

Chp. 5: The Employ. Contract

⊕ Overview

- ▣ Contracts of & for service(s)
- ▣ Formation & content of employment contracts
 - The 4 sources of contractual arrangements
- ▣ Variation & termination of empl. Contracts
- ▣ ECA & legal precedent
 - What areas were the key ones?
 - What will the effect be under the ERA?

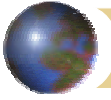
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“Books on employment relations are commonly written to describe collective or group actions and relationships.” (p. 96). Remember that the ECA included for the first time individual contracts under employment legislation.

“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.” (96). If a CEA is in force then this will influence the initial agreement (see p. 130).

The first three points deal with more general employment law principles (though influenced by some recent legal decisions), while the ECA & legal precedent discusses legal decisions in the 1990s.

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.



Contracts of & for service(s)

- ⊕ When employment contracts (or agreements under the ERA) are mentioned it is normally contracts of service (employees)
- ⊕ Contracts for services cover: independent contractors, consultants, etc. (# employees)
- ⊕ OF or FOR? see table 5.1 for key features
 - Definitions in ERA & legal precedent set the key hallmarks for the NZ distinction

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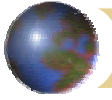
This is a crucial distinction and whether a contract is of or for service(s) has been tested by courts on a regular basis (see p. 114). It was also a major issue during the debate of the ER Bill (see p. 122).

Employees are covered by contracts of service.

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

p. 97 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. This includes “a person intending to work”, that means that people will be covered as soon as they enter into an employment agreement.



Contracts of & for service(s) II

- ⊕ Labour market changes have blurred the distinctions (see flexibility, pp 156-165)
- ⊕ Tests to distinguish the 2 contract types:
 - ▣ Control test, organisation test, business test, mixed test (see pp 98-99)
- ⊕ Advantages of the 2 contract types (see p. 97)
 - ▣ OF service: protection of employment legislation
 - ▣ FOR services: tax deductions, entrepreneurial rewards (including: could be start of a successful business)

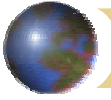
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Recent labour market changes – outsourcing, using temporary and agency staff, people changing between being employees and self-employed – have made it important to distinguish between the two types of workers but it has often become difficult to make 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 industry/occupation, or the type of job.

The traditional word ‘worker’ has made a come back since it can cover both employees and self-employed (without employees).



Employment contract contents

- ☛ Formation: offer & acceptance (behaviour can be enough & importance of true representation)
 - ☒ Genuine consent & 'good faith'
- ☛ Content: the contract/agreement itself
 - ☒ Collective and/or individual agreement?
 - ☒ Implied terms (fundamental responsibilities)
 - ☒ Legislation: there several Acts involved
 - ☒ Custom & practice (workplace practices)

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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 (p. 100). Writing a good CV is a marketing exercise but it is not a license for falsifying.

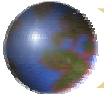
“An employment contract may be written or oral, formal or informal. Few employment contracts will specify all the terms that go to make it up.” (p. 101). The ERA prescribes more formal, written individual agreements, see p. 131.

“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. 105).

The extent of this ‘special form’ is disputed – see pp. 68-72 & 142-143.

There is also the issue about this 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. 105).



Variation & termination

- ⊕ Variation: what type of contract/agreement?
 - ▣ Expire of CEAs or fixed-term IEAs
- ⊕ Golden rule: both parties have to agree
 - ▣ What is the workplace reality re: variation?
- ⊕ Termination
 - ▣ Adequate ('reasonable') notice
 - ▣ Sufficient cause
 - ▣ Procedural fair

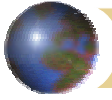
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Both CEAs and fixed-term IEAs will run out at a particular date. The issue of variation may not surface before the expiry date is triggered.

“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 contract.” (p. 106)

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 were high in the 1990s (see pp 90-92).



Termination

- ⊕ Justification: misconduct, capacity (performance issues) & economic reasons
 - ▣ Performance: more crucial in the post-1991 era
 - ▣ Organisational restructuring & redundancies
- ⊕ Procedural fairness (notoriety under the ECA)
 - ▣ Proper investigation
 - ▣ Inform employee & hear 'the other side'
 - Could allow the employee to rectify behaviour over time
 - ▣ Don't make any conclusion before the end

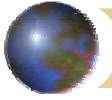
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All 3 types of justification can be difficult to prescribe precisely. It is easy to understand gross misconduct or total lack of ability to perform the job. But when will it cost you your job if you wear the wrong shoes, or is a bit sloppy with your paper work. 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. 109). There will probably also be some impact of the good faith requirements in the ERA.

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.



Termination II

- ⊕ Summary ('instant') dismissal
 - ⊞ Should only happen in rare circumstances
 - ⊞ Serious misconduct, wilful disobedience, serious neglect of duty, gross incompetence
- ⊕ Constructive dismissal
 - ⊞ Employee resigns but in unfair circumstances
 - Resign or be dismissed, employer 'leaning' on employee to resign, employer breaches contract

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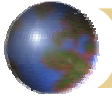
While summary dismissals have been made famous on television, films, or as triggers of major industrial disputes, such dismissals should be regarded as extreme cases and exceptions only.

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.



Legal precedent under ECA

- ☉ What were the key areas – see p. 111
 - ▣ Many legal decisions will influence ERA era
 - Employee or contractor, redundancy, holidays, casual & fixed-term employees, undue influence.
 - ▣ ERA will overrule/change some legal decisions
 - Union matters (ERA promotes unions + registration)
 - harsh & oppressive contracts & procedural fairness (good faith will set new benchmarks)
- ☉ ERA will generate new legal decisions

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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.