INSUFFICIENCY AND LACK OF CLARITY OF STATUTORY REGULATION OF FIXED TERM CONTRACTS IN SOUTH AFRICA

by

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CHAPTER 1

INTRODUCTION

Employment relations as we have become accustomed to have been changing over time. Globalisation and technological advancement have largely been the contributing factors. This in turn is exacerbated by the cost of doing business. Employers suddenly started reviewing their employment obligations with a view to cut costs. At the same time there has been a steady increase in the flexibility of employment. In modern times reference is made to atypical or non-standard employment, for instance part-time workers, casual and seasonal workers, independent contractors and temporary employment services.

From the employee's point of view, the more skilled you are, the likelihood of not binding yourself to one particular employer indefinitely. The current practice in the corporate world is to place senior executives on fixed term contracts and the rest of staff on indefinite employment.

The employees falling under the category of non-standard employment are regarded by the ILO as the vulnerable group. They do not enjoy standard labour rights such as belonging to a trade union or participating in a bargaining chamber. In the nature of the power imbalance between employers and employees where employers hold the bargaining power generally, employees in non-standard employment are in a worse-off position.

South Africa is a Constitutional state and labour rights are enshrined in section 23 of the Constitution. In this minor dissertation consideration will be given to labour protections which are a result of our obligations to the International Labour Organisation (ILO). There is largely an alignment in terms of our adoption of core conventions of the ILO such as Freedom of Association and the Right to Organise Convention, 1948 (No. 87); Right to Organise and Collective Bargaining Convention, 1949 (No. 98); Equal Remuneration Convention, 1951 (No.100), our Constitution and our labour law framework.

Our common law as well as labour laws differentiate between indefinite and fixed term contracts of employment. Of significance is also the fact that our labour laws are rooted in the principles of fairness and equity as alluded to earlier in terms of section 23 of the Constitution and respectively sections 4, 5 and 6 of the Labour Relations Act ("LRA")[1] which provide for employees' right to freedom of association, protection of employees and persons seeking employment and employers' right to freedom of association. As a result, any determination on the nature of an employment relationship must take cognisance of these principles. The most common form of employment in this country is indefinite employment.

A contract of employment is indefinite where the parties do not specify a date of termination. The employment relationship endures until it is terminated by agreement, by the giving of the contracted stipulated or reasonable notice of termination, or until

[1] 66 of 1995.

either party elects to terminate on fundamental breach by the other, or on retirement at the agreed age, on one of the other grounds accepted in law.[2]

In this minor dissertation, focus will be on the rationale behind fixed term contracts and the development of the legislative framework governing such contracts. Pertinently, the focus of this contribution will be on insufficiency and lack of clarity of the legislative framework. Areas of focus will include (a) possible expectation of employment by an employee on another *fixed term* contract basis, (b) implications for an employee who works beyond expiry of a fixed term contract without signing a new contract, and (c) whether an employer can create a legitimate expectation of permanent employment upon expiry of a fixed term of employment. Consideration will also be given to a comparative legal review in some foreign jurisdictions such as the European Union, Germany and United Kingdom where more sophisticated regulation governs such practices. This is significant as our Constitution requires in section 39 consideration of international law when interpreting the Bill of Rights.

In conclusion, this minor dissertation will have regard to the amendments to the Labour Relations Act 66 of 1995 ("the LRA"), Employment Equity Act 55 of 1998, Basic Conditions of Employment Act 75 of 1997, and the implications thereof on fixed term employment contracts.

As it will become apparent in later discussion, our law on fixed term contracts before the amendments to the LRA that came into effect on 1 January 2015, had been rooted in the law on dismissal and more specifically, section 186 (1)(b) of the LRA. This form of employment relationship is supposedly straightforward, whereby an employee is contracted for a determined number of weeks, months or years, or until the end of a project. However, employers get into trouble where they do not renew the contract at the end of its term, only to find that the employee has a reasonable expectation of renewal or in some instances, the expectation is of indefinite employment.

Many countries adopt a combination of various approaches in order to achieve the right balance between regulatory flexibility and employee protection as referred to above. The common approaches adopted in foreign countries are largely the following:

(a) identify the accepted categories in which fixed term contracts are justified;
(b) limit the contracting period in the other circumstances; and
(c) regulate abuses associated with the rehiring of employees on successive contracts rather than employing them indefinitely.

It is submitted that flexibility in the use of fixed term contracts is critical in so far as job creation is concerned. However this cannot be at the expense of the protections afforded to employees in the Bill of Rights.

The method of study for this minor dissertation comprises of a review of academic material, both local and from foreign jurisdictions, analysis of judgments from different forums such as the Commission for Conciliation Mediation and Arbitration, Bargaining Councils, Labour Courts, Labour Appeal Courts, the Supreme Court of Appeal and the Constitutional Court. The main research question therefore pertains to the

[2] Grogan J Workplace Law (2014) 11th ed.

insufficiency and lack of clarity of statutory regulation of fixed term contracts in South Africa.

In the next chapter focus will be on reviewing the regulatory framework governing fixed term contracts and indefinite forms of employment, looking at the common law, the Constitutional framework, how the ILO has influenced our labour law framework and the current legislative framework.

CHAPTER 2

DIFFERENCES BETWEEN FIXED TERM CONTRACTS AND INDEFINITE CONTRACTS

2.1 Introduction

This chapter deals with the development of the common law in so far as the law of dismissals is concerned, the Constitutional impact and its influence on the law on dismissals, the obligations placed on South Africa arising out of its membership with the ILO and the adjudication by the courts in this area of labour law.

The fixed term employment is essentially of a limited duration and in most instances linked to a conclusion of a project or assignment. On the other hand an indefinite employment is about ongoing relationship with an employer and largely terminated on the basis of capacity of an employee, misconduct or operational requirements of the employer.

