

Importance of justifying fixed-term employment

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Does the termination of an employee's fixed-term contract of employment, where such employee earns below the earnings threshold and is employed to perform work of a permanent nature, amount to an unfair dismissal?



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Section 198B of the Labour Relations Act 66 of 1995 (LRA) provides that fixed-term employees earning less than R205,433.30 per annum (threshold) may only be employed for longer than three months if the work they perform is of a limited or definite duration, or if the employer can demonstrate any other justifiable reason for fixing the term of the contract. In the absence of a justifiable reason, the employee will be regarded as being indefinitely employed.

Facts

In the case of *Ntsoko v St John the Baptist Catholic School (2019)*, Ntsoko (the employee) was employed as an educator at St John the Baptist Catholic School (the employer). The employee was employed in terms of four fixed-term contracts - the first of which was signed in February 2015. The last fixed-term contract was signed on 31 October 2017 and was to run from 1 January to 31 December 2018. This contract was not renewed and this (the non-renewal of this contract) was the subject matter of the dispute between the parties.

On 15 November 2018, the employee was advised that his fixed-term contract would not be renewed for 2019. The employee contended that he had formed a reasonable expectation that his contract would be renewed and sought to challenge this decision. He referred a dispute to the Commission for Conciliation, Arbitration and Mediation (CCMA) relying on section 186 of the LRA.

Section 186 of the LRA provides that if an employee employed in terms of a fixed-term contract of employment reasonably expected the employer to renew it on the same or similar terms, or to be retained on an indefinite basis on the same or similar terms, but the employer offered to renew or retain the employee's employment on less favourable terms, or did not renew or retain the employee at all, it constitutes a dismissal.

The parties argued the matter before the CCMA on the basis of a non-renewal of the employment contract.

CCMA's evaluation

The Commissioner noted that the Employee earned R10,000 a month and therefore section 198B of the LRA applied.

Section 198B (3) of the LRA provides that an employer may only employ an employee, who earns below the threshold, on a fixed-term contract for longer than three months if the nature of the work for which the employee is employed is of a limited or definite duration or if the employer can demonstrate any other justifiable reason for fixing the term of the contract.

Any fixed-term employment contract which contravenes the provisions of section 198B (3) is deemed to be of indefinite duration (in other words, the employee is regarded as being a so-called "permanent" employee).

The Commissioner held that the nature of the employee's work was not of a limited or definite duration. The employer had failed to provide any justifiable reason for employing the employee on a fixed-term contract. The employee was therefore a permanent employee of the employer.

The letter of 15 November 2018 informing the Employee that his contract would not be renewed constituted a dismissal. The Commissioner was satisfied that the employee had shown that he had been dismissed. All dismissals must follow a fair process and be for a valid reason. No procedure was followed and no valid explanation had been provided justifying the employee's dismissal. The employee's dismissal was therefore substantively and procedurally unfair.

The employee did not seek reinstatement and the Commissioner awarded compensation equivalent to four months' salary.

Importance of the case

The case highlights the protection the LRA provides to employees earning below the Threshold who are employed on fixed term contracts. Employers should consider whether that have current fixed term employees who earn less than the Threshold, have been employed for longer than 3 months or are not performing "temporary work" or for whom there is no justifiable reason to fix the term of their employment.

If employers intend employing employees on fixed-term contracts for a period of more than three months, justifiable reasons need to be present for fixing the term of the contract. In the absence of doing so, there is a risk that these employees are indefinite employees and that the non-renewal of the fixed term contract of employment will constitute a dismissal.

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