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TERMINATION OF SERVICE OF TEMPORARY EMPLOYEES

In the previous instalment, the distinction between employment contracts for an unspecified term ("permanent" appointments) and fixed term contracts ("temporary" appointments) is discussed. In this instalment, the termination of service of persons who have temporary appointments is discussed.

As mentioned earlier, temporary employees enjoy the same protection under labour legislation as their permanent peers. This also applies in respect of compliance with the rules w.r.t. fair dismissal: if an employer wants to terminate the services of a temporary employee *before* expiry of the term of the contract, it has to be for a fair reason and a fair procedure must be followed before dismissal.

If, however, the term of the contract merely expires, the contract dies a natural death and there is no question of dismissal. The employee can therefore not complain of unfair dismissal. There are however two situations in which the employer's decision not to renew the contract could give rise to problems. The one case is where the employer and employee have agreed (whether in writing, verbally or even tacit) to extend or renew the contract: in this case that must be carried out, because failure to do that would constitute a breach of contract. A typical case would be where the fixed term has expired, but the employee is allowed to continue working. The employee could argue that a tacit renewal took place. It may even be argued that the relationship is no longer a temporary one, but tacitly converted into a "permanent" relationship, i.e. one for an unspecified period. This holds implications for both the way in which the relationship may be terminated and the employee's claim to employment benefits.

The second potential problem area occurs where the temporary employee can prove that she had a "reasonable expectation" to believe that the contract would be renewed on more or less the same conditions as before. This may be the case where the contract was regularly renewed in the past for example, or a promise of extension was made by a representative of the employer. If the employee can prove that such an expectation exists, the employer must offer a good reason why the contract has not been extended and a fair procedure should also have been followed before the decision was taken. In practice, this means that the non-extension of the contract constitutes dismissal and needs to be justified, as in the case of any other dismissal.

In an attempt to limit their exposure in this regard, it is recommended that employers firstly set out the employment conditions of temporary staff clearly in writing. Among other things, it should be expressly stated that the appointment is temporary in nature.

The term or condition that would terminate the contract, must be stated. The contract should also show that the employee accepts that he may not entertain any expectation of renewal. Secondly, one should not make temporary appointments in posts that are in reality permanent posts, unless someone is employed merely in an acting capacity. Thirdly, management must be instructed to properly manage temporary contracts (among others to ensure that they do not exceed the agreed period) and not to make any promises or say things that may give rise to the employee entertaining an expectation of renewal of the appointment. Finally, each decision to renew the contract should be preceded by a new process of contracting with the individual concerned, on terms as mentioned above. In this regard, it must be noted that the law contains no prescripts on how many times a contract may be extended. It is not necessarily the number of extentions that give rise to an expectation of renewal, but rather factors such as the wording of the contract, the nature of the job, the nature of the industry, etc. that are important.