

# **The Law and Alternative Working Arrangements**

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## Preface

An orthodox conventional employment relationship has traditionally been seen as one that is ongoing, of indefinite duration and more or less full-time. Over the past three decades, an exponential growth has been seen in non-orthodox 'alternative' working arrangements. Issues have arisen with respect to the law governing such arrangements and particularly:

- (a) the options for labour market flexibility; and
- (b) protection of the individual workers concerned.

Since the enactment of the Employment Contracts Act 1991, the relevant legal environment has been governed by a single encompassing statute, currently and since the 1<sup>st</sup> October 2000, the Employment Relations Act. The Holidays Act 1981 also has some relevance.

Issues typically arise in the context of, and with reference to, the following:

- (i) the rights and remedies of 'workers' in alternative employment arrangements when their services are dispensed with; and
- (ii) the application of the statutory codes of 'minimum conditions' with respect to such matters as holidays and the minimum wage.

Individuals providing services as 'independent contractors' are not covered by any of the relative labour/employment statutes. Arrangements of this nature are governed by the general law of contract. With respect to those engaged as 'employees' in accordance with 'employment agreements' pursuant to the statutory definitions of those terms, the general body of employment law will be applicable.

This paper examines the law relating to the following categories of 'alternative' or non-orthodox employment:

- (1) casual and part-time workers
- (2) temporary employees
- (3) those engaged pursuant to probationary or trial clauses
- (4) employees on fixed-term agreements.
- (5) Persons intending to work
- (6) Independent contractors and home workers.

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## 1. INTRODUCTION

During the 1970s and 1980s, there were significant developments in the labour market which created the conditions for the development of alternative work arrangements. The relevant legislation governing employer and employee relationships was confined to those employees who were members of registered unions and covered by awards or agreements in the private sector and determinations in the public sector. These documents covered approximately 60 percent of the workforce<sup>1</sup> and, in the early seventies, were focused mainly on full-time workers. As the labour market developed and changed, pressure grew for greater options in terms of alternative work arrangements. There was a growing debate within the union movement and amongst employer groups for documents to reflect different work patterns. Clauses relating to part-time, casual and seasonal workers gradually began to appear. Despite this, the Courts were increasingly called upon to determine whether or not workers came within the jurisdiction of the relevant employment legislation, as the legislation itself did not define alternative working arrangements.

With the move from the collective focus of traditional industrial legislation to the coverage of individual contracts under the Employments Contracts Act 1991<sup>2</sup> (ECA), there was a change in how employment contracts were defined to mean a contract of service.<sup>3</sup> This reflected the significance of the contractual basis of employment agreements as well as the objects of the Act. The determination of whether or not a person came within the jurisdiction of the Act, and thereby obtained all the benefits associated with this, remained a matter for the Courts to determine.

The definition of ‘employment agreement’ in Section 5 of the Employment Relations Act 2000 (ERA) continued the concept of the contract of service despite the change in philosophy of the Act.<sup>4</sup> In line with the changed emphasis of the Act, legislative guidance is provided in relation to certain arrangements which, to date, had been defined by the Courts, for example, fixed-term arrangements, probationary periods and independent contractors.

This paper considers the law governing alternative employment arrangements in contrast to the law relating to full-time employment. It sets out those arrangements that have traditionally come within the jurisdiction of the relevant legislation and those that traditionally have not. It considers the legislative framework, the tests the courts have looked at in determining the nature of these relationships and whether or not the Employment Relations Act 2000 has, through statutory guidance, impacted on the nature of those relationships.

The question whether there is a contract **of** service or a contract **for** services has traditionally been a matter of law<sup>5</sup> where determination of the question requires the

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<sup>1</sup> Refer to the *Nexis Lexis Employment Law Guide*, page 29.

<sup>2</sup> While the Labour Relations Act allowed for individual arrangements, the main focus remained the collective agreement.

<sup>3</sup> Section 2.

<sup>4</sup> The ERA rejected the notion that the relationship between employers and employees was purely contractual and economic. Refer to the *Employment Relations Bill* Introductory Note 1.

<sup>5</sup> *NZ Couriers Ltd v Curtin* [1992] 2 ERNZ 541; [1992] 3 NZLR 562 (CA).

interpretation of a written contract. In the absence of a written contract, it will be a matter of mixed fact and law.<sup>6</sup> Merely labelling a relationship does not determine what in fact or law it is. Simply because a worker is not permanent or full-time does not mean that the arrangement under which they work is not a contract of service. Collective agreements have long included definitions of part-time and casual employees. Although each case must be dealt with on an individual basis, these types of arrangements do not generally fall outside the jurisdiction of employment legislation.

