Prospects of employment security for employees on fixed-term contracts in terms of South African labour legislation

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It all starts here ™

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ABSTRACT

This study aims to evaluate the prospects of employment security for employees employed on fixed-term basis in South Africa, in terms of the labour legislation. The study has been triggered by the recent developments in the labour law field, in particular, the *Labour Relations Amendment Act* 6 of 2014 which came into force in January 2015, and which has effected a great deal of amendments on the provisions of the *Labour Relations Act* 66 of 1995. The specific amendments of particular interest herein relate to the fixed-term work in South Africa.

Section 30 of the Amendment Act has amended section 186 of the *Labour Relations Act* dealing with dismissals, in particular, dismissal of employees on fixed-term contracts. Section 186 of the *Labour Relations Act* of 1995 defined dismissal of fixed-term employees as including a situation where the employer fails to renew the fixed-term contract, or renewed it on less favourable terms, in circumstances where the employee had reasonable expectation that such contract would be renewed on the same or similar terms. However the Amendment Act widens the scope of dismissal and provides that where the employer fails to retain the employee on permanent basis or offers to retain him on less favourable terms in circumstances where the employee had reasonable expectation to be retained on the same or similar terms, it amounts to dismissal.

Most interestingly, section 198B of the *Amendment Act* limits duration of a fixed-term contract to three months. Since one of the objectives of this Amendment Act is to provide greater protection to employees in atypical employment, and to regulate fixed-term work with a view of creating job security, the study herein investigates whether the Act does achieve that purpose. The study does that by determining the practical effectiveness of these new provisions. A comparative reflection is made in chapter five, between United Kingdom and South African labour provisions.

Key Words: Fixed-term contracts, employment security, employment protection

OPSOMMING

Die doel van hierdie studie is om die vooruitsigte van werksekuriteit vir werknemers op vaste termyn kontrakte in Suid-Afrika in terme van die arbeidswetgewing te ondersoek. Die studie is gemotiveer deur onlangse ontwikkelings op arbeidsgebied, spesifiek die Arbeidsverhoudinge Wysigingswet 6 van 2014 wat in Januarie 2015 van krag gekom het. Die wysigingswet het ‘n reuse-impak op wysigings op die bepalings van die Wet op Arbeidsverhoudinge 66 van 1995. Die spesifieke wysigings van belang het betrekking op vaste termyn kontrakte in Suid-Afrika.

Afdeling 30 van die Wysigingswet het afdeling 186 van die Wet op Arbeidsverhoudinge, wat verband hou met die ontslag van vaste termyn werkers, gewysig. Afdeling 186 van die Wet op Arbeidsverhoudinge van 1995 het die ontslag gedefinieer as insluitend van situasies waar die werkgewer verseg om die vaste termyn kontrak te hernieu, of dit hernieu op minder gunstige terme, in omstandighede waar die werknemer redelike verwagtinge gehad het dat so ‘n kontrak hernieu sal word op gelyke terme as voorheen. Die Wysigingswet maak die spektrum vir ontslag wyer en voorsien dat, waar die werkgewer nie die werknemer permanent aanstel nie, óf aanstel op minder gunstige terme, dit gelykstaande is aan ontslag.

Interessant genoeg beperk afdeling 198B van die Wysigingswet die tydperk vir ‘n vaste termyn kontrak tot drie maande. Aangesien een van die doelwitte van hierdie Wysigingswet is om groter beskerming vir werknemers in a-tipiese werk te bied, en om vaste termyn werk te reguleer met die vooruitsig om weksekuriteit te verseker, stel die studie ondersoek in of dié doelwit wel bereik word. Die studie doen dit deur die praktiese effektiwiteit van die nuwe voorwaardes te bepaal. ‘n Vergelykende refleksie word in hoofstuk vyf gemaak tussen die verenigde koningkryk en Suid-Afrikaanse arbeidsbepalings.

Sleutel woorde: Vaste termyn kontrak, werk sekuriteit, beskerming indiensneming.

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LIST OF ABBREVIATIONS

BCEA	-	Basic Conditions of Employment Act
CC	-	Constitutional Court
EAT	-	Employment Appeal Tribunal
EEA	-	Employment Equity Act
EPA	-	Employment Protection Act
ERA	-	Employment Rights Act
FTER	-	Fixed-Term Employee Regulations
IC	-	Industrial Court
ILJ	-	Industrial Law Journal
ILO	-	International Labour Organisation
LAC	-	Labour Appeal Court
LC	-	Labour Court
LRA	-	Labour Relations Act
LRAA	-	Labour Relations Amendment Act
PER	-	Potchefstroom Electronic Review
SA	-	South Africa
STELL LR	-	Stellenbosch Law Review
UK	-	United Kingdom

Chapter 1-Introduction, Problem statement, Methodology, Framework

1.1 Introduction

The takeoff point in this study is section 23(1) of the Constitution of South Africa[1] (the Constitution) which provides that everyone has a right to fair labour practices. Debates as to whether this section also covers those outside the employment relationship, will be addressed in chapter two of this study. The above section is always read with section 185 of the *Labour Relations Act- (LRA)*[2] which entitles every employee to a right not to be unfairly dismissed or subjected to any kind of unfair labour practice. Dismissals are defined under sections 186(1) and 187, while unfair labour practices are defined under section 186(2) of the *LRA.* These are also dealt with in the next chapter. The aim of the Constitution and the *LRA* is thus to provide employment security for all employees, whether in the atypical or atypical employment relationship. In this regard the *Basic Conditions of Employment Act (BCEA)*[3] lends a helping hand to the above mentioned legislations to guarantee secure and favourable working conditions during the life of the employment relationship.

There are essentially two types of employment contract: fixed-term and indefinite.[4] In an indefinite type of contract of employment the parties do not specify a date on which the contract shall terminate.[5] In this instance the employment contract lapses automatically upon demise of the employee or when the employee reaches the retirement age.[6] The employment contract may endure until either party terminates it by giving reasonable notice of termination;[7] when one of the parties commits a fundamental breach;[8] when both parties mutually agree to terminate the contract;[9] or the contract is terminated on any of the grounds acceptable in law.[10]

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1 *Constitution of the Republic of South Africa* 108 of 1996.
2 66 of 1995.
3 75 of 1997.
4 Grogan *Workplace Law* 11th ed 43.
5 Grogan *Workplace Law* 11th ed 46.
6 Grogan *Workplace Law* 11th ed 46; *Thembane v Revertex Chemicals (Pty) Ltd*'1997 18 ILJ 174; (LAC)*Harris v Bakker & Steyger (Pty)* Ltd 1993 14 ILJ 1553 (IC).
7 Grogan *Workplace Law* 11th ed 46, 72-74.
8 Grogan *Workplace Law* 11th ed 46.
9 *Breet v Maxim Dantex SA (Pty) Ltd* 2012 33 ILJ 1634 (LC); Grogan *Workplace Law* 11th ed 46.
10 Grogan *Workplace Law* 11th ed 46.

On the other hand, fixed-term contracts of employment are those which are concluded for a determined or determinable period of time, or linked to the occurrence of a specific event.[11] That is, the parties clearly specify the duration of their employment contract, and the contract lives for the specified duration and comes to an end on the stipulated date unless the contract itself provides for earlier termination by notice,[12] it is terminated earlier by repudiation, fundamental breach or by agreement.[13]

At common law, fixed-term contracts terminate automatically upon expiration of the term of appointment.[14] The employer does not have to take any action to terminate the fixed-term contract, and as a result no dismissal can be said to have occurred. In many instances, employers abused this common law principle of automatic termination in an endeavour to avoid obligations labour legislation would otherwise impose upon them.[15]

1.2 Problem statement

It has become increasingly common to appoint employees on temporary basis as alternative to permanent employment[16] (fixed-term contracts included). In South Africa fixed-term contracts are regulated by the *Labour Relations Act* of 1995 *(LRA).*[17] This Act is always read in conjunction with the *Constitution* of South Africa 1996,[18] the *Basic Conditions of Employment Act*[19] *(BCEA)*, the *Employment Equity Act*[20] *(EEA),* other employment laws and the instruments of the *International Labour Organisation (ILO)* so as to give effect to the protection of employment security for employees on fixed-term contracts.

In answer to the demand for cohesive protection for employees appointed in terms of fixed-term contracts, the Legislature enacted section 186(1) (b) of the *LRA* of 1995.

11 Olivier 1996 *ILJ* 1006; Grogan *Workplace Law* 11th ed 44.
12 *Morgan v Central University of Technology, Free* State 2013 BLLR 52 (LC).
13 Grogan *Workplace Law* 11th ed 44.
14 Olivier 1996 *ILJ* 1006.
15 Olivier 1996 *ILJ* 1006.
16 Thompson 2003 *ILJ* 1793.
17 66 of 1995.
18 *Constitution of the Republic of South Africa* 108 of 1996.
19 75 of 1997.
20 55 of 1998.

The purpose of this section was mainly to regulate the termination of fixed-term contracts.[21] It has been held that this section was enacted to deter employers from discontinuing the employment relationship by non-renewal where a reasonable expectation of renewal has been created, to prevent the unfairness of indefinite renewals, as well as to strike a balance between the freedom of contract and legislative intervention in the protection of employees.[22] Despite this section, there were still some lacunas in the security of employment regarding fixed-term employees in relation to permanent appointment and renewal, hence enactment of the *Labour Relations Amendment Act of*2014 *(LRA Amendment of* 2014).[23]

Under the *LRA* of 1995 a temporary employee is regarded as an ordinary employee and is as such entitled to the same statutory protection and rights afforded to other, permanent employees. Thus, no distinction is drawn between temporary and permanent employees.[24] Fixed term employees did not have same rights as those employees employed on permanent basis. For instance, the fixed-term employees could not compete for positions with those permanent employees, they were not entitled to severance payment, pension fund and at the end of the duration of the fixed-term contract it was not always certain whether these fixed-term employees could be said to have been unfairly dismissed. Consequently much prejudice was suffered by most of these employees.[25]

The 2014 *Amendment Act* was enacted with objectives inter alia of "providing greater protection for workers placed on temporary employment services, regulating the employment of workers on fixed-term contracts, as well as specifying the liability for employers' obligations".[26] The amended section 186 of the *LRA* provides that dismissal of an employee on a fixed-term contract will only occur where such an employee "reasonably expected the employer to renew a fixed-term contract on the same or similar terms but the latter offered to renew it on less favourable terms instead, or did not renew it at all"; or if the employee "reasonably expected the employer to convert their contract into an indefinite one but otherwise on the same or

21 Geldenhuys 2008 *Merc* LJ268.
22 Geldenhuys 2008 *Merc LJ2*68-279.
23 6 of 2014.
24 Geldenhuys 2008 *Merc LJ* 271*;* also see section 213 of the *LRA* 66 of 1995.
25 Geldenhuys 2008 *Merc LJ* 271.
26 See the preamble of the *LRA Amendment Act* 6 of 2014.

similar terms as the fixed-term contract and the employer offered to retain the employee on less favourable terms or did not retain him/her at all".[27]

The 2014 *Amendment Act* does not place a limit on the number of successive renewals that can be allowed before an employee could be expected to have a reasonable expectation that his/her fixed-term contract would be converted into an indefinite one. Save where a justifiable reason exists, the old position is retained and some employers can still renew fixed-time contracts numerously, enjoying the services of the employees to their own benefit, but to the detriment of those employees. After numerous contract renewals, the employee is dismissed.

A simple example could be taken from the facts of *Dieks v UNISA*[28] and *Yebe v KZN.*[29] In the former case, Dierks, the applicant, was employed by the university on fixed-term contracts for 1995 and 1996. The university formulated a policy regarding temporary work. During 1997 he was employed for two periods, March and April and July until December. The fixed-term contract made it clear that the employee was entitled to a permanent position. At the end of his contract Dierks was not given a permanent post. He launched proceedings in the Labour Court claiming that he had been unfairly retrenched. In dismissing his claim for unfair dismissal, the court held that section 186 (b) was not applicable to him and /or the evidence did not show anything that should have created in his mind, a reasonable expectation of permanent appointment. In *Yebe's* case an employee's contract was renewed twenty times over a period of four and half years using twenty eight fixed-term employment contracts and yet the employer refused to appoint her permanently.

This illustrates unfairness which the Amendment Act too fails to cure, and this amounts to unjustified exploitation of employees by employers who have the strong bargaining power in employment relationships. There is no provision prohibiting employers from incorporating a clause against the expectation of indefinite appointment and/or renewals at the end of the fixed-time contract. Such clauses

27 Section 186 of the *LRA* of 1995 as amended by section 30 of the *LRA Amendment Act 6* of 2014.
28 1999 4 BLLR 304 (LC).
29 2007 28 ILJ 490 (CCMA).

might be inserted into fixed-term contracts by employers with a sole purpose of placing employees' services at their disposal for as long as they wish.[30]

1.3 Methodology

The methodology used throughout the dissertation is library research. This study is mainly based on literature review of relevant textbooks, case law, law journals, *International Labour Organisation (ILO)* Conventions, South African legislation and internet sources dealing with the notion of fixed-term contracts. A comparative reflection will be made in chapter four focusing on the regulation of fixed-term contracts in the United Kingdom. Specifically, the *Employment Relations Act (ERA)* 1996 of UK and the *Fixed-term Employees (Prevention of Less Treatment) Regulation*[31] will be discussed against the *LRA* 1996 of RSA and the *LRA Amendment Act* of 2014 in so far as fixed-term contracts are concerned.

1.4 Framework

1.4.1 Chapter one

This chapter gives the introduction and definition of the contracts of employment; lays down the problem statement; shows the methodology used herein and provides the outline of chapters of the study.

1.4.2 Chapter two

This chapter discusses employment protection, employment security, and job security in a general way.

1.4.3 Chapter three

The chapter is focused on fixed-term contracts under the common, the LRA of 1956, the LRA of 1995, and the LRA Amendment Act of 2014.

1.4.4 Chapter four

30 *Vorster v Rednave Enterprises CC t/a Cash Converters Queenswood* 2009 30 ILJ 407 (LC). This case should be referred to as an example of the point made above.

31 2034 of 2002.

Chapter four makes a reflection of the labour law provisions in relation to fixed-term contracts in the United Kingdom and compares them with those of South African labour legislation. The United Kingdom has been picked for a comparative study because the law in the UK regulates fixed-term contracts better they are regulated in South Africa. In the UK the laws regulating fixed-term contracts is the *Employment Rights Act* of 1996, *Employment Relations Act* (ERA) of 1996, as well as the *Fixed-term Employees (Prevention of Less Treatment) Regulation* (FTER) of 2002. Regulation provides inter alia for restriction of the number of successive fixed-term contracts through a collective agreement so as to alleviate the abuse resulting from the use of successive fixed-term contracts.

1.4.5 Chapter five

In this chapter conclusions are drawn from the whole study and the recommendations are made from the conclusions made.

Chapter 2 – Employment protection, employment security and job security

Key words: Employment protection, employment security, job security

2.1 Introduction

According to Professor van Niekerk, traditionally the protection extended by the labour legislation was afforded only to persons who were or could be defined as 'employees'.[32] The courts often used the common-law employment contract characteristics in interpreting who is, and who is not, an employee.[33] They used the control test,[34] organisation or integration test,[35] dominant impression test, and economic test.[36] Although under the traditional regime it was difficult to draw a borderline between commercial relationships and employment contracts,[37] it has been submitted that the nature of employment which has since changed significantly created even more challenges.[38]

Nowadays "the standard employee is no longer full-time and employed by the same employer during the normal working hours in a week as it was the case in the past".[39] A variety of new forms of workers have emerged, such as the 'e-lancer' based at home, undertaking online projects and others.[40] Furthermore, atypical work, such as the triangular broker relationship,[41] fixed-term and part-time work has emerged.[42] The occurrence of these modern work relationships is mainly "due to employers' quest for flexible working arrangements, technological innovation and the shift to service-based economies".[43] Consequently "protection of vulnerable employees has become a major concern of the statutes, especially protection of the 'non-standard' employees

32 Van Niekerk *Law @ work* 57.
33 Van Niekerk *Law @ work57.*
34 Levy *Rights at Work* 12; *April and Workforce Group Holdings (Pty) Ltd t/a The Workforce Group* 2005 26 ILJ 2224 (CCMA).
35 Levy *Rights at Work* 13; *April and Workforce Group Holdings (Pty) Ltd t/a The Workforce Group* 2005 26 ILJ 2224 (CCMA).
36 *April and Workforce Group Holdings (Pty) Ltd t/a The Workforce Group* (2005) 26 ILJ 2224 (CCMA).
37 Brassey 1990 *ILJ* 7893.
38 Van Niekerk *Law@work57.*
39 Thompson 2003 *ILJ* 1798; Van Niekerk *Law@work57.*
40 Van Niekerk *Law@work* 57.
41 These are referred to as 'temporary employment services' (*TES)* by the *LRA* 66 of 1995.
42 Van Niekerk *Law@work57.*
43 Van Niekerk *Law@work57.*

including those employed by the temporary employment services, fixed-term employees and part-time employees".[44]

In the last two decades "the global labour market has changed extremely both in its composition and in its dynamics and has become more flexible than before. Growing internationalisation of economic activity has affected the nature and type of labour relations".[45] It has been said that it has "rendered regulation of employment and standards of employment more difficult, and markets are more competitive, technology is changing rapidly, and the organisation of work looks different from two decades ago".[46] Various kinds of employment, that is different to that of full time protected regular wage and salary employment have emerged and such employment can be temporary, informal or external.[47] An umbrella term 'non-standard employment' is generally used to refer to such employment.[48] "The number of people forming part of non-standard workforce is escalating and, more people are bound by non-permanent employment contracts and an ever increasing numbers of displaced workers are witnessed".[49]

