# Are fixed-term school governing body employment contracts for educators the best model for schools?

**Jaco Deacon**
*LLB LLB LLD*
*Deputy Chief Executive Officer of FEDSAS, Research Fellow, Department of Mercantile law, University of the Free State, South Africa*

**OPSOMMING**

**Is Vastetermyndienskontrakte vir Opvoeders in Beheerliggaamposte die Beste Model vir Skole?**

Weens departementele begrotingstekorte en groeiende behoeftes in skole is dit vandag algemene praktyk dat skoolbeheerliggame aanstellings uit skoolfondse finansier. Indien ʻn beheerliggaam 'n aanstelling maak, is die skool die werkgewer, en nie die tersaaklike departement van onderwys nie. Die belangrikste gevolg hiervan is dat arbeidswetgewing, en nie net wetgewing spesifiek uitgevaardig vir die onderwys nie, die werksverhouding reguleer. Uit FEDSAS se omgewingsontleding van ledeskole blyk dit dat 28 % van opvoeders en 52 % van nie-opvoeders deur beheerliggame aangestel word. 'n Groot persentasie van hierdie aanstellings is vir 'n vaste tydperk en beheerliggame voer verskeie redes aan waarom dit die beste model is. Daar is geen statutêre beperkinge op die sluit van termynkontrakte nie, en in die meeste gevalle is dit weens praktiese oorwegings die enigste opsie vir skole. Begrotings word jaarliks opgestel en goedgekeur, waarná 'n beheerliggaam die aantal poste vir die volgende jaar vasstel. Versuim om 'n vastetermynkontrak te hernu was nog altyd 'n omstrede aangeleentheid. Indien daar gedurende die dienstermyn 'n verwagting van 'n voortdurende verhouding geskep is, sal die versuim om die kontrak te hernu ooreenkomstig artikel 186(1)(b) van die Wet op Arbeidsverhoudinge op ontslag neerkom. Die tydperk van afwagting is uit die aard van die saak 'n stresvolle tydperk vir die opvoeder wat gepaard gaan met werkonsekerheid en finansiële bekommernis wat 'n nadelige invloed op die opvoeder se onderrig kan uitoefen. Hierdie artikel ondersoek die aard en wenslikheid van diensooreenkomste tussen skool beheerliggame en opvoeders en kom tot die gevolgtrekking dat die vastetermynkontrak nie teenoor die reg van die opvoeder gestel behoort te word nie, maar dat daar na die praktiese oorwegings binne skole en die beste belang van leerders gekyk word binne 'n raamwerk van goeie beheer en bestuur.

## 1 Introduction

Due to departmental budget constraints and schools' growing needs, it is currently common practice for School Governing Bodies (SGBs) to finance additional staff appointments out of school funds.[1] Since the quality of an education system cannot exceed the quality of its educators; as set out in the McKinsey Report on World School Systems;[2] SGBs invest a lot of money in additional educators in order ensure that quality education is provided.

When a governing body appoints additional staff members, the public school, and not the relevant department of education, acts as employer.[3] The most important consequence of such appointments is that the employment relationship is governed by labour laws[4] instead of by merely the Employment of Educators Act[5] as is the case with educators employed by the State. As employer, the school, via its SGB, thus has to comply with all the requirements set by labour legislation.

Before any appointments can be made, governing bodies must determine their schools' particular needs as well as the extent of available funds. In this regard, it is important for SGBs to take note of the requirements contained in section 20(4) to (10) of the South African Schools Act (SASA). These requirements can be briefly summarised as follows:

(i) Section 20(4) – a school may establish additional posts for educators.

(ii) Section 20(5) – a school may establish additional posts for non-educators.

(iii) Section 20(6) – persons who are employed in any of the afore-mentioned posts must comply with the employment requirements set in any other applicable law. (Persons who are appointed as educators must for example hold the required qualifications.)

(iv) Section 20(7) – persons can only be employed as educators if they have been registered as such with the South African Council of Educators.

(v) Section 20(8) – persons who are appointed must be employed in compliance with the basic values and principles envisaged in section 195 of the Constitution of the Republic of South Africa, 1996 (the Constitution). Factors that should be taken into account when making appointments include the candidate's ability, the principle of equity, the need to redress past injustices, as well as the need for representivity.