Temporary and seasonal workers may also be covered by collective agreements but are largely dealt with on an individual or fixed-term basis. Under the Employment Relations Act 2000, if the employees are employed under a contract of service, then clearly they are within the jurisdiction of the Act. As noted below, however, the variety of arrangements that arise in respect of 'temporary' workers may lead to the Courts concluding that the arrangement is really one for services. Contractors, on the other hand, have traditionally been held to be on a contract for service and therefore excluded from the jurisdiction of the relevant employment legislation. Each category is discussed in the following Section on alternative working arrangements.

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<sup>6</sup> *Cunningham v TNT Express Worldwide (NZ) Ltd* [1993] 1 ERNZ 695 (CA).

## 2. ALTERNATIVE WORKING ARRANGEMENTS

### 2.1 Casual and Part-time Workers

There is no prescribed definition of a casual employee. However, the courts have often had to consider whether or not the nature of the employment is casual or part-time. This situation arises not in respect of the jurisdiction of the relevant employment legislation (i.e. whether there is a contract of or for service) but in respect of the termination of the employee. It is often assumed that by being classed as a casual worker, the employer can terminate the employment at will. This is why the use of casual staff became an increasingly attractive option, particularly in the service sector. However, simply by defining employment as casual does not exempt the employer from the jurisdiction of employment legislation or requirements to terminate the employment fairly and in accordance with established common law tests.<sup>7</sup>

In determining whether or not an employee is casual or part-time, the main criteria the courts have considered are the permanency and continuity of employment. In *Canterbury Hotel etc IUOW v Fell* 1982 ACJ 285, the worker was employed as a casual bartender. The Court considered the concept of ‘casual worker.’ In this case, the definition of casual worker contained no provisions relating to dismissal on notice or dismissal at all. This led to the proposition that she had been merely rostered off and therefore there was no dismissal. The court held that in their view, the worker was really a part-timer. She worked on a regular basis, with set hours. There was continuity of employment. Similarly in *Barnes (formerly Kissel) v Whangerei Returned Services Association (Inc)* [1997] ERNZ 626, the employee signed a contract which explicitly stated she was a casual employee being someone who worked on an ‘as and when required basis’. After six months, she was rostered each week on regular days and hours. The Court held that the contract’s original terms had been varied and that when this occurred, the contractual arrangements took on the features of regularity and permanence.

This case is significant because the nature of true casual employment often carries with it the notion that the employer does not have to offer work and the employee does not have to accept work. The Court discussed this. It found that on two of her rostered evenings, the worker was in sole charge of the bar and that this was incompatible with a situation of true casual employment. The reason for this was that if the worker had the freedom to accept or reject the offers of employment, then the employer would have been in a state of total uncertainty about whether the bar was going to be opened on the nights the worker was in sole charge.

The rights of casual employees to the benefits that accrue as a result of being an employee are no less than for any other employee. For example, given that s65 of the Employment Relations Act 2000 requires all individual agreements to be in writing and to contain an explanation of the services available for the resolution of employment relationship problems, there can be no doubt that the procedures relating

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<sup>7</sup> Refer to *Tyson v Angus Inn Motor Hotel* WET 706/92 4 June 1993 PR Stapp.

to termination apply as equally to casuals as to any other employee. However, such workers rarely take unjustified dismissal claims due to the very nature of their employment. The cost of legal proceedings heavily outweighs any outcome they may obtain. If a personal grievance is raised, then it is clear that simply ‘rostering off’ a casual employee even for genuine reasons, such as a downturn in business, may give rise to a legitimate claim for unjustified dismissal resulting in remedies for lost wages and compensation for hurt and humiliation.<sup>8</sup> In *Tyson*<sup>9</sup>, it was held that an employee who is a casual and who is given an expectation of work, albeit with varied hours and/or irregular hours, has a right to be given notice and good cause.

Casual employees’ access to minimum conditions of employment, such as holiday pay and special leave, is only limited by statutory definitions. For example, the entitlement to special leave is based on six months continuous employment. It is unlikely that a casual employee would accrue six months continuous service to qualify for the benefit of the entitlement to special leave. Casual employees are covered by the Wages Protection Act 1993 and Health and Safety in Employment Act 1992.

In respect of holiday entitlements, most casuals would not have a paid holiday but would be entitled to payment of 6 percent of their gross earnings on ordinary pay as calculated at the conclusion of each engagement. In many cases, casuals are paid holiday pay ‘as they go’. While there has been considerable litigation on this point, the law is now settled and in such circumstances, it has been determined<sup>10</sup> that the Holidays Act 1981 does not prevent an employer from paying, and the casual employee accepting, advance payments of holiday pay in anticipation of the holiday pay to become due on termination. Where such anticipatory payments have been made and accepted, the worker does not, on the termination of the employment, become entitled to be paid a second time.

## **2.2. Part-time Employees**

As discussed in the section above, a part-time employee will be a person with continued and permanent employment as defined by the days or hours they work. As above, all the benefits of being an employee accrue to part-time employees, including access to personal grievance provisions, provided they meet any entitlement criteria.

