

An Overview of Fixed-Term Contracts of Employment as a Form of A-typical Employment in South Africa

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Abstract

A fixed-term employment contract is an example of atypical or non-standard employment. Fixed-term appointments can have many benefits when utilised for proper and lawful reasons. These contracts are frequently abused, however, by unscrupulous employers and are generally regarded as providing less security to employees than permanent employment. The article considers the general use of fixed-term contracts and addresses selected issues pertaining to the 2014 amendments to the *Labour Relations Act* 66 of 1995 in as far as these contracts are concerned. The article also considers the potential effect these amendments might have on common historic problems associated with fixed-term contracts and highlights certain unresolved problem areas and uncertainties.

Keywords

Fixed term; atypical employment; employment contracts; automatic termination; fixed period; section 186(1)(b); *Labour Relations Act*; section 198B; 2014 legislative amendments.

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1 Introduction

South African labour laws are largely premised on the regulation of typical or standard employment relationships.¹ Typical or standard work is generally regarded as being the norm and representative of the type of work and work relationships over which labour laws have maximum coverage.² Though no definition has been formulated to date, typical or standard employment can broadly be defined as the employment of an individual (the employee) by another person (natural or juristic – the employer) on an ongoing basis (an indefinite basis), at an agreed rate of pay, and for agreed fixed hours of work per day or week. Consequently, key elements of a typical employment relationship appear to be continuity and certainty. Employment arrangements deviating from the above in any substantive manner are regarded as deviating from the norm, and are referred to as atypical or non-standard employment. Atypical employment arrangements commonly include casual labour, independent contractors, part-time employees and fixed-term appointments (fixed-term contracts of employment).³

While statistics internationally suggest a steady decline in typical employment arrangements and a rise in atypical arrangements, the former remains the benchmark against which different forms of work are measured and ultimately classified.⁴ Atypical employment arrangements are attractive alternatives to parties for the flexibility they offer.⁵ However, despite the appeal of atypical employment, these arrangements create less certainty for employees than typical employment. Atypical employment is often associated with increased employee vulnerability.

As a result of the rise in atypical employment, the argument has been made that a regulatory legal system which largely caters for typical forms of employment is increasingly ill-suited to the SA labour market.⁶ While typical

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¹ For a detailed and insightful explanation of the unitary nature of the contract of employment and eventual reception of typical employment in South Africa, see Le Roux *World of Work*.

² Le Roux *World of Work* 8.

³ Van Niekerk *et al Law@work* 70.

⁴ See the discussion in this regard in Benjamin 2010 *ILJ* 845; also see Le Roux *World of Work* 12.

⁵ As seen from the Labour Appeal Court's finding in the case of *Enforce Security Group v Fikile* 2017 38 *ILJ* 1041 (LAC) (discussed in paras 4.2.1 and 4.2.2 below), South African courts seem to be appreciative of the increased need by both employers and employees for flexibility in work arrangements.

⁶ Cheadle 2006 *ILJ* 664.

employment remains (for the time being at least) the model of work which largely underpins existing legislative structures in employment, this model fails to reflect the true nature of work arrangements in which many workers are engaged.⁷ Whether typical employment therefore still remains reflective of most work arrangements is open to debate. Consequently, the practical reach of a regulatory regime which was drafted largely with typical employment in mind is brought into question.⁸ Could it perhaps be said that atypical employment has become the new typical?⁹ Addressing this question falls beyond the scope of this article, however.

The focus of the article will be on fixed-term contracts specifically as an example of atypical employment. Fixed-term appointments can have many benefits when utilised for proper and lawful reasons (such as the completion of a temporary project).¹⁰ These contracts are unfortunately frequently abused by unscrupulous employers. Examples of such abuse include where certain opportunities and benefits are reserved for permanent employees only, such as promotion and training opportunities¹¹ and access to employer-supported pension funds; employers can readily rid themselves of unwanted employees as they are (generally) not required to provide

⁷ Le Roux *World of Work* 12-13. This is particularly true in the context of the Fourth Industrial Revolution (4IR). It is widely accepted that the 4IR is changing the world of work. **While no singular definition of the 4IR exists, it could be described as** "the fourth major industrial era since the initial Industrial Revolution of the 18th century. It is characterized by a fusion of technologies that is blurring the lines between the physical, digital, and biological spheres, collectively referred to as cyber-physical systems. It is marked by emerging technology breakthroughs in a number of fields..." (Wikipedia date unknown https://en.wikipedia.org/wiki/Fourth_Industrial_Revolution). Consequently, labour laws and labour institutions must change to accommodate the 4IR. See in general the work done by the *Labour Law 4.0: Labour Law in the Fourth Industrial Revolution* niche area at the Department of Mercantile and Labour Law, University of the Western Cape (Labour Law 4.0 date unknown <http://labourlaw4-0.uwc.ac.za/>)

⁸ Le Roux *World of Work* 12.

⁹ At the 31st Annual Labour Law Conference, *The Fourth Industrial Revolution: Challenges and Opportunities* (held in Johannesburg from 16 to 17 August 2018), the Director of the ILO's Pretoria Office, Mr Joni Musabayana, also expressed the view that the informal economy was entering the realm of the formal economy, and consequently what has traditionally been viewed as being the exception was increasingly becoming the rule – see Ramotsho 2018 *De Rebus* 12.

¹⁰ Refer to the discussion under para 2 below on the lawful use of fixed-term contracts. Also see *Enforce Security Group v Fikile* 2017 38 ILJ 1041 (LAC) para 42, where the Labour Appeal Court (LAC) held that "[i]t does not follow that the inclusion in a contract of employment of a clause similar to the one in this case should automatically render a termination of that contract based solely on its legitimate terms, a dismissal. *That would in my view defeat the whole purpose of concluding fixed-term contracts concluded for legitimate reasons*" [own emphasis added].

¹¹ Gericke 2011 *PELJ* 106-107.

reasons for the non-renewal of fixed-term contracts;¹² and the abuse of fixed-term contracts for probationary purposes.¹³

The article will commence with a brief discussion of the concept of fixed-term employment and the rationale behind the existence and usage of such contracts. Thereafter the discussion will turn to the pre- and post-2014 legislative protection available to fixed-term employees¹⁴ under the *Labour Relations Act* 66 of 1995 (the LRA). Subsequently, some notoriously difficult issues surrounding the use of fixed-term contracts and the labour courts' approaches to these issues to date will be discussed. In conclusion, the article will argue that although some progress has been made towards providing better protection to fixed-term employees as a result of the 2014 legislative amendments to the LRA, some uncertainties over the use of these forms of contracts and some opportunities for abuse still exist.

2 An introduction to fixed-term contracts of employment

Permanent (or indefinite) contracts of employment are contracts which continue for an unspecified period and may be terminated for a lawful reason only. Such lawful reasons include fair dismissal of the employee,¹⁵ resignation by the employee, mutual termination of the employment contract by the contracting parties, the employee reaching the agreed or normal retirement age, and the death of the employee.

Fixed-term contracts of employment on the other hand should, as the name suggests, be entered into for a fixed, determinable, period of time only. In terms of common law, in the absence of any lawful reason for early termination, fixed-term contracts terminate automatically at the end of the agreed period. The contract is generally a once-off agreement with a limited duration which automatically terminates upon the occurrence of a clearly

¹² Geldenhuys 2008 *SA Merc LJ* 268.

¹³ See the discussion on the abuse of fixed-term contracts for probationary purposes under para 4.3 below.

¹⁴ Significant amendments were effected to labour legislation through the *Labour Relations Amendment Act* 6 of 2014, the *Employment Equity Amendment Act* 47 of 2013, and the *Basic Conditions of Employment Amendment Act* 20 of 2013. In terms of the *Memorandum of Objects: Labour Relations Amendment Bill, 2012* (available at DOL date unknown <http://www.labour.gov.za/DOL/downloads/legislation/bills/proposed-amendment-bills/memoofobjectslra.pdf>), the proposed amendments (as they then were) served to respond to the increased informalisation of labour so as to ensure that vulnerable categories of workers received adequate protection and were employed in conditions of decent work and to ensure compliance with both fundamental constitutional rights and South Africa's obligations in terms of international labour standards.

¹⁵ In terms of s 188(1) of the *Labour Relations Act* 66 of 1995 (LRA).

specified date or event,¹⁶ or the completion of a specified task or project.¹⁷ Lawful reasons for early termination of the contract will include fair dismissal in terms of the LRA¹⁸ or termination through mutual agreement by the parties.¹⁹ In terms of common law, termination of the contract at the expiry of the fixed period does not take place at the behest of any of the contracting parties, and therefore no dismissal presents itself.²⁰ Consequently, under common law the employee cannot aver that the employer's failure to renew the contract, or renewing it on less favourable terms, constitutes unfair and actionable conduct.²¹

Section 186(1)(b) of the LRA, however, provides an exception to the general common law position described above. Section 186(1)(b) must be understood in the light of the constitutional imperative to fair labour practices in terms of section 23(1) of the *Constitution of the Republic of South Africa*, 1996. Section 23(1) of the *Constitution* provides that "[e]veryone has the right to fair labour practices". *Everyone* for purposes of section 23 is afforded a broad interpretation, and includes all employees, whether engaged in terms of a fixed term or an indefinite contract of employment.²²

¹⁶ Cohen 2007 *SA Merc LJ* 26.

¹⁷ This is in terms of the definition of a fixed-term contract in s 198B(1) of the amended LRA. Section 198B(1) states that: "For the purpose of this section, a fixed-term contract means a contract of employment that terminates on - (a) the occurrence of a specified event; (b) the completion of a specified task or project; or (c) a fixed date, other than an employee's normal or agreed retirement age, subject to subsection (3)".

¹⁸ Section 186(1) of the LRA defines what constitutes a dismissal for the purposes of the Act. In the matter of *Buthlezi v Municipal Demarcation Board* 2005 2 BLLR 115 (LAC) the Labour Appeal Court held that the retrenchment of fixed-term employees (that is, dismissal for operational requirements in terms of s 189, and where applicable s 189A of the LRA) prior to the expiry of the fixed-term contract is possible only where there is a clause in the contract specifically providing for such early termination.

¹⁹ *Enforce Security Group v Fikile* 2017 38 ILJ 1041 (LAC) para 18.

²⁰ *Air Traffic and Navigation Services Company v Esterhuizen* (SCA) (unreported) case number 668/2013 of 25 September 2014 para 17, as discussed in *Enforce Security Group v Fikile* 2017 38 ILJ 1041 (LAC) para 18, where the LAC in the latter matter confirmed that "[i]t has been the position in common law that the expiry of the fixed term-contract of employment does not constitute termination of the contract by any of the parties. It constituted an automatic termination of the contract by operation of law and not a dismissal".

²¹ Van der Bank 2008 *IJLMA* 158.

