New Zealand Journal of Industrial Relations, **22(1)**: 123-142

Casual Employment Contracts: Continuing Confusion when Protection and Free Market Clash

Judith Ferguson*

Introduction

In 1992 Employment Tribunal Member D.S. Miller described casual employment as a grey area in employment law.[1] The situation seems little clearer now, although, as those working in the area of employment law will know, the term "casual employee" has certainly not faded from use.

The particular focus of this paper is on personal grievances involving notions of casual employment. It will be argued that the courts have, by and large, found ways to provide remedies for casual workers when it is apparent that employers are attempting to use the casual employment label as a device to avoid ongoing employer obligations. This has been achieved in spite of the real conceptual difficulties in allowing casual workers access to personal grievance procedures. It will also be argued that the problems the courts have in dealing with the notion of casual employment are yet another example of the difficulties encountered when attempting, as the Employment Contracts Act 1991 itself does, to instigate a regime which tries to satisfy the demands of a particular contractual philosophy, but which is necessarily compromised by its industrial relations context and its application in an arena committed to notions of social justice and equity.[2]

Casual employment could be regarded as the epitome of the philosophy purportedly underlying the current employment contracts regime.[3] A casual workforce would give the employer the freedom to tailor the workforce daily - or hourly - to the needs of the business so as to provide maximum efficiency; to hire labour only when and if needed, as the requirements of the business dictate. The employer would not be burdened with ongoing obligations and expectations. It would be a simple matter of the most convenient and efficient use of the available commodities needed to run a business - in this case the commodity of labour.

* Law Faculty, University of Otago. Thanks to Dr Paul Roth for encouragement and comment.

[1] *McLachlan v Mellsop (t/a Franz Josef Glacier Guides)* unrep 30/10/92, D.S. Miller, CT 113/92 at p.5.

[2] See Anthony Russell (1995), Philosophy and Application - The Contractual Basis of the Employment Contracts Act 1991, 1 *New Zealand Business Law Quarterly* 145.

[3] See, for example, M. Wilson (1995), Policy, Law and the Counts: An Analysis of Recent Employment Law Cases in New Zealand, 8 *Australian Journal of Labour Law* 203.

The Bill Robertson Library
DUNEDIN

But what happens when employers attempt to make use of the available workforce in this way? Does the Employment Contracts Act 1991 really allow such freedom or is this another area in which the expectations of employers have been disappointed? Although the stated purpose of the Employment Contracts Act 1991 is "to promote an efficient labour market"[4], it exists against a background of a statutory and common law tradition which has laid down and protected minimum rights for workers. In spite of the clear move towards a free market contractual basis, this tradition has survived in a number of forms. Within the Act itself, Parts III and IV in particular contain important protective rights for workers[5]. In addition, other legislation such as the Holidays Act 1981, the Equal Pay Act 1972, the Minimum Wages Act 1983, the Parental Leave and Employment Protection Act 1987 and the Wages Protection Act 1983 continue to lay down minimum requirements which cannot be contracted out of. The common law has continued to supplement the statutory protections for workers, giving substance, for example, to such concepts as procedural fairness in dismissals.

However, the insistence on a strict contractual basis for the employment relationship - the focus on the immediate bargain rather than on the underlying relationship - has left some workers potentially vulnerable to exploitation. The tendency to define casual employment as spasmodic employment - being called upon from time to time as the need arises - has led to its legal depiction as a series of short term, stand alone engagements, discrete quasi-fixed term contracts.[6] While it may be a useful classification for determining matters such as holiday pay entitlements,[7] this particular analysis, if it does not reflect the reality of the employment relationship, can lead to injustices, particularly with regard to the requirements for fair treatment at the end of an employment relationship.

The Court of Appeal has made it clear that the express words of the employment contract are not to be disregarded or reinterpreted lightly.[8] If the courts accept the express words of a contract and determine that workers are "casual", it would seem that at present they are committed to finding that the workers are employed by the hour, by the day, by the engagement, or at the whim of the employer. Work may be intermittent; it may be on an "oncall"

---

[4] Long Title

[5] For example, access to personal grievance procedures, sexual harassment, discrimination, duress, harsh and oppressive contracts, wage provisions, etc.

[6] For example, *Drake Personnel (New Zealand) Ltd v Taylor* [1966] 1 ERNZ 324

[7] The practice of including a six percent loading in the hourly rate of regular workers as a substitute for holiday pay has in most situations been found to be contrary to the requirements of the Holidays Act 1981. Workers must be provided with paid holidays each year. Money in lieu of holidays is only acceptable if workers leave their employment before they are entitled to annual leave. However, if a worker is employed on a strictly casual basis in the sense that every pay period is in effect a separate and distinct employment contract with a beginning and end, with no expectation of another contract to follow, then in this "grey" area, the courts have hinted that holiday pay on a "pay as you earn" basis may be possible. (See *McLachlan v Mellsop*, supra n.1). The Court of Appeal has gone further in the *Drake Personnel* case (supra n.6) indicating that employers who do not expect to employ their workers for the full year may be able to discharge their debts to those workers early by paying them their holiday pay on a "pay as you earn" basis.

[8] See *Cunningham v TNT Express Worldwide (NZ) Ltd* [1993] 1 ERNZ 695

basis only. There is no obligation on the employer to offer the job to the same employee the next time a worker is needed and there is no obligation on the employee to make him or herself available for work or to accept work if it is offered.

Such an arrangement may be advantageous to both parties if it really does suit each of their needs. However, in times of high unemployment employers may choose to hire staff on a casual basis knowing that even if a particular worker refuses work when it is offered, there will be plenty of others to choose from. Workers who would prefer permanent employment are forced to accept casual positions, and the attendant uncertainty and likely fluctuations in income and availability of work, because at such times in a free market environment they lack bargaining power. Employers are able to rid themselves of less desirable or less efficient staff quickly and without the substantive and procedural requirements imposed by the unjustified dismissal principles. They can respond to changing employment requirements without the obligations imposed upon them in a normal redundancy situation. Employers, then, may argue that casual employment promotes efficiency in the short term, but if used inappropriately it may also allow exploitation and the denial of basic standards of fairness recognised in other employment contracts.

