

**Fixed-term contracts and the reasonable expectation of renewal and the effect of the
Labour Relations Amendment Bill 2012.**

By

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Declaration

I declare that this dissertation for the degree Master of Laws hereby submitted by myself is my work in execution and design and all that the material contained herein has been duly acknowledged.

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Abstract

This dissertation aims to explore the nature of fixed-term contracts and their effect. Employees who are employed on fixed-term contracts usually develop a reasonable expectation of renewal. A reasonable expectation may arise where an employee, who has been employed on a fixed-term contract, or successive fixed-term contracts, then develops a reasonable expectation that s/he will be offered permanent employment. The common law position was that employees who were employed on fixed-term contracts could not have this expectation, as their contract expressly provided for automatic termination on a specific date, or on the completion of a specific project. However, the Labour Relations Amendment Bill which is now in force serves to change this position. It provides some relief to employees who are exploited in the sense that they are essentially kept in limbo-employed temporarily and without certainty or job security. In this dissertation, fixed-term contracts in general and relevant provisions of the Bill will be compared to international developments and standards.

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1. Introduction

1.1 Background

The employment relationship comes into existence when the employee agrees to place his/her services at the disposal of the employer, in return for remuneration by the employer. ¹ This employer-employee relationship is regulated by contract. There are no formalities for the conclusion of a contract of employment, and the contract need not be in writing. The nature of the employment may be permanent or temporary.

The employment relationship used to be regulated exclusively by the law of contract, but the position is now changed, and the common law is supplemented by legislation. Employment law in South Africa has undergone a drastic change since the implementation of the Constitution. This change can mainly be attributed to the emphasis of fairness and equality as entrenched by the Constitution.²

Currently, labour law principles are derived from both the common law and statute. These rules have a “common purpose”- to regulate the relationship between employers (those persons who employ others to provide services to them) and employees (those persons who provide their labour to others³). Employers and employees interact with each other everyday so it is vital that this relationship is properly regulated so that the interests of all parties involved are balanced and protected.⁴

In terms of the common law, the employment relationship was premised on the law of contract, which emphasised freedom of contract and left parties to resolve any disputes

¹ J Grogan *Workplace Law* 10th ed 2009 page 21-24.

² J Grogan *Workplace Law* 10th ed 2009 page 1.

³ *Ibid.*

⁴ *Ibid.*

that they had amongst themselves. However, this was changed by statute.⁵ Essentially, statutory intervention limited the parties' capacity to regulate their relationship amongst themselves, and instead provided a legal framework by which their relationship could be regulated and their disputes resolved.⁶ In giving effect to the right to fair labour practices as set out in section 23(1) of the Constitution⁷, the Labour Relations Act 66 of 1995 provides that employees should not be subject to unfair dismissal or unfair labour practices.

In 1994, South Africa was regulated by a new Constitutional dispensation. This in turn led to a new "regime" of labour law. Although other labour legislation exists, such as the Basic Conditions of Employment Act 75 of 1997, the Labour Relations Act 66 of 1995 ("LRA" or "the Act") forms the cornerstone of the statutory labour laws in South Africa. The LRA is a distinctive piece of legislation which is the product of "a tripartite agreement between organised labour, organised business and the State."⁸ The common object amongst labour legislation is to promote a democratic work environment that is fair, while balancing the interests of both the employer and the employee. There is also an aim to promote a stable background against which the law relating to labour relations would form and develop.⁹

⁵ J Grogan *Workplace Law* 7th ed page 1.

⁶ *Ibid.*

⁷ The Constitution of the Republic of South Africa 1996, Section 23.

⁸ J Rheeder "Labour Relations Act, Legislation and Labour law amendments". Available at: <http://www.jrattorneys.co.za/south-african-labour-law-case-articles/legislation-and-labour-law-amendments.html> Accessed: 9th September 2013.

⁹ J Rheeder "Labour Relations Act, Legislation and Labour law amendments". Available at: <http://www.jrattorneys.co.za/south-african-labour-law-case-articles/legislation-and-labour-law-amendments.html> Accessed: 9th September 2013.

An employer can sign either of two basic contracts- a permanent contract of employment for an indefinite period, or a fixed-term contract or employment.¹⁰ Both contracts have advantages and disadvantages, the most obvious being that a permanent or indefinite contract of employment will provide job security, whereas a fixed-term contract will not.

Atypical employment refers to employment relationships which do not take the form of a permanent or full time employment relationship, but rather employment of a temporary or fixed-term or temporary nature.¹¹ An agreement between parties regarding factors such as remuneration, duration of employment and other benefits relating to this “kind of atypical¹² employment contract is vital to avoid any misunderstanding and unreasonable expectations on the part of the employee.”¹³

When the contract is concluded, the parties have to be “*ad idem*”¹⁴ or a meeting of their minds must have occurred.¹⁵ The parties should have mutually agreed that this type of

¹⁰ J Grogan *Workplace Law* 10th ed 2009 page 41-42.

¹¹ Naidoo, M. “Fixed-term contracts: The current jurisprudence and the impact of the amendments.” Available at: <http://www.nortonrosefulbright.com/files/za-fixed-term-contracts-72237.pdf> Accessed: 23rd September 2013 at page 8.

¹² Naidoo, M. “Fixed-term contracts: The current jurisprudence and the impact of the amendments.” Available at: <http://www.nortonrosefulbright.com/files/za-fixed-term-contracts-72237.pdf> Accessed: 23rd September 2013 at page 8.

¹³ S B Gerick “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.” (2011) 14(1) *PER* 105.

¹⁴ S B Gerick “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.” (2011) 14(1) *PER* 105.

contract would commence on a certain date and then terminate on a certain date or upon the occurrence of a specific event, or upon the completion of a specific task. This can be compared to a contract for an indefinite duration, or a contract for permanent employment, where the parties do not have the intention that the contract will terminate on a specific date or be for a limited duration.¹⁶

Because fixed-term contracts are flexible, these are readily used to exploit employees. One of the most important features of a fixed-term contract is that it terminates on the termination date and the employee cannot claim that he was dismissed.¹⁷ With a fixed-term contract, it is clear that the contract (and thus the employment) will terminate on the date specified. In terms of Section 186(1)(b)¹⁸ an employee who can reasonably prove that his employer, either by his words or conduct, gave the employee a reasonable expectation that his contract would be renewed either for another fixed-

¹⁵ S B Gerick "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." (2011) 14(1) *PER* 105.

¹⁶ S B Gerick "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." (2011) 14(1) *PER* 105.

¹⁷ J Grogan *Workplace Law* 10th ed 2009 page 41.

¹⁸ Section 186(1)(b) of the LRA provides that two requirements need to be fulfilled in order for the employers action to constitute a dismissal:

"(1) A reasonable expectation on the part of the employee that a fixed term contract on the same or similar terms will be renewed; and

(2) A failure by the employer to renew the contract on the same terms or a failure to renew it at all."

term, or for an indefinite period¹⁹ has been dismissed. However, if the employee cannot prove this expectation, they cannot claim that they were dismissed under their fixed-term contract once the contract comes to an end.

This presented many problems in our country as vulnerable employees were exploited—being employed on a series of fixed-term contracts, and once the employee decided not to renew their contract, they would be left without a job and no redress as they had signed a fixed-term contract. Another way in which employees were, and are still being exploited is by being employed on a casual or fixed-term basis on less favourable terms. This issue is addressed by the Labour Relations Amendment Bill of 2012 (the “LRAB” or the “bill”) and will be discussed in chapter 5.

After years of deliberation, and interruptions, the legislature has finally amended the Labour Relations Act 66 of 1995 and introduced (but has not yet finalised) the Labour Relations Amendment Bill of 2012. The amendments are currently in the form of the Labour Relations Amendment Bill which was adopted by the National Assembly in Parliament on 20 August 2013.²⁰ Next the Bill will be presented to the National Council of Provinces (“the NCOP”) where it will be subjected to a “public participatory process”. It will then be debated on and the NCOP will vote on it—deciding to pass the law, reject it, or pass it with amendments. If the Bill is passed by the NCOP, it will be submitted to the president for assent. However, if the NCOP rejects the Bill or suggests amendments,

¹⁹ S B Gerick “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.” (2011) 14(1) *PER* 111 at page 113.

²⁰ Labour Relations Amendment Bill, B 16B—2012, amended by the Portfolio Committee on Labour (National Assembly). Available at <http://www.info.gov.za/view/DownloadFileAction?id=196649> Accessed: 14 September 2013.

the National Assembly would have to reconsider the Bill and pass it again- with or without the suggested amendments made by the NCOP. Where the Bill is passed again by the NCOP, it will then be submitted to the president for assent.²¹ The Bill then comes into effect when it is published or on a date fixed by the president. It is expected that the LRAB will be finalised and come into force by May 2014.²²

Amongst other things, the Bill addresses various problematic aspects of fixed-term contracts of employment.

1.2 Aims and objectives

This dissertation will explore fixed-term contracts in general and then move on to a discussion of the position of an employee who has been employed on a fixed-term contract or successive fixed-term contracts and who develops a reasonable expectation that his contract will be renewed, or that he will be employed on a permanent contract..

Further, the amendments of the Labour Relations Amendment Bill of 2012 insofar as they relate to fixed-term contracts will be discussed and criticised. The introduction of this Bill will also be compared to international standards in determining the possible effect this Bill will have on the employment sector as well as the development of current labour legislation and case law.

²¹ A Rocher. "South Africa: When can we expect to see the new labour laws come into operation?" Available at: <http://www.mondaq.com/x/278372/employee+rights+labour+relations/When+Can+We+Expect+To+See+The+New+Labour+Laws+Come+Into+Operation> Accessed: 20th December 2013.

²² A Rocher. "South Africa: When can we expect to see the new labour laws come into operation?" Available at: <http://www.mondaq.com/x/278372/employee+rights+labour+relations/When+Can+We+Expect+To+See+The+New+Labour+Laws+Come+Into+Operation> Accessed: 20th December 2013.

1.3 Research question/issue

The research question considered in this dissertation may be expressed as follows:

How have fixed-term contracts and the law relating to these contracts changed in terms of the newly introduced Labour Relations Amendment Bill?

1.4 Research methodology

In this dissertation, both primary and secondary sources will be referred to.

1.5 Structure of dissertation

Chapter 1 will consider the general background to the employment relationship.

Chapter 2 will discuss fixed-term contracts and how they come into force and the termination of such contracts. Chapter 3 will consider the termination of a fixed-term contract and when this will constitute a dismissal. This chapter will further discuss the concept of a “reasonable expectation” and how this is created. Chapter 4 will focus on when an employee can be said to have developed a reasonable expectation that their fixed-term contract will be renewed or that they will be employed on a permanent basis. Conflicting views as well as how the courts have interpreted a “reasonable expectation” will be considered, as well as what forms of relief are available to an employee who has been unfairly dismissed on this basis. Chapter 5 will discuss the new Labour Relations Amendment Bill in relation to fixed-term contracts and will consider the possible impact of these new provisions. Finally, chapter 6 provides a conclusion in determining whether South Africa has kept up with international standards and whether the changes brought about by the Labour Relations Amendment Bill will have the intended outcome.

2. The fixed-term contract of employment

2.1 What is it and how does one determine if it exists?

A fixed-term contract of employment arises where the parties to the contract agree that the contract will subsist for a specific period. This contract will be in effect for that period unless it is expressly provided otherwise or where the contract is terminated for a reason recognised in law, such as by repudiation, a fundamental breach of the terms of the contract or by agreement between the parties. The fixed-term contract may also contain a term providing that the contract may be terminated by notice on an earlier date.²³ Fixed-term contracts are regulated by the common law as supplemented by the provisions of the Labour Relations Act 66 of 1995, the Basic Conditions of Employment Act 75 of 1997, the Constitution and any other relevant provisions including the provisions of a collective agreement (in certain circumstances).

Whether the parties in question have concluded a fixed-term contract depends on the context of their agreement, their intention and whether the agreement was in writing. The court in *Swissport (Pty) Ltd v Smith NO & Others*²⁴ favoured the actual wording of the contract in settling a dispute between the parties. The issue in this case was whether the employee was dismissed or whether her contract had simply expired by the effluxion of time.²⁵ The court found that based on the actual wording of the contract, it was clear that the employee had not been dismissed. The court found that since “the

²³ *Morgan v Central University of Technology, Free State* [2013] 1 BLLR 52 (LC).

²⁴ *Swissport (Pty) Ltd v Smith NO & Others* (2003) 24 ILJ 618 (LC).

²⁵ *Swissport (Pty) Ltd v Smith NO & Others* (2003) 24 ILJ 618 (LC) at para 7.

employee had not relied on misrepresentation, fraud, duress or undue influence”, she could not lead evidence contrary to the terms of the written agreement.²⁶

*Gerick*²⁷ suggests that the parol evidence rule may be used where a challenge is brought under the common law contract of employment to prevent the employee from presenting evidence which is “in conflict with the terms of the written contract.”²⁸

However, in the case of *Elundini Municipality v SALGBC & Others*,²⁹ the court did not rely on the written contract itself, but rather took into account the testimony of the employee and the overall intention of the employer. The intention of the employer was determined by its actions. The employer had offered a casual staff member permanent employment and then proceeded to employ him for three months with all the benefits of a permanent employee. The employee was then asked to sign a three month fixed-term contract (expiring on the day it was presented to the employee to sign) and he refused. The court concluded that his dismissal had been unfair and it did not rely on the written document as per the court in *Swissport*³⁰.