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1 S 20 SASA: "(4) Subject to this Act, the Labour Relations Act, 1995 (Act 66 of 1995), and any other applicable law, a public school may establish posts for educators and employ educators additional to the establishment determined by the Member of the Executive Council in terms of section 3(1) of the Educators' Employment Act, 1994."

2 McKinsey & Company *How the world's best performing school systems come out on top* (2007) 43 available online at http://www.mckinsey.com/App_Media/Reports/SSO/Worlds_ School_Systems_Final.pdf (accessed 2010-02-17).

3 Even though the governing body is often informally referred to as the employer, or people often speak of governing body appointments, staff or posts, s 20 SASA clearly provides that the school, and not the governing body, is the employer. The governing body is merely an organ of the school as juristic person. Also see s 3(4) of the Employment of Educators Act 76 of 1998 (EEA).

4 The Labour Relations Act 66 of 1995 (LRA); the Basic Conditions of Employment Act 75 of 1997; the Compensation for Occupational Injuries and Diseases Act 130 of 1993; the Occupational Health and Safety Act 85 of 1993; the Unemployment Insurance Act 63 of 2001; the Employment Equity Act 55 of 1998; the Skills Development Act 97 of 1998, and the Skills Development Levies Act 9 of 1999.

5 76 of 1999.

(vi) Section 20(9) – when presenting the annual budget for parents' approval, the governing body must provide sufficient details with regard to any envisaged additional posts, the estimated costs relating to such additional posts, as well as the manner in which such costs will be met/ covered.

(vii) Section 20(10) – The State is not liable for any act or omission flowing from the school's contractual responsibility as the employer in respect of staff employed by the school additional to the state's establishment.

## 2 Appointments Made by School Governing Bodies

SGBs may appoint additional educators[6] and non-educators (for example administrative staff, terrain staff or sports coaches). These appointments may be made for an indefinite period of time or fixed-term.[7] SGBs may also employ a person to work less than 24 hours per month, for example a sports coach, who coaches only five hours per week. This employee category is excluded from several labour laws.

### 2 1 Permanent Appointments

Through such an appointment, the governing body commits itself for an indefinite period of time. Such an employment relationship may be terminated on three grounds only, namely misconduct by the employee, the incompetence or unsuitability of the employee, or the employer's operational requirements. The employment relationship could also be contractually terminated when the employee reaches retirement age.

### 2 2 Fixed-term Appointments

This type of employment contract is entered into for a fixed period of time only, for example a specific school year. Fixed-term appointments are particularly suitable in cases where the future availability of funds is not a foregone conclusion. Through such a contract, the governing body commits itself for a particular period of time to receive the educator into service and to pay a particular amount of remuneration. The employment relationship ceases to exist at the end of the contract period.

6 As per the definition in s 1 EEA, "educator" means "any person who teaches, educates or trains other persons, or who provides professional educational services, including professional therapy and education psychological services, at any public school ...".

7 The non-renewal, or renewal on less favourable terms, of a fixed-term employment contract constitutes a dismissal in terms of s 186 LRA if a reasonable expectation was created with the employee that the contract would be renewed.

In order to ensure that all parties fully understand their exact rights and responsibilities, it is of the utmost importance that all employees have written contracts.[8] The Basic Conditions of Employment Act[9] should form the basis of such a contract, with specific adaptations to suit the education sector.

## 3 FEDSAS Environmental Analysis

From the FEDSAS[10] environmental analysis of member schools, it appears that 27,45 % of educators and 52,44 % of non-educators in South African public schools are appointed by SGBs.[11] A large number of these appointments are for a fixed term, usually a particular academic year.

