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Name of candidate:	AMANDA MICHELLE JOUBERT
Student number:	2040775
Degree:	LLM
Department:	DEPARTMENT OF MERCANTILE & LABOUR LAW
Title of Study:	A review of the protection of fixed-term contract employees within South African labour law: A comparative discussion
Supervisor:	Ms Huysamen
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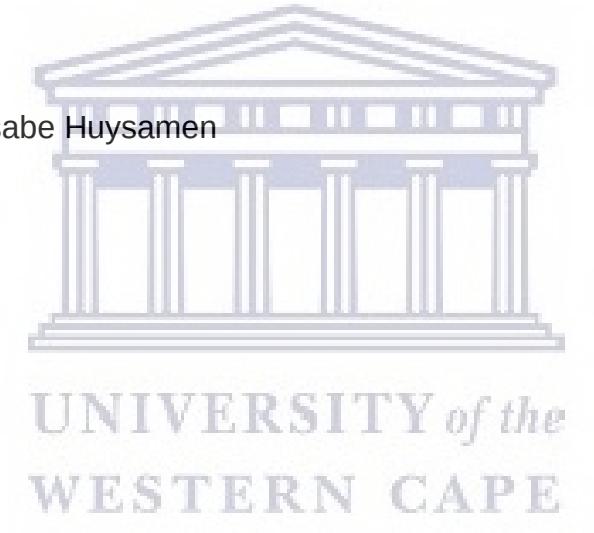
PLAGIARISM DECLARATION

I, Amanda Michelle Joubert, declare that the thesis entitled, 'A review of the protection of fixed-term contract employees within South African labour law: A comparative discussion', is my own work, that it has not been submitted for any degree or examination in any other university, and that all sources I have used or quoted have been indicated and acknowledged as complete references.

Signed by Amanda Michelle Joubert

2 December 2020

Signed by Supervisor, Elsabe Huysamen



DEDICATION AND ACKNOWLEDGEMENTS

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I dedicate this study to my two precious angels in heaven whom I've never met. Sarah and Michael, you were a part of this journey and will always remain in my heart until we meet again.

ABSTRACT

This research aims to explore the available legislative protection afforded to atypical employment, with specific reference to fixed-term workers. Atypical, employed workers, such as fixed-term workers, are often exploited as they do not always enjoy the same rights as typical employees. Hence, they are in a precarious position with regard to employee benefits and rights. Common law provides for the automatic termination of a fixed-term contract of employment on a specific date, typically either as stipulated in the contract or upon completion of a project or task. The Constitution of South Africa, however, provides for the right to fair labour practices for everyone. In 2014 section 186(1)(b) of the Labour Relations Act (LRA) was amended, while section 198B was added as a completely new section. Together these sections are aimed at providing increased protection to fixed-term workers. This study seeks to determine whether, with the 2014 amendments to the LRA, South African legislation has progressed adequately in providing protection for fixed-term contract employees. This will be done by looking as well at the protection available for such workers in the jurisdictions of the Netherlands and Germany.

KEYWORDS

PART-TIME

EMPLOYEE

DISMISSAL

CONSTITUTION OF SOUTH AFRICA

S 186(1)(B) OF THE LABOUR RELATIONS ACT 66 OF 1995

S 198B OF THE LABOUR RELATIONS ACT

REASONABLE EXPECTATION

ATYPICAL EMPLOYMENT

TYPICAL EMPLOYMENT

FIXED-TERM EMPLOYMENT

SOUTH AFRICA

NETHERLANDS

GERMANY

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ABBREVIATIONS

BCEA — BASIC CONDITIONS OF EMPLOYMENT ACT 75 OF 1997

CCMA — COMMISSION FOR CONCILIATION, MEDIATION AND ARBITATION

CEEP — EUROPEAN CENTRE OF ENTERPRISES WITH PUBLIC PARTICIPATION

EEA — EMPLOYMENT EQUITY ACT 55 OF 1998

ETUC — EUROPEAN TRADE UNION CONFEDERATION

FTW — FIXED-TERM WORK

LAC — LABOUR APPEAL COURT

LC — LABOUR COURT

LRA — LABOUR RELATIONS ACT 66 OF 1995

SDA — SKILLS DEVELOPMENT ACT 97 OF 1998

TES — TEMPORARY EMPLOYMENT SERVICES

TZBFG — THE GERMAN PART-TIME AND FIXED-TERM EMPLOYMENT ACT OF 2001

UNICE — UNION OF INDUSTRIAL AND EMPLOYEES' CONFEDERATIONS OF EUROPE

WAA — ADJUSTMENT OF THE WORKING HOURS ACT

CHAPTER 1:
INTRODUCTION

1.1 Background and problem statement

The origin of labour legislation in South Africa can be traced to the introduction of Roman-Dutch law in the country.[1] Roman-Dutch law became entrenched in the Industrial Conciliation Act of 1924, which was aimed at regulating industrial mineworkers at the time.[2] The Act was introduced to benefit only white skilled workers by protecting their employment rights and benefits, but no similar protection was provided for black workers.[3] The Act was later renamed the Labour Relations Act of 1956 (LRA, 1956). The LRA, 1956, further promoted collective bargaining and prohibited unfair labour practices as defined in the Act.[4]

South Africa became a fully democratic state in the early 1990s. The Interim Constitution of the Republic of South Africa, Act 200 of 1993, and the Constitution of the Republic of South Africa, 1996 ('the Constitution'), were enacted. Section 23 of the Constitution explicitly states that *everyone* has the right to fair labour practices.[5] This constitutional right to fair labour practices resulted in the implementation of, inter alia, the Basic Conditions of Employment Act 75 of 1997 (BCEA), the Employment Equity Act 55 of 1998 (EEA) and the Labour Relations Act 66 of 1995 (LRA).

While South Africa's labour laws undoubtedly provide a multitude of rights to workers, the question remains whether all South African workers, and specifically those employed in atypical employment, are adequately protected by existing laws. In addressing this question, it is necessary to differentiate between typical and atypical employment.

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[1] Blignaut C *The Effectiveness of conciliation as an alternative dispute resolution process in unfair dismissal disputes* (unpublished LLM thesis, University of Pretoria, 2018) 4.
[2] Blignaut C (2018) 5.
[3] Blignaut C (2018) 5.
[4] Blignaut C (2018) 5.
[5] Section 23(*1*) of The Constitution of the Republic of South Africa, 1996.

Typical or standard employment is generally understood as being full-time permanent employment.[6] Conversely, atypical employment or non-standard employment is generally reflective of temporary or fixed-term employment.[7] Atypical employment most commonly includes part-time work, temporary work, casual and seasonal work, and the subject of this research, fixed-term contracts of employment.[8] Fixed-term employment implies that there is a pre-determined date on which the employment relationship will terminate, normally determined by a stipulated date or the completion of a specified project.[9] Fixed-term employment is often associated with low job security.[10]

Under the common law, a fixed-term contract automatically terminates on the specified date or occurrence of an event or on the completion of a task, as agreed.[11] No dismissal can be said to have occurred. Section 186(1)(b) of the LRA, however, creates an exception to this general common law principle. Section 186(1)(b) holds that an employee can claim a dismissal where the employee has reasonably expected the employer to renew a fixed-term contract of employment on the same or similar terms, but the employer has offered to renew it on less favourable terms or has not renewed it at all. After the 2014 amendments[12] to the LRA, section 186(1)(b)(ii) was added to the existing section 186(1)(b). The amendment provides that an employee can now also claim a dismissal where, on the expiry of a fixed-term contract, the employee reasonably expected to be appointed permanently and the employer failed to do so.

The 2014 amendments to the LRA also introduced section 198B into the LRA This was aimed at providing increased protection to fixed-term employees. The provisions of s 198B are, however, limited to those workers who earn less than the earnings

[6] Schoukens P & Barrio A 'The changing concept of work: When does, typical work become atypical?' (2017) Vol 8(4) *ELLJ* 306-322.
[7] Schoukens P & Barrio (2017) 306-322.
[8] Fourie ES 'Non-standard workers: The South African context, international law and regulation by the European Union' (2008) 11(4) *PER/PELJ* 111.
[9] Grogan J *Workplace law* 11 ed (2014) ch 10.
[10] Gericke SB 'A new look at the old problem of a reasonable expectation: the reasonableness of repeated renewals of fixed-term contracts as opposed to indefinite employment' (2011) 14 *PELJ* 120-234.
[11] Grogan J (2014).
[12] Labour Relations Amendment Act 66 of 1995 (LRAA).

threshold as determined by the Minister of Labour from time to time in accordance with the BCEA. At the time of this writing, the earnings threshold was fixed at R205,433 per annum.[13]

With the above in mind, this study aims to provide insight into the existing legislative protection of fixed-term contract employees subsequent to the 2014 amendments to the LRA, and to determine to what extent the precarious position of fixed-term contract employees has been addressed by the 2014 amendments, if at all.

1.2. Significance of the problem

Labour markets internationally are increasingly impacted on by technology and globalisation.[14] Globalisation refers to the 'widening and deepening of international trade, finance, information and culture in a single integrated world market'.[15] Consequently, globalisation increases, inter alia, competition through transfer of investments and production of goods, all of which have a significant impact on the labour markets of countries.[16] A study by Fomosah[17] on the effects of globalisation in South Africa found that international network enterprises were promoted; this resulted in the formation of a pattern of atypical employment that favours a diversity of contractual agreements between labour and capital.

As a developing country, South Africa has adopted atypical forms of employment to keep up with the growing demands of globalisation within the labour market.[18] Barker points out that there are problems in the labour market in South Africa, particularly since Temporary Employment Services (TES) offer lower salaries to workers than those normally earned by full-time employees.[19] This leads to huge disparities in wages earned by workers under different employment conditions.[20] Although

[13] Government Notice 531 Basic Conditions of Employment Act (75/1997): Determination: Earnings Threshold Government Gazette No. 3 37795.
[14] Nel, Kirsten & Swanepoel *South African employment relations theory and practice* 8 ed (2016) 130.
[15] Nel, Kirsten & Swanepoel (2016) 130.
[16] Nel, Kirsten & Swanepoel (2016) 130.
[17] Fomosah AR *Globalisation and Work Regulation in South Africa* 8-9.
[18] Barker F *The South African Labour Market Theory and Practice* Rev. 5 ed (2015) ch 6.
[19] Barker F (2015) ch 6.
[20] Barker F (2015) ch 6.

legislation such as the LRA and BCEA theoretically protect atypical employees such as fixed-term workers, in practice the scenario is very different. Barker further argues that training is often not provided to contract or temporary employees,[21] who often have no access to social security or retirement fund benefits.[22] Due to problems associated with atypical contracts of employment, and the generally precarious position in which atypical workers find themselves, it is important to evaluate the protection provided within South African labour legislation for such workers, and those employed on a fixed-term basis. This is in line with the constitutional right that everyone has the right to fair labour practices.[23]

This research focuses on fixed-term contract employees as a category of atypical workers and the protection available to such workers. Analysing the legal principles involved and applying them could lead to a reduction in the imbalances of the labour market.

1.3. Research question

The research questions this study intends to answer is whether South African workers employed under fixed-term contracts are sufficiently protected by existing labour legislation after the 2014 amendments to the LRA.

1.4. Aims of the research

As stated in section 1.3, this study aims to provide insight into the LRA's protection of fixed-term contract employment after the 2014 amendments to the LRA.

The study examines the precarious position of atypical workers and the problems encountered specifically by fixed-term appointed employees. In this way, the study highlights some of the challenges in applying existing labour legislation effectively to such employees. A related aim is to determine how existing legislative protection could be improved in order to adequately protect these employees, should such protection

[21] Barker F (2015) ch 6.
[22] Barker F (2015) ch 6.
[23] Section 23(*1*) of The Constitution of the Republic of South Africa, 1996.

be found lacking. This would assist both employers and workers in understanding their rights and obligations regarding fixed-term contracts.

In order to achieve these aims, the study explores the applicable legislative provisions of the Netherlands and Germany. The insights gained from the legislation of these countries may assist in determining whether South Africa's LRA is aligned to international standards.

1.5. Literature review

Spurred by the core ideals of neoliberalism across the world, atypical forms of employment, including fixed-term contracts, have become the norm both locally and internationally, as new forms of employment emerge.[24] When labour legislation was drafted in South Africa, the legal framework was, however, designed to protect the full-time employee typical at the time. Historically, one of its main design principles was that it did not advocate, nor lean in favour of, atypical employment. This is because atypical employment is based on a short-lived contract that has a clearly stated expiration date and where the employee has no benefits, such as a pension. Fixed-term employees also have little or no job security.[25] Vettori states that fixed-term contract employees usually have few prospects of promotion and are normally not granted the same benefits to which other employees in the workplace are entitled.[26] This makes atypical employees more exposed to exploitation by employers.

In the case of *Van Wyngaardt v Unisa,*[27] the commissioner held that the applicant could only claim dismissal if she were able to prove that she had a reasonable expectation that her contract would be renewed. She was unable to do so since the contract had the express provision that the applicant would not be entitled to expect a renewal.[28]

Section 213 of the LRA, 1995 defines an employee as :

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[24] Fourie (2008) 110-112.
[25] Vettori S 'Fixed-term employment contracts: The permanence of the temporary' (2008) Stell LR 189-208.
[26] Vettori S (2008) 189-208.
[27] [2006] 1 BALR 91.
[28] Fourie ES (2008) 110-112.

(a) ‘Any person, excluding an independent contractor, who works for another person or for the State and who receives, or is entitled to receive, any remuneration, and

(b) Any other person who in any manner assists in carrying out or conducting the business of an employer and employee and employment have meanings corresponding to that of employee.’

According to Fourie, the definition of ‘employee’ in section 213 of the LRA does not differentiate between full-time or part-time employees. Fixed-term employment is generally regarded as a contract entered into by two parties for a certain time, or for a certain goal or project to be completed.[29] Under common law, the contract would automatically come to an end upon the agreed termination date or the occurrence of an event as specified by the parties in the contract.[30] Grogan confirms that the life of a fixed-term contract may be determined either by stipulating a termination date or by stipulating the occurrence of an event.[31]

Under common law, this leaves the employee with no recourse when his or her contract is not renewed. This is a result of common law focusing on the contract itself, and not on the relationship between the parties.[32] In *Fedlife Assurance v Wolfaardt*[33] the Supreme Court of Appeal (SCA) held that the common law right to enforce such a term remained intact and it was thus not necessary to declare a premature termination for it to be an unfair dismissal. Mmatli has also submitted that courts should uphold the parties’ wishes in the contract in terms of common law, thus making early termination thereof impermissible.[34] Thus, the common law remains an important source of law when dealing with fixed-term contracts.[35]

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[29] Grogan J (2014) ch 10

[30] Grogan J (2014) ch 10.

[31] Grogan J (2014) ch 10.

[32] Gericke SB ‘The regulation of successive fixed-term employment in South Africa: lessons to be gleaned from foreign and international law’ *(2016) TSAR 94.*

[33] Fedlife Assurance v Wolfaardt (2002) 2 All SA 295 (SCA).

[34] Mmatli SL *Insufficiency and lack of clarity of statutory regulation of fixed-term contracts in South Africa* (unpublished thesis, LLM, University of Johannesburg, 2015).

[35] Grogan J (2014) ch 10.

To provide an exception to the common law approach towards the termination of fixed-term contracts, the LRA, through the introduction of section 186(1)(b), provides fixed-term employees with the means to claim unfair dismissal in certain instances. Section 186(1)(b)(i) of the LRA provides that if an employee has reasonably expected the employer to renew a fixed-term contract on the same or similar terms, but the employer has offered to renew it on less favourable terms or has not renewed it, that would constitute a dismissal. The protection against unfair dismissal available to fixed-term employees was extended with the inclusion of section 186(1)(b)(ii) in the LRA (through the LRAA). This section now provides that a dismissal can be argued where the employee had a reasonable expectation that the contract would become permanent, but the employer did not offer such permanent employment to the employee.

This latter inclusion to the LRA has now settled an ongoing debate between the courts as to whether the pre-amended section 186(1)(b) applied to situations where the employee based the dismissal on a reasonable expectation to be appointed permanently. In *Auf van der Heyde v the University of Cape Town,*[36] the Labour Court (LC) determined that the reasonable expectation provided for in the former section 186(1)(b) was limited to the renewal of the contract and not to the expectation of a permanent position.[37] Similarly, in the matter of *University of Pretoria and others*,[38] the court held that :

> 'The words employed in s 186 envisage that two requirements must be met for an employer's actions to constitute a dismissal:
>
> (1.) A reasonable expectation on the part of the employee that a fixed-term contract on the same or similar terms will be renewed; and
>
> (2.) A failure by the employer to renew the contract on the same terms or a failure to renew it at all. These words do not, however, carry the meaning argued by the third respondent, namely that being employed based on a series

[36] (2000) 21 ILJ 1758 (LC).
[37] *Auf Der Heyde v University of the Cape Town (*2000) 21 ILJ 1758 (LC).
[38] *(*unreported case no JA38/2010).

of fixed-term contracts [implies that] an employee has more than a reasonable expectation of a permanent appointment.'[39]

Apart from the increased legislative protection now available to fixed-term employees under section 186(1)(b)(ii), the introduction of section 198B into the LRA also brought about changes assisting employees engaged in fixed-term contracts. Section 198B,[40], however, only applies to employees earning less than the earnings threshold determined periodically by the Minister of Labour. Section 198B (3) states that an employer may not employ a person on a fixed-term contract for longer than three months unless certain exceptions apply, or the employer can provide a justifiable reason for doing so.[41]

Section 198B (5) also provides that, after being employed for three months on a fixed-term contract, an employee would be regarded as a permanent employee.[42] Despite this, section 198B does provide for circumstances where a fixed-term contract can be utilised for a period exceeding three months without being automatically regarded as a permanent contract. The LRA stipulates that there must be justifiable reasons for engaging in a fixed-term contract exceeding three months, such as replacing an employee who will temporarily be absent from work, seasonal work, and so on.[43]

Section 198B has generally been welcomed because it now provides for employees who have been employed in terms of a fixed-term contract for more than three months to receive the same benefits as permanent employees, unless a justifiable reason exists for different treatment. Section 198B(8)(a)[44] further stipulates that an employee

[39] *University of Pretoria v CCMA and others (LAC) (*unreported case no JA38/2010).
[40] S 198B (2)*(a)*, Labour Relations Amendment Act of 2014.
[41] Grogan J (2014) ch 10.
[42] The Labour Relations Act 66 of 1995.
[43] S 198B(4) Labour Relations Amendment Act of 2014 states as follows: 'The employee is employed on account of a temporary increase in the volume of work which is not expected to endure beyond 12 months; The employee is a student or recent graduate who is employed for the purpose of being trained or gaining work experience in order to enter a job or profession; The employee is employed to work exclusively on a specific project that has a limited or defined duration; The employee is a non-citizen who has been granted a work permit for a defined period; The employee is employed to perform seasonal work; The employee is employed for the purpose of an official public works scheme or similar public job creation scheme; The employee is employed in a position which is funded by an external source for a limited period; or The employee has reached the normal or agreed retirement age applicable in the employer's business.'
[44] Labour Relations Amendment Act of 2014.

employed under a fixed-term contract for more than three months must not be treated less favourably than an employee employed on a permanent basis performing the same or similar work, unless there is a justifiable reason for the different treatment. This means that these fixed-term contract employees should also be afforded the same salary, leave, training and working hours, and so on.