## **2.3. Temporary Employees**

The term ‘temporary employee’ is used in a variety of circumstances and most often in relation to what are truly casual or fixed-term employees (see discussion below). The term is perhaps more correctly used in relation to seasonal workers, those employed as relievers over busy periods of production, those covering for injured or absent employees, those undertaking special projects for organisations or companies, or consultants. There is no prescribed definition and therefore each situation must be

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<sup>8</sup> *Tyson v Angus Inn Motor Hotel* WET 706/92 4 June 1993 PR Stapp.

<sup>9</sup> *Ibid.*

<sup>10</sup> *Drake Personnel NZ Ltd v Taylor* [1996] 1 ERNZ 324 CA.

considered on its own merits. Whether or not a ‘temporary worker’ is engaged on a contract of or for service will be subject to the usual tests as discussed below<sup>11</sup> but it is not unusual for temporary workers to be covered by collective agreements or to be ‘employed’ on a contract of service. In many situations, the employee will be on a fixed-term contract.<sup>12</sup>

In *Telecom South v Post Office Union* [1992] 1 ERNZ 711; [1992] 1 NZLR 275(CA), a human resource consultant with his own company took up a management position with the employer. Despite the consultant’s company invoicing the employer monthly, he was held to be an employee as there was an integrated working relationship with the employer. On the other hand, agency ‘temps’ have been found not to be integrated into the agency’s business and are therefore independent contractors. The English Court of Appeal has held in relation to such workers that it is legally possible to distinguish between the general terms under which a person agrees to accept assignments from an agency and the terms under which he or she may work on individual engagements or for specific tasks. In other words, the person could be an independent contractor when engaged by the agency but found to have a contract of service with the person for whom they carry out any particular work.<sup>13</sup>

Seasonal workers are generally considered to be temporary workers but in unionised industries, they are usually covered by collective agreements. For example, in the meat industry, awards and agreements often contain arrangements for seasonal lay offs.<sup>14</sup> In non-unionised industries, the situation may be quite different and even where there is union coverage, certain types of seasonal worker may be held to be contractors. For example, in the case of *NZ Workers IUOW v Kelly* 1989, 1 NZLIR 202, an organiser of a shearing team was held to be an independent contractor on the grounds that he was paid an organising fee, the farmer paid a lump sum to him for organising the gang and did not make individual payments to the shearers, and the organiser was the person who selected the workers for the gang.

## 2.4. Fixed-term Agreements

The inclusion of Section 66 of the Employment Relations Act 2000 concerning fixed-term contracts appears intended to deal with the situation that arose in *Principal of Auckland College of Education v Hagg* [1997] 1 ERNZ 116 CA. This case (taken under the ECA) related to a lecturer who had been appointed on a series of fixed-term contracts. The repeated rolling over of the fixed-term contract gave rise to the question of whether or not the contracts were genuine and whether or not Mr Hagg was in fact employed on a permanent ongoing contract.

Prior to the Employment Contracts Act 1991, the courts had developed a series of guidelines to be applied to the termination of fixed-term contracts and thereby give the employee access to the personal grievance provisions of the legislation. These guidelines were set out in *Smith v Radio i Ltd* [1995] 1 ERNZ 281 and followed in

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<sup>11</sup> Refer to the Section on independent contractors.

<sup>12</sup> Refer to *Christchurch Carpet Yarns Ltd v Maddock* [1994] 1 ERNZ 999.

<sup>13</sup> Refer to *McMeechan v Secretary of State for Employment* [1997] ICR 549.

<sup>14</sup> See *NZ Meat Processors Etc IUOW v Alliance Freezing Company (Southland) Ltd* [1990] 2 NZLIR 1071.

*Haddon v Victoria University of Wellington* [1995] 1 ERNZ 375. The guidelines were as follows:

1. *Fixed-term contracts of employment are valid unless prohibited expressly or impliedly by an applicable collective employment contract;*
2. *A fixed-term contract will not automatically expire on the date specified in it against the will of the employee if:*
  - *It does not genuinely relate to the operational requirements of the undertaking or establishment of the employer; or*
  - *If the employer fails to discharge the burden of proving, in each case, that there was a genuine reason for the seasonal or other fixed-term contract of employment and that the purpose of the contract is not to deprive the employee of protection of an applicable collective contract or the benefit of the personal grievance procedure required to be inserted in the contract by the [EC] Act; or*
  - *The employer failed to consider whether the genuine need at the time of the creation of the contract for its termination on a particular date still existed when the expiry of the contract was imminent and considered whether the genuine need at the time of its creation for its termination still existed; or*
  - *There has been an express or implied promise of renewal that has not been kept or the termination of the contract was brought about in defiance of the employee's legitimate expectations of renewal; or*
  - *The termination of the contract was brought about by any wrong motive or unfairness on the part of the employer.*

The Court of Appeal in *Hagg* saw no basis for these guidelines '*either in the principled application of the law governing the construction of contracts or in the provisions of the [EC] Act*'. In other words, the same principles of interpretation that apply to any other contract were to apply to fixed-term contracts. The consequence of this was that a dismissal did not arise as a result of the expiry of the fixed-term contract. There were, in fact, only two situations whereby the expiry of a fixed-term contract would give rise to a personal grievance. They were:

- (1) when the fixed-term contract was a sham; or
- (2) where there had been an express or implied promise of renewal or other conduct creating a legitimate expectation of renewal on the part of the employee.

