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EMPLOYMENT

Fixed term employment and procedural fairness in large scale retrenchments

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ISSUE(S)

Whether the employees' fixed term contracts had terminated by operation of law having regard to section 196B of the LRA.

Whether the employer should be compelled to reinstate dismissed employees in terms of section 189A (13) of the Labour Relations Act 66 of 1995 ("LRA") pending a fair dismissal procedure.

COURT'S DECISION

In the case of *AMCU and Others v Piet Wes CC and Another* (J2834/16; J2845/16) [2017] ZALCJHB 7 (13 January 2017) a number of employees, all of whom were members of AMCU, had been employed, by two employers ("service providers"), on purported fixed term contracts. The two disputes were consolidated given the similar underlying facts. The service providers provided services to Exxaro Coal Mines as contractors. The employees' fixed-term contracts contained no definite termination date. Instead, the employees' contracts of employment provided that their services would terminate should a third party (which would include Exxaro) terminate its contracts with the service providers. The continuation of the employees' contracts, so the services providers contended, were dependent upon their contracts with Exxaro.

Exxaro terminated the services of both service providers. As a direct result the service providers dismissed the employees, claiming their contracts of employment had terminated by effluxion of time. It was common cause that no retrenchment process, as envisaged by section 189A (it being a large scale retrenchment), was followed by the employers. The employees had not been consulted prior to the termination of their contracts of employment.

As a result AMCU, who represented the employees, launched an urgent application seeking, by virtue of section 189A (13) to compel the employers to re-instate the dismissed employees until such time as the service providers complied with the procedural requirements of section 189A of the LRA. Section 189A requires that employers who seek to dismiss employees for operational requirements properly consult with such employees' trade union on all matters affecting the employees including the reasons for the proposed dismissals, alternatives that the employer considered before proposing that the employees be dismissed, the number of affected employees, the method for the selection of employees for dismissal, the severance pay proposed etcetera. Employers are also obliged to comply with the minimum consultation periods as prescribed within section 189A.

The central question before the Court was whether the employees' contracts of employment terminated by operation of law. Section 189B regulates in what circumstances employees may be employed on a fixed term basis. Importantly, employees may only be so employed for a period in excess of three months (if they earn under the threshold of R205,433.30) if the nature of their work is of a limited or definite nature or there is another justifiable reason for the use of such contracts. An example of a 'justifiable reason' would be the employment of employees for a specific project.

The Court held that the service providers bore the onus of proving that there was a justifiable reason for the use of fixed term employers. The Court held that the reason for using such contracts in this case was insufficient. There was no indication on the facts that a specific project had come to an end. This was not an instance where Exxaro had asked, for instance, that employees be brought in to clean a specific

mine. Such an example would constitute a justifiable basis for employing the employees' on a fixed term basis. The mere cancellation of a service contract by a client (in and of itself) was not a valid ground that the employer could rely on to show a justifiable reason to employ workers on a fixed term contract for more than three months.

Rather, it was clear that the contracts were not intended to be for a fixed term. To make employees' employment contingent upon the whims of a third party would undermine their rights and the protection afforded by the LRA.

As a result the employees' services could only be terminated once the provisions of section 189A had been adhered to. This required, among others, a process of consultation with AMCU (acting on behalf of the affected employees). AMCU were therefore successful in their application.

IMPORTANCE OF THIS CASE

This case highlights the importance of only using fixed term contracts in appropriate, justifiable circumstances. Employers seeking to employ employees on a fixed term basis must do so only upon proper consideration of the provisions of the LRA and once they are assured that the employment of such employees on such basis can be justified.

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