²² Gericke 2011 *PELJ* 107; also see *Nape v INTCS Corporate Solutions (Pty) Ltd* 2010 31 ILJ 2120 (LC) para 63, where the court held "[t]he Constitution provides that everyone and not just employees have a right to fair labour practices. Consequently, even though a person may not be regarded by the law as an employee of the client but of the labour broker, the client still has a legal duty to do nothing to undermine an employee's right to fair labour practices unless the limitation is justified by national legislation"; also see Halton Cheadle's interpretation of *everyone* and *fair labour practices* in Cheadle and Davis *South African Constitutional Law* ch 18.

The definition of *employee* contained in section 213 of the LRA²³ similarly does not distinguish between fixed-term and permanent employees.²⁴ *Fair labour practices* as referred to in section 23(1) of the *Constitution* is also much broader than the limited meaning ascribed to *unfair labour practices* under the LRA. It is therefore safe to say that the right to fair labour practices in terms of the *Constitution* includes protection against the unfair use (the abuse) of fixed-term contracts. Consequently, fixed-term employees should generally receive the same legislative protection as that available to permanent employees. Whether this occurs in practice is one of the fundamental questions underpinning this article. Fixed-term employment is generally regarded as providing less stability, protection and certainty for employees than indefinite employment.²⁵

Whilst fixed-term employees may often render the same value and standard of work, they do not always enjoy the same level of employment protection, status, remuneration and benefits as those afforded to permanent employees. Promotion and training opportunities are often available to permanent members of staff only.²⁶ Fixed-term employees often also do not enjoy trade union protection and are rarely covered by collective agreements.²⁷ In circumstances where section 186(1)(b) of the LRA does not find application, by not renewing the fixed-term contract upon automatic termination thereof an employer can also free itself of an unwanted employee without having to follow the required process for fair dismissal as provided for in the LRA.²⁸ Employers are also not required to provide reasons for the non-renewal of fixed-term contracts.²⁹ The result is that fixed-term contracts are unfortunately too often abused by unscrupulous employers in an attempt to circumvent the provisions of the LRA.³⁰

²³ Section 213 of the LRA defines an employee as "(a) any person, excluding an independent contractor, who works for another person or for the State and who receives, or is entitled to receive, any remuneration; and (b) any other person who in any manner assists in carrying on or conducting the business of an employer...".

²⁴ Geldenhuys 2008 *SA Merc LJ* 268.

²⁵ Gericke 2011 *PELJ* 106-107.

²⁶ Gericke 2011 *PELJ* 106-107.

²⁷ ILO 2015 https://www.ilo.org/wcmsp5/groups/public/---ed_protect/---protrav/---travail/documents/publication/wcms_436125.pdf.

²⁸ In terms of s 188(1) of the LRA a dismissal will be fair only if there is a valid reason for the dismissal (subjective fairness) and where a fair procedure has been followed in dismissing the employee (procedural fairness).

²⁹ Geldenhuys 2008 *SA Merc LJ* 268.

³⁰ Cohen 2007 *SA Merc LJ* 26; Collier *et al Labour Law in South Africa* 189.

Nevertheless, there are undeniably genuine operational needs which require the use of fixed-term contracts under specific circumstances³¹ or in particular industries.³² Because of the constitutional right to fair labour practices, and subsequently the introduction of section 186(1)(b) of the LRA, an employer is no longer able to employ employees on fixed-term contracts with the sole intent of placing them beyond the protection of the LRA. Fixed-term employees, like any other employees, are protected under the principles of fairness and equity as embodied in the LRA.³³

The discussion will now turn to the legislative protection available to fixed-term employees in terms of the LRA by considering both the pre- and post-2014 periods.

3 Legislative protection afforded to fixed-term employees

Under common law the employment terms agreed upon between an employer and an employee were regarded as being reflective of the relative bargaining strengths of the parties. Many employees, particularly low-skilled individuals, were often left vulnerable, open to exploitation and with very little job security.³⁴ The only established requirement for the lawful termination of the contract under common law was that the employer had to provide the employee with the period of notice of termination of the contract agreed upon. The reason for termination was of no consequence, however.³⁵ The enactment of the LRA and the protection that came with it were as such a necessary and welcome advancement for employees – both permanent and fixed-term.

In the furtherance of the general right to fair labour practices as provided for in section 23(1) of the *Constitution*, the LRA protects employees against specifically unfair dismissals and unfair labour practices. Section 188(1) of

³¹ Such as the appointment of a fixed-term employee where another employee is on maternity leave, or the appointment of an individual to complete a once-off specific project.

³² Such as those affected by constant economic and seasonal fluctuations, which in turn require fluctuations in employment numbers.

³³ Van der Bank 2008 *IJLMA* 163. As the focus of this article is on the protection of fixed-term employees under the LRA, the impact of the *Employment Equity Act* 55 of 1998's (EEA) *equal pay for work of equal value* provisions on fixed-term employees falls beyond the scope of the discussion (see the discussion under fn 72 below).

³⁴ The most extreme form of worker exploitation was that of slavery, where the worker in effect became the property of the owner – see the discussion in Collier *et al Labour Law in South Africa* 8-12.

³⁵ Cohen 2007 *SA Merc LJ* 26, 27. For a detailed discussion on *relational contract theory* see Cohen 2012 *Acta Juridica*.

the LRA stipulates that a dismissal should be both substantively fair (for a fair and lawful reason) and procedurally fair (complying with a fair procedure).³⁶ Section 186 of the LRA provides a comprehensive definition of what constitutes a dismissal. In terms of section 186(1)(b) dismissal includes the non-renewal of fixed term contracts by employers, or a renewal on less favourable terms, where the employee had a reasonable expectation that the contract would be renewed on the same or similar terms³⁷ (or, subsequent to the 2014 amendments to the LRA, a reasonable expectation that the contract would be made permanent).³⁸

South African labour legislation underwent some significant amendments during 2014. The *Labour Relations Amendment Act* 6 of 2014 (the LRAA), amongst other things, amended section 186(1)(b) of the LRA and introduced section 198B into the LRA.

3.1 Regulation of fixed-term contracts prior to the 2014 LRA amendments

Prior to the 2014 amendments to the LRA, section 186(1)(b) held that:

"Dismissal" means that –

(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.

With the inclusion of the above into the LRA, employees on fixed-term contracts were for the first time awarded legislative stature. This was of particular significance in as far as job security and preventing employers from bypassing the provisions of the LRA were concerned.³⁹ Section 186(1)(b) served to deter employers from terminating the employment relationship in circumstances where a reasonable expectation of renewal of the contract existed on the part of the employee. An ancillary purpose was to curb the use of indefinite fixed-term contracts with the same employee

³⁶ Cohen 2007 *SA Merc LJ* 27.

³⁷ Section 186(1)(b)(i) of the LRA. For further insight into the origin of the concept *reasonable expectation*, see the discussion under para 4.1 below.

³⁸ Section 186(1)(b)(ii) LRA.

³⁹ See the majority ruling in *Fedlife Assurance Ltd v Wolfaardt* 2002 2 All SA 295 (A) para 18, where Nugent AJA held that "[b]y enacting s 186(b) the legislature intended to bestow upon an employee whose fixed-term contract has run its course a new remedy designed to provide, in addition to the full performance of the employer's contractual obligations, compensation (albeit of an arbitrary amount) if the employer refuses to agree to renew the contract where there was a reasonable expectation that such would occur."

(particularly where the position the employee held was of a permanent nature) and the unfairness associated therewith.⁴⁰

In any unfair dismissal dispute, the onus is first on the employee to show that a dismissal as defined in section 186 of the LRA had occurred.⁴¹ In *SA Rugby (Pty) Ltd v Commission for Conciliation Mediation and Arbitration*⁴² the Labour Court (LC) held that, for the purposes of section 186(1)(b), the onus was on an employee to establish the existence of a reasonable or legitimate expectation of the renewal of the employment contract.⁴³ In *De Milander v Member of the Executive Council for the Department of Finance: Eastern Cape*⁴⁴ the Labour Appeal Court (LAC) summarised the application of section 186(1)(b) as follows:

The appellant's case is founded upon s 186(1)(b) of the LRA and that being so, she had to provide facts which, objectively considered, would bring her case within the ambit of that section...⁴⁵

Zondi AJA in *De Milander* added that:

...it [was] first necessary to determine whether she in fact expected her contract to be renewed, which [was] the subjective element. Secondly, if she did have such an expectation, whether taking into account all the facts, that expectation was reasonable, which is the objective element...⁴⁶

Essentially the question is whether a reasonable employee under the same prevailing circumstances would have expected the employer to renew his or her fixed-term contract on the same or similar terms and conditions.⁴⁷ It

⁴⁰ Geldenhuys 2008 SA Merc LJ 269.

⁴¹ Section 192(1) of the LRA.

⁴² *SA Rugby (Pty) Ltd v Commission of Conciliation Mediation and Arbitration* 2006 27 ILJ 1041 (LC) para 44.

⁴³ Also see *SA Rugby Players Association v SA Rugby (Pty) Ltd* 2008 29 ILJ 2218 (LAC) para 44, where the LAC held that "[the employees] carried the onus to establish that they had a 'reasonable expectation' that their contracts were to be renewed."

⁴⁴ *De Milander v Member of the Executive Council for the Department of Finance: Eastern Cape* 2013 34 ILJ 1427 (LAC).

⁴⁵ *De Milander v Member of the Executive Council for the Department of Finance: Eastern Cape* 2013 34 ILJ 1427 (LAC) para 25.

⁴⁶ *De Milander v Member of the Executive Council for the Department of Finance: Eastern Cape* 2013 34 ILJ 1427 (LAC) para 29.

⁴⁷ See *SA Rugby (Pty) Ltd v Commission of Conciliation Mediation and Arbitration* 2006 27 ILJ 1041 (LC) para 11, where the court stated: "For the employee's expectation to be 'reasonable', there must be an objective basis for the creation of his expectation, apart from the subjective say-so or perception..."; also see *SA Rugby Players Association v SA Rugby (Pty) Ltd* 2008 29 ILJ 2218 (LAC) para 44, where the LAC confirmed the above; *Dierks v University of South Africa* 1999 20 ILJ 1227 (LC) para 132.

is only once the employee has been able to establish that s/he has been dismissed in terms of section 186(1)(b) of the LRA that the onus shifts to the employer to show that the dismissal was fair (both substantively and procedurally).⁴⁸

In summary, to successfully prove that a dismissal in relation to the termination of a fixed-term contract occurred, the employee had to establish that:

- (1) s/he had an expectation that the employer would renew the fixed-term contract in question on the same or similar terms;
- (2) the expectation by the employee had been reasonable;⁴⁹ and
- (3) the employer did not renew the contract, or offered to renew it on less favourable terms.⁵⁰

In considering the first two requirements the questions to ask would be firstly whether the employee subjectively expected the contract to be renewed (the subjective element) and secondly whether that expectation was reasonable given the facts of the matter (the objective element). In short, it must be determined whether a reasonable employee in the same circumstances as the employee would have expected the contract to be renewed on the same or similar terms.⁵¹ The expectation must have been created through the conduct of the employer. An employer's actions prior to the non-renewal of the fixed-term contract are therefore of paramount importance and trump any express wording in the employment contract which states that the employee could not claim any expectation of renewal.⁵²

In conclusion, the effect of the pre-2014 legislative provisions can be summarised as:

⁴⁸ Section 192(2) of the LRA. Also see *De Milander v Member of the Executive Council for the Department of Finance: Eastern Cape* 2013 34 ILJ 1427 (LAC) para 26.