The distribution of educator and non-educator posts in FEDSAS schools* is as follows:

| | Number of educators | | % educators | | Number of non-educators | | % non-educators | |
|---|---|---|---|---|---|---|---|---|
| | Dept | SGB | Dept | SGB | Dept | SGB | Dept | SGB |
| Gauteng | 378 | 130 | 74,41 | 25,59 | 199 | 122 | 61,99 | 38,01 |
| KZN | 1 114 | 549 | 66,99 | 33,01 | 470 | 522 | 47,38 | 52,62 |
| Limpopo | 588 | 230 | 71,88 | 28,12 | 186 | 209 | 47,09 | 52,91 |
| Mpumalanga | 739 | 294 | 71,54 | 28,46 | 169 | 247 | 40,63 | 59,38 |
| North West | 507 | 245 | 67,42 | 32,58 | 141 | 211 | 40,06 | 59,94 |
| Northern Cape | 656 | 179 | 78,56 | 21,44 | 324 | 161 | 66,80 | 33,20 |
| Eastern Cape | 375 | 128 | 74,55 | 25,45 | 102 | 143 | 41,63 | 58,37 |
| Free State | 2 148 | 556 | 79,44 | 20,56 | 579 | 716 | 44,71 | 55,29 |
| Western Cape | 852 | 472 | 64,35 | 35,65 | 300 | 286 | 51,19 | 48,81 |
| Total | 7 357 | 2 783 | 72,55 | 27,45 | 2 470 | 2 617 | 48,56 | 51,44 |

*Based on survey responses regarding the number of posts at each school

The table above shows that more than 70 % of educators are remunerated by the Education Department, while the majority of non-educator posts (51 %) are paid by SGBs. Just under 80 % of the educators in the Free State are remunerated by the Education Department, while the highest percentage of educators who are paid by SGBs are employed in the Western Cape.

8 FEDSAS has standard contracts for all possible forms of appointment that are available to members free of charge.
9 75 of 1997.
10 Federation of Governing Bodies of South African Schools.
11 FEDSAS *FEDSAS Environmental Analysis* (2009) 8.

There are no statutory restrictions on concluding fixed-term contracts,[12] and, in most cases, practical considerations render it the only option for schools. School budgets are drafted and approved on an annual basis in terms of section 38 of SASA. This is done after the Provincial Education Department has published the post establishment for the next year,[13] following which the governing body determines the number of posts for the next year. Beforehand, the governing body must determine the school's particular needs as well as the extent of its available funds for staff salaries and remuneration. SGBs need to consider all the above-mentioned factors before deciding on the terms of the employment contracts, as remuneration might constitute one of the most expensive items on the budget. As the number of learners, the departmental post establishment and income might differ from year to year,[14] SGBs may not be able to enter into long-term employment agreements.

## 4 The "Renewal" of Contracts and the Legitimate Expectation

Consequently, most SGBs have adopted the practice of entering into fixed-term employment contracts only, and merely "renewing" them when possible for the next year. In strict technical terms, the contract is not renewed, a new contract is rather entered into for a following fixed term. However, the problem arises when an educator's contract is not "renewed". Awaiting the renewal or not of an employment contract, is a very stressful period for the educator as it leads to job and financial insecurity which may also have a negative effect on the educator's performance in the classroom. Such an educator is however not without remedy.

The termination of an employment contract under certain circumstances, such as summary dismissal for serious misconduct, has always been regarded as dismissal.[15] However, the definition of a dismissal in the Labour Relations Act[16] (LRA) provides that termination of employment without notice also constitutes dismissal. Until recently, an employer could terminate the services of employees by merely giving them notice for the period required by the employment contract, legislation or a collective agreement. The employer was not required to provide a valid and fair reason, or to follow fair procedure.[17] In terms of

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12 Grogan *Workplace Law* (2010) 189.
13 See *FEDSAS v MEC for Basic Education* (unreported case 60 of 2011 in the Bisho High Court of the Eastern Cape, Bisho, delivered on 2011-02-22, available at http://www.fedsas.org.za/downloads/8_44_2_FEDSAS%20v%20 MEC%20EASTERN%20CAPE.pdf (accessed 2013-03-20)).
14 SGBs should also avoid retrenchment procedures in light of the matter *Buthelezi v Municipal Demarcation Board* [2005] 2 BLLR 115 (LAC).
15 Du Plessis & Fouche *Practical Guide to Labour Law* (2008) 266.
16 66 of 1995.
17 S 8(6) Shops and Offices Act 41 of 1939

the definition, however, an employer is now obligated to comply with the requirements of substantive and procedural fairness.[18]

Failure to renew a fixed-term contract has always been a controversial matter. A fixed-term contract is entered into for a specific period and is based on the principles of the law of contract. Such a contract automatically terminates upon the expiry of that period. However, the Industrial Court refused to accept this principle in the case of the automatic renewal of a fixed-term employment contract, and based its decision on the continuous nature of the employment relationship.

