

A NEW LOOK AT THE OLD PROBLEM OF A REASONABLE EXPECTATION: THE REASONABleness OF REPEATED RENEWALS OF FIXED-TERM CONTRACTS AS OPPOSED TO INDEFINITE EMPLOYMENT

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1 Introduction

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. Consensus between both parties on the contents and the specific limitations of this kind of atypical employment contract is vital to avoid any misunderstanding and unreasonable expectations on the part of the employee. 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. 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.

Section 186(1)(b) of the *Labour Relations Act* 66 of 1995 (LRA) regulates and protects the position of an employee who can prove that the employer's conduct gave rise to a reasonable expectation that the fixed-term contract would be renewed on the same or similar terms while the employer is only prepared to offer the employee a renewal on less favourable terms, or not at all. This decision of the employer constitutes a dismissal.

While the general focus has been on fairness and reasonableness in terms of any expectation that the employee might have had regarding the employer's intention to renew the fixed-term contract at the end of the specific term, the matter of reasonableness and fairness regarding the employer's repeated offers to extend the

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employment relationship in order to avoid indefinite employment¹ has not yet been addressed by the legislator. Renewals of fixed-term contracts do not *per se* give rise to an objective basis for a reasonable expectation regarding further renewals or indefinite employment.² A series of offers by the employer to the employee to engage in repeated fixed-term contracts, instead of extending an offer of indefinite employment to that employee, has been the topic of hot debate and dispute in the arena of labour law under the following circumstances: (a) where the employer is in the position to do so; and/or (b) where the employer was responsible for creating a reasonable expectation that repeated renewals would result in indefinite employment when possible.³

The purpose of this contribution is to consider a legal approach that could regulate a series of fixed-term contract renewals and prevent the exploitation of employees who find themselves trapped in repeated fixed-term contracts, instead of being indefinitely employed, where a reasonable expectation has been created that such an appointment is indeed possible but was avoided by the employer in order to circumvent restrictive labour legislation regarding dismissals and rights afforded to employees in terms of section 185 of the LRA.⁴ As the weaker bargaining parties in the employment relationship, employees often find themselves in a position where an unstable life-line is thrown at them by employers who wish to take advantage of employees in temporary employment positions by withholding rights and benefits from them instead of offering them an indefinite employment opportunity to create employment security and stability, where such an appointment is feasible.⁵ An employee in a fixed-term contract who renders the same standard of service and delivers the same amount of work as an employee in an indefinite position is usually

¹ See Cheadle 2006 *ILJ* 664 para 6.

² Grogan *Workplace Law* 150 reflects on several factors to be considered when evaluating the conduct of the employer as giving rise to the employee's reasonable expectation of future renewals or changing the employment relationship to permanent employment.

³ See the facts of *Yebe v University of KZN* 2007 28 *ILJ* 490 (CCMA) para 4.5. The court held that the series of renewals in this case created a reasonable expectation that the employment relationship would be renewed, and the employer's failure to renew the employment relationship proved to be a dismissal.

⁴ See 2.2 below re ss 185 and 186(2) of the *Labour Relations Act* 66 of 1995 in terms of the rights linked to an unfair labour practice. *Biggs v Rand Water* 2003 24 *ILJ* 1957 (LC) 1961A-B stated: "Section 186(1)(b) was included in the LRA to prevent the unfair practice of keeping an employee on a temporary basis without employment security until it suits an employer to dismiss such an employee without the unpleasant obligations imposed on employers by the LRA in respect of permanent employees."

deprived of a certain level of status, remuneration, benefits, promotion and training opportunities exclusively available to permanent members of staff. Exploitation of this kind should be prevented, as it is tantamount to a violation of the fundamental right to fair labour practices by legal protection afforded to employees against fixed-term malpractices.⁶

2 Underlying legal principles of the fixed-term contract

2.1 A constitutional dimension to labour protection

Although section 23(1) of the *Constitution*⁷ does not explain in detail the nature of the fair labour practices afforded to everyone, the courts have developed a labour jurisprudence recognising this fundamental right to fair labour practices, as it unfolds in the protection afforded to employees in terms of the labour rights enshrined in labour legislation.⁸ It is, however, accepted that the fundamental right to fair labour practices is afforded to all employees, whether in a fixed-term relationship or one of indefinite duration.⁹ It is submitted that a positive duty is therefore placed on the employer in the context of the employment relationship to act within the parameters of the protection afforded by section 23(1).¹⁰ The constitutional right to fair labour practices, on the other hand, is as much afforded to the employer as to the employee within the meaning of "everyone".¹¹ The employer is therefore rightfully entitled to conclude fixed-term contracts determined by an "objective condition" such as the

⁵ See fn 3.

⁶ See s 23(1) of the *Constitution of the Republic of South Africa*, 1996, hereafter the *Constitution*. This concept of fair labour practices correlates with the International Labour Organisation's (ILO) concept of and quest for the creation of "decent work" for all. See para 3 below on the ILO.

⁷ *Constitution of the Republic of South Africa*, 1996.

⁸ See s 185(a) and (b) of the LRA regarding the "right [of every employee] not to be unfairly dismissed or subjected to an unfair labour practice", as well as s 2 of the *Basic Conditions of Employment Act* 75 of 1997 and s 9 of the *Employment Equity Act* 55 of 1998.

⁹ Cheadle 2006 *ILJ* 663 para 1 reflects on the impact of "labour reforms in the 1990s", specifically "on those aspects of the reforms that were intended but improperly realised in practice". Lawfulness and fairness are the two crucial elements that hold the balance to labour justice, however difficult to put into practice.

¹⁰ S 39(2) of the *Constitution* reflects on the courts' obligation to develop common-law principles and to promote the spirits and objects of the Bill of Rights in the interpretation of legislation.

¹¹ See *NEHAWU v University of Cape Town* 2003 24 *ILJ* 95 (CC) para 39.

arrival of an agreed date, the completion of a specific task or the happening of a particular event.¹²

Another constitutional dimension of merit is added to the employment relationship in respect of dignity and equality. Section 1 of the Constitution promotes the values of "human dignity, the achievement of equality and the advancement of rights and freedoms".¹³ Section 9 is a manifestation of these values and affirms that "[e]veryone is equal before the law and has the right to equal protection and benefit of the law".¹⁴ Neither the state nor any person may unfairly discriminate directly or indirectly against anyone on one or more grounds including the list of sixteen grounds.¹⁵

2.2 *The Labour Relations Act 66 of 1995*

Cheadle refers to the need for flexible forms of employment and the corresponding challenges of employment security and legal protection. As he so aptly puts it:¹⁶

[T]he traditional model of employment (permanent full-time employment with one employer until retirement) is steadily giving way to less stable (and often more vulnerable) forms of employment. This has two consequences for the labour market regulation. The first is that much of the regulation based on the traditional model is not suited to these new forms of employment. The second is that the modern labour market is dynamic and labour market regulation is always a step behind.

