



# DISMISSAL IN TRIANGULAR EMPLOYMENT

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## Are you a temporary employee?

When you go temping (or work for a labour-hire agency), you're employed by an agency, but you're hired out to another business (the host). The host will pay a fee to the agency that covers the cost of your wages plus a profit margin to that agency.

The employee will be paid normally like any other employment relationship, but the employee will be performing work at the host's premises of work. Often the host will inherently have the ability to direct control over how and when the employee performs their work.

When temping the employee's placement at the host is often referred to the agency as an 'assignment'. The employee will often have a written employment agreement that cross-

references the assignment document. It's common practice in these kinds of employment relationships that when that assignment comes to an end, it's often that the agency considers that the employment is terminated immediately at cessation of the assignment.

## Unfair dismissal in triangular employment

Why did the assignment come to an end? That's a good question to ask.

If it can be established that employment is of an ongoing nature, or that the employment is not genuinely fixed term, or if employment is not casual or a dismissal has occurred within a period of casual engagement, and the dismissal is without substantial reason or has been carried out in a procedurally unfair manner, an

employee will probably have grounds to bring an unjustified dismissal personal grievance.

## What is the real nature of your employment when temping?

Most recruiting, temping, and labour-hire agencies will regard the employment relationship as either fixed-term or casual. Do not be fooled by them. We see many cases of employees working long and regular hours for six months, 12 months, and longer. Some cases involve an employee working past the expected date that an assignment would have ended. Many triangular employment relationships we see are not casual and also not genuinely fixed-term either.

Just because it's written in an employment agreement that the employment relationship

is fixed-term or casual is not determinative. Section 6 of the Employment Relations Act 2000, among other things, gives the Employment Relations Authority and the Employment Court the ability to determine the real nature of employment between the parties, and substance will prevail over form.

## "The client (host) can terminate the assignment at any time"

We do not accept this. In a temping or labour-hire employment agreement, although it might say that the agency's client (the host) can decide they can end an employee's assignment at any time, the labour-hire agency is at risk of being answerable to an unjustified dismissal personal grievance claim. Substantial justification and procedural fairness is required before a decision is made—just like any other employment relationship.

The historical position of a dismissed employee if they have grounds to challenge an unfair dismissal in a triangular employment relationship was that the employee would have to decide to pursue one or the other. A recent law change now allows a dismissed temp employee to go after both the agency and their client (the host).

## Triangular Employment Amendment Act 2019

This has been a long time in the making, the Employment Relations Amendment Bill (No 3) 2008, was on its way in 2008, however, the Bill was discharged on 6 March 2009 due to a change of government.

The Triangular Employment Amendment Act 2019 had finally come into effect on 27 June 2020, and it recognised a labour-hire agency's client to be that of a "controlling third party", which can now become answerable to personal grievance proceedings.

While temporary labour-hire employees always had personal grievance rights under the Act, the new legislation has opened the door to an employee's ability to seek remedies (e.g. humiliation and loss of earnings) as a result of actions or inactions of the controlling third party.

A "controlling third party" is now a term, which is defined in section 5 of the Act as follows:

- controlling third party means a person—
- who has a contract or other arrangement with an employer under which an employee of the employer performs work for the benefit of the person; and
  - who exercises, or is entitled to exercise, control, or direction over the employee that's similar or substantially similar to the control or direction that an employer exercises, or is entitled to exercise, in relation to the employee.

The possibility of joining a controlling third party for the purposes of a personal grievance was introduced under section 103B and also the possibility of obtaining remedies against a controlling third party under section 123A.

## The personal grievance process with a controlling third party

When it's decided that a temp's employment is to end and there are grounds

“Any unwillingness to participate in resolution will result in Employment Relations Authority proceedings”

to challenge it, the employee can raise a personal grievance for unjustified dismissal with the labour-hire agency within the normal 90-day time limit in the usual way.

To include a controlling third party, the employee needs to have considered that the actions of the controlling third party caused or contributed to the employee's personal grievance. The employee then has to notify the controlling third party within the 90-day time-limit as well.

If an employer (the labour-hire agency) receives a personal grievance from an employee and the employer considers that the actions of the controlling third party (the host) caused or contributed to the personal grievance, the employer can notify the controlling third party within 90 days of receiving the personal grievance (if the employee has not already done so). This is the same as the employer saying to their client "hey! You have caused this problem; you can pay for it!".

If there is any unwillingness to participate in resolution of the personal grievance, particularly on the part of the controlling third party, either the employee or the employer can apply to the Employment Relations Authority to join the controlling third party to the proceedings. This is under section 103B as described above and this will inevitably get all of the parties to the mediation table to participate in resolution. If the matter is not resolved by agreement between all of the parties, the Employment Relations Authority can then hear and decide on the matter.

## What we can do for employers and employees

We represent our clients in direct negotiations, the Employment Mediation Service, the Employment Relations Authority, and the Employment Court. ■

**For more details, contact Lawrence Anderson on 0800 946 549 or 0276 529 529 or Lawrence@AndersonLaw.nz or visit AndersonLaw.nz.**



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