

The regulation of successive fixed-term employment in South Africa: A quest for the right to fair labour practices*

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1 Introduction

It is generally acknowledged that fixed-term employment, as an example of flexible non-standard employment, plays a fundamental and influential role in the changed world of work of the 21st century.¹ The impact of specific challenges holds especially true for developed countries where it is estimated that people will live longer and remain dependent on pension, medical or social security schemes for longer periods.² Many will still be contributing to the economy long after others have retired.³ Companies invest on a global scale while labour cost remains one of the indicative factors that influence investment decisions at a local level.⁴ As such, flexible employment arrangements, such as fixed-term employment, remain attractive options that serve the interests of employers in lower employment costs. It is therefore safe to assume that in future the demand for non-standard employment will remain and probably grow. The question that remains to be answered is whether labour law in South Africa, within its limitations, presently provides the legal basis to reasonably protect employees' rights to fair labour practices and to equality where they are employed in terms of successive fixed-term contracts.⁵

The case for fixed-term employees as a particularly vulnerable group of workers, often not in a position to bargain on equal footing to protect their rights at the workplace, has been well articulated by many academics.⁶ Abusive practices such as successive fixed-term

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¹ Blanpain "Work in the 21st century" 1997 18 *ILJ* 185. Drawing from the views of Blanpain, consideration should be had to the "often underestimated impact" of factors such as globalisation, demographic changes and the growth of the information society.

² *Ibid.*

³ *Idem* 187.

⁴ *Ibid.*

⁵ See *NEHAWU v University of Cape Town* 2003 24 *ILJ* 95 (CC); 2003 5 *BLLR* 409 (CC) regarding the tension between the interests of workers and employers; Smit "Everything fixed about fixed-term contracts of employment: or not?" 2005 20 *TSAR* 200; Hepple "The future of labour law" 1995 24 *ILJ* 303 (<http://heinonline.org> (19-02-2014) also referred to by Barnard, Deakin & Morris (eds) 2004 in *The Future of Labour Law Liber Amicorum Bob Hepple QC* (2004) 1 and Benjamin "Decent work and non-standard employees: Options for legislative reform in South Africa: A discussion document" 2010 31 *ILJ* 845 846.

⁶ The LRAA 6 of 2014 came into effect on 1 January 2015. Section 37(c) came into force on 1st April 2015. (See *GG* 38317 No 10336 of 19-12-2014).

employment and unequal treatment have been globally recognised to impact severely on the life perspective of these workers as valuable members of society. It is therefore submitted that the rights to dignity, equality and fair labour practices fulfil a decisive role in the implementation of the decent work agenda and, importantly, towards securing the financial security of fixed-term employees in South Africa.⁷ Evolving debates on the scope of flexibility at enterprise level and the concomitant need for employment security can either swing the pendulum in favour of or against extended flexibility.⁸ Too much flexibility may imply that employers' interests mostly gain the upper hand while workers remain a "commodity".⁹ Consequently a strong argument in favour of the alignment of labour laws and standards not only as a theoretical basis, but as a practical guideline, has been offered in this article. Employment under these terms and conditions portrays the view that employment might after all still be a "commodity".¹⁰ The concluding remarks in this article focus on specific insights and recommendations gathered from international and supra-national law concerning the protection of fixed-term employees trapped in exploitive employment practices that offer nothing more than insecurity of employment and an infringement of a worker's rights to fair labour practices, equality and dignity.

2. *The South African legal position of successive fixed-term employment relationships and the right to fair labour practices*

2.1 Background

South African labour law, the primary guardian of employees' rights, has been transformed over decades, responding to the needs of workers employed in terms of a contract of employment. Various forms of non-standard employment emerged since South Africa joined

⁷ The South Africa Decent Work Country Program: 2010-2014 was launched by government, the ILO, representatives of organised business and labour and the community constituency on 29-09-2010 http://ilo.org/jobspact/resources/WMCMS_145432/lang--en/index.htm (29-07-2014). See the National Development Plan 2030: Our Future – Make it Work National Planning Commission ch 2 <http://www.poa.gov.za/Out-comes%2520Publications/National%2520Development%2520Plan.pdf> (29-07-2014).

⁸ See Vosko's views on the "standard employment relationship" (SER) in *Managing the Margins Gender, Citizenship and the International Regulation of Precarious Employment* (2010) 1. Vosko states that the SER, defined by a full-time continuous employment relationship where one worker works under the direct supervision of one employer, on the premises of that employer, with access to comprehensive benefits and entitlements "was never universal, nor was it ever meant to be. Not even at its peak ... was it accessible to all workers. Indeed the SER cannot be understood apart from its exclusions. It rests on them. In this regard it is necessary to analyse the "historical and contemporary management of a SER *at its margins*."

⁹ See s (1)(a) of the ILO Declaration of Philadelphia of 10 May 1944: "Labour is not a commodity."

¹⁰ With reference to an overview of the ground-breaking views of Sinzheimer and the first fundamental principle of the Declaration as discussed above. See Nogler "In memory of Hugo Sinzheimer (1875-1945): Remarks on the methodenstreit in labour law" 1996 *Cardozo Law Bulletin* <http://www.jus.unin.it.cardozo/review/Laborlaw/Nogler-1996/nogler.htm> (13/10/2013).

the era of globalisation and the adoption of a constitution based on certain values and guaranteeing certain rights. Of key importance are everyone's rights to fair labour practices, dignity and equality.¹¹ The transformation of labour law and the emergence of various forms of legal protection to promote, respect and uphold constitutional values and rights and the interests of non-standard employees became a regular topic of academic debate. Of special importance and relevance to the topic of this article is the right of employees engaged in successive fixed-term relationships to fair labour practices in South Africa. Notwithstanding the fact that the Constitution, legislation, collective agreements and case law impact to a large degree upon the contract of employment in South Africa, it is still characterised by a strong Roman-Dutch law foundation.