Background

Casual positions in the workforce are not a new phenomenon springing into existence in the context of the new right, free market driven world heralded by the introduction of the Employment Contracts Act 1991. They have long been a reality even under the more paternalistic award regime. There was often provision for the employment of casual workers in awards. Although not always clearly defined, the assumption seems to have been that these workers were to be employed on a needs basis - with irregular hours, sometimes on call, without the security of guaranteed hours and continuity of employment that attached to the "permanent" workforce. Actual definitions usually focused on the length of the engagement, the short term nature of the employment, restricting casual employment to periods most often of less than a week's work. For example:

> A casual worker is one who is engaged for less than one week at any one engagement.[9]

or

> A worker engaged to work for less than five consecutive days in a week, is a casual.[10]

Occasionally the irregularity of casual work is more clearly referred to:

> NOTE - For the purposes of this clause "casual workers" are those who do not work any specified hours on a regular basis.[11]

---

[9] Clause 2(b) of the *NZ Dairy, Confectionery and Mixed Business Shop Employees Award,* [1991] BA 9329

[10] Clause 16(a) of the *Canterbury and Westland Ready-Mix Concrete Industry Workers Composite Award,* [1991] BA 9415

[11] Clause 35 of the *NZ Motor Industry Employees Composite Award,* [1991] BA 9583

The lack of security of employment was usually compensated for to some extent by a higher hourly wage rate but the general protection of the union was still available to casual employees.

Under the awards, unions worked to protect full-time positions and were reluctant to allow employers to erode the conditions of workers by taking away their security of employment. Casual workers were catered for mainly in industries which clearly had specific needs for fluctuating staff levels and variable hours. So in awards such as the *New Zealand Tearooms and Restaurant Employees Award* [1987] BA 6145 clause 12 allowed for the employment of casuals on a daily basis. Yet this award clearly contemplated the employment relationship being a long term one, with increased rates for long serving casuals, holiday provisions applying and pro-rata sick leave and other benefits. Workers could be "regular casuals" and work up to seven days a week. What distinguished a casual from other workers? It would seem that it was the unevenness of the employment - the fluctuations in hours. Separate provision was made for part-timers, presumably those with regular, less than 40 hour weeks. The availability of part-time work was much more strictly controlled, requiring dispensation from the union, presumably to protect the positions of the full-time workers. The standard employment was still the 40-hour week.

With compulsory unionism and the award regime, the question of the classification of a worker was determined largely by the definitions contained within the awards and the conditions which flowed from those classifications. Since the inception of the Employment Contracts Act regime, however, many workers no longer have the benefit of clear definitions and even those who do cannot be sure of the consequences which may flow from the labels attached to their positions. Not only are clear definitions absent from many employment contracts, but the present contractual free market approach and the legal contractual principle of accepting the clear express terms of a contract do not bode well for the worker labelled "casual" in his or her employment contract.

Under the Employment Contracts Act 1991

At first glance, under the Employment Contracts Act 1991, the position of a casual worker must be an unenviable one. If freedom of contract notions apply, unfettered employers can engage workers on an on-call basis, treat them as disposable commodities and end any engagement when they choose without the hampering requirements of fairness implied into ongoing employment contracts. Theoretically this is possible because the personal grievance provisions ensuring remedies for unjustifiable treatment and unjustified dismissal apply only to an "employee" - defined in section 2 of the Act as "any person of any age employed by an employer to do any work for hire or reward". While this includes in (ii) "a person intending to work", an employee not currently "employed by an employer" and not within the ambit of a current employment contract and having accepted no offer of specific future work is in limbo. In the period between engagements, unless party to an ongoing contract and so still employed by the employer, he or she is not an employee under the Act and so has no standing to bring a grievance.

The Employment Contracts Act applies to all workers (s.3) and all employment contracts must contain personal grievance procedures (s.32). There would appear to be no contracting out of the Act (prohibited by s.147) as long as the requirements of the Act are met *within* each discrete employment contract. It would also seem that treatment within one period of employment cannot be complained of as unjustified treatment to the worker's disadvantage under s.27(b) if it is likely to disadvantage the worker in the next period of employment. For instance, if decisions about the next period of work are made while the employee is engaged under a casual employment contract, no grievance can be sustained if the conduct complained of disadvantages the worker only in a subsequent period of work and not within the current employment contract.[12]

Employers of casual labour argue that at the end of each separate casual engagement there is not a dismissal when the employer says there is no more work. Employment simply ceases, at least in the meantime. There is no dismissal, they argue, because the agreement was for work only if it was available. This is a persuasive argument under a contractual analysis, but it will be argued that it denies the longer term reality of most "casual" employment relationships, a reality at times recognised by the Employment Tribunal when confronted with the arguments of the employers.

Definitions

It is not the purpose of this paper to examine in depth definitional issues: what is considered is the reaction of the courts when the word "casual" appears in a contract or is raised in argument.

However, it is helpful to look briefly at some of the labels given to workers and to distinguish them at least superficially. In practice, the term "casual worker" has been used to cover a wide range of situations including the truly "on-call" worker only offered work on a spasmodic basis if the need arises, the regular rostered worker whose actual hours of work may vary from week to week and the worker engaged as a temporary "casual" with regular hours but no guarantee of ongoing employment. Working definitions adapted from those used by Pat Walsh and Peter Brosnan[13] in their report on a survey of non-standard employment in New Zealand are:

> Permanent - one who works all year with the expectation of continuing employment (whether part-time or full-time).