The Industrial Court[19] found that it is, essentially, about a legitimate expectation.[20] If, during the term of employment, an expectation of a continuous relationship has been created, failure to renew the contract would constitute dismissal. In *South African Veterinary Council v Greg Szymanski*,[21] Cameron J stated that mere confusion is no basis for a legitimate expectation.[22] To substantiate his decision, Cameron referred the judgment of Heher J in *National Director of Public Prosecutions v Phillips*,[23] namely that "the law does not protect every expectation but only those which are 'legitimate'". The requirements for an expectation to be legitimate were set to be as follows:[24]

(i) The representation underlying the expectation must be 'clear, unambiguous and devoid of relevant qualification';
(ii) The expectation must be reasonable;[25]
(iii) The representation must have been induced by the decision maker;[26] and
(iv) The representation must be one which it was competent and lawful for the decision maker to make without which the reliance cannot be legitimate.[27]

With regards to an expectation being reasonable, Van Niekerk[28] states that there is no single factor that defines what is reasonable in every case and that the test applies to determine the existence of the reasonable expectation is an objective one and requires an examination of all relevant factors.

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18 S 193 LRA.
19 *Administrator Transvaal v Traub* (1989) 10 ILJ 823 (A).
20 See the definition of "legitimate expectation" in *Administrator Transvaal v Traub* (1989) 10 ILJ 823 (A).
21 Supreme Court of Appeal unreported case 79/2001 (2003) ZASCA 11 (2003-03-14).
22 Par 18: "Still less can misinterpreting the words or actions of an authority give rise to a legitimate expectation".
23 2002 4 SA 60 (W) par 28.
24 Par 28.
25 *Administrator, Transvaal v Traub* 1989 4 SA 731 (A) 756I-757B.
26 *Attorney-General of Hong Kong v Ng Yuen Shiu* (1983) 2 All ER 346 (PC) 350h-j.
27 *Hauptfleisch v Caledon Divisional Council* 1963 4 SA 53 (C) 59E-G.
28 Van Niekerk *Unfair Dismissals* (2008) 21.

## 5 Labour Relations Act 66 of 1995

The vagueness and confusion with regard to the legitimate expectation was finally addressed with the drafting of the LRA. Section 186(1) of the LRA defines "dismissal" as follows:

> 'Dismissal' means that:
> (a) ...
> (b) an employee reasonably expected the employer to renew a fixed-term contract of employment on the same or similar terms, but the employer offered to renew it on less favourable terms, or did not renew it ..."

Consequently, an employer (public school) is effectively dismissing an employee (educator) if the employer does not renew a fixed-term contract, although an expectation has been created that the contract would indeed be renewed, or if the employer does renew the contract, but on less favourable conditions than before.[29]

However, Cameron J warned in the *National Director of Public Prosecutions* case that it is worth emphasising that the reasonableness of the expectation operates as a pre-condition to its legitimacy. The first question is factual, namely whether the expectation sought to be relied on, is reasonable in all circumstances. That entails applying an objective test to the circumstances from which the applicant claims the expectation arose.[30]

The SGB is however bound by a number of external factors to employ educators on a more permanent basis, and should always act in the best interests of the school on the other hand. This could include the duty to contract the best possible educators for as long as possible.

A fixed-term contract does not offer the best job security for the educator, and the annual uncertainty and negotiations may have a negative effect on the educator's morale and performance.

On numerous occasions, the courts considered the non-renewal of fixed-term contracts, and without exception demanded that the employees prove that they had had a reasonable expectation that the contract would be renewed. For example, an expectation is created if contracts are automatically renewed every year; if employees are promised that they will have jobs the following year, or if forward planning is linked to a person instead of a post.