1.5.1. Overview of legislation in the Netherlands and Germany on atypical employees

When the Dutch invaded South Africa in 1652, they imposed Roman-Dutch law on the indigenous people.[45] Even after the British colonised South Africa, this legal system remained in place.[46] The Netherlands is important as it symbolises the origin of Roman-Dutch laws. Gericke asserts that various countries, such as the Netherlands and Germany, have applied employment protection legislation to fixed-term contracts to mitigate discrimination against vulnerable categories of workers and to ensure job stability, improved productivity through increased adaptation, continuous training, and technological progress.[47] In view of this and the historic influence of Dutch and German law in South Africa law, considering the approaches to fixed-term employment in these two jurisdictions may be deemed appropriate.

The Dutch Work and Security Act was introduced in 2015 in the Netherlands.[48] A three-year limit was set on the duration of the renewals of fixed-term employment, but there is no limitation on the duration of the first contract.[49] When there are three successive fixed-term contracts not exceeding a three-year period, the fourth renewal of such contract will transform it into a permanent contract.[50] The Dutch Senate approved new legislation in May 2019 to extend the duration of fixed-term contracts, called the Labour Market in Balance Act. This Act came into operation in January 2020.

[45] Lenel B The History of South African Law and its Roman–Dutch Roots (2002).
[46] Lenel B (2002).
[47] Gericke SB (2011) 125.
[48] Gericke SB (2016) 94.
[49] Gericke SB (2016) 94.
[50] Gericke SB (2016) 94.

In 2004 Germany was described as the top reformer in fixed-term contracts.[51] This means that Germany uses fixed-term contracts to make successful changes to its labour market. Exploring how German labour law protects fixed-term contract employees allows for a valuable comparison with South African law. For example, German legislation extends protection to all fixed-term contract employees without exclusions or differentiation between high- and low-income fixed-term contract workers.[52] Germany's legal limit for the maximum length of fixed-term contracts is two years if the employee had no previous employment contract with the employer; renewing the employment for a third year would result in its being regarded as indefinite employment.[53] Germany also makes use of precarious non-standard employment in certain circumstances, as stated in different statutory laws.

What becomes clear is that every country has a unique history determining why its laws and policies take the form they do; consequently, labour laws differ from one country to the next.[54] It is therefore important to discuss the context in which laws are developed. Furthermore, globalisation influences labour markets in determining how staff are employed.[55] The laws of a country also affect international investments. For example, if a country's labour laws are too rigid, then companies and organisations are unlikely to invest, resulting in fewer job opportunities.[56]

1.6. Research methodology

This study is located within a legal interpretivist methodological framework. Legal interpretivism offers a philosophical account of how institutions – in this case meaning the Department of Labour – interpret and understand the legal significance, actions, and practices of people's legal rights and obligations. In other words, the focus of the study is how the law is applied in practice when dealing with atypical appointments. The study identifies the challenges and concerns regarding part-time conditions of

[51] Barker F (2015) ch 6.
[52] Gericke SB (2016) 102.
[53] Carre F 'Employment law overview Germany' 2019-2020 *http://www.Knowledge.leglobe.org* (accessed 27 November 2019).
[54] Gericke SB (2016) 101.
[55] Barker F (2015) ch 6.
[56] Barker F (2015) ch 6.

employment; more specifically, it examines the grounds, if any, on which atypical employees are protected in the labour market, and what can be done to ensure continued protection.

The main sources of data are derived from desktop study. As such, the literature review will focus on primary sources such as the Constitution of the Republic of South Africa, legislation such as the LRA, LRAA, Employment Equity Act, and the Basic Conditions of Employment Act. These will be discussed to show the foundational sources of atypical employment and case law. Secondary sources such as textbooks, academic articles, reports of international instruments, and journal articles will also be used. Legal authors and academics who have touched on the subject matter, such as Vettori, Gerricke, Huysamen, Grogan and Bendix, will be consulted for their viewpoints and legal explanations. The most valuable tool remains the Constitution of South Africa, which opened the doors to new legislation in the labour sector. It provides guidance to the interpretation of common law in modern times.

Since this is a comparative study, international sources from Germany and Netherlands will be used, together with guidelines of precautionary measures for fixed-term employment by the European Union Directives. (It must be added that it was difficult to trace legislation of the Netherlands due to language barriers.)

1.7. Chapter outline

Chapter one serves as the introduction and background to the study and explains the research problem and aims of the study.

Chapter two discusses different types of employment and the legislative protection afforded to such forms of employment. The history of South African labour law is discussed, as is the legislation that formed atypical employment, the rise in atypical employment with specific reference to fixed-term contracts of employment, and the precarious nature of fixed-term contracts of employment.

Chapter three focuses on the current legislative protection available to fixed-term contract employees in South Africa. It includes analyses of selected case law.

Chapter four provides a brief overview of the legal position of fixed-term employment in the Netherlands and Germany, as well as a comparison with South African law.

Finally, chapter five concludes the study and offers recommendations concerning the research findings.

CHAPTER 2:
AN OVERVIEW OF REGULATIONS THAT LAID THE FOUNDATION FOR ATYPICAL EMPLOYMENT IN SOUTH AFRICAN LABOUR LAW

2.1. Introduction

South Africa faces significant challenges due to its history of inequality and discrimination. Imperialism and apartheid caused deep-seated racial inequality that directly resulted in political, social, and economic challenges,[57] many of which are still observable today. Apartheid laws ensured that white South Africans had better job opportunities than black South Africans.[58] Moreover, apartheid ensured that black people did not receive the same education as white South Africans.[59] The challenges occasioned by such injustices persist as the government continues to redress the legacy of the apartheid past. Of the sectors plagued by the injustices mentioned above, one that continues to face significant challenges is the labour sector.

This chapter commences with a brief discussion of the history of South African labour law to illustrate its growth. After that, various forms of employment in South Africa are discussed and broadly categorised into typical or atypical work. The precarious nature of these type of contracts, and the relevant legislative protection afforded to them through labour legislation, is discussed. The legislation which paved the way for atypical employment in South Africa will be shown. Fixed-term contract employment as a specific form of atypical employment is then considered.

2.2. History of South African labour laws

South Africa's history of labour law is a history of injustices in the workforce.[60] Since the beginning of colonialism, and during the expansion of the political and economic power of the Afrikaner *volk*, people, predominantly black people and females, were

[57] Twyman CM 'Finding Justice in South African Labour Law: The Use of Arbitration to Evaluate Affirmative Action'. (2001) *Case W. Res. J. Int'l L* 313.
[58] Twyman CM (2001) 313. The term 'black', as used in the sentence, refers to the Employment Equity Act, No. 55 of 1998 in which 'black people' refers to people of African, coloured, Indian and Chinese descent.
[59] Twyman CM (2001) 313.
[60] Twyman CM (2001) 308.

treated unjustly.[61] After the Dutch arrived at the Cape of Good Hope in 1652, disparities based on race and gender became evident as the Dutch decided what work the indigenous people of South Africa ought to do.[62] The Dutch introduced the master-servant concept, which formed the basis of employment contracts at the time.[63] During this early stage of colonialism, Roman-Dutch law was introduced. Roman-Dutch law is a civil legal system based on two governing principles, namely that case law prevails in common law and that judicial decisions are binding.[64]

The two most influential industries that gave rise to the South African labour system during the early 1900s were farming and mining.[65] The Transvaal Industrial Disputes Prevention Act 20 of 1909 and the Mines and Workers Act 12 of 1911 were implemented. They addressed the organisation of white workers and had the effect of reserving specific jobs for them as well as ensuring that they were paid more than black workers.[66]

After the Rand Revolt strike of 1922,[67] led by white workers, the Industrial Conciliation Act of 1924 was enacted.[68] The Act was introduced to further benefit white skilled workers by providing added protection of their employment rights and benefits. No similar protection was provided for black workers at the time.[69] Only in 1947 did change for the rights of black workers slowly emerge through the introduction of the Industrial Conciliation (Natives) Bill.[70] The Bill's primary objective was to provide black workers with statutory recognition and for them to be treated equally to their white counterparts, even if only superficially so.[71] Unfortunately, it was still only white

[61] Twyman CM (2001) 308.
[62] Twyman CM (2001) 308.
[63] Twyman CM (2001) 317.
[64] Twyman CM (2001) 317.
[65] Twyman CM (2001) 308.
[66] Twyman CM (2001) 308.
[67] The Rand Rebellion of 1922 was an armed uprising which is also referred to as the Rand Revolt or Red Revolt. It occurred during a period of economic depression following World War I when mining companies were faced with rising costs and a fall in the price of gold. See *https://www.sahistory.org.za/article/rand-rebellion-1922* (accessed on 21 April 2020).
[68] Twyman CM (2001) 319.
[69] Blignaut C *The Effectiveness of conciliation as an alternative dispute resolution process in unfair dismissal disputes.* (unpublished LLM thesis, University of Pretoria,2018) 5.
[70] Twyman CM (2001) 319.
[71] Twyman CM (2001) 319.

workers who could be members of a trade union, leaving black workers with no similar bargaining power.[72]

With the rise of apartheid in the 1950s, a turbulent period in the political history of South Africa, injustices against blacks specifically were amplified with the passing of the Suppression of Communism Act 44 of 1950.[73] In 1956 the Industrial Conciliation Act was also amended to provide the apartheid government[74] with more control over black workers.[75] It was only in 1979, after the establishment of the Wiehahn Commission of Inquiry, that a positive change in South African labour relations started to emerge.[76] The rights of black workers were also provided for in the Labour Relations Act 28 of 1956.[77]

Democracy in South Africa finally emerged between 1991 and 1994 with the introduction of, first, the Interim Constitution of 1993 and, thereafter, the Final Constitution in 1996. The Interim Constitution changed the landscape of the South African labour regime of the time, with the result that it was declared that the Labour Relations Act of 1956 was not constitutional.[78] The Final Constitution subsequently replaced the Interim Constitution.

Under the Final Constitution, labour law was one of the first areas of law to undergo extensive reform,[79] with the Constitution providing for the introduction of new

[72] Twyman CM (2001) 319.
[73] Bhoola U 2002 'National labour law profile: South Africa. International Labour Organisation' Available online at *http://www. ilo. org/public/english/dialogue/ifpdial/info/national/sa. htm* (accessed on 27 November 2019).
[74] Katherine Schulz Richard states: 'The Afrikaners are a South African ethnic group who are descended from 17th century Dutch, German, and French settlers to South Africa. The Afrikaners slowly developed their language and culture when they came into contact with Africans and Asians. The word 'Afrikaners' means 'Africans' in Dutch'. Richard KS 'Afrikaners'. Thought Co, Feb. 11, 2020, (accessed on 21 April 2020). *https://www.thoughtco.com/afrikaners-in-south-africa-1435512*
[75]Bhoola U 2002 'National labour law profile: South Africa. International Labour Organisation' Available online at *http://www. ilo. org/public/english/dialogue/ifpdial/info/national/sa. htm* (accessed on 27 November 2019).
[76] Bhoola U 2002 'National labour law profile: South Africa. International Labour Organisation' Available online *at http://www. ilo. org/public/english/dialogue/ifpdial/info/national/sa. htm* (accessed on 27 November 2019).
[77] Bhoola U 2002 'National labour law profile: South Africa. International Labour Organisation' Available online at *http://www. ilo. org/public/elish/dialogue/ifpdial/info/national/sa. htm* (accessed on 27 November 2019).
[78] Bhoola U 2002 'National labour law profile: South Africa. International Labour Organisation' Available online at *http://www. ilo. org/public/english/dialogue/ifpdial/info/national/sa. htm* (accessed on 27 November 2019).
[79] Bhoola U 2002 'National labour law profile: South Africa. International Labour Organisation' Available online at *http://www. ilo. org/public/english/dialogue/ifpdial/info/national/sa. htm* (accessed on 27 November 2019).

workplace legislation. Addressing labour relations specifically, section 23 of the Constitution entrenches fair labour practices and reads as follows:

> 'Section 23 Labour relations
> (1) Everyone has the right to fair labour practices.
> (2) Every worker has the right—
> (a) to form and join a trade union.
> (b) to participate in the activities and programmes of a trade union.
> (c) to strike.
> (3) Every employer has the right—
> (a) to form and join an employers' organisation, and
> (b) to participate in the activities and programmes of an employers' organisation.
> (4) Every trade union and every employer's organisation have the right—
> (a) to determine its administration, programmes, and activities.
> (b) to organise, and
> (c) to form and join a federation.
> (5) Every trade union, employers' organisation and the employer have the right to engage in collective bargaining. National legislation may be enacted to regulate collective bargaining. To the extent that the law may limit a right in this chapter, the limitation must comply with section 36(1).
> (6) National legislation may recognise union security arrangements contained in collective agreements. To the extent that the legislation may limit a right in this chapter, the limitation must comply with section 36(1).'

Since then, the introduction of the Constitution, the Labour Relations Act 66 of 1995 (LRA), the Basic Conditions of Employment Act 75 of 1997 (BCEA), the Employment Equity Act 55 of 1998 (EEA), and the Skills Development Act 97 of 1998 (SDA) have all been enacted as part of the legislative reform occasioned by the Constitution.[80]

[80] Bhoola U 2002 'National labour law profile: South Africa. International Labour Organisation' Available online at *http://www. ilo. org/public/english/dialogue/ifpdial/info/national/sa. htm* (accessed on 27 November 2019).

2.3. Forms of employment in South Africa

2.3.1. Typical employment

Typical employment is regarded as being full-time and of an indefinite period.[81] A typical employment contract provides for a commencement date without a clear identified termination date.[82] Work in terms of such a contract is described as permanent or full-time, and the employer does not expect it to end within the near future.[83] Full-time employment is also often accompanied by benefits such as pension, leave, training, staff development, and medical aid assistance.[84]

The contract can only be terminated on a legally recognised ground, such as resignation, retirement, fair dismissal under the LRA,[85] or death of the employee.[86] The parties to the contract are free to agree on the applicable retirement age.[87] Overall, typical employment arrangements are regarded as providing better job security, conditions of employment, and protection for employees.

2.3.2. Atypical employment

In contrast to typical employment, atypical employment is generally associated with decreased job security and employee protection. It is usually related to work of an intermittent nature, and, as such, not indicative of permanent employment. Employees engaged in atypical contracts of employment are often not provided with the same benefits as those provided to full-time employees, such as pension and medical aid.[88]

Atypical employment is generally for a specific purpose, such as when an employee stands in for a full-time worker or performs a particular task.[89] Atypical forms of employment include casual work, part-time work, temporary work, seasonal work, and

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[81] Grogan J *Workplace Law* 12 ed (2017) 36.
[82] Bendix S *Labour Relations in Practice: A Hands-On Approach* (2015) 143.
[83] Bendix S (2015) 143.
[84] Bendix S (2015) 143.
[85] S 186 of the LRA.
[86] Huysamen E 'An Overview of Fixed-Term Contracts of Employment as A Form of Atypical Work in South Africa' *PER/PELJ* 2019 22.
[87] Grogan J (2017) 38.
[88] Grogan J (2017) 38.
[89] Bendix S (2015) 144.

fixed-term contracts.

Part-time workers are described as employees who are paid for the time they work.[90] They generally work fewer hours than full-time workers. A labour broker contract is defined as a temporary employment service (TES).[91] The LRA defines a TES employee or labour broker as 'any person who, for reward, procures for or provides to a client other person who render services to, or perform work for, the client and who are rewarded by the temporary employment service'. The labour-broker employee thus works for one of his or her clients. The LRA regulates TES, and the regulation thereof will be discussed in section 2.2.4.

A fixed-term employee is a person employed for a clearly determined (identifiable) period.[92] The contract itself is for a specified period with an agreed date of termination, which could be a specific date, the occurrence of an event, or the completion of a specified task.[93] The replacement of an employee who is on maternity leave, a worker doing a specific job such as building a house, a seasonal worker who is harvesting vegetables, and students who attend training or obtain work experience, are all examples of fixed-term contracts.[94]

2.3.2.1 Precarious nature of atypical employment

It is generally accepted that the employment of atypical employees, particularly of fixed-term employees, is much more precarious than that of typically employed employees. It is submitted that they generally have less job security and receive fewer benefits than employees employed in typical employment. At the time that labour legislation was drafted in South Africa, the legal framework was generally designed to protect full-time (typical) employees. Historically, one of the South African labour legislation's primary design failures was that it did not plan for atypical employment.

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[90] Bendix S (2015) 144.
[91] S 198(*1*) of the LRA.
[92] Grogan J (2014) 10.
[93] Grogan J (2014) 10.
[94] Legalwise 'Rights of A Fixed Term, Part-Time and Other Employees' available at *www.legalwise.co.za/help-yourself/legal-articles/rights-employees* (accessed on 10 January 2020).

The precarious nature of atypical work differs depending on country, region, economic and social structure, and political system of labour markets.[95] It also changes as employers find new loopholes in existing employment regulations, often to increase the profitability of business at the expense of employees.[96]

Disadvantages associated with atypical employment include uncertainty as to the duration of the employment relationship, TES workers' ambiguous employment relationship (their relationship with a TES company versus their relationship with the contract employer), a general lack of access to social protection and the benefits usually associated with typical work, low pay, and substantial legal and practical obstacles to joining a trade union and participating in collective bargaining.[97]

Fixed-term employees often do not receive the same benefits as permanent employees who do the same work[98]. Grogan is of the opinion that fixed-term contracts allow employers to abuse employees by evading certain legal requirements, such as the procedural requirements for retrenchment and the obligation to pay severance monies when a fixed-term employee's services are no longer required.[99] This is what makes them precarious in nature, especially for fixed-term employees earning over the minimum threshold. They are excluded from legal protection, and earn lower wages than their permanent co-workers, without leave days, pensions, or severance packages.[100]

So, fixed-term employees excluded from the protection of section 198B must resort to the common law for protection, which often fails them as it focuses on the contract and not the employment relationship.[101] Although it is argued that these employees, earning above the minimum threshold, should be in a better position to negotiate their

[95] International Labour Organization, 2011. Policies and regulations to combat precarious employment.
[96] International Labour Organization, 2011. Policies and regulations to combat precarious employment.
[97] International Labour Organization, 2011. Policies And Regulations to Combat Precarious Employment.
[98] Grogan J (2017) 7.
[99] Grogan J (2017) 7.
[100] Fourie ES 'Non-standard workers: The South African Context, International Law and Regulation by The European Union' *PER* (2008) Volume 11 No 4.
[101] Grogan J (2014) 10.

conditions and terms of employment, the South African labour market provides no scope for this. The Minister of Labour, in terms of section 6 of the BCEA, must make a determination, on advice of a commission, on the minimum threshold, which excludes these workers from the protection of certain sections in chapter 2 of the BCEA as well as section 198B of the LRA. It should be asked what criteria the Minister uses when deciding on the minimum remuneration threshold, and whether the standard of living considering the income and expenses of the employee are well thought-out.[102] Employees cannot afford to fight well-funded corporations in court.[103] It can be argued that legislation does not provide as much protection for atypical employees as would be expected from the Constitution. To study this further, the next topic will focus on the legislative protection afforded to fixed-term employees.

