

A critical analysis of the rights of employees in fixed-term contracts: The right to reasonable expectation

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Declaration of authenticity

I declare that the mini-dissertation titled "A critical analysis of the rights of employees on fixed-term contracts: The right to reasonable expectation", is my own work and that all the sources I have used or quoted, have been indicated and acknowledged by means of complete references.

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ABSTRACT

The aim of the study was to critically analyse developments and strides made in effecting protection to employees on fixed-term contracts. There has been an increase in the use of non-standard employment relationships, more particularly fixed-term contracts. Although there is an honest need for fixed-term contracts in relation to employers' operational needs in certain circumstances, however, utilisation of these type of contracts has resulted in abuse by unscrupulous employers to the detriment of employees.

Factors, such as a highly competitive global market, has resulted in unscrupulous employers opting for a more flexible employment relationship in an effort to avoid obligations of labour legislation to the disadvantage of employees on fixed-term contracts, such as claims for dismissal and employment security. The Labour Relations Act of 1995, together with the subsequent amendments, was then enacted to provide a solution to this problem and provides that a dismissal includes the non-renewal of a fixed-term contract, either on the same or similar terms, or indefinitely, where the employee had a reasonable expectation of renewal. The legislation does not provide a definition of what constitutes a reasonable expectation thus, creating legal uncertainty with regard to this issue.

It is without doubt, that there is currently more protection afforded to employees on fixed-term contracts, especially with the inclusion of the Labour Relations Amendment Act of 2014; however, such protection does not come without consequences. Thus, the consequences of the regulation were examined in this study in order to understand whether or not the purpose of the regulation has been achieved thus far. Recommendations have been made for a more flexible approach towards regulation, taking into consideration, the purpose for the enactment of such employment relationship as same should not be equated with permanent employment and associated rights. A critical analysis of the rights of employees on fixed-term contracts was done by outlining the historical development and regulation thereof.

Key words: Fixed-term contracts; abuse; unscrupulous employer; reasonable expectation; employment security

Table of contents

ACKNOWLEDGEMENT.....	i
ABSTRACT.....	ii
TABLE OF CONTENTS.....	iii
LIST OF ABBREVIATIONS AND ACRONYMS	vi
Chapter 1: Introduction.....	1
1. Title.....	1
2 Research question.....	1
3 Research problem.....	1
4 Background of the study.....	3
5 Justification of the study.....	5
6 Research method.....	7
6.1 Qualitative research method.....	7
6.2 Literature review.....	7
7 Outline of the study.....	9
8 Relevance of the study to the Research Unit.....	10
8.1 Vulnerable societies.....	10
9 Ethical considerations.....	12

Chapter 2: Historical development of fixed-term contracts	13
Introduction.....	13
2. Development of fixed-term contracts: Pre- LRA.....	14
2.1 Defining a fixed-term employment contract.....	14
2.2 Common law position.....	15
2.2.1 Termination of a fixed-term contract.....	16
2.2.2 The right to reasonable expectation under common law.....	17
2.3 The International Labour Organisation.....	18
2.4 The right to fair labour practice.....	20
Concluding remarks.....	21
Chapter 3: Significance of fixed-term contracts	23
3. Introduction.....	23
3.1 The changing nature of work.....	24
3.2 Importance of fixed-term contracts.....	25
3.3 Employment flexibility.....	26
3.3.1 Defining employment flexibility.....	26
3.3.2 The need for employment flexibility.....	27
3.4 The exploitative nature of fixed-term contracts.....	29
3.5 Employment security.....	30

Concluding remarks.....	32
Chapter 4: Regulating fixed-term contracts.....	35
Introduction.....	35
4. Dismissal.....	36
4.1 International standards.....	36
4.2 The Labour Relations Act 66 of 1995.....	36
4.3 Dismissal under the Labour Relations Act 66 of 1995.....	37
4.4 Limitations of the LRA.....	38
4.5 The Labour Relations Amendment Act 6 of 2014.....	40
4.5.1 Defining fixed-term contracts under the LRAA.....	41
4.5.2 Dismissal of a fixed-term contract employee under the LRAA.....	41
4.5.3 Duration of fixed-term contracts.....	42
4.5.4 Treatment of fixed-term contracts.....	42
Concluding remarks.....	44
Chapter 5: Reasonable expectation.....	46
Introduction.....	46
5. Understanding “reasonable expectation”.....	46
5.1 Reasonable expectation: Case law perspective.....	48
5.1.1 Contract clauses expressly excluding reasonable expectation.....	49

5.1.2 Assurance of renewal.....51

5.1.3 Reasons to conclude a fixed-term contract.....51

5.1.4 Conditions for renewal have been met.....52

5.1.5 The rolling over of fixed-term contracts.....53

Concluding remarks.....53

Chapter 6: Conclusion and recommendations.....55

6.1 Conclusion.....55

6.2 Recommendations.....57

LIST OF ABBREVIATIONS AND ACRONYMS

BCEA	Basic Conditions of Employment Act
ILO	International Labour Organisation
LC	Labour Court
LRA	Labour Relations Act
LRAA	Labour Relations Amendment Act
PELJ	Potchefstroom Electronic Law Journal

CHAPTER 1: INTRODUCTION

1. Title

A critical analysis of the rights of employees on fixed-term contracts: The right to reasonable expectation

2. Research question

The research question asked in this study was:

- What constitutes the right to reasonable expectation with regard to fixed-term contracts?

3. Research problem

Under common law, employees on fixed-term contracts were not protected against dismissal. Thus, such employees could not claim that failure to renew the contract or renewing it on less favourable terms constituted unfair and actionable conduct.¹ The employer could argue that there was no dismissal based on the fact that the employment had terminated automatically. This presented problems in practice as it prejudiced employees on fixed-term contracts.

Section 23(1) of the Constitution of the Republic of South Africa, 1996 (hereafter the *CONSTITUTION*), provides that everyone has the right to fair labour practices,² a right that must also be enjoyed by employees on fixed-term contracts. The rights of employees are largely legislative in nature, with the introduction of legislation such as the Labour Relations Act 66 of 1995 (hereafter the *LRA*), enacted to regulate the right, as entrenched in Section 23(1) of the *CONSTITUTION*.

Section 186(1) (b) of the *LRA* provides that the expiry of a fixed-term employment contract can constitute dismissal. This is the case when an employee, employed in terms

¹ Huysamen E 2019 PELJ 5.

² The *Constitution*.

of a fixed-term employment contract, 'reasonably expects' the employer to renew the fixed-term contract on the same terms and the employer, in turn, fails to renew it on the same terms or to retain the employee to that particular position on an indefinite basis.³

The most important aspect that has to be considered in terms of Section 186(1) (b) of the *LRA*, is whether the expectation of renewal is 'reasonable'. Reliance on this particular provision by employees on fixed-term contracts, presented a lot of problems as the impression created by the legislature was that continuous extension of fixed-term contracts on its own would, in certain instances, justify a reasonable expectation as far as the employee is concerned, that the fixed-term contract would be extended on similar terms or indefinitely even in future. It is not clear, however, what constitutes "reasonable expectation" as this is not addressed by the legislature.⁴

The continuous extension of fixed-term contracts on its own, in certain circumstances, justifies a reasonable expectation as far as the employee is concerned. Regard was, however, not given to the operational need for the extension of fixed-term contracts in circumstances that were necessary for the workplace.

Section 198B of *the LRA* was then introduced for this specific purpose and applies only to employees on fixed-term contracts below the threshold as determined by Section 35 of BCEA. The Section states that a fixed-term contract must be in writing and may be longer than three months, taking into consideration the following: replacing an employee who is temporarily absent from work; employed due to the temporary volume of work experienced by the employer; a student for the purposes of being trained; and employed for a specific project or seasonal work.

The legislature had good intentions when enacting the amendments, as they not only wished to address the abuse that came with such contracts, but also considered the operational needs of the employer's business in the provision of the need for fixed-term contracts, which will run for longer than three months. However, a proper explanation

³ Section 186 (1) (b) the *LRA*.

⁴ Gericke 2015 PELJ 1.

was not provided with regard to what constitutes a reasonable expectation, as it was not outlined in the amendments. There is a need for the legislature to lay down requirements as to what constitutes a reasonable expectation.

They then left it to the courts to interpret and provide guidelines as to what constitutes a reasonable expectation and such interpretation can, sometimes, lead to legal uncertainty. It would be prudent for proper guidelines to be provided by legislation in order to highlight instances which constitute the right to reasonable expectation in a fixed-term contract. In *Joseph v University of Limpopo*⁵, the court provided different guidelines that can be considered as follows: written terms of the contract; practice of past renewals; reasons for having entered into a fixed term contract; and any assurances given by the employer to the employee that the contract would be renewed. The court also emphasised that this is not a closed list and other factors could also be decisive.⁶

In *SA Rugby v CCMA*⁷, the court stated that in considering the right to reasonable expectation, a two stage approach must be followed, which has both subjective and objective elements. The subjective element refers to whether or not the employee expected the contract to be renewed on the one hand, while the objective element on the other, refers to whether or not the expectation was reasonable. The expectation must be created by the employer through his or her conduct.⁸

The courts and other dispute resolution forums have traditionally applied the principles of fairness in ascertaining whether a reasonable expectation existed in a fixed-term contract. The notions of fairness and reasonableness are notoriously wide and open to interpretation.⁹ The courts do not use a closed list and whichever factor that the courts deem fit and necessary, will then be used to prove reasonableness. This then causes a problem as certain factors may be misinterpreted by the courts. Many undesirable

⁵ *Joseph v University of Limpopo* 2011 32 ILJ 2085 (LAC) at para 35. (hereafter The *Joseph* case).

⁶ The *Joseph* case at para 35.

⁷ *SA Rugby v CCMA* 2006 27 ILJ 1041 (LC) at paras 9-11 (hereafter The *SA Rugby* case).

⁸ The *SA Rugby* case at paras 9-11.

⁹ Gericke 2015 PELJ 106.

precedents have been set by different courts in the past, resulting in legal uncertainties. A closed list is necessary for consistency in the application of what constitutes reasonable expectation and this will not hinder the development of the jurisprudence as a base determination must be applied. The courts must, however, always have discretion as each case must be considered in turn. This will then give guidance to the courts as to what can constitute reasonable expectation.

4. Background of the study

It is necessary to differentiate between a typical and atypical employment relationship. Atypical employment relationship commonly includes the following: casual labour; part-time employment; and fixed-term appointments. A fixed-term contract is a form of an atypical employment relationship, defined as a contract for the duration agreed in advance between the employer and employee. It can also be defined as the period for the completion of a specific project. The fixed-term contract will then terminate upon the specified period of time or upon the conclusion of the specified event.¹⁰ Typical employment relationship on the other hand refers an employment relationship which the existence thereof is not dependent on a duration of time or the completion of a specific task, this is commonly known as a “permanent” employment relationship.¹¹

We are in an era where a lot of employers are phasing in and adopting the principles of the fourth industrial revolution and artificial intelligence, as seen in the banking and retail sectors. This might, in turn, prompt employers to use the services of temporary and part-time workers for the completion of certain tasks. The extensive introduction of the fourth industrial revolution might, in future, replace the traditional mode of employment, resulting in an increase in less stable and more vulnerable forms of employment.¹²

¹⁰ The South African Labour Guide 2015 <https://www.labourguide.co.za/50-new/most-recent-publications/1536-fixed-term-contracts-and-the-expectation-of-permanent-employment>. Accessed 06 April 2020.

¹¹ The South African Labour Guide 2015 <https://www.labourguide.co.za/50-new/most-recent-publications/1536-fixed-term-contracts-and-the-expectation-of-permanent-employment>. Accessed 06 April 2020.

¹² Gericke 2015 PELJ 1.

The Covid-19 pandemic has changed the world, with several countries closing their borders, and implementing nationwide lockdowns. Measures to curb the pandemic have resulted in the reduction of economic activities in an effort to prevent the spread of the virus. Developing countries, such as South Africa, have been greatly affected by the pandemic. In a study conducted by Statistics South Africa, 8.1% of respondents revealed that they lost their jobs within six weeks of the implementation of the lockdown and these numbers are likely to increase.¹³ This might probably also prompt an increase in the use of fixed-term contract employees by employers in order to recover from the economic setback.