The duration of a fixed-term contract is either for a specific period – in which case the date of the termination of the contract is pre-determined; alternatively, it may provide

²⁶ *Swissport (Pty) Ltd v Smith NO & Others* (2003) 24 ILJ 618 (LC) at para 14.

²⁷ S B Gerick “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.” (2011) 14(1) *PER* 104-136.

²⁸ S B Gerick “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.” (2011) 14(1) *PER* 117; *Swissport (Pty) Ltd v Smith NO* 2003 24 ILJ 618 (LC).

²⁹ *Elundini Municipality v SALGBC & Others* (2011) 12 BLLR 1193 (LC).

³⁰ *Swissport (Pty) Ltd v Smith NO & Others* (2003) 24 ILJ 618 (LC).

that the contract will terminate upon the occurrence of a particular event or once the task is completed.³¹ However, where the parties have agreed that the contract will terminate upon the occurrence of a specific event or the completion of a task, the employer bears the onus of proving that the event has occurred, or the task been completed, and thus that the contract has terminated.³²

Specifying when the fixed-term contract will expire can be beneficial to both the employer and the employee as both parties will have an opportunity to plan ahead. The employee may begin looking for another job before his contract is terminated, while the employer may decide whether to renew the employees' contract for a further period. This is also beneficial where the business of the employer is not financially stable as he is not committed to a permanent workforce.

If an employee works beyond the expiry of his fixed-term contract, without the employer saying anything, the relationship will tacitly evolve into a permanent contract of employment.³³

2.2 Termination of a fixed-term contract of employment

A fixed-term contract may be terminated in various ways depending on subjective circumstances such as the contract entered into, the duration of employment etc. In the

³¹ J Grogan *Workplace Law* 10th ed 2009 page 158.

³² J Grogan *Workplace Law* 10th ed 2009 page 157; *Bottger v Ben Nomoyi Film & Video CC* (1997) 2 LLD 102 (CCMA).

³³ J Grogan *Dismissal* (2010) page 39.

following paragraphs, the termination of fixed-term contracts will be discussed in terms of the common law and further, in terms of an automatic termination clause.

2.2.1 Common law

Under section 192(1) of the Labour Relations Act, the employee has to show that he was dismissed, and then the onus is on the employer (in terms of section 192(2)) to show that the dismissal was not unfair. This is a two stage enquiry- the existence of the dismissal and whether the dismissal was unfair or not.

No notice period (for the termination of a fixed-term contract) is required under the common law unless otherwise agreed by the parties, and the employer may terminate the contract based on the terms of the contract (such as: a term to the effect that the termination will occur on a specific date or on completion of the task). However, the employer cannot solely rely on the common law position, where it is evident that he wished to evade the protection offered to the employee by statute, even though the parties reached consensus at the time the contract was concluded.³⁴

Although the common law position relating to fixed-term contracts was superceded by section 186(1)(b) of the LRA, even at common law the employer could not fully escape liability by relying on the automatic termination of a fixed-term contract where by his words or actions, the employer has created a reasonable expectation “of a tacit renewal at common law”³⁵. This may lead the employee to believe that his contract will be

³⁴ S B Gerick “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.” (2011) 14(1) *PER* 116.

³⁵ S B Gerick “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.” (2011) 14(1) *PER* 116.

renewed, even if the renewal is for another fixed-term contract and not a contract of employment on an indefinite basis.³⁶ The common law position dealing with employment contracts differs from the position regulating other contracts. As per the common law, a fixed-term contract of employment terminates automatically in the following instances³⁷:

“(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.”³⁸

However, whether or not termination of the fixed-term contract (at common law) did occur seemed to be within the employers’ discretion.

The common law seems to have many implications which seem to favour of the employer.

2.2.2 Automatic termination clause

Where the duration of a fixed-term contract is dependent on an event or occurrence which is in turn dependant on the actions of the employer or the employee, the

³⁶ Grogan *Workplace Law* page 149.

³⁷ S B Gerick “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.” (2011) 14(1) *PER* 116.

³⁸ S B Gerick “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.” (2011) 14(1) *PER* 116. Van der Merwe *et al Contract: General Principles* pages: 32, 105, 278, and 279.

termination clause is likely to be viewed critically by the courts.³⁹ Examples would be where a contract provides for automatic termination if the employee is found guilty of misconduct; where the employee is not performing as required; or where the employer makes an operational decision to terminate the employee's contract. Such terms will be categorised as *pro non scripto*⁴⁰ as they have the effect of depriving employees of their constitutional rights, as well as the protection offered by statute against unfair dismissal.⁴¹ It follows that since automatic termination clauses may deprive employees of their constitutional rights, unless otherwise agreed, a fixed-term contract (which contains an automatic termination clause) may not be terminated arbitrarily and without good cause.⁴² This means that the employer must have a reason for terminating the fixed-term contract. These reasons should be either that the task has been completed or that the employer has done the work it had set out to do.

In *Mampeule v SA Post Office*⁴³, the court held that the employee had been dismissed even though the terms of his contract provided for an automatic termination of employment upon expiry of a five year period. In reaching this conclusion, the court pointed out that the termination of the employees' contract was not linked to a specific period or an eventuality and the clause could not be upheld.⁴⁴ This was the case because in order for an automatic termination clause to apply, there must be a specific task to

³⁹ *Ibid.*

⁴⁰ J Grogan *Dismissal* (2010) page 44.

⁴¹ J Grogan *Dismissal* (2010) page 9-10.

⁴² *Buthelezi v Municipal Demarcation Board* (2004) 25 ILJ 2317 (LAC) which held that this principle will apply both under the Labour Relations Act and the common law.

⁴³ *Mampeule v SA Post Office* (2009) 30 ILJ 664 (LC).

⁴⁴ "Fixed-term contracts" Available at: <http://www.uhrdir.co.za/index.php/latest-news/24-fixed-term-contracts> Accessed: 18th January 2014.

complete, or a specific time period needs to elapse- the contract cannot terminate just because the employer wishes to cease employment.⁴⁵

The court in *Sindane v Prestige Cleaning Services*⁴⁶ came to the opposite conclusion. The employer claimed that the employees' services had terminated according to the terms of the fixed-term contract concluded between the parties which provided that the contract will only be in force while the employer required his services. The employer denied that the employee was dismissed. The court held that the termination of an employment contract linked to the duration of the employer's contract with a client did not constitute a dismissal.⁴⁷ This case can be distinguished from *Mampeule*⁴⁸ as in that case, the alleged misconduct of the employee was linked to the termination of the contract, and not to the expiry of the contract.

*Sindane*⁴⁹ has not been followed by the Labour Court as per the case of *Mahlamu v CCMA & Others*.⁵⁰

In *Mahlamu v CCMA and others*⁵¹ the employer was employed by a labour broker. The employment contract between the parties provided that the contract would commence on 23rd October 2008, and would terminate automatically on:

1. "Expiry of the contract between the employer and the client, alternatively,

⁴⁵ *Mampeule v SA Post Office* (2009) 30 ILJ 664 (LC) at para 18.

⁴⁶ *Sindane v Prestige Cleaning Services* (2010) 31 ILJ 733 (LC).

⁴⁷ *Sindane v Prestige Cleaning Services* (2010) 31 ILJ 733 (LC) at para 20.

⁴⁸ *Mampeule v SA Post Office* (2009) 30 ILJ 664 (LC).

⁴⁹ *Sindane v Prestige Cleaning Services* (2010) 31 ILJ 733 (LC).

⁵⁰ *Mahlamu v CCMA & Others* (2011) 4 BLLR 381 (LC).

⁵¹ *Mahlamau v CCMA and others* (2011) 4 BLLR 381 (LC).

2. In the event where the client does not require the services of the employee for whatsoever reason.”⁵²

In February 2009, the client then informed the broker (the employer) that the employee’s services were no longer needed. This information was communicated to the employee, and since the employer had no alternative positions for the employee to occupy, his services were terminated.⁵³ Mahlamu approached the CCMA and claimed that he was unfairly dismissed.

The arbitrator at arbitration favoured a literal interpretation of the contract of employment and held that the contract had provided that the employees’ contract would terminate automatically where the client no longer required his services. The arbitrator held that the contract had terminated automatically and therefore no dismissal had taken place in terms of section 92 of the Act.⁵⁴ Mahlamu contended that the Commissioner made a material error of law and he took the matter on review to the Labour Court.

⁵² “Automatic termination of contract of employment.” Available at: <http://www.uhrdir.co.za/index.php/latest-news/6-automatic-termination-of-contract-of-employment>. Accessed: 13th September 2013.

⁵³ *Mahlamu v CCMA and others* 2011 (4) BLLR 381 (LC) at para 4.

⁵⁴ Section 92 of the Act states: “Full-time members of workplace forum:

(1) In a workplace in which 1000 or more employees are employed, the members of the workplace forum may designate from their number one full-time member.

(2)(a) The employer must pay a full-time member of the workplace forum the same remuneration that the member would have earned in the position the member held immediately before being designated as a full-time member. (b) When a person ceases to be a full-time member of a workplace forum, the employer must reinstate that person to the position that person held immediately before election or appoint that person to any higher position to which, but for the election, that person would have advanced.”

The court held as follows: "in short, a contractual device that renders a termination of a contract of employment to be something other than a dismissal, with the result that the employee is denied the right to challenge the fairness thereof in terms of section 188 of the LRA, is precisely the mischief that section 5 of the act prohibits."⁵⁵

Secondly, the court held that "a contractual term to this effect does not fall within the exclusion of section 5(4)⁵⁶, because contracting out of the right not to be unfairly dismissed is not permitted by the act."⁵⁷

The court added that this is "not to say that dismissal occurs at the end of a fixed-term contract. Dismissal occurs where the employee reasonably expected the employer to renew the contract."⁵⁸

In this case, the employee's employment was solely dependent on the will of the client- as the automatic termination clause came into force once the client no longer required the services of the employee.⁵⁹ The court pointed out that "the employee's security of employment was entirely dependent on the will of the client. The client could at any time, for any reason, simply state that the employee's services were no longer required and having done so, that resulted in a termination of the contract, automatically and by the operation of law, leaving the employee with no right of recourse. For the reasons

⁵⁵ *Mahlamau v CCMA and others* 2011 (4) BLLR 381 (LC) at para 22.

⁵⁶ Section 5(4) of the Act states: "A provision in any contract, whether entered into before or after the commencement of this Act, that directly or indirectly contradicts or limits any provision of section 4, or this section, is invalid, unless the contractual provision is permitted by this Act."

⁵⁷ *Ibid.*

⁵⁸ *Mahlamau v CCMA and others* 2011 (4) BLLR 381 (LC) at para 23.

⁵⁹ "Automatic termination clause gets its teeth drawn." Available at:

<http://www.ens.co.za/images/news/BLTR%201.pdf> Accessed: 13th September 2013.

that follow, and to the extent that the commissioner regarded this proposition to be the applicable law, he committed a material error of law that must necessarily have the result that his ruling is reviewed and set aside.”⁶⁰

If the contract terminates on the date agreed upon and the employee continues to work for the employer, the contract between the parties is tacitly renewed. The contract will have the same terms agreed upon in the initial fixed-term contract; however the duration may be varied.⁶¹ This is dependent on the circumstances of each case, including the conduct of the parties.⁶²

If a new contract is formed, it will be assumed to be for an indefinite duration, terminable by a reasonable notice⁶³ unless it is shown, from the facts, that the parties had intended something else. However, where the fixed-term contract provides that the employee will be employed permanently after a specific duration, the employer cannot then, at the end of the specified duration use the automatic termination of the fixed-term contract to justify the termination of employment.⁶⁴

In the employment relationship, the focus has usually been on reasonableness and fairness “in terms of any expectation that the employee might have had regarding the

⁶⁰ *Mahlamau v CCMA and others* 2011 (4) BLLR 381 (LC) at para 10.

⁶¹ J Grogan *Workplace Law* 10th ed (2010) at chapter 10; *Owen & others v Department of Health, KwaZulu-Natal*(2009) 30 ILJ 2461 (LC); *Braund v Baker, Baker & Co* (1905) 19 EDC 54.

⁶² *Nobubele v Kujawa NO & another*(2008) 29 ILJ 2986 (LC) which referred to the case of *Redman v Colbeck* 1917 EDL 35 at 38.

⁶³ J Grogan *Workplace Law* 10th ed (2010) Reasonable notice as set out in chapter 5, para 10.

⁶⁴ *Solidarity obo Van Niekerk v Denel (Pty) Ltd (Denel Dynamics)* [2012] 10 BLLR 1030 (LC).

employer's intention to renew the fixed-term contract at the end of the specific term.”⁶⁵ However, reasonableness and fairness in the context of where an employer has entered into multiple fixed-term contracts with an employee in order to evade permanently employing the employee, has not yet been addressed by the courts.⁶⁶

3. Termination of a fixed-term contract of employment in terms of Section 186(1)(b) of the LRA.

Section 186(1)(b) of the Labour Relations Act⁶⁷ provides that two requirements need to be fulfilled in order for the employers action to constitute a dismissal:

First there must be “a reasonable expectation on the part of the employee that a fixed term contract on the same or similar terms will be renewed”. Secondly, there must be “a failure by the employer to renew the contract on the same terms or a failure to renew it at all.”⁶⁸

Section 186(1)(b) is restricted as its application only extends the regulation of a fixed-term contract when relating to a “dismissal.”⁶⁹ It is important to note that the courts

⁶⁵ S B Gerick “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.” (2011) 14(1) *PER* 106.

