NON-RENEWAL OF A FIXED-TERM
EMPLOYMENT CONTRACT

by

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SUMMARY

In terms of the common law contract of employment an employee who is a party to a fixed term contract, unlike an indefinite period contract, cannot be dismissed. The contract terminates upon an agreed or ascertainable date determined by the parties and the conclusion of the contract.

Section 186(1)(b) of the Labour Relations Act 1995, however, defines the failure to renew a fixed term contract on the same or similar terms where the employee reasonably expected the contract to be renewed, as a dismissal.

In this treatise the scope and content of this provision is considered with reference to relevant case law.

The factors and considerations that establish a reasonable expectation are highlighted and considered.

The question as to whether or not this provision also provides for the situation where an employee expects indefinite employment is also considered and critically discussed.

The author concludes that the provision should not be interpreted in such a manner that an expectation of permanent employment is created.
CHAPTER 1
INTRODUCTION

In terms of the common law, a fixed-term contract of employment terminates at the expiration of the term, or completion of the task, for which it was entered into.\(^1\) The termination follows automatically and is not considered to be a dismissal. Therefore, notice of the termination is not required.\(^2\) The way in which the Industrial Court and the Labour Appeal Court have treated the issue, and in particular its regulation in the Labour Relations Act,\(^3\) constitutes a major inroad in the common law position. When interpreting the Labour Relations Act,\(^4\) the Act puts it beyond doubt that in certain circumstances the employer will not be entitled to rely on the automatic termination doctrine, at least where the employee had a reasonable expectation of renewal of his/her fixed term contract of employment. In those cases the termination must be regarded as a dismissal or termination at the initiative of the employer.\(^5\) However, the common law is superseded by the provisions of section 186(b) of the Labour Relations Act\(^6\) but only to the extent that such expectation of renewal is found to be present.

For the reason that the contract is meant to subsist for a predetermined or determinable duration, it follows that notice of premature termination is at common law, as a rule, not permissible.\(^7\) The rule is, however, subject to a contrary arrangement. For example, the parties may agree that prior notice may be given. It is accepted that this does not affect the fixed-term nature of the contract.\(^8\) Under the current dispensation, as discussed in paragraph 3.3 below, South Africa still follows this rule.\(^9\) However, the implication under the current dispensation would be that the employee concerned can still invoke the unfair dismissal provisions of the Labour

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\(^2\) R v Bhana 1941 SR 186 and Tiopaizi v Bulawayo Municipality 1923 AD 317.
\(^3\) 66 of 1995.
\(^4\) Ibid.
\(^5\) Olivier supra.
\(^6\) Ibid.
\(^7\) Supra.
\(^8\) Bon Accord Irrigation Board v Braine 1923 AD 480.
\(^9\) Dixon v BBC 1979 QB 546.
Relations Act,\(^{10}\) as long as it is clear that the employee had a reasonable expectation that the contract would be renewed.

Parties may agree that the contract has to be automatically renewed, unless it had been terminated by prior notice.\(^{11}\) In \textit{Cape Town Municipality v Minister of Labour}\(^ {12}\) it was held that in such a case the contract should be treated as a contract for indefinite duration. If either party elects to give notice, such notice amounts to a termination of the contract at the initiative of the party who does so.\(^ {13}\) In modern parlance it would be assumed that the employment relationship continues to exist, and that the automatic conclusion of a contract for the subsequent period entitles the employee to view the unjustified termination thereof as unfair.\(^ {14}\)

In \textit{Ndamase v Fyfe-King}\(^ {15}\) it was held that if the parties were to agree that the fixed-term employee is appointed on probation, the contract may in the event of unsatisfactory performance at common law be terminated on reasonable notice before expiry of the probationary period. Any prescribed procedures also needs to be complied with.\(^ {16}\)

In \textit{Mackay v Comtec Holdings (Pty) Ltd}\(^ {17}\) it was held that if an employee does not return to work after the expiration of his/her fixed-term contract of employment, one would assume that the common law rule that the voluntary acceptance that the contract has come to an end does not amount to a dismissal, would apply.

It is submitted that the common law perception regarding the nature of the contract of employment allows for an approach which treats the contract as potentially extending beyond the mere initial arrangement and qualified consensus reached by two parties.\(^ {18}\)

\(^{10}\) 66 of 1995.
\(^{11}\) Olivier \textit{supra}.
\(^{12}\) 1965 (4) SA 770 (C).
\(^{13}\) At 774E-F.
\(^{14}\) \textit{Jeffrey v Persetel (Pty) Ltd} [1996] 1 BLLR 67 (IC).
\(^{15}\) 1939 EDL 259.
\(^{16}\) \textit{Muzondo v University of Zimbabwe} 1981 (4) SA 755 (2).
\(^{17}\) [1996] 7 BLLR 863 (IC).
\(^{18}\) Olivier \textit{supra}. 
In *National Chemsearch (SA) v Borrowman*\(^{19}\) the court dealt with the reasonable ambit of a restraint of trade clause to which former employees were subject, the Supreme Court gave legal recognition to the social phenomenon that employers and employees foresee a lasting relationship.

Olivier\(^{20}\) has the view that the new Labour Relations Act\(^{21}\) builds on the notion of contractual continuity as far as fixed-term contracts of employment are concerned, even though it limits this to circumstances where a reasonable expectation of renewal exists.

In this treatise, recent case law will be analysed as these recent decisions, mostly involving universities and tertiary institutions, assess different aspects of the failure to renew fixed-term contracts. The most important of these cases that will be dealt with are *Dierks v University of South Africa*,\(^{22}\) *McInnes v Technicon Natal*\(^{23}\) and *Auf der Heyde v University of Cape Town*.\(^{24}\)

The above case law outlines the development of the law relating to the non-renewal of fixed-term employment contracts. In this treatise, these cases will be dealt with to the extent of the manner in which their outcomes contributed to the current law relating to the issue in question.

In regard to its structure, this treatise commences with an explanation of the different types of contracts used by employers within an employment arena in South Africa, namely, indefinite period contracts and fixed-term employment contracts. The issue with which this treatise deals, is the non-renewal of fixed-term employment contracts and therefore, only the latter type of contract is important for our purposes.

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\(^{19}\) 1979 (3) SA 1092 (T).

\(^{20}\) Supra.

\(^{21}\) 66 of 1995.

\(^{22}\) (1999) 20 *ILJ* 1227 (LC).

\(^{23}\) [2000] 6 *BLLR* 701 (LC).

\(^{24}\) [2000] 8 *BLLR* 877 (LC).
The treatise then proceeds to deal with and explain the different elements of the definition of “dismissal” as it appears in section 186(1)(b) of the Labour Relations Act.25

The controversial issue which surrounds the issue of non-renewal of fixed-term employment contracts is the interpretation of section 186(1)(b) of the Labour Relations Act. The main question, which has been the subject of many Labour Court and Labour Appeal Court decisions as well as the topic of debate of various labour law authors, is whether section 186(1)(b) relates to an expectation of renewal of a fixed-term employment contract or whether it, in fact, relates also to an expectation of permanent employment in the workplace.

The treatise, finally, then discusses the latter issue in detail, with reference to the relevant case law and opinions of various authors.

There are two types of employment contracts in South Africa namely fixed-term and indefinite employment contracts.

2.1 FIXED-TERM EMPLOYMENT CONTRACTS

In terms of a fixed-term employment contract an employee places his/her labour potential at the disposal of an employer, in return for remuneration, for a specific period agreed upon between the latter parties. Such contract endures for the specified period, unless it is terminated earlier by agreement or by fundamental breach by either of the parties.\(^{26}\)

The duration of the fixed-term contract may be determined by the parties by either stipulating a date for termination thereof, or by stipulating a particular event the occurrence of which will terminate the contract, or with reference to completion of a specific task.\(^{27}\) Where the parties have agreed that the termination of the contract will take place on the occurrence of a particular event or the completion of a particular task, the onus rests on the employer to prove that the event has occurred or the task was in fact completed.\(^{28}\) For example, in *Böttger v Ben Nomoyi Film and Video CC*,\(^{29}\) the employer failed to discharge the onus and the employee was held to have been unfairly retrenched prior to the expiry of the fixed-term contract.