---

12 See the recent Court of Appeal decision in *Victoria University of Wellington v Haddon* [1996] 1 ERNZ 139 which considered the treatment of a worker applying for a permanent position while employed in the same position pursuant to a fixed term contract; and the earlier decision in *Wellington Area Health Board v Wellington Hospital, Restaurant and Related Trades Union* [1992] 3 NZLR 658 which considered the rehiring of a worker pursuant to a redundancy clause in the contract.

13 Pat Walsh and Peter Brosnan, *The Employment Contracts Act and Non-Standard Employment in New Zealand 1991-1995*. Paper presented at the Seventh Conference on Labour, Employment and Work, Wellington, 29 November 1996.

Fixed Term - employed under a contract which has a definite expiry date.

Temporary - working for a relatively short but unspecified period.

Casual - working on a periodic basis as the need arises.

To this might be added seasonal workers - those employed for continuous periods in the busy season of the year but laid off in the off-season.

While these definitions may be a useful starting point, in practice the labels used in contracts, in argument and in different work patterns do not always fit such definitional guidelines. When irregular work hours occur, for example, the categorisation may be confused. More seriously, as will emerge from the discussion of personal grievances which follows and the analysis of the decisions, it may be in the best interests of the workers to restrict any definition of casual workers to the narrowest possible scope. It is, in terms of access to the protective provisions of personal grievances, a damning label. For this reason, the writer's own preferred meaning for a casual worker is that it should refer only to those workers who are hired to work from time to time with a clear understanding - and agreement - between employer and employee that there is no obligation on the former to offer further work or on the latter to accept it if it should arise.

What are the consequences flowing from the label "casual worker"?

A casual worker must deal not only with the inherent uncertainty flowing from the concept of casual employment itself, but also with the denial of some of the obligations of fairness normally imposed on an employer at the end of an employment contract. In a normal employment relationship, if a worker is dismissed, not only must the dismissal be justified substantively, but it must also be carried out in a fair manner. The strengthening of the requirements of procedural fairness at the end of an employment contract has been an important gain for employees under the current regime. Even if a worker is employed under a fixed term contract the employer must still justify the need for the contract to be fixed term and again, at the end of the fixed term, must show that that need still exists. If these requirements are not met, then a worker may well still claim to have been unjustifiably dismissed.[14] However, it would seem that in most cases if a casual worker believes that the way the employer treated him or her at the end of his or her employment was unfair it would be necessary to establish that the contract of employment was not in essence one of casual employment at all before the protections of the personal grievance provisions applying to dismissal could be invoked.

An employer can, of course, dismiss a worker for reasons of economic efficiency. However, even if the employer can justify such a dismissal by showing it to be for genuine business

---

[14] See *Smith v Radio i Ltd* [1995] 1 ERNZ 281 and the acceptance by a full Employment Court of the principles laid down in *NZ (except Northern etc) Food Processing IUOW v ICI* [1989] 3 NZILR 24.

reasons, it must still meet the standards of procedural fairness now well defined in the area of employment law.[15]

As will be seen in the discussion of personal grievance cases which follows, there is some support for the notion that if one can label a worker "casual" there can be no expectation of ongoing work. Workers are employed only for the term of the current contract. The contract is very like a fixed term contract, although the "term" is not always so clearly defined, often being vaguely for as long as it suits the employer. When the employer no longer needs the worker's services, the contract naturally just comes to an end in the same way as a fixed term contract expires. There is no dismissal, so there can be no complaint of unjustified dismissal. If the worker believes he or she has been treated unfairly in the way the contract has been ended, there can be no recourse to the usual remedies contained in the personal grievance provisions incorporated into the employment contract.

So far the concept of casual employment has not been examined fully within the context of the Employment Contracts Act regime by either the Employment Court or the Court of Appeal. However, in a sample period 25 July to 1 August 1995 the concept was considered in different ways in four decisions which were handed down from the Employment Tribunal. These were all personal grievances in which unjustified dismissal was claimed and in all cases it was argued by the employer that there was no dismissal because of the status of the employee at the time the employment relationship ended. These cases, it will be argued, show the inconsistencies and confusions still rife in the area, the ongoing "greyness" and the unpredictability of outcome when notions of casual employment come into play.

The Tribunal decisions of 25 July - 1 August 1995

1. *Porter v Falloon* Unrep 1/8/95, G.M. Teen, CT 109/95

In these personal grievance proceedings, three motel workers claimed that they had been unjustifiably dismissed from their jobs cleaning motel units. The employer denied that there had been any dismissals as the cleaners were employed on casual contracts only and could have no expectations of ongoing employment. They were, he said, employed "at the discretion of the employer" and he had decided on a new system of cleaning for the upcoming busy season and so would no longer require their services. The three workers had been employed by Mr Falloon for between two and four years.

Clearly, if it had been found that the workers were employed under ongoing contracts of employment, the end of their employment could have been characterised as redundancies in which case the employer would have been required to show they were genuine redundancies and that the dismissals had been carried out in a fair manner.[16] However, in the case of two of the motel cleaners, it was found that they were not permanent part-time workers but were

---

[15] See *G.N. Hale & Son Ltd v Wellington, etc, Caretakers, etc, IUW* [1991] 1 NZILR 151 and *Brighouse v Bilderbeck* [1994] 2 ERNZ 243.

[16] See *Hale*.

casuals and as such they could not be dismissed at all. The Employment Tribunal found that the express word of the contract stated the employees were employed on a casual basis and although the workers' understanding of the employment relationship was that "they were 'on call' during the slack period of the year and worked during the 'busy season' on the basis that they would report to work unless they were notified that they were not required", the Tribunal found that:

> [w]hilst there may have been an expectation of employment on a seasonal basis there was no regular or continuing employment throughout the year, and employment was, even in the busy period . . . still contingent upon and dependent upon the trade which the motel experienced. . . . In the circumstances applying it could not be said that the applicants had an expectation of regular or ongoing employment. At best their employment was seasonal. Nor in my view were they employed on any permanent basis whilst that seasonal work was carried out.

