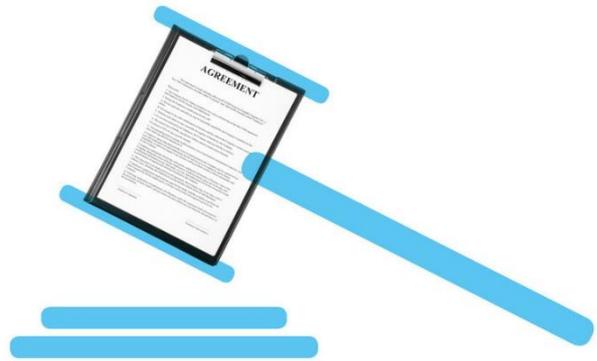


Employment Law update

Is a fixed term contract really that fixed?

Currently employers believe that:

- if they prematurely terminate a fixed-term employment contract, they will have to pay the employee the remainder of contract; and
- they can only retrench employees employed on fixed term contracts if the contract contains a clause specifically allowing them to do so.



This does not appear to be the case in terms of contract law.

Very recently the High Court, in the case of *Joni v Kei fresh produce Market*, held that nothing prevents an employer from terminating a fixed term contract (“**FTC**”) prematurely where this is specifically catered for in the contract.

In this case Joni instituted a claim for damages against her employer for unlawfully terminating her FTC in that her employer terminated same, for operational requirements, prior to the termination date. She stated that she understood that she would be entitled to the monetary equivalent of the balance of her contract in the event of premature termination.

In this case:

- The FTC commenced on 1 July 2010, to continue for a period of 5 years until 30 June 2015.
- It was an express term of the FTC that either party could terminate the FTC on one calendar month’s written notice to the other party.
- The employer terminated the FTC on 30 November 2011 by giving Joni one calendar month’s written notice of cancellation and citing the company’s operational requirements as the reason for termination.

The High Court held that while it is trite that a fixed term contract cannot be terminated in the absence of a repudiation or a material breach of contract by the other party in terms of the common law, the exception to this rule is where the contract provides for such termination.

In this case the clause was clear – either party could terminate the FTC on one calendar month’s written notice to the other. There was no restriction on the grounds for the premature termination and, therefore, the High Court held that the clause could not be restrictively interpreted to exclude the possibility of retrenchment and is wide enough to cover this situation. In the circumstances, the High Court held that the FTC was lawfully terminated in accordance with the provisions of the agreement and Joni was not entitled to damages.

This case makes it clear that:

- if the FTC allows for premature termination then the employer will not be liable to pay the employee in respect of the remainder of the term of the contract; and
- an employer can retrench an employee employed on a FTC even if the contract does not specifically mention that this is permissible, but rather allows for premature termination as a general statement.

However, this judgment speaks merely to an employee's contractual claim for premature termination, if any. An employee may still have a claim in terms of the Labour Relations Act for unfair dismissal if the dismissal was not for a fair reason in law and/or if the employer did not follow a fair procedure in dismissing the employee.

In order for an employer to mitigate and understand its risks, it is always advisable for them to have their FTC's reviewed by an attorney and to consult with an attorney before terminating a FTC prematurely.

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