These changes in the labour market have been accompanied by a general decline of employment security.[50] Overall, "it is generally accepted that the trend towards increased labour market flexibility, or easier hiring and firing, has negatively affected employment security".[51] Non-standard employment, escalating with flexible labour markets, "tends to be less secure with lower average wages, and laws governing benefits are increasingly de-linked from such employment".[52] It has been submitted that there are more women than men are in less secure employment relations.[53] "Workers in the services sector enjoy less employment security than

44 Van Niekerk *Law@work57.*
45 Dasgupta 2001 http://www.ilo.org/ses 1.
46 Dasgupta 2001 http://www.ilo.org/ses 1.
47 Dasgupta 2001 http://www.ilo.org/ses 1.
48 Dasgupta 2001 http://www.ilo.org/ses 1.
49 Dasgupta 2001 http://www.ilo.org/ses 1.
50 Dasgupta 2001 http://www.ilo.org/ses 1.
51 Dasgupta 2001 http://www.ilo.org/ses 1.
52 Dasgupta 2001 http://www.ilo.org/ses 1.
53 Dasgupta 2001 http://www.ilo.org/ses 1.

workers in the industrial sector, and as employment in services rises, employment security falls".[54]

Recent surveys from some developed countries show that "there has been a significant decline in people's perceptions about employment security, and that in many developing countries; employment in low-income, unprotected informal activities has increased".[55] Such employment amounts to "over 60 per cent of total employment in Africa and Latin America and around 40 to 50 per cent of the total employment in developing Asia".[56] Reports of increasing "feelings of insecurity in employment and of lay-offs and redundancies also flourish in the press".[57] Some surveys of workers also show that "workers in various countries report that employment security ranks as one of the most important qualitative aspects of a job".[58] It has been suggested that employment security is "an important dimension of quality of employment and that secure employment is the main means to secure income". The importance of employment security as a socio-economic concept can hardly be over emphasised.[59]

2.2 Employment protection

Employment protection legislation covers three main areas: Regular employment, temporary employment and collective dismissals.[60] "Regulation regarding regular work deals with the definition of just cause for dismissal, time limits for notification, severance pay and other procedural rules in connection with dismissals".[61] Further restrictions, such as notice to a union or public employment service, may apply "if a dismissal is defined as collective. Temporary work is regulated by time limits, valid reasons for fixed-term contracts and by defining which kinds of work can be used from temporary work agencies".[62]

54 Dasgupta 2001 http://www.ilo.org/ses 1.
55 Dasgupta 2001 http://www.ilo.org/ses 1.
56 Dasgupta 2001 http://www.ilo.org/ses 1.
57 Dasgupta 2001 http://www.ilo.org/ses 1.
58 Dasgupta 2001 http://www.ilo.org/ses 1.
59 Dasgupta 2001 http://www.ilo.org/ses 1.
60 Dasgupta 2001 http://www.ilo.org/ses 1.
61 Dasgupta 2001 http://www.ilo.org/ses 1.
62 Skedinger 2011 http://www.inf.se/Wfiles/wp/wp865.pdf 5.

Not only has "employment protection become a vital topic in the institutional approach to labour markets, but these markets have also changed in ways that make questions of employment protection more pressing than before".[63] Rapid globalisation and prompt technological advance place demands on "the ability to adapt on both businesses and employees while, at the same time, there is a legitimate need for a safety net for those workers who are adversely affected by the changes"[64]. Moreover, the challenges of the recent worldwide recession have brought employment protection issues to the forefront on the policymaking agenda and they are likely to endure for years to come.[65]

Employment protection legislation is generally "blamed for reducing labour turnover and increasing the duration of unemployment".[66] That is, many arguments suggest that stricter employment protection reduces labour turnover, "with tenures in both jobs and unemployment lasting longer".[67] The position in South Africa has described as follows:

> The most striking feature of South Africa's labour market is the extreme level of unemployment[68] and South Africa's exceptionally low ratio of employment to working age population is usually blamed on inflexible labour laws.[69] Some writers argue that South Africa's 'wicked' labour laws not only toss millions of the population into the trash can of joblessness, but also cripple the country's economy, cause poverty and degradation, and causes South Africa to be the unequal society. These writers also argue that the labour laws are a violation of the fundamental human right: the right to work.[70]

According to Hepple, "the overall official unemployment rate has been above 20 per cent since the late 1990s, with a peak of 27 per cent in 2002".[71] In countries falling under the *Organisation for Economic Co-operation and Development* (OECD), "the employed generally account for 60 to 75 per cent of the working age population, but in South Africa that figure has been less than 50 per cent for more than a decade and

63 Skedinger 2011 http://www.inf.se/Wfiles/wp/wp865.pdf 5.
64 Skedinger 2011 http://www.inf.se/Wfiles/wp/wp865.pdf 5.
65 Skedinger 2011 http://www.inf.se/Wfiles/wp/wp865.pdf 1.
66 Pissarides 2001 http://www.elsevier.nl/locate/econbase 131.
67 Pissarides 2001 http://www.elsevier.nl/locate/econbase 131.
68 Hepple "Is South African labour law fit for the global economy?" 2.
69 Hepple "Is South African labour law fit for the global economy?" 1.
70 Hepple "Is South African labour law fit for the global economy?" 1.
71 Hepple "Is South African labour law fit for the global economy?" 1.

is currently just above 40 per cent".[72] Thus, few countries have seen such high levels of open unemployment as in South Africa.[73]

2.2.1 Effects of employment protection

Firing costs do not only decrease "the employer's inclination to dismiss an employee, but also his or her willingness to hire new recruits".[74] The latter effect is due to the fact that the firm incorporates potential future costs in the case of a lay-off already in the hiring decision.[75] "With higher firing costs, greater uncertainty regarding the factors which determine the size of the work force will make the company more reluctant to hire someone".[76] For instance, it can be difficult to determine in advance how a new employee will fit into a work group or an organisation and how this employee will manage the company's routines, especially if the employee in question lacks earlier work experience.[77]

Taken together, "the effects of a more stringent employment protection thus imply that employee turnover is reduced, since the flows into and out of the firms are smaller".[78] One consequence of this is that average job tenures and unemployment durations are longer than in countries or sectors with less employment protection.[79] Hence, the "net effect on employment and unemployment is theoretically indeterminate and depends upon which of the two flows dominates".[80] According to Kahn, more stringent regulation reduces employment among youth,[81] and "the incidence of temporary jobs increased when it became easier to use temporary contracts. This suggests that employers essentially substituted temporary workers for permanent ones".[82]

72 Hepple "Is South African labour law fit for the global economy?" 1.
73 Organisation for Economic Co-operation Development (OECD), *South Africa: Economic Survey* 2010 (2010) 93.
74 Skedinger 2011 http://www.inf.se/Wfiles/wp/wp865.pdf 3.
75 Skedinger 2011 http://www.inf.se/Wfiles/wp/wp865.pdf 3.
76 Skedinger 2011 http://www.inf.se/Wfiles/wp/wp865.pdf 3.
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80 Skedinger 2011 http://www.inf.se/Wfiles/wp/wp865.pdf 3.
81 Kahn 2005 http://ftp.iza.org/dpl548.pdf 333-334.
82 Kahn 2010 www.elsevier.com/locate/labeco 1-15.

Another theoretical forecast is that employment protection "inhibits swings in employment and unemployment over the business cycle. During a downturn, fewer employees are fired with stringent employment protection, while during an upturn, not as many employees are hired".[83] Analysis points to the possibility that "employment protection has different effects depending on the stage of the business cycle and that unemployment can become permanent after a deep recession".[84] Firms may become reluctant to take on new employees since they are uncertain as to how long the recovery will last. There are also some "hypotheses which state that stringent employment protection has more negative effects on employment after macroeconomic shocks".[85]

On the other hand the common argument in the literature against employment protection, that it reduces new job creation, is not always supported.[86] The reason for this is that "well-designed flexible employment protection does not reduce job creation, because it makes the total job package offered to the worker more attractive".[87] But purely administrative costs of employment terminations, almost certainly reduce both job creation and job destruction, since they make turnover more expensive.[88]

2.2.2 Types of employment protection

Employment protection encompasses "any set of regulations, either legislated or written in labour contracts, which limit the employer's ability to dismiss the worker without delay or cost".[89] Five kinds of employment protection have been identified,[90] and defined as follows:

> …administrative procedures, notice of termination, severance payment, protection against dismissal, and additional measures for collective dismissals.[91] Administrative procedures include amongst

83 Skedinger 2011 http://www.inf.se/Wfiles/wp/wp865.pdf 3.
84 Skedinger 2011 http://www.inf.se/Wfiles/wp/wp865.pdf 3.
85 Skedinger 2011 http://www.inf.se/Wfiles/wp/wp865.pdf 3.
86 Pissarides 2001 http://www.elsevier.nl/locate/econbase 134.
87 Pissarides 2001 http://www.elsevier.nl/locate/econbase 134.
88 Pissarides 2001 http://www.elsevier.nl/locate/econbase 134.
89 Pissarides 2001 http://www.elsevier.nl/locate/econbase 136.
90 Pissarides 2001 http://www.elsevier.nl/locate/econbase 136.
91 Pissarides 2001 http://www.elsevier.nl/locate/econbase 136.

> others, requirements such as writing to the employee concerned or to an organisation such as a trade union, giving reasons for the dismissal, as well as the date by which the employee has to respond.[92] The second one is notice of termination. The length of notice varies by tenure and includes a period of delay, during which the notice is issued but does not become effective.[93] Severance payment has been identified as a third one, and its payment and the amount due again vary by length of service of the employee.[94] In the fourth place is the difficulty of dismissal, that is, protection against dismissal.[95] This category includes mainly the possibility of a challenge by the employee for unfair dismissal and the leniency with which the law and courts in different countries deal with such claims.[96] The fifth one concerns additional measures for collective dismissals. Some countries impose more costs and inconveniences if the dismissals exceed a prescribed number, usually about ten workers in the same production unit.[97]

2.3 Employment security

Secure employment is generally understood as "the absence of fear of employment loss, or the threat loss of employment".[98] In the literature, employment security generally refers to "protection against unfair or unjustified dismissals".[99] According to the most commonly used and understood definition, 'employment security' means that "workers have protection against arbitrary and short notice dismissal from employment, as well as having long-term contracts of employment and having employment relations that avoid casualisation".[100] Employment security, like other aspects of socio-economic security, has both subjective and objective elements.[101] Thus an objective indicator of employment security is "the proportion of the employed with stable or regular contracts of employment; a subjective indicator is the reported expression of belief that employment continuity is assured".[102]

The labour market is viewed as comprising "three sets of workers - workers in protected employment, workers in unprotected employment, and unemployed workers".[103] Protected employment is "employment that is legally protected against

92 Pissarides 2001 http://www.elsevier.nl/locate/econbase 136.
93 Pissarides 2001 http://www.elsevier.nl/locate/econbase 136.
94 Pissarides 2001 http://www.elsevier.nl/locate/econbase 136.
95 Pissarides 2001 http://www.elsevier.nl/locate/econbase 136.
96 Pissarides 2001 http://www.elsevier.nl/locate/econbase 136.
97 Pissarides 2001 http://www.elsevier.nl/locate/econbase 136.
98 Dasgupta 2001 http://www.ilo.org/ses 2.
99 Dasgupta 2001 http://www.ilo.org/ses 2.
100 Dasgupta 2001 http://www.ilo.org/ses 2.
101 Dasgupta 2001 http://www.ilo.org/ses 2.
102 Dasgupta 2001 http://www.ilo.org/ses 3.
103 Dasgupta 2001 http://www.ilo.org/ses 4.

arbitrary dismissal and is likely to continue".[104] Unprotected employment includes "work of a limited or uncertain duration or where there is no legal support to continuing employment".[105]

2.3.1 Employment security and job security

Employment security is different from 'job security'.[106] Job security is "the security of being employed in a job, or occupation that justifies a worker's qualifications and skills".[107] Employment security also differs from income security to the extent that income security need not be exclusively employment based.[108] Income security could depend on transfers from the state, firms or families. Therefore it is possible to have employment security, but not job security, and income security but not employment security.[109] On the other hand, "if one has employment, they have access to income, but the question to be posed is what kind of income, and whether it is 'decent' employment that provides a 'decent' income?".[110] Despite the distinctions between different kinds of security, it is clear that employment security, job security and income security are interrelated.[111]

2.3.2 Employment security and employment flexibility

There has been a widespread and fervent debate on employment opposed to labour flexibility.[112] "The debate has discussed in great detail the costs of institutional employment security provisions, through employment protection laws, which relate to hiring and firing and rules governing unfair dismissals".[113] From the employers' perspective, employment security is "a constraint variable that interferes with the firm's efficient functioning".[114] Employment flexibility, on the other hand, allows greater leverage to adjust firms' production according to the market, which includes

104 Dasgupta 2001 http://www.ilo.org/ses 4.
105 Dasgupta 2001 http://www.ilo.org/ses 4.
106 Dasgupta 2001 http://www.ilo.org/ses 5.
107 Dasgupta 2001 http://www.ilo.org/ses 5.
108 Dasgupta 2001 http://www.ilo.org/ses 5.
109 Dasgupta 2001 http://www.ilo.org/ses 5.
110 Dasgupta 2001 http://www.ilo.org/ses 5.
111 Dasgupta 2001 http://www.ilo.org/ses 5.
112 Dasgupta 2001 http://www.ilo.org/ses 5.
113 Dasgupta 2001 http://www.ilo.org/ses 5.
114 Dasgupta 2001 http://www.ilo.org/ses 6.

"demand for products, technology and competition".[115] In the debate on the actual impact of flexible labour markets on total employment some have argued that "employment flexibility might allow greater employment, while others have argued that it is also possible that sustained flexibility might make workers expect less security".[116]

2.3.3 Why is employment security important?

Even though many arguments are against employment security, there are however, important arguments in favour of employment security. Employment security is "the main means to income security and it enhances worker welfare".[117] International human rights instruments broadly acknowledge the right to protection against employment loss. According to Article 23 of the *Universal Declaration of Human Rights,* 1948, all persons have the right "to work, to free choice of employment, to just and favourable conditions of work and to protection against unemployment".[118] Employment security is especially important in developing economies that do not have a system of unemployment benefit.[119] Loss of employment in such situations leads to loss of income, and loss of livelihood and this may mean "hunger and misery not only for the person losing his employment but his or her family and dependents, as fall back options beyond the community and family networks are few".[120]

Over and above these arguments based on workers' rights and protection against loss of employment as a human right, employment protection "encourages stable employment relationships that create an atmosphere of macroeconomic stability".[121] Secure employment means "stable employment relations that encourage investment in worker training and skill development and which in turn increases the commitment and motivation of workers, and the productivity of the firm".[122] Security of employment can also lead to "increase in worker loyalty and discipline".[123] At a

115 Dasgupta 2001 http://www.ilo.org/ses 6.
116 Dasgupta 2001 http://www.ilo.org/ses 6.
117 Dasgupta 2001 http://www.ilo.org/ses 6.
118 Dasgupta 2001 http://www.ilo.org/ses 6.
119 Dasgupta 2001 http://www.ilo.org/ses 7.
120 Dasgupta 2001 http://www.ilo.org/ses 7.
121 Dasgupta 2001 http://www.ilo.org/ses 7.
122 Dasgupta 2001 http://www.ilo.org/ses 7.
123 Dasgupta 2001 http://www.ilo.org/ses 7.

macroeconomic level, "aggregate employment levels are less cyclical in countries with high employment security, and little non-standard employment".[124]

2.4 Job security

Even though the main focus of labour law has been the protection of employees in employment, labour law has been concerned too much with issues such as "the establishment of employment relationships, the terms and conditions under which the employees work, and the circumstances in which the employment contract can be ended".[125] As Paul Benjamin stipulates, traditionally, labour law "offers narrow protection in a diversity of involuntary transitions such as unemployment and occupational injury disease, while employees who are foreign or resign fall outside the scope of labour law until they become employees again when hired".[126] However, in the current labour market climate, "workers change their work and status much more frequently so much that the task of how labour law should provide security during the numerous periods of transitions such workers may experience during their working time has arisen".[127]

Job security is focused on shielding the employees from losing their jobs unfairly.[128] Job security is regarded as "a fundamental component of decent work".[129] Job loss involves "not only the loss of income but has far-reaching consequences for the dignity of employees and their family and community stability".[130] The constitutional guarantee of fair labour practices and legislative protection against unfair dismissal, unfair labour practices and unfair discrimination aims to protect the job security of employees in formal and typical employment relationships.[131] However, it is argued that "employees in atypical employment relationships and in informal employment experience insecure and unstable working conditions".[132]

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124 Dasgupta 2001 http://www.ilo.org/ses 7.
125 Benjamin "Labour law beyond employment" 32.
126 Benjamin "Labour law beyond employment" 32.
127 Benjamin "Labour law beyond employment" 32.
128 Benjamin "Labour law beyond employment" 32.
129 Cohen & Moodley 2012 *PER/PELJ* 10.
130 Cohen & Moodley 2012 *PER/PELJ* 10.
131 Cohen & Moodley 2012 *PER/PELJ* 11.
132 Cohen & Moodley 2012 *PER/PELJ* 11.