Matters such as the fact that the workers had not been paid their holiday pay at the end of their last period of employment were treated as "confusing aspects" but were insufficient to dislodge the finding that the workers were casuals and as such, even though there had been a regular pattern of employment and a probable expectation of at least seasonal work, the Tribunal made it clear there was no legal requirement even for the courtesy of notifying the workers that there would be no more work for them.

However in the same case, a third motel cleaner, employed under the same contract and having the same work pattern was found by the Tribunal to have been unjustifiably dismissed by the same employer. The difference in the situations was simply that, although like her colleagues she was not going to be offered work in the upcoming busy season, the employer made the mistake of telling her this during the currency of an employment period and said the reason there would be no more work for her was "because of her attitude towards the appointment [of a new manager]." The Tribunal found that she had been dismissed summarily for cause and when it examined the cause it found it did not justify the dismissal.

What seems odd is that it has been well established that dismissals for reasons of business efficacy must still be justified both substantively and procedurally, just as dismissals for cause must be. Yet here, we have three workers in very similar situations who have all been told within about a twenty-four hour period there will be no more work for them in the upcoming season. For one it is because of conduct or "attitude"; for the other two it is for apparent business reorganisation reasons. However, only the one receives any protection of her expectations of fair treatment at the end of her employment. It is difficult to grasp the difference between the two situations. The conclusion of the Tribunal would seem to be that a casual worker cannot expect any future work at all and has no legal redress unless he or she can show that there was an "unfair" reason given for the end of the employment. No reason at all is quite acceptable. But if casual employment really is "employment at the employer's discretion" can it be fettered in any way?

To be logically consistent, surely either all of the principles carefully developed over the years with regard to fair treatment at the end of an employment relationship ought to apply - or none at all. Was the key difference that the third worker was informed that her employment was to end *while she was actually employed* (i.e. not in between engagements)? On the facts it would appear that in essence, the message that all three workers received was the same - no more work in the next busy season. If all really were casual workers as their contract of

employment indicated, then the employer was, according to the Tribunal, free to decide not to re-employ any or all of them. The employer's mistake would seem to be simply in stating a reason. He would have been better to have simply not informed the workers of a recommencement date - let them carry on assuming they would have employment in the busy season - budget and plan on that assumption - but then simply not provide them with work.

2. ***Burnard v Omarama Motor Lodge Limited*** **Unrep 27/7/95 D.S. Miller CT 107/95** [17]

In *Falloon* the two workers found to be "casuals" - or at best seasonal workers - were denied legal recognition of any expectation of continuing work and the failure to offer further work could not amount to a dismissal, even though it was recognised that they "had an expectation of substantial employment on a seasonal basis". It is interesting to contrast this finding with that of *Burnard v Omarama Motor Lodge Limited*, another Tribunal decision heard and decided within a few days of the *Falloon* case.

In *Burnard* a cook/kitchen hand was employed on a seasonal basis for up to nine months a year. She had been employed on this basis for six or seven years. While working, her hours varied: occasionally there were no hours; some weeks up to 50 hours. Hours were posted on a weekly roster. In 1993 Mrs Burnard had signed a collective employment contract which described workers as full-time, part-time or casual (clause 3) but, in spite of the constantly varying hours, the Employment Tribunal found her position to be "closest" to that of a part-time employee, employed on a seasonal basis.

The differences between her position and the two "casual" cleaners in *Falloon* are minimal. In both cases there was a past history of regular employment during a busy season, with fluctuating hours of work and in both cases there was a recognised expectation of work from year to year. However, according to Mr D.S. Miller, the Tribunal member adjudicating the *Burnard* case, the vital piece of evidence which established Mrs Burnard's claim that she had been dismissed, came in a telephone conversation between the employee and the employer in the off-season during which the employee alleged the employer said "I will be needing you in a few weeks time when things get busy." The Tribunal relied on this statement (categorically denied by the employer) classifying it as an offer of employment. Although the employee did not respond to it at all, it was concluded that silence could be read as acceptance[18] and so in classic contractual analysis, the contract of employment had been formed for the new season and Mrs Burnard was a person intending to work and could bring a grievance for unjustified dismissal when the work did not eventuate.

---

[17] This decision was later appealed before Judge Palmer (unrep 31/5/96 CEC 14/96). The appeal was dismissed, Judge Palmer accepting the seasonal classification of the worker and the factual finding that she had been offered and had accepted (silently) a new term of employment.

[18] Although past dealings could not be relied on to provide evidence of an understanding that there would be work each season, past dealings were an acceptable basis for construing Mrs Burnard's silence as contractual acceptance.

Due to a planned reorganisation of the business, the employer found he did not need the services of his regular seasonal cook and wrote advising her of this - just as the two motel cleaners in *Falloon* were informed their services were no longer needed. However, because there was no evidence of a formed contract for the ensuing season, they could not bring personal grievance proceedings.

This might also explain the differences between the Tribunal's findings with regard to the one cleaner dismissed for cause: the third cleaner was employed at the time she was told there was no more work for her. However, this was not the difference that the Tribunal member, Mr Teen, focused upon. For him it was the reason given for the dismissal which proved crucial. Because she was dismissed for cause rather than for business reorganisation reasons, different considerations came into play and the question of whether or not her employment was casual or seasonal was not considered. Would the situation have been the same if it had been while they were actually employed that the two workers had been told their services were not required in the future?

In the other two grievances decided in the week between 25 July and 1 August 1995, the initial agreement was on a casual or temporary basis or labelled as such in the contract. However the Tribunal determined that the reality which developed over time was that the relationship changed and the worker became a permanent employee, either part-time or full-time.

