

UNIVERSITY OF THE WESTERN CAPE



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FACULTY OF LAW

Mini Thesis

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Name of candidate : MUZIWAKHE MATHE

Student number : 3783101

Degree : MASTER OF PHILOSOPHY IN COMPARATIVE LABOUR LAW

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Supervisor : MS E. HUYSAMEN

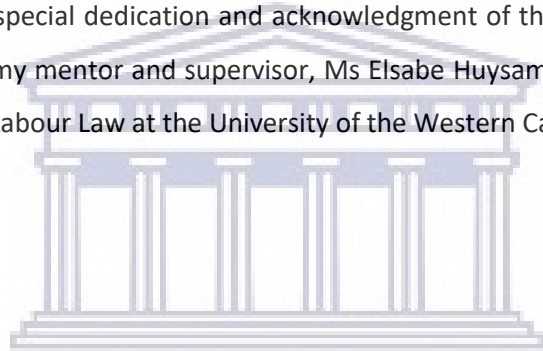
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PLAGIARISM DECLARATION

I declare that 'Using Fixed-term Contracts of Employment Subsequent to the Introduction of Section 198 in the Labour Relations Act 66 of 1995: A study of the Technical and Vocational Education and Training Sector in South Africa' - is my own work, that it has not been submitted before for any degree or assessment in any other university, and that all sources I have used or quoted have been indicated and acknowledged by means of complete references.

DEDICATION AND ACKNOWLEDGMENTS

I dedicate and acknowledge the endless support from my family. It is through their support that I have reached this level of education. I further acknowledge my friends and colleagues who have been supporting me throughout this journey. A special dedication and acknowledgment of the support, guidance, patience and supervision received from my mentor and supervisor, Ms Elsabe Huysamen, the Senior Lecturer in the Department of Mercantile and Labour Law at the University of the Western Cape.



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ABSTRACT

This study is encouraged by the fact that the field of labour law has drastically changed after enactment of amendments in various labour legislation such as Employment Equity Act, Basic Conditions of Employment Act and Labour Relations Act during 2013 and 2014. These changes have compelled employers to review their policies in line with the amendments of these Acts. This study will however focus on the impact of the newly introduced section 198 to the Labour Relations Act 66 of 1995. The study will specifically focus on the continued use of fixed-term contracts of employment within the Technical and Vocational Education and Training (TVET) Sector of South Africa.

The Technical and Vocational Education and Training (TVET) Sector is a branch under the Department of Higher Education and Training (DHET). There are 50 Public Technical and Vocational Education and Training Colleges in the South Africa with over 260 campuses.¹ The main purpose of these type of colleges is to train young school leavers, providing them with the skills, knowledge and attitudes necessary for employment in the labour market.² They primarily provide training for the mid-level skills required to develop the South African economy and tend to concentrate on occupations in the engineering and construction industries, tourism and hospitality, and general business and management studies.³



TITLE

USING FIXED-TERM CONTRACTS OF EMPLOYMENT SUBSEQUENT TO THE INTRODUCTION OF SECTION 198 IN THE LABOUR RELATIONS ACT 66 OF 1995: A STUDY OF THE TECHNICAL AND VOCATIONAL EDUCATION AND TRAINING SECTOR IN SOUTH AFRICA.

KEYWORDS

- Non-standard Employment ▪ Temporary Service ▪ Fixed-term Contract ▪ Part-time Employment
- Cheap Labour and Flexibility ▪ Vulnerable and Exploited Labour ▪ Worker's rights ▪ Employer's interests ▪ Labour Law Legislation and Regulations ▪ Reasonable Expectation ▪

¹ White Paper for Post-School Education and Training in GN 11 GG 37229 of 15 January 2014.

² White Paper for Post-School Education and Training in GN 11 GG 37229 of 15 January 2014.

³ White Paper for Post-School Education and Training in GN 11 GG 37229 of 15 January 2014.

ABBREVIATIONS AND/OR ACRONYMS:

- BCEA : Basic Conditions of Employment Act 75 of 1997.
- CC : Constitutional Court.
- CCMA : Commission for Conciliation, Mediation and Arbitration.
- DHET : Department of Higher Education and Training.
- EEA : Employment Equity Act 55 of 1998.
- ELRC : Education Labour Relations Council.
- FTC : Fixed-term Contract.
- GPSSBC : General Public Service Sector Bargaining Council.
- ILO : International Labour Organisation.
- LAC : Labour Appeal Court.
- LC : Labour Court.
- LRA : Labour Relations Act 66 of 1996.
- LRAA : Labour Relations Amendment Act 6 of 2014.
- NTT : National Task Team.
- PSA : Public Service Act 103 of 1994.
- PSCBC : Public Service Coordinating Bargaining Council.
- PSR : Public Service Regulations of 2016.
- PTE : Part-time Employment.
- SA : South Africa.
- TES : Temporary Employment Service.
- TVET : Technical and Vocational Education and Training.

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CHAPTER 1: INTRODUCTION AND BACKGROUND TO THE STUDY

1.1 INTRODUCTION AND PROBLEM STATEMENT

Two different types of employment arrangements, i.e., typical/standard and atypical/non-standard employment, dominate employment relationships in various sectors in South Africa. “Non-standard” or “atypical” forms of employment is an umbrella term for different employment arrangements that deviate from standard employment.⁴ These include temporary employment, part-time and on-call work, temporary agency work, fixed-term contracts and other multiparty employment relationships, as well as disguised employment and dependent self-employment.⁵ The landscape of labour law or the labour relations field is changing not only in South Africa (SA), but globally, with a rise in the use of non-standard employment arrangements. A consequence of this can be seen in the 2014 amendments to labour legislation in SA, most notably the amendments to the Labour Relations Act 66 of 1995 (LRA) by way of the Labour Relations Amendment Act 6 of 2014 (LRAA).

It is widely accepted that historically many employees employed within non-standard employment arrangements, particularly fixed-term contract employees or those employed on a temporary basis, have not been as well protected through labour legislation as is the case with standard employment arrangements. Hence, there remains a need for legislation which strengthens the governance of non-standard employment.⁶ Non-standard employees have often been subjected to various prejudicial treatment or practices. Many employers prefer to utilise non-standard employment as it is regarded as more flexible and cheaper than standard employment arrangements. Non-standards employees are often deprived of access to benefits (e.g. provident fund, pension and medical aid) that are received by employees in standard employment relationships. Often non-standard employees are also the first to fall prey to retrenchment where organisational circumstances demand downscaling or restructuring.⁷ Consequently, these employees tend to be affected by retrenchments more often and ahead of those employees that are engaged within permanent appointments, irrespective of the former’s performance and contribution to the organisation. Many employers utilise fixed-term contracts specifically as means of evading statutory obligations and protections in terms of the applicable laws, such as the protection against unfair dismissal as provided for in

⁴ Mbwaalala, N. ‘Can labour law succeed in reconciling the rights and interests of labour broker employees and employers in South Africa and Namibia?’ 2013.

⁵ Mbwaalala, N. ‘Can labour law succeed in reconciling the rights and interests of labour broker employees and employers in South Africa and Namibia?’ 2013.

⁶ Griessel J ‘Temporary Employees - The 2015 Landscape’ available at <https://www.labourguide.co.za/most-recent/2004-temporary-employment-in-2015> (accessed 08 March 2018).

⁷ ILO ‘The effects of non-standard forms of employment on worker health and safety: Conditions of Work and Employment Series No. 67’ 2015: Page 17.

the LRA.⁸ Furthermore, employers have a tendency to utilise fixed-term contracts as a substitute method for probation.⁹ Non-standard employees are often also denied access to developmental opportunities that are applicable to permanent employees.¹⁰

Prior to the legislative amendments of 2014, the LRA only defined a temporary employment service.¹¹ Fixed-term employment and part-time employment were however not defined at all in the LRA prior to 2014. Through the 2014 amendments introduced by the LRAA various employers have now been forced to review their employment contracts, policies, relationships, partnerships and practices so as to ensure that they conform to the requirements of the amended LRA as far as non-standard employment arrangements are concerned.

The Technical and Vocational Education and Training (TVET) sector is an example of a sector in SA where atypical/non-standard employment arrangements dominate. As with any other employer, this sector is however required to conform to the section 198 of the LRA. Since the introduction of section 198 to the LRA, dispute resolution institutions operating within the TVET sector, such as, the Educators Labour Relations Council (ELRC), General Public Service Sector Bargaining Council (GPSSBC) and Labour Court have dealt with various labour cases from TVET Colleges in relation to temporary employment service (TES), fixed-term contracts (FTC), and part-time employment (PTE). Such cases will be incorporated into the research in order to determine the current status of labour law practices in the TVET Sector with regard to managing fixed-term contract employment specifically after the introduction of section 198B into the LRA.

Challenges frequently experienced within the TVET sector are largely as a result of the unpredictability in student numbers annually. TVET Sector Colleges are often required to opt for non-standard types of employment, and in particular fixed term appointments, in order to achieve operational demands. As example, lecturers are often employed on temporary contracts as substitute lecturers due to, e.g., the prolonged absence of permanent lecturers on sabbatical leave, replacement for lecturers on maternity leave, and increased student enrollments. Often the contracts between TVET Colleges and such temporary lecturers also tend to roll over should an increase in student numbers be experienced again. Despite this, TVET Colleges have little choice but to let the employment contracts lapse on expiry date should the number of students decrease. In summary, TVET Colleges find it difficult to regard many lecturer positions as permanent as student enrolment number fluctuates and are not guaranteed to be stable from one year to the next. Many

⁸ ILO 'Non-standard employment around the world: Understanding challenges, shaping prospects' 2016.

⁹ Huysamen E 'An Overview of Fixed-Term Contracts of Employment as a Form of a Typical Employment in South Africa' *PER / PELJ* 2019(22) – DOI.

¹⁰ Section 198B(8) (a) of the LRA.

¹¹ Section 198A(1) of the Labour Relations Act 66 of 1995 defined a temporary service as any person who, for reward, procures for or provides to a client other persons who render services or perform work for, the client and who were remunerated by the temporary employment service.

TVET Sector employees regard this practice as prejudicial, most notably because of the lack of employment security experienced. The 2014 amendments to the LRA, particularly through the introduction of section 198A to D, seek to address problems and discrepancies with regard to management of non-standard employees.

The research will evaluate the amendments to the LRA, and in particular in as far as fixed-term appointments are concerned, in relation to its impact on the TVET Sector in South Africa. While the introduction of section 198 of the LRA is conceptually welcomed, various historical uncertainties around fixed-term employment remain, with some new issues also arising. The exclusion from the protection provided by section 198B of the LRA of employees who earn above the ministerial determined earnings threshold¹² might also be regarded as a gap or omission. Employees who earn in excess of the threshold are also exposed to vulnerability and exploitation.

1.2 SIGNIFICANCE OF THE PROBLEM

Historically many employees employed within non-standard employment arrangements, particularly fixed-term contract employees or those employed on a temporary basis, have not been as well protected through labour legislation as is the case with standard employment arrangements.¹³ Section 9(1) of the Constitution of the Republic of South Africa, 1996, (the Constitution) however regards *everyone* as equal before the law and having the right to equal protection and benefits of the law.¹⁴ In terms of section 23(1) of the Constitution *everyone* therefore has a right to fair labour practices,¹⁵ and consequently not only those employed in standard or typical employment relationships. The International Labour Organisation (ILO) also provides international standards in the field of labour law, many of which are also applicable in South African labour law since South Africa is a member state to the ILO and signatory to many ILO Conventions.

The introduction of sections 198A to D into the LRA, which governs certain aspects of non-standard employment, was therefore welcomed. These amendments will be evaluated specifically in relation to its impact on the TVET Sector in South Africa, and particularly the use of fixed-term employment arrangements in the sector in terms of section 198B. This study is unique in the sense that it will not only discuss the amendments of the LRA, but also selected economical, and financial implications as a result of the implementation of section 198A to D in the TVET sector. This study will make a meaningful contribution to

¹² The current threshold is R205 433.30 per annum in terms of Section 6(3) of the Basic Conditions of Employment Act, No. 75 of 1997.

¹³ Griessel J 'Temporary Employees - The 2015 Landscape' available at <https://www.labourguide.co.za/most-Recent/2004-temporary-employment-in-2015> (accessed 8 March 2018).

¹⁴ Section 9(1) of the Republic of South Africa 1996.

¹⁵ Section 23(1) of the Republic of South Africa 1996.

the field of labour law through incorporating the views of legal experts, labour relations practitioners and courts on relevant issues. The study will also explore current trends in dispute mechanism institutions operating within the TVET sector in order to ascertain the impact of the insertion of sections 198A to D into the LRA. Few papers (if any) have to date been written on this issue within the TVET sector specifically.

1.3 RESEARCH QUESTION AND RESEARCH AIMS

The main question the research sets out to address is to consider the practical effects to date within the TVET Sector of the Department of Higher Education and Training of the introduction of section 198A to D, and in particular, section 198B, into the LRA.

Consequently, the research will aim to ascertain the implications that the new section 198A to D of the LRA has brought into the field of labour law, with specific focus on the impact of these amendments on the use and management of fixed-term employment within the TVET Sector. The research will also explore potential implications of these changes for the organisation and its employees specifically in the TVET Sector. The research will evaluate TVET Sector compliance with section 198 of the LRA. Through this the research, it will attempt to ascertain the vulnerability and exploitation that non-standard employees in the TVET Sector continue to experience, specifically those employed on fixed-terms contracts of employment. Furthermore, the research will determine and analyse TVET Sectoral collective agreements that addresses non-standard employment conditions. The research will discuss the reasons, sources and causes of utilisation of non-standard employees in the forms of fixed-term employees within the TVET Sector.

The research will ascertain the actions and intervention strategies that the DHET has applied to address increasing number of non-standard employment in the TVET Sector in line with the requirements the LRA Amendments and other relevant labour legislation. The analysis of relevant and applicable case law will be instrumental to contribute to the success of this research. The outcome of such disputes will be analysed and presented. The advantages and disadvantages of utilising the non-standard employees for both employer (DHET) and employees in a TVET Sector will be ascertained. The omissions or gaps still existing in the LRA as far as fixed-term employment is concerned will also be explored and recommendations will be made to contribute to the field of labour law.

1.4 LITERATURE REVIEW

The ever increasing regional and global trade competition has manifested itself in a growing number of non-standard forms of employment.¹⁶ According to Mbwaalala, the increase in non-standard forms of employment in the past few decades has been driven by a variety of forces, including demographic shifts, labour market regulations, macroeconomic fluctuations, and technological change.¹⁷ In many instances non-standard forms of employment accommodated such changes, thereby allowing more workers to become integrated into the labour market, while in other instances non-standard forms of employment pose challenges for working conditions and the performance of companies, as well as for the overall performance of labour markets, economies and societies.¹⁸ Despite the constitutional rights afforded to everyone and the increase in use of non-standard forms of employment, Gericke is of the view that fixed-term contract employees have traditionally not fully benefited from the provisions of the Constitution¹⁹ as its protection has not always adequately filtered through to labour legislation, such as the LRA, in as far as these workers are concerned. This has resulted in amendments of the various labour laws of South Africa over the years.

According to Joubert and Loggenberg the negative implications for non-standard employees include impending unemployment, negative attitude and poor employability prospects.²⁰ In a study conducted by Strydom prior to the 2014 amendments to the LRA on job satisfaction of academic staff members on fixed-term employment contracts at South African higher education institutions, it was found that fixed-term contract employees generally experienced a lack of job security and long-term career prospects.²¹ Apart from the general prejudice suffered by non-standard employees, a high use of non-standard employment practices has negative consequences for employers as well. Such consequences include less accountability, less continuity (erosion of firm-specific skills), a need for continuous identification of new skills for the market instead of developing skills for in-house/current employees, short term instead of long term costs and flexibility gains that may be in the long run, outweighed by productivity losses.²²

¹⁶ Mbwaalala, N. "Can labour law succeed in reconciling the rights and interests of labour broker employees and employers in South Africa and Namibia?" 2013.

¹⁷ Mbwaalala, N. "Can labour law succeed in reconciling the rights and interests of labour broker employees and employers in South Africa and Namibia?" 2013.

¹⁸ Mbwaalala, N. "Can labour law succeed in reconciling the rights and interests of labour broker employees and employers in South Africa and Namibia?" 2013.

¹⁹ Gericke SB "The regulation of successive fixed-term employment in South Africa: lessons to be gleaned from foreign and international law" 2016.

²⁰ Joubert YT & Loggenberg B 'The impact of changes in labour broking on an integrated petroleum and chemical company: Acta Commercii' (2017).

²¹ Strydom A 'The job satisfaction of academic staff members on fixed-term employment contracts at South African Higher Education Institutions' (unpublished Philosophiae Doctor Thesis, University of the Free State, 2011) 2.

²² ILO 'Non-standard employment around the world: Understanding challenges, shaping prospects' 2016.

Aleksynska and Muller however view fixed-term contract employment as a mechanism that provides flexibility to enterprises to respond to changes in demand, replacing temporarily absent workers, or evaluating newly hired employees before offering them an open-ended contract.²³ ILO research has also indicated that the use of temporary employment allows enterprises to adjust their workforces to changing circumstances.²⁴ At the same time however, an over-reliance on the use of temporary workers can lead to productivity challenges, both for individual employers and the economy overall.²⁵

Various views continue to be raised over the benefits and shortcomings of the use of fixed-term contracts. The TVET Sector is no exception in this regard. Consequently, the research will contribute to the topic by attempting to determine the extent to which fixed-term employment (as regulated by section 198B of the LRA) is beneficiary and/or disadvantageous to the unique TVET Sector.

1.5 RESEARCH OUTLINE AND RESEARCH METHODOLOGY

Chapter 1: will provide the introduction and full background history to the research topic. The aims of the research will be outlined as well as the reasons why the research was undertaken.

Chapter 2: will in main discuss the legislative regulation of fixed-term contracts of employment in South Africa against the background of the Constitution of the Republic of South Africa 1996 (the Constitution) and international obligations under the International Labour Organisation (ILO). Chapter 2 will also discuss the prejudice and shortcomings suffered by fixed-term contract employees. This chapter will further discuss an overview of the post-2014 applicable legislative framework in South Africa as well as the Labour Relations Act 66 of 1995 (LRA) post-2014. Furthermore, chapter 2 will discuss the different views on the implications of the LRA amendments of 2014 in relation to non-standard employment arrangements. Chapter 2 will lastly, discuss the effect of using fixed-term contracts of employment in the Public Technical and Vocational Education and Training (TVET) sector subsequent to the introduction of section 198B of the LRA.

Chapter 3: will mainly focus on an overview of non-standard employment in South Africa, the distinction between atypical and typical employment arrangement, factors contributing to the rise in non-standard employment and lastly, the advantages & disadvantages of utilising non-standard employment with reference to the TVET sector.

²³ Mariya A and Muller A 'INWORK and GOVERNANCE INWORK Brief No. 6: Nothing more permanent than temporary? Understanding fixed-term contracts' 2015.

²⁴ ILO 'Regulating the use of Temporary Contracts by Enterprises' 2016.