2.2 Common Law

In terms of the common law, a fixed term contract of employment terminates at the expiration of the term, or completion of the task for which it was entered into. The common law position was pronounced in the case of *Buthelezi v Municipality Demarcation Board* as follows:

> *'at common law a party to a fixed term contract has no right to terminate such contract in the absence of a repudiation or a material breach of the contract by the other party'*[3]

In this minor dissertation an attempt will be made in providing clarity with regard to analysis by the courts of the impact of the Constitution on the common law as it relates to remedies in instances of unfair dismissal arising from a premature termination of a fixed term contract.

A fixed term contract, as its name implies, is a contract designed to last for a specific period, or until the conclusion of a specified project. As a result of the fact that the contract is for a predetermined period, at common law, an early termination of the contract is impermissible. This principle has its roots in the principle of sanctity of contracts. Parties enter into contracts out of their free will and therefore the courts have sought to ensure that their wishes as contained in these contracts, are not undermined.

[3] (2004) 25 ILJ 2317 (LAC) at E-F.

2.3 Constitutional Framework

The dawn of a new era with the democratic government taking office resulted in the revision of the 1956 Labour Relations Act. This was a consequence of the enactment of the Interim Constitution 200 of 1993 which incorporated labour rights in the Bill of Rights. The new LRA was assented to in November 1996. It regulated amongst others the right to strike in section 64 and the establishment of bargaining councils in section 27.

Section 23(1) of the Constitution of the Republic of South Africa of 1996 ("the Constitution") entrenches fair labour practices. This protection does not differentiate between categories of employees, and this does not mean however that employers cannot enter into fixed term contracts on terms agreeable to both parties. The concept of fairness however becomes relevant. These principles are underpinned by our Constitution and extend to the right to human dignity in terms of section 10 and the right to equality in terms of section 9 as well. Employers therefore who abuse the fixed term contracts framework by hiding behind the sanctity of contracts cannot sustain this under a Constitutional framework.

Although employers have a discretion to either enter into a fixed term contract or not, the power imbalance between employers and employees makes employees vulnerable and thereby requiring these protections. The level of unemployment in the country places job seekers in a vulnerable situation where there is desperation for employment on the one hand and the power that employers have to determine the terms and conditions for employment. The Employment Equity Act 55 of 1998 seeks to address discrimination in the workplace. Where a series of fixed term contracts are renewed, the onus is on the employer to demonstrate fairness and equity.

2.4 International Labour Organisation

South Africa is a founding member of the ILO and is bound by its Constitution to the obligations imposed by the conventions it had ratified. South Africa has given effect to the core conventions[4] through legislation such as the Labour Relations Act of 1995, Basic Conditions of Employment Act 75 of 1997, Employment Equity Act 55 of 55 1998.

In terms of section 39 of our Constitution public international law and customary international law may be used as tools of interpretation for the chapter three provisions

[4] Freedom of Association and the Right to Organise Convention, 1948 (No. 87); Right to Organise and Collective Bargaining Convention, 1949(No. 98); Forced Labour Convention, 1930 (No. 29); Abolition of Forced Labour Convention, 1957 (No. 105); Minimum Age Convention, 1973 (No. 138); Worst Forms of Child Labour Convention, 1999 (No. 184); Equal Remuneration Convention, 1951 (No. 100) and Discrimination (Employment and Occupation) Convention, 1958 (No. 111).

of the LRA. South Africa has ratified the core conventions of the ILO. This minor dissertation seeks to briefly elaborate on the key ones that are relevant to the topic under discussion. Employees on fixed term contracts are regarded as vulnerable employees as they do not enjoy the labour protection enjoyed by employees on indefinite contracts, such as belonging to a trade union, accessing employee benefits such as pensions and medical aid cover etc.

The Equal Remuneration Convention 1951 (No. 100) is particularly relevant. It seeks to promote fairness when employers determine remuneration for employees. Chapter 2 of the Employment Equity Act 55 of 1998 on prohibition of unfair discrimination, also encompasses the principle of equal remuneration of men and women for work of equal value. This convention therefore prohibits discrimination on arbitrary grounds in respect of wage differences.

South Africa has taken further steps in seeking to meet its obligations under this convention with the promulgation of the Employment Equity Amendment Act 47 of 2013. The effect of the amendment is to introduce under section 6 of the Act, provisions which deal with the prohibition of unfair discrimination. These clauses expressly prohibit differences in conditions of employment involving same employees doing the same job and based on any of the listed grounds of discrimination. In addition, the amendment empowers the Minister to issue regulations that deal with the criteria and methodology for assessing work of equal value.

The other Convention that is relevant is the Discrimination (Employment and Occupation) Convention, 1958, which seeks to ensure that all forms of discrimination in the workplace are prohibited. Linked to this Convention is the equality provision in section 9 of our Constitution which prohibits unfair discrimination. Equally important is the Termination of Employment Convention No. 158 of 1982 and the Termination of Employment Recommendation No. 166 of 1992. They both place an obligation on employers to protect jobs and promote job security. Articles 2(3) of the Convention and Articles 3(1) to (2) of the Recommendation place obligation on signatories to put in place mechanisms that protect employees who seek to enter into fixed term contracts.[5]

2.5 Current law

In any dismissal case pertaining to a fixed term contract, the existence of a fixed term contract must first be proved.[6] The courts have tended to apply a strict approach when it comes to deciding whether or not a contract is a fixed term contract. This approach has its origin in the labour jurisdiction that seeks to promote continuous employment and the Constitutional guarantees of fair labour practices.

The use of fixed term contracts has, it is submitted correctly so, been viewed as a tool used by employers where they seek not to be subjected to the provisions of the LRA pertaining to employee protections and, in particular, job security. It is indeed true that

[5] ILO 2008 www.ilo.org Note 4.

[6] Olivier MP 'Legal Constraints on the Termination of Fixed term Contracts of the Employment: An Enquiry Into Recent Developments' (1996) 17 ILJ 1001 at 1002.

there may be instances where a fixed term contract is necessary, for instance where an employee is substituted for a limited period (maternity leave), seasonal workers and project workers.

