CANTERBURY EMPLOYERS' CHAMBER OF COMMERCE

WE KNOW HUMAN RESOURCES

Casually speaking……

Recognising substance over form

Casual employment has been a feature of New Zealand's economic and industrial relations landscape for decades. More prevalent now than it was in the decades under former industrial relations legislation and the highly centralised, union-dominated system of awards and collective agreements that prevailed until 1991. Remarkable then that 21 years later there remains so much confusion about the notion of just what casual employment is – and what it isn't.

If you were looking for guidance from our principle employment relations legislation you would be surprised and disappointed. Open up the pages of the Employment Relations Act, and you won't find a single reference to the term "casual" yet so many disputes have resulted from a failure to understand and apply the correct legal requirements to employment relationships which are, in many cases, rather loosely characterised as "casual" but which may, both in fact and law, be something else!

The problem often comes to a head when an employer attempts to rely upon the view that as the employee is a casual and not a permanent employee, the employer is not obliged to offer further work – indeed the parties may even have signed an employment agreement declaring that the agreement was one of casual employment and that there could be no expectation of future employment beyond the cessation of the immediate work period.

The trouble is that sometimes, the characterisation of the intended relationship as being one of casual employment is inappropriate or, as often happens, what starts out as a legitimate casual employment relationship 'mutates' into something else. The latter may be insidious and occur over a period of days or weeks rather than a watershed change.

The need for care is due, amongst other things, to the difference in statutory rights that an employee can legitimately expect in regard to the cessation of employment. The coming to an end of a proper casual engagement can not provide the employee with the right to pursue a personal grievance claiming unjustifiable dismissal. (Note however, that such a claim can be brought if work is withdrawn (without good cause and without fair process) during the course of a casual engagement e.g. if a casual has been hired to cover four shifts of an employee on sick leave and after completing one shift the employer instructs the employee not to return for the remaining three shifts). On the other hand, a permanent employee could reasonably expect that he or she would continue to be provided with work until such time as the employment relationship is terminated for just cause and following due process, a breach of either of which will, in the ordinary course of events, invoke a personal grievance.

The real nature of the employment relationship must be determined in order to resolve questions about the obligations that employers may have or not have and the Employment Relations Authority and Employment Court are obliged to look beyond the *label* given to it by the parties. Substance will prevail over form.

Case law both from New Zealand and other Commonwealth jurisdictions (and cited by the New Zealand Employment Court) provides a number of tests which have been used in determining the real nature of the employment relationship. These include:

- The number of hours worked each week
- Whether work is allocated in advance by a roster
- Whether there is a regular pattern of work
- Whether there is a mutual expectation of continuity of employment
- Whether the employer requires notice before an employee is absent or on leave
- Whether the employee works to consistent starting and finishing times

From some Canadian cases:

"…if someone is spasmodically called upon once in a while to do a bit of work for an indeterminate time, that may be considered as casual work. If, however, someone is hired to work specified hours for a definite period or on a particular project until it is completed, this is not casual, even if the period is a short one."

And…

"*What is a genuine casual employee? In the notion of casual work, there is an element of chance or a chance factor which requires that the voluntary and immediate availability of a potential employee coincide with the unforeseen need of an employer to have work done. Conversely, as soon as the need is foreseeable, only part time work is automatically created: the employee is not a casual worker but a part-time one.*

Casual employment is therefore the product of a given employer's unforeseen need to have work performed and the chance, random and voluntary availability of a given employee."

In the New Zealand context, the regularity and continuity of work are likely to be key factors. Arrangements which are not irregular, unpredictable and spasmodic are unlikely to withstand close scrutiny if classified and relied upon as being casual. Particular care should be taken to recognise those situations which may legitimately start as casual but which, with a change in circumstances, over a relatively short period, can mutate into something different. Where this occurs employment needs to be reclassified and a more appropriate employment agreement put in place. This may be either for on-going or fixed term employment, where the circumstances meet the statutory requirements for fixed term employment.

In a recent case before the Employment Court, Judge Inglis held that a crucially important factor in determining whether a person is a permanent or casual employee is the test of whether the employer is obliged to offer (and/or whether the employee is obliged to accept) any particular

engagement. The case was notable because the employee concerned had advised her availability on a roster – and was provided with a pager to alert her to incoming jobs. She was however free to remove her name from the roster at any time. The Court observed that the inclusion of an employee on a roster will be relevant to the assessment of an employee's status but that the context of that roster will also be important. In particular, the Court noted that where a roster creates a positive obligation on an employee to attend work that may indicate regularity and permanence of the position, whereas a roster that merely indicates availability, but does not create an obligation to work, will not necessarily have the same effect.

A failure to recognise the real nature of the employment relationship can prove to be costly. To avoid the potential for dispute we would recommend that members pro-actively review all current casual arrangements and ask the following questions before entering into a casual employment relationship:

- Can the requirement for labour be reasonably foreseen?
- Is the available work likely to be regular – even if for varying hours?
- Is the duration of work likely to be more than several days on any single occasion?
- Is there an expectation that the employee will be available for work when it is available?
- Is the employee completely free to decline work if offered?
- Could the work requirements be met by the use of a fixed term employment agreement?

Answering any of these questions in the affirmative may not conclusively mean that the employment is not casual, however, it should cause pause for thought – and for further advice!

For assistance on this or any other employment matter contact The Chamber on 03 366 5096 or 0800 50 50 96.