Academics in the field of labour law have for decades acknowledged that the freedom to negotiate the terms and conditions of employment contracts is in most cases founded upon a legal fiction of consensus as inequality between the parties places fixed-term employees in a weaker negotiating position. Fixed-term employees, in particular those employed in terms of successive fixed-term contracts, occupy positions renowned as uncertain and prone to abusive practices. Labour law therefore has a role to play in ensuring fair treatment of employees in these circumstances. Although the legislator has set out to do this, the scope and content of such protection may, however, be criticised for not going far enough.

Workers who cannot rely on a valid contract of employment, are nevertheless regarded as employees in terms of the wide definition of "employee" in labour statutes and have the right to fair labour practices. Labour law acknowledges the unequal employment relationship, generally regarded as *sui generis* in nature, as a ground to extend protection to employees in terms of the rights emanating from the fundamental right to fair labour practices.¹² As stated above, the contract of employment as a "juridical concept" with its complex connections to the economy and the social milieu of "industrial capitalism",¹³ emphasises the complex nature of employment regulation. The common law, however, focuses on the contract rather than the relationship between the parties.

¹¹ See Gericke "A new look at the old problem of a reasonable expectation: The reasonableness of repeated renewals of fixed-term contracts as opposed to indefinite employment" 2011 14 *PELJ* 4; Smit and Van Staden "The regulation of the employment relationship and the re-emergence of the contract" 2010 4 *TSAR* 702 and Smit "Towards social justice: an elusive and a challenging endeavour" 2010 1 *TSAR* 1.

¹² Both the *TzBfG* and the LRA in South Africa aim to increase the degree of legal protection of fixed-term employees in an unequal bargaining position, and to prohibit employees from abusing fixed-term workers in the context of unjustified discriminatory treatment. See s 14(1) of the *TzBfG* and s 198B(8)-(9).

¹³ Deakin "Workers, finance and democracy" in Barnard, Deakin and Morris (eds) *The Future of Labour Law Liber Amicorum Sir Bob Hepple QC* (2004) 91.

Another essential characteristic of any employment relationship is its unequal nature, a fact that labour law principles (in contrast to the common law) have acknowledged. The duration element of a fixed-term contract is in itself an indication of the power of employers. Employers control the duration of the contract and as such the automatic termination of employment regardless of contractual freedom. The inequality of the bargaining power between the parties, or the fact that fixed-term employees – generally acknowledged as the weaker bargaining party (especially in the absence of union membership and the benefit of collective bargaining) – could have a reasonable expectation of indefinite employment, is not a concern of the common law. As indicated in this article the Constitution, however, provides for the developing of the common law in order to give effect to fundamental rights where relevant.

Employers must prove that the contract is terminable, whether in terms of a specific calendar date or with regard to the completion of a specific task or project. Dismissal protection does not occur in the context of the common law. The common law protects the parties against breach of contract and affords the remedies of specific performance, cancellation and damages. In general, it has been acknowledged by academics that “the common law has not been at the forefront of worker protection, this role has been played by labour legislation”.¹⁴

2.2 The current legal protection and gaps

The legal position of fixed-term workers in South Africa, especially those employed in terms of multiple fixed-term contracts, has undergone fundamental changes in terms of recent amendments to the LRA and EEA.¹⁵ It is generally acknowledged that successive fixed-term contracts are used by employers as a vehicle to circumvent administrative and financial burdens as well as dismissal protection, generally perceived as too restrictive and in need of flexibility. In an attempt to address the high unemployment rate and the outcry for decent jobs, government and other role players have launched various initiatives to extend the scope of protection to employees who were perceived as particularly susceptible to abusive forms of non-standard employment. The South African Decent Work Country Programme (DWCP) 2010-2014, an initiative in co-operation with the ILO, has been considered as not having the

¹⁴ See Cheadle and Clark *International Labour Office National Studies on Workers-Protection Country Study: South Africa* National Study Workers-Protection South Africa 14 available at www.ilo.org/documents/publications/wcms_205379.pdf (30-09-2014).

¹⁵ See s 186(1)(b)(i)-(ii) and s 198B of the LRA. See s 6 of the EEA.

anticipated impact on job creation or the protection of labour rights.¹⁶ Recent amendments to the LRA and the EEA were, however, welcomed as a step in the right direction, extending the fundamental right to fair labour practices to many fixed-term employees. In order to evaluate the current scope and standard of legislative protection afforded to fixed-term employees in abusive employment practices, it is submitted that such an evaluation should be done with due regard to a substantive conception of the rule of law operating from a rights-based perspective in an unequal society. It must be kept in mind that section 7 of the Constitution states that the Bill of Rights is the cornerstone of democracy in South Africa.

The LRA serves as the main vehicle for introducing fairness as a requirement for the valid termination of an employment contract. The contentious issue of dismissal protection in the context of fixed-term employment is regulated in a unique way: The most recent amendments to the LRA¹⁷ in addition to the possibility of a dismissal in circumstances where a fixed-term contract is not renewed, or is renewed on less favourable terms, also provide for a dismissal where a fixed-term contract is not confirmed as a permanent contract in certain circumstances.¹⁸ As such, the *status quo ante* whereby the right to dismissal protection applied exclusively to employees who met the requirements of section 186(1)(b) of the LRA, excluding those who could prove a reasonable expectation of indefinite employment, can be considered as a conundrum of the past.¹⁹ This extended scope of protection is welcomed.