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29 In *SARPA obo Bands v SA Rugby (Pty) Ltd* [2005] 2 BALR 227 (CCMA) the commissioner ruled that the relevant factors such as contractual provisions, undertakings by the employer, past practices and the reason for entering into the agreement must be considered.
30 Supreme Court of Appeal unreported case 79/2001 (2003) ZASCA 11 (2003-03-14) par 21.

If such employees are then not re-appointed, they may refer an unfair-dismissal dispute to the Commission for Conciliation, Mediation and Arbitration (CCMA).

## 6 Dispute Resolution

The employer is obligated to maintain discipline, promote stability and job security, as well as to ensure the fair and equitable treatment of all employees. If there is a dispute between the SGB and the employee, the internal process must be followed before any external procedures can take effect.

### 6 1 Internal Process

In terms of the Constitution, everyone has the right to fair labour practices.[31] This right is further qualified in the LRA, more specifically by stating that everyone has the right not to be unfairly dismissed.[32] This includes the non-renewal of a fixed-term contract.[33]

For a dismissal to be fair, the employer must ensure that the process is both substantively and procedurally fair.[34] Substantive fairness deals with the reason for dismissal. In terms of the LRA, there are but three valid grounds for dismissal, namely:

(a) a fair reason related to the employee's conduct;
(b) the employee's incapacity or incompetence; or
(c) the employer's operational requirements.

The fairness of the reason for dismissal is determined based on the facts of the matter as well as the suitability of dismissal as sanction.

In order to determine whether the dismissal has taken place in accordance with a fair procedure, the relevant *Code of Good Practice*,[35] issued in terms of the LRA, should be taken into account.

The Code is a general one, and does not distinguish between different employer types or sizes.[36] It is not a law that has to be strictly complied with, but merely serves as the employer's guide. Primarily, the employer is responsible for discipline in the workplace, and therefore, certain guidelines for conduct in the workplace are needed, as well as provision for a fair procedure to deal with discipline. The key principle in this Code

31 S 23(1) Constitution.
32 S 185 LRA.
33 S 186(1) LRA.
34 Even if the dismissal complies with any notice period contained in a contract of employment or a law regulating the employment relationship.
35 Sc 8 LRA.
36 Van Jaarsveld & Van Eck *Principals of Labour Law* (2002) refers to the fact that the key principal of the *Code* is that employers and employees should treat one another with mutual respect, with the premium being placed on both employment justice and the efficient operation of the business.

is that employers and employees should treat one another with mutual respect. While employees should be protected from arbitrary sanction, employers are entitled to satisfactory conduct and work performance from their employees.[37]

The fairness of the procedure is determined based on the guidelines in the Code.

In cases where the dismissal is not automatically unfair, the employer must prove that the reasons for dismissal relate to the employee's conduct or capacity, or are based on the operational requirements of the employer. If the employer fails to do that, or fails to prove that the dismissal was effected in accordance with a fair procedure, the dismissal is unfair.[38]

## 6 2 External Process

The principal difference between governing body appointments and departmental posts is that two different dispute resolution forums apply. All disputes within the Education Department are referred for adjudication to the Education Labour Relations Council (ELRC). Disputes between SGBs and governing body appointees must be referred to the CCMA. The external dispute process with regard to governing body posts is regulated by the LRA.

Section 191 of the LRA deals with disputes regarding unfair dismissal. In short, the procedures are as follows: If the fairness of a dismissal is disputed, the dismissed employee may refer the dispute in writing to the CCMA within 30 days of the date of dismissal.[39]

If the employee shows good cause at any time, the dispute could also be referred after the 30-day period has already lapsed. The employee must serve a copy of the referral on the employer. The CCMA must first attempt to resolve the dispute through conciliation. Only thereafter, the CCMA may certify that the dispute remains unresolved. If 30 days have expired since the referral, and the dispute remains unresolved, the CCMA must arbitrate the dispute at the request of the employee. Employees could request arbitration only if they allege that the reason for dismissal is related to their conduct, suitability or capacity; if they allege that the employer made continued employment intolerable, or if they do not know the reason for dismissal.[40]

Section 192 of the LRA provides that, in any dismissal proceedings, the *onus probandi* (burden of proof) to establish the existence of the

