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INSIDE

## How to ensure fixed term employment agreements are valid

### What is needed for a fixed term provision to be valid?

The Employment Relations Act 2000 contains specific requirements that must be complied with before a fixed term provision is valid:

- the employer must have “genuine reasons based on reasonable grounds” for limiting the employment to a fixed period (as opposed to permanent employment);
- those reasons, and the way in which the employment will end, must be clearly set out in the employment agreement;
- as always, the new employee must agree to and sign the employment agreement **before** commencing employment.

### What are “genuine reasons based on reasonable grounds”?

Whether there are genuine reasons based on reasonable grounds must be assessed on a case by case basis. Section 66 of the Employment Relations Act states that the following are not genuine reasons:

- to exclude or limit the rights of the employee under the Employment Relations Act;
- to establish the suitability of the employee for permanent employment;
- to exclude or limit the rights of an employee under the Holidays Act 2003.

Employment cases have made it clear that even where the employer genuinely and sincerely believes that a fixed term period of employment is justified, the provision will not be enforceable unless that belief is based on reasonable grounds.

Some examples of reasons that were not held to be based on reasonable grounds include “*generic concerns about the uncertain economic climate*”, and uncertainty around funding in the public sector. On the other hand, operational reasons such as the temporary replacement of a permanent employee who is on maternity leave or the performance of a project, have been considered to be reasonable grounds.

### What happens if a fixed term provision is not valid?

Where the requirements in the Employment Relations Act are not complied with and the employee challenges the termination of employment, the consequence may be that the employer is **not** able to rely on the fixed term to justify termination – in effect making the employment arrangement permanent. Where the employee has ceased working for the employer, this could mean that the employer is ordered to reinstate the employee.

## Case study: *Thompson v Taranga Environment Centre Charitable Trust*

### What happened?

This case involved the termination of employment when a fixed term agreement came to an end and the employer did not have funding to offer the employee further employment. The employee disputed the validity of the fixed term and argued that she was unjustifiably dismissed. The Employment Relations Authority ('the Authority') agreed.

### Why did the Authority consider the fixed term provision invalid?

Three explanations were given for the fixed term provision not being valid:

- The employee had been employed on a number of fixed term agreements over several years, and on more than one occasion had continued working past the expiry date.
- The employee had not signed the latest fixed term agreement and was opposed to the fixed term provision. She had continued working for several months after her latest fixed term agreement had expired, giving the employee the reasonable impression that the employer did not wish to enforce the fixed term provision.
- None of the fixed term agreements had set out the way in which the employment would end or the reasons for it ending in that way. For this reason alone, none of them were valid.

### What was the consequence in this case?

While the Authority held that the fixed term provision was invalid, it accepted that if the employee had been treated as being permanent (as she was entitled to be treated) the employer would have had to make her redundant. It therefore did not award reinstatement or lost wages, but ordered the employer to pay notice and redundancy entitlements under the agreement, as well as \$3,000 compensation.

### What is the lesson for employers?

If you are an employer seeking to employ someone for a fixed term, be sure to check first that the reasons for the fixed term and the way in which the fixed term agreement is written complies with all the requirements of the Employment Relations Act - otherwise you may inadvertently have employed a permanent employee.

## Employee vs. Contractor – IRD sets out the tests

### What's new?

The importance of determining whether a worker is an employee or a contractor is nothing new. Case law outlining various tests used to determine this has been developing for several years. However the IRD has recently released updated guidance (draft interpretation guideline ING0017) on how to determine the status of a worker for tax purposes. The guidelines are not intended to signal a change in this area, but do summarise the position to date.

### Why is it important to determine the status of a worker?

The rights and obligations which attach to contractors and principals are different to those attaching to employees and employers. One of the differences is in the way that tax payments are made to the IRD.

### What do the guidelines say?

The guidelines outline the tests that common law has developed for determining whether there is an employment relationship or an independent contract or relationship. Those tests are referred to as:

- **Intention** - This test assesses what type of relationship the parties intended when the contract was agreed. This may also include consideration of industry practice.
- **Control** - This looks at what degree of control the person engaging services exerts over the worker. A high level of control indicates that the worker is an employee.
- **Independence** - This involves examining the level of independence that the worker has over their work. A high level of independence supports the conclusion that the worker is an independent contractor.
- **Fundamental** - This test assesses whether the worker is acting in business on his or her own account. If so, this indicates that they are an independent contractor.
- **Integration** - The integration test considers whether the worker is integrated into the business. If so, this indicates that they are an employee.

The guidelines highlight that these tests are not exhaustive and no one test is necessarily determinative. There may also be situations where not all tests are relevant. However, when these tests are used and the factors are weighted against each other, they can be helpful in determining the likely status of the worker.

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