Although the concept of fairness in sections 185 and 186 of the LRA does not regulate the repeated renewal of fixed-term contracts in order to avoid an employment relationship of indefinite duration, this practice certainly begs the question: does the employer's discretion display a degree of fairness and reasonableness when considering repeated renewals of a fixed-term contract as opposed to an offer of indefinite employment? Or does it mirror unscrupulous

¹² For an example of detailed employer guidelines and statutory protection to employees re the justification of using fixed-term contracts, consult the *Protection of Employees (Fixed-term Work) Act 29 of 2003* of Ireland.

¹³ S 10 of the *Constitution* confirms that "everyone has inherent dignity and the right to have their dignity respected and protected".

¹⁴ S 9(1) of the *Constitution*.

¹⁵ S 9(3) and 9(5) of the *Constitution* state that discrimination on any listed ground is unfair unless it is established that the discrimination is fair.

¹⁶ Cheadle 2006 *ILJ* 664 para 6.

exploitation by retaining the *status quo* in the absence of any legal restrictions on an abusive practice followed by some employers?¹⁷

According to section 186(2) of the LRA an "unfair labour practice" means "any unfair act or omission that arises between an employer and an employee involving" (a closed list of examples not regulating continual renewal of fixed-term contracts over an extended period of time):¹⁸

- (a) unfair conduct by the employer relating to promotion, demotion, probation (excluding disputes about dismissals for a reason relating to probation) or training of an *employee* or relating to the provision of benefits to an *employee*;
- (b) the unfair suspension of an *employee* or any other unfair disciplinary action short of dismissal in respect of an *employee*;
- (c) the failure or refusal by an employer to reinstate or re-employ a former *employee* in terms of any agreement; and
- (d) 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.

It is clear from the specific wording of section 186(1)(b) that the principle of fairness which is connected to "reasonableness" is not incorporated in this section to address an employer's decision to engage in a series of repeated fixed-term contracts. The case law seems to be divided on whether or not employees can claim a dismissal in terms of section 186(1)(b) if they claim an expectation of indefinite employment after the lapse of a fixed-term contract. As the stronger bargaining party the employer decides the fate of the fixed-term contract and the employment security of the employee.¹⁹ The primary focus is therefore on the decision taken by the employer who acts from a position of power and discretion. The employer could prefer not to renew a fixed-term contract after the lapse thereof or enter into a series of fixed-term contracts for various reasons of which one could be to avoid the legal obligations

¹⁷ Grogan *Workplace Law* 148 reflects on s 186(1)(b) of the LRA as a form of dismissal chosen by the legislator to protect employees against employers who plan to keep their employees "indefinitely on fixed-term contracts and terminating at will without fair procedures and without good reason".

¹⁸ See *Wood v Nestle SA (Pty) Ltd* 1996 17 *ILJ* 184 (IC) where the employer's own personnel policy classified the repeated extension of a fixed-term contract as an "unfair labour practice".

¹⁹ For a detailed discussion of the legal constraints on the termination of the fixed-term contract, see Olivier 1996 *ILJ* 1001–1040.

imposed on employers by labour legislation. On the other hand the employment relationship could be extended for an indefinite period.²⁰

In this regard section 186(1)(b) of the LRA has a restrictive application as this section regulates a fixed-term contract only with regard to a "dismissal".²¹ In 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". Again 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.²²

The Draft Labour Relations Amendment Bill, 2010²³ proposes the following amendment to section 186(1)(b):

an employee engaged under a fixed-term contract of employment reasonably expected the employer –

- i) to renew a fixed-term contract on the same or similar terms but the employer offered to renew it on similar or less favourable terms, or did not renew it; or
- ii) 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, where there was reasonable expectation;²⁴

²⁰ See *Wood v Nestle SA (Pty) Ltd* 1996 17 ILJ 184 (IC) 185F-I, 189D-F, 190I-19IB, and 191D.

²¹ In *Dierks v University of South Africa* 1999 20 ILJ 1227 (LC) 1248E Oosthuizen AJ concluded that "an entitlement to permanent employment cannot be based simply on the reasonable expectation of s 186(b), ie an applicant cannot rely on an interpretation by implication or 'common sense'. It would require a specific statutory provision to that effect, particularly against the background outlined above". The ruling in *Dierks* was upheld by *Auf der Heyde v University of Cape Town* 2000 21 ILJ 1758 (LC) and *SA Rugby (Pty) Ltd v CCMA* 2006 27 ILJ 1041 (LC). Although the judgment was overruled on appeal, the Labour Appeal Court (LAC) did not deal with that specific point. The contrary view was expressed in *McInnes v Technicon Natal* 2000 21 ILJ 1138 (LC) and in *Geldenhuys v University of Pretoria* 2008 29 ILJ 1772 (CCMA). See fn 23.

²² In *Geldenhuys and University of Pretoria* 2008 29 ILJ 1772 (CCMA) Commissioner Jansen van Vuuren found the Labour Court divided on the issue of a dismissal i.t.o. s 186(1)(b) where the claim is based on an expectation of indefinite employment after the lapse of a fixed-term relationship. As the LAC had not at the time taken a stance on this issue, the Commissioner preferred a wide interpretation on the matter as "there seems to be no reason or logic or law why an expectation of permanent employment should not provide a ground for a claim of dismissal under this provision".

²³ GG no 33873 3 released on 17 Dec 2010.

²⁴ Words underlined indicate insertions in existing enactments.

The amendment explicitly incorporates section 186(1)(b)(ii) as a form of extended protection included in the wider 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.

South African labour legislation places no restriction on the duration of a fixed-term contract, whether it is the first of a series or the only fixed-term contract entered into by the same parties, or evaluates the reasonability of repeated renewals in terms of the total duration as well as the total number of fixed-term contracts between the same parties.²⁵ Currently there is no law regulating the position of the employee who falls prey to repeated renewals of fixed-term contracts, where an objectively reasonable expectation in the circumstances existed for the reconstruction of the contract of limited duration into one of indefinite duration.²⁶ It is therefore submitted that a need for protection beyond the parameters of section 186(1)(b) is apparent.²⁷ Cheadle's argument²⁸ "that the concept of regulated flexibility may be put to good use in extending protection to those who most need it" is supported.

2.3 *The Employment Equity Act 55 of 1998*²⁹

The *Employment Equity Act 55 of 1998* (EEA) gives effect to section 9 of the *Constitution*. It promotes the achievement of equality in employment and prohibits both direct and indirect discrimination. The right to equality can be regarded as a cornerstone in the implementing of justice and in the protection of a person's dignity.³⁰

²⁵ See Table 1 at par 5 below.

