Comprehensive Guide to Unfair Dismissal: Fixed-Term Contract

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If a worker is employed under a" fixed-term" contract, and the employer allows the contract to expire and terminates the worker, that may amount to an unfair dismissal.

The key question is whether the contract was genuinely a fixed-term or short-term contract which the worker was aware of at the time he entered the contract, or whether the worker was actually indefinitely employed and the employer was using the "fixed-term" contract merely as a label/disguise to limit his obligations to the worker.

If the contract is a genuine fixed-term contract, when the contract period ends, the employment relationship ends, and there is no legal duty or obligation for the contract to be renewed. However, if the contract was only 'fixed-term' in form but not substance, and the worker was actually indefinitely employed, then allowing the contract to expire and ending the employment relationship would be a dismissal.

TD No. 216 of 2001 Banking, Insurance and General Workers Union v Royal Bank of Trinidad and Tobago

H H Khan, President, held that: "A worker who serves an employer pursuant to a fixed-term contract is a worker within the meaning of the IRA unless specifically excluded by law. Further, it is well settled that a failure to renew a fixed-term contract upon its expiry can be a dismissal which is harsh and oppressive or not in accordance with the principles of good industrial relations practice.

TD Nos. 48 and 188 of 2015 Oilfields Workers' Trade Union v University of Trinidad and Tobago Limited

HH Thomas-Felix, President, stated: "While normally and without more, there is no legitimate expectation in law for the renewal of a fixed-term contract and therefore an employer has no duty or obligation to a worker at the end of the term of such a contract, which expires with the effluxion of time in accordance with the principles of good industrial relations practice, the Court must examine the facts of each trade dispute to ascertain the true nature of the contract of employment which exists between the parties to determine whether the contact of employment is fixed-term in nature or of an indefinite duration."

TD No. 21 of 2015 Banking, Insurance and General Workers Union and Tobago House of Assembly

It is neither fair, nor just and it is certainly not in the interest of the Worker who is the person immediately concerned or the community as a whole, or in accord with equity, good conscience and the principles and practices of good industrial relations…for an employer to deprive a Worker of the protection of the law by the colourable device of successive renewal of a fixed term contract over a period of years…we hold that we are not constrained by the label placed by the parties on the contractual relationship. This is only one consideration. What is important is the reality of the course of dealings between the parties and the principles and practices of good

industrial relations in general. This is the overriding consideration to come to an understanding of the true legal nature of the relationship.
The Court is guided by the principles and practice of good industrial relations in its determination of whether or not the expression “fixed-term” is a label or a disguise, or whether it is a genuine fixed-term arrangement between the parties…
“What an industrial tribunal must do is to ensure that the case is a genuine one where an employee has to his own knowledge been employed for a particular period, or a particular job, on a temporary basis…At one end is the plain case where a person, for example, a school teacher, is employed to fill a gap where somebody is absent, and it is made plain at the moment of engagement that he is only being employed during the period of absence of the person he is temporarily replacing. At the other end is the case of the employee who is engaged on a short fixed-term contract, perhaps described as ‘temporary’, in an employment where, as a general rule, the employees are engaged on a weekly basis and where there is no particular end served by the employment being arranged in the manner in which it has been. In between, there will be every possible variety of case…The great thing is to make sure that the case is a genuine one, and for industrial tribunals to hold a balance. On the one hand, employers who have a genuine need for a fixed-term employment, which can be seen from the outset not to be ongoing, need to be protected. On the other hand, employees have to be protected against being deprived of their rights through ordinary employments being dressed up in the form of temporary fixed-term contracts.”

TD No. 97 of 2003 Transport and Industrial Workers’ Union v National Maintenance Training and Security Company Limited

“The Union asserted that the worker was interviewed for the position of Clerk which is a permanent position, and she was appointed to work as a Clerk. The Company argued that the worker was employed on a temporary basis (on a 3-month contract) as a Clerical Assistant to assist in clearing a backlog which existed at the time. The Company stated that there exists a policy within the Company of employing extra workers to perform specific tasks for specific period from time to time. These workers are temporary workers, and their jobs are not among the jobs listed in the Collective Agreement…the worker was employed as a temporary worker by the Company, and she knew or ought to have known this. Further, that there is no duty on the part of the company to confirm the worker to a permanent status after three (3) months since she cannot be regarded as a worker on probation for the purposes of the provisions of the Collective Agreement. The Court held that in all of the given circumstances when the worker’s term of employment expired in March 2002 there was no duty on the Company to extend her employment for a further period. We held that “the decision for the Company not to rehire her and/or extend her term for a further three months cannot be considered unreasonable, harsh or oppressive and it is not contrary to good industrial relations practices.”