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37 Sch 8 par 1(3) LRA.
38 Sch 8 par 2(4) LRA.
39 CCMA form LRA 7.11 is used for referral, and is available at the CCMA offices or http://www.ccma.org.za (accessed 2013-03-20).
40 This is an informal process in which the party is assisted by a CCMA commissioner to try to settle the matter. No legal representation is permitted during this step.

dismissal rests upon the employee. If the existence of dismissal is established, the burden of proof is reversed: Then, the employer must prove that the dismissal is fair.[41] If a dismissal is found to be unfair, the employer may be ordered to pay compensation[42] or to reinstate the employee.[43]

## 7 What Should the Employer do to Prevent an Expectation from Being Created?

The management of fixed-term contracts is the school principal's responsibility, and the governing body must adopt the necessary policy to create the framework within which the principal could do so.[44] This includes that there must be good administrative systems in place for staff management. The governing body could take the following decisions or steps:

(a) Governing bodies should adopt a policy stating that no contract will be 'automatically renewed'.
(b) Governing bodies should adopt a policy stating that all fixed-term contracts terminate on 31 December every year. (The exception is where governing bodies have enough funds to enter into longer-term contracts.)
(c) Available posts must be advertised only following the adoption of the next year's budget. (This advertisement may be internal, external or both.)
(d) Employment contracts should be entered into annually by not later than November for the ensuing year.
(e) The governing body and principal may not make any promises to any employee, and vacancies should be filled only after due process has been followed.
(f) Forward planning must be linked to posts and not persons.
(g) The payment advice must clearly indicate how many months are left before the contract term expires.
(h) The principal must regularly meet with all staff, and policy, contract terms and advertisements must form part of the agenda.
(i) If the school's budget and funds allow longer-term contracts, and the particular post is an essential and ongoing post at the school, the governing body should seriously consider entering into such longer-term contract.

Grogan argues as follows:

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41 Once again, fairness refers to substantive and procedural fairness, as discussed above.
42 A maximum of 12 months' compensation may be granted for unfair dismissal, and 24 months' for an automatic unfair dismissal. Also see s 193 LRA.
43 If the relationship of trust between the parties has however been irrevocably harmed; the circumstances surrounding the dismissal are such that a continued employment relationship would be intolerable, or if it is not reasonably practicable for the employer to reinstate or re-employ the employee, such order shall not be issued after the parties have been heard.
44 The FEDSAS website www.fedsas.org.za (accessed 2013-03-20) contains a number of documents on this topic.

The case law indicates that a number of circumstances favour acceptance of employees' claims that they expected fixed-term contracts to be renewed. The two most obvious considerations are past practises and prior promise. Logic indicates that the more frequent an employer has renewed a fixed-term contract in the past, the more reasonable is the employee's expectation that the employer will continue to do so in future. This is not to say that an employer is not permitted to renew a fixed-term contract; it merely becomes more likely that repeated renewals would reinforce the impression that the employment relationship has de facto become permanent – and also lend credence to the employees' claim that they viewed the relationship as permanent.[45]

## 8 Conclusion

Governing bodies are clearly hesitant to commit to long-term employment contracts. Fixed-term contracts certainly hold certain benefits for employers, but they also have a number of disadvantages. The most important arguments in this regard are set out below:

The benefits are:

(1) Fixed-term contracts allow employers to get rid of employees more easily if the 'reasonable expectation' is properly managed, without having to go through any procedures prescribed in the LRA for misconduct or poor work performance.
(2) Employers work with the available funds in a budget, which is annually approved and adopted.
(3) Employers never need to follow dismissal procedures in the case of retrenchment due to operational requirements, and, therefore, also do not have to pay severance packages.
(4) Schools know (or should know) how many departmental posts are available for the following year, and can budget and plan accordingly.

The disadvantages are:

(1) In the longer term, employees' work performance and morale may be affected by their insecurity about their jobs and income.
(2) Fixed-term employees may not necessarily be as loyal as permanent employees.
(3) Employers must manage the process meticulously and guard against creating expectations.
(4) Usually, the labour turnover is higher for temporary employees than for permanent employees, resulting in a frequent intake of new employees or a very young workforce.

