

EMPLOYMENT

THE OBLIGATION
TO PAY SEVERANCE
PAY TO FIXED-TERM
EMPLOYEES

ENCAPSULATING
INCAPACITY

THE OBLIGATION TO PAY SEVERANCE PAY TO FIXED-TERM EMPLOYEES

The amendments to the Labour Relations Act, No 66 of 1995 (LRA), ushered in an era of greater protection for employees on fixed-term contracts where the employees earn below the earnings threshold (currently R205,433.30) published annually in terms of the Basic Conditions of Employment Act, No 75 of 1997 (BCEA). Amongst the advantages offered to fixed-term contract workers receiving a salary of less than R205,433.30 per year is the fact that, under some circumstances, they may now also lay claim to a new statutory payment at the conclusion of a fixed-term contract.

Section 198B(10)(a) of the LRA provides that employees on fixed-term employment contracts are entitled to a payment of one week's remuneration for every completed year of the (fixed-term) employment contract, subject to the terms of an applicable collective agreement. This payment falls due to the employee where (1) the employee earns below the earnings threshold, (2) the employee has been employed for a fixed-term to work exclusively on a specific project that has a limited or defined duration (3) the duration of the contract exceeds two years. If all these requirements have been met the employee is entitled to the payment upon termination of the contract. This provision does not import an obligation on employers to consult with affected employees about the amount of severance due, contrary to the position in respect of other severance payments provided for in the LRA and BCEA (ie in an operational requirement dismissal). Nonetheless, it provides for the possibility that a collective agreement may overrule this statutory protection. It is not stated whether such collective agreement may only increase the payment, or whether it is possible to agree to a reduced payment as well,

The employer may further escape its liability to make this statutory payment where the employer offers the employee permanent employment or procures employment for the employees with a different employer at the expiry of the contract, provided the employment is on the same or similar terms.

Employers should take great care in defining the nature and term of any project where the project is used to determine the duration of the fixed-term contract. This is especially true where there are sub-components to a project. There should be no confusion on whether the contract will terminate on the completion of the sub-component or upon completion of the larger project itself.

Employers should further take cognisance of all the amendments in respect of fixed-term employment especially when employing staff earning below the earnings threshold. Whilst the widened scope of protection offered to fixed-term employees in respect of unfair dismissal apply to all fixed-term employees, those workers earning below the threshold are likely to find refuge in the additional fortification provided to them in s198B.

Johan Botes

ENCAPSULATING INCAPACITY

Labour legislation requires an employer to reasonably accommodate the needs of an employee with physical or mental impairments in the event that such impairment substantially limits the employee's ability to perform the essential functions of the job. The type of reasonable accommodation required would depend on the job and its essential functions; the work environment and the employee's specific impairment. It would be considered unlawful to request an employee to perform tasks that he/she is not able to perform due to ill-health.

Generally, when employees are no longer able to carry out their employment obligations, due to ill-health or injury, and alternative work arrangements are not feasible, they may be eligible for medical boarding.

In the event that the employee's medical condition does not improve, resulting in the employee's continued inability

continue



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to perform the functions of their employment, the employer should consult the employee to explore the possibility of alternative employment appropriate to the employee's capacity. Only in circumstances where the employee can no longer perform in the position, the employee is unable to be accommodated and/or there exists no appropriate alternative employment, may the employer, terminate the employment relationship by reasonable notice to the employee; that is, medically board the employee.

An employer intending to dismiss an employee due to incapacity must do so in accordance with item 10 and 11 of Schedule 8 to the Labour Relations Act, No 66 of 1995 (LRA), failing which, the fairness of such dismissal falls to be challenged.

Schedule 8 to the LRA embodies the Code of Good Practice in relation to dismissal. Items 10 and 11 of the schedule provides as follows:

"10: Incapacity: ill-health or injury

- (1) Incapacity on the grounds of ill health or injury may be temporary or permanent. If an employee is temporarily unable to work in these circumstances, the employer should investigate the extent of the incapacity or the injury. If the employee is likely to be absent for a time that is unreasonably long in the circumstances, the employer should investigate all the possible alternatives short of dismissal. When alternatives are considered, relevant factors might include the nature of the job, the period of absence, the seriousness of the illness or injury and the possibility of securing a temporary replacement for the ill or injured employee. In cases of permanent incapacity, the employer should ascertain the possibility of securing alternative employment, or adapting the duties or work circumstances of the employee to accommodate the employee's disability.*
- (2) In the process of the investigation referred to in subsection (1) the employee should be allowed the opportunity to state a case in response and to be assisted by a trade union representative or fellow employee.*
- (3) The degree of incapacity is relevant to the fairness of any dismissal. The cause of the incapacity may also be relevant. In the case of certain kinds of incapacity, for example alcoholism or drug abuse, counselling and rehabilitation may be appropriate steps for an employer to consider.*
- (4) Particular consideration should be given to employees who are injured at work or who are incapacitated by work-related illness. The courts have indicated that the duty on the employer to accommodate the incapacity of the employee is more onerous in these circumstances.*

11: Guidelines in cases of dismissal arising from ill-health or injury

Any person determining whether a dismissal arising from ill health or injury is unfair should consider:

- (a) whether or not the employee is capable of performing the work; and*
- (b) if the employee is not capable:*
 - (i) the extent to which the employee is able to perform the work;*
 - (ii) the extent to which the employee's work circumstances might be adapted to accommodate disability, or, where this is not possible, the extent to which the employee's duties might be adapted; and*
 - (iii) the availability of any suitable alternative work".*

The above means that before the employer takes the decision to dismiss an employee due to incapacity, such employer must undertake an incapacity enquiry aimed at assessing whether the employee is capable of performing their duties, be it in the position they occupied before the enquiry or in any suitable alternative position. A conclusion as to the employee's capability or otherwise can only be reached once a proper assessment of the employee's condition has been made.

It is important to note that if the assessment reveals that the employee is permanently incapacitated, the enquiry must continue and the employer must then establish whether it cannot adapt the employee's work circumstances so as to accommodate the incapacity, or adapt the employee's duties, or provide the employee with alternative work if same is available.

In considering whether or not to dismiss an employee due to ill-health, the employer must take note of the following:

- a thorough assessment of the employee's impairment must be conducted and;
- all alternatives must be exhausted.

Permanent or continued incapacity arising from ill-health or injury may be recognised as a legitimate reason for terminating an employment relationship. An employer is not obliged to retain an employee who is permanently incapacitated if such employee's working circumstances or duties cannot be adapted. A dismissal in these circumstances may be fair, provided that it was based on a proper investigation into the extent of the incapacity, as well as a consideration of possible alternatives to dismissal.

Katlego Letlonkane

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