Cooper identifies some examples of labour practices relating to the employees' security in the context of individual employment: "any unfair conduct or omission relating to dismissal and suspension, unfair treatment relating to work opportunities (promotion, demotion, probation training and benefits), and disciplinary action"[133] constitutes unfair labour practice in terms of section 186(2) of the *Labour Relation Act.* For purposes of this study, only unfair dismissal shall be dealt with hereunder as a form of unfair labour practice as it is the actual termination of employment relationship. It is worth noting that this discussion of dismissal shall mainly be in the context of South African labour law.

2.4.1 Right to fair labour practices

The starting point in this section is section 23(1) of the *Constitution* of South Africa[134] (the Constitution) which provides that everyone has a right to fair labour practices. In terms of subsections (2), (3) and (4), there are four beneficiaries of the right under subsection (1): employees, employers, trade unions and employer organisations. In *National Education Health & Allied Workers Union v University of Cape Town*[135] the Constitutional court held that the structure of the beneficiaries of the right to fair labour practices mentioned under subsections (2), (3) and (4), taken together with the reference to labour practices in section 23(1), restricts the focus of section 23(1) to the "relationship between the worker and the employer and the continuation of that relationship on terms that are fair to both".[136]

It has been held that reference to 'everyone' in section 23(1) should be taken to exclude those who are beyond the employment relationship.[137] However, Cooper argues that "the structure of section 23(1) is such that the right to fair labour practices in sub section (1) should be understood as separate from the rights dealt with in sub

133 Cooper 'Labour Relations' 53-13; In its definition of unfair labour practice, section 186(2) of the Labour Relations Act 66 of 1995 adds that failure or refusal by an employer to reinstate or re-employ an employee in terms of any agreement, and an occupational detriment other than dismissal in contravention of the Protected Disclosures Act 26 of 2000 on account of the employee having made a protected disclosure defined in that Act, also amounts to unfair labour practice.
134 *Constitution of the Republic of South Africa* 108 of 1996.
135 2003 24 ILJ 95 (CC).
136 At para 40.
137 Le Roux "The new unfair labour practice" 43.

sections (2), (3) and (4)".[138] For this submission he relies on the judgment of His Lordship Sachs J in *South African National Defence Union v Minister of Defence*[139] in which the court did not consider whether soldiers were workers, but solely concentrated on the fact that the right to fair labour practices in section 23(1) is available to 'everyone', thus by implication to soldiers as well.

2.4.2 Unfair dismissal

Dismissal is normally understood as "a termination of employment relationship at the initiative of the employer".[140] In layman's terms it means "to fire someone, which implies some action on the part of the employer, terminating the employment contract".[141] However, the statutory definition of dismissal is much broader as it includes a number of elements that would not be understood to be dismissals in the ordinary course.[142] For instance, resignation by an employee and even refusal by an employer to re-employ an employee would amount to dismissal in some circumstances.[143] On the other hand not every employment termination amounts to dismissal. For instance, retirement and expiry of the period of the fixed term employment contract have the effect of terminating employment relationship, however neither is dismissal.[144]

Section 186(1) of the *Labour Relations Act (LRA)*[145] defines what constitutes dismissal. In terms of this section dismissal occurs where:

> the employer has terminated the employment contract with or without notice;[146] the employer refuses or fails to renew a fixed-term contract where the employee has reasonable expectation of renewal or if the employer renews it on less favourable terms while the employee had reasonable expectation that it would be renewed on the same or similar terms;[147] the employer refuses to allow the employee to resume work after she had taken maternity leave in terms of any law

138 Cooper "Labour Relations" 53-14.
139 1999 6 BCLR 615 (CC) para 48.
140 Van Niekerk *Unfair Dismissal*'19; Grogan *Workplace Law*'11th ed 165.
141 Van Niekerk *Unfair Dismissal* 19.
142 Van Niekerk *Unfair Dismissal* 19.
143 Van Niekerk *Unfair Dismissal* 19.
144 Van Niekerk *Unfair Dismissal* 19.
145 66 of 1995 as amended by section 30 of the *Labour Relations Amendment Act6* of 2014.
146 Section 186(1) (a).
147 Section 186(1) (b).

> or collective agreement;[148] the employer had dismissed a number of employees and has offered to re-employ one or others but refuses to re-employ another;[149] the employee has terminated the employment contract with or without notice because the employer had made the continued employment intolerable for such employee;[150] the employer has transferred the business in terms of section 197 of the *LRA* and the new employer has provided the employee with conditions of work that are less favourable than those provided by the previous employer such that the employee terminates the employment contract, with or without notice.[151]

Section 187 of the *LRA* renders dismissal for the following reasons automatically unfair:

> that the employee participated or supported a protected strike or protest action in compliance with chapter IV of the *LRA,* specifically, section 5 thereof;[152] the employee refused to perform work of another employee participating in a strike or who was locked out, unless it was necessary to do such work to prevent harm to life, personal safety or health;[153] the employer was compelling the employee to accept a demand in respect of a matter of mutual interest between an employer and employee;[154] the employee took action or intended to take action against the employer by exercising any right in terms of the *LRA* or participating in any proceedings in terms of the *LRA;*[155] the employee was pregnant, intended being pregnant or for any reason related to her pregnancy;[156] that the employer discriminated against the employee, whether directly or indirectly, for any ground mentioned in section 9(3) of the Constitution;[157] transfer or reason related thereto in compliance with section 197 of the *LRA;*[158] for a reason that the employee made a protected disclosure in terms of the *Protected Disclosures Act* 2000.[159]

Any other dismissal which is not automatically unfair is unfair if the employer fails to prove: "that the dismissal was for a fair reason which related to the employee's conduct or capacity, or which was based on the employer's operational requirements; and that the dismissal was effected in compliance with a fair procedure".[160] Most significantly, section 185 of the LRA entitles every employee to the right not to be unfairly dismissed or subjected to any unfair labour practice.

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148 Section 186(1) (c).
149 Section 186(1) (d).
150 Section 186(1) (e).
151 Section 186(1) (f).
152 Section 187(1)(a).
153 Section 187(1) (b).
154 Section 187(1) (c).
155 Section 187(1) (d).
156 Section 187(1) (e).
157 Section 187(1) (f).
158 Section 187(1) (g).
159 Section 187(1) (h).
160 Section 188(1) (a) (i), (ii) and (b).

2.5 Concluding remarks

It has been noted in this chapter that the traditional aim of labour law was to "provide guarantee of fair labour practices and protection against unfair dismissal, unfair labour practices and unfair discrimination so as to protect the job security of employees in formal and typical employment relationships".[161] Despite this, the job of employees in atypical employment relationships and in informal employment remained insecure and unstable. However, the need to engage in the latter forms of employment arrangements precipitated legislative intervention to extend employment protection and job security to employees in the atypical employment as well. Although many blame employment protection legislation on the unemployment rate and low rates of employment, it is concluded that all employees are now better off with employment protection legislation than without it.

161 See Van Niekerk *Law @ work 57.*

Chapter 3 – Fixed-term contracts under: Common law; Labour Relations Act 1956; Labour Relations Amendment Act 2014

3.1 Introduction

Labour law recognises that employers are generally in a stronger bargaining position than employees and consequently it is mainly premised on the idea of protection of the interests of employees.[162] Because fixed term employees as "'atypical' or 'contingent' employees are particularly weaker bargaining parties in the employment relationship, it is common for employers to treat fixed term employees differently to their permanent co-workers".[163] Temporary employment relationships are "often associated with the withholding of rights and benefits, lack of job security, deprivation of status and poor remuneration. Fixed term employees are also often more exposed to exploitation particularly those who are not highly skilled".[164] In addition, "they often do not enjoy trade union protection and are not covered by collective agreements. As a result, fixed term employees are more inclined to depend on statutory protection enacted to ensure basic working conditions".[165] Although they may enjoy equal legislative shelter in theory, it has been argued that "in practice the conditions of their work make it very difficult to enforce their rights".[166] The purpose of this chapter is to evaluate the treatment of fixed-term contracts (specifically, termination thereof) and protection of fixed-term employees under the common law and the labour statutes in South Africa.[167] This is due to the fact that there have been sundry developments on how fixed-term contracts and fixed-term employees were being dealt with since the statutory intervention, through various amendments to the current era.[168]

3.2 Definition of fixed term contract

A fixed-term employment contract is defined as one in which "an employee places his/her labour potential at the disposal of an employer, in return for remuneration, for

162 Geldenhuys *An Evaluation of the Rights of Fixed Term Employees in south Africa* 1.
163 Geldenhuys *An Evaluation of the Rights of Fixed Term Employees in south Africa* 1.
164 Geldenhuys *An Evaluation of the Rights of Fixed Term Employees in south Africa* 1.
165 Gerickle 2011 *PER/PELJ* 107/234.
166 Timothy *Non-Renewal of a Fixed-Term Employment Contracts* 1.
167 Timothy *Non-Renewal of a Fixed-Term Employment Contracts* 1.
168 Timothy *Non-Renewal of a Fixed-Term Employment Contracts* 1.

a specific period agreed upon between the latter parties".[169] Where parties to a contract do stipulate the duration thereof it is considered to be a fixed-term contract[170] and such contract endures for the stated period, unless it is terminated earlier by agreement or by fundamental breach by either of the parties.[171] A fixed-term contract is usually entered into because the task to be performed is a limited or specific one. In the normal course of events, the contract terminates when an objective condition is fulfilled, such as reaching a specific date, completing a specific task, or the occurrence of a specific event.[172] According to Gerickle, "...the fixed-term contract has been used as a legal instrument by parties who wish to engage in an employment relationship within the framework of predictability and freedom to control the duration of their contractual relationship".[173]

Gerickle opines that "agreement between both parties on the contents and the specific limitations of this kind of atypical employment contract is important to avoid any misapprehension and unreasonable expectations on the part of the employee".[174] At the conclusion of the contract, "the parties need to be *ad idem* that employment would start at the time of the conclusion of their contract, or at a specific date or event stipulated therein, and would inevitably terminate automatically at such time as the parties have agreed upon".[175] It should have been "the mutual intention of the parties that the purpose of this type of contract is linked to a limited duration, unlike that of the traditional contract of indefinite employment, which is likely to continue for an indefinite period".[176]

3.3 Fixed-term employment contracts under Common law

Fixed term contracts are commonly used in the labour arena for different reasons.[177] Sometimes employees are needed on a project for a specific time period or a position is only available for a certain time, for instance where an employee is on

169 Timothy *Non-Renewal of a Fixed-Term Employment Contracts* 1.
170 *McKenzie v Econ Systems* 1995 BLLR 64 (IC); Smit 2005 *TSAR* 200.
171 Hutchinson 1998 *SALJ* 642-646; Timothy *Non-Renewal of a Fixed-Term Employment Contracts* 1.
172 Hutchinson 2000 *ILJ* 2188.
173 Gerickle 2011 *PER/PELJ* 105/234.
174 Gerickle 2011 *PER/PELJ* 105/234.
175 Gerickle 2011 *PER/PELJ* 105/234.
176 Gerickle 2011 *PER/PELJ* 105/234.
177 Vettori 2008 *STELL LR 89.*

maternity leave; in the building industry fixed term contracts could be terminated upon occurrence of a specific event, for example a plasterer's contract will terminate if that portion of the project is finalised.[178] Under common law, these contracts come to a natural end at the time stipulated in the contract or at the arrival of a specific event, when the employee's services will terminate.[179] That is then the end of the relationship between the parties and no notice of termination is required.[180]

3.3.1 Termination of a fixed-term contract before the stipulated date

Since the fixed-term contract comes to an end by effluxion of time, a question to be posed is whether such a contract could be terminated before the specified date in the contract? The common law rule is that such a contract may not be terminated for any other reason than material breach or repudiation of the contract by the employee.[181] This means that the employee may resign before the date of termination, or if the employee is found guilty of serious misconduct and dismissed, which will mean the employee was in breach of the contract.[182] By mere reason that the contract is intended to survive for a predetermined or determinable duration, it follows that notice of premature termination is at common law, as a rule, impermissible.[183] However, the parties may make an arrangement that prior notice may be given, although it is acknowledged that this does not affect the fixed-term nature of the contract.[184] The reason for the rule that the employer may not terminate the contract before the time agreed upon is that "parties bind themselves in the contract for a specific time period and such commitment should be honoure".[185]

This common law rule was articulated by Jafta AJA in *Buthelezi v Municipal Demarcation Board*[186] (Zondo JP and Davis AJA concurring) as follows:

178 Vettori 2008 *STELL LR 89.*
179 Timothy *Non-Renewal of a Fixed-Term Employment Contract* 1.
180 *R v Bhana* 1941 SR 186; *Tiopaizi v Bulawayo Municipality* 1923 AD 317.
181 *Bon Accord Irrigation Board v Braine* 1923 AD 480.
182 Timothy *Non-Renewal of a Fixed-Term Employment Contract* 1.
183 *Bon Accord Irrigation Board v Braine* 1923 AD 480; Timothy *Non-Renewal of a Fixed-Term Employment Contract* 1.
184 *Dixon v BBC* 1979 QB 546; Timothy *Non-Renewal of a Fixed-Term Employment Contract* 1.
185 *Buthelezi v Municipal Demarcation Board* 2004 25 ILJ 2317 (LAC); 2005 2 BLLR 115 (LAC).
186 2004 25 ILJ 2317 (LAC) at para 9.

> There is no doubt that at common law a party to a fixed-term contract has no right to terminate such contract in the absence of repudiation or a material breach of the contract by the other party. In other words there is no right to terminate such contract even on notice unless its terms provide for such termination. The rationale for this is clear. When parties agree that their contract will endure for a certain period as opposed to a contract for an indefinite period, they bind themselves to honour and perform their respective obligations in terms of that contract for the duration of the contract and they plan, as they are entitled to in the light of their agreement, their lives on the basis that the obligations of the contract will be performed for the duration of that contract in the absence of a material breach of the contract. Each party is entitled to expect that the other has carefully looked into the future and has satisfied itself that it can meet its obligations for the entire term in the absence of any material breach. Accordingly, no party is entitled later to seek to escape its obligations in terms of the contract on the basis that an assessment of the future had been erroneous or had overlooked certain things...

The court reasoned that the employer is at liberty not to enter into a fixed-term contract but to conclude a contract for an unlimited period if he contemplates that there is a risk that he might have to dispense with the employee's services before the expiry of the term. But if he chooses to enter into a fixed-term contract, he assumes the risk that he might have necessity to dismiss the employee mid-term but is prepared to undertake that risk. Consequently, if he has chosen to take such a risk, he cannot be heard to complain when the risk ensues. In the like manner, "the employee also accepts a risk that during the span of the contract he could be offered a more rewarding job while he has a duty to complete the contract term. Thus, both parties make a choice and there is no unfairness in the exercise of that choice".[187]

On the above grounds the Labour Appeal Court in the Buthelezi case rejected a claim for unfair dismissal based on operational requirements on the ground that the employer had acted unfairly by retrenching the employee prior to the expiry of the fixed term of the employment contract. This trend was followed by the Labour Court (per Kennedy AJ) in *Nkopane and others v Independent Electoral Commission* (IEC).[188] In that case the applicants were employed by the respondent, the IEC, on fixed-term contracts for 'two to three years'. Later the applicants were called upon to fill in forms in which they inserted specific dates on which their contracts were to terminate and they did. The IEC subsequently engaged in a retrenchment programme, and the applicants were retrenched. It was held that the agreement

187 2004 25 ILJ 2317 (LAC) at para 9.
188 *Buthelezi v Municipal Demarcation Board* 2004 25 ILJ 2317 (LAC) paras 10-11.

between the parties in terms of the form had the effect of a fixed-term rather than a maximum term contract of employment as it was contended by the respondent. Therefore the respondent had no lawful basis and therefore acted unfairly in its premature termination of the contracts of employment of the applicants.[189]

This common law principle seems to be applicable even in the case of probationary employees. This is apparent from the judgment of the court in *Muzondo v University of Zimbabwe*,[190] in which the court held that a probationary employee's contract could not be terminated before expiry of the probationary period unless in accordance with provisions of the contract itself and in compliance with necessary procedures. The facts of that case were distinguished from those of *Ndamase v Fyfe-King NO*[191] in which the court had held that if the parties were to agree that the fixed-term employee is appointed on probation, the contract may in the event of unsatisfactory performance at common law be terminated on reasonable notice even before expiry of the probationary period.

3.3.2 Shortcomings of the common law

It can be argued from the discussion above that under common law employees could not claim dismissal since the contract automatically terminates by effluxion of time, except of course in cases of premature termination of the fixed-term contract. It has been noted from the above authorities that there is no right to terminate the fixed-term contract before expiry of the term of the contract.[192] However it has been submitted that the common law "overlooks the continuing nature of the employment relationship in that it offers employees no legal right to demand better employment conditions with passage of time".[193] For instance, right to engage in collective bargaining, salary increase, promotions and or an opportunity to apply for better positions. It also did not cater for the "inherent inequality in bargaining power

189 2007 28 ILJ 670 (LC).
190 1981 4 SA 755 (Z).
191 1939 EDL 259 at 262.
192 *Buthelezi v Municipal Demarcation Board* 2004 25 ILJ 2317 (LAC); *Nkopane and others v Independent Electoral Commission* 2007 28 ILJ 670 (LC).
193 Grogan *Workplace Law* 11th ed 3.

between the employer and employees and the latter were dependent on the former for their welfare and job security".[194]

It is submitted herein that fixed-term employees, whether appointed on probationary basis or not, are in the same position as far as job security is concerned. This is premised on the fact that, although a fixed-term contract cannot be terminated prematurely, continuity of the job after the lapse of the contract term is in the discretion of the employer who might or might not renew the contract or appoint the employee permanently despite existence of circumstances creating reasonable expectation for renewal and or permanent appointment. Moreover, the common law recognised only two types of dismissals, namely, those with notice and those without notice.[195] On this note, it is submitted that it denied or at least failed to expressly provide for employees whose employment contracts were terminated beyond these kinds of dismissal. Thus, the common law does not provide effective protection for the job security of employees.