⁶⁶ S B Gerick “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.” (2011) 14(1) *PER* 106.

⁶⁷ Act 66 of 1995.

⁶⁸ *Ibid.*

⁶⁹ S B Gerick “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.” (2011) 14(1) *PER* 110.

have affirmed that expiry of a fixed-term contract other than in the circumstances provided for in Section 186(1)(b) does not constitute a dismissal of an employee.⁷⁰

In South Africa there is no set restriction on the duration of a fixed-term contract. This seems to be the case for various fixed-term contracts- whether the contract was “the first of a series”⁷¹ or if it was the only fixed-term contract entered into by the parties. There is also no set standard which regulates 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.”⁷²

Previously, Section 186(1)(b) of the LRA regulated the position of employees who were employed on a series of fixed-term contracts, but this did not provide adequate protection.⁷³ However, that position has changed with the implementation of the Labour Relations Amendment Bill. It remains to be seen what relief the court will grant to employees who have been employed on a series of fixed-term contracts and have not been offered permanent employment.

⁷⁰ J Grogan *Dismissal* (2010) page 14; page 39.

⁷¹ S B Gerick “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.” (2011) 14(1) *PER* 111; H Cheadle “Regulated Flexibility: Revisiting the LRA and the BCEA” (2006) 27 *ILJ* 663 at 664.

⁷² S B Gerick “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.” (2011) 14(1) *PER* 111; H Cheadle “Regulated Flexibility: Revisiting the LRA and the BCEA” (2006) 27 *ILJ* 663 at 664.

⁷³ S B Gerick “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.” (2011) 14(1) *PER* 111.

Instances where the employer engages in a series of fixed-term contracts with the employee as opposed to offering him/her permanent employment has been debated in the following circumstances⁷⁴: Firstly, where the employer is in a position to offer permanent employment to the employee, but fails to do so, instead offering another fixed-term contract to the employee. Secondly, where the employer created a reasonable expectation in the mind of the employee that repeated renewals of the employees' fixed-term contract will result in permanent employment.⁷⁵

Employees may find themselves trapped by being employed on fixed-term contracts where they do have a reasonable expectation of permanent employment, but their employer has chosen not to employ them indefinitely. Permanent employment is usually avoided by the employer in order to escape statutory provisions relating to dismissals and rights afforded to employees in terms of section 185 of the LRA.”⁷⁶The question of who bears the onus of proving a reasonable expectation has been decided by the courts as being one that rests on the employee.

⁷⁴ *Ibid.*

⁷⁵ *Yebe v University of KZN* 2007 28 ILJ 490 (CCMA) at para 4.5.

⁷⁶ S B Gerick “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.” (2011) 14(1) *PER* 107; Section 185 of the Act reads: “Right not to be unfairly dismissed or subjected to unfair labour practice.

Every employee has the right not to be (a) unfairly dismissed; and (b) subjected to unfair labour practice.”

3.1 The onus under section 186(1)(b) of the Labour Relations Act 66 of 1995

The onus of proving a reasonable expectation rests on the employee who alleges this as per *Ferrant v Key Delta*⁷⁷. A further question is whether the test to determine if an employee had a reasonable expectation is objective or subjective. In *Fedlife Assurance Ltd v Wolfaardt*⁷⁸ the court favoured an objective test. It must have been found that the employer created an impression that the contract of employment would be renewed.⁷⁹

3.2 How is a reasonable expectation created?

3.2.1 An express or implied promise by the employer.

*Grogan*⁸⁰ is of the opinion that two of the most basic considerations in determining the existence of a reasonable expectation will be that of “past practise and prior promise.” *Grogan*⁸¹ points out that an assurance which is either express or implied and which is made before the date on which the fixed-term contract is due to expire may give rise to a reasonable expectation that the employment will continue. Whether the expectation exists depends on “the nature of the alleged assurance, the position of the person who gave it, and the strength of warnings by the employer that the contract would in fact expire.”⁸² The promise- which may be either expressly or impliedly made by the employer would amount to a contractual undertaking. The promise made by the

⁷⁷ *Ferrant v Key Delta*(1993) 14 ILJ 464 (IC); see also *SARPA & others v SA Rugby & Others* (2008) 29 ILJ 2218 (LAC).

⁷⁸ *Fedlife Assurance Ltd v Wolfaardt*(2001) 22 ILJ 2407 (SCA).

⁷⁹ J Grogan *Workplace Law* 10th ed (2009) page 149.

⁸⁰ J Grogan *Workplace Law* 8ed (2005) at page 168.

⁸¹ John Grogan: Dismissal, Discrimination and Unfair Labour Practices, August 2005 at page 151.

⁸² John Grogan: Dismissal, Discrimination and Unfair Labour Practices, August 2005 at pages 151-152.

employer is usually in the form of an assurance to the employee which then gives rise to a reasonable expectation of permanent employment of better contractual terms in their employment contract.⁸³ In simple terms, a promise may simply be an assurance made to the employer, even if it is just a passing comment.

The common practise of inserting a disclaimer in the employment contract to the effect that the employee “has no expectation that the contract will be renewed or that no expectation of renewal can arise unless the employer gives notice in writing of its intention to renew”⁸⁴ does not necessarily prove that the employee does not have a reasonable expectation that his contract would be renewed.

3.2.2 Past practice by the employer

Common sense favours the indication that the more frequently the contract was renewed by the employer in the past, the more likely that it would be renewed in the future. This is in line with the employees’ reasonable expectation which may have arisen based on the past practice of the employer.⁸⁵ In *Mavata v Afrox Home Health Care*⁸⁶, the court held that where “casual” contracts were renewed every year for three years, there was “no apparent need not to renew them for a fourth year.”⁸⁷

⁸³ R Cloete “A promise is a promise- or is it?” Available at:

<http://web.up.ac.za/sitefiles/File/hpc/A%20promise%20is%20a%20promise%20or%20is%20it.pdf> Accessed: 10th December 2013.

⁸⁴ John Grogan: *Dismissal, Discrimination and Unfair Labour Practices*, August 2005 at page 152.

⁸⁵ M Humphries. “Fixed-term contracts of employment”. Available at: <http://www.twb.co.za/news/listing/9> Accessed: 8th November 2013.

⁸⁶ *Mavata v Afrox Home Health Care* 1998 (19) ILJ 931 (CCMA).

⁸⁷ J Grogan *Workplace Law* 10th ed 2009 page 150.

Where an employer has successively renewed their employees' fixed-term contracts, this may lead to a reasonable expectation that their contract will continually be renewed or that they will be offered permanent employment.

In *King Sabata Dalindyebo Municipality v CCMA & others*⁸⁸ the employer habitually renewed fixed-term contracts. However, it allowed the last fixed-term contracts to lapse, even though there was work available for the employees. The court held that based on this past practice, the employees had expected their contracts to be renewed. In *SACTWU & another v Cadema Industries (Pty) Ltd*⁸⁹ the Labour Court held that "the repeated renewals over a long period of relatively short fixed term contracts gave rise to a reasonable expectation of renewal, and that the termination of the final contract constituted a dismissal."⁹⁰

4. An expectation of indefinite employment in terms of section 186(1)(b) after the lapse of a fixed-term contract.

Can an employee claim to have been dismissed in terms of section 186(1)(b) if they claim an expectation of indefinite employment after the lapse of a fixed-term contract ?

Fixed-term contracts are regulated by Section 186(1)(b) of the Labour Relations Act which provides that two requirements need to be fulfilled in order for the employers action to constitute a dismissal: These are, firstly that "a reasonable expectation on the part of the employee that a fixed term contract on the same or similar terms will be renewed"; and

⁸⁸ *King Sabata Dalindyebo Municipality v CCMA & others* (2005) 26 ILJ 474 (LC).

⁸⁹ *SACTWU & another v Cadema Industries (Pty) Ltd* [2008] 8 BLR 790 (LC).

⁹⁰ "Renewal of fixed-term contracts- Legitimate expectations". Available at: <http://www.retrenchmentassist.co.za/index.php/ra-newsletters/108-renewal-of-fixed-termcontracts-legitimate-expectations> Accessed: 8th November 2013.

secondly that “a failure by the employer to renew the contract on the same terms or a failure to renew it at all.”⁹¹

It is expressly provided in the Labour Relations Act that a dismissal will occur where an employee had attained a reasonable expectation that their contract will be renewed and this expectation is then "dashed"⁹². However, the effect of this is that an employee will have to prove that he or she had a reasonable expectation and if this is not proven, it would mean that the expiry of his or her fixed term contract will not constitute a dismissal.⁹³

4.1 Conflicting views

There have been conflicting views on what constitutes a reasonable expectation in many cases. Five of these conflicting cases will be discussed below.

In the case of *University of Cape Town v Auf der Heyde*⁹⁴, Mr Heyde was employed on a three-year contract, with the possibility that his contract may be extended to five years. The possibility of an extension was not enough to constitute a reasonable expectation. It was not expressed to Mr Heyde in any way that his contract would be extended to five years, or that he could reasonably expect permanent employment. Towards the end of his contract, a permanent position became available and he applied for it. The University made it clear that he would not be given any preference, but would be

⁹¹ *Ibid.*

⁹² J Grogan *Dismissal* (2010) 39.

⁹³ J Grogan *Dismissal* (2010) 40.

⁹⁴ *University of Cape Town v Auf der Heyde* (2001) 22 ILJ 2647 (LAC).

considered as a candidate when he applied. The court held that no reasonable expectation existed and that, based on the facts, he was not dismissed.

In *SA Rugby Players' Association (SARPA) & Others v SA Rugby (Pty) Ltd & Others*⁹⁵, the Labour Appeal Court considered the “proper interpretation and application of a reasonable expectation that constitutes a dismissal.”⁹⁶

In this case, three rugby players had claimed that they had been dismissed as they had a reasonable expectation that their fixed-term contracts will be renewed, however, this did not happen. Their expectation was based on representations made by their coach. However, the players knew that the coach had no authority to make such representations to them. The contracts were for the period 1st September 2003 to 30th November 2003 and they clearly indicated that the contracts will terminate automatically on the date of termination, and that “the players had no expectation that the contracts would be renewed.”⁹⁷ The players claimed that they were dismissed because they reasonably expected a renewal of their contracts, and none of the contracts were renewed.

⁹⁵ *SA Rugby Players' Association (SARPA) & Others v SA Rugby (Pty) Ltd & Others* (2008) 9 BLLR 845 (LAC).

⁹⁶ Naidoo, M. “Fixed-term contracts: The current jurisprudence and the impact of the amendments.” Available at: <http://www.nortonrosefulbright.com/files/za-fixed-term-contracts-72237.pdf> Accessed: 23rd September 2013 at page 3.

⁹⁷ *SA Rugby Players' Association (SARPA) & Others v SA Rugby (Pty) Ltd & Others* (2008) 9 BLLR 845 (LAC) at para 22; Naidoo, M. “Fixed-term contracts: The current jurisprudence and the impact of the amendments.” Available at: <http://www.nortonrosefulbright.com/files/za-fixed-term-contracts-72237.pdf> Accessed: 23rd September 2013 at page 3.

In the Labour Appeal Court it was held that the “test was whether a reasonable employee would have acquired an expectation that his contract would be renewed on the same or similar terms.”⁹⁸ The court stated that they had no reasonable expectation of renewal as their contracts were for a specific event- the Rugby World Cup- which had come and gone; and that their contracts did not provide for a renewal, therefore, they did not have any reasonable expectation of renewal.

In *Dierks v University of South Africa*⁹⁹, the issue¹⁰⁰ was whether the employer, either by writing or by its conduct, created an expectation in the mind of the employer that his fixed-term contract will be renewed or that he will be offered permanent employment. The court held that with regards to the facts, the circumstances did not justify a reasonable expectation of permanent employment.¹⁰¹

It was held that the term “reasonable expectation” which is not defined in the LRA will include factors such as: equity and fairness in the context of the employment relationship; whether there was a substantive expectation of renewal; whether the employee subjectively expected the renewal of his contract on a permanent basis even though his employer did not share the same view; and any supportive objective factors which justify the expectation.¹⁰²

⁹⁸ Naidoo, M. “Fixed-term contracts: The current jurisprudence and the impact of the amendments.” Available at: <http://www.nortonrosefulbright.com/files/za-fixed-term-contracts-72237.pdf> Accessed: 23rd September 2013 at page 4.

⁹⁹ *Dierks v University of South Africa* (J399/98) 1998 ZALC 126.

¹⁰⁰ *Dierks v University of South Africa* (J399/98) 1998 ZALC 126 at para 14.

¹⁰¹ *Dierks v University of South Africa* (J399/98) (1998) ZALC 126 at para 191.

¹⁰² *Dierks v University of South Africa* (1999) 20 ILJ 1227 (LC) at page 1245 paragraph 130; see also *SACTWU v Cadema Industries (Pty) Ltd* Case no: 277/05.

On the facts, the court concluded: "an entitlement to permanent employment cannot be based simply on the reasonable expectation of section 186(1)(b), i.e. 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".¹⁰³ This was upheld in *Auf der Heyde v University of Cape Town*¹⁰⁴ and *SA Rugby (Pty) Ltd v CCMA*.¹⁰⁵

On appeal, the judgment was overruled however; the Labour Appeal Court did not deal specifically an entitlement of permanent employment based on a reasonable expectation.¹⁰⁶ The court in *McInnes v Technicon Natal*¹⁰⁷ and in *Geldenhuis v University of Pretoria*¹⁰⁸ expressed a contrary view.¹⁰⁹ In *McInnes v Technicon Natal*¹¹⁰ the court considered the subjective reasonable expectation of the employee which was in contradiction of what was held in *Dierks v University of South Africa*¹¹¹.