GSD-MPD NO. 003 of 2012 OWTU v Ministry of Education; The Chief Personnel Officer

The Worker was initially employed on a three year contract with the Employer. At the end of that first contract, the parties continued their employment relationship and the Worker entered into a second contract for a further term of three years.

During the period of her second three year contract, the Worker became pregnant. When she proceeded on maternity leave, she did not receive the full maternity leave benefits of 13 weeks because the Employer said that her contract was expiring and they could only pay benefits up to the expiration date of the contract. The employer argued that the Worker's contract was for a fixed term which ended with the effluxion of time…

The Court held:

Contracts of employment for fixed terms have become commonplace in the workplace in this country, and, more and more, the Industrial Court is called upon to make pronouncements on the legal import of these contracts in the industrial relations context.

In the general sense, there are particularities of a fixed term contract, such as, it is for a particular purpose which is discharged by performance, and also, that both parties end the arrangement at the end of the term of the stated contract. When the Court examines a contract, including those which have been labelled as "fixed term", what is of paramount consideration, is the true legal nature of the employment relationship which exists between the parties and not the label which the parties may use to describe their relationship. It is therefore important for us to lift the veil or to remove the label which has been ascribed to this employment contract to determine the true nature of the relationship between the CPO and the Worker.

In Industrial Relations, when a Worker is employed on a bona fide fixed term contract this type of employment is usually considered as "temporary" or "casual work". Employment of this type may happen for various reasons; there might be a need to fill a gap for someone who is absent or pregnant, there might be uncertainty about the duration of the job, or there might be a need for a short engagement for that position at that moment, among other things.

When we examine the evidence of the employment relationship between the parties in this Trade Dispute, we note that the Worker was initially employed on a three year contract and she continued to be employed on several successive contracts for varying periods with the Ministry. Throughout her employment with the Ministry, she performed the same functions and the same duties as she did [under the first contract]. Some thirteen (13) years later, when this dispute was listed for hearing by the Court, the Worker was still employed at the Ministry where she was still performing the same duties and functions and the job continued to exist. The only difference, which is superficial, is that the job title has changed…

The reality is [when the worker took maternity leave], there was not one three year fixed term contract between the parties but a six (6) year continuous and seamless employment relationship. During that six year relationship the job remained the same and the Worker performed the same functions at the Ministry.

The Worker applied for maternity leave towards the end of her second three year contract. Simply put, the application was made in the sixth year of her employment with the CPO, in the latter part of a second three year contract, in what can only be considered an indeterminate employment relationship.

A worker who has been employed under successive contracts, and for whom this Court cannot determine a definite end date of employment, cannot be given the same consideration for leave benefits as, for example, a person who is employed on a very short fixed term contract…

The Court found that:

- the Worker was employed in the same job for six (6) years and that she performed the same functions at work for the entire period;

- the labelling of this contract as “fixed term” was a disguise to hide the true employment relationship;
- that the Worker had been employed continuously on successive contracts for an indeterminate period;
- that the Worker is entitled to the same maternity rights and benefits as a permanent worker in the same circumstance.

The exercise which a Court undertakes to ascertain whether a contract is fixed-term or not, is a fact finding exercise. The Court scrutinizes the evidence about the nature of the employment in order to ascertain the true relationship which the parties to the contract shared over time.

In determining whether a contract of employment is a genuine fixed-term contract, the Courts have to discern:

- whether the employee knew that he/she had been employed under a contract for service for a particular period and/or to do a specific job on a temporary basis;
- whether the nature of the initial employment relationship changed; or
- whether the employment is a contract of service and therefore it is permanent employment for an indeterminable period.