²⁶ Cheadle 2006 *ILJ* 664 holds a view of particular relevance here namely: "Rather than intensifying regulation in favour of those who least need it, labour law should be setting its sights on the extension of protection to those who most need it."

²⁷ As reflected by Currie and De Waal *Bill of Rights Handbook* 23, "one of the most important principles of our law is expressed by the maximum *ubi ius ibi remedium* – where there is a right there is a remedy". The LRA does not regulate or provide a remedy for an infringement of the right to a "fair labour practice" or an "unfair dismissal" in terms of a refusal to appoint an employee permanently where the employee was led to believe that at some stage the benefits and status of a permanent relationship would be granted to the employee in terms of a permanent appointment. See fn 12.

²⁸ Cheadle 2006 *ILJ* 664 para 3.

²⁹ *Employment Equity Act 55 of 1998*.

³⁰ S 1 of the *Constitution*.

The focus in this section of the investigation is therefore on the *nexus* between the concepts of equality and discrimination on the one hand and the continuous renewal of the contract of employment on the other hand, primarily where the purpose of employment would allow for a permanent position, but is avoided by the employer for reasons of financial gain and less restrictive legislative labour regulation.

It is important to distinguish between *equality* in the workplace (the same treatment for everyone) and the concept of *equity* (fairness in an employer's policies) when evaluating the process and outcome of restructuring employment contracts in the workplace, for example, whether the continued renewal of a fixed-term contract would be fair under the circumstances instead of a permanent position when justified and possible.³¹ Equity in the workplace is a prerequisite for equal opportunities (to compete equally with others) without regard to the general factors such as race, gender and disability (listed grounds in terms of section 6(1)). Another factor (an unlisted ground) that reflects equity in the arena of work is an employment policy that allows for a series of renewals of fixed-term contracts, depriving the employee of equal opportunities and the benefits of permanent employment, where such an appointment is indeed possible under the circumstances.³²

One of the "two primary means"³³ to achieve equity in the workplace is the elimination of unfair discrimination.³⁴ Equity in the workplace optimises equal access to employment opportunities to every employee by means of a process and an ultimate outcome as reflected in an employer's policy on the renewal of fixed-term contracts.³⁵ All employers must act (in accordance with section 5) to endorse equal opportunities in the workplace in fairness to both the employer and the employee.

³¹ Jordaan, Kalula and Strydom (eds) *Understanding the EEA* 6.

³² See *Geldenhuys and University of Pretoria* 2008 29 ILJ 1772 (CCMA), and *Yebe v University of KZN* 2007 28 ILJ 490 (CCMA).

³³ Jordaan, Kalula and Strydom (eds) *Understanding the EEA* 4.

³⁴ Ch 2 of the EEA. See fn 18 for an example of an employer who did not adhere to his own personnel policy which afforded protection to the fixed-term employee regarding repeated renewals.

³⁵ Jordaan, Kalula and Strydom (eds) *Understanding the EEA* 7.

The key factor and prerequisite to unfair *discrimination* connected to the sixteen listed grounds in section 6(1) is *differentiation* (see the next page for the listed grounds). *Differentiation* in the workplace is a neutral term "constituting a difference between or in" something,³⁶ for example, a difference in the salary and the exclusion of benefits afforded to fixed-term employees in terms of the employer's policy, compared with those of permanent employees who render the same service. However, an employer may have good reasons for treating fixed-term employees differently. For example, the purpose of such an appointment may justify differentiation if the employee agreed to and preferred employment for the purpose of a specific project or a certain period, instead of a commitment for an indefinite period. Consequently, differentiation would therefore be fair to both parties. Discrimination, on the other hand, is not prohibited unless it is unfair and linked with the abovementioned listed grounds.³⁷

Section 6(1) of the EEA contains a list of grounds (not a closed list) on the basis of which *unfair* discrimination is prohibited:

No person may unfairly discriminate, directly or indirectly against an employee, in any employment policy or practice, on one or more grounds, *including* [emphasis added] 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 and birth.

The issue of *unfair discrimination* becomes prominent in the context of fixed-term contracts when the same fixed-term employment relationship is repeatedly renewed for years, as opposed to an offer of permanent employment, where such an appointment is feasible to both parties.³⁸ Fixed-term employees are a vulnerable species. They are susceptible to indirect³⁹ unfair discrimination in respect of employment conditions, benefits and remuneration, reflecting less favourable terms

³⁶ Allen Concise Oxford Dictionary 325.

³⁷ The *Promotion of Equality and the Prevention of Unfair Discrimination Act 4 of 2000* prohibits unfair discrimination in spheres of life other than employment.

³⁸ See *Geldenhuys and University of Pretoria* 2008 29 ILJ 1772 (CCMA) 4.8.

³⁹ The EEA does not define indirect discrimination. However, the courts have held that it manifests in criteria applied by the employer that appear to be neutral but disproportionately affect a specific group resulting in harmful and negative results which are not justifiable. The criteria could be the full- or part-time status of the employee. In this regard see *Leonard Dingler Employee Representative Council v Leonard Dingler (Pty) Ltd* 1998 19 ILJ 285 (LC) 298G.

and conditions compared with those of permanently employed comparable employees, unless such differentiation is justifiable on objective grounds.⁴⁰

The crucial question is whether the above list of grounds on which discrimination is prohibited is or is not exhaustive. The wording of section 6(1) contains the word "including" immediately before the listed grounds. This indicates that a "possibility exists" that unfair discrimination can occur on grounds not listed in section 6(1).⁴¹

The approach to unfair discrimination (based on the distinction between differentiation and discrimination, whether unfair or not) was clarified by the court in *Middleton v Industrial Chemical Carriers (Pty) Ltd*.⁴² If it is established that differentiation occurred on an unlisted ground (not found in section 6(1)), the existence or not of discrimination will objectively depend on whether or not the differentiation on an unlisted ground (for example the "employment status" of fixed-term employees linked to the unreasonable renewals of their fixed-term contracts) had the potential to impact negatively on the "fundamental human dignity" of that person as a human being. If the answer to this question is yes, then the court will establish discrimination. If the answer is no, the court must consider if the differentiation affected him or her "adversely in a comparably serious manner".⁴³ Only if the answer to both questions is "yes" could unfair discrimination be established on an unlisted ground.

It is therefore submitted that equity in the workplace is also connected to a fixed-term policy.⁴⁴ The application of fairness should be demonstrated in the number of renewals of an employee's fixed-term contract. These are the cases where a

⁴⁰ UEA 2002 www.uea.ac.uk. See also *Wood v Nestle SA (Pty) Ltd* 1996 17 ILJ 184 (IC) 185I and 191G regarding less favourable terms of fixed-term employees compared with the terms offered to employees on indefinite contracts.

