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# LEGAL ALERT

Vol. 03 | May 2023

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## LEGITIMATE EXPECTATION IN **FIXED TERM EMPLOYMENT CONTRACTS**

The Employment Act recognizes employment relationships as existing in the forms of a casual basis, **fixed term contract**, personal or open-ended term contract and probationary contracts. A fixed term contract is defined as a contract of service for a fixed or a definite period of time. So this kind of contract is distinguished from a permanent contract because it has definite commencement date and an end date on the contract.

Legitimate expectation in renewal of fixed terms has not been defined nor expressly provided for in our **Employment Act**. The concept has however been the subject of various decisions of the Employment and Labour Relations Court. Since the concept has not been clarified through legislation, the Courts have to heavily rely on decided cases when faced with a claim arising from legitimate expectation. There have been quite a number of decisions emerging on the subject and we shall unpack and discuss the key ones.

The Courts in Kenya have held that there may be instances with unique circumstances where an employee may have a legally enforceable expectation for the renewal of the contract despite having a clear end date. The burden of proof in a legitimate expectation claim is always on the employee. The employee must demonstrate that the employer led the employee to legitimately expect that there would be a renewal of the contract.

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The general rule held by various decisions of the Employment and Labour Relations Court of Kenya is that that a fixed term contract does not carry any expectation of renewal beyond the term specified in the contract. The Court have developed several exceptions to this general rule to provide for instances when legitimate expectation for renewal of a fixed term contract can arise. On 17<sup>th</sup> December 2021, the Court of Appeal in the case of **Keen Kleeners Limited vs Kenya Plantation and Agricultural workers' Union** discussed in length some of these exceptions. The Court held that the long standing, uninterrupted and consistent practice of renewing or extending fixed term contracts could have led the employees to believe that their contracts would be renewed. More so in the absence of any reasonable notice of non-renewal given by the employer.

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Some other exceptions that have been developed from past decided cases by the Court include repeated renewals, extended service beyond the

period provided for in the fixed term contract, promises of renewal by the employer and where the employee fails to issue a notice of renewal. However, the presence of these elements is not to be taken as conclusive proof of legitimate expectation. Legitimate expectation should also not be confused with anticipation, hope or desire. In determining whether there exists a legitimate expectation for the renewal of a fixed term contract, the Court in **Teresa Carlo Omondi vs Transparency International- Kenya [2017] eKLR** emphasized that the merits of each case must be considered and the nature of the employment relationship must be analyzed to consider whether there exists a rational and objective reason for the employee's expectation. The representation underlying the expectation must be clear and unambiguous. The expectation must also be induced by the decision maker who must have authority to renew.

The Court was satisfied that the employee had legitimate expectation that the contract would be renewed for reasons that there was a promise for renewal subject to fulfillment of certain conditions that were met by the employee. The employee performed satisfactorily and the Court noted that her services were still required by the employer.

The above decision was however appealed by the employer in the Court of Appeal which affirmed the position that there can not be a legitimate expectation of renewal of fixed term employment contract. The Court of Appeal on 17<sup>th</sup> February 2023 held that the doctrine of legitimate expectation does not arise in the renewal of a fixed term contract and its non-renewal can not constitute unfair termination or dismissal. The Court observed that the employer had not made any representation or any promise that the employment contract would be renewed to be relied upon by the employee. The Court further opined that the scenario would have been different if there was an indication by act or omission from the employer to indicate that the renewal was forthcoming to stimulate the employee's appetite that the contract would be renewed and hence rely on the doctrine of legitimate expectation.



## DETERMINATION

*The Court of Appeal decision removes the obligation on the employer to provide justification for termination at the expiry of the fixed term contract. It further gives an employer the discretionary power to renew or not to renew a fixed-term contract. An employer must adhere to the timelines should there be a Notice period in the contract.*

Employers must ensure that fixed term employment contracts are worded clearly to avoid ambiguity and refrain from including renewal clauses or wording that could be construed as a promise of renewal of the contract.

It should be noted that the Court of Appeal position can be challenged in the Supreme Court should the employee be dissatisfied with the said decision. Since the issue has become a recurrent cause of employment disputes, perhaps our Employment Act could be amended to incorporate the concept of legitimate expectation.

### DISCLAIMER

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