The Labour Appeal Court[7] has held that there is no intrinsic unfairness in these types of contracts. It is in the nature of our commercial interaction that both employers and employees would enter into contracts that they believe serve their interests. The employer is free not to enter into a fixed term contract if he foresees a risk that he might have to dispense with the employee's services before the expiry of the term, but still chooses to take the risk. The employer cannot be heard to complain should such a risk materialise.

The situation is no different to an employee who elects to take the risk, as he could be offered a lucrative job while he has an obligation to complete the contract term. In *Biggs v Rand Water,*[8] the court clearly captured the conduct referred to above, stating that section 186(1)(b) was included in the LRA to prevent the unfair practice of keeping an employee on a temporary basis without employment security, until it suits an employer to dismiss such an employee without obligations imposed on the employers by the Act in respect of permanent employees.

2.6 Definition of Dismissal

Prior to the amendment to the LRA, dismissal was defined in section 186(1) as follows:

> "Dismissal means that-
>
> a) An employer has terminated a contract of employment with or without notice;
> b) An employee reasonably expected the employer to renew a fixed term contract of employment on the same or similar terms but the employer offered to renew it on less favourable terms or did not renew it;…"

Not every termination of a fixed term contract attracts the Act's interest.[9] As far as coverage in terms of section 186(1)(b) is concerned, it is clear that the employee must have had reasonable expectation of renewal of a fixed term contract. This is a jurisdictional fact, the presence of which must be proven by the employee in terms of section 192(1) of the Act (which provides that any proceedings concerning any dismissal, the employee must establish the existence of the dismissal.[10]

The aforementioned definition of dismissal was extended in the new amendments to the LRA that came into effect on 1 January 2015 and sought to also address a situation where an employee on a fixed term contract has a reasonable expectation at the end of a contract to be employed on an indefinite contract but the employer fails to offer the employee such employment.

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[7] Buthelezi (Supra).
[8] (2003) 24 ILJ 647 (LC).
[9] Van Niekerk, Smit et al, Law@work (2015).
[10] NEHAWU vs South African Local government Association (1994) 16 ILJ 366.

It is significant to point out though that the new amendment to the LRA only applies to employees earning below a cap of R205 433. 30 per annum. In addition, they do not apply to employers with staff of less than ten, and those allowed by sectorial determination or bargaining chamber.

2.7 Code of Good Practice: Dismissal

Section 1(3) of the Code provides that employers and employees should treat one another with mutual respect**.** The principle is in accordance with the ILO standards that address human dignity and respect for employees.

The Code reaffirms substantive and procedural fairness before effecting a dismissal. Whether or not is for a fair reason, is determined by the facts of the case, and the appropriateness of dismissal as a penalty. The LRA in section 188 recognises three grounds on which a termination of employment might be legitimate. These are: the conduct of the employee, the capacity of the employee and the operational requirements of the employer's business.

2.8 Dismissal prior to a fixed term contract running its course

Employees on a fixed term contract may be dismissed before the agreed date of termination only if the employee is in material breach. Otherwise premature termination constitutes repudiation by the employer, for which the employee may claim damages equivalent to the salary he or she would have received until the date of termination. As it will become clearer later, legislation has encroached into the domain of the common law. This however, has not made the common law obsolete in so far as the premature termination of contracts is concerned. Of relevance in this regard are the consequences that flow from such repudiation and the nature of the remedies available to an employee. The Labour Court had to deal with similar circumstances in the case of *Nkopane and three others v Independent Electoral Commission (IEC).*[11]

The applicants were previously employed as contractors by the IEC until they were retrenched. It was common cause that the IEC had a general need to retrench some employees. The applicants however, challenged the fairness of their retrenchment on two grounds:

- A substantive attack on the fairness of the retrenchment, on the basis that they had fixed term contracts which did not permit termination for operational reasons;
- A procedural one, on the ground that although the IEC undertook a process of consultation, it was inadequate and unfair in relation to alleged deficiencies in the disclosure of information and the application selection criteria.

[11] (2007) 2 BLLR 146 (LC).

The court made the point that in assessing the substantive fairness of a retrenchment, the key question is whether the applicants were employed in terms of fixed term contracts of employment.

An employee whose fixed term contract has been terminated for reasons other than breach, is not confined to a contractual claim for damages. The dismissal can also be challenged as being unfair and the relief for this can be claimed under the provisions of the LRA.

The court also referred to the Labour Appeal Court decision of *Buthelezi v Municipal Demarcation Board,*[12] where the court rejected a claim for unfair dismissal based on operational requirements on the ground that the employer had acted unfairly by retrenching the employee prior to expiry of the fixed term of the employment contract. The court confirmed the decision of the Labour Appeal Court in this regard.

Furthermore, the court held that such employees prematurely dismissed before the expiry of their fixed term contract, cannot claim compensation in excess of the remuneration they would have received if their contracts had run their course.

The perceived conflict between the common law and the legislation was considered by the Supreme Court of Appeal in *Fedlife Assurance Ltd v Wolfaard,*[13] where the court had to deal with an appeal that arose from an action that was instituted by the respondent against the appellant, in which he claimed damages for breach of contract.

It traced the common law foundation and its implications for the LRA as well. It looked at the structure of the LRA and contrasted that with the inroads made by the Constitution.

The respondent argued in his particulars of claim that the contract was for a fixed term of five years, and that the appellant repudiated the contract by purporting to terminate the contract before its term, on the grounds that the respondent's position had become redundant.

The court spent time analysing the structure of the LRA and more specifically, Chapter VII of the 1995 Act. The court emphasised the fact that the foundation of this chapter which deals with "Unfair Dismissals" under section 185 provides that 'every employee has the right not to be unfairly dismissed'. It was contended for the appellant that the effect of the 1995 Act has been to confer on employees the rights and remedies provided for in Chapter VII in the event of dismissal, and on the other hand to deprive them of their common law remedies. The chapter is thus said not only to be comprehensive, but also exhaustive in so far as it provides for remedies upon dismissal. The effect of this submission is that the common-law right to enforce a fixed term contract has been abolished by the 1995 Act. The court went on to examine the law and the implications brought about by the Constitution in section 23, which guarantees that every person has the right to fair labour practices. The court was of the view that the Constitutional dispensation did not deprive employees of the common-law right to enforce the terms of a fixed term contract of employment.