The position of employees who are susceptible to successive fixed-term employment contracts has also received the long-awaited attention from the legislature. Unfortunately, there remain a number of concerns regarding the scope of protection in the case of successive fixed-term contracts:

1. The fact that the extended protection in sections 198B and 198D excludes employees earning above the earnings threshold is a point of serious criticism.²⁰ No justification for

¹⁶ The South Africa Decent Work Country Program: 2010-2014 was launched by government, the ILO, representatives of organised business and labour and the community constituency on 29-09-2010 http://ilo.org/jobspact/resources/WMCMS_145432/lang--en/index.htm (29-07-2014).

¹⁷ In effect since 1 January, 2015.

¹⁸ Labour Relations Amendment Act 6 of 2014 (GG 37921/629 of 19-08-2014).

¹⁹ Dismissal protection in term of the unamended s 186(1)(b) excluded fixed-term employees who could prove that the employer created a reasonable expectation of indefinite employment on the same or similar terms and conditions while the employer only offered a renewal on less favourable terms and conditions, or not at all. It provided protection only to those employees who could discharge the onus that the employer created a reasonable expectation of a renewal on the same or similar terms and conditions, but was only prepared to offer such a renewal on less favourable terms or not at all. In *Swart v Department of Justice* 2003 7 BALR 802 (GPSSBC) par G-H, it was confirmed that repeated renewals of fixed-term contracts could result in “an obvious ground” for an expectation of further renewals.

²⁰ See s 198B(2)(a-c) of the LRA.

the decision to limit the protection of a vulnerable class of non-standard employees to a specific category is provided in the Memorandum. The fundamental right to adequate protection in terms of section 23 of the Constitution affords “everyone” the right to fair labour practices and decent working conditions, irrespective of income.²¹ The full extent of this right has not been afforded to those fixed-term employees who earn in excess of the present income threshold; and having regard of the relative low level at which the ceiling is set it is submitted that the protection falls short of what is reasonable or fair.

2. For the first time employers must justify the use of fixed-term contracts. However, the amendments to the LRA extend a wide scope of flexibility to all employers in terms of the numerous grounds, which are not a closed list, of justification for concluding fixed-term contracts, as opposed to indefinite employment, or to enter into successive fixed-term contracts with the same employee.²² In this regard, decisions taken by the CCMA and the Labour Court will undoubtedly play a decisive role in scrutinising an employer’s motives for engaging in a series of consecutive fixed-term contracts where the need for permanent employment is evident at the workplace.²³ It will take time to establish such guidelines which will inevitably result in a measure of legal uncertainty.
3. The amendments to the LRA do not limit the number of fixed-term contracts or the maximum duration of fixed-term employment between an employer and employee as long as the employer can show a justifiable reason for concluding or renewing a fixed-term contract. This raises the question whether different reasons may subsequently be used for renewing a fixed-term contract with the same employee and whether past contracts are relevant to establish abusive practices between the parties. The regulation of the renewal of fixed-term contracts in recent amendments to the LRA (section 186(1)(b) and section 198B) are not clear in this respect and more weight must be given to the protection of fixed-term employees. This would be the case if different reasons may be offered by an employer to renew successive fixed-term contracts of the same employee in

²¹ S 1 of the LRA states: “The purpose of this Act is to advance economic development, social justice, labour peace and the democratization of the workplace by fulfilling the primary objects” referring to s 27 of the interim Constitution 1993 and s 23 of the final Constitution, 1996 regarding the “right to fair labour practices”.

²² See ss 198B(2) and (4) of the LRA and s14 regarding the scope of inclusions and exclusions from the requirement of objective justification in terms of the *TzBfG* in Germany.

²³ See *Makoti v Jesuit Refugee Service SA* 2012 33 *ILJ* 1706 (LC) par 42, 45 where the renewal of a series of fixed-term contracts was dependent on funding and the availability of the post. The court held that the employee had a reasonable expectation of a renewal of the contract in correlation with the available funds. The employer’s failure to renew the fixed-term contract on that basis constituted an unfair dismissal. *In casu* the reasonable expectation doctrine was not upheld as the employee had been automatically unfairly dismissed on account of sexual harassment. In *Lempe and Kroon Gietersy & Staal* 2012 33 *ILJ* 2738 (BCA) 2741 the applicant could not benefit from a collective agreement concluded on behalf of fixed-term employees as the contract was concluded in contravention of the collective agreement.

the same employment position over an extensive period of time. Such renewal of successive fixed-term contracts must be regarded as one without merit. I also recommend that the past practice of successive fixed term contracts with the same employee should be evaluated and considered to establish whether such renewals display valid grounds for the renewal of the fixed-term position, as opposed to an indefinite one, or whether it merely reflects an abusive employment practice.

4. Section 6 of the EEA now addresses disparities between the income of male and female employees with reference to the application of the principle of equal pay for equal work or work of equal value.²⁴ It is submitted that this right should be equally applicable to employees in successive fixed-term employment relationships. Although a fixed-term contract plays a vital role in job creation and employers' need for flexibility, it should be borne in mind that it remains an instrument susceptible to abusive practices that infringes on employees' rights to equal treatment and protection before the law. Recent amendments to the EEA were made in response to criticism by the ILO in respect to the inadequate provision of legal protection afforded to employees with equal remuneration claims.²⁵ In addition, a Draft Code of Good Practice is considered to serve as a guideline to direct employers and employees with respect to the evaluation of equal pay for work of equal value and to promote remuneration equity at the workplace. It is unclear at this stage whether the Code will be of any help to fixed-term employees who earn unequal pay for doing the same or similar work as their colleagues in standard employment. The application of the principle of non-discrimination is especially relevant to protect employees caught in cyclical or enduring fixed-term employment in South Africa. Although there are no scientific studies in this regard, it is a well-known fact that employers in many instances discriminate against fixed-term employees with regard to the remuneration packages afforded to these non-standard workers who do the same or similar work as their co-employees on permanent appointments. If interpreted widely, as suggested above, regard the amended section 6(4) of the EEA, the right of fixed-term workers to equal treatment can now be uphold. The prohibition states that a "difference in