⁴¹ Jordaan, Kalula and Strydom (eds) *Understanding the EEA* 28. The list is therefore not exhaustive.

⁴² *Middleton v Industrial Chemical Carriers (Pty) Ltd* 2001 22 ILJ 472 (LC). See the *Stocje v University of KZN* [2007] 3 BLLR 493 (LC) case for an example of discrimination on unlisted and listed grounds at 4.4.

⁴³ Jordaan, Kalula and Strydom (eds) *Understanding the EEA* 62.

⁴⁴ In *Pretorius v Sasol Polymers* [2008] 1 BALR 10 (NBCCI) it was established that the employer's policy gave the fixed-term employee a reasonable expectation that her contract would be renewed. The policy allowed that a fixed-term employee, who occupied a permanent post, could fill a permanent post with management's approval. The employer's failure to give the employee

reasonable expectation has been created by the employer that the service of an employee is valuable and can be accommodated in an indefinite employment relationship to serve the interests of both parties. The nature of a temporary relationship and the contract of employment should therefore be adapted (where feasible for both parties) in order to afford an employee a decent salary similar to that of employees in indefinite contracts, who enjoy a pension fund, a medical fund, employment security and human dignity, as well as the possibility of promotions and salary increases.

It could be considered as controversial to include "employment status" as an unlisted ground if regarded as analogous to the listed grounds, to form the basis for a claim of indirect unfair discrimination. "Employment status" as an unlisted ground could lie at the heart of an employment policy or practice if it is linked to the unreasonable renewal of an employee's fixed-term contract through a series of fixed-term contracts, merely to exclude the employee from the benefits of employment of indefinite nature. Although such a policy does not necessarily distinguish explicitly between people on the basis of any unprohibited ground like sex or race, it could nonetheless have a discriminatory effect if it excludes fixed-term employees from certain employment benefits purely on the basis of their employment status. If such an exclusion should discriminate against the employee for an unacceptable reason, for example to exclude fixed-term employees from employment benefits and protection or from equal remuneration for the sole benefit of the employer, then such an exclusion could be regarded as unfair discrimination. This does not apply to an employer who could have a very good reason to treat fixed-term employees differently from comparable employees on indefinite contracts. In classifying discrimination as unfair the employer's intention is irrelevant. Where fixed-term employees do the same work and work the same hours as full-time employees and receive less favourable treatment based on their "employment status", in the absence of no legal justification the discrimination becomes unfair.

2.4 Common-law principles regulating the fixed-term contract

Although the common-law position of the fixed-term contract was superseded by section 186(1)(b) of the LRA, the employer cannot entirely rely on an automatic termination of the fixed-term contract as decided by the parties if the employer has created a reasonable expectation of a tacit renewal at common law, allowing the employee to believe that the employment relationship might extend for a further term, albeit temporarily.⁴⁵

Common-law principles regulating the contract of employment differ from other contracts with good reason.⁴⁶ At common law, a fixed-term contract of employment terminates automatically:⁴⁷

- (a) when the reason(s) representing the preference for this kind of contract no longer exist(s);
- (b) when the fixed time period has elapsed;
- (c) when a specific task which initiated the agreement between the parties has been completed; or
- (d) upon the expiry or beginning of a specific event.

Whether termination would indeed occur is a question that remains within the discretion of the employer. This kind of employment contract *does not require notice* of termination *except* where the parties have agreed that notice may be given. The employer can rely on the date set in the contract or on any relevant terms and conditions in the fixed-term contract providing for such termination. However, an employer cannot exclusively rely on common-law terms and conditions, based on consensus between the parties, when the very essence of their inclusion reflects the employer's intention and attempt to evade the protection afforded to employees in terms of a fair labour practice regime under the 1956 LRA and in terms of the spirit

⁴⁵ reinstatement was ordered.

⁴⁶ Where the employer wants to terminate the fixed-term contract prematurely, the common law requires good cause to ensure that the employer avoids breach of contract. See Grogan *Workplace Law* 149.

⁴⁷ For a detailed discussion on common-law principles re estoppel, misrepresentation and tacit terms in general, see Van der Merwe *et al* *Contract: General Principles* 32, 105, 278, and 279.

⁴⁷ See Olivier 1996 *ILJ* 1010–1014.

and purpose of the 1995 LRA.⁴⁸ However, the converse is also true. The employee cannot rely on a subjective interpretation of the terms of the contract as a reflection of both parties' intention to convert the fixed-term contract into a contract of indefinite employment. The parol evidence-rule may be applied to prevent an employee from leading evidence in conflict with the terms of the written contract.⁴⁹

The need to improve labour standards and to protect the human rights of employees remains a global concern and responsibility on a national and international level.

3 The International Labour Organisation

As a founder member and member state of the International Labour Organisation (ILO) since 1919, South Africa has ratified most of the eight core conventions of the ILO. The purpose of the ILO is to further social justice and to set international standards of human rights for labour.⁵⁰

Two of the core instruments, the *Termination of Employment Convention* No 158 of 1982 and the *Termination of Employment Recommendation* No 166 of 1982 (both instruments refer to the termination of employment at the initiative of the employer) require member states that have ratified the above convention to take the necessary steps to prevent abuse in terms of job security.⁵¹ Article 2(3) of the Convention and article 3(1)-(2) of the Recommendation require that member states should take "adequate safeguards" to protect employees against the consequences of entering into "fixed-term contracts" as a mechanism to evade statutory protection against unfair dismissal.⁵² The question that comes to mind is if South Africa has met its international obligation by implementing labour law principles to regulate the abuse

⁴⁸ The definition of an "unfair labour practice" in s 1 of the 1956 LRA was extremely wide, defining an "unfair labour practice" as "any labour practice" which constitutes an "unfair labour practice" in the opinion of the IC. In *SACTWU v Mediterranean Wooden Mills (Pty) Ltd* 1995 16 ILJ 366 (LAC) 367 the court held that the "role of the Industrial Court [IC] is to ensure that principles of fairness, and not strictly rules of law, are applied in the relationship between employer and employee". See s 1 of the 1995 LRA.

⁴⁹ See *Swissport (Pty) Ltd v Smith* NO 2003 24 ILJ 618 (LC).

⁵⁰ See Van Niekerk *et al* *Law@Work* 22 for a summary of the core conventions and Van Niekerk *et al* *Law@Work* 26 for a summary of the application of international labour standards in South African law.