⁴⁹ See the discussion under para 4.1 below as to what might constitute a *reasonable expectation*.

⁵⁰ *SA Rugby (Pty) Ltd v Commission of Conciliation Mediation and Arbitration* 2006 27 ILJ 1041 (LC) para 9, as referred to in *Cash Paymaster Services (Pty) Ltd v Christie* (LC) (unreported) case number C550/2013 of 19 August 2014 4.

⁵¹ See *SA Rugby (Pty) Ltd v Commission of Conciliation Mediation and Arbitration* 2006 27 ILJ 1041 (LC) paras 9 and 11; also see the earlier discussion of *De Milander v Member of the Executive Council for the Department of Finance: Eastern Cape* 2013 34 ILJ 1427 (LAC).

⁵² See *SA Rugby (Pty) Ltd v Commission of Conciliation Mediation and Arbitration* 2006 27 ILJ 1041 (LC) paras 12 and 13.

- Employers were not allowed to use fixed-term contracts for improper reasons, such as prolonged probation periods, or a means through which to deny factually permanent employees employed on fixed-term contracts access to benefits typically available only to permanent employees.
- An employee could claim unfair dismissal where s/he reasonably expected that the employer would renew the contract on the same or similar terms, but the employer failed to renew it, or renewed it on less favourable terms.

3.2 Regulation of fixed-term contracts subsequent to the 2014 LRA amendments

The LRAA, signed off by former President Jacob Zuma and promulgated in the Government Gazette during August 2014,⁵³ came into effect on the 1st of January 2015. The preamble to the LRAA indicates the purpose of the amendments as providing greater protection to workers engaged in temporary employment services and better regulation of the employment of fixed-term and part-time employees who earn below the earnings threshold.⁵⁴

3.2.1 Extension of section 186(1)(b)

Section 186(1)(b) as amended now holds that:

‘Dismissal’ means that –

(b) an employee employed in terms of a fixed term contract of employment 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 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 to section 186(1)(b) extended the scope of the protection already available to fixed-term employees. The amended section 186(1)(b)

⁵³ GN 629 in GG 37921 of 18 August 2014.

⁵⁴ The earnings threshold as determined by the Minister of Labour from time to time. As at the date of the writing of this article, the threshold was set at R205 433.30 per annum.

no longer provides for protection only in the case where an employee is able to show that s/he had a reasonable expectation that the fixed-term contract would be renewed, but now also provides for a dismissal where the employee is able to show that s/he had a reasonable expectation that the contract would be made permanent. A reasonable expectation of permanent employment was not previously explicitly recognised as a ground that could give rise to a claim of dismissal under the pre-amended section 186(1)(b).

In *SA Rugby (Pty) Ltd v Commission of Conciliation Mediation and Arbitration*,⁵⁵ the LC held that the pre-amended section 186(1)(b) clearly stated that dismissal could be argued only where the employee reasonably expected the existing fixed-term contract to be renewed on the same or similar terms, and not that a new contract would be concluded for a different period or purpose.⁵⁶ While not overtly stated as such by the court, from the aforesaid it can be deduced that an employee could not rely on section 186(1)(b) for protection where a reasonable expectation of a permanent appointment, that is a different period, was argued. In *Dierks v University of South Africa*⁵⁷ the applicant had been employed on three fixed-term contracts during the period 1995 to 1997. When the third contract expired at the end of 1997, the applicant claimed that he had a reasonable expectation of permanent employment.⁵⁸ The LC concluded that an expectation of permanent employment did not satisfy the requirements of dismissal for the purposes of section 186(1)(b). In short, the court's reasoning in this regard was as follows:

- As could be gathered from the wording of section 186(1)(b), the reasoning behind the initial inclusion of the section into the LRA was to counteract the patent unfairness brought forth by indefinite renewals of fixed-term contracts by employers without good reason.⁵⁹
- An employee who claimed an expectation of permanent appointment had to institute such a claim in terms of the unfair labour practices provisions of the LRA.⁶⁰

⁵⁵ *SA Rugby (Pty) Ltd v Commission of Conciliation Mediation and Arbitration* 2006 27 ILJ 1041 (LC).

⁵⁶ *SA Rugby (Pty) Ltd v Commission of Conciliation Mediation and Arbitration* 2006 27 ILJ 1041 (LC) para 22.

⁵⁷ *Dierks v University of South Africa* 1999 20 ILJ 1227 (LC).

⁵⁸ *Dierks v University of South Africa* 1999 20 ILJ 1227 (LC) para 137.

⁵⁹ *Dierks v University of South Africa* 1999 20 ILJ 1227 (LC) para 143.

⁶⁰ *Dierks v University of South Africa* 1999 20 ILJ 1227 (LC) para 146.

- In order for an employee to successfully claim a dismissal under section 186(1)(b) where an expectation of permanency was relied on, "... a specific statutory provision to that effect..." had to be written into the LRA by the legislature.⁶¹

Similarly, in the matter of *Auf der Heyde v University of Cape Town*⁶² the LC concluded that section 186(1)(b) did not apply to instances where an expectation of indefinite renewal was claimed by an employee. Consequently, a fixed-term employee could at best argue the existence of a reasonable expectation of further employment only on a further temporary basis. This is in contrast to the decision reached in the matter of *McInnes v Technikon Natal*,⁶³ where the LC held that section 186(1)(b) provided for the situation where an employee was able to prove that the employer had created a reasonable expectation of indefinite renewal of the contract.

In *University of Pretoria v CCMA*⁶⁴ the employee had been employed on seven fixed-term contracts over a period of just under four years. Prior to the expiry of the last fixed-term contract the employee unsuccessfully applied for a permanent position at the employer. While her application was unsuccessful, the employer did offer the employee an eighth fixed-term contract on improved terms and conditions of service. The employee refused to accept employment on yet another fixed-term contract, however, and claimed dismissal under section 186(1)(b) on the basis of a reasonable expectation of permanent appointment. In dismissing the employee's claim, the LAC held that:

These words do not however carry the meaning which is urged by third respondent, namely that, by being employed on the basis of a series of fixed terms contracts, an employee has without more a reasonable expectation of a permanent appointment.⁶⁵

Uncertainties around the applicability of section 186(1)(b) in cases where employees claim a reasonable expectation of permanent employment have now been settled through the addition of section 186(1)(b)(ii) to the LRA. The amended section explicitly provides for a claim of dismissal where employees had a reasonable expectation of permanent employment. This is of particular importance to employees who have historically experienced continued renewal (or so-called "rolling over") of their fixed-term contracts,

⁶¹ *Dierks v University of South Africa* 1999 20 ILJ 1227 (LC) para 148.

⁶² *Auf der Heyde v University of Cape Town* 2000 8 BLLR 877 (LC).

⁶³ *McInnes v Technikon Natal* 2000 21 ILJ 1138 (LC).

⁶⁴ *University of Pretoria v CCMA* 2012 25 ILJ 183 (LAC).

⁶⁵ *University of Pretoria v CCMA* 2012 25 ILJ 183 (LAC) para 18.

who would now be able to argue a dismissal based on a reasonable expectation of permanent appointment.

Under the amended section 186(1)(b) employees will now have a choice whether to argue dismissal based on the expectation of renewal of the fixed-term contract, or to claim a reasonable expectation of permanent employment. Employees are likely to claim the aforesaid in the alternative.

To be successful with a claim of reasonable expectation of permanency the employee would have to show that: (a) the employer is in a position to provide indefinite employment; (b) the employer is responsible for creating an expectation that indefinite employment would be offered; and (iii) such an expectation held by the employee is reasonable.⁶⁶ The test for reasonableness remains the same as that applicable to claims of a reasonable expectation of the renewal of a fixed-term contract, as discussed under 3.1 above.

3.2.2 Introduction to section 198B

Apart from an increase in the protection now provided for under section 186(1)(b), section 198B of the amended LRA was a completely new addition to the Act pursuant to the 2014 amendments to the Act. Section 198B is explicitly focussed on the protection of fixed-term employees.

Section 198B(1) defines a fixed-term contract as:

...a contract of employment that terminates on —

- (a) the occurrence of a specified event;
- (b) the completion of a specified task or project; or
- (c) a fixed date, other than an employee's normal or agreed retirement age, subject to subsection (3).

The above essentially confirms what has historically already been understood and applied as the definition and lawful use of fixed-term contracts. Consequently, not much has been gained through the inclusion of the specific provision.

Section 198B is not available to all employees and employers. The following categories of employees and employers are excluded from the provisions of section 198B:

⁶⁶ Gericke 2011 *PELJ* 106.

- Employees earning in excess of the earnings threshold as prescribed by the Minister of Labour in terms of the *Basic Conditions of Employment Act 75 of 1997* (hereafter the BCEA). At the time of writing this article the threshold was set at R205 433.30 per annum;⁶⁷
- Employers who employ less than 10 employees;⁶⁸
- Where an employer employs between 10 and 50 employees, the business has been in operation for less than two years (subject to certain exceptions as listed in section 198B(2)(b));⁶⁹
- Employees employed in terms of a fixed term contract permitted by any statute, sectoral determination or collective agreement.⁷⁰

3.2.2.1 Justification for and the allowed periods of fixed-term contracts (sections 198B(3), (4), (5), (6) and (7))

The above provisions hold that:

- (3) An employer may employ an employee on a fixed term contract or successive fixed term contracts for longer than three months of employment only if –
 - (a) the nature of the work for which the employee is employed is of a limited or definite duration; or
 - (b) the employer can demonstrate any other justifiable reason for fixing the term of the contract.
- (4) Without limiting the generality of subsection (3), the conclusion of a fixed term contract will be justified 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;

⁶⁷ Section 198B(2)(a) of the LRA.

⁶⁸ Section 198B(2)(b) of the LRA.

⁶⁹ Section 198B(2)(b) of the LRA.

⁷⁰ Section 198B(2)(c) of the LRA.

- (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.
- (5) Employment in terms of a fixed term contract concluded or renewed in contravention of subsection (3) is deemed to be of indefinite duration.
- (6) 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; and
 - (b) state the reasons contemplated in subsection (3)(a) or (b).
- (7) If it is relevant in any proceedings, an employer must prove that there was a justifiable reason for fixing the term of the contract as contemplated in subsection (3) and that the term was agreed.