Successive Contracts

In some of the employment relationships, a person is employed on several successive contracts which span a number of years. This person is usually employed to do the same job, and to perform the same duties and functions for the entire period of the employment arrangement. Additionally, he/she may be employed on terms similar (if not identical) to his/her co-workers, in a job which continues to exist after the employment relationship has ended. Yet, the employer regards and labels this type of employment as “fixed-term”.

When it has been determined that a contract did not end with the effluxion of time, but it is indeed permanent employment which is disguised as a fixed-term contract, the Court removes the veil and the label which parties have ascribed to the relationship and applies the principles and practice of good industrial relations, prescribed by the IRA, to determine the fair and just resolution of the dispute.

TD No. 21 of 2015 Banking, Insurance and General Workers Union v Tobago House of Assembly

“A court should be particularly vigilant when an employee works for several years under a series of allegedly fixed-term contracts. Employers should not be able to evade the traditional protections of the ESA and the common law by resorting to the label of ‘fixed-term contract’ when the underlying reality of the employment relationship is something quite different, namely continuous service by the employee for many years coupled with verbal representations and conduct on the part of the employer that clearly signal an indefinite-term relationship.”

Describing the job as temporary or a ‘fixed-term’ contract is just one factor to be considered. The reasonable expectation of the employee as to the likelihood of renewal is another factor that has to be considered. The considerations to be weighed in finding if the Worker had a reasonable expectation of renewal:
(1) Whether it was the ordinary kind of short-term fixed contract, based on the kind of work the employee is employed to do and where he is employed to do it as well as the manner in which workers similarly situated are treated;
(2) Whether there was a genuine purpose for organizing the employment relationship on a temporary fixed-term basis;
(3) Whether the purpose for organizing the employment relationship on a fixed-term basis is either obvious or clearly brought to the attention of the employee at the time the relationship commenced and there is no subsequent contrary course of conduct that would undermine this understanding;
(4) Whether the purpose in fact came to an end because the task he was employed to do was completed or the post was abolished or funding expired or the kind of work that the worker was engaged to do is no longer available.
Also:
1) It is not sufficient for the employer merely to show that the employee had signed what may be a regular relationship ‘dressed up’ as a fixed-term contract. This must be supported by the other circumstances of the case so that there can be no basis upon which the employee could contend that he had a reasonable expectation of renewal.
2) The burden of proof will initially have to be discharged by the employer by presenting evidence of the details of the reasons for not renewing.
3) There must be consultation and communication when making the decision regarding non-renewal; it must comport with good industrial relations practice. The implied duty of respect, trust and confidence must be fulfilled.

RSBD No 4 of 1996 OWTU v Schlumberger Trinidad Inc.
The worker was initially employed as a ‘casual worker’; he worked continuously for 2 years until the Company switched him to a ‘temporary worker agreement’ for which he had to sign six-month contracts. He worked continuously under these 6 month contracts, with a gap of not more than a week or two between the expiry of one and the signing of another, and during those gaps he worked as a ‘casual worker’ for the company. There were no breaks in his services over a period of more than 10 years. When the last contract expired, he continued as a ‘casual worker’ until the company informed him that due to a downturn in its activities it was not possible for the Company to renew his contract.
The Court held:
“Is to be employed on a series of successive fixed term contracts the same as to be employed “on a specified fixed term basis” for the purposes of s3(1)(e)[RSBA]?”... “Can s3(1)(e) apply to a worker who is employed on a specified fixed term basis for a period of 20 years?” We do not think so... a worker who is employed by the same employer (or a successor) on a series of successive fixed term contracts does not fall within the exception in 3(1)(e) of the Act. Any other interpretation would be subversive of the intent and purpose of the legislation [Retrenchment & Severance Benefits Act]. It would render the legislation absurd if its purpose could be subverted

by a device as transparent as that employed by the Company in relation to the Aggrieved…We therefore find that the Aggrieved had been a worker in continuous employment with the Company…and order that severance benefits be calculated…and paid.

