

EMPLOYMENT

# Retrenchment of employees on fixed-term contracts: How far can you go?

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*by Sandile July, Director and Nyiko Mathebula, Candidate Attorney*

Retrenchments are viewed in a bad light due to the very sensitive socio economic element of rendering employees jobless. Although regulated by statute, in particular sections 189 and 189A of the Labour Relations Act 66 of 1995, employers still find the retrenchment process a difficult one to navigate.

The advent of the COVID-19 pandemic has made retrenchments commonplace for obvious reasons. As such, once the hurdle of whether to retrench or not has been cleared, and the outcome is to retrench, the question that follows is who then does the employer select to be retrenched.

There are different types of employees; those who are employed on a permanent basis and those on who are on fixed-term contracts. The difficulty comes in where an employee falls under the latter classification. This is because the law provides a stronger protection to those employees because of the nature of their contracts. Simply put, a fixed-term contract of employment cannot be terminated for any other reason outside of a material breach, repudiation, or by way of the contract coming to its natural end e.g. effluxion of time.

However, there are different types of fixed-term contracts which may change the above position. These are classified according to the following:

- the period to which the contract is set to exist;
- the completion of a specific task or project; or
- the occurrence of a specific event.

What is important about the above is that in respect of the first two types of fixed term contracts, an employer cannot retrench an employee. The reason being that the employer is bound by the law to honour the terms of those agreements namely; 1) termination by effluxion of time; or 2) termination on completion of the specified task or project.

This brings us to the third type of contract mentioned above. In that instance, should the contract state that the employment relationship is terminable for reasons of operational requirements, the employee may be retrenched even if the fixed period of time has not ended or the specified task or project has not been completed. As such, the inclusion of such a term in the contract serves to guard against the risk of having the dismissal held to be substantively unfair when it is legally challenged at a later stage.

Consequently, when contemplating retrenchments, employers should beware of the fixed-term contracts. Accordingly, those contracts should be perused to establish whether there exists a provision which allows the employer to retrench those particular employees. If not, then the employer is bound by the law which says that where you have a fixed-term contract, an employer cannot dismiss the employee based on operational requirements.



**Sandile July**

Head of Employment

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