The Right To Indefinite Employment of Temporary Employees in South Africa: Is The Model Effective And Viable?

Introduction

On 27 April 1994, South Africa became a constitutional democracy with a universal franchise. The Constitution is the supreme law of the country. Its constitution contains a Bill of Rights. Section 23 of the Constitution of South Africa provides that "Everyone has the right to fair labour practices." Despite this provision only persons defined as employees are protected by labour legislation. Certain employees are furthermore excluded from the operation of labour legislation, although they fall within the statutory definition of "employee". These include members of the National Defence Force, the National Intelligence Agency, the SA Secret Service and SA National Academy of Intelligence.

In an ideal labour market employees would obtain a job commensurate with their skills and experience and be given opportunity to develop as well as fair wages and conditions of employment.

In an imperfect market those conditions are present for a small section of the workforce – mainly high income earners. For less skilled labour market participants few prospects of success exist and they have a limited potential to improve their economic welfare. They also face considerable risk in regard to employment security and working conditions. They are consistently in a precarious and vulnerable position in the labour market.

In order to hold and protect vulnerable employees, the state needs to legislate for protection and job security. This paper highlights one aspect of protection, namely fairly recently introduced in South Africa – namely protection against temporary or fixed-term employment by employees becoming deemed permanent as a result of the operation of law.

The model of protection introduced in South Africa will be explained and consideration will be given to the exceptions regarding fixed-term employees being deemed-permanent. The protection is aimed at vulnerable employees. In this paper we also consider whether the test for vulnerability in South Africa is sufficiently robust – which may also be implemented in other countries.

South Africa and the ILO

Labour issues have been a matter of international concern for many decades leading to the formation of the International Labour Organization (ILO) in 1919. South Africa was a founding member of the ILO. However, the country violated the ILO principles governing workers' rights by its labour legislation that was intended to protect the white minority workers; by allowing them to join trade unions, enjoy collective bargaining and have jobs rescued for them. Legislation was also used to organize, control and oppress the black labour force. South Africa withdrew its membership to the ILO in 1964 due to increasing criticism of its apartheid-era racial policies, which were also apparent in labour legislation. However, with the country's transition to a constitutional democracy in 1994 a positive change to the legal system was brought about which saw South Africa rejoining the ILO.

Article 2(2) of Convention 158 permits a member state to exclude workers engaged under a contract of employment for a specified period of time or a specified task or workers engaged on a casual basis for a short period from its ambit.

Article 2(3) however requires as follows:

> "Adequate safeguards shall be provided against recourse to contracts of employment for a specified period of time the aim of which is to avoid the protection resulting from the convention."

Recommendation 166 proposes the following may be used as adequate safeguards.

> "(a) limiting recourse to contracts for a specified period of time in cases which, owing either to the nature of the work to be effected or the circumstances under which it is to be effected or to the interests of the worker, the employment cannot be of indeterminate duration.
>
> (b) deeming fixed-term contracts to be of indeterminate duration.
>
> (c) deeming fixed-term contracts when renewed on one or more occasions to be interminable."

It can also be argued that Recommendation 166 is consistent with the Employment Relationship Recommendation 198 (R198) of the ILO whose Pre-amble notes that "situations exist where contractual arrangements can have the effect of depriving workers of protection that they deserve and that there is a role for international guidance to members the protection through national law and practice."

Fixed-term employment

Fixed-term employees as atypical and contingent employees are in a particularly weak bargaining position in an employment relationship. It has become common practice to treat fixed-term employees differently to their permanent colleagues.

The Labour Relations Amendment Act of 2014, which took effect on 1 January 2015, introduced provisions to give labour broking employees, employees employed on fixed-term contract, and part-time employees greater protection than that which was previously afforded to them.

The provision relative to fixed term contracts do not:

- Apply to employees earning more that the statutory threshold (presently R205 422.30) per annum;

- An employer that employs less than 10 employees, or that employs more than 50 employees and whose business has been in operation for less than two years; and
- An employee employed in terms of a fixed-term contract, which is permitted by any statute, sectoral determination in terms of the Basic Conditions of Employment Act or collective agreement.

The exclusion of employers employing less than 10 employees and those employing more than 50 employees and whose business has been in operation for less than two years are mainly aimed at providing flexibility for small and medium enterprises.

