

Alternative working arrangements post the Omicron peak

The disruption and uncertainty caused by Covid-19 may lead business owners to think about how to best to engage staff to allow for maximum flexibility.

This is particularly the case for employers where they experienced a sudden downturn in business as a result of Covid-19 restrictions or customers/clientele exercising caution as a result of high case numbers. As the cases ease off and things pick up again, it can be tempting to use a trial or probationary period, a fixed term or casual agreement, or to engage a worker as a contractor – so if there is another downturn in the future (perhaps from another Omicron wave or a new variant), the business will not have the same obligations as they would with permanent employees. While in some situations these alternative arrangements will be suitable, business owners should be mindful of some common pitfalls.

Trial periods/probationary periods

A 90 day trial period is only available to businesses with fewer than 20 employees. The benefit of a trial period is that an employer can terminate within the first 90 days, without needing to provide a reason and without having to follow the usual consultation process prior to termination. When properly used, the employee cannot bring an unjustified dismissal claim relating to their termination. However, it is easy for a trial period to be invalidated and many employers trip themselves up. In order to be valid, remember the following:

- A trial period clause must be included in the employment agreement, and must state that the employer can dismiss the employee in the first 90 days (or a shorter, but not longer, period), that there is no entitlement to bring a personal grievance for unjustified dismissal, and the date the

trial period starts.

- The employee must not have worked for the business previously.
- The employee must sign their employment agreement before they start work. Even signing ten minutes into their first day would mean the trial period is void.
- The employee should be told about the trial period before signing the agreement, and given the opportunity to get independent advice.

Probationary periods are sometimes confused with trial periods but they are very different. Any employer can use a probationary period and they can be for longer than 90 days. However, they do not prevent an employee from raising an unjustified dismissal grievance, and an employer must still follow a fair process and have good cause before dismissing. Essentially, the dismissal process will be the same as for an employee who is not subject to a probationary period.

Fixed term employment

A fixed term agreement will state that employment will end on specified date, on the occurrence of a specified event or at the conclusion of a specified project. The employer must have genuine reasons based on reasonable grounds for the fixed term, and those reasons must be properly outlined in the employment agreement. Common reasons are to temporarily cover the absence of a permanent employee (such as parental leave cover) or to assist during a busy period. Legislation is clear that testing a person's suitability for permanent employment will not be a valid reason to use a fixed term. The Courts have also recently confirmed that general financial uncertainty is not a valid reason to employ someone on a fixed term basis¹. If there is no genuine reason for the fixed term, or the fixed term

¹ *Morgan v Transit Coachlines Wairarapa Ltd* [2020] NZEmpC 169

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clause is not drafted properly, the employee will be entitled to claim permanency.

Casual employment

There is no statutory definition of a casual employee, but typically a casual should have no regular hours or pattern of work, should only work intermittently with no expectation of ongoing employment (with work only being offered on an "as and when required" basis) and in particular, there should be no obligation on the employee to accept any work that is offered. Many employees who are on casual employment agreements are in reality part-time permanent employees.

Recent case law² has confirmed that it is also important to have a properly drafted casual employment agreement – for example a redundancy clause in a casual agreement is unnecessary and is more consistent with ongoing employment. This is because there is no need to provide for redundancy if work is only offered as and when required. Casuals are not entitled to sick leave, bereavement leave or public holidays and are paid holiday pay with their wages, rather than actually taking annual leave. However if an employee is deemed to be a permanent employee (regardless of what the employment agreement might say) they will be entitled to claim all the benefits of permanent employment and they cannot be simply let go if work dries up.

Independent contractor agreements

Employers may wish to engage a worker as an independent contractor to avoid the obligations involved with employing an individual. In particular, a contracting arrangement can usually be terminated simply by the giving of notice. Where business owners are anxious about the certainty of ongoing work, a contractor agreement may be an attractive option, however we are seeing a number of cases where workers have

successfully challenged their status as a contractor and have been deemed to be an employee.³

The Courts have developed a series of tests which are used to assess whether an individual is an employee or a contractor. The main tests are:

- **The intention test:** did the parties intend for the relationship to be that of employee and employer, or principal and contractor? The agreement will be relevant, but on its own, will not determine the worker's status.
- **The control test:** the greater the company's control over the worker the more likely the worker is to be an employee. A worker with greater freedom to dictate how and when they perform the work is more likely to be a contractor.
- **The integration test:** does the person wear a uniform, use company equipment and attend training and social events? These are some of the questions that need to be answered to determine whether a worker is "part and parcel" of the organisation rather than being just supplementary to it. If so, this points more towards an employment relationship.
- **The fundamental or economic reality test:** is the person in business their own account? Do they pay their own taxes, invoice for their services, have the ability to profit from their work, and work for other entities? These are all characteristics of a contractor.

Ensuring that a worker is, in reality, a contractor is important, because if the worker can successfully claim they are an employee, they will also be able to claim all employee related entitlements such as sick leave and holiday pay, and can pursue a personal grievance.

² 123 Casino Ltd v Zuo [2020] NZEmpC 88

³ Including *Barry v CI Builders Limited* (article [here](#)), and *Leota v Parcel Express Limited* (article [here](#)),

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What this means for employers

In any dispute the Employment Relations Authority and Court will always look at the real nature of the relationship to determine status – simply saying an employee is a casual, on a fixed term or not an employee at all and actually a contractor - does not make it so.

There can be benefit in considering alternatives to a standard permanent employment arrangement. However it is important to carefully analyse whether the alternative is suitable, appropriate and likely to be upheld in the event of a challenge. It might be that such arrangements are more trouble than they are worth.

Want to know more?

If you have any questions about the various kinds of working arrangements, please contact our specialist [Employment Team](#).