3. *Baker v NZ Automobile Association* Unrep 27/7/95, Janet L. Scott, AT 215/95

In this case what began as employment "as required by the Association" evolved in fact into a regular part-time engagement of at least four hours every day, Monday to Friday. In defending the personal grievance claim, the employer appealed to the casual label in the employment contract and argued that "the contract is all." The Tribunal replied that the performance of the contract can be examined to determine whether the relationship has changed over time.[19]

4. *Coldecutt v Platt (t/a Platts Nursery)* Unrep 25/7/95, B.M. Stanton, AT 211/95

A similar approach was taken in *Coldecutt.* Again what began as a "week to week" arrangement on a casual or seasonal basis depending on work availability became continuous employment - here full-time employment spanning a full year. The Tribunal rejected any suggestion that the worker was temporary, casual or seasonal, noting:

> It is stretching credulity more than somewhat to suggest that after the passage of 12 months, or four seasons that the applicant could still only be considered to be in a casual, seasonal nature position.

---

[19] Idem *TNT Worldwide Express NZ Ltd v Cunningham* [1993] 3 NZLR 684 was used as authority.

Other "casual worker" grievances

The foundations for these last two decisions had been laid much earlier in cases such as *Canterbury Hotel etc IUOW v R E & A C Fell t/a the Leeston Hotel* [1982] ACJ 285. Although the worker claiming unjustified dismissal in this case was paid under the Award as a "casual worker" she was in fact regarded as a regular member of the staff, working quite regular hours five days a week. Williamson J noted, at p.287:

> There was continuity. Both parties were entitled to regard that arrangement as continuous. Mrs Jellyman was not just a casual occasionally and irregularly called in for some limited or purely casual purpose. Because of the longstanding continuity she was a regular employee and therefore in our view had to be dismissed and could not merely be rostered off.

Further indications from the Labour Court were that even if the hours - or even days - worked by a worker were variable there might still be sufficient continuity to establish the employee was not a casual and could not simply be rostered off, even if business restructuring was the justification for changes to the roster. Such was the position in *Avenues Restaurant Ltd t/a Avenues Restaurant & Wine Bar v Northern Hotel etc IUOW* [1991] 1 ERNZ 420. A restaurant worker was rostered off purportedly for business reasons. She had a work pattern of approximately four hours a night for at least two nights a week, although there was no fixed pattern. Just like the motel owner in *Falloon,* the employer decided for business efficiency reasons to change the system and reduce the number of part-time workers. When the worker reported in sick one night, she was informed she would not be on the roster for the ensuing fortnight and on further inquiry was told that she would only be reinstated if the employer required her to work. On appeal in the Labour Court, Finnigan J affirmed that she was a regular employee, that she had continuity of employment, that her employment was neither casual in its essence nor seasonal, and so her rostering off amounted to a dismissal.

The cases so far considered all emphasise continuity of employment among the considerations taken into account. The implication certainly appears to be that without continuity, employment is more likely to be either seasonal or casual. From the factual basis of these cases one might be excused for concluding that continuity of employment meant employment without breaks of any significance, being more or less on the payroll from week to week. Being called in to work intermittently would certainly seem to be more consistent with the label "casual". Being employed only at busy times, or when the particular need for employment arises, especially if occurring regularly each year, seems to attract the label "seasonal". In those cases in which there were breaks, even if the breaks followed a consistent pattern from year to year, the workers were denied any expectations of ongoing work in the absence of some clear specific agreement that such work would be forthcoming. Each season was self-contained and indeed, in *Falloon* there was even some doubt that the workers had the full protection afforded seasonal workers over each summer. Although the Tribunal member refers to them as seasonal workers, he goes on to state at p.16:

> At best they were employees who had an expectation of substantial employment on a seasonal basis. In any event the contract of employment and the means by which these employees were rotated through the work available indicates that they were, even during the busy period of the "season", employed as casual on-call employees.

However, even this analysis may not be relied on. What of a worker called in to do a specific task for only a day at a time several times a year, labelled "casual" in the employment contract and having signed an employment contract which allowed the employer to "engage/employ staff as and when required"? Even if such a worker had been called to work on every available occasion, according to the principles applied in *Burnard* and *Falloon* more than just a regular pattern was needed to escape the categorisation of casual or at best seasonal. There had to be some indication that an offer of employment had been made for the ensuing "season" or engagement before failure to offer further employment could be seen as dismissal.

Yet Mr Gray, who worked as head banker for the racing club meetings in the Hawkes Bay on the single days that meetings were held, and who was referred to in the Tribunal decision dealing with his grievance and in his contract as a casual worker, was found by the Tribunal to have been dismissed when he was not offered work on three consecutive racing days.[20] The employer argued that he had not been dismissed, he was still a casual employee and would be called upon in the future if necessary. In a change of policy embodied in the employment contract the employer was obliged to give preference to local workers and Mr Gray was not local.

The Tribunal did not consider the significance of the label "casual". It appears that the Tribunal regarded Mr Gray in the same light as Mrs Baker and Mr Coldecutt. In spite of the words of the contract, the employment had become continuous - Mr Gray had been employed at every race meeting over a period of 18 years, even though each engagement lasted only one day. But is this not still analogous with the workers employed every *season* over a number of years, especially in businesses which simply do not have work available - or do not operate - at other times of the year? These workers have been told that such patterns cannot create a legitimate expectation of work for the ensuing seasons. Evidence was presented that Mr Gray relied on his casual earnings to supplement his superannuation and "organised his life around being available for race days" (at p.2), but clearly such evidence would not be sufficient to support a seasonal worker's claim for ongoing employment from season to season. Although it is not entirely clear from the decision, it does not appear that Mr Gray would simply turn up for work at each meeting. He had to be rostered on and there seems to have been some system of notification of the upcoming meetings. It was the lack of contact from his employer that alerted him to the fact that he was no longer being employed.