From a labour law perspective, one could argue that the fixed-term contract is the best model for SGBs.[46] However, the most important

45 Grogan *Workplace Law* (2010) 190.
46 Grogan 189: "The use of fixed-term contracts obviously provides an easy way for employers to evade statutory provisions pertaining to dismissals and employment security." In *Biggs v Rand Water* [2003] 24 ILJ 1957 (LC) 1961A-B, the court stated: "S 186(b) was included in the LRA to prevent the

question that needs answering certainly is what would be in the school and the learners' best interests. The governing body stands in a position of trust towards the school, and must serve the interests of the school when appointing additional staff. This adds a whole new dynamic to the labour law perspective and labour law arguments.

The argument that the governing body prefers to make only fixed-term appointments due to uncertainty about sufficient funds is not entirely sound, as the LRA does in fact provide for dismissal due to operational requirements based on finance. There is no reason for a school to be treated differently from a business. Often, businesses have no indefinite income guarantees. However, this does not prevent them from making full-time appointments. One should however take note of the *Buthelezi v Municipal Demarcation Board*[47] judgement in the Labour Appeal Court, where the court made it very clear that employers may not retrench employees for operational reasons if they are on fixed-term contracts, and that, if they do so, they may be liable to contractual claims for damages for the balance of the contract period. In practice, this will mean that all educators on fixed-term contracts will have absolute protection against any retrenchment for the full period of their contracts.

The argument that the Department's post provisioning to the school may change, which may result in too many staff at the school, with parents having to bear the extra costs, seems to have merit. However, the LRA provides for this, and employers may dismiss employees in the case of restructuring. (The reason, therefore, does not relate to a budget deficit.) This argument must now be read against the backdrop of the McKinsey report.[48] Although it may be convenient for the employer (school governing body) to enter into fixed-term contracts, it is not necessarily in the school's best interests, as the most valuable asset in the classroom is indeed the teacher. Therefore, all governing bodies should attempt to appoint the best educators, and remunerate them as best they can. Governing bodies should invest in their educators by exposing them to further training and development opportunities, and pension and medical benefits should be considered to make these posts as attractive as possible and to retain educators.

Trying to keep labour within the school context as cheap as possible each year is irresponsible and does not serve the school's interests. The nature of the fixed-term contract should therefore not be juxtaposed with the educator's rights, but the practical factors within the school and the best interests of learner education must be considered. This should in no way be purported as a blanket rejection of fixed-term contracts in a school context, but the rationale behind these contracts must be

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unfair practice of keeping an employee on a temporary basis without any employment security until it suits the employer to dismiss such an employee without any unpleasant obligations imposed on employers by the LRA in respect of permanent employees".

47 [2004] 25 ILJ 2317 (LAC).

48 McKinsey & Company *op cit*.

considered. Several schools appoint excellent educators for many years on a fixed-term basis, even allowing these educators pension-fund benefits. Therefore, proper governance and management seem to be the key to responsible decisions about the nature of employment contracts at a particular school.

Former president Nelson Mandela said that education is the most powerful weapon that you can use to change the world: “Education is the great engine of personal development. It is through education that the daughter of a peasant can become a doctor; that a son of a mineworker can become the head of the mine; that the child of farm workers can become the president of a country.”[49]

The core business of any education institution is to educate, and this can only take place if there is an educator to do the work. SGBs should therefore do everything possible to minimise any negative influence on the education process, including uncertainty about contracts.

SGBs should therefore debate the effectiveness and appropriateness of fixed-term contracts or permanent contracts for educators, and consider all the factors at the specific school. If they do decide to enter into fixed-term contracts, they must consider the length of the contracts, and are not necessarily bound by a specific financial year. The SGB must then ensure that the process and management of these contracts are in place and in line with the human resource policy of the school, and that regular feedback is given at SGB meetings.

It is always easier to appoint employees than to dismiss employees. Therefore, the governing body must ensure a proper appointment process, but also a good management system to control and manage educators – the school’s most important assets – appropriately and in the school’s best interests.

49 Available online at http://www.brainyquote.com/quotes/keywords/education.html (accessed 2011-03-04).