It was anticipated following the decision in *Hagg* that there would be a significant increase in the use of fixed-term contracts to avoid both redundancy and personal grievance provisions in collective contracts but there is no data that has considered the incidence of such contracts post-*Hagg*. Certainly such contracts are widely used but this could be as a result of other factors such as deunionisation, loss of coverage of groups such as middle and senior managers, or restructuring leading to the contracting out of work. The use of the fixed-term contract also did not remove parties from the jurisdiction of the relevant legislation (i.e. it did not mean that there was not a contract of service and that the person so employed was not an employee within the meaning of the Act). It simply limited the access the employee had to a personal grievance on the grounds of unjustified dismissal. The employee could no longer claim a grievance

solely on the basis that the contract had expired or had been rolled over a number of times and not been renewed.<sup>15</sup>

Despite the contractual approach of the Court of Appeal, cases continued to come before the Employment Court challenging the concept of the fixed-term contract. In *Lakeland Health Ltd v Joseph* [1997] 1 ERNZ 425, the Employment Court rejected the claim by the employer that a consultant anaesthetist was on a fixed-term contract. The reasons for this were that the contract had no formal expiry date but provided for termination on notice. There was also provision for annual performance reviews and evidence showed the parties did not intend to enter into a fixed-term contract. In *Vice Chancellor University of Canterbury v Purchas* 1998 3 ERNZ 925 (CA), it was held there was an implied term that Mr Purchas would be appointed to a tenured position in the fixed-term contract. The Court in this case distinguished *Hagg* and found in favour of Mr Purchas, despite the express terms of the contract.

It is clear that the original intention behind Section 66 of the Employment Relations Act 2000 was to return to the pre-*Hagg* law but the section as finally enacted does not go as far as the original clause contained in the Employment Relations Bill. The Act requires in relation to fixed-term arrangements that:

1. *An employee and an employer may agree that the employment will end -*
  - a) *At the close of a specified date or period; or*
  - b) *On the occurrence of a specified event; or*
  - c) *At the conclusion of a specified project.*
2. *Before an employee and employer agree that the employment of the employee will end in a way specified in subsection 1 the employer must –*
  - a) *Have genuine reasons based on reasonable grounds for specifying that the employment of the employee is to end in that way; and*
  - b) *Advise the employee of when or how his or her employment will end and the reasons for his or her employment ending in that way.*
3. *The following reasons are not genuine reasons for the purposes of subsection 2 a:*
  - a) *To exclude or limit the rights of the employee under this Act:*
  - b) *To establish the suitability of the employee for permanent employment.*

While employers will not be able to use fixed-term agreements to avoid the rights owed to employees under the ERA, it remains clear that as long as the termination is not treated as a dismissal the courts will be entitled to conclude that the contract expired on the occurrence of one of the events in Section 66(1) (a) (b) or (c) and provided that there are genuine reasons for the agreement ending in that way.

There have been a number of determinations issued by the Authority in relation to s 66 of the Act. The case of *Miller v Red Bull NZ Ltd*, P Cheyne (18 April 2002 CA 42/02) was an application for reinstatement. Ms Miller was employed as a brand consultant for Red Bull NZ Ltd on two fixed-term contracts. The first was for a year and the second for six months. Both agreements were expressly stated to be made

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<sup>15</sup> As a result of *Hagg*, the mere fact that a fixed-term contract was rolled over did not give rise to a claim of legitimate expectation or that the contract was a sham.

pursuant to s 66 of the Act. She was advised prior to the expiry of her agreement that she would not be offered re-employment.

The Authority found that *Hagg* was no longer a binding authority on the question of the validity of fixed-term contracts. It held that what is now necessary is for the Authority to strike a balance between the stated terms of the contract and assessing whether the employer had reasons based on reasonable grounds for stipulating a fixed-term agreement. The assessment is to include (but is not limited to) an inquiry about the genuineness of the stated reasons.

