DISMISSAL IN CASUAL EMPLOYMENT

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When it comes to challenging dismissals, we're getting more and more employment cases where the employee is falsely regarded as being a "casual employee" from the outset of employment. Even if the employee is truly casual, we commonly deal with cases where they have been let go during the course of a casual engagement. Casual employees who are dismissed may still be well within their rights to pursue a personal grievance for unjustified dismissal.

A typical scenario that we come across is an employee client tells us they have been unfairly dismissed on a particular day that they were working. When we then write to their employer requesting a statement for reasons in writing for dismissal, the employer will often respond saying something like "your client was hired as a casual employee as expressly agreed in their employment agreement. There were no guaranteed hours and the employment ended at the end of their shift. We did not offer further work thereafter."

Often the employer will use this to mask the actual truth about what really happened, and they take a position of conveniently hiding behind the employment relationship being "casual".

There are a few ways we deal with these cases and it's factually dependent. The first approach we look at taking is if we can establish that the employment was not truly that of casual nature. If we are successful on that point, then the employer must justify why employment came to an end. The second approach is where we can find that a dismissal occurred within the period of casual engagement. If we can establish a case from this angle the employer must meet the test of justification under the legislation and justify the dismissal.

Are you really a casual employee?

If your employment does not fall within the following definition, then you're probably not a casual employee. A true casual employment relationship exists where there's no obligation on the employer to provide any work, but the employee is free to refuse any offer of work and hence is free to accept other employment. A casual employee is truly casual if they do not know when in the future they will be offered work until the employer makes an offer of work, which would then be for a specific period of time (a period of casual engagement). This is irrespective of what your written employment agreement might say for reasons I will explain further below.

This is what the Employment Court has said in a leading case before it that reinforces our definition: ... the distinction between casual employment and ongoing employment lies in the extent to which the parties have mutual employment related obligations between periods of work. If those obligations only exist during periods of work, the employment will be regarded as casual. If there are mutual obligations which continue between periods of work, there will be an ongoing employment relationship. The strongest indicator of ongoing employment will be that the employer has an obligation to offer the employee further work which may become available and that the employee has an obligation to carry out that work. Other obligations may also indicate an ongoing employment relationship but, if there are truly no obligations to provide and perform work, they are unlikely to suffice. Whether such obligations exist and their extent will largely be questions of fact. (Jinkinson v Oceania Gold (NZ) Limited [2009] ERNZ 225 at [40]-[41])

Where the real nature of the relationship is to be determined in a legal forum, the substance of the relationship will prevail over form. Section 6 of the Employment Relations Act 2000 enables this where the Employment Relations Authority and Employment Court are able to determine the real nature of the employment relationship; consider all relevant matters, including any matters that indicate the intention of the parties; and to not treat as a determining matter any statement by the persons that describes the nature of the relationship. In the Jinkinson case, some of the indicia in making such an assessment can include:

- How many hours are worked each week
- If work is allocated in advance by a roster
- If there's a regular pattern of work
- Whether the employer requires notice before an employee is absent or on leave
- Whether the employee works consistent starting and finishing times
- If there's a mutual expectation that employment will continue

If we can establish that employment is not truly casual but more so one of ongoing nature where mutual obligations between the parties exist outside periods of work, then the employer's position in relying upon employment ending at conclusion of a purported casual engagement is challengeable.

If someone is truly a casual employee, that does not mean that they have lesser employment rights than what a permanent employee would have. During the period of casual engagement while they are working, the employer is required to act in good faith and justify actions that would disadvantage employment. This includes an employer's obligation to justify a dismissal during that engagement.

A casual employee but unfairly dismissed

I recently successfully defended a case for Mr Armstrong in the Employment Court who was found to be unjustifiably dismissed during a period of casual engagement in Surplus Brokers Limited v Armstrong [2020] EmpC 131.

Mr Armstrong, from month to month, would be offered casual work. These offers of employment would be made in advance and could be accepted or declined and he could choose his hours.

Mr Armstrong was on a multiday out of town sales trip during that period of casual work a verbal offer was made to extend the working period.

As this was an away trip, Mr Armstrong was sharing a motel with another employee. Unfortunately, there was a serious incident where Mr R threatened to kill Mr Armstrong for snoring. This led to Mr Armstrong being unable to work alongside this co-worker and being too tired to work straight away the next day.

When Mr Armstrong advised his manager of the incident, there was a distinct lack of concern by his manager in his report of the incident. Mr Armstrong found the prospect of having to travel back to his hometown with his co-worker later that evening to be impossible. Although Mr Armstrong was allowed to sleep in the company car, the keys were taken from Mr Armstrong and he was told to lock the car if he were to leave. It was a hot day and sleeping in the car became impossible for Mr Armstrong and he left in search of food and to find alternate options home.

Mr Armstrong's manager then called and sent a subsequent TXT message to Mr Armstrong requiring Mr Armstrong's work shirts to be returned to the company headquarters.

The next morning Mr Armstrong sent a TXT message to his manager to confirm the plan for the remainder of his casual employment period. Mr Armstrong was again instructed to pick up his car from the company headquarters and to drop off his shirts. Mr Armstrong did so. The days that followed involved an exchange of emails stated that the company did not require Mr Armstrong such that Mr Armstrong would not be offered work in the future.

The contention that brought this matter past the Employment Relations Authority and to the Employment Court was that Surplus Brokers were arguing that Mr Armstrong was not dismissed within an engagement of casual employment by its belief that there were no specific words amounting to dismissal. Surplus Brokers also contended that there was no offer and acceptance for the subsequent day of work. These arguments were not accepted by the Authority or the Court.

As I argued and had success for Mr Armstrong: whether something amounts to a dismissal must be considered objectively, considering the circumstances that applied at the relevant time, Cornish Truck & Van Ltd v Gildenhuys [2019] NZEmpC 6 at [45]. Keys taken from Mr Armstrong, a distinct lack of concern for Mr Armstrong, an instruction for Mr Armstrong to return his work shirts—these all cumulatively amounted to dismissal from the objective point of view of the employee.

The Court came to the conclusion that Mr Armstrong was entitled during that period of casual engagement to all that full-time employees are usually entitled to, including not to be dismissed without substantive and procedural justification. The company breached those obligations and Mr Armstrong was successful in his claim.

This should serve as a lesson to employers in the future. Sending an employee away during an engagement and relying upon a casual employment agreement to justify this will most often be an untenable position.

What we can do for employers and employees

While we take cases for employees and often do so on a "no win no fee" basis to obtain compensation, lost wages, and costs, we also defend employers and give appropriate advice to employers on how to manage employees.

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

Whether you're an employee or employer and you need assistance with any employment issue, we're here to help.

No matter the situation, we recommend you speak to us for professional advice before you take action. ■

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