¹⁰³ *Dierks v University of South Africa* (1999) 20 ILJ 1227 (LC) at 1248 E.

¹⁰⁴ *Auf der Heyde v University of Cape Town* (2000) 21 ILJ 1758 (LC).

¹⁰⁵ *SA Rugby (Pty) Ltd v CCMA* (2006) 27 ILJ 1041 (LC).

¹⁰⁶ S B Gerick "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." (2011) 14(1) *PER* 110.

¹⁰⁷ *McInnes v Technicon Natal* (2000) 21 ILJ 1138 (LC).

¹⁰⁸ *Geldenhuis v University of Pretoria* (2008) 29 ILJ 1772 (CCMA).

¹⁰⁹ S B Gerick "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." (2011) 14(1) *PER* 110.

¹¹⁰ *McInnes v Technicon Natal* (2000) 21 ILJ 1138 (LC) at page 7.

¹¹¹ *Dierks v University of South Africa* (J399/98) 1998 ZALC 126.

The view in *Dierks v University of South Africa*¹¹² was accepted by the court in the case of *Auf der Heyde v University of Cape Town*¹¹³- which view was not accepted by the court in *McInnes v Technicon Natal*¹¹⁴. The view adopted by the court in *McInnes v Technicon Natal*¹¹⁵ seems to be the preferred view. However, the approach adopted by the court in *Auf der Heyde v University of Cape Town*¹¹⁶ was adopted in the case of *SA Rugby Players' Association (SARPA) & Others v SA Rugby (Pty) Ltd & Others*¹¹⁷ which showed that the issue was still debatable. However the court in *University of Pretoria v CCMA and others*¹¹⁸ provided more clarity on the issue.

The court in *Geldenhuis v University of Pretoria*¹¹⁹ was faced with the following question: can an employee rely on Section 186(1)(b) if he/she was employed on a fixed-term contract; and had a reasonable expectation that he/she will be offered permanent employment- but this expectation failed to materialise?

The applicant based her claim on S 186(1)(b) of the LRA, however, the CCMA rejected this argument and stated that this section did not give rise to an expectation of permanent employment.¹²⁰ Here it was stated that there could be a reasonable expectation of

¹¹² *Dierks v University of South Africa* (J399/98) 1998 ZALC 126.

¹¹³ *Auf der Heyde v University of Cape Town* (2000) 21 ILJ 1758 (LC).

¹¹⁴ *McInnes v Technicon Natal* (2000) 21 ILJ 1138 (LC).

¹¹⁵ *McInnes v Technicon Natal* (2000) 21 ILJ 1138 (LC).

¹¹⁶ *Auf der Heyde v University of Cape Town* (2000) 21 ILJ 1758 (LC).

¹¹⁷ *SA Rugby Players' Association (SARPA) & Others v SA Rugby (Pty) Ltd & Others* (2008) 9 BLLR 845 (LAC).

¹¹⁸ LAC Unreported case no. JA38/2010, 04-11-2011.

¹¹⁹ *Geldenhuis v University of Pretoria* (2008) 29 ILJ 1772 (CCMA).

¹²⁰ M Naidoo "Interpreting a reasonable expectation" (2011)*De Rebus* January/February 54.

permanent employment as the relevant provision was wide enough to include this. It was also pointed out that the act should be interpreted in a purposive way.¹²¹

The case went on appeal to the Labour Court and the employer claimed that the employee was not dismissed. The court held that the intention of the legislature could not have been one which would limit "reasonable expectation" to include the renewal of fixed-term contracts and exclude the reasonable expectation of permanent employment¹²². The application was dismissed.

The employer appealed to the LAC in case of *University of Pretoria v CCMA and others*¹²³, the Labour Appeal Court (LAC) was faced with the question of whether the reasonable expectation of an employee is limited to an expectation of the renewal of another fixed-term contract, or whether this expectation can be broadly interpreted to include permanent employment.¹²⁴ The employer claimed that where the employee is alleging that the dismissal fell within the section, the employee's expectation must not be based on an expectation of permanent employment, but rather employment on the basis of the renewal of a fixed-term contract.¹²⁵

The LAC also said that even though the employee's fixed-term contract was renewed on several occasions, this did not mean that she could claim that she was dismissed. The

¹²¹ M Naidoo "Interpreting a reasonable expectation" (2011)*De Rebus* January/February 54.

¹²² M Naidoo "Interpreting a reasonable expectation" (2011)*De Rebus* January/February 54.

¹²³ LAC Unreported case no. JA38/2010, 04-11-2011.

¹²⁴ LAC Unreported case no. JA38/2010, 04-11-2011.

¹²⁵ M Naidoo "Interpreting a reasonable expectation" (2011)*De Rebus* January/February 55.

employer claimed that where the employee is alleging that the dismissal fell within the section, the employee's expectation must not be based on an expectation of permanent employment, but rather employment on the basis of the renewal of a fixed-term contract¹²⁶.

It was argued on behalf of the employee that the purpose of the section was to prevent employers from renewing fixed-terms contracts on a continuous basis to escape legislative obligations relating to permanent employment. However, it was contended that if an employee's reasonable expectation is limited (by the section) to yet another fixed-term contract (and not permanent employment)- this would be in conflict with the purpose of the Act itself. However, the court pointed out that it had a duty to interpret the law in a manner that adhered strictly to the words of the legislature. The court interpreted the provision in a narrow manner and concluded that the employee had not been dismissed¹²⁷.

4.2 How is a reasonable expectation in the context of a fixed-term contract interpreted?

4.2.1 The legislative position

The legislature has moved away from simply examining the contents of a fixed-term contract, to considering the nature of the expectation of the employee¹²⁸ and the reasonableness of this expectation¹²⁹. However, a literal interpretation of the section points to the issue that an employee can reasonably expect a fixed-term contract to be renewed,

¹²⁶ M Naidoo "Interpreting a reasonable expectation" (2011)*De Rebus* January/February 55.

¹²⁷ M Naidoo "Interpreting a reasonable expectation" (2011)*De Rebus* January/February 54.

¹²⁸ J Grogan *Dismissal* (2010) at page 44.

¹²⁹ J Grogan *Dismissal* (2010) at page 45.

but not indefinitely or on a permanent basis¹³⁰. It is contended that this section is narrow and is open to challenge under the Constitution¹³¹, unless it is given a more practical meaning or changed altogether.¹³² It seems that once the section is given a more stable definition, that a lot of uncertainty will be resolved. It is also important to note that sections cannot be too widely construed or interpreted as this could provide a loophole for a variety of claims which may arise under similar circumstances.

Section 5 of the Labour Relations Act¹³³ states: "no person may do, or threaten to do any of the following: (b) prevent an employee... from exercising any right conferred by this Act..."

Section 5(4) provides : "a provision in any contract, whether entered into before or after the commencement of this Act, that directly or indirectly contradicts or limits any provision of... this section is invalid, unless the contractual provision is permitted by this Act." These provisions are significant as employees can include them in their argument when faced with a dispute regarding how the court may interpret their fixed-term contracts which, upon its expiry, do not lead to a permanent contract of employment. Further, the application and interpretation of these provisions may guide the court in determining whether to adopt a literal or purposive view, and once their view is adopted, what relief may be appropriate based on the facts of the case.

4.2.2 The position adopted by the courts

The concept of a reasonable expectation is not defined in the LRA but our courts have provided some guidance on interpreting this phrase. The courts have used both a

¹³⁰ J Grogan *Dismissal* (2010) at page 46.

¹³¹ The Constitution of the Republic of South Africa 1996, Section 23.

¹³² J Grogan *Dismissal* (2010) at page 46.

¹³³ Act 66 of 1995.

narrow view and a wide view when determining the existence of a reasonable expectation. The courts have the option of either favouring a wide view- which favours a purposive interpretation; or a narrow view which favours a literal interpretation. It seems that the purposive view is the better view as adopting a narrow and restrictive view may lead to unfairness.

The wider meaning, if adopted by a court would mean that the court will order a party to act in a way which favours the other party- such as affording them a hearing.¹³⁴

The narrow meaning is entrenched in section 186(1)(b) of the LRA, which provides that a legitimate expectation is confined to a fixed-term contract of employment. This means that the fixed-term contract of employment entered into by the parties will hold the most weight in determining the outcome of the matter. Section 186(1)(b) provides:

“Dismissal means that...an employee reasonably expected the employer to renew a fixed term contract of employment on the same or similar terms but the employer offered to renew it on less favourable terms, or did not renew it...”. In defining what this section means in the context of a reasonable expectation arising from a fixed-term contract, the court will have to determine which view to adopt- a literal or purposive view.

The courts are more likely to follow a wider interpretation than a narrow one. A narrow interpretation could lead to unjust results for the employee while a wider interpretation may allow for the courts to provide some relief to the employee. However, an interpretation that is too wide may then have negative implications for the employer. It seems that here the courts have to balance the interests of both parties and determine if the outcome is fair, or at least somewhat fair on both parties.

¹³⁴ *Winter and others v Administrator in executive Committee and others* 1973 (1) SA 873 (A) at page 890.

Once the employer has created a reasonable expectation of renewal, or of permanent employment, in terms of Section 186(1)(b) of the LRA, an automatic termination of the contract becomes a dismissal. The employer must then show that there is a fair reason for termination. This is an objective test, based on the facts of the case, and not a subjective one based on the subjective opinion of the employee. The suggested test for a reasonable expectation is that “the employer must have created the expectation through words, letters, documents or its conduct”¹³⁵– which must then be proven by the employee.¹³⁶ Once a reasonable expectation is proven, the court will have to determine if this expectation was reasonable in that particular employment relationship.¹³⁷

This test was satisfied in the CCMA in the case of *IDWU obo Mathebula & others v Band V Mining & Slabs*¹³⁸. The facts of this case are as follows: the employees had worked on a series of weekly fixed-term contracts for a duration of about 8 months. When their contracts were not renewed, they claimed that they had been dismissed. The employer contended that it was necessary for them to be employed using these successive weekly

¹³⁵ J Rheeder “The muddy waters of legitimate expectations in fix term agreements” Available at: <http://nteu.nmmu.ac.za/nteu/media/Store/documents/local/SA%20Labour%20Guide/SA%20Labour%20Guide%202011/2011---06---muddy-waters-of-legitimate-expectations-in-fix-term-agreements.doc> Accessed: 26th September 2013.

¹³⁶ J Rheeder “The muddy waters of legitimate expectations in fix term agreements” Available at: <http://nteu.nmmu.ac.za/nteu/media/Store/documents/local/SA%20Labour%20Guide/SA%20Labour%20Guide%202011/2011---06---muddy-waters-of-legitimate-expectations-in-fix-term-agreements.doc> Accessed: 26th September 2013.

¹³⁷ J Rheeder “The muddy waters of legitimate expectations in fix term agreements” Available at: <http://nteu.nmmu.ac.za/nteu/media/Store/documents/local/SA%20Labour%20Guide/SA%20Labour%20Guide%202011/2011---06---muddy-waters-of-legitimate-expectations-in-fix-term-agreements.doc> Accessed: 26th September 2013.

¹³⁸ *IDWU obo Mathebula & others v Band V Mining & Slabs* (2010) 19 CCMA 8.34.5.

fixed-term contracts as the nature of his business was not very stable and the demand for his building services fluctuated.¹³⁹

The issue was whether the employees had expected that their contracts would be renewed and the commissioner found that such an expectation did exist as they were offered new fixed-term contracts every week for a long period of time. A further issue was whether this expectation was reasonable and the Commissioner found that the routine renewal of their contracts “also rendered their expectation reasonable.”¹⁴⁰ This amounted to “past practise”. Thus, the employees had proven that a non-renewal of their fixed-term contracts constituted a dismissal. The employees were awarded compensation amounting to four weeks wages.

It is important to note that successive renewals may prove a reasonable expectation. Successive renewals cannot be viewed in isolation and the perspectives of both the employer and the employee must be considered.¹⁴¹

In *Gubevu Security Group (Pty) Ltd v Ruggiero NO and others*¹⁴², the employee was employed on a fixed-term contract of three months and she was told that her contract will

¹³⁹ “Advance Notification: Butterworths Arbitration Law Reports” Available at: <http://www.legalbrief.co.za/article.php?story=2011011010473612> Accessed: 30th September 2013.

¹⁴⁰ J Rheeder “The muddy waters of legitimate expectations in fix term agreements” Available at: <http://nteu.nmmu.ac.za/nteu/media/Store/documents/local/SA%20Labour%20Guide/SA%20Labour%20Guide%202011/2011---06---muddy-waters-of-legitimate-expectations-in-fix-term-agreements.doc> Accessed: 26th September 2013.

¹⁴¹ *Ibid.*

not be renewed. However, she was offered employment for a further month as a notice period. She refused to work during this month and referred her dispute to the CCMA. The employee claimed that she was dismissed in terms of Section 186(1)(b) of the Act. The employee had a reasonable expectation of permanent employment¹⁴³ based on an email that was sent to her by her financial director which contained the phrase "we look forward to many years of business together"¹⁴⁴. However, the arbitrator found that even though she did have a reasonable expectation, in terms of Section 186(1)(b) this expectation was only for a renewal of her contract for a further three months. The employee was awarded compensation in the form of two months remuneration.