[12] Buthelezi (Supra).

[13] (2001) 22 ILJ 2407 (SCA) at 2415.

It was further held that the 1995 Act does not expressly abrogate an employee's common-law entitlement to enforce contractual rights, neither does it do so in section 186(1) (b), which extends the meaning of 'dismissal'. It is significant that although the legislature dealt specifically with fixed term contracts in this definition, it did not include premature termination of such contracts, notwithstanding that such termination would be manifestly unfair. The reason for that is common-law right to enforce such a term to remain intact, and it was not necessary to declare a premature termination to be an unfair dismissal. The very reference to fixed term contracts makes it clear that the legislature recognised their continued enforceability and any other construction would render the definition absurd.

The court in the *Fedlife* case has hopefully put to bed the contrary arguments about an employee's common law remedies in employment matters. There is clearly a separation that is distinct between the remedies that flow in terms of the LRA where there has been a repudiation of contract, and those that follow based on the common law.

In conclusion, it is evident therefore that certainly from the common law and the amended definition of dismissal position, the anomaly that came about where an employee had a reasonable expectation for employment indefinitely at the end of a fixed term contract has been addressed. It is however clear that the issue of reasonableness will still be the subject of litigation.

In the next chapter, focus of this minor dissertation will be an assessment of the manner in which the courts have interpreted expectation for indefinite employment prior to the amendment to the LRA that extended the grounds for dismissal in section 186.

CHAPTER 3

EXPECTATION OF PERMANENT EMPLOYMENT

3.1 Introduction

This chapter looks at the concept of reasonable expectation and dismissal, implications for an employee who works beyond the expiry of a fixed term contract without signing an agreement. A further point that is canvassed in this chapter is whether an employer can create a legitimate expectation of permanent employment upon expiry of fixed term probation and lastly a comparative review of the legal framework in foreign jurisdictions.

The approach followed by the European Union and its member countries is indicative of a flexible regulatory framework for fixed term contracts. The significance of the choice of the three jurisdictions for comparative analysis is mainly that their legal framework was informed by a need to address socio-economic factors such as high unemployment rates. South Africa continue to face similar challenges, which is not a surprise that the amendments to the LRA in so far as fixed term regulatory framework are strikingly similar.

3.2 The current legal position

Prior to the new amendments to the LRA that came into effect on 1 January 2015, the courts had made pronouncements based on differing interpretations of the law in this regard. At common law, a fixed term contract terminates at the end of its term. This therefore does not require a notice to be given as the contract terminates automatically. As pointed out earlier, this is not as simple, as South Africa has ILO commitments as well as the Constitution which promote fair labour practices.

3.3 Reasonable expectation and "dismissal"

The concept of reasonable expectation has found application in various areas of our law, and more specifically, administrative law. It is sometimes referred to as the doctrine of legitimate expectation and most academics are of the view that it is the same that applies in the context of administrative law. In the case of *Administrator, Transvaal v Traub*,[14] Corbet CJ made the following comments on the insufficiency of common law principles to provide for a comprehensive application of the rules of natural justice in the administrative law sphere:

> *"…there are many cases where an adherence to the formula of liberty, property and existing rights would fail to provide legal remedy, when the facts cry out for one; and would result in a decision which appeared to have been arrived at by*

[14] (1989) 10 ILJ 823 (A) 840 at A-B.

a procedure which was clearly unfair being immune from review. The law should in such cases be made to reach and come to the aid of persons prejudicially affected"

There is no single factor that determines what would comprise a reasonable expectation. Some of the factors deemed relevant to the reasonableness of the expectation are the following: the terms of the contract, any past practices of renewal etc. The courts have sought to give meaning to this concept and laid down various principles. In the case of *SA Bank of Athens LTD v Ceillier No & others,*[15] the court had regard to the fact that the employee was involved in private business, whose conduct was in conflict with his employer's interests, that he failed to discuss such private business before employment, and the fact that the employee was aware that the employer was unhappy with such private business.

It was pointed out that it is part of our law that there has to be a factual basis for a legitimate expectation to exit. The onus is on the employee to prove that the termination of employment falls within the purview of section 186(1) (b) of the Act; and also to prove that the subjective expectation was in relation to the renewal of the contract and not permanent employment. The expectation must also be reasonable, and this has to be objectively determined by the court.

In the case of SA Bank of Athens referred to above, the onus was on Groot (employed by the bank as a senior Financial Manager on a fixed term contract) to prove on a balance of probabilities and based on the facts that a legitimate expectation as envisaged in the Act was created by the bank. The only fact, upon which Groot placed reliance for such expectation, was that his post was senior and that it was a full-time and permanent post. Groot also laid emphasis on clause 6.3 of the contract, which stated that the contract could be renegotiated.

In the line of cases referred to in this minor dissertation, it is evident that the existence of an expectation is not an easy onus to discharge. Each case must be determined on its own set of facts. A mere statement or comment made by an employer may not for instance, necessarily be sufficient for an employee forming an expectation in his or her own mind. This was evident in the case of *SA Rugby Players Association and Others v S A Rugby (Pty) Ltd.*[16]

The three professional rugby players were employed by the first respondent on fixed term contracts to play for the Springboks in 2003. All three players had entered into separate three-month contracts for the purpose of taking part in the Rugby World Cup 2003 and terminating their contracts on 30 November 2003. Their representative union wrote to the appellant expressing concern that no one had communicated with the players regarding their contracts for 2004. The then coach, Straueli, indicated to them that he wished to keep them and they were in his plans for 2004. The coach resigned on 4 December 2003 and new management decided to dispense with the contracts and pay match fees only. Players took the matter to the CCMA on the basis that they were constructively dismissed in terms of section 186(1) (b) as they had a reasonable expectation that their contracts would be renewed for 2004.

[15] (2009) 30 ILJ 197 (LC) at 21.
[16] (2008) 29 ILJ 2218 (LAC) at 52.