3.4 Fixed-term contracts under the Labour Relations Act 1956

The main purpose of the *Industrial Conciliation Act* which was later renamed *Labour Relations Act* as amended,[196] (hereafter the 1956 *LRA)* was to promote collective bargaining and eliminate unfair labour practices.[197] This it did by recognizing trade unions and employers' organisations, and by also making provision for the establishment of forums in which trade unions and employers' organisations could reach binding collective agreements.[198] Section 18 of this Act provides for formation of the industrial councils, and the functions of these councils are stipulated under section 23. These functions include: "negotiating agreements, prevention of disputes

194 Grogan *Workplace Law* 11th ed 3.
195 Timothy *Non-Renewal of a Fixed-Term Employment Contract* 11.
196 28 of 1956 as amended by: *Industrial Conciliation Amendment Act* 41 of 1959; *Industrial Conciliation Amendment Act* 18 of 1961*; Industrial Conciliation Amendment* Act 43 of 1966; *Industrial Conciliation Amendment Act* 61 of 1966; *Industrial Conciliation Amendment Act* 104 of 1967*; Industrial Conciliation Amendment Act* 21 of 1970; *Industrial Conciliation Amendment Act* 94 of 1979; *Industrial Conciliation Amendment Act* 95 of 1980; *Labour Relations Amendment Act* 57 of 1981; *Labour Relations Amendment Act* 51 of 1982; *Labour Relations Amendment Act* 2 of 1983; *Labour Relations Amendment Act* 81 of 1984; *Transfer of Powers and Duties of the State President Act* 97 of 1986; *Labour Relations Amendment Act* 3 of 1988; *Labour Relations Amendment Act* 9 of 1991.
197 Grogan *Workplace Law* 3rd ed 8.
198 Grogan *Workplace Law* 3rd ed 8.

and settlement of same in accordance with section 27A, and regulating settlement of matters of mutual interest".[199] This Act establishes the conciliation bards under section 35 and provides for their functions under section 36. The conciliation boards also had the function of settling disputes.[200] Both the conciliation boards and the industrial councils could apply to the Minister of Labour for appointment of a mediator to assist in settling disputes if there is need for that.[201]

The most important feature of the **1956 *LRA*** is that it established the Industrial Court (hereafter the IC)[202] and the Labour Appeal Court (hereafter the LAC).[203] These courts were significantly tasked with duty of determining disputes concerning alleged unfair labour practices, and granting the appropriate relief,[204] with the LAC having jurisdiction of deciding questions of law, hearing appeals from the IC relating to unfair labour practices, and reviewing decisions of the IC.[205] However, the definition of 'unfair labour practice' was somehow open-ended such that it grated the courts abundant autonomy to formulate general guidelines as to what fair and unfair meant in the workplace.[206] In terms of the 1956 *LRA,* the disputes were settled by agreement, assisted by voluntary mediation if agreed to, by arbitration, or by industrial action.[207]

3.4.1 Application of the act

The 1956 *LRA* was applicable to employers and employees in every undertaking, industry, trade or occupation in South Africa.[208] Under this Act an employee has been defined as "any person who is employed by or working for any employer and receiving or entitled to receive remuneration and that includes any person who is in any manner assisting in the carrying on or conducting of the business of the employer".[209] An employer is defined as "any person who employs or provides work

199 Section 23(1) of the 1956 *LRA.*
200 Section 36(1) of the 1956 *LRA.*
201 Section 44(1) of the 1956 *LRA.*
202 Section 17.
203 Section 17C.
204 Grogan *Workplace Law* 3rd ed 8.
205 Section 17B of the 1956 *LRA.*
206 Grogan *Workplace Law* 3rd ed 8.
207 Grogan *Workplace Law* 3rd ed 9.
208 Section 2(1) of the 1956 *LRA;* Du Plessis *et al A Practical Guide to Labour Law* 129.
209 Section 1 of the 1956 *LRA* (definition of employee substituted by section 1(a) of Act 2 of 1983).

for any person and remunerates or undertake to remunerate him, whether the undertaking is express or implied, and who permits any person in any manner to assist him in the carrying on or conducting of his business".[210] The Act did however not apply to:

> persons employed in relation to any farming services; domestic servants employed in private households; civil servants and members of parliament; persons employed by charitable institutions, who receive no remuneration for their services; persons who teach, educate or train other persons at any university, technikon, college, school or other educational institution maintained wholly or partly from public funds; and a chief administrative officer of a local authority.[211]

3.4.2 Unfair labour practice

Unfair labour practice is defined as:

> any act or omission other than a strike or lockout, which has or may have the effect that any employee or class of employees is or may be unfairly affected or that his or their employment opportunities or work security is or may be prejudiced or jeopardised thereby; the business of any employer or class of employers is or may be unfairly affected or disrupted thereby; labour unrest is or may be created or promoted thereby; the labour relationship between employer and employee is or may be detrimentally affected thereby.[212]

In terms of the definition of the concept of unfair labour practice introduced into the *LRA* 1956 by the *Industrial Conciliation Amendment Act* of 1979, unfair labour practice meant "any labour practice that in the opinion of the Industrial Court was unfair labour practice".[213]

The most developments to the Act came after the Wiehahn Report.[214] Although the Act did not have a specific provision dealing with employees of fixed-term contracts, it could be gleaned from the jurisprudence of the IC that the unfair labour practice provision was also intended to apply to the fixed-term employees. The first unfair labour practice case was *Metal and Allied Workers Union v A Mauche (Pty) Ltd.*[215] In that case the employer failed or reused to re-employ a fixed-term employee upon expiry of the term of the contract. The union claimed that

210 Section 1 of the 1956 *LRA* (definition of employer substituted by section 1(b) of Act 2 of 1983).
211 Section 2(2) of the 1956 *LRA.*
212 Section 1 of the 1956 *LRA* (this definition was substituted by section 1(a) of Act 9 of 1991).
213 Van Niekerk 2004 *ILJ* 853.
214 Van Niekerk 2004 *ILJ* 853.
215 1980 ILJ 227(IC).

the employee had reasonable expectation of renewal and that failure to re-employ the employee constituted unfair labour practice. The court was not called upon to determine this issue, however it could be gathered that the union's argument was based on the fact that the employer was bound both by the implied term of the contract that the contract would be renewed and the statutory protection against victimisation.

In another case of *SA Diamond Workers' Union v The Master Diamond Cutters' Association of SA*,[216] the court had to determine the issue of unfair labour practice. In that case it was alleged that the employees' contracts had been terminated contrary to an industrial agreement. The court held that since termination of the contracts had been effected in breach of certain procedures, the terminations were null and void, and therefore those contracts were still in existence. The employees had claimed reinstatement but the court held that reinstatement was not possible. The court distinguished termination of employment based on unfair labour practice from the common law concept of wrongful dismissals. It held that, while wrongful dismissals require common law remedies, unfair labour practices were to be determined in accordance with statutory provisions as the legislature intended.[217]

3.4.3 Unfair dismissal

The justification of protection against unfair dismissal is found in part one of chapter four of the Wiehahn Report's recommendation that the IC be established, which is connected to the recommendation in chapter three by the majority of the commission that the statutory reservation of job be abolished.[218] Moreover, the recommendation in paragraph 3.137 of the report that the adjudication of unfair dismissals should be allocated to the IC is obviously one of the necessary safeguards for the interests of individuals and groups of workers which were to provide better protection for employees against unfair displacement than the existing measure of statutory work reservation in section 77, especially if the

216 1982 3 ILJ 787 (IC).
217 1982 3 ILJ 87 (IC).
218 Van Niekerk 2004 *ILJ* 856.

National Manpower Commission remained alert to the need for such protection and if appropriate measures were incorporated in fair employment practices legislation.[219]

This means that "job reservation had to go, subject to the confines of unspecified limitations to be devised by the IC and placed on employers to ensure the necessary safeguards for the interests of individuals and groups of workers".[220] All these were directed against unjustified or unfair changes in the established labour pattern of an employer, and alleged cases of unfair dismissal, inequitable changes in conditions of employment, under payment of wages, unfair treatment and other cases of grievances.[221] It has been suggested that the Wiehahn Commission envisaged the IC as a facilitator for the implementation of progressive changes to the labour relations system.[222] The White paper issued after the publication of part one of the Wiehahn Report accepted the recommendations. The conditions, on which the proposals relating to the abolition of job reservation were made, connect protection against unfair dismissal with the abolition of job reservation.[223]

The case of *Metal and Allied Workers' Union v Barlows Manufacturing (Pty) Ltd*[224] sanctioned in the clearest terms the distinction between a contractually valid and an unfair dismissal, and thus laid the basis for what must rank as the most fundamental impact on South African employment law ever.[225] In *Metal & Allied Workers' Union v Stobar Reinforcing (Pty) Ltd*,[226] the employees had been dismissed for participating in a go-slow and the dismissal had been effected without giving them an opportunity to refute the allegations. The court took into account article 11(5) of the ILO Recommendation which requires that before a decision to dismiss could become finally effective, the employee should be given an opportunity to state his case, with the assistance of a representative where necessary. The court relied on *Earl v Slater &Wheeler (Airline) Ltd*[227] in establishing an obligation on employers to justify

219 Van Niekerk 2004 *ILJ* 855-856.
220 Van Niekerk 2004 *ILJ* 856.
221 Van Niekerk 2004 *ILJ* 856.
222 Van Niekerk 2004 *ILJ* 856.
223 Van Niekerk 2004 *ILJ* 856-857.
224 1983 4 ILJ 283.
225 Van Niekerk 2004 *ILJ* 866.
226 1983 4 ILJ 84 (IC).
227 1973 1 All ER 145.

fairness of the principal reason for dismissal. All applicant employees were thus reinstated in terms of section 43 of the *LRA* 1956.

In *Singwebela v Huletts Refineries*[228] where the employee had been dismissed summarily for misconduct, the court reaffirmed the obligation placed on the employer to establish that the employee had been dismissed on sufficiently good grounds. In the case of *Van Zyl v O'Okiep Copper (Pty) Ltd*,[229] the court followed the decision in *Stober* in which the ILO Recommendation 119 was applied. The employee had been dismissed for gross negligence and he was reinstated on account of employer's failure to conduct a proper investigation into the allegations of negligence.

These decisions indicate that the IC relied more on the common law to infer fairness or otherwise of the dismissals in cases that came before it. The decision of *Metal and Allied Workers Union v A Mauche (Pty)* Ltd indicate that the fairness or unfairness of the dismissal was determined by the courts under the *LRA* 1956, without differentiating between types of employment contracts, whether fixed-term or indefinite.

3.4.4 Shortcomings of the LRA 1956

As Van Niekerk submits, the most apparent justification to be detected for the introduction of the statutory protection of employment security in the 1979 Act was "a racist one because the interest being served was the protection of white workers who stood the chance of losing safeguard of job reservation and their racially based privilege in the workplace also standing a chance to be undermined".[230] This means the legislature did not intend to do more than cater for the interests of white workers by "enacting the unfair labour practice definition and the institution through which the envisaged protection against job losses and less favourable conditions of employment, in the face of competition from workers of other races could be sought".[231]

228 1980 1 ILJ 51 (N).
229 1983 4 ILJ 125 (IC).
230 Van Niekerk 2004 *ILJ* 861.
231 Van Niekerk 2004 *ILJ* 867.

Even after establishment of the IC, "there was no consideration of rights to dignity, and the manner in which an unfair dismissal might infringe this right, nor any concern for the value of autonomy and its application in employment".[232] The only social policy that had been articulated by the legislature, the protection of racial privilege, was never applied by the IC, nor was is it called upon to do so.[233] On the contrary, it was the unintended beneficiaries of the unfair labour practice jurisdiction in the form of black employees and the union movement that they supported, who were most instrumental in developing a jurisprudence that extended security of employment to employees of all races and in all occupations.[234]

3.5 Fixed-term contracts under the Labour Relations Act 1995

The purpose of the *Labour Relations Act* 66 of 1995 *(LRA)* is to "advance economic development, social justice, labour peace and democratisation of the workplace by fulfilling the primary objectives of the Act",[235] which objectives are to give effect to the fundamental rights enshrined in the Constitution and international obligations; and to promote collective bargaining, employee participation in decision-making and the effective resolution of labour disputes.[236] In clarification of this, the Constitutional Court (CC) in *National Education Health & Allied Workers Union v University of Cape Town & others*[237] stated that one of the core purposes of the *LRA* and section 23 of the Constitution is to "safeguard workers' employment security, especially the right not to be unfairly dismissed".[238]

3.5.1 Dismissal under the LRA 1995

In terms of section 186(1) (a) of the *LRA* the termination of employment, with or without notice, constitutes dismissal. Such dismissal is considered as unfair unless the employer can prove that the termination was for a substantively fair reason and in compliance with a fair procedure.[239] Contrarily, since a fixed-term contract is a

232 Van Niekerk 2004 *ILJ* 867.
233 Van Niekerk 2004 *ILJ* 867.
234 Van Niekerk 2004 *ILJ* 867.
235 Cohen 2014 *ILJ* 2607.
236 Cohen 2014 *ILJ* 2607.
237 2003 24 ILJ 95 (CC).
238 Cohen 2014 *ILJ* 2607.
239 Cohen 2014 *ILJ* 2609; section 188 of the *LRA* 66 of 1995.

contract of limited period that comes to an end upon the "occurrence of an event or on a specified date, the contract terminates automatically by effluxion of time and not at the instance of the contracting parties, therefore the termination does not constitute a dismissal and the provisions of the *LRA* do not apply".[240]

The fixed-term contracts were originally intended to be used by employers prone to economic or seasonal fluctuations; however, these contracts have been abused by employers in order to bypass statutory and constitutional protections.[241] Employers, in an attempt to avoid creating permanent appointments, conclude fixed-term contracts with employees which terminate automatically at the conclusion of the fixed term.[242] More often than not, the concerned employees are rendered insecure and vulnerable and they are often prejudiced by a simultaneous inequality in remuneration, benefits, and terms and conditions of employment when compared to permanent employees.[243]

Dismissal of fixed-term employees is regulated by section 186(1) of the *LRA* and this section attempts to prevent an abuse of fixed-term contracts.[244] Section 186(1) (b) provides that if the employer fails to renew the fixed-term contract where the employee had reasonable expectation that it would be renewed; or if the employer offers to renew such contract on less favourable terms and conditions, it is tantamount to dismissal.[245] Although this section extends the definition of dismissal to cases where the employee had reasonable expectation of renewal, it is not always clear as to what circumstances could create such expectation.[246] This concept of reasonable expectation shall be addressed below.

3.5.1.1 Reasonable expectation of renewal

In the case of *Cremark a Division of Triple-P Chemical Ventures (Pty) Ltd v SA Chemical Workers Union*[247] the Labour Appeal Court pronounced that reasonable

240 Cohen 2014 *ILJ* 2609.
241 Cohen 2014 *ILJ* 2609.
242 Cohen 2014 *ILJ* 2609.
243 Cohen 2014 *ILJ* 2609; Gerickle *PER/PELJ* 107/234.
244 Cohen 2014 *ILJ* 2609.
245 Cohen 2014 *ILJ* 2609.
246 Cohen 2014 *ILJ* 2609.
247 1994 15 ILJ 289 (LAC).

expectation of renewal can be created by facts such as the number of previous renewals. If the contract has previously been renewed on occasions, the court might hold that reasonable expectation of renewal was created. However, not only previous renewals are relevant but other factors might be taken into account too. Hutchinson[248] provides examples of other factors to be considered: an evaluation of all the surrounding circumstances, the importance or otherwise of the contractual provision, agreements, undertakings by the employer or practice or custom in regard to renewal or re-employment, the availability of the post, and the purpose of or reason for concluding the fixed-term contract.[249] The court also pointed out that however, if the contract unequivocally stipulates that the contract is of a temporary nature, or adequate notice terminating the contract was issued, such termination or non-renewal shall not constitute dismissal.[250]

Factors such as previous renewals and the reason for which the fixed-term contract was concluded are illustrated by the facts of *Zank v Natal Fire Protection Association*[251] as discussed by Hutchinson.[252] In that case the respondent required the services of pilots only during the fire season, and the season period lasted for five months (from 1st June to 31st October) of every year. The applicant concluded a fixed-term contract with the respondent and the former commenced his duties during the 1991 fire season as a spotter pilot. It was a practice that at the end of every fire season, the respondent would renew the contracts with the pilots for the subsequent fire season, and in line with this practice, the applicant's contract was renewed for the 1992, 1993 and 1994 fire seasons. During the 1994 fire season the applicant was disciplined for flying without a license.

