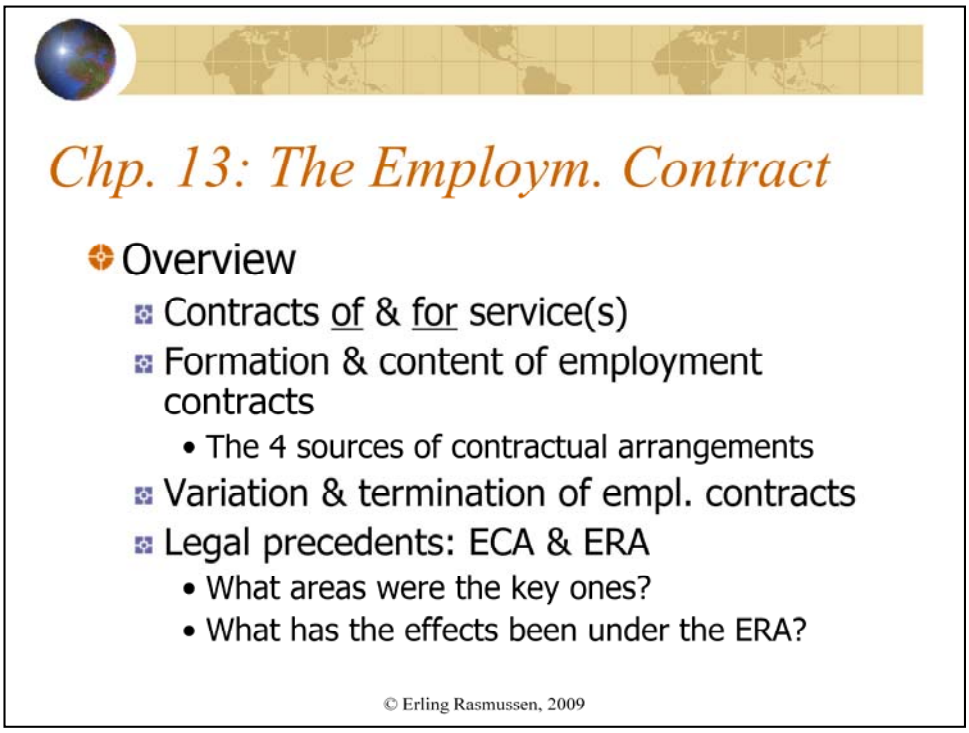


"Books on employment relations are commonly written to describe collective or group actions and relationships. However, we must also bear in mind the individual aspect of employment" (p. 359). Remember that the ECA included *for the first time* individual employment contracts under employment legislation. This has continued under the ERA.

"When any one person is hired for the job, a contract is formed between that individual worker on one hand and his or her employer on the other." (359). Although if a CEA is in force then this will influence the initial agreement (see p. 114).

The first three points deal with more general employment law principles (though influenced by some recent legal decisions), while the legal precedent section discusses legal decisions under the ECA and ERA.

One of the current major issues is to what degree the legal precedent formed under the ECA will influence the legal decisions under the ERA. This has influenced areas such as good faith and the employee-contractor distinction as well as new (2004) regulations about 'passing on' of union-negotiated improvements of employment conditions.

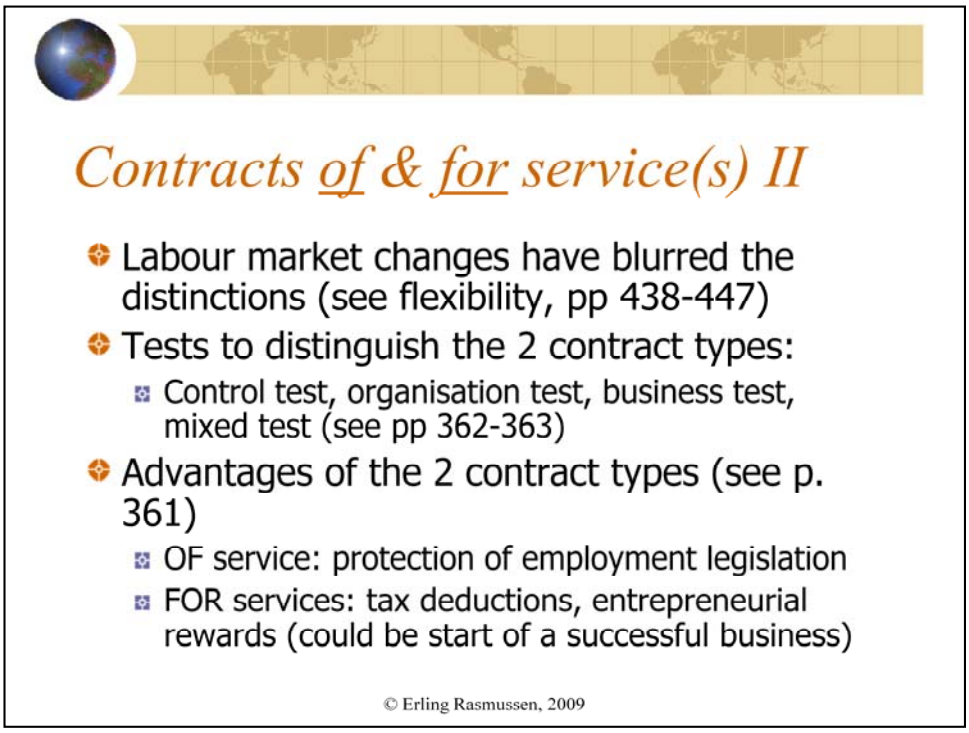
This is a crucial distinction and whether a contract is of or for service(s) has been tested by courts on a regular basis (see pp 377-9). It was also a major issue during the debate of the ER Bill (see p. 106).