Month to month contracts

TD No. 250 of 2012 Public Services Association of Trinidad and Tobago v Housing Development Corporation

H H George-Marcelle examined what was referred to as "month to month contracts" and noted:-
Three workers in this case were terminated; however, special importance is paid to a worker, who was first employed with the NHA as a CSR in or around the year 2002. She worked continuously on a series of fixed-term contracts of employment and subsequently for the HDC. Three months prior to the end of her contract, the worker gave notice in writing of her desire to have her contract renewed, pursuant to Clause 15 of the contract. The Worker was advised that her services would be retained on a month to month basis until advised in writing. The worker was then dismissed.
"The month to month contract created in the minds of the workers a legitimate expectation that their original contracts of employment would have been renewed. Under the circumstances, the Court had no other choice but to determine that a new contract of employment had begun and the services of the workers were subsequently terminated in a harsh and oppressive manner not in keeping with good industrial relations practices."

TD Nos. 48 and 188 of 2015 Oilfields Workers' Trade Union v University of Trinidad and Tobago Limited

After two consecutive three year contracts ended, the worker continued to be employed by the University on a month to month basis, performing the same functions as he did under the previous contracts.
The worker was employed on two consecutive three year contracts with no break in service at the end of the initial contract. The first contract ended and during the period when there was no contract in place, the worker continued to be employed without any interruption or break in service until the commencement date of the second written contract. The full effect of this arrangement is that the worker continued uninterrupted for more than six years and at variance to the terms of his written contracts. The University has not properly explained to the Court why the worker continued to be employed uninterrupted at the end of one contract for some three months before a new contract was in force and further, why, when the second contract ended, did he continue to work on what has been described as a "month to month contract" with the same terms and conditions as in the contract.
The Attorney-at-Law for the University argued that the worker was on fixed-term employment which expired and he then continued to be employed on a "month to month" contract; this month to month contract was not in writing. We are at pains to ascertain what is meant by a "month to month" contract in this context, when the reality of the employment relationship between the parties for more than 7 years is that there was continuous service by the worker and the verbal

representations from the management of a further renewal with a salary increase. This can only be defined as an indefinite term arrangement dressed up as fixed-term employment.

Performance Appraisals

The use of performance appraisals is not consistent with fixed-term employment, and thus if an employer uses performance appraisals that is a factor that may show that the relationship is actually one of indefinite employment.

TD Nos. 48 and 188 of 2015 Oilfields Workers' Trade Union v University of Trinidad and Tobago Limited

"A performance appraisal is usually done if there exists a contract of service between the parties and it is used as a tool to assist the employer in the evaluation of a worker's performance. It is curious that in this case, a performance appraisal was done under what the University considers to be a contract for services, namely as part of fixed-term employment…"

TD Nos. 384 of 2010 Oilfields Workers' Trade Union v Chief Personnel Officer, Ministry of Education

The Employer referred to a number of judgments both local and foreign and also Halsbury readings in its Closing Submission in support of its case that the workers were on fixed-term contracts which naturally came to an end with the effluxion of time and contained no claims for automatic reemployment or for automatic renewal. However, in this instance, there were distinguishing facts between the instant matter and the authorities under reference.

The distinguishing factors are:

i) the number of contracts;

ii) the completed performance appraisal of the workers and the recommendation to renew the contracts, and

iii) the precedent established in the past to renew the contracts on the basis of the performance appraisal.

In previous years, the appraisals were done in order to renew contracts and the contracts were renewed on that basis…. Indeed, without more, the precedent has been established and is applicable for all such future instances relative to the renewal of contract…Moreover, the question arises as to the reason for requiring performance appraisals of purportedly contract workers. The answers are two-fold, namely: i) for an increase in salary, an event which rarely takes place, and/or ii) for continued employment.

We know for a fact that there was no increase in salary, for whatever reason. By a process of elimination, it is therefore for the purpose of continued employment.

Retirement in Fixed-Term Contracts?

Termination based on retirement and the provision of retirement benefits are inconsistent with genuine fixed-term contracts which end with the effluxion of time.

TD Nos. 48 and 188 of 2015 Oilfields Workers' Trade Union v University of Trinidad and Tobago Limited

HH Thomas-Felix: The University implemented a new policy which made the age of retirement for non-academic staff sixty-five (65) years.