Consequently, at the end of that season the respondent informed applicant that his contract would be terminated and not renewed for the following fire season. The Industrial Court found that the applicant's contract was not terminated because it had expired by effluxion of time but due to his conduct. This was more so because the respondent had already concluded the contract with other pilots for the 1995 fire

248 Hutchinson 2000 *ILJ* 2189.
249 *Dlerks v University of South Africa* 1999 20 ILJ 1227 (LC) at 1246 para 133.
250 *Cremark a Division of Triple-P Chemical Ventures (Pty) Ltd v SA Chemical Workers Union* 1994 15 ILJ 289 (LAC); Timothy *Non-Renewal of a Fixed-Term Employment Contract* 7.
251 1995 16 ILJ 708(IC).
252 Hutchinson 2000 *ILJ* 2189.

season even before end of the 1994 fire season. The court also found that the purpose of concluding the fixed-term contract was to regulate the employment relationship during the fire period of a particular year and not to provide termination of the relationship. It was held that as long as the work was still available, the applicant entertained a reasonable expectation that his contract would be renewed for the 1995 fire season.[253]

In the case of *Yebe v University of KZN*,[254] the fixed-term contract of the employee was renewed twenty times over a period of approximately four and a half years using twenty eight fixed-term employment contracts, whilst the permanent post which he could have filled remained vacant for five years. During this period the employee successfully upgraded his skills through various courses at the University of KwaZulu-Natal. It was held that this was an obvious example where the series of renewals created a reasonable expectation that the employment relationship would be renewed. Consequently the court found that the employer's failure to renew the employment relationship was an unfair dismissal. However, despite this holding, it should be noted that section 186(1) is silent about the fairness of the series of renewals.

It has been provided that the expectation can be formed irrespective of an express provision in the fixed-term contract stipulating that the employee has no expectation of renewal.[255] In *Mediterranean Woollen Mills (Pty) Ltd v SA Clothing & Textile Workers Union*[256] the employees were employed on three-month temporary contracts that clearly stipulated that they were to have no expectation of the contracts being renewed. The purpose of the contract period, it emerged, was to determine whether the employment relationship could be resuscitated following a hostile illegal strike. Before the contracts were signed by the employees, the company's managing director gave the employees a verbal assurance at a meeting of the workforce that if they met management's expectations during the three-month period, they would be offered permanent contracts. The contracts were not renewed. The court held that despite wording to the contrary, a reasonable expectation could arise during

253 Discussed by Hutchinson 2000 *ILJ* 2189.
254 2007 28 IJL7490 (CCMA).
255 Cohen 2007 *SA Merc LJ* 35.
256 1998 19 ILJ 366 (LAC).

employment if assurances, existing practices and the conduct of an employer led an employee to believe that there was hope for a renewal.

In another case of *Vorster v Rednave Enterprises CC t/a Cash Converters Queenswood*,[257] he applicant had been employed by the respondent in terms of two successive contracts, each of one month's duration. It appeared the applicant had been promised that he would be considered for a permanent post after serving a "three-month probation period". His contract was never renewed and he claimed dismissal. The court held that that an expectation to renew the fixed-term contract may exist, even if the contract expressly stipulated that the employee should not expect any renewal(s). Therefore Vorster had been dismissed, as he had proved an objectively reasonable expectation of renewal, based on the promise that she would be considered for permanent employment after the three-month probation period.

The above case law indicates that there is a variety of factors and circumstances that the courts consider to determine the existence of reasonable expectation of renewal on the part of the employee.

3.5.1.2 Reasonable expectation of indefinite appointment

Most problems arise in cases where the employee has a reasonable expectation of permanent employment or where the employee considers himself to be a permanent employee notwithstanding a written term in the contract to the contrary.[258] In the latter case, the contract may be designed to conceal a permanent relationship in order to avoid obligations which attach to permanent employees.[259] This is because an employee subject to a fixed-term contract may allege that the nature of the employment relationship has changed to that of indefinite employment by virtue of repeated renewals of the fixed-term contract, and this may lead to an inference that the relationship does not purport to be what it is.[260]

Olivier opined that "section 186(b) only has application where the expectation relates to a renewal on the same or similar terms, but it does not cover the

257 2009 30 ILJ 407 (LC).
258 Hutchinson 2000 *ILJ* 2190.
259 Hutchinson 2000 *ILJ* 2190.
260 Hutchinson 2000 *ILJ* 2190.

situation where the expectation is that of permanent or indefinite employment".[261] These sentiments were reiterated in the case of *Dierks v University of SA*[262] that an expectation of permanent employment does not fall within the ambit of s 186(b). However, this is problematic, as it will be gleaned from the cases hereunder.

In the case of *Dierks* the applicant, was employed by the university on fixed-term contracts for 1995 and 1996. The university formulated a policy regarding temporary work. During 1997 he was employed for two periods, March and April and July until December. The fixed-term contract made it clear that the employee was entitled to a permanent position. At the end of his contract Dierks was not given a permanent post. He launched proceedings in the Labour Court claiming that he had been unfairly retrenched. While the court accepted the logic of an expectation to appropriate relief for permanent appointment, it however held that on a literal interpretation section 186(1)(b), it did not expressly provide relief where the claim is for expectation of permanent employment.[263]

This decision was followed in *Van Biljon v Bloemfontein Transitional Local Council*[264] where it was held that section 186(1)(b) did not envisage any reasonable expectation of permanent employment. Similarly, in *Auf der Heyde v University of Cape Town*[265] the court decided that section 186(1)(b) did not apply to instances where an expectation of indefinite renewal was claimed. In *University of Pretoria v Commission for Conciliation, Mediation & Arbitration (CCMA) & others*[266] the Labour Appeal Court (LAC) decided that in the absence of a legislative amendment to the contrary, section 186(l)(b) could not be interpreted to extend to an employee's expectation of indefinite employment.

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261 Olivier 1996 *ILJ* 1006.
262 1999 20 *ILJ* 1227 (LC).
263 *Dierks v University of South Africa* 1999 20 *ILJ* 1227 (LC) at 1248. It should be noted that the judge (Oosthuizen AJ) mentioned in unambiguous words that if he was incorrect by holding that section 186(l)(b) of the LRA was not applicable where reasonable expectation of permanent employment was claimed, the facts of that case did however not drive to a conclusion that such expectation had been created.
264 1999 20 ILJ 2481 (CCMA).
265 2000 8 BLLR 877 (LC).
266 2012 33 *ILJ* 183.

Conversely, in *McInnes v Technikon Natal*[267] the Court held that section 186(1)(b) indeed covered the situation where an employer created the expectation that renewal would be indefinite. In that case the applicant had been employed in terms of two successive fixed-term contracts until the renewal of a temporary post to one of indefinite duration. The post was advertised as a permanent one and she applied for it. She was recommended by the selection committee for appointment. She thus reasonably believed that she would be appointed into the new permanent position as she was the selection committee's preferred choice. However, the decision to appoint the applicant was overturned due to the respondent's affirmative action policy. The court established that the applicant had a reasonable expectation of an indefinite appointment and that she was unfairly dismissed based on the employer's affirmative action policy.

The *ratio decidendi* in the above case was that what section 186(b) clearly strives for is to address the situation where an employer fails to renew fixed-term employment when there is a reasonable expectation that it would be renewed. It is the employer who creates this expectation and it is then this expectation, created by the employer, which now gives the employee the protection afforded by this section. If then the expectation which the employer creates is that the renewal is to be indefinite, the section must also be held to cover that situation.[268]

In *Wood v Nestle (5A) (Pty) Ltd,*[269] the employee's reason for entering into a fixed-term contract was based on a special project, the employee assistance programme. The employer's personnel policy specified any continued extension of temporary contracts as an unfair labour practice, depriving temporary personnel of benefits allocated exclusively to permanent staff. Contrary to this policy, the employer had renewed Wood's fixed-term contract several times over a continued period of three years. The Industrial Court held that Wood had a legitimate expectation that her status would change because she was indeed led to believe that she would be considered for indefinite employment. The court held that the employer's refusal to engage in an indefinite contract of employment constituted an unfair labour practice and awarded her compensation as if she had been in indefinite employment.

267 2000 21 ILJ 1138 (LC) at 1143.
268 See Hutchinson 2000 *ILJ* 2191-2192.
269 1996 17 *ILJ* 184 (IC).

These cases illustrate a point that where an employer created a reasonable expectation that a fixed-term contract of employment would become permanent, it would be unfair to deny the employee reliance on the protection of section 186(1)(b).[270] Some case law seems to align with the above interpretation of section 186(1)(b) of the *LRA.* It is submitted that cases such as *Yebe v University of KwaZulu-Nata*[271] and *Tshabalala v North West University*[272] provide an example of cases decided in that line. Looking at how the courts are divided on the interpretation of section 186(1)(b), it is only safe to submit that the question whether an employee can claim relief for indefinite employment based on apprehension of reasonable expectation is still moot and open for debate, although the courts will always examine the facts of each case to reach their decisions.[273]

3.5.1.3 Burden of proof under section 186(1)(b)

Section 186(b) provides that a dismissal occurs where an employee reasonably expected the employer to renew *a* fixed-term contract on the same or similar terms but the employer offered to renew it on less favourable terms, or did not renew it. In the first place, 'a reasonable expectation' must be established. If this hurdle can be proved, the Act regards the employee as having been dismissed. Consequent to such a finding, then the onus rests on the employer to demonstrate that the dismissal was effected for a fair reason in accordance with a fair procedure in line with section 188(1)(b).[274] The employee must prove that he had a subjective expectation that the contract would be renewed on the same or similar terms, that the expectation was reasonable, and that the employer failed to renew the contract or did so on less favourable terms.[275] In order for "the employee's expectation to be 'reasonable', there must be an objective basis for the creation of his expectation apart from the subjective say-so or perception".[276] This means the enquiry is objective and

270 Geldenhuys 2008 *SA Merc LJ* 274.
271 2007 28 ILJ 490 (CCMA).
272 2007 28 ILJ 1204 (CCMA).
273 Geldenhuys 2008 *SA Merc LJ* 274.
274 Hutchinson 2000 *ILJ* 2189.
275 *SA Rugby (Pty) Ltd v CCMA* 2006 27 ILJ 1041 (LC).
276 *SA Rugby (Pty) Ltd v CCMA* 2006 27 ILJ 1041 (LC).

ruminates whether a reasonable employee in the position of the particular employees would have expected the contract to be renewed in the circumstances.[277]

In *SA Rugby (Pty) Ltd v CCMA*[278] the applicants were appointed for the purpose of the 2003 World Cup tournament, after which their contracts expired. The court held that remedies are only available to employees who subjectively relied on a reasonable expectation created by the employer for the renewal of a fixed-term contract, provided that the expectation has an objective basis. It was held that their expectation of indefinite appointment after the World Cup tournament was not so reasonable because the tournament in issue took place only after every four years, and their claim was based on dismissal. It was held that their contract basically terminated after the tournament.[279]

3.5.1.4 Weaknesses of the 1995 *LRA*

It has been held that the fixed-term employees have no prospect of promotion despite the fact that the contract might be renewed severally.[280] In *Public Servants Association obo Botes & Others v Department of Justice,*[281] an employee who had been required to act in a higher position for an extended period claimed to have a legitimate expectation of promotion. The Commissioner held that there were no precedents to afford the employee substantive rights on the ground of that legitimate expectation. One of the most criticisms associated with promotion is that temporary employee who is eligible for promotion but is nevertheless not promoted, could claim that the employer's conduct constitutes an unfair labour practice in terms of section 186(2) of the *LRA,* But on the other hand, where such an employee has satisfied the requirements for a permanent employee to be promoted and his or her contract is thereafter not renewed, section 186(1)(b) would not provide the employee with any remedy.[282]

One other shortfall of the *LRA* 1995 is with respect to fixed-term employees' right to training. "Fixed-term employees are often not afforded the same training as their permanent colleagues and they are in effect denied the possibility of acquiring the skills

277 Cohen 2007 *SA Merc LJ* 35.
278 2006 27 *ILJ* 1041 (LC).
279 *SA Rugby (Pty) Ltd v CCMA* 2006 27 ILJ 1041 (LC) at 1042.
280 Geldenhuys 2008 *SA Merc LJ* 274-275.
281 2000 21 JL7690 (CCMA).
282 Geldenhuys 2008 *SA Merc LJ* 275; Gerickle *PER/PELJ*107/234.

required for permanent appointment".[283] Furthermore, Geldenhuys argues that this is a further violation on the employees' right to job security and that it should follow logically from the reading of section 186(2) that a temporary employee who is expected to perform the same basic task as his permanent colleagues, should be entitled to the same training as those permanent employees.[284]

The other problem under this Act is that it does not oblige the employer to provide reasons for non-renewal of the fixed-term contract.[285] Instead the employee bears the burden of going an extra mile to prove the dismissal in that the expectation in fact existed.[286] The employee is required to show that a reasonable person in his or her position would in fact have shared such an expectation of renewal, but also that cause of the expectation was an act or omission by the employer.[287] It is submitted that the fact that the employer is not required to provide reasons for non-renewal goes against the principle of natural justice in that the employee is not being afforded a hearing where their rights are to be affected by non-renewal of their fixed-term contract.[288]

Most importantly, under section 186(1)(b) a dismissal means that an employee reasonably expected the employer 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. In this section no mention is made of the reasonableness of repeated renewals of a fixed-term contract or a restriction on the maximum number of successive contracts by the same employer.[289] It is submitted that there is no value of fairness in this section. As such it perpetuates exploitation of fixed-time employees by employers who renew fixed-term contracts numerously with an aim of avoiding creation of permanent jobs. In *Geldenhuys and University of Preterit*[290] the Commissioner opined that there was no reason or logic in law why an expectation of permanent employment should not provide a ground for a claim of dismissal under section 186(1)(b). The section also provides no remedy for employees who would claim dismissal on the

283 Geldenhuys 2008 *SA Merc LJ* 275; Gerickle *PER/PELJ*107/234.
284 Geldenhuys 2008 *SA Merc* LJ 275.
285 Geldenhuys 2008 *SA Merc LJ* 276.
286 Geldenhuys 2008 *SA Merc LJ 276;* section 192(1) of the *LRA* 66 of 1995.
287 Geldenhuys 2008 *SA Merc LJ* 276.
288 Geldenhuys 2008 *SA Merc LJ* 277-278; *Swanepoel v Western Region District Council* 1998 19 IU 1418 (SE) at 1423.
289 Gerickle2011 *PER/PELJ* 110/234.
290 2008 29 ILJ 1772 (CCMA).

ground of having a reasonable expectation that their contract would be renewed on more favourable terms than the previous fixed-term contract.

The fact that the *LRA* permits or does not prevent different treatment between permanent and fixed-term employees in terms of benefits has been met with a criticism that it is discriminatory and infringes the employees' constitutional right to equality and the right not to be discriminated.[291]

3.6 Fixed-term contracts under the Labour Relations Amendment Act 6 of 2014

The *Labour Relations Amendment Act* 2014 *(LRAA)* was enacted with objectives *inter alia* of "providing greater protection for workers placed on temporary employment services, regulating the employment of workers on fixed-term contracts, as well as specifying the liability for employers' obligations".[292] It encompasses provisions aimed at ensuring that vulnerable employees receive adequate protection and decent work conditions. In principle the *Amendment Act* is proposed to ensure the protection of the constitutionally entrenched rights to fair labour practices and equality for all categories of employees since there were defects in the *LRA* 1995 that needed to be remedied.[293]

3.6.1 Definition of a fixed-term contract under the LRAA

In a supplementary step to protect fixed-term employees from contractually justified disparate treatment and the vulnerability associated with atypical employment relationships, the *LRAA* introduces extensive provisions that comprehensively restrict the use of fixed-term contracts[294] and protect atypical employees against abusive and discriminatory practices.[295] Section 198B of the *LRAA* defines a fixed-term contract as "a contract of employment that terminates on the occurrence of a

291 Geldenhuys 2008 *SA Merc LJ* 276.
292 Memorandum of the objects of the *Labour Relations Amendment Act (LRAA)* 6 of 2014.
293 Geldenhuys *An Evaluation of the Rights of Fixed Term Employees in South Africa* 236. This paper was discussed in the context of the Labour Relations Amendment Bill 2012 just before the *Labour Relations Amendment Act &*of 2014 could be endorsed and passed as law.
294 Cohen 2014 *ILJ* 2610. This article was published before the enactment of the *Labour Relations Amendment Act* 6 of 2014 *(LRAA).* However many provisions in the current *LRAA* remain exactly similar to those of the Labour Relation Amendment Bill 2012.
295 Geldenhuys *An Evaluation of the Rights of Fixed Term Employees in South Africa* 236.

specified event; the completion of a specified task or project; or a fixed date, other than an employee's normal or agreed retirement age". This is the first time the fixed-term contract of employment is being defined[296] and regardless of the label attached to an employment contract, it is obvious that contracts that fall short of this definition will be considered as standard contracts of employment.[297]

3.6.2 Dismissal of fixed-term employees under the LRAA

The amended section 186(1)(b) of the *LRA*[298] provides that dismissal occurs where:

> an employee reasonably expected the employer 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 at all;[299] or an employee expected the employer to offer the employee an indefinite contract of employment on the same or similar terms but the employer offered it on less favourable terms, or did not offer it.[300] The amendment unequivocally incorporates section 186(1)(b)(ii) as a form of extended protection included in the broader meaning of dismissal where the employee reasonably expected an offer of indefinite employment but the employer only offered it on less favourable terms or made no such offer where there was a reasonable expectation in the circumstances of the case.[301]

The *LRAA* comprehends the possibility of a claim based on a reasonable expectation of permanent employment. However, as illustrated above,[302] the courts have not yet decisively established that an employee can bring these claims in the alternative even though there may be circumstances in which a fixed-term employee may expect to be kept on indefinitely, or at least until the person that he or she had been standing in for has, for example, returned.[303] This therefore means that, despite the statutory guarantee that employees might bring claims for being permanently retained or for permanent appointment under this section, they may still be confronted with difficulties if the courts disagree that they had a reasonable expectation they declare to have apprehended.[304] The question remains whether this new provision (186(1)(b)(ii)) shall assist the employees profitably or shall merely

296 Geldenhuys *An Evaluation of the Rights of Fixed Term Employees in South Africa* 236.
297 Cohen 2014 *ILJ* 2610.
298 As amended by section 30 of the *LRAA* 6 of 2014.
299 Section 186(l)(b)(ii) of the *LRA as* amended.
300 Section 186(l)(b)(ii) of the *LRA as* amended.
301 Gerickle 2011 *PER/PELJ* 111/234.
302 *Dierks v University of South Africa* 1999 20 ILJ 1227 (LC).
303 Geldenhuys *An Evaluation of the Rights of Fixed Term Employees in South Africa* 240.
304 Geldenhuys *An Evaluation of the Rights of Fixed Term Employees in South Africa* 240.

leave them and the courts in the frustration that has always reigned during the *LRA* 1995 era. This question shall be answered in the concluding remarks of this chapter.

