SmartMoves
Human Capital

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Fixed Term Contracts

A fixed-term contract is an employment contract that terminates on the completion of a specified event, task or project or on an agreed-upon date. These types of contracts may be renewed or extended beyond three months if the nature of the work is of a limited or definite duration or if a justifiable reason is given. However if an employee reasonably expects the contract to be extended or renewed on the same or similar terms and the employer does not offer to do so, or offers an extension or renewal on less favourable terms, this would be considered a dismissal and not merely the conclusion of the contract.

Section 198B of the Labour Relations Act (LRA) addresses these types of contracts with employees who earn below the earnings threshold (R205 433.30 per annum) and employers who have more than 10 employees. Employees who do not fall into this category are still entitled to protection against unfair dismissal under the definition in the opening paragraph above.

A person employed on a fixed-term contract for longer than three months may not be treated any less favourably than a permanent employee in a similar position or who does similar work. This includes being given the same opportunities to apply for vacancies.

An amendment which came into effect in 2015, offered further protection to employees with fixed-term contracts. However a recent decision by the Labour Appeal Court (LAC) has changed the way in which this section of the LRA is interpreted and applied.

The case involved a service provider who had a number of employees on both verbal and written fixed-term contracts. When the employer's client cancelled their contract with the service provider, the employer in turn deemed the employee's fixed term contracts to be terminated. However the LAC determined that the duration of an employment contract cannot be linked to the on-going supply of work contracts by clients as this does not equate to a specific event, task, project or fixed date. The possibility that further client contracts may not be supplied in future is an operational risk, and therefore the employer was obligated to embark on the consultation process required by the LRA in instances of dismissal based on operational requirements. The result was that the employees' contracts were reinstated and deemed to be of an indefinite nature, not fixed-term.

The law provides nine specific examples of reasons which could be used to justify the usage of a fixed-term contract as opposed to a permanent, indefinite-term employment contract. Fixed-term contracts can be justified when: there is an unanticipated increase in the volume of work which is not expected to last more than 12 months, for seasonal work, or for exclusive work on a specific project with limited duration; when another employee takes a leave of absence and needs to be temporarily replaced; when the position is funded by an external source for a limited period, or is part of a public works job creation programme; when the employee has reached the retirement age, is a non-citizen with a work permit, or is a student or recent graduate in need of experience before seeking permanent employment.

The onus is on the employer to prove there is a justifiable reason for the contract being of a fixed-term nature. If a justifiable reason is not given, in writing, then the employment will automatically be considered to be indefinite. Likewise, as in the case described, if the work for which the employee is contracted does not fall within the scope of a specified project, event or limited duration their employment will be considered permanent.

The use of a fixed-term contract in place of a permanent contract with a probationary period continues to be illegal and should be avoided.

References

1. Labour Relations Act 66 of 1995 (updated December 2015)
2. le Roux, P.A.K.(2019) '*Fixed-term contracts: an update*' Contemporary Labour Law, Vol 28 no. 4, pages 46 - 50

Temporary Employment Services: Assignees and Deemed Employers

Temporary service, as defined by the Labour Relations Act (LRA), refers to work for a client by an employee for a period of no more than three months, or as a substitute for an employee who is temporarily absent, or in a particular category of work which is determined by a collective agreement for any period of time.

A Temporary Employment Service (TES) refers to someone who, for reward, procures for or provides to a client other people who perform work for the client and are remunerated by the TES.

Traditionally businesses have used a TES for a number of reasons such as the desire to reduce their liability, to protect against the risk of strike action, and to reduce their administrative resources and costs. It also allowed the client to easily acquire staff when additional help was required on a specific project or if an employee was temporarily absent. From a recruitment point of view, a person could be temporarily assigned to a client and their suitability for a permanent placement could be assessed.

According to section 198A of the LRA, an employee performing a temporary service for the client is an employee of the TES. But if the work done for the client does not fit the definition of temporary service, then the assignee is deemed to be the employee of the client. It also states that, unless there is a fixed-term contract, the employment is of an indefinite nature.

However, a Constitutional Court decision in July 2018 has blurred the lines between the client, TES and the employee, and thus may discourage the use of temporary employment services going forward.

The Court had to decide, in circumstances where the assignee is deemed to be the employee of the client, whether the client is the sole employer for the purposes of the LRA, or if the TES is also an employer. The client's responsibilities as a deemed employer would not change regardless, because in most cases the client would be the strongest employer, and so the assignee would prefer to exercise its rights against the client. But the Court's decision has rekindled the debate as to what rights the assignee has against the client as a deemed employer.

The intention of the legislation is to protect vulnerable employees who fall below the Basic Conditions of Employment Act (BCEA) threshold from exploitation, and to disincentivise the use of TES for non-temporary service assignments. Since the client is deemed to be the employer for the purposes of the LRA, they would be considered liable for any unfair dismissal or unfair labour practice against the employee. The assignee may also not be treated any less favourably than the client's other employees doing the same or similar work, without justification. This means the assignee can join a union, engage in collective bargaining, and participate in strike action against the client, and must be taken into consideration when determining representativity requirements of a union. In addition, assignees not performing temporary services must be taken into account in determining whether section 198A of the LRA will apply to dismissals based on an employer's operational requirements. Section 82(1) of the BCEA states that the TES is deemed to be the employer of an assignee for purposes of the BCEA, although the TES and the client remain jointly and severally liable for any breaches of the BCEA, and perhaps, the Employment Equity Act (EEA) as well

The Constitutional Court came to the conclusion that when an assignee earning under the BCEA threshold does not perform a temporary service, the client is the sole employer. It alone is liable for the employer obligations that flow from the provisions of the LRA. When an assignee is earning above the BCEA threshold the TES and the client remain jointly and severally liable.

It will be interesting to see the outcome of cases flowing from this decision.

References

1. Labour Relations Act 66 of 1995 (updated December 2015)
2. le Roux, P.A.K.(2018) '*Assignees and deemed employers. What has changed between clients and their TES?*' Contemporary Labour Law, Vol 28 no. 1, pages 1 - 14

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