2.4 Legislative protection in the field of South African labour law

2.4.1 The Constitution of the Republic of South Africa, 1996

The final Constitution of 1996 took effect on 4 February 1997.[104] It governs and applies to all laws and conduct within the borders of South Africa.[105] Chapter 1 of the Constitution states that, as it is the supreme law of the Republic, all its obligations must be fulfilled and any act or conduct inconsistent with it is to be declared invalid.[106] Chapter 2 contains the Bill of Rights, which provides the fundamental and basic rights of all citizens. The Constitution also imposes a duty on the state to respect and fulfil the responsibilities of the Constitution.[107] The Constitution is binding on all spheres of government, encompassing the executive, legislature, judiciary, and all organs of state.[108]

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[102] Mfikoe M 'Vulnerable Employees': The RSA Legislature Intervention and The Employers Retaliation available at www.ee.co.za/article/vulnerableemployees the employer's retaliation (accessed on 10 January 2020).
[103] Mfikoe M 'Vulnerable Employees': The RSA Legislature Intervention and The Employers Retaliation available at *www.ee.co.za/article/vulnerableemployees the employer's retaliation* (accessed on 10 January 2020).
[104] Bendix S (2015) 85.
[105] Bendix S (2015) 85.
[106] S 2 of the Constitution of the Republic of South Africa, 1996: 'Supremacy of Constitution: This Constitution is the supreme law of the Republic; law or conduct inconsistent with it is invalid, and the obligations imposed by it must be fulfilled'.

[107] S 8(1) of the Constitution of the Republic of South Africa 1996: 'The Bill of Rights applies to all law, and binds the legislature, the executive, the judiciary and all organs of state'.

[108] Constitution of the Republic of South Africa, 1996.

Labour relations specifically are explicitly enshrined in section 23 of the Constitution. Section 23(1) provides that '[e]everyone has the right to fair labour practices. Furthermore, section 8(2) places a duty on the courts to develop and apply common law (within the limitations clause of section 36) where legislation falls short and fails to give effect to constitutional rights.

Common law can be described as unwritten law, with roots in indigenous law, Roman-Dutch law, and English law.[109] It is based on the morals and values of society and developed as a result of societal changes.[110] Common law remains an essential source of South African law.[111] The principle of precedents within South African law allows superior courts to develop the common law by modifying judgments.[112] This means that South African courts are bound to follow the previous decisions of superior courts.[113]

In *SA Maritime vs McKenzie*,[114] McKenzie, the chief internal auditor of SA Maritime, was dismissed by his employer. He instituted a claim against SA Maritime in which he alleged that his contract of employment was subject to the condition that it could not be terminated without just cause. By having dismissed him unfairly, he argued, SA Maritime had breached an implied term of his contract and that he should be awarded damages for the remainder of his contract period. McKenzie argued that the implied term either flowed from the provisions of section 185 of the LRA (dealing with unfair dismissal) or could alternatively be found in the development of common law by the courts. The court, however, held that where employees were protected under the LRA, section 8(3) of the Constitution did not warrant or require importing an implied term from the realm of constitutionally protected labour rights into an individual contract.[115]

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[109] Twaddle R 'Common law and common sense' available at *https://robintwaddle.co.za/2018/12/07/common law-and-common-sense/* (accesssed 28 November 2019).
[110] Twaddle R 'Common law and common sense' available at *https://robintwaddle.co.za/2018/12/07/common law-and-common-sense/* (accesssed 28 November 2019).
[111] Twaddle R 'Common law and common sense' available at *https://robintwaddle.co.za/2018/12/07/common law-and-common-sense/* (accesssed 28 November 2019).
[112] Twyman CM (2001) 318.
[113] Twyman CM (2001) 328.
[114] *South African Maritime Safety Authority v McKenzie* 2010 (3) SA 601 (SCA) 2.
[115] *SAMSA v McKenzie* 2010 2. Para 37 states: 'I share the view of Professor Halton Cheadle, whose role in the drafting of the LRA is well documented, that where, as here, the employees are protected by the LRA, section 8(3) of the Constitution does not warrant or require importation from the realm of constitutionally protected labour rights into individual contracts of employment by way of an implied term. The LRA specifically gives effect to

Therefore, the court was of the view that in the present matter there was no need to develop the common law; theoretically, however, the court agreed that, in terms of common law, fairness was an implied term of employment contracts.

In the case of *Murray vs Minister of Defence*,[116] Murray claimed damages for an alleged constructive dismissal. The court held that even though Murray was not an employee for purposes of the LRA,[117] he was still able to rely on section 23(1) of the Constitution directly, which required the common law to be developed. The court held as follows:

> 'However, it is, in my view, best to understand the impact of these rights on this case through the constitutional development of the common law contract of employment. This contract has always imposed mutual obligations of confidence and trust between employer and employee. Developed as it must be to promote the spirit, purport and objects of the Bill of Rights, the common law of employment must be held to impose on all employers a duty of fair dealing at all times with their employees – even those the LRA does not cover.'[118]

2.4.2 Labour Relations Act 66 of 1995 (LRA)

In terms of section 1(a) of the LRA, one of the primary objects of the Act is to give effect to and regulate the fundamental rights conferred by section 23 of the Constitution.[119] It furthermore aims to change the law governing labour relations and regulate the organisational rights of trade unions.[120] In regard to fixed-term contract

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the constitutional right to fair labour practices and the consequent right not to be unfairly dismissed. Accordingly, the constitutional basis for developing the common law of employment and thereby altering the contractual relationships is absent.'

116 *Murray v Minister of Defence* (383/2006) 2008 ZASCA 44.

117 The LRA expressly excludes members of the South African National Defence Force from its operation. See S2 LRA which stipulates that:

2. 'Exclusion from the application of this Act

This Act does not apply to members of-

(a) the National Defence Force;

(b) the National Intelligence Agency; and

(c) the South African Secret Service

Mr Murray was employed by the National Defence Force as a commander military naval police.'

118 *Murray v Minister of Defence* (383/2006) 2008 ZASCA 44 para 5.

119 Bendix S (2015) 33.

120 Gibson C & Flood P *Everyone's guide to labour law* (2015) 83; see s 1(*b)* to *(d)* of the LRA.

workers, section 186(1)(b) defines dismissal and makes specific provision for the termination of fixed-term workers.

After the 2014 amendments to the LRA, increased protection was provided to atypically employed employees through the amendment of the existing section 186(1)(b) and the introduction of sections 198A, B and C. In as far as fixed-term employees are concerned, section 186(1)(b) was amended by adding a reasonable expectation of permanent employment. Section 186(1)(b) now provides that a dismissal occurs where an employee had a reasonable expectation that the employer would renew his or her contract on the same or similar terms, or a reasonable expectation that the employment contract would be made permanent, but the employer failed to do so.

Section 198B, which addresses issues of fixed-term employment in detail, was also included in the LRA. The provisions of section 198B are, however, only applicable to employees who earn below the ministerially determined minimum threshold.[121] While the section does not provide for a maximum length any fixed-term contract may take, it does provide that, where employees are employed on such a contract in excess of three months, the employer has to provide acceptable reason(s) for such employment on a fixed-term basis.[122] A fixed-term contract may be extended if there is a justifiable reason.[123] In cases where employees are employed for longer than three months without justifiable reason, they will be regarded as permanent employees.[124] Employees employed in terms of a fixed-term contract of employment may not be treated less favourably than permanent employees doing the same or similar work.[125] In cases where the contract is renewed, such an agreement must be in writing, and the reasons for the renewal must be provided.[126] An employee who works longer than two years is entitled to severance pay on termination of employment.[127] Where the

[121] S198B *(2) (a)* of the LRA.
[122] S198*B (3)* of the LRA.
[123] S198 *B(3) (b*) of the LRA.
[124] S198*B (4*) of the LRA.
[125] S198*B* (*5)* of the LRA.
[126] S198 *B*(*8)(a)* of the LRA.
[127] S198 *B (6*) of the LRA.

employer has created a reasonable expectation of permanent employment to a fixed-term employee, it is an unfair dismissal if the contract is not renewed.[128]

Section 198A of the LRA regulates temporary employment services (TES). It states that a labour broker is an employer whose employees work for a client of the labour broker.[129] An example would be where an employee substitutes for a temporarily absent employee of the client. The labour broker concludes the contract with the client and provides an employee to the client for a determined period with specified remuneration.[130] This period cannot exceed three months if an employee earns less than the minimum threshold in terms of section 198A.[131] If a client employs an employee of the labour broker for longer than three months, the employee will be deemed a permanent employee of that employer.[132] Furthermore, such an employee cannot be treated differently or less favourably than the client's permanent employees who are doing the same or similar work, unless there is a justifiable reason.[133]

If a contract in terms of which a labour broker employee was employed for more than three months is terminated, this is a dismissal and consequently the employee can refer an unfair dismissal dispute to the CCMA or a bargaining council.[134] Both the labour broker and the client's company are liable towards the employee in respect of a labour dispute.[135] However, work can be for more than three months where this is provided for in a bargaining council agreement, a sectoral determination, or a ministerial notice.[136] When the contracts of workers governed by such agreements, determinations or notices come to an end, it is not regarded as a dismissal.[137]

Section 198C, dealing with part-time workers, stipulates that part-time workers must be treated the same as full-time workers who do the same kind of work in the

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[128] S198 *B* (*10)(a)* of the LRA.
[129] S186(*1) (b*) of the LRA.
[130] S198(*2*) of the LRA.
[131] S198 (*2*) of the LRA.
[132] S198 *A (3)(b*) LRA.
[133] S198 *A* (*5*) LRA.
[134] S198 A (*3*) LRA.
[135] S198(4)(*a*) LRA.
[136] S198(4)(*b*)-(*d)* of the LRA.
[137] S198 (*4*) of the LRA.

workplace.[138] They should be provided access to training and skills development, as well as the right to apply for vacancies for full-time employment.[139] They can only be treated differently if there is some justifiable reason, such as seniority, experience or length of service, merit, the quality or quantity of the work performed, or any criteria of a similar nature and which is non-discriminatory.[140]

However, some part-time workers are not protected under section 198 C such as (i) part-time workers in the first three months of working for an employer, (ii) employers who have fewer than 10 workers, (iii) employers with fewer than 50 workers during their first two years, unless they have more than one business, or the company arose from the breaking-up or closure of an existing business.[141] Workers earning more than the minimum threshold are also excluded.[142]

2.4.3 Basic Conditions of Employment Act 75 of 1997 (BCEA)

The purpose of the BCEA is well summarised in the title of the Act itself. As suggested by the title, it focuses on the bare minimum conditions of employment that employees are entitled to.[143] It lays down fundamental terms of work as determined by the legislature.[144] Section 29 of the BCEA stipulates that an employer should provide the employee with a written contract with all the details of the employment. This issue was also raised in the recent case of *Piet Wes Civils CC and Another v Association of Mineworkers and Construction Unions and Other* where some of the employees were employed on verbal fixed-term contracts, which is in contradiction of section 198B (6).[145] This case will be discussed fully in chapter 3.

The importance of the BCEA for fixed-term employees is that the Minister has the power to declare sectoral determinations dealing with conditions of service of specific categories of employees.[146] There is no specific sectoral determination for fixed-term

[138] Bendix S (2015) 144.
[139] Bendix S (2015) 144.
[140] S198 D(*2*) of the LRA.
[141] S198 C (*2*)(b) of the LRA.
[142] S198 C (*2*) (a) of the LRA.
[143] Bendix S (2015).33.
[144] Grogan J (2017) 7.
[145] (2019) 40 ILJ 130 (LAC).
[146] Bendix S (2015) 33.

employees currently. However, they are affected by the minimum threshold that the Minister of Labour publishes on the advice of a Commission which excludes employees earning above a certain amount per year from sections of Chapter 2 of the BCEA.[147]

Some employees are, however, excluded from the protection of this Act as indicated in section 6(3) of the BCEA. Important for this study are casual workers who work less than 24 hours a month for any specific employer and who do not enjoy the minimum benefits provided in terms of the Act for leave.[148] Previously, the BCEA defined a casual employee as an employee not working more than three days a week.[149] Today it includes many that were excluded, since the exclusion is now for workers who work less than 24 hours a month.[150]

An essential factor in the Act is that it stipulates that no contract of employment may contain conditions which are less favourable than those listed in the Act unless these have been agreed to by a bargaining council and that the employment contract should be in writing.[151]

2.4.4 Employment Equity Act 55 of 1998 (EEA)

This Act was enacted to redress demographic imbalances caused by past discriminatory practices.[152] It prohibits unfair discrimination and makes provision for fair discrimination in the form of affirmative action initiatives, which could include preferential treatment of suitably qualified persons from designated groups.[153] The EEA has two parts.[154] First, it prohibits unfair discrimination against employees and applicants for employment.[155] Secondly, it promotes affirmative action by setting ground rules and elevates its mandatory policy.[156] The EEA can assist fixed-term

[147] S6(*3*) of The Basic Conditions of Employment Act, Act 75 of 1997.
[148] Bendix S (2015) 33.
[149] Fourie ES (2008) 113.
[150] Fourie ES (2008) 113.
[151] Bendix S (2015) 33.
[152] Bendix S (2015) 33.
[153] Bendix S (2015) 254.
[154] Grogan J (2017) 7.
[155] Grogan J (2017) 7.
[156] Grogan J (2017) 7.

workers by ensuring that there is no discrimination against them because of their fixed term employment status. The draft code of good practice on equal pay for work of equal value was also introduced in September 2014 to ensure that South Africa complies with the international standard. It states that there must be equal pay for work of equal value, failing which, an unfair discrimination claim may arise.[157] The objective is to provide practical guidance to employers on how to apply the principle of equal pay for work of equal value.[158] The EEA,[159] together with section 198B(8), goes further by stating that an employee employed under a fixed-term contract for more than three months must not be treated less favourably than an employee employed permanently performing the same or similar work unless there is a justifiable reason for the different treatment; this protects fixed-term employers.

Gericke asserts that there is a nexus between the concepts of equality and discrimination, on the one hand, and the continuous renewal of fixed-term contracts, on the other, especially if the employer is avoiding permanent employment of workers for reasons of financial gain and less restrictive legislative labour regulation. The EEA led the way for section 198B(8)(a) to be incorporated into the LRA. Since the EEA provided for no discrimination in the workplace, it was the gateway to ensure that all types of employees were included.

2.5 Conclusion

It is clear that the labour market in South Africa is changing. Atypical employment is becoming more prevalent and is consequently a topic of great interest. The injustices and imbalances of the past, together with the rise of globalisation and technology, are reasons to revisit the legislation that underpins the rights of an atypical employee. The South African government is forced to protect employees and ensure that the injustices and imbalances of the past do not repeat themselves through legislation. In theory the government has done so, but the practical implementation of the legislation

[157] *Draft Code of Good Practice on Equal Pay for Work of Equal Value, Government Gazette, 29 September 2014, No. 38031 at 4*
[158] *Draft Code of Good Practice on Equal Pay for Work of Equal Value, Government Gazette, 29 September 2014, No. 38031 at 4.*
[159] S 6*(4)* Employment Equity Act, Act 55 of 1998.

leaves a gap wide enough for South African employers to continue to abuse and exploit their workers, as was the case under apartheid.

The exclusion of some from protection is constitutionally incorrect, as the Constitution stipulates fair labour practices for all. 'All' includes independent contractors, atypical workers earning more than the minimum threshold, and many others. Mfikoe holds that it is crucial that, when legislation is promulgated to achieve an objective, it should be thoroughly tested to ensure that it meets its intended purpose and reflects the social order that reflects the political situation of the day.[160] This is elaborated on in the next chapter, which discusses the current legislative protection for, specifically, fixed-term employees, and analyses relevant case law.

[160] Mfikoe M 'Vulnerable Employees': The RSA Legislature Intervention and The Employers Retaliation available at *www.ee.co.za/article/vulnerable-employees-the-rsa-legislature-intervention-and-the-employers-retaliation.html* (accessed on 10 January 2020).

CHAPTER 3:
REGULATION OF FIXED-TERM CONTRACTS IN SOUTH AFRICA

3.1. Introduction

Generally, employment contracts are regulated by common law.[161] Parties determine the terms and conditions of a contract, and, as per the common law, no legal relationship exists unless the parties conclude a valid employment contract. Where a dispute arises, the parties can settle the dispute by reviewing the terms and conditions of the agreement. Thus, in South Africa the BCEA stipulates that all contracts of employment should be in writing.[162]

A legal employment relationship comes into existence once the employee accepts the employer's offer of employment unconditionally.[163] Under common law, the employer was previously entitled to terminate the contract at any stage for any reason, provided the agreed-to notice was given to the employee.[164] Fixed-term employees were especially vulnerable, and could not claim for breach of contract or the existence of a reasonable expectation of further employment once the contract came to an end. Thus, the enactment of legislation such as the LRA, BCEA, and EEA was essential, and was aimed at levelling the playing field between employers and employees.

This chapter will discuss the regulation of fixed-term contracts at common law, as well as the regulations in terms of existing legislation. The concept of a *reasonable expectation* under the dismissal provisions of section 186(1)(b) of the LRA will be explored. Case law will also be used to illustrate the discrimination experienced by fixed-term employees.

3.2 Regulation of fixed-term contracts before the Labour Relations Act 66 of 1995

As indicated in the introduction, under common law, once the parties had agreed to

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[161] Grogan J *Workplace law* (2017) 14.
[162] S29 of the Basic Conditions of Employment Act 75 of 1997 states: 'An employer must supply an employee, when the employee commences employment, with the following particulars in writing …'
[163] Grogan J (2017) 26.
[164] Grogan J (2017) 3.

the nature of employees' duties and the remuneration, a valid employment contract came into existence.[165] The common law, however, provided very little job security to employees.[166] An employer could terminate a contract of employment at any stage for any reason, provided only that the agreed-to notice of termination was given to the employee.[167]

In as far as fixed-term contracts were concerned under common law, such agreements could only terminate in the following instances:

> '(a) When the reason(s) representing the preference for this kind of contract no longer exist(s);
> (b) when the fixed period has elapsed;
> (c) when a specific task which initiated the agreement between the parties has been completed; or
> (d) upon the expiry or beginning of a particular event.'