⁵¹ ILO 2008 www.ilo.org. "This means that domestic policy and practice must comply with the ILO constitution and the ratified conventions" – see Cheadle 2006 *ILJ* 666 para 14.

of the fixed-term contract as other member countries under the European Commission have done, for example.⁵³

The main focus of the ILO Informal Note⁵⁴ is the need for "a balanced and comprehensive approach to address labour market flexibility which includes the possibility to redeploy employees and to adapt firms to new challenges".⁵⁵ The "possible nexus between security and flexibility" has led to the innovative creation of the word "flexicurity", which refers to the link between "a conceptual framework and a policy strategy".⁵⁶ In acknowledging current changes and challenges in the globalised world of labour, it has been argued that adaptability rather than flexibility is needed.⁵⁷ The re-formation of labour brings about an attempt to enhance a new kind of "employment and social security", complementary to the "flexibility" of labour markets, the workplace and labour relations.⁵⁸ One of the main goals of the ILO has been "security of work, especially vulnerability to unemployment and loss of income", which reflects on the international "quality of work".⁵⁹

This article supports the view that these two concepts should function in a "complementary" manner as opposed to being placed in a category of their own, to optimise the maximum protection afforded to vulnerable employees engaged in terms of unfair successive fixed-term relationships.⁶⁰ This brings to the fore the need to address the position of employees who find themselves in a fixed-term relationship with no security and even less flexibility within a protective framework, based on a reasonable expectation of limited renewals or where indefinite employment could materialise.⁶¹

⁵² See ILO 2008 www.ilo.org Note 4.

⁵³ See Olivier 1996 *ILJ* 1024 and the detailed summary of EU member countries that protects employees at 16.

⁵⁴ ILO 2008 www.ilo.org.

⁵⁵ Van Niekerk *et al* *Law@Work* 23.

⁵⁶ ILO 2008 www.ilo.org Notes 22 and 23. A discussion on flexicurity does not fall within the ambit of this article. For a detailed discussion consult Hendrickx *Flexicurity*.

⁵⁷ ILO 2008 www.ilo.org Note 23.

⁵⁸ ILO 2008 www.ilo.org Note 23 fn 84.

⁵⁹ Rodgers *et al* *ILO and the Quest for Social Justice* 94 and 95.

⁶⁰ Rodgers *et al* *ILO and the Quest for Social Justice* 24.

⁶¹ See Table 1 at par 5 below regarding the regulation of fixed-term contracts in twenty-two countries.

The following examples from South African case law illustrate the dilemma of the fixed-term employee with a reasonable – and sometimes not so reasonable – expectation to be permanently employed, and thus the need for a regulated framework providing legal certainty and protection against abusive practices.

4 Recent judgments on the fixed-term contract

The primary focus of judgments in evaluating the reasonability and fairness of the fixed-term contract are based on the three main aspects of section 186(1)(b) of the LRA:

- (a) whether the failure to renew a fixed-term contract constitute a dismissal;
- (b) whether "on the same or similar terms" were included in the renewal; and
- (c) whether the employee can prove that his/her *de facto* expectation of the renewal was indeed reasonable.

However, two significant questions are not addressed in section 186(1)(b) of the LRA, namely:

- (a) the *reasonableness* of the successive renewals of a fixed-term contract where the employment relationship could have been "reconstructed"⁶² to one of indefinite employment in terms of a contract of indefinite duration; and
- (b) whether a failure to change the nature of the employment relationship from a fixed-term relationship into an indefinite employment relationship, where a reasonable expectation by the employee was proved, would constitute a dismissal in terms of this section.

4.1 *Wood v Nestle (SA) (Pty) Ltd 1996 17 ILJ 184 (IC)*

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-

⁶² Refer to 4.1 above. The IC confirmed the judgment in *SACTWU v Mediterranean Woollen Mills(Pty) Ltd* (1995) 16 ILJ 366(LAC) that "the expiration of the [fixed-term] contract does not mean that labour courts are prevented from looking at the context in which the contract was entered into" [thus considering the reasons why the parties entered into the fixed-term contract].

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 (in terms of the previous position under the LRA of 1956) and awarded her compensation as if she had been in indefinite employment.⁶³

4.2 *Mediterranean Woollen Mills (Pty) Ltd v SACTWU* 1998 19 ILJ 366 (LAC)

The importance of this case lies in the court's judgment on the effect of a disavowal clause which expressly stipulates that the employee fully understands that no reasonable expectation for the renewal of the fixed-term contract could arise from the nature of the contract. The court held that despite wording to the contrary, a reasonable expectation could arise during employment if assurances, existing practices and the conduct of an employer led an employee to believe that there was hope for a renewal, whether on a temporary or an indefinite basis.

4.3 *Dierks v University of South Africa* 1999 20 ILJ 1227 (LC)

The court emphasised the wording of the LRA section 186(1)(b) "on the same or similar terms" as the ground on which the employee must rely if a renewal of the contract is expected.⁶⁴ Accordingly Dierks was precluded to rely on section 186(1)(b) as he claimed that he had been led to believe that he would be indefinitely appointed to the post he had previously held in terms of a series of fixed-term contracts. The court furthermore sought support for this view – which is generally accepted as incorrect – on the view that the "residual unfair labour practice" definition constituted a remedy for employees on fixed-term contracts based on their claim for indefinite employment.

⁶³ "[T]he weight to be attached to the practice probably increases in proportion to the number of successive contracts concluded by the parties". See Grogan *Workplace Law* 150 on the evaluation of the practice of repeated renewals of fixed-term contracts.

⁶⁴ *Dierks v University of South Africa* 1999 20 ILJ 1227 (LC) 1146F-G.

The same view was incorrectly adopted by the court in *Auf der Heyde v University of Cape Town*,⁶⁵ dissented from in *McInnes v Technikon Natal* discussed below, which is submitted to be the preferred view, but adopted in *SA Rugby(Pty) Ltd v CCMA*.⁶⁶ The issue therefore remains moot and open to debate.

4.4 *Auf der Heyde v University of Cape Town* 2000 21 ILJ 1758 (LC)

In this case the court addressed the issue of a dismissal in terms of section 186(1)(b) based on the employer's refusal to renew the applicant's fixed-term contract or to appoint the applicant in an indefinite position for which the applicant applied. The court incorrectly adopted the same approach as in Dierks, stating that the applicant had had a reasonable expectation that his contract would be renewed (albeit not through a series of fixed-term contracts between the same employee and employer), and therefore stated that the applicant was dismissed.

4.5 *McInnes v Technikon Natal* 2000 21 ILJ 1138 (LC)

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 applicant reasonably believed (had an expectation) that she would be appointed into the new 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 adopted a two-stage approach to establish whether the applicant's subjective expectation was reasonable, and 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.