²⁴ See ILO Convention 100 (read with Recommendation 90) of 1951 on South Africa's obligation incurred on equal remuneration. Also see the application of the principle of equal treatment as regulated by clause 1(a)-(b) of Directive 1999/70/EC which corresponds with Article 9 of the Framework Agreement and the aim to extend equal rights in employment to men and women in fixed-term employment. Also see article 21(1) of the Charter of Fundamental Rights of the EU which requires objective justification when employers consider treating fixed-term workers less favourably than standard employees on the basis of the *pro rata temporis* principle. For an open-ended list of various forbidden grounds see article 21(1) of the Charter.

²⁵ See the Global Gender Gap Report – 2013 of the World Economic Forum regarding the position of South Africa and Germany on the Global Gender Gap Index 2013.

terms and conditions of employment between the employees of the same employer performing the same or substantially the same work, or work of equal value is a form of unfair discrimination prohibited on any one or more grounds of unfair discrimination listed in subsection (1)”. Sections 198B(8)-(9) (which afford fixed term employees employed for longer than three months the right not be treated “on the whole less favourably than an employee employed on a permanent basis performing the same or similar work, unless there is a justifiable reason for different treatment”, and to equal access to opportunities to apply for vacancies) and 198D(2) (allowing any party to refer a dispute in writing to the CCMA or the bargaining council with jurisdiction, within six months after the act or omission occurred) of the amended LRA, must be read together with this provision. It remains to be seen whether the nature of someone’s employment or employment status will be recognised by the courts as an arbitrary ground under section 6(4). If the section is interpreted too narrowly the provision will have very limited impact on employees employed in terms of successive fixed-term contracts. It would have been preferable to have a provision that expressly prohibited the payment of differential remuneration to standard and fixed-term employees due to such fact (i.e. the nature of their employment) alone. It is submitted that the EEA should not only focus on wage discrimination between men and women or workers of the same sex, but that fixed-term employees in successive fixed-term relationships should be protected as well. In this respect it is recommended that section 5 of the EEA will caution employers to implement measures to promote equal opportunities and prevent discriminatory policies or practices which would infringe upon successive fixed-term employees’ right to equality in this respect.

3 *A German perspective on the regulation of successive fixed-term employment*

A comparison can be drawn between the scope of protection provided by the *TzBfG* to protect the rights of fixed-term employees with regard to the abusive practice of successive fixed-term employment and the right to non-discrimination. The following realistic view of Weiss puts the process of law reform into perspective:

“The function of labour law, as well as the institutional arrangements which it creates, very much depend on the historical, political, cultural and economic context of specific countries and specific regions. Therefore, it

would not make much sense to speculate on the functions and institutions of labour law on a global scale, even if globalisation is advancing. This implies that the discussion on the future of [law reform] has to be embedded in a specific environment.”²⁶

One should be mindful of the fact that a comparison between different Acts from different legal systems cannot always offer a complete solution to shortcomings in another jurisdiction. This view finds resonance in the comment proffered by Weiss: “I have my doubts whether there is a universal approach to labour law.”²⁷ Different regions of the world have their unique legal systems and use different terminology in labour or employment law based on cultural, legal and political traditions. Hepple argues that the transformation and creation of labour law eventually will depend on two major forces, namely, “the power of capital and the countervailing power of organized labour and civil society”.²⁸ The integration of heterogeneous groups of workers and citizens in decision making are crucial to advance the process to protect their interests. These are people who work part-time or in terms of fixed-term contracts, or those who are employed through a temporary employment agency, who need to be acknowledged as partners, who should be represented by firm believers in those who can offer active involvement in decision making and the protection of employee’s rights and their dignity as valuable citizens of society. Perhaps Weiss describes it best: Although “labour law does not need to be reinvented”, now more than ever, the regulation of labour in the broadest sense needs to be respected and developed. Individual and collective instruments need to be regulated by “hard and soft law”, a combination of legally binding and non-binding law.²⁹ It is crucial that the interrelationship between employees and employers, based on open communication mechanisms and trust which are imperilled by severe strain in the process of adapting to new challenges, should be developed. With the decline in union membership, the question comes to mind whether the time is ripe for South Africans to reconsider the value of the rights based approach, not only for employment in general, but especially for the protection of the interest and rights of non-standard workers. Of course, this would necessitate recognition that a great number of workers are engaged in non-standard employment and *de*

²⁶ Weiss “The future of workers’ participation in the EU” in Barnard, Deakin & Morris (eds) *The Future of Labour Law Liber Amicorum Bob Hepple QC* (2004) 229.

²⁷ Weiss (“Re-inventing labour law?” in Davidov and Langille (eds) *The Idea of Labour Law* (2011) 43.

²⁸ Hepple “Labour law and the new labour force” in Gladstone (ed) *Labour Relations in a Changing Environment* (1991) 287, 288, 295. Hepple addresses three challenges for labour law, namely (i) the escalation of non-standard employment relationships; (ii) the changing gender and age composition of the workforce, and (iii) the shift from production industries to the services sector, especially where new technology is applied.

²⁹ Weiss (n 27) 56.

facto insufficiently protected, but much more significant, that an even greater number of workers are engaged in the unregulated informal economy.