While there was no maximum period of fixed-term employment provided for in the pre-amended LRA, section 198B(3) might be understood to suggest that fixed-term contracts are generally appropriate only where the period of employment is less than three months. In accordance with section 198B(3), where an employee is employed for a period exceeding three months, the employer is required to show that the work the employee is employed to do is of a limited/definite duration, or to provide any other justifiable reason for the continued use of a fixed-term contract. While the list it contains is not a closed, section 198B(4) provides for instances where employers may justify using fixed-term contracts which exceed the legislated three-month period. Again, not much has been gained through the inclusion of section 198B(4), as it merely confirms the already accepted understanding and implementation of the lawful use of fixed-term contracts.

Section 198B(3)(b) contains a fairly broadly worded failsafe provision available to employers to justify the use of fixed-term contracts in excess of three months. Consequently, it seems as if it would be rather easy for employers to justify the use of fixed-term contracts. It is argued that this view is also supported by the wording itself of section 198B(4), which includes the qualification "[w]ithout limiting the generality of subsection (3)..." Of little comfort perhaps is the fact that section 198B(7) places the onus on employers in legal proceedings to justify the use of fixed-term contracts. Such justifications will consequently form the subject of legal scrutiny before the CCMA and labour courts. Justifying the use of fixed-term contracts is

also provided for in section 198B(6), which stipulates that any offer to employ an employee on a fixed-term contract, or to renew or extend such a contract, must be in writing and must indicate the reasons for entering into a fixed-term contract specifically. While the legislature might be commended for its attempt to compel employers to show the existence of justifiable reasons for utilising fixed-term contracts in excess of three months, given the reservations highlighted above it remains to be seen to what extent sections 198B(3) and (4) will curb the misuse of these contracts.

Where an employer employs an employee on a fixed-term contract in excess of three months and fails to show that the nature of the work is of a limited nature, or fails to establish a justifiable reason for exceeding the three-month period, the employee's employment will automatically be deemed to be of indefinite duration.⁷¹ Under the amended LRA the potential claims faced by employers engaged in fixed-term contracts are therefore two-fold: first, a possible unfair dismissal claim under the extended section 186(1)(b), and second, claims for the automatic conversion of fixed-term contracts into permanent/indefinite contracts of employment. These claims might pose significant financial and/or structural risks for employers, particularly where employers are faced with a sudden (and unexpected) increase in staff cost and composition where contracts are declared to be of an indefinite nature.

3.2.2.2 Equal treatment (sections 198B(8), (9), (10) and (11))

Sections 198B(8), (9), (10) and (11) hold that:

- (8) (a) An employee employed in terms of a fixed term contract for longer than three months must not be treated less favourably than an employee employed on a permanent basis performing the same or similar work, unless there is a justifiable reason for different treatment.

(b) Paragraph (a) applies, three months after the commencement of the Labour Relations Amendment Act, 2014, to fixed term contracts of employment entered into before the commencement of the Labour Relations Amendment Act, 2014.
- (9) As from the commencement of the Labour Relations Amendment Act, 2014, 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.
- (10) (a) An employer who employs an employee in terms of a fixed term contract for a reason contemplated in subsection (4)(d) for a period

⁷¹ Section 198B(5) of the LRA; also see ELRC date unknown <http://www.elrc.org.za/news/summary-labour-relations-amendment-act-6-2014>.

exceeding 24 months must, subject to the terms of any applicable collective agreement, pay the employee on expiry of the contract one week's remuneration for each completed year of the contract calculated in accordance with section 35 of the Basic Conditions of Employment Act.

(b) An employee employed in terms of a fixed-term contract, as contemplated in paragraph (a), before the commencement of the Labour Relations Amendment Act, 2014, is entitled to the remuneration contemplated in paragraph (a) in respect of any period worked after the commencement of the said Act.

- (11) An employee is not entitled to payment in terms of subsection (10) if, prior to the expiry of the fixed term contract, the employer offers the employee employment or procures employment for the employee with a different employer, which commences at the expiry of the contract and on the same or similar terms.

Section 198B(8) provides for the equal treatment of fixed-term and permanent employees.⁷² Section 198B(8)(a) provides for differential treatment only where there is a justifiable reason for such differentiation. Section 198B(8), read with section 198D(2) provides examples of what could constitute such justifiable reasons. These include seniority, experience, length of service, merit, the quality or quantity of work performed, or any other criteria of a similar nature. It remains to be seen whether employers will view the list as being too restrictive. It must be remembered, however, that section 198D(2)(d) provides that "...any other criteria of a similar nature" may also be considered.

It also remains to be seen exactly how the courts and other dispute resolution forums will interpret section 198B(8). The phrase "not treated less favourably" could arguably have a far wider meaning than simply providing equal terms and conditions of employment in a narrow sense. Such a progressive approach seems to be in line with the provisions of sections 198B(9) and (10). The former holds that fixed-term contract employees must be provided with equal opportunities to apply for vacancies within the business (i.e. equal to the opportunities provided to permanent

⁷² *Equal pay for work of equal value* provisions were introduced into the EEA during 2015 through the *Employment Equity Amendment Act* 47 of 2013. Section 6(4) of the EEA now provides that "[a] difference in terms and conditions of employment between employees of the same employer performing the same or substantially the same work or work of equal value that is directly or indirectly based on any one or more of the grounds listed in subsection (1), is unfair discrimination". Section 6(5) stipulates that "[t]he Minister, after consultation with the Commission, may prescribe the criteria and prescribe the methodology for assessing work of equal value contemplated in subsection (4)". Subsequently, the Minister of Labour published the *Code of Good Practice on Equal Pay / Remuneration for Work of Equal Value* on the 1st of June 2015.

employees).⁷³ Section 198B(10)(a) in turn provides that where an employee is employed on a fixed term in excess of 24 months to work on a project with a limited duration, the employee is entitled to one week's remuneration for each completed year of the contract once the contract expires as agreed. Essentially this section provides for the payment of severance pay under circumstances similar to those pertaining to the retrenchment of employees under section 189 of the LRA. In terms of section 198B(11), however, an employee is not entitled to such severance pay if prior to the expiry of the fixed-term contract the employer offered the employee alternative employment on the same or similar terms, or procured employment for the employee with a different employer.⁷⁴

4 Legislative protection afforded to fixed-term appointments: selected issues from case law

What follows below is a discussion of selected issues courts have been called on to determine arising from the legislative protection afforded to fixed-term contract employees. These include issues which were either not sufficiently addressed, or not addressed at all, prior to the 2014 amendments to the LRA.

4.1 What constitutes a reasonable expectation?

To be successful with a claim of dismissal under section 186(1)(b) of the LRA as amended, an employee has to show that s/he had a reasonable expectation that the fixed-term contract would either be renewed on the same or similar terms, or that the contract would be made permanent. The concept reasonable expectation can be traced back to the equality jurisprudence of the former Industrial Courts and the latter's approach to the notion of a legitimate expectation as understood within unfair labour practices disputes argued under the 1956 LRA.⁷⁵

Prior to the 2014 amendments to the LRA there were opposing views as to whether a reasonable expectation of permanent employment (as opposed to simply the renewal of a fixed-term contract) was protected under the dismissal provisions of the former section 186(1)(b). While the labour courts reached conflicting outcomes in this regard, the issue has now been settled through the inclusion of section 186(1)(b)(ii) into the LRA. The section

⁷³ Section 198B(9) of the LRA.

⁷⁴ Section 198B(11) of the LRA.

⁷⁵ See *Dierks v University of South Africa* 1999 20 ILJ 1227 (LC) para 119 and *Administrator of the Transvaal v Traub* 1989 10 ILJ 823 (A) 833-837.

specifically provides for a reasonable expectation of permanent employment. The explanatory memorandum that accompanied the *Labour Relations Amendment Bill* 16D of 2012 highlighted that the amended section 186(1)(b) would remove the anomaly that existed, in terms of which fixed-term employees could claim dismissal only where they reasonably expected the employer to renew the fixed-term contract, and not where they reasonably expected to be retained on an indefinite basis.

Courts and other dispute resolution forums have traditionally applied principles of fairness or reasonableness in ascertaining whether a reasonable expectation existed in fixed-term contract termination disputes.⁷⁶ Notions of fairness and reasonableness are notoriously wide, however, and open to different interpretations. South African courts are therefore turned to for guidance on the application of section 186(1)(b).

In the matter of *SA Rugby (Pty) Ltd v Commission of Conciliation Mediation and Arbitration*⁷⁷ the applicants claimed unfair dismissal on the ground of a reasonable expectation they had that their contracts would be renewed. The employer argued that the employees' fixed term contracts expressly stated that there could be no expectation of renewal upon the expiry of the contracts. The LC held that the test to establish a reasonable expectation included both a subjective and an objective element. The employee's subjective perception that the contract would be renewed had to be based on facts which objectively supported the employee's perception. In short, the question was thus whether a reasonable employee in the position of the employee would have had a similar expectation that the contract would be renewed under the circumstances.⁷⁸ In the court's opinion a reasonable expectation could be argued despite the fact that the contract included an express provision to the contrary. The latter view of the court is to be applauded and is in keeping with the general willingness by labour courts to consider substance over form, which supports the view that labour law is a law of fairness.

According to the LC in the *SA Rugby* case a number of factors were instructive in determining whether a reasonable expectation had indeed been formed. Without constituting a closed list,⁷⁹ these included: the written

⁷⁶ Vettori 2008 *Stell* LR 203.

⁷⁷ *SA Rugby (Pty) Ltd v Commission of Conciliation Mediation and Arbitration* 2006 27 ILJ 1041 (LC).

⁷⁸ *SA Rugby (Pty) Ltd v Commission of Conciliation Mediation and Arbitration* 2006 27 ILJ 1041 (LC) paras 9-11; Cohen 2007 *SA Merc* LJ 35.

⁷⁹ Also see *Joseph v University of Limpopo* 2011 32 ILJ 2085 (LAC) para 35.

terms of the contract; the practice of past renewals; the reason(s) for having entered into a fixed term contract; and any assurances given by the employer to the employee that the contract would be renewed. An employee might therefore have a strong claim of reasonable expectation where assurances were given by the employer that continued employment would be offered, or past practices of renewal and the conduct of the employer had led the employee to believe that there was prospect of a renewal.⁸⁰

In *Yebe v University of KZN*⁸¹ the fixed-term contract of the employee had been renewed twenty times over a period of four-and-a-half years. The employee also rendered the same services as that rendered by two colleagues who had already been appointed on a permanent basis. The Commission for Conciliation, Mediation and Arbitration (CCMA) held that this was a clear example of where a practice of past renewals, together with the factual nature of the job, created a reasonable expectation of the renewal of the contract.

