckland College of Education v Hagg*⁹³ has indicated that the Court of Appeal is reluctant to look at whether a contract is necessary for operational reasons.

Originally the personal grievance process was only to be extended to those employees on collective contracts and to those on individual contracts who chose to include the

⁸⁷ [1987] NZLR 14, 15.

⁸⁸ See *Lavery v Wellington Area Health Board* [1993] 2 ERNZ 31.

⁸⁹ *Paykel Ltd v Ahlfeld* [1993] 1 ERNZ 334, and *Air New Zealand v Johnston* [1992] 1 NZLR 159.

⁹⁰ (1977) 1 All ER 567.

⁹¹ Above n90, 571, as cited above n56, 4.

⁹² *Bongard v Universal Business Directories* [1995] 1 ERNZ 393, 401, also *NZ Meat Workers Union v Richmond* [1992] 3 ERNZ 643.

⁹³ Above n46.

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process.⁹⁴ The personal grievance provisions in the Act were extended to cover all employees by the Labour Committee.⁹⁵

“It is clear that the use of fixed term employment contracts are seen by some employers as a means of avoiding either the liability for redundancy compensation or personal grievance claims”.⁹⁶ Similar considerations would also apply to casual employment. Allowing employers to simply use the nature of casual employment contracts to avoid their responsibilities under the Act is unreasonable and unfair.

As a matter of policy employees on fixed term or casual contracts should not be excluded from the protections provided by the Act. Employment protection has been extended in other jurisdictions. In the UK the non renewal of a fixed term contract is treated as a dismissal.⁹⁷ Legislation in France and Germany makes special provisions for part time or temporary workers to receive the same rights as full time workers.⁹⁸

VI. CONCLUSION

In the future courts dealing with issues of casual employment will be constrained by the majority judgment of the Court of Appeal in *The Principle of Auckland College of Education v Hagg*⁹⁹. In particular, the Court of Appeal is unlikely to regard the termination of a casual employment contract as dismissal, unless the contract is a sham or the employer has made representations to the employee regarding continuity of employment. This means that a casual employee may only have limited protection from dismissal. For example, in situations of constructive dismissal.

The contract does not preclude the employee making claims of unjustified disadvantage, discrimination or sexual harassment. However, the employer would still have considerable freedom to exploit the employee, as there is still a threat on terminating the employment. Without protection from termination the effect of these protections will be substantially reduced.

⁹⁴ NZPD, vol 511, 481, 19 December 1991.

⁹⁵ NZPD, vol 514, 1426, 23 April 1991.

⁹⁶ Fixed Term Contracts - Not the Great Escape, Neville Taylor [1996] (3) May ELB 39. The writer of this article bases this proposition on his experience as a practitioner.

⁹⁷ Employment Rights Act 1996 (UK), s95(1)(b).

⁹⁸ See S Deakin “Legal Change and Labour Market Restructuring in Western Europe and the US” (1991) 16 NZJIR 109, 115.

⁹⁹ Above n46.

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As a result an unscrupulous employer would be able to use casual contracts to avoid liability for unjustifiable dismissal. In effect this allows the employer the power to dismiss at will. The principle of employment at will has been rejected in New Zealand, this will allow it to be introduced unobtrusively. This is not fair or just. As the courts cannot or will not develop the law in this area, then Parliament is obliged to act. Some form of protection is required for casual workers, Parliament must provide it. Otherwise by its failure to act Parliament will be allowing the principle of employment at will in New Zealand.

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APPENDEX - The Employment Contract

INDIVIDUAL EMPLOYMENT CONTRACT

BETWEEN

_____ (The Company)

AND

_____ (The Employee)

Casual Employment

It is agreed that employment shall be on an "as and when required" basis. The Employer is not obliged to offer you work at any time. Similarly you are under no obligation to accept such work when it is offered.

Nothing in this contract [sic] shall expressly or implication be read as providing an entitlement to or expectation of any further employment beyond each engagement.

Each time you are employed on a casual basis the following conditions will apply.

Position

You will be employed as a _____ at the Company's _____ Branch.

Hours of Work

(a) The number of hours worked in each day and the start and finish times each day will be as agreed for each work period.

(b) The fact that you, in any week, work 40 hours shall not of itself, change your status from that of a casual.

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APPENDIX - The Employment Contract

INDIVIDUAL EMPLOYMENT CONTRACT

BETWEEN

(The Company)

AND

(The Employee)

Casual Employment

It is agreed that employment shall be on an "as and when required" basis. The Employee is not obliged to offer you work at any time. Similarly, you are under no obligation to accept such work when it is offered.

Nothing in this contract (sic) shall expressly or impliedly be read as providing an entitlement to be appointed to any further employment beyond each engagement.

Each time you are employed on a casual basis the following conditions will apply:

Location

You will be employed as a _____ at the Company's _____ Branch.

Hours of Work

(a) The number of hours worked in each day and the start and finish times each day will be as agreed for each work period.

(b) The fact that you, in any week, work 40 hours shall not of itself change your status from that of a casual.



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Wages

- (a) You will be paid \$ _____ gross for each hour worked.
- (b) Your holiday entitlement of 6% of gross earnings will be withheld and paid at the expirations of each period of casual employment.
- (c) Wages will be paid weekly by direct credit into a bank account nominated by yourself.

Termination of Employment

Not less than [sic] one hour's notice of termination of employment shall be given by either party. Where employment is terminated without the requisite notice one hour's wages shall be paid or forfeited as the case may be. Nothing in this clause shall prevent your summary dismissal for serious misconduct.

DECLARATION

I (full name) _____ declare that I have read and understood the conditions of employment detailed above and accept them fully.

SIGNED: _____

Employee

SIGNED: _____

Company Representative

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Company Representative



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