Fixed term contracts: The current jurisprudence and the impact of the amendments

1 Introduction

Fixed term contracts are a popular option for employers seeking flexibility and a hassle-free termination of a non-permanent contract of employment.

The Labour Relations Amendment Bill, 2012 seeks to implement an additional right for employees on fixed term contracts to bring a claim for unfair dismissal against their employer. This applies to all employees employed on fixed term contracts irrespective of their level of earnings.

The amendments also introduce a number of additional protections for lower-paid employees employed on fixed term contracts by regulating the use of fixed term contracts. The protection applies to employees who are classified as vulnerable workers. Vulnerable workers are identified by their level of earnings. The proposed distinguishing level is the threshold prescribed in terms of section 6(3) of the Basic Conditions of Employment Act, 1997 (BCEA). The current threshold to which the additional protection applies is R183,008.00 per annum or R15,250.00 per month.

This paper explores:

a) The current statutory position and jurisprudence applicable to the termination of fixed term contracts;

b) The impact of the proposed amendments on the current jurisprudence;

c) The significant amendments affecting the regulation of fixed term contracts; and

d) International trends concerning the use and regulation of fixed term contracts.

2 Current statutory position

Section 186 of the Labour Relations Act, 1995 (LRA) defines a dismissal:

“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"

The first part of the definition contemplates a unilateral termination of a contract of employment by the employer. The expiry of a fixed term contract is not a unilateral termination by the employer because the effective date of termination is agreed to occur on a fixed date or on completion of a task or project. The contract therefore terminates automatically by the effluxion of time.

An employee seeking to bring an unfair dismissal claim at the end of a fixed term contract must prove a reasonable expectation that the employer would renew the fixed term contract on same or similar terms, but the employer did not renew it or offered to do so on less favourable terms.

3 The current jurisprudence

The jurisprudence of this genre of an unfair dismissal claim has developed in two areas. The first area concerns the factors by which an employee proves a reasonable expectation of renewal or extension of the fixed term contract. The second area concerns the relief that may be granted to an employee who successfully proves that reasonable expectation.

3.1 When is the employee’s expectation of renewal or extension reasonable?

According to John Grogan, a leading employment law academic, the two most obvious considerations are past practice and prior promise. Successive renewals by an employer may reasonably create an expectation that the employer will continue renew the contract in future. “An assurance, express or implied, given by the employer at some stage before the date on which a fixed term contract is set to expire may also logically give rise to an expectation on the part of the employee that the employment relationship will continue. Whether the expectation so aroused will be regarded as reasonable depends on the nature of the alleged assurance, the position of the person who gave it, and the strength of warnings by the employer that the contract would in fact expire. The practice of inserting disclaimers into fixed term contracts of employment clauses to the effect that the employee has no expectation that the contract will be renewed or that no expectation of renewal can arise unless the employer gives notice in writing of its intention to renew, though advisable, is not
conclusive proof that the employee could not reasonably have expected the contract to be renewed.\footnote{1}

In *University of Cape Town v Auf der Heyde*\footnote{2}, the court held that the facts of the matter did not demonstrate that the employee could have had a reasonable expectation of renewal or extension of his fixed term contract. Mr Heyde was employed as a lecturer on a three year contract. The post was advertised as a three year contract, with a possible extension to five years. Although the advertisement provided that a possibility existed for the contract to be extended to 5 years, this was not in itself enough to establish a reasonable expectation. The University did not represent to Heyde in any way that there was a possibility that his contract would be extended or that permanent employment would be offered to him. When Heyde prodded the university prior to the end of his contract, at a time when a permanent position became available, their reaction made it clear that he could expect nothing other than to be considered for the post if he applied for it. The court was not convinced that a reasonable expectation existed and held that there was no dismissal based on the facts.

In *SA Rugby Players’ Association (SARPA) & Others v SA Rugby (Pty) Ltd & Others*\footnote{3} the Labour Appeal Court examined the proper interpretation and application of a reasonable expectation that constitutes a dismissal.

The facts were as follows. Three employees and professional rugby players employed by SA Rugby (Pty) Ltd, Victor Matfield, Richard Bands and Christo Bezuidenhout, claimed that they had been unfairly dismissed on the grounds that they reasonably expected that their fixed term contracts would be renewed.

The three employees concluded individual player’s agreements with SA Rugby (Pty) Ltd, for the specific purpose of the Rugby World Cup. The contracts commenced on 1 September 2003 and were to terminate on 30 November 2003. The contracts expressly provided that it would automatically end on the agreed termination date and that the players had no expectation that the contracts would be renewed.