Employees are covered by contracts of service.

Independent contractors and self-employed are covered by contracts for services.

p. 361 is crucial since it sets out: (1) the advantages and disadvantages of being either covered by contracts of service or contracts for services; (2) key features of the two types of contracts.

As the ERA covers employees – workers on contracts of service – the Act specifies what an employee is (see p. 360). This includes "a person intending to work', that means that people will be covered as soon as they enter into an employment agreement.



Recent labour market changes – outsourcing, using temporary and agency staff, people changing between being employees and self-employed – have made it important to distinguish between the two types of workers but it has often become more difficult to make such a distinction.

One problem is that employers and workers want to take advantage of the cost aspect of contracts for services but employers also like to have the control and stability associated with the employer-employee relationship.

In many cases the employee would have little choice regarding his/her contract status since it would be determined by the employer, or the type of job, or the industry/occupation. Contractors have become very prevalent in some industries or occupations, see the famous 'Bryson case' on p. 378.

The traditional word 'worker' has made a comeback since it can cover both employees and self-employed (without employees). It also addresses situations where an individual may have different employment status at different times or dependent on the situation.

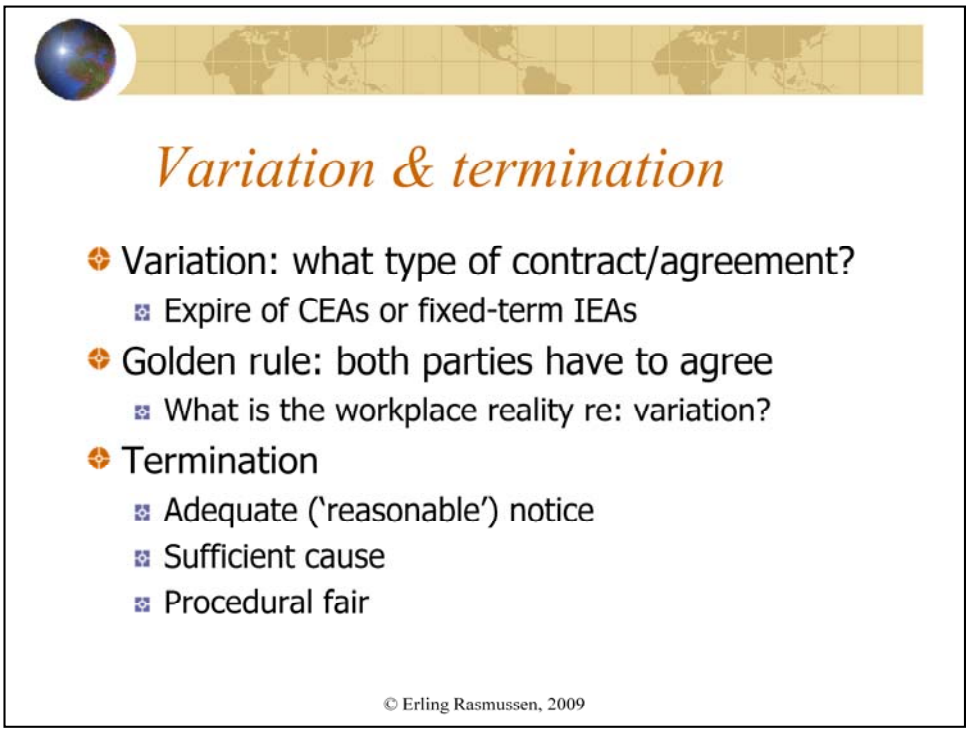
True representation: although one is allowed to present oneself in a positive light, employees should not exaggerate or misrepresent the skills or qualifications they have (pp 364-5). Writing a good CV is a marketing exercise but it is not a license for falsifying. In several high-profile cases, this has prompted the determination of employment.