On review to the Labour Court¹⁴⁵, the court held that the arbitrator was correct in stating that if there was a dismissal, the employer cannot be ordered to reinstate the employee on a permanent basis. The court noted that "the wording of Section 186(1)(b) requires that, in order to constitute a dismissal, the employee had a reasonable expectation that the contract would be renewed "on the same or similar terms"; and that it was not so renewed."¹⁴⁶ However, where there was no dismissal in terms of Section 186(1)(b), the employer could be ordered to renew the fixed-term contract on "the same or similar terms" or to compensate the employee.¹⁴⁷ The court found further that the employee had proven that she did have a reasonable expectation that her contract would be reviewed, but this did not mean that she had an expectation of

¹⁴² *Gubevu Security Group (Pty) Ltd v Ruggiero NO and others* Case no: C 481/10.

¹⁴³ *Gubevu Security Group (Pty) Ltd v Ruggiero NO and others* Case no: C 481/10 at para 2.

¹⁴⁴ *Gubevu Security Group (Pty) Ltd v Ruggiero NO and others* Case no: C 481/10 at para 4.

¹⁴⁵ *Gubevu Security Group (Pty) Ltd v Ruggiero NO and Others* (2012) 33 ILJ 1171 (LC) at para 20.

¹⁴⁶ *Gubevu Security Group (Pty) Ltd v Ruggiero NO and Others* (2012) 33 ILJ 1171 (LC) at para 24.

¹⁴⁷ *Gubevu Security Group (Pty) Ltd v Ruggiero NO and Others* (2012) 33 ILJ 1171 (LC) at para 24.

permanent employment¹⁴⁸. The court held that there was no basis for the appeal and it was dismissed with costs. The court was correct in its conclusion as based on the facts of the case, especially considering the duration of the employment, the employee could not have expected permanent employment.

In reaching its decision court referred to the case of *University of Pretoria*¹⁴⁹ in which the LAC held that “Section 186(1)(b) does not allow for an order to be made that an employee who had been employed on a fixed term contract should be employed permanently, based on a reasonable expectation to be so employed.”¹⁵⁰

The court pointed out that this argument is supported by *Olivier*, in his article “Legal constraints on the termination of fixed term contracts of employment: An enquiry into recent developments”¹⁵¹ in which the author states that another important issue concerns the nature of the expectation and “by implication the nature and extent of the relief to be afforded.”¹⁵² He further pointed out that in order for Section 186(b) to apply, there needs to be an expectation in the mind of the employee that his fixed-term contract will be renewed on the same or similar terms. One of the most important points made by *Olivier* is that it is clear that the LRA does not “require that or regulate

¹⁴⁸ The court referred to the case of *University of Pretoria v CCMA & others* [2012] 2 BLLR 164 (LAC) where it was held that section 186(1)(b) does not permit an order which would grant an employee who has been employed on a fixed-term contract a permanent contract of employment.

¹⁴⁹ *University of Pretoria v CCMA & others* [2012] 2 BLLR 164 (LAC).

¹⁵⁰ *Gubevu Security Group (Pty) Ltd v Ruggiero NO and Others* (2012) 33 ILJ 1171 (LC) at para 20.

¹⁵¹ M Olivier “Legal constraints on the termination of fixed term contracts of employment: An enquiry into recent developments” (1996) 17 *ILJ* 1001.

¹⁵² *Gubevu Security Group (Pty) Ltd v Ruggiero NO and Others* (2012) 33 ILJ 1171 (LC) Para 21; M Olivier “Legal constraints on the termination of fixed term contracts of employment: An enquiry into recent developments” (1996) 17 *ILJ* 1001 under the heading titled ““Nature of the expectation””.

the position where the expectation implies a permanent or indefinite relationship on an ongoing basis ..."¹⁵³ this seems to be the correct view to follow when determining the existence of lack thereof of a reasonable expectation of permanent employment.

In light of the current employment situation in South Africa, permanent employment will provide job security and employment benefits. As pointed out above, where an employee has been dismissed in terms of Section 186(1)(b), the court cannot order the employer to re-employ him on a permanent basis. However, where a dismissal has not occurred under this section, it would be possible for the court to make an order that the contract be renewed, or that the employee be compensated in some form.

In *Vorster v Rednave Enterprises CC t/a Cash Convertors Queenswood*¹⁵⁴, the applicant claimed unfair dismissal as after her probationary period of three months, she was not permanently employed. The court pointed out that the question of whether an employee can rely on Section 186(1)(b) where they had a reasonable expectation of permanent employment remains moot. However, the court held that the employee had proved that she had an "objectively reasonable expectation"¹⁵⁵ that her contract would be renewed. She was therefore held to have been dismissed. This was based on the promise made by the employer that she would be permanently employed after the three month probationary period. This case illustrates the point that an employee who is employed on a probationary period usually develops an expectation that permanent employment will be offered after

¹⁵³ *Gubevu Security Group (Pty) Ltd v Ruggiero NO and Others* (2012) 33 ILJ 1171 (LC) Para 21; M Olivier "Legal constraints on the termination of fixed term contracts of employment: An enquiry into recent developments" (1996) 17 ILJ 1001 under the heading titled "Nature of the expectation".

¹⁵⁴ *Vorster v Rednave Enterprises CC t/a Cash Convertors Queenswood* (2009) 30 ILJ 407 (CC).

¹⁵⁵ *Ibid.*

the probation period has successfully been completed. If, during this period, the employer did not have any issues or grievances with the employee, or did not address any problems with the employees' performance, the employer will have some difficulty in arguing that the non-renewal was for a good reason.¹⁵⁶

The court in *Vorster v Rednave Enterprises CC t/a Cash Convertors Queenswood*¹⁵⁷ did not offer any remedy as the court did not have jurisdiction to hear the matter and the matter was referred back to the CCMA for arbitration.¹⁵⁸

In the case of *SACTWU v Mediterranean Woollen Mills (Pty) Ltd*¹⁵⁹, the employment contract contained a clause stating that no reasonable expectation for the renewal of the fixed-term contract "could arise from the nature of the contract".¹⁶⁰ The court stated that it is possible that the relationship that exists between the employer and employee can be viewed as aiming at a relationship of a permanent duration- even though the contract between the parties may state the contrary. This is the case if, during the subsistence of the employment relationship the employer made certain assurances or representations which led the employee to believe that there was a possibility of

¹⁵⁶ J Rheeder "The muddy waters of legitimate expectations in fixed term agreements" Available at:

<http://nteu.nmmu.ac.za/nteu/media/Store/documents/local/SA%20Labour%20Guide/SA%20Labour%20Guide%202011/2011---06---muddy-waters-of-legitimate-expectations-in-fix-term-agreements.doc> Accessed: 26th September 2013.

¹⁵⁷ *Vorster v Rednave Enterprises CC t/a Cash Convertors Queenswood* (2009) 30 ILJ 407 (CC).

¹⁵⁸ *Vorster v Rednave Enterprises CC t/a Cash Convertors Queenswood* (2009) 30 ILJ 407 (CC) paras 31 and 31.

¹⁵⁹ *SACTWU v Mediterranean Woollen Mills (Pty) Ltd* (1995) 4 ILJ 889 (LAC).

¹⁶⁰ S B Gerick "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." (2011) 14(1) *PER* 116.

renewal- whether on a temporary or permanent basis.¹⁶¹ Assurances which are given to the employees outside their contracts (not specifically stated in their contracts in writing) gives them an expectation that such assurances will be given effect. In this case the employer in effect “overruled its own agreement.”¹⁶²

The court held that even though there is a written contract between the parties, setting out the terms of their agreement, the conduct of the employer may then negate some these terms. This seems to go against the parole evidence rule, which intends to uphold the integrity of the written contract.¹⁶³

The court in *SA Rugby Players Association and Others v SA Rugby (Pty) Ltd and Others*¹⁶⁴ emphasised that the CCMA is not a court of law, it is merely a "creature of statute"¹⁶⁵.

Therefore, the CCMA has to follow the law as it is, not as it should be.

In *S v Zuma*¹⁶⁶, the constitutional court held that the courts should interpret legislation as it is set out and not in a way that they "wish it to mean". This principle is important as judges need to consider what the legislation actually says. This has been the position in most of

¹⁶¹ S B Gerick “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.” (2011) 14(1) *PER* 116.

¹⁶² J Rheeder “The muddy waters of legitimate expectations in fix term agreements” Available at: <http://nteu.nmmu.ac.za/nteu/media/Store/documents/local/SA%20Labour%20Guide/SA%20Labour%20Guide%202011/2011---06---muddy-waters-of-legitimate-expectations-in-fix-term-agreements.doc> Accessed: 26th September 2013.

¹⁶³ “Contract law parole evidence rule” Available at: <http://www.polity.org.za/article/contract-law-parole-evidence-rule-2013-04-19> Accessed: 30th September 2013.

¹⁶⁴ *SA Rugby Players Association and Others v SA Rugby (Pty) Ltd and Others* (2008) 29 ILJ 2218 (LAC).

¹⁶⁵ *SA Rugby Players Association and Others v SA Rugby (Pty) Ltd and Others* (2008) 29 ILJ 2218 (LAC) at para 39-41.

¹⁶⁶ *S v Zuma* (1995) 2 SA 642 (CC).

the cases relating to fixed-term contracts, especially where the employee had a reasonable expectation of permanent employment, and they were then not offered this. In terms of Section 186(1)(b) of the LRA, the employee had no reasonable expectation of permanent employment and therefore, the law had to be applied accordingly. However the LRAB has changed this position and will be discussed in the chapters ahead.

4.3 What relief may be granted to an employee or employees who successfully prove that they have a reasonable expectation?

The courts have created reinstatement as a remedy but there have been conflicting views on what constitutes appropriate relief to successful employees.

4.3.1. Reinstatement

In *Tshongweni v Ekurhuleni Metropolitan Municipality*,¹⁶⁷ the court confirmed that where a claim is made under Section 185(1)(b) of the LRA the remedy cannot exceed what the employee was entitled to under the contract of employment. It was emphasised that the court or the CCMA cannot and will not create a new agreement between the parties; it will only uphold the original agreement.¹⁶⁸ This means that if an employee is reinstated; he will be reinstated on the same terms, with the same contract in force. However, the court may order that the employees' contract be renewed, and

¹⁶⁷ *Tshongweni v Ekurhuleni Metropolitan Municipality* [2010] 10 BLLR 1105 (LC).

¹⁶⁸ J Rheeder "The muddy waters of legitimate expectations in fix term agreements" Available at: <http://nteu.nmmu.ac.za/nteu/media/Store/documents/local/SA%20Labour%20Guide/SA%20Labour%20Guide%202011/2011---06---muddy-waters-of-legitimate-expectations-in-fix-term-agreements.doc> Accessed: 26th September 2013.

not that the employee be employed only for the remaining duration of the contract.

The court in *SEAWU v Trident Steel*¹⁶⁹ held that where the court orders that the employee be reinstated, the same contract that was concluded between the employer and the employee comes into force, there is no new contract of employment. Agreeing with this reasoning, *Grogan*¹⁷⁰ states that “because reinstatement revives the original employment contract, the court and arbitrators cannot fashion new contracts when they order reinstatement”.¹⁷¹

This has been confirmed in the case of *Cash Paymaster Services Northwest (Pty) Ltd v Commission for Conciliation, Mediation & Arbitration & others*¹⁷². In this case, the court held that the nature of the contract needs to be examined before an order as to reinstatement can be made. This issue was taken to arbitration a month before the fixed-term contract was due to expire. The Labour Court held that the arbitrator had gone beyond her powers by ordering a reinstatement as she had in effect extended the fixed-term contract beyond its term. The arbitrator's ruling was set aside, and replaced with an order awarding compensation to the employee for the remaining duration of the fixed-term contract.¹⁷³

¹⁶⁹ *SEAWU v Trident Steel* (1986) 7 ILJ 418 (IC).

¹⁷⁰ Grogan J *Dismissal, Discrimination & Unfair Labour Practices* (2005) at page 449.

¹⁷¹ *Tshongweni v Ekurhuleni Metropolitan Municipality* [2010] 10 BLLR 1105 (LC) at para 23.

¹⁷² *Cash Paymaster Services Northwest (Pty) Ltd v Commission for Conciliation, Mediation & Arbitration & others* (2009) 30 ILJ 1587 (LC).

¹⁷³ *Cash Paymaster Services Northwest (Pty) Ltd v Commission for Conciliation, Mediation & Arbitration & others* (2009) 30 ILJ 1587 (LC) at para 26.

4.3.2. Other forms of relief

There are conflicting decisions regarding what other forms of appropriate relief may be given to employees who have been employed on fixed-term contracts. What form of relief may be granted is dependent on the facts, circumstances of the case and the discretion of the court hearing the matter.

In the case of *Owen & others v Department of Health, KwaZulu Natal*¹⁷⁴ of the court held that where an employee is employed on a fixed-term contract and is allowed to work beyond the date of expiry of that contract, the contract is deemed to be renewed.

Further, the court held that such an employee “may be entitled to claim and be granted permanent employment.”¹⁷⁵

In *Gubevu Security Group (Pty) Ltd v Ruggiero NO and others*¹⁷⁶, the employee continued to work beyond the expiry of her three month fixed-term contract and was then notified that her contract would not be renewed. The Labour Court had to determine the appropriate relief to grant to her and held that she did not have a reasonable expectation of permanent employment based on the terms of her contract. However, the appropriate relief where an employee had a reasonable expectation that her fixed-term contract would be renewed (and it was then not renewed) was a renewal of the fixed-term contract either on the same terms or similar terms of the previous fixed-term contract.