Although strides have been made to fill the gap in terms of Section 186 (1) (b) of the *LRA*, in an effort to address the exploitive nature of fixed-term contracts, there is still a grey area that has not been covered by legislation; protection in terms of Section 186(1) (b) of the *LRA* still came with a lot of questions that still need to be answered. The regulation, based on the traditional model of employment, is not suited to these forms of atypical employment relationship. The modern labour market is dynamic and labour law regulation is always a step behind and, as such, the legislature must be specific in addressing certain issues. Even though there are a lot of questions that still need to be answered, the pivotal question to be addressed in this study is: What constitutes the right to reasonable expectation?¹⁴

5. Aims and objectives of the study

This study provides an analysis of the rights and protection of employees on fixed-term contracts as well as the right to reasonable expectation. The following issues are discussed in order to achieve the aims and objectives of the study:

¹³ Stats SA 2020 <https://www.gov.za/speeches/respondents-lost-jobs-20-may-2020-0000/>. Accessed 30 April 2020.

¹⁴ Gericke 2019 PELJ 2.

- The historical background of fixed-term contracts with regard to the common law approach prior the introduction of the *LRA*. An examination of whether or not an employee on a fixed-term contract had any protection under common law;
- The definition of a fixed-term contract with reference to the *LRA* and interpretations given by different courts. The importance and purpose of this type of atypical employment relationship is provided, taking into consideration the growing change in the manner in which work is conducted. The kind of laws to be passed for the effective regulation of such employment relationship is also discussed in the study;
- Important strides made by the *LRA*, such as Section 186 (1) (b) and amendments in terms of Section 198B to offer protection to employees on fixed-term contracts as well as achievements made by legislation and reforms that still need to be made by the legislature;
- An evaluation of what constitutes the right to reasonable expectation and case law development in the interpretation of the right to reasonable expectation. Suggestions with regard to guidelines (with the assistance of case law) to establish what constitutes the right to reasonable expectation; and
- Gaps not addressed by the *LRA* and recommendations where needed.

The study does not focus on other types of atypical employment relationships as well as their protection, and is limited to fixed-term employment contracts.

Instances where an employee can institute action against the employer, in a situation where the employer decides not to renew a fixed-term contract, are provided and discussed, especially those that constitute the right to reasonable expectation.

The broader aims of the study were to:

- a. Analyse the reasons for the increase in fixed-term contracts;

- b. Identify gaps and loopholes in the regulation of fixed-term contracts and provide recommendations to address these gaps; and
- c. Analyse instances where employees on fixed-term contracts can successfully rely on reasonable expectation.

The objectives of the study were to:

- Assess the development of the *LRA* and strides made to offer protection to the rights of employees on fixed-term contracts as well as the application of such rights;
- Establish a better standard for the *LRA* in order to provide an extended cover and protection to employees on fixed-term contracts;
- Provide a better understanding of why employees on fixed-term contracts are more susceptible to abuse and provide a more effective way of protecting their rights, to the extent that was not covered by the *LRA*; and
- Establish ways to better improve the right to reasonable expectation in order to provide an efficient protection to employees on fixed-term contracts.

6. Research method

6.1 Qualitative Research Method

A qualitative research approach will be used in the study, as it will encompass an analysis and collection of non-numerical data. This entails a desktop analysis of primary and secondary sources of the law such as: textbooks, legislation, journals, court decisions and internet sources in an endeavour to understand the problem statement and provide solutions to same.

The justification for the use of this methodology is that the study examines the right to reasonable expectation in fixed-term contracts from a theoretical approach only, as opposed to a quantitative analysis of specific and pre-determined variables.

6.2 Literature review

Employees on fixed-term contracts are very vulnerable to unfair labour practices and are often not in a position to bargain on equal footing to protect their rights at the workplace.¹⁵ An important consideration is job security. The rights to dignity, equality and fair labour practices are the cornerstone of any employment relationship and financial security should also be a priority in certain fixed-term contracts.¹⁶ The ILO has also set some standards that have to be followed by its member states, including South Africa.

Article 3(1) of the Termination of Employment Recommendation states that adequate safeguards should be provided against recourse of employment for a specified period of time, such as fixed-term contracts.¹⁷ This can be done by limiting recourse to contracts for a specific period of time, however, due to either the nature of the work or the interest of the worker, the employment relationship cannot be of an indeterminate duration.¹⁸ One of the protections is considering fixed-term contracts, renewed one or more times without just cause, to be contracts of employment on an indefinite basis.¹⁹

There have been some key developments in South Africa in terms of the *LRA* to provide rights and protection to employees on fixed-term contracts. The legal position of fixed-term workers in South Africa, especially those employed in successive fixed-term contracts, has undergone fundamental changes in terms of recent amendments to the *LRA*. In some instances, employers use fixed-term contracts as a vehicle to circumvent administrative and financial burdens as well as dismissal.²⁰

This was also evident in *Biggs v Rand Water*²¹ wherein, the court held that Section 186(1) (b) of the LRA was implemented to prevent unfair practices of keeping an employee in a position on a temporary basis without employment security until the employer decides to

¹⁵ Gericke 2019 PELJ 3.

¹⁶ Gericke 2019 PELJ 2.

¹⁷ A 3 of the *Termination of Employment Recommendation* (1982).

¹⁸ A 3 of the *Termination of Employment Recommendation* (1982).

¹⁹ A 3 of the *Termination of Employment Recommendation* (1982).

²⁰ Huysamen E 2019 PELJ 2.

²¹ *Biggs v Rand Water* 2003 24 ILJ 1957 (LC) at para 61. (hereafter The *Biggs* case).

dismiss the employee without being exposed to any legal retribution imposed by the LRA.²²

Significant amendments were made to the *LRA* in 2014. Section 186(1) (b) of the *LRA* was amended and now states that an employee can claim dismissal if the said employee reasonably expected the employer to renew the fixed-term contract on the same or similar terms but the employer chose to renew it on less favourable terms or in some instances, where the employer failed to retain the employee on an indefinite basis.²³

This amendment does not only provide for protection in the case where an employee is able to show that he or she had a reasonable expectation that the fixed-term contract would be renewed, but now also provides for a dismissal claim where the employee is able to show that he or she had a reasonable expectation that the contract would be made permanent.²⁴

To be successful with a claim of dismissal under Section 186(1) (b) of the *LRA*, as amended, an employee has to show that he or she 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. There is no provision in the *LRA* with regard to what constitutes a reasonable expectation, however, different guidelines have been provided by case law.

In the *SA Rugby case*,²⁵ the LC held that the test to establish 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 issue was whether a reasonable employer in the position of the employee, would have had a similar expectation that the contract would be renewed under the circumstances. The court viewed that reasonable

²² The *Biggs* case at para 61.

²³ Section 186(1) (b) of *the LRA*.

²⁴ Huysamen E 2019 PELJ 7.

²⁵ The *SA Rugby* case at para 10.

expectation could be argued despite the fact that the contract included an express provision to the contrary.²⁶

In *Yebe v University of KZN*,²⁷ 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.²⁸

Further factors highlighted in case law on whether a reasonable expectation had been created include the the following: terms of the contract and the nature of business; 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. 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.²⁹

Employees on fixed-term contracts face many challenges, including the reality of high unemployment in South Africa and lack of employment security. Thus, while employed and working in successive fixed-term contracts, more protection should be provided to this group of employees.

7. Outline of the study

7.1 Chapter 1: Background of the study

²⁶ The *SA Rugby* case at para 10.

²⁷ *Yebe v University of KZN* 2007 28 ILJ 490 (CCMA) at para 61. (hereafter the *Yebe* case).

²⁸ The *Yebe* case at para 61.

²⁹ Geldenhuys 2008 SA Merc LJ 277.

Chapter one focuses on the introduction, background of the study, research problem, significance of the study and outline of the study.

7.2 *Chapter 2: Historical background of fixed-term contracts*

Chapter two focuses on the historical background of fixed-term contracts. In order to understand the current regulations on fixed-term contracts, there is need to consider the historical development. The common law approach and regulation of this type of employment relationship before the introduction of the *LRA* is also discussed in this Chapter.

7.3 *Chapter 3: Importance of fixed-term contracts*

Chapter three provides a discussion on the use of fixed-term contracts, highlighting the importance of this type of employment relationship and its specific purpose; how this employment relationship is abused by employers and the need for reform.

7.4 Chapter 4: Regulating fixed-term contracts

Chapter four focuses on strides and amendments made in the *LRA* with regard to the right to reasonable expectation in order to provide a better regulation and protection of employees on fixed-term contracts.

7.5 Chapter 5: The right to reasonable expectation

Chapter five focuses on the right to reasonable expectation. The Chapter also focuses on factors that constitute the right to reasonable expectation and provides developments from case law as far as this aspect is concerned.

7.6 Chapter 6: Conclusion and recommendations

The final chapter provides recommendations to address shortcomings not covered by legislation, as a means to level the playing field in atypical employment relationships relating to fixed-term contracts.

8. Relevance for the Research Unit

8.1 Vulnerable societies

The right to fair labour practice is entrenched in Chapter 2 of the Constitution as a fundamental right. Section 8 of the Constitution states that the Bill of Rights applies to everyone and binds all organs of State.³⁰

As indicated before, a fixed-term employment relationship is often not stable, as it is susceptible to abuse from employers. A lot needs to be done to sensitise stakeholders on the rights and protection of employees on fixed-term contracts. Amendments to the Act became effectived in 2015 but have not had the impact anticipated in terms of exposure to the public. Some employers/employees still do not know about the regulation of fixed-term contracts. Thus, this study is significant within the North-West University's Justice

³⁰ The *CONSTITUTION*.

in Practice: Vulnerable Societies Research Unit, as it relates to socio-economic rights of vulnerable members of society within the employment environment.

This study is very important as it touches on important Constitutional rights, such as the right to fair labour practice, access to justice and socio-economic empowerment.

The world is passing through an era where people are losing their jobs because of different factors such as: the current coronavirus pandemic and high rate of unemployment. The manner in which people are executing their duties is surely going to change as work is becoming more specialised and the use of atypical employment relationship might even increase in future. Thus, it surely plays an important role as far as the socio-economic aspect is concerned, especially in relation to job security.

9. Ethical considerations

Ethical clearance was not required as the study did not involve any human participants and no interviews were conducted. The study focused solely on primary and secondary sources such as legislation, journals and case law.

Chapter 2: Historical development of fixed-term contracts in South Africa

Introduction

In order to understand the present legislative framework of fixed-term contracts, it is important to first consider the development of this kind of employment relationship. This chapter focuses on the historical development of fixed-term contracts before the introduction of the Labour Relations Act 66 of 1995. This is particularly important as it shows how this type of employment relationship has evolved over the years and the importance of this historical development on the current regulation and protection, as outlined in the *LRA*.

It is very important to provide a definition of a fixed-term contract thus, this Chapter provides the common law definition of fixed-term contract as well as the definition by the *LRA*. The importance of such agreement is certainty of time and a specific event and the importance of certainty surrounding such employment relationship.

There was unequal bargaining strength between the employer and employee, especially during the common law era. This Chapter focuses on the position of common law with regard to fixed-term contracts, the shortcomings and how employers have been using this type of relationship to their advantage. The most important aspect is termination of fixed-term contracts, in accordance with common law and whether or not an employee has any legal recourse as soon as a fixed-term contract is terminated, especially the right to reasonable expectation according to common law.

There is a growing concern of exploitation related to fixed-term contracts. The concern is based on the growing nature of this employment relationship due to the flexibility with regard to how people conduct their work. Fixed-term contracts are suitable for this purpose as employees are able to get the work done without the employer committing to the longevity of the employment relationship.

This is also important as the employer is able to bypass legislation while getting the job done. Thus, this is becoming an international phenomenon and steps needed to be taken

at international level. This Chapter also focuses on the role of the International Labour Organisation (hereafter the ILO) in providing a guided structure in the formulation of domestic laws, with regard to the protection of employees on fixed-term contracts. This objective is achieved by examining relevant conventions and their application at the domestic level (in terms of case law).

The legislature had to intervene to protect these employees who were exploited in order to bridge the unequal bargaining strength between an employer and employee. Section 23(1) of the Constitution of the Republic of South Africa, 1996 provides for the right to fair labour practice. This Chapter focuses on the definition and scope of the right to fair labour practices and whether or not employees on fixed-term contracts are covered in the said scope.

2. Development of fixed-term contracts: Pre-LRA

2.1 Defining a fixed-term employment contract

According to common law, a fixed-term contract of employment is an agreement in which the duration thereof is limited as a result of the parties agreeing to a set termination date or the occurrence of a specified event or the completion of a specific task.³¹ The most important aspect about this definition is that the determining factor, which will end the agreement, is defined, making such employment relationship and its existence definite.

The South African legislature did not provide a definition of a fixed-term contract until the enactment of the Labour Relations Amendment Act. Section 198B of the *LRA* provides a definition of a fixed-term contract of employment as an employment relationship that terminates on one of these occasions: the occurrence of a specified event; the completion of a specified task or project; or a fixed date other than an employee's normal or agreed retirement age.