3.6.3 Duration of the fixed-term contract

In terms of section 198B (3) of the *LRAA,* an employer may not employ an employee on a fixed-term contract or successive fixed-term contracts for longer than three months of employment unless the nature of the work for which he is employed is of a limited or definite duration;[305] or unless the employer can show any other justifiable reason for fixing the term of the contract.[306] In simple terms this provision means that the employer is still allowed to engage employees on a fixed-term basis. However the lifespan of such a contract should not exceed three months. If the employer wishes to employ an employee or renew a fixed-term contract for a period longer than three months, then the employer has to provide justifiable reasons for fixing the term of the contract beyond three months.[307]

Justifiable reasons under which the employer may fix the term of the contract are stipulated under section 198B (4). In terms of this subsection, concluding a fixed-term contract will only be justified if:

> the employee is replacing another employee who is temporarily absent from work; is employed on account of a temporary increase in the volume of work which is not expected to endure beyond 12 months; 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; is employed to work exclusively on a specific project that has a limited or defined duration; is a non-citizen who has been granted a work permit for a defined period; is employed to perform seasonal work; is employed for the purpose of an official public works scheme or similar public job creation scheme; is employed in a position which is funded by an external source for a limited period; or has reached the normal or agreed retirement age applicable in the employer's business.[308]

If any fixed-term contract is concluded or renewed in contravention of provisions of section 198B (3), such a contract shall be deemed to be of indefinite breed.[309] Subsection (6) provides that an offer to employ an employee on a fixed-term basis or

305 Section 198B(3)(ii).
306 Section 198B(3)(ii).
307 Section 198B(3) of the *LRAA.*
308 Section 198B (4) (a),(b),(c),(d),(e),(f),(9),(h),(i).
309 Section 198B (5).

renew a fixed-term contract must be made in writing and should indicate that the nature of the job is of limited duration, and show any other justifiable grounds for fixing the term of the contract in compliance with subsection (3)(a) and (b).[310]

3.6.4 Treatment of fixed-term employees

Section 198B (9) compels an employer to provide an employee employed on a fixed term basis and an employee employed on permanent basis with equal access to opportunities to apply for available vacancies. This obligation has already been illustrated in the case of *McPherson v University of Kwazulu-Natal and Another*,[311] in which the Labour Court held that the university's policy of restricting eligibility for head of school to permanent employees was unfairly discriminatory. In terms of section 198B (8)(a), an employee employed on a fixed-term basis for longer than three months is entitled not to be treated less favourably than an employee employed on permanent basis performing the same or similar job, save where there is justifiable reason for different treatment. For purposes of this provision, a justifiable reason is defined as including: seniority, experience or length of service; merit; the quality or quantity of work performed; or any other criteria of a similar nature,[312] and such reason should not be prohibited by section 6(1) of the *Employment Equity Act* (EEA).[313]

Section 6(1) of the EEA provides that no person may unfairly discriminate, whether directly or indirectly, against an employee, in any employment policy or practice on one or more grounds including: "race, gender, sex, pregnancy, marital status, family responsibility, ethnic or social origin, colour, sexual orientation, age, disability, religion, HIV status, conscience, belief, political opinion, culture, language, birth or any other arbitrary ground". In terms of section 6(4) of the *EEA,* a difference in terms and conditions of employment between employees of the same employer performing the same or substantially the same work or work of equal value that is directly or indirectly based on any one of the grounds mentioned in subsection (1), constitutes unfair discrimination. This therefore means that the

310 Section 198B (6)(a) and (b).
311 2008 29 ILJ 674 (LC).
312 Section 198D (2) (a),(b),(c) and (d).
313 55 of 1998.

employer's reliance upon fixed-term contract to justify differential and unequal treatment of employees is prohibited, and if connected to a protected ground under section 6(1) of the *EEA,* it will amount to unfair discrimination.[314]

3.6.4.1 Exception to application of section 198B

This section does not apply in cases of employees earning in excess of the earnings threshold.[315] This earning threshold is determined in terms of section 6 of the *Basic Conditions of Employment Act (BCEA).*[316] Employees earning above the earnings threshold are assumed to possess bargaining power contractually to protect themselves against unfair treatment.[317] Section 198B does not apply also to employers employing less than ten employees, or start-up companies with fewer than fifty employees and whose business has been in operation for less than two years;[318] and fixed-term contracts permitted by statute, sectoral determination or collective agreement.[319] It has been submitted that the employers in the above scenarios are however protected under section 186(1)(b) of the *LRA.*[320]

3.6.5 Envisaged problems under the LRAA

It is not in dispute that the *LRAA* makes some positive changes to the rights and protections afforded to fixed-term employees.[321] However, there are few noteworthy concerns accompanying this Amendment Act. Firstly, the *LRAA* does not establish a limitation to the maximum number of successive fixed-term contracts that can be entered into (number of renewals) or the maximum cumulative duration of successive fixed-term contracts.[322] It is submitted that by merely placing a limitation on the duration of the first term of the fixed-term contract, the *LRAA* does not enhance the job security but instead, it promotes job insecurity. For instance, under the provisions of the *LRAA,* it is possible that many employers if not all of them, will engage employees on a fixed-term basis for three months and upon expiry thereof,

314 Cohen 2014 *ILJ* 2612.
315 Section 198B (2)(a) of the LRAA.
316 75 of 1997.
317 Cohen 2014 *ILJ* 2622.
318 Section 198B (2)(b).
319 Section 198B (2)(c).
320 Cohen 2014 *ILJ* 2612.
321 Cohen 2014 *ILJ* 2622.
322 Cohen 2014 *ILJ* 2622; see section 198B of the *LRAA* 2014.

terminate the contract and conclude a different contract with new employees. It is also possible after lapse of the three months period to terminate the contract, allow an interruption period of some months and re-engage the same employees on a fixed-term basis on new terms.

The motive in these situations would be to avoid creating permanent employment merely after three months. It is submitted that it would be unreasonable for the employers employ all fixed-term employees on permanent basis because that is likely to have negative impact on the employer's enterprise. An obvious example is huge employer institutions such as universities which engage hundreds of employees on fixed-term basis. Recently after the *LRAA* had come into force, many employees of the University of South Africa who were hired on fixed-term contracts sought, relying on section 198B (3) and (5) of the *LRAA,* that their contracts be converted into indefinite ones. If this materialised, it would increase costs of employing lecturers and as a result the university would be left with no option but to retrench some of its employees on fixed-term contracts, leading to job losses.[323] In other instances, employers might have to employ employees permanently while such permanent positions do not exist, and again this might facilitate need for retrenchment.[324] One more problem is that, in the absence of provision of maximum duration of cumulative fixed-term contracts, the employee concerned might face working on fixed-term basis for the rest of his/her entire working life.[325]

Secondly, section 198B (9) requires the employer to provide employees on fixed-term contracts and on permanent contracts with equal opportunities to apply for vacancies. This poses a problem in cases where an employer has already been training a certain individual for a specific job in mind. Furthermore, section 198B (8) requiring fixed-term and permanent employees performing the similar job not to be treated differently could be interpreted to mean that these fixed-term employees should access benefits such as training. It is submitted that it would be unreasonable to expect the employer to train an employee who might not be re-hired after three months, and again have to train a new employee. This would very costly on the employer. On the other hand, if the employer does not train

323 Cohen 2014 *ILJ* 2613.
324 Cohen 2014 *ILJ* 2613.
325 Cohen 2014 *ILJ* 2613.

employees engaged on three months fixed-term contract, then the business would be inefficient since it will be using unskilled labour.

Thirdly, it is submitted that the duration of three months placed by section 198B (3) would be impracticable. It would have negative impacts as far as offering benefits such as training indicated in the preceding paragraph is concerned. Associated with the problem of training is the issue of probationary employees. Usually the probationary period is fixed beyond three months (six months to two years) to allow employers to train and evaluate the performance of these employees in order to decide whether to employ them or not. On this score, it is submitted that it would be very difficult for employers to assess the standard of these employees within such a short period as fixed by section 198B (3).

Fourthly, save that section 30 (a) of the *LRAA* extends the meaning of dismissal to situations where the employee had reasonable expectation of indefinite employment, the other provisions otherwise remain the same as those of section 186(1) (b) of the *LRA.* Section 30 (a) (ii) of the *LRAA* provides that the employee is dismissed if they had reasonable expectation to be retained indefinitely on the same or similar conditions of the fixed-term contract, but the employer chose to retain them on less favourable terms. This section makes no mention of any more favourable terms, and it is submitted that there are circumstances which might induce an employee to apprehend reasonable expectation of indefinite employment on more favourable terms. For instance, an employee who has been doing the same job for one employer for seven years (supposing the employer has always had justifiable reasons for renewing the fixed-term contract) would be considered experienced and might have reasonable expectation to be retained on permanent basis on more favourable terms than those of the fixed-term contract.

Fifthly, as a summary, it is submitted that the *LRAA* makes the laws regulating fixed-term employment relationship expensive, and more difficult to comply with.[326] Consequently, employers will be more cautious to employing fixed-term employees. They will therefore find other alternatives to engage employees on fixed-term basis such as outsourcing certain work, working overtime, as well as

326 Cohen 2014 *ILJ* 2622.

splitting up the available job amongst current employees.[327] This simply means people might run the risk of losing jobs.

3.7 Concluding remarks

It could be concluded from the above discussion that the provisions incorporated by the *LRAA* into the *LRA* intended to provide employees in the atypical employment relationship with further protection and security will to some extent achieve that purpose. It has been submitted that the *LRAA* (section 198B in particular), is in line with article 2(3) of *ILO Convention Concerning Termination of Employment at the Initiative of the Employer*[328] and article 3(1)-(2) of the *Recommendation Concerning Termination of Employment at the Initiative of the Employer*[329] which provide that, although fixed-term contract employees "may be excluded from some provisions of the convention, member states should however take adequate safeguards against recourse to fixed-term employment contracts whose aim is to bypass the protection provided by the convention and the recommendation".[330]

The above notwithstanding, the problems addressed earlier in this discourse will have to be dealt with by the courts, and only then it will be seen how effective these new provisions of the *LRAA* are. It is possible that, just like the issue of reasonable expectation of renewal has been a troubling subject before the courts, reasonable expectation of indefinite employment under the *LRAA* shall similarly become a thorny issue before the courts. Concerning the provision against different treatment of fixed-term and permanent employees doing same or similar work, the argument will most likely revolve around which employees are doing same or similar work, and whether the employer treat the employees differently. However, as stated above, the effectiveness of these provisions is questioned, but it will depend on their interpretation and application by the courts.[331]

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327 Cohen 2014 *ILJ* 2622.
328 Convention 158 of 1982.
329 Recommendation 166 of 1982.
330 Olivier 1996 *ILJ* 1024.
331 Cohen 2014 *ILJ* 622.

Chapter 4 – Comparative reflections: South Africa v United Kingdom

4.1 Introduction

The definition of temporary workers covers employees on fixed-term contracts, temporary agency workers, casual workers and seasonal workers.[332] The increase in temporary work in the United Kingdom (UK) was in fixed-term contracts, which consisted of half of all temporary employment, and of temporary agency work.[333] In 1997, the number of temporary workers had fallen to 6 percent until 2003, indicating that temporary work was less prevalent.[334] However, a "significant reduction occurred in the percentage of fixed-term employees, from 50.1 percent of all temporary employees in 1997 to 44.1 percent in the first quarter of 2007".[335] During this period, the proportion of temporary agency work increased from 13.5 percent to 18.7 percent of all temporary workers.[336]

It has been shown that "the proportion of men working under the fixed-term contracts was less. Men constituted 41.6 percent of all temporary employees as compared to 46.1 percent women in 2007".[337] The biggest proportion of temporary employees under fixed-term contracts was in the lower managerial and professional occupations (25.1 percent), the semi-routine occupations (20.1 percent), and the intermediate occupations (18 percent of all temporary workers).[338] It is also important to note that fixed-term contracts were not only used among the "peripheral workforce but also among the core workforce, especially when the workforce centered on a particular occupation".[339]

The main reason for using fixed-term contracts was that "people were unable to find permanent employment, and the general reason for using fixed-term contracts was

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332 Sadevirta *A Comparative Study of the Regulation Governing the Use of Fixed-term Contracts* 202.
333 Sadevirta *A Comparative Study of the Regulation Governing the Use of Fixed-term Contracts* 202.
334 Sadevirta *A Comparative Study of the Regulation Governing the Use of Fixed-term Contracts* 202.
335 Koukiadaki "The Regulation of Fixed-Term Work in Britain" 24.
336 Koukiadaki "The Regulation of Fixed-Term Work in Britain" 24.
337 Koukiadaki "The Regulation of Fixed-Term Work in Britain" 28.
338 Sadevirta *A Comparative Study of the Regulation Governing the Use of Fixed-term Contracts* 203.
339 Koukiadaki "The Regulation of Fixed-Term Work in Britain" 28.

to respond to a temporary increase in demand and the workforce".[340] Koukiadaki states that "more than 36 percent of workplaces with some fixed-term employees used the above reason to justify their use of fixed-term contracts".[341] Almost 24 percent of the workplaces used fixed-term contracts to replace employees on maternity leave or long-term absence.[342] Fixed-term contracts were used to "achieve and utilise specialist skills in 17 percent of workplaces with such contracts, and 16 percent of workplaces employing fixed-term employees used the contracts in order to make a decision whether or not to employ a person on permanent basis".[343] Only less than 10 percent of the workplaces used fixed-term contracts as a tool to maintain the number of permanent staff, achieve enhanced performance of employees, for time-limited funding reasons, budget restrictions, or financial constraints.[344] It is apparent that "fixed-term employees are more frequently confronted with periods of unemployment than permanent employees".[345]

4.2 Development of British law on Fixed- Term Contracts

According to case law, a fixed-term contract is traditionally defined as "a contract of employment for a stipulated period of time".[346] In the UK, prior to the implementation of the Directive on Fixed-Term Work, task or purpose contracts were excluded by the dismissal legislation.[347] This means that, fixed-term contracts whose expiry was defined by the occurrence of a particular event or by completion of a particular task was not counted as a fixed-term contract.[348] This also meant that those kinds of contracts were excluded from the definition of what was considered as dismissal in the UK law, thereby closing the door on dismissal protection for those hired on this kind of contract.[349]

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340 Sadevirta *A Comparative Study of the Regulation Governing the Use of Fixed-term Contracts* 204.
341 Koukiadaki "The Regulation of Fixed-Term Work in Britain" 29.
342 Koukiadaki "The Regulation of Fixed-Term Work in Britain" 29.
343 Koukiadaki "The Regulation of Fixed-Term Work in Britain" 29.
344 Koukiadaki "The Regulation of Fixed-Term Work in Britain" 29-30.
345 Sadevirta A Comparative Study of the Regulation Governing the Use of Fixed-term Contracts 204.
346 *Wiltshire Country Council v NA TFHEG* 1978 77 LGR 272.
347 *Wiltshire Country Council v NA TFHEG* 1978 77 LGR 272.
348 *Wiltshire Country Council v NA TFHE* 1980 ICR 455.
349 Sadevirta *A Comparative Study of the Regulation Governing the Use of Fixed-term Contracts* 205.

