

FIXED TERM CONTRACTS 101

A fixed term contract is a contract for a specific duration and terminates:

- on the occurrence of a specific event; OR
- on completion of a specific task or project; OR
- on a fixed date other than an employee's normal or agreed retirement date.

The period of a contract may be determined by stipulating either:

- a date for termination,
- that when a particular event takes place the contract will terminate, or
- that on the completion of a particular task or project the contract will terminate.

It is trite that a fixed-term employee has the same rights as any other permanent employee for the duration of the fixed-term contract. Employers must ensure that they follow the correct procedure in dismissing these employees.

Most important clause:

Buthelezi v Municipal Demarcation Board [2005] 2 BLLR 115 (LAC) the Labour Appeal Court held that the retrenchment of fixed-term employees (that is, dismissal for operational requirements in terms of s 189, and where applicable s 189A of the LRA) prior to the expiry of the fixed-term contract is possible only where there is a clause in the contract specifically providing for such early termination.

Two requirements in terms of the Labour Relations Act:

- i. Fixed term contracts must be in writing.
- ii. The duration of the contract must be specified and the reason for same, whether it is on completion of an event or if the contract has a specific end date i.e.:

Definition of dismissal:

The definition of what constitutes a dismissal in terms of Chapter VIII of the LRA has been expanded.

The next amendment to the definition of "dismissal" relates to the issue of the reasonable expectation of continued employment. In terms of an amendment to Section 186(1)(b), "dismissal" is not only when an employer fails to renew a fixed term contract of employment of an employee

in circumstances where the employee has a reasonable expectation of such renewal, as is currently the case. Added to the equation is Section 186(1)(b)(ii) which provides that where the employee has a reasonable expectation of being **offered permanent employment** at the end of the fixed term contract of employment, but was not offered such permanent employment, it is also considered to be a dismissal.

Fortunately, this whole Section 186(1)(b) provision now only applies to fixed term contracts of employment. The problem created by this of course is where a fixed term contract employee is replaced by a permanent employee, this could give rise to a claim for unfair dismissal.

The company to succeed in such a case of reasonable expectation created is to prove that a permanent position does not exist. If the employee performs poorly, it is management responsibility to manage it and follow due process in terms of Schedule 8 of the Labour Relations Act.

Golden tips:

- Upon termination of fixed term contract, state in a notice that a permanent position does not exist and justify it by providing reasons therefore.
- If an employee does reach the normal retirement age, terminate permanent employment and offer a fixed term contract thereafter.

Equal Treatment (Terms, Conditions and Benefits)

All fixed term contract employees who are employed for longer than three (3) months must have the **same terms and conditions of employment** and employment **benefits** of similar/related permanent employees of an employer, unless the employer can prove that there is a justifiable reason for applying different treatment.

Severance Pay:

Section 198B(10)(a) in turn provides that where an employee is employed on a fixed term in excess of 24 months to work on a project with a limited duration, the employee is entitled to one week's remuneration for each completed year of the contract once the contract expires as agreed.

Rolling over of fixed term contracts

An employee has been employed on a fixed-term employment contract for several years. Each consecutive year, the fixed contract is renewed at the election of the employer. After the fixed contract expired, the employer decides not to renew the employee's contract. Is the employee entitled to a renewal of the fixed-term employment contract based on previous renewals?

Section 186(1)(b) of the Labour Relations Act (“the Act”) makes provision that one of the definitions of a dismissal is that an employee reasonably expected the employer to renew a fixed-term contract of employment on the same or similar terms, but the employer offered to renew it on less favourable terms or did not renew it at all. The requirement that such expectation of the employee must be reasonable is one of the most important considerations and will be dealt with in-depth hereunder.

In terms of case law, the Labour Court held that the purpose of the above section of the Act is to prevent the unfair practice by employers of keeping an employee on a temporary basis, without employment security such as pension and medical aid until such time as the employer wants to dismiss the employee without complying with the obligations imposed by the Act in respect of permanent employees.

“Rolling over” a contract is when a fixed-term contract is continuously renewed by the employer after the expiry of each term. It is not against the law or forbidden for an employer to renew such a contract once or twice but, when a contract is rolled over for a third or fourth time, the employee may develop a right to expect that the employer will continue to renew the contract. In other words, the number of times that a fixed-term contract has been rolled over may contribute towards an expectation of another similar contract after the natural expiry of the last contract.

The employee’s expectation of renewal is open to the interpretation of the Courts and may depend on the facts in the circumstances. In *Malandoh v SABC*, the employee was employed on a renewable fixed-term contract, which was rolled over for eight consecutive periods. The employee was then informed that it would not be renewed again. It was found that the contract itself created no expectation of renewal. On the other hand, in *Thiso & Others v King Sabata Municipality*, the employer’s refusal to renew fixed-term contracts after it had automatically renewed them for four consecutive years, was held to constitute a dismissal.

In *Dierks v University of South Africa*, it was decided that, in determining whether an employee has a right of reasonable expectation, the following factors are to be taken into account:

1. the significance or otherwise of any contractual stipulation;
2. undertakings by the employer;
3. the practice of the employer with regard to the renewal of employment;
4. the availability of work;
5. the purpose of concluding the fixed-term contract;
6. failure to give reasonable notice; and
7. the nature of the employer’s business.

The above list is not exhaustive and other factors may also need to be considered.

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- A fixed term contract of employment cannot exceed a period of three (3) months.
- There are specific exceptions created, firstly being if the employer can prove the actual nature of the work the employee is required to perform is of a limited or definite duration, or the employer can prove another “justifiable reason”.
- The employer will always have the *onus* in this regard, as provided for in Section 198B (7). Section 198B (4) provides a guide as to what would be considered to be “justifiable” in specific instances. This would be:
 - a) If the employee replaces a permanent employee of an employer that is temporarily absent;
 - b) If there is a temporary increase in the volume of work of an employer, provided the contract is then not for a period of more than 12 (twelve) months;
 - c) If the employee is a student or recent graduate being trained for a profession;
 - d) If the employee is actually engaged to work on a genuine and specific project that has a limited or specified duration;
 - e) If the employee is not a citizen and the employment is linked to the period of the employee’s work permit;
 - f) The performing of seasonal work;
 - g) If the employee is engaged in an official public works scheme or public job creation scheme;
 - h) Where the position the employee occupies is funded by an external source for a limited period;
 - i) If the employee has reached normal or agreed retirement age.
- Where an employee is then employed on a fixed term contract, or an existing fixed term contract of employment is renewed, in contravention of Section 198A (3), the employment of the employee is then in terms of Section 198B (5) deemed to be permanent employment. Therefore, and specifically, permanent employment is created, and not just an expectation of renewal of a fixed term employment contract.
- A company is not allowed to continuously use a fixed term contract for only 3 months for a new employee in order to circumvent the amendments. The CCMA could award reinstatement to a permanent position.

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

- Employees earning in excess of the earnings threshold (currently R211,596.30 gross salary per annum) as prescribed by the Minister of Labour in terms of the Basic Conditions of Employment Act 75 of 1997 (hereafter the BCEA);
- Employers who employ less than 10 employees;

- Where an employer employs between 10 and 50 employees, the business has been in operation for less than two years (subject to certain exceptions as listed in section 198B(2)(b));
- Employees employed in terms of a fixed term contract permitted by any statute, sectoral determination or collective agreement.

Conclusion:

Contact an expert at Apex HR Solutions to assist you with your fixed term contracts.



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