The *TzBfG* continued to offer a complete and exclusive framework, already in existence at the time, for the regulation and protection of the rights of fixed-term employees to decent work.³⁰ Contrary to the regulation of fixed-term employment in South Africa by section 198B of the LRA, the *TzBfG* extends protection to *all* fixed-term employees without exclusions and the categorisation between high- and low-income fixed-term workers. Bearing in mind that the fundamental right to equal treatment should be evaluated in the context of each nation's historical and political background and employment policies regarding unemployment and the regulation of fixed-term employment in particular, valuable insights can be drawn from criticism by academic writers regarding the court's interpretation and application of Directive 1999/70/EC.³¹ Section 6 of the EEA, which gives effect to the constitutional right to equality, does not specifically protect successive fixed-term employees' right not to be subjected to discriminatory treatment on account of their status of employment contracts. It is therefore recommended that the amended section 6(5) which allows the Employment Equity Commission to identify factors that should be taken into account in assessing whether work performed by employees earning different income is of equal value, should in particular protect the right of successive fixed-term employees to equal treatment in the workplace, generally subjected to lower remuneration, while doing the same or similar work. The Minister of Labour, on the advice of the Commission, may publish a Code of Good Practice containing these factors. It is further submitted that the regulation of successive fixed-term employment, with reference to a limited number of fixed-term contracts within a certain period should be considered as a guideline in the Code. The legal position of fixed-term employees, who deliver an uninterrupted service by means of multiple successive fixed-term contracts, portrays an employment practice that does not uphold the value of human dignity, equality and justice as it infringes on an employee's right to fair labour practices. The need for employment security is prevalent in any strategy which strives to uphold and protect the rights of a class of vulnerable workers, deserving of better living prospects, especially in instances where employers still resort to successive fixed-term employment to avoid the costs of indefinite employment.³²

³⁰ See ss 1 and 3 of the German Constitution concerning the rights to dignity and equality.

³¹ Waas "Labour policy and fixed-term employment contracts in Germany" in Blanpain (ed) *Regulation of Fixed-term Employment Contracts A Comparative Overview* (2010) 87

³² See *Bianca Küçük v Land Nordrhein Westfalen* C-586/10 http://csdle.lex.unict.it/Archive/LW/EU%20social%20law/EU%20case-law/Judgments/20120126-055000_C_586_10enpdf.pdf (13-12-2014).

Another essential element of the *TzBfG* is the degree of flexibility afforded to employers to conclude successive fixed-term employment under specific conditions. It is strongly suggested that policymakers in South Africa can benefit from the example set by the regulated flexible approach. In this respect two aspects can be considered:

- (1) Firstly, to accommodate employers of newly-established enterprises. Section 14(2a) exempts employers from the justification requirement to enter into successive fixed-term contracts during the first four years of a newly-established enterprise. This degree of flexibility is likely to grant investors the necessary freedom to meet the challenges that results from the unpredictable economic and political realities of society. It is submitted that the South African economy and the unacceptably high unemployment figure can benefit from regulations that strive to maintain a balance between the protection of workers' rights and job creation.
- (2) Secondly, section 14(2)(a) of the *TzBfG* states that a term may be fixed according to a calendar period not exceeding two years and limited to a maximum of three renewals during a two-year period, provided that no employment relationship existed between the parties for at least three years preceding the conclusion of the fixed-term contract. It is submitted that the aforementioned prohibition on the conclusion of fixed-term contracts without a justification for a two-year period, based on a history of previous employment between the parties, for a minimum of three years preceding the conclusion of a fixed-term contract, is another example of regulated flexibility. Consequently parties are free to conclude a contract of indefinite employment or a justified fixed-term contract for any period exceeding two years.

It is submitted that the interpretation and application of Directive 1999/70/EC by the courts should be considered as a valuable source of comparison that might strengthen the newly introduced amendments to the LRA and successive fixed-term employees' right to equal treatment (as set out in the EEA) at the workplace. In the context of South African constitutional obligation, regard should be had to international law and foreign law to the extent that such law "promotes the values that underlie an open and democratic society, based on human dignity, equality and freedom".³³ Policy makers and courts can gain from these insights in the process of developing labour law as it pertains to fixed-term employees' rights

³³ See s 39(1)-(3) of the Constitution.

to fair labour practices and equality. In this respect it might be valuable to briefly refer again to the following judgments:

1. In *Mangold* the ECJ had to consider Directive 1999/70/EC on fixed-term employment and Directive 2000/78/EC on equal treatment. The court ruled that section 14(3) of the *TzBfG* which provided for the conclusion of *unlimited* fixed-term contracts to promote employment for older workers without an objective justification, breached the principle of non-discrimination on the grounds of age.³⁴ In 2005, section 14(3) of the *TzBfG* was amended to allow fixed-term employment for workers from the age of 52 years, provided that they have been unemployed for a minimum period of four months or longer, before entering into fixed-term employment for a limited period of five years, without providing an objective justification for such a decision. Criticism of advocate Tizzano's ruling focussed on the lack of recognition of and the balancing of employers' interests, as reflected in national and supra-national policy and employees' fundamental rights provided by national legislation.³⁵
2. However, in *Küçükdeveci* the same court confirmed the importance of finding a balance between the interests of employers which could result in a limitation of the right to non-discrimination in the context of Directive 2000/78/EC, provided that the employers' justification for such treatment is acceptable to the court. In *casu* the ECJ held that German law contravened the principle of equality and the minimum standard implemented by supra-national law.³⁶
3. In *Prigge* the same court held a provision of a collective agreement which obliged a pilot to retire earlier than the general retirement age of other workers, as being contrary to EU law. It was decided that air traffic did not constitute a legitimate justification

³⁴ Emphasis added. *Mangold v Helm* ECJ decision of 15.11.2005 – Case 144/04 [2005] ECR I-9981 (ECJ).