The Court reasoned that:

"The question arises whether a retirement policy which does not exist as a term in a fixed-term contract can be included during the life of the contract without prior agreement or consultation. The University cannot on the one hand say that there exists a fixed-term contract, the terms of which are binding on parties and which comes to an end with the effluxion of time and that the parties are confined to operate within the terms of that contract, then on the other hand, say that there is a retirement policy which though is not a term of the contract and which was introduced without proper consultation, must be adopted and applied to the worker's employment contract in a similar manner as is done with a person on an indefinite term contract.

A retirement policy which does not form part of a fixed-term contract cannot be included in a unilateral manner by the University. Further, as with all fixed-term employment, retirement is not an issue; the contract ends with the effluxion of time and therefore the employer has no duty or obligation to provide retirement benefit and other benefits which may arise in cases of retirement.

Unfair Dismissal Under Genuine Fixed-Term Contract

If a worker is employed under a genuine fixed-term contract and he is unfairly dismissed before that contract comes to an end, he can still bring a claim for unfair dismissal against his former employer. Being employed under a fixed-term contract does not deprive a worker of protection under the IRA.

TD No. 21 of 2015 Banking, Insurance and General Workers Union and Tobago House of Assembly

…even if a contract is upheld as one for a fixed-term, where there is a dispute in relation to that contract that this Court is called upon to resolve, the conduct of the parties under that contract will be assessed by the criteria laid down in the IRA by which this Court must determine all disputes and the Court will make its awards or orders according to its factual findings and its application of those principles.

TD No. 140 of 1997 Bank and General Workers' Union v Home Mortgage Bank

"We find that the Employer's failure to give such reason or reasons [for dismissal] was in breach of the principles of good industrial relations practice. It does not matter that the contract was a short-term contract. The Act's protection applies to all persons who work under contracts of employment, regardless of the duration of the contract. In our opinion, it is just as possible for an employer to dismiss a worker under a short-term contract of employment harshly and oppressively or contrary to the principles of good industrial relations practice as he can in the case of a worker under an indefinite contract of employment. The length of the employment under the contract is of no significance. Every contract of employment, whether short-term or of

indefinite duration, may be terminated by notice. If an employer dismisses a worker under a short-term contract of employment harshly or oppressively or contrary to the principles of good industrial relations practice, the Court will take the duration of the contract into account for the purpose of assessing the quantum of damages to be paid by the employer, but its short-term character is no defence in such a situation."

Reference No. 4 of 2004 Jennifer Geran and Dream Company Ltd (K-Club Barbuda)

"...it must be borne in mind that the employee was hired under a fixed-term contract, and in the circumstances of unfair dismissal and breach of contract, she is entitled to the outstanding salary and perquisites that she would normally have enjoyed…In this case, since the dismissal was deemed to be unfair and the contract breached, the employee was entitled to the amount of salary she would have earned from the time of her dismissal up to the closing date of the contract, in addition to paid leave and any other perquisites provided by the contract together with her equity."

Worker under fixed-term contract or independent contractor?

Under the statutory definition in the IRA, a worker is an individual who has entered into or works under a contract of service with an employer. By implication, the statutory definition does not extend to self-employed persons and independent contractors. Therefore for a person under a fixed term contract to claim that he was unfairly dismissed, he must show that he was not an independent contractor.

Reference No. 9 of 2008 Hyacinth Pestaina and Dickenson Bay Management Ltd. (DBA Sandals Antigua)

In this case, the Court examined different tests to determine whether a person is an employee or independent contractor:

- The control test:

"A master is one who not only prescribes to the workman the end of his work, but directs or at any moment may direct the means also, or, as it has been put, retains the power of controlling the work"

- The integration test:

"The integration test: might be a significant factor where the individual started off as an independent contractor but ended up working full-time for one 'client', so that over the passage of time he has become indistinguishable from direct employees doing similar work."

- The multi-factor test:

"No one test on its own may be utilised to determine whether a worker has been employed as an employee or an independent contractor. The tests assist as useful general guides, but the modern approach is to examine the totality of the various elements which constitute the relationship between the parties."