An employer may only terminate a fixed-term employment contract of an employee, during the subsistence thereof, if he/she can show good cause for doing so or if the parties have initially agreed otherwise. If the employer, however, fails to show good cause for such termination, the termination will be regarded as unfair dismissal and the employer will then be in breach of the employment contract.\(^{30}\) The employee will

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\(^{27}\) Grogan *Workplace Law* (2005) 8\(^{th}\) ed 44.

\(^{28}\) *Böttger v Ben Nomoyi Film and Video CC* [1997] 5 BLLR 621 (CCMA).

\(^{29}\) Ibid.

\(^{30}\) Todd *Contracts of Employment* (2001) 63-64.
then be entitled to the common law remedies for breach of contract, namely, specific performance and/or damages.

The contractual remedy of specific performance entails that the employee approaches the court and prays for a court order to the effect that the employer performs his obligations in accordance with the contract.\(^{31}\) Whether the employee claims specific performance, or not, he/she will still be entitled to claim damages which he/she suffered as a result of the employer’s breach.\(^{32}\)

The previous Basic Conditions of Employment Act\(^{33}\) (hereinafter referred to as the “BCEA”) did not expressly accept fixed-term contracts as it provided that any contract of service could be terminated on the giving of the prescribed notice. These provisions of the old BCEA were interpreted by the Industrial Court\(^{34}\) to mean that the legislature had “effectively outlawed” such contracts. The Industrial Court conferred on the parties the right to terminate such fixed-term contracts by notice, during the currency thereof. The Industrial Court’s interpretation of these provisions of the old BCEA was subsequently subjected to extensive debate as to the correctness thereof. Section 37(1) of the current BCEA clarifies the intention of the legislature by stating that the prescribed periods of notice must be given in the case of a contract of employment “terminable at the instance of a party to the contract”. It is clear from section 37(1) of the current BCEA\(^{35}\) that it was not the legislative intention to “outlaw” fixed-term contracts. It was rather the intention of the legislature to protect the parties against termination on notice periods shorter than those prescribed.\(^{36}\)

A fixed-term contract of employment comes to an end once the agreed date for termination is reached or upon completion of a specific agreed task. However, if the employee remains in service of the employer and the employer continues to pay the agreed remuneration, the contract is deemed to have been tacitly renewed. In these circumstances, however, both parties must have the intention of renewal of the

\(^{32}\) Ibid.
\(^{33}\) Act 3 of 1983.
\(^{34}\) Penrose Holdings (Pty) Ltd v Clark (1993) 14 ILJ 1558 (IC) at 1562A-B.
\(^{35}\) Act 75 of 1997.
contract. In *Braund v Baker, Baker & Co* it was held that such a renewed contract will continue on exactly the same terms and conditions as the initial fixed-term contract. The only exception would be that the duration of the contract need not be the same as that of the initial contract. The duration of such renewed contract must be determined according to the circumstances of each particular case. Grogan submits that unless the contrary intention can be inferred from the facts, it will generally be assumed that the parties intended the new contract to be of indefinite duration, terminable by reasonable notice given by either party.

Section 186(1)(b) of the Labour Relations Act (hereinafter referred to as the “LRA”) expressly provides that where an employee “reasonably expected” the employer to renew a fixed-term contract on the same or similar terms but, instead, the employer offered to renew it on less favourable terms or did not renew it, it would constitute a dismissal. In the case of Cremark various employees had, after a take-over, been required to sign a new fixed-term contract of one year’s duration, which was not then renewed. The Labour Appeal Court held that whether non-renewal of a fixed-term contract amounts to a dismissal depends on the circumstances, including, but not limited to, the number of previous renewals. However, if a contract clearly states that the contract is temporary in nature, or if sufficient notice is given for the termination thereof, the termination will not be regarded as a dismissal.

The current position regarding the non-renewal of fixed-term contracts is that fixed-term employment contracts, unless the contrary intention can be inferred from the facts, it will generally be assumed that the parties intended the new contract to be of indefinite duration, terminable by reasonable notice given by either party.

37 *Redman v Colbeck* 1917 EDL 35 at 38.
38 (1905) 19 EDC 54.
41 Cremark a Division of Triple-P Chemical Ventures (Pty) Ltd v SA Chemical Workers Union (1994) 15 ILJ 289 (LAC).
42 Malandoh v SA Broadcasting Corporation (1997) 18 ILJ 544 (LC) and Smith v American International School of Johannesburg (1994) 15 ILJ 817 (IC).
43 *Koyini v Strand Box (Pty) Ltd* (1985) 6 ILJ 453 (IC).
As to what constitutes “reasonable notice” the Industrial Court held in the case of *Metal & Allied Workers Union v A Mauchle (Pty) Ltd t/a Precision Tools*\(^\text{44}\) that failure to renew a fixed-term contract without prior notice constituted an unfair labour practice where the employers had created an expectation of renewal. In this case, migrant workers who had been employed on fixed-term contracts were granted relief even though their contracts had expired with the effluxion of time, because of the expectation of renewal that the employer created. Subsequent to this case there were various other cases which enforced this principle.\(^\text{45}\)

### 2.2 INDEFINITE CONTRACTS OF EMPLOYMENT

In indefinite contracts of employment the parties do not agree on a specific date for termination of the contract. Nor is it an agreement that the contract of employment will terminate at the occurrence of a particular event or completion of a specific task, as is the case in a fixed-term contract. In fact, in indefinite employment contracts, the parties do not intend the contract to terminate at all, except in the obvious case of death of the employee or agreed retirement age. An indefinite period contract of employment is permanent in nature and may be terminated by giving reasonable or contractually stipulated notice, which may not be less than the notice periods prescribed by the current BCEA, or until either party elects to terminate the contract on fundamental breach by the other party, or on retirement at the agreed age, or by death of either party, or by insolvency of the employer, or by supervening impossibility of performance, or by repudiation or by state action, or by mutual agreement.

In *Harris v Bakker & Steyger (Pty) Ltd*\(^\text{46}\) it was held that parties are free to agree on a mandatory retirement age. When the aforesaid retirement age is reached, the employer is entitled to demand that the employee retire. In this situation the employer will neither have an action for breach of contract nor will he/she have a remedy for unfair dismissal.

\(^{44}\) (1980) 1 ILJ 227 (IC).
\(^{45}\) *Koyini v Strand Box (Pty) Ltd* (1985) 6 ILJ 453 (IC); *Metal & Allied Workers Union of SA v Screenex Wire Weaving Manufacturers (Pty) Ltd* (1985) 6 ILJ 75 (IC) and *Mtshamba v Boland Houtnywerhede* (1986) 7 ILJ 563 (IC).
\(^{46}\) (1993) 14 ILJ 1553 (IC).
Employees are obliged to work through a notice period, unless the employer exempts them from this obligation in which case they must be paid in lieu of notice.\footnote{S 38 of the Basic Conditions of Employment Act 75 of 1997.}

At common law, indefinite period contracts traditionally regarded the parties’ right to terminate on notice as unfettered. In \textit{Lamprecht v McNeillie}\footnote{(1994) 15 ILJ 998 (A).} the Appellate Division held that the rules of natural justice are not impliedly incorporated into the common law contract of service, and that the general disciplinary code does not confer contractual rights unless expressly incorporated into the contract. Therefore, the employer is not required to show good cause for terminating the contract, or to inform the other party of such reasons as there may be, or to follow any special procedure before termination. Neither fairness nor reasonableness is relevant to the legality of a dismissal on notice.

