



Fixed term employees – stricter regulation

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1 January 2015 saw the introduction of stricter regulation of atypical forms of employment with the Labour Relations Act (LRA) amended to include a number of provisions specifically aimed at giving labour broking employees, employees employed on fixed term contracts, and part-time employees greater protection. Except for the amendment to s186(1)(b) of the LRA, which applies to all employees irrespective of their level of remuneration, the amendments only apply to employees on atypical work arrangements who earn below the prescribed earnings threshold.

This threshold is currently R205 433.30 per annum, but it is anticipated that it will increase with effect from 1 July 2015. Small employers, that is those with less than 10 employees, are exempt, and so are start-ups with less than 50 employees (that is, businesses in operation for less than 2 years – but not if the employer conducts more than 1 business or where the business was formed by the division or dissolution of an existing business).

It is important to note these amendments do not mean our law has discontinued to recognise fixed term employment contracts. Instead, it continues to recognise them as well as their benefits, for example, that they expire on an agreed end date; that this expiry is not a dismissal; and that the employer is not required to follow any pre-expiry process with the employee. The exception to this rule is that reliance on the agreed end date to bring a fixed term contract to an end will be regarded as a “dismissal” where the employee has a reasonable expectation of continued employment.

Prior to the amendments, the extent of the expectation was renewal of the fixed term contract and therefore continued employment for another fixed term. However, Section 186(1)(b) of the LRA now specifically states that an employee, irrespective

of their level of remuneration or seniority, may not only have an expectation of being employed for another limited duration but that the expectation may be for an indefinite term.

An employee bringing a claim that the employers’ reliance on the agreed end date to bring the fixed term contract to an end, amounted to a “dismissal” must prove that he/she subjectively had the expectation of continued employment (either for another fixed term or indefinitely) and that this expectation was objectively reasonable.

Section 198B of the LRA applies only to employees earning below the earnings threshold. It does not apply to small employers and start-ups, and it also does not apply to fixed term contracts permitted by statute (such as the Skills Development Act), a sectoral determination or a collective agreement.

The key amendments as set out in s198B are as follows:

- the right to equal treatment;
- the right to equal access to vacancies;
- payment of an end-of-term payment;
- the requirement that a fixed term contract must be in writing and must specify the reason why the term is fixed; and
- certain fixed term contracts will be deemed to be indefinite.

a) Equal treatment

An employee employed under a fixed term contract for more than 3 months must not be treated less favourably than an employee employed on a permanent basis performing the same or similar work, unless there is a justifiable reason for different treatment. Section 198D lists the justifiable reasons that could be relied upon, namely seniority, experience, length of service, merit, quantity or quality of work performed and any other non-discriminatory reason.

The right to equal treatment arguably does not mean that employees employed on fixed term contracts can demand identical treatment to that offered to permanent employees. It happens often that the rules of benefit schemes exclude employees employed for a limited duration. An employer would therefore arguably be in compliance with the equal treatment provisions of s198B if it provided a monetary equivalent where provision of the exact same benefit is not practicable or possible. But this raises interesting questions, such as whether fixed term employees are also entitled to paid maternity leave. Many employers provide paid maternity leave to employees who have been with the employer for at least 12 months.

This is often coupled with the requirement that the employee must work for the employer for an agreed period of time after she returns from her maternity leave, failing which she must repay the relevant portion of her maternity benefits. Employees on a fixed term contract for longer than 12 months could arguably demand to be treated “equally” to their permanent counterparts, except: they may not be able to work for the employer for the specified time period after their maternity leave period because the contract term might then have lapsed; and requiring a work-back period after the expiry of the contract term could potentially create a reasonable expectation of continued employment.

When do the equal treatment provisions become effective? In respect of fixed term contracts concluded before 1 January 2015, the equal treatment provisions apply from 1 April 2015. In respect of fixed term contracts concluded after 1 January 2015, the equal treatment provisions apply from the date on which the fixed term contract is concluded.

b) Equal access to vacancies

As from 1 January 2015, employers must provide employees employed on fixed term contracts and employees employed on a permanent basis with equal access to opportunities to apply for vacancies at the employer. Employers who distinguish between their permanent and fixed term employees in communicating the existence of vacancies will have to review these practices in order to ensure that fixed term employees have equal access to opportunities to apply for vacant positions.

c) End-of-term payment

Employees who are employed to work on a specific project that has a limited or defined duration for a period exceeding 24 months are, on expiry of the contract, entitled to an end-of-term payment equal to one week’s remuneration for every completed year of the contract. This amount must be calculated in accordance with section 35 of the Basic Conditions of Employment Act (BCEA) and the Schedule on Remuneration promulgated in terms of s35, or any applicable collective agreement.

In respect of fixed term contracts that took effect prior to 1 January 2015, only the contract period after 1 January 2015 must be taken into account in determining the value of the end-of-term payment.

An employee is not entitled to an end-of-term payment if, prior to the expiry of the contract, the employer offered the employee employment (or procured employment for the employee with a different employer) on the same or similar terms starting at the expiry of the fixed term contract.

Importantly, the end-of-term payment is only payable in respect of fixed term contracts where the reason for fixing the term is work on a specified project. This payment is therefore not available to fixed term employees, irrespective of the length of the contract period, who are, for example, non-citizens who have been granted a work permit for a defined period, or employees who have reached the agreed or normal retirement age, or employees whose employment is dependent on funding from an external source, unless, of course, they are required to work on a specified project.

d) Formal requirements

It is now a statutory requirement, contained in s198B(6), that an offer to employ an employee on a fixed term contract or to renew or extend a fixed term contract must be in writing and must state the reason for fixing the term. If it is relevant in any proceedings, the employer bears the onus to prove that there was justifiable reason for fixing the term of the contract and that the term was agreed.

e) Certain fixed term employees deemed indefinite

An employer may employ an employee on a fixed term contract or successive fixed term contracts for longer than three months only if the nature of the work for which the employee is employed is of a limited duration, or the employer can demonstrate another justifiable reason for fixing the term of the contract. If not, the employee will be deemed to be employed indefinitely.

Section 198B lists examples of reasons that would justify engaging an employee on a fixed term contract. These examples include the following:

- replacing an employee who is temporarily absent from work;
- being employed on account of a temporary increase in the volume of work, which is not expected to endure for more than 12 months;
- employing a student or recent graduate for the purpose of being trained or gaining work experience;
- working exclusively on a specified project that has a limited or defined duration;
- performing seasonal work;
- being employed in a position which is funded by an external source for a limited period.

The examples of justifiable reasons set out in s198B(4) are not a closed list and an employer could therefore employ an employee for a limited duration as long as there is an objectively justifiable reason for doing so.