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EMPLOYMENT

Fixed term faux pas – how not to employ someone for a limited period of time

1 February 2021 *5 min read*

By Bradley Workman-Davies, Director

Fixed term contracts of employment are allowable and acceptable in South African employment law, and are used on a frequent basis where there is a justifiable usage. The Labour Relations Act, 66 of 1995 (LRA) even specifies when there will be a prima facie reasonable usage of a fixed term contract, such as where the employee is only needed for a limited period of time, such as to replace an employee who is temporarily absent (for example, due to having proceeded on maternity leave) or where there is a project of limited duration or linked to limited external funding. Where a fixed term need exists, fixed term contract is appropriate. It is surprising therefore, that fixed term contracts are still improperly used in a manner which exposes employers to unnecessary risks and liabilities. A recent case highlights the issues.

Recently, the Commission for Conciliation, Mediation and Arbitration (CCMA) held, in the case of *Chetty / Midlands Communication* the parties had concluded the particular fixed-term contract, in terms of which the employee was appointed as a sales agent and which allowed the employer to terminate the contract before the expiry date only in the event of a material breach by the employee. The employer dismissed the employee for poor work performance and the CCMA accordingly found the employee had been unfairly dismissed. However, while the dismissal of the employee was certainly unlawful, it was potentially not unfair merely because of this contractual restriction, and any liabilities could have been avoided by the employer making a simple additional provision in its contract with the employee.

Firstly, the dismissal of the employee could arguably still have been shown to have been fair, in light of the fact that contracts of employment and the employment relationship in South Africa do not exist in a legislative vacuum and are not governed only by the contract of employment. If so, the LRA would be irrelevant; instead the LRA should be seen as the over-arching statute which governs an employee's rights and entitlements, as well as those of the employer, and the framework within which the contract between the parties should be viewed. In this case, the LRA provides that an employer has the right to dismiss an employee, provided it is able to demonstrate (if challenged), it had a fair reason to dismiss, and followed a fair procedure in doing so. The LRA specifically recognises incapacity (in the form of poor work performance) as grounds for a fair dismissal. As such, even if the contract of employment between the parties specified the employee could only be terminated for material breach, the over-arching statute (the LRA) entitled the employer to dismiss for poor work performance. In this regard, the employer may have been in breach of the contract and could have been found to have affected an unlawful termination, but not an unfair dismissal. A finding of unlawful termination would simply recognise the employer had contractually agreed not to dismiss the employee for any reason other than material breach, and in terminating for a reason other than material breach, had breached its own contractual undertakings. The termination in Chetty was accordingly unlawful, but not necessarily unfair (as defined and regulated by the LRA, which recognises poor work performance as a ground for dismissal). In this case, since the employer also failed to follow a fair process to dismiss the employee, the dismissal was in fact unfair. It need not have been.

In addition, there is no reason why a fixed term contract has to be entered into with a start and end date only, and without the employer reserving its right to fairly dismiss the employee before the expiry date is arrived at. The contract in Chetty tried to achieve this, but erred in providing only early termination could take place for material breach (which is, in any event, not a recognised ground of dismissal under the LRA).

The simple fix is for employers to ensure that where they employ any person on a fixed term basis, they do so with a simple contractual reservation entitling them to dismiss the employee before the expiry date *for any reason recognised in the LRA and after following a fair*

process. In this manner, the employer can (i) effect a fair dismissal for the purposes of the LRA and (ii) affect a lawful termination which they are contractually entitled to implement under the employment agreement.

As is always the case, since the LRA is the overriding requirement, provided the dismissal is fair for the purposes of the LRA, and the contract allows early termination for this reason, any employer engaging an employee on a fixed term basis should always ensure that, firstly the contract is properly drafted when engaging the employee, and secondly it complies with the statutory fairness requirements when ending the relationship.



Bradley Workman-Davies

Director

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