The reasons given by the employer for the fixed-term agreement in this case was: (1) there was a business requirement to ensure staff turnover amongst brand ambassadors and (2) the company budgeting process determined the funds available and in turn the continued employment of brand ambassadors. The Authority determined that in respect of the reason concerning budgeting, many organisations produce yearly budgets and a 12-month budget said to warrant a 12-month term could not be a genuine reason for the second 6-month term. Further, given that there had been continuous funding for brand ambassadors since the Red Bull launch in 1996, it was arguable as to whether there was any substance to the budget reason. As to the need for staff turnover, the Authority held that the traits valued by the company in suitable employees were more important to the performance of the candidate they selected rather than the duration of their employment. Ms Miller was granted interim reinstatement on the basis that there was an arguable case as to whether there were genuine reasons based on reasonable grounds for the fixed-term.

Cases where the Authority has held that there are genuine reasons for the fixed-term include:

- (1) where no permanent position was available and the employer wished to provide work experience for the relative of an employee;<sup>16</sup>
- (2) where the employee was given the ability to assess an option to purchase;<sup>17</sup>
- (3) the person was employed for the period of the Christmas rush. This period was then extended, as the employer was due to make a permanent appointment. The employment continued until this event occurred;<sup>18</sup>
- (4) during a restructuring process, a fixed-term contract was extended until the process was complete. The employer needed temporary cover during the secondment of the incumbent permanent employee.<sup>19</sup>

These cases signify that the Authority and Court will again be looking behind the form of the contract as to whether there are genuine reasons for its being of a fixed term. This has led to a degree of litigation on the issue as would be expected. Until another definitive judgment by the Court of Appeal, the extent to which the law will go in revisiting the principles as outlined in *Smith* and *Haddon* is unknown.

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<sup>16</sup> *Jamieson v de'Amalfi Survival Ltd* unreported J Wilson 29 April 2002 AA 119/02.

<sup>17</sup> *Richards-Ratray v Willbank* unreported PR Stapp 26 March 2001 WA 11/01.

<sup>18</sup> *Parore v Sheldon & Hammond (Pty) Ltd* unreported YS Oldfield 23 Nov 2001 AA 196/01.

<sup>19</sup> *Bunter v University of Auckland* unreported YS Oldfield 14 Sept 2001 AA 131/01.

## 2.5. Homeworkers

A homeworker in the Employment Relations Act 2000<sup>20</sup> means:

- (a) *a person who is engaged, employed or contracted by any other person (in the course of that other person's trade or business) to do work for that other person in a dwellinghouse (not being work on that dwellinghouse or fixtures, fittings or furniture in it); and*
- (b) *includes a person who is in substance so engaged, employed or contracted even though the form of the contract between the parties is technically that of vendor and purchaser.*

The Act also makes it clear in s 5 that an employment agreement includes a contract for services between an employer and a homeworker. This means that despite the contract being one for services, a homeworker is entitled to all the protections of the Act, in particular the personal grievance provisions.

Homeworkers were first included as a special category under the Labour Relations Act 1987 (LRA). The Government of the time identified such workers as being those:

*...who for a range of reasons are prevented from or restricted in undertaking regular work in a factory, commercial premises or customarily designated place of work and who are employed by a firm or intermediary agent to carry out work in their own homes.*<sup>21</sup>

The workers were mainly machinists but it is likely that there has been an increase in the diversity of work carried out from home since their inclusion in the Labour Relations Act 1987.

The reasons for the inclusion of homeworkers were:

- (1) to provide protection for a vulnerable group of mainly women workers;
- (2) to avoid disputes regarding the classification of the relationship i.e. whether there was a contract of or for service; and
- (3) to clarify the application of legislation relating to minimum wages, holidays, ACC etc.

Under the Employment Contracts Act 1991 and the Employment Relations Act 2000, the definition has remained unchanged. There has only been one leading case concerning the classification of these workers. In *Cashman v Central Regional Health Authority* [1996] 2 ERNZ 156, the Court of Appeal considered the question of whether professional homecare workers came within the definition of homeworker and therefore were employees and entitled to the protection of all the relevant legislation.<sup>22</sup> The Court found that the homecare workers did come within the definition of homeworker and the effect of the definition *'is to deem to be an*

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<sup>20</sup> Section 5.

<sup>21</sup> Industrial Relations: A Framework for Review, vol 2 Government Printer, Wellington, 1985, 87.

<sup>22</sup> The Employment Contracts Act 1991, the Holidays Act 1981, the Wages Protection Act 1983 Parental Leave Act 1987 etc.

*employee anyone who has been engaged in the course of some other person's trade or business to do non tradesmen's work in a dwelling (not necessarily their own) An engagement, employment or contract is within the definition if it is expressly or impliedly a term that the place where the work will be done is to be a dwelling house'.*

The Court went on to state that *'such an interpretation will include people like the appellants but would not extend to those like artists journalists or designers who choose to work from home but in respect of whose place of work the other party to the engagement is indifferent, and in respect of whom no term can be implied about where the work is to be done'*. In deciding the case, the Court also relied on policy considerations describing the workers as being very much the type of vulnerable worker susceptible to manipulation who needed the protection of the Act by being deemed to be an employee.