³¹ John Grogan *Dismissal* 48.

It is, however, important to note that the term “fixed employee” is not defined in South Africa’s labour legislation; an employee appointed under a fixed-term contract, falls under the umbrella term of atypical employees.³² It can, therefore, be concluded that a fixed-term employment agreement is concluded if the parties to the agreement reach consensus that one will make his or her services available to the other for reward for a specified period of time or at the occurrence of a specified event.

It is important that the parties to this type of an agreement are *ad idem* regarding the type of agreement, the duration thereof and that it should be clear that the parties are agreeing to an employment relationship different from the traditional employment relationship, which is likely to continue for an indefinite period.³³ The type and purpose of such agreement must be unequivocal, especially on the part of the employer to avoid any misunderstanding.

2.2 Common law position

The employment terms under common law, were very reflective of the bargaining strengths of the parties at the time, as there was minimal regulation thereby, shifting all the power towards the employer and creating an unequal employment relationship.³⁴ The employment relationship was seen as one of an individual nature, with the regulation only stemming from the employment agreement concluded between the parties and if there was an issue that was not addressed by the agreement, then, common law will be applied to fill the void.³⁵ There was also no protection provided by common law and this left the employee usually at the mercy of the employer as far as employment security was concerned. There was no emphasis on fairness, the only thing that was important was the terms of the employment agreement.

³² Gericke 2011 PELJ 105.

³³ Gericke 2011 PELJ 105.

³⁴ Huysamen E 2019 PELJ 7.

³⁵ Garbers *et al the New Essential Labour Law Handbook* 8.

The unequal nature of the employment relationship resulted in many employers taking advantage of employees as there was very little employment security. This was prejudicial to many low skilled workers who were dismissed without any repercussions to the employer.³⁶

2.2.1 *Termination of a fixed-term contract under common law*

Huysamen states that under common law, the only thing that was required for lawful termination was that an employer needed to provide the employee with a notice of termination before ending the employment relationship.³⁷ However, a notice of termination was not required with a fixed-term employment relationship as the employer was able to terminate automatically when the terms or expectations arising out of the relationship were met with regard to: the fixed time had lapsed; when the task had been completed; upon expiry of or the beginning of a specified event.³⁸

With common law, the concept of reasonable expectation did not exist, leaving the employee vulnerable and without any recourse in the event the employer terminated the employment relationship. The duration of the employment relationship was solely at the discretion of the employer and such employer was not required to give notice when terminating the fixed-term employment relationship, unless specifically agreed to between the parties.³⁹ There was also no requirement that the dismissal had to be fair hence, the reasons for termination were inconsequential as they were not actionable.⁴⁰ It is submitted that there was no job security in common law, as the discretion of the existence of the employment relationship was solely in the hands of the employer. This resulted in a lot of employees being exploited due to the unequal bargaining power in the employment relationship.

³⁶ Huysamen E 2019 PELJ 7.

³⁷ Huysamen E 2019 PELJ 7.

³⁸ Gericke 2011 PELJ 116.

³⁹ Gericke 2011 PELJ 116.

⁴⁰ Garbers et al *the New Essential Labour Law Handbook* 125.

There was, however, some form of protection afforded to employees on fixed-term contracts in the event that the employer terminated the agreement prematurely. According to common law, a fixed-term contract may not be terminated for any other reason other than material breach or repudiation of the contract by the employee.⁴¹

This was also decided in *Buthelezi v Municipal Demarcation Board*⁴² wherein, the court held that there was no common law right to terminate a fixed-term contract before its stipulated time even with notice, unless the terms provided for such notice.⁴³ If the parties agreed that their contracts will endure for a certain period as opposed to indefinitely, they had to bind themselves to honour and perform their respective obligations in terms of the contract for its duration.⁴⁴

2.2.2 *The right to reasonable expectation under common law*

Under common law, the employee cannot claim for unfair dismissal or a reasonable expectation that the employer would renew the fixed-term contract. The employee cannot also claim unfair dismissal since the contract automatically ends with time.⁴⁵ Common law also overlooks the continuing nature of the employment relationship as far as fixed-term contracts are concerned, in that it offers employees no legal right to demand better employment conditions with the passage of time.⁴⁶ The rationale behind this is that the agreement is only in place to serve a particular purpose through a pre-determined period of time thus, making flexibility a priority, and diminishing employees' right to promotions, equal pay and collective bargaining.

Even though it is stated that a fixed-term contract cannot be terminated prematurely, continuity of the employment relationship after lapse of the contract term is in the discretion of the employer who might or might not renew it or obtain the services of the

⁴¹ *Bon Accord Irrigation Board v Braine* 1923 AD 48.

⁴² *Buthelezi v Municipal Demarcation Board* 2004 25 ILJ 237 (LAC). (hereafter *The Buthelezi case*)

⁴³ *The Buthelezi case* at para 9.

⁴⁴ *The Buthelezi case* at para 9.

⁴⁵ *The Buthelezi case* at para 10.

⁴⁶ *Grogan Workplace law* 3.

employee on an indefinite basis.⁴⁷ Common law does not provide any job security for employees on fixed-term contracts and such employees have no legal recourse at the end of the period of the fixed-term contract thus, cannot rely on the right to a reasonable expectation that the employer will extend the fixed-term contract.

2.3 The International Labour Organisation

In order to fully understand the historical development of fixed-term contracts in South Africa, it is important to consider the importance of international role players, such as the ILO in influencing labour laws in South Africa, through its standards. International norms and standards have already had a significant influence on the regulation of labour markets and social security framework in South Africa, as they set standards that national law must adopt in the administration of socio-economic rights.⁴⁸ In *S v Makwanyane*,⁴⁹ the court held that international agreements and customary international law provide a framework within which the Bill of Rights can be evaluated and understood and, as such, reports of specialised agencies, such as the ILO and other important conventions may provide guidance as to the current interpretation of a particular provision.⁵⁰

South Africa is one of the founding members of the ILO (1919) and the international labour standards have a direct influence on South Africa's formulation of its labour policies. International labour standards refer to legal instruments drawn with the intention of providing basic principles and rights for the administration of labour law rights.⁵¹ The standards are used as a tool the government, in consultation with all stakeholders involved, such as employers and workers, in drafting, executing labour law and social security policies in an effort to conform to internationally accepted standards, as provided

⁴⁷ ENS Africa 2020 <https://www.ensafrica.com/news/detail/2754/when-employees-continue-working-after-their-f>.

⁴⁸ ILO 2016 <http://ilo.org/global/standards/introduction-to-international-labour-standards/lang-en/index.htm>.

⁴⁹ *S v Makwanyane* 1995 (3) SA 391 (CC). (hereafter *Makwanyane* case)

⁵⁰ *Makwanyane* case at para 35.

⁵¹ ILO 2016 <http://ilo.org/global/standards/introduction-to-international-labour-standards/lang-en/index.htm>.

by international organisations, such as the ILO.⁵² In *NUMSA v Bader Bop*,⁵³ the court held that the purpose of the LRA is to give legislative effect to international treaty obligations arising from the ratification of ILO conventions; South Africa's international obligations are thus, of great importance to the interpretation of the LRA.⁵⁴

The issue of unfair dismissal and employment security is not only a national concern, but a global one, which needs to be addressed. There are two core instruments of the ILO that have been put in place to deal with such issues: the Termination of Employment Convention No 158 of 1982 (hereafter the Convention); and the Termination of Employment Recommendation No 166 of 1982. The two instruments deal with the issue of unilateral termination of employment on the part of the employer and require member states that have ratified the convention, to take reasonable steps to ensure job security. Article 2(3) of the Convention provides that there should be adequate safeguards to employees against employers who unfairly terminate an employment relationship without just cause and who engage employees on fixed-term contracts with the sole intention of evading statutory consequences against unfair dismissal.⁵⁵

Article 4 of the Convention offers some protection by requiring the employer to have fair reasons before terminating the employment relationship and provides that the reasons for termination must be one of the following: the conduct of the employee; the employee's capacity or inability to do the work; and the employer's operational requirements.⁵⁶ This was done to put some parity in the employment relationship. The Convention requires the employee to state the reasons for termination and this is an indication of a shift from the common law position.

Another important change ushered in by the Convention is that not only does the employer have to provide reasons for termination, but in terms of Article 13, the employer

⁵² The ILO 2016 <http://ilo.org/global/standards/introduction-to-international-labour-standards/lang-en/index.htm>.

⁵³ *NUMSA v Bader Bop* 2003 (3) SA 513 (CC). (hereafter the *Bader Bop* case)

⁵⁴ The *Bader Bop* case at para 13.

⁵⁵ The Convention.

⁵⁶ The Convention.

is obliged to consult or notify employees or their representatives, if there is a contemplated dismissal and must provide the necessary information to enable employees to come up with a response.⁵⁷ This is also applicable in fixed-term contracts.

2.4 The right to fair labour practice

The legislature did not only conform to international law standards but went a step further by entrenching the labour rights within Chapter 2 of the Constitution of South Africa. The legislature gave the outmost importance and priority to labour rights of collective labour law by entrenching them in the Bill of Rights, with other important rights. One of the most important constitutional provisions for the purposes of this study is Section 23(1), which guarantees everyone the right to fair labour practices.⁵⁸ In *Sidumo v Rustenburg Platinum Mines*,⁵⁹ the court held that although Section 23(1) provides the right to fair labour practice to both the employer and employee alike, however, it plays more of an important role for employees as it also affords employment security.⁶⁰

Huysamen argues that Section 23(1) is afforded a broad interpretation and includes all employees, whether engaged in terms of a fixed-term contract or an indefinite contract of employment.⁶¹ Section 213 of the LRA goes further and considers an employee as any person (excluding an independent contractor) who works for another person or the State and receives or is entitled to a pay. The broad definition includes protection against abuse of fixed-term contracts and no distinction is made between employment relationships. The provision dictates that fair labour practices should be afforded to everyone in the workplace. It was held in *NEHAWU v CCMA* that the flexibility conferred by the words “fair labour practices” was intentional in order to provide flexibility in an effort to guarantee equitable protection across all boards of employment.⁶² Gericke argues that there is a positive duty placed on the employer in the context of an employment

⁵⁷ The Convention.

⁵⁸ Constitution of the Republic of South Africa, 1996.

⁵⁹ *Sidumo v Rustenburg Platinum Mines* 2008 (2) SA 24 (CC). (hereafter *Sidumo* case).

⁶⁰ *Sidumo* case at para 55.

⁶¹ Huysamen E 2019 PELJ 5.

⁶² 2003 24 ILJ at para 2339.

relationship to act within the parameters of the protection afforded in terms of Section 23(1) of the Constitution.⁶³ The Constitution and LRA have played an important role in seeking to rectify the power imbalance between employees and employers as the rights currently enjoyed by employees have been hard-won, followed by years of struggle by workers.⁶⁴

Historically, common law applied if the employment agreement did not cover a particular aspect of the employment relationship. The introduction of the Constitution has played a major role in impacting the freedom of parties to contracts, as each employment agreement must be drafted in the spirit and purports of the Constitution. One of the important constitutional principles applicable to an employment contract is dignity and equality.⁶⁵ In *Affordable Medicines Trust v Minister of Health RSA*, the court held that an individual's work is intertwined to his or her dignity and that work forms part of that individual's existence.⁶⁶ Furthermore, Section 9 provides that everyone is equal before the law and has the right to equal protection and benefit.⁶⁷ The employer must not discriminate between employees on a fixed-term contract and those employed indefinitely; all employees should be afforded the same opportunities.

Concluding remarks

The South African legislature did provide a definition of a fixed-term contract of employment until the enactment of the Labour Relations Amendment Act. Section 198B of the *LRA* now defines a fixed-term contract of employment as a contract that terminates on one of the following occasions: the occurrence of a specified event; the completion of a specified task or project; or a fixed date other than an employee's normal or agreed retirement age. The fixed-term agreement must be clearly defined in order to avoid any uncertainties, and both parties should be able to understand that existence of such a

⁶³ Gericke 2011 PELJ 107.

⁶⁴ *Sidumo* case at para 74.

⁶⁵ Gericke 2011 PELJ 107.

⁶⁶ *Affordable Medicines Trust v Minister of Health RSA* 2005 (6) BCLR 529 CC at para 59.

⁶⁷ Constitution of the Republic of South Africa, 1996.

contract comes with limitations and it is very important to avoid any misrepresentations or unreasonable expectations on the part of the employee.⁶⁸ The purpose under which the agreement is concluded must be clearly outlined and that should form the basis for which the agreement will exist.