\textit{Anderman}\footnote{The Law of Unfair Dismissal (1978).} states that the common law viewed employer and employee as free and equal contracting parties, ignoring the obvious discrepancy in their bargaining power and the fact that the employment relationship provided income to a family unit of one party and provided a cost of production or service for the other. Therefore, he went on further to state, that as long as contractual notice of termination was given, the employee was free to dismiss an employee for any reason he wished, with no obligation to reveal his reason for dismissal to the employee, much less to justify it. Anderman makes the point that the employer’s unfettered power to terminate the contract on notice is generally regarded as the central instrument by which power over employees is preserved. In terms of the doctrine of freedom of contract, this power of the employer is underpinned, in terms whereof the contracting parties are deemed to have entered into the agreement as equals and with open eyes.
3.1 THE DEFINITION OF DISMISSAL

Only employees can be dismissed. Therefore, to determine whether a person was unfairly dismissed one first needs to determine whether that applicant was in fact an employee. Even if the applicant is an employee as defined by the Labour Relations Act,\textsuperscript{50} one still needs to determine whether the termination of the contract was in fact a dismissal. There may have, for example, been a resignation by the employee or the employee may have repudiated the contract of service by absconding. A dismissal takes place when the contract is terminated at the instance of the employer. Dismissal entails some communication in the form of words or conduct, by the employer to the employee that the contract has come to an end.\textsuperscript{51}

“Dismissal” is defined by section 186(1) of the Labour Relations Act\textsuperscript{52} as:

(a) the termination of a contract of employment with or without notice (section 186(1)(a));

(b) failure to renew a fixed-term contract on the same or similar terms where the employee “reasonably expected” the employer to do so (section 186(1)(b));

(c) refusal to allow a female employee to resume work after taking maternity leave in terms of law, contract or collective agreement (section 186(1)(c));

(d) refusal to re-employ an employee who has been dismissed, together with other employees, for the same or similar reasons but offered to re-employ only some of the other dismissed employees (section 186(1)(d));

\textsuperscript{50} Act 66 of 1995.
\textsuperscript{51} Grogan \textit{Workplace Law} (2005) 106.
\textsuperscript{52} Supra.
(e) resignation of an employment contract, by an employee, where the employer has made continued employment intolerable (section 186(1)(e)); or

(f) termination of a contract of employment by an employee, with or without notice, for the reason that the “new” employer, after a transfer of a business in terms of section 197 or section 197A,\(^{53}\) provided the employee with conditions or circumstances at work that are substantially less favourable than those provided by the “old” employer (section 186(1)(f)).

The common law only recognized two forms of dismissal, namely, those with notice and those without notice. The Labour Relations Act has extended the concept to include other forms of dismissal, as set out above.

Section 186(1)(b) of the Act\(^ {54}\) deals with dismissal in the form of non-renewal of a fixed-term contract, where there exists a reasonable expectation for renewal thereof and reads as follows:

“Dismissal means that –

... 

(b) 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; ...”

By the enactment of the above definition, the legislature gives effect to the protection that the Industrial Court had extended to temporary employees under certain circumstances.\(^ {55}\) Such protection, however, is limited to situations where such employees have a reasonable expectation that their contracts will be renewed on “the same or similar terms”. This issue regarding protection has been the subject-matter in numerous cases. In much of these cases, such protection was said to be afforded only to employees who expected the contracts to be renewed and where such expectation was reasonable.\(^ {56}\)

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\(^{53}\) Act 66 of 1995.

\(^{54}\) Act 66 of 1995.

\(^{55}\) Olivier 1001.

\(^{56}\) University of Cape Town v Auf der Heyde [2001] 12 BLLR 1316 (LAC); Sithole v Lipton SA (Pty) Ltd (1992) 1 LCD 257 (IC); Mtshamba v Boland Houtnywerhede supra.
When employees “reasonably expected” their employers to renew a fixed-term contract of employment on the same or similar terms, they are deemed to be dismissed. At common law, a fixed-term contract automatically expires on the arrival of the date or the occurrence of the event on which the parties agreed that the contract would terminate. In terms of section 186(1)(b) of the Labour Relations Act the termination of a fixed-term contract may now constitute dismissal.

The terms of a contract of employment remains relevant when determining whether or not the non-renewal of a fixed-term contract constitutes dismissal. The contract itself is an important indication that the parties did, in fact, intend the contract and relationship to terminate on the date mentioned therein or upon the occurrence of the specified event.57

A promise by an employer that the employee will be retained on a permanent basis is a good ground for the employee to have an expectation of permanent employment. Such a promise may be implied or express. Where an employer made such a promise to the employee, that the contract would be renewed or extended, the employee may have a contractual claim for renewal, as well as a claim for unfair dismissal in terms of the Labour Relations Act.58

The onus of proving a reasonable expectation rests on the employee.59 The test to be used in order to determine whether a reasonable expectation existed or not, is an objective test. The employee must prove the existence of facts that would, in the ordinary course, lead a reasonable person to anticipate renewal of the fixed-term contract. Whether there was a reasonable expectation of renewal must be determined from the perspective of both the employer and the employee. There are many factors to be taken into account when making this determination, for example, where a fixed-term contract had been renewed on more than one occasion, it would be indicative of the existence of a reasonable expectation of permanent employment.

57 Foster v Stewart Scott Inc (1997) 18 ILJ 367 (LAC); Malandoh v SA Broadcasting Corporation supra.
The following principles, regarding the definition in section 186(1)(b)( of the Labour Relations Act, can be gleaned from the cases, namely:

(a) The reasonable expectation of renewal need not be shared by the employer. It is sufficient that it is entertained by the employee.\(^{60}\) In terms of *Malandoh*,\(^ {61}\) the employee must be able to demonstrate an objective basis for it.

(b) In establishing whether a reasonable expectation exists, it is important to determine the reason for entering into a fixed-term contract. Where the reason was uncertainty over continued funding, it was held that there existed a reasonable expectation that employment would continue as long as there were funds available.\(^ {62}\) However, where the employer entered into a fixed-term contract to replace an employee who was on leave, it was held that there was no reasonable expectation of renewal.\(^ {63}\)

(c) The wording of the contract is important, but not conclusive.\(^ {64}\) In *Foster v Stewart Scott Inc*\(^ {65}\) it was held that, although agreement on the duration of the contract did not necessarily denote agreement between the parties that it would come to an end on expiry of the period, it was an important indication that the parties did have such an intention. Subsequent conduct may give rise to a reasonable expectation, notwithstanding the declared intent of the parties.\(^ {66}\)

(d) The factors that play an important role in determining a reasonable expectation include the number of times that the contract has been renewed and the conduct of the employer, both at the time of concluding the contract and during the employment relationship.\(^ {67}\)

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\(^{60}\) Dierks v University of South Africa *supra*.
\(^{61}\) *Malandoh* v SA Broadcasting Corporation *supra* at 547D.
\(^{62}\) Bronn v University of Cape Town (1999) 20 ILJ 951 (CCMA).
\(^{63}\) Dierks v University of South Africa *supra*.
\(^{64}\) *Malandoh* v SA Broadcasting Corporation *supra*.
\(^{65}\) [1997] 2 BLLR 117 (LAC).
\(^{67}\) Zwane v Elegance Jerseys (1998) 19 ILJ 969 (CCMA).
3.2 REASONABLE EXPECTATION

The concept of reasonable expectation is essentially subjective in nature, vesting in the employee. In order to determine whether the expectation is a reasonable one, the courts apply an objective test and consider such criteria as the significance of contractual terms, agreements or undertakings by the employer, practice and custom, the purpose for concluding the fixed-term contract and the nature of the employer’s business.\(^{68}\)

In *Malandoh v South African Broadcasting Corporation*,\(^{69}\) the applicant was employed on a renewable fixed-term contract by the respondent, as a television licence inspector. The contract characterized the applicant as a temporary employee and provided that it could be terminated by either party on four weeks’ notice. On the expiration of the contract it was renewed by the respondent eight times for monthly periods before the applicant was informed that it would not be renewed again. The applicant alleged that, during the course of his temporary employment, he had been offered a permanent position and had thus become a permanent employee. He further alleged that, in any event, he had a reasonable expectation that if the respondent wished to terminate his services, it would be bound by the Act, in particular to consult with him before terminating his services for operational requirements.

Regarding the applicant's claim that he had a reasonable expectation of continued employment, the court noted that it was common cause that the people who allegedly made promises of a permanent position, had no authority to do so. Furthermore, the applicant had been unsuccessful in an application for a permanent position. The respondent had also entered into an agreement with trade unions, which included an elaborate recruitment and selection procedure for permanent employees, but which did not make provision for the conduct relied upon by the applicant in support of the allegation that he had been granted a permanent position. There was no factual basis for the other grounds upon which the applicant relied.

\(^{68}\) *Dierks v University of South Africa* [1999] 4 BLLR 304 (LC).