The test established by the Court was followed in *McCulloch v Director General of the Department of Social Welfare* [2000] 1 ERNZ 467. In this case, the appellants were volunteers and were held not to come within the definition of homeworker.

## **2.6. Independent Contractors**

Independent contractors are a group of workers traditionally seen as being beyond the jurisdiction and application of any relevant employment legislation. This is because independent contractors are seen as autonomous, arranging their own remuneration, holidays and other conditions, providing their own equipment and being responsible for any matters of tax.

Despite this, a significant body of law has developed for distinguishing between a contract **of** service and a contract **for** service. As the labour market has changed, the type of work arrangements have become more flexible and fluid. There are now groups of workers who are clearly regarded or deemed to be independent contractors, for example real estate agents,<sup>23</sup> owner-drivers (e.g. taxi drivers and couriers) and contract tradespeople. While there may be industry acceptance as to the appropriate contractual arrangement, each case should be dealt with on its own merits and by considering the relevant legal tests as discussed below.

There have been four main tests by which the courts have determined whether or not there is a contract of service or a contract for service. They are:

- (1) The control test. This involves looking at the nature and degree of the detailed control over the person alleged to be the employee. It is concerned with whether the employer has the right to control the employee in terms of what they do and also when the work must be done.
- (2) The organisation or integration test. In *Stevenson, Jordan and Harrison Ltd v MacDonald and Evans* [1952] 1TLR 101, Lord Denning stated that *'Under a contract of service a man is employed as part of the business and his work is done as an integral part of the business; whereas under a contract for services, his work, although done for the business is not*

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<sup>23</sup> Refer the Real Estate Agents Act 1976.

*integrated into it but only an accessory to it*. The test was later described as one that depends on whether a person is part and parcel of the organisation.<sup>24</sup>

- (3) The economic reality test or fundamental test. The question to be determined in this test is whether the person is truly independent of the organisation – did the person risk his or her own capital and did the opportunity to profit from the work depend on how the person arranged the work. Cook J in *Market Investigations Ltd v Minister of Social Welfare* [1969] 2 QB 173 stated the test in the following terms: *‘Is the person who has engaged himself to perform the services performing them as a person in business on his own account. If the answer to that question is ‘yes’ then the contract is a contract for services. If the answer is ‘no’ then the contract is a contract of service’*.

Other matters which will be relevant are:

- a) Did the person provide their own equipment?
  - b) Did they hire their own helpers?
  - c) What degree of financial risk did they take?
  - d) What degree of responsibility do they have for investment and management?
  - e) How far do they have the opportunity to profit from the sound management of the task?
- (4) The mixed or multiple test. In this test, the court looks at the totality of the relationship – all the circumstances must be considered as part of a balancing process and the court will look at factors such as:
- a) The employer’s power of selection of an employee;
  - b) The employer’s right of dismissal;
  - c) The method of payment;
  - d) The payment of wages and other remuneration;
  - e) The power to delegate the performance of the work;
  - f) The label that the parties themselves have attached to the relationship.

The leading case in New Zealand in respect of independent contractors is *TNT Worldwide Express NZ Ltd v Cunningham* [1993] 1 ERNZ 695 (CA). While consideration was given to the tests above the Court of Appeal held *‘that the terms of the written contract must be placed at the forefront of the Courts consideration’*. The focus on the parties intention as expressed in writing marked a different approach by previous courts and was seen largely as a product of the policy and direction of the Employment Contracts Act 1991. A stricter more contractual approach was applied and the Court of Appeal found the Employment Court had attached too much weight to the control factor, which was no longer to be regarded as the sole determining factor.

The Employment Relations Act 2000 has clearly sought to reverse the contractual approach taken by the Courts under the ECA by including legislative guidance on the

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<sup>24</sup> *Challenge Realty Ltd v Commissioner of IRD* [1990] 3 NZELC 917 [1990] 3 NZLR 42.

question of whether a person has a contract of service or a contract for services. Section 6 of the Act states at subsection (2):

*In deciding for the purposes of subsection (1) (a) whether a person is employed by another person under a contract of service, the Court or Authority (as the case may be) must determine the real nature of the relationship between them.*

It goes on in subsection (3) to state:

*For the purposes of subsection (2) the Court or the Authority –*

- (a) Must consider all relevant matters, including any matters that indicate the intention of the persons; and*
- (b) Is not to treat as a determining matter any statement by the persons that describes the nature of their relationship.*

The first case to be determined, applying the provisions of the Act was *Koia v Carlyon Holdings Ltd* [2001] ERNZ 585. The applicant purchased a distributorship from a predecessor distributor, which was approved by the defendant. The contract entered into between the applicant and the defendant described the creation of an independent distributor relationship. The Court held that in determining the real nature of the relationship, the intention of the parties was still relevant but was no longer decisive. In considering all relevant matters, issues such as control or whether the person is carrying on business on his own account will also be relevant. The Court also found that the fact of labelling the relationship as an independent one could also no longer be treated as decisive because of s 6(3) (b). It was recognised that the relationship may evolve and develop over time because while the Court may be slow to overrule the intention of the parties, the law is now *'more concerned with substance than with form'*. The Court found on assessment that the applicant was an independent contractor.