In *Ekurhuleni West College v Education Labour Relations Council*⁸² the employee was initially appointed on a three-month fixed-term lecturing contract. The post was subsequently advertised as a permanent one. The employee's application to be appointed in the permanent position was unsuccessful. Whilst the permanent position remained vacant the employee's contract was renewed twice for a period of three months at a time. Shortly after the second renewal the employee informed her manager that she was pregnant. The manager did not indicate to the employee that her contract would not be renewed for a next term and in fact advised her to apply for maternity leave. The maternity leave period would have fallen outside of the employee's last contractual period. Both the Education Labour Relations Council (hereafter the ELRC) and the LC concluded that based on the employer's advice, the employee's expectation that her contract would again be renewed on termination had been reasonable and accordingly found that she had been unfairly dismissed.

The LAC concurred with the findings of the ELRC and the LC that a reasonable expectation of renewal had been created and that the employee's dismissal had been procedurally and substantively unfair. Whilst not explicitly commenting on the issue, the LAC's judgment could be understood to mean that employers are bound by the expectations created

⁸⁰ *Mediterranean Woollen Mills (Pty) Ltd v SACTWU* 1998 19 ILJ 731 (LAC) 735.

⁸¹ *Yebe v University of KZN* 2007 28 ILJ 490 (CCMA).

⁸² *Ekurhuleni West College v Education Labour Relations Council* (LAC) (unreported) case number JA55/2016 of 30 November 2017.

by those in positions of authority, such as managers, despite how negligent or misplaced the conduct of a manager might be in creating any expectations. In the present matter the manager's advice to the employee to apply for maternity leave where such a period of leave would have fallen outside of the employee's last contractual period was instrumental in the creation of a reasonable expectation of continued employment.

Further factors highlighted in case law on the question whether a reasonable expectation had been created include the terms of the contract and the nature of business;⁸³ the importance of the work done by the employee; whether money was available to continue to pay the employee; and the employee's overall work performance.⁸⁴ While not often argued, it has also been suggested that affirmative action policies could play a role in determining whether or not a reasonable expectation had been created for continued employment.⁸⁵

Determining whether an employee would be successful with a claim of dismissal under section 186(1)(b) of the LRA will ultimately depend on the employee's ability to prove that s/he had a reasonable expectation of the renewal of the contract or an expectation of permanent appointment. This subjective expectation must be objectively justifiable. It is only once the employee has been able to show that a dismissal had occurred that the question of the fairness of such a dismissal becomes relevant. Since employees might not have kept records of any verbal communications which supported the belief that a contract would be renewed or made permanent, proving a claim of reasonable expectation under section 186(1)(b) might turn out to be rather tricky. Adding to the difficulty of proving such a claim is the fact that employers are not obliged to provide employees with written reasons for the non-renewal of the fixed-term contract on expiry thereof. It is for this reason that the LC's approach in the *SA Rugby* case to consider a bundle of factors, as opposed to a single factor, in determining the existence of a reasonable expectation is to be further commended.

⁸³ *De Milander v Member of the Executive Council for the Department of Finance: Eastern Cape* 2013 34 ILJ 1427 (LAC) para 16; *Joseph v University of Limpopo* 2011 32 ILJ 2085 (LAC) para 35.

⁸⁴ *Vettori* 2008 *Stell LR* 203, 204.

⁸⁵ *Geldenhuys* 2008 *SA Merc LJ* 277.

4.2 Automatic termination clauses and fixed-term contracts of employment

The forms of dismissal in terms of section 186 of the LRA requires that there has to be some form of action on the part of the employer that resulted in the termination of the employee's contract of employment.⁸⁶ The inherent nature of a fixed-term contract of employment is such, however, that the contract terminates automatically upon an agreed and identified date, or the occurrence of an agreed upon event (such as the completion of a specific project). Under these normal circumstances the fixed-term employment contract simply terminates by operation of law and there is no termination of the contract at the behest of the employer and as such no dismissal for the purposes of section 186(1)(a) of the LRA.

Automatic termination clauses are typically found in tripartite relationships where the existence of the employment contract is dependent on the existence of a separate contract, generally a commercial contract, between the employer and a client. On the termination of the commercial contract, employees in tripartite work relationships as described above might be faced with an unexpected termination of the employment contract, often without any fault on their part or warning by the employer.⁸⁷ In the light of the uncertainty they create particularly over job security, the lawfulness of such automatic termination clauses in employment contracts has plagued the labour courts for years. Yet the approach taken by South African labour courts to automatic termination clauses has been far from consistent.

The discussion below will be guided by two questions. First, is the termination of an employment contract pursuant to an automatic termination clause a dismissal or merely an automatic termination of a fixed term contract? Secondly, are automatic termination clauses lawful?

⁸⁶ *Enforce Security Group v Fikile* 2017 38 ILJ 1041 (LAC) para 21. The only exceptions to the general rule that it is the employer's termination of the employee's contract which results in a dismissal claim under s 186 of the LRA is a resignation by an employee in terms of s 186(1)(e) or 186(1)(f) of the LRA. In these exceptional circumstances, even though the employment relationship is terminated through the resignation of the employee, a possible dismissal might still be argued.

⁸⁷ See the Labour Court's view in *Nape v INTCS Corporate Solutions (Pty) Ltd* 2010 31 ILJ 2120 (LC) para 59, where the court held that "[i]n this tripartite arrangement, employees are the weakest and most vulnerable."

4.2.1 *Automatic termination clauses: automatic termination of the fixed-term contract or dismissal?*

Section 186(1)(a) of the LRA provides that:

"Dismissal" means that –

(a) an employer has terminated employment with or without notice;

The LAC has previously held that:

[t]he key issue in the interpretation of the phrase 'an employer has terminated the contract with or without notice' is whether the employer has engaged in an act which brings the contract of employment to an end...⁸⁸

In this context, there are conflicting views on whether automatic termination clauses give rise to fixed-term contracts which automatically terminate on the termination of the commercial contract, with no dismissal thus taking place.

In the matter of *SA Post Office Ltd v Mampeule*⁸⁹ the LC had to consider whether the termination of the employee's employment contract had resulted in a dismissal for the purposes of section 186 of the LRA. The employee had been removed from the employer's board of directors, consequent to which the employer claimed the employee's contract of employment terminated automatically. The employer's argument was founded in a term in the employee's contract of employment which, when read in conjunction with the employer's articles of association, suggested that the employee's employment would terminate automatically should the employee be removed from the board of directors. The LC did not agree with the employer's claim that the employment contract terminated automatically.

The court held that since it was an act by the employer which resulted, whether directly or indirectly, in the termination of the employee's contract of employment, a dismissal for the purposes of section 186(1)(a) of the LRA had occurred. In the court's opinion it had been the removal by the employer of the employee from the board of directors which triggered, proximately or effectively, the termination of the employee's employment contract.

⁸⁸ *National Union of Leather Workers v Barnard* 2001 22 ILJ 2290 (LAC) paras 22-23.

⁸⁹ *SA Post Office Ltd v Mampeule* 2009 30 ILJ 664 (LC). The LAC in the matter of *SA Post Office Ltd v Mampeule* 2010 31 ILJ 2051 (LAC) upheld the LC's ruling that the employee had been dismissed by the employer.

In *Sindane v Prestige Cleaning Services*⁹⁰ the employee was employed on what was termed a fixed term eventuality contract. The employer, a provider of cleaning services, placed the employee as a cleaner at the premises of one of its clients. The employer and employee agreed that the employment contract would be on a fixed term basis and that it would automatically terminate upon the termination of, or a reduction in, the commercial contract between the employer and the client. After having been employed for just under five years, the employee's contract was terminated when the client downscaled its commercial contract with the employer. The LC had to determine whether a dismissal for the purposes of section 186(1)(b) of the LRA had occurred, or whether the employee's contract of employment had simply terminated automatically upon the client's downscaling of the commercial contract.

In referring to the LC's judgment in the *Mampeule* matter, the court considered the *proximate cause* test for dismissal. The court held that:

[i]n the first instance, if the fixed term employment contract is, for example, entered into for a period of six months with a contractual stipulation that the contract will automatically terminate on the expiry date, the fixed term employment contract will naturally terminate on such expiry date, and the termination thereof will not (necessarily) ... constitute a "dismissal", as the termination thereof has not been occasioned by an act of the employer. In other words, the proximate cause of the termination of employment is not an act by the employer.⁹¹

Contrary to the finding by the LC in *Mampeule*, the LC in *Sindane* ruled that the employer's conduct had not been the proximate cause for the termination of the employment contract and thus no dismissal had occurred.⁹²

Not long after the LC's ruling in *Sindane*, the LC yet again reached a different conclusion in the matter of *Mahlamu v Commission for Conciliation, Mediation and Arbitration*.⁹³ In *Mahlamu* the employee had been placed by the employer as a security officer at the premises of one of the employer's clients. The employee's contract with the employer stated that the contract would terminate automatically upon the termination of the commercial contract between the employer and the client, or where the client no longer required the services of the employee for whatsoever reason. Some five

⁹⁰ *Sindane v Prestige Cleaning Services* 2010 31 ILJ 733 (LC).

⁹¹ *Sindane v Prestige Cleaning Services* 2010 31 ILJ 733 (LC) para 16.

⁹² The court in *Sindane* was of the view that the LC's decision in *Mampeule* was distinguishable from the present matter for various reasons – see discussion at para 17.

⁹³ *Mahlamu v CCMA* 2011 32 ILJ 1122 (LC).

months into the employment contract the employer informed the employee that as a result of the client's cancellation of the commercial contract, the employee's services were no longer required. The employee was informed that in accordance with the terms of his contract, his contract had terminated automatically.⁹⁴

The court in *Mahlamu* confirmed that the LRA had to be purposively construed so as to give effect to the *Constitution*, and in this case, the right to fair labour practices as provided for in section 23(1). The right not to be unfairly dismissed formed an essential part of the right to fair labour practices⁹⁵ and accordingly the LRA had to be interpreted in favour of protecting employees against unfair dismissals.⁹⁶ The court held that parties to an employment contract could not contract out of the LRA's protection against unfair dismissal provided to employees.⁹⁷ Consequently, the court held that the employee had been dismissed by the employer. The court concluded that:

...a contractual device that renders a termination of a contract of employment to be something other than a dismissal, with the result that the employee is denied the right to challenge the fairness thereof in terms of section 188 of the LRA, is precisely the mischief that section 5 of the Act prohibits. Secondly, a contractual term to this effect does not fall within the exclusion in section 5(4), because contracting out of the right not to be unfairly dismissed is not permitted by the Act.⁹⁸

In the *SATAWU obo Dube v Fidelity Supercare Cleaning Services Group (Pty) Ltd* matter (the facts of which were similar to that of the *Sindane* case) the court in considering the question whether a dismissal had occurred held that:⁹⁹

[t]o the extent that this termination is triggered by the "occurrence of an event" and is not based on an employer's own decision, there is no dismissal and the employee is not entitled to a hearing...

⁹⁴ *Mahlamu v CCMA* 2011 32 ILJ 1122 (LC) para 12.