The court could not determine on the evidence before it that the players were to be offered renewed contracts similar to the ones of 2003 during the World Cup. The standard contracts beyond 2003 would have been different as they served a different purpose. Furthermore, the court held that a statement by Straueli that the players were part of his plans for 2004 was not sufficient to form a basis for a reasonable expectation. Players should have known that the appointment of a new coach did not guarantee their positions, as a new coach would have his own preferences.

3.4 Expectation of permanent employment

This question has now been answered by the new amendments to the LRA that came into effect at the beginning of this year. Prior to the amendment, the courts were called upon to provide guidance on the correct interpretation. It is worth noting that this is one of the reasons that led to the proposed amendments to section 186(1) (b) resulting from the concerns with abuses that take place where employers enter into a series of fixed term contracts in order to avoid entering into indefinite contracts.

In *Dierks v University of South Africa*,[17] the respondent had employed the applicant in terms of certain fixed term contracts between January 1995 and December 1997. Despite the reference to dismissal based on operational requirements, this is a matter which essentially involved an alleged reasonable expectation and the expiry of a fixed term contract.

It was common cause that the applicant had been employed by the respondent in terms of two fixed term contracts. It was contented for the respondent that if the court found that a reasonable expectation had been engendered in the applicant, it was the end of the matter as far as the enquiry into an unfair dismissal was concerned, as the respondent was relying on the expiry of the fixed term contract and no other reason for termination. As a result, no 'fair procedures' in consequence of any 'fair reason' were followed as required by section 188 of the Act.

In support of his case for establishing a reasonable expectation, the applicant relied on the contention that it was a tradition with the respondent that the majority of employees were initially employed on temporary basis. As a result, he believed that he was entitled to assume that he might be afforded a permanent position in due course. When questioned regarding on what facts he based this expectation, he said that it was based on talk in passages where one overheard things. It was pointed out that section 186(1)(b) has its origins in the equity jurisprudence of the Industrial Court, and that it is based on the concept of legitimate expectation.

Employers had not been slow to appreciate the significant difference between a contract terminating on the basis of effluxion of time, and one terminating on account of misconduct, incapacity or operational requirements. The latter involving a substantive and procedural obstacle course while the former was clinical and neat. The result was that employers continued with the practice of endless renewals of fixed term contracts which usually came to an abrupt end ostensibly due to effluxion of time

[17] (1999) 20 ILJ 1227(LC) at 119-120.

when often the underlying reason related to poor performance or operational requirements. It was a means of cutting costs and ensuring flexibility.

Besides the clear wording of the section, the reason for such a provision is founded largely on the patent unfairness of the indefinite renewals of fixed term contracts. In consequence of such unfairness, there is a renewal which will endure for the same period of the previous contract. That seems fair, given that a reasonable expectation is a principle of equity falling short of a right.

In the view of the court[18], an entitlement to permanent employment cannot be based simply on the reasonable expectation of section 186(b), i.e. an applicant cannot rely on an interpretation by implication or "common sense". It would require a specific statutory provision to that effect, particularly against the background outlined above.

The interpretation of section 186(1)(b) further came to be discussed in the case of *Mclnnes v Technikon Natal.*[19] The employee was employed by the Technikon Natal as Marketing Manager. She was later employed on a one-year contract as locum. Her contract was renewed from time to time. Her temporary post was made permanent and she and two others were shortlisted for an interview. The majority of the interviewing committee recommended that she be appointed. The Vice Principal referred the recommendation back to the committee to reconsider its recommendation in light of the Technikon's affirmative action policy. The committee affirmed its preference for the employee, but recommended another candidate. The employee's contract came to an end. The appointee was paid more than the normal remuneration in order to induce him to accept the post. The employee complained to the Labour Court that she had been unfairly dismissed and in the alternative that she was unfairly discriminated against as an applicant for a post. The dismissal the applicant relied upon is based upon the extended statutory meaning of this term as defined in section 186(1)(b) of the LRA (as it then was), which extends the meaning of this term to include a situation where an employee reasonably expects an employer to renew a fixed term contract of employment on the same or similar terms.

It was contended in Mcinnes case referred to above that once the applicant made the allegation that the dismissal was automatically unfair by reason of unfair discrimination, and provided the allegation was made seriously and in good faith, the court was the correct forum for the resolution of the dispute. Once it has jurisdiction the court must resolve the dispute which it has before it. It must be able to do so without having to decide whether or not the allegation that the dismissal was automatically unfair has been proved. The court held that if the determination of this issue will make no difference to the result or the remedy, a two-stage enquiry is necessary under the circumstances. The first was to determine what the applicant's subjective expectation was in relation to the renewal. This is a question of fact. Only once the subjective expectation has been established as a fact, does the court then go on to decide the second stage, namely whether this expectation was reasonable in the circumstances. As to the former, what is required is that the applicant must subjectively have held the expectation that her contract of employment would be renewed on terms which are the same or are similar to the terms which prevailed during her fixed term contract.

[18] Dierks (Supra).

[19] (2000) 21 ILJ 1138 (LC).

The court failed to see why this should always be so. What section 186(1)(b) clearly seeks to address, is the situation where an employer fails to renew a fixed term employment when there is a reasonable expectation that it would be renewed. It is the employer who creates this expectation and it is then this expectation, created by the employer, which now gives the employee the protection afforded by this section. If then the expectation which the employer creates is that the renewal is to comprise an indefinite contract, the section must be held to cover that situation. The court referred to *Wood v Nestle (SA) (Pty) Ltd*[20] and also *Malandoh v SA Broadcasting Corporation*.[21]

Accordingly, it was the court's position that if the applicant genuinely believed that she would stay on in her post which was to become permanent, and if this belief is such that it would have been shared by a reasonable person in her position, then there is no reason why this section should not be held to cover her situation.

