

Demotion, like dismissal, must be handled by the book

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The Labour Relations Act (LRA) makes provision in Section 186 (2) for employees to take action against any employer for unfair labour practices — one of which is demotion.

Employers often raise the question: “We have an employee who is not doing the job properly. His performance is below standard. Can we demote him and reduce his salary?”

The answer, generally, is one of those “yes and no” scenarios. The employer shouldn’t lose sight of the fact that he has entered into a contract of employment with the employee, and the contract usually stipulates the position that the employee is employed in, and also the salary.

These conditions cannot be altered unilaterally. No employee can be demoted unless the employer first follows a fair procedure, and if the demotion is the only option available to rectify the problem.

In the case of poorly performing employees, the procedure for addressing issues of poor work performance must be followed first.

These procedures are briefly detailed in Schedule 8 of the LRA Code of Good Practice — Dismissal. No employer can be excused for not following these procedures.

It should be remembered that a unilateral demotion would amount to a breach of the employee’s employment contract. In other words, the employer would be seen as having repudiated the contract, which is not permissible in common law.

The employee should, therefore, agree to the demotion. It can’t simply be enforced. If it’s enforced, it constitutes a breach of contract by the employer.

In such a case, the employee would be entitled to refer a dispute of unfair dismissal, or he could sue for damages, or apply for a court order to force the employer to restore the status quo.

Unilateral demotions lead the employer into something of a minefield.

The employee claiming an unfair demotion must prove that he was actually demoted. The employee must also prove that there has been a material reduction in salary, or perhaps in his responsibilities or status.

Therefore an employee who continues to occupy his present position, but has been subjected to a reduction in salary as well as having some of his responsibilities curtailed, may claim a demotion.

Generally, if there is no reduction in salary or responsibilities, he probably would not have such a claim.

The fact that Section 186 of the LRA is titled “unfair labour practice” implies that not all demotions would necessarily constitute an unfair labour practice, but that a demotion could also be fair.

A demotion would be fair if it were for a reason to address issues of poor work performance where, for example, the employee may be able to perform satisfactorily in a lower position, or if it was offered as an alternative to retrenchment for operational requirements, or an alternative to dismissal in instances of misconduct or poor work performance. — Derek Jackson is a consultant with SA Labour Guide www.labourguide.co.za