³⁵ See Sciarra "National and European Policy" in Davidov and Langille (eds) *Boundaries and Frontiers of Labour Law* (2006) 256-257. See also the view of Čapeta in "The advocate general: Bringing clarity to CJEU decisions? A case study of *Mangold* and *Küçükdeveci*" 2011-2012 14 *Cambridge Yearbook of European Legal Studies* 563-586. The author concluded that arguments and opinions offered by AG's in response to the decisions of the two cases, did not particularly contribute to explain the "unreasoned parts of the judgment". The author opined that contributions by academics are valued in the absence of the court's willingness to follow up on its own judgments. See Schmidt "The principle of non-discrimination in respect of age: Dimensions of the ECJ's *Mangold* judgment" 2006 7 5 *German Law Journal* 506 *et seq* available at [http://www.germanlawjournal.com/pdfs/Vol07No05/PDF_vOL_07nO_05_505-524_\(23-10-2013\)](http://www.germanlawjournal.com/pdfs/Vol07No05/PDF_vOL_07nO_05_505-524_(23-10-2013)).

³⁶ *Seda Küçükdeveci v Swedex GmbH & Co KG* C-555/07 see judgment of 2010 I – 00365 ECLI:EUC:2010:21).

within the meaning of article 4(1) of Directive 2000/78/EC, which prohibits discrimination on the grounds of age.³⁷

4. In an important decision with respect to the main aim of Directive 1999/70/EC and the *TzBfG*, namely, to prevent abusive treatment in the form of successive fixed-term employment, the court in *Bianca Küçük* confirmed the significance of clause 5(1)–(2) and the implementation of one or more of three proposed preventative measures. In this respect, the *TzBfG* which enforces measures already in existence at the time serves as an excellent source of comparison of protection for fixed-term employees beyond required minimum standards. The ECJ confirmed that s 16 of the *TzBfG* provides that an invalid fixed-term contract is deemed to be a contract of indefinite duration.³⁸

It is submitted that the number and the cumulative length of successive fixed-term contracts, as well as any past employment relationship between the parties, are aspects of particular relevance when evaluating abusive treatment of successive fixed-term employees in South Africa. The value and role of European law, as stated by Riesenhuber, have earned a central place in comparative law as “it especially serves as a model for employment policies with respect to the protection of fixed-term employees”. It is submitted that this opinion may also be true in the context of extending protection to fixed-term employees in South Africa.

14 Concluding remarks and recommendations

People’s participation in labour or work lie at the core of this research and in conjunction with this fundamental concept goes the following truth:

“Work is one of the most fundamental aspects in a person’s life, providing the individual with a means of financial support and, as importantly, a contributory role in society. A person’s employment is an essential component of his or her sense of identity, self-worth and emotional well-being.³⁹ Thus, for most people work is one of the defining features of their

³⁷See *Prigge & Ors v Deutche Lufthansa* AG13/09/2011:C-447/09 ECJ <http://curia.europa.eu/juris/liste.jsf?language=en&num=C-447/09> (04-11-2014). The labour appeal court in *SAA v Jansen van Vuuren and another* 2014 8 BLLR 748 (LAC) par 25 held that the appellant failed to justify the allegations of unfair discrimination on the ground of an inherent job requirement in terms of s 9 and 36 of the Constitution and s 6(2) and 11 of the EEA, which may be considered in the event of other considerations that may render a direct form of discrimination by the employer as fair.

³⁸ See s 198B(5) of the LRA.

³⁹ As per Dickson CJ noted in *Reference Re Public Service Employee Relations Act (Alta)* 1987 Canll 88 (SCC) 1987 1 SCR 313 368 par 38.

lives. Accordingly, any change in a person's employment status is bound to have far reaching repercussions"⁴⁰ (footnotes added).

In support of the aforementioned statement one must realise, as stated by Benjamin with reference to the Supiot Report, that the "challenges facing labour law can be grouped under the rubric of the need to move 'beyond employment'"⁴¹ Already in 2001, more than a decade ago, Supiot and Meadows with other lawyers and economists reflected on the reform of labour law in the context of the nature of the individual employment relationship.⁴² Various examples of "stable and flexible" forms of employment emerged "despite . . . divergent interests and often limited degree of trust, [between workers and management]"⁴³ The key characteristics of these new forms of non-standard employment were their open-ended nature pertaining to their duration and the tasks assigned to workers.⁴⁴ The value of the Supiot Report can be summarised as follows: The standard employment relationship does not fulfil contemporary needs of the labour market. The result is that contemporary labour protection which centred on the standard form of employment currently fails to protect the rights of workers falling outside the scope of standard labour protection ear-marketed for employees in standard employment relationships.⁴⁵ Of importance is the suggestion that employment status should be redefined to protect workers' rights in the interim – also between different kinds of employment. In other words, rights of all workers should be transferable under all kinds of employment relationships, irrespective of their status as workers.⁴⁶ Kalula, in support of the views of Davies and others, neatly captured the reality of the shortcomings concerning labour market regulation as follows:

"[S]ocial rights are not an agenda of the past. I would add that, in spite of a globalising world that expects countries to adapt and respond to new imperatives, the future of labour law in Southern Africa depends on going beyond 'borrowing an

⁴⁰ *Ibid* par 39.

⁴¹ See Benjamin "Labour law beyond employment" (2012) (n 20) 25 with reference to the Supiot and Meadows *Beyond Employment: Changes in Work and the Future of Labour Law* (2001) 221, a report prepared for the European Commission, widely referred to as The Supiot Report.

⁴² See Marsden and Stephenson (eds) "Labour law and social insurance in the new economy: A Discussion Paper and debate on the Supiot Report" 2001 <http://cep.lse.ac.uk/pubs/download/DP0500.pdf> (22/12/2014).