The employment terms under common law, were very reflective of the bargaining strengths of the parties at the time, as there was minimal regulation, thereby, shifting all the power towards the employer and creating an unequal employment relationship.⁶⁹ The employment relationship was seen as one of an individual nature, with the regulation only stemming from the employment agreement concluded between the parties. In a situation where an issue was not addressed by the agreement, common law was applied to fill such void. Under common law, the only thing that was required for lawful termination was that an employer needed to provide the employee with a notice of termination before ending the employment relationship. Common law did not make provision for 'reasonable expectation', leaving employees vulnerable and without any recourse in the event an employer terminated the employment relationship.

International norms and standards have already had a significant influence on the regulation of labour markets and social security framework in South Africa, as they set standards that national law must adopt in the administration of socio-economic rights. Two core instruments of the ILO have been put in place to deal with such issues as follows: the Termination of Employment Convention No 158 of 1982 (hereafter the Convention); and the Termination of Employment Recommendation No 166 of 1982. The two instruments deal with the issue of unilateral termination of employment on the part of the employer and require member states that have ratified the Convention, to take reasonable steps to ensure job security.

One of the most important constitutional provisions considered in this study, is Section 23(1), which guarantees everyone the right to fair labour practices. Section 23(1) is

⁶⁸ Gericke 2011 PELJ 105.

⁶⁹ Huysamen E 2019 PELJ 7.

afforded a broad interpretation and includes all employees, whether engaged in terms of a fixed-term contract or an indefinite contract of employment. There is a positive duty placed on the employer in the context of an employment relationship to act within the parameters of the protection afforded in terms of Section 23(1) of the Constitution.

Chapter 3: Significance of fixed-term contracts

3. Introduction

It is without doubt that the nature of work is changing and these changes have a direct impact on the labour market. This Chapter focuses on changes in the labour market, with the introduction of non-standard employment arrangements, such as fixed-term contracts and the consequences thereof, to both employers and employees. Although fixed-term contracts only exist for a specified period of time, their importance cannot be overemphasised as they serve to accomplish a specific organisational goal. This Chapter also focuses on the importance of fixed-term contracts and specific circumstances where it is necessary for the employer to utilise fixed-term over standard employment contracts.

The world has become one global village in which national boundaries are less restrictive in terms of trade, with big enterprises taking advantage of countries with less restrictive labour to produce goods on a large-scale to be distributed at a cheaper price all over the world. Globalisation, coupled with technological advances, such as the fourth Industrial Revolution, has made the labour market very competitive, with smaller companies struggling to compete with big enterprises, sparking the need for flexible labour rights.

Some scholars argue that a flexible labour market provides an opportunity for the creation of more jobs in future. Even though their argument is founded, there are other unscrupulous employers who are taking advantage of the vulnerabilities of employees in non-standard employment relationships. This Chapter focuses on how some employers exploit employees on fixed-term contracts to their benefit and why employees cannot challenge such employers.

The most important aspect of working is to be able to generate an income in order to obtain a livelihood; but core to this, is also financial stability in the long-run. A worker cannot make lasting financial commitments if he or she is in and out of work. Such employee experiences instability with regard to income, usually associated with non-standard employment agreements, such as fixed-term contracts. The concept of

employment security and its importance on the livelihood of employees is discussed in this study.

3.1 *The changing nature of work*

Even though standard employment remains the rule rather than the exception, it is without doubt, that there is an increase in non-standard employment relationships, and there is an emergence in employment relationships such as fixed-term contracts.⁷⁰ Traditionally, the protection extended by labour legislation was only afforded to people who were defined as employees in the traditional sense of the word, but the nature of work has changed significantly in the past couple of decades as there has been a shift towards flexibility and the definition of the word 'employee' seen as restrictive.⁷¹ It is now safe to say that the standard employee is no longer only employed on a full-time basis as per the standard employment agreement, there are a variety of new forms of non-standard employment agreements, such as fixed-term contracts.⁷² Van Niekerk argues that standard employment is steadily eroding and atypical employment relationships, such as fixed-term contracts, are increasing at all levels of the workforce.⁷³ This is an accurate analysis as there has been a global increase in flexible working arrangements since 1970.⁷⁴ The nature of how people are conducting their work is changing with the constant introduction of new technological developments and as such, it is without doubt, that the employment relationship has changed in the past couple of decades and will continue to do so in the decades to come. This will, indeed, have a negative impact on the standard employment relationship as we know it, resulting in the increase of atypical employment relationships.

It is, however, very difficult to know the exact number of fixed-term employees in the South African workforce at the moment, however, according to Statistics South Africa,

⁷⁰ Fourie ES 2008 PER 1.

⁷¹ Van Niekerk *Unfair Dismissal* 57.

⁷² Van Niekerk *Unfair Dismissal* 57.

⁷³ Geldenhuys *an Evaluation of the Rights of Fixed Term Employees in South Africa* 3.

⁷⁴ Geldenhuys *an Evaluation of the Rights of Fixed Term Employees in South Africa* 3.

about 25% of workers surveyed in 2008 indicated that they were appointed in terms of contracts of a limited duration.⁷⁵ The number could also be higher due to the fluctuating number of appointments and dismissals in atypical employment relationships.

3.2 Importance of fixed-term contracts

There has been an increase in the number of employers who have employed their workers on fixed-term contracts rather than on a temporary basis, as this type of employment relationship is well suited to its particular business needs.⁷⁶ Fixed-term contracts are usually used in instances where there is a specific organisational goal that has to be accomplished within a fixed period of time and it will cease to exist once that goal is met. This usually pertains to seasonal work, maternity cover or where funding has been provided for a specific project.⁷⁷

Although fixed-term contracts do not guarantee employment security as the employment agreement will only be in existence for a certain period of time, there are certain benefits that come with this type of employment relationship and it goes two folds in the benefit of both the employer and the employee. The company will have the advantage of benefiting from an employee with specialist and expert knowledge for a particular project or period of time, without worrying about the expense of employing the said employee for an indefinite period.⁷⁸ This is particularly important to smaller companies that require assistance for a specified period of time and cannot take up an indefinite commitment towards an employee. Employers can also use this period as a 'probationary period' to evaluate the work of employees before offering them a permanent position.⁷⁹ This is

⁷⁵ Geldenhuys *an Evaluation of the Rights of Fixed Term Employees in South Africa* 5.

⁷⁶ Eden Scott 2019 <https://www.edenscott.com/blog/fixed-term-contract-meaning-and-benefits>. Accessed 10 February 2021.

⁷⁷ Eden Scott 2019 <https://www.edenscott.com/blog/fixed-term-contract-meaning-and-benefits>. Accessed 10 February 2021.

⁷⁸ Eden Scott 2019 <https://www.edenscott.com/blog/fixed-term-contract-meaning-and-benefits>. Accessed 10 February 2021.

⁷⁹ Eden Scott 2019 <https://www.edenscott.com/blog/fixed-term-contract-meaning-and-benefits>. Accessed 10 February 2021.

effective in terms of assessing whether or not an employee will be a good investment for the organisation before making an indefinite commitment.

It can also be efficient when there is an employee absent for certain reasons, such as maternity leave, or in an effort to maximise labour in a period where there is an increase in production demand.⁸⁰ This type of contract can also be useful during unpredictable economic climate; this can also be seen with the advent of the coronavirus pandemic. It is during these fluctuating market periods that it becomes a useful tool for employers not to make a commitment to an indefinite employment relationship but to use fixed-term contracts.

A fixed-term contract also plays an important role as it provides the employee with the necessary experience in a particular field if the said employee is not an expert.⁸¹ This is important as it will be advantageous to the employee in terms of finding employment in a particular field as he or she will be considered first whenever there is a permanent position available, also depending on performance.

The changing nature of work is indicative of the need for employment flexibility in order for smaller companies to be able to compete with big conglomerates. This, however, does not come without consequences. The concept of employment flexibility is important in explaining the increase in the nature of work as well as the growing number of atypical employment relationships.

3.3 Employment flexibility

3.3.1 Defining employment flexibility

It is important to consider the concept of employment flexibility in an effort to explain the reasons behind the changing nature of work. Employment flexibility refers to “the

⁸⁰ Eden Scott 2019 <https://www.edenscott.com/blog/fixed-term-contract-meaning-and-benefits>. Accessed 10 February 2021.

⁸¹ Eden Scott 2019 <https://www.edenscott.com/blog/fixed-term-contract-meaning-and-benefits>. Accessed 10 February 2021.

changing work practices by which firms no longer use internal labour or make implicit promises to employees for a lifetime job security but, instead, seek flexible employment relations that permit them to increase, diminish and reassign their workforce with ease".⁸² The key with regard to the concept of employment flexibility, is to employ and let go of employees without any legal consequences, enabling the employer to reach their full economic capabilities without any repercussions.

The increase in non-standard employment relationships points towards the shift in employers dismantling their internal job structures and not promising employment security in an effort to opt for employment relationships that are not based on longevity as this gives employers the opportunity to cross utilise employees.⁸³ Employers have shifted from job security towards "employability security", which is the ability of employees to acquire skills that will enhance their opportunities in the labour market in order for them to grow the skills that will equip them for a job outside the company.⁸⁴ The main goal for this type of employment arrangement is production over a commitment to an employee. The employee must gather the necessary skills that will be advantageous to their prospective employment; this goes to the heart of employment flexibility itself.

3.3.2 The need for employment flexibility

It can be seen from the above discussion that there is, indeed, a shift in the nature of work, even though standard employment is still the rule rather than the exception. There

⁸² Researchgate *Flexibilisation, Globalisation and Privatisation: Three challenges to Labour Rights in our Time* 84.

⁸³ Researchgate *Flexibilisation, Globalisation and Privatisation: Three challenges to Labour Rights in our Time* 84.

⁸⁴ Researchgate *Flexibilisation, Globalisation and Privatisation: Three challenges to Labour Rights in our Time* 84.

is no denying the increase in atypical employment relations, such as fixed-term contracts and such shift cannot be adequately understood without an assessment of the need for flexibility in employment relations. The effects of globalisation on the nature of work and as a catalyst of the need for employment flexibility is also considered in this study.

Globalisation refers to the interconnectedness as well as cross-border transactions that occur in the production and marketing of goods and services, which sees employers opting to go with countries that have low labour costs in the production of goods and services.⁸⁵ This creates a tough competitive market between organisations in terms of retail prices as consumers opt for cheaper products, resulting in organisations capitalising in cheap labour costs, especially in countries such as China, yielding more economic return in terms of profits, and prompting the need for employment flexibility in a competitive market. Globalisation is a cross border interpretation of economic life, and can be seen by the telecommunication and technological inventions that enable organisations to produce, distribute and market all over the world.⁸⁶ The interconnectedness between countries into one global village has rendered national boundaries inconsequential as countries have seen an influx of goods produced all over the world, and this is becoming problematic for smaller organisations to compete with big companies due to lack of global reach.

Globalisation undermines domestic labour standards and labour organisations due to the fact that such organisations prefer to produce goods in legal environments that offer the least protection of labour rights.⁸⁷ This is very troubling as it indicates that labour organisations cannot enforce or compel another country to comply with certain labour

⁸⁵ Researchgate *Flexibilisation, Globalisation and Privatisation: Three challenges to Labour Rights in our Time* 84.

⁸⁶ Researchgate *Flexibilisation, Globalisation and Privatisation: Three challenges to Labour Rights in our Time* 84.

⁸⁷ Researchgate *Flexibilisation, Globalisation and Privatisation: Three challenges to Labour Rights in our Time* 84.

rights thus, creating a gap between not only employers, but countries as well. There is need to balance it all and this is where employment flexibility plays an important role. Employment flexibility is constructed in opposition to labour rigidities, such as protective labour legislation, collective bargaining agreements as well as standard employment.⁸⁸

Technological advancements have driven changes in the organisation of production, which, in turn, requires a labour force adaptable to changes in market fluctuations and increasingly specialised products, which are produced on demand.⁸⁹ In addition to the restructuring of external labour markets through strategies, such as outsourcing and subcontracting, employers have also sought new ways to increase the productivity of their remaining internal workforce.⁹⁰ This requires employers to quickly adjust the size and composition of their workforces in order to reach financial targets, even if it means being able to rid themselves of employees without any legal repercussions. Technology is changing rapidly and with it, the organisation of work, which has seen relatively more people engaged in service activities rather than manufacturing and agriculture.⁹¹

There are those who believe that a free market is the future if organisations are to attain true financial potential. The logic of a free market reform demands for less interference in regulations in the labour market by governments and trade unions. This will provide for flexibility in the labour market and a free flow of workers who are not indefinitely tied to a job.⁹² The evolving nature of employment emerging in this dynamic environment merits attention for their potential to contribute to employment creation and increase the range of opportunities for both employer and employee.⁹³ It could be argued that the high unemployment rate, such as in South Africa, is a direct result of too much labour regulation. The labour regulation in South Africa has made it difficult for domestic companies to compete with international counterparts, especially as far as manufacturing

⁸⁸ ILO *Flexibilising Employment: An Overview* 1.