Once a fixed-term contract was lawfully terminated, an employee could not claim any expectation of further employment. Early termination of a fixed-term contract of employment by either the employer or employee was, however, not permitted and constituted a breach or repudiation of the contract.[168] A damages claim could thus be pursued by the employee where such contract was terminated early by the employer.

In *Fedlife Assurance v Wolfaardt*[169] the employee was employed by Fedlife Assurance on a fixed-term contract for five years. Fedlife terminated the contract before the agreed-to expiry date because of operational requirements. The employee claimed compensation equivalent to the income he would have earned for the remainder of the agreement. Fedlife argued that the matter should have been dealt with in the Labour Court and not the High Court. The High Court, however, held that, although the dispute was labour-related, the employee was entitled to common law protection against

[165] Grogan J (2017) 39.
[166] Grogan J (2017) 3.
[167] Grogan J (2017) 3.
[168] Grogan J (2017) 143.
[169] *Fedlife Assurance v Wolfaardt* (2002) 2 All SA 295 (SCA).

breach of contract and to thus enforce his rights in terms of the remainder of the contract period before the court. The High Court found in the employee's favour and awarded him compensation.

3.3 Regulation of fixed-term contracts of employment under the LRA 66 of 1995: The position before 2015

3.3.1 Introduction of Section 186(1)(b) into the LRA

In giving effect to the right to fair labour practices as afforded by section 23(1) of the Constitution, the LRA 66 of 1995 was enacted, inter alia. The LRA came into operation on 11 November 1996. Section 186(1) defined when a dismissal could be argued to have occurred. Section 186(1)(a) confirmed the meaning of dismissal in terms of the common law, that is, a dismissal occurred when an employer terminated an employee's contract with or without notice.[170] Of importance to fixed-term employment contracts specifically, however, was the introduction of section 186(1)(b) of the LRA. Section 186(1)(b) held that:

> 'Dismissal means that –
> (a.) an employee reasonably expected the employer to renew a fixed-term contract of employment on the same or similar terms.'

Still, the employer offered to renew it on less favourable terms or did not renew it. In terms of section 186(1)(b), the onus was entirely on the employee to prove that a reasonable expectation was created by the employer that the fixed-term contract would be renewed on the same or similar terms. If the employee failed to prove the existence of such a reasonable expectation, no dismissal could be said to have occurred on expiry of the contract.

The issue this raised, however, was what would be regarded as a *reasonable expectation*. The LRA provides no definition or guidance as to what would constitute a reasonable expectation. As such, case law must be turned to for guidance on the interpretation of a reasonable expectation.

3.3.2 Meaning of Reasonable Expectation

Even before the rise of industrial labour laws in South Africa, the concept *reasonable expectation* was debated under the doctrine of *legitimate expectation*.[171] Subsequent to the introduction of section 186(1)(b) into the LRA, labour courts have dealt with numerous cases of employees claiming a dismissal under this section. Many of the cases centered around the question of whether the employee could prove the existence of a *reasonable expectation* of the contract being renewed. In *Joseph v the University of Limpopo*,[172] the Labour Appeal Court (LAC) held as follows:

> 'The onus is on an employee to prove the existence of a reasonable or legitimate expectation. He or she does so by placing evidence before an arbitrator that there are circumstances which justify such an expectation. Such circumstances could be, for instance, the previous regular renewals of his or her contract of employment, provisions of the contract, the nature of the business, and so forth. The aforesaid is not a closed list. It all depends on the given circumstances and is a question of fact.'[173]

In the matter of *SA Rugby (Pty) Ltd v CCMA,*[174] three rugby players' contracts were not renewed by the employer. The employees claimed that the coach at the time had assured them that their contracts would be renewed. Before such renewal, however, the coach resigned from the employer. SA Rugby decided not to renew any contracts and so the players approached the CCMA, claiming dismissal under section 186(1)(b). The court held that to determine the existence of a reasonable expectation, an objective test had to be applied.[175] It also held that the fixed-term contract should be capable of renewal.[176] The court determined that :

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[171] Patrick MP *The doctrine of legitimate expectation in South African Labour Law* (Thesis: University of Limpopo 2010) 201.
[172] (2011) 32 ILJ 2085 (LAC).
[173] At para 35.
[174] *SA Rugby (Pty) Ltd v Commission of Conciliation Mediation and Arbitration* 2006 27 ILJ 1041 (LC).
[175] At para 44: 'The appellants carried the onus to establish that they had a 'reasonable expectation' that their contracts were to be renewed. They had to place facts which, objectively considered, established a reasonable expectation. Because the test is objective, the enquiry is whether would a reasonable employee in the circumstances prevailing at the time have expected the employer to renew his or her fixed term contract on the same or similar terms.'
[176] At para 43 'The operative terms in s 186(1*)(b)* are in my view, that the employee should have a reasonable

> '[T]he appellants carried the onus to establish that they had a 'reasonable expectation' that their contracts were to be renewed. They had to place facts which, objectively considered found a reasonable expectation. Because the test is objective, the enquiry is whether would a reasonable employee in the circumstances prevailing at the time have expected the employer to renew his or her fixed-term contract on the same or similar terms. As soon as the other requirements of s 186(1)(b) have been satisfied it would then be found that the players had been dismissed, and the respondent (SA Rugby) would have to establish that the dismissal was both procedurally and substantively fair.'[177]

In applying the above, the Labour Court (LC) found that a confirmation of renewal by the erstwhile coach was not sufficient to create a reasonable expectation of renewal and consequently dismissed the applicants' claim.

3.3.3 Expectation of permanent employment

When we come to the meaning of *reasonable expectation* under the pre-amended section 186(1)(b), the LC has in the past often been called upon to determine whether a dismissal could be claimed under section 186(1)(b) when the employee argued a reasonable expectation to be appointed permanently.

In *Dirks v University of the Western Cape*[178] the employee was employed on a series of consecutive fixed-term contracts by the university. The agreements made provision for the employee to eventually become permanent. However, after failing to be offered a permanent position upon the termination of his last fixed-term contract, the employee launched proceedings in the LC, claiming unfair dismissal under section 186(1)(b). The court focused on the meaning of this section and held as follows:

> 'An entitlement of permanent employment cannot be based simply on a reasonable expectation of s 186(1)(b) an applicant cannot rely on an interpretation by implication or common sense. It would require a specific

expectation, and the employer fails to renew a fixed term contract or renew it on less favourable terms. The fixed term contract should also be capable of renewal'.

[177] *SA Rugby (Pty) Ltd v CCMA* (2006) para 44.

[178] *Dirks v University of South Africa (*1999) (LC) 20 ILJ 1227.

statutory provision to that effect, particularly against the background outlined above.'[179]

In *Auf van der Heyde v the University of Cape Town*[180] the LC determined that a *reasonable expectation* as provided for in section 186(1)(b) was limited to the renewal of the contract on same or similar terms, and not a renewal of the contract into a permanent one.[181]

In the matter of *McInnes v Technicon Natal,*[182] the applicant argued that she had been unfairly dismissed in terms of section 186(1)(b) of the LRA. The court conducted a two-stage enquiry. First, it considered the applicant's subjective expectation concerning the renewal of the contract; secondly, it considered whether the applicant's subjective expectation of having her contract converted into a permanent position was reasonable in the circumstances. The court held that the focus should be on the nature of the expectation, and whether in the situation this expectation was reasonable.[183] The court found in the applicant's favour.

In *Yebe v University of KZN,*[184] the court also found that the employer's failure to renew the employee's fixed-term contract constituted an unfair dismissal. In this case, Yebe was employed by the university on a series of fixed-term contracts over a period of four and a half years. The position that the employee was contracted to do was virtually of a permanent nature. However, according to the court, the facts clearly illustrated where a series of renewals had created a reasonable expectation in the mind of the employee that the contract would be made permanent.

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[179] *Dirks v University of South Africa* (1999) para 148.

[180] (2000) 21 ILJ 1758 (LC).

[181] *Auf der Heyde v University of the Cape Town* (2000).

[182] *McInnes v Technikon Natal* (2000) 21 ILJ 1138 (LC). The court conducted a subjective test. It held:
'What should be focused on in my view is the nature of the expectation and whether in a particular situation, this expectation was reasonable. In the ordinary course of events where fixed-term contracts are renewed from time to time an expectation that the agreement would be renewed indefinitely or made permanent would probably not be reasonable and, for that matter, would probably not be genuine. That does not mean, however, that such a situation cannot arise. Accordingly, if the applicant genuinely believed that she would stay on in her post which was to become permanent and if this belief is such that I t would have been shared by a reasonable person in her position, then I see no reason why this section should not also be held to cover her situation.'

[183] See Discussion at para 21 *McInnes v Technikon Natal* (2000) 21 ILJ 1138 (LC).

[184] *Yebe v University of KwaZulu Natal* (2007) 28 ILJ (CCMA).

Similarly, to the matter of *University of Pretoria*,[185] the LAC held that

> '[T]he words employed in section 186 envisage that two requirements must be met for an employer's actions to constitute a dismissal:
>
> 1. A reasonable expectation on the part of the employee that a fixed-term contract on the same or similar terms will be renewed, and
> 2. a failure by the employer to renew the contract on the same terms or a failure to renew it at all. These words do not, however, carry the meaning, which is urged by the third respondent, namely that being employed based on a series of fixed-term contracts, an employee has more than a reasonable expectation of a permanent appointment.'[186]

In the case of *Ekurhuleni West College and Education Labour Relations Council,*[187] the third applicant was employed by the Ekurhuleni West College on a fixed-term basis contract for three months. The contract was extended three times. During her third contract period, the employee fell pregnant, and both her supervisor and the human resource department requested a doctor's certificate from her to complete her maternity leave application. They assured the employee that her contract would be extended. This, however, did not take place, and she approached the Legal Education Council, claiming she had been unfairly dismissed in terms of section 186(1)(b).

The arbitrator found in her favour against the employee. On review, the employer contended before the court that the arbitrator had committed a gross irregularity in the conduct of proceedings and that the arbitrator's finding was not a reasonable one. The court held that it was inconceivable that the employee would not have had a reasonable expectation that her contract would be renewed considering the information that she was requested to produce in order to complete the maternity leave form. The court confirmed that the employee had been unfairly dismissed. This case

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[185] *University of Pretoria v Commission of Conciliation Mediation and Arbitration and Others* (LAC) (unreported case no JA38/2010, 4-11-11).
[186] *University of Pretoria v CCMA* (unreported case no JA38/2010) para 18.
[187] (JA55/2016) 2017 ZALAC 75.

illustrated that a manager should not make empty promises to vulnerable employees. It also provided some measure of assurance to fixed-term contract employees that they would be protected against exploitation by employers.

3.3.4 The test for reasonable expectation?

In the case law above, the courts reviewed various facts when applying the test to determine what constitutes a reasonable expectation, subjectively and objectively. The most prominent factors to consider in determining whether, objectively speaking, a reasonable expectation existed were the employment relationship, communication between the parties, the actions of the employer, whether there was evidence of repeated renewals, and the reasons for such renewals. Huysamen holds that an employee's success ultimately depends on the ability to prove that he or she had a reasonable expectation of the renewal of the contract, and that such subjective expectation has to be objectively justified.[188] Only once a dismissal is held to have occurred would the question of fairness of the dismissal be considered. This is, however, a difficult test for employees to satisfy, especially where no proper record of communication between the employee and the employer is available. Consequently, it would be difficult to prove the existence of a reasonable expectation where no evidence of employer action that has allegedly created the expectation could be produced.

In view of the conflicting judgments in so far as an expectation of permanent employment is concerned, there was a need to amend section 186(1)(b) to provide certainty on the issue of expectation of permanency.[189]

3.4 Regulation of fixed-term contracts of employment under the LRA 66 Of 1995: 2015 to the present

3.4.1 Section 186(1)(B) of the LRA

After the 2014 amendments to the LRA, a dismissal in relation to the non-renewal of a fixed-term contract is now defined by section 186(1)(b) as follows:

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[188] Huysamen E 'An overview of fixed-term contracts of employment' (2019) 22.
[189] See discussion under 3.4.1. below.

'Dismissal means that –

(b) An employee employed in terms of a fixed-term contract reasonably expected the employer-

(i) 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; or

(ii) to retain the employee in the employment on an indefinite basis but otherwise on the same or similar terms as the fixed-term contract, but the employer offered to retain the employee on less favourable terms or did not offer to retain the employee'.

As indicated above, for a claim under section 186(1)(b) to be successful, the employer needs to prove the existence of a reasonable expectation of renewal of the contract on the same or similar terms, or that the contract would be made permanent. Before the inclusion of section 186(1)(b)(ii), the labour courts disagreed as to whether a *reasonable expectation* should include an expectation of permanent employment as well. The amended section 186(1)(b) now clearly provides for a reasonable expectation of permanent employment as well. This ended the debate in courts whether section 186(1)(b) could be relied upon to claim dismissal based on an expectation of permanent employment.

It is submitted that the amended section 186(1)(b) now provides better protection to employees and is consistent with finding ways to curb the use of ongoing fixed-term contracts. It has clarified all uncertainties for all parties involved and is a move in the right direction.[190] The onus, however, still rests on the employee to prove the existence of a reasonable expectation of permanent employment.[191]

3.4.2 Section 198B of the LRA

The above section was a new addition to the LRA as included in the 2014 amendments, with the aim of protecting fixed-term contract workers specifically. Section 198B(1) of the LRA defines a fixed-term contract as 'a contract of employment which terminates on the occurrence of a specified event, the completion of a specified

[190] Huysamen E 'An overview of fixed-term contracts of employment' (2019) 19.
[191] Cohen T 'The effect of the labour relations amendment bill 2012 on non-standard employment relationships' 2610.

task or a project, or on a fixed date other than an employee normal or agreed-upon retirement age'.

Some persons are, however, excluded from the protection of section 198B. These include:

- 'Employees who earn more than minimum earnings threshold as determined by the Minister of Labour from time to time.
- Employees employed in terms of fixed-term contracts which are permitted by any statute, sectoral determination, or collective agreement.
- Employers who employ less than 10 people.
- Employers who employ less than 50 people and whose businesses have been in operation for less than two years, unless the employer conducts more than one company, or the business was formed by the division or dissolution of an existing business.'

Section 198B(3) states that an employer may not employ a person on a fixed-term contract for longer than three months unless certain exceptions apply, or the employer can provide a justifiable reason for doing so. This is to ensure that vulnerable employees are not exploited. The LRA points out that there must be justifiable reasons for engaging in a fixed-term contract exceeding three months, such as replacing an employee who will temporarily be absent from work, the need for seasonal workers, and so on.[192]

Section 198B(4) stipulates what is regarded as a justifiable reason. Reasons include:

- 'Replacing another employee who is temporarily absent from work.

[192] S198B(4)of the LRA states as follows: 'The employee is employed on account of a temporary increase in the volume of work which is not expected to endure beyond 12 months; the employee is a student or recent graduate who is employed to be trained or gaining work experience in order to enter a job or profession; the employee is employed to work exclusively on a specific project that has a limited or defined duration; the employee is a non-citizen who has been granted a work permit for a defined period; the employee is employed to perform seasonal work; the employee is employed for an official public works scheme or similar public job creation scheme; the employee is employed in a position which is funded by an external source for a limited period, or the employee has reached the normal or agreed retirement age applicable in the employer's business.'

- Catering for a temporary increase in workload that is not expected to last for more than 12 months.
- Students or graduates on learnerships or gaining work experience to enter a job or profession.
- Genuine and specific projects that have a limited or defined duration.
- A non-citizen (foreign national) with a work permit for a defined time period.
- Persons hired to perform seasonal work.
- Persons hired for an official public works scheme or similar public job creation programme.
- A position funded by an external source for a limited period.
- Someone who has reached normal or agreed-on normal retirement age.'

This list is not a *numerus clausus*, and thus more reasons could be given that would be justifiable.[193] Section 198B(5) also provides that, after being employed for three months under a fixed-term contract, an employee would be regarded as permanent.[194] This occurs where there are no justifiable reasons for appointing the employee on a fixed-term contract basis on more than one occasion. The legislature shifted the onus to the employer by inserting section 198B(7), which states that, if necessary, in any proceedings, an employer must prove that there was a justifiable reason for fixing the term of the contract as contemplated in subsection 3, and that such term was agreed upon between the parties.

Section 198B has been welcomed for providing employees who have been employed in terms of a fixed-term contract for more than three months with the right to receive the same benefits as permanent employees, unless a justifiable reason exists for different treatment. Section 198B(8)(a)[195] states that an employee employed under a fixed-term contract for more than three months must not be treated less favourably than an employee employed permanently and who performs the same or similar work, unless there is a justifiable reason for the different treatment. This means that

[193] Huysamen E 'An overview of fixed-term contracts of employment' (2019) 16.

[194] of the LRA.

[195] of the LRA.

qualifying fixed-term contract employees should be provided with the same salary, leave, training and working hours, and so on.

Section 198B(9) further provides that equal access to opportunities to apply for vacancies should be given to both fixed-term workers and permanent employees. In terms of section 198B(10) fixed-term workers employed for over 24 months on a project with limited duration are also entitled to severance pay under the BCEA in the event of retrenchment. Such severance pay would, however, only become payable in circumstances where an employer did not offer a new contract based on similar terms as contemplated in section 198B(11).[196] This is welcome because it provides the employee with some form of income while searching for new job opportunities.

Even though section 198B has brought significant change and has generally been welcomed, there are still various shortcomings. Although it provides for an employee on a fixed-term contract to become permanent after three months as per section 198B(5), there remains the possibility of exploitation. It is submitted that the absence of a limit on how many fixed-term contracts workers can enter with the same employer for a specific position is to the disadvantage of employees. Section 198B(6) provides that the contract needs to be in writing, or the renewal thereof needs to be in writing and should state the reasons for the renewal. Hence, it would arguably be rather easy for employers to provide reasons for extending fixed-term contracts under section 198B(6).[197] Consequently, the shifting of onus in terms of section 198B(7) is likely to have little impact on an employer's ability to provide a justifiable reason. Huysamen also asserts that even though the legislature could be commended for its attempt to compel employers to show the existence of justifiable reasons for using fixed-term contracts longer than three months, there is little evidence yet of the protection offered.[198]

[196] Huysamen E 'An overview of fixed-term contracts of employment' (2019) 19.
[197] Huysamen E 'An overview of fixed-term contracts of employment' (2019) 16.
[198] Huysamen E 'An overview of fixed-term contracts of employment' (2019) 17.