⁴³ *Idem* 2.

⁴⁴ *Idem* 3.

⁴⁵ *Idem* 4.

⁴⁶ *Idem* 7.

bending', to embrace the realities of deprivation and social needs".⁴⁷

In this article it has been contended that successive fixed-term employees in South Africa have a right to dignity, to fair labour practices and to equal treatment. What this means is that, in essence, fixed-term employees should be treated as respected stakeholders in the enterprise with reference to their valued qualitative and quantitative input in the success of the enterprise.⁴⁸ This challenge not only involves employers and employees and/or their representatives with each party presenting a diverse (and generally viewed as competing) outlook with regard to their interests. The DWCP 2010-2014 in South Africa, in co-operation with the ILO, has not delivered the anticipated impact on job creation or the protection of labour rights.⁴⁹ Recent amendments to the LRA and the EEA are welcomed as a step in the right direction, extending the fundamental right to fair labour practices to fixed-term employees, albeit with the exclusion of those fixed-term employees earning in excess of the income threshold and with limits to the nature of protection afforded. It is submitted that this dilemma lies at the heart of the challenge to unite the parties in the implementation of fixed-term employees' rights to dignity, fair labour practices and equal treatment at the workplace. Poorly treated fixed-term employees in successive employment relationships do not experience their rightful respect and appreciation as valuable stakeholders in the enterprise. What is needed is the incorporation of the interests of fixed-term employees that will result in similar treatment as that received by standard employees on indefinite contracts of employment.⁵⁰ This may be viewed as a social policy issue, but it is one that must be given effect to in the drafting and scope of legal regulation pertaining to fixed-term contracts of employment. In this respect it is submitted that policy makers and the legislator must include a limitation to the number of successive fixed-term contracts allowed between the same parties within a specific period of time, in future amendments to the LRA.

⁴⁷ See Kalula with reference to Davis, Macklem and Mundlak "Social Rights, Social Citizenship and Transformative Constitutionalism: A Comparative Assessment" in Conaghan *et al* (eds) *Labour Law in an Era of Globalisation: Transformative Practices and Possibilities* (2002) 534 in Kalula "Labour Market Regulation and Labour Law in Southern Africa" in Barnard, Deakin and Morris (eds) *The Future of Labour Law Liber Amicorum Sir Bob Hepple QC* (2004) 287.

⁴⁸ Deakin (n 13) 95.

⁴⁹ See the ILO's Decent Work Country Programme SA 2010-2014.

⁵⁰ See Bell "Between flexicurity and fundamental social rights: The EU Directives on atypical work" 2012 *European Law Review (ELR)* 31. With reference to the origin of the concept of "flexicurity" Bell acknowledges the ground-breaking work done in the Netherlands and Denmark as discussed by Wilthagen and Tros "The concept of 'flexicurity': A new approach to regulating employment and labour markets" 2004 10 *Transfer: European Review of Labour and Research* 166, in n 20 34.

It is recommended that regular worker information and consultation sessions as part of trust building and worker democratisation should flow from policy considerations. Weiss considers “active involvement of workers” as the sixth most important core aspect of labour law in his recognition of Sinzheimer’s contribution to the development of the primary elements of labour law:⁵¹ “If the employee is not to be treated as a mere object it is also necessary that the democratic structure of modern society is reflected in the employment relationship.”⁵²

The exercise of power by employers in the unequal bargaining relationship is a reality and a direct concern of labour lawyers. In his quest to research the comparative evolution of the employment relationship,⁵³ Deakin referred to the growing number of non-standard labour relationships that are excluded from the scope of protection afforded to workers in the historical context of the standard employment contract or relationship.⁵⁴ Concerns about the degree of inequality in the employment relationship have and will always be a universal challenge.⁵⁵ As stated by Deakin, “the task – which is no doubt difficult enough – is to challenge neoliberal and neoconservative dogmas which might otherwise become so deeply entrenched that only another upheaval of catastrophic dimensions could shift them”.⁵⁶ In an unequal society with great degrees of variance between the socio-economic positions of members of society, and I include South Africa here, this seems to be a chilling and apt warning.

Of particular importance for the outcome of this research is a proposed Code of Good Practice that offers guidelines within the framework of constitutional rights and values that could expand on the concept of “fair labour practices” for non-standard employees, in particular for the protection of successive fixed-term employees’ rights and on “justifiable reasons” for fixed-term employment. As indicated throughout the article the rights to dignity, equality and to fair labour practices are crucial with respect to the implementation of justice in society. It is submitted that such guidelines could play a valuable role to create a greater awareness of a feasible practice that could be beneficial to both parties provided that it functions within an open, honest and justifiable process, capable of endorsing and advancing

⁵¹ See Weiss (n 25) 44-45. The other four elements or pillars which support of the goal of labour law, as a tool to regulate the employment relationship are: 1) the protection of workers in an unequal bargaining position; 2) the individual dependency of workers for their financial and personal security on the employer; 3) the conservation of and respect for a worker’s human dignity as a person; 4) the management of the needs and risks.

⁵² See Weiss (n 26) 50.

⁵³ See Deakin (n 13) 89-108 89.

⁵⁴ *Idem* 89.

⁵⁵ As was pointed out *passim* in the article.

⁵⁶ Deakin (n 13) 91.

legal certainty within the fixed-term employment relationship, especially in employment conditions where the opportunity for multiple fixed-term contracts is inevitable and foreseeable.

