Introduction

Employment contracts in Kenya are generally for an indefinite period and are terminated either by notice or payment in lieu of notice; however, others exist for an agreed fixed period. The latter are more common in non-governmental organisations where budgets are based on donor funding, which is typically given in tranches of one, three or five years. In those sectors, employers prefer fixed-term to open-ended contracts as they enable them to avoid being saddled with the cost of maintaining employees that are no longer required upon the expiry of the grant or specific project for which they were employed.

The underlying understanding between the parties of fixed-term contracts is that that once the fixed period has ended, the contract is automatically terminated without any further liability on the employer's part on account of unfair termination or redundancy.

However, despite this apparently clear intention, Kenyan jurisprudence is awash with claims lodged by employees on the grounds that the non-renewal of such contracts amounted to unfair termination.

Fixed-term contracts

Fortunately, both the Employment and Labour Relations Court and the Court of Appeal have pronounced themselves robustly on the nature and legal effect of fixed-term contracts. The bottom line is that such contracts bind the parties to the fixed term specified therein and confer no rights of renewal unless agreed otherwise by the parties. Such contracts carry no rights beyond their expiry dates and employers are not obliged to issue a notice of termination or give any reasons for termination. Once the agreed term has ended, the contract expires with it and the employer has no obligation to justify the termination or provide reasons for non-renewal.

Where the contract provides that it may be renewed upon its expiry, it is incumbent on the employer to notify the employee prior to the expiry date that the contract will not be renewed. However, failure to give this notification does not amount to an automatic renewal because the renewal is a new contract which requires the parties' agreement on the terms. This may not apply only where the contract provides that it will automatically renew on the same terms unless either party expresses a contrary intention to the other in writing. In such case, the contract renews automatically unless either party has notified the other to the contrary.

Therefore, the courts will not infer a renewal of contract where none was intended by the parties. It is to be assumed that when employees sign a contract, they are aware that it is for a fixed term and that they will therefore not be entitled to any compensation if it is not renewed. The expiry of a fixed contractual period does not constitute an unlawful termination of the contract.
Legitimate expectation

Every rule has an exception and the principle enunciated above is no exception. There are certain situations when an employees may be able to successfully claim unfair termination if a fixed-term contract is not renewed – for example, where employees can prove that they had a legitimate expectation that their contract would be renewed. The courts have held that legitimate expectation is not a mere anticipation, wish, desire or hope. The expectation must be based on a cogent, rational and objective reason induced by the employer either expressly or by conduct.

A legitimate expectation can arise in various ways. For instance, where the contract provides that in the case of non-renewal, the employer will give the employee a certain length of notice prior to the expiry date. If such notice is not given, the employee may assume that the contract will be renewed. Similarly, where the contract period has expired but the employees continue to work and receive pay, the contract will be deemed to have been renewed on the same terms.

Repeated past renewals also create a legitimate expectation. If a contract has been renewed several times in the past, unless the employee is notified otherwise, they are entitled to assume that it will be similarly renewed. An express promise by the employer that the contract will be renewed has a similar effect. However, where the promise is conditional on certain deliverables being met (eg, satisfactory performance, continuation of funding or the execution of a new contract), the expectation is valid only if such conditions have been fulfilled.

Where a legitimate expectation has been proved, failure to renew the contract would amount to unfair termination. The burden lies on the employee to prove the existence of the legitimate expectation.

The rationale for the above legal position is that courts do not make contracts for parties, but merely interpret those contracts which parties themselves have voluntarily entered into. Accordingly, inferring an automatic renewal in a fixed term contract would amount to creating an indefinite contract which was not intended by the parties.

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