4.6 *SA Rugby (Pty) Ltd v CCMA* 2006 27 ILJ 1041 (LC)

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

⁶⁵ *Auf der Heyde v University of Cape Town* 2000 21 ILJ 1758 (LC).

employer for the renewal of a fixed-term contract, provided that the expectation has an objective basis. As this tournament takes place only every fourth year, their expectation of an indefinite appointment after the World Cup tournament was not so reasonable, as was their claim based on a dismissal. Their contract simply expired after the tournament.⁶⁷

4.7 *Yebe v University of KZN* 2007 28 ILJ 490 (CCMA)

The fixed-term contract of this employee was renewed 20 times over a period of approximately four and a half years using 28 fixed-term employment contracts, whilst the permanent post which he could have filled remained vacant for five years.⁶⁸ The employee rendered the same service as two permanent employees on the same campus would have done during the extended period of time. During this period the employee successfully upgraded his skills through various courses at the University of Kwazulu-Natal. The court held that this is a clear 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.

4.8 *Geldenhuys and University of Pretoria* 2008 29 ILJ 1772 (CCMA)

The applicant (a part-time lecturer) was appointed at the university on a series of fixed-term contracts before she applied for a permanent position as lecturer. Although her application was unsuccessful, she was offered an additional fixed-term contract on improved terms. She claimed a dismissal in terms of section 186(1)(b) of the LRA, contending that she had a reasonable expectation of permanent appointment and that the employer's failure to appoint her constituted a dismissal. The commissioner acknowledged the Labour Court's division on the matter of whether or not an employee on a fixed-term contract can claim dismissal relying on section 186(1)(b). The judgment illustrated that the ambit of this section is wide enough to accommodate the frustration of an employee's expectation of permanent

⁶⁶ *SA Rugby (Pty) Ltd v CCMA* 2006 27 ILJ 1041 (LC).

⁶⁷ *SA Rugby (Pty) Ltd v CCMA* 2006 27 ILJ 1041 (LC) at 1042.

⁶⁸ *Yebe v University of KZN* 2007 28 ILJ 490 (CCMA) 505 67G.

employment as a dismissal, provided that the expectation is objectively reasonable.⁶⁹ The matter was referred for arbitration on a point *in limine*. The employer relied on a dismissal based on the refusal to renew a fixed-term contract on the same or similar terms, while the applicant relied on a reasonable expectation of indefinite employment created by the employer during her appointment as a lecturer in terms of a series of fixed-term contracts.

4.9 *Nobubele v Kujawa* 2008 29 ILJ 2986 (LC)

The applicant had been employed on a fixed-term contract by an employer whose organisation depended on fixed-term grant agreements. The employee was suspended pending an investigation into misconduct when she received notice that her contract would not be renewed. After the termination of the fixed-term contract, the applicant claimed that she had been "dismissed due to [novation]⁷⁰ of her permanent appointment" at that stage, or in the alternative that she had had a reasonable expectation of a renewal of the fixed-term contract. The court held that no reasonable expectation could exist due to the temporary nature of the employer's business and the employee's suspension based on serious misconduct. Employees cannot simultaneously base a claim on two expectations, one of the renewal of their fixed-term contract and the other of permanent employment.

4.10 *Vorster v Rednave Enterprises CC t/a Cash Converters Queenswood* 2009 30 ILJ 407 (LC)

The applicant in the Vorster case had been employed by the respondent in terms of two successive contracts, each of one month's duration. Her employment was extended for a further month. Ms Vorster claimed an unfair dismissal after having served "a three-month probation period". The respondent company denied the dismissal.

⁶⁹ For more details on the facts of the case, see fn 23.

⁷⁰ See Grogan in Juta's Annual Labour Law Update at 4 where it is mentioned that the term *novation* is occasionally relied on in the context of employment law "to support a claim that a fixed-term contract has transmuted into a permanent contract".

The court accepted 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). While the challenging question whether an employee on a fixed-term contract can rely on section 186(1)(b) when claiming dismissal based on the reasonable expectation of indefinite employment remains moot, the court held that Vorster 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. She had therefore been dismissed.

This raises the question whether the LRA would pass the test for flexibility to include this labour question under section 186(1)(b), fitting comfortably under the meaning of dismissal or within section 186(2)(a), provided that the closed list of unfair labour practices be amended. It is suggested that an amendment to the LRA could extend the necessary rights to fixed-term employees who are exploited in terms of a series of fixed-term contracts by placing a limit on the maximum number of successive contracts.

5 Legal comparisons and the effect of section 39 of the Constitution on the interpretation and development of the right to a fair labour practice

Section 39 of the *Constitution* places an obligation on a court, tribunal or forum to promote the values underlying an open and democratic society, based on human dignity, equality and freedom to consider international law when interpreting the Bill of Rights. Foreign law may be considered. The spirit, purport and objects of the Bill of Rights must be promoted by every court, tribunal and forum when interpreting any legislation and when developing the common law or customary law. Section 233 of the Constitution furthermore obliges "every court" when interpreting any legislation to prefer "any reasonable interpretation of the legislation that is consistent with international law over any alternative interpretation that is consistent with international law".

Pursuant to the ILO Informal Note, the South African Labour Court regarded Convention 158 as an "important and influential point of reference in the interpretation and application of the [LRA]" despite the fact that South Africa has no

obligation to do so in terms of the ratification of the Convention.⁷¹ Although South Africa has not ratified Convention 158⁷² the Labour Court has recognised the importance of additional documents compiled by experts as an important aid in the interpretation of the LRA and the Labour Code.⁷³ The Convention has therefore been applied by the courts as a model of:

- (a) norms of direct application in the legal systems;
- (b) an aid to interpretation of national legislation;
- (c) an instrument to strengthen the application of national law; and/or
- (iv) as a source of equity.⁷⁴

Employment protection legislation with regard to the fixed-term contract has been applied by various countries to "mitigate discrimination against vulnerable categories of workers".⁷⁵ It furthermore ensures job stability and improved productivity through increased advanced enterprise adaptation, continuous training and technological progress.⁷⁶

According to the Organisation for Economic Co-operation and Development's (OECD) 2006 overview on the empirical evidence, it is suggested that a general agreement on the effect of employment protective legislation (EPL) "is far from reached".⁷⁷ For example, India has reported a negative impact of EPL on job security and reduced workers' welfare while EPL in Latin America had no "significant effect on unemployment and employment".⁷⁸ However, a research report released in Bonn reported EPL to have a positive effect on employment performances in Germany.⁷⁹ The OECD's report on policy recommendations regarding the effect of EPL on

⁷¹ ILO 2008 www.ilo.org Note 19 with reference to the judgment in *Avril Elizabeth Home for the Mentally Handicapped v CCMA* 2006 27 ILJ 1644 (LC).

⁷² ILO 2008 www.ilo.org Note 19.

