DEMOTION AS A UNFAIR LABOUR PRACTICE

A demotion occurs if the change to the employee's terms or conditions of employment is such that they result in a material reduction of the employee's remuneration, responsibility or status.[1] However, demotion can mean a reduction or diminution of dignity, importance, responsibility, power or status even if salary, attendant benefits and rank are retained. [2]

Regard must be had to the provisions of the Labour Relations Act, [3] section 186(2)(a) which reads as follows:

"(2) Unfair labour practice means any unfair act or omission that arises between an employer and an employee involving-

(a) unfair conduct by the employer relating to the promotion, demotion, probation (excluding disputes about dismissals for a reason relating to probation) or training of an employee or relating to the provision of benefits to an employee;
(b) .....
(c) .....
(d) ....."

Clearly, the Labour Relations Act permits an employer to demote an employee **provided only that this is done fairly**. Before a demotion can be fair, it must be justifiable on substantive grounds [4] and must satisfy the requirements of due process. [5]

Demotion – Breach of contract

To demote an employee without his consent constitutes a breach of the employment contract.

Demotion as an alternative to retrenchment

An employer can offer an employee demotion, provided that it is made in the process of a properly conducted retrenchment programme.

Demotion as a disciplinary measure

As a disciplinary measure, demotion is allowed only in circumstances where dismissal is justified but, due to mitigation factors, the employer decides not to dismiss the employee.[6] Before demoting an employee, an employer must

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[1] Ndlela v SA Stevedores Ltd (1999) 13 ILJ 663 (IC)
[2] A-B v SA Breweries Ltd (2001) 22 ILJ 495 (CCMA); Department of Justice v Wepenar (2001) 22 ILJ 2082 (BCA)
[3] Act 66/1995
[4] Matheyse v Acting Provincial Commissioner, Corectional Services & others (2001) 22 ILJ 1653 (LC)
[5] Cf Hoch v Mustek Electronics (Pty) Ltd (2000) 21 ILJ 365 (LC) at 374D (para 66)
[6] See Arris v Afric Addressing (Pty) Ltd t/a Afric Mail Advertising [1998] 5 BALR 525 (CCMA); Metro Rail (Wits) v SAFWU [1998] 1 BALR 88 (IMSSA); Transnet Johannesburg v TWU [1998] 8 BALR

follow the same procedure as that required before the dismissal of an employee. [7]

Brassey, makes the following statement, *"With the employee's consent, demotion can be used as a disciplinary sanction, but it must of course be appropriate. Consent, which is necessary because a breach of contract is otherwise, committed which in turn constitutes constructive dismissal, will seldom be forthcoming unless dismissal is competent and is proffered as the unpalatable alternative."* [8]

Thus under these circumstances, demotion will be permissible where dismissal is justified, and the employee has consented to the alternative, namely demotion. However, the requirements for substantive and procedural fairness must be satisfied.

In ***Van Niekerk v Medicross Health Care Group (Pty) Ltd*** [9] the CCMA found that, since demotion is a disciplinary action, 'consultation and counselling should take place before the demotion is implemented. In the absence of a fair reason and fair procedure the demotion was held to amount to an unfair unilateral alteration of terms and conditions of employment.

In ***Glass v University of Zululand,*** [10] however, commissioner Rycroft found that demotion following a disciplinary inquiry is justified where demotion is expressly provided for as a sanction in the employer's disciplinary code. Under those circumstances, the employer "was under no obligation to consult and obtain agreement to demotion as a sanction as opposed to dismissal.

In ***Van der Riet v Leisurenet t/a Health and Racquet Clubs*** [11] the Labour Appeal Court held that failure by the employer to consult with an employee prior to his demotion constituted an unfair labour practice.

It is, therefore, submitted that demotion should always be preceded by consultation.

1127 (IMSSA); TWU obo Van Zyl v Metrorail [1999] 7 BALR 888 (IMSSA); CWIU obo Sityana & Mane v Valpa Easigas [2000] 1 BALR 23 (CCMA)

[7] TOWU obo Malan v Commuter Handling Services (Pty) Ltd [2006] 3 BALR 327 BALR (CCMA).

[8] Employment and Labour Law, Commentary on the Labour Relations Act page A8-36

[9] [1198] 8 BALR 1038 (CCMA)

[10] [2006] 4 BALR 388 (CCMA)

[11] [1997] 6 BLLR 721 (LAC)