"An employment contract may be written or oral, formal or informal, although the ERA specifies that individual employment agreements must be in writing." (p. 365). Still, not all terms can normally be covered and the employment situation may change over time.

"Thus, we must regard the contract of employment as a very special form of 'contract'. It is something quite different from, say, a contract for the sale and purchase of a television set." (p. 370). The extent of this 'special form' is disputed in the last couple of decades – see pp. 77-81 & 425-6.

There is also the issue about the employment relationship being a power relationship. Is this really true & who has the upper hand?

"At best, it is a complex bargain between two unequal parties based on a large number of assumptions about future behaviour." (p. 370).

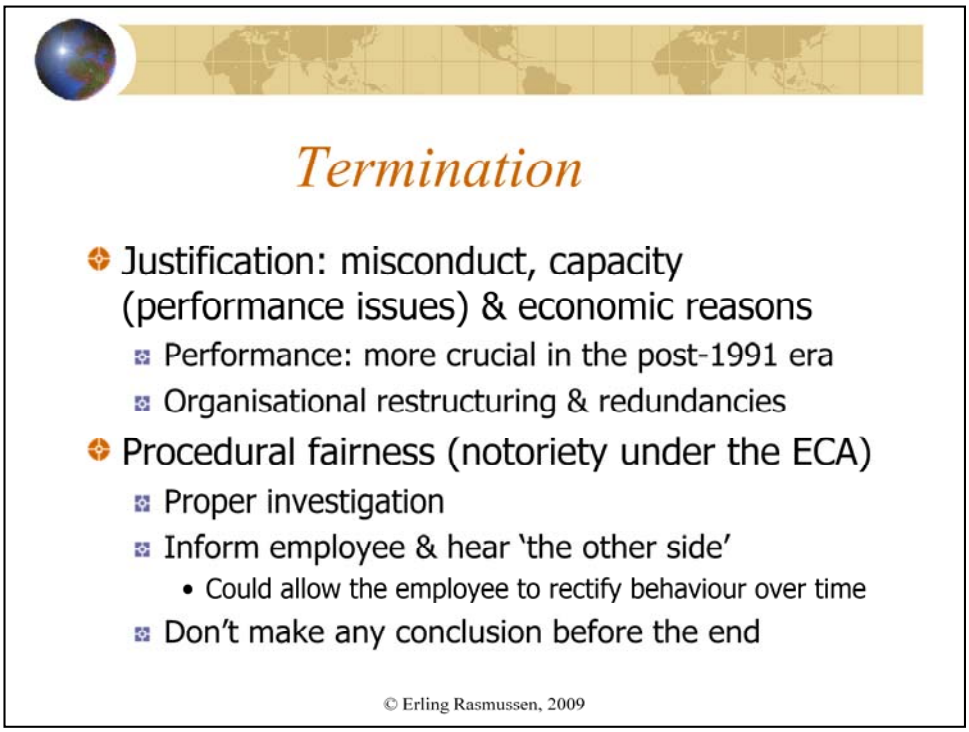


Both CEAs and fixed-term IEAs will run out at a particular date. The issue of variation may not surface before the expiry date is triggered.

"The duration of the contract/agreement is of relevance because once the contract has been entered into, it cannot be varied without the consent of both parties to the agreement." (p. 371)

Normally, an IEA is expected in principle to run indefinitely but it will often be altered as technology, work organisation, the employee's job, etc. change over time.

It is important to understand the 3 basic elements of just and fair termination. The number of unjustifiable dismissals cases has been high since the early 1990s (see pp 98-99, 155).



All 3 types of justification can be difficult to prescribe precisely. It is easy to understand gross misconduct or total lack of ability to perform the job. But there are borderline cases: when will it cost you our job if you wear the wrong shoes, or is a bit sloppy with your paper work? Or what happens when one person out of a work unit of 5 people has to be made redundant? It is these less clear-cut cases that may end up in court.

Procedural fairness often surfaced in unjustifiable dismissal cases under the ECA. Over time, it became clearer what the basic requirements were (see p. 374). Still, there have also been media headlines under the ERA when employers fall foul of 'procedural fairness' or when employer organisations call personal grievances a 'gravy train'.

