The new nature of the fixed-term contract

By Antoine Smith

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The Labour Relations Amendment Bill 2012 was recently tabled before parliament to amend the Labour Relations Act no 66 of 1995. It has been accepted by parliament but has not yet been enacted.

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The effect of this is that it is in its final stages of being passed into law and that while the final version will only be set in stone when it is signed by the president and published in the government gazette, employers need to take notice of what is coming and prepare accordingly.

"The art of war teaches us to rely not on the likelihood of the enemy's not coming, but on our own readiness to receive him; not on the chance of his not attacking, but rather on the fact that we have made our position unassailable." - Excerpt from: Sunzi 6th cent. B.C. "The Art of War."

These wise words written centuries ago find application even today. It does not do us any good to wait for the amendments to be enacted before we start to plan accordingly. As such I turn today to the proposed section 198B which deals with fixed-term contracts. This is an entirely new section and was not dealt with in the previous act at all. Until now fixed-term contracts were regulated by the common law and the principle of contractual freedom. The amendments look to bring the regulation of this type of contract under the auspices of the statute.

Who is this section applicable on?

The heading of the section states that it is applicable on all employees earning below the threshold determined by the minister, from time-to-time, in the Basic Conditions of Employment Act, with whom fixed-term contracts are entered into.

Except:

a) employees earning in excess of the threshold prescribed by the Minister in terms of section 6(3) of the Basic Conditions of Employment Act;

Currently the threshold is R193,805.00 per annum (R16,150.41 gross per month)

b) an employer that employs less than 10 employees, or that employs less than 50 employees and whose business has been in operation for less than two years, unless -
(i) the employer conducts more than one business; or
(ii) the business was formed by the division or dissolution for any reason of an existing business.

As these amendments have not been enacted yet, and therefore not been interpreted by our courts, it is unclear if the exception referred to in subsection 198B (2) (b) i includes different legal entities with the same trading name, members, directors or holding company and will probably lead to numerous cases to the courts for determination. We also cannot speculate on the effect of a 197 transfer as a going concern will have on the interpretation of division and dissolution of a business. But given the general and wide wording of the subsection, I assume that sale of an employers business as a going concern will form part of the wording used and this section will be applicable.

What is considered to be a fixed-term contract?

(1) For the purposes of this section, a 'fixed-term contract' means a contract of employment that terminates on -
(a) the occurrence of a specified event;
(b) the completion of a specified task or project; or
(c) a fixed date, other than an employee's normal or agreed retirement age.

In other words, any contract which we currently consider to be for a limited duration.

Period or length for which I may employ someone on a fixed-term contract?

(3) An employer may engage an employee on a fixed-term contract or successive fixed-term contracts for longer than six months of employment only if -
(a) the nature of the work for which the employee is engaged is of a limited or definite duration; or
(b) the employer can demonstrate any other justifiable reason for fixing the term of the contract.

It appears that the legislator has determined that all fixed-term contracts will be capped at six months. This time frame was negotiated under the auspices of NEDLAC, but it appears as if the six-month time limit might be shortened and we will only know the exact limit once the amendments are published. This section has the effect that employees employed on fixed-term contracts for longer than six months will be deemed to be permanent, unless the employer can show that the work is of a limited duration or has a justifiable reason.

I presume that the CCMA, Bargaining councils and the courts will apply a restrictive approach to interpreting what a limited or definite duration is to give effect to the goal of the inclusion of this section in the act to prevent employers from circumventing the act. This can be seen from the wording, genuine and specific, used in subsection (4) (d).

When will it be justified?

(4) Without limiting the generality of subsection (3), the conclusion of a fixed-term contract will be justified if the employee:
(a) is replacing another employee who is temporarily absent from work;
Examples of his will be for extended or protracted forms of sick leave or maternity leave and cases such as approved study leave.
(b) is engaged on account of a temporary increase in the volume of work which is not expected to endure beyond 12 months;

This is a reality in especially the manufacturing sector, care should be taken to specifically stipulate the project and reason in the fixed-term contract and ensure that the employer can proof that the employee was informed of this at the start and no expectation was created for further or future employment beyond the increase in work.
(c) 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;
It will be interesting to see if the latest developments in apprenticeship and youth subsidy will be incorporated into this ground of justification.
(d) is engaged to work exclusively on a genuine and specific project that has a limited or defined duration;
It will be crucial to be able to show and proof the finite nature of the contract for which the employee is employed and that he was informed prior to the start of his contract of this fact.
(e) has been engaged for a trial period of not longer than 6 months for the purpose of determining the employee's suitability for employment;
This is the only really positive impact this section has for employers. Under the current legislation the CCMA, Councils and Courts frown on employers utilising fixed-term contracts for the purposes of probation to avoid the arduous process of probation in schedule 8. This will now no longer be an issue and employers should be able to make full use of this justifiable ground to test the waters with new employees. The new section specifically states that length of service, merit, quality of work or any other just ground, as long as it does not amount to discrimination in term of the employment equity act, are justifiable grounds or different treatment. Therefore if your work is not of sufficient quality the employer does not have to offer you further employment.
(f) is a non-citizen who has been granted a work permit for a defined period;
It is a reality that South Africa has a flood of refugees with work permits seeking employment in various industries, this takes cognisance of this fact and allows employers to provide fixed-term contracts for the duration of the work permit without undue consequences.
(g) is engaged to perform seasonal work;
In the agriculture sector this form of limited duration contract is a reality and farmers and employers associated with this sector will have to be specific and clear when drawing up these contracts to ensure they specify clearly the nature and duration of the work for which the employee is employed.
(h) is engaged on an official public works scheme or similar public job creation scheme;
This is self explanatory and incorporates municipalities requirements in tenders that contractors employ people from the local community for projects in that specific area.
(i) is engaged on a position which is funded by an external source for a limited period;
The importance of disclosure at the start and the inclusion of the fact in the contract cannot be overstated to ensure that employers can show that the employee was aware at all times
(j) has reached the normal or agreed retirement age applicable in the employer's business.
What is of tantamount importance is that each contract contain an agreed age of retirement to ensure that the employer enjoys the protection offered in this section.