There was one significant term in the employment contract which, although referred to, was not examined closely by the Tribunal in terms of its possible impact on the status of the worker. The collective employment contract, while it did not guarantee work specifically,[21] did require staff to be available for work for a minimum number of specified days, days on which all casual staff might be called up. Maybe this was the crucial difference. There was a mutual obligation present which is not usually part of a casual employment relationship.

---

[20] *Gray v Hawkes Bay Racing Centre Ltd* unrep 11/2/94, D.E. Hurley, WT 25/94

[21] A useful comparison might be drawn here with the contract in the *ICI* case (supra n.15). Although there were no specific promises for an extended contract for individual workers employed on a fixed term contract in the *ICI* case the court recognised that the wording of the contract was sufficient to form the basis of an implied promise of continued work for at least an unspecified number of workers.

As in an ongoing employment contract, the employee had assumed a duty to be ready and willing to work, albeit on only a few occasions. The worker had promised - and was *obliged* to work if required on those occasions. Otherwise what might in fact be regarded as an ongoing employment relationship would be breached.

The Tribunal's analysis of the dismissal in *Gray* is perhaps a further example of its powers of creative reasoning. Rather than treat the failure to notify the employee of the reporting procedures for the next meetings as the dismissal, the Tribunal found that this failure, along with other matters affecting his employment, constituted a breach of the implied term of trust and confidence and so in effect gave rise to a constructive dismissal! Just how the Tribunal member, Mr D.E. Hurley, made the leap from a breach of an implied term to a constructive dismissal is unclear. Unlike most constructive dismissals, there was no resignation or forced leaving on the part of the employee flowing from the initial breach by the employer. Mr Gray was, in effect, not called up or rostered on for the next meeting. Yet the Tribunal concluded: "The combined events . . . in my view constitute a breach of the implied term of trust and confidence in any employment contract and accordingly a dismissal occurred."

In *Gray* the Tribunal must have recognised that the employment relationship continued between the separate engagements, even though there was no work or payment during those periods. Mr Gray was still an employee and was dismissed - whether constructively or directly - when he was not actually engaged in work. It was *between* engagements that his employment contract was breached.

The last Tribunal decision which will be considered in this paper is another pragmatic one in which the Tribunal examined the essential nature of the employment relationship and rejected the claim made by the employer that the worker was a casual worker. In *Pratt v Jetour N.Z. Ltd* [Unrep. 5/5/95, Ian McAndrew, CT 60/95] decided in May 1995, Ms Pratt was employed as a tour guide. She would report in each Friday to see what work there would be in the following week. Work availability was seasonally variable although there was general agreement concerning the likely annual income she would be able to earn. Ms Pratt was paid monthly but on the basis of a set fee for each tour guided. The employer argued that Ms Pratt was a casual employee engaged for particular tours, each tour being a separate engagement which ended at the conclusion of the tour. Thus, when she was assigned no further tours in response to a dramatic downturn in business and cost-saving measures instigated by the company to adjust to this change, the employer argued that there was no dismissal as there was no obligation to provide further work.

Following the approaches in *Fell* and *Avenues* the Tribunal rejected the employer's submission that Ms Pratt was a casual employee. It concluded that she was a regular employee "entitled and expected to work for Jetour on an ongoing basis" (at p.9). The parties were in agreement with regard to Ms Pratt's likely income. The agreement was for the employer to provide the worker with regular, if seasonally variable, employment on an ongoing basis. There was no express term in the employment contract guaranteeing work for the employee. Indeed the Tribunal recognised that the employer was in no position to give such a guarantee. However, the general agreement with regard to the likely income level was seen as sufficient for the employee to base an expectation of ongoing work upon.

Where to from here?

In this small sample of recent Tribunal cases at least one thing which is apparent is that it is not always easy to predict the outcome of cases involving casual employment claims. While it is recognised that it is an extremely small sample and that Tribunal decisions cannot be appealed to as guiding precedents of authority, they may still have "persuasive relevance"[22] and, in the absence of any extensive examination of an area at Employment Court or Court of Appeal, they do give some indication of how different factual situations are dealt with at least at this first level of adjudication.

It is of interest that in spite of the purported free market contract base for the Act up until now there does not appear to be an increased willingness on the part of the Tribunal to label workers "casual" and so allow employers increased freedom to adjust their staffing levels to respond quickly to changed operational requirements and improve their efficiency. Although employers are still employing workers expressly as casuals and arguing sometimes successfully that they should have freedom to do so, there are many situations - like those in *Burnard, Pratt, Gray, Coldecutt* and *Baker* in which such freedom has been denied. However, the courts have still been unwilling to impose upon the parties any agreement involving an actual offer - or guarantee - of further employment unless there is some specific evidence to support it. This reluctance may be founded on notions of the protection of the basic freedom to enter a contract or upon the refusal to intrude upon the employer's right to manage a business as he or she thinks fit - the managerial prerogative. The difficulties arise when these notions are recognised in a personal grievance setting - a setting designed for the protection of the workers' rights to fair treatment - and to some degree, the protection of some sort of security in employment.[23] The conflict between the purpose of the legislation with its commitment to a contractual model and the tradition of legal protection embodied particularly in the personal grievance provisions guaranteed to all workers accounts for many of the apparent inconsistencies, anomalies and much of the uncertainty still evident in the cases in which casual employment is argued.

Possible directions

1. *Definitions*

One possible solution to this problem might be simply to return to a focus on status and definition. For example, casual employment is a situation involving employees "occasionally and irregularly called in for some limited or purely casual purpose."[24] If the nature of the employment contract means that a worker fits within the definition, an employer has no

---

[22] See *McClutchie v Landcorp Farming Ltd* [1993] 1 ERNZ 388 at 393-394, per Finnigan J

[23] The way the courts have dealt with redundancy in particular recognises these rights. See *Hale and Brighouse*, ibid.

[24] See *Leeston* ibid.

ongoing employment relationship with the worker. Each engagement is a quite separate stand alone contract with no reference to either the past or the future.

