

Limited duration employment contracts - unlimited hassles when not properly managed



By Johan Botes

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Employers use limited duration contracts (LDCs) to create certainty and limit legal risk in respect of staffing solutions. Appointing an employee for a fixed period or defined project allows an employer to plan for the employee's exit in advance. This is because the contract will expire on a certain date or upon reaching a defined milestone, without the limitations of only being able to terminate the contract for valid reasons, and after following a fair procedure. But what happens when the work is not completed by the end date, the employee delivers such good work that the employer wishes to retain the employee past this period, or the employee is not keen on the contract terminating? The Labour Appeal Court (LAC) in South Africa recently confirmed some of the principles inherent in fixed-term employment contracts.



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The South African legislature recognises the vulnerable position of employees on fixed-term employment contracts. As the termination of the limited duration contract does not constitute a dismissal, as a rule, the employee is deprived of the right to challenge the fairness of the termination of employment. Employees have the right to a fair dismissal, but where the termination of employment does not constitute a dismissal for the purposes of employment law, ergo there can be no unfair dismissal that may be subject to legal challenge. Other typical examples of terminations that do not constitute dismissal include retirement, resignation and termination by agreement or mutual consent. However, limited duration employees receive statutory protection in that:

- they may claim that the termination of their limited duration contract should be viewed as a dismissal where they can show that they had a reasonable expectation that their contracts would be renewed or converted into indefinite duration (permanent) agreements, but the employer then failed to satisfy this expectation. This claim also applies to limited duration employees whose contracts were renewed on less favourable terms.
- those employees earning below a statutory minimum (the Earnings Threshold) enjoy additional entitlements in respect of valid reasons for such agreements, equal treatment to indefinitely employed colleagues, and deemed permanent employment after a period.

The LAC had to consider the status of employees where the limited duration employment contracts expired, but the

employees were allowed to continue working past the contractual termination date. It confirmed an earlier decision that the employment contract tacitly novated into an agreement for open-ended employment. Having regard for the 2009 decision quoted by the LAC on this issue, we caution that the facts of each case will determine the extent of the novation of the limited duration agreement.

The LAC judgment should not be regarded as establishing an immutable position that all LDCs will become permanent where employees are continued to be employed after the expiry date. Factors such as non-variation clauses, communication between the parties and other evidence on the agreed intention of the parties could defeat a claim of novation into indefinite employment, in our view. However, there is a clear risk that the court may accept that the employment contract continued on the same terms save for the expiry date, which no longer applies.

Employers may minimise their employment law risk in respect of LDCs by ensuring that:

- their contract templates reflect the current legal thinking and best practice
- they deploy LDCs in respect of defensible projects or business needs only
- they maintain an accurate register of contract expiry dates and ensure they do not continue to employ LDC staff after the expiry of the agreement, without putting in place a new contractual regime to deal with changes in circumstances
- they train managers on the risks inherent in tacit promises or representations to LDC employees on renewal or employment contracts

Even more so in 2020 and beyond, fixed-term employment contracts are valuable business tools that allow employers flexibility to manage the volatile business world. Contracting an employee as cover for a team member on maternity leave will remain a sound business practice. Facing an unfair dismissal claim or being saddled with additional headcount because no-one monitored the expiry of replacement employee's contract is decidedly not good for business.

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