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EMPLOYMENT ALERT

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Can an arbitrator grant relief under s198B after the expiry of the fixed-term contract?

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CLIFFE DEKKER HOFMEYR

Can an arbitrator grant relief under s198B after the expiry of the fixed-term contract?

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One of the 2014 amendments to the Labour Relations Act (LRA) sought to curb the reliance on fixed-term contracts by employers, which took the form of continuous renewals of fixed-term contracts even in cases where it was clear that the nature of the work was of an indefinite nature and permanent employment was more appropriate.

Section 198B of the LRA has established instances where it would be justified to enter into fixed-term contracts, failing which the fixed-term contract might be deemed to be of indefinite duration. It follows that where an employee has good reason to assert that there is no justification to be placed on repeated fixed-term contracts, the relief provided in s198B read with s198D is for a dispute to be referred to the CCMA or bargaining council to interpret and apply the statutory protections afforded to employees, in particular those earning below the ministerial threshold.

Most employees do not take issue with being on fixed-term contracts until the expiry of such contracts and their employment terminates. The purpose of this article is to explore the legal position with regard to whether fixed-term employees can seek a declarator under s198D after the termination of their employment. This question recently was considered by the Labour Court in *Nama Khoi Local Municipality / IMATU obo Raymond August*.

The employee concerned was employed on two consecutive fixed-term contracts of three months each. Upon the expiry of the second fixed-term contract, the employee was given a notice indicating that his temporary employment had come to an end. Aggrieved by the termination, IMATU referred a dispute to the SALGBC under s198D and sought relief to the effect that the employee must be appointed on an indefinite contract. In its award, the SALGBC found that the employee had been employed for an indefinite duration and ordered reinstatement in his favour.

The Municipality instituted review proceedings in the Labour Court on the basis that relief under s198D relates to the interpretation and application of s198B but does not include the power to reinstate an employee whose services had been terminated. Further, IMATU never sought reinstatement but a declaration that the employee's contract was in fact an indefinite one. The essence of the grounds of review was that the SALGBC had acted *ultra vires* as reinstatement is a remedy for unfair dismissal which was never the issue before the SALGBC.

The Labour Court emphasised that s198B has its own dispute resolution process in that s198D makes it possible for employees to refer disputes whilst the employment relationship is ongoing. This is to determine the status of the employment relationship and for a declaration that the fixed-term contract is an indefinite one.

Can an arbitrator grant relief under s198B after the expiry of the fixed-term contract?...continued

One difficulty that arises from this matter is that there is nothing proactive in the wording of s198D to suggest that employees must seek the declarator during the currency of their employment.

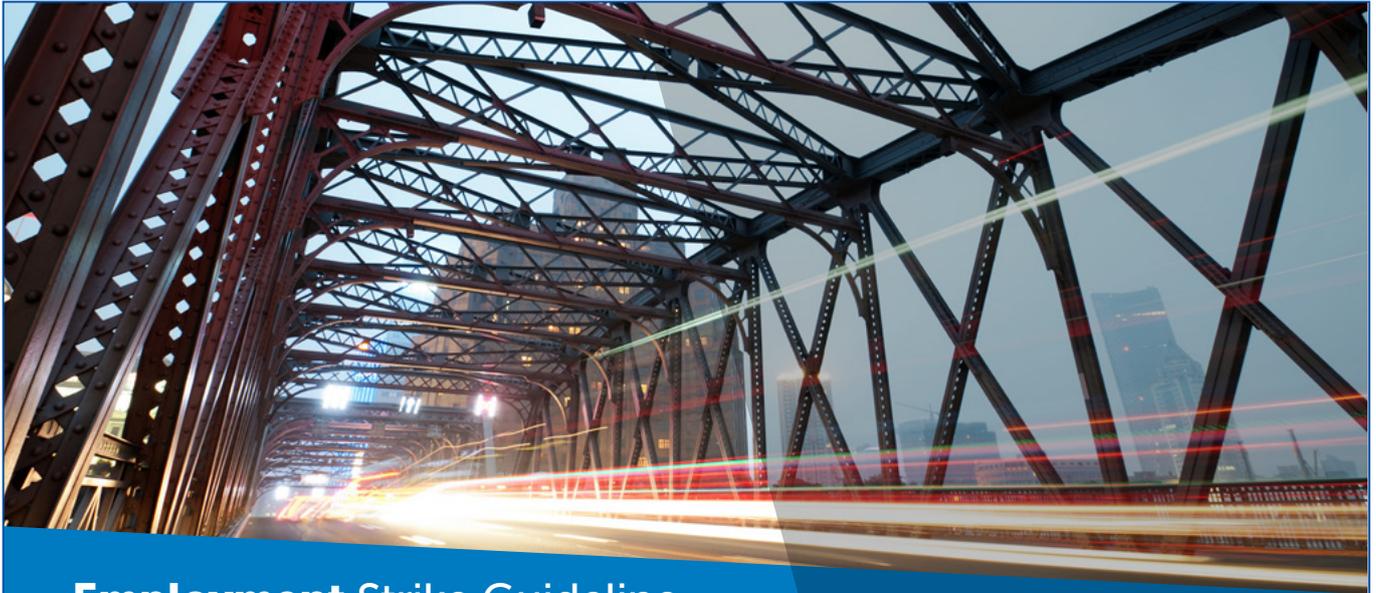
The Labour Court held that s198D was proactive in that it entitles employees to remedy the state of affairs during the currency of the employment relationship.

On whether the employee could seek such declaratory relief after the termination of employment, the Labour Court highlighted that distinct separate dispute resolution processes exist under s191 and s198D. It is that the s198D process was not designed to apply after termination of employment. This is because the section does not provide relief similar to s193 and s194, such as possible retrospective relief or compensation, which apply to disputes relating to unfair dismissals and unfair labour practices. Accordingly, the Labour Court set aside the arbitration award.

One difficulty that arises from this matter is that there is nothing proactive in the wording of s198D to suggest that employees must seek the declarator during the currency of their employment. It could be argued that employees do not rely upon s198D during the currency of their employment because they either believe they are deemed to be employees under s198B(5) or fear victimisation by employers. There is no reason why in our law a declarator cannot be sought after the termination of the fixed-term contract. This is because nothing in s198B suggests that an employee on a fixed-term contract must take steps for the contract to be deemed to be of an indefinite duration.

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