This judgement appears straightforward, recognising both the legislative requirements and the previous tests. But the decision was revisited in the case of *Curlew v Harvey Norman Stores NZ Pty Ltd* [2002] 1 ERNZ 114. This case is significant for a number of reasons. The Court found that:

- (1) The Employment Relations Act could not have retrospective operation but an employment contract is an evolving thing and its status was not mutually fixed at the time it was entered into. The contract in this case had been entered into under the ECA.
- (2) The legislative criteria established under s 6(2) of the Employment Relations Act 2000 has impacted on the common law or 'judge-made' tests that have been applicable to date in determining whether a person is an employee or independent contractor.
- (3) *Cunningham v TNT Express Worldwide* has been misrepresented and the view taken in *Koia v Carlyon Holdings Ltd* was too simple in its analysis of both the tests and *Cunningham*. *Cunningham* has previously been interpreted as emphasising the express terms of the contract over other factors but a feature of a number of the judgments was that they placed reliance on all the relevant factors of which an express term was one.

- (4) The direction by Parliament that the Authority and Court determine the real nature of the relationship by considering all relevant matters allows for the continued application of the ‘judge-made’ tests. What Parliament has expressly provided for is in addition to, and not in substitution of, the traditional analysis.

In determining the facts of the case, the Court considered the factors that favoured a contract **of** service and the factors that favoured a contract **for** services. It then examined the arrangements for the points of view of control, integration, fundamentalism and ultimately the statute’s real nature test. In this way, the Court concluded that the relationship between Mr Curlew and Harvey Norman was not an employment relationship.

The decision is also significant in that it did not explain how the Courts revised the way an analysis of *Cunningham* affects the application of Section 6. In *Koia*, the Court clearly considered the ‘judge-made’ tests still relevant and in *Curlew*, the Court could have reached the same view without revising its analysis of *Cunningham*. It remains to be seen what if any effect the decision will have on the question of whether there is a contract of service or a contract for services. While the law now may mean that more contracting parties could come within the definition of an employee, nine years of the Employment Contracts Act 1991 may have created a broader acceptance of differing contractual arrangements whereby it is accepted that the relationship is outside the jurisdiction of the Act. As a result, there may not be a return to challenges of the relationship in industries where independent contracting is seen as the norm.<sup>25</sup>

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<sup>25</sup> However, it should be noted that there has been a recent challenge in the Employment Court concerning contract courier drivers. Refer *Lowe & Tarawhiti v New Zealand Post Ltd* AC 41/03 23 June 2003 Judge Colgan. The matter of the status of the employment has not been determined as the Court referred the parties back to mediation.

### 3. PROBATIONARY PERIODS/TRIAL PERIODS

Until the Employment Relations Act 2000, there have been no statutory provisions dealing with persons employed on trial or probationary periods. Section 67 of the Act requires that:

*where the parties to an employment agreement agree as part of the agreement that an employee will serve a period of probation or trial after the commencement of the employment:*

*the fact of the probationary or trial period must be specified in writing in the employment agreement; and*

*neither the fact that the probationary or trial period is specified, nor what is specified in respect of it, affects the application of the law relating to unjustifiable dismissal to a situation where the employee is dismissed in reliance on that agreement during or at the end of the probationary or trial period.*

The Act does not define what a trial or probationary period is but the requirement that the fact of the period must be specified in writing resolves the problems that arose prior to the Act where termination occurred shortly after commencement and the parties disputed (a) whether in fact such a period had been agreed to and (b) whether or not the employment terminated as a result of an unsuccessful trial.

Prior to the Act, the Courts had determined that trial periods were not fixed-term contracts and that such terms formed part of the employment contract on the basis that they make ongoing employment more likely rather than making it easier to dismiss.<sup>26</sup> It was also held that during the trial period, there was a greater onus on an employer to provide assistance to a new employee. For many employers, the obligations to go through a performance process with employees at this stage was regarded as onerous, largely because such trial periods were sometimes used as a device to dismiss employees without the prospect of facing a personal grievance. It was argued that the employer should be entitled to determine whether or not a person had the capacity to carry out the job before employing them permanently.

The requirement that the normal rules of fairness apply and that any dismissal must be justified was reinforced by the Court of Appeal in *Nelson Air Ltd v NZ Airline Pilots Assn* [1994] 2 ERNZ 665. It was stated in that case (page 669) that the employer had to act fairly:

*It was under no less obligation to act as a good employer. The requirements of that obligation will vary from case to case. Every probationer may be taken to realise that being on trial he or she will be under close and critical assessment and that permanent employment will be assured only if the employer's standards are met. The employer for its part may not be simply a critical observer, but must be ready to point out shortcomings, to advise about any necessary*

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<sup>26</sup> Refer to *Otago Hotel Hospital etc IUOW v Skyline Enterprises Ltd* [1985] ACJ 449.