4.2.1 Fixed- Term Work prior to implementation of the Directive 99/70/EC

Unlike most of the Western European countries in the 1970-1980's, "the British labour law was traditionally characterised by a complete policy of the state with regard to statutory law in industrial relations and the reliance on collective bargaining as the primary form of labour market regulation".[350] This is referred to as the laissez-faire approach. According to Koukiadaki, by virtue of reliance on the laissez-faire, "non-unionised workers and therefore the majority of non-standard workers were marginalised in terms of a regulatory model and the normative conception of the labour law".[351]

"Fixed-term contracts were subject to little regulation before the introduction of the Fixed-Term Employees Regulation which led to the implementation of the Directive on Fixed-Term Work".[352] The attitude of the common law towards temporary works generally, and specifically to fixed-term contracts, is said to have been permissive for a long time.[353] It is also submitted that "there is still no common law rule in the English law which imposes a limit on the form in which work relations are established, and as a result the parties are at liberty to conclude a contract either on indefinite basis or on fixed-term basis".[354]

No minimum or maximum limit on the duration of a fixed-term contract is laid down by the common law and such a contract could be renewed numerous times without being regarded as permanent.[355] Moreover, in common law, the contract terminates automatically at the expiry of the fixed period. That is, the liberal attitude towards the use of fixed-term contracts in the common law means that the concepts of renewal and extension of employment contract have not been recognised.[356] Thus, as a general rule, such a contract could not be terminated before its expiry date "except for gross misconduct or by mutual agreement. However it was possible to insert a

350 Koukiadaki "The Regulation of Fixed-Term Work in Britain" 32.
351 Koukiadaki "The Regulation of Fixed-Term Work in Britain" 32.
352 Koukiadaki "The Regulation of Fixed-Term Work in Britain" 32.
353 Koukiadaki "The Regulation of Fixed-Term Work in Britain" 32.
354 Koukiadaki "The Regulation of Fixed-Term Work in Britain" 32.
355 Barnard and Deakin *Flexibility and Security in Temporary Work* 121.
356 Smith and Thomas *Smith & Wood's Employment Law* 421.

provision in that contract enabling either party to terminate it by granting notice before the expiry date".[357]

4.2.1.1 Statutory development

Although the statutory law has gradually increased in the area of individual employment contract, the core of regulation governing employment relationships has remained in the common law.[358] A significant part of the statute regulating the employment relationship was first consolidated into the *Employment Protection (Consolidation) Act* 1978, and later into the *Employment Rights Act* 1996, and many subsequent amendments incorporated into that Act.[359] However, the right of employees to claim unfair dismissal was enshrined in the *Industrial Relations Act* 1971, and was re-introduced with minor amendments by the *Trade Union and Labour Relations Act* 1974.[360] Additional amendments to the unfair dismissal provisions were made by the *Employment Protection Act* 1975, which also added more extensive set of provisions concerning remedies for unfair dismissals.[361]

Such provisions were consolidated into the *Employment Protection (Consolidation) Act* 1978 which was later amended by the *Employment Acts* 1980, 1982, 1988, and 1990.[362] Some of the significant provisions were transformed into the *Trade Union and Labour Relations (Consolidation) Act* 1992. Furthermore, provisions relating to unfair dismissal were amended by the *Trade Union Reform and Employment Rights Act* 1993.[363] The current law on unfair dismissals is greatly included in Part X of the *Employment Rights Act 1996.*[364]

4.2.1.2 Non-renewal of a fixed-term contract

As Barnard and Deakin stipulated, "the concept of fixed-term work did not form part of the legal and policy discussion until the 1970s when the unfair dismissal legislation

357 Smith and Thomas *Smith & Wood's Employment Law* 421-422.
358 Freedland "Employment" 1008.
359 Freedland "Employment" 1008.
360 Freedland "Employment" 1152.
361 Freedland "Employment" 1152.
362 Freedland "Employment" 1152.
363 Freedland "Employment" 1152.
364 Freedland "Employment" 1152.

was introduced".[365] That legislation made it essential to determine expiry and non-renewal of a fixed-term contract on the same terms as a 'dismissal' "so as to reduce the effectiveness of unfair dismissal legislation, which resulted in a debate about the necessity and desirability of fixed-term employment".[366] It has also been suggested that "regarding the expiry of a fixed-term employment contracts without renewal as dismissal was necessary because under the common law, the expiry of a fixed-term contract without renewal would not be regarded that way".[367]

According to Freedland, "it is deemed positively counter-intuitive to regard the expiry of a fixed-term contract of employment as a dismissal by the employer".[368] The immediate consequence of deeming the non-renewal of a fixed-term contract as dismissal was that "an employee working under such a contract could claim unfair dismissal or a redundancy payment in cases of non-renewal of a fixed-term contract".[369] However, after determining non-renewal of a fixed-term contract as a dismissal, "qualifying periods were incorporated into the unfair dismissal and redundancy payment rights so as to balance the equilibrium between the contracting parties".[370] When the qualifying periods for unfair dismissal rights were introduced in 1971, employers employing four or less employees were excluded from its application.[371]

Concerning the qualifying periods, the legislation was amended in 1979, and a compromise was made in which the failure to renew a fixed-term contract on the same terms as before was considered to be dismissal.[372] The employee could waive his or her right to claim unfair dismissal rights effectively, provided of course that the contract stipulated a fixed-term of at least a year,[373] and as long as the duration was for two years in relation to redundancy compensation.[374] It has been submitted that "these waiver provisions entailed the idea of a trade-off between protection and

365 Barnard and Deakin *Flexibility and Security in Temporary Work* 121.
366 Barnard and Deakin *Flexibility and Security in Temporary Work* 121.
367 Barnard and Deakin *Flexibility and Security in Temporary Work* 121.
368 Freedland *The Personal Employment Contract* 316.
369 Koukiadaki "The Regulation of Fixed-Term Work in Britain" 32.
370 Koukiadaki "The Regulation of Fixed-Term Work in Britain" 33.
371 Kilpatrick 2003 *ID* 147.
372 Sadevirta *A Comparative Study of the Regulation Governing the Use of Fixed-term Contracts* 207.
373 Section 55(2) of the *Employment Protection Act* 1979.
374 Section 142(1) of the *Employment Protection Act* 1979.

job security so that the rights could be waived in exchange for a guaranteed period of work, the rights in question being considered inappropriate to genuine fixed-term contracts", where both parties to the contract realised that there was no understanding that the contract would necessarily be renewed on expiry.[375]

According to the above provisions of the *Employment Protection Act* 1979 *(EPA* 1979), the employer did not have additional substantive reasons for electing to offer employment as required by the sections.[376] Section 142 of the *EPA* 1979 merely laid down procedural constraints on the parties' right to derogate and did not impose any limit on the number of times a fixed-term contract may be renewed.[377] The main precondition for derogation was that the contract for which non-renewal constitutes dismissal had to be for a fixed-term of one year at least.[378] Case law indicates that it was possible to insert a clause enabling termination before expiry of the contract period.[379] However, the Court of Appeal took a different view in *BBC v Ioannou.*[380] In that case, a contract concluded for a fixed-term contained a clause for termination by three months' notice. The contract was held not to be a fixed-term one, and the employee's written waiver clause of redundancy payment and unfair dismissal rights was deemed ineffective.

If a fixed-term contract for a year or more was renewed at the time it expires for a period less than a year, "it did not necessarily preclude the employer from relying on a waiver previously signed by the employee".[381] This was due to the fact that "it was possible to consider the renewal as a variation of the existing contract and extending its length, rather than concluding a new agreement altogether".[382] It has been held that "the minimum qualification period of one year was regarded as fulfilled even if the initial contract was less than a year but was extended by a

375 Barnard and Deakin *Flexibility and Security In Temporary Work* 121; also see McCann *Regulating Flexible Work* 113.
376 Sadevirta *A Comparative Study of the Regulation Governing the Use of Fixed-term Contracts* 207.
377 Sadevirta *A Comparative Study of the Regulation Governing the Use of Fixed-term Contracts* 207.
378 Deakin and Morris *Labour Law* (1995) 402-404.
379 See Court of Appeal decision in *Dixon v BBC [1979]* ICR 281 as discussed in: Lorber *Regulating Fixed-Term Work in the United Kingdom* 131; and Deakin & Morris *Labour Law* (1995) 402-404.
380 1975 ICR 267 as discussed in Deakin & Morris *Labour Law* (1995) 402-404.
381 Deakin & Morris *Labour Law* (1995) 402-404.
382 See the Northern Ireland Court of Appeal in *Mulrine v University of Ulster* 1993 IRLR 545 as discussed in Deakin & Morris *Labour Law* (1995) 402-404.

variation of the contract after which the duration of the contract was at least a year".[383] In *BBC Kelly-Phillips*[384] it was held that the statutory requirement relating to the waiver rule was satisfied when the original contract was for such period, regardless of the fact that the employment was subsequently extended by an agreed variation of that contract, even for a period less than one year.[385]

4.2.1.3 The effect of the waiver requirement

In their discussion of the case of *Kingston upon Hull City Council v Mountain,*[386] Deakin and Morris stated that the case law has highlighted the failure of labour laws to cover the work performed under successive fixed-term contracts.[387] In the above case the applicant employee had been employed for seventeen years under an open-ended contract immediately before concluding a fixed-term contract with the same employer under which he waived his right to redundancy payment. The Employment Appeal Tribunal (EAT) held that he was not entitled to the redundancy payment irrespective of the period of service that preceded the fixed-term employment.[388]

The rights created by the waiver provisions have been held "to have reflected a very difficult compromise between two conflicting policy objectives: on the one hand, "the need to prevent the widespread and uncontrolled use of fixed-term contracts with an aim of avoiding circumvention of the Employment Act", and on the other, "a perceived need to preserve the option of fixed-term employment free from the possibility of unfair dismissal cases where, on the grounds of flexibility or otherwise, the use of fixed-term contracts was believed to be legitimate".[389] This was because the purpose of the waiver rule was "to reduce the burden on the employers when

383 Sadevirta *A Comparative Study of the Regulation Governing the Use of Fixed-term Contracts* 207-208.
384 1998 ICR 587.
385 See Deakin & Morris *Labour Law* (1995) 402-404.
386 1998 ICR 44 (EAT).
387 Deakin and Morris *Labour Law* (1995) 403.
388 Deakin & Morris *Labour Law* (1995) 402-404; McCann *Regulating Flexible Work* 113.
389 Deakin and Morris *Labour Law* (1995) 403; Barnard and Deakin *Flexibility and Security in Temporary Work* 121-122; Koukiadaki "The Regulation of Fixed-Term Work in Britain" 34.

terminating the contract, and for workers, their attraction to agree to a waiver clause was a promise of a one or two year contract".[390]

No major amendments to the law relating to fixed-term contracts were effected until in the 1980s.[391] The waiver rules were amended in the 1980s so that the employer was "obliged to offer a fixed-term contract for one year in order for the employee's opt-out from unfair dismissal to be valid. However, a two year waiver remained required for purposes of redundancy payment".[392] Barnard and Deakin submit that the legal position of fixed-term employees "was made worse in the mid-1980s when the fixed-term employee could be given a contract for only one year, but could be required to work two years before achieving an entitlement to basic unfair dismissal protection".[393]

Kilpatrick argues that these rights "were based on the notion of continuous work both in regard to qualification for statutory right and the amount of compensation received in case of a successful claim".[394] Therefore, "employees who were working under successive fixed-term contracts for the same employer were vulnerable to non-qualification as interruption between employments relationships could exclude them from the continuous employment required".[395] He argues that even in the event of qualification to make a claim, interruptions in continuity would reduce their compensation.[396]

In addition, Lorber suggests that the legislation "placed no restriction on the use of fixed-term contracts" to provide that if there was a justified reason for the use of a fixed-term contract, or if the contract was renewed more than the maximum number of times permitted by the statute, "the employee was treated as if he was employed on a contract of indefinite duration with the full protection of dismissal law".[397] That is, prior to the implementation of the Directive on Fixed-Term Work, "the UK law had no restriction on how these contracts were to be used by employers, and permitted use of

390 Lorber *Regulating Fixed-Term Work in the United Kingdom* 121 and 131.
391 Barnard and Deakin *Flexibility and Security in Temporary Work* 122.
392 Barnard and Deakin *Flexibility and Security in Temporary Work* 122; Contouris *The Changing Law of Employment Relationship* 91.
393 Barnard and Deakin Flexibility and Security in Temporary Work 122-123.
394 Kilpatrick 2003 *IU* 142-143.
395 Kilpatrick 2003 *IU* 142-143.
396 Kilpatrick 2003 *IU* 142-143.
397 Lorber *Achieving the Fixed-Term Work Directive's Aims* 323.

successive fixed-term contracts for unlimited periods of time. The lack of regulation not meant possible abuse of these contracts".[398]

Kilpatrick further submitted that "workers on fixed-term contracts have also been excluded from other forms of employment protection which should have been afforded to them"[399]. For example, employees on contracts of three months or less were excluded from minimum notice period, guarantee pay, statutory sick pay and payments on medical suspension as these require a qualifying period of continuous employment.[400] Consequent to the legislation discussed above, it is clear that it operated to "marginalise non-standard workers as the standard model was transplanted to the legislative form".[401]

4.3 Implementation of the Directive on Fixed-Term Work

As already noted above, in order to avoid excessive overuse and abuse of fixed-term contracts, legislation specified that the employer's failure to renew a fixed-term contract under the same terms and conditions as before amounted to 'dismissal'. However, the employer could still argue that the dismissal was fair.[402] For instance, objective economic reasons could be demonstrated for the employer's inability to offer permanent work (an example would be loss of a research grant, in the case of a university, and loss of an external contract, in the case of a commercial business). Moreover, "the employee could waive his or her right to claim unfair dismissal rights and the rights to redundancy compensation, as long as the fixed-term contract was for duration of at least two years".[403] In order to provide a further regulation of fixed-term work, the UK legislature introduced the *Fixed-Term Employees Regulations (FTER).*[404]

The *FTER* were designed to implement the UK *Council Directive 99/70 on Fixed-Term Work* (the Directive). This Directive gives effect to a Framework Agreement concluded by the European social partners. The Agreement is premised on the view

398 Kilpatrick 2003 *IU* 142-143.
399 Kilpatrick 2003 *IU* 142-143.
400 Kilpatrick 2003 *IU* 142-143.
401 Koukiadaki 'The Regulation of Fixed-Term Work in Britain" 33.
402 Koukiadaki 2009 *ILJ* 90.
403 Koukiadaki 2009 *ILJ* 90.
404 *Fixed-Term Employees (Prevention of Less Favourable Treatment) Regulations* 2030 of 2002.

that "contracts of an indefinite duration, are, and will continue to be, the general form of employment relationship between employers and workers".[405] This Directive has two purposes: firstly, it is to "improve the quality of fixed-term work by ensuring the principle of non-discrimination between fixed-term workers and comparable permanent workers"; and secondly, it is to "establish a framework to prevent abuse arising from the use of successive fixed-term employment contracts or relationships".[406]

While there is acknowledgement that fixed-term employment contracts do in certain circumstances respond to the needs of both employers and workers, the 99/70 Directive is more obviously about worker protection than the Part-Time Work Directive.[407] The Directive reinforces the sense in which the indeterminate duration contract of employment is to be regarded as the norm, by requiring the application of the principle of non-discrimination.[408]

4.4 Fixed-Term Employees Regulation (FTER)

Under these regulations a fixed-term contract is defined as "a contract of employment that, under its provisions determining how it will terminate in the normal course, will terminate on: the expiry of a specific term,[409] on the completion of a particular task,[410] or on the occurrence or non-occurrence of any other specific event" other than the attainment by the employee of any normal and bona fide retiring age in the establishment for an employee holding the position held by him.[411] Thus in terms of Regulation 1(2), and unlike the Directive and the Agreement which apply to the wider category of 'workers', the *FTER* controversially, only apply to employees. In line with the Directive, the *FTER* contain three main rights for fixed-term employees: "prevention of unfair dismissal and discrimination between fixed-term

405 Directive 99/70/EC, Annex (Framework Agreement on Fixed-Term Work concluded by the ETUC, UNICE and CEEP), recital 2; koukiadaki 2009 *ILJ* 90.
406 Clause 1, as cited by Koukiadaki 2009 *ILJ* 90.
407 Koukiadaki 2009 *ILJ* 90.
408 Koukiadaki 2009 *ILJ* 90.
409 Reg 1(2) (a) of the *FTER*.
410 Reg 1(2) (b) of the *FTER*.
411 Reg 1(2) (c) of the *FTER*.

and permanent employees; prevention of abuse of fixed-term contracts; and the right to be provided with information by the employer".[412]

4.4.1 Principle of non-discrimination

In terms of Regulation 3(1), a fixed-term employee has the right not to be treated by his employer less favourably than a comparable permanent employee regarding the terms of his contract;[413] or by being subjected to any other detriment by any act, or deliberate failure to act, of his employer.[414] Regulation 3(2) provides that the right conferred by paragraph (1) includes in particular the right of the fixed-term employee in question not to be treated less favourably than the employer treats a comparable permanent employee in relation to any period of service qualification relating to any particular condition of service,[415] the opportunity to receive training,[416] or the opportunity to secure any permanent position in the establishment.[417] A fixed-term employee has a right not to be treated less favourably than the comparable permanent employee if that less favourable treatment is based on the ground that the employee is a fixed-term employee,[418] and the treatment is not justified on objective grounds.[419]

Regulation 4(1) stipulates that where a fixed-term employee is treated by his employer less favourably than the employer treats a comparable permanent employee as regards any term of his contract, the treatment in question shall be regarded for the purposes of regulation 3(3)(b) as justified on objective grounds if the terms of the fixed-term employee's contract of employment, taken as a whole, are at least as favourable as the terms of the comparable permanent employee's contract of employment.

Regulation 3(5) provides that "in determining whether a fixed-term employee has been treated less favourably than a comparable permanent employee, the *pro rata* principle shall be applied unless it is inappropriate". Under Regulation 1, the *pro rata*

412 Koukiadaki 2009 *ILJ* 91-92.
413 Reg 3(1) (a) of the *FTER.*
414 Reg 3(1) (b) of the *FTER.*
415 Reg 3(2) (a) of the *FTER.*
416 Reg 3(2) (b) of the *FTER.*
417 Reg 3(2) (c) of the *FTER.*
418 Reg 3(3) (a) of the *FTER.*
419 Reg 3(3) (b) of the *FTER.*

principle is defined as follows: "a comparable permanent employee receives or is entitled to pay or any other benefit, that a fixed-term employee is to receive or be entitled to such proportion of that pay or other benefit as is reasonable in the circumstances" having regard to the length of his contract of employment and to the terms on which the pay or other benefit is offered.

