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*The future of fixed term and part-time contracts: proposed LRA amendments to the LRA*

## **FIXED TERM CONTRACTS**

### **Definition**

Fixed-term contracts are those that are intended to dissolve automatically when an agreed future event occurs, i.e. the happening of an event (e.g. return of someone from maternity leave or participation in a strike); expiry of a time period; or completion of the project or job for which someone was employed. The proposed s 198B introduces protection for such 'vulnerable workers' and will apply to employees earning below the statutory earnings threshold applicable under the BCEA, currently R 172 000 p.a.

### **Limitation**

An employer will be permitted to employ an employee earning less than the threshold on a fixed term contract or successive contracts for up to 6 months, unless s 198(B)(3) applies. Section 198B(3) determines that an employer may engage an employee on a fixed term contract or successive fixed term contracts for longer than six months of employment if:

- the nature of the work for which the employee is engaged is of a limited or definite duration; or
- if the employer can provide any other justifiable reason for fixing the term of the contract.

Section 198(B)(4) provides a list of examples of situations when employment beyond six months will be justified, i.e. if the employee:

- is replacing another employee who is temporarily absent from work;
  - is engaged on account of a temporary increase in the volume of work which is not expected to endure beyond 12 months;
  - is a student or recent graduate who is employed for the purpose of being trained or gaining work experience in order to enter a job or profession;
  - is engaged to work exclusively on an genuine and specific project that has a limited or defined duration;
  - has been engaged for a trial period of no longer than 6 months for the purpose of determining the employee's suitability for employment;
  - is a non-citizen who has been granted a work permit for a defined period;
  - is engaged to perform seasonal work;
  - is engaged on an official public works scheme or similar public job creation scheme;
  - is engaged on a position which is funded by an external source for a limited period;
- and

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- has reached the normal or agreed retirement age applicable in the employer's business.

The six month limitation also does not apply if:

- the employee is engaged in a fixed term contract that is permitted by any statute, sectoral determination or collective agreement, or
- an employer employs less than 10 employees or employs less than 50 employees and whose business has been in operation for less than 2 years, unless the employer conducts more than one business, or the business was formed by the division or dissolution of an existing business.

If an employee is employed on a fixed term contract for longer than six months, his/her employment is deemed to be of indefinite duration i.e. permanent unless the employer provides a justification for the employee's continued temporary employment.

### **Comment**

The amendment tries to strike a balance between the need to protect vulnerable employees against the potential for abuse and the need to permit short-term flexibility. In future employers will not be allowed to appoint an employee in a job which by its very nature is a permanent fixture in its structure. Many employers will realise that they have more 'permanent' employees in their employment and that they would have to revise the benefits these employees qualify for.

The examples listed in s 198(B)(4) are nothing new, but essentially only confirm the purpose and application for which the fixed term contract was designed for. It is as a result of the improper use of fixed term contracts, that revisiting and regulating them more stringently was required, obviously also taking into account the need for employment flexibility. The examples of justifiable use of fixed term contracts will certainly bring more clarity and direction to human resources practitioners and managers and contribute to more responsible decision-making and planning when staffing decisions are made. As a rough rule of thumb, employers will have to ask themselves: 'What is the reason why employee X is employed on a temporary basis?' Absent a business-related justification, the employee's employment should not exceed six months unless he/she is employed permanently.

### **Written particulars required**

An offer to employ, renew or extend a fixed term contract must be in writing and must provide the reason for the appointment of a fixed term, i.e. either because of the work being of a definite (limited) duration or any other justifiable reason. This applies to all fixed term contracts and not only those in excess of six months.

### **Comment**

The requirement of written particulars relating to the use of fixed term contracts will assist in monitoring the correct application of these contracts and will assist aggrieved employees who feel that they are exploited in respect of their employment status. This provision will assist them in exercising their rights. It will be imperative for such contracts to be closely monitored to ensure that they do not run over the agreed term of employment. If they do and an employee is allowed to continue working beyond the agreed period, the employer will in all likelihood face a demand for permanent employment.