Matfield had, in addition to the three month contract for the Rugby World Cup, entered into a standard one year player’s contract with SA Rugby (Pty) Ltd, that

\footnote{1}{John Grogan: Dismissal, Discrimination and Unfair Labour Practices, August 2005 at pages 151-152}
\footnote{2}{(2001) 22 ILJ 2647 (LAC)}
\footnote{3}{(2008) 9 BLLR 845 (LAC)}
commenced on 1 January 2003 and which was to expire by mutual agreement on 31 December 2003.

The Springboks did not do well at the Rugby World Cup. They were knocked out of the competition and were required to return home early. After 30 November 2003, Bands and Bezuidenhout had no contracts with SA Rugby. Matfield continued on his one year player’s contract until the end of December 2003. None of the players were offered renewals. This led to the claim for unfair dismissal based on their reasonable expectation of renewal.

The Labour Appeal Court held that the test was whether a reasonable employee would have acquired an expectation that his contract would be renewed on the same or similar terms. The players’ claims were based on their individual performances during 2003 and on certain remarks of their coach. The Court noted that all their contracts were for a specific event being the Rugby World Cup that had come and gone. The failure by SA Rugby (Pty) Ltd to reply to the players’ association regarding re-negotiating any of the contracts did not give rise to a reasonable expectation of renewal when the contract itself did not provide for a renewal. Although representations were made by the coach, it was common cause that the coach did not have authority to offer contracts. Therefore his representations could not reasonably be relied on. The court concluded that none of the players had established a reasonable expectation of renewal of their contracts.

3.2 **The appropriate relief available to an employee that proves a reasonable expectation**

Conflicting decisions exist in the Labour Court regarding the appropriate relief that may be granted.

In *Owen & others v Department of Health, KwaZulu Natal*\(^4\), the court held that if an employer permits an employee to continue working beyond the expiry of a fixed term contract, the contract is deemed to have been renewed. The court held that an employee in such circumstances may be entitled to claim and be granted permanent employment.

In *Gubevu Security Group (Pty) Ltd v Ruggiero NO and others*\(^5\), the employee was employed on a fixed term contract for three months. An email was sent to the

\(^4\) (2009) 30 ILJ 2461 (LC)

\(^5\) (2012) 33 ILJ 1171 (LC)
employee by the employer’s financial director wishing her as follows: “All the best and welcome aboard. We look forward to many years of business together.” The employee’s fixed term contract was due to expire on 30 November 2009. The employee continued to work beyond the expiry date. She was then notified that her fixed term contract would not be renewed.

On the issue of appropriate relief, the Labour Court held that the terms of the fixed term contract did not give rise to an expectation of permanent employment. The appropriate relief for an unfair dismissal arising from a reasonable expectation was a renewal of the fixed term contract on the same or similar terms of the previous contract.

The Labour Appeal Court settled this debate in University of Pretoria v Commission for Conciliation, Mediation and Arbitration & others. The court held that an expectation of permanent employment does not fall within the ambit of Section 186(1)(b). The appropriate relief to be awarded to an employee who proves a reasonable expectation is a renewal of the fixed term contract of employment on same or similar terms.

The impact of the proposed amendments on the current jurisprudence is that despite the debate that has consumed arbitrators and judges of the Labour Court on this point, the proposed amendments will change the current legal position confirmed by the Labour Appeal Court by way of the insertion of an additional right to claim unfair dismissal in the following circumstances:

If an employee engaged under a fixed term contract of employment who reasonably expected the employer-

(i) 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; or

(ii) to retain the employee on an indefinite contract of employment but otherwise on the same and 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.”

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The additional cause of action permits claims for indefinite or permanent employment arising from a reasonable expectation.

4 **Significant amendments impacting on fixed term contracts of employment**

Other significant proposed amendments seek to regulate fixed term contracts of employees earning below the threshold of R183,008.00 per annum.

4.1 The amendment bill will introduce a definition of a fixed term contract.  

*A fixed term contract is defined as a contract of employment that terminates on:*

- the occurrence of a specified event;
- the completion of a specified task or project;
- a fixed date other than an employee’s normal or agreed retirement age.

4.2 An employer may only engage an employee on a fixed term contract or successive fixed term contract for longer than six months if:

- The nature of the work for which the employee is engaged is of a limited of definite duration; or
- The employer can demonstrate any other justifiable reason for fixing the term of the contract.