The Labour Appeal Court had the opportunity to decide the matter in the case of *University of Cape Town v Auf der Heyde.*[22] The matter first went to the Labour Court where the applicant in this case had appointed the respondent as a senior lecturer for a period of three years. When the contract expired in 1998, the applicant did not renew it. The respondent alleged that the appellant thereby dismissed him. He also alleged that the dismissal was unfair. In the alternative, the respondent alleged that the appellant's actions pertinent to the renewal of the contract constituted an unfair labour practice.

The court noted that the first issue to be determined is whether the respondent had been dismissed. It was submitted for the respondent that he reasonably expected the appellant to renew his fixed term contract either by extending it to five years, or by appointing him permanently.

The court in this case referred to the cases of *Dierks and Mclnnes v Technikon Natal* where it was respectively held that section 186(1)(b) does not cover a reasonable expectation of a permanent appointed, and in *Mclnnes*, that it does.

The court alluded to the difference of opinion around the correct interpretation of section 186(1)(b), and noted that it would assume without finding that a reasonable expectation of a permanent appointment falls within the ambit of section 186(1)(b).

As pointed out above, this anomaly has now been resolved by the extension of the definition of dismissal in the new amendments to the LRA.

3.5 Implications for an employee who works beyond the expiry of a fixed term contract without signing a new agreement

Van Niekerk *et al*. 2014 submit that previously in cases where an employee continued to offer services after the termination of a fixed term contract of employment, the principle that the contract is deemed to have been tacitly renewed and that such

[20] (1996) 17ILJ 184 (IC) 190J-191A.
[21] (1997) 16 ILJ 544 (LC) 547D-E.
[22] (2001) 12 BLLR 1316 (LAC) at 1320.

renewal is generally accepted to be on the same terms but for an indefinite period, has on occasion been endorsed.[23]

Furthermore, a fixed term contract can also be converted into an indefinite period contract if the employee is permitted to continue working after the expiry of the fixed term contract. The employer cannot rely on the earlier fixed term contract if the employment relationship is subsequently terminated.

In the National Education & Health Allied Workers Union on behalf of Tati and SA Local Government Association,[24] the applicant was employed, initially as an executive secretary but thereafter in various other positions, on a succession of fixed term contracts, the last expiring on 28 February 2006. In January 2006, the applicant attended a strategic planning workshop at which those present indicated that she would be retained as marketing and stakeholder coordinator in terms of a five-year contract, and at an increased salary. The applicant's employment was not terminated and she continued to function as marketing and stakeholder coordinator. Her appointed was never formalised. On May 25 2006, she was advised by letter that her fixed term contract had come to an end on 28 February, and that her employment would be terminated on 30 June 2006. She claimed in arbitrated proceedings that she had been unfairly dismissed.

The Commissioner noted that the employer created an expectation that the contract would be renewed, but it was not satisfied that the applicant expected renewal on the same or similar terms. She expected promotion at a higher salary for a period of the five years.

The court noted that it was common cause that the respondent had permitted the applicant to continue to work after the expiry of her fixed term contract and to receive remuneration. In such circumstance the contract was deemed to have been tacitly renewed on the same terms, but for an indefinite period, and would only be terminated by dismissal with or without notice, or by the employee's resignation.

In Owen & others v Department of Health, KwaZulu Natal,[25] the respondents employed the applicants, all of whom are medical practitioners to perform what is known as "sessions" at Greytown Hospital. On 29 December 2005, each of the applicants received a letter from the hospital's manager, giving them a month's notice of the termination of their employment. The applicants disputed the fairness of their termination and claimed compensation and severance pay. The Court had to decide two questions, firstly, a jurisdictional question, i.e. whether the applicants were dismissed. If they were, the court then had to determine the substantive and procedural fairness of the dismissals.

Section 192 of the Act requires an employee to establish the existence of a dismissal. The respondent contended that the applicants were employed in terms of a fixed term contract and that such contract terminated by the effluxion of time on 31 January 2006. In the absence of any reasonable expectation of renewal of the contract, it was submitted, there was no dismissal. It was common cause that the applicants

[23] Van Niekerk et al (Supra).
[24] (2008) 29 ILJ 1777 (CCMA) at G.
[25] (2009) 30 ILJ 2461 (LC) at I-H.

performed work in terms of the contract and that after the expiry of the contract on 31 July 2005, they continued to work on the same terms and conditions until their employment was terminated with effect from 31 January 2006.

The court accepted the evidence on behalf of employees that, while they were aware that the fixed term contracts expired on 31 July 2005, the hospital simply continued to employ them on the same terms and there was no agreement, implied or otherwise, that they would work only for a further six months. Furthermore, the giving of one month's notice was inconsistent with employment on fixed term contract.

3.6 Can an employer create a legitimate expectation of permanent employment upon expiry of fixed term probation?

The court found in the affirmative in the case of *Elcie Jacobs Vorster v Rednave Enterprises cc t/a Cash Converters Queenwood*[26]. It was the applicant's case that she was appointed by the respondent that she will be considered for permanent employment after the expiry of the three month probationary period.

It was common cause that the applicant was not appointed either on a permanent basis or on a further fixed term contract after the expiry of the said three months' probation period. It was the applicant's case that she had a legitimate expectation of permanent employment after the expiry of the probation period. It was her case that non-appointment on a permanent contract after the (fixed) three months' probation period constituted a "dismissal" as contemplated by section 186 (1)(b) of the LRA.

The Court, was satisfied on the evidence presented that a decision was in fact taken not to renew the applicant's contract, and that the evidence does not support a conclusion that the relationship between the applicant and the respondent simply came to an end after the expiry of the probation period.

It was not in dispute (at least in respect of the first two months of the probation period) that the applicant was appointed on a month-to-month basis during the said three-month period and that she had signed two written fixed term employment contracts, one for August 2005 and one for September 2005.

The court on evidence presented, found that the applicant did in fact have a legitimate expectation that the contract would be renewed and be made permanent. The factors that were considered to be important were that the applicant was given written warning merely days before the expiry of the contract. Secondly, the warning was valid for six months and it would have expired six months after the alleged termination of the fixed term contract.