In terms of section 198B(3) an employer may employ an employee on a fixed-term contract or successive fixed-term contracts for longer than three months only if either the nature of the work is of a limited or definite duration or the employer can demonstrate a justifiable reasons contained in section 198B(4) of the Labour Relations Act.

- replacing another employee who is temporarily absent from work;
- employed on account of a temporary increase in the volume of work which is not expected to endure beyond 12 months;
- 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;
- employed to work exclusively on a specific project that has a limited or defined duration;
- a non-citizen who has been granted a work permit for a defined period;
- employed to perform seasonal work;
- employed for the purpose of an official public works scheme or similar public job creation scheme;
- 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.

It is notable that the list of examples is not a closed list and an employer may employ an employee for a limited duration so long as there is an objectively reasonable ground to do so. It is required that longer, permissible, fixed-term contract must be in writing and the reason for the longer term must be stated.

If the requirements in section 198B (3) are not met the employee is deemed to be employed on an indefinite basis.

An important further provision (section 198B(8)a) is that an employee who is employed for longer than 3 months must not be treated less favourably than an employee employed on a permanent basis performing the same or similar work unless there is a justifiable reason for different treatment.

Justifiable reasons that could be relied upon are seniority, experience, and length of service, merit, quantity or quality of work performed or any other non-discriminatory reason.

Another key provision is that employers must provide employees employed on fixed-term contracts and permanent employees with equal access to opportunities to apply for vacancies at the employer.

Moreover, where a fixed-term contract exceeds 24 months an employee is entitled to an amount equal to one week's remuneration for each completed year of employment. This provision is similar to the severance pay provision in the Basic Conditions of Employment Act.

It is also important to note that section 198B (6) provides that an offer to employ an employee on a fixed-term contract must be in writing and also state the reason for that contract.

Section 198B(7) further places the burden of proof on the employer in the event that there is a dispute relating to a fixed-term contract in that it provides that the employer must prove that there was a justifiable reason for fixing the term of the contract and that the term was agreed upon.

Part-time employment

Section 198C of the LRA deals with part-time employees who earn below the threshold. A part-time employee is defined as an employee who is remunerated wholly or partly by reference to the time that the employee works and who works less hours than a comparable full-time employee.

This section does not apply to :
(a) employees who earn more than the threshold;
(b) employees who ordinarily work less than twenty fours a month for an employer;
(c) during the first three months of continuous employment with an employer; and
(d) an employer who employs less than 10 employees or who employs less than 50 employees and whose business has been in operation for less than two years unless the employer conducts more than one business or the business was formed by the division or dissolution for any reason of an existing business.

In order to ensure that part-time employees are not subjected to differentiated treatment when compared to full-time employees section 198C (3) (a) of the LRA provides:

Taking into account the working hours of a part-time *employee,* irrespective of when the part-time *employee* was employed, an employer must—

(a) treat a part-time *employee* on the whole not less favourably than a comparable fulltime *employee* doing the same or similar work, unless there is a justifiable reason for different treatment.

This section like section 198A (5) of the LRA also refers to the phrase "on the whole not less favourably". Section 198C (6) of the LRA sets out the requirements that must be considered when making a comparison with a full-time employee. The part-time employee must choose a full-time employee employed by the employer on the same type of employment relationship who performs the same or similar work in the same workplace or if there is no comparable full-time employee in the same workplace, then a comparable full-time employee employed by the employer in any other workplace. The comparable full-time employee must be in the same workplace as the part-time employee except where there is no comparable full-time employee in the same workplace then the employee may identify a comparable full-time employee who is employed by the employer in any other workplace.

Sections 198A, 198B and 198C of the LRA state that an employee must be treated "on the whole not less favourably" and "not less favourably" unless there is a justifiable reason for the different treatment. To this end, section 198D (2) of the LRA provides that a justifiable reason would include that the different treatment is as a result of the application of a system that takes into account the following:

(a) seniority, experience, length of service;

(b) merit;

(c) the quality or quantity of work performed;

or (d) any other criteria of a similar nature; and such reason is not prohibited by section 6(1) of the EEA.