In fact, there are instances where the CCMA or Labour Court have made findings in favour of the employer. In *Lephale v University of South Africa,*[199] the employee was a graduate assistant in terms of the scheme to assist postgraduate students. His contract was renewed regularly by the employer. The employee relied on section 198B(5) in order to be deemed a permanent employee because he had worked longer than three months. The employer, however, argued that he was no longer a registered student and therefore did not qualify under the scheme for assistance. The worker's claim was subsequently dismissed.

However, in the *Piet Wes*[200] matter the court took a different approach. The employees were given notice of termination of their fixed-term employment contracts in view of a mass retrenchment, and those employees then referred the matter to the CCMA, claiming they were unfairly dismissed in terms of section 198B. Piet Wes was in contract with Exxaro Coal (Pty) Ltd, trading as Grootegeluk Mine, for the provision of efrain services to Exxaro including the management and distribution of magnetite, the movement of coal, an internal service delivery and the cleaning of the plants. To maintain the contract, Piet Wes employed several employees on fixed-term contract. Some of these employees did not have written contracts. The written fixed- term contract provided that the contract was subject to the contract provided by Exxaro. In August 2016 Exxaro gave one months' notice for the cancellation of one contract to Piet Wes. This resulted in Piet Wes giving notice to 43 fixed-term employees.

The Labour Appeal court held that the requirement that a written offer of employment made to an employee is a compelling reason, in that it seeks to prevent any later dispute arising as to the terms and scope or duration of the fixed-term or limited duration contract entered. Thus, for those employees who had verbal contracts, the employer failed to prove in terms of section 198B (6) that the contracts were concluded in terms of the conditions of section 198B, and those employees were thus to be regarded as indefinite employees. This was a victory for fixed-term employees in that it addressed the issues that result in fixed-term contracts being abused by employers.

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[199] 2018 7 BALR 724 (CCMA).

[200] *Piet Wes Civils CC and Others v Association of Mineworkers and Construction Union (AMCU)* 2019 40 ILJ 130 (LAC).

With regard to the other employees who had a written contract, the court held as follows:

> 'A contract duration linked to the supply of work contracts by clients cannot be construed to equate to the occurrence of a 'specified event', ' the completion of a specified task or project' or a 'fixed date' as contemplated by s198B(1).This is so in that a 'specified event', ' the completion of a specified task or project' or a 'fixed date' does not constitute a possibility that future contracts may not be supplied in the future by an employer's client. This remains a possibility and nothing more than that.'[201]

It held that this is an operational risk which might occur in the ordinary business operations of an organisation. Indeed, section 198B exists for security of employment except in circumstances where a fixed-term contract is clearly justified. In conclusion, the CCMA agreed with the labour court and held that all employment contracts entered were for an indefinite duration, but that after Exxaro terminated its contract with Piet Wes there may have existed justifiable and fair reason for dismissing the employees for operational requirements; and hence sections 186 and 189A of the LRA procedure needed to be followed.[202]

3.5 Other forms of termination of fixed-term contracts

In the case of fixed-term contracts, a dismissal could be argued where an employer creates a reasonable expectation of a renewal of the contract to an employee but fails to renew the contract on the same or similar terms. There are, however, instances where a fixed-term contract legally comes to an end. Cases where the contract is ended lawfully leave the employee without any recourse and, consequently, in a vulnerable position. It is, however, true that the very nature of fixed-term contracts

[201] *Piet Wes Civils CC and Others v Association of Mineworkers and Construction Union (AMCU)* 2019 40 ILJ 130 (LAC).
[202] *Piet Wes Civils CC and Others v Association of Mineworkers and Construction Union* (AMCU) 2019 40 ILJ 130 (LAC).

does not secure an employee's future within the organisation or company beyond the stipulated timeframe.

Fixed-term contracts are most lawfully terminated where the contract makes provision for automatic termination. In such instances, fixed-term contracts terminate when certain events occur or at a specified agreed date and time.[203] In such cases, it cannot be argued that a dismissal took place. An example would be where an employee was employed to substitute a permanent employer on maternity leave. When the permanent worker returns from maternity leave, the fixed-term contract comes to an end.

Geldenhuys[204] notes that the LRA recognises three types of automatic termination:

> 'Termination by the passage of time. In this case, the employment contract is subject to a resolutive condition. The parties' agreed employment relationship would last for a particular time and not indefinitely.
>
> Termination on the completion of an agreed-upon project. This is when the employer and employee have agreed to the termination of the contract on completion of a contract. In this case, for the termination to be valid, the employer must prove that the project has been completed.
>
> Termination on the occurrence of an event. Here, the parties agree that a certain event should occur for the contract to end, such as a permanent employer returning to work. For the termination to be valid, the event should, however, not have been caused by the employer.'

Fixed-term contract workers who are employed by TESs and who have automatic termination clauses which link the existence of the employment contract to the commercial contract between the TES and the client, may, however, be in contravention of the LRA.[205] Such was the case in *SA Post Office Ltd v Mampeule*.[206]

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[203] Huysamen E 'An overview of fixed-term contracts of employment' (2019) 23.

[204] Geldenhuys J 'The effect of changing public policy on the automatic termination of fixed-term employment contracts in South Africa' (2017) 20 *PER / PELJ* 5-7.

[205] Geldenhuys J 'The effect of changing public policy' (2017) 5-7.

[206] *South African Post Office v Mampeule* (2009) 30 ILJ 664 (LC); *South African Post Office v Mampeule* (2010)

The Minister of Communications removed Mr. Mampeule as the director from the board of directors, which resulted in his contract being automatically terminated. His employment contract had an automatic termination clause which stipulated that his employment contract would terminate if he no longer held the office of the director. Mr. Mampeule argued that he was dismissed in terms of section 186 of the LRA. Both the LC and the LAC held that the Minister's actions resulted in a dismissal in terms of section 186(1)(b).

Courts, however, do not always agree on this issue. In the *Sindane v Prestige Cleaning Services*[207] matter, the court held a different view. Mr. Sindane was employed by Prestige Cleaning Services in terms of a fixed-term contract which would terminate upon the termination of the commercial contract between Prestige Cleaning and the client (Menlyn Piazza). Menlyn Piazza then provided a notice to Prestige Cleaning in which it informed them that some services would no longer be required, which included Mr. Sindane's position at the waste bin post. Mr. Sinadane argued that he was dismissed in terms of section 186(1)(b). In contrast, the respondent argued that there was no dismissal, as the contract made provision for simultaneous termination of the contract of the applicant if the respondent's cleaning contract with the client terminated or was reduced. The court applied the proximate cause test and held that no dismissal had occurred as the employer's conduct had not been the proximate cause of the termination of the employment contract.[208]

31 ILJ 2051 (LAC).

[207] *Sindine v Prestige Cleaning Services* (2010) 31 ILJ 733 (LC).

[208] In *Sindine v Prestige Cleaning Services* (2010) 31 ILJ 733 (LC), the court held: 'It is accepted that apart from a resignation by an employee (unless constructive dismissal is claimed consequent to resignation), an employment contract can be terminated in several ways which do not constitute a dismissal as defined in s186(1) of the LRA, and more particularly, in terms of s186(1)(a). These circumstances include the following: (i) The death of the employee; (ii) The natural expiry of a fixed-term employment contract entered into for a specific period, or upon the happening of a particular event, e.g., the conclusion of a project or contract between an employer and a third party. In the first instance, if the fixed-term employment contract is, for example, entered into for a period of six months with a contractual stipulation that the contract will automatically terminate on the expiry date, the fixed-term employment contract will naturally terminate on such expiry date, and the termination thereof will not (necessarily) (subject to what is stated below in respect of the remedies provided for by the LRA to an employee who has signed such a contract) constitute a "dismissal", as the termination thereof has not been occasioned by an act of the employer. In other words, the proximate cause of the termination of employment is not an act by the employer.' Para 16.

In *Pecton Outsourcing Solutions CC and Pillemer B*,[209] the court found that automatic termination clauses in fixed-term contracts linked to service agreements between the employer and its only client were unenforceable. In this matter the fixed-term contract provided that 'on cancellation of the service contract between Pecton Outsourcing and the client (Unilever), this employment contract shall automatically terminate'.

The court held the following:

> 'I prefer an approach that starts by examining, in all cases where the termination of TES contracts of employment is triggered by the will of a client, whether the underlying cause of the termination, concerning the TES employer, is one for which employees typically are dismissed. These are reasons relating to misconduct, incapacity, operational requirements, or no reason at all. In this determination, the courts should recognise the content of the reason for the termination over the form of the contractual device covering it. If the facts show that the reason for termination of the contract is one that typically constitutes a reason for dismissal, then this is a clue that, as the commissioner succinctly put it, there may be an attempt to 'contract out' of Section 188 of the LRA. In the absence of evidence to the contrary, the termination thus becomes a dismissal and the underlying reasons for it will be ventilated in forums the LRA has set aside for this purpose.'[210]

In *SATAWU Obo Dube and Others v Fidelity Supercare Cleaning Services Groups*[211] the court looked for assistance at the *Sindane* and *Mampeule* matter. The facts are as follows. Fidelity provided cleaning services to the University of the Witwatersrand subject to a service-level agreement. The employees, who were SATAWU members, were employed on a fixed-term contract basis by Fidelity. In terms of the fixed-term contract the employment date would end on a date as per schedule, or when the contract with the University of the Witwatersrand came to an end. It further provided

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[209] *Pecton Outsourcing Solutions CC and Pillemer B* (2016) 37 ILJ 693 (LC).

[210] *Pecton Outsourcing Solutions CC and Pillemer B* (2016) para 43.

[211] *SATAWU Obo Dube and Others v Fidelity Supercare Cleaning Services Groups (Pty) Ltd* (Js 879/10) 2015 ZALC JHB 129; 2015 8 BLLR 837 (LC); 2015 1923 (LC).

that the employees acknowledged that the company's contract with the University might be terminated for various reasons, more specifically that the employees' contract was based solely on the contract between the employer and the company. Thus, it would automatically terminate if the university terminated the contract with Fidelity. Witwatersrand than gave notice to Fidelity that they would terminate the service agreement. They did, however, offer them another contract, but with limited staff.

SATAWU took the matter to court and claimed that Fidelity did not apply section 189 of the LRA correctly and thus that their members were unfairly dismissed. Fidelity argued that, as there were no dismissals, the contract had automatically terminated. It should also be noted that Fidelity did offer the employee concerned a chance to apply for a supervisory post available at the university, but she declined it. The court referred to several case law as stated above but held the following view:

> 'It can no longer be debatable that, following this legislative directive, labour-brokers may no longer hide behind the shield of commercial contracts to circumvent legislative protections against unfair dismissal. A contractual provision that provides for the automatic termination of the employment contract and undermines the employee's rights to fair labour practices, or that clads slavery with a mink coat, is now prohibited and statutorily invalid.'[212]

The interesting part of this court case is that the court found that it was a dismissal but that the dismissal was not procedurally unfair due to operational requirements. The court's view was that the employer made her a reasonable offer which she refused and therefore she could not complain.[213]

The court again revisited the proximate cause test in the matter of *Enforce Security Group v Fikile*.[214] In this matter the appellant was a private security service provider and provided security services to various clients. The employee's contract of

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[212] See para 59*: SATAWU Dube and Others v Fidelity Supercare Cleaning Services Group* (Pty) Ltd (Js 879/10) 2015 ZALC JHB 129; 2015 8 BLLR 837 (LC); 2015 1923 (LC).
[213] *SATAWU Dube and Others v Fidelity Supercare Cleaning Services Group* (Pty) Ltd (Js 879/10) 2015 ZALC JHB 129; [2015] 8 BLLR 837 (LC); 2015 1923 (LC).
[214] *Enforce Security Group v Fikile* (2017) 38 ILJ 1041 (LAC).

employment had an automatic termination clause which provided that the employment contract would endure until termination of the contract between Enforce Security and the client, Boardwalk. When Boardwalk terminated the commercial contract, Enforce Security Group offered alternative employment to Mr Fikile and others, who refused to accept same.

The court held as follows:

> 'In my view, it does not necessarily follow that in all cases, an automatic termination clause based on an event contained in a fixed-term contract of employment will be visited with invalidity. It would be necessary to determine whether, in the circumstances of a particular case, the clause was intended to circumvent the fair dismissal obligations imposed on the employer by the LRA and the Constitution. Some of the relevant considerations, in my view, would include the precise wording of the automatic termination clause and the context of the entire agreement; the relationship between the fixed-term event and the purpose of the contract with the client; whether it is left to the client to choose and pick who is to render the services under the service agreement; whether the clause is used to unfairly target a particular employee by either the client or the employer; whether the event is based on proper economic and commercial considerations; the list is not exhaustive. Each case must be decided on its circumstances.'[215]

The court thus found that there had been no dismissal in terms of the LRA, but merely a contract which automatically ended. In the matter of *Nogcantsi v Mnquma Local Municipality*[216] the court had to decide whether the automatic termination clause in the employee's employment contract was valid and enforceable. Mr. Nogcantsi was appointed by the Mnquma Local Municipality in terms of a fixed-term contract subject to a vetting and screening process. The contract included an automatic termination clause which stated that should the outcome of the vetting and screening process be

[215] *Enforce Security Group v Fikile* (2017) para 41.

[216] *Nogcantsi v Mnquma Local Municipality* (2017) 4 BLLR 358 (LAC).

negative his appointment would automatically terminate. The appellant's contract was subsequently terminated due to negative vetting and screening results. The LAC held that in these circumstances there had been no dismissal. The appellant willingly agreed to the vetting and screening process and knew, if the results were negative, it would result in the automatic termination of his contract. The dismissal had not been triggered by any actions on the part of the employer.

It is clear from the case law above that there remain differing views as to when an automatic termination clause would be seen as a dismissal. In some instances, despite the facts being almost the same, there were still different outcomes (see for example *Pecton*[217] and *Fikile*,[218] where the courts came to different conclusions). Both Geldenhuys[219] and Huysamen[220] concur that there is always room for improvement in this area. Hence, fixed-term contract employees should be aware of what their contract contains to determine whether there would be any recourse for them if they are dismissed.

3.6 Conclusion

This chapter has addressed the regulation of fixed-term contracts in both common law and in terms of legislation in SA. The case law discussed highlighted some of the problems regarding the current regulation of these contracts. Despite legislative amendments aimed at protecting fixed-term employees, employers may still be able to avoid their responsibilities towards fixed-term employees.

From a comparative perspective, the next chapter will discuss the regulation of fixed-term contracts in the Netherlands as well as in Germany.

[217] *Pecton Outsourcing Solutions CC and Pillemer B* (2016) 37 ILJ 693 (LC).
[218] *Enforce Security Group v Fikile* (2017).
[219] Geldenhuys J 'The effect of changing public policy' (2017) p 48.
[220] Huysamen E 'An overview of fixed-term contracts of employment' (2019) p 36.

CHAPTER 4:
AN OVERVIEW OF THE REGULATION OF ATYPICAL EMPLOYMENT IN THE NETHERLANDS AND GERMANY

4.1. Introduction

Following the Dutch invasion of South Africa in 1652, Roman-Dutch law became the applicable law enforced in the country.[221] Even after the British colonisation of South Africa, Roman-Dutch laws and practices (slightly modified at times) remained in place for many decades.[222] The Dutch also facilitated the German invasion of South Africa through the establishment of the Dutch East-India Company.[223] Most Germans that came to South Africa during 1652 and the period afterwards were working for the Dutch East-India Company and were not immigrants.

Given the historic links described above, and the advancements made in both Germany and the Netherlands on the regulation of fixed-term employment, this chapter will discuss the regulation of fixed-term employment in these two jurisdictions with the view to see whether South Africa can learn anything from the approach adopted in these countries.

4.2. The Netherlands

4.2.1. Introduction to fixed-term employment in the Netherlands

The Netherlands has become known as the 'part-time economy' because of the rapid increase in the use of fixed-term contracts in the country.[224] At the same time, the country is known for its low structural unemployment rate.[225] Structural unemployment refers to the mismatch number of people seeking work who do not possess the skills

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[221] *Lenel B* The History of South African Law and its Roman-Dutch roots *(2002)* available at https://pdf4pro.com/view/the-history-of-south-african-law-and-its-roman-2935ee.html (accessed 27 November 2019).

[222] Lenel B *The history of South African Law* (2002) 2.

[223] Lenel B *The history of South African Law* (2002) 2.

[224] Barker F (2015) ch 6.

[225] Beukes A *The impact that the implementation of flexicurity may have on the temporary employment sector in South Africa: A comparison between The Netherlands and South Africa* (unpublished LLM Thesis, Tilburg University, 2011) 16.

employers require and demand.[226] As with most countries, the Netherlands is also constantly confronted by the effects of globalisation.[227] The Netherlands has risen to these challenges by applying flexicurity strategies. Flexicurity is defined as combining employment and income security with flexibility in labour markets, working organisations, and labour relations.[228] Bovenberg and Wilthagen assert that this approach should transcend the simple trade-off between flexibility and security, where the former is seen as being in the exclusive interest of the employer, while the latter is seen as being only the concern of the employee.[229]

The Netherlands has developed flexicurity policies to normalise atypical employment while preserving flexibility in the labour markets.[230] As a result, the Dutch are regarded as providing a good example of how to normalise atypical employment.[231] Eichorst submits that fixed-term contracts (as an example of atypical employment) were introduced to make hiring easier, as opposed to offering permanent contracts. This was done to reduce unemployment and create additional job opportunities.[232]

4.2.2 Legislation regulating fixed-term employment in the Netherlands

Security for atypical employees in the Netherlands is provided in strictly applying the *pro rata temporis* principle to part-time workers.[233] This principle provides that a fixed-term employee will enjoy the same rights, benefits, and salary as a permanent

[226]Herz, B. and Van Rens, T., 2011. Structural unemployment.1.

227 Petersen T & Jungbluth 'Globalization Report 2018: Who benefits most from globalization' available at https://ged-project.de/globalization/globalization-report-2018-who-benefits-most-from-globalization/ (accessed 27 November 2019) 'There is growing uncertainty in industrialised countries as to whether globalisation means more opportunity or more risk. Trump, Brexit and increasing populism are direct consequences of this development. However, our Globalization Report 2018 shows for the third time in a row, as in 2014 and 2016: when measured in terms of real gross domestic product (GDP) per capita, industrialised *countries continue to be the biggest winners of increasing globalisation, while developing and emerging economies lag'*.

[228] Bovenberg L & Wilthagen T 'On the road to flexicurity: Dutch proposals for a pathway towards better transition security and higher labour market mobility' (2008) *European Journal of Social Security* 10 No. 4 326.