\(^{69}\) *Supra.*
The court concluded that there existed no reasonable expectation of renewal of employment, therefore, the employer was not bound to follow pre-retrenchment procedures when terminating the employment of the employee on fixed-term contract who has no reasonable expectation of renewal. The application was accordingly dismissed. The court in this case was of the view that where the contract expressly states that a person is a temporary employee and that no expectation is created, the employee cannot claim a reasonable expectation. The court, in *Dierks v University of South Africa*,70 relying on *Mediterranean Woollen Mills (Pty) Ltd v SA Clothing & Textile Workers Union*,71 held that the wording of a contract is not sufficient to exclude an expectation.

In *Dierks v University of South Africa*72 the court held that the failure to renew a fixed-term contract amounts to a dismissal within the statutory meaning73 only if the employee can show that he reasonably expected to enter into a fixed-term contract. It further stated that the employee is required to prove that his expectation of renewal was reasonable and that, apart from a subjective perception, there is an objective, factual basis for such an expectation. The court enumerated the criteria that have to be considered in an attempt to establish whether a reasonable expectation has come into existence on an objective basis:

- the evaluation of all surrounding circumstances;

- the significance otherwise of the contractual stipulations;

- agreements or undertakings by the employer;

- practice or custom in regard to renewal or re-employment;

- the availability of the post;

- the purpose of or reason for concluding the fixed-term contract;

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70 Supra.
71 (1998) 19 ILJ 731 (SCA) at 734C.
72 Supra.
73 S 186(b) of the Labour Relations Act 66 of 1995.
- inconsistent conduct;
- failure to give reasonable notice; and
- the nature of the employer’s business.

The court found, having regard to these criteria, that the applicant had failed to prove that he had a reasonable expectation of renewal of his contract. A letter received by the applicant after an unsuccessful application for a permanent position, which advised him that he was “appointable”, rumours and the fact that other temporary staff members’ contracts had been renewed or had been permanently appointed, were not sufficient to establish a reasonable expectation.

In *Morag v Dortech (Pty) Ltd*[^74] a managing director on a two-year contract of employment claimed unfair dismissal when his contract was not renewed. Five weeks before expiration of the applicant’s contract the respondent notified him that his contract would not be renewed because the respondent was not happy with the applicant’s work performance. The applicant relied on a provision in the contract in an attempt to prove that he expected his contract to be renewed, despite the applicant knowing of the respondent’s unhappiness. The relevant clause in the contract stated that the parties would, during the final six months of the applicant’s employment, “discuss and, if possible, agree” on the renewal of the contract. The court held that the provision to discuss renewal created no more than a possibility that the contract would be renewed. If that possibility did not materialize, initial period would remain the only period of employment. The relevant clause was not sufficient to create a reasonable expectation of renewal.

In terms of section 186(b)[^75] a dismissal occurs where the employer fails to renew a fixed-term contract in circumstances where the employee reasonably expects a renewal. In this context the question arose as to whether section 186(b)[^76] includes a

[^74]: [2001] 8 BLLR 917 (LC).
[^76]: Ibid.
reasonable expectation of permanent employment. The main thrust of the applicant’s case in Dierks v University of South Africa\textsuperscript{77} was based on a reasonable expectation of permanent employment as opposed to renewal of a fixed-term contract. The court noted that, while section 186(b)\textsuperscript{78} covered situations in which employees claimed that they expected the renewal of a further fixed-term contract, it was not clear whether it covered situations in which the reasonable expectation was for permanent employment.

The court, further, noted that certain considerations lead one to believe that section 186(b)\textsuperscript{79} should be confined to the renewal of fixed-term contracts only and an expectation of permanent employment is not to be included.

Such considerations include the clear wording of the section and the patent unfairness of the indefinite renewals of fixed-term contracts. In the latter instance the exploitative employer is dealt with, according to the court, because “a renewal … will endure for the same period as the previous contract. That seems fair, given that a reasonable expectation is a principle of equity falling short of a right”. The court concluded, having regard to these considerations, that section 186(b) does not include an expectation for permanent employment. Consequently, the Labour Court does not have the jurisdiction to decide the issue insofar as it concerns the reasonable expectation of permanent employment.

In McInnes v Technikon Natal\textsuperscript{80} the court rejected the notion that section 186(b) excludes an expectation of permanent employment. In this case, the applicant was employed as a lecturer in 1996 on a one-year contract. Her contract was then renewed three times before the post was advertised on a permanent basis. The applicant applied for the position, was short listed and recommended for the post by the selection committee. On request of the respondent’s vice-chancellor, the selection committee reconsidered its recommendation in the light of the affirmative action policy. The committee reaffirmed its preference for the applicant, but recommended a black male candidate, who was appointed at a salary much higher

\textsuperscript{77} Supra.
\textsuperscript{78} Labour Relations Act 66 of 1995.
\textsuperscript{79} Ibid.
\textsuperscript{80} Supra.
than that which had been advertised. The applicant’s contract was not renewed. The applicant claimed that she had been unfairly dismissed, alternatively, unfairly discriminated against on the basis of race and/or gender. The respondent denied that the applicant had been dismissed.

The court noted that the enquiry into the applicant’s alleged dismissal entailed two stages: firstly, it had to be determined whether the applicant had an expectation that she would be appointed and, secondly, it had to be determined whether the expectation of appointment was reasonable in the circumstances. In the first enquiry, the app was required to prove that she subjectively believed that her contract would be renewed on the same or similar terms. The applicant had pleaded in this regard that she expected her contract to be renewed on a permanent basis, alternatively, that it would be renewed for a further period of one year. The court noted that it was not possible to hold two subjective expectations at the same time. However, although the app was somewhat vague about the details of what she expected, the crux of her evidence was that she had expected to continue doing the same work after the date on which her employment was terminated, on a permanent basis.

The court rejected the respondent’s contention that an expectation of the renewal of a fixed-term contract of employment on a permanent basis did not amount to a reasonable expectation of renewal for purposes of the Labour Relations Act.\(^{81}\) The court consequently held that the decision in *Dierks v University of South Africa*\(^ {82}\) was wrong. The court stated that what section 186(b) seeks to address is the situation where an employer fails to renew a fixed-term employment contract where there is a reasonable expectation that it would be renewed. It further stated that if the employer creates such an expectation then the employee would be given the protection under this section.

The court held that the applicant had been unfairly dismissed and added that affirmative action cannot constitute a fair basis for dismissing, as opposed to appointing, an employee.

\(^{81}\) 66 of 1995.

\(^{82}\) *Supra.*
In *Auf der Heyde v University of Cape Town*\(^8\) the applicant responded to an advertisement for a position as senior lecturer in chemistry, the duration of which was stipulated as “initially for three years with a possible extension to five years”. He was subsequently appointed in terms of a “three-year contract”, which stated that the appointment was for the period specified and “does not carry any commitment to a permanent appointment”. Two other lecturers, both black, were appointed at the same time on similar terms. About three years later, the respondent advertised a permanent position and the applicant applied but was not appointed. Both black incumbents were, however, appointed as permanent lecturers. The applicant contended that the respondent’s failure to appoint him or to renew his fixed-term contract amounted to an automatically unfair dismissal, alternatively, that his dismissal was unfair due to the respondent’s failure to comply with the requirements for a fair dismissal on operational grounds. The respondent denied that the applicant had been dismissed. However, it conceded that, if the applicant were found to have been dismissed on the grounds of operational requirements, the dismissal would be procedurally unfair.

Jammy AJ held that an employee cannot rely on an expectation that he will be permanently appointed to a position in order to substantiate a claim that he has been dismissed as a result of the termination of a fixed-term contract of employment.

In regard to the issue of reasonable expectation, the court held that, although the expectation of renewal was expressly negated by the disclaimer that the contract did not give rise to “any commitment to a permanent appointment”, the applicant had proved that he had a reasonable expectation of the renewal or extension of his fixed-term contract. It could reasonably be inferred, from the advertisement for the position, that a further extension for a two-year period was dependent on the performance of the incumbent. The applicant’s work had been of a high standard but had, nevertheless, effectively been excluded from applying for one of the position to which his black colleagues had been appointed. The court was of the opinion that the applicant’s dismissal could only have been for operational reasons. In the light of the respondent’s concessions that the appropriate retrenchment procedures had not

\(^8\) Supra.
been followed, the could held the applicant’s dismissal to be procedurally unfair and ordered compensation to the applicant equivalent to 12 months remuneration.