⁹⁵ *Mahlamu v CCMA* 2011 32 ILJ 1122 (LC) para 11.

⁹⁶ *Mahlamu v CCMA* 2011 32 ILJ 1122 (LC) para 12; also see *SA Post Office Ltd v Mampeule* 2010 31 ILJ 2051 (LAC) para 23, where the court held that "parties to an employment contract cannot contract out of the protection against unfair dismissal afforded to an employee whether through the device of 'automatic termination' provisions or otherwise because the Act had been promulgated not only to cater for an individual's interest but the public's interest".

⁹⁷ Also see the comments in this regard in *SA Post Office Ltd v Mampeule* 2009 30 ILJ 664 (LC) para 46.

⁹⁸ *Mahlamu v CCMA* 2011 32 ILJ 1122 (LC) para 22.

⁹⁹ *SATAWU Obo Dube v Fidelity Supercare Cleaning Services Group (Pty) Ltd* 2015 36 ILJ 1923 (LC) para 30.

In referring to the *proximate cause* test the court held that:¹⁰⁰

[t]his proximate cause theory, as I understand, holds that the act that directly or indirectly actuates termination, is the one determining whether or not there was a dismissal. An act by a third party, as for instance a decision by the Vice Principal of Wits, terminating a service level contract with the labour broker, cannot be a proximate cause, and therefore cannot result in a dismissal of the employee of the labour broker.

On the facts of the matter, the court concluded that a dismissal for the purposes of section 186(1)(a) of the LRA had occurred and that it had been based on the employer's operational requirements.¹⁰¹

In the more recent matter of *Enforce Security Group v Fikile*,¹⁰² the LAC was called upon to revisit the proximate cause test. The LAC, amongst other things, had to consider whether the termination of the employees' employment contracts with the employer subsequent to the termination of a commercial contract between the employer and a client had resulted in the employees' being dismissed for the purposes of the LRA.

The employer operated as a provider of private security services to various clients. To honour a commercial contract it had with one of its clients, the employer employed the employees with the express view of placing them as security officers at the premises of the client. The employment contracts contained a provision which stipulated that the nature of the employees' employment with the employer and the duration thereof would be totally dependent on the duration of the commercial contract with the client. The commercial contract was subsequently terminated by the client. As a result the employer offered the employees alternative employment, albeit at a different workplace. The employees were informed that if they did not accept such alternative employment their contracts of employment would automatically terminate. At arbitration the commissioner held that no dismissal had taken place, which award was thereafter overturned by the LC. The matter was subsequently referred to the LAC.

In determining whether a dismissal had occurred, the LAC held that, based on the facts of the matter, it was clear that the cancellation of the commercial contract by the client had been the proximate cause for the termination of the employees' contracts of employment. The court found no reason to

¹⁰⁰ *SATAWU Obo Dube v Fidelity Supercare Cleaning Services Group (Pty) Ltd* 2015 36 ILJ 1923 (LC) para 33.

¹⁰¹ For a more expansive discussion of the court's finding and reasons in the matter of *SATAWU Obo Dube v Fidelity Supercare Cleaning Services Group (Pty) Ltd* 2015 36 ILJ 1923 (LC), refer to para 4.2.2 below.

¹⁰² *Enforce Security Group v Fikile* 2017 38 ILJ 1041 (LAC).

believe that the cancellation of the commercial contract had been done with any intention to assist the employer in ridding itself of the employees. Nor could the LAC find any evidence that there had been a clandestine move on the part of the employer to dismiss the employees.¹⁰³ The LAC concluded that:¹⁰⁴

[i]t is Boardwalk that cancelled the contract and not the appellant. There was no direct or indirect act by the appellant to cancel the contracts.... On the facts of this case the cancellation of the service contract by Boardwalk is the proximate cause for the termination of the employees' contracts of employment.

The LAC therefore ruled that no dismissal for the purposes of the LRA had taken place.

From the discussion above it is clear that there still remains uncertainty as to whether the termination of an employment contract by virtue of an automatic termination clause gives rise to a dismissal, or whether it is simply an automatic termination of a fixed-term contract.

4.2.2 Lawfulness of automatic termination clauses linked to the termination of a commercial contract¹⁰⁵

The lawfulness or otherwise of automatic termination clauses has long been a contentious issue in SA labour law, and courts have taken different approaches to the issue. Questions around lawfulness arise in the context of section 5 of the LRA, specifically sections 5(2)(b) and 5(4). These sections, in short, provide that no person may prevent an employee from exercising any rights s/he has in terms of the LRA, nor may any contractual provision infringe upon the protection afforded to employees under the LRA. Parties can therefore not contract out of the legal obligations and rights provided by the LRA, including the unfair dismissal protection afforded to employees.

In *SATAWU Obo Dube v Fidelity Supercare Cleaning Services Group (Pty) Ltd*¹⁰⁶ the employer placed the employee at a client to render cleaning

¹⁰³ *Enforce Security Group v Fikile* 2017 38 ILJ 1041 (LAC) para 23.

¹⁰⁴ *Enforce Security Group v Fikile* 2017 38 ILJ 1041 (LAC) para 23.

¹⁰⁵ The discussion under para 4.3 does not address situations which fall within the scope of s 198A of the LRA (most notably the employment of employees earning in excess of the prevailing earnings threshold, and the placement of employees at a client for a period shorter than 3 months). The content and scope of s 198A falls beyond the scope of this paper.

¹⁰⁶ *SATAWU Obo Dube v Fidelity Supercare Cleaning Services Group (Pty) Ltd* 2015 36 ILJ 1923 (LC).

services. The employment contract between the parties stated that the employee's employment would terminate automatically on termination of the commercial contract between the employer and the client. Subsequent to the termination of the commercial contract by the client, the employer informed the employee that her employment contract had automatically terminated. The employee argued that she had been unfairly dismissed since the employer failed to engage in retrenchment proceedings in terms of section 189 of the LRA.¹⁰⁷ The employer argued that no dismissal had taken place and that section 189 had therefore not been applicable, as the employee's contract terminated automatically as per the automatic termination clause agreed upon.

In addressing the question of the lawfulness of automatic termination clauses, the LC held that such clauses trumped both section 5 of the LRA and the fundamental rights of employees as embedded in section 185 of the LRA.¹⁰⁸ The court agreed with the LC's finding in the matter of *Nape v INTCS Corporate Solutions (Pty) Ltd*¹⁰⁹ that such automatic termination clauses were against public policy.¹¹⁰ The court furthermore confirmed that practices of contracting, or attempting to do so, out of the obligations of the LRA are now addressed through section 198(4C) of the LRA, which holds that:¹¹¹

An employee may not be employed by a temporary employment service on terms and conditions of employment which are not permitted by this Act, any employment law, sectoral determination or collective agreement concluded in a bargaining council applicable to a client to whom the employee renders services.

In the court's view automatic termination clauses which provided for the automatic termination of an employee's contract at the behest of an outside third party, such as a client of the employer, undermined an employee's right

¹⁰⁷ In terms of s 189 of the LRA an employer is required to consult with employees on certain issues (listed in s 198(2) and (3)) when the employer contemplates dismissals for operational requirements, i.e. retrenchment(s).

¹⁰⁸ *SATAWU Obo Dube v Fidelity Supercare Cleaning Services Group (Pty) Ltd* 2015 36 ILJ 1923 (LC) paras 49 and 51. Section 185 of the LRA provides that "[e]very employee has the right not to be – (a) unfairly dismissed; and (b) subjected to unfair labour practice".

¹⁰⁹ *Nape v INTCS Corporate Solutions (Pty) Ltd* 2010 31 ILJ 2120 (LC).

¹¹⁰ See the discussion of *Nape* in *SATAWU Obo Dube v Fidelity Supercare Cleaning Services Group (Pty) Ltd* 2015 36 ILJ 1923 (LC) paras 53-55. Cohen is of the view that the willingness of the court in *Nape* to move beyond its legislative mandate by implying that public policy considerations existed in a contract was to be applauded – see Cohen 2013 ELRC Labour Bulletin 4-5.

¹¹¹ *SATAWU Obo Dube v Fidelity Supercare Cleaning Services Group (Pty) Ltd* 2015 36 ILJ 1923 (LC) para 59.

to fair labour practices and were disallowed by labour market policies.¹¹² Having declared that the automatic termination clause in the employee's employment contract was unfair and invalid,¹¹³ the court concluded that a dismissal based on the employer's operational requirements had taken place.¹¹⁴ The court found the dismissal to have been procedurally fair, however, as the employer had discussed possible alternatives for employment with the employee, which alternatives the employee had rejected.¹¹⁵ Whilst not specifically saying so, it seems from the court's ruling that the dismissal was also found to have been substantively fair. In the court's opinion the employer had truly attempted to find alternative employment for the employee, which alternatives the employee had chosen not to accept.¹¹⁶

Unfortunately, the LC in *Fidelity Supercare* did not indicate whether its finding on the unlawfulness of automatic termination clauses was applicable across the board to all such clauses, or whether such clauses had to be considered on a case-by-case basis, as was held in the *Enforce Security*¹¹⁷ case discussed next.

In the more recent matter of *Enforce Security Group v Fikile*¹¹⁸ the LAC was again tasked with considering the lawfulness of automatic termination clauses linked to the existence of a commercial contract. The employer, a private security services provider, entered into a commercial contract with a client, Boardwalk, to supply on-site security officers to the latter. The employment contracts with the employees specifically linked the continuance of the employment contracts with the continuance of the commercial contract between the employer and Boardwalk.

In response to Boardwalk's having terminated the commercial contract with the employer, the employer issued the employees with a month's notice of termination of their employment contracts. The CCMA took the view that the employment contracts had simply terminated automatically by operation of

¹¹² *SATAWU Obo Dube v Fidelity Supercare Cleaning Services Group (Pty) Ltd* 2015 36 ILJ 1923 (LC) para 51.

¹¹³ See the discussion of *Enforce Security Group v Fikile* 2017 38 ILJ 1041 (LAC) case below, however, where the court reached a different conclusion.

¹¹⁴ A similar conclusion was subsequently reached by the LC in the matter of *AMCU v Piet Wes Civils CC* 2017 38 ILJ 1128 (LC).

¹¹⁵ *SATAWU Obo Dube v Fidelity Supercare Cleaning Services Group (Pty) Ltd* 2015 36 ILJ 1923 (LC) para 60.

¹¹⁶ *SATAWU Obo Dube v Fidelity Supercare Cleaning Services Group (Pty) Ltd* 2015 36 ILJ 1923 (LC) paras 63-64.

¹¹⁷ *Enforce Security Group v Fikile* 2017 38 ILJ 1041 (LAC)

¹¹⁸ *Enforce Security Group v Fikile* 2017 38 ILJ 1041 (LAC).

law and that no dismissal had occurred. On review the LC overturned the CCMA's ruling and held that the employees had been dismissed, and that the dismissals had been both procedurally and substantively unfair.