⁸⁹ ILO *Flexibilising Employment: An Overview* 1.

⁹⁰ ILO *Flexibilising Employment: An Overview* 1.

⁹¹ ILO *Employment Security: Conceptual and Statistical Issues* 1.

⁹² ILO *Flexibilising Employment: An Overview* 2.

⁹³ ILO *Flexibilising Employment: An Overview* 2.

is concerned. The production of goods, domestically, is far more expensive compared to those produced internationally, in countries such as China or Malaysia, resulting in the closure of several firms, due mainly to the fact that consumers always prefer cheaper products. A flexible labour regulation will result in greater focus on the manufacturing side of business rather than just the provision of services thus, resulting in job creation.

It is, however, very important to strike a balance between regulation of labour and employment flexibility, due to the unequal nature of the employment relationship between an employer and employee. An unregulated employment relationship will result in unscrupulous employers taking advantage of an employee without any consequences, to the detriment of the employee.

It is without doubt, that employees on fixed-term contracts, are more susceptible to exploitation due to the nature of the employment relationship and less regulation might also be detrimental to their labour rights.

3.4 The exploitive nature of fixed-term contracts

There is need for the use of non-standard contracts of employment, such as fixed-term contracts, however, such use does not come without consequences. The increase in these types of employment relationships has given rise to informalisation and segmentation. Geldenhuys argues that this is due to globalisation, economic, social and technological changes that are necessary for employers to adapt to an increasingly competitive environment, where big conglomerates manufacture and sell their products at a cheaper price compared to smaller domestic organisations that are struggling with production costs.⁹⁴ The consequence at the centre of informalisation is that it leaves employees with no protection as there is a push for deregulation of labour rights that were put to safeguard them. Geldenhuys further argues that informalisation is also important for employers as they are not obliged to contribute to employees' medical aid as well as pension fund, as this is seen as an added expense halting the employer's economic

⁹⁴ Geldenhuys an *Evaluation of the Rights of Fixed Term Employees in South Africa* 4.

gains.⁹⁵ In an effort to curtail the negative effects of globalisation and reduce production costs, employers are disregarding traditional employment boundaries, to the detriment of employees on fixed-term contracts.

With the competitive global market, employers have had to make changes to their workplace policies and resorted to the appointment of employees on fixed-term contracts, even if the nature of work better suits a permanent appointment.⁹⁶ Such change is to maximise or minimise the labour force at a whim given the economic complexities at the time, in order to escalate profit. This all is, however, to the detriment of employees.

According to Geldenhuys, the high levels of unemployment has resulted in the expansion of the informal economy, with an increase in non-standard forms of work, often exposing employees to unacceptable working conditions and possible exploitation.⁹⁷ South Africa has one of the highest unemployment rates in the world and employers have used this to their advantage in advancing their ends, knowing that employees are less likely to terminate their employment as they will have no source of income. The employment relationship is unequal in nature and this explains why there is need for regulation in order to bridge the gap.

There is a high level of skills shortage in South Africa; workers with a low level of education are at a high risk of unemployment or to be employed in low paying jobs. In 2020, 40.2 % of people who were unemployed did not have a National Senior certificate (Grade 12) compared to 12.5% of unemployed, who had tertiary education.⁹⁸ The desperate need for employment will result in workers enduring exploitation in the workplace as they do not want to see themselves out of work thus, allowing employers

⁹⁵ Geldenhuys an *Evaluation of the Rights of Fixed Term Employees in South Africa* 4.

⁹⁶ Geldenhuys an *Evaluation of the Rights of Fixed Term Employees in South Africa* 27.

⁹⁷ Geldenhuys an *Evaluation of the Rights of Fixed Term Employees in South Africa* 27.

⁹⁸ Stats SA 2020 <https://www.gov.za/speeches/respondents-lost-jobs-20-may-2020-0000/>. Accessed 30 September 2020.

to take away their job security or rolling over fixed-term contracts for a long period of time, without offering an employee a job indefinitely.

Employees on fixed-term contracts are not often provided with the same skills development opportunities as permanent employees and this limits their chances not only to get a permanent position within that particular organisation, but also does not equip them with the necessary skills needed by another prospective employer.

3.5 Employment security

Debates around employment security and flexibility have always been a factor which continues even today. In the employer's perspective, employment security is a constant interference with an organisation's efficiency. Employment flexibility, on the other hand, allows organisations the freedom to adjust production according to the market, which includes demand for products, technology and competition.⁹⁹

Article 23 of the Universal Declaration of Human Rights states that everyone has the right to work, to free choice of employment, as well as the protection against employment.¹⁰⁰ Employment security must be attained in order to achieve income security and this enhances the welfare of workers.¹⁰¹ However, there are others who still maintain that flexibility might create more employment.¹⁰² Although flexibility might create more employment, it does not, however, result in income stability and negatively impacts employees in the long-run.

The increase in the number of non-standard employment agreements, such as fixed-term contracts, is usually coupled with a decline in employment security.¹⁰³ This is very important as it also negatively impacts on the ability of employees to attain financial stability as they cannot make long-term financial commitments, as they do not know

⁹⁹ ILO *Employment Security: Conceptual and Statistical Issues* 6.

¹⁰⁰ A' 23 of the Universal Declaration of Human Rights (1948).

¹⁰¹ ILO *Employment Security: Conceptual and Statistical Issues* 6.

¹⁰² ILO *Employment Security: Conceptual and Statistical Issues* 6.

¹⁰³ ILO *Employment Security: Conceptual and Statistical Issues* 1.

whether they will still be employed after the fixed-term contract has lapsed. Employment security is an important dimension of quality employment and secure employment is the main means to secure income and be able to make long-term financial commitments, such as taking up a mortgage bond, for example.¹⁰⁴

Not only do we have to consider the issue of income stability for employees, but also a sense of stability for the employers' organisation with the provision of employment security. A secure employment will result in stable employment relations that will encourage investment in worker training and skills development which, in turn, increases the commitment and motivation of workers thus, contributing to the efficiency of the employer's organisation.¹⁰⁵

Employment security is also important in developing economies that do not have a system of unemployment benefits; loss of employment in such an instance, will lead to loss of livelihood.¹⁰⁶ This was also stated in the *Sidumo* case, where the court held that security of employment is a core value of the Constitution, which has been given effect by the LRA and is a protection afforded to employees who are vulnerable as their vulnerability flows from the inequality that characterises employment in modern developing economies.¹⁰⁷ It can also be argued that even though there are some developing economies that have unemployment benefits on a contributory level, such unemployment benefits will not be sufficient given the short-term of employment as well as contributions as far as fixed-term employees are concerned.

A captivating debate is also advanced in that a flexible labour market is essential economically and if employment security is an impediment to such flexibility, then, all that needs to happen is to provide other forms of security and employment security will then be a tradable right.¹⁰⁸ It is without doubt that both employment security and

¹⁰⁴ ILO *Employment Security: Conceptual and Statistical Issues* 1.

¹⁰⁵ ILO *Employment Security: Conceptual and Statistical Issues* 1.

¹⁰⁶ ILO *Employment Security: Conceptual and Statistical Issues* 7.

¹⁰⁷ *Sidumo case* at para 72.

¹⁰⁸ ILO *Employment Security: Conceptual and Statistical Issues* 7.

flexibility is important in this current economic climate. A comprehensive regulation, which appreciates and celebrates both phenomena, is needed to provide a balance and ensure that both employee and employer needs are protected.

Concluding remarks

The traditional protection extended by labour legislation was only afforded to people defined as employees in the traditional sense of the word, however, the nature of work has changed significantly in the past couple of decades as there has been a shift towards flexibility and the restrictive definition of the word 'employee' seen as restrictive. It is now safe to say that the standard employee is no longer only employed on a full-time basis as per the standard employment agreement, there are a variety of new forms of non-standard employment agreements, such as fixed-term contracts.

Although fixed-term contracts do not guarantee employment security as the employment agreement will only be in existence for a certain period of time, there are certain benefits that come with this type of employment relationship, and it goes two folds in the benefit of both the employer and the employee. Fixed-term contracts are particularly important to smaller companies that require assistance for a specified period of time and cannot take up an indefinite commitment towards an employee.

The key with regard to the concept of employment flexibility is to employ and dismiss without any legal consequences, enabling the employer to reach full economic capabilities without any repercussions. The interconnectedness between countries into one global village has rendered national boundaries inconsequential as states have seen an influx of goods produced all over the world and this is becoming problematic for smaller organisations that lack global reach.

The high levels of unemployment has resulted in the expansion of the informal economy thus, an increase in non-standard forms of work, often exposing employees to unacceptable working conditions and possible exploitation, especially for low skilled workers. The increase in the number of non-standard employment agreements, such as

fixed-term contracts, is usually coupled with a decline in employment security. This is very disadvantageous to employees on fixed-term contract as employment security is an important dimension of quality employment and secure employment is the main means to secure income and be able to make long-term financial commitments. A comprehensive regulation, which appreciates and celebrates both phenomena, is needed to provide a balance and ensure that both employee and employer needs are protected.

Chapter 4: Regulating fixed-term contracts

Introduction

South Africa's domestic law is influenced by international standards, thus, it is important to first consider international instruments relating to fixed-term contracts before examining domestic strides made by the country. This Chapter focuses on the role of the International Labour Organisation in regulating fixed-term contracts, through the enactment of international instruments, such as the Termination of Employment Convention 158 of 1982.

Section 23(1) of the Constitution guarantees the right to fair labour practice, however, this right must be regulated in order for it to be enjoyed. The *LRA* was put in place to protect labour rights and ensure the right to fair labour practice. For the purpose of this study, recourse is made to the *LRA*.

This Chapter focuses on the circumstances that constitute a dismissal under the *LRA* and whether or not fixed-term contract employment relationships are covered by the Act. Although some strides have been made by the *LRA* to offer protection to employees on fixed-term contracts, such protection does not come without hindrances. The *LRA* only provides for protection against dismissal of employees on fixed-term contracts, but a lot of questions have not been unanswered, such as: how many times an employer can extend fixed-term contracts or the duration thereof; whether or not there is reasonable expectation for indefinite appointment; and benefits afforded to employees on fixed-term contracts.

The Labour Relations Amendment Act 6 of 2014 (hereafter the *LRAA*) was enacted to provide more regulation and protection for employees on fixed-term contracts. One of the main aims for the enactment was also to fill the gaps left by the *LRA*. This Chapter also focuses on dismissal with the introduction of the *LRAA*, as well as benefits provided to employees on fixed-term contracts.

4. Dismissal

4.1 International standards

In order to understand South Africa's current laws relating to unfair dismissals, it is very important to consider its origins. The *ILO* has played an important role in guiding domestic laws relating to unfair dismissal, especially the Termination of Employment Convention 158 of 1982. The Convention states that a reason for dismissal must fall into one of the three categories: the conduct or misconduct of the employee; the employee's capacity or ability to do the work; and the employer's operational requirements.¹⁰⁹ The Convention not only lays the foundation for the fairness of the reasons for dismissal, but also sets standards in respect of pre-dismissal procedures that must be followed.¹¹⁰

4.2 The Labour Relations Act 66 of 1995

The *LRA* plays an important role in terms of regulating the law relating to unfair dismissals, as well as advancing the constitutional right to fair labour practices in terms of Section 23(1) of the Constitution.¹¹¹ The purpose of the *LRA* is to advance economic development, social justice, labour peace and the democratisation of the workplace by fulfilling the primary objectives of the Act, which is to give effect to the fundamental rights, which are enshrined in the Constitution and international obligations.¹¹² It was held in *National Education Health and Allied Workers Union v University of Cape Town*¹¹³ that one of the core purposes of the *LRA* and Section 23 of the Constitution is to safeguard employment security of workers, especially the right not to be unfairly dismissed.¹¹⁴

4.3 Dismissal under the Labour Relations Act 66 of 1995

A dismissal has to be both substantially and procedurally fair in order for it to succeed; this entails that the reasons advanced for the dismissal must be fair as well as the

¹⁰⁹ A 13 *Termination of Employment Convention* (1982).

¹¹⁰ Garbers *et al the New Essential Labour Law Handbook* 125.