²⁵ ILO 'Regulating the use of Temporary Contracts by Enterprises' 2016.

Chapter 4: will serve as the concluding chapter to the research in which the research question will be addressed. Recommendations will be made as to the way forward for the use of fixed-term contracts in the TVET sector in light of section 198A to D of the LRA. Lesson learnt by both employers and employees will be outlined.

The research was conducted through a review of South African literature published in primary and secondary sources, such as international conventions, journal articles, books, legislation, case law and internet sources. The research was also conducted by analysing the relevant South African legislation and case law regarding the impact of an introduction of Section 198 in the Labour Relations Act 66 of 1995. The impact and practice of labour laws regarding the use of non-standard employment, particularly fixed-term contracts, in the TVET Sector was examined.

1.6 CONCLUSION

In conclusion, the success of the research on fixed-term contract of employment is mainly based on the analysis of the provisions of the Constitution, ILO and the applicable legislative framework with reference to the regulation of fixed-term employment specifically in the TVET sector.

Chapter 2 will in main discuss the legislative regulation of fixed-term contracts of employment in South Africa, the provisions of the Constitution and ILO. Chapter 2 will also discuss the prejudice and shortcomings suffered by fixed-term contract employees, an overview of the post-2014 applicable legislative framework in South Africa, the Labour Relations Act 66 of 1995 (LRA) post-2014, the different views on the implications of the LRA amendments of 2014 in relation to non-standard employment arrangements and lastly the effect of using fixed-term contracts of employment in the public TVET sector subsequent to the introduction of section 198B of the LRA.

CHAPTER 2: AN OVERVIEW OF THE REGULATION OF FIXED TERM CONTRACTS OF EMPLOYMENT IN SOUTH AFRICAN LABOUR LAW

2.1 INTRODUCTION

This chapter will discuss the legislative regulation of fixed-term contracts of employment in South Africa against the background of the Constitution of the Republic of South Africa 1996 (the Constitution) and international obligations under the International Labour Organisation (ILO). The Constitutional paradigm is important as it provides for fair labour practices,²⁶ equality,²⁷ dignity²⁸ and protection against unfair discrimination.²⁹ Specifically, the focus will fall on sections 186(1)(b) and 198B of the amended LRA.³⁰ The effect of using fixed-term contracts of employment in the TVET sector subsequent to the introduction of section 198B into the LRA will be considered.

2.2 INTERNATIONAL LABOUR ORGANISATION (ILO)

The ILO has significantly contributed to the topic of fixed-term contracts of employment. The Constitutional Court of SA has on several occasions referred to ILO instruments in reaching decisions on labour matters, including fixed-term contracts.³¹ Amongst others, the ILO adopted Convention 87 of 1948 (Freedom of Association and Protection of the Right to Organise Convention, ratified by South Africa on 19 Feb 1996) which concerns freedom of association and protection of the rights to organise.³² Notably the Convention “guarantees the right of workers and employers without distinction to include workers outside the scope of the traditional contract of employment”.³³ Similarly, the ILO’s Convention 98 of 1949 (Right to Organise and Collective Bargaining Convention, ratified by South Africa on 19 Feb 1996) promotes the right to organise, promotes collective bargaining and further enables workers to enjoy adequate protection against acts of anti-union discrimination in respect of their employment.³⁴ The Convention assisted in addressing the uncertainty regarding the employment status of workers where a contractual relationship hides the true legal status and deprive these vulnerable workers of the protection due to them.³⁵ This is in line with the view

²⁶ Section 23(1) of the Constitution of the Republic of South Africa, 1996.

²⁷ Section 9(1) of the Constitution of the Republic of South Africa, 1996.

²⁸ Section 10 of the Constitution of the Republic of South Africa, 1996.

²⁹ Section 9(3) and 9(4) of the Constitution of the Republic of South Africa, 1996.

³⁰ LRA as amended by Labour Relations Amendment Act 6 of 2014.

³¹ NUMSA v Bader Bop (Pty) Ltd 2003 24 ILJ 305 (CC); [2003] 2 BLLR 103 (CC); NEHAWU v UCT [2003] 5 BLLR 409 (CC).

³² ILO ‘Non-standard employment around the world: Understanding challenges, shaping prospects’ 2016.

³³ Gericke E ‘Temporary employment services: Closing a loophole in section 198 of the Labour Relations Act 66 of 1995’ 2010:97.

³⁴ ILO ‘Article 1(1): Right to Organise and Collective Bargaining Convention’ 1949.

³⁵ ILO ‘Non-standard employment around the world: Understanding challenges, shaping prospects’ 2016.

that the existence of the employment relationship should primarily be guided by the facts related to the working relationship rather than by the wording of the agreement between the parties.³⁶ Convention 100 of 1951 (Equal Remuneration Convention, ratified by South Africa on 30 Mar 2000) was introduced to promote equal remuneration for men and women workers for work of equal value.³⁷ This convention provides for equal remuneration for all irrespective of the nature of the work relationship. Convention 111 of 1958 [Discrimination (Employment and Occupation) Convention, ratified by South Africa on 05 Mar 1997] further prohibits discrimination against any worker.³⁸ It is therefore evident that ILO's conventions and policies do not promote suppression and inequality based on employment status, but attempt to provide protection to all workers, thus including non-standard employees.

The ILO further adopted the concept of *decent work*³⁹ in 2015 through its 2030 Sustainable Development Agenda.⁴⁰ Four pillars of decent work for all have been identified: (a) employment opportunities/creation⁴¹ or promotion of employment creation and income opportunities;⁴² (b) workers' rights⁴³ or promotion of standards and rights at work;⁴⁴ (c) social protection & social security;⁴⁵ and (d) representation/social dialogue⁴⁶ or promotion of social dialogue and tripartism.⁴⁷

The ILO's decent work agenda should also have an impact on the improvement of the precarious position of non-standard workers all over the world.⁴⁸ The ILO understands that non-standard employment is naturally associated with insecurity.⁴⁹ In line with decent work agenda, the ILO has subsequently made recommendations⁵⁰ that national legislation needs to address employment misclassification and restrict

³⁶ ILO 'Non-standard employment around the world: Understanding challenges, shaping prospects' 2016.

³⁷ ILO 'C100 - Equal Remuneration Convention (No. 100)' 1951.

³⁸ ILO 'Discrimination Convention (No. 11)' 1958.

³⁹ ILO '2030 development agenda: Major breakthrough for world of work' Available at https://www.ilo.org/global/about-the-ilo/newsroom/news/WCMS_388407/lang--en/index.htm (accessed 23 October 2019).

⁴⁰ ILO '2030 development agenda: Major breakthrough for world of work' Available at https://www.ilo.org/global/about-the-ilo/newsroom/news/WCMS_388407/lang--en/index.htm (accessed 23 October 2019).

⁴¹ Van der Burg A et al 'Going for Broke: A Case Study of Labour Brokerage on Fruit Farms in Grabouw' 2009: 16.

⁴² ILO 'South African Decent Work Country Programme' Available at http://www.ilo.org/jobspact/resources/lang-en/docName/WCMS_145432/index.htm.2621 (accessed 08 December 2018).

⁴³ Van der Burg A et al 'Going for Broke: A Case Study of Labour Brokerage on Fruit Farms in Grabouw' 2009: 16.

⁴⁴ ILO 'South African Decent Work Country Programme' Available at http://www.ilo.org/jobspact/resources/lang-en/docName/WCMS_145432/index.htm.2621 (accessed 08 December 2018).

⁴⁵ Van der Burg A et al 'Going for Broke: A Case Study of Labour Brokerage on Fruit Farms in Grabouw' 2009: 16.

⁴⁶ Van der Burg A et al 'Going for Broke: A Case Study of Labour Brokerage on Fruit Farms in Grabouw' 2009: 16.

⁴⁷ ILO 'South African Decent Work Country Programme' Available at http://www.ilo.org/jobspact/resources/lang-en/docName/WCMS_145432/index.htm.2621 (accessed 08 December 2018).

⁴⁸ Fourie ES 'Non-standard workers: The South African context, International Law and regulation by European Union' 2008.

⁴⁹ ILO 'Non-standard employment around the world: Understanding challenges, shaping prospects' 2016.

⁵⁰ ILO 'Non-standard employment around the world: Understanding challenges, shaping prospects' 2016.

some uses of non-standard employment to prevent abuse.⁵¹ It would therefore be interesting to see how South Africa continues to approach non-standard employment and the protection of such workers to adhere to ILO Conventions and the ILO's decent work agenda.

2.3 PROVISIONS OF THE CONSTITUTION OF THE REPUBLIC OF SOUTH AFRICA, 1996 (THE CONSTITUTION)

The Constitution entitles everyone with the rights to inherent dignity, equality and freedom⁵² and the right to have their dignity respected and protected.⁵³ The reference to the broad term *everyone* should be emphasised as it reflects inclusiveness to all, and this in the labour context, all workers. Section 9(1) of the Constitution further provides that *everyone* is equal before the law and have the right to equal protection and benefits of the law.⁵⁴ Section 9(4) of the Constitution prohibits direct and indirect discrimination by holding that '[no person may unfairly discriminate directly or indirectly against anyone on one or more grounds in terms of subsection (3)⁵⁵ of section 9 of the Constitution]'. The grounds referred to include race, gender, sex, pregnancy, marital status, ethnic or social origin, colour, sexual orientation, age, disability, religion, conscience, belief, culture, language and birth.⁵⁶

The Constitution further provides for the right to fair labour practices.⁵⁷ In terms of section 23(1) of the Constitution *everyone* has this right to fair labour practices,⁵⁸ thus, consequently, not only those employed in standard or typical employment. The Constitutional right to fair labour practices is wider than the concept of *unfair labour practices* as provided for in the LRA.⁵⁹ For example, in *Mans v Mondi Kraft*,⁶⁰ the court commented that the right to fair labour practices enshrined in the Constitution protects both the employer and employee regardless of the nature of appointment, occupational classification and whether or not the individual fits into the legislatively provided⁶¹ definition of an employee.⁶² The Constitution also grants every

⁵¹ ILO 'Non-standard employment around the world: Understanding challenges, shaping prospects' 2016.

⁵² Section 7(1) of the Constitution of the Republic of South Africa, 1996.

⁵³ Section 7(2) of the Constitution of the Republic of South Africa, 1996.

⁵⁴ Section 9(1) of the Constitution of the Republic of South Africa, 1996.

⁵⁵ Section 9(4) of the Constitution of the Republic of South Africa, 1996.

⁵⁶ Section 9(3) of the Constitution of the Republic of South Africa, 1996.

⁵⁷ Section 23(1) of the Constitution of the Republic of South Africa, 1996.

⁵⁸ Section 23(1) of the Constitution of the Republic of South Africa, 1996.

⁵⁹ Slabbert et al *Managing Employment Relations* (2017) 5.

⁶⁰ *Mans v Mondi Kraft*⁶⁰ 2000 ILJ 213 (LC).

⁶¹ See the definition of employee in s 213 of the LRA: [means - (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 on or conducting the business of an employer].

⁶² *Mans v Mondi Kraft LTD* 2000 ILJ 213 (LC).

worker the right to (a) form and join a trade union; (b) participate in the activities and programmes of a trade union; and (c) strike⁶³ of which such rights are consequently applicable to fixed-term contract employees.

The various references to *everyone* throughout the Constitution, and reference to workers,⁶⁴ implies that, irrespective of whether employees are permanent or not, or regarded as being engaged in standard employment or not, all workers are entitled to enjoy full protection of the law in terms of equality, protection against unfair discrimination, dignity and freedom of association, to name but a few. The Constitution is therefore instrumental in the protection of those engaged in non-standard and precarious employment, such as fixed-term employees. This is significant since unfair treatment of workers are far more prevalent in atypical employment arrangements than in typical employment arrangements, as will be discussed next.

2.4 AN OVERVIEW OF THE POST-2014 APPLICABLE LEGISLATIVE FRAMEWORK IN SOUTH AFRICA

Legislation was enacted to give effect to the constitutional protection provided to workers as discussed under paragraph 2.3 above. For purposes of this study, the most pertinent legislative pieces are the Labour Relations Act 66 of 1995 (LRA), Employment Equity Act 55 of 1998 (EEA), Basic Conditions of Employment Act 75 of 1997 (BCEA) and Public Service Act 103 of 1994 (specifically for Public Sector).

It has been stated that the primary aim of the LRA is to safeguard employment relationships in line with the Constitution.⁶⁵ The LRA itself provides that its main aim is to advance economic development, social justice, labour peace and the democratisation of the workplace by fulfilling the primary objects of this Act.⁶⁶ Primary objectives of the LRA include to give effect to and regulate the fundamental rights conferred by section 23 of the Constitution⁶⁷ and to give effect to obligations incurred by SA as a member state of the ILO.⁶⁸ In light of the above, it is safe to view that the LRA promotes sound and healthy employment relationships irrespective of occupational classification and nature of employment.

The main aim of the BCEA is to advance economic development and social justice by fulfilling the primary objects of this Act which are: *'(a) to give effect to and regulate the right to fair labour practices conferred by section 23(1) of the Constitution (i) by establishing and enforcing basic conditions of employment and (ii) by regulating the variation of basic conditions of employment (b) to give effect to obligations incurred by the Republic as a member state of the International Labour Organisation'*.⁶⁹ The BCEA provides for minimum

⁶³ Section 23(2) of the Constitution of the Republic of South Africa, 1996.

⁶⁴ Section 23(2) of the Constitution of the Republic of South Africa, 1996.

⁶⁵ Cohen T 'The effect of the Labour Relations Amendment Bill 2012 on non-standard employment relationships' 2012.

⁶⁶ Section 1 of the LRA 66 of 1996.

⁶⁷ Section 1 (a) of the LRA 66 of 1996.

⁶⁸ Section 1 (b) of the LRA 66 of 1996.

⁶⁹ Section 2 of the Basic Conditions of Employment Act 75 of 1997.

conditions of employment in *any* employment relationship, thereby not distinguishing between standard and non-standard employment arrangements.

The EEA prohibits unfair discrimination against all employees, thus irrespective of the form of employment engaged in, by stating that ‘No person may unfairly discriminate, directly or indirectly, against an employee, in any employment policy or practice, on one or more grounds, including race, gender, sex, pregnancy, marital status, family responsibility, ethnic or social origin, colour, sexual orientation, age, disability, religion, HIV status, conscience, belief, political opinion, culture, language and birth’⁷⁰The EEA also provides for equal pay for work of equal value e.g. work that is the same, substantially the same or of the same value as other work.⁷¹ Consequently, this requires employers to investigate whether permanent and fixed-term employees who perform jobs of equal value are not perhaps remunerated differently with no justification.⁷² Failure to provide equal pay for work of equal value is now specified as a form of unfair discrimination.⁷³

2.5 THE LABOUR RELATIONS ACT 66 OF 1995 (LRA) POST-2014

2.5.1 Introduction/background

The Labour Relations Act 66 of 1995 (LRA) was amended by the Labour Relations Amendment Act 6 of 2014 (LRAA), which amendments came into effect during January 2015. A major focus of the LRA amendments was to provide additional protection to fixed-term employees who earn below the earnings threshold.⁷⁴ It also sought to respond to the increased informalisation of labour⁷⁵ so as to ensure that vulnerable groups were protected adequately and employed in conditions of decent work. These amendments were desperately needed and are in line with international trends.⁷⁶

LRAA introduced far-reaching provisions that extensively curtail the use of fixed-term contracts.⁷⁷

The LRAA amendments seek to strengthen among other things and with reference to this research,

⁷⁰ Section 6 (1) of the Employment Equity Act 55 of 1998 as amended.

⁷¹ Section 4 of the Regulation made in terms of Employment Equity Act 55 of 1998, as amended.

⁷² In terms of section 7 of Employment Equity Regulations [full title].

⁷³ CCMA ‘Labour Law Amendments: Resource Guide’ 2016.

⁷⁴ Smith C ‘Debate on labour broker, client responsibility heat u’” Fin24 07 April 2018, Available at <https://www.fin24.com/Economy/Labour/debate-on-labour-broker-client-responsibility-heats-up-20180406> (accessed 14 May 2018).

⁷⁵ Dicks R ‘The growing informalisation of work: Challenges for labour – recent developments to improve the rights of atypical workers’ 2007.

⁷⁶ Smith C ‘Debate on labour broker, client responsibility heat u’” Fin24 07 April 2018, Available at <https://www.fin24.com/Economy/Labour/debate-on-labour-broker-client-responsibility-heats-up-20180406> (accessed 14 May 2018).

⁷⁷ Cohen T ‘The Effect of the Labour Relations Amendment Bill 2012 on Non-Standard Employment Relationships’ (2014) 35 Indus. L.J. (Juta) 2607.

the regulation of fixed-term employment contracts. Fixed-term contract means a contract of employment that terminates on (a) the occurrence of a specified event (b) the completion of a specified task or project and (c) a fixed date, other than an employee's normal or agreed retirement age subject to subsection (3) of the Act.⁷⁸ The contracts that fail to comply with this definition is regarded as standard contracts of employment.⁷⁹

2.5.2 Section 198A of the LRA

The LRA amendments brought major changes in terms of the interpretation and application of a definition of a temporary service. Section 198A(1) defines 'temporary service' as work for a client by an employee (i) For a period not exceeding three months, (ii) As a substitute for an employee of the client who is temporarily absent, (iii) In a category of work and for any period of time which is determined to be a temporary service by a collective agreement concluded in a bargaining council, a sectoral determination or a notice published by the Minister, in accordance with the provisions of subsections (6) to (8).⁸⁰ Consequently, section 198A directs the application of section 198B in relation to prohibition of fixed-term employment beyond a period of three months.

2.5.3 Section 198B of the LRA

In summary, LRA amendments prohibit fixed-term employment beyond a period of three months⁸¹ without justifiable reasons. A justifiable reason for different treatment includes application of a system that takes into account (a) seniority, experience or length of service; (b) merit (c) the quality or quantity of work performed; or (d) any other criteria of a similar nature.⁸² The LRA amendments further stipulate that an employee employed in terms of a fixed-term contract for longer than three months must not be treated less favourably than a permanent employee who performs the same or similar work, unless there is a justifiable reason for different treatment.⁸³

The LRA amendments further introduced clarity in terms of regulation of fixed-term contract of employment that is beyond a period of three months.⁸⁴ Section 198B(3) stipulates that an employer

⁷⁸ Section 198B(1) of the LRA.

⁷⁹ Cohen T 'The Effect of the Labour Relations Amendment Bill 2012 on Non-Standard Employment Relationships' (2014) 35 *Indus. L.J. (Juta)* 2607.

⁸⁰ Section 198A(1) of the LRA.

⁸¹ Section 198A(1)(a) of the LRA.

⁸² Section 198D(2) of the LRA.

⁸³ Section 198B(8) (a) of the LRA.

⁸⁴ Section 198B(3) of the LRA.

may employ an employee on a fixed-term contract or successive fixed-term contracts for longer than three months of employment if:

- (a) The nature of the work for which the employee is employed is of a limited or definite duration or.
- (b) The employer can demonstrate any other justifiable reason for fixing the term of the contract.