An employee is a comparable permanent employee in relation to a fixed-term employee if, "at the time of the alleged less favourable treatment of the fixed-term employee, both employees are: employed by the same employer",[420] and "engaged in the same or broadly similar work having regard, where relevant, to whether they have a similar level of qualification and skills";[421] "the permanent employee works or is based at the same establishment as the fixed-term employee or", where there is no comparable permanent employee working or based at that establishment who is employed by the same employer or engaged in the same or similar work, "the employee works or is based at a different establishment and satisfies those requirements".[422] In terms of Regulation 2(2), an employee is not a comparable employee if his employment relationship has ceased.

Regulation 3(6) provides that in order to enable the employee to effectively exercise his right not to be treated less favourably than a comparable permanent employee in terms of opportunity of securing permanent position in the business,[423] "the employer has to inform the employee of the available vacancies in the establishment". The employee is informed by his employer for purposes of regulation 3(6) only if "the vacancy is contained in an advertisement which the employee has a reasonable opportunity of reading in the course of his employment or the employee is given reasonable notification of the vacancy in some other way".[424] If an employee feels that he has been treated less favourably in contravention of regulation 3, he must be provided with a written statement by the employer, giving reasons for the treatment, within twenty one days of request.[425]

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420 Reg 2(1) (i) of the FTER.
421 Reg 2(1) (i) of the FTER.
422 Reg 2(1) (i) (b) of the FTER.
423 In terms of reg 3(2) of the FTER.
424 Reg 3(7) of the FTER.
425 Reg 5(1) of the FTER.

4.4.2 Unfair dismissal

An employee has a right not to be unfairly dismissed[426] or subjected to any detriment by any act or deliberate failure to act, of his employer[427] on grounds that the employee:

> brought proceedings against the employer under the *FTER:,* requested from his employer a written statement under regulation 5 or regulation 9; gave evidence or information in connection with such proceedings brought by any employee; otherwise did anything under the *FTER* in relation to the employer or any other person; alleged that the employer had infringed the *FTER;* refused (or proposed to refuse) to forgo a right conferred on him by the *FTER;* declined to sign a workforce agreement for the purposes of the *FTER;*[428] or that, being a representative of members of the workforce for the purposes of Schedule 1, or a candidate[429] in an election in which any person elected will, on being elected, become such a representative, he performed (or proposed to perform) any functions or activities as such a representative or candidate; or that the employer believes or suspects that the employee has done or intends to perform any of the acts mentioned above.[430]

4.4.3 Successive fixed-term contracts

It has been submitted that the protection concerning prevention of abuse of fixed-term contracts contained in the *FTER* arguably constitutes a far-reaching change to UK law.[431] The Directive sets out three possible options for preventing abuses of successive fixed-term contracts and requires one or more of them to be used: "(a) the number of renewals of a fixed-term contract should be limited; (b) the total duration of successive fixed-term contracts should be limited; and (c) fixed-term contracts should only be renewed if there is an objective justification for doing so".[432]

Under regulation 8 of the *FTER,* when an employee is employed under successive fixed-term contracts and has continuity of employment of four years or more, the term limiting the duration of the contract of employment is to be of no effect from the date on which the four years of continuous employment were acquired or from

426 Reg 6(1) of the FTER, read with part 10 of the ERA 1996.
427 Reg 6(2) of the FTER.
428 Reg 6(3) (a) (i)-(vii) of the *FTER.*
429 Reg 6(3) (a) (viii) of the *FTER.*
430 Reg 6 (3) (b) of the *FTER.*
431 Koukiadaki 2009 *ILJ* 92.
432 Koukiadaki 2009 *ILJ* 92.

the date on which the contract was most recently renewed.[433] Simply, if an employee is employed under a fixed-term contract, such contract is automatically considered to be permanent upon lapse of four years from date of conclusion of the contract (if it had not been renewed), or on the date the contract was last renewed (in case of successive fixed-term contract), unless the employer could show reasons for continuing employment on fixed-term basis.[434]

However, regulation 5 permits the parties to conclude a collective agreement for purposes of modifying:

> the maximum total period for which the employee or employees may be continuously employed on a fixed-term contract or on successive fixed-term contracts; the maximum number of successive fixed-term contracts and renewals of such contracts under which the employee or employees may be employed; and objective grounds justifying the renewal of fixed-term contracts; or the engagement of the employee or employees under successive fixed-term contracts.[435]

An employee who considers himself as a permanent employee may request written statement providing reasons why his contract remains fixed, and has to be furnished with such statement within twenty one days.[436] Such employee may also be apply to court for declaration that his contract is permanent.[437]

4.5 Concluding remarks

The UK law concerning protection of fixed-term employees changed considerably after the implementation of the Council Directive 99/70 on fixed-term work. As far as the principle of non-discrimination introduced by the Directive is concerned, section 198B(8) of the South African LRAA which provides for non-discriminatory treatment of fixed-term as against their comparable permanent colleagues, has almost similar purpose or effect with regulation3 of the *FTER.*

However, concerning the prevention of the abuse of successive fixed-term contracts by employers, section 198B differs in most respects from the UK FTER. As indicated earlier in this Chapter, regulation 8 of the FTER restricts duration of a

433 Koukiadaki 2009 *ILJ* 92.
434 Reg 8(2) (a) and (b) (i), (ii) of the *FTER.*
435 Reg 5(a), (b) and (c) of the *FTER.*
436 Reg 9(1) and (2).
437 Reg 9(5) of the *FTER.*

fixed-term contract or successive fixed-term contracts to four years, although this period may be varied by a collective agreement. In contrast to regulation 8 of the FTER, section 198B (3) of the *LRAA* limits the duration of a fixed-term contract or successive fixed-term contracts to three months. Unlike the *FTER,* the *LRAA* does not contain any provision allowing modification of these periods by collective agreements, except to mention that conclusion of fixed-term contract or renewal of successive fixed-term contracts beyond three months shall be permitted only on justifiable grounds. As shown in chapter three, this provision is problematic in that the limit placed therein is too short and impracticable for employers to comply with.

Moreover, the *FTER* provides a very flexible way in which the employers and trade unions can agree on the justifiable reasons for maintaining a contract on fixed-term basis beyond four years, or for renewal of such contract for more than four years, which is through a collective agreement. However, apart from the list of grounds under section 198B (4) of the *LRAA,* subsection (3)(b) thereof merely states that the employer may provide any other justifiable ground for fixing or renewing the contract for a period exceeding three months. This too, does not solve the problem and parties will always fight on whether reasons provided by the employers are justifiable, since most employers will deliberately fix the term of contracts and provide economic reasons as a cause of fixing the term of the contract.

Chapter 5 – Conclusions and Recommendations

5.1 Introduction

The main goal of this study was to evaluate whether the LRAA indeed achieves its objective of offering greater protection and regulating the fixed-term employment contracts,[438] with a view of improving employment security for such employees. Chapter one of the study dealt with the introduction, problem statement, methodology as well as the framework. Chapter two generally focused on employment protection, employment security and job security. Chapter three discussed the fixed-term contracts under the: Common Law, *LRA* 1956,[439] *LRA* 1995,[440] and *LRAA* 2014.[441] Chapter four reflected on the regulation of fixed-term contracts in the UK, with a view of making comparisons between the UK and South African positions concerning regulation of fixed-term contracts, as well as to draw some lessons for South Africa. This chapter makes an analysis of the regulation of fixed-term contracts in the UK and South Africa, draws conclusions and makes some recommendations. The Directive on Fixed-Term Work[442] and the UK *FTER*[443] are considered in order to compare and evaluate the current legal regulation of fixed-term employment in South Africa and to offer recommendations from a rights-based perspective.[444]

5.2 South African regulation of fixed-term employment and some loopholes

As the primary guardian of employees' rights, the South African labour law has been transformed over decades, responding to the needs of employees according to an employment contract.[445] Numerous forms of non-standard employment materialised since South Africa joined the era of globalisation and the adoption of

438 Memorandum of objects of the *Labour Relations Amendment Act* of 2014.
439 *Labour Relations Act* 28 of 1956.
440 *Labour Relations Act* 66 of 1995.
441 *Labour Relations Amendment Act* 6 of 2014.
442 Directive 99/70/EC.
443 *Fixed-Term Employees (Prevention of Less Favourable Treatment) Regulations* 2030 of 2002.
444 See Gerickle *Successive Fixed-term Employment Contracts in South Africa* 251, where she considers the Council Directive 1999/70/EC and the *German Part- Time and Fixed-Term Employment Act* 2000.
445 Gerickle *Successive Fixed-term Employment Contracts in South Africa* 252.

a constitution based on certain values and guaranteeing those rights.[446] Of vital significance are everyone's rights to fair labour practices, dignity and equality[447] which are guaranteed by sections 23, 10 and 9 of the Constitution respectively. Despite the fact that the Constitution, legislation and case law impact prominently upon the contract of employment in South Africa, it is still branded by a solid Roman-Dutch law foundation.[421] It has been acknowledged that the "freedom to negotiate the terms and conditions of employment contracts in many instances are founded upon the legal fiction consensus because inequality between the parties places the fixed-term employees in a weaker bargaining position".[448] Specifically, fixed-term employees sometimes occupy positions renowned as uncertain and prone to abusive practices, and as a result labour law has a role to play so as to ensure fair treatment of employees in those circumstances.[449] It is submitted that, although the legislature has endeavoured to do this, the scope and content of that protection could be criticised for not being enough.[450]

There are some troubling issues of concern under the *LRAA.* Firstly, the scope of protection in section 198B is limited to employees earning below the earnings threshold despite the fact that there exists no justification for limiting the protection of a vulnerable class of non-standard employees to a specific category in the Memorandum[451] or in that section. It is submitted that this goes against section 23 of the Constitution which guarantees the right to fair labour practices for 'everyone' irrespective of their income.[452] It is also submitted that this limitation falls short of reasonableness and fairness, especially considering the low level at which the ceiling is placed, and it prevents the legislator from fulfilling its obligations in line with international standards[453] and the Constitution. In simple terms, it could be argued that this section discriminates between fixed-term employees on the basis of their salary.

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446 Gerickle *Successive Fixed-term Employment Contracts in South Africa* 252.
447 Gerickle *Successive Fixed-term Employment Contracts in South Africa* 252.
448 Gerickle *Successive Fixed-term Employment Contracts in South Africa* 252-253.
449 Gerickle *Successive Fixed-term Employment Contracts in South Africa* 253.
450 Gerickle *Successive Fixed-term Employment Contracts in South Africa* 253.
451 Gerickle *Successive Fixed-term Employment Contracts in South Africa* 253.
452 Gerickle *Successive Fixed-term Employment Contracts in South Africa* 255.
453 Gerickle *Successive Fixed-term Employment Contracts in South Africa* 255.

Secondly, the *LRAA* places no limit on the number of successive fixed-term contracts. Instead, the employer is allowed to engage the employees on successive fixed-term contracts as long as they can show justifiable grounds for renewing the contract.[454] As Gerickle correctly submits, the above situation prompts a question "whether different reasons may subsequently be provided for renewing a fixed-term contract with the same employee, and whether the past contracts are relevant in establishing abusive practices between the parties".[455] It is submitted that the regulation of fixed-term contracts under both sections 186(1)(b) of the *LRA* and 198B is unclear and consequently more weight is needed for protection of fixed-term employees.[456] For instance, different reasons might be provided by the employer to renew successive fixed-term contracts of the same employee on similar terms for a considerably long time. It is submitted that such renewal would be abusive.[457]

Thirdly, section 198B of the *LRAA* grants the employers an opportunity to think and provide reasons for either fixing the term or renewing the contract without consulting the trade union, and this means as long as the employer has those 'justifiable' reasons for either fixing or renewing the contract term, the employees shall work on fixed-term basis for the rest of their life. Sometimes the reasons might not even be justifiable, but looking at the high rate of unemployment, the employees might be forced to agree to be retained on fixed-term basis for fear of becoming unemployed. In such an event, it would mean the problem of employers bypassing statutory provisions protecting fixed-term employees, or the problem of the employers abusing the use of successive fixed- term contracts would remain only partly solved. Moreover, the list of justifiable grounds upon which the employer could rely for use or extension of a fixed-term contract is not closed, consequently it will remain in the courts' discretion to scrutinise the employers' motives for concluding or renewing a fixed-term contract.[458] However, it will take a great deal of time for the courts to develop guidelines which will ultimately cure the legal uncertainty.[459]

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454 Gerickle *Successive Fixed-term Employment Contracts in South Africa* 255.
455 Section 198B(3) of the *Labour Relations Amendment Act* 6 of 2014.
456 Gerickle *Successive Fixed-term Employment Contracts in South Africa* 256.
457 Gerickle *Successive Fixed-term Employment Contracts in South Africa* 256.
458 Gerickle *Successive Fixed-term Employment Contracts in South Africa* 256.
459 Gerickle *Successive Fixed-term Employment Contracts in South Africa* 256.

Fourthly, it is submitted that the limitation period for which fixed-term contracts may be concluded (three months) is too short and might create some difficulties which might lead to unemployment or disregard of other LRAA provisions.[460] For instance, it will in most cases be impracticable for the employers to employ employees on fixed-term contracts for three months and at the expiry of the term of the contracts have all such employees as permanent employees. That would be more difficult for employers such as universities which engage fixed-term employers on massive scale. A consequent result would be that the employers will incur financial problems, and ultimately face only one option: retrenchment of some employees.[461]

5.3 Difference between the LRAA and the FTER

As indicated above, regulation 8 of the FTER provides that in the UK, first fixed-term contract duration is four years. Unlike this regulation, section 198B of the LRA restricts this time limit to three months. It is submitted that the position obtaining in the UK in terms of regulation 8 is much more reasonable than that under the LRA.

Another difference lies on the fact that regulation 8(5) of the FTER allows parties to conclude a collective agreement or workforce agreement in terms of which they could modify and agree on the following:

> the maximum total period for which the employee or employees may be continuously employed on a fixed-term contract or on successive fixed-term contracts; the maximum number of successive fixed-term contracts and renewals of such contracts under which the employee or employees may be employed; or objective grounds justifying the renewal of fixed-term contracts; or the engagement of the employee or employees under successive fixed-term contracts.

In contrast, the *LRAA* places the duty to provide reasons to justify conclusion or renewal of a fixed-term contract on the employer, but contains no specific provision under which parties could negotiate and agree on those reasons, and vary the duration of the fixed-term contract or number of successive fixed-term contracts.

460 Gerickle *Successive Fixed-term Employment Contracts in South Africa* 256.
461 Section 198B of the amended LRA.

5.4 Final conclusions and recommendations

As already submitted in chapter three, the *LRAA* introduced some positive changes to the rights and protections afforded to fixed-term employees under the South Africa labour law.[462] However, it makes the laws regulating fixed-term employment relationship more expensive, and difficult to comply with than flexible.[463] Consequently, employers will be more cautious in regard to employing fixed-term employees. They will therefore find other alternatives to engaging employees on fixed-term basis such as outsourcing certain work, working overtime, as well as splitting up the available job amongst the current employees to do it.[464] This simply means people might run the risk of unemployment.

However, since these provisions of the *LRAA* are still novel, they have not yet been tested before the courts of law.[465] Their effectiveness is highly doubted, and it will depend on their interpretation by the courts.[466] It is submitted that these provisions are likely to be the subject of debate before the courts and most problems encountered under the 1995 *LRA* are likely to confront the employees, employers, legal practitioners as well as the courts.

It is recommended that the number and cumulative length of successive fixed-term contracts should be limited. Moreover, the number and cumulative length of successive fixed-term contracts from the past employment relationship between the parties, should be taken into account in evaluating the abusive treatment of successive fixed-term employees in South Africa.[467]

It is further recommended that a Code of Good Practice providing guidelines based on the constitutional rights and values should be adopted to "implement the concept of 'fair labour practices' for the protection of fixed-term employees' rights and on 'justifiable reasons' for fixed-term employment".[468]

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462 Chap 3 para 3.6.5.
463 Chap 3 para 3.6.5.
464 Chap 3 para 3.6.5.
465 Chap 3 para 3.6.5.
466 Chap 3 para 3.6.5.
467 Chap 3 para 3.6.5.
468 Gerickle *Successive Fixed-term Employment Contracts in South Africa* 280.

Another recommendation made herein is that the fixed-term employees excluded in terms of section 198B(2) of the *LRA* should be placed in the position of other fixed-term employees to enjoy the equality and protection offered by the law.[469]

A provision in the *LRA* which permits the parties to: vary the three months period for conclusion of fixed-term contract; agree on the number of successive fixed-term contracts that employees could work; and agree on reasons that could justify renewal of a fixed-term contract instead of offering indefinite employment is recommended. If this could happen, such as under the *FTER,* parties would agree on much reasonable duration of the contract, and as such job security would be enhanced.

It is finally recommended that section 198B should be amended since it does not conform to constitutional standards and values to protect the excluded category of fixed-term employees.[470] Moreover, a limitation to the number of successive fixed-term contracts permitted between the same parties, and specific guidelines to regulate the conclusion of multiple fixed-term contracts will not only enhance certainty, but will protect the rights of fixed-term employees in an unequal employment relationship within the context of their right to fair labour practices,[471] and shall also enhance job security for fixed-term employees.

469 Gerickle *Successive Fixed-term Employment Contracts in South Africa* 280.
470 Gerickle *Successive Fixed-term Employment Contracts in South Africa* 281.
471 Gerickle *Successive Fixed-term Employment Contracts in South Africa* 281.

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