¹⁷⁴ *Owen & others v Department of Health, KwaZulu Natal* (2009) 30 ILJ 2461 (LC).

¹⁷⁵ Naidoo, M. “Fixed-term contracts: The current jurisprudence and the impact of the amendments.” Available at: <http://www.nortonrosefulbright.com/files/za-fixed-term-contracts-72237.pdf> Accessed: 23rd September 2013 at page 4.

¹⁷⁶ *Gubevu Security Group (Pty) Ltd v Ruggiero NO and Others* (2012) 33 ILJ 1171 (LC).

This issue of whether an employee could develop a reasonable expectation of permanent employment where he/she has been employed on a fixed-term contract was addressed by the Labour Court in *University of Pretoria v Commission for Conciliation, Mediation and Arbitration & others*¹⁷⁷. It was held that the scope of Section 186(1)(b) does not include a reasonable expectation of permanent employment. The court held further that the appropriate relief to be awarded, where a person proves a reasonable expectation is a “renewal of the fixed term contract of employment on the same or similar terms.” However, there was nothing stopping the employer from employing *Geldenhuis*¹⁷⁸ on a permanent basis. From the facts, it seems like the employment relationship was solid and free from any conflict, therefore the employer-employee relationship still seemed intact. It is submitted that the *Geldenhuis* was entitled to permanent employment.

The impact of the Labour Relations Amendment Bill is that even though there has been debate regarding the above two issues (viz: when does a person have a reasonable expectation, and once this is proved, what is the appropriate relief), the Bill changes the position adopted by the Labour Appeal Court by introducing “an additional right to claim unfair dismissal”¹⁷⁹ in the following two circumstances:

¹⁷⁷ *University of Pretoria v Commission for Conciliation, Mediation and Arbitration & others* (2012) 33 ILJ 183 (LAC).

¹⁷⁸ *University of Pretoria v Commission for Conciliation, Mediation & Arbitration & others* [2012] 2 BLLR 164 (LAC).

¹⁷⁹ Personnel Today “Employment law changes: Increase in unfair dismissal qualifying period” Available at: <http://www.personneltoday.com/articles/13/03/2012/58415/6-april-2012-employment-law-changes-increase-in-unfair-dismissal-qualifying-period.htm> Accessed: 30th September 2013.

Firstly, where an employee is employed on a fixed-term contract and has a reasonable expectation of renewal on either the same terms or similar terms, and the employer did not renew this contract or renewed it on terms which are less favourable than the original fixed-term contract;

Secondly, where the employer offers to retain the employee on an indefinite basis on the same or similar terms as the fixed-term contract, but instead offers to retain the employee on terms which are less favourable than the terms contained in the fixed-term contract, or did not offer to retain the employee at all.¹⁸⁰ Under similar circumstances, that is, where the employer offers indefinite employment on less favourable terms, or offers no permanent employment at all provides for an additional cause of action which permits a person who has a reasonable expectation to claim permanent or indefinite employment.

4.4 Academic critique of fixed-term contracts

*Gerick*¹⁸¹ is of the opinion that a "Code of Good Practice" restricting the renewal of fixed-term contracts should be implemented, to serve as a guide on the renewal of fixed-term contracts¹⁸². He suggests that the first step to take in developing this area of labour law would be to acknowledge that there is a need for legal certainty. He also proposed, before

¹⁸⁰ Labour Relations Amendment Bill 2012, amendment to section 186 of the Labour Relations Act 66 of 1995.

¹⁸¹ S B Gerick "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." (2011) 14(1) *PER* 104-136

¹⁸² S B Gerick "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." (2011) 14(1) *PER* 104-136 at page 130.

the introduction of the LRAB, that section 186(1)(b) of the Act be amended¹⁸³ by the legislature to counter the difficulties that have arisen for employees as the aim of the act is essentially to protect employees as they are the weaker parties in the employment relationship.¹⁸⁴

*Grogan*¹⁸⁵ considers an objective test in determining a reasonable expectation: "the employee must prove the existence of facts that would lead a reasonable person to anticipate renewal."¹⁸⁶ He also notes that whether a reasonable expectation does exist depends on the facts of each case. However, a reasonable expectation would usually arise as a result of a "prior promise or past practise".¹⁸⁷ He also makes the crucial point that "there is no reason in logic or law why an expectation of permanent employment should not provide a ground for a claim for dismissal in terms of Section 186(1)(b)."¹⁸⁸

*Cohen*¹⁸⁹, in discussing the rights of employees states that where a promisor makes a promise, the promisee will have to prove to the court that "a reasonable person in the

¹⁸³ S B Gerick "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." (2011) 14(1) *PER* 104-136 at page 130

¹⁸⁴ S B Gerick "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." (2011) 14(1) *PER* 104-136 at page 106.

¹⁸⁵ J Grogan *Workplace Law* 8ed (2005).

¹⁸⁶ J Grogan *Workplace Law* 8ed (2005) at page 168.

¹⁸⁷ *Ibid.*

¹⁸⁸ *Ibid.*

¹⁸⁹ T Cohen "Employees rights to discretionary benefits" 2010 127(3) *SALJ* 443-462.

position of the promisor would have foreseen such reliance."¹⁹⁰ An employee may rely on the promise or assurance by the employer and may form an "expectation of entitlement."¹⁹¹

She also points out that the promise of discretionary benefits is also abused by employers. Since the renewal of a fixed-term contract is at the discretion of the employer, it can be argued that this falls under the category of "discretionary benefits"¹⁹². Usually, to increase performance by employees, employers promise them various benefits, bonuses or an increase in remuneration. However, employees are not always legally entitled to these benefits. Even though employees may hold on to this a reasonable expectation which was brought about by these promises, this does not mean that that these expectations will materialise if they lie solely with the discretion of the employer.¹⁹³ This is relevant in assessing the prior position of fixed-term contracts and a reasonable expectation of renewal of the contract, or a reasonable expectation of permanent employment. Previously, under Section 186(1)(b) of the Labour Relations Act 66 of 1995, an employee who claimed a dismissal based on the non-renewal of his fixed-term contract, was effectively, only allowed to allege and prove a reasonable expectation of a renewal of his fixed-term contract on the same or similar terms. Where an employee alleged a reasonable expectation of permanent employment, the law in terms of Section 186(1)(b) did not cover this situation.

¹⁹⁰ T Cohen "Employees rights to discretionary benefits" 2010 127(3) *SALJ* 443-462 at page 458.

¹⁹¹ *Ibid.*

¹⁹² T Cohen "Employees rights to discretionary benefits" 2010 127(3) *SALJ* 443-462 at page 443.

¹⁹³ T Cohen "Employees rights to discretionary benefits" 2010 127(3) *SALJ* 443-462 at page 443.

*Vettori*¹⁹⁴ states that fairness and reasonableness are always applied in determining the outcome of the case. She states that "a subjective belief or expression based on an objectively reasonable interpretation" of the current state of affairs, taking into consideration the employers conduct, will give rise to "a right of renewal in terms of both the common law and in terms of Section 186(1)(b)".¹⁹⁵

She states that since a fixed-term contract usually terminates automatically, this has many benefits for the employer. However, advantages for the employer usually mean disadvantages for the employee.¹⁹⁶ The employer will not be responsible for contributing towards the employees' pension fund, medical aid and other benefits which are enjoyed by permanent employees. Further, by letting the fixed-term contract terminate without renewing it means that the employer saves time as he does not have to go through the procedures which he would usually engage in to dismiss an employee as the fixed-term contract expires automatically and the employee is therefore, automatically left unemployed.¹⁹⁷

Another important consideration is that a claim for the renewal of a "fixed-term contract on a permanent basis should be possible in terms of the Act if the surrounding

¹⁹⁴ S Vettori "Fixed-term employment contracts: The permanence of the temporary" (2008) 2 *STELL LR* 189-208.

¹⁹⁵ S Vettori "Fixed-term employment contracts: The permanence of the temporary" (2008) 2 *STELL LR* 190.

¹⁹⁶ S Vettori "Fixed-term employment contracts: The permanence of the temporary" (2008) 2 *STELL LR* 189

¹⁹⁷ S Vettori "Fixed-term employment contracts: The permanence of the temporary" (2008) 2 *STELL LR* 189

circumstances justify it."¹⁹⁸ This will be beneficial as it would provide job certainty to the employee who will then know where he stands in terms of his employment.

More importantly, since the constitutional right to fair labour practises backs legislation, it is not logical to limit the scope of Section 186(1)(b) to the renewal of another fixed-term contract, if the circumstances point to a reasonable expectation of permanent employment.

Reasonableness and fairness are also important factors to consider- however, how they are interpreted and applied in determining a dispute relating to a fixed-term contract may be problematic.¹⁹⁹ It is usually implied that there is mutual trust in contracts of employment, coupled with the Constitutional right of fair labour practices.²⁰⁰ Fairness and reasonableness are also important when the arbitrator is deciding on the appropriate award to be made where the parties have a dispute.²⁰¹

*Olivier*²⁰² is of the opinion that in determining the outcome of a case, due regard should be given to the terms of the contract itself, relevant legal principles, surrounding circumstances and most importantly, the conduct of the respective parties.

It remains to be seen how the Bill will be interpreted and applied by the courts, and what relief will be granted to employees who prove the requirements of the amended Section 186(1)(b). The one issue which is most likely to come up is the fact that a court

¹⁹⁸ S Vettori "Fixed-term employment contracts: The permanence of the temporary" (2008) 2 *STELL LR* 190.

¹⁹⁹ S Vettori "Fixed-term employment contracts: The permanence of the temporary" (2008) 2 *STELL LR* 196.

²⁰⁰ S Vettori "Fixed-term employment contracts: The permanence of the temporary" (2008) 2 *STELL LR* 190.

²⁰¹ *Ibid.*

²⁰² M Olivier "Legal constraints on the termination of fixed-term contracts of employment: An enquiry into recent developments" (1996) 17 *ILJ* 1001.

cannot order an employer to employ someone indefinitely as this could lead to even more problems. However, the court can order that an employee be re-instated or order for the employer to conclude a further fixed-term contract with the employee- depending on the circumstances of the case and the duration of the employees' initial contract with the employer. The employer will face additional costs in employing that person indefinitely, and will then have to follow the procedures set out in the LRA before he dismisses that permanent employee. Further, the employee can argue that by being forced to employ someone indefinitely, there will be no mutual confidence and trust between the employer and the employee.

4.5 Conflict resolved by the Labour Appeal Court

The Labour Court in *Gubevu Security Group (Pty) Ltd v Ruggiero & others*²⁰³ considered the recent judgment of the Labour Appeal Court in *University of Pretoria v Commission for Conciliation, Mediation & Arbitration & others*²⁰⁴ and “following that decision, found that the wording of Section 186(1)(b) of the LRA requires that, to constitute a dismissal, an employee must have had a reasonable expectation that the contract would be renewed on the same or similar terms, and that it was not so renewed. It thus cannot lead to an expectation of permanent employment.”²⁰⁵

²⁰³ *Gubevu Security Group (Pty) Ltd v Ruggiero NO & others* (2012) 33 ILJ 1171 (LC).

²⁰⁴ *University of Pretoria v Commission for Conciliation, Mediation & Arbitration & others* (2012) 33 ILJ 183 (LAC)

²⁰⁵ “Industrial Law Journal Preview”. Available at:

<http://www.jutalaw.co.za/newsletter/newsletter/ilj-monthly-preview-may-2012/> Accessed: 8th November 2013.

4.6 Criticism of *University of Pretoria* and section 186(1)(b)

The issues presented in *University of Pretoria v Commission for Conciliation, Mediation and Arbitration & others*²⁰⁶ (Geldenhuys' employer appealed against the decision of the Labour court which favoured the employee) have been subject to controversy and conflicting judgments.

In light of the above, I propose the following scenario in order to illustrate how fixed-term contracts have the potential to deprive employees of permanent employment as well as the benefits that accompany it:

"Employee A" was employed on a one year fixed-term contract and was told that he would be employed on a permanent basis if his conduct was satisfactory. For the duration of the contract, he was assured that he was performing well. Objectively, would a reasonable employee expect permanent employment if he was in the same position? Yes. This is because from the words of the employee, the one year contract could be interpreted as being a probationary period as this was subject to his performance during that time period.

In the current job market, where the unemployment rate is high, a person who is advised or assured by his or her employer that he will be permanently employed after a one year fixed-term contract will develop an expectation. This expectation itself would lead to better performance by the employee- in the hope that the employer will take note of this performance in a positive way and keep to his word. Another important consideration is that a permanent employee is likely to perform better and develop a relationship of trust between himself and his employer- and this could lead to a promotion or increase in benefits. In the same way, an employee employed on a fixed-term contract can be said to be

²⁰⁶ *University of Pretoria v Commission for Conciliation, Mediation & Arbitration & others* [2012] 2 BLLR 164 (LAC).

entitled to expect permanent employment if his conduct exceeds expectations. In my opinion, a move from a fixed-term contract of employment to permanent employment would be seen as a form of promotion. It is also important to note that a person who is unemployed would rather settle for a fixed-term contract instead of being unemployed. This fact is usually abused by employers.

By using fixed-term contracts, the employer could also experience a loss of skills as a result of not employing his or her employees on a permanent basis. Permanent employees have the potential of becoming assets to the employer.