In the event that the contract of employment exceeds a period of three months, the onus is placed on the employer to justify the utilisation of a fixed-term contract and the time frames adopted.⁸⁵ In terms of section 198B(4), the employer's conclusion of a fixed-term contract will be justified if the employee—

- (a) Is replacing another employee who is temporarily absent from work.
- (b) Is employed on account of a temporary increase in the volume of work which is not expected to endure beyond 12 months.
- (c) 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.
- (d) Is employed to work exclusively on a specific project that has a limited or defined duration.
- (e) Is a non-citizen who has been granted a work permit for a defined period.
- (f) Is employed to perform seasonal work.
- (g) Is employed for the purpose of an official public works scheme or similar public job creation scheme.
- (h) Is employed in a position which is funded by an external source for a limited period; or
- (i) Has reached the normal or agreed retirement age applicable in the employer's business.

Furthermore an employer must provide an employee employed in terms of a fixed-term contract and an employee employed on a permanent basis with equal access to opportunities including to apply for vacancies.⁸⁶ The section 198B subsection (3) of the LRA implies that if any of these requirements are not met, then it is not a fixed-term contract, employment is of indefinite duration and the employee must be treated as a 'permanent' employee.⁸⁷

The LRA amendments also regulate how the fixed-term employment contract and its extension should be concluded.⁸⁸ Section 198B requires that an offer to employ an employee on a fixed-term

⁸⁵ Cohen T 'The Effect of the Labour Relations Amendment Bill 2012 on Non-Standard Employment Relationships' (2014) 35 *Indus. L.J.* (Juta) 2607.

⁸⁶ Section 198B(9) of the LRA.

⁸⁷ CCMA 'Labour Law Amendments: Resource Guide' 2016.

⁸⁸ Section 198B(6) of the LRA.

contract or to renew or extend a fixed-term contract, must — (a) be in writing; and (b) state the reasons contemplated in subsection (3)(a) or (b) of the Act.⁸⁹ The legal requirement for written fixed-term contract implies that parties, during contract extension should sign full new contract in the same way, instead of simply giving an extension letter. The employer is compelled to sit down with the employee whenever a fixed-term contract might be renewed, to discuss all provisions of the new contract before it is signed.⁹⁰

Subsequent to the new LRA amendments, fixed-term employed workers are entitled to severance package subject to the duration of contract for which they have been employed and provisions of any applicable collective agreement. Section 198B(10) provides that an employee employed on fixed-term contract on a specific project for a period longer than 24 months, depending on the terms of any applicable collective agreement, will be entitled to severance pay in an amount of 1 week's remuneration for each completed year of service at the end of the fixed-term contract⁹¹ subject to the provisions of section 198B(11) of the LRA. Should the Collective Agreement provide that employees employed on fixed-term contracts for more than 24 months will not be entitled to any severance pay, such clause will supersede (replace) the provisions of section 198B(10) of the LRA.⁹²

In terms of scope of applicability, Section 198B does not apply to (a) employees earning in excess of the threshold prescribed by the Minister in terms of section 6(3) of the BCEA (b) an employer that employs less than 10 employees, or that employs less than 50 employees and whose business has been in operation for less than two years, unless—(i) the employer conducts more than one business; or (ii) the business was formed by the division or dissolution for any reason of an existing business and (c) an employee employed in terms of a fixed-term contract which is permitted by any statute, sectoral determination or collective agreement.⁹³

The current earnings threshold is R205 433.30 per annum.⁹⁴ The critical concern about applying the threshold is that there are employees who are employed on fixed-term contract of employment and earning beyond the set threshold whose employment conditions are less favourable in terms of any applicable law. This concern implies that the new section 198B in the LRA presents a potential omission if it applies to only those that are earning below the threshold. The employees who are

⁸⁹ Section 198B(6) of the LRA.

⁹⁰ Section 198D(2) of the LRA.

⁹¹ CCMA 'Labour Law Amendments: Resource Guide' 2016.

⁹² CCMA 'Labour Law Amendments: Resource Guide' 2016.

⁹³ Section 198B(2) of the LRA.

⁹⁴ The current threshold is R205 433.30 per annum in terms of Section 6(3) of the Basic Conditions of Employment Act 75 of 1997.

exempted from provisions of section 198B of the LRA are nonetheless remain regulated by section 186 of the LRA.

2.5.4 Section 186(1)(b) of the LRA

The LRA regulates reasonable expectation that can be created by the employer in relation to a fixed-term contract employee who is expecting to be made permanent. The new addition to section 186(1)(b) of the LRA makes provision for permanency in such that it is deemed to be a dismissal if an employee employed in terms of a fixed term contract of employment is reasonably expecting the employer 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.⁹⁵ Furthermore, fixed-term contract employees are protected from automatically unfair dismissal.⁹⁶

The case law provide a better understanding to parties in an employment relationship in relation to interpretation of laws that regulates fixed-term employment arrangements. In *Biggs v Rand Water*, the Labour Court held that the purpose of this section is to prevent the unfair practice by employers of keeping an employee on a temporary contract basis without employment security such as pension fund and medical aid until such time that the employer wants to dismiss the employee without complying with the obligations imposed by the LRA in respect of permanent employees.⁹⁷

In *NAPTOSA obo Moosa S and 3 Others v East Cape Midlands TVET College*, the commissioner stated that a reasonable expectation has been defined in case law to include (a) equity and fairness; (b) existence of a substantive expectation of renewal; (c) subjective expectation of renewal and (d) objective factors that support the expectation.⁹⁸

In *Dierks v University of South Africa*,⁹⁹ the labour court held that that section 186(b) does not include a reasonable expectation of permanent employment therefore an employee cannot claim reasonable expectation for permanent appointment. In *SA Rugby Association & others*,¹⁰⁰ the Labour Appeal Court held that failure to communicate an intention not to renew a contract does not constitute the reasonable expectation of renewal of contract.¹⁰¹

⁹⁵ Section 186(b)(ii) of the Labour Relations Act 66 of 1995 as amended.

⁹⁶ Section 187 of the Labour Relations Act 66 of 1995 as amended.

⁹⁷ Du Toit J 'Expectation of permanent employment' Available at <https://www.labourguide.co.za/latest-news-1/1536-fixed-term-contracts-and-the-expectation-of-permanent-employment> (accessed 12 November 2018).

⁹⁸ *NAPTOSA obo Moosa S and 3 Others v East Cape Midlands TVET College (ELRC78-15/16EC) (8 September 2016)*.

⁹⁹ *Dierks v University of South Africa* [1999] 4 BLLR 304.

¹⁰⁰ *Rugby Association & others (2008) 29 ILJ 2218*.

¹⁰¹ *Dierks v University of South Africa* [1999] 4 BLLR 304.

In *Peetz v Cash Paymaster Services (Pty) Ltd*,¹⁰² the commissioner noted that the critical issue was whether the applicant had a reasonable expectation that his contract would be renewed. The more frequently the employer renews fixed-term contracts, the more likely it is that an employee will acquire such an expectation. The mere fact that the contract contains a clause saying that its renewal should not be construed as creating an expectation of renewal is not in itself sufficient to prove that the employee did not acquire a reasonable expectation.¹⁰³

In *King Sabata Dalindyebo Municipality v CCMA & others*,¹⁰⁴ the Labour Court found that employees (cleaners) had established a reasonable expectation, and consequently that their dismissal was deemed to be unfair in circumstances in which there were repeated renewals of the contract, their services as cleaners was still required, and the Municipality had sufficient funds to sustain the renewal. (The important principles to establish a reasonable expectation: repeated renewals, services still required and available funds).¹⁰⁵

In *SACTWU & another v Cadema Industries (Pty) Ltd*,¹⁰⁶ the Labour Court held that the employer's decision not to renew employment contract was unfair under the principle that work was available for the employee to do, and the employee could do it. In *Black v John Snow Public Health Group*,¹⁰⁷ the Labour Court held that no reasonable expectation can be created for renewal of employment contract if such renewal of contract is dependent on financial resources from an external donor.¹⁰⁸

Furthermore, termination of employment contract triggered by the occurrence of an event [that is not based on an employer's own decision] cannot constitute dismissal.¹⁰⁹ In *SATAWU Obo Dube v Fidelity Supercare Cleaning Services Group (Pty) Ltd*,¹¹⁰ [same as in *Sindane v Prestige Cleaning Services*¹¹¹], the extent that the termination is triggered by the "occurrence of an event" and is not based on an employer's own decision, there is no dismissal and the employee is not entitled to a hearing.¹¹²

¹⁰² *Peetz v Cash Paymaster Services (Pty) Ltd* - (2011) 20 CCMA.

¹⁰³ *Peetz v Cash Paymaster Services (Pty) Ltd* - (2011) 20 CCMA.

¹⁰⁴ *King Sabata Dalindyebo Municipality v CCMA & others* (2005) 26 ILJ 474 (LC).

¹⁰⁵ *King Sabata Dalindyebo Municipality v CCMA & others* (2005) 26 ILJ 474 (LC).

¹⁰⁶ *SACTWU & another v Cadema Industries (Pty) Ltd* [2008] 8 BLLR 790 (LC).

¹⁰⁷ *Black v John Snow Public Health Group* (2010) 31 ILJ 1152 (LC).

¹⁰⁸ *Black v John Snow Public Health Group* (2010) 31 ILJ 1152 (LC).

¹⁰⁹ *SATAWU Obo Dube v Fidelity Supercare Cleaning Services Group (Pty) Ltd* 2015 36 ILJ 1923 (LC).

¹¹⁰ *SATAWU Obo Dube v Fidelity Supercare Cleaning Services Group (Pty) Ltd* 2015 36 ILJ 1923 (LC).

¹¹¹ *Sindane v Prestige Cleaning Services* (2010) 31 ILJ 733 (LC).

¹¹² *SATAWU Obo Dube v Fidelity Supercare Cleaning Services Group (Pty) Ltd* 2015 36 ILJ 1923 (LC).

The court referred to proximate cause test and held that the act that directly or indirectly actuates termination, is the one determining whether or not there was a dismissal.¹¹³ An act by a third party, as for instance a decision by the Vice Principal of Wits, terminating a service level contract with the labour broker, cannot be a proximate cause, and therefore cannot result in a dismissal of the employee of the labour broker.¹¹⁴

In *Enforce Security Group v Fikile*,¹¹⁵ Boardwalk Inkwazi terminated service level agreement with the employer resulting to termination of contract for employees.¹¹⁶ The Labour Appeal Court thus found that the LRA provides in section 186(1) for specific acts which constitute a 'dismissal'. This meant that there are other ways that an employment contract could be terminated without a 'dismissal' arising, such as the expiry of a fixed-term contract upon the occurrence of a specified event. In other words, upon the occurrence of a specified event, the contract would terminate automatically, and this would not constitute a 'dismissal' for purposes of the LRA. The Court further found that section 186(1) of the LRA requires an act by an employer that terminates a contract of employment. In this case, the evidence showed that the proximate cause of the termination of the contracts of employment had been the termination of the service level agreement by Boardwalk Inkwazi and not the employer. Consequently, the Court found that the termination of the employees' employment was not a 'dismissal' for purposes of the LRA.¹¹⁷

2.6 DIFFERENT VIEWS ON IMPLICATIONS OF THE LRA AMENDMENTS OF 2014 IN RELATION TO NON-STANDARD EMPLOYMENT ARRANGEMENTS

Views over the effects of the LRA amendments of 2014 in relation to non-standard employment protection are divergent. Among those views are those that are cooperative towards the LRA amendments while other views argue that the amendments negatively affect organisational flexibility. Views that supports LRA amendments are referred to as cooperate views, while those that criticises the LRA amendments are referred to as adversarial views.

From a corporate views standpoint, according to the Spokesperson of the African National Congress (ANC) in 2014, Zizi Kodwa, the LRAA was set to improve workers' constitutional rights and promote fair labour

¹¹³ *SATAWU Obo Dube v Fidelity Supercare Cleaning Services Group (Pty) Ltd* 2015 36 ILJ 1923 (LC) para 33.

¹¹⁴ *SATAWU Obo Dube v Fidelity Supercare Cleaning Services Group (Pty) Ltd* 2015 36 ILJ 1923 (LC) para 33.

¹¹⁵ *Enforce Security Group v Fikile* 2017 38 ILJ 1041 (LAC).

¹¹⁶ *Enforce Security Group v Fikile* 2017 38 ILJ 1041 (LAC).

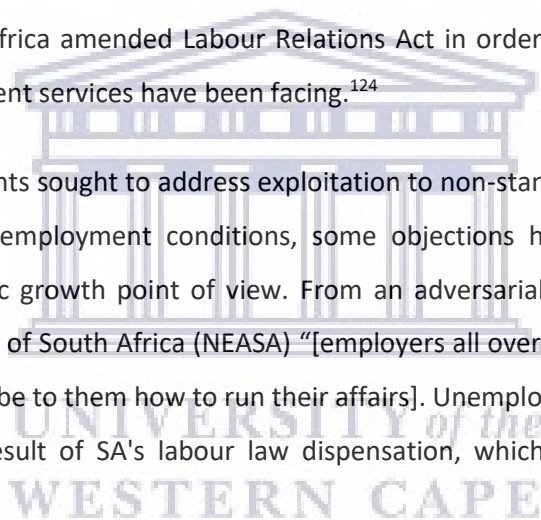
¹¹⁷ *Enforce Security Group v Fikile* 2017 38 ILJ 1041 (LAC).

practices.¹¹⁸ The labour law amendments would prevent worker exploitation, ensure decent work for all workers, protect the employment relationship and regulate contract work, subcontracting and outsourcing.¹¹⁹

Furthermore, in 2018 spokesperson Mac Maharaj said that the amendments sought to respond to the increased informalisation of labour, to ensure that vulnerable groups received adequate protection and that they have access to decent work.¹²⁰ The LRA amendments were aimed at ensuring that labour legislation gives effect to fundamental constitutional rights, including the right to fair labour practices, to engage in collective bargaining, and the right to equality and protection from unfair discrimination.¹²¹

It was particularly the provision which provided that employees could only have workers on a temporary basis or fixed-term contract for three months which was welcomed. The understanding was that fixed-term employees would be entitled to equal benefits and conditions as employees employed permanently, barring a few exceptions identified within the Act.¹²² Such reforms were desperately needed and are also in line with international trends.¹²³ South Africa amended Labour Relations Act in order to overcome challenges that workers in temporary employment services have been facing.¹²⁴

While the labour law amendments sought to address exploitation to non-standard employees and ensuring equity and standardization in employment conditions, some objections have been raised against the amendments from an economic growth point of view. From an adversarial viewpoint, according to The National Employers' Association of South Africa (NEASA) "[employers all over the world respond negatively when governments over-prescribe to them how to run their affairs]. Unemployment, poverty and inequality will therefore continue as a result of SA's labour law dispensation, which is of a very interfering and



¹¹⁸ Kodwa Z 'Labour Act ends exploitation of workers –ANC' Fin24 20 August 2014 available at <https://www.fin24.com/Economy/Labour/News/Labour-act-ends-exploitation-of-workers-ANC-20140820> (accessed 4 November 2018).

¹¹⁹ Joubert YT & Loggenberg B 'The impact of changes in labour broking on an integrated petroleum and chemical company: Acta Commercii' 2017.

¹²⁰ Maharaj M 'Zuma stamps property rates, labour acts' Fin24 20 August 2014 available at <https://www.fin24.com/Economy/Zuma-stamps-property-rates-labour-acts-20140818> (accessed 4 November 2018).

¹²¹ Maharaj M 'Zuma stamps property rates, labour acts' Fin24 20 August 2014 available at <https://www.fin24.com/Economy/Zuma-stamps-property-rates-labour-acts-20140818> (Accessed 4 November 2018).

¹²² Kowa Z 'Labour Act ends exploitation of workers –ANC' Fin24 20 August 2014 available at <https://www.fin24.com/Economy/Labour/News/Labour-act-ends-exploitation-of-workers-ANC-20140820> (accessed 4 November 2018).

¹²³ Smith C 'Debate on labour broker, client responsibility heats up' Fin24 07 April 2018, Available at <https://www.fin24.com/Economy/Labour/debate-on-labour-broker-client-responsibility-heats-up-20180406> (accessed 14 May 2018).

¹²⁴ Ciliwe Y (2016). An evaluation of the amended Temporary Employment Service Provisions in the South African Labour Relations Act. University of the Western Cape.

prescriptive nature.”¹²⁵ NEASA CEO at the time, Gerhard Papenfus, argued that the amended labour laws were detrimental to sustainable growth and development.

2.7 PUBLIC SERVICE ACT 103 OF 1994 (PSA) AND RELATED REGULATIONS

With reference to public sector employment, section 8(1) of the Public Service Act 103 of 1994 provides that employees may be appointed in positions that are additional to the staff establishment.¹²⁶ Staff establishment refers to an organisational structure of the specific department [Department of Higher Education and Training]. The Minister may make regulations and on amongst others, the employment that is additional to the establishment (fixed-term contract employment).¹²⁷ The PSA has its own regulation called the Public Service Regulation (PSR) on which the latest amendments became in force in 2016. Employment conditions in the public service are standardised as far as possible irrespective of the nature of employment. An executive authority is required to determine the salary of an employee employed in a part-time capacity proportional to the salary of an equally graded full-time employee.¹²⁸ Consequently, the TVET sector employment conditions are regulated by the PSA as regulated in section 20 (1) of the Further Education and Training Colleges Amendment Act 3 of 2012.¹²⁹

It is evident that the TVET sector despite the introduction of section 198B of the LRA, has been regulated through PSA¹³⁰ in order to eliminate inequalities between permanent and temporary employees. Currently in the TVET sector, fixed-term contract employees and employees employed on a permanent basis are given equal access to opportunities to apply for vacancies.¹³¹ Furthermore, after the implementation of the 2014 LRA amendments,¹³² the Public Service Regulation was amended in 2016 which introduced critical clauses aimed at regulating appointment of fixed-term employees in the Public Service.¹³³

¹²⁵ The National Employers' Association of South Africa (Neasa) 'Unemployment because of SA labour laws – Neasa' Fin24 20 August 2014 Available at <https://www.fin24.com/Economy/Labour/News/Unemployment-because-of-SA-labour-laws-Neasa-20140820> (accessed 4 November 2018).

¹²⁶ Section 8(1) of the Public Service Act 103 of 1994.

¹²⁷ Section 41 of the Public Service Act 103 of 1994.

¹²⁸ Section 43(3) of the Public Service Regulations, 2016.

¹²⁹ "Appointment of staff:

20. (1) The staff of public colleges consists of persons appointed by— (a) the Minister in terms of the Public Service Act in posts established on the organisational structure of the Department and identified as posts to the respective colleges;

¹³⁰ "Appointment of staff:

20. (1) The staff of public colleges consists of persons appointed by— (a) the Minister in terms of the Public Service Act in posts established on the organisational structure of the Department and identified as posts to the respective colleges;

¹³¹ Section 198B(9) of the LRA.

¹³² Labour Relations Amendment Act 6 of 2014.

¹³³ Section 57(2) of Public Service Regulations, 2016.