¹¹¹ The Constitution of the Republic of South Africa, 1996.

¹¹² The objectives of the Labour Relations Act 66 of 1995.

¹¹³ *National Education Health and Allied Workers Union v University of Cape Town* 2003 24 ILJ 95 (CC).

procedure followed to uncover the said reasons.¹¹⁵ A claim for unfair dismissal will be upheld if one of the two requirements is not met.

Section 186 provides a statutory definition of what constitutes dismissal. For the purpose of this study, it provides that a dismissal includes the non-renewal of a fixed-term contract by employers or renewal of the fixed-term contract on less favourable terms where the employee had a reasonable expectation that the contract would be renewed on the same or similar terms.¹¹⁶ Although the *LRA* provides for instances wherein a fixed-term contract employee can institute a claim for dismissal, the Act does not define what constitutes a fixed-term contract for the purpose of a dismissal.

Huysamen argues that the inclusion of this provision meant that for the first time, employees on fixed-term contracts were awarded legislative protection. This was particularly important in relation to job security and preventing employers from bypassing the provisions of the *LRA*.¹¹⁷ The employee, however, must show that a reasonable expectation existed and that the employment relationship was going to continue even after the contract had lapsed. The mere expiry of the fixed-term contract does not constitute unfair dismissal; an inquiry to determine same will have to be established.

In order for the employee to bring an application for unfair dismissal, it must first be established that there is a dismissal to begin with.¹¹⁸ If the existence of a dismissal is uncertain and disputed, which is not usually the case, then the employee bears the onus to establish same.¹¹⁹ This was also upheld in the *SA Rugby* case¹²⁰ wherein, the court held that for the purpose of Section 186 (1) (b) of the *LRA*, the onus is on the employee to establish the existence of a reasonable or legitimate expectation of the renewal of the employment contract.¹²¹ In *De Milander v Member of the Executive Council for the*

¹¹⁵ Section 188 (1) of the Labour Relations Act 66 of 1995.

¹¹⁶ Section 186(1) (b) of the Labour Relations Act 66 of 1995.

¹¹⁷ Huysamen E 2019 PELJ 9.

¹¹⁸ Garbers *et al the New Essential Labour Law Handbook* 126.

¹¹⁹ Section 192 of the Labour Relations Act 66 of 1995.

¹²⁰ *SA Rugby* case.

¹²¹ *SA Rugby* case at para 44.

Department of Finance: EC,¹²² the court went a step further and provided that it is necessary to determine whether an employee expected the employment agreement to be renewed (subjective element) and if the employee had such expectation, whether taking into account all the facts, the expectation was reasonable (objective element).¹²³ Thus, it begins with what the employee perceives subjectively as acts or conduct by the employer, which led to the expectation that there were circumstances for the renewal of the contract and what an employee perceives must be objective, given all the factors of a particular case.

The introduction of Section 186 (1) (b) of the *LRA* was hailed as one of the victories for employees on fixed-term contracts as employers were no longer allowed to use fixed-term contracts for unscrupulous reasons, such as putting employees on prolonged probation periods or as a means to deny employees on fixed-term contracts, access to benefits typically only accessible and available to permanent employees.¹²⁴ This was a step in the right direction not only to provide protection to employees on fixed-term contracts but also to rubber stamp the validity and importance of fixed-term contracts in employment relations.

4.4 Limitations of the LRA

Gericke states that although some positive strides have been made by the legislature in terms of protecting employees on fixed-term contracts, by regulating such contracts, some important concerns have not been addressed by Section 186(1) (b) of the *LRA*. Firstly, it is evident from the wording of Section 186(1) (b) that the principle of fairness is not incorporated to address an employer's decision to engage in a series of repeated fixed-term contracts.¹²⁵ The provision does not provide for a reduction in the number of times a fixed-term contract can be renewed; the only requirement is for the employee to

¹²² *De Milander v Member of the Executive Council for the Department of Finance: EC* 2013 34 ILJ 1427 (LAC).

¹²³ *De Milander v Member of the Executive Council for the Department of Finance: EC* 2013 34 ILJ 1427 (LAC) at para 29.

¹²⁴ Huysamen E 2019 PELJ 11.

¹²⁵ Gericke 2015 PELJ 109.

rely on reasonable expectation when making a claim in terms of Section 186 (1) (b) of the *LRA*. This entails that an employer can roll over a fixed-term employment contract for a period of over a year and the employee will still fail for a claim in terms of Section 186 (1) (b), if reasonable expectation does not exist. The term of the fixed-term contract, however, will still play an important role in determining a reasonable expectation that an employee's fixed-term contract would be renewed on the same or similar terms.

Secondly, even though there is some form of protection for employees on fixed-term contracts, such protection is minimal as such employees do not enjoy the same benefits provided to permanent employees, such as access to skills development and applying for vacant positions.¹²⁶ The mere codification of the right to reasonable expectation is not sufficient to properly regulate fixed-term contracts as there are a lot of facets and factors that need to be considered.

Thirdly, there was no indication by the legislature as to whether or not an employee has reasonable expectation that the fixed-term contract can be renewed and made indefinite. This has led to divisions within the South African jurisprudence as different courts have made inconsistent findings as to whether or not, based on the principle of reasonable expectation, a fixed-term contract can be reconstructed to an indefinite employment.¹²⁷ This has created legal uncertainty around the issue and the gap created by the legislature left to the courts to fill.

This issue was addressed in *Wood v Nestle*¹²⁸ wherein, the court held that the employee had a legitimate expectation that her status of employment will change and promised to be considered for indefinite employment and the refusal to provide same to the employee on fixed-term contract, constituted an unfair labour practice.¹²⁹ Although it was not specified in the *LRA*, the court created a precedence that an employee on a fixed-term contract, can rely on the claim for indefinite employment as long as such expectation is

¹²⁶ Gericke 2015 PELJ 109.

¹²⁷ Gericke 2015 PELJ 109.

¹²⁸ *Wood v Nestle* 1996 17 ILJ 184 (IC). (hereafter *Wood* case)

¹²⁹ *Wood* case at 191D.

reasonable. This was also conferred in *Mediterranean Woollen Mills v SACTWU*¹³⁰ wherein, the court held that regardless of the wording, a reasonable expectation could arise during employment if promises, existing practices, and the conduct of an employer, led the employee to believe he could be offered indefinite employment.¹³¹

There was, however, a drastic change of the legal position as brought about by *Dierks v University of South Africa*¹³² wherein, the court emphasised the wording of Section 186 (1) (b) of the LRA “on the same or similar terms” as the ground on which the employee must rely if a renewal of the fixed-term contract is expected and there should be no reliance on an indefinite contract of employment.¹³³ This position was also upheld in *University of Pretoria v CCMA*¹³⁴ where it was stated that the words in terms of Section 186 (1) (b) do not provide employees on fixed-term contracts, a reasonable expectation of a permanent appointment.¹³⁵ These decisions provided by the courts show a more rigid approach towards an employee’s reliance on Section 186 (1) (b) of the LRA. There is need for a more flexible approach for better protection, as the court needs to consider all factors at its disposal and if it so happens that a fixed-term contract of employment is more suited to an indefinite employment contract, then such an order must be made to the benefit of an employee on a fixed-term contract. Higher courts, unlike Magistrates courts that are merely creatures of statutes, have more duties and responsibilities placed on them, especially as far as the interpretation of the law is concerned.

4.5. The Labour Relations Amendment Act 6 of 2014

The *LRAA* came into effect on 1 January 2015 and was enacted with the purpose of providing an in-depth regulation and protection for non-standard employment relationships, especially for fixed-term contracts, as well as outlining employers’ liability

¹³⁰ *Mediterranean Woollen Mills v SACTWU* 1998 19 ILJ 366 (LAC) .

¹³¹ *Mediterranean Woollen Mills v SACTWU* 1998 19 ILJ 366 (LAC) at para 13.

¹³² *Dierks v University of South Africa* 1999 20 ILJ 1227 (LC).

¹³³ *Dierks v University of South Africa* 1999 20 ILJ 1227 (LC) at paras 147 and 148.

¹³⁴ *University of Pretoria v CCMA* 2012 25 ILJ 183 (LAC).

¹³⁵ *University of Pretoria v CCMA* 2012 25 ILJ 183 (LAC) at para 18.

and obligations.¹³⁶ It is without doubt, that the *LRA* left some gaps and ambiguities in relation to fixed-term contract employment relationships.

4.5.1 Definition of fixed-term contract under the LRAA

Section 198B of the *LRAA* defines a fixed-term contract as “a contract of employment that terminates on the existence of a specified event, the completion of a specified task or project, or a fixed date, other than an employee’s normal or agreed age”. This was the first time a definition of a fixed-term contract was provided for by the legislature; this is important in terms of codifying this specific non-standard employment relationship, as well as acknowledging its importance.

4.5.2 Dismissal of a fixed-term contract employee under the LRAA

The *LRAA* made provision for an extension to Section 186 of the *LRA*, the addition in terms of Section 186(1) (b) (ii) now provides that “a dismissal means that an employee employed in terms of a fixed-term contract, reasonably expected the employer: to retain the employee 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 retain the employee”.¹³⁷ According to Huysamen, the uncertainties surrounding the application of Section 186(1) (b) in cases where employees were claiming reasonable expectation for indefinite employment, have now been settled by the extension, as provided in terms of Section 186(1) (b) (ii) of the *LRA*. The amendments extend the scope of protection already available to employees on fixed-term contracts as such employees can no longer only claim for a dismissal where the employer failed to renew the fixed-term contract on same or similar terms, but can now also claim dismissal in instances where the employee had reasonable expectation for indefinite

¹³⁶ Objectives of the *LRAA* 6 of 2014.

¹³⁷ As amended by Section 30 of the *LRAA* 6 of 2014.

employment.¹³⁸ The extension is important as it puts to bed, the legal uncertainty on the issue.

In order to be successful in a claim for reasonable expectation of indefinite employment contract, the employee will have to show that: the employer is in a position to provide indefinite employment; the employer is responsible for creating an expectation that indefinite employment would be offered; and such an expectation held by the employee is reasonable.¹³⁹ Reasonable expectation lies at the crux of the matter, and an employer cannot be compelled to extend the fixed-term contract in instances where it is unreasonable to do so, and this also protects the genuine use of fixed-term contracts.

4.5.3 Duration of fixed-term contracts

One of the aspects which sparked the debate around the regulation of fixed-term contracts was the number of times employers could be allowed to roll them over. The regulation before *LRAA* was mute in terms of how many times employers were allowed to extend fixed-term contracts and in which instances the extensions could result to a reasonable expectation. Section 198B (3) of the *LRAA* plays an important role in this aspect as it provides that an employer may not employ an employee on a fixed-term contract or successive fixed-term contracts for a period longer than three months, unless an employer can show a justifiable reason for fixing the fixed-term contract for longer than three months 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.

Although the *LRAA* provides some regulation as far as the duration of fixed-term contracts is concerned, it still falls short of dealing with successive extensions of such contracts and

¹³⁸ Huysamen E 2019 PELJ 12.

¹³⁹ Huysamen E 2019 PELJ 14.

the implications thereof. An employer can place an employee on a fixed-term contract for two years, just as long as there is a justification for same.

4.5.4 Treatment of fixed-term contracts

Section 198B compels an employer to provide employees on fixed-term contracts, equal access to skills development and opportunities as those on permanent contracts.¹⁴⁰ This was also confirmed in *McPherson v University of KZN*¹⁴¹ wherein, the court held that the university policy of restricting eligibility for the position of head of school to permanent employees was unfairly discriminatory, as employees in fixed-term contracts should not be treated less favourably than those on permanent contracts performing the same or similar job, save where there is a justifiable reason for different treatment.¹⁴² The court correctly pointed out that employees on fixed-term contracts should not be discriminated against, especially as far as being considered for indefinite appointments. This can be regarded as a positive step towards the provision of some sort of employment security to employees on fixed-term contracts. The measure is also cost effective to the employer as it relates to filling an available position. The problem begins when there is an obligation towards the employer to provide skills development programmes to both permanent and fixed-term contract employees.

Although the introduction of this particular provision was aimed at bridging the gap between benefits given to employees on fixed-term contracts and those permanently employed, the introduction of this provision makes it difficult for employers to use fixed-term employment relationships due to the costs associated with the provision of skills development, especially when long-term commitments have not been undertaken with an employee on a fixed-term contract.

It is important to first examine the purpose of fixed-term contracts before expecting employers to provide employees on fixed-term contracts with the same training and

¹⁴⁰ The *LRAA*.

¹⁴¹ *McPherson v University of KZN* 29 ILJ 674 (LC).