On appeal, the Labour Appeal Court did not express a view on whether section 186(b) is sufficiently broad in order to cover an expectation of permanent employment. The court, instead, concluded on the facts. The court held that the employee did not have a reasonable expectation for either permanent employment or an extension of its fixed-term contract. Consequently, he had not been dismissed and the decision of the court _a quo_ was overturned.

In terms of _Böttger v Ben Nomoyi Film and Video CC_ if an employee concludes a fixed-term contract with the sole purpose of having a particular job completed, the contract is terminated upon completion of that specific job. Such termination does not amount to a dismissal provided the employer can prove that the purpose of the contract had been achieved. The employer is not required to follow a pre-retrenchment procedure on expiration of the contract.

Despite the actual wording of a fixed-term contract, the following aspects should be considered in terms of South African case law in order to determine whether a reasonable expectation of renewal has been created, despite the wording of the contract.

(i) The reasonable expectation must be created by a person with the necessary authority to bind the employer.

(ii) A reasonable expectation will be created if an employee is permitted, by default, to continue in employment after the fixed term has expired.

(iii) If an employer can prove that operational requirements have necessitated continuous renewal of fixed-term contracts, and the employees are aware of this, a reasonable expectation will not have been created.

84 University of Cape Town v Auf der Heyde _supra_.
85 Supra.
(iv) A reasonable expectation of continued employment may still be present even if certain conditions of employment in the contract are to be reviewed after a certain period.

(v) If the employer states that certain renewals are subject to good behaviour and proper work performance, the failure to inform an employee of poor work performance prior to the expiry of the fixed term may lead to a reasonable expectation of renewal.

(vi) Where contracts are renewable on the occurrence of a certain event, employees have a reasonable expectation of renewal on the occurrence of the event.

3.3 RECENT CASE LAW RE: “REASONABLE EXPECTATION”: BUTHELEZI v MUNICIPAL DEMARCATION BOARD

In the case of Buthelezi v Municipal Demarcation Board the court dealt with the issue of whether an employee, on a fixed-term contract, may be retrenched before expiration of the contract of employment. The Labour Appeal Court held that notwithstanding the provisions of the Labour Relations Act, such retrenchments are unfair per se, even if the employer has valid grounds, in terms of the operational requirements of his business, for dismissing the employee.

3.3.1 THE FACTS

On 24 January 2000, Mr Buthelezi (the “applicant”) was appointed deputy manager, in charge of financial operations of the Municipal Demarcation Board (the “respondent”). Approximately a year later the applicant was handed a retrenchment notice, informing him his post had become redundant, in terms of a restructuring process. After further consultations, the applicant and another redundant employee

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87 [2005] 2 BLLR 115 (LAC).
88 Ibid.
89 66 of 1995.
were invited to apply for a post in the new structure. Mr Buthelezi’s application was unsuccessful and he was retrenched.

On the fact of it, the respondent had an operational reason for retrenching Buthelezi. It also appeared as if the respondent followed, or at least attempted to follow, the retrenchment procedures prescribed by the Labour Relations Act.90 There were, however, two differences between Mr Buthelezi and the other employees who sought to challenge their retrenchments in the Labour Court, namely:

(i) Mr Buthelezi had been appointed on a fixed-term employment contract for five years; and

(ii) Mr Buthelezi had only been employed for one year by the respondent.

The Labour Court, subsequently, ruled the applicant’s dismissal to be unfair. The Labour Court found that despite the respondent’s denials, the applicant had indeed been appointed on a fixed-term contract and, furthermore, that its termination was substantively unfair because the contract had not run its course. The Labour Court also found that the applicant’s dismissal was also procedurally unfair, for the reason that the applicant’s dignity had been impaired by the manner in which he had been treated by the respondent. However, the Labour Court held that, soon after his dismissal, the applicant had made “scurrilous accusations” against the respondent which would have justified his dismissal. Since the applicant had been paid to date, due to these accusations, the court ruled that he was not entitled to any compensation. Accordingly, Buthelezi’s application was dismissed with costs.

3.3.2 THE APPEAL

On appeal91 Buthelezi challenged every finding of the Labour Court other than the ruling that his dismissal before the termination of his fixed-term contract rendered it substantively unfair.

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90 Ibid.
91 Buthelezi v Municipal Demarcation Board supra.
The Labour Appeal Court began setting out the requirements of the common law, stating:

“There is no doubt that at common law a party to a fixed-term contract has no right to terminate such contract in the absence of repudiation or a material breach of the contract by the other party. In other words there is no right to terminate such contract even on notice unless its terms provide for such termination.”

The court went further to explain the reason for the common law principle, stating:

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

The main question before the Labour Appeal Court was whether the common law should apply without qualification in the current labour dispensation, in which employers are expressly permitted to dismiss employees for reasons relating to their operational requirements.

3.3.3 IMPORTANT ASPECTS OF ARGUMENTS

The Municipal Demarcation Board (the respondent) argued that the common law had been altered, or, if not, that it should be “developed” in the light of this dispensation, as reinforced by the Constitution. In backing up their argument, the respondent referred the Labour Appeal Court to the case of National Automobile & Allied Workers’ Union v Borg-Warner SA (Pty) Ltd,92 in which it was held that the 1956 Labour Relations Act had altered the common law by recognizing that the relationship between employers and employees could endure beyond the termination

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of the contract, at least in cases where employees who had been dismissed and the employer promised to re-employ and for no justifiable reason did not.

In terms of section 186(2)(c) of the current Labour Relations Act\textsuperscript{93} that form of dismissal is now recognized as unfair labour practice. By referring to the aforementioned case, the respondent sought to invoke the constitutional guarantee of equality.

The Labour Appeal Court dismissed the respondent’s submissions as being “without merit”. The court invoked the presumption that, if the legislature wanted to change the common law, it would say so expressly or by necessary implication. It went on, further, to say that the fact that the legislature may have chosen to amend the common law in other respects did not mean that it had intended to change that particular common law principle. In regard to the respondent’s argument that the common law should be “developed” to bring it into line with the Constitution, the court could not find anything unconstitutional about the common law principle, that parties to fixed-term contracts should be held to their terms as agreed therein.

\subsection*{3.3.4 OUTCOME OF APPEAL}

On appeal, the court held that the trial judge’s finding, that Buthelezi might have been dismissed was “mere speculation” which had never been relied on by the respondent. However, the Labour Appeal court confirmed that the trial judge had correctly limited compensation to the date on which Buthelezi found another job. The Labour Appeal Court stated that such limitation is justified by the common law principle, that employees whose services are unlawfully terminated must attempt to mitigate their damages. Mr Buthelezi, subsequent to his dismissal, acquired a better paid post within three months of his dismissal.

In the end, the Labour Appeal Court granted Mr Buthelezi compensation equivalent to three months’ pay.

\textsuperscript{93} 66 of 1995.


3.4 CONCLUSION

In order to determine whether a person was unfairly dismissed, one needs to determine the following:

(i) whether the person was, in fact, an employee, as defined by the Labour Relations Act;\textsuperscript{94}

(ii) whether the termination of the contract was, in fact, a dismissal. Section 186(1) of the Labour Relations Act\textsuperscript{95} outlines circumstances when the termination of a contract of employment will constitute a dismissal; and

(iii) whether such dismissal was fair, in the circumstances. This aspect will be discussed in more detail in paragraph 4.2 below.

For purposes of this paper, section 186(1)(b) is relevant. In terms of the aforesaid provision, failure to renew a fixed-term contract on the same or similar terms where the employee “reasonably expected” the employer to do so, is regarded as a dismissal.

However, whether the phrase “reasonable expectation of renewal” includes a reasonable expectation of permanent employment is uncertain. Various authors and various cases seem to share conflicting views on the issue. The issue whether a reasonable expectation of renewal includes a reasonable expectation of permanent employment will be discussed in more detail in chapter 5 below.