Section 57(2) of Public Service Regulations of 2016 provides for employment of temporary personnel subject to (a) the incumbent of a post is expected to be absent for such a period that his or her duties cannot be performed by other employees; (b) a temporary increase in work occurs or it is necessary for any other reason to temporarily increase the staff of the department; (c) an employee's post has been abolished and he or she cannot be transferred into another post; or (d) an employee is part of a development programme.¹³⁴ The Public Service Regulation limits employment of fixed employment to a period not exceeding 12 consecutive calendar months unless otherwise directed by the Minister (Minister of the Department of Higher Education and Training).¹³⁵

In order to standardise conditions of service, the Public Service Coordinating Bargaining Council (PSCBC) introduced Resolution 1 of 2007 [Agreement on improvement in salaries and other conditions of service for the financial years 2007/2008 to 2010/2011]. The resolution was concluded on 05 July 2007 and describes a contract worker as a person employed for a fixed-term, including an educator appointed in a temporary capacity, but excluding casual workers or employees to whom retirement age applies.¹³⁶ A fixed-term contract worker employed for less than six months are entitled to a basic salary plus 37% *in lieu* of benefits.¹³⁷ Fixed-term contract workers employed for six months or longer are entitled to a basic salary plus benefits (excluding leave benefits) or a basic salary plus 37% *in lieu* of benefits (excluding leave benefits).¹³⁸ The leave conditions of fixed-term contract workers in a TVET sector are managed on pro rata basis linked to their contract terms,¹³⁹ which ultimately equate to permanent employee leave credits.

The Education Labour Relations Council (ELRC) is the sectoral bargaining council in the education sector under which the Further Education and Training Colleges Bargaining Unit (FETCBU) introduced the ELRC Collective Agreement 2 of 2013, titled "*Permanent appointment of serving temporary and contract lecturers who have been in the employ of Further Education and Training Colleges for a period of 12 months or longer*". The said collective agreement indicates that "[parties to the Council agree that temporary or contract lecturers who have been employed on a continuous basis in the College establishment for a period of 12 months or more and are currently in a vacant funded substantive posts will be made permanent"]¹⁴⁰ This collective agreement was concluded on condition that all identified lecturers must meet minimum requirements of the post to which they will be permanently employed,¹⁴¹ and that this process shall not be subjected to normal

¹³⁴ Section 57 (2) of the Public Service Regulations, 2016.

¹³⁵ Section 57 (4) of the Public Service Regulations, 2016.

¹³⁶ Clause 11.3 of the PSCBC Resolution 1 of 2007.

¹³⁷ Clause 11.4.1 of the PSCBC Resolution 1 of 2007.

¹³⁸ Clause 11.4.2 of the PSCBC Resolution 1 of 2007.

¹³⁹ Clause 11.4.3 of the PSCBC Resolution 1 of 2007.

¹⁴⁰ Clause 4.1 of the ELRC Collective Agreement 2 of 2013.

¹⁴¹ Clause 4.2 of the ELRC Collective Agreement 2 of 2013.

recruitment and selection policy of Colleges.¹⁴² This implies that the TVET sector is less generally exposed to vulnerability and exploitations of temporary employed employees.

2.8 PREJUDICE AND SHORTCOMINGS SUFFERED BY FIXED-TERM CONTRACT EMPLOYEES

The overall importance of using non-standard employment has increased over the past few decades in both industrialised and developing countries, with its use becoming more widespread across various economic sectors and occupations.¹⁴³ According to the ILO, many workers continue to face substantive deficits in their working conditions, and the prospects for improvement are being tested by the emergence of new types and forms of work.¹⁴⁴ Fixed-term contract employees experience numerous shortcomings despite being legally and constitutionally protected.¹⁴⁵ As part of shortcomings, employment in non-standard employment is typically associated with insecurity¹⁴⁶ i.e. job insecurity. Job insecurity is prevalent in the sense that temporary employment places a likelihood that a fixed-term employee may be without job in the near future.¹⁴⁷ The lack of job security implies that fixed-term contract workers are often at much higher risk of unemployment than counterparts in standard employment.¹⁴⁸ Transitions from temporary to permanent employment is minimal and range between 10 per cent to 50 per cent on yearly basis.¹⁴⁹ Fixed-term working arrangement does not fit into the set goals of decent work agenda [Decent work agenda promotes sustained, inclusive and sustainable economic growth, full and productive employment and decent work for all].¹⁵⁰

Despite having the constitutional right to join trade unions of their choice,¹⁵¹ fixed-term contract workers may be reluctant to join trade unions out of fear that their contract may not be renewed and therefore they have a relatively lower ability to exercise their voice in the workplace.¹⁵² Workers in non-standard employment lack access to freedom of association and collective bargaining rights either for legal reasons or because of their more tenuous attachment to the workplace.¹⁵³ They tend to face other violations of their

¹⁴² Clause 4.3 of the ELRC Collective Agreement 2 of 2013.

¹⁴³ ILO 'Non-standard employment around the world: Understanding challenges, shaping prospects' 2016.

¹⁴⁴ ILO 'Non-standard employment around the world: Understanding challenges, shaping prospects' 2016.

¹⁴⁵ As protected by section 23 of the Constitution of the Republic of South Africa, 1996.

¹⁴⁶ ILO 'Non-standard employment around the world: Understanding challenges, shaping prospects' 2016.

¹⁴⁷ As discussed in 3.4.2.2 (a) of Chapter 2 of this research.

¹⁴⁸ ILO 'What does it mean for workers?' Available at <https://www.ilo.org/infostories/en-GB/Stories/Employment/Non-Standard-Employment#what-does-it-mean-for-workers> (accessed on 4 April 2020).

¹⁴⁹ ILO 'Non-standard employment around the world: Understanding challenges, shaping prospects' 2016.

¹⁵⁰ ILO 'Decent work and the 2030 agenda for sustainable development' 2015.

¹⁵¹ Section 23(2)(a) of the Republic of South Africa, 1996.

¹⁵² Mariya A and Muller A 'INWORK and GOVERNANCE INWORK Brief No. 6: Nothing more permanent than temporary? Understanding fixed-term contracts' 2015.

¹⁵³ ILO 'Non-standard employment around the world: Understanding challenges, shaping prospects' 2016.

fundamental rights at work, including discrimination and forced labour.¹⁵⁴ The non-standard employment may reinforce labour market segmentation and lead to greater volatility in employment with consequences for economic stability.¹⁵⁵

Workers in non-standard employment face substantial wage penalties relative to comparable standard workers.¹⁵⁶ Fixed-term contract employees are often deprived full access to medical aid, provident and/or pension fund, housing allowance as well as applicable institutional bonuses. Whilst fixed-term employees may often render the same value and standard of work, they do not always enjoy the same level of employment protection, status, remuneration and benefits as those afforded to permanent employees.¹⁵⁷ Workers in non-standard employment are mostly excluded from social security coverage.¹⁵⁸ Even when they are formally protected, they still experience inadequate coverage or limited benefits in relation to unemployment and retirement.¹⁵⁹ Social security benefits are not accessible i.e. access to adequate housing schemes¹⁶⁰ irrespective of introduction of section 198 of the LRA. The research shows that, it is more difficult for non-standard employment workers to get access to credit facility and housing acquisition which leads to delays in starting their families.¹⁶¹ The main factor being the shorter duration of an employment contract. Consequently, banks regard fixed-term contract employees as risks as compared to those who are permanent.

Despite the existing equal pay for equal work,¹⁶² employers make use of fixed-term employment arrangement to reduce labour related costs which leads to direct or indirect vulnerability and exploitation. Despite the LRA amendments, fixed-term contract workers are typically offered lower level of protection in terms of termination of their employment¹⁶³ particularly because employers are still provided an opportunity to justify the reasons for choosing fixed-term or temporary work arrangements in terms of section 198B(4) of the amended LRA. The permanent staff members are still having an upper hand in terms of enjoying full employment benefits such as access to training and developmental opportunities.¹⁶⁴ Workers in non-

¹⁵⁴ ILO 'Non-standard employment around the world: Understanding challenges, shaping prospects' 2016.

¹⁵⁵ ILO 'Non-standard employment around the world: Understanding challenges, shaping prospects' 2016.

¹⁵⁶ ILO 'Non-standard employment around the world: Understanding challenges, shaping prospects' 2016.

¹⁵⁷ Huysamen E 'An Overview of Fixed-Term Contracts of Employment as a Form of a Typical Employment in South Africa' *PER / PELJ* 2019(22) – DOI.

¹⁵⁸ ILO 'Non-standard employment around the world: Understanding challenges, shaping prospects' 2016.

¹⁵⁹ ILO 'Non-standard employment around the world: Understanding challenges, shaping prospects' 2016.

¹⁶⁰ ILO 'Non-standard forms of employment: Report for discussion at the meeting of experts on non-standard forms of employment' 2015.

¹⁶¹ ILO 'non-standard employment around the world: understanding challenges, shaping prospects' 2016.

¹⁶² As regulated in section 4 of the Regulation made in terms of Employment Equity Act 55 of 1998, as amended.

¹⁶³ ILO 'Non-standard employment around the world: Understanding challenges, shaping prospects' 2016.

¹⁶⁴ Section 198B(8)(a) of the LRA.

standard employment are less likely to receive on-the-job training, which can have negative repercussions on career development, especially for young workers.

It is important to differentiate between the legitimate and illegitimate function of a fixed-term employment arrangement. Employers are fond of employing workers on fixed-term contracts as a way of testing out whether the employee is going to fit well into the organisation.¹⁶⁵ In *Abrahams vs Rapitrade (Pty) Ltd*,¹⁶⁶ the employee was hired on the basis of a contract containing a probationary clause. However, when the employee's performance was found wanting the employer claimed that the employee was on a fixed-term contract and informed the employee that this contract was not going to be renewed. When the employee lodged an unfair dismissal dispute, the employer claimed that the employee's performance had been poor. Wherein the arbitrator found that: (1) The employee was not on a fixed-term contract but on a normal contract with a probationary clause, (2) In any case, if the employee's performance was poor the employer was obliged to provide counselling and training before considering dismissal and (3) The dismissal was therefore unfair and proved exploitation of fixed-term contract employee.¹⁶⁷

Fixed-term employment arrangements are therefore in some instances used to assess fitness of an employee into the position instead of applicable normal probation which constitute exploitation and susceptibility to employees on fixed-term employment arrangements. The ILO recognizes that work can have varied contractual forms however the goal is not to make all work standard, but rather to make all work decent.¹⁶⁸ This implies that even standard employment arrangements have not achieved decent work status thus non-standard employment have in no way closer to achieve decent work agenda.

Exploitation of fixed-term employment workers exists and also existed prior to amendment of section 186(1)(b) of the LRA.¹⁶⁹ Employers had a leeway to utilize fixed-term contracts employment arrangements in order to avoid their responsibilities and obligations imposed by the LRA for permanent employees.¹⁷⁰ This practice is consequently claimed to have taken place because there was a gap in the LRA,¹⁷¹ however, it is not because there were no piece/s of legislation that was in place to protect them. It is not only a question of law that fixed-term contract employment arrangement is exposed to exploitation and vulnerability

¹⁶⁵ Israelstam I 'should an employer use fixed-term contracts for employees in permanent positions?' available at <https://www.skillsportal.co.za/content/should-employer-use-fixed-term-contracts-employees-permanent-positions> (accessed 24 October 2018).

¹⁶⁶ *Abrahams vs Rapitrade (Pty) Ltd* (2007, 6 BALR 501).

¹⁶⁷ *Abrahams vs Rapitrade (Pty) Ltd* (2007, 6 BALR 501).

¹⁶⁸ ILO 'Non-standard employment around the world: Understanding challenges, shaping prospects' 2016.

¹⁶⁹ LRA as amended by Labour Relations Amendment Act 6 of 2014.

¹⁷⁰ Du Toit J 'Expectation of permanent employment' Available at <https://www.labourguide.co.za/latest-news-1/1536-fixed-term-contracts-and-the-expectation-of-permanent-employment> (accessed 12 November 2018).

¹⁷¹ Prior an enactment of Labour Relations Amendment Act 6 of 2014.

because the Constitution reasonably provides the protection to everyone¹⁷² however there are circumstances under which exploitation in specific sectors would continue to prevail due to the nature of their business complexity i.e. the business is atypical in nature. Fixed-term contract of employment falls under so called atypical employment as opposed to typical employment arrangements.¹⁷³ Consequently, the former creates less certainty for employees than atypical employment arrangements.¹⁷⁴

Prior to enactment of the Labour Relations Amendment Act 6 of 2014, the Labour Relations Act 66 of 1995 did not explicitly address all perspectives of prejudice faced by fixed-term employment. A definition of fixed-term employment contract was non-existent. It was only after the LRA amendments that the fixed-term employment arrangements were specifically regulated under section 198B of the LRA.

Prior to the Labour Relations Amendment Act 6 of 2014, section 186(1)(b) of the LRA provided that an employee could claim dismissal where the individual had a reasonable expectation of further employment on the same or similar terms.¹⁷⁵ The same protection was however not available where an employee had a reasonable expectation of permanent employment¹⁷⁶ thus exposed fixed-term contract employees to prejudice. Subsequent to the 2014 amendments to the LRA, section 186(1)(b) was expanded, with section 186(1)(b)(ii) now providing that an employee can claim dismissal where the individual reasonably expected the employer to retain the employee in employment on an indefinite basis, and the employer failed to do so.¹⁷⁷ This amendment was thus welcome as it serves to protect employees from endless revolving fixed-term employment contracts in order to address their exploitation. Alternatively, employers opt not to renew employment contracts. It is unfortunate that employers are not required to provide reasons for the non-renewal of fixed-term contracts.¹⁷⁸ For these reasons, fixed-term employees are somewhat exposed to exploitation.

Previously, there were no prescribed formalities for a contract to be in writing which could lead workers to exploitation. In fact, in *Rumbles versus Kwabat Marketing*,¹⁷⁹ the learned AJ van Niekerk said, “It should be recalled, though, that a contract of employment may be in writing or oral, and its terms may be express or

¹⁷² Section 23(1) of the Republic of South Africa, 1996.

¹⁷³ As discussed in detail in Chapter 3 (3.2) of this research.

¹⁷⁴ Huysamen E ‘An Overview of Fixed-Term Contracts of Employment as a Form of a Typical Employment in South Africa’ *PER / PELJ* 2019(22) – DOI.

¹⁷⁵ Section 186(1)(b)(i) of the LRA.

¹⁷⁶ In *Dierks v University of South Africa* [1999] 4 BLLR 304, the labour court held that that section 186(b) does not include a reasonable expectation of permanent employment therefore an employee cannot claim to have reasonably expected an employer to offer permanent employment.

¹⁷⁷ Section 30 (b)(ii) of the Labour Relations Amendment Act 6 of 2014.

¹⁷⁸ Geldenhuys 2008 SA Merc LJ 268.

¹⁷⁹ *Rumbles versus Kwabat Marketing*¹⁷⁹ (D1055/2001) [2003] ZALC 57 (21 May 2003).

tacit.¹⁸⁰ There are no formalities required for the formation of a contract of employment. Section 29 of the Basic Conditions of Employment Act 75 of 1997 (BCEA) requires “written particulars of employment” to be given to an employee – it does not require a written contract.”¹⁸¹ This position has now been changed by the new Act,¹⁸² which prescribes that an offer to an employee on a fixed-term contract or to renew or extend a fixed-term contract *must* be in writing and the reasons for the fixed-term nature of the contract must be offered.¹⁸³ It remains to be seen if the new LRA amendments will curb prejudice and exploitation of fixed-term employees in a long run.

2.9 THE EFFECT OF USING FIXED-TERM CONTRACTS OF EMPLOYMENT IN THE PUBLIC TECHNICAL AND VOCATIONAL EDUCATION AND TRAINING (TVET) SECTOR SUBSEQUENT TO THE INTRODUCTION OF SECTION 198B OF THE LRA.

The education sector in South Africa, particularly the TVET sector, often utilises non-standard employment arrangements. It is vital for all sectors to adhere to the provisions of existing legislation that governs fixed-term employment arrangement, such as section 198B of the LRA. The TVET sector has personnel (both support and lecturing staff) appointed by the Minister of the Department of Higher Education and Training (DHET) in terms of the Public Service Act in posts established on the organisational structure of the Department (DHET).¹⁸⁴ This category of staff is administered through the Government Peral System and are mostly employed on permanent capacity. The TVET sector also has personnel appointed by the respective College Council on posts established in addition to posts contemplated above.¹⁸⁵ The latter is typically arranged on temporary capacity and are directly implicated by an introduction of section 198 of the LRA since their employment contract is temporary in nature.

Lecturers who are appointed in line with section 198B(4)(b) are not guaranteed to be offered permanent employment or contract renewal in the following year. This section of the LRA permits employment of a fixed-term contract employee on account of a temporary increase in the volume of work which is not expected to endure beyond 12 months.¹⁸⁶ The number of student enrolments becomes a deciding factor as to the staff needs of Colleges, thus lecturers are appointed for 12 months (one academic year) only. The Colleges within the TVET sector prevalently apply section 198B(4)(b) to justify the rationale behind

¹⁸⁰ *Rumbles versus Kwabat Marketing*¹⁸⁰ (D1055/2001) [2003] ZALC 57 (21 May 2003).

¹⁸¹ *Rumbles versus Kwabat Marketing*¹⁸¹ (D1055/2001) [2003] ZALC 57 (21 May 2003).

¹⁸² Labour Relations Amendment Act 6 of 2014.

¹⁸³ Section 198B(6)(a) of the Labour Relations Act 66 of 1995.

¹⁸⁴ Section 20(1)(a) of the Continuing Education and Training Act 16 of 2006.

¹⁸⁵ Section 20(1)(b) of the Continuing Education and Training Act 16 of 2006.

¹⁸⁶ Section 198B(4)(b) of the LRA.

appointment of fixed-term contract employee (s).¹⁸⁷ The increase in student enrolment numbers determines the increase or retention of lecturing staff, with an associated decrease in the number of lecturing staff employment contracts where numbers decrease.

Section 198B(4)(b) potentially results in the justification of the utilisation of fixed-term employment arrangement in the TVET sector. In addition to section 198B(4)(b) of the LRA, section 198B(4)(a)¹⁸⁸ and section 198B(4)(d)¹⁸⁹ are also prevalent in the TVET sector. Section 198B(4)(a) enables TVET Colleges to appoint a substitute lecturer in the event that another lecturer is on maternity leave or prolonged sickness.¹⁹⁰ Section 198B(4)(d) enables TVET Colleges to appoint lecturers for the short technical skills programmes or projects which are meant to run for a limited or defined duration.¹⁹¹ The TVET sector further employ lecturers in academic programmes that are funded from external sources for a limited period.¹⁹²

2.10.1 Successes in regulating fixed-term employment in the TVET Sector

Subsequent to the enactment of the 2014 LRA amendments,¹⁹³ the Public Service Regulation was amended in 2016 which introduced critical clauses aimed at regulating appointment of fixed-term employees in the Public Service¹⁹⁴ [As discussed in 2.8]. These amendments in the PSR were made in line with LRA amendments of 2014. Subsequent to the introduction of section 198B in the LRA, the Department of Higher Education and Training (DHET) established a National Task Team (NTT) in 2015 to assess the effect of introduction of section 198B in the LRA within TVET sector. The NTT comprised of the DHET senior management team and union representatives. The NTT developed criteria to be used to identify staff members who qualified to be made permanent in terms of the Public Service Act 103 of 1994 resulting from the introduction of section 198B in the LRA. The excessive number of lecturers and support staff who were on fixed-term contract of employment had to be absorbed into fully funded permanent positions.