*improvement and to warn of the likely consequences if its expectations are not met. Because the objective is always that the trial will be a success, not a failure, both parties must contribute to its attainment. If it becomes apparent to the employer, judging fairly and reasonably, that the trial is not a success, the employee is entitled to fair warning before the end of the probationary period that the employment will then be coming to an end.*

The Employment Relations Act 2000 clearly reinforces the view that while trial periods are permissible, they cannot be used to defeat the personal grievance procedures nor do they affect the application of the law.

In any event, an employer may still be able to test an employee's capacity prior to employment with impunity by showing no contract was formed at the time the trial was carried out. In *Northern Distribution Union v Knight t/a Jacci Boutique* [1992] 1 ERNZ 491, the Court contrasted such a situation with a trial period. Provided the employer makes it clear that there is no offer of employment and that the work performance is, in effect, an extension of the employee's job interview, then there can be no issue of a dismissal if a person is not appointed to the position following the testing of the performance.

#### 4. PERSONS INTENDING TO WORK

Prior to the Labour Relations Act 1987, it was not unusual for the courts to find that the termination of a contract, after entering into it but before the work had begun, was a justified dismissal.<sup>27</sup> By including within the definition of worker a person who is intending to work, the situation was remedied. The definition was carried through all subsequent legislation.

In *Canterbury Hotel etc IUW v The Elm Motor Lodge Ltd* [1989] NZILR 958, a casual worker applied for a permanent position and was appointed. He was given a start date and informed that he would have to fill out an employment form nearer the starting date. The employment form contained a job description and a letter of acknowledgment. Prior to signing the form, the employer advised the worker that the position was no longer available. It was held that there was a concluded contract. The fact that the grievant had not signed the employment form did not detract from this as it merely contained a job description. The conclusion to be drawn from the case is that where there is an offer and acceptance, consideration and intent to enter into binding legal relations, then the person will be held to be a person intending to work. Even if there are matters outstanding, provided there is an offer and acceptance the person will come within the definition of the Act<sup>28</sup> but there must be more than mere discussions for the Act to apply.<sup>29</sup>

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<sup>27</sup> *Auckland Clerical etc Employees IUW v Wilson* [1980] ACJ 327.

<sup>28</sup> *Harawira v Presbyterian Support Services* [1994] 2 ERNZ 281.

<sup>29</sup> *Rhodes v LSS Holdings Ltd* unreported CC 10/99.

## **5. VOLUNTEERS**

Volunteers are specifically excluded from the application of the Employment Relations Act 2000. This provision is new and was more than likely inserted as a result of concerns expressed when the first drafts of the ERA were introduced. The relevant provision (s.6 (1)(c)) was added to 'provide increased clarity as to the policy intent' after some submissions on the original Bill assumed that volunteers could fall within the definition of 'employee' in the legislation (Employment Relations Bill: Report of the Department of Labour to the Employment and Accident Insurance Legislation Select Committee, June 2000:21).

## 6. CONCLUSION

The Employment Relations Act 2000 was initiated by the Government as a deliberate shift from the purely contractual approach which underpinned the Employment Contracts Act 1991. As such, the Employment Relations Act 2000 is more prescriptive. It seeks to regulate the employment relationship on the basis of ensuring a greater degree of fairness or balance in the employer–employee relationship. This is shown in the objects of the Act which refer to, in particular, the inherent inequality of the bargaining power in employment relationships. Whether or not such regulation of the employment relationship will, in fact, change the behaviour of employers and employees is debatable. Good employers will automatically comply with the provisions of the Act but this does not mean that they view the relationship with the employee any differently. Nor does it mean that they develop new employment policies in line with what may be new ideals enshrined in legislation. Changes of behaviour may only occur through the enforcement of the Act in a legal forum. Similarly, bad employers are not necessarily even going to comply with the provisions of the Act unless required to do so through enforcement procedures. The question remains, therefore, whether or not regulation of alternative employment relations as discussed in this paper will, in fact, lead to any change in the nature of those relationships. Employees will have to challenge the relationships in the Authority or Court and, until this happens, the law is unlikely to develop any further. Changes to the Holidays Act may have more impact in determining employer’s decisions to take on staff than the changes outlined in this paper. Also, the process of changing behaviour is likely to be slow and determined by the degree to which the Courts are prepared to interpret the provisions of the Act. There has been comment already from the Minister of Labour that the Courts are not going far enough. However, if there is a policy agenda which is not being met by the Courts, then it is surely a matter for Parliament to amend the Act. Whether the current review of the Act leads to any further changes remains to be seen.

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