It is submitted that decisions made in any matter concerning fixed-term contracts, whether made by bargaining councils, the CCMA or the courts, should prevent abusive treatment in the form of successive fixed-term employment in accordance with our underlying constitutional values and employers' duty to provide decent work and to eliminate discrimination in terms of section 5(1) of the LRA and section 6 (1) of the EEA, whether directly or indirectly "or any other arbitrary ground."

The following additional recommendations are offered in this article:

1. South Africa as a member state of the ILO must give effect to the values, ideals and obligations of international labour law in compliant and enforceable domestic instruments. Conditions of freedom and dignity, of economic security and equal opportunity are especially relevant to fixed-term employees abused in successive fixed-term employment and discriminatory practices. It is recommended that the protection of labour rights should not be viewed as an obstacle to investors. Policymakers must strive to maintain a degree of flexibility through negotiations to implement ILO standards where labour rights play a fundamental role in economic, social and political freedoms.
2. The value and role of European law has earned a central place in comparative law in the manner that it serves as a model for employment policies with respect to the protection of fixed-term employees in abusive practices such as successive fixed-term employment. I therefore recommend that the German model of regulating successive fixed-term contracts must serve as an example of how the South African legal position can be further improved to reach a successful balance between the degree of flexible working arrangements and the protection of labour rights for successive fixed-term employees in South Africa.
3. It is recommended that the number and the cumulative length of successive fixed-term contracts, as well as any past employment relationship between the parties, must be taken into consideration when evaluating abusive treatment of successive fixed-term employees in South Africa. Although a certain degree of flexibility is allowed to accommodate the renewal of a fixed-term employment position, the test to establish the merit of consecutive renewals should always be a dominant impression one. No

single factor should play a decisive role to establish the existence of an abusive practice. Factors such as the grounds (justification) for the renewal of the same employee's fixed-term contract in the same position without offering that employee indefinite employment, the financial position of the employer, the temporary or permanent need of the workplace to fill the specific employment position and specific attributes that an employee has to offer, which might be difficult to replace in the specific employment position, must be taken into consideration to evaluate each successive renewal practice on its own merits.

4. It is crucial to implement regular worker information and consultation sessions as part of trust building and worker democratisation. This should be incorporated into policy considerations at the workplace to assist workers and management to achieve and realise feasible views of the degree of equal treatment considered as reasonable and practical under the circumstances.
5. A proposed Code of Good Practice offering guidelines within the framework of constitutional rights and values, to implement the concept of "fair labour practices" for the protection of successive fixed-term employees' rights and on "justifiable reasons" for fixed-term employment is recommended.
6. It is recommended that fixed-term employees excluded in terms of section 198B(2) should enjoy the same right to equality than fixed-term employees employed for "longer than three months who may not in terms of section 198B(8) "be treated less favourably than an employee on a permanent basis performing the same or similar work, unless there is a justifiable reason". On a similar basis it is equally important that the right "to equal access" to apply for vacancies at the workplace in terms of subsection 198B(9), must apply in the same way to all fixed-term employees excluded in terms of section 198B(2) of the LRA.
7. It is recommended that section 198B should be amended in view of the fact that it does not meet constitutional standards and values to protect the excluded category of fixed-term employees. The need to secure decent employment for fixed-term employees plays a vital role in the protection of employees. Consequently, it is recommended that the drafting and scope of legal regulations pertaining to fixed-term contracts of employment must be given serious reconsideration by the legislature to include factors as set out above that might play a decisive role to distinguish between an abusive or justified renewal of fixed-term contracts. A limitation to the number of successive fixed-term contracts allowed between the same parties, and specific

guidelines to regulate the conclusion of multiple fixed-term contracts will not only enhance legal certainty but in addition protect the rights of fixed-term workers in an unequal employment relationship within the context of their right to fair labour practices and decent work.

To conclude, it is clear that our constitutional framework and values require of labour law to intervene where vulnerable workers are in danger of being abused and prejudiced. To this end the LRA and EEA have provisions that regulate the use of fixed-term contracts of employment in South Africa. To answer the question whether contemporary labour law in South Africa, within its limitations and in the context of recent labour law reforms, succeeds to provide a sound, clear legal basis for the appropriate protection of employees in successive fixed-term contracts is, however, a complex issue. Recent amendments form part of a “slow and often contested process” of transformation of national legislation.⁵⁷ In South Africa and elsewhere, basic minimum standards form the framework of protective measures for these vulnerable non-standard employees who aspire to employment security and to the promotion of their fundamental rights. Competing interests are discernible and fair labour practices and the right to equality sometimes are seen to compete with employers’ interests. Fixed-term employees face many challenges, including the reality of high unemployment in South Africa and the lack of employment security when working in terms of successive fixed-term contracts. As stated by Sciarra, to measure “standards in legislation on ‘flexibility’ can result in a paradox”.⁵⁸

Despite the complexities involved an appropriate balance must be achieved and the rights to fair labour practices and to equality need to be secured. This is necessary, not only in the context of fundamental rights but even more so with regard to labour laws, employment policies and preventive measures that ensure fair treatment and decent work for fixed-term employees. In achieving extended protection the legislator and labour courts should engage with the challenge to offer vulnerable fixed-term employees a life perspective similar to that of standard employees. Special attention must be paid to the prevailing lacunae which bar the full application of the right to fair labour practices to employees caught in successive fixed-term employment contracts in South Africa.⁵⁹ This article has set out to identify such lacunae and has made recommendations in order to address these gaps. In this regard it has been

⁵⁷ See Sciarra (n 35) 259.

⁵⁸ *Ibid.*

⁵⁹ See *NUMSA v Bader Bop (Pty) Ltd and another* 2003 3 SA 513 (CC); 2003 2 BLLR 103 (CC) par 37.

shown that valuable insights are available in other regions and jurisdictions, which may be informative when extending the protection available in terms of our common law and legislation.