¹⁸⁷ Prevalently applicable reason for fixing contract of employment in the TVET Sector in line with section 198B(4)(b) of the LRA: '[the conclusion of a fixed term contract will be justified if the employee— (b) is employed on account of a temporary increase in the volume of work which is not expected to endure beyond 12 months'].

¹⁸⁸ Section 198B(4)(a) of the LRA stipulates that 'the conclusion of a fixed term contract will be justified if the employee is replacing another employee who is temporarily absent from work.'

¹⁸⁹ Section 198B(4)(d) of the LRA stipulates that 'the conclusion of a fixed term contract will be justified if the employee is employed to work exclusively on a specific project that has a limited or defined duration.'

¹⁹⁰ In line with section 198B(4)(a) of the LRA.

¹⁹¹ In line with section 198B(4)(d) of the LRA.

¹⁹² In line with section 198B(4)(d) of the LRA.

¹⁹³ Labour Relations Amendment Act 6 of 2014.

¹⁹⁴ Section 57(2) of Public Service Regulations, 2016.

The TVET sector is continuously having a responsibility to regularly (at least once annually) conduct workforce analysis in order to ascertain positions that require permanent personnel for the purpose of reducing the number of temporary staff.¹⁹⁵ Human resource units within the TVET sector are mandated to align their strategies with the amendments of the LRA for compliance purposes.¹⁹⁶

2.10.2 Continuing shortcomings in the employment of fixed-term contract employment

Fixed-term contract employees in the TVET sector are however continuing to be underserved and excluded from accessing home loans in spite of their regular income.¹⁹⁷ They, like any other fixed-term employees in different sectors, find it more difficult to get access to credit facility¹⁹⁸ Consequently, banks regards sector fixed-term contract employees [including those in the TVET sector] as risks as compared to those in permanent employment arrangements. The main risk factor being the shorter duration of a contract.

In terms of employment conditions of service, the TVET sector pays 37% in lieu of government benefits to employees who are employed on fixed-term contract of employment¹⁹⁹ [As discussed in 2.8 above]. The 37% in lieu of benefits are paid as cash accessible with the monthly salary. In practicality, 37% of cash is no way equivalent to full benefits and allowances that are offered to government permanent employees. Government benefits include 13% pension contributed by the employer, government employees medical aid (GEMS), housing allowance and service bonus.

Furthermore, an access to institutional staff bursaries by employees on fixed-term employment in the TVET sector is minimal as compared to that of permanent employees. Despite their entitlement to the constitutional rights,²⁰⁰ access to organisational rights and protection from various labour laws, fixed-term workers in the TVET sector opt to focus in honouring their employment contract obligation rather than exercising their rights for freedom of association [As discussed in 2.4].

¹⁹⁵ DHET 'Human Resources Circular No. 37 of 2019'"2019.

¹⁹⁶ DHET 'HR Circular 17 of 2015 (LRA as amended)"2015.

¹⁹⁷ Government Employees Housing Scheme (GEHS) 'About SA Housing' available at <https://www.gov.za/about-sa/housing> (accessed on 5 January 2019).

¹⁹⁸ ILO 'Non-standard employment around the world: Understanding challenges, shaping prospects' 2016.

¹⁹⁹ Clause 11.4.1 of the PSCBC Resolution 1 of 2007.

²⁰⁰ Section 23(1) of the Republic of South Africa, 1996.

2.11 CONCLUSION

The Constitution remains the foundation for providing workers with basic rights, irrespective of the nature of appointment (specifically in terms of s 23 of the Constitution). To give effect to Constitutional principles in the employment context, the EEA, LRA and BCEA are crucial. To provide for increased protection to vulnerable fixed-term employment workers, the LRA was amended in 2014. Despite the LRA amendments, shortcomings are still experienced by fixed-term employees, including those in the TVET sector. This chapter has indicated that the TVET sector is one of the sectors where operating without fixed-term employment arrangement is virtually impossible due to nature of their business.

The current legislation within the TVET Sector has been found to provide clear regulation of fixed-term contract employment arrangement. Employers have no leeway anymore to utilise fixed-term contracts employment arrangements for the purpose of avoiding their legal responsibilities and obligations. The LRA amendments provided positive contribution in the management of fixed-term employment relationships. The TVET also benefited from the LRA amendments considering the decision by the Department of Higher Education and Training to formulate a National Task Team to identify employees who are eligible for conversion to permanent positions. It is clear that legislative landscape has changed as far as employment on fixed-term contract is concerned. Employers will now have to evaluate whether all positions occupied by employees on fixed-term contracts are indeed of a limited or definite duration and prepare to act accordingly in line with the provisions of the LRA. The case law collection plays an important role in guiding the employers and employees regarding application of law in a fixed-term employment relationship.

The findings reveal that there are various advantages emanating from labour law amendments (Cooperative View) while other sectors view labour law amendments as detrimental to their operations (Adversarial View). The cooperate view has applied more in the TVET Sector than adversarial view which implies that the latest labour law amendments were welcomed. The next Chapter (Chapter 3) will focus on an overview of non-standard employment in South Africa, distinction between atypical and typical employment arrangement, factors contributing to the rise in non-standard employment and advantages & disadvantages of utilising non-standard employment with reference to the technical and vocational education and training sector.

CHAPTER 3: THE USE OF FIXED TERM CONTRACTS OF EMPLOYMENT AS A FORM OF ATYPICAL EMPLOYMENT IN THE SOUTH AFRICAN TVET SECTOR

3.1 INTRODUCTION

Chapter 3 will briefly consider the difference, and how to distinguish, between non-standard (atypical) and standard (typical) employment arrangements. In addition, the chapter will discuss the factors that contribute to the rise in non-standard employment as well as existing legislative provisions protecting employees engaged in non-standard employment. The chapter will then proceed to discuss fixed-term employment in South Africa as a specific form of non-standard employment. The discussion throughout will be done in the context of the Technical and Vocational Education and Training (TVET) Sector in South Africa.

3.2 DISTINTION BETWEEN ATYPICAL AND TYPICAL EMPLOYMENT ARRANGEMENTS

Non-standard (or atypical) employment is an umbrella term denoting employment arrangements which deviate from what is regarded as *standard* employment, that is, the norm.²⁰¹ The most common forms of atypical employment in SA include fixed-term work, temporary employment, part-time work, on-call work, temporary agency work, multiparty employment relationships, disguised employment, dependent self-employment,²⁰² homeworking and casual work.²⁰³

Effectively, any worker who is engaged in work on any basis other than in terms of a full-time, permanent (indefinite), contract is employed on a non-standard employment basis.²⁰⁴ With reference to the TVET sector, non-standard employment commonly involves part-time, seasonal work, temporary and, for purposes of this research, fixed-term contract employment.²⁰⁵ Standard or typical employment thus refers to employment arrangements that are typically deemed permanent and full-time.²⁰⁶ Standard employment implies that there is an indefinite employment contract in existence between the employer and employee.²⁰⁷

²⁰¹ Mbwaalala, N. 'Can labour law succeed in reconciling the rights and interests of labour broker employees and employers in South Africa and Namibia?' 2013.

²⁰² Mbwaalala, N. 'Can labour law succeed in reconciling the rights and interests of labour broker employees and employers in South Africa and Namibia?' 2013.

²⁰³ Burchell, Deakin and Honey 'The employment status of individuals in non-standard employment' 1999.

²⁰⁴ Carman N 'Expectation of permanent employment' Available at <https://www.labourguide.co.za/most-recent/2001-the-labour-relations-amendment-act-2014-and-non-standard-employment> (accessed 07 March 2020).

²⁰⁵ Mbwaalala, N. 'Can labour law succeed in reconciling the rights and interests of labour broker employees and employers in South Africa and Namibia?' 2013.

²⁰⁶ Mbwaalala, N. 'Can labour law succeed in reconciling the rights and interests of labour broker employees and employers in South Africa and Namibia?' 2013.

²⁰⁷ ILO 'Non-standard employment around the world: Understanding challenges, shaping prospects' 2016.

Employees who are involved in standard employment arrangements have a considerable advantage over those workers engaged in atypical forms of employment. Such advantages include job security, better access to medical aid, pension and housing benefits, and more comprehensive protection under labour legislation.²⁰⁸ Standard employment generally provides stable and adequate income and security against unforeseen events that could impede ability to continue to work. It also provides security in retirement in terms of the Pension Fund Act 24 of 1956.²⁰⁹ Legislation in the employment sphere has historically largely been designed around notions of an employment relationship that is full-time and indefinite.²¹⁰

3.3 FACTORS CONTRIBUTING TO THE RISE IN NON-STANDARD EMPLOYMENT

There are various factors that contribute to the rise and growth of non-standard employment. According to the ILO, there are three predominant reasons why there continues to be an increase in the use of non-standard employment arrangements.²¹¹ These are flexibility, cost advantages and technological change.²¹² Globalisation is also said to have been a large contributor to the increase in employment flexibility, and thus, non-standard employment arrangements.²¹³ These reasons are not independent however an organisation may adopt non-standard work for any one or a combination of reasons.²¹⁴

3.3.1 Globalisation and employment flexibility

Globalisation is said to have contributed to the growth in non-standard employment in a substantive manner.²¹⁵ As a consequence of globalisation, employment flexibility has been emphasised as a means through which employers can restructure their organisations to remain globally competitive and relevant.²¹⁶ Consequent to such flexibility there has been a rise in precarious employment, which is exacerbated by ongoing economic uncertainty throughout much of the world.²¹⁷ The non-standard employment because of

²⁰⁸ Theron J 'Employment is not what it used to be: The Nature and Impact of Work Restructuring in South Africa' 2003.

²⁰⁹ Pension Fund Act 24 of 1956.

²¹⁰ ILO 'Non-standard employment around the world: Understanding challenges, shaping prospects' 2016.

²¹¹ ILO 'Non-standard employment around the world: Understanding challenges, shaping prospects' 2016.

²¹² ILO 'Non-standard forms of employment: Report for discussion at the meeting of experts on non-standard forms of employment' 2015.

²¹³ ILO 'Non-standard employment around the world: Understanding challenges, shaping prospects' 2016.

²¹⁴ ILO 'Non-standard forms of employment: Report for discussion at the meeting of experts on non-standard forms of employment' 2015.

²¹⁵ ILO 'Non-standard employment around the world: Understanding challenges, shaping prospects' 2016.

²¹⁶ Caldbick, Sam, et al 'Globalisation and the rise of precarious employment: the new frontier for workplace health promotion' 2014.

²¹⁷ Caldbick, Sam, et al 'Globalisation and the rise of precarious employment: the new frontier for workplace health promotion' 2014. Economic uncertainty will no doubt increase as a result of the current (2020) world COVID-19 pandemic.

its flexibility, has become a preferred option for employers in order to remain responsive to global demands and competitiveness.²¹⁸ Some employers employ temporary workers specifically to shield their core workers from any potential downsizing that may result from demand fluctuations or adverse shocks.²¹⁹

With reference to the TVET sector the employment of academic employees depends on the enrollment numbers of students. The principle of flexibility is prevalent in the TVET sector due to consideration of limited resources (funding) and fluctuation of student numbers (enrolments).²²⁰

3.3.2 Cost advantage

Consequent to its flexibility, many employers opt to use non-standard employment in order to reduce employment costs.²²¹ In response to a rapidly changing labour market employers are often forced to turn to a more flexible option than permanent employment²²² in order to cut permanent employment costs. These employment costs include pension contributions by the employer, medical aid subscriptions by the employer, housing benefits, etc. In the TVET sector it becomes less costly to hire temporary lecturers for temporary work that is not expected to endure beyond twelve²²³ months academic year.

3.3.3 Technological change

Technology can be used as a substitute labour to reduce or replace workers. It has a role to play in whether or not non-standard employment arrangements are used, particularly if it facilitates standardisation, making it easier to replace workers.²²⁴ In a business environment context, standardisation and technology become the reason for firms to use non-standard employment in order to respond to the demand fluctuations²²⁵ since businesses operate in an unstable and dynamic environment.²²⁶

²¹⁸ Caldbick, Sam, et al 'Globalisation and the rise of precarious employment: the new frontier for workplace health promotion' 2014.

²¹⁹ ILO "Regulating the use of Temporary Contracts by Enterprises' 2016.

²²⁰ DHET *Annual Monitoring Report on the Projected 2014 Targets of the Ministerial Statement on Student Enrolment Planning, 2014/15 – 2019/20* (2016) 5.

²²¹ ILO 'Non-standard forms of employment: Report for discussion at the meeting of experts on non-standard forms of employment' 2015; Gericke E 'Temporary employment services: Closing a loophole in section 198 of the Labour Relations Act 66 of 1995' 2010:97.

²²² Gericke E 'Temporary employment services: Closing a loophole in section 198 of the Labour Relations Act 66 of 1995' 2010:97.

²²³ Section 198B(4)(a) of the LRA.

²²⁴ ILO 'Non-standard forms of employment: Report for discussion at the meeting of experts on non-standard forms of employment' 2015.

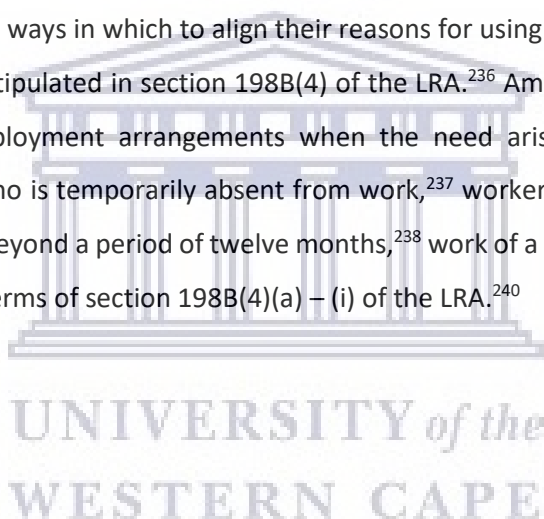
²²⁵ ILO 'Non-standard forms of employment: Report for discussion at the meeting of experts on non-standard forms of employment' 2015.

²²⁶ Lewis MG & Sullivan DG 'The Growth of Temporary Services Work: The Journal of Economic Perspectives' (1997) vol. 11, no. 2 pp. 117–136.

3.3.4 Legislation

Historically there have often been gaps or grey areas in legislation that provided fertile ground for the development of non-standard work arrangements.²²⁷ For example, prior to the 2015 amendments to the LRA,²²⁸ the LRA did not explicitly regulate fixed-term employment arrangements.²²⁹ Enterprises capitalised on such gaps which contributed to the rise of non-standard employment arrangements. The amendments of the Basic Conditions of Employment Act,²³⁰ Employment Equity Act,²³¹ and Labour Relations Act²³² amongst others aimed to address these legislative gaps.²³³ According to the International Labour Organisation (ILO) some of the legislative gaps emanated from the decline of concluded collective bargaining agreements in various sectors in a specific country.²³⁴

Even after the 2014/2015 large-scale amendments to labour legislation in SA, it has been argued that the Labour Relations Amendment Act 6 of 2014 unintentionally promoted enterprises to use non-standard employment, even though its main intention was to regulate prejudices associated with such employment.²³⁵ Many employers have identified ways in which to align their reasons for using non-standard employment to one or more of the provisions stipulated in section 198B(4) of the LRA.²³⁶ Amongst others, employers have options to use fixed-term employment arrangements when the need arises for work that requires a replacement of an employee who is temporarily absent from work,²³⁷ workers to perform temporary work that is not expected to endure beyond a period of twelve months,²³⁸ work of a limited or defined duration,²³⁹ or any other valid reason(s) in terms of section 198B(4)(a) – (i) of the LRA.²⁴⁰



227 ILO 'Non-standard employment around the world: Understanding challenges, shaping prospects' 2016.

228 Labour Relations Amendment Act 6 of 2014.

229 Discussed in Chapter 2 (2.5.2 to 2.5.3) of this research.

230 Basic Conditions of Employment Amendment Act 20 of 2013.

231 Employment Equity Amendment Act 47 of 2013.

232 Labour Relations Amendment Act 6 of 2014.

233 AgriSA 'Summary and Explanation of the Labour Law Amendments' 2014.

234 ILO 'Non-standard employment around the world: Understanding challenges, shaping prospects' 2016.

235 Section 198B(4) of the LRA.

236 Section 198B(4) of the LRA.

237 Section 198B(4)(a) of the LRA.

²³⁸ Section 198B(4)(b) of the LRA.

²³⁹ Section 198B(4)(d) of the LRA.

²⁴⁰ Any other reason (s) stipulated in Section 198(4) (a - i) of the LRA [Also discussed fully in Chapter 2 (2.6) of this research].

3.4 ADVANTAGES AND DISADVANTAGES OF UTILISING NON-STANDARD EMPLOYMENT ARRANGEMENTS, SPECIFICALLY FIXED-TERM CONTRACTS, IN THE TVET SECTOR.

The TVET sector, like all sectors, strives for flexibility in the workforce. The success of the sector is dependent on meeting its service delivery objectives and targets. It is thus imperative to determine the nature of staffing needs required by institutions in the sector. Such staffing needs include both temporary and permanent workers.

3.4.1 Advantages of utilising fixed-term contract employment arrangements

3.4.1.1 Employer advantages

(a) Workforce flexibility

Fixed-term contract employment provides staffing flexibility²⁴¹ in order for businesses to meet their operational demands within a specific period. Employers often opt for non-standard employment arrangements because of the flexibility advantages such employment bring, such as, the deployment of workers in different jobs, at different locations and with short notice.²⁴²

The use of temporary employment allows employers in the TVET sector to adjust workforces in keeping with changing circumstances.²⁴³ This includes changing student enrolment numbers, lecturers going on maternity leave, absence due to ill-health, and sabbatical leave – all which necessitates the sourcing of substitute lecturers.²⁴⁴ As a result of the aforesaid substitution, lecturers are required so as to ensure that teaching and learning is not compromised since students must be attended to at all times.²⁴⁵

(b) Addressing temporary increase in the volume of work

Closely linked to the above, is the need by the TVET sector to make use of fixed-term contract employment by employing temporary lecturers on the basis of a temporary increase in the number of students. Fixed-term contract employment has a potential to accommodate employer's staff

²⁴¹ ILO 'Non-standard work and workers: Organisational implications: Conditions of Work and Employment Series No. 61' 2015:14.

²⁴² ILO 'Non-standard work and workers: Organisational implications: Conditions of Work and Employment Series No. 61' 2015.

²⁴³ ILO "Regulating the use of Temporary Contracts by Enterprises' 2016.

²⁴⁴ DHET *Recruitment and Selection Policy* (2019) 17.