With regard to the issue of whether an employee, on fixed-term contract, may be retrenched before the expiration of the contract of employment, it is respectfully submitted that the Labour Appeal Court in Buthelezi v Municipal Demarcation Board\textsuperscript{96} was correct in its finding. The Labour Appeal Court upheld the common law principle that a party to a fixed-term contract has no right to terminate such contract

\textsuperscript{94} 66 of 1995.
\textsuperscript{95} Ibid.
\textsuperscript{96} Supra.
in the absence of repudiation or material breach by the other party. It is further submitted that the Labour Appeal Court, correctly, rejected the Municipal Demarcation Board’s argument that the common law had been altered in order to bring the principle in line with the Constitution. It is finally submitted that the Labour Appeal Court was correct in stating that there was nothing unconstitutional about the aforesaid common law principle.
CHAPTER 4
EXPECTATION OF PERMANENT EMPLOYMENT

4.1 GENERAL

In the past, fixed-term contracts were predominantly linked to influx control under the apartheid system. In terms of these policies, black persons were to exercise their political and other rights in the so-called homelands established in the rural areas of South Africa. Even though many acquired the legal rights to live and work permanently in the “white” urban industrialised areas of South Africa, most were denied this right.

The entitlement of “migrant workers” from the homelands to live and work in the industrialized areas was a temporary right, linked to a fixed-term contract of one year and entered into their employers. Once this contract expired, employees were expected to return to the areas from which they came.

However, if their services were still needed by their employers, and if the influx control authorities approved, they could enter into a further fixed-term contract. In practice, employees built up long periods of service with an employer in terms of a series of fixed-term contracts that were renewed on an annual basis.

Nowadays, temporary employees do not enjoy the same rights as permanent employees. For example, the termination of temporary employment at the expiry of a stipulated fixed period is not subject to the same notice requirements or requirements of substantive and procedural fairness as are applicable to the termination of permanent employment contracts. Nor will an employer be obliged to pay a severance package to a temporary employee at the expiry of a fixed period. Temporary employees are also not entitled to certain benefits to permanent employees, such as medical aid and pension benefits.

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97 De Villiers 31.
98 Ibid.
99 Ibid.
100 Ibid.
Employers have since attempted to use fixed-term contracts in order to avoid obligations they would otherwise have towards permanent employees, particularly in regard to substantive and procedural fairness upon termination of employment.\textsuperscript{102}

The law regarding the non-renewal of fixed-term employment contracts has developed increasingly to recognize the true nature of an employment relationship, irrespective of any fixed period formally agreed to. The Labour Relations Act, 1956 did not have a definition of dismissal, therefore, the courts instead relied on the wide definition of unfair labour practice.\textsuperscript{103} This definition of unfair labour practice was the cornerstone of individual labour law and the law of unfair dismissal in pre-1995 jurisprudence.\textsuperscript{104} If an act or omission did not fall within the definition of an unfair labour practice, the Industrial Court did not usually have jurisdiction to intervene.

The new Labour Relations Act\textsuperscript{105} has extended the common law concept of dismissal to the extent that it rendered dismissals, for certain reasons, impermissible in any circumstances and confined permissible reasons for dismissal.\textsuperscript{106}

Section 186\textsuperscript{107} lists five specific forms of dismissal. Section 186(b) states that

\begin{quote}
“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.”
\end{quote}

Therefore, section 186(b)\textsuperscript{108} supercedes the common law but only to the extent that such an expectation is found to be present. In the absence thereof the employer would generally still be entitled to rely on the normal common law rule that a fixed-term employment contract has terminated at the expiration of the period concerned.\textsuperscript{109}

\begin{footnotes}
\item[102] Ibid.
\item[104] Ibid.
\item[105] 66 of 1995.
\item[107] Labour Relations Act 66 of 1995.
\item[108] Ibid.
\item[109] Olivier 1013.
\end{footnotes}
Since the inception of the unfair labour practice regime, it is no longer unconditionally accepted that a fixed-term contract of employment automatically terminates at the effluxion of the contract.\textsuperscript{110}

In terms of the decision of the Appellate Division in \textit{NAAWU (now NUMSA) v Borg-Warner SA (Pty) Ltd}\textsuperscript{111} the law is now settled, that the employment relationship does not necessarily terminate at the formal expiry of the contract of employment.

In South Africa, the fixed-term contract of employment is regarded as a form of a typical employment, which differs from the continuous form of employment. The Labour Relations Act\textsuperscript{112} makes no distinction, in terms of its coverage, between temporary and permanent employees.

At common law, a fixed-term contract of employment automatically terminates at the expiry of the period of the contract. No premature termination of the employment contract is permissible, except if there is an agreement between the parties to the contrary.

In terms of section 186(b) of the Labour Relations Act,\textsuperscript{113} the refusal or failure to renew a fixed-term contract on the same or similar terms is subjected to a two-fold enquiry, namely:

\begin{itemize}
  \item[(i)] Firstly, the court has to establish whether a reasonable expectation, that the contract would be renewed on the same or similar terms, existed on the part of the employee concerned. If an expectation is found to be present, the failure or refusal to renew would constitute a dismissal.
  
  \item[(ii)] Secondly, the court has to establish whether the refusal or failure to meet the expectation of renewal is fair with reference to misconduct or incapacity on the part of the employee or with reference to the employer’s operational
\end{itemize}

\textsuperscript{110} Olivier 1005. \\
\textsuperscript{111} Supra. \\
\textsuperscript{112} 66 of 1995. \\
\textsuperscript{113} Ibid.
requirements. Furthermore, the employer also has to follow a fair procedure before dismissing the employee concerned.

Section 186(b) of the Labour Relations Act\(^\text{114}\) does not include an expectation of a permanent or indefinite term relationship on an ongoing basis.

In terms of section 192(1) of the Labour Relations Act\(^\text{115}\) the employee has the onus of proving that the dismissal occurred. Once the employee has disposed of this burden of proof, the employer will have to prove the following:\(^\text{116}\)

\[(a)\] Firstly, the reason for the dismissal, which should relate to the employee’s misconduct or incapacity or to the employer’s operational requirements; and

\[(b)\] secondly, that it is fair to rely on the reasons concerned for purposes of the dismissal, both from a substantive and procedural point of view.

### 4.2 REASON FOR DISMISSAL

When determining the reason for terminating the contract, two distinct matters need to be canvassed.

Firstly, where the actual reason for terminating the employee’s services is not the alleged expiry of the term of the contract, but relates to other considerations, such as the misconduct or incapacity of the employee or the employer’s operational requirements, reliance on the automatic termination of the contract will not be counternanced.\(^\text{117}\)

Secondly, apart from enquiring into the existence of another reason for terminating the contract, the fairness of relying on that reason must be scrutinized.\(^\text{118}\)

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\(^\text{114}\) Ibid.
\(^\text{115}\) Ibid.
\(^\text{117}\) Olivier 1010.
\(^\text{118}\) Ibid.
In *Zank v Natal Fire Protection Association*\(^{119}\) the employer sought to justify the non-renewal of the contract of employment on the basis that the employee, a spotter pilot, had piloted an aircraft without a valid licence and on another occasion arrived late when required to take off at first light.

The Industrial Court found that the employee had already been disciplined for the first infraction. As for the second matter, it was opined that if it was so serious, the employer would have taken immediate disciplinary action and afforded the employee a proper hearing. It was accordingly held that the termination of the employee’s services was unfair.

Prior to *Zank v Natal Fire Protection Association*\(^{120}\) there was a similar case, namely *FGWU v Lanko Co-operative Ltd.*\(^{121}\) In this case, the employer who had previously followed a practice of re-employing seasonal workers, decided to replace some of them with “new” workers, who were allegedly better qualified. There was no evidence that any of the applicants were poor workers and/or that the new employees had superior skills. The court found that the employer was not justified in refusing to re-employ them on that basis.

In *Price Club v SACCAWU*\(^{122}\) the arbitrator held that an employer has an obligation to follow retrenchment procedures where it was found that fixed-term employment contracts had been prematurely terminated.

The arbitrator had to consider whether the retrenchment of the four employees, by the company, was fair. These employees had been employed on a fixed-term contract for a period of three months. Shortly after the expiration of the contract, the employees were informed that the employer no longer required their services.

