

Casual employees can also raise unjustified dismissal claims

One of the main benefits of engaging staff on a casual basis is the ability to simply stop offering them future work without it constituting a 'dismissal'. There are however certain instances where a casual employee could be successful in raising an unjustified dismissal claim.

There is no legal definition of what constitutes 'casual employment', however it is generally accepted to be where there is a lack of an obligation on the employer to offer ongoing work, or for the employee to accept work when offered.

The factors to consider when determining whether or not the nature of the employment is casual or permanent include:

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

Dismissing casual employees

Engaging an employee on a casual basis can be beneficial where employers just need someone on an 'ad hoc' basis, so they do not want to commit to having to offer a set amount of hours per week, or be bound to

pay an employee for a guaranteed number of hours even if the work is not available. It follows that if the employer has no ongoing work available for the employee, they can simply choose not to offer any future work, and this will not be considered a 'dismissal'.

Where an employer actually dismisses a casual employee in the course of a casual engagement however, that will constitute a dismissal, and could result in an unjustified dismissal grievance being pursued.

This was highlighted in a recent Employment Relations Authority decision¹. In that case, an employee was engaged on a casual basis with the employer. The employer had committed to an eight-week training period, and had said further korero and training would begin once the employee had returned from overseas.

After three weeks of training, the employer had concerns about the employee's behaviour and capability, so it terminated the employee's employment.

The employee raised a personal grievance for unjustified dismissal.

The employer argued that as the employee was engaged on a casual basis, it did not need to follow a process in terminating the employee's employment, but rather it could simply choose to offer no further engagements.

The Authority disagreed, and found that the employer had unjustifiably dismissed the employee, due to the failure to engage in any meaningful process.

The Authority stated that the employer's belief that it could end the employee's casual employment *during a period of engagement*, without any process was mistaken, and was fatal to the employer's ability to justify its decision to terminate the employee's employment.

¹ *Ford v Haven Falls Funeral Home Limited* [2024] NZERA 224.

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The employee was awarded \$20,000 compensation, and four weeks lost wages, (being for the hours that he was expected to perform work under the roster), plus holiday pay and interest on the four weeks.

Key takeaway

An employer is at liberty to offer as much or as little work to a genuine casual employee, and at any stage can choose not to offer any future shifts.

If, however, a casual employee is in the middle of an engagement (i.e. in the middle of an agreed period of shifts), general employment law obligations apply, including those in relation to terminating the employment relationship.

In such a situation, an employer needs to act as a fair and reasonable employer, and follow a proper process (as it would when dismissing any other employee). We would encourage any employer intending to terminate the employment of a casual employee to seek legal advice before doing so.

Want to know more?

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