With regards to the application of Section 186(1)(b), there have been conflicting decisions. However, it is essentially the courts that influence the legislature to amend the law where necessary. When legislation is passed, the provisions enacted do not usually cover every single situation that might arise. It is up to the courts to determine how to apply these provisions. Where these provisions are deemed to be too narrow or far-reaching, the courts note this and eventually, changes are made. This leads to the issue of discretion. Usually, judicial officers have a discretion with regards to the outcome of a case- what might be fair and just to one person, may not be the same to another.

It is also accepted that a fixed term contract must be renewed a number of times before the non-renewal of one can be said to constitute a dismissal under Section 186(1)(b). However, in the scenario presented above, "employee A" was employed on a one year fixed-term contract- not many successive fixed-term contracts, therefore if the employee took the matter to the CCMA, the CCMA will probably conclude that he failed to prove that he was dismissed. However, where a person is employed on 12 successive one month fixed-term contracts, will this constitute a dismissal? It seems likely that a dismissal would be present and it could also be said that the employer is escaping the provisions of the LRA by

concluding these 12 contracts instead of employing the employee permanently. If the employer in *University of Pretoria*²⁰⁷ could offer to renew the employees' fixed-term contract for a fourth year, what's stopping him from employing her on a permanent basis?

In terms of "employee A", it is contended that the employer made a tacit promise to the employee that he will be permanently employed- on the basis of his performance. The employee was misled into believing this promise, therefore under Section 185 and on authority of *Gubevu*²⁰⁸, the failure to offer the employee permanent employment could constitute an unfair dismissal.

There are also constitutional implications. Every employee has a right to fair labour practises under the Constitution²⁰⁹.

The courts have recognised the defect in the LRA and proposed amendments are to be made. However, will the employee only be aided by the legal system once the amendments are made? This seems unfair as the defect has already been recognised, but the changes have not been made yet.

5. The Labour Relations Amendment Bill (LRAB)

The Labour Relations Amendment Bill B16B-2012 was introduced by the National Assembly on 20th August 2013. The Bill introduces notable and major changes into the current LRA and this will affect businesses and employers significantly.²¹⁰

²⁰⁷ *University of Pretoria v Commission for Conciliation, Mediation & Arbitration & others* [2012] 2 BLLR 164 (LAC).

²⁰⁸ *Gubevu Security Group (Pty) Ltd v Ruggiero NO and others* [2012] 4 BLLR 354 (LC).

²⁰⁹ The Constitution of the Republic of South Africa 1996, Section 23.

Fixed-term contracts are utilised by employers who opt for flexibility and problem-free termination of contracts of employment. The implementation of the Labour Relations Amendment Bill of 2012 allows employees to bring unfair dismissal claims against their employers where they are employed on fixed-term contracts and these then automatically terminate either on the date of expiry of the contract, or once the task for which they have been employed has been completed. This will apply to all employees who are employed on fixed-term contracts, irrespective of how much they earn.

The Bill also provides further protection by regulating fixed-term contracts and how they are used. The protection offered by the Bill will apply to persons falling into the category of “vulnerable workers”. These workers are identified by the amount that they earn. The threshold of earnings is set out in the BCEA, which sets out that additional protection will apply to those workers who earn below R183,008.00 per annum, or R15,250.00 a month.

The law relating to an unfair dismissal claim in terms of Section 186 of the LRA has developed in two areas: Firstly, where the employee proves a reasonable expectation of renewal of the fixed-term contract, or the expectation of permanent employment. Secondly, the relief that may be granted where the employee has proven a reasonable expectation.

²¹⁰Niewoudt, H. “Labour Relations Amendment Bill, 2012.” Available at: <http://www.nortonrosefulbright.com/news/65149/labour-relations-amendment-bill-2012#.UhrIVhuSJco.email> Accessed: 27th August 2013.

The proposed amendments to the Acts can be grouped under the following five themes²¹¹:

1. Vulnerable employees being provided with satisfactory protection;
2. Aiming to comply with international standards;
3. Safeguarding and giving effect to fundamental Constitutional rights, including the right to fair labour practises, the right to be able to partake in collective bargaining, the right to equality and protection of employees from discrimination;
4. Improving the efficiency of various bodies which regulate labour disputes such as: the Labour Court and the CCMA;
5. Remedying irregularities and clarifying any uncertainties which may have arisen from the “interpretation by the courts and application of these two statutes in the past decade.”²¹²

The bill regulates labour broking and temporary employment services, but does not ban them.²¹³ Issues relating to organisational rights, the right to essential services, the right to strike and the liability for unlawful conduct relating to a strike as well as temporary

²¹¹ J Rheeder “Labour Relations Act, Legislation and Labour law amendments”. Available at: <http://www.jrattorneys.co.za/south-african-labour-law-case-articles/legislation-and-labour-law-amendments.html> Accessed: 9th September 2013.

²¹² J Rheeder “Labour Relations Act, Legislation and Labour law amendments”. Available at: <http://www.jrattorneys.co.za/south-african-labour-law-case-articles/legislation-and-labour-law-amendments.html> Accessed: 9th September 2013.

²¹³ SAPA “Labour Relations Amendment Bill passed”. Available at: <http://www.engineeringnews.co.za/article/labour-relations-amendment-bill-passed-2013-08-21> Accessed: 9th September 2013.

employment and fixed-term contracts are addressed by the Labour Relations Amendment Bill.²¹⁴

In terms of the LRAB, an award of the CCMA may now be enforced as if it were an award of the Magistrates court. This will make proceedings more effective and cheaper, especially in rural areas and in places where the labour court does not sit.²¹⁵

5.1 Amendment to Section 186(1)(b) of the Labour Relations Act 66 of 1995

The Bill has also extended the definition of dismissal²¹⁶. Dismissal, as per Section 186(1)(b) has now been extended to include a reasonable expectation of employment where an employee has been employed on a fixed-term contract, had a reasonable expectation that he would be retained permanently on the same or similar terms, then having the employer not retain him as a permanent employee because the employer offered to renew it on less favourable terms or did not renew it at all.²¹⁷

²¹⁴ Niewoudt, H. "Labour Relations Amendment Bill, 2012." Available at: <http://www.nortonrosefulbright.com/news/65149/labour-relations-amendment-bill-2012#.UhrIVhuSJco.email> Accessed: 27th August 2013.

²¹⁵ *Ibid*

²¹⁶ The previous definition is set out in section 186(1)(b) of the Act.

²¹⁷ Niewoudt, H. "Labour Relations Amendment Bill, 2012." Available at: <http://www.nortonrosefulbright.com/news/65149/labour-relations-amendment-bill-2012#.UhrIVhuSJco.email> Accessed: 27th August 2013.

5.2 Non-standard employees

Section 198B of the Labour Relations Act regulates the position regarding Temporary Employment Services (TES).

Labour brokers are not banned, but are now regulated by the Bill- to an extent. The Bill provides protection, extensively to employees falling into these categories: fixed-term employees, part-time employees, and employees of a temporary employment service (“TES” or “labour brokers”).²¹⁸

The Bill provides that employees engaged by a labour broker may only perform genuinely temporary work. The period for which an employee may be employed by a TES is now 3 months- as opposed to the previous duration of 6 months. If they are employed for a longer period, they are deemed to be employees of the employer. Such employees have to be treated the same as permanent employees, and be remunerated on the same rate. This will be the case unless the employer can justify a difference in treatment or remuneration.²¹⁹

Section 198(B) of the LRAB²²⁰ provides that employees who earn below the earnings threshold (determined by the Minister) of R193 805.00 per annum²²¹ may not be

²¹⁸ Niewoudt, H. “Labour Relations Amendment Bill, 2012.” Available at: <http://www.nortonrosefulbright.com/news/65149/labour-relations-amendment-bill-2012#.UhrIVhuSJco.email> Accessed: 27th August 2013.

²¹⁹ Niewoudt, H. “Labour Relations Amendment Bill, 2012.” Available at: <http://www.nortonrosefulbright.com/news/65149/labour-relations-amendment-bill-2012#.UhrIVhuSJco.email> Accessed: 27th August 2013.

²²⁰ Section 198(B) was inserted by the LRAB into the LRA.

²²¹ Cliffe, Dekker, Hofmeyr. “Labour Relations Amendment Bill Adopted by the National Assembly”. Available at: <http://www.polity.org.za/article/labour-relations-amendment-bill-adopted-by-the-national-assembly-2013-08-26> Accessed: 9th September 2013.

employed on a fixed-term contract for a period exceeding 6 months. However, if the employer can justify the reason for employing such a person on a fixed-term contract for more than 6 months, this will be allowed.²²² However, the circumstances of each situation differ and this requirement is not as clear cut as it appears.

Justifiability is the underlying principle of the amendment to section 198B of the Act.²²³

An employer must be able to sufficiently justify the reason for the fixed-term contract, and why the employee has not been employed permanently.²²⁴

5.3 Justifiable reasons for employing persons temporarily

A list of justifiable reasons are included in the Labour Relations Amendment Bill (this list is not exhaustive):²²⁵

“1. Replacement of an employee who is temporarily absent from work;

²²² *Ibid.*

²²³ Section 198B does not apply to:

“(a) *employees* earning in excess of the threshold prescribed by the *Minister* in terms of section 6(3) of the *Basic Conditions of Employment Act*;

(b) an employer that employs less than 10 *employees*, or that employs less than 50 *employees* and whose business has been in operation for less than two years, unless-

(i) the employer conducts more than one business; or

(ii) the business was formed by the division or dissolution for any reason of an existing business; and

(c) an *employee* employed in terms of a fixed term contract which is permitted by any statute, sectoral determination or *collective agreement*.”

²²⁴ Cliffe, Dekker, Hofmeyr. “Labour Relations Amendment Bill Adopted by the National Assembly”. Available at: <http://www.polity.org.za/article/labour-relations-amendment-bill-adopted-by-the-national-assembly-2013-08-26> Accessed: 9th September 2013.

²²⁵ Naidoo, M. “Fixed-term contracts: The current jurisprudence and the impact of the amendments.” Available at: <http://www.nortonrosefulbright.com/files/za-fixed-term-contracts-72237.pdf> Accessed: 23rd September 2013 at page 7.

2. An employee engaged on account of a temporary increase in the volume of work which is not expected to endure beyond 12 months;
3. The employee is a student or recent graduate who is employed for the purpose of being trained or gaining work experience in order to enter a job or profession;
4. The employee is engaged to work exclusively on a genuine and specific project that has a limited or defined duration;
5. The employee has been engaged for a trial period of not longer than six months for the purpose of determining the employee's suitability for employment;
6. The employee is a non-citizen who has been granted a work permit for a defined period;
7. The employee is engaged to perform seasonal work;
8. The employee is engaged in a position which is funded by an external source for a limited period;
9. The employee has reached a normal or agreed retirement age applicable in the employer's business."²²⁶

This list does seem fair at the outset but it remains to be seen how these categories will apply in practise, and more importantly, how they will be analysed by the courts. The list is also said to be one that is not exhaustive which then leads to the question of how the courts will decide which circumstances may or may not fall into this list.

5.4. General criticisms of the Bill

In a paper submitted by the Solidarity Trade Union ("the Union"), it was proposed comments relating to the amendments of the Labour Relations Act ("the LRA"), the

²²⁶ *Ibid.*

Basic Conditions of Employment Act (“the BCEA”), the Employment Equity Act (“the EEA”) and the proposed Employment Services Bill (“the ESB”) which were issued by the Minister of Labour. However, to keep in line with this topic, only relevant comments will be discussed.²²⁷

At the outset, the Union pointed out that it agreed with government’s attempts to promulgate legislation which has the effect of protecting employees and preventing their exploitation and abuse. However, they stressed that attention also has to be paid to the various realities facing South Africa.²²⁸ Factors which were set out included: job creation, economic growth and fighting poverty,²²⁹ the protection of Constitutional rights and the accountability of government.²³⁰ The Union also praised government for

²²⁷ Solidarity Trade Union. “Comments on the Labour Relations Amendment Bill, the Basic Conditions of Employment Amendment Bill, the Employment Equity Act Amendment Bill and the Employment Services Bill”. Available at: <http://navorsing.co.za/wp-content/uploads/2011/02/labour-bills.pdf> Accessed: 9th September 2013 at para 1.1

²²⁸ Solidarity Trade Union. “Comments on the Labour Relations Amendment Bill, the Basic Conditions of Employment Amendment Bill, the Employment Equity Act Amendment Bill and the Employment Services Bill”. Available at: <http://navorsing.co.za/wp-content/uploads/2011/02/labour-bills.pdf> Accessed: 9th September 2013 at para 2.2

²²⁹ Solidarity Trade Union. “Comments on the Labour Relations Amendment Bill, the Basic Conditions of Employment Amendment Bill, the Employment Equity Act Amendment Bill and the Employment Services Bill”. Available at: <http://navorsing.co.za/wp-content/uploads/2011/02/labour-bills.pdf> Accessed: 9th September 2013 at paras 2.2.1-2.2.3

²³⁰ Solidarity Trade Union. “Comments on the Labour Relations Amendment Bill, the Basic Conditions of Employment Amendment Bill, the Employment Equity Act Amendment Bill and the Employment Services Bill”. Available at: <http://navorsing.co.za/wp-content/uploads/2011/02/labour-bills.pdf> Accessed: 9th September 2013 at paras 2.2.4-2.2.5

aiming to protect the right to fair labour practises and striving towards the creation of decent work for all.²³¹

However, they expressed the opinion that the way in which government set out to implement these goals, by introducing and amending various bills was not the most practical or ideal way to do it.²³² They stressed that it was their “considered opinion that the vehicle that government has in this instance chosen to reach this goal, namely the introduction of the Bills, is to a large extent unworkable, ill-conceived and if implemented will have severe consequences on the industrial system in South Africa, on the South African economy as a whole and on job creation and the fight against poverty.”²³³

The irony here lies in the fact that the governments aims, which are²³⁴ “... to ensure that vulnerable categories of workers receive adequate protection and are employed in conditions of decent work, by regulating sub-contracting, contract work and outsourcing” and “...to ensure the protection of fundamental Constitutional rights including the right to fair labour practices, to engage in collective bargaining and the right to equality and the protection from discrimination for, for all categories of

²³¹ Solidarity Trade Union. “Comments on the Labour Relations Amendment Bill, the Basic Conditions of Employment Amendment Bill, the Employment Equity Act Amendment Bill and the Employment Services Bill”. Available at: <http://navorsing.co.za/wp-content/uploads/2011/02/labour-bills.pdf> Accessed: 9th September 2013 at para 3.1.