**Other interesting provisions in relation to fixed term employment status**

- An employee employed on a fixed term basis for longer than 6 months must be treated 'on the whole' not less favourably than an employee employed on an indefinite basis performing the same or similar work, unless there is a justifiable reason for different treatment. There is no indication in the relevant section (s 198B(8)) of what might amount to a 'justifiable reason'. (However, see below 'Justifications for differential treatment' under part-time employees.)
- An employer must allow the fixed term employee the same opportunities in respect of applying for vacancies for jobs of an indefinite duration as it would provide to an employee employed on an indefinite basis. This is simply good practice.
- An employer who employs an employee on a fixed term contract on a genuine and specific project of definite duration for longer than 24 months must pay such an employee at the expiry of such contract a severance benefit of one week's remuneration for every completed year's service. An employee who unreasonably refuses an offer of employment by such employer or any other employer is not entitled to such payment.

**Comment**

The above provisions should also be read together with an amendment to s 186 in respect of the definition of dismissal. There has been some controversy over whether s 186(1)(b)(i) dealing with non-renewal of a fixed-term contract applies where the employee expected not renewal, but permanent employment. In a recent decision the LAC decided that it did not apply. An amendment to the section now determines that the non-appointment of a fixed term employee on a permanent basis will amount to a dismissal when an employee engaged under a fixed term contract of employment reasonably expected the employer to retain the employee on an indefinite contract of employment, but the employer offered to retain the employee on less favourable terms, or did not offer to retain the employee.

Should a position for which a fixed term contract was used, become a permanent one in the employer's structure, employers would be well advised to appoint the incumbent to that position, unless there is a good reason for not doing, e.g. misconduct or incapacity, and the necessary steps had been followed to address these issues.

Furthermore, the above provisions in general allow for equal treatment of employees on a fixed term basis and ensure that they have equal access to vacancies and other opportunities, even though they are appointed on a fixed term basis, thereby ensuring that their vulnerable status is protected.

**PART-TIME EMPLOYEES****Definition**

A part-time employee is someone who works less than hours normally worked in a workplace, e.g. ½ day instead of the normal 8-hour day worked by other employees at the workplace; or 1 day per week instead of 5 days per week, etc.

According to the new s 198(c)(3) part-time employees should on the whole not be treated less favourably than a 'comparable' full-time employee doing the same or similar work, unless there is a justifiable reason for the different treatment. A part-time employee should also be provided with access to training and skills development as well as access to opportunities to apply for vacancies on the whole not less favourable than the access applicable to a comparable full-time employee.

#### **Justifications for differential treatment**

A justifiable reason for different treatment may include seniority, experience or length of service, merit, the quality or quantity of work performed and any other criteria of a similar nature not prohibited in law.

#### **This section does not apply if:**

- the employee earns in excess of the statutory threshold, or
- the employee is engaged in a fixed term contract that is permitted by any statute, sectoral determination or collective agreement, or
- an employer employs less than 10 employees or employs less than 50 employees and whose business has been in operation for less than 2 years, unless the employer conducts more than one business, or the business was formed by the division or dissolution of an existing business; or
- to an employee who ordinarily works less than 24 hours a month; and
- during an employee's first six months of continuous employment.

#### **Comment**

Again, this provision tries to protect vulnerable employees and practices that deprive employees of their right to fair labour practices and forces employers to apply principles of equal treatment and parity to those in a-typical employment. The protection provided is similar to those employees appointed on a fixed term basis.

#### **Conclusion**

Overall, the amendments are aimed at promoting the achievement of the original objects of the LRA, i.e. ensuring that the employment rights provided for in the Constitution are extended to all employees, particularly vulnerable ones, such as fixed term and part-time employees. Some of the provisions will impact significantly on companies' employment strategies. However, for the most part employers who use fixed-term and other non-standard forms of employment for sound, business-related reasons, should not experience too much difficulty.

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