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Cancelling fixed term employment contracts - expiry or retrenchment?

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In terms of the Labour Relations Act 66 of 1995 (LRA), employers and employees can enter into fixed term contracts of employment, which are accepted as valid employment agreements, subject to certain conditions. Generally, there must be a justifiable reason to enter into the employment relationship on a fixed term basis, rather than entering into a permanent employment contract. Usually, the reason for using a fixed term contract relates to employment enduring until the occurrence of a specified event, or the completion of a specified task or project, or a fixed date, other than an employee's normal or agreed retirement age.

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Due to historical misuse of fixed term contracts to avoid the consequences of entering into permanent relationships, labour law has developed to ensure that the reasons are regulated for entering into a fixed term contract. In particular Section 198B of the LRA provides that the conclusion of a fixed term contract will be justified if the employee is, for example, replacing another employee who is temporarily absent from work; is employed on account of a temporary increase in the volume of work; is a student or recent graduate who is employed for the purpose of being trained or gaining work experience; is employed to work exclusively on a specific project that has a limited or defined duration, or has reached the normal or agreed retirement age applicable in the employer's business.

It should also be noted that these sections do not apply to employee earning in excess of R241,110.59 in term of section 6(3) of the Basic Conditions of Employment Act 75 of 1997 (BCEA). Generally, an employee's fixed term contract may terminate in the circumstances contemplated in section 198B, and this is not regarded as a dismissal but is simply seen as the termination of an employment contract by effluxion of time. Critically, it is also important to understand this this termination of employment does not constitute the retrenchment of the employee.

Case details

This principle was recently confirmed by the Commission for Conciliation, Mediation and Arbitration (CCMA) in the case of *Financial Sector Allied Workers Union of South Africa obo Members v Bidvest Prestige Cleaning Services (Pty) Ltd [2023]*, in which certain employees of Bidvest Prestige were employed in terms of fixed term contracts as provided for by section 198B of the LRA. These contracts were terminated by Bidvest Prestige when a service contract between Bidvest Prestige and its client was awarded to another company by the client. The employees alleged that their termination by Bidvest Prestige was a dismissal was for operational requirements and that they were entitled to be paid severance pay.

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However, section 41(2) of the BCEA makes provision for the payment of severance pay and it provides that "an employer must pay an employee who is dismissed for reasons based on the employer's operational requirements or whose contract of employment terminates or is terminated in terms of section 38 of the Insolvency Act, 1936 (Act No. 24 of 1936), severance pay equal to at least one week's remuneration for each completed year of continuous service with that employer, calculated in accordance with section 35."

The CCMA in the *Bidvest Prestige* case stated that in terms of aforementioned section of the BCEA, severance pay is only for those employees who are dismissed for reason of the employer's operational requirement or insolvency.

The CCMA was tasked to determine whether the employees were dismissed for operational requirements as contemplated by section 189 of the LRA and accordingly whether the employees were entitled to severance pay. In addressing the first question, the CCMA referred to the definition of a fixed term contract as per section 198B of the LRA and compared it to the wording in the employees' contracts of employment.

The clause provided inter alia that "this contract is a fixed eventuality contract for a definite period which terminates automatically upon ...the employer's client terminating the contract or part of the contract pertaining to the Employee which exists between the Employer and its client." The contracts of employment also provided expressly "that the Employee's contract of employment will terminate at any time as and when an event [of termination] occurs, in such event this contract will automatically terminate. Such termination will not be construed as being termination for operational reasons."

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The CCMA held that the employees were employed in accordance with section 198B of the LRA and that their contracts made it clear that the termination of their employment would not constitute a dismissal for operational requirements in terms of section 189 of the LRA. The CCMA further held that the employees were not entitled to severance pay and buttressed that severance pay is only for those employees who are dismissed for reason of the employer's operational requirement or insolvency.

It is, therefore, pivotal for Employers and Employees to be mindful that if employees are employed in terms of section 198B of the LRA and if their contracts of employment were not terminated for operational requirements, they are not entitled to severance pay as provided for in section 41(2) of the BCEA if their employment terminates when the fixed term period ends.

However, section 198B(10)(a) of the LRA states that "an employer who employs an employee in terms of a fixed term contract for a reason contemplated in subsection (4)(d) for a period exceeding 24 months must, subject to the terms of any applicable collective agreement, pay the employee on expiry of the contract one week's remuneration for each completed year of the contract calculated in accordance with section 35 of the Basic Conditions of Employment Act." This provision should not be misconstrued as severance pay in terms of section 41(2) of the BCEA. It is merely calculated in a similar manner as section 41(2) of the BCEA.

Employers should be aware that the CCMA and Labour Courts are building up a clear and consistent body of case law which supports the use of valid fixed term contracts. Wherever their usage can be justified, an employer should consider engaging employees on a fixed term basis to simplify their labour environment.

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