²³² Solidarity Trade Union. “Comments on the Labour Relations Amendment Bill, the Basic Conditions of Employment Amendment Bill, the Employment Equity Act Amendment Bill and the Employment Services Bill”. Available at: <http://navorsing.co.za/wp-content/uploads/2011/02/labour-bills.pdf> Accessed: 9th September 2013 at para 3.2

²³³ *Ibid.*

²³⁴ *Ibid.*

workers”²³⁵ will largely be invalid and will not in fact achieve their purpose if the proposed bills and amendments were to be implemented in the form presented.²³⁶

The LRAB may provide for better employment conditions and permanent employment for employees who are employed by Temporary Employments Services and on fixed-term contracts, it is evident that many employees who fall into these categories may be left job-less as a result of their employers finding compliance with new labour legislation too onerous.²³⁷

The Union also pointed out the obvious irony that would arise upon the implementation of the bills- the aim of the various bills and amendments is to promote better and permanent employment, however, many employees will stand to lose their jobs once these bills come into effect. The aims of the Government are in contrast with the provisions of the bills.²³⁸

²³⁵Solidarity Trade Union. “Comments on the Labour Relations Amendment Bill, the Basic Conditions of Employment Amendment Bill, the Employment Equity Act Amendment Bill and the Employment Services Bill”. Available at: <http://navorsing.co.za/wp-content/uploads/2011/02/labour-bills.pdf> Accessed: 9th September 2013 at para 3.3.

²³⁶ Labour Relations Amendment Bill of 2010; 2012.

²³⁷ Solidarity Trade Union. “Comments on the Labour Relations Amendment Bill, the Basic Conditions of Employment Amendment Bill, the Employment Equity Act Amendment Bill and the Employment Services Bill”. Available at: <http://navorsing.co.za/wp-content/uploads/2011/02/labour-bills.pdf> at para 3.4.

²³⁸ Solidarity Trade Union. “Comments on the Labour Relations Amendment Bill, the Basic Conditions of Employment Amendment Bill, the Employment Equity Act Amendment Bill and the Employment Services Bill”. Available at: <http://navorsing.co.za/wp-content/uploads/2011/02/labour-bills.pdf> Accessed: 9th September 2013 at para 3.5.

Further, it was contended that some of the provisions of the proposed legislation are not in line with existing legislation- their provisions being unclear and lacking clarity which “may quite plausibly contribute to legal uncertainty if not aligned to existing legislation.”²³⁹ However, they did find that some provisions were “workable” when read alone and when “not assessed as forming part of the Bills in their current format.”²⁴⁰ It was further suggested that these provisions needed more detail and needed to be elaborated on to provide for a degree of certainty.²⁴¹

The Union was of the opinion that minor alterations to the bills will not be enough to achieve the aims set out by the Government. They suggested that all bills that Government proposed to change (in the labour law sphere) should be retracted and re-assessed, while taking into account the input of persons and organisations that are affected.²⁴² However, this comment does not seem feasible as it might take a long time before government even contemplates doing this as the re-drafting of all labour law legislation will not be an easy or cheap task. Further, new legislation always has gaps or

²³⁹ Solidarity Trade Union. “Comments on the Labour Relations Amendment Bill, the Basic Conditions of Employment Amendment Bill, the Employment Equity Act Amendment Bill and the Employment Services Bill”. Available at: <http://navorsing.co.za/wp-content/uploads/2011/02/labour-bills.pdf> Accessed: 9th September 2013 at para 3.7.

²⁴⁰ Solidarity Trade Union. “Comments on the Labour Relations Amendment Bill, the Basic Conditions of Employment Amendment Bill, the Employment Equity Act Amendment Bill and the Employment Services Bill”. Available at: <http://navorsing.co.za/wp-content/uploads/2011/02/labour-bills.pdf> Accessed: 9th September 2013 at para 3.8.

²⁴¹ *Ibid.*

²⁴² Solidarity Trade Union. “Comments on the Labour Relations Amendment Bill, the Basic Conditions of Employment Amendment Bill, the Employment Equity Act Amendment Bill and the Employment Services Bill”. Available at: <http://navorsing.co.za/wp-content/uploads/2011/02/labour-bills.pdf> Accessed: 9th September 2013 at para 3.9.

uncertainty which the courts will then have to straighten out. The amendments have been described by the Union as “job-killing” amendments.²⁴³

The Union commented on the following proposed amendments and stated that these provisions are workable, however, the wording should be re-considered to provide for clarity and unambiguity:

1. The substitution of Section 157 of the LRA which will give exclusive jurisdiction to the Labour Court in all labour related matters that need to be determined in terms of the LRA or other labour legislation.²⁴⁴
2. Extending the meaning of dismissal in terms of Section 186 of the LRA to “include circumstances where an employee, engaged under a fixed term contract of employment, reasonably expected the employer to offer that employee and 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 a reasonable expectation.”²⁴⁵

²⁴³ Ensor, L. “DA in last-ditch bid to change Labour Relations Amendment Bill”. Available at: <http://www.bdlive.co.za/national/labour/2013/06/20/da-in-last-ditch-bid-to-change-labour-relations-amendment-bill> Accessed: 9th September 2013.

²⁴⁴ Solidarity Trade Union. “Comments on the Labour Relations Amendment Bill, the Basic Conditions of Employment Amendment Bill, the Employment Equity Act Amendment Bill and the Employment Services Bill”. Available at: <http://navorsing.co.za/wp-content/uploads/2011/02/labour-bills.pdf> at para 4.3.

²⁴⁵ Solidarity Trade Union. “Comments on the Labour Relations Amendment Bill, the Basic Conditions of Employment Amendment Bill, the Employment Equity Act Amendment Bill and the Employment Services Bill”. Available at: <http://navorsing.co.za/wp-content/uploads/2011/02/labour-bills.pdf> at para 4.4.

This suggested definition may have negative implications for employers as it does seem to be drafted widely. When interpreted subjectively, the definition could include a number of circumstances. It is suggested that the term “reasonable expectation” be given a more concrete interpretation, or at least be given an interpretation which is not too wide.

6. Conclusion

South Africa is a member of the International Labour Organisation (ILO) since the year 1919²⁴⁶ and this gives rise to a duty to keep up with international labour law trends. This obligation is set out in Section 1 of the LRA. The ILO forms part of the United Nations and has the task of founding and controlling these international labour standards.²⁴⁷

A 2011 survey conducted by Statistics South Africa found that approximately 65% of people employed in South Africa are permanent employees, which would mean that the rest of the 35% are employed on temporary or fixed-term contracts.²⁴⁸

While a 2007 survey had reported that approximately 500 000 employees who were employed on fixed-term or temporary contracts were employed by the same employer

²⁴⁶ S B Gerick “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.” (2011) 14(1) *PER* 117.

²⁴⁷ Naidoo, M. “Fixed-term contracts: The current jurisprudence and the impact of the amendments.” Available at: <http://www.nortonrosefulbright.com/files/za-fixed-term-contracts-72237.pdf> Accessed: 23rd September 2013

²⁴⁸ *Ibid.*

for more than three years, and another 300 000 employees were temporarily employed by the same employer for more than 5 years.²⁴⁹

Employers are free to use fixed-term contracts without justification in countries such as Egypt, Lesotho, Singapore, and previously, South Africa.²⁵⁰ In other countries such as Angola, Brazil and Denmark, objective reasons for the use of fixed-term contracts need to be provided.²⁵¹

However, many countries, do not provide a limitation on the duration of a fixed-term contract, or set a limit on the number of fixed-term contracts that may be used; this was the position in South Africa prior to the Labour Relations Amendment Bill. The following statement illustrates, in some way how South Africa has considered international standards and the practises of the countries that are part of the ILO when drafting the LRAB:

²⁴⁹ Naidoo, M. "Fixed-term contracts: The current jurisprudence and the impact of the amendments." Available at: <http://www.nortonrosefulbright.com/files/za-fixed-term-contracts-72237.pdf> Accessed: 23rd September 2013 at page 8; Quartely Labour Force Survey, September 2007 available at: <http://www.statssa.gov.za/publications/P0210/P0210September2000,2001,2002,2003,2004,2005,2006,2007.pdf> Accessed: 23rd September 2013.

²⁵⁰ Naidoo, M. "Fixed-term contracts: The current jurisprudence and the impact of the amendments." Available at: <http://www.nortonrosefulbright.com/files/za-fixed-term-contracts-72237.pdf> Accessed: 23rd September 2013 at page 8.

²⁵¹ *Ibid.*

The position in Belgium is that the maximum number of fixed-term contracts that may be concluded is four. Further, “the maximum cumulative duration of successive fixed term contracts is 36 months.”²⁵²

The position in Brazil differs. The maximum number of fixed-term contracts that may be concluded is two, while the cumulative duration of these successive fixed-term contracts is limited to a duration of two years.²⁵³

In the United Kingdom, an employee may be employed on successive fixed-term contracts for a maximum duration of four years. If the employees’ contract is renewed upon expiry of the four year period, then the employee then becomes a permanent employee unless the employer “can demonstrate a good reason for the continuation of a fixed-term contract.”²⁵⁴

Based on the above, it seems clear that the amendments are in line with international standards regarding the regulation, and possible development of the law relating to fixed-term contracts. However, these changes would mean that employers must prepare themselves to keep in line with legislation.²⁵⁵ Employers need to examine fixed-term

²⁵² Naidoo, M. “Fixed-term contracts: The current jurisprudence and the impact of the amendments.” Available at: <http://www.nortonrosefulbright.com/files/za-fixed-term-contracts-72237.pdf> Accessed: 23rd September 2013 at page 9.

²⁵³ Naidoo, M. “Fixed-term contracts: The current jurisprudence and the impact of the amendments.” Available at: <http://www.nortonrosefulbright.com/files/za-fixed-term-contracts-72237.pdf> Accessed: 23rd September 2013 at page 9.

²⁵⁴ Naidoo, M. “Fixed-term contracts: The current jurisprudence and the impact of the amendments.” Available at: <http://www.nortonrosefulbright.com/files/za-fixed-term-contracts-72237.pdf> Accessed: 23rd September 2013 at page 9.

²⁵⁵ *Ibid.*

contracts and determine the reason for their use and the duration of successive fixed-term contracts. They would also need to limit the amount of persons who have authority to renew fixed-term contracts to prevent unfair dismissal claims which arise out of a reasonable expectation of permanent employment (based on successive renewals, action can be taken under the LRAB).²⁵⁶

It is evident that the law relating to fixed term contracts in South Africa needed to be developed to eliminate uncertainty and to provide more protection to employees who are vulnerable as a result of concluding a fixed-term contract. These contracts provide a constant reminder to employees that their employment is not secured and once their fixed-term contract expires, without being renewed, they have no other option but to find alternative employment. This is prejudicial against employees as their employers are free to exploit their services.

Whether the decision of the legislature to adapt the LRAB was a good choice remains to be seen. At the outset, it seems beneficial to employees in South Africa as many people are unemployed and would rather sign a three month fixed-term contract than demand permanent employment.

There seems to be many downfalls and implications for employees now that the LRAB is set to be in force. An employer may not be able to afford employing someone permanently. Also, another argument could be that a fixed-term contract terminates on the date set out, or upon completion of an undertaking and an employer cannot be bound simply because he did not renew a contract.

²⁵⁶ Ibid.

No piece of legislation can ever address every possible labour law issue, or will be drafted to suit every person. However, it can provide a “default” set of rules which can provide a useful guideline to affected parties.

Provisions of the LRAB which have been discussed and which deal with temporary employment services (although not banned, but the provisions of the Bill having the effect of a ban), it seems like this provision addresses only employees’ rights and is somewhat problematic when taking into account how employers will be affected.

Some employees cannot be employed by a temporary employment service for longer than three months. Once the three month period is over, the temporary employment service is not obliged to keep the employee and employ them at another job, for another period.

This would lead to employees being “recycled” and it could also lead to a cycle where one batch of employees are employed for three months, left jobless and then replaced with another batch of employees.

Another positive aspect of the Bill is that a loss of skills may be curbed. Where persons are employed on a permanent basis, they will contribute to the business of the employer by becoming skilled and experienced in their field.

Another practical and important factor which is overlooked is that most South Africans would rather be employed temporarily on a fixed-term contract by a temporary employment service than be unemployed.

It is also evident that the clauses which are now law, apply to employers and employees, however, not all businesses or companies are the same. Smaller businesses may not be

as stable and may require employees to be employed on fixed-term contracts as a result of this uncertainty and lack of stability.

The same may apply to larger businesses or companies. It would not be fair to force an employer to commit to a permanent contract of employment when they are not certain regarding the financial status of their company.

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