Reference No. 7 of 2009 Edwin Brown and Kings Casino Limited

The term “employee” is defined at Section A5 of the Antigua and Barbuda Labour Code as follows: “… ‘employee’ means any person who enters into or works under…a contract with an employer, personally to perform any services or labour, whether the contract be oral or written, expressed or implied…”
“…The wording of the (definition) does not highlight the distinction between contracts of service and contracts for services. But as a general principle contracts for service are not contracts of employment…The existence of a contract of employment or a contract of service or apprenticeship is a necessary and vital ingredient of a contract with an employer.”
In Ready Mixed Concrete (South East) Ltd. v Minister of Pensions and National Insurance, Mac Kenna J. identified three conditions which are required to be present in a contract of service. He stated as follows: “A contract of service exists if these three conditions are fulfilled: (i) The servant agrees that, in consideration of a wage or other remuneration, he will provide his own work and skill in the performance of some service for his master; (ii) He agrees, expressly or impliedly, that in the performance of that service he will be subject to the other’s control in a sufficient degree to make that other master; and (iii) The other provisions of the contract are consistent with its being a contract of service…The servant must be obliged to provide his own work and skill. Freedom to do a job either by one’s own hands or by another’s is inconsistent with a contract of service, though a limited or occasional power of delegation may not be…
[A] master is one who “retains the power of controlling the work…for several years certain tests have evolved which the Courts utilize to determine whether or not a contract of service does exist. The control test is one of those tests. The matter however does not depend solely upon the existence of the nature and extent of control…the law now recognises that a contract of employment involves mutual trust and confidence…The employee is obliged to use his best endeavours to ensure the efficient running of the employer’s business. It connotes a requirement of personal service.”

The approach of the Courts in Antigua and Barbuda, to the law on fixed-term contracts, is very similar, if not identical, to the approaches of the Industrial Court in Trinidad and Tobago. The Courts examine all the various elements which constitute the relationship between the parties, in order to determine whether or not it is a contract of service or a contract for service.

<u>Principles/Summary: How to determine whether a fixed-term contract is genuine or if it is just a label/disguise?</u>

1. **Specific Purpose or Period.**
   A genuine fixed-term or short-term contract is one that is created for a specific purpose/project or for a specific period of time. And the worker must be informed (or it must be obvious to him), at the time he enters into the employment, that the employment relationship is temporary, until the completion of the purpose/project or until the end of the period.
   For example: the Worker must know that he is being hired as a temporary replacement for an absent worker, or to help get rid of a backlog, or to keep up with increased demand during the busy season, or to complete a specific project, etc.

The genuine fixed-term contract comes to an end when, for example, the task the worker was employed to do has been completed, or the post was abolished or funding expired, or the kind of work that the worker was engaged to do is no longer available, etc.
If the work that the worker was employed to do has not come to an end but is continuing to be performed as normal, then there is no genuine end date for the employment relationship and there is no real reason for the relationship to be classed as fixed-term. And that is an indication that the relationship may be one of indefinite employment.

2. **Expectation of renewal.**
   If the employer made certain statements or conducted himself in a way that led the worker to believe that the contract would be renewed, then that would be an indication that the relationship was not genuinely fixed/short-term. Even if the relationship genuinely began as a short term relationship for a special purpose and period, subsequent statements and conduct by the employer may be enough to alter the employment relationship and create the expectation of a contract renewal & continued employment.

3. **Continuous employment / Successive contracts / Month-to-Month contracts/ Same role and functions.**
   If a worker has been continuously employed beyond the duration of the 'fixed-term' contract, or if the worker has received successive fixed-term contracts, or if the worker has received successive month-to-month contracts, and the Worker has continuously worked with the employer for a number of months or years, performing the same roles and functions, without a break in service, this is indicative of indefinite employment and not a genuine fixed-term relationship.

4. **Treatment of Coworkers.**
   If the worker is employed under a fixed-term contract, but is performing the same work and is receiving the same treatment as his coworkers who are permanently employed, this may also be an indication that the worker is not employed under a genuine fixed-term contract.