²⁴⁵ DHET *Recruitment and Selection Policy* (2019) 10.

needs in the event of temporary increase in the volume of work that is not expected to endure beyond twelve months.²⁴⁶

(c) Addressing critical and scarce skills through foreign nationals

In instances where the TVET sector is experiencing a shortage in certain skills, the employment of foreign nationals can be considered to address such critical or scarce skills shortages. A non-citizen must have been granted a work permit for a defined period²⁴⁷ in order to secure employment in SA. The TVET sector regularly experiences shortages of qualifying candidates in the technical skills that are classified as a national priority.²⁴⁸ These skills include trade tested candidates in the field of plumbing, boiler making and other engineering related occupational trades. The TVET sector therefore opt to utilise foreign national²⁴⁹ candidates in such kind of positions and appoint them on apprenticeship based projects and in line with their work permit duration.²⁵⁰

(d) Seasonal work, project-based employment and work funded by external sources

Fixed-term contract employment provides the TVET sector an advantage to appoint employees who are required for seasonal work.²⁵¹ Seasonal work in the TVET sector that requires fixed-term appointments includes, but is not limited to, registration assistants during registration periods of training institutions and external invigilators during test and examination periods. A need to employ workers on a specific project that has a limited or defined duration is also commonly observed in the TVET sector.²⁵² This includes appointment of lecturers and facilitators for occupational skills/programmes which have a limited or defined duration such as learnerships, short skills programmes and apprenticeships.

The TVET sector has an edge to utilise fixed-term contracts in an event that an employee is required for temporary work that is funded by an external source for a limited period.²⁵³ The TVET sector Colleges regularly secure partnerships with other organisations. The staffing for these programmes,

²⁴⁶ Section 198B(4)(b) of the LRA.

²⁴⁷ Section 198B(4)(e) of the LRA.

²⁴⁸ DHET *Annual Monitoring Report on the Projected 2014 Targets of the Ministerial Statement on Student Enrolment Planning, 2014/15 – 2019/20* (2016) 5.

²⁴⁹ Immigration Act 13 of 2002.

²⁵⁰ Immigration Act 13 of 2002.

²⁵¹ Section 198B(4)(f) of the LRA.

²⁵² Section 198B(4)(d) of the LRA.

²⁵³ Section 198B(4)(h) of the LRA.

such as three year apprenticeships, are linked to the term or duration of the partnerships which makes fixed-term employment arrangements an advantage.

(d) Work commitment and cost cutting measures

Many fixed-term contract employees are generally committed in their work with the view to secure permanent employment.²⁵⁴ They are eager to learn and less unionised. The employer incurs reasonably less employment costs, i.e., savings on benefits such as car allowances, travelling costs, home owner allowances and medical aid subscriptions.²⁵⁵

(e) Pool of applicants for permanent positions

Fixed-term employment has the advantage of creating great application pools for employers. The application pool or database for temporary or fixed-term contract workers is used to identify potential workers for current or future permanent employment needs.²⁵⁶ Research has found that TVET sector Colleges consider fixed-term contract employees when they appoint permanent staff into positions of both lecturing and support staff.²⁵⁷

3.4.1.2 Employee advantages

(a) Gaining experience

Fixed-term contract employment opportunities can be a useful way of gaining work experience,²⁵⁸ which in turn increases an individual's chances of employability. It often acts as an entry point into the labour market for school-leavers and reintegrate people who have been out of the labour force.²⁵⁹ Fixed-term employment assists those individuals who may have difficulties in finding employment.²⁶⁰

²⁵⁴ ILO 'Non-standard work and workers: Organisational implications: Conditions of Work and Employment Series No. 61' 2015:11.

²⁵⁵ ILO 'Non-standard work and workers: Organisational implications: Conditions of Work and Employment Series No. 61' 2015:06.

²⁵⁶ DHET *Recruitment and Selection Policy* (2019) 10.

²⁵⁷ Clause 4.1 of the ELRC Collective Agreement 2 of 2013.

²⁵⁸ ILO 'Non-standard forms of employment: Report for discussion at the meeting of experts on non-standard forms of employment' 2015.

²⁵⁹ McGinnity F et al 'A bad start? Fixed-Term Contracts and the Transition from education to work in West Germany' 2005.

²⁶⁰ Autor DH and Houseman SN 'Do temporary-help jobs improve labour market outcomes for low-skilled workers? Evidence from work first in American Economic Journal: Applied Economics' 2010.

(b) Skills development

Skills development provides opportunity for a fixed-term contract employee to develop both job-specific and general skills, strengthen labour market attachment and expand social and professional networks.²⁶¹ Fixed-term employment can offer development of a skill, both job-specific and general and getting acclimated to the labour market, as well as work ethic.²⁶²

Although workers face the possibility of being exploited in non-standard employment, it is still a better option from an unemployed person's perspective to be part of a non-standard employment and gain experience and skills than to face a day without the possibility of earning an income.²⁶³

3.4.2 Disadvantages of utilising fixed-term contract employment arrangements

3.4.2.1 Employer disadvantages

(a) Employer insecurity

Non-standard employment is typically associated with worker insecurity.²⁶⁴ Non-standard employment can however also pose challenges for employers²⁶⁵ as a result of such worker insecurity.²⁶⁶ Fixed-term contract workers, especially those who are attached to the organisation for a limited period of time, might affect the TVET sector's performance negatively on the basis that they do not have relationships that facilitate the transfer of knowledge within the organisation.²⁶⁷ There is often also very little employee loyalty that employers could depend on in building a successful work environment.

(b) Increased litigation

Fixed-term employment arrangements expose organisations to possible litigation under existing labour laws.²⁶⁸ As example, litigation in the TVET sector remains a possibility where an employee's

²⁶¹ ILO 'Non-standard forms of employment: Report for discussion at the meeting of experts on non-standard forms of employment' 2015.

²⁶² ILO 'Non-standard employment around the world: Understanding challenges, shaping prospects' 2016.

²⁶³ Gericke SB 'The regulation of successive fixed-term employment in South Africa: lessons to be learned from foreign and international law' 2016.

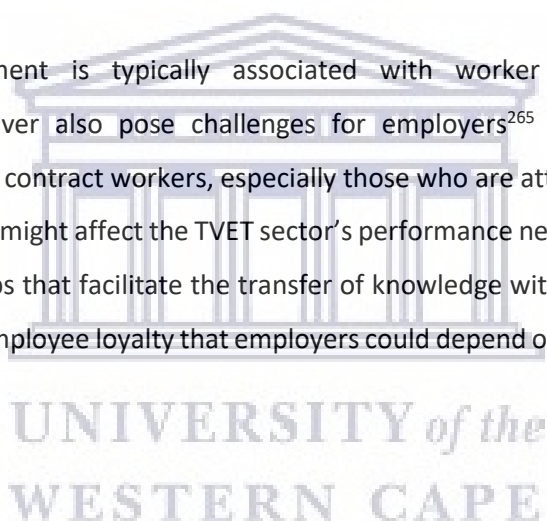
²⁶⁴ ILO 'Non-standard employment around the world: Understanding challenges, shaping prospects' 2016.

²⁶⁵ ILO 'Non-standard employment around the world: Understanding challenges, shaping prospects' 2016.

²⁶⁶ ILO 'Non-standard work and workers: Organisational implications: Conditions of Work and Employment Series No. 61' 2015:14.

²⁶⁷ ILO 'Non-standard work and workers: Organisational implications: Conditions of Work and Employment Series No. 61' 2015:14.

²⁶⁸ Section 9 and 23 of the Constitution of the Republic of South Africa 1996, Section 186 and 198 of the LRA, Section 4 of the Regulation made in terms of Employment Equity Act 55 of 1998, as amended and other applicable sections of various legislation in South Africa.



contract comes to an end and the employee claims that the employer (i) terminated his/her contract with or without notice,²⁶⁹ and/or (ii) created a reasonable expectation²⁷⁰ that the employee would be employed permanently or that his/her contract would be renewed on the same or similar terms. This is a real risk in the TVET sector where some lecturing staff's appointments are directly linked to student numbers.

(c) Less accountability

Fixed-term contract employees are less accountable due to the short nature of employment contract.²⁷¹ Accountability refers to the view that non-standard workers might not be very committed to the organisation, and, as such, it is very difficult for the employer to allocate them full functional accountability.²⁷² Fixed-term contract workers are generally seen as less attached and less committed as they do not have long term relationship with the organisation.²⁷³ As a result, the employment relationship might cease to exist in the near future.

(d) Increased contract management processes

The management of non-standard employment involves intensive and repetitive administrative work,²⁷⁴ e.g., renewal of employment contracts, drafting of letters for the extension of employment contracts and leave credits management on pro rata basis. The implications are that the employer has to embark on these administrative work every three (3) months,²⁷⁵ unless there is a valid reason to extend fixed-term employment beyond three months in line with the legislation.²⁷⁶ Subsequently, lecturers on fixed-term contracts within the TVET sector require extension of contract for each academic year, semester or trimester because their appointment is based on allocated resources and yearly student enrolments.²⁷⁷ The exit management of fixed-term contract workers is often also

²⁶⁹ Section 186(a) of the LRA.

²⁷⁰ Section 186(b) of the LRA.

²⁷¹ ILO 'Non-standard work and workers: Organisational implications: Conditions of Work and Employment Series No. 61' 2015:14.

²⁷² ILO 'Non-standard work and workers: Organisational implications: Conditions of Work and Employment Series No. 61' 2015:14.

²⁷³ ILO 'Non-standard work and workers: Organisational implications: Conditions of Work and Employment Series No. 61' 2015:14.

²⁷⁴ ILO 'Non-standard employment around the world: Understanding challenges, shaping prospects' 2016.

²⁷⁵ Joubert YT & Loggenberg B 'The impact of changes in labour broking on an integrated petroleum and chemical company: Acta Commercii' 2017.

²⁷⁶ Section 198B(4) of the LRA.

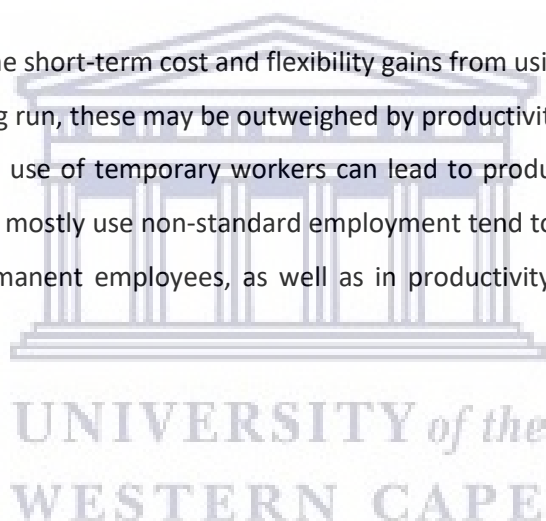
²⁷⁷ DHET *Annual Monitoring Report on the Projected 2014 Targets of the Ministerial Statement on Student Enrolment Planning, 2014/15 – 2019/20* (2016) 5.

cumbersome as these employees tend to resign with immediate effect without complying with section 37 of the BCEA²⁷⁸ once they secure permanent employment elsewhere.

(e) Gradual erosion of specific skills

An over-reliance on non-standard employment arrangements can lead to a gradual erosion of specific skills in the organisation, limiting its ability to respond to changing market demands.²⁷⁹ Non-standard employees with specific skills are less attached to the organisation²⁸⁰ since they form part of the organisation for a shorter period. Keeping specific skills in an organisation becomes impractical during expiry of employment contracts of non-standard employees. In-house training becomes outdated since fixed-term contract employees are with the organisation for a shorter period.²⁸¹ Consequently, employers who rely heavily on fixed-term employment need to adjust their human resource strategies with the view to identify and attract relevant sets of skills from the labour market.²⁸²

While there may be some short-term cost and flexibility gains from using non-standard employment arrangement, in the long run, these may be outweighed by productivity or service delivery losses.²⁸³ An over-reliance on the use of temporary workers can lead to productivity challenges.²⁸⁴ There is evidence that firms that mostly use non-standard employment tend to underinvest in training, both for temporary and permanent employees, as well as in productivity-enhancing technologies and innovation.²⁸⁵



²⁷⁸ Section 37 of the Basic Conditions of Employment Act 75 of 1997 states that:

“37 Notice of termination of employment (1) Subject to section 38, a contract of employment terminable at the instance of a party to the contract may be terminated only on notice of not less than- (a) one week, if the employee has been employed for six months or less; (b) two weeks, if the employee has been employed for more than six months but not more than one year; (c) four weeks, if the employee- (i) has been employed for one year or more; or (ii) is a farm worker or domestic worker who has been employed for more than six months”

²⁷⁹ ILO ‘Non-standard employment around the world: Understanding challenges, shaping prospects’ 2016.

²⁸⁰ ILO ‘Non-standard work and workers: Organisational implications: Conditions of Work and Employment Series No. 61’ 2015:14.

²⁸¹ ILO ‘Non-standard employment around the world: Understanding challenges, shaping prospects’ 2016.

²⁸² ILO ‘Non-standard employment around the world: Understanding challenges, shaping prospects’ 2016.

²⁸³ ILO ‘Non-standard employment around the world: Understanding challenges, shaping prospects’ 2016.

²⁸⁴ ILO ‘Regulating the use of Temporary Contracts by Enterprises’ 2016.

²⁸⁵ ILO ‘Non-standard employment around the world: Understanding challenges, shaping prospects’ 2016.

(f) Negative implications of LRA amendments

The amendments to the LRA²⁸⁶ present high cost implications for employers, such as the training and retraining of individuals resulting from possibly having to employ new workers on a regular basis.²⁸⁷ It becomes impractical and costly to invest in training and retraining non-standard employees who are employed temporarily, especially on three months employment contract. This is because non-standard employees are not fully attached to the organisation.²⁸⁸ Employers are also required to review their employment policies in relation to non-standard employment arrangement.²⁸⁹ Employers are expected to refrain from using fixed-term employment arrangements where possible.

3.4.2.2 Employee disadvantages

(a) Job security

Though non-standard employment can provide opportunities for workers to enter into the labour market, the lack of security associated with non-standard employment often places workers at much higher risk of unemployment.²⁹⁰ It is also generally accepted that permanent employees are legislatively much more protected than those on fixed-term contract employment.²⁹¹ An example is the practical reality that non-standard workers often receive lower level of protection in comparison to permanently employed workers in terms of termination of employment.²⁹²

(b) Employment benefits

Fixed-term employees generally do not have access to full employment benefits.²⁹³ Yet, fixed-term employees commit to temporary jobs because they are often unable to find permanent employment.²⁹⁴ Most of the workers from non-standard employment are particularly vulnerable to

²⁸⁶ Section 198 of the Labour Relations Act 66 of 1995 as amended.

²⁸⁷ Joubert YT & Loggenberg B 'The impact of changes in labour broking on an integrated petroleum and chemical company: Acta Commercii' 2017.

²⁸⁸ ILO 'Non-standard work and workers: Organisational implications: Conditions of Work and Employment Series No. 61' 2015:14.

²⁸⁹ Joubert YT & Loggenberg B 'The impact of changes in labour broking on an integrated petroleum and chemical company: Acta Commercii' 2017.

²⁹⁰ ILO 'What does it mean for workers?' Available at <https://www.ilo.org/infostories/en-GB/Stories/Employment/Non-Standard-Employment#what-does-it-mean-for-workers> (accessed on 4 April 2020).

²⁹¹ ILO 'What does it mean for workers?' Available at <https://www.ilo.org/infostories/en-GB/Stories/Employment/Non-Standard-Employment#what-does-it-mean-for-workers> (accessed on 4 April 2020).

²⁹² ILO 'Non-standard forms of employment: Report for discussion at the meeting of experts on non-standard forms of employment' 2015.

²⁹³ Fourie ES 'Non-standard workers: The South African context, International Law and regulation by European Union' 2008.

²⁹⁴ ILO 'Non-standard forms of employment: Report for discussion at the meeting of experts on non-standard forms of employment' 2015.

exploitation because they are unskilled or work in sectors with little or no trade union organisation or little or no coverage by collective bargaining.²⁹⁵ They frequently have less favourable terms of employment than permanent employees performing the same work.²⁹⁶ They often do not receive benefits such as medical aid, pension or provident funds.²⁹⁷

3.5 CONCLUSION

According to the findings in Chapter 3, the main three reasons for employers to utilise fixed-term contract employment arrangements are cost advantages, flexibility and technological influences.²⁹⁸ Student enrolment numbers and availability of funding in the TVET sector are key factors that lead to utilisation of fixed-term employment arrangements. Overall employers however continue to benefit more than employees from non-standard employment relationships. Chapter 4 will next analyse the research findings, make recommendations and provide a conclusion to the research.



²⁹⁵ Fourie ES 'Non-standard workers: The South African context, International Law and regulation by European Union' 2008.

²⁹⁶ Fourie ES 'Non-standard workers: The South African context, International Law and regulation by European Union' 2008.

²⁹⁷ Fourie ES 'Non-standard workers: The South African context, International Law and regulation by European Union' 2008.

²⁹⁸ ILO 'Non-standard forms of employment: Report for discussion at the meeting of experts on non-standard forms of employment' 2015.

CHAPTER 4: ANALYSIS OF RESEARCH FINDINGS, RECOMMENDATIONS AND CONCLUSIONS

4.1 INTRODUCTION

Chapter 4 summarises the research findings and serves as conclusion to the research. Conclusions drawn relate to the research question posed in chapter 1, that is, “[w]hat is the practical effects to date within the TVET Sector of the Department of Higher Education and Training of the introduction of section 198A to D, and in particular, section 198B, into the LRA?” Furthermore, based on the finding and conclusions reached in this chapter, lessons to be learnt by both employers and employees will be highlighted. Finally, recommendations emanating from the research findings will be made in relation to how management of TVET’s should best proceed to deal with fixed-term employment arrangements going forward.

4.2 FINDINGS

The research undertaken throughout chapters 1, 2 and 3 was aimed at addressing the research question posed in chapter 1. It is against the backdrop of this question that the findings discussed below must be understood. The findings reveal important effects occasioned by the 2014 LRA amendments on atypical employment arrangements in general, as well as important effects in as far as fixed-term employment arrangements in the TVET sector specifically are concerned.

4.2.1 Findings: the effects of the 2014 amendments on fixed-term employment arrangements in general

The LRA has been said to give effect to various fundamental constitutional rights including, the right to fair labour practices²⁹⁹ as provided for in section 23 of the Constitution, the right to engage in collective bargaining³⁰⁰ and the right to equality and protection from unfair discrimination.³⁰¹ To this extent the amendments to the LRA in as far as atypical employment was concerned focused on the elimination of exploitation and vulnerability that is associated with non-standard employment arrangements.³⁰² Amongst others, the amendments are said to provide increased job protection, better employment benefits, fairer

²⁹⁹ Section 23 of the Constitution of the Republic of South Africa, 1996.

³⁰⁰ Section 23(5) of the Constitution of the Republic of South Africa, 1996.

³⁰¹ Section 9(2) of the Constitution of the Republic of South Africa, 1996.