¹⁴² *McPherson v University of KZN* 29 ILJ 674 (LC) at para 13.

opportunities as those in permanent positions. The purpose of a fixed-term contract of employment is to serve for a particular period and then the employment relationship terminates after that; the same cannot be said about permanent employees as the employer has made a long-term commitment towards their services. The provision of skills development and training to permanent employees is an investment an employer makes to further organisational goals and objectives. The same cannot be said about employees on a fixed-term contract as their future with the company is dependent on a specified event or a specific period of time. Geldenhuis argues that the resources for the provision of skills development are also a factor to consider, resulting in a lot of employers not utilising this type of employment relationship as it proves to be too costly.¹⁴³

Concluding remarks

The Labour Relations Act plays an important role in regulating the law on unfair dismissals, as well as advancing the constitutional right to fair labour practices in terms of Section 23 (1) of the Constitution. The purpose of the LRA is to advance economic development, social justice, labour peace and the democratisation of the workplace by fulfilling the primary objectives of the Act, which is to give effect to the fundamental rights, which are enshrined in the Constitution and international obligations.

The LRA provides that a dismissal includes the non-renewal of a fixed-term contract by employers or renewal of the fixed-term contract on less favourable terms where the employee had a reasonable expectation that the contract would be renewed on the same or similar terms. The provision does not provide for a curb in the number of times a fixed-term contract can be renewed; the only requirement is for the employee to rely on reasonable expectation when making a claim in terms of Section 186 (1) (b) of the LRA. There was also no indication by the legislature as to whether or not an employee has reasonable expectation that the fixed-term contract can be renewed and made indefinite thus, creating legal uncertainty on the issue.

¹⁴³ Geldenhuys 2008 SA Merc LJ 277.

The LRAA was then enacted with the purpose of providing in-depth regulation and protection for fixed-term contract employment relations, as well as outlining employers' liability and obligations. The LRAA provided an extension to Section 186 of the LRA, the addition in terms of Section 186(1) (b) (ii) currently provides that "a dismissal means that an employee employed in terms of a fixed-term contract, reasonably expects the employer to: retain the employee 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 retain the employee". This has settled uncertainties on the application of Section 186(1) (b). Cases where employees have been claiming reasonable expectation for indefinite employment have now been settled by the extension as provided in terms of Section 186(1) (b) (ii) of the LRA.

Section 198B(3) of the LRAA provides that an employer may not employ an employee on a fixed-term contract or successive fixed-term contracts for a period longer than three months, unless an employer can show a justifiable reason for fixing the fixed-term contract for longer than three months. This, however, still falls short of regulating successive fixed-term employment contracts. Section 198B also compels an employer to provide an employee on a fixed-term contract, equal access to skills development and opportunities as those on permanent contracts.

Chapter 5: "Reasonable expectation"

Introduction

Although a fixed-term contract is used for a specific purpose, unscrupulous employers have taken advantage of the loopholes in this type of contract to the detriment of employees. There is an increase in the use of such employment relationship as employers prefer the flexibility surrounding it, to the detriment of employee's job security, especially when misused. It is was easier for employers to rid themselves of an employee who is on a fixed-term contract as they cannot claim there was dismissal, as such an employment contract lapses by operation of law, at a specified period of time or on the completion of a specific task. Such behaviour resulted in the introduction of Section 186(1) (b) of the *LRA*, which provides the right to reasonable expectation of renewal on the same terms or even indefinitely, of fixed-term contracts. This Chapter focuses on the right to reasonable expectation and circumstances, which constitute such right.

5. Understanding "reasonable expectation"

It is generally accepted that the natural termination of a fixed-term contract, such as the occurrence of a specified event or time, does not constitute dismissal as the termination occurs by operation of law and in accordance with the intentions of the parties. This, however, resulted in scrupulous employers abusing this type of contract by circumventing the provisions of the *LRA* to the detriment of the rights of employees.¹⁴⁴ This prompted the introduction of Section 186(1) (b) of the *LRA*, which provides that in certain circumstances, the expiry of a fixed-term employment contract can constitute dismissal. This occurs when an employee, who is employed in terms of a fixed-term employment contract, 'reasonably expected' the employer to renew the fixed-term contract on the same terms and the employer in turn, failed to renew it on the same terms or to retain the employee to that particular position on an indefinite basis.

¹⁴⁴ Huysamen E 2019 PELJ 9.

Section 186(1) (b) of the *LRA* clearly seeks to address the situation where an employer fails to renew a fixed-term contract when there is a reasonable expectation that it would be renewed and such an expectation should be equated with legitimate expectation applicable in administrative law.¹⁴⁵ A reasonable expectation is the most flexible measure that could be formulated to service unfair labour practice because of the array of possible circumstances which may present themselves during the course of employment. This relates to the promises or any other indication made to the employees that they will attain indefinite employment and same could not materialise.¹⁴⁶ This is problematic as it creates a sense of false reliance and also hinders on the employee's employment security.

In the heart of the claim, is the fact that an employee must be able to show that a reasonable expectation for renewal or indefinite appointment existed, failure to do so will result in an employee not being able to show that there was unfair dismissal. It was held in *Vorster v Rednave Enterprises*¹⁴⁷ that by proving a reasonable expectation for renewal, the employee, on fixed-term contract, shows that only a dismissal has taken place; it is quite possible also for the employer to show that the dismissal was fair in terms of Section 192(2) of the *LRA*, this will then entail a two leg inquiry; the employee must be able to show that there was reasonable expectation that the fixed-term contract will be renewed and the employee, on the other hand, must show that failure to renew the fixed-term contract is fair given the circumstances at the time. This also enshrines the *audi alteram partem* rule as well as the fact that an employee cannot place a blind reliance on the right to reasonable expectation without a solid foundation, taking into consideration all surrounding factors.

Geldenhuis states that the most important aspect that has to be considered in terms of Section 186(1) (b) of the *LRA*, is whether the expectation of renewal is 'reasonable'; it is, however, not clear what constitutes "reasonable expectation" as this was not addressed by the legislature.¹⁴⁸ This created legal uncertainty as there was no checklist for courts to

¹⁴⁵ *Foster v Stewart Scott Inc* 1997 18 ILJ 367 (LAC) at page 373. (hereafter the *Foster* case)

¹⁴⁶ The *Foster* case at page 373.

¹⁴⁷ *Vorster v Rednave Enterprises* 2009 30 ILJ 407 (LC).

¹⁴⁸ Gericke 2015 PELJ 1.

follow in outlining what constitutes reasonable expectation. Thus, the courts had to determine under which circumstances an employee could rely on the right to reasonable expectation. It can also be argued that it was commendable for the legislature not to provide a list of what constitutes reasonable expectation as this allowed the courts to explore a number of factors that might be indicative of same; a closed list would have been restrictive. This is an important argument as it is in support of a flexible application of the right to reasonable expectation and appreciates the fact that each case must be considered in turn. The universal application of this right will be detrimental to some employees on fixed-term contracts who might not be able to rely on such contracts.

5.1 Reasonable expectation: Case law perspective

The courts and other dispute resolution forums have traditionally applied principles of fairness or reasonableness in ascertaining whether a reasonable expectation existed in a fixed-term contract. According to Hysamen, the notions of fairness and reasonableness are notoriously wide and open to different interpretations.¹⁴⁹ Thus, it is important to determine reasonable expectation on a case-by-case basis, even though previous court decisions might have set a precedence in this regard, it will forever remain that what is reasonable in certain circumstances may not be reasonable in others. In *de Milander v MEC for the Department of Finance: EC*,¹⁵⁰ the court held that the test in determining whether a dismissal occurred in terms of Section 186(1) (b) of the *LRA* was twofold: whether the employee expected the contract to be renewed (subjective requirement); and whether the subjective element, in the light of all the relevant facts, was reasonable (objective requirement). If the answer to both inquiries is in the affirmative, a dismissal in terms of Section 186(1) (b) of the *LRA* has occurred.¹⁵¹

This was also indicated in *SA Rugby case*¹⁵² The court, in this matter, stated that in considering the right to reasonable expectation, a two stage approach must be followed,

¹⁴⁹ Hysamen E 2019 PELJ 20.

¹⁵⁰ *de Milander v MEC for the Department of Finance: EC* 2013 34 ILJ 1427 (LAC).

¹⁵¹ *de Milander v MEC for the Department of Finance: EC* 2013 34 ILJ 1427 (LAC) at para 29.

¹⁵² The *SA Rugby case*.

which has both subjective and objective elements. The subjective element refers to whether or not the employee expected the contract to be renewed and the objective element refers to whether or not the expectation was reasonable. The expectation must be created by the employer through his conduct.¹⁵³

As stated in this study, what is reasonable in one case might not be reasonable in another, thus, there are different indicators that might point to a reasonable expectation and an array of factors highlighted in different cases. In the *Joseph case*¹⁵⁴ the court provided different guidelines to be followed such as: the written terms of the renewals; the practice of past renewals; the reasons for having entered into a fixed-term contract; and any assurances given by the employer to the employee that the contract would be renewed. The court also emphasised it was not a closed list and other factors could also be decisive.¹⁵⁵ In *Dierks v UNISA*,¹⁵⁶ the court held that "all the surrounding circumstances, the significance of the contractual stipulation, the customs of renewal or re-employment, availability of the post, the purpose of the fixed-term contract, inconsistent conduct, failure to give reasonable notice and the nature of the employer's business"¹⁵⁷ should also be considered. The different factors are indicative of the importance of an open list in order for different indicators to be considered.

5.1.1 Contract clauses expressly excluding reasonable expectation

The right to reasonable expectation for renewal of a fixed-term contract cannot be expressly excluded by a clause stating non-reliance. In *SACTWU v Cadema Industries*,¹⁵⁸ the court held that the provisions of a fixed-term contract are important but not decisive in determining an expectation of renewal; the evidence as a whole informed by the entire

¹⁵³ The *SA Rugby* case paras 9-11.

¹⁵⁴ The *Joseph case*.

¹⁵⁵ The *Joseph case* at para 35.

¹⁵⁶ *Dierks v UNISA* 1999 20 ILJ 1227 (LC).

¹⁵⁷ *Dierks v UNISA* 1999 20 ILJ 1227 (LC) at para 133.

¹⁵⁸ *SACTWU v Cadema Industries* 2008 8 BLLR 790 (LC).

facts surrounding the case will determine a finding of reasonable expectation even if there is a clause expressly prohibiting same.¹⁵⁹ This conclusion was also reached in *Medeterran Wollen Mills v SACTWU*¹⁶⁰ wherein, the court held that a reasonable expectation could arise during employment if assurances, existing practices and the conduct of the employer led an employee to believe there was hope for renewal, whether on a temporary or indefinite basis, despite a clause prohibiting a reasonable expectation for renewal.¹⁶¹

Although one might argue that the courts are imposing themselves upon the parties' freedom to contract, this is particularly important in terms of minimising the abuse associated with this kind of employment relationship, as employers will include the clause in the contracts to their benefit while giving the employee a reasonable expectation knowing very well that the employee cannot rely on same. This imposition is very crucial as far as advancing Section 23(1) of the Constitution, which provides for the right to fair labour practice as well as advancing the purpose of the *LRA*, which is to promote economic development, fair labour practices, peace, democracy and social development.¹⁶² Even though the right to freedom to contract is important, same must not be used to the advancement of unfair labour practices. Allowing such practice enables employers to give a misrepresentation of permanent employment contracts, which are termed as fixed-term contracts, thereby, giving the employee the advantage of misusing this type of employment relationship without any legal consequences. This is why surrounding factors play an important role, instead of what the parties termed their contract to be.

It is stated in *Denel v Gerber*¹⁶³ that the 'true and real position' must always be looked at as far as employment agreements are concerned and that the courts have to lift a veil and give a true analysis of the terms of the contract. If a court is precluded from observing matters outside the parties' agreement, then there would be a serious danger that it

¹⁵⁹ *SACTWU v Cadema Industries* 2008 8 BLLR 790 (LC) at para 20.

¹⁶⁰ *Medeterran Wollen Mills v SACTWU* 1998 19 ILJ 737 (LAC). (hereafter *Wollen Mills* case)

¹⁶¹ *Wollen Mills* case at para 35.