[229] Bovenberg L & Wilthagen T (2008) 326.

[230] Bovenberg L & Wilthagen T (2008) 330.

[231] Bovenberg L & Wilthagen T (2008) 326.

[232] Eichhorst W 'Fixed-term contracts IZA' (2014) *World of Labour* 45. 'They did this impressively well in 2001; their unemployment rate was 3,7 per cent compared to the EU member rate of 7,1 per cent.'

[233] Bovenberg L & Wilthagen T (2008) *EJSS* 330. 'The principle of *pro-rata temporis* principle means the principle whereby any remuneration or other benefit to which a comparable full-time employee is entitled, is directly proportional to the remuneration or other benefit to which a part-time employee is entitled, based on a comparison of the number of hours worked each week by the comparable full-time employee and the part-time employee respectively.'

employee.[234] Despite the aforesaid general approach, Dutch employment law is not consolidated into a single code or statute. Legislation often overlaps and new legislation typically amends more than one act. The employment relationship is primarily governed by the Dutch Civil Code.[235] The primary laws regulating fixed-term workers are the Prohibition of Discrimination by the Working Hours Act (*Wet Verbod Onderscheid Arbeidsduur*, 'WVOA') and the Adjustment of the Working Hours Act (*Wet Aanpassing Arbeidsduur*, 'WAA').[236]

The WVOA came into operation on 1 November 1996. Article 7:648 of the Dutch Civil Code prohibits employers from discriminating between employees, based on a difference in working hours and the conditions under which these employees conclude, extend, or terminate an employment contract.[237] The WAA, which came into effect on 1 June 2000, is of equal importance. This Act provides employees with the right to alter the terms of an already existing employment contract. The Act applies both to employees who are employed in terms of Article 7: 610 of the Civil code[238] and employees in the service of an administrative body under an appointment under public law.[239]

[234] Bovenberg L & Wilthagen T (2008) *EJSS* 330.
[235] Oberman P 'Employment law overview Netherlands 2019-2020' available at *https://knowledge.leglobal.org/wp-content/uploads/sites/2/LEGlobal-Employment-Law-Overview_Netherlands_2019-2020.pdf* (accessed 27 November 2019).
[236] Bovenberg L & Wilthagen T (2008) *EJSS* 330.

[238] Article *7:610* of the Dutch Civil Code: Definition of 'employment agreement' - 1. An employment agreement is an agreement under which one of the parties ('the employee') engages himself towards the opposite party ('the employer') to perform work for a period of time in service of this opposite party in exchange for payment. - 2. When an agreement has the characteristics of both, an agreement as meant in paragraph 1 and of another statutory regulated particular agreement, then the statutory provisions of the present title (Title 7.10) and the statutory provisions set by law for this other particular agreement shall apply simultaneously (side by side) to that agreement. In the event of a conflict between these statutory provisions, the statutory provisions of the present title (Title 7.10) prevail.

[239] Article 1 of Adjustment of the Working Hours Act (Wet Aanpassing Arbeidsduur, WAA). In this Act and the provisions based on it, the following definitions apply:

a. employer: the one who has carried out another contract under civil or public law appointment;
b. employee: the other person referred to under a;
c. working hours: the number of agreed hours of which a working week or an otherwise agreed working period of the employee consists;
d. place of work: any agreed place that is or usually is used by the employee in connection with the performance of work;
e. working time: the agreed times on a working day or an otherwise agreed period during which the employee is working.

In terms of article 7:655 of the Dutch Civil Code, contracts need not be in writing and can be concluded orally. Similar to the position in South Africa, however, the employer must provide the following in writing to the employee: the details of where the work is to be carried out; the employee's name and place of residence; the position and job description; the commencement of employment date; whether the employment contract is for a fixed period; the duration of the contract; vacation rights; salary; working hours; and the required notice period.[240] A limit was set in terms of Article 7: 688a 1 Dutch Civil Code on the term of the renewals for fixed-term employment to a period of three years.[241] According to article 7: 688a, on the fourth renewal of a contract it automatically becomes permanent.[242]

In 2015, the Dutch Work and Security Act (*Wet Werk en Zekerheid*) was introduced in the Netherlands.[243] The Act aimed to limit the gap between flexible and permanent employment,[244] in other words to create a balance between permanent employees with protection and atypical employees with little or no protection. The Act provides that the maximum duration of successive fixed-term contracts is three consecutive fixed-term contracts within a period of 24 months.[245] Successive fixed-term contracts are a series of fixed-term contracts which follow one another with no more than three months in between them, as per article 7:668a of the Dutch Civil Code.[246] This means that employers can only appoint the same employee for a maximum of three fixed-term contracts within 24 months before the contract is regarded as an indefinite contract. The *Wet Werk en Zekerheid* further provides that for fixed-term agreements

[240] Oberman P 'Employment law overview Netherlands 2019-2020' available at *https://knowledge.leglobal.org/wp-content/uploads/sites/2/LEGlobal-Employment-Law-Overview_Netherlands_2019-2020.pdf* (accessed 27 November 2019).

[241] Gericke SB (2016) *TSAR* 94.

[242] Article *7:677* paragraph 4 of the Dutch Civil Code.

[243] Gericke SB (2016) *TSAR* 94.

[244] Jones Day 'The Netherlands passes Work and Security Act' available at *https://www.jonesday.com/en/insights/2014/06/the-netherlands-passes-work-and-security-act* (accessed 27 November 2019).

[245] Article *7.668(a)* of the Dutch Civil Code.

[246] Article *7:668(a)* of the Dutch Civil Code 'A chain of fixed-term employment agreements.

1. As from the day that between the same parties:
(a) two or more employment agreements for a fixed term have succeeded one another at intervals of not more than three months and these employment agreements jointly have covered a total period of 36 months, these intervals included, the last employment agreement for a fixed term is deemed to be an employment agreement that has been entered into for an indefinite term; read with Article I part N of the Work and Security Act'.

longer than six months, but shorter than a year, a probation period of one month applies.[247] Hence a duty is placed on employers to notify employees of the renewal of the contract, including the renewed conditions, within one month before the contract ends.[248]

Article 611(a) of the Dutch Civil Code provides:

> 'The employer should enable the employee to follow training that is necessary for the performance of his job and, insofar as this can reasonably be expected of him, for the continuation of the employment contract if the employee's position is ceased or he is no longer can fulfil these.'

The legislator thus made the training of fixed-term employees compulsory. The Dutch Work and Security Act also makes provision for no work or salary when there is non-performance, which is seen as at the risk of the employee.[249] If an employee fails to work or is not performing, the employee will not receive a salary for the days that the non-performance took place. A fixed-term contract can be terminated early only if the parties mutually agree in writing.[250] In cases where there is no agreement, the employer can only terminate the contract provided permission from the Employee Insurance Agency has been obtained, or by dissolution by a Cantonal Court (also known as a Small Claims Courts).[251]

In May 2019 the Dutch Senate approved new legislation in the form of the Labour Market in Balance Act. This Act came into operation in January 2020. It aims to reduce the gap in legal protection and monetary differences between fixed and permanent employees.[252] The Act extended the 24-month maximum duration principle to 36 months, or a fourth fixed-term employment contract.[253] This move is in contrast to what

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[247] Article 7:672 of the Dutch Civil Code and Article 652 (4) of the Wet Werk en Zekerheid.

[248] Article 668 of the Wet Werk en Zekerheid.
[249] Article 628(1) of the Wet Werk en Zekerheid.
[250] Article 670(b)(i) of the Wet Werk en Zekerheid.

[251] Article 670(b)(i*)* of the Wet Werk en Zekerheid.
[252] Article 8(2)- (4) of the Labour Market Balance Act.
[253] Article 668 (a)5 Labour Market Balance Act.

many other European countries have done.[254] However, the Act provides for additional termination clauses as well as changes in transition allowances, on-call employment contracts, unemployment insurance contribution, and pension plans.[255]

4.2.3. Strengths and weaknesses

The Dutch labour market is known for its low structural unemployment rate.[256] Its strength is that atypical work is regarded as normal work.[257] Certain employees prefer to work on a contract rather than to become permanently employed.[258] In particular, female employees with families are often atypical workers.[259] Flexicurity provides security for atypical workers in that laws are strictly applied.[260] Moreover, discrimination between employees related to working hours is prohibited by legislation.[261] Lastly, the Netherlands protects atypical employees insofar as remuneration and benefits,[262] pension, and training are concerned. As indicated above, the focus is on transitional payments and equal treatment of fixed-term employees with regard to remuneration and training. This is one of the key focus areas that South Africa still needs to explore.

Bovenberg and Wilthagen, however, indicate several challenges or weaknesses in the

[254] Suriram S, 'Netherlands-Dutch Senate approves new law restoring 36-month duration for fixed-term contracts. *https://www2.staffingindustry.com/eng/Editorial/Daily-News/Netherlands-Dutch-Senate-approves-new-law-restoring-36-month-duration-for-fixed-term-contracts-50114* (accessed on 27 June 2019).

[255] 'The preamble of the Labour Market Balance Act 'We Willem-Alexander, by the grace of God, King of the Netherlands, Prince of Orange-Nassau…
All who will see or hear these read, salute! do:
Although we have considered that it is desirable to amend Book 7 of the Civil Code, the Employment Force Allocation Act by intermediaries, the Social Insurance Finance Act and any other laws to introduce a new severance base, to extend the possibility of entering into a flexible employment contract where the nature of the work requires it, to extend the probationary period, to reduce the transition allowance for long-term employment contracts and at the same time, from the first day, to establish the right to transition allowance, to establish rules to prevent the permanent availability of workers on call contracts, to prevent competition on working conditions in payrolling, to introduce a WW premium which depends on the form of contract and to abolish the sector premiums, in order to improve the balance between fixed and flexible employment contracts;
It is thus that We, the Advisory Section of the Council of State, and with common consultation of the States-General, have recovered and understood, as we agree and understand in this.'

[256] Beukes A (2011) 16.
[257] Beukes A (2011) 16.
[258] Beukes A (2011) 16.
[259] Beukes A (2011) 17.
[260] Beukes A (2011) 18.
[261] Beukes A (2011) 18.
[262] Beukes A (2011) 18.

Dutch system.[263] They argue that the regulations and policies must be enhanced to enable specific vulnerable groups of employees to enter the labour market.[264] These groups are low-skilled workers, female workers, and elderly workers.[265] In 2008, Bovenberg and Wilthagen reported that the unemployment rate amounted to 15 per cent for non-western non-nationals and 8.1 per cent for nationals in the age group 15-25 years.[266] School drop-outs were considered a serious problem at the time.[267] The training system within the work place in 2008 failed to adequately provide for a combination of work and training for these type of workers.[268] Consequently, it was difficult for fixed-term employees to move over to indefinite employment as job opportunities for the latter largely required professional skills.

These laws resulted in companies making more use of atypical employment to bridge the gap. They would rather employ flexible workers and make use of employment agencies to procure employees. Atypical employees were then negatively affected financially because they ended up with little or no social security.[269] Atypical employment mainly consists of female workers, who still form only a small part of permanent employment.[270] Hence, Bovenberg and Wilthagen argue that 'the lack of female labour supply threatens the economic and financial sustainability of the welfare state in an ageing society'.[271]

Based on the above, females are often employed on fixed-term contracts, hence they have little security or pension, which makes their lives more difficult when they become pensioners. The legislation Dutch Work and Security Act also made it difficult for elderly workers, who received less security if they transferred between employers.[272] It is hard for them to find employment if they have been unemployed for a certain period, and they have defaulted to early retirement.[273] As people reach the pension

[263] Bovenberg L & Wilthagen T (2008) 331.
[264] Bovenberg L & Wilthagen T (2008) 331.
[265] Bovenberg L & Wilthagen T (2008) 331.
[266] Bovenberg L & Wilthagen T (2008) 332.
[267] Bovenberg L & Wilthagen T (2008) 332.
[268] Bovenberg L & Wilthagen T (2008) 332.
[269] Bovenberg L & Wilthagen T (2008) 332.
[270] Bovenberg L & Wilthagen T (2008) 334.
[271] Bovenberg L & Wilthagen T (2008) 334.
[272] Bovenberg L & Wilthagen T (2008) 333.
[273] Bovenberg L & Wilthagen T (2008) 333.

age, the challenge of how they can sustain themselves and not rely on the state for funds becomes apparent.

4.3 Germany

4.3.1. Fixed-term employment in Germany

In 2004 Germany was described as the top reformer in fixed-term contracts after a struggle with unemployment due to financial recession.[274] This means that Germany made use of use of fixed-term contracts which reduced the unemployment rate during the recession. Moreover, Germany appeared to be thriving under the economic pressures of the time while other economies experienced difficulties.[275] This was due to its response to economic pressures, which was to transform its labour market and make more use of fixed-term contract employment.[276] According to Dustmann, Germany's economic growth average was about 1.2 per cent per year from 1998 to 2005, including the recession in 2003.

During the period 2005 to 2008, Germany was also regarded as an 'economic superstar'.[277] Dustmann argues that this was achieved because of the specific features of contracts and mutual agreements between employer associations, trade unions, and work councils.[278] He further states that that the specific governance structure of the German labour market institutions allowed them to react flexibly in a time of extraordinary economic circumstances. This was done by forcing unions and work councils to accept deviations from industry-wide agreements, which resulted in lower wages for workers.[279] Addison argues that, despite the financial recession at the time, Germany's unique performance between 2008 and 2009 successfully negotiated economic adversity without an increase in unemployment or a decline in the job market.[280]

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[274] Barker F *The South African labour market theory and practice* Rev.5 ed (2015) ch 6.

[275] Dustmann C *et al.* 'From sick man of Europe to economic superstar: Germany's resurgent economy' (2014) *Journal of Economic Perspectives* 28(1) 168.

[276] Dustmann C et al. 'From sick man of Europe to economic superstar: Germany's resurgent economy' (2014) *Journal of Economic Perspectives* 28(1) 168.

[277] Dustmann C *et al.* (2014) 168.

[278] Dustmann C *et al.* (2014) 168.

[279] Dustmann C *et al*. (2014) 182.

[280] Addison JT *et al.* 'Worker representation and temporary employment in Germany: The deployment and extent

South Africa could learn from Germany's ability to turn a struggling economy around. Germany is one of the leading countries when it comes to atypical employment as it makes use of fixed-term employment and provides legislative protection for atypical employees. Like South Africa, Germany views fixed-term employment as one type of atypical employment, while other common forms of atypical employment include part-time and temporary agency work.[281] At times, an individual may hold a combination of these different forms of employment at the same time,[282] for example, a part-time employer holding a fixed-term contract, or an agency worker holding a fixed-term contract with an agency. Dustmann stresses that Germany's success is not rooted in legislation, but rather in the contracts and mutual agreements between employer associations, trade unions, and work councils.[283]

4.3.2 Law regulating fixed-term contracts in Germany

4.3.2.1 Legislation

As in South Africa, law-makers in Germany have traditionally viewed permanent employment contracts as the standard, or typical, employment arrangement.[284] Fixed-term contracts were regulated by section 620 of the Civil Code (*Bürgerliches Gesetzbuch*) which stipulated that a contract ends when the period of time prescribed by the parties to the contract has come to its end.[285] According to Waas, when the Act on Dismissal Protection came into force in 1952, the legislator realised that the act did not apply to fixed-term contract employees since their contracts automatically end, so the employer does not have to provide notice to an employee.[286]

In 1972, the Labour Leasing Act was introduced to regulate temporary agency work in Germany.[287] At first, temporary agencies were only allowed to appoint permanent

of fixed-term contracts and temporary agency work' (2018) *IZA* DP No 11378, 3.
[281] Waas B 'Labour policy and fixed-term employment contracts in Germany' 2.
[282] Waas B 'Labour policy and fixed-term employment contracts in Germany' 2.
[283] Dustmann et al. (2014) 168.
[284] Luthge H *Fixed-term employment contracts under German Law* (2018) 1.
[285] Waas B 'Labour policy and fixed-term employment contracts in Germany'24.
[286] Waas B 'Labour policy and fixed-term employment contracts in Germany'24.
[287] Addison JT *et al*. 'Worker representation and temporary employment in Germany' (2018).

officials.[288] The position soon changed, and agencies could enter open-ended employment relationships. The Act on Advancing Employment (*Beschaftigungsforderungsgesetz*) in 1985 was, however, introduced to ensure that employers offer more employment opportunities and thus make the fixing of terms easier.[289] During 2016 the Reform of the German Temporary Employment Act was discussed and introduced in 2017. The Temporary Employment Act of 2017 amendment stipulates that the hiring company must terminate the temporary employee after 18 months, failing which the employee will become a permanent employee of the hiring company. The agency can provide the company with a different employee after 18 months. Workers will also receive equal pay to permanent employees after nine months. Temporary agency employees cannot replace employees who are on strike.

German labour law protects all fixed-term contract employees. For example, the German Act of 2007 extends protection to all fixed-term contract employees without exclusions and differentiation between high- and low-income fixed-term contract workers.[290] Germany's legal limit for the maximum duration of a fixed-term contract is two years if the employee has had no previous employment contract. Renewing the contract for a third year would result in the employment being regarded as indefinite employment.[291] Germany also makes use of precarious non-standard work in certain circumstances.

The German Part-Time and Fixed-term Employment Act of 2007 (*Teilzeit-und Befristungsgesetz*, 'TzBfG') regulates fixed-term employment contracts.[292] The Act is based on the EU Directive 1999/70/EC of 28 June 1999 concerning the framework agreement on fixed-term work concluded by the European Trade Union Confederation (ETUC), the Union of Industrial and Employers' Confederations of Europe (UNICE), and the European Centre of Enterprises with Public Participation (CEEP) The CEEP

[288] Addison JT *et al*. 'Worker representation and temporary employment in Germany' (2018).
[289] Waas B 'Labour policy and fixed-term employment contracts in Germany'25.

[290] Gericke SB (2016) 102.
[291] Carre F 'Employment law overview Germany' 2019-2020 *http://www.Knowledge.leglobe.org* (accessed 27 November 2019).

[292] Luthge H *Fixed-term employment contracts under German Law* (2018) 1.

provides guidelines for member states regarding precautionary measures to be put in place for fixed-term contracts.[293] It stipulates that these measures must ensure the following:

> 'Requiring objective reasons to justify the renewal of fixed-term contracts.
> Defining the maximum duration of successive fixed-term contracts.
> Defining the number of renewals of such contracts.'

