Different forms of non-standard employment contracts and when they are used

Non-Standard Employment

Sections 198 A-D of the Labour Relations Act 66 of 1995 (LRA) provide specific protection to vulnerable employees employed in non-standard employment contracts who earn below the earnings threshold set from time to time in terms of section 6(3) of the Basic Conditions of Employment Act 75 of 1997 (BCEA). Non-standard employment within this context includes employees employed by a temporary employment services (TES), employees employed on fixed-term contracts and part-time employees.

Employees employed by a temporary employment services (TES) organisation – section 198A of the LRA

Section 198 of the LRA states that a TES refers to any person who procures for or provides to a client other persons who perform work for the client and who are remunerated by the TES.

Section 198A is specific to TES (also known as labour brokers) employees who earn below the BCEA threshold.

The following protections apply to such employees:

1. The client and the TES employer are jointly and severally liable if the TES, in respect of any of its employees, contravenes a collective agreement concluded in a bargaining council, a binding arbitration award that regulates terms and conditions of employment, the BCEA, or a sectoral determination. In terms of the BCEA, as amended in 2018 and the National Minimum Wage Act, 2018, non-compliance with payment of the national minimum wage will be included here.

2. If an employer uses the services of an employee of a TES for a period in excess of three months, other than as a substitute for a temporarily absent employee (for example, where an employee is on maternity leave for a period that exceeds three months) or in certain categories of work specifically determined in a bargaining council collective agreement, sectoral determination or Ministerial determination, the employer, as client of the TES, will run the risk of that employee being deemed to be employed by it on an indefinite basis or for a period of time linked to a fixed-term contract that meets the requirements of section 198B of the LRA (see below). This is known as the *"deeming provision".*

3. An employee who is deemed to be an employee of the client must on the whole be treated not less favourably than an employee of the client performing the same or similar work, unless there are justifiable reasons for different treatment. For example, long service.

Employees employed on fixed-term employment contracts – section 198B of the LRA

A fixed-term contract of employment is defined as one which terminates on the occurrence of a specific event, or on the completion of a specific task or project, or on a fixed date (other than a retirement date).

An offer to employ an employee on a fixed-term contract, or to renew or to extend a fixed-term contract **must be in writing**. The offer must also state the nature of the work and justifiable reasons for fixing the term of the contract. If it becomes necessary, the employer will bear the onus of proving that there was a justifiable reason for fixing the term, and that the term was agreed.

This section does not apply to:

- An employee who earns above the BCEA threshold;
- an employer who employs less than 10 people, or to an employer who employs less than 50 people if the business has been in operation for less than two years (unless the employer conducts more than one business, or the business was formed by the division or dissolution of a previously existing business); and
- an employee employed on a fixed-term contract that is allowed in terms of any law, sectoral determination or collective agreement.

Justifiable reasons for fixing the term of a contract:

Where section 198B is applicable, the fixed-term contract may not exceed three months (including any renewals of the contract) if the nature of the work is of a limited or defined duration, or if the employer cannot demonstrate any other justifiable reason for fixing the term of the contract.

If the contract exceeds three months and the nature of the work is found not to be of a limited or definite duration, or the employer is not able to provide a justifiable reason for fixing the term of the contract, the employee will be deemed to be indefinitely employed.

Justifiable reasons for fixing the term of a contract include:

- the replacement of a temporarily absent worker;
- a temporary increase in the volume of work (not expected to last longer than 12 months);
- a student or recent graduate employed for the purpose of training or to gain work experience;
- limited or defined duration projects;
- employment of a non-citizen who has been granted a work permit for a defined period;
- seasonal work;
- employment in an official public works scheme or similar job creation scheme;
- work funded by an external source for a limited period; and
- post-retirement contracts.

The list is not exhaustive, but any other reason for fixing the term must be justified.
Affordability is NOT a justifiable reason, and nor is probation.

An employee must be treated not less favourably

An employee earning below the BCEA threshold and employed on a fixed-term contract exceeding three months must be treated no less favourably than an employee employed on a permanent basis performing the same or similar work, unless there is a justifiable reason for such different treatment.

Justifiable reasons for treating employees differently, include:

- seniority, experience or length of service;
- merit;
- the quality or quantity of work performed; or
- any other criteria of a similar nature.

An employer must provide an employee employed on a fixed-term contract and an employee employed on a permanent basis with equal access to opportunities to apply for vacancies.

Limited entitlement to severance pay

Where an employee is employed on a fixed-term contract for a limited-duration project which exceeds two years, the employee must be paid severance pay of one week's pay per completed year of service, on the termination of the contract, unless the employer offers or procures employment for the employee, on the same or similar terms, which commences on the expiry of the contract.

Employees employed on part-time employment contracts – section 198C of the LRA

A part-time employee is an employee who is remunerated wholly or partly by reference to the actual time the employee works and who works fewer hours than a comparable full-time employee.

This section does not apply to:

- An employee who earns above the BCEA threshold.
- An employer that employs less than 10 people, or to an employer who employs less than 50 people if the business has been in operation for less than two years (unless the employer conducts more than one business, or the business was formed by the division or dissolution of a previously existing business).
- An employee who works for fewer than 24 hours per month for an employer.
- During the first three months of continuous employment with an employer.

An employee must be treated no less favourably

The part-time employee must be treated on the whole not less favourably than a comparable full-time employee doing the same or similar work, taking into account the working hours of the part-time employee, unless there is a reason for different treatment.

The part-time employee must be given the same access to training and skills development as a comparable full-time employee.

The part-time employee must be given the same access as full-time employees to opportunities to apply for vacancies.

General Provisions

Section 198D of the LRA sets out the general provisions relating to non-standard employment. It deals with "justifiable reasons" for different treatment of fixed-term and part-time employees, compared to permanent full-time employees.

Section 198D also sets out the dispute resolution process that may be followed should a dispute arise from the interpretation or application of sections 198 A-C of the LRA. Such a dispute may be referred for conciliation to the CCMA or a bargaining council with jurisdiction within six months after the act or omission occurred.

Justifiable reasons for different treatment

In essence it is regarded as justifiable to treat a fixed-term or part-time employee differently on the grounds of:

- seniority, experience or length of service;
- merit (i.e. performance); the quality or quantity of work performed; or
- other criteria of a similar nature provided it does not constitute unfair discrimination in terms of the Employment Equity Act.

See CCMA Information Sheet: Section 198A-D of the LRA (non-standard employment)

A dispute concerning the interpretation or application of section 198A, B and C may be referred to the CCMA or a bargaining council for conciliation and arbitration. A dispute, other than a dismissal dispute in terms of s198A(4)[1], must be referred within 6 months of the act or omission.

[1] The termination by the TES of an employee's service with a client, for the purpose of avoiding the *deeming provision* in terms of section 3(b), or because the employee exercised a right in terms of the LRA, is a dismissal.