The problem the employers face with fixed term probation is that it creates the impression that the employee will be permanently appointed if the employee performs sufficiently during the probation period. If the employer did not address any poor performance during this period, it will have great difficulty in arguing the substantive fair reason for the non-renewal.

[26] (2008) ILJ 11 (LC).

3.7 What are the remedies that employees seek under the circumstances?

In *Mongezi Tshongweni v Ekurhuleni Metropolitan Municipality,*[27] the applicant's fixed term contract had some nine months to run when the respondent terminated the agreement. The applicant claimed that had he not been dismissed, the respondent would have employed him for a further five-year term. He testified that the majority of his peers were offered such contracts, on a variety of terms. On this basis, and given that his performance had not been called into question (but for the incidents that led to his dismissal), he reasonably expected the respondent to offer him a second fixed term contract for a further five years.

Due to the fact that he had in the meantime received an attractive employment, he sought reinstatement into a new contract not in the physical sense. He therefore sought reinstatement on the form of the remuneration that he would have earned for the unexpired period of the original contract, plus what he would have earned for the unexpired period of the original contract that he claims would have been entered into, but for his dismissal.

The court found that there was no authority to support the remedy sought by the applicant. On the contrary, all the available authorities, both judicial and academic indicate the contrary. In *SEAWU v Trident Steel,*[28] it was held that an order of reinstatement restores the original contract, it does not make a new one.

The line of cases discussed in this part appears to be consistent regarding the nature of the remedies available to an employee under the circumstances. It is submitted that these cases are in line with the common law remedies available to an employee where a fixed term contract is repudiated prematurely.

This approach was recently applied by Moahlehi J in Cash Paymaster Services Northwest (Pty) Ltd v Commission for Conciliation, Mediation and Arbitration and other,[29] where the court dealt with a case of a fixed term contract that was to terminate within a month of the arbitration hearing. The court held that the commissioner had a duty to establish the nature of the contract when fashioning a remedy; and that by making an order of reinstatement, and effectively extending the contract beyond its fixed term, the commissioner had exceeded her powers. The award was set aside and substituted with an award of compensation for the unexpired position of the fixed term contract.

[27] (2010) 10 BLLR 1105 (LC).
[28] (1986) 7 ILJ (IC) 437 at E-F.
[29] (2009) 30 ILJ 1587 (LC) at A-B.

3.8 Comparative analysis with foreign jurisdictions: The European Union, Germany and United Kingdom

3.8.1 European Union

The European Union countries are governed by the EC Directive 99/97/EC regulating fixed term contracts. The directive is based on a framework agreement on fixed term work between Europe's trade unions and employers. Framework agreement comprise an important part of the EU legal landscape.[30]

The agreement forbids employers to treat fixed term workers less favourably than permanent workers, unless different treatment can be justified on objective grounds. In order to prevent abuse of successive fixed term contracts, EU member states, after consultation with social partners, must specify one or more of the following criteria:

- The objective reason that would justify the renewal of fixed term contracts or relationships.
- The maximum total duration of successive fixed term employment contracts and relationships.
- The permitted number of renewals.

It is submitted that the amendments to the LRA in respect of section 186(1)(b) do not go far enough to compare favourably with the approach adopted by the European Union. It should however come as a relief that the amendments attempts to provide vulnerable employees with protection and standard of work which is linked to the Decent Work programmes of the ILO.

3.8.2 Germany

Olivier[31] refers to various academics articles on the German law of fixed term contracts. The general rule in Germany is that contracts of employment are for an indefinite period. Germany places onerous obligations on employers who seek to deviate from the general rule. There must be social justification for embarking on fixed term contracts.

Germany is also part of the European Union and as alluded to above, the socio economic factors prevailing in Germany informed their legislation governing atypical employment relationships. Of significance is that Germany is also impacted by the EU Directive regulating fixed term contracts. It is also worth pointing out that the Protection against Dismissal Act (Kundigungsschutzgesetz) of 1969 (PADA) was amended in 2008 and specifically regulated fixed term contracts in Germany.

In Germany, employers in the first two years do not have to justify employment in terms of fixed term contracts. Of significant interest is that some of the changes brought

[30] (1999/70/EC).
[31] Olivier Supra.

about by the amendments to the LRA are similar to those provided for in the German legislation governing fixed term contracts.[32]

The justifiable grounds for fixed term contracts are also provided for under the German legislative framework. They range from those employed to fill the vacancy of an employee on maternity leave, those on probation etc.[33]This piece of legislation further provides for exemption in respect of short-term contracts, older persons and non-parties to collective agreements.

3.8.3 United Kingdom

The Fixed Term Employees (Prevention of less Favourable Treatment) Regulations "FTER" became law on 1 October 2002. This piece of legislation seeks to balance fair employment practice and the employers' rights to determine their employment relationships. It is worth noting that as it was the case in South Africa, their regulatory framework on fixed term contracts is located within their dismissal law where there's evidence of unfair treatment. Their legal framework requires substantive reasons for not renewing the contract after one year of service. The employee has remedies for breach of contract is terminated prematurely. Fixed term contract employees are entitled to a statutory minimum notice period before where the contract would not be renewed.

In instances where an employee works continuously longer than the term of contract without renewal, there is an implied agreement to renew the contract. The legislative also places a restriction on the number of renewals. Where a contract is renewed for four or more years, such an employee will be deemed to be to be permanently employed unless there are justifiable business reasons for doing so.[34]

The lack of specification in certain provisions such as the "objective grounds" justification for the use of successive fixed term contracts, have been areas of consideration by the tribunals examining the application of FTER.[35]

In conclusion therefore, it is evident that South Africa is in line with the practice in the developed world in this regard. Although one needs to point out there are still weaknesses in the new amendments to the LRA in so far as it seeks to protect vulnerable employees. The fact that the protections that come with the amendments to the LRA are limited to low income earners below a statutory cap is of concern.

In the next chapter the focus of discussion will be a detailed analysis of the amendments to the LRA.