¹⁶² Preamble of the LRA

¹⁶³ *Denel v Gerber* 2005 26 ILJ 1256 (LAC).

could be precluded from determining the true position or true relationship between the parties and end up making a finding that the parties wish to make as to the position whereas, the true position is different.¹⁶⁴ This is an important consideration why the clauses precluding reliance on a reasonable expectation bear no effect towards fixed-term contracts; the surrounding circumstances (true and real position) will be determinative as to whether or not there exists a reasonable expectation. The courts should not only determine the employment relationship based on what the parties call it in their contract, as the agreement might not reflect the true and real position (reality test) and it must be decided on the basis of substance over form.¹⁶⁵

5.1.2 Assurance of renewal

An implied or express assurance by the employer that the contract will be renewed is also one of the many factors to be considered in relying on reasonable expectation. In the *SA Rugby* case, despite a clause prohibiting employees from relying on a reasonable expectation of renewal, employees claimed they had been given a reasonable expectation that their contracts would be renewed by their coach. Although the court found the reliance to be unfounded, as the coach had no authority to renew the contract, the importance of this consideration cannot be ruled out.¹⁶⁶

Past practices of the company will also be considered, such as instances where the company renewed fixed-term contracts of other employees on similar terms or on an indefinite basis, thus, also forming the basis of an employee's reliance. In the *Wollen Mills* case¹⁶⁷ the court held that an employee might 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 as well as the conduct of the employer had led the employee to believe there was a prospect of renewal.¹⁶⁸

¹⁶⁴ *Denel v Gerber* 2005 26 ILJ 1256 (LAC) at para 19.

¹⁶⁵ *Denel v Gerber* 2005 26 ILJ 1256 (LAC) at para 23.

¹⁶⁶ *SA Rugby* case at paras 8 and 9.

¹⁶⁷ *Wollen Mills* case.

¹⁶⁸ *Wollen Mills case* at para 35.

5.1.3 Reasons to conclude a fixed-term contract

Reasons to enter into a fixed-term contract are important as they highlight the crux of the agreement, as well as its purpose. In *SACTWU v Cadema Industries*,¹⁶⁹ the court held that it is very important to consider the reasons why parties enter into a fixed-term contract. Usually, such agreement is entered into because the task to be performed is of a limited or specific one, in the sense that the employer can offer the job only for a specific period of time.¹⁷⁰ A reasonable expectation can then be created by the employer if it so happens that the purpose of the contract exceeded the specified period of time. However, if the purpose and reasons have been met, it would be unreasonable to expect the employer to extend the contract. This was also stated in the *SA Rugby* case wherein, consideration was given to the fact that the fixed-term contract entered by the applicants applied to the World Cup and that no reasonable expectation of renewal existed beyond the tournament.¹⁷¹

The nature of the employer's business also plays a critical role and same was discussed in *Nobubele v Kujawa*¹⁷² wherein, the court held that no reasonable expectation could exist due to the temporary nature of the employer's business.¹⁷³ Fixed-term employment agreements are concluded for a specific task, consideration to the purpose of the whole agreement goes to the importance of this type of employment agreement.

5.1.4 Conditions for renewal have been met

Conditions for renewal also play an important role in determining whether or not a reasonable expectation exists; a condition can also be the extension of the specified task, which forms the basis of the contract due to reasons, such as new budget allocation. A lot of fixed-term contracts also have a performance clause in them and the renewal is subject to performance; same was also highlighted in *Mthembu v Trans Caledon Tunnel*

¹⁶⁹ *SACTWU v Cadema Industries* 2008 8 BLLR 790 (LC).

¹⁷⁰ *SACTWU v Cadema Industries* 2008 8 BLLR 790 (LC) at para 18.

¹⁷¹ *SA Rugby* case at para 35.

¹⁷² *Nobubele v Kujawa* 2008 29 ILJ 2986 (LC).

¹⁷³ *Nobubele v Kujawa* 2008 29 ILJ 2986 (LC) at para 50.

Authority,¹⁷⁴ wherein, an extension of a fixed-term contract was subject to employee's satisfactory performance and on finding that the employee had performed her services satisfactorily, it was found that a reasonable expectation for renewal of the fixed-term contract had existed on the part of the employee.¹⁷⁵

5.1.5 Rolling over of fixed-term contracts

The repeated renewals of a fixed-term contract over several years is sufficient to create a reasonable expectation of renewal as common sense would suggest that the more frequently a fixed-term contract is renewed, the more likely an employee is to gain an expectation of renewal and the more likely it is for the renewal to be reasonable.¹⁷⁶ The number of times the contract has been rolled over can also be indicative of the fact that the agreement can be renewed indefinitely. In *Yebe v University of KZN*,¹⁷⁷ 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 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.¹⁷⁸ The rolling over of a contract for such a long period time might indicate the need for that particular fixed-term employment contract to be converted into a permanent one.

Concluding remarks

It is generally accepted that the natural termination of a fixed-term contract, such as the occurrence of a specified event or time, does not constitute dismissal as the termination occurs by operation of law and in accordance with the intentions of the parties, thus, resulting in scrupulous employers abusing this type of contracts in terms evading the

¹⁷⁴ *Mthembu v Trans Caledon Tunnel Authority* 2009 9 BALR 934 (CCMA).

¹⁷⁵ *Mthembu v Trans Caledon Tunnel Authority* 2009 9 BALR 934 (CCMA) at page 935I.

¹⁷⁶ *SACTWU v Cadema Industries* 2009 9 BLLR 845 (LAC) at para 22.

¹⁷⁷ *Yebe v University of KZN* 2007 28 ILJ 490 (CCMA).

¹⁷⁸ *Yebe v University of KZN* 2007 28 ILJ 490 (CCMA) at para 61.

legal repercussions of labour rights to the detriment of employees. This prompted the introduction of Section 186(1) (b) of the *LRA*, which provides that in certain circumstances, the expiry of a fixed-term employment contract can constitute dismissal. This is the case when an employee, who is employed in terms of a fixed-term employment contract, 'reasonably expected' the employer to renew the fixed-term contract on the same terms and the employer in turn, failed to renew it on the same terms or to retain the employee to that particular position on an indefinite basis.

The most important aspect to be considered in terms of Section 186(1) (b) of the *LRA* is whether the expectation of renewal is 'reasonable'; it is, however, not clear as to what constitutes "reasonable expectation" as this was not addressed by the legislature. The uncertainty in the provision of the Act left a lacuna, with the courts given the mandate to determine what constitutes reasonable expectation. Factors, such as the written terms of the renewals, the practice of past renewals, reasons for having entered into a fixed-term contract, and any assurances given by the employer to the employee that the contract would be renewed, would be considered to establish whether a reasonable expectation exists. This is, however, not a closed list as other factors can also be decisive; all matters would have to be considered on a case-by-case basis.

Chapter 6: Conclusion and recommendations

6.1 Conclusion

Under common law, the terms of employment were very reflective of the bargaining strengths of the parties at the time, as there was little as far as employment regulation, thereby, shifting all the power towards the employer and creating an unequal employment relationship.¹⁷⁹ The unequal nature of the employment relationship then resulted in many employers taking advantage of employees as there was very little job

¹⁷⁹ Huysamen E 2019 PELJ 7.

security; none felt the undesired consequences, such as low skilled employees, as they were dismissed without any repercussions to the employer.¹⁸⁰

The issue of unfair dismissal and employment security was not only a national concern, but a global one, which needed to be addressed. Two core instruments of the ILO were put in place to deal with the issue as follows: The Convention and the Termination of Employment Recommendation No 166 of 1982. The legislature did not only conform to international law standards but went a step further by entrenching the labour rights within Chapter 2 of the Constitution of South Africa. They gave the outmost importance and priority to labour rights of collective labour law by entrenching them in the Bill of Rights, with other important rights. One of the most important constitutional provisions entrenched, especially as far as fixed-term contracts are concerned, is Section 23(1), which guarantees everyone the right to fair labour practices.¹⁸¹

The *LRA* plays an important role in regulating the law relating to unfair dismissals, as well as advancing the constitutional right to fair labour practices in terms of Section 23 (1) of the Constitution.¹⁸² The purpose of the *LRA* is to advance economic development, social justice, labour peace and the democratisation of the workplace by fulfilling the primary objectives of the Act, which is to give effect to the fundamental rights, which are enshrined in the Constitution and international obligations.¹⁸³

Section 186 provides a statutory definition of what constitutes dismissal, and for the purpose of this study, it provides that a dismissal includes the non-renewal of a fixed-term contract by employers or renewal of the fixed-term contract on less favourable terms where the employee had a reasonable expectation that the contract would be renewed on the same or similar terms.¹⁸⁴ In order for the employee to bring an application for unfair dismissal, it must first be established that there is a dismissal to begin with; if there

¹⁸⁰ Huysamen E 2019 PELJ 7.

¹⁸¹ The Constitution of the Republic of South Africa, 1996.

¹⁸² The Constitution of the Republic of South Africa, 1996.

¹⁸³ The objectives of the Labour Relations Act 66 of 1995.

¹⁸⁴ Section 186(1) (b) of the Labour Relations Act 66 of 1995.

is a dismissal, then, the employee must show that he or she had a reasonable expectation for renewal of the fixed-term contract.¹⁸⁵

The most important aspect that has to be considered in terms of Section 186(1) (b) of the *LRA*, is whether the expectation of renewal is 'reasonable'. It is, however, not clear as to what constitutes "reasonable expectation", as this was not addressed by the legislature. It is necessary to determine whether an employee expected the employment agreement to be renewed (subjective element) and if he or she had such an expectation, whether taking into account all the facts, that expectation was reasonable (objective element).¹⁸⁶

Different guidelines will be indicative of a reasonable expectation, such as: "all the surrounding circumstances; the significance of the contractual stipulation; the customs of renewal or re-employment; availability of the post; the purpose of the fixed-term contract; inconsistent conduct; failure to give reasonable notice; and the nature of the employer's business". The different factors are indicative of the importance of an open list in order for different indicators to be considered.

6.2 Recommendations

Section 23 of the Constitution provides that everyone has the right to fair labour practice, irrespective of their status or income.¹⁸⁷ The extended regulation in terms of Section 198B and 198D of the *LRAA*, however, excludes certain employees from relying on the protection provided by this legislation if they are earning an amount above the threshold as provided by the Minister.¹⁸⁸ There was no specific explanation provided by the legislature as to why certain employees are prohibited, even though the right to fair labour practice is a right be enjoyed by "every" employee. The rationale behind the enactment of the threshold might be that employees who are earning above the threshold

¹⁸⁶ *De Milander v Member of the Executive Council for the Department of Finance: EC 2013 34 ILJ 1427 (LAC)* at para 29.

¹⁸⁷ The Constitution of the Republic of South Africa, 1996.

¹⁸⁸ The *LRAA*.

provided by the Minister, are in a better bargaining position compared to their counterparts who are earning below the threshold. This is, however, still not sufficient reasoning as every employee is prone to unfair labour practice, regardless of how much they earn. It is, therefore, recommended that the provision relating to the threshold is inconsequential for protection and must be done away with in order for more fixed-term contract employees be able to rely on the provisions of the *LRAA*.

Section 198B is also not applicable in instances where the employer has fewer than 10 (ten) employees under their employ or employers employing fewer than 50 (fifty) employees during the first two years of operation.¹⁸⁹ Inclusion of this provision is important as it is meant to assist smaller organisations that are starting up, to expand and compete with more established organisations. Smaller companies are most vulnerable and there is need for a more flexible approach to aid in their growth as they could play a pivotal role in the creation of many jobs.

Section 198B (3) of the *LRAA* provides that an employer may not employ an employee on a fixed-term contract or successive fixed-term contracts for a period longer than three months, unless such employer can show a justifiable reason for fixing the fixed-term contract for longer than three months.¹⁹⁰ Inclusion of this provision creates an exception to the general rule that a fixed-term contract may not be longer than three months.¹⁹¹ Fixed-term contracts can be used for a number of different reasons thus, it was important for the legislature not to provide a closed list to instances where a fixed-term contract could run for more than three months. This also goes to solidify the important role played by fixed-term contracts on the labour market. It is recommended that a closed list is not necessary as it will impact negatively on the employer as well as job creation.

Thus, great strides have been made in regulating fixed-term contracts, with the intention of providing better protection to employees; however, it is recommended that such regulation should not be greater than the whole purpose behind the establishment of

¹⁸⁹ Garbers *et al the New Essential Labour Law Handbook* 84.

¹⁹⁰ The *LRAA*.

¹⁹¹ Garbers *et al the New Essential Labour Law Handbook* 84.

fixed-term contracts. Impositions, such as the provision of skills development programmes to fixed-term employees, are very costly and strains employers, especially smaller organisations that are already finding it difficult to survive in this tough economic climate. It is further recommended that a strict regulation will result in employers choosing not to utilise fixed-term contracts thus, resulting in loss of employment. Every right that is applicable to permanent employees cannot also be applicable to fixed-term contract employees due to the nature of their employment agreements.

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