While recognition of such a class of worker may define the group for whom any expectations of continuing work must be unrealistic, it is a rather superficial solution to the problem and does not address the underlying issues. For instance, there are still many unanswered questions with regard to the situation where the work itself is ongoing but the employer chooses to employ new and frequently changing workers to perform it. If there is a job to be done, if the work does not change, is it acceptable for an employer to withdraw the work from one worker and offer it to another without any particular justification? Does a worker have an interest in a particular job? Are there situations where workers have a legitimate expectation that, if the work continues and their performance is satisfactory, the job will remain theirs, maybe even regardless of the contract provisions? Recognition of such an expectation has been considered in cases such as *Smith v Radio i* and *Sinclair v Totara Mental Health Trust* Unrep AT 123/94 but the applicants failed to establish such an expectation on their particular facts.

A focus on definition may be of some assistance, but unless there are limitations on an employer's ability to categorise workers in an unfettered way, limitations which will not easily be argued for in the present political and judicial climate (at least at Court of Appeal level), then such an approach will do little to assist the motel cleaners in *Falloon* to understand their plight.

2. *The umbrella contract*

Another approach is to take the approach implicit in cases such as *Gray* and *Pratt.* Even though each engagement, each period of employment, may be discrete, with a clear beginning and end, even though there may well be no *guarantee* of re-engagement at any particular time and no specific contractual offer of such future work, there may be an agreement between the parties which is indicative of an ongoing subsisting employment relationship capable of supporting an expectation of fair treatment if no further work is forthcoming.[25] Just as it seems possible to recognise that a worker may concurrently be party to both a collective employment contract and an individual employment contract, it may also be possible to recognise that a worker is employed under a specific short-term employment contract which defines a particular engagement but is also party to a longer term agreement which establishes the employment relationship and in a sense keeps that worker on the list of employees even when not actually engaged in work.

In 1985 Gwyneth Pitt[26] examined the conflicting English line of cases dealing with casual employment in which claims for unfair dismissals were resisted on the ground that the casual

[25] Such fair treatment would not extend as far as that demanded, say, in redundancy situations (e.g. consideration of compensation payments). Terms implied into such an umbrella contract would be those appropriate to that contract and might well differ from those implied into the contract governing the specific current engagement.

[26] Gwyneth Pitt, "Law, Fact and Casual Workers" (1985) 101 Law Quarterly Review 217

workers were not employees at all but were engaged in contracts for services. In many of the English decisions dealing with the dismissal of what may be labelled "casual" workers, the courts have been asked to decide whether the workers were engaged in contracts of service or contracts for services - the threshold test for access to the protective industrial legislation. In other words the focus has been on the status of the worker as employee or contractor. Although this focus has not, by and large, been mirrored in the New Zealand decisions, the English courts' approach may still be relevant. They have been prepared to consider the possibility of employment at two levels - at the level of the particular agreement and at the level of the overall umbrella agreement.[27] As Richardson J noted in the Court of Appeal: "The contract of employment cannot be equated with an ordinary commercial contract. It is a special relationship under which workers and employers have mutual obligations of confidence, trust and fair dealing."[28]

If such an umbrella contract were recognised, then even at times when not actually working, there would be access to the grievance procedures as one "intending to work" and within the ambit of a broad employment contract although not a specific engagement. The terms of any such umbrella contract may vary from case to case, but the general implied terms of trust and confidence and expectations of fair treatment at the end of the employment relationship would be assured and would apply not only during specific engagements, but through periods between engagements.

One of the difficulties establishing such an umbrella contract approach at present is reconciling it with the direction the courts appear to be taking in the closely related area of seasonal work. The Employment Court has expressly rejected arguments along the lines that the employment contract of a worker seasonally laid off and re-employed each season subsists through the off-season.[29] Evidence of an ongoing seasonal pattern of employment is not sufficient to imply a term into the employment contract which will ensure that the established pattern will continue. During the off-season, the worker is not employed by an employer and thus cannot turn to the Employment Contracts Act 1991 for the protection of its provisions. Evidence of an express offer of work is needed before the employment relationship can be recognised again. Given this approach, it would seem difficult to argue that without evidence of some sort of offer of recurring work, the courts would be willing to recognise a subsisting umbrella agreement between the parties in situations involving more intermittent, casual work.

Maybe this approach could again be challenged, especially in view of the apparent inconsistency with approaches in other settings. Evidence of a past pattern of work even if it covers a considerable number of years cannot be used to found a worker's expectation of further seasonal work. Yet, as shown in cases such as *Gray* and *Pratt,* such evidence can be used to establish an expectation of ongoing work even of a relatively "spread out" nature when challenging express labels in an employment contract such as "casual worker". However, recent indications from the Court of Appeal in particular and the renewed emphasis

---

[27] See *O'Kelly v Trusthouse Forte plc* [1984] QB 90

[28] *Telecom South Limited v Post Office Union (Inc.)* [1992] 1 NZLR 275, at p.285

[29] See *New Zealand Meat Workers etc Union Inc. v Richmond Ltd* [1992] 3 ERNZ 643

on the express terms of the contract do not augur well for those hoping for further creative social protectionist-driven reasoning at this level.[30]

3. *The Application of Fixed Term Principles*

An approach which may have fitted more comfortably with the decisions of the Employment Court would be to apply to casual employment contracts restrictions similar to those applied to fixed term contracts. Such contracts are permissible and in many circumstances may be justifiable, but in recognition of the potential for employers to exploit workers and deny them ongoing security of employment, the Employment Court recognised a helpful set of requirements which might be useful if adapted and applied to the area of casual employment.