[32] See Protection against Dismissal Act (Kundigungsschutzgesetz) of 1969.
[33] The Act on Part-Time Work and Fixed term Contracts of 2001.
[34] www.gov.uk (viewed in October 2015)
[35] Koukladaki A "Case law developments in the area of fixed term work" Centre for Business Research and Darwin College, University of Cambridge (2009) 38 (1); Ind Law J 89.

CHAPTER 4

LABOUR RELATIONS AMENDMENT ACT, No.6 of 2014 (AMENDMENT ACT)

Earlier in this minor dissertation it was pointed out that South Africa has international commitments with the ILO which arise from the conventions that it has ratified, and the recommendations that it is required to implement by virtue of its membership with the ILO. In addition, section 39 of our Constitution provides that when interpreting the Bill of Rights regard must be had to international law. Section 23 of the Bill of Rights entrenches fair labour practices. It is therefore in this context that legislation that is enacted must conform to both instruments. The other consideration emanates from a need to protect vulnerable employees who are in actual fact low income earners, such as those who are employed in Temporary Employment Services.

The Amendment Act was passed by the National Assembly during August 2013 and came into effect on 1 January 2015. The definition of dismissal is now extended in so far as employees on fixed term contracts are concerned.

Section 186(1)(a) (ii) of the principal Act is amended with the insertion of the following:

(a) An employee employed in terms of a fixed term contract of employment reasonably expected the employer:

(ii) to retain the employee in employment on an indefinite basis but otherwise on the same or similar terms as the fixed term contract, but the employer offered to retain the employee on less favourable terms, or did not offer to retain the employee

The amendments also introduced a new section 198B. It must be pointed out however that these provisions only apply to employees earning at or under a threshold of R205 533.30 per annum. The threshold is prescribed by the Minister in terms of section 6(3) of the Basic Conditions of Employment Act.

Sub section (2), besides restricting application to the above threshold, does not apply to employers that employ less than 10 employees, or that employ less than 50 employees and whose business has been in operation for less than two years unless

(i) The employer conducts more than one business; or
(ii) The business was formed by the division or dissolution for any reason of an existing business; and an employee on a fixed term contract which is permitted by any statute, sectoral determination or collective agreement.

Sub section (3) provides a non-exhaustive list of ten justifiable reasons for fixing a term of contract, namely:

(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 for 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.

Section 198(B)(6) provides that an offer to employ an employee on a fixed term contract or to renew or extend a fixed term contract must

(a) Be in writing;
(b) State the reasons for employing an employee on fixed term contracts for longer than three months.

The other significant amendment is in terms of Section 198(B)(5) which provides that employment in terms of a fixed term contract concluded in contravention of subsection (3) is deemed to be of indefinite duration.

The legal framework now provides for the principle of same remuneration and other benefits for similar work, as is the case with many European countries.

The glaring weakness in the amendment to section 186(1)(b), it is submitted, is placing a cap on the earning of a category of employees. In addition, it fails to regulate the successive renewals where an employer is required to provide justification for such renewals. One needs to consider the German model where justification is not required during the limited two-year period in which fixed term contracts are in place.

The main criticism against the gaps found currently in various pieces of legislation is the contradiction one finds in this country where labour abuses are allowed to happen, despite the constitutionally-entrenched right to fair labour practices. Section 9 of the Constitution of 1996 enshrines the fundamental right to equality. The Employment Equity Act (EEA) was promulgated in order to provide for the practical implementation of these Constitutional principles, and to outlaw discrimination whether directly or indirectly.

Section 198B does not apply to employees who are employed in terms of a statute, sectoral determination or collective agreement that permits the conclusion of a fixed term contract. In addition, and in order to accommodate new and small businesses, the section does not apply to:

- An employer who employs less than 10 employees;
- An employer who employs less than 50 employees and whose business has been in operation for less than 2 years.

An employer bears an onus to prove in any relevant proceedings, that there is a justifiable reason for fixing the term of the contract and that the term was agreed upon.

In conclusion therefore, although the amendments have gone a long way in clarifying the legal framework in this area of the law, the question that always remains is whether they actually go far enough in meeting the intended objective, especially with protecting a much broader category of vulnerable employees.

The next chapter is the final one, focusing on conclusion and recommendations.

CHAPTER 5

CONCLUSION

The analysis of material referred to throughout this minor dissertation, leaves no doubt in one's mind that the legislative framework that currently governs the law on fixed term contracts is inadequate. Legal certainty is still required for employees in fixed term contracts but earning above the statutory threshold.

The anomaly created by the definition of dismissal prior to the amendments to the LRA has largely been addressed by extending the scope of dismissal definition in the amendments. It still remains a criticism of our legal framework that fixed term contracts are regulated under a dismissal dispensation and not treated separately.

On a careful assessment of the extended definition, the burden of proof still remains with the employee to show on a balance of probabilities that he or she reasonably expected to be retained indefinitely at the end of a fixed term contract. The jurisdictional facts that existed before the amendments still prevail.

The main criticism of our legislative framework is that it fails to address the abuses that prevail where employers enter into successive fixed term contracts in order to avoid labour law obligations of job security, equal employee benefits, training and other benefits, which are normally associated with indefinite contracts of employment.

The amendments currently allow successive renewals and places the burden on the employer instead of simply placing a restriction on these renewals as is the case under the German legal framework.

A lot can be learned from the model applied by most European Union countries and more specifically, Germany and the United Kingdom. Their legislative frameworks, it is submitted, are comprehensive and able to achieve balance between flexibility in the labour market on the one hand, and protecting vulnerable groups on the other.

It is therefore recommended that the current threshold applicable to section 198B of the amendment Act be scrapped. At the very least the requirements under section 198B should apply equally to all employees under fixed term contracts. There is no logic in imposing legislative requirements by an arbitrary determination of which category of employees are the vulnerable group. There is no doubt that even employees in executive positions equally face the wrath of unscrupulous employers who employ them on successive fixed term contracts with no justification.

As pointed out above, the very difficult questions that the courts have grappled with before the amendments came into effect when interpreting section 186(b)(1) of the LRA, will simply disappear.

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