The arbitrator held that the sole motivation for terminating the contracts was the shortfall in turnover in the company’s business. The employer argued that it was not obliged to follow retrenchment procedures, giving the reason that the employees

\(^{119}\) [1995] 16 BLLR 110 (IC).
\(^{120}\) *Ibid.*
\(^{121}\) (1994) 15 ILJ 876 (IC).
\(^{122}\) (1990) 1 ARB 5.1.3.
were employed on temporary contracts. The arbitrator rejected this argument of the employer on the following grounds:  

(i) Article 3 of the International Labour Organisation’s Convention 158 provides that:

“Adequate safeguards shall be provided against recourse to contracts of employment for a specified period of time, the aim of which is to avoid the protection resulting from this Convention.”

(ii) The employer was not obliged to follow fair retrenchment procedures as employees stayed on after the formal date of expiry of their contracts.

The termination of the four employees were, therefore, held to be unfair.

In *Khumalo v Supercare Cleaning* the arbitrator found that the employees were not entitled to severance pay after their contracts were terminated because of the cancellation of the contracts for which they were employed.

In *Mkhiva v BCS Joint Venture* the applicant’s services as a checker were terminated while work was still available beyond that date, albeit on a reduced level. Another checker, in the workplace, who was also employed in a temporary capacity, had been retained for purposes of completing the work. The employer cited that the reason the second employee was retained was because his timekeeping was better.

The respondent’s argument was that the applicant’s services were terminated as a natural consequence of the project for which he was employed and accordingly no dismissal had occurred.

The court rejected the respondent’s argument and concluded that the respondent had unfairly dismissed the applicant for operational reasons. This approach has

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123 Ibid.
124 2000 9 CCMA 5.5.2.
125 [1997] 8 BLLR 1014 (LC).
been criticised as overprotective and prescriptive by virtue of the manifestly onerous
duty on employees who enter into genuine temporary contracts of employment.126

A further question was raised, whether it was the intention of the legislature to confer
protection of fixed-term employees where the project exceeded the period for which
the employee had specifically been employed. This approach is seen as not
conducive to meeting the challenges posed by globalization, with the necessity to
introduce flexibility in the labour market and to overcome excessive bureaucratic
regulation.127

4.3 EXPECTATION OF PERMANENT EMPLOYMENT

Fixed-term contracts are usually entered into because the task to be performed is a
limited or specific one. Usually, the contract terminates upon the fulfillment of an
objective condition, for example, completing a specific task or the occurrence of a
specific event.128

Conflicting policy goals are inherent in the use of fixed-term contracts. On the one
hand, there is a fear that their use will undermine statutory unfair dismissal protection
and on the other hand, the desire to foster flexibility in the labour market.129

The case law which follows contributed to the development of the law, relating to the
expectation of permanent employment, in South Africa as it currently stands.

In Wood v Nestlé (Pty) Ltd130 the court found that the employer had committed an
unfair labour practice by not offering the applicant a permanent position.131 The
employer led the applicant to understand that she would receive a permanent post.
The applicant had formed a reasonable expectation that she would continue to work
on the employee assistance programme and receive permanent status in the

126  Hutchinson “Premature Termination of Fixed-Term and Temporary Employment Contracts” 644.
127  Ibid.
2188 at 2188.
129  Ibid.
130  (1996) 17 ILJ 184 (IC).
131  Hutchinson “Uncertainties Surrounding the Renewal of Fixed-term Contracts” supra.
workplace. The decision of the employer was described as “unreasonable, arbitrary and capricious”, as no account was taken of the employee’s legitimate expectation to be permanently employed.

The unfair labour practice that had been committed was not that the employee had been unfairly dismissed, but rather that the employer failed to appoint the applicant to permanent employment, thereby depriving her of benefits to which she would have been entitled. The applicant was awarded compensation on this basis. This was possible under the 1956 Labour Relations Act, in terms of the wide scope of the definition of unfair labour practice.

In *Dierks v University of South Africa* the Labour Court defined “reasonable expectation” as expressed in section 186(b) of the Labour Relations Act to include the following considerations:

- It is essentially an equity criterion, ensuring relief to a party on the basis of fairness in circumstances where the strict principles of the law would not foresee a remedy.

- The Labour Relations Act envisages the existence of a substantive expectation, to the extent that the expectation must relate to the renewal of the fixed-term contract.

- The expectation is seen to be essentially subjective in nature and, therefore, vests in the person of the employee. The employer need not share the same expectation.

- The courts must apply an objective test to determine whether continued employment had indeed become permanent and whether the employee could hold the alleged reasonable expectation of continued employment.

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133 *Supra.*
In *SACTWU v Mediterranean Woollen Mills*\(^{136}\) the Labour Appeal Court held that the relationship between the employer and employee could be construed as aiming at a permanent duration, despite an official description to the contrary. The employees who had resorted to illegal strike action and associated misconduct, were initially dismissed and thereafter re-employed on fixed-term contracts. The court held that the arrangement was akin to a probationary period and that the employees should have been given the same protection afforded to probationary employees.

It is clear that an employee engaged in a fixed-term contract and having a reasonable expectation of renewal of that contract will prove section 186(b) statutory “dismissal” if the employer refuses to renew or offers less favourable terms. However, it is not so clear what will ensue if the reasonable expectation is one of permanent employment. Section 186(b) requires an expectation that a fixed-term contract would be renewed on the same or similar terms. The Act does not, however, require that or regulate the position where the expectation implies a permanent or indefinite relationship on an ongoing basis.\(^{137}\)

Section 186(b) apparently envisages that an employer should not be allowed not to continue with fixed-term employment in circumstances where an expectation of renewal is justified.\(^{138}\)

In terms of *Dierks v University of South Africa*\(^{139}\) it does not seem logical that if a reasonable expectation can lead to a renewal of a fixed-term contract, the same expectation should lead to appropriate relief for permanent employment by implication, particularly if there is no provision in the Act to address the apparent lacuna.

In *Dierks v University of South Africa*\(^{140}\) the judge concluded that where the employee alleges that a reasonable expectation has been created for permanent employment or that a fixed-term contract has been converted into one of

\(^{136}\) *Supra.*

\(^{137}\) *Zwane v Elegance Jerseys* (1998) 7 CCMA 4.3.2.

\(^{138}\) *Colavita v Sun International Bophuthatswana Ltd* [1995] 9 BLLR 88 (IC).

\(^{139}\) *Supra.*

\(^{140}\) *Ibid.*
permanence, the employee might seek to rely on unfair labour practice jurisdiction as opposed to the defined unfair labour practice.

The court, accordingly, found that section 186(b) does not include a reasonable expectation of permanent employment and that the court does not have the jurisdiction to decide the issue insofar as it concerns the reasonable expectation of permanent employment.

The court, however, pointed out that where the period of temporary employment appears to be excessive in length, the court should be prepared to investigate whether the use of temporary employees is merely a method of avoiding the court’s scrutiny of the fairness of the termination of the contract.141

In this case, it was found that “the balance of probability” does not favour a finding that the grievants’ contracts were genuinely fixed-term contracts. It seems also fair and reasonable of the employees to have expected that their contracts should at best be made permanent or be renewed on the same basis as it was before termination.142

In terms of South African labour law, a “reasonable expectation” does not include a reasonable expectation of permanent employment. There is an apparent lacuna in the Labour Relations Act143 and where an employee alleges a reasonable expectation of permanent employment, that employees must proceed under schedule 7 item 2(1)(d) of the above-mentioned Act.144

141 Alfred Teves Technology v NUMSA 1996 5 ARB 8.2.8.1.
142 Supra.
143 66 of 1995.
CHAPTER 5
CONCLUSION

It is submitted that the common law remedies available to fixed-term employees still play a role, to the extent that these remedies are applicable, despite the peculiar regime created by the Labour Relations Act.\textsuperscript{145} In circumstances where the employee does not have a right to the renewal of the contract, the common law would not provide a remedy. In cases where there is such an expectation, the Labour Relations Act\textsuperscript{146} provides remedies for the employee, if it can be shown that the non-renewal amounted to an unfair dismissal. However, the aforementioned Labour Relations Act’s regulation of compensation, as a remedy, is rather a restricted one, especially when it comes to the position of fixed-term employees.\textsuperscript{147}