Sections 198A (5), 198B (8)(a) and 198C (3)(a) of the LRA dealing with equal pay for temporary service employees, fixed-term contract employees and part-time employees do not require the respective employees to prove unfair discrimination in order to succeed with an equal pay claim in terms of either section. The sections further do not require an employee to prove a *prima facie* case of discrimination before the burden will shift to the employer to prove that the discrimination is not unfair as there is a justifiable reason for the differentiation. Section 198D (2) provides examples of what would amount to a justifiable reason and requires that such reason should not be prohibited by section 6(1) of the EEA. The interpretation that one gains from this section is that the employer will have to prove that the ground is not prohibited by section 6(1) of the EEA as it is the one who would have to advance a justifiable reason for the differential treatment in order to successfully defend an equal pay claim in terms of sections 198A (5), 198B (8)(a) and 198C (3)(a) of the LRA, respectively. This would mean that an employee's burden of proof will be limited to the following:

a) In terms of section 198A (5) of the LRA an employee will have to prove the following:

(i) that he/she is not excluded from the protection of the section;

(ii) that he/she is deemed to be an employee of the client in terms of subsection 3(b); and

(iii) that he/she performs the same or similar work as an employee of the client but is treated on the whole less favourably.

b) In terms of section 198B (8)(a) of the LRA an employee will have to prove the following:

(i) that he/she is not excluded from the protection of the section;

(ii) that he/she is employed on a fixed-term contract for longer than three months; and

(iii) that he/she performs the same or similar work as a permanent employee of the employer but is treated less favourably.

c) In terms of section 198C (3) (a) of the LRA read with section 198C (6) of the LRA an employee will have to prove the following:

(i) that he/she is not excluded from the protection of the section;

(ii) that he/she is employed as a part-time employee; and

(iii) that he/she performs the same or similar work as a comparable full-time employee of the employer but is treated on the whole less favourably.

Once the employee has discharged the onus as set out above, then the onus will shift to the employer to prove that there is a justifiable reason for the different treatment and that the reason is not prohibited by section 6(1) of the EEA. This is a marked difference as opposed to how an equal pay claim would be dealt with in terms of the EEA. In terms of the EEA a claimant would have to prove unfair discrimination on a listed ground or unlisted ground (arbitrary ground). Section 198D(2) of the LRA does not require the employee to prove that she was unfairly discriminated against by the employer as it merely states that the justifiable reason advanced must not be prohibited by section 6(1) of the EEA which states the following:

No person may unfairly discriminate, 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 on any other arbitrary ground.

This would mean that the employer will have to prove that the justifiable reason is not prohibited in terms of section 6(1) of the EEA as it is the party that will advance reasons for the different treatment. This is confusing as it is a departure from the EEA with regard to proving an unfair discrimination claim. Sections 198A-198C of the LRA thus contains a novel equal pay legal framework which does not require an employee to prove that she is paid less as a result of the employer discriminating against her unfairly. It is the employer who bears the onus to prove that the differential treatment is based on a justifiable reason and such reason is not unfairly discriminatory.

Vulnerable employees.

Attempting to define vulnerable arrangements in a manner that is sufficiently flexible to reflect the realities in employment the ACTRAV symposium has devised a definition that accounts for two contractual categories and four working-condition categories that characterize vulnerable work:

Contractual arrangements:

- The limited duration of the contract (fixed term, short-term, temporary, seasonal, day labour and casual labour)
- The nature of the employment relationship (triangular and disguised employment relationships, bogus self-employment, subcontracting and agency contracts)

Precarious conditions:

- Low wage
- Poor protection from termination of employment
- Lack of access to social protection and benefits usually associated with full-time standard employment
- Lack of or limited access of workers to exercise their rights at work

It seems therefore that vulnerability in employment consists of two parts (1) monetary vulnerability that is earning below the threshold and non-monetary vulnerability, which satisfies the other criteria in the definition above.

Non-standard employment encompasses part-time work, employment on a short term or time-limited contract basis and employment through temporary employment services as well as own account self-employment.

Non-vulnerable employment or standard employment is an employment relationship that is fixed-term or permanent with earnings above the earnings threshold.

The Threshold

To distinguish between vulnerable fixed-term employees who enjoy the protection of section 198B of the Labour Relations Act the earnings threshold provided for in the Basic Conditions of Employment Act of 1997 is used. In order to evaluate the scope of protection of atypical employees in South Africa it is necessary to investigate this yardstick of vulnerability.

Recognising the legacy that apartheid legislation had on the employment of mostly black workers the BCEA was introduced with the purpose of ensuring social justice through the establishment of basic standards for employment regarding issues such as leave, working hours, and other conditions of employment including a mechanism to establish by means of sectoral determinations minimum wages in unorganised sectors employing vulnerable workers.