4.3 A breach of this provision will result in the employee being deemed to be employed for an indefinite duration. A non-exhaustive list of justifiable reasons is included in the proposed amendment. These include:

- replacement of an employee who is temporarily absent from work;
- an employee engaged on account of a temporary increase in the volume of work which is not expected to endure beyond 12 months;
- the employee 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;
• the employee is engaged to work exclusively on a genuine and specific project that has a limited or defined duration;

• the employee has been engaged for a trial period of not longer than six months for the purpose of determining the employee’s suitability for employment;

• the employee is a non-citizen who has been granted a work permit for a defined period;

• the employee is engaged to perform seasonal work;

• the employee is engaged in a position which is funded by an external source for a limited period;

• the employee has reached a normal or agreed retirement age applicable in the employer’s business.

4.4 Any offer, renewal or extension of a fixed term contract must be in writing and the reason for the fixed term must be recorded in writing.

4.5 An employee employed on a fixed term contract, earning below the threshold, for longer than six months must be treated on the whole no less favourably than an employee employed on an indefinite basis performing the same or similar work, unless there is a justifiable reason for different treatment. A justifiable reason for differential treatment may relate to seniority, experience or length of service; merit; the quality and quantity of work performed; or any other criteria of a similar nature not prohibited by section 6(1) of the Employment Equity Act of 1998.

4.6 An employer must provide an employee employed on a fixed term contract with the same access to opportunities to apply for vacancies as it provides to an employee employed on an indefinite basis.

4.7 An employee engaged on a fixed term contract for a period exceeding 24 months must be paid, on expiry of the contract, one week’s remuneration for each completed year of service.

5 International trends

South Africa is obliged to keep up with international employment and labour standards as a member of the International Labour Organisation (ILO). This obligation is enshrined in section 1 (b) of the LRA.
The ILO is a specialised agency of the United Nations that is responsible for establishing and overseeing international labour standards. The ILO is the only tripartite United Nations agency that gives an equal voice to workers, employers and governments to ensure that the views of the social partners are reflected in labour standards.

At least 90 of 185 member states to the ILO utilise fixed term contracts. In 2010, it was reported by the ILO that member countries of the European Union employed 8.3 percent of its workforce under fixed term contracts. In 2011, statistics sourced from a quarterly labour force survey conducted by Statistics South Africa, reported that approximately 65 percent of employees in South Africa are employed permanently leaving the balance of 35 percent being employed on atypical contracts. Atypical work refers to employment relationships not conforming to the standard or typical model of full time work such as temporary and fixed term contract workers.

A 2007 Labour Force Survey conducted by Statistics South Africa reported that approximately half a million workers were employed on temporary or fixed term contracts and had been working for the same employer for more than three years, whilst approximately 300 000 had been employed for more than five years.

In countries such as South Africa, Egypt, Lesotho and Singapore, there are no current requirements for employers to justify the use of fixed term contracts. However, in countries such as Angola, Brazil and Denmark, there have to be objective and material reasons for a fixed term contract to be used.

Like South Africa, many countries do not establish a limitation to the maximum number of successive fixed term contracts that can be entered into or the maximum cumulative duration of successive fixed term contracts. There are a few noteworthy exceptions.

In Belgium, the maximum number of fixed term contracts permitted is four while the maximum cumulative duration of successive fixed term contracts is 36 months. In Brazil, the maximum number of fixed term contracts that is permitted is two while the maximum cumulative duration of successive fixed term contracts is two years.

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7 International Labour Organization : Industrial and Employment Relations Department – employment protection legislation database.  
8 Quartely Labour Force Survey, Quarter 4, 2011.  
11 See 10  
12 See 10
In the United Kingdom, an employee can be retained on successive fixed-term contracts limited to four years. If the contract is renewed after the expiry of that period, the employee becomes a permanent employee unless the employer can demonstrate a good reason for the continuation of a fixed-term contract.

6 Conclusion

It is clear from an overview of international trends that the proposed amendments are in line with International standards of regulation of fixed term contracts. As the amendments seek to introduce a number of significant amendments to the regulation of this form of atypical employment relationship, employers must gear themselves in preparation by:

a) auditing fixed term contracts by critically assessing the reason for their use and the duration of use of successive fixed term contracts;

b) ensure that the provisions of fixed term contracts are amended to align with the amendments;

c) implement more stringent controls in regard to who is authorised to negotiate and renew fixed term contracts to minimise the risk of alleged unfair dismissal claims arising from reasonable expectation of a fixed term contract.

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