⁷³ ILO 2008 www.ilo.org Note 19. The need to recognise and address the tension between the interests of the employer and the employee in the case of an unfair dismissal was addressed in *Avril Elizabeth Home for the Mentally Handicapped v CCMA* 2006 27 ILJ 1644 (LC) 1646. Although for reasons not relating to a fixed-term contract, the importance of international labour standards which give context to the constitutional right to fair labour practices and the right not to be unfairly dismissed in s 185 of the LRA was stated by the court.

⁷⁴ ILO 2008 www.ilo.org Note 20.

⁷⁵ ILO 2008 www.ilo.org Note 22.

⁷⁶ ILO 2008 www.ilo.org Note 22.

⁷⁷ See fn 78 of ILO 2008 www.ilo.org Note 22.

⁷⁸ ILO 2008 www.ilo.org Note 23.

⁷⁹ See fn 81 of ILO 2008 www.ilo.org Note 23.

economic and labour market outcomes should accordingly be observed with "great caution" due to its "ambiguous empirical results".⁸⁰

Table 1 below affords an international perspective on the legal position and protection related to restrictions on the maximum number of repeated fixed-term contracts afforded to employees in various countries.

Table 1 The regulation of the fixed-term contract in 22 different countries⁸¹

	Legal provisions	Valid cases for use of FTC (scale 0-3)	Maximum number of successive contracts	Maximum cumulated duration (months)
Austria	No restrictions for first contract. No legal limit specified for maximum number of renewals and cumulated duration. Successive fixed-term contracts without objective reason imply the risk of a court declaring the contract unlimited.	2.5	Scored 1.5	No limit
Belgium	Without an objective reason: 4 successive contracts permitted for up to 2 years (each 3 months), or for up to 3 years (each >6 months) with the authorisation of the social and labour inspectorate. With an objective reason: no limitations.	2.5	4	30
France	Restricted to "objective situations" (replacement, seasonal work, temporary increases in company activity). A maximum duration of 18 months in principle but can vary from 9 to 24 months. A new contract on the same post can start only after a waiting period amounting to one third of initial contract.	1	2	18
Germany	Fixed-term contracts without specifying an objective reason are possible up to two years and four renewals; for employees aged over 52 years fixed-term contracts are possible without any restrictions. No restrictions on contracts with an objective reason.	2.5	4	24

⁸⁰ ILO 2008 www.ilo.org Note 23.

⁸¹ CESifo DICE is described in the List of Abbreviations below. See for the Regulation of Fixed Term Contracts, 2003 CESifo 2003 www.cesifo-group.de

Greece	Objective situations only (mainly seasonal work and special projects), with the exception of the public service. After three renewals the contract is converted into a working relationship of an indefinite term. The maximum cumulated duration of successive fixed-term contracts without the existence of specific reasons stated by law cannot exceed two years in total.	0	3	24
Hungary	No restrictions for the first contract, except for public service (objective reasons only). No limit on renewal specified but the amended Labour Code (2003) states that any fixed-term contract shall be deemed as indefinite if the contract is repeatedly established or extended without the employer having a legitimate reason to do so and this violates the employee's legitimate interests. The maximum cumulated duration of successive fixed-term contracts cannot exceed five years in total.	2.5	2.5	60
Ireland	No restriction for the initial fixed-term contracts. The Protection of Employees (Fixed-term Work) Act 2003 provides that where an employer proposes to renew a fixed-term contract, the employee shall be informed in writing, not later than the date of renewal of the objective grounds justifying the renewal and the failure to offer a contract of indefinite duration. No limit specified for the number of renewals in case of objective grounds. The maximum cumulated duration of renewed fixed-term contracts may not exceed four years.	2.5	4	30
Italy	Since 2001 (Legislative Decree no 368/2001) FTC can be used for technical, production and organisational reasons, including the replacement of absent workers. Whether such grounds actually exist may be contested before the courts. One renewal possible, provided the duration initially agreed is less than three years. No maximum duration except for managers (five years). When the contract is subject to a renewal the total duration cannot exceed three years.	2	1	No limit

Netherlands	No restriction on valid cases. Three successive fixed-term contracts not exceeding a period of three years permitted by law. A fourth renewal or a renewal exceeding a total period of three years will alter the fixed-term contract automatically into a contract of indefinite time. The number of renewals and/or the duration can be changed (more/less) by collective agreement. No limit on duration for the first fixed-term contract, but three years in the case of renewals.	3	3	No limit
Poland	No restrictions (modified by the new Labour Code in 2002) until the Polish accession to the EU; then two successive fixed-term contracts allowed.	3	No limit	No limit
Portugal	Permitted <i>inter alia</i> for (a) business start-ups; (b) launching new activities of uncertain duration; (c) recruiting workers in search of their first job and long-term unemployed. The initial contract is limited to three years, renewals included, nor may it be renewed more than twice. After a three-year period or the maximum number of renewals, the contract can be subject to one more renewal for no less than one year and no more than three years, except for new activities and business start-ups (two years).	2	4	48
Slovak Republic	Generally permitted for a maximum of three years. Firms with more than twenty employees: duration can be extended for "objective reasons" (such as exceptional workload, replacement, specific task) and certain categories of employees. Firms with a maximum of twenty employees: no restrictions on renewals or duration.	3	No limit	Scored 60
Sweden	Permitted <i>inter alia</i> for (a) temporary replacement of absent employees for up to three years in a five-year period; (b) temporary increases in workload for up to six months in a two-year period; (c) trainee work; (d) since 1997 also allowed without specifying the reason, but only where no more than five employees are covered by such contracts for up to 12 months in a three-year period or 18 months for a first employee.	2.5	No limit	Scored 12
United Kingdom	No restrictions for up to four years, after which the worker will be treated as a permanent employee.	3	No limit	48

Norway	Permitted for specific tasks/projects ie the hiring of trainees, athletes and chief executives, temporary replacements of absent employees, and job creation measures. In case of successive contracts, justification of limitation of contract subject to court examination.	1	Score 1.5	No limit
Switzerland	No restrictions. No limit specified for the number of renewals, but successive contracts imply the risk of a court declaring the fixed-term contract null and void.	3	Scored 1.5	No limit
Australia	No restrictions on valid cases. No legal limit specified for maximum number of renewals and cumulated duration, but risk that upon continuous renewal, the courts will find that the primary purpose of the contract is to avoid termination laws.	3	Scored 1.5	No limit
USA and Canada	No restrictions	3	No limit	No limit
Japan	Fixed-term contracts duration: less than three years widely possible without specifying an objective reason; up to five years for highly skilled employees or those aged 60+.	2.5	No limit	No limit
New Zealand	The ERA provides that the employer must have genuine reasons based on reasonable grounds. No limit specified on renewal, but there may be a risk that upon continuous renewal the courts will find a fixed-term contract agreement to be a "sham".	2	Scored 4	No limit
United States	No restrictions	3	No limit	No limit
Czech Republic	Generally permitted, with restrictions for certain categories of employees, such as the disabled, those under 18 and recent graduates of apprenticeship and higher education.	2.5	No limit	No limit
Denmark	Fixed-term contracts allowed for specified periods of time and/or for specific tasks, widely used particularly in professional services and construction. Renewal must be based on objective reasons. The Danish Confederation of Trade Unions states that court rulings suggest that two to three years' temporary employment entail notification procedures.	2.5	Scored 1.5	30
Finland	Permitted for temporary replacements, traineeship, and special business needs (unstable nature of service activity, etc.). In the case of successive contracts, justification of limitation of contract subject to court examination.	1	Scored 1.5	No limit