Before the LAC the employer argued that the termination of the employees' contracts of employment did not constitute a dismissal for the purposes of the LRA. The employer argued that the proximate cause for the termination of the employment contracts had not been consequent upon any conduct on the part of the employer. The employer argued that it had been the client's actions in terminating the commercial contract which had resulted in the termination of the employees' employment contracts.

In explaining the general effect of automatic termination clauses on the employment contract the LAC held that:¹¹⁹

the nature of the Employee's employment with the company and its duration is totally dependent upon the duration of the Company's contract with the Client/s and that the Employee's contract of employment shall automatically terminate. Such termination shall not be construed as a retrenchment but a completion of contract...

On the issue of the lawfulness of automatic termination clauses, the LAC held that not all such clauses could automatically be regarded as invalid. The lawfulness of such clauses had to be considered on a case-by-case basis.¹²⁰ What would be decisive in deciding upon the issue of lawfulness was whether, in the circumstances of a particular case, the clause was intended to circumvent the fair dismissal obligations imposed on employers in terms of the LRA and the *Constitution*.¹²¹ The court held that the enquiry into the lawfulness of automatic termination clauses included:¹²²

the precise wording of the automatic termination clause and the context of the entire agreement; the relationship between the fixed-term event and the purpose of the contract with the client; whether it is left to the client to choose and pick who is to render the services under the service agreement; whether the clause is used to unfairly target a particular employee by either the client or the employer; whether the event is based on proper economic and

¹¹⁹ Clause 3.2.1 of the employees' contracts of employment, as quoted by the court in *Enforce Security Group v Fikile* 2017 38 ILJ 1041 (LAC) para 4.

¹²⁰ *Enforce Security Group v Fikile* 2017 38 ILJ 1041 (LAC) para 41.

¹²¹ *Enforce Security Group v Fikile* 2017 38 ILJ 1041 (LAC) para 41.

¹²² *Enforce Security Group v Fikile* 2017 38 ILJ 1041 (LAC) para 41; also see *SA Post Office Ltd v Mampeule* 2010 31 ILJ 2051 (LAC) para 12, where the court remarked that "[t]he subsection defines 'dismissal' as follows: '...an employer has terminated a contract of employment with or without notice...' I am in agreement with the court *a quo* that 'dismissal' means any act by an employer which results, directly or indirectly, in the termination of an employment contract..."

commercial considerations; the list is not exhaustive. Each case must be decided on its circumstances.

Having considered the facts of the matter, the court held that the automatic termination clauses in the present matter were lawful and that the parties had consequently entered into fixed-term employment contracts. When Boardwalk terminated the commercial contract with the employer, the fixed-term contracts of the employees terminated automatically, and accordingly no dismissals had occurred. The court could find no evidence to suggest that the cancellation by Boardwalk of the commercial contract was a device to aid the employer to rid itself of any employees. Nor was there evidence to suggest that the implementation of the automatic termination clauses was a clandestine move by the employer to dismiss the employees.¹²³

The difference in the approaches adopted by the courts in *Fidelity Supercare* and *Enforce Security* are worth noting for various reasons. First, the LAC in *Enforce Security* was seemingly alive to the current labour market reality and the associated increased need for flexibility in work arrangements.¹²⁴ This must be compared to the finding in *Fidelity Supercare*, where the LC seems to have been mostly persuaded by arguments around the abuse suffered by labour broking employees at the hands of labour brokers. The court declared that labour brokers could no longer hide behind the shield of commercial contracts in attempts to circumvent the legislative protection available to employees against unfair dismissals.¹²⁵

Secondly, the court in *Fidelity Supercare* did not clearly indicate whether its finding on the unlawfulness of the automatic termination clause in that matter was applicable to all automatic termination clauses in general, or whether the lawfulness of such clauses should be considered on a case-by-case basis. In *Enforce Security* the LAC held that such clauses did not automatically fall foul of lawfulness and that the lawfulness or otherwise of such clauses would have to be answered in the light of the specific circumstances of each case. From the LAC's finding in *Enforce Security* it might therefore be deduced that an event which gives rise to the termination of a fixed-term contract as provided for in section 198B(1)(a) of the LRA could include the termination of a commercial contract by a client of the employer, provided that the automatic termination clause linked to that

¹²³ *Enforce Security Group v Fikile* 2017 38 ILJ 1041 (LAC) para 23.

¹²⁴ This, again, is of particular importance as far as the 4IR is concerned – see the discussion under fn 7 above.

¹²⁵ *SATAWU Obo Dube v Fidelity Supercare Cleaning Services Group (Pty) Ltd* 2015 36 ILJ 1923 (LC) para 59.

commercial contract is regarded as lawful, as described by the LAC in *Enforce Security*.

Finally, the employee's reliance in *Fidelity Supercare* on the applicability of section 189 of the LRA is interesting and worth noting. Including an automatic termination clause in an employment contract, which renders the continuation of the employment contract dependent on the existence of a commercial contract, is one means through which employers can protect the business where the economic circumstances of the business change. An example would be where the cancellation of a commercial contract with a client results in a reduction of income for the employer. Where the affected employees' services are not required at another client, the employer will receive no financial benefit in keeping the redundant employees on its payroll. On termination of the commercial contract with the client, the employer can simply rid itself of the excess employees through relying on the automatic termination of their employment contracts, without having to implement any dismissal proceedings.

The above approach is in stark contrast with the rather stringent requirements to retrench as provided for in section 189 of the LRA. Under section 189 employers are obliged to embark on consultations with employees where the employer "contemplates dismissing one or more employees for reasons based on the employer's operational requirements...". Operational requirements are defined in terms of the LRA as requirements based on the employer's economic, technological, structural or similar needs.¹²⁶ Economic reasons typically include the need to downscale the workforce in the light of dwindling client contracts/projects and resultant reduction in business income.

When considering the true reason for no longer requiring the services of employees in the examples provided above, that is economic reasons related to a decline in business, it becomes difficult to justify the adoption of different approaches by the employers in an attempt to reach essentially the same outcome. Both instances of termination of the employment contract are linked to the employer's operational requirements. Generally such termination is required to be effected through a section 189 retrenchment process. Yet where an automatic termination clause is present in the employment contract, in line with the judgment in *Enforce Security*, the employer would simply be able to argue that the contract was a fixed-term

¹²⁶ Section 213 of the LRA.

contract which terminated automatically without the employer's having to embark on a section 189 process.

The above analogy, and it would seem superficial distinction, raises several questions. Could employment contracts simply contain automatic termination clauses which stipulate that the contract will automatically terminate on a reduction in business for the employer? How broadly can such a reduction in business be defined? Would this not be at odds with the unfair dismissal protection currently provided to employees through section 189 of the LRA? Would this essentially mean that employers would be able to circumvent the provisions of section 189 (a practice which is exactly what the court in *Nape* and *Fidelity Supercare* sought to denounce)? While the answer to the latter questions was answered in the negative in the matter of *Fidelity Supercare*, it does seem as if the door to such an approach might have been opened through the more recent finding in *Enforce Security*.

4.3 Misuse of fixed-term contracts for probation purposes

A probation period is an agreed fixed period between an employer and an employee during which the employer has the opportunity to determine a newly appointed employee's ability to perform as expected. Employers benefit from such periods in that they are effectively protected against "being saddled indefinitely with employees who fail to perform satisfactorily..."¹²⁷ On the successful completion of a probationary period the employer will confirm the employee's appointment.¹²⁸ If an employer is not satisfied with an employee's performance during the probation period, however, the employer has the option of dismissing the employee for poor performance on expiry of the probation period. Such a dismissal for poor performance must, however, still satisfy both substantive and procedural fairness elements in order to be declared fair.¹²⁹

Some employers subject newly appointed employees to probation periods by means of fixed-term contracts of employment. In such instances, new employees are appointed for a fixed period of three months, for instance.

¹²⁷ Van Niekerk *et al* *Law@work* 208.

¹²⁸ Van Niekerk *et al* *Law@work* 208.

¹²⁹ Clause 8(1)(f) of Schedule 8 to the LRA, *Code of Good Practice: Dismissal* holds that "(f) [i]f the employer determines that the employee's performance is below standard, the employer should advise the employee of any aspects in which the employer considers the employee to be failing to meet the required performance standards. If the employer believes that the employee is incompetent, the employer should advise the employee of the respects in which the employee is not competent. The employer may either extend the probationary period or dismiss the employee after complying with subitems (g) or (h), as the case may be".

On expiration of the so-called fixed-term contract, employers simply do not renew the contracts of employees with whom the employer experienced performance issues. This practice circumvents the protection against unfair dismissal provided by the LRA and an employee's right to respond to issues before being dismissed. Employees are often not provided with reasons as to why their fixed-term contracts were not renewed or made permanent. While employers have obligations towards employees under a period of probation,¹³⁰ the fulfilling or otherwise of such obligations will become relevant only where a dismissal pursuant to a probationary period occurred. Should the employee have been appointed on a fixed term contract, however, steps taken by the employer during a period of factual probation would remain irrelevant. In the latter scenario, the employee would first have to prove that the fixed-term contract had essentially been a sham in that the employee had in practice served a probation period and that a dismissal under section 186(1)(a) of the LRA had thus occurred. It is only once the employee is successful in showing the existence of a dismissal that the employer's conduct during the factual probation period comes into question.

In *Abrahams v Rapitrade (Pty) Ltd*¹³¹ the CCMA confirmed that employers could not use fixed-term contracts to avoid their legal obligations during probation periods. In *GUBEVU Security Group (Pty) Ltd v Ruggiero*¹³² the respondent employee had been employed for a three-month fixed period. On the expiry of the three-month period the employer had not renewed the employee's contract. Whilst the issue was not explicitly argued by any of the parties, the LC on its own accord commented that the three-month period had, on the facts of the matter, in practice been a period of probation. The court unfortunately did not further canvass the issue over the lawfulness of using a fixed-term contract for the purposes of probation. The court concluded that the employee had successfully shown the existence of a reasonable expectation of renewal of the contract and that a dismissal had therefore occurred.

While the outcome for the employee of the LC's ruling in *GUBEVU* is welcomed, it is unfortunate that the court did not further canvass the consequences of the employer's misuse of a fixed-term contract under the circumstances. The court had an ideal opportunity to clarify the true nature of the agreement between the parties - that is, a probationary period as part

¹³⁰ Refer to clause 8(1) of Schedule 8 to the LRA, *Code of Good Practice: Dismissal*, which contains the employer's obligations to employees on probation.

¹³¹ *Abrahams v Rapitrade (Pty) Ltd* 2007 6 BALR 501 (CCMA).

¹³² *GUBEVU Security Group (Pty) Ltd v Ruggiero* 2012 4 BLLR 354 (LC).

of an indefinite employment contract, and the consequences for the employer of the unlawful use of a fixed-term contract in its stead.