In *Smith v Radio i* a full Employment Court affirmed that in the area of fixed term employment contracts the law stated by the Court of Appeal in *Actors Variety etc IOUW v Auckland Theatre Trust Inc.* [1989] 1 NZILR 463 and applied by the Labour Court in *NZ (except Northern etc) Food Processing etc IUOW v ICI (NZ) Ltd* [1989] 3 NZILR 24 was still applicable under the Employment Contracts Act 1991 and stated the principles to be:

> 1. Fixed term contracts of employment are valid unless prohibited expressly or impliedly by an applicable collective employment contract.
>
> 2. A fixed term contract will not automatically expire on the date specified in it for the purpose against the will of the employee if:
>
>   (a) It does not genuinely relate to the operational requirements of the undertaking or establishment of the employer; or
>
>   (b) 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 the benefit of the personal grievance procedure required to be inserted in the contract by the Act.
>
>   (c) 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
>
>   (d) 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
>
>   (e) The termination of the contract was brought about by a wrong motive or unfairness on the part of the employer.

[30] See *Victoria University of Wellington v Haddon* ibid.

Casual employment is sometimes regarded as a series of quasi-fixed term contracts, each engagement standing alone for the duration agreed between the parties. This is the reasoning that has allowed the courts to approve holiday pay being paid at the end of each separate engagement rather than annually (for example, *Drake Personnel (NZ) Ltd v Taylor*).

Maybe it would also be possible to approach casual employment contracts in a similar manner. Casual employment contracts might be valid, but only if they satisfy the following principles (the onus of proof resting with the employer):

1. The casual employment contract genuinely related to the operational requirements of the business.

2. There was a genuine reason for the casual employment contract, and the purpose was not to deprive the worker of the benefit of access to personal grievance procedures.

3. The genuine need at the time of the creation of the contract for its casual nature still existed at the time the contract was brought to an end.

4. There was no express or implied promise of continuing employment.

5. The contract was not terminated by a wrong motive or unfairness on the part of the employer.

However, the potential for adopting this approach has been severely checked by the recent decisions of the Court of Appeal in *Victoria University of Wellington v Haddon* and *The Principal, Auckland College of Education v Hagg* [1997] ERNZ 116 (Employment Court decision reported at [1995] 2 ERNZ 239). The decisions indicate a significant change in direction in the law, with the earlier creative approaches of the Employment Court being disapproved of and those decisions being overturned or challenged. The two cases had earlier been examples of the liberal open-textured approach of the Employment Court. They were both concerned with fixed term contracts. In *Haddon* the Employment Court found the claimed "unfair" non-appointment of a worker to a permanent position affected his employment to his disadvantage (under s.27(1)(b) of the Act) while in *Hagg,* argued under the same section, the Employment Court had recognised that the worker had a legitimate expectation in continuing employment beyond the end of the fixed term employment contract. The Court of Appeal allowed the appeal in *Haddon,* taking a narrow view of what "employment" was within s.27(1)(b).[31] "Employment" was taken to relate only to the current employment contract period - the "on the job" situation - and not to the longer-term employment relationship. For those hoping for a reconsideration of any umbrella contract concept, this decision augurs badly indeed.

In *Hagg* the fixed term contract guidelines in *Smith v Radio i* were rejected and it was held that allowing a fixed term contract to expire could not be regarded as a dismissal and so

[31] At pp.147-148 of the judgement delivered by Gault J.

recourse to unjustified dismissal consideration was denied. While acknowledging that there was potential for actual or perceived unfairness in the field of limited term contracts, the Court of Appeal saw its role as applying general principles of interpretation of contracts to employment contracts, there being no "different or special set of rules applicable to employment contracts."[32] The one ray of hope left by the Court of Appeal was the lack of insistance on adherence to the strict contract labels and terms of the contract and a reminder of the "well settled principles concerning sham or non-genuine aspects of contracts and the variation of contracts."[33] Even though a contract may indicate in its formal terms that the contract is for a fixed term, the reality of the parties' intentions at the time of formation, or as the relationship develops, may indicate that the legal relationship is in fact something different from the label and may indeed be in the nature of ongoing and permanent employment.

As can be seen in the decisions considered in this paper, the Employment Tribunal has been prepared to examine the reality behind superficial labels in a casual employment contract document. However, questions with regard to the meaning of "ongoing" employment for casual, spasmodic workers which do not arise in situations involving the extension of fixed term contracts still present difficulties. While there may be an ongoing relationship between employer and employee, there is often not continuing, ongoing employment sufficient to establish a current employment contract, as such contracts are construed by the Courts.

Applying the reasoning in *Haddon* and *Hagg*, it is difficult to find any comfort for the casual worker who believes his or her employment has been terminated unfairly, unless it can be shown there was a clear legitimate expectation of re-employment (in other words, a contractual offer had been made) or that the employment was ongoing and not casual at all. The writer would still argue that, if a position is genuinely "casual", and the job function remains, the worker who has been employed to fulfil that function on a casual basis in the past, should be offered it in the future. Such an expectation can be supported by reference to the purpose of the Act itself - to promote an efficient labour market. Continuity of employment, a stable workforce and minimising the need to retrain must ultimately contribute to the promotion of an efficient labour market. However, without direct legislative support, such an approach is difficult to give legal effect to in the light of the strict contractual principles being applied by the Courts.

The Employment Tribunal often manages to achieve its own solution to individual cases involving casual employment claims. While these may lack an authorised, principled basis and do not always give rise to certainty and predictability, at least they have in some instances, given workers a remedy for unfair treatment in a potentially unprotected position. The fear must be that insistance on a strict, principled contractual approach may leave casual employees even more vulnerable. As has been suggested, there are other solutions available, but it would appear that the present climate is not particularly conducive to their full development. Although by no means satisfactory in the long term, maybe the current "greyness" surrounding the ad hoc decisions of the Tribunal provide greater protection for

---

[32] Per Richardson J at p. 126

[33] Per Richardson J at p.132

many casual workers than a strict free-market contractual approach. The fuzzy mists of "greyness" may be more comforting than the stark black possibilities which could be looming.