

FIXED TERM CONTRACTS OF EMPLOYMENT

Since 1 January 2015, there have been significant restrictions in terms of South African labour law on the use of 'non-standard' employees, including those on fixed term and part-time contracts.

INTRODUCTION

- A limited duration (fixed-term) employment contract is one entered into for a temporary period. It automatically terminates due to effluxion of time upon:
 - the occurrence of a specified event; or
 - the completion of a specified task or project; or
 - a fixed date (other than normal/agreed retirement age).
- There are a number of risks for employers associated with making use of temporary employment. Some of these risks always existed, however specific statutory protection has been added in respect of certain categories of employees.

DISMISSAL (Applies generally to all employees and employers)

- On termination / expiry of a temporary contract, the employee does not have a contractual right to further employment (either renewal of the contract or permanent employment).
- However, if the employee can prove that despite the contractual termination clause, he/she had a reasonable expectation for further employment after expiry, but the employer did not offer further employment - this could constitute an unfair dismissal in terms of the definition of dismissal in the Labour Relations Act. Employers should therefore take care to ensure that they did and said nothing, directly or indirectly, which might lead the employee to expect renewal of the contract or permanent employment.
- Note that the test for the existence of a "reasonable expectation" is a factual determination that could include many factors to be considered.
 - The number of times the contract might have been renewed in the past, is only one factor. There is no legal significance in the specific number of times a contract has or has not been renewed.

- Explicit wording in a contract that there 'will be no expectation of further employment' would not be enough if the employer's actual conduct contradicted the express words and led to such a reasonable expectation on the part of the employee.
- An employer appointing an employee to 'try him/her out' with the implication that there would be permanent employment if they make the grade, is looking for trouble. Using a fixed term contract as a probationary tool, instead of using a probationary clause in a permanent contract, is not acceptable in terms of the law. If the position is actually a permanent one, an employer who does not offer further employment upon expiry of the contract without having followed any performance or misconduct processes, will be hard pressed to defend a challenge of a 'reasonable expectation' on the part of the employee if he/she had not been made aware of any problems prior to expiry.
- Whether the employee's expectation is reasonable, is however an objective test – so the courts would look at all the circumstances and not just at any subjective expectation that the employee may claim to have had.

PROTECTION OF 'VULNERABLE' EMPLOYEES

- In addition to the above, the section 198B of the Labour Relations Act adds further protection to lower earning employees against possible abuse of temporary appointments by employers. (See below.)
- The purpose of these additional provisions is to counter practices by employers such as using a fixed term contract when a position is not really temporary; or to "try out" an employee and, if it does not work out, appoint someone else on the same basis upon expiry of the contract. Or the employer prefers temporary employees simply because the cost of employment is less – mostly because of the lack of benefits such as medical aid, pension, bonuses, etc. These provisions make it much less attractive and more difficult for employers to get away with using temporary employees where the position is not truly a temporary one.
- **Exemptions**
 - a. These additional provisions as set out below however only apply to employees on a fixed-term contract earning less than the BCEA earnings threshold, which is currently R205,433 per year;

- b. They also do not apply to an employer:
- that employs less than 10 employees, or
 - that employs less than 50 employees and whose business has been in operation for less than two years, unless:
 - o the employer conducts more than one business; or
 - o the business was formed by the division or dissolution for any reason of an existing business.
- c. The provisions do not apply where the employee is employed in terms of a fixed term contract which is permitted by any statute, sectoral determination or collective agreement.

Temporary employment exceeding 3 months

- Employment in terms of a fixed term contract (newly concluded or renewed) for longer than 3 months will be deemed to become permanent employment – with some exceptions (see below). Note – an employer cannot circumvent this provision by using successive fixed term contracts limited to 3 months each. It is not the current contract period, but the total period of employment, that must not exceed 3 months.
- Exceptions are if the employer can satisfactorily prove that:
- o The nature of the work for which the employee is employed, is of a limited or definite duration; or
 - o There is another justifiable reason for the temporary appointment, such as (section 198B(3)):
If the employee -
 - (a) is replacing another employee who is temporarily absent from work;
 - (b) is employed on account of a temporary increase in the volume of work which is not expected to endure beyond 12 months;
 - (c) is a student or recent graduate who is employed for the purpose of being trained or gaining work experience in order to enter a job or profession;
 - (d) is employed to work exclusively on a specific project that has a limited or defined duration;
 - (e) is a non-citizen who has been granted a work permit for a defined period;
 - (f) is employed to perform seasonal work;

- (g) is employed for the purpose of an official public works scheme or similar public job creation scheme;
- (h) is employed in a position which is funded by an external source for a limited period; or
- (i) has reached the normal or agreed retirement age applicable in the employer's business.

This is however not a closed list of justifiable reasons.

Treating fixed term employees no less favourably than their permanent counterparts

- A temporary employee (even if the reason for the temporary status is justified) may, after 3 months' employment with the employer, not be treated less favourably than a comparable permanent employee, unless there is a justifiable reason for different treatment.
- In terms of s198D(2), a justifiable reason includes when the different treatment is a result of the application of a system that takes into account—
 - (a) seniority, experience or length of service;
 - (b) merit;
 - (c) the quality or quantity of work performed; or
 - (d) any other criteria of a similar nature,and such reason is not prohibited by section 6(1) of the Employment Equity (these refer to human rights-type grounds such as race, gender, religion, etc.)

There is some debate about the specific wording of s198B(8)(a) in that does not use the words "*on the whole* no less favourable" as is the case elsewhere in the LRA and the EEA, but just "*not less favourably*" – which implies more of an exact comparison as opposed to a general 'package' comparison of remuneration and benefits. This will probably give rise to litigation very soon in order to obtain clarity of interpretation.

Other relevant provisions relating to vulnerable employees

- An employer must provide an employee employed in terms of a fixed term contract and an employee employed on a permanent basis, with equal access to opportunities to apply for vacancies.

- The contract of a temporary employee must be in writing, must specify the reason why the appointment is only temporary and must contain the employee's agreement to the temporary appointment and the agreed duration.

If the contract needs to be extended, a full new contract should be signed in the same way, instead of simply giving an extension letter.

It is also recommended that the employer sits down with the employee whenever a fixed term contract might be renewed, to discuss all these issues before the new contract is signed. This may also clear up any issues around future expectations on the part of the employee.

- A temporary employee who is employed for longer than 24 months on a specific project, will be entitled to severance pay of at least one week's remuneration for each completed year of service.
- Disputes in terms of the interpretation or application of s198B can be referred to the CCMA / Bargaining Council for determination within 6 months after the relevant act or omission. (Unfair dismissal claims based on expectations of further employment upon expiry of the fixed term contract, will be dealt with as before.)

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