

Fixed-term contracts not for permanent positions



South African employers often lose at CCMA and bargaining councils in cases relating to fixed-term contracts. A key reason for this is that employers do not understand the legal purpose of fixed-term contracts and the circumstances under which they are safe to implement or terminate.

The point at which the employer gets caught out is not normally at the date of employment but rather at the stage when the employee loses either benefits or the job itself. That is, as long as the fixed-term employee receives the same benefits as his/her permanent colleagues and as long as the employer continues to renew the fixed-term contract the employee has no legal grounds to complain.

It is when the fixed-term employee perceives that he/she is losing out on benefits or a job, he/she is most likely to become unhappy. However, if the job itself is genuinely of fixed duration the employee's legal case will be weakened. This is because the employer may well have the right to treat a fixed-term employee who is in a genuine fixed-term job differently to permanent employees. For example, the employer may have two permanent debtors clerks. Where a temporary backlog in the collection of debts arises it would be fair for the employer to hire, for, say, a two month period, another employee to help remove the backlog. Then, as soon as the backlog has been cleared, the fixed-term job has come to an end and it is fair to allow the fixed-term contract to expire.

Also, in the above scenario, the fixed-term employee would not expect the employer to put him/her on the company pension fund because, by nature, such funds are for long term employees. Thus, it is where employers fill permanent jobs with fixed-term employees that things go wrong.

So, what is the difference between a fixed-term and a permanent job? A permanent job is one where there is no reason to expect the work to come to an end. Put another way, no matter how far you look into the future the expectation is that this job will always be needed. On the other hand, a fixed-term job is one where, at the time of the job's inception, it is clear that the job will last for only a limited duration. The situation mentioned above of the temporary debtors clerk serves as a typical example.

In summary then, employers should reserve fixed-term employment contracts for filling fixed-term jobs. Where employers misuse fixed-term contracts for other reasons they are risking labour law problems. For example, employers are fond of employing workers on fixed-term contracts as a way of testing out whether the employee is going to fit into the organization. However, this is not a legitimate function of a fixed-term contract. In the case of *Abrahams vs RapiTrade (Pty) Ltd* (2007, 6 BALR 501) the employee was hired on the basis of a contract containing a probationary clause. However, when the employee's performance was found wanting the employer claimed that the employee was on a fixed-term contract and informed the employee that this contract was not going to be renewed. When the employee lodged an unfair dismissal dispute the employer claimed that the employee's performance had been poor. The arbitrator found that:

The employee was not on a fixed-term contract but on a normal contract with a probationary clause
In any case, if the employee's performance was poor the employer was obliged to provide counseling and training before considering dismissal
The dismissal was therefore unfair.

Mixing up probationary clauses with fixed-term contracts is not the only way in which employers get into trouble. In the case of *Nyama vs Twala's Construction* (2007, 2 BALR 166) the employer terminated the employee's fixed-term contract before its expiry date. As there was no justification for this the arbitrator decided that the dismissal was unfair and that the employer had to pay the employee the wages he would have earned until the contract's expiry date.

In *Feni vs SA Five Engineering* (2007, BALR) the employee was hired via 6 successive one-month employment contracts. He was then given work to do for another five months without a contract being signed. Then the employer terminated the employee's employment and he referred a dispute to the Metal and Engineering Industries Bargaining Council. The arbitrator found that:

As soon as the employee started working for the employer without a valid fixed-term contract he became a permanent employee

No valid reason had been given for the dismissal

Proper pre-dismissal procedures were not followed

The employer was to reinstate the employee with full back pay.

The above cases make it clear that, before employers consider using fixed-term contracts as short cuts, they should carefully consider whether the short cut they use will lead them to the CCMA or bargaining council. Due to the fact that distinguishing between legal and illegal use of fixed-term contracts can be tricky employers are advised to obtain advice from a reputable labour law expert before utilizing such contracts.