What is the effect of non-compliance?

(5) Employment in terms of a fixed-term contract concluded or renewed in contravention of subsection (3) is deemed to be of indefinite duration.

Thus employees employed on a fixed-term contract for a period longer than 6 months without a justifiable reason for the extended period will be considered to be a permanent employee irrespective of the form of the contract, and enjoy all the protection the act offers permanent employees.

What form must the offer to employ or renew be?

The act stipulates the form which an employer must comply with when employing an employee on a fixed-term contract. The effect of this section is that if the employer does not comply with the requirements stipulated the employee will be considered permanent. In the past an employer could argue that the employee was employed on a fixed-term contract without a written contract, by way of oral evidence. This is no longer the case.

(6) An offer to employ an employee on a fixed-term contract or to renew or extend a fixed-term contract must -
(a) be in writing; and
(b) state the reason contemplated by subsection (3)(a) or (b).
Who bears the onus?
Under the current labour dispensation once the employer has proved that the employee was employed on a fixed-term contract the employee had to proof he was dismissed and that it was unfair. As the CCMA, Councils and courts accepted the contract on face value and as such there would be no dismissal in terms of sec186 of the LRA. This section changes that.

(7) If it is relevant in any proceedings, an employer must prove that there was a justifiable reason for fixing the term of the contract as contemplated by subsection (3) and that the term was agreed.

The employer must show that irrespective of the fact that a valid fixed-term contract was signed that there was a need that the contract be fixed or for a limited duration and that the reason is justified. The employer must further proof that the employee knew of the reason and that he agreed at the start of the contract. Failing which the employee will be considered permanently employed.

Must fixed-term employees be treated the same as my permanent staff?

For the first six month of employment the answer is no. fixed-term employees to not need to be treated the same as permanent employees performing the same work. If the employer has a justifiable reason to employ an employee for longer than six months, without him becoming a permanent employee, this situation changes.

(8) An employee employed on a fixed-term contract for longer than six 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.

Whether this means that fixed-term employees must receive bonuses or be added to the provided fund or receive that same hourly rate is unclear but unions will argue that any benefit enjoyed by the permanent staff must accrue to the fixed-term staff as well.

Must they enjoy similar opportunities?

(9) An employer must provide an employee employed on a fixed-term contract with the same access to opportunities to apply for vacancies as it provides to an employee employed on an indefinite basis.

Irrespective of the duration of the contract all fixed-term employees must be given the same opportunities as permanent staff. The positive side of this section is that if a position opens up and an employer has a fixed-term staff member which is better suited than a permanent employee for the position, it cannot be claimed that the employer committed an unfair labour practice by promoting the fixed-term employee to the position over the permanent staff member. The new section specifically states that length of service, merit , quality of work or any other just ground, as long as it does not amount to discrimination in term of the employment equity act, are justifiable grounds or different treatment.

Severance pay?

This is not severance pay in its true sense as it is not connected to the employers operational requirements but has the exact same wording and effect as that of severance pay.

(10) An employer who engages an employee on 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 means that employers will be liable to pay the employee 1 weeks remuneration calculated in terms of section 35 of the BCEA for every completed year for which the employee was in the employ of the employer, similar to severance pay.

What if I offer him employment and he refuses?

(11) An employee who unreasonably refuses to accept an employer's offer of employment with that employer or any other employer is not entitled to payment in terms of sub-section (10).
Similar to the determination with regards to retrenchment the unreasonable refusal of permanent employment with the employer or another employer the employee looses his right to payment referred to above.

What happens if there is a dispute?

198D General provisions applicable to sections 198A to 198C

(1) Any dispute arising from the interpretation or application of sections 198A, 198B and 198C may be referred to the Commission or a bargaining council with jurisdiction for conciliation and, if not resolved, to arbitration.
The CCMA or Council will have jurisdiction over any disputes regarding these new sections and the matter will be referred to them for adjudication.

Should the employee refer a dispute for unfair dismissal it is important to note the amendment to section 186 of the current act. In the current dispensation a fixed-term employee cannot have a reasonable expectation of permanent employment, the employee can only have an expectation that his contract will be renewed for the same period as the last contract offered to him. This has been changed.

Section 186

"(b) an employee engaged under a fixed-term contract of employment reasonably expected the employer -
(i) to renew a fixed-term contract of employment on the same or similar terms but the employer offered to renew it on less favourable terms, or did not renew it; or
(ii) to retain the employee on an indefinite contract of employment but otherwise on the same or similar terms as the fixed-term contract, but the employer offered to retain the employee on less favourable terms, or did not offer to retain the employee."

The employee can now have an expectation of permanent employment and such can be found by the CCMA or Council to be the case. This can have serious implications on employers. Not only can these employees now be permanently reinstated but compensation of the full 12 months can now be granted as compensation which in the past was limited to the remainder or length of the fixed-term contract. Employers will have to have their current fixed-term contracts reviewed and changed accordingly by Legal professionals to ward against this scenario.

I trust that the above discussion enables employers to review their current needs and staff contingent prior to the amendments being enacted into law.

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