The Labour Relations Act\textsuperscript{148} prescribes the remedies available in the event of an unfair dismissal. In terms thereof the fixed-term employee who had a reasonable expectation that his/her contract of employment would be renewed on the same or similar terms, and whose termination of service did not match the Act’s fairness criteria, will primarily be entitled to an order of reinstatement or re-employment.\textsuperscript{149} Reinstatement implies continuity of employment on the same terms and condition from a date not earlier than the date of dismissal. Re-employment suggests that the employee be placed in the same or other reasonably suitable work on any terms from a date not earlier than the date of dismissal.\textsuperscript{150}

According to Du Toit\textsuperscript{151} this means that the employee must be placed in a position which is no longer a fixed-term one, one would think that the emphasis put in section 186(b) on the renewal of a fixed-term contract on the same or similar basis would normally imply the continuation of the relationship on a fixed-term basis. However,

\begin{footnotesize}
\begin{enumerate}
\item[145] Olivier supra.
\item[146] 66 of 1995.
\item[147] Olivier supra.
\item[148] 66 of 1995.
\item[149] S 193 of the Labour Relations Act 66 of 1995.
\item[150] S 193(1)(a)-(b) of the Labour Relations Act 66 of 1995.
\item[151] Du Toit, Bosch, Woolfrey, Godfrey, Rossouw, Christie, Cooper, Giles and Bosch The Labour Relations Act of 1995 (1996) at 387.
\end{enumerate}
\end{footnotesize}
where the relationship has matured into a permanent one, it would be apposite to order the re-employment of the employee on a permanent basis.\textsuperscript{152}

In regard to the nature of the expectation required by section 186(b) of the Labour Relations Act,\textsuperscript{153} the following case law contributed substantially in the development of the law relating thereto:

(i) \textit{Dierks v University of South Africa}\textsuperscript{154}

In this case the employee had been employed by means of a series of fixed-term contracts. The employee argued that he had been unfairly retrenched, and that he was entitled to a permanent position. Here the employee sought to secure a permanent position by using section 186(1)(b)\textsuperscript{155} and was not merely claiming unfair dismissal.

The main question here was whether one could use section 186(1)(b) to secure a permanent position. The Labour Court held that the provision only provides for the expectation of renewal of the contract on “the same or similar terms” and not to the expectation of permanent employment. Therefore, the court declined the argument by the applicant and accordingly held that an employee may not use the provision to secure permanent employment.

(ii) \textit{McInnes v Technikon Natal}\textsuperscript{156}

In this case, the Labour Court held that the decision in \textit{Dierks} was incorrect and took the view that the focus should be on the nature of the expectation and whether in the circumstances that expectation is reasonable. The court stated the issue to be determined is whether the expectation, in the words of the section, is an expectation that her employment would be renewed on “similar terms”.

\textsuperscript{152} Olivier \textit{supra}.
\textsuperscript{153} 66 of 1995.
\textsuperscript{154} (1999) 20 ILJ 1227 (LC).
\textsuperscript{155} Labour Relations Act 66 of 1995.
\textsuperscript{156} [2000] 6 BLLR 701 (LC).
Here the employee genuinely thought that she would be doing the same work as before but only on a permanent basis in future.

In determining the reasonableness of the employee’s expectation, the Labour Court stated that it was quite clear that, had it not been for the affirmative action policy, the employee would have continued to be employed. The Labour Court further stated that the respondent failed to discharge the onus resting upon it in terms of section 192(2), to show that the dismissal was fair.\textsuperscript{157}

\textit{(iii) Auf der Heyde v University of Cape Town}\textsuperscript{158}

In this case the Labour Court followed the decision in \textit{Dierks v University of South Africa}\textsuperscript{159} and held that s 186(1)(b) did not include a reasonable expectation of permanent employment.

On appeal\textsuperscript{160} the Labour Appeal Court upheld the decision of the court \textit{a quo}, and stated that if the expectation existed and if such expectation was reasonable, then such termination of the contract would amount to unfair dismissal.

Grogan\textsuperscript{161} argues that there is no reason why an expectation of permanent employment should not also provide a basis for a claim of dismissal in terms of section 186(1)(b). Grogan views the purpose of section 186(1)(b) to prevent employers from keeping employees on fixed-term employment contracts for an extended period of time.

The criteria to be considered in order to establish whether a reasonable expectation has come into existence are:\textsuperscript{162}

\begin{itemize}
  \item the evaluation of all the surrounding circumstances;
  \item the significance of the contractual stipulations;
\end{itemize}

\textsuperscript{157} At 710.
\textsuperscript{158} [2000] 8 BLLR 877 (LC).
\textsuperscript{159} Supra.
\textsuperscript{160} University of Cape Town v Auf der Heyde (2001) 22 ILJ 2647 (LAC).
\textsuperscript{162} Dierks v University of South Africa supra.
agreements or undertakings by the employer;
- practice or custom in regard to renewal or re-employment;
- the availability of the post;
- the purpose of or reason for concluding the fixed-term contract;
- inconsistent conduct;
- failure to give reasonable notice; and
- the nature of the employer’s business.

In terms of the case law, discussed above, it is apparent that there exists some confusion in regard to whether or not a fixed term employee can have a reasonable expectation of permanent employment, and that such expectation will fall within the ambit of the Labour Relations Act.\(^\text{163}\) Generally, there are two conflicting views. Firstly, there is the view that section 186(b) only refers to a reasonable expectation of the renewal of the fixed-term employment contract on the same or similar terms as the initial contract.\(^\text{164}\) Secondly, there is the view that section 186(b) does not only refer to an expectation of the renewal of the contract but that it also refers to an expectation of permanent employment, in certain cases.\(^\text{165}\)

The authors Grogan\(^\text{166}\) and Du Toit \textit{et al}\(^\text{167}\) both favour the view of \textit{McInnes v Technikon Natal}.\(^\text{168}\) Du Toit briefly submitted, in his reasoning, that on a purposive reading of section 186(1)(b), there is no reason for excluding the non-appointment of a temporary employee with a reasonable expectation of continued employment from the definition of “dismissal” merely because the post in question has been converted to a permanent one. He goes on further to say that the right to fair labour practices of an employee in this position is no less worthy of protection than that of an employee expecting a further temporary contract. On this basis, Du Toit preferred the ruling of \textit{McInnes v Technikon Natal}.\(^\text{169}\)

\(^{163}\) 66 of 1995.
\(^{164}\) \textit{Dierks v University of South Africa} supra.
\(^{165}\) \textit{McInnes v Technikon Natal} supra.
\(^{166}\) \textit{Workplace Law} (2005) 45.
\(^{167}\) \textit{Labour Relations Law} (2003) 4\textsuperscript{th} ed at 369.
\(^{168}\) Supra.
\(^{169}\) Supra.
It is respectfully submitted that the views of the authors, Grogan and Du Toit, are not sufficiently justified. It is further submitted that the ruling in *McInnes v Technikon Natal*\(^ {170}\) is incorrect. What is required in order to activate the provisions of section 186(1)(b) is an expectation that the fixed-term contract in question would be renewed on the same or similar terms. It is evident that the Labour Relations Act\(^ {171}\) does not require that or regulate the position where the expectation implies a permanent or indefinite relationship on an ongoing basis. The reference to “renewal” on the “same” or “similar terms” supports that this is the inference to be drawn from the wording of the subsection. It is further submitted that if the legislature intended this provision to provide for an expectation of permanent employment, then it would have inserted terms to that effect into the provision. What section 186(10(b) apparently envisages is that an employer should not be allowed not to continue with fixed-term employment in circumstances where an expectation of renewal is justified. The implication is that the remedy to be granted in this case, if the termination is found to be unfair, is that of reinstatement or re-employment on the same or similar terms, but not that the employee has to be reappointed as a permanent employee or on an indefinite basis. This also seems to be the approach followed in the case of *FGWU v Lanko Co-operative Ltd.*\(^ {172}\)

Therefore, it is finally submitted, that the correct view to be followed is that of the ruling of *Dierks v University of South Africa.*\(^ {173}\)

\(^{170}\) Supra.

\(^{171}\) 66 of 1995.

\(^{172}\) (1994) 15 ILJ 876 (IC) at 885H-886A.

\(^{173}\) Supra.
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