Directive 1999/70/EC stresses that no discrimination may occur between fixed-term and permanent workers in terms of employment conditions or service qualifications.[294]

The TzBfG focuses on two matters: part-time and fixed-term work with a valid reason, and such contracts without a valid reason.[295] Section 14(1) provides as follows:

> (1) 'The term of an employment agreement may be fixed if this justified on objective grounds. Such objective grounds exist in particular if:
> 1. The operational need for the work involved is only temporary.
> 2. The term is fixed following training or study in order to facilitate the employee's transition to a subsequent job,
> 3. The employee is hired to fill in for another employee.
> 4. The type of work involved justifies the fixed term.
> 5. The fixed term is intended to try the employee out.
> 6. There are personal reasons residing with the employee which justify the fixed term.
> 7. The employee is renumerated from the public funds which are earmarked for fixed-term employment, and he has been hired on the basis or,
> 8. The fixed term is based on a court settlement.'

[293] Addison JT *et al.* (2018) 66.
[294] Clause 1 (a) Council Directive 1999/70/EC of 28 June 1999 concerning the framework agreement on fixed-term work concluded by ETUC, UNICE and CEEP official Journal L175, 10/07/1999 P0043-0048.
[295] S14*(1)-(8*) The German Part-Time and Fixed-term Employment Act of 2007 (Teilzeit-und Befristungsgesetz; 'TzBfG').

Contracts with a valid reason are subject to stricter rules, for example that the employer may only extend a fixed-term contract a maximum of three times and that this may not exceed two years in total.[296] However, fixed-term contracts with a valid reason are used where permanent employees are unable to work and need to be replaced for a short period.[297]

There are specific rules that guide fixed-term contract employees and which employers must obey. The contract must be in writing, and signed by both parties.[298] Section 14(4) of the TzBfG states that fixed-term employment contracts must be executed in writing according to the meaning of section 126 of the German Civil Code.[299] This implies that no copies, emails, or scanned signatures are allowed.[300] If the contract is not in writing it will still be valid, but the automatic expiration after the fixed-term contract has lapsed will be null and void.[301] The contract will automatically become a permanent employment contract.[302]

Section 14(2) regulates fixed-term contracts without objective grounds, namely contracts that have no reason for substitution or temporary needs:

> 'The limitation of the term of an employment agreement according to the calendar to up to two years where no objective ground exists is permissible; moreover, a term fixed according to the calendar may be extended no more than three times up to a total term of two years. A fixed-term is pursuant to assent. It is not permissible if a fixed or unlimited term employment relationship had previously existed with the same employer. It is possible to stipulate the number of extensions or the maximum duration of the fixed term in deviation from the set collective bargaining agreement.'

[296] S 14*(2)* The German Part-Time and Fixed-term Employment Act of 2007 (*Teilzeit-und Befristungsgesetz*).
[297] S14(1)-(8) The German Part-Time and Fixed-term Employment Act of 2007 (*Teilzeit-und Befristungsgesetz*).
[298] Luthge H *Fixed-term employment contracts under German Law* (2018).
[299] Luthge H *Fixed-term employment contracts under German Law* (2018).
[300] Luthge H *Fixed-term employment contracts under German Law* (2018).
[301] Luthge H *Fixed-term employment contracts under German Law* (2018).
[302] S14(4) The German Part-Time and Fixed-term Employment Act of 2007 (*Teilzeit-und Befristungsgesetz*).

Hence, such a fixed-term contract can be extended up to three times. Once regulations are violated, remedies only become available to employees if they cannot settle with the employer out of court.[303] The employee must then take legal action by filing a claim of permanent employment with the competent labour court within three weeks after the agreed end date of the contract.[304] If the employee does not file such a claim within three weeks, the employer may assume that the fixed-contract ended amicably.[305] Luthge submits that there is a high rate of success when employees sue for the right to permanent employment, although the real risk of the above assumption is often not realised.[306] Lastly, no additional agreements may be made as part of a contract extension.[307] Contracts with valid reason are also subject to the contract being in writing signed by both parties.[308]

4.3.2.2 German case law

As indicated above, in terms of the TzBfG, fixed-term contracts can only be extended three times within a two-year period.[309] Extensions should be concluded before the current term expires.[310] In terms of section 14(2)(2) of the TzBfG, a party who has been previously employed by an employer cannot enter into a fixed-term contract with the same employer.[311] This section prevents employers from employing workers on effective fixed-term contracts if they were previously employed by the same organisation. This is to protect the employee against abuse through ensuring that there are not consecutive fixed-term contracts following each other. This rule has, however, been highly criticised and recently reviewed by the German Federal Constitutional Court.[312]

In Case Docket No. 7 AZR 452/17[313] the German Federal Constitutional Court had to

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[303] Section 17 sentence 1 The German Part-Time and Fixed-term Employment Act of 2007 (*Teilzeit-und Befristungsgesetz*).
[304] Luthge H *Fixed-term employment contracts under German Law* (2018).
[305] Luthge H *Fixed-term employment contracts under German Law* (2018).
[306] Luthge H *Fixed-term employment contracts under German Law* (2018).
[307] Luthge H *Fixed-term employment contracts under German Law* (2018).
[308] Luthge H *Fixed-term employment contracts under German Law* (2018).
[309] S 14 (2) The German Part-Time and Fixed-term Employment Act of 2007 (*Teilzeit-und Befristungsgesetz*)
[310] Luthge H *Fixed-term employment contracts under German Law* (2018).
[311] S 14 (2) (2) The German Part-Time and Fixed-term Employment Act of 2007 (*Teilzeit-und Befristungsgesetz*)
[312] Luthge H *Fixed-term employment contracts under German Law* (2018).
[313] No names disclosed of the parties involved.

decide on this matter. The company employed the plaintiff from October 1991 to November 1992. In October 2010, the plaintiff accepted another fixed-term contract for different employment, but within the same company. After her contract expired, she instituted legal action, claiming that the time limitation of her last contract was invalid due to her employment 22 years previously. The court found in favour of the employer and based its decision on the fact that employment 22 years previously could not influence the time limitation of the new contract.

In the matter of *Bianca Kucuk v Land Nordrhein-Westfalen,*[314] the Court of Justice of the European Union was faced with the question of whether the need for replacement staff qualified as an objective reason under clause 5(1)(a) of the FTW Framework Agreement as per the Directive 1999/70/EC discussed above.[315] The plaintiff entered into several fixed-term contracts with the German employer. The reason for the contracts was to replace permanent staff who were on temporary leave, parental leave, and special leave. The employee's argument at the labour court was that her contract should have been made permanent as she had been engaged in a total of 13 fixed-term contracts over a continuous period of 11 years, which indicated the need for permanent employment. She further argued that point 3 of paragraph 14(1) TZBFG, which refers to an objective replacement of another employee, was not justified in terms of clause 5(1) of the FTW Framework Agreement.

The court found that clause 5(1) of the FTW Framework Agreement had to be interpreted as meaning that a temporary need for replacement staff, as provided for by national legislation within the meaning of the clause, constituted an objective reason.[316] Although employers make use of temporary staff continuously, this may

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[314] *Bianca Kucuk v Land Nordrhein-Westfalen* C586/10 Digital Reports (Court Reports-general) ECLI identifier: ECLI:EU:C2012:39 (hereinafter *Kucuk*).

[315] Clause 5 of the FTW Framework Agreement, entitled 'Measures to prevent abuse', states:

> 'To prevent abuse arising from the use of successive fixed-term employment contracts or relationships, Member States, after consultation with social partners under national law, collective agreements, or practice, and/or the social partners, shall, where there are no equivalent legal measures to prevent abuse, introduce in a manner which takes account of the needs of specific sectors and/or categories of workers, one or more of the following measures:
> (a) objective reasons justifying the renewal of such contracts or relationships;
> (b) the maximum total duration of successive fixed-term employment contracts or relationships;
> (c) the number of renewals of such contracts or relationships.'

[316] *Kucuk.*

also be covered by the hiring of employees under employment contracts of indefinite duration; it does not mean that there is no objective reason under clause 5(1)(a) of the FTW Framework Agreement, or that there cannot be abuse.[317] Hence the court should always evaluate the circumstances of the case, including the number and cumulative duration of the fixed-term employment contracts, and the relationships concluded in the past with the same employer.[318]

In the matter of *Werner Mangold v Rudiger Helm,*[319] it was argued by the employee that the age limit set for fixed-term contracts in national legislation was incompatible with the Framework Agreement and Directive 2000/78/EC of 27 November 2000. The plaintiff further asserted that member states should introduce measures to prevent abuse arising from successive fixed-term contracts and not restrict the age of employees under fixed-term contracts.

The plaintiff concluded a contract with the employer which expressly provided that the employee would start on 1 July 2003 and work until 28 February 2004, and that the contract was based on the statutory provision intended to simplify concluding fixed-term contracts of employment for older workers as the plaintiff was 52 years old. The contract also stated that all other grounds for limiting the term of employment by the legislature were excluded. The plaintiff argued that paragraph 5 was in direct contrast with the Framework Agreement and Directive 2000/78/EC which provides for non-discrimination. The defendant further held that the focus should be on fixing or introducing methods to prevent the abuse of successive fixed-term contracts, not imposing age limitations thereon, or, to sum up, that they fail to protect older persons' employment. They are discriminating against older employees by imposing age limits on fixed-term employees.

[317] *Kucuk.*
[318] *Kucuk.*
[319] *Werner Mangold v Rudiger Helm* C-144/04 European Courts reports 2005 I -09981 ECLI identifier: ECLI:EU:C: 2005:709 (hereinafter *Mangold*).

The court held that clause 8(3) of the Framework Agreement was not contrary to the provision of domestic legislation which lowered the age limit for employees under fixed-term contracts.

4.3.3 Strengths and weaknesses

Germany has a legal framework that protects all fixed-term employees across the salary spectrum.[320] There is no distinction between high- and low-earning fixed-term workers.[321] The system is also very flexible concerning fixed-term contracts, on objective grounds.[322] Employees of newly-established enterprises are exempted from providing reasons for fixed-term contracts for four years.[323] This is to allow investors room to make decisions and meet challenges during the period of growth of the enterprise.[324]

However, although this broad protection and flexibility is a strength, it could also be argued that it is a weakness. The German legal framework is two-fold: there are fixed-term contracts with objective grounds, but it can be difficult for employees to be appointed temporarily.[325] It could be argued that entrusting the interpretation entirely to the courts is as much a strength as it is a weakness. This is so because the courts have applied the legislation very strictly, and it is difficult to determine which objective ground the court will acknowledge.[326] There have also been different approaches by the courts.

According to Waas, it is very hard for small employers to interpret the law as they do not always understand the benefits of fixed-term contracts.[327] A short-term contract can become an indefinite contract if employers do not adhere to the rules.[328] Employees know that courts will apply the legislation rigidly and may thus make a finding in their favour.

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[320] Gericke SB (2016) 102.
[321] Gericke SB (2016) 102.
[322] Gericke SB (2016) 102.
[323] Gericke SB (2016) 102.
[324] Gericke SB (2016) 102.
[325] Waas B *Labour policy and fixed-term employment contracts in Germany 40.*
[326] Waas B *Labour policy and fixed-term employment contracts in Germany 40.*
[327] Waas B *Labour policy and fixed-term employment contracts in Germany 40-41.*
[328] Waas B *Labour policy and fixed-term employment contracts in Germany 41.*

4.4. Conclusion

South Africa's legal foundations may stem from the Dutch, but the economic climates of the two countries are vastly different. Each country has its own history of the formation of rules and policies, so labour law will differ.[329] Moreover, globalisation influences how staff are employed in different labour markets.[330] The laws of a country also influence international investments. For example, if a country's labour laws are too rigid, companies and organisations are unlikely to invest, resulting in fewer job opportunities.[331] Hence, it is submitted that South Africa would find it difficult to apply its labour laws too rigidly, as it still has the status of a developing country when compared to the Netherlands and Germany.

Legislation should not only protect minorities, but provide adequate protection for all workers, and as such also fixed-term workers. The Netherlands' *pro-rata temporis* principle for atypical workers, which states that fixed-term employees will receive the same benefits as permanent employees, is excellent. South Africa and Germany rely on the principle, but it is limited in certain instances. Hence South Africa can learn from the flexicurity approach adopted in the Netherlands, by implementing more security for atypical employees. South African legislation still fails to make provision for the number of fixed-term contracts that can be concluded by an employer and an employee. Fixed-term contract workers in South Africa are covered in certain circumstances, as provided for in section 198B10(a);[332] other fixed-term employees have no access to severance pay and may find themselves with no pension or money if contracts are terminated for whatever reason, leaving them vulnerable. This negatively impacts the economy of the country, since it leaves people dependent on the state to provide for their livelihoods.

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[329] Gericke SB (2016) 101.
[330] Barker F (2015) ch 6.
[331] Barker F (2015) ch 6.

[332] S 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.'

The Netherlands and Germany have the same concept of protecting fixed-term employees. Both countries have a legislative non-discrimination clause as stipulated above, and they do not apply different rules for higher-income fixed-term employees. In South Africa, employees that earn above the earnings threshold are not protected in terms of section 198B. Germany's approach regarding protecting fixed-term employees of all earning capacities may be more appropriate in addressing this problem and making the rules clear and easily accessible to all. Germany's section 14 TzBfg provides a list of contracts with objective reasons, whereas the LRA provides for a non-exhaustive list and there is no limit on the contracts that an employee might have with the same employer.

All three countries use their court system to interpret legislation, which, as shown earlier in this chapter, can at times be problematic. Legislators should focus on being more strategic when writing the laws, aiming at clarity and concision, lest courts run the risk of legislating the workforce on a piecemeal or case-by-case approach. If legislation is not clear, the interpretation thereof can vary widely, which is illustrated in the different judgments of court cases. The legislator must ensure that laws are not vague and therefore embarrassing.

CHAPTER 5:
CONCLUSION AND RECOMMENDATIONS

5.1 Introduction

The focus of this research, as set out in Chapter one, was to discuss the precarious nature of fixed-term employment workers in South Africa as a form of atypical employment. The objective was to examine the precarious nature of this type of work and the legislative changes that have been enacted to increase the protection of fixed-term employment, while highlighting the challenges that remain. The study has shown that, although South Africa has experienced many injustices in the past and faced many adversities, it has also made relevant changes and good progress where necessary. Challenges, however, still remain.

Throughout the periods of colonisation and apartheid, and into the rise of democracy, South African labour laws have undergone extensive development. While there have been, and continue to be, extensive challenges in offering adequate protection for all atypically employed workers, South African labour law is moving in the right direction. Globalisation has brought about a 'widening and deepening of international trade, finance, information and culture in a single integrated world market',[333] and has consequently also had a significant impact on labour protection required by both employers and employees.

Despite historical and existing challenges and the positive steps taken to address such challenges, atypically employed workers, such as fixed-term workers, remain vulnerable when compared to full-time or typically employed workers.

5.2 Summary of the precarious position of atypical workers

South African labour legislation was drafted with a focus on protection for full-time employees (typical employment). However, usage of atypical employment is constantly on the rise, and such employment has gradually become a global norm.[334]

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[333] Nel, Kirsten, and Swanepoel *South African Employment Relations Theory and Practice* (2016) 130.

[334] Nel, Kirsten, and Swanepoel *South African Employment Relations Theory and Practice* (2016) 130

Atypical employment is generally indicative of part-time employment, fixed-term employment, seasonal work, and casual employment. As illustrated in Chapter 2, workers engaging in atypical employment are often not provided with the same levels of legislative protection and benefits as provided to typical employed workers.
The focus of this study has been on fixed-term employed workers as an example of atypically employed workers. Fixed-term employment is defined as employment for a specified period, with an agreed date of termination which is either determined by a specific date, the occurrence of an event, or the completion of a task.[335]

While some universal shortcomings are experienced, the preceding chapters have shown that the exact vulnerability of fixed-term employees differs between country, region, economic and social structure, and the political systems of different labour markets.[336] The precarious nature of this work is largely a result of the uncertainty around the duration of ongoing (future) employment and the lack of social protection and benefits that generally apply to typically employed workers.[337] It is submitted that South African fixed-term workers are no exception to such challenges.

5.3 Summary of existing legislative protection afforded to fixed-term employees in South Africa

The Constitution provides everyone with the right to fair labour practices.[338] In providing for this right, the Constitution does not differentiate between typically and atypically employed workers. To give effect to Constitutional rights for workers, legislation has been enacted to provide for labour protection. Of importance to this study are the LRA, BCEA, EEA, and SDA.

Despite the enactment of relevant legislation, common law remains important in South African labour law. The Constitution in fact clearly stipulates in section 8(3)(a) -(b) that '[w]hen applying a provision of the Bill of Rights to a natural or juristic person in terms of subsection (2), a court:

[335] Grogan J (2014) 10.
[336] International Labour Organization (2011). Policies and regulations to combat precarious employment.
[337] International Labour Organization (2011). Policies and regulations to combat precarious employment.
[338] S 23(1) of the Constitution.

'(a) In order to give effect to a right in the Bill, must apply, or if necessary, develop, the common law to the extent that legislation does not give effect to that right; and

(b) may develop rules of the common law to limit the right, provided that the limitation is in accordance with section 36(1).'

Moreover, section 39(2) of the Constitution states that, when interpreting any legislation, and when developing the common law or customary law, every court, tribunal, or forum must promote the spirit, purport, and objects of the Bill of Rights. In *Fedlife Assurance V Wolfaardt,*[339] the court held that the employee was entitled to common law protection against breach of contract and could consequently enforce his rights in terms of the remainder of the contract period.[340] In terms of common law, contracts can only legally terminate when the reason(s) for entering into this kind of contract cease to exist, the agreed period has elapsed, the specific task for which the contract has been concluded has been completed, or upon the expiry or occurrence of a specific event.[341] The common law deals with the terms of the contract on the basis that if one of the parties does not adhere to the terms of the contract it constitutes a breach of contract.[342]

This is, however, of little help to fixed-term employees when disputes outside of the contract arise, such as an expectation of permanent employment. Legislative

[339] *Fedlife Assurance v Wolfaardt* (2002) 2 ALL SA 295 (SCA).

[340] *Fedlife Assurance v Wolfaardt* (2002) 2 ALL SA 295 (SCA). The employee was employed by Fedlife Assurance on a fixed-term contract for five years. Fedlife terminated the contract before the agreed-on expiry date because of operational requirements. The employee claimed compensation equivalent to the income he would have earned for the remainder of the agreement. Fedlife argued that the matter should have been dealt with in the Labour Court and not the High Court. The High Court held that although the dispute was labour-related, the employee was entitled to common law protection against breach of contract and to thus enforce his rights in terms of the remainder of the contract period. The High Court found in the employee's favour and awarded him compensation. See para 22. In my view, Chapter VIII of the 1995 Act is not exhaustive of the rights and remedies that accrue to an employee upon the termination of a contract of employment. Whether approached from the perspective of the constitutional dispensation and the common law or merely from a construction of the 1995 Act itself, I do not think the respondent has been deprived of the common law right that he now seeks to enforce. A contract of employment for a fixed term is enforceable in accordance with its terms and an employer is liable for damages if it is breached on ordinary principles of the common law.