The provisions of Chapter 2 of the BCEA containing maximum hours of work per day and week extra pay for overtime (which needs to be agreed upon) and work on Sundays and Public holidays are only applicable to employees who earn remuneration equal to or below the threshold.

Section 6 of the BCEA provides for the Minister of Labour to periodically publish the earning threshold on the advice of the Employment Conditions Commission (ECC) that limits the legislative protection offered to workers earning above the threshold. This earnings threshold was first introduced in 2002 and it was set at the earnings level of a public-sector manager earning R89 445.00 at the time. The current threshold stands at R205 433.30 per year.

As a result of the promulgation of the earnings threshold the BCEA excludes all workers who earn in excess of the threshold from the provisions prescribing ordinary hours of work, overtime, compressed working week, average hours of work, meal intervals, daily and weekly rest periods, the double pay for work on Sundays, night work, and work on public holidays. (These protections are also not applicable to senior managerial employees and employees engaged as travelling sales staff and employees who work less than 24 hours per month.

The amendment to the Labour Relations Act as well as the Basic Conditions of Employment Act in 2002 also introduced a statutory presumption of employment, which applies to persons earning less than the earnings threshold. A person earning below this amount and who renders service to another is presumed, regardless of the form of the contract, to be an employee if one or more of several factors is or are present in the relationship. In this context then, the threshold is also used to assist vulnerable workers who are treated as contractors by employers who wish to escape the consequences of protection in terms of the Labour Relations Act in 2014 taking effect on 1 January 2015.

At the Employment Conditions Commission, the statutory commission advising the Minister *inter alia* on the amount the threshold should be members representing employers in South Africa raised the concern that the threshold amount may be too high, in that it appeared an arbitrary determination of vulnerability from the outset.

As a result, the Department of Labour upon the request of the ECC appointed the Development Policy Research Unit of the University of Cape Town to analyse the impact and effectiveness of the earning threshold.

The research aimed at understanding the impact of the earnings threshold on providing protection to vulnerable workers, the robustness with which the threshold is determined, whether the earnings threshold is set at a level that correctly distinguishes between vulnerable and non-vulnerable workers, the impact of the threshold on employment and the relevance of the application of the threshold in a rapidly-changing labour market.

The research concluded that the purpose of the earnings threshold is to address the lack of bargaining power amongst workers. By offering these workers legal protection in the workplace, their vulnerability is reduced. Since the threshold had been irregularly adjusted to account for inflation and its level has diverged significantly from the earnings of a public sector manager.

It follows that there is currently no robust decision rule on which to determine a threshold. What is apparent is that the threshold is successful in identifying and covering many vulnerable employees.

The recommendation was that the real level of the threshold should not be changed. However, if a robust decision rule were to be developed that could accurately identify employees with weak bargaining power, and if this could be mapped accurately to earnings then the threshold should be adjusted.

In principle is then, an earnings threshold may be used effectively to grant tenure to vulnerable employees, but a robust decision making rule needs to be developed.

Conclusion

The amendments to the Labour Relations act 66 of 1995 must be lauded for giving protection to vulnerable employees, namely the fixed-term and part-time employees. By limiting recourse to fixed term contracts to 3 months or less and by also requiring that there must be justifiable reason for fixed-term contracts that are longer than 3 months, the Act gives effect to Recommendation 166 (Termination of Employment Recommendation, 1982 No 166) of the ILO.

This is also achieved through providing that fixed-term contracts that are longer than 3 months without any justifiable reason are by operation of law deemed to be of indefinite duration.

Also, the amendments also protect fixed-term and part-time employees from being subjected to less favourable treatment when compared to employees employed on a permanent basis and full-time employees. This gives full effect to the constitutional right to equality.

By providing protection only to employees earning below the threshold it can be argued that the amendments to a certain degree to not fully give effect to the constitutional right to everyone as envisaged by the Constitution of the Republic of South Africa.

Also, by not limiting the period that an employer may extend successive fixed term contracts for justifiable reason, a potential loophole could be created for employers to renew fixed –term contracts and thus frustrate the objectives of the amendments.

However, the amendments provide much needed stability and job security to vulnerable employees.

It can also be argued that they are a step in the right direction towards fulfilling and realising the Decent Work Agenda of the ILO.

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