It was often problematic that employers did not have their facts straight, did not give the employee a chance to explain or rectify behaviour. In particular, it is a problem when premature conclusion has been reached before the employee was consulted.

Often it is necessary to give an employee one or several warnings before termination of employment can be considered.

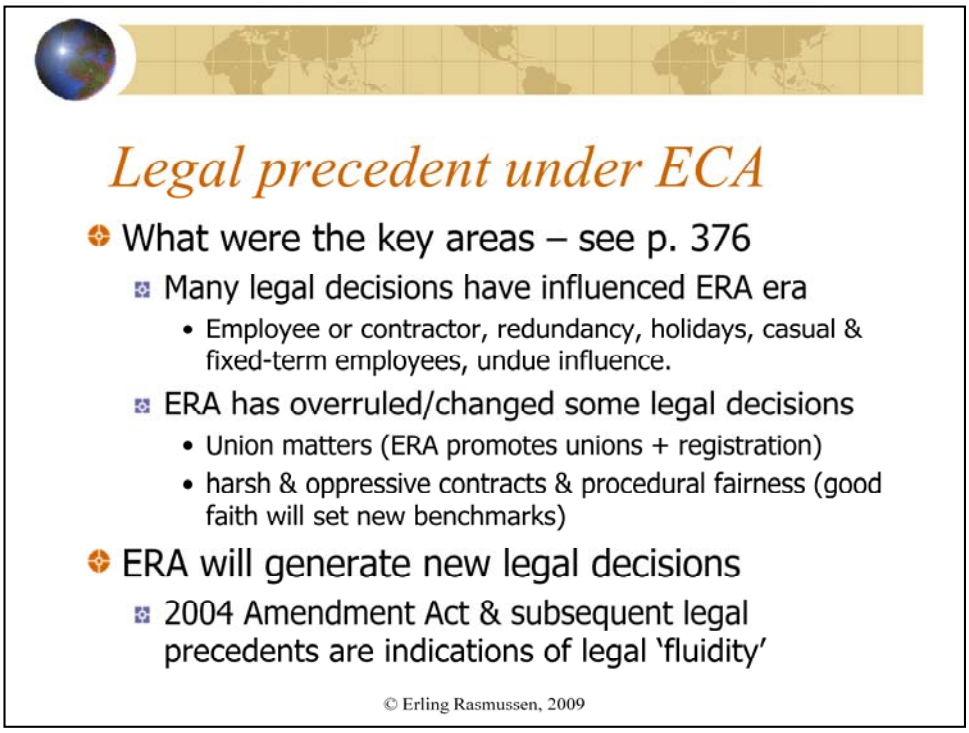
While summary dismissals have been made famous on television, films, or as triggers of major industrial disputes, such dismissals should be regarded as extreme cases and exceptions only.

The golden rule is: "the punishment should fit the crime."

Thus, the behaviour has to be way out of line before a summary dismissal can be considered.

Constructive dismissal is another type of improper dismissal.

It is a rather peculiar type of dismissal because the employee is not dismissed but has resigned. However, it is considered a dismissal because the employee was 'forced' in some way to resign. The 3 main situations are described at the overhead.



General advice: it is not necessary for most students to understand the various trends and details of legal precedent under the ECA.

The details of the key areas of legal precedent described on p. 111 should be left to employment lawyers or people interested in employment law.

Legal precedent becomes part and parcel of practical employment relations over time. For example, the booklets from the Employment Relations Service will incorporate changes to acceptable behaviour in areas such as holiday entitlements, parental leave entitlements, employing people on fixed-term agreements, etc.

While the ERA will overrule several legal decisions, there are bound to other issues raised by the legislation.

Some formulations in the 2004 ER Amendment Act are clearly a reaction to legal precedent in the good faith area. In particular, the Amendment Act sought to clarify that good faith was different from and implying a new, higher standard than previous legal precedent (see p. 160). However, further court decision may decide where the actual implications of good faith end up.

Overall, it was the intention to reduce 'the need for judicial intervention' (p. 107) & this has largely been achieved. A more prescriptive legislative framework & less appetite for court challenges amongst employers and unions have limited the contested areas (compare with the ECA, see list on p. 376). Likewise, the frequent attacks on the Employment Court in the 1990s have largely stopped in the new millennium.

The 'passing on' issue has changed in two ways post-2004. First, the Court decisions have made it difficult for unions to prove that 'passing on' has actually happened (see Caisley 2010). There have also been few cases of 'bargaining fees' being agreed at workplace level. Second, unions appear less concerned about 'passing on' and instead they are interested in developing a way of bargaining for all employees at a workplace (Harré 2010, Kelly 2010).