[341] Gericke S 'A new look at old at the old problem of a reasonable expectation: The reasonableness of repeated renewals of fixed-term contracts as opposed to indefinite contract' (2011) 14 *PER/PELJ* 116.

[342] Grogan J, Workplace Law (2014) 10.

protection for fixed-term employed workers is provided for in the LRA, specifically through sections 186(1)(b) and 98B, but is found to be limited.

5.3.1 Section 186(1)(b): meaning of reasonable expectation

Section 186(1)(b) of the LRA defines a dismissal as where:

> (i) 'An employee reasonably expected the employer to renew a fixed-term contract of employment on the same and similar terms, but the employer offered to renew it on less favourable terms
>
> (ii) to retain the employee in employment on an indefinite basis, but otherwise on the same or similar terms as the fixed-term contract, but the employer offered to retain the employee on less favourable terms or did not offer to retain the employee.'

The provision for reasonable expectation of permanent employment was only introduced into the LRA in 2014 by way of the LRAA. As illustrated in Chapter 3, however, neither the LRA nor any Code of Good Practice provides guidance as to what constitutes a reasonable expectation. Consequently, case law must be turned to for such guidance. What has become clear through case law is that reasonable expectation places the onus on the employee to prove that the employer created the expectation that the fixed-term contract would be renewed on the same or similar terms, and that other employees in the employee's shoes would have had a similar expectation.

In *Joseph v the University of Limpopo*[343] the Labour Appeal Court (LAC) held as follows:

> 'The onus is on an employee to prove the existence of a reasonable or legitimate expectation. He or she does so by placing evidence before an arbitrator that there are circumstances which justify such an expectation. Such circumstances could be, for instance, the previous regular renewals of his or her contract of employment, provisions of the contract, the nature of the

[343] (2011) 32 ILJ 2085 (LAC).

business, and so forth. The aforesaid is not a closed list. It all depends on the given circumstances and is a question of fact.'[344]

In the matter of *SA Rugby (Pty) Ltd v CCMA*[345] the court indicated that the applicable test is objective, that is, whether a reasonable person in the shoes of the employee would have had the same expectation of renewal. In *Yebe v University of KZN,*[346] the CCMA found that a series of fixed-term contracts created a reasonable expectation of renewal of the contract.

Before the inclusion of subsection 186(1)(ii) in the LRA, courts were also faced with the issue of whether section 186(1)(b) included a reasonable expectation of permanent employment. In *Dirks v University of South Africa,*[347] the court held that section 186(1)(b) alone did not entitle an employee to a claim of permanent employment[348] and that a statutory provision had to provide for such appointment.[349] This was even though the employee in the specific matter had already been employed on numerous fixed-term contracts with a provision to be made permanent. Along

[344] At para 35.

[345] *SA Rugby (Pty) Ltd v Commission of Conciliation Mediation and Arbitration* 2006 27 ILJ 1041 (LC) In the matter of *SA Rugby (Pty) Ltd v CCMA* three rugby players' contracts were not renewed by the employer. The employees claimed that the coach at the time had assured them that their contracts would be renewed. Before such renewal, the coach, however, resigned from the employer. SA Rugby decided not to renew any contracts and as such the players approached the CCMA in terms of s 186(1)(b), claiming dismissal under s 186(1)(b). The LC held that a statement by the erstwhile coach was not sufficient to form a basis for a reasonable expectation and dismissed the applicants' claim. See para 44. 'The appellants carried the onus to establish that they had a 'reasonable expectation' that their contracts were to be renewed. They had to place facts which, objectively considered established a reasonable expectation. Because the test is objective, the enquiry is whether would a reasonable employee in the circumstances prevailing at the time have expected the employer to renew his or her fixed term contract on the same or similar terms. As soon as the other requirements of s186(1)(b) have been satisfied it would then be found that the players had been dismissed, and the respondent (SA Rugby) would have to establish that the dismissal was both procedurally and substantively fair.'

[346] (2007) 28 ILJ (CCMA). para 4.5.

[347] (1999) (LC) 20 ILJ 1227.para 148

[353] Dirks v University of South Africa (1999) (LC) 20 ILJ 1227 para 148. In the Dirks matter the employee was employed on a series of consecutive fixed-term contracts by the university. The agreements made provision for the employee to become permanent. However, after failing to be offered a permanent position upon the termination of his last fixed-term contract, the employee launched proceedings in the LC, claiming unfair dismissal under s 186(1)(b). The court focused on the meaning of s186(1)(b) dealing with the failure to renew a fixed-term contract and held the following: 'An entitlement of permanent employment cannot be based simply on a reasonable expectation of s 186(1)(b). An applicant cannot rely on an interpretation by implication or common sense. It would require a specific statutory provision to that effect, particularly against the background outlined above'.

[349] *Dirks v University of South Africa* (1999) (LC) 20 ILJ 1227 para 148.

similar lines the Labour Court in *Auf van der Heyde v the University of Cape Town*[350] determined that the reasonable expectation provided for in section 186(1)(b) was limited to the *renewal* of the contract on the same or similar terms, and not a transformation of the contract into a permanent one.[351]

McInnes v Technicon Natal[352] brought about a two-stage enquiry that the court conducted to determine whether a dismissal had occurred under section 186(1)(b). The first stage was to determine the applicant's subjective expectation concerning the renewal of the contract. The second was to consider whether the applicant's expectation of having her contract converted into a permanent position was reasonable under the circumstances. The court found in favour of the applicant and held she was unfairly dismissed.[353] A subjective test was applied by the LC and held that there was a reasonable expectation created by the employer.[354].

Case law has had a pivotal role in shaping the protection afforded to fixed-term employees through the judicial system. As indicated in Chapter 3, however, courts have not always agreed on the nature of a *reasonable expectation*, and each case is also to be determined on its specific facts. This raises questions about whether this reflects negatively on the judicial system, or whether one can perhaps argue that it is precisely such divergence that is the strength of the judicial system. Whichever view one takes on this, in as far as a reasonable expectation of permanent employment is concerned, the matter has now been settled through the addition of section 186(1)(b)(ii) to the LRA. The inclusion of such an expectation has now created certainty on the historic issue around the meaning of reasonable expectation and provides better protection for fixed-term employees. However, much more could still

[350] (2000) 21 ILJ 1758 (LC).
[351] *Auf der Heyde v University of the Cape Town* (2000) 21 ILJ 1758 (LC) para17.

[352]*McInnes v Technikon Natal* (2000) 21 ILJ 1138 (LC). See para 21-22 the court conducted a subjective test. It held that: 'What should be focused on in my view is the nature of the expectation and whether in a particular situation, this expectation was reasonable. In the ordinary course of events where fixed-term contracts are renewed from time to time an expectation that the agreement would be renewed indefinitely or made permanent would probably not be reasonable and, for that matter, would probably not be genuine. That does not mean, however, that such a situation cannot arise. Accordingly, if the applicant genuinely believed that she would stay on in her post which was to become permanent and if this belief is such that it would have been shared by a reasonable person in her position, then I see no reason why this section should not also be held to cover her situation.'
[353]*McInnes v Technikon Natal* (2000) 21 ILJ 1138 (LC). para 45.
[354]*McInnes v Technikon Natal* (2000) 21 ILJ 1138 (LC). para 21-22.

be done to relieve the employee of the burden of proof of the existence of such legitimate expectation.

5.3.2 Section 198B

Section 198B holds that employees who are employed on a fixed-term basis for more than three months without a justifiable reason will be regarded as permanent employees.[355] Section 198B(6) states that an offer to an employee of a fixed-term contract, or to renew the contract, must be in writing and state the reason(s) for extending the contract in terms of section 198B(3)(a) or (b). One of the most important provisions of section 198B is section 198B(8)(a), which provides that fixed-term employees should not be treated less favourably than permanent employees doing the same or similar work. Section 198B (10)(a) also provides that severance pay must be paid to fixed-term employees who are employed to work exclusively on a specific project with a limited or defined duration for a period exceeding 24 months.[356] Despite the protection afforded to fixed-term employees by section 198B, the protection provided remains limited, with some employees being excluded from the protection offered by the section. Excluded from its provisions are:

- 'Employees who earn more than R205,433.33 per annum (the prevailing minimum earnings threshold).
- Employees employed in terms of fixed-term contracts that are permitted by any statute, sectoral determination, or collective agreement.
- Employers who employ less than 10 people.
- Employers who employ less than 50 individuals and whose businesses have been in operation for less than two years, unless the employer conducts more than one company, or the business was formed by the division or dissolution of an existing business.'

While there is a need to protect all fixed-term employees, all atypical employees earning above the minimum threshold are thus excluded from sections 198A, 198B, and 198C. This means that fixed-term, part-time, and TES workers earning above the

[355] S198 B (4) and S198B (5) of the LRA.
[356] S198B (10)(*a)* of the LRA.

minimum threshold have no protection under sections 198A, 198B, or 198C of the LRA. This is of concern since all workers are protected in terms of the section 23 of the Constitution, which states that everyone has the right to fair labour practices.

5.3.3 Automatic termination of fixed-term contracts

When used properly, a fixed-term contract comes to an end automatically and the employee would have no recourse to argue an unfair dismissal. A fixed-term contract may generally be described as where a person is employed for a clearly determined (identifiable) period.[357] Geldenhuys[358] explains that a fixed-term contract will automatically terminate under the following circumstances:

- 'Termination by the passage of time. In this case, the employment contract is subject to a resolutive condition. The parties' agreed employment relationship would last for a particular time and not indefinitely.
- Termination on the completion of an agreed-upon project. This occurs where the employer and employee agree that the contract will terminate when a project is completed. In this case, for the termination to be valid, the employer must prove that the project was complete.
- Termination on the occurrence of a specified event. Here, the parties agree that a certain event should occur for the contract to end, such as a permanent employer returning to work. The event should not have been caused by the employer for the termination to be valid.'

In the aforesaid circumstances, the contract thus automatically terminates at the end of the agreed period, the occurrence of the identified event, or completion of the agreed task. As discussed in Chapter 3, this does not, however, mean that employees will never have any recourse when a contract automatically terminates.

In *SA Post Office Ltd v Mampeule*[359] both the LC and LAC held that the actions of the Minister of Communication resulted in the automatic termination of the employee's

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[357] Grogan J (2014) 10.

[358] Geldenhuys J 'The effect of changing public policy on the automatic termination of fixed-term employment contracts in South Africa' (2017) 20 *PER / PELJ* 5-7.

[359] *South African Post Office v Mampeule* (2009) 30 ILJ 664 (LC); *South African Post Office v Mampeule* (2010)

contract, and thus it was seen as a dismissal.[360] Similarly, in *Sindane v Prestige Cleaning Services*[361] the court held that the employer should have no hand in the contract automatically coming to an end.

In the matter of *Pecton Outsourcing Solutions CC and Pillemer B and others,*[362] the employment contract automatically terminated when the commercial contract between Pecton Outsourcing, and Unilever came to an end. The court held as follows:

> 'I prefer an approach that starts by examining, in all cases where the termination of TES contracts of employment is triggered by the will of a client, whether the underlying cause of the termination, concerning the TES employer, is one for which employees typically are dismissed. These are reasons relating to misconduct, incapacity, operational requirements, or no reason at all. In this determination, the courts should recognise the content of the reason for the termination over the form of the contractual device covering it. If the facts show that the reason for termination of the contract is one that typically constitutes a reason for dismissal, then this is a clue that, as the commissioner succinctly put it, there may be an attempt to 'contract out' of section 188 of the LRA. In the absence of evidence to the contrary, the termination thus becomes a dismissal and the underlying reasons for it will be ventilated in forums the LRA has set aside for this purpose.'[363]

To conclude the above discussion, the employer should have no aim or objective to end the contract, and so effectively dismiss the employee by triggering the automatic termination of the employment contract.

5.4 Summary of comparative study of the Netherlands and Germany

The research also discussed fixed-term employment protection and legislation in the Netherlands and Germany with the aim of identifying whether South Africa can learn anything from the legislative approaches adopted in these jurisdictions respectively.

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31 ILJ 2051 (LAC).

[360] See discussion on Mampeule in chapter 3 subheading 3.5 paragraph 4.
[361] *Sindine v Prestige Cleaning Services* (2010) 31 ILJ 733 (LC).
[362] *Pecton Outsourcing Solutions CC and Pillemer B and others* [2016] 2 BLLR 186 (LC) para 3-7.
[363] *Pecton Outsourcing Solutions CC and Pillemer Band others* [2016] 2 BLLR 186 (LC) para 43.

The Netherlands has shown that more flexible employment can assist in reducing the unemployment rate. It regards atypical employment as normal work and has strict protection for fixed-term employees through its flexicurity policies. In comparison, South Africa is less flexible in its labour policies, leaving the employer with greater bargaining power in terms of fixed-term employment. The BCEA regulates conditions of employment contracts. It provides that no contract of employment may contain conditions which are less favourable than those listed in the Act, unless an agreement was reached by a bargaining council, and that an employment contract must be in writing.[364] However, it does not provide a corresponding opportunity for employees to negotiate terms that could better suit their needs. A method such as this would be more effective in ensuring that there are no misunderstandings with regard to both parties' reasonable expectations.

South Africa and Germany can learn from the Netherlands regarding its *pro-rata temporis* principle towards atypical employees, which provides that a fixed-term employee will enjoy the same rights, benefits, and salary as a permanent employee. In South Africa as well as in Germany, it is subject to the contract that was concluded, and the position person held. Germany provides that after nine months a fixed-term employee can receive the same benefits as a permanent employee. There should be no conditions attached to the principle of providing protection for all, especially where the same work is done.

Both the Netherlands and Germany have legislation that empowers employees to negotiate flexible working hours, with the option of changing them at a later stage. This provides employees with the opportunity to work for multiple employers. In South Africa, though, the BCEA makes no mention of employees bargaining to work for reduced working hours.

Severance pay is another issue which is provided for in all three countries. However, South Africa's severance pay for fixed-term employees is limited in terms of

[364] Bendix S (2015) 33.

section 198B(10). The Netherlands and Germany have a more holistic approach; by legislation, it is available for all. Section 198B ultimately only applies to fixed-term employees earning less than the minimum wage. The Netherlands too might have a similar situation as in South Africa when it comes to elderly workers who have little security if transferred between employers, then default to earlier retirement and finally rely on state funds. If fixed-term employees' severance pay is not addressed as it is for other employees, the situation will be the same in South Africa or worse.

While the legislative regime in Germany ensures that employees are protected, the success of the German system is rooted not only in legislation, but also in the contracts and mutual agreements between employer associations, trade unions, and work councils.[365] The main Directive 1999/70/EC on fixed-term employment considers three specific measures to regulate fixed-term contracts: requiring objective reasons to justify the renewal of fixed-term contracts; defining the maximum duration of successive fixed-term contracts; and defining the number of renewals of such contracts.[366] Furthermore, German labour law is used to protect all fixed-term contract employees and does not distinguish between fixed-term employees based on the salary they earn. For example, the German Part-Time and Fixed-term Employment Act of 2007 extends protection to all fixed-term contract employees without exclusions and differentiation between high- and low-income fixed-term contract workers.[367]

South African labour legislation, specifically section 198B of the LRA, only protects fixed-term employees who earn below the minimum threshold, as has been stated throughout this study. Germany and South Africa have one aspect in common regarding section 198B. Germany distinguishes between contracts with a valid reason and contracts without a valid reason, and the rules that apply when the fixed-term contract might become indefinite employment. Section 198B stipulates reasons as to when a fixed-term contract is used for a valid reason without it becoming an indefinite employment. This means that in South Africa all contracts that do not have a valid

[365] Dustmann et al 'From sick man of Europe to economic superstar: Germany's resurgent economy' *Journal of Economic Perspectives* 28(1)168.
[366] See chapter 4 in 4.3.4.1 para 1.
[367] Gericke SB (2016) 102.

reason for appointing an employee on a fixed-term contract will not automatically be protected against section 198B (5). In essence one can argue that on this basis South Africa and Germany follow the same root in recognising that there is a valid reason for entering into fixed-term contracts in some circumstances, whereas in the Netherlands a fixed-term employment contract is seen as a contract of employment, regardless of the reason for employment.

The court systems of all three countries are used as effective tools to assist with the interpretation of legislation when disputes arise. It is contended that by making use of more strategic writing of the legislation it would alleviate the pressure experienced by the courts in these three countries. Relying on court cases all the time is problematic since the interpretation of legislation can vary widely. This is seen in the different judgments in court cases discussed in this study.

5.5 Recommendations

In this study it has become clear that the protection of atypical employment in South Africa remains complex. Despite substantial developments towards better protection, ongoing global changes within the labour market sector continue to cause challenges. In view of the fact that South Africa is still a developing country, the following recommendations are suggested:

- 'South Africa should consider a more flexible policy for fixed-term employment which can provide equal bargaining power for both employers and employees.
- All fixed-term employees should be protected by legislative provisions, regardless of earnings. Therefore, s 198B should be amended to provide protection for all fixed-term employees regardless of annual earnings.
- For legal certainty, legislation should be drafted in a manner that is clearly understood and leaves no loopholes or opportunities for misinterpretation.
- Trade unions, employer associations and work councils should unite and make collective decisions that will benefit both employees and employers.
- There needs to be more labour market efficiency and flexibility. The study found that for South Africa to address its alarmingly high unemployment rate, and to compete in the global market, it must adapt to labour market efficiency and flexibility trends.

> Germany is known for its tradition that trade unions co-determine workplace policies and practices with management. Manamela has, however, argued that the restructuring of the labour market has led to a multiplicity of precarious work arrangements that threaten traditional union organisations.[368] However it is contended that, while unions are present in South Africa, most fixed term employees are not members of a union due to the short and unsure nature of their employment.'

In conclusion, it is strongly argued that South African labour legislation cannot be the only resource to overcome the current obstacles to providing protection for atypical employees. There is a definite need for all the role-players in the labour market to work together and bring about change to benefit atypical employers. This will assist in alleviating the precarious nature of employment for atypical employees.

5.6 Conclusion

Atypical employees, with specific reference to fixed-term employees, are found in this study to be in a precarious position. As a result, they require protection because of the increased use of fixed-term employees in the job market. While legislative protection for these workers is available in South Africa, there remain shortcomings. As a result of South Africa's economic status as a Third World country, there are, however, many economic factors to be considered in finding a convincing solution. As stated in the research, legislation is important, but the labour market must also adhere to the rules and regulations for the legislation to be applied effectively and to make a difference. Hence, it is submitted that the South African labour market should welcome changes which afford increased protection for all fixed-term employees. The non-compliance of protective legislation for fixed-term employees should be taken more seriously, as it affects social circumstances. The principle of protecting all fixed-term employees, irrespective of earnings, is the start of a possible answer.

[368] Manamela (2015) 70.

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