³⁰² Ciliwe Y ‘An evaluation of the amended Temporary Employment Service Provisions in the South African Labour Relations Act: University of the Western Cape’ 2016.

treatment of employees and less litigation in the long run.³⁰³ The LRA amendments have been argued to provide a measure of regulated flexibility in an attempt to reconcile the principles of equity and efficiency.³⁰⁴

The research revealed that the LRA amendments, and in particular section 198B, have brought noticeable and significant changes and effects in the employment relationship, particularly in areas such as the following:

- (a) Strict regulation and management of fixed-term employment arrangements in line with section 198B of the LRA;³⁰⁵
- (b) Elimination of exploitation and vulnerability that is associated with non-standard employment arrangements;³⁰⁶
- (c) Addressing insecurity and inequality that is associated with non-standard employment arrangements;³⁰⁷
- (d) Alignment with or operating within the ambit of International Labour Organisation (ILO) standards³⁰⁸ and working towards achieving decent work agenda for all;³⁰⁹
- (e) Promotion and enforcing of fair labour practices in line with section 23(1) of the Constitution of the Republic of South Africa.³¹⁰
- (f) Section 198B now explicitly provides a clear definition of *fixed-term employment*.³¹¹

Despite the fact that section 198B of LRA is only applicable to employees earning below the earnings threshold,³¹² the researcher submits that employers have no legal right to exploit fixed-term employed employees who earn above the said threshold.³¹³ It has been argued that organisations may incur higher

³⁰³Joubert YT & Loggenberg B 'The impact of changes in labour broking on an integrated petroleum and chemical company: Acta Commercii' 2017.

³⁰⁴Cohen T 'The Effect of the Labour Relations Amendment Bill 2012 on Non-Standard Employment Relationships' (2014) 35 Indus. L.J. (Juta) 2607.

³⁰⁵As discussed in chapter 2 of this research.

³⁰⁶Smith C 'Debate on labour broker, client responsibility heats up' Fin24 07 April 2018, Available at <https://www.fin24.com/Economy/Labour/debate-on-labour-broker-client-responsibility-heats-up-20180406> (accessed 14 May 2018).

³⁰⁷ILO 'Non-standard employment around the world: Understanding challenges, shaping prospects' 2016.

³⁰⁸As discussed in 2.2 of chapter 2 of this research.

³⁰⁹As discussed in 2.2 of chapter 2 of this research.

³¹⁰Section 23(1) of the Constitution of the Republic of South Africa, 1996.

³¹¹As discussed in chapter 2 of this research.

³¹²The current threshold is R205 433.30 per annum in terms of Section 6(3) of the Basic Conditions of Employment Act 75 of 1997.

³¹³As discussed in 2.6.3 of chapter 2 of this research.

costs resulting from more benefits to employees, as well as the need to employ new temporary employees in every three months.³¹⁴ Consequently, on a practical level, 2016 saw a significant increase in the number of fixed-term contract related disputes referred to the higher education bargaining councils.³¹⁵

4.2.2 Findings: the effects of the 2014 amendments on fixed-term employment arrangements with particular reference to the TVET sector

The research has highlighted that the TVET sector is a unique sector when it comes to fixed-term employees since it largely relies on temporary employees to address the ever-changing number of annual student enrolments.³¹⁶ Most fixed-term contract employees in the TVET sector are employed on project based contracts,³¹⁷ such as, lecturing positions, occupational programmes and apprenticeships.³¹⁸ The need for such positions are directly linked to fluctuating student enrolment numbers. It is for this reason that fixed-term employment arrangements are appealing in the TVET sector.³¹⁹

Legislative regulation of atypical employment, and, in particular, fixed-term employment, however changed substantively with the enactment of the LRAA of 2014. With reference to fixed-term employment specifically, section 186(1)(b) was amended to provide for wider protection against dismissal on termination of a fixed-term contract, while section 198B, dealing with employment of fixed-term employees specifically, was a completely new addition to the LRA. As such the TVET sector had to realign its non-standard employment policies and practices in order to abide with the new LRA amendments.³²⁰ *HR Circular 17 of 2015 (LRA as amended)*³²¹ in fact instructed Colleges within the TVET sector to comply with the LRA amendments.³²² Since 2014 the realignment of policies and practices to a large extent included conversion of fixed-term contracts to permanent contracts.³²³

Subsequent to the introduction of section 198B in the LRA, the Department of Higher Education and Training (DHET) established a National Task Team (NTT) in 2015 to assess the likely effect of section 198B on the TVET

³¹⁴Joubert YT & Loggenberg B 'The impact of changes in labour broking on an integrated petroleum and chemical company: ActaCommerci' 2017.

³¹⁵ELRC 'About-us' Available at <http://www.elrc.org.za/about-us> (Accessed 03 November 2018).

³¹⁶Section 198B(4)(a) of the LRA (As discussed in 2.9 of chapter 2 of this research).

³¹⁷Section 198B(4)(d) of the LRA.

³¹⁸As discussed in 3.4.1.1 (d) of chapter 3 of this research.

³¹⁹As discussed in 3.4.1.1 (d) of chapter 3 of this research.

³²⁰As discussed in 3.4.2.1 (f) of chapter 3 of this research.

³²¹ DHET 'HR Circular 17 of 2015 (LRA as amended)' 2015 is obtainable on request via muziwakhem@eec.edu.za / muzimathe@gmail.com.

³²²DHET 'HR Circular 17 of 2015 (LRA as amended)' 2015.

³²³DHET 'HR Circular 17 of 2015 (LRA as amended)' 2015.

sector.³²⁴ As a direct result of the introduction of section 198B the NTT developed criteria to be used to identify staff members who qualified to be made permanent in terms of the Public Service Act 103 of 1994.³²⁵

4.3 Lessons to be learned by both Employers and Employees

4.3.1 Lessons to be learned in general

The introduction of section 198 into the Labour Relations Act 66 of 1996 has had important consequences for both employers and employees. Parties who enter into fixed-term employment contracts should be aware of their rights and obligations.³²⁶ The overall lesson for both employers and employees is that it is crucial to fully understand all the requirements and consequences of the concluded employment contract.³²⁷

Case law has assisted parties in understanding how to interpret various issues, such as, reasonable expectation for renewal of an employment contract in terms of section 186(1)(b) of the LRA. In cases such as *NAPTOSA obo Moosa S and 3 Others v East Cape Midlands TVET College*,³²⁸ *Peetz v Cash Paymaster Services*,³²⁹ *King Sabata Dalindyebo Municipality v CCMA & others*,³³⁰ it was held that a *reasonable expectation* can exist if there is (a) equity and fairness; (b) an existence of a substantive expectation of renewal; (c) subjective expectation of renewal and (d) objective factors that support such expectation.³³¹ It has also been established that the more frequently an employer renews an employee's fixed-term contract, an existing need for someone to render services currently rendered by the employee, and the availability of funds for a particular position, all pointed to a reasonable expectation of further renewal.³³² The mere fact that a contract contains a clause stipulating that its renewal should not be construed as creating an expectation of any further renewals, is not sufficient to prove that an employee could not have had a reasonable expectation of renewal.³³³

In *SACTWU & another v Cadema Industries (Pty) Ltd*,³³⁴ the Labour Court held that the employer's decision not to renew the employee's employment contract was unfair. The court held that since there was work

³²⁴As discussed in 2.9.1 of chapter 2 of this research.

³²⁵As discussed in 2.9.1 of chapter 2 of this research.

³²⁶As discussed in chapter 2 of this research.

³²⁷As discussed in 2.6 of chapter 2 of this research.

³²⁸ *NAPTOSA obo Moosa S and 3 Others v East Cape Midlands TVET College (ELRC78-15/16EC) (8 September 2016)*. As discussed in 2.6.4 of chapter 2.

³²⁹ *Peetz v Cash Paymaster Services (Pty) Ltd - (2011) 20 CCMA*. As discussed in 2.6.4 of chapter 2.

³³⁰ *King Sabata Dalindyebo Municipality v CCMA & others (2005) 26 ILJ 474 (LC)*. As discussed in 2.6.4 of chapter 2.

³³¹ *NAPTOSA obo Moosa S and 3 Others v East Cape Midlands TVET College (ELRC78-15/16EC) (8 September 2016)*.

³³² *King Sabata Dalindyebo Municipality v CCMA & others (2005) 26 ILJ 474 (LC)*.

³³³ *Commission for Conciliation, Mediation and Arbitration v Commission for Conciliation, Mediation and Arbitration and Others (JR1624/16) (2017) ZALCJHB 240 (LC)*.

³³⁴ *SACTWU & another v Cadema Industries (Pty) Ltd [2008] 8 BLLR 790 (LC)*.

available which the employee could do,³³⁵ a reasonable expectation for the contract to be renewed was created.

In *SA Rugby Association & others*,³³⁶ the Labour Appeal Court when dealing with a claim of reasonable expectation, held that the failure by the employer to communicate to the employee that it will not renew a contract of employment does not constitute the reasonable expectation.³³⁷ This position is even clearer when the contract itself does not have a clause for renewal.³³⁸ In *Black v John Snow Public Health Group*,³³⁹ the Labour Court showed that if the renewal of the employment contract is dependent on resources from an external donor, then the claim of reasonable expectation does not arise if such resources were not received from the donor.³⁴⁰ Limited financial resources and notice of termination are thus important considerations to mitigate the argument of reasonable expectation.³⁴¹ In *Dierks v University of South Africa*,³⁴² the Labour Court held that section 186(b) does not include a reasonable expectation of permanent employment therefore an employee cannot claim to have reasonably expected an employer to offer permanent employment.³⁴³ The amended s 186(1)(b) however provides for an expectation of permanent appointment to give rise to a dismissal claim.

A further lesson is that section 198 of the LRA prohibits fixed-term employment beyond a period of three months, unless there is a justifiable reason for doing so.³⁴⁴ An employee employed in terms of a fixed-term contract for longer than three months must not be treated less favourably than a permanent employee who performs the same or similar work, unless there is a justifiable reason for different treatment.³⁴⁵ The restriction on less favourable treatment of fixed-term employees goes beyond parity of pay and benefits.³⁴⁶ Any form of less favourable treatment is potentially unlawful such as, for example, not offering fixed-term employees the same career development opportunities offered to permanent employees, regular appraisals, training and access to promotion opportunities³⁴⁷ and access to apply for vacancies.³⁴⁸ The only circumstance in which fixed-term employees can be treated less favourably than permanent employees is if

³³⁵ *SACTWU & another v Cadema Industries (Pty) Ltd* [2008] 8 BLLR 790 (LC).

³³⁶ *SA Rugby (Pty) Ltd v Commission, for Conciliation, Mediation & Arbitration & Others* (2006) 27 ILJ 1041 (LC).

³³⁷ *SA Rugby (Pty) Ltd v Commission, for Conciliation, Mediation & Arbitration & Others* (2006) 27 ILJ 1041 (LC).

³³⁸ *SA Rugby (Pty) Ltd v Commission, for Conciliation, Mediation & Arbitration & Others* (2006) 27 ILJ 1041 (LC).

³³⁹ *Black v John Snow Public Health Group* (2010) 31 ILJ 1152 (LC).

³⁴⁰ *Black v John Snow Public Health Group* (2010) 31 ILJ 1152 (LC).

³⁴¹ *Black v John Snow Public Health Group* (2010) 31 ILJ 1152 (LC).

³⁴² *Dierks v University of South Africa* [1999] 4 BLLR 304.

³⁴³ *Dierks v University of South Africa* [1999] 4 BLLR 304.

³⁴⁴ Section 198B(4) of the LRA.

³⁴⁵ Section 198B(8)(a) of the LRA.

³⁴⁶ Workman-Davies D 'Fixed-term contracts – how are they justified?' 2019.

³⁴⁷ Workman-Davies D 'Fixed-term contracts – how are they justified?' 2019.

³⁴⁸ Section 198B(9) of the LRA.

it can be objectively justified in terms of section 198B(4) of the LRA.³⁴⁹ Employers and employees are also now guided through section 198B of the LRA on the meaning of what constitutes a fixed-term contract.³⁵⁰ Section 198B(1) of the LRA provides that fixed-term contract means a contract of employment that terminates on (a) the occurrence of a specified event; (b) the completion of a specified task or project; or (c) a fixed date, other than an employee's normal or agreed retirement age subject to subsection (3) of the Act.³⁵¹ In short, fixed-term employment contract may thus be defined as a contractual employment arrangement between an employer and an employee, in terms of which arrangement it is agreed that the contract will be of a limited duration or come to an end on a pre-specified event.³⁵²

4.3.2 Lessons to be learned in the context of the TVET sector

Having discussed the lesson to be learned in general above, lessons to be learned in the context of the TVET sector specifically will now be considered. It is a lesson to be learned by the TVET sector that an employer who relies heavily on fixed-term employment needs to adjust its human resource strategies with the view to identify and attract relevant sets of skills from the labour market.³⁵³

Employment benefits applicable to fixed-term contract lecturers and support staff should not be less than those offered to permanent employees. Chapter 2 of this research indicated that a fixed-term contract worker in the TVET sector who is employed for less than six months is entitled to a basic salary plus 37% *in lieu* of benefits.³⁵⁴ Despite such 37% cash benefit, fixed-term contract workers in the TVET sector are still deprived access to other benefits such as access to credit facilities and housing acquisition.³⁵⁵

Lecturers appointed on fixed-term contracts should be granted access to developmental opportunities, such as bursaries. Fixed term appointed lecturers must also have equal access to opportunities to apply for vacancies in line with the LRA.³⁵⁶ Even though section 198B of the LRA does not apply to lecturers who earn more than the earnings threshold (currently R205 433.30), this does not entitle the TVET sector to undermine the employment rights of those who are not covered by the LRA. Lecturers and support staff who are not

³⁴⁹ Section 198B(4) of the LRA.

³⁵⁰ As discussed in 2.6.3 of chapter 2 of this research.

³⁵¹ Section 198B(1) of the LRA.

³⁵² Mariya A and Muller A 'INWORK and GOVERNANCE INWORK Brief No. 6: Nothing more permanent than temporary? Understanding fixed-term contracts' 2015.

³⁵³ ILO 'Non-standard employment around the world: Understanding challenges, shaping prospects' 2016.

³⁵⁴ Clause 11.4.1 of the PSCBC Resolution 1 of 2007.

³⁵⁵ ILO 'non-standard employment around the world: understanding challenges, shaping prospects' 2016.

³⁵⁶ Section 198B(9) of the LRA.

protected under section 198B are nonetheless regulated by section 186 of the LRA.³⁵⁷ Exploitation of fixed-term contract employees should thus not occur.

The TVET sector's new or reviewed policies, which should all be in line with LRA amendments, will play a big role in the future protection of fixed-term employees.³⁵⁸ While policies and practices in the TVET sector have since 2014 generally been realigned to the amended LRA,³⁵⁹ employers in the TVET sector should understand that it is not simply enough to do have such policies without proper implementation.

Apart from the provisions of the LRA, employers in the TVET sector should also comply with the Public Service Act (PSA)³⁶⁰ and its regulation (Public Service Regulation of 2016 (PSR))³⁶¹ to manage fixed-term employment arrangements.³⁶² In addition to the constitutional mandate of fair labour practices, the LRA, Employment Equity Act and Basic Conditions of Employment Act, the PSA and its Regulations³⁶³ form part of the regulatory framework for fixed-term employment in the TVET sector.³⁶⁴ Governed by the LRA and PSA, employers in the TVET sector must thus learn to make informed decisions regarding the use of fixed-term employment arrangements and the legality thereof.³⁶⁵ As example, rolling fixed-term employment contracts are not only discouraged, but may in fact be prohibited by section 198B of the LRA.³⁶⁶ The TVET sector's failure to operate within the ambit of the LRA and PSA may lead to litigations, and the legislative declaration of fixed-term employment agreements into that of indefinite contracts.³⁶⁷ TVET employers must thus guard against the use of fixed-term employment for the purpose of benefiting from cheap labour and bypassing statutory contractual obligations.³⁶⁸

Employers in the TVET sector should understand that employing workers on fixed-term employment arrangements without good reason is now not only discouraged anymore, but in fact prohibited.³⁶⁹ Section 198B(3) and (4) of the LRA curb the utilisation of fixed-term contracts without good reasons. The lesson to

³⁵⁷As discussed in 2.6.3 of chapter 2 of this research.

³⁵⁸As discussed in 2.4.2.1 (f) of chapter 2 of this research.

³⁵⁹DHET 'HR Circular 17 of 2015 (LRA as amended)' 2015.

³⁶⁰ Section 57(2) of Public Service Regulations 2016 (As discussed in 2.8 of chapter 3 of this research).

³⁶¹ As discussed in 2.8 of chapter 2 of this research.

³⁶² Section 57(2) of Public Service Regulations 2016 (As discussed in 2.8 of chapter 3 of this research).

³⁶³ Section 57(2) of Public Service Regulations 2016 (As discussed in 3.8 of chapter 3 of this research).

³⁶⁴ Section 23(1) of the Constitution of the Republic of South Africa, 1996.

³⁶⁵As discussed in 2.6 of chapter 2 of this research.

³⁶⁶As discussed in 2.6.3 of chapter 2 of this research [Also see *Wood v Nestle SA (Pty) Ltd* 1996 17 ILJ 184 (IC)].

³⁶⁷ CCMA 'Labour Law Amendments: Resource Guide' 2016.

³⁶⁸Du Toit J 'Expectation of permanent employment' Available at

<https://www.labourguide.co.za/latest-news-1/1536-fixed-term-contracts-and-the-expectation-of-permanent-employment> (accessed November 2018).

³⁶⁹As discussed in 2.6.3 of chapter 2 of this research.

be learned by employers in the TVET sector is what constitutes *good reasons*.³⁷⁰ Good reason for the use of fixed-term contracts are indicated under section 198B(4) as:

- (i) Replacing another employee who is temporarily absent from work;
- (ii) Employing an employee on account of a temporary increase in the volume of work which is not expected to endure beyond 12 months;
- (iii) Employing a student or recent graduate for the purpose of being trained or gaining work experience in order to enter a job or profession;
- (iv) Employing an employee to work exclusively on a specific project that has a limited or defined duration;
- (v) Employing a non-citizen who has been granted a work permit for a defined period;
- (vi) Employing an employee to perform seasonal work;
- (vii) Employing an employee for the purpose of an official public works scheme or similar public job creation scheme;
- (viii) Employing an employee in a position which is funded by an external source for a limited period; or
- (ix) Where an employee has reached the normal or agreed retirement age applicable in the employer's business.

The TVET sector's reliance on fixed-term employed lecturers and other staff can thus be justified in line with the above.³⁷¹ Use of fixed-term employment contracts in any unlawful manner will however present various risks. Risks include increased litigation based on e.g. misusing probationary periods for unintended purposes;³⁷² unjustified rolling over of the fixed-term contracts that result in fixed-term contracts being declared indefinite contracts;³⁷³ and despite wording to the contrary in the contract, the creation of a reasonable expectation where assurances, existing practices and the conduct of an employer led an employee to believe that there was hope for a renewal, whether on a temporary or an indefinite basis.³⁷⁴

Employers in the TVET sector must also avoid unnecessary risks such as allowing an employee to work without an employment contract. In *Feni v SA Five Engineering*³⁷⁵ the employee was employed for six successive one-month employment contracts.³⁷⁶ He was then given work to do for another five months

³⁷⁰ Section 198B(4) of the LRA [Also see *Mahlamu v Commission for Conciliation, Mediation and Arbitration and Others* 2008 09 ILJ 1702 (LC)].