5 Conclusion

Through the introduction of section 198B into the LRA, and particularly the amendment to section 186(1)(b), fixed-term employees are now provided with increased job security and better employment conditions. What the practical impact of section 198B will be on the employment conditions of those employed in terms of fixed-term contracts remains to be seen.

As highlighted in this article, some shortcomings and uncertainties around the use of fixed-term contracts of employment still remain in the current legislative framework. Most notable are the questions raised earlier pertaining to the lawfulness or otherwise of automatic termination clauses, in which the termination of employment contracts is linked to the termination of a commercial contract between the employer and a third party.¹³³ As indicated in 4.2.2 above, in the recent matter of *Enforce Security* the LAC held that the presence of an automatic termination clause gave rise to the existence of a fixed-term contract of employment.¹³⁴ While the exact date of the termination of the employment contract is undetermined, what is certain is that the contract will terminate automatically where the commercial contract between the employer and the client comes to an end. The LAC's finding is open to questioning, however, particularly around the impact the finding might have on the applicability of section 189 of the LRA. It is unfortunate that the legislature did not seize the opportunity during the 2014 amendments to the LRA to address the lawfulness of such automatic termination clauses.¹³⁵

Another shortcoming is the relative ease with which employers would be able to justify the use of a fixed-term contract in excess of three months in terms of section 198B(3) and (4).¹³⁶ Theoretically the inclusion of a provision forcing employers to justify their decisions to use fixed-term contracts is to

¹³³ See the discussion under para 4.2.2 above.

¹³⁴ See *Enforce Security Group v Fikile* 2017 38 ILJ 1041 (LAC) para 23, where the LAC unequivocally stated that "[t]he factual matrix in this case supports the view that the employees' contracts of employment were fixed term contracts where the end of the fixed term was defined by the completion of a specified task or project, that is, the termination of the Boardwalk contract."

¹³⁵ See the discussion under paras 4.2 and 4.3 above.

¹³⁶ See the discussion under para 3.2.2.1 above.

be applauded, but the manner in which the legislature attempted to do so in section 198B remains somewhat unconvincing.

A successful claim of dismissal under section 186(1)(b) requires the employee to prove both subjective and objective elements. Given the relative difficulties for employees in claiming a dismissal based on the reasonable expectation of the renewal of a contract or being given a permanent appointment as provided for under section 186(1)(b), a provision which required employers to provide reasons for the non-renewal of the contract would also have been welcomed.

It will be interesting to see the courts' approaches to the implementation of the amended section 186(1)(b) and newly introduced section 198B and to what degree the courts will be willing to extend the protection available to fixed-term employees. While not the comprehensive protection of the rights of fixed-term employees one could have hoped for, it is somewhat reassuring to see the legislature's willingness at least to provide increased protection for those traditionally engaged in vulnerable work arrangements.

Bibliography

Literature

Benjamin 2010 *ILJ*

Benjamin P "Decent Work and Non-standard Employees: Options for Legislative Reform in South Africa: A Discussion Document" 2010 *ILJ* 845-871

Cheadle 2006 *ILJ*

Cheadle H "Regulated Flexibility: Revisiting the LRA and the BCEA" 2006 *ILJ* 663-702

Cheadle and Davis *South African Constitutional Law*

Cheadle H and Davis D *South African Constitutional Law: The Bill of Rights* (LexisNexis Durban 2005)

Cohen 2007 *SA Merc LJ*

Cohen T "When Common Law and Labour Law Collide – Some Problems Arising out of the Termination of Fixed-term Contracts" 2007 *SA Merc LJ* 26-43

Cohen 2012 *Acta Juridica*

Cohen T "The Relational Contract of Employment" 2012 *Acta Juridica* 84-101

Cohen 2013 *ELRC Labour Bulletin*

Cohen T "The Legality of the Automatic Termination of Contracts of Employment" 2013 *ELRC Labour Bulletin* 1-10

Collier *et al Labour Law in South Africa*

Collier D *et al* (eds) *Labour Law in South Africa: Context and Principles* (Oxford University Press Cape Town 2018)

Geldenhuys 2008 *SA Merc LJ*

Geldenhuys J "Reasonable Expectations: Real Protection or False Security for Fixed-term Employees?" 2008 *SA Merc LJ* 268-279

Gericke 2011 *PELJ*

Gericke SB "A New Look at the Old Problem of a Reasonable Expectation: The Reasonableness of Repeated Renewals of Fixed Term Contracts as Opposed to Indefinite Employment" 2011 *PELJ* 105-136

Le Roux *World of Work*

Le Roux R *The World of Work: Forms of Engagement in South Africa* (Institute of Development and Labour Law, University of Cape Town Rondebosch 2009)

Ramotsho 2018 *De Rebus*

Ramotsho K "The Fourth Industrial Revolution Changing the World of Work" October 2018 *De Rebus* 12-14

Van der Bank 2008 *IJLMA*

Van der Bank CM "Non-renewal of Fixed-term Contracts: Critical Analysis of Award" 2008 *IJLMA* 158-167

Van Niekerk *et al Law@work*

Van Niekerk A *et al* (eds) *Law@work* 4th ed (LexisNexis Durban 2018)

Vettori 2008 *Stell LR*

Vettori S "Fixed Term Employment Contracts: The Permanence of the Temporary" 2008 *Stell LR* 189-208

Case law

Abrahams v Rapitrade (Pty) Ltd 2007 6 BALR 501 (CCMA)

Administrator of the Transvaal v Traub 1989 10 ILJ 823 (A)

Air Traffic and Navigation Services Company v Esterhuizen (SCA) (unreported) case number 668/2013 of 25 September 2014

AMCU v Piet Wes Civils CC 2017 38 ILJ 1128 (LC)

Auf der Heyde v University of Cape Town 2000 8 BLLR 877 (LC)

Buthelezi v Municipal Demarcation Board 2005 2 BLLR 115 (LAC)

Cash Paymaster Services (Pty) Ltd v Christie (LC) (unreported) case number C550/2013 of 19 August 2014

De Milander v Member of the Executive Council for the Department of Finance: Eastern Cape 2013 34 ILJ 1427 (LAC)

Dierks v University of South Africa 1999 20 ILJ 1227 (LC)

Ekurhuleni West College v Education Labour Relations Council (LAC) (unreported) case number JA55/2016 of 30 November 2017

Enforce Security Group v Fikile 2017 38 ILJ 1041 (LAC)

Fedlife Assurance Ltd v Wolfaardt 2002 2 All SA 295 (A)

GUBEVU Security Group (Pty) Ltd v Ruggiero 2012 4 BLLR 354 (LC)

Joseph v University of Limpopo 2011 32 ILJ 2085 (LAC)

Mahlamu v CCMA 2011 32 ILJ 1122 (LC)

McInnes v Technikon Natal 2000 21 ILJ 1138 (LC)

Mediterranean Woollen Mills (Pty) Ltd v SACTWU 1998 19 ILJ 731 (LAC)

Nape v INTCS Corporate Solutions (Pty) Ltd 2010 31 ILJ 2120 (LC)

National Union of Leather Workers v Barnard 2001 22 ILJ 2290 (LAC)

SA Rugby (Pty) Ltd v Commission of Conciliation Mediation and Arbitration 2006 27 ILJ 1041 (LC)

SA Rugby Players Association v SA Rugby (Pty) Ltd 2008 29 ILJ 2218 (LAC)

SA Post Office Ltd v Mampeule 2009 30 ILJ 664 (LC)

SA Post Office Ltd v Mampeule 2010 31 ILJ 2051 (LAC)

SATAWU Obo Dube v Fidelity Supercare Cleaning Services Group (Pty) Ltd 2015 36 ILJ 1923 (LC)

Sindane v Prestige Cleaning Services 2010 31 ILJ 733 (LC)

University of Pretoria v CCMA 2012 25 ILJ 183 (LAC)

Yebe v University of KZN 2007 28 ILJ 490 (CCMA)

Legislation

Basic Conditions of Employment Act 75 of 1997

Basic Conditions of Employment Amendment Act 20 of 2013

Code of Good Practice on Equal Pay / Remuneration for Work of Equal Value, 2015

Constitution of the Republic of South Africa, 1996

Employment Equity Act 55 of 1998

Employment Equity Amendment Act 47 of 2013

Labour Relations Act 66 of 1995

Labour Relations Amendment Act 6 of 2014

Labour Relations Amendment Bill 16D of 2012

Memorandum of Objects: Labour Relations Amendment Bill, 2012

Government publications

GN 629 in GG 37921 of 18 August 2014

Internet sources

DOL date unknown <http://www.labour.gov.za/DOL/downloads/legislation/bills/proposed-amendment-bills/memoofobjectsira.pdf>

Department of Labour date unknown *Memorandum of Objects: Labour Relations Amendment Bill, 2012* <http://www.labour.gov.za/DOL/downloads/legislation/bills/proposed-amendment-bills/memoofobjectsira.pdf> accessed 20 March 2019

ELRC date unknown <http://www.elrc.org.za/news/summary-labour-relations-amendment-act-6-2014>

Education Labour Relations Council date unknown *Summary of the Labour Relations Amendment Act 6 of 2014* <http://www.elrc.org.za/news/summary-labour-relations-amendment-act-6-2014> accessed 27 February 2018

ILO 2015 https://www.ilo.org/wcmsp5/groups/public/---ed_protect/---protrav/---travail/documents/publication/wcms_436125.pdf

International Labour Office 2015 *Collective Bargaining and Non-standard Forms of Employment: Practices that Reduce Vulnerability and Ensure Work is Decent* https://www.ilo.org/wcmsp5/groups/public/---ed_protect/---protrav/---travail/documents/publication/wcms_436125.pdf accessed 21 April 2019

Labour Law 4.0 date unknown <http://labourlaw4-0.uwc.ac.za/>

Labour Law 4.0 date unknown *Labour Law 4.0: Labour Law in the Fourth Industrial Revolution* <http://labourlaw4-0.uwc.ac.za/> accessed 20 March 2019

Wikipedia date unknown https://en.wikipedia.org/wiki/Fourth_Industrial_Revolution

Wikipedia date unknown *Fourth Industrial Revolution* https://en.wikipedia.org/wiki/Fourth_Industrial_Revolution accessed 20 February 2019

List of Abbreviations

4IR	Fourth Industrial Revolution
BCEA	Basic Conditions of Employment Act
CCMA	Commission for Conciliation Mediation and Arbitration
DOL	Department of Labour
EEA	Employment Equity Act

ELRC	Education Labour Relations Council
IJLMA	International Journal of Law and Management
ILJ	Industrial Law Journal
ILO	International Labour Office
LAC	Labour Appeal Court
LC	Labour Court
LRA	Labour Relations Act
LRAA	Labour Relations Amendment Act
PELJ	Potchefstroom Electronic Law Journal
SA Merc LJ	South African Mercantile Law Journal
Stell LR	Stellenbosch Law Review