6 Conclusion

In the words of Hepple: "Most governments and policy makers, however, are neither pure free trade advocates nor pure protectionists. They do not think there is a simple choice between more jobs (free trade) and better jobs (protection)."⁸² They attempt to establish a balance between "free trade and investment on the one hand and employment growth and the [upliftment] of social and labour standards, on the other hand".⁸³ When considering labour law reforms, "any new phase of labour law reform should be comprehensive and not limited to a specific objective".⁸⁴

It is in the interest of labour law, which as its core is primarily interested in the protection of labour rights and justice, to ensure that everyone is entitled to a fair labour practice. It is submitted that the first step in the direction of legal protection⁸⁵ against the exploitation of employees with fixed-term contracts would be to acknowledge the need for legal certainty. There is a definitive need for an objective, unbiased legal approach in terms of a legal code that regulates the renewal of fixed-term contracts and the reasonableness of a person's expectation to be indefinitely employed. Employers should therefore not be allowed to employ employees on a series of fixed-term contracts if the purpose of the continuous renewals is to avoid filling an employment vacancy of an indefinite nature where the possibility exists and where the engagement in a series of fixed-term renewals deprive employees from their dignity and from the benefits of employment of indefinite nature such as promotions, training and employment security. It is therefore submitted that a Code of Good Practice: Restriction on the Renewal of Fixed-term Contracts, be implemented as a guideline on the renewal of fixed-term contracts in addition to an amendment of section 186(1)(b) of the LRA of 1995.⁸⁶

⁸² Hepple *Labour Law* 2.

⁸³ Hepple *Labour Law* 2.

⁸⁴ Cheadle 2006 *ILJ* 666 para 13.

⁸⁵ As stated by Rodgers *et al* *ILO and the Quest for Social Justice* 94-95: "'Better quality work' is a goal that can be achieved *inter alia* 'by regulating and legislating to ensure that minimum standards are followed by all; making better work more productive, and so eliminating the trade-off, if there is one, between conditions of work and competitiveness appealing to social solidarity and ethical principles. [T]he goal for better quality work is common. This is a fundamental 'ILO idea'."

⁸⁶ See para 2.2 on s 186(1)(b)(i) and (ii) of the Labour Relations Amendment Bill of 2010.

The position in the Netherlands can serve as a guideline where there are no restrictions on valid cases.⁸⁷ Three successive fixed-term contract renewals are permitted by law, provided the total cumulated period does not exceed three years. A fourth renewal or employment exceeding three years in total shall automatically change the fixed-term contract into a contract of indefinite duration. However, the number of renewals or the total duration of employment on a fixed-term basis can be extended by a collective agreement. No limit is placed on the duration of the first fixed-term contract although three years remain the limit of the total duration of employment on fixed-term contracts.⁸⁸

The words of Nugent JA touch the core of the matter:⁸⁹

The freedom to engage in productive work – even where that is not required in order to survive – is indeed an important component of human dignity for mankind is pre-eminently a social species with an instinct for meaningful association. Self-esteem and the sense of self-worth – the fulfilment of what it is to be human – is (*sic*) most often bound up with being accepted as socially useful.

⁸⁷ "Valid" in this sense refers to the number of renewals allowed in terms of any applicable law regulating the renewal of fixed-term contracts in that specific country or area of the labour market.

⁸⁸ Recent developments on the regulation of fixed-term contracts in developing areas such as the Middle East and North African (MENA) region fell outside the scope of this article. Consideration is however currently being given to further research by the author on employment protection between developed and developing countries.

⁸⁹ *Minister of Home Affairs v Watchenuka* 2004 4 SA 326 (SCA) para 27.

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List of abbreviations

BALR	Butterworth Arbitration Labour Reports
BCEA	Basic Conditions of Employment Act
CCMA	Commission for Conciliation Mediation and Arbitration
CESifo DICE	Centre for Economic Studies and information institute for economic Studies. CESifo is the trade name used by IFO,CES & CESifo GmbH to reflect their international activities. The centre, institute and the society forms a unique economic research group in Europe combining the theoretically orientated economic research of the university with the empirical work of a leading Economic Research Institute and places this combination in an international environment.
EEA	Employment Equity Act
EPL	Employment protective legislation
Fn	footnote

FTC	Fixed-term contract
IC	Industrial Court
ILJ	Industrial Law Journal
ILO	International Labour Organisation
LC	Labour Court
LAC	Labour Appeal Court
LRA	Labour Relations Act
OECD	Organisation for Economic Co-operation and Development
Para	Paragraph
S	Section
SACTWU	South African Clothing and Textile Workers Union
SCA	Supreme Court of Appeal
UEA	University of East Anglia, Norwich, United Kingdom

**A NEW LOOK AT THE OLD PROBLEM OF A REASONABLE EXPECTATION:
THE REASONABLENESS OF REPEATED RENEWALS OF FIXED-TERM
CONTRACTS AS OPPOSED TO INDEFINITE EMPLOYMENT**

SB Gericke*

SUMMARY

In South Africa, the *Labour Relations Act* 66 of 1995 (LRA) regulates and protects the position of the employee who reasonably expects that a fixed-term contract will be renewed on the same or similar terms while the employer only offered to renew the contract on less favourable terms or in some instances was not prepared to renew the fixed-term contract at all. The LRA regards the latter conduct as a dismissal, as long as the employee can prove that the employer was responsible for creating the reasonable expectation of contractual renewal. In contrast to this position, the LRA does not regulate or protect the position of the employee whose fixed-term contract was repeatedly renewed on the same, similar or even improved terms, while the employer was in a position to offer the employee indefinite employment. The employer may even have created a reasonable expectation that repeated renewals would result in permanent employment. The exploitation and abuse of the fixed-term contract to the extent that an employee is deprived of employment security and the benefits linked to an employment relationship of indefinite duration have prompted a comparative investigation into this particular field of law.

KEYWORDS

Fixed-term contract; reasonable expectation; section 23 of the *Constitution of South Africa*, 1996; section 186(1)(b) of the *Labour Relations Act* 66 of 1995

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