³⁷¹ Section 198B(4) of the LRA.

³⁷² See *Abrahams v Rapitrade (Pty) Ltd* (2007) 6 BALR 501.

³⁷³ *Wood v Nestle SA (Pty) Ltd* 1996 17 ILJ 184 (IC).

³⁷⁴ *Mediterranean Woollen Mills (Pty) Ltd v SACTWU* 1998 19 ILJ 366 (LAC).

³⁷⁵ *Feni v SA Five Engineering* (2007, BALR).

³⁷⁶ *Feni v SA Five Engineering* (2007, BALR).

without a contract being signed.³⁷⁷ The employer subsequently terminated the employee's employment and the employee referred a dispute to the Metal and Engineering Industries Bargaining Council. The arbitrator found that as soon as the employee started working for the employer without a valid fixed-term contract he became a permanent employee. Consequently, as no valid reason was given for the dismissal and no proper pre-dismissal procedures were followed, the employer was ordered to reinstate the employee with full back pay.³⁷⁸

4.4 RECOMMENDATIONS

The legislative landscape has changed as far as employment on fixed-term contract is concerned. Based on the findings of this research, employers are encouraged to review their current employment contracts and practices to ensure compliance with the LRA (as amended) and, as such, reduce potential risks as highlighted above.³⁷⁹ Employers will now have to evaluate whether all positions occupied by employees on fixed-term contracts are indeed of a limited or definite duration, and be prepared to act accordingly on the basis of the new section 198B of the LRA.

The use of fixed-term contracts should be based on objective and acceptable reasons and be captured in writing.³⁸⁰ Objective reasons means justifiable reasons for fixing employment contract in line with section 198B(4) of the LRA. In *Mahlamu v Commission for Conciliation, Mediation and Arbitration and Others*,³⁸¹ the court confirmed that the LRA had to be purposively construed so as to give effect to the Constitution,³⁸² and in this case, the right to fair labour practices as provided for in section 23(1).³⁸³ The right not to be unfairly dismissed formed an essential part of the right to fair labour practices³⁸⁴ and accordingly the LRA had to be interpreted in favour of protecting employees against unfair dismissals.³⁸⁵ The court held that parties to an employment contract could not contract out of the LRA's protection against unfair dismissal provided to

³⁷⁷ *Feni v SA Five Engineering* (2007, BALR).

³⁷⁸ *Feni v SA Five Engineering* (2007, BALR).

³⁷⁹ Joubert YT & Loggenberg B 'The impact of changes in labour broking on an integrated petroleum and chemical company: ActaCommercii' 2017.

³⁸⁰ Cohen T 'The Effect of the Labour Relations Amendment Bill 2012 on Non-Standard Employment Relationships' (2014) 35 Indus. L.J. (Juta) 2607.

³⁸¹ *Mahlamu v Commission for Conciliation, Mediation and Arbitration and Others* 2008 09 ILJ 1702 (LC) para 11.

³⁸² *Mahlamu v Commission for Conciliation, Mediation and Arbitration and Others* 2008 09 ILJ 1702 (LC) para 11.

³⁸³ Cohen T 'The Effect of the Labour Relations Amendment Bill 2012 on Non-Standard Employment Relationships' (2014) 35 Indus. L.J. (Juta) 2607.

³⁸⁴ *Mahlamu v CCMA* 2011 32 ILJ 1122 (LC) para 11.

³⁸⁵ *Mahlamu v CCMA* 2011 32 ILJ 1122 (LC) para 12; also see *SA Post Office Ltd v Mampeule* 2010 31.

ILJ 2051 (LAC) para 23, where the court held that "parties to an employment contract cannot contract out of the protection against unfair dismissal afforded to an employee whether through the device of 'automatic termination' provisions or otherwise because the Act had been promulgated not only to cater for an individual's interest but the public's interest".

employees.³⁸⁶ It is for these reasons that employers are advised to contract within the parameters of relevant legislation i.e. LRA.

Employers must also refrain from rolling over fixed-term contracts as far as possible. In *Yebe v University of KZN*,³⁸⁷ the CCMA held that a series of renewals was likely to create a reasonable expectation that the employment relationship would be renewed. The court therefore found that the employer's failure to renew the employment relationship constituted an unfair dismissal.³⁸⁸ Any claims made by employees for reasonable expectation must however be objective. In *Nobubele v Kujawa*³⁸⁹ the applicant had been employed on a fixed-term contract by an employer whose organisation depended on fixed-term grant agreements from the donor. The employee was on suspension pending an investigation into alleged misconduct when she received notice that her contract would not be renewed.³⁹⁰ After the termination of the fixed-term contract, the applicant claimed that she had been unfairly dismissed in that she had a reasonable expectation of permanent appointment or, in the alternative, that she had had a reasonable expectation of a renewal of the fixed-term contract.³⁹¹ The court held that no reasonable expectation could exist due to the temporary nature of the employer's business and the employee's suspension based on serious misconduct.³⁹² Prior to the amendment to section 186(1)(b) of the LRA, employees could also not simultaneously base a claim on two expectations, one of the renewal of their fixed-term contract, and the other of permanent employment.³⁹³

In *SA Rugby (Pty) Ltd v Commission for Conciliation Mediation and Arbitration*³⁹⁴ the Labour Court (LC) held that for purposes of section 186(1)(b), the onus was on the employee to establish the existence of a reasonable or legitimate expectation of the renewal of the employment contract.³⁹⁵ In short, it had to be determined whether a reasonable employee in the same circumstances as the employee would have expected the contract to be renewed on the same or similar terms.³⁹⁶ The expectation must have been created through the conduct of the employer.³⁹⁷ An employer's actions prior to the non-renewal of the fixed-

³⁸⁶ *SA Post Office Ltd v Mampeule* 2009 30 ILJ 664 (LC) para 46.

³⁸⁷ *Yebe v University of KZN* 2007 28 ILJ 490 (CCMA).

³⁸⁸ *Yebe v University of KZN* 2007 28 ILJ 490 (CCMA).

³⁸⁹ *Nobubele v Kujawa* 2008 29 ILJ 2986 (LC).

³⁹⁰ 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.

³⁹¹ 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.

³⁹² *Nobubele v Kujawa* 2008 29 ILJ 2986 (LC).

³⁹³ 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.

³⁹⁴ *SA Rugby (Pty) Ltd v Commission of Conciliation Mediation and Arbitration* 2006 27 ILJ 1041 (LC) para 44.

³⁹⁵ *SA Rugby Players Association v SA Rugby (Pty) Ltd* 2008 29 ILJ 2218 (LAC) para 44.

³⁹⁶ *SA Rugby (Pty) Ltd v Commission of Conciliation Mediation and Arbitration* 2006 27 ILJ 1041 (LC) paras 9.

³⁹⁷ *SA Rugby (Pty) Ltd v Commission of Conciliation Mediation and Arbitration* 2006 27 ILJ 1041 (LC) paras 9.

term contract are therefore of paramount importance and trump any express wording in the employment contract which states that the employee could not claim any expectation of renewal.³⁹⁸

From the above two recommendations can be made. First, employers must be careful to do or say anything (or act in any manner) that could create a legitimate expectation on the part of the employee that the contract would either be made permanent, or at least renewed for another period. Secondly, employers should refrain from employing employees on a series of fixed-term contracts for unacceptable reasons, such as, simply to avoid filling an existing employment vacancy of an indefinite nature. This has been submitted as depriving employees of dignity and from receiving benefits of employment of an indefinite nature, such as, promotion, training and employment security.³⁹⁹

Legislation in SA does not however explicitly limit the number of successive contract renewals allowed. It is recommended that an amendment to the LRA which provides for a definite limit on contract renewals could extend the necessary rights to fixed-term employees who are exploited in terms of a series of fixed-term contracts.⁴⁰⁰ All that the LRA currently provides for is that employers, when employing an employee on a fixed-term basis in excess of 3 months, must have a justifiable reason for such prolonged employment.⁴⁰¹ Despite the Act limiting fixed-term contract employment to the period of three months, it is recommended to note that the period allowed for a fixed term contract is not sustainable. The legislature had good intentions to limit fixed-term contract to three months, but such good intentions were ultimately denied due to the varied nature of employment contracts, the needs of different employment conditions and circumstances, etc.⁴⁰²

As far as *automatic termination clauses* are concerned, it is recommended that parties understand that there is still no full consensus on the lawfulness of linking the automatic termination of a fixed-term contract to the existence or cancellation of a third party commercial contract. An example of applying automatic termination clause has been discussed in *SATAWU Obo Dube v Fidelity Supercare Cleaning Services Group*⁴⁰³ where the employer terminated a service level contract with a labour broker which then resulted in the automatic termination of the employees' contracts.⁴⁰⁴ The approach towards automatic termination clauses varies. The preferred approach however seems to be that, to the extent that the automatic termination of

³⁹⁸ See *SA Rugby (Pty) Ltd v Commission of Conciliation Mediation and Arbitration* 2006 27 ILJ 1041 (LC) paras 12 and 13.

³⁹⁹ 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.

⁴⁰⁰ 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.

⁴⁰¹ As contemplated in Section 198B(3) and 198B(4) of the LRA.

⁴⁰² In terms of section 198B(4) of the LRA.

⁴⁰³ *SATAWU Obo Dube v Fidelity Supercare Cleaning Services Group (Pty) Ltd* 2015 36 ILJ 1923 (LC) para 30.

⁴⁰⁴ See 2.6.4 of chapter 2 of this research.

the fixed-term contract is triggered by the "occurrence of an event", and not by an employer's own decision or actions, there is no dismissal.⁴⁰⁵

Ultimately, all employers, including those in the TVET sector, are advised to review their employment policies in line with relevant legislation and statutes⁴⁰⁶ in order to address: (a) exploitation and vulnerability that is associated with non-standard employment arrangements; (b) insecurity and inequality that is associated with non-standard employment arrangements; (c) non-compliance with International Labour Organisation (ILO) standards; (d) unfair labour practices; and (e) eliminate tendency to bypass statutory obligations.⁴⁰⁷

The TVET sector has to advance its human resource strategies and policies to cater for improved management of fixed-term contract employment arrangements in line with the amended section 186(1)(b) and section 198B of the LRA.⁴⁰⁸ It is recommended that an annual assessment of the status of fixed-term employment utilisation in the TVET sector is conducted in order to ascertain discrepancies that are against the statutory obligation of the employer. The TVET sector should consider a full development programme for fixed-term contract employed employees⁴⁰⁹ by, for example, offering such employees bursaries to further their studies, and⁴¹⁰ providing them with equal access to opportunities to apply for permanent vacancies.⁴¹¹

4.5 CONCLUSION

Labour law at its core is primarily interested in the advancement of labour rights and justice so as to ensure that everyone is entitled to fair labour practices.⁴¹² Constitutional rights extend to all people in an employment relationship, irrespective of occupation classification or the nature of employment.⁴¹³ Though this research maintains that temporary employment allows enterprises to adjust their workforces to hanging

⁴⁰⁵ *SATAWU Obo Dube v Fidelity Supercare Cleaning Services Group (Pty) Ltd* 2015 36 ILJ 1923 (LC) para 30 [Also see *Enforce Security Group v Fikile* 2017 38 ILJ 1041 (LAC)].⁴⁰⁵

⁴⁰⁶ Joubert YT & Loggenberg B 'The impact of changes in labour broking on an integrated petroleum and chemical company: ActaCommercii' 2017.

⁴⁰⁷ As discussed in chapter 2 of this research.

⁴⁰⁸ As discussed in chapter 2 of this research.

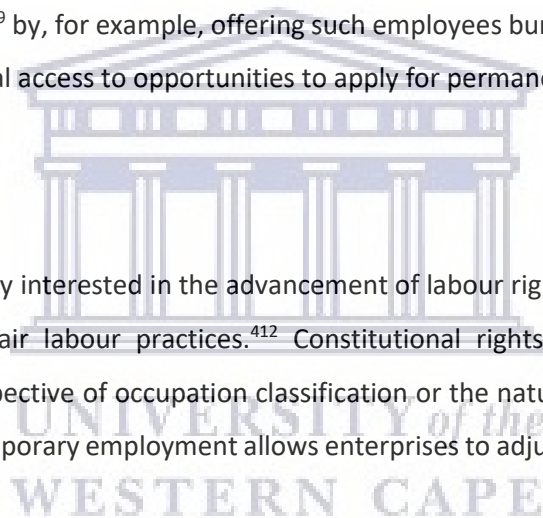
⁴⁰⁹ Section 198B(8)(a) of the LRA.

⁴¹⁰ As discussed in chapter 2 of this research.

⁴¹¹ Section 198B(9) of the LRA.

⁴¹² 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.

⁴¹³ As discussed in 2.5 of chapter 2 of this research.



circumstances,⁴¹⁴ thus providing for staffing flexibility,⁴¹⁵ such flexibility must not come at the expense of employees and their employment rights.

Many employers in South Africa have however continue to rely upon non-standard employment practices to bypass statutory obligations towards employees.⁴¹⁶ Due to unscrupulous employer actions many employees are subject to inferior and unequal terms and conditions of employment and lacks the security that is central to fair labour practices and decent work.⁴¹⁷ It has been argued that the principles of the ILO's decent work agenda is still far from being achieved in the TVET sector in SA due to the nature of the sector's operational demands which prioritise temporary or fixed-term work arrangements over permanent employment arrangements.⁴¹⁸ It is rarely disputed that fixed-term employees are deprived from access to all four pillars of decent work⁴¹⁹ as a result of commercial exploitation and they are mostly vulnerable to various injustices and insecurity.⁴²⁰

Subsequent to the 2014 amendments to the LRA employers are however now called upon to justify different treatment of atypical or non-standard employees.⁴²¹ The utilisation of fixed-term employment arrangements is no longer an option for employers if valid reasons cannot be furnished for the use thereof in terms of the LRA.⁴²² Through the introduction of section 198B into the LRA and the amendment to section 186(1)(b), fixed-term employees are now provided with increased job security and better employment conditions.⁴²³ It will be interesting to follow the courts' approach to the implementation of the amended section 186(1)(b) and newly introduced section 198B and to what degree the courts will be willing to extend the protection available to fixed-term employees.⁴²⁴



⁴¹⁴ILO 'Regulating the use of Temporary Contracts by Enterprises' 2016.

⁴¹⁵ILO 'Non-standard work and workers: Organizational implications: Conditions of Work and Employment Series No. 61' 2015:14.

⁴¹⁶Du Toit J 'Expectation of permanent employment' Available at <https://www.labourguide.co.za/latest-news-1/1536-fixed-term-contracts-and-the-expectation-of-permanent-employment>(accessed November 2018).

⁴¹⁷ILO 'South African Decent Work Country Programme' Available at <http://www.ilo.org/jobspact/resources/langen/docName WCMS 145432 /index. htm. 2621> (accessed 08 December 2018).

⁴¹⁸ As discussed in chapter 2 of this research.

⁴¹⁹ As discussed in 2.2. of chapter 2 of this research.

⁴²⁰ILO 'South African Decent Work Country Programme' Available at <http://www.ilo.org/jobspact/resources/langen/docName WCMS 145432 /index. htm. 2621> (accessed 08 December 2018).

⁴²¹ Section 198D(2) of the LRA.

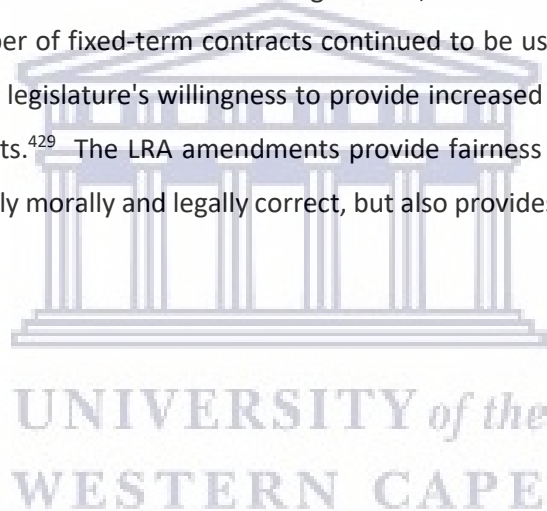
⁴²²Section 198B(4) of the LRA.

⁴²³ Huysamen E 'An Overview of Fixed-Term Contracts of Employment as a Form of a Typical Employment in South Africa' *PER / PELJ* 2019(22) – DOI.

⁴²⁴ Huysamen E 'An Overview of Fixed-Term Contracts of Employment as a Form of a Typical Employment in South Africa' *PER / PELJ* 2019(22) – DOI.

The amendments to the LRA hold that non-standard employment arrangements should be no less favourable than permanent employment arrangements.⁴²⁵ That being said, the LRA amendments have been criticised for affecting workforce flexibility through limiting temporary work up to a period of three months, unless there is a justifiable reason to embark on fixed-term employment for a period in excess of three months.⁴²⁶ While the LRA amendments introduced positive changes to the rights and protection afforded to non-standard employees, the impact of such amendments will largely depend upon the effective implementation and enforcement of these protective provisions.⁴²⁷ The amendments seek to provide a measure of regulated flexibility in an attempt to reconcile the principles of equity and efficiency.⁴²⁸

The TVET sector is unique in nature in that it largely has justifiable reasons for utilising fixed-term employment arrangements because of fluctuating student numbers. It is however legally required of all employers, including the TVET sector, to comply with the newly introduced section 198B of the LRA. If employers in the TVET sector ensure that they operate within the confines of section 186(1)(b) and section 198B, read with the provision of the PSA and the latter's Regulations, there should be no reason for the sector to be concerned with the number of fixed-term contracts continued to be used. At the end of the day it is however reassuring to note the legislature's willingness to provide increased protection for those engaged in vulnerable work arrangements.⁴²⁹ The LRA amendments provide fairness to fixed-term employees and providing such fairness is not only morally and legally correct, but also provides the foundation for long term sustainable growth.⁴³⁰



⁴²⁵As discussed in chapter 2 of this research.

⁴²⁶As discussed in chapter 2 of this research.

⁴²⁷Cohen T 'The Effect of the Labour Relations Amendment Bill 2012 on Non-Standard Employment Relationships' (2014) 35 *Indus. L.J. (Juta)* 2607.

⁴²⁸Cohen T 'The Effect of the Labour Relations Amendment Bill 2012 on Non-Standard Employment Relationships' (2014) 35 *Indus. L.J. (Juta)* 2607.

⁴²⁹ Huysamen E 'An Overview of Fixed-Term Contracts of Employment as a Form of a Typical Employment in South Africa' *PER / PELJ* 2019(22) – DOI.

⁴³⁰Thompson C 'The Changing Nature of Employment'(2003) 24 *ILI* 1793 at 1794.

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