5. **Performance appraisals.**
   If the worker receives performance appraisals, this is an indication of indefinite employment. Performance appraisals are generally used to determine if workers should receive salary increases and/or renewed/continued employment. Therefore, performance appraisals are not consistent with fixed-term agreements which are supposed to end with the effluxion of time.

6. **Worker vs independent contractor.**
   Independent contractors typically enter into fixed-term contracts with companies to provide services. Therefore, it is important to distinguish whether the person who entered into the fixed-term contract is an independent contractor or a worker. It must be

established that the person is a worker before it can be determined whether he is on a genuine fixed-term contract or indefinitely employed.
A person may be considered a worker if: the contract refers to him as a worker/ employee; the employer has control over what work he does, how he does it, and when he does it; he is required to perform the tasks personally (possibly with a limited exception for delegating); and he is not operating his own business, his role is integrated into the employer's business.

Accordingly, if:

- the employment relationship is not for a specific period or project;
- at the time the worker entered into the contract, he was not informed that the employment was temporary, for a specific purpose or period;
- the worker has been continuously employed on multiple contracts (or has remained employed even after the contract expired);
- the employer has said or done things to the worker to create the expectation of continued employment/contract renewals;
- the worker has performed the same role and functions in the company over the course of several contracts/years;
- the worker performs similar tasks to his coworkers who are permanent and he is treated in a similar manner;
- the company uses performance appraisals to evaluate the worker's performance (presumably to determine if the worker should be given a raise or continue in his employment); and
- the worker is not an independent contractor

The reality of that employment relationship may be that it is not a genuine fixed-term employment, but rather indefinite employment.

And in this situation, if the worker is dismissed by the employer claiming that the contract has expired and will not be renewed, this may be an unfair dismissal.

Questions to ask your client to determine if his employment was genuine fixed-term or indefinite employment

1. Were you employed under a fixed-term contract?
2. When was the contract supposed to end? Did you continue working after the contract ended? Did the work that you were hired to do come to an end or did the company still need employees to perform that role?
3. At the time you were employed, were you told that it was a temporary position for a specific purpose or period? Were you brought in to complete a specific project? To temporarily replace a worker? To help clear a backlog? To provide additional support during a busy period? Was it understood that the job would come to an end by a specific date or when a specific project was completed?

4. How many years did you work with the organization? How many contracts did you sign? Were there any breaks in your employment?
5. After the expiration of your first contract, did you continue to work and perform the same functions for the same pay and in the exact manner, as you did during the term of the contract? Prior to the expiration of the contract, did you give notice of your desire to be renewed?
6. What was your job title and your job functions? Did you always hold the same title and perform the same functions? For how many years did you have this title and perform these functions?
7. Were your functions part of the normal operations of the organization?
8. Was your post abolished? Was all the work that you were required to do over the years completed? Was the work you were doing no longer available?
9. Were there workers who were permanent? Did you perform the same functions as them? Was there any difference between you and the permanent workers in terms of what you were required to do?
10. Did you expect your contract to be renewed? Did your employer say or do anything to make you believe that your contract would be renewed/ that your employment would continue? Were any reasons given for your “non-renewal”? Were there any consultations and communications about your renewal?
11. Did you receive performance appraisals? How many performance appraisals did you receive? How did you perform? Were you recommended for renewal? Did the organization usually renew contracts on the basis of successful performance appraisals? Did they say that you would be renewed if your appraisal was successful?
12. Did your contract refer to you as an employee or independent contractor? Did the company tell you what work to do, how to do it and when to do it? Were you operating your own business, or was your role part of the employer’s business? Were you required to follow the company’s rules and policies? Were you obligated to show up every day/when you were rostered? Did you have to perform your job personally or could you have appointed someone else to perform the job?

Sources:

1. Case Law

2. Texts:

- Commonwealth Caribbean Employment and Labour Law, Natalie Corthésy and Carla-Anne Harris-Roper
- Labour Law in the Commonwealth Caribbean, The Practice of Good Industrial Relations in the 21st Century, Deborah Thomas-Felix
- Labour Law, Simon Deakin & Gillian S Morris, Sixth Edition,
- Selwyn's Law of Employment, Twentieth Edition, Astra Emir