

Demotion as an alternative to retrenchment during Covid-19 outbreak

By [Kayla Shadiack](#)

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A number of international and local companies have requested that their employees work from home due to the dire consequences of the Covid-19 coronavirus pandemic. With some employees also opting to self-quarantine, there are a number of labour law considerations that South African businesses will have to consider.



Kayla Shadiack

These include:

1. South African workers will still be entitled to payment, should their employer ask them to remain at home during this crisis.
2. If an employee is not sick and still willing to attend work, but it is a direct instruction from their employer to remain at home, such employees will still be entitled to earn and receive their normal salary and benefits.
3. If, however, the employee has travelled to an “at risk” area or has been in direct contact with people who have the Covid-19 disease, the employer may consider flexi/remote working, unpaid leave or sick leave if the employee is sick.
4. If an employee refuses to attend work because of concerns of contracting the virus (given the declaration of a disaster by President Cyril Ramaphosa), each case should be dealt with based on its own merits. If the employee has a particular health issue that would make them particularly vulnerable to the disease, this must be taken into consideration. If there is a reasonable concern that an employee may contract the virus while attending work, the employer must attend to an immediate investigation on an urgent basis.
5. However, if the employer attends to a full and proper investigation and there is still no real or justifiable reason for concern or fear about contracting the virus (e.g. where it is found that false information has been circulating), employees who fail to obey a reasonable instruction to attend work can be disciplined.

Demotion may be one of the ways to assist employers with financial issues due to COVID-19

Demotion can occur in the following ways:

The employer gives the employee a letter stating that he/she has been demoted due to:

- The employee's pay and/or responsibilities being reduced.
- The employee's subordinates being taken away.
- The employee being required to report to someone who used to report to him/her.
- An employee acting temporarily in one position getting transferred back to his/her old position.

Despite trying circumstances, employers are advised to take all labour law considerations into account before imposing demotion on an employee. The reason for this is that should the CCMA or bargaining council find the demotion to be unfair, the commissioner has the right to:

- Reinstatement of the employee into the position from which he/she was demoted;
- award of employee compensation;
- apply any other corrective measure that he/she may deem to be appropriate.

In *Plaatjies vs RK Agencies (2005)*, the employer offered the employee an alternative position at a lower salary due to the fact that the employer had lost a major contract. While the arbitrator accepted this as a valid reason, the demotion was still unfair because the employer had failed to consult with the employee before making the offer.

In view of the above decision, employers should never implement demotion before obtaining the appropriate labour law advice as to:

1. Whether the demotion is merited (in the case of Covid-19 it would be as the employer will no longer be able to afford salaries).
2. The procedure to be followed in implementing a fair demotion.

In terms of *Ngxowa v Sebenza Manufacturing System (2009) (MEIBC)*, a demotion occurs when the employer diminishes the status of the work or responsibilities of an employee even when their remuneration remains the same. Section 186(2)(a) of the Labour Relations Act 66 of 1995 provides that any act or omission involving the unfair conduct of the employer in relation to Demotion constitutes an unfair labour practice.

There are three contexts in which Demotion arises and such are:

1. As a disciplinary measure;
2. as an alternative to dismissal for incapacity; and
3. as an alternative to retrenchment.

In *Piki vs Development Action Group*, the CCMA held that an employer is not permitted to unilaterally change the employment conditions of the contract of employment without the employee's consent. Since a demotion without consent is a repudiation of the employment contract, it, therefore, entitles the employee to sue for breach of contract.

However, an employer should always consider a demotion as an alternative to retrenchment. The main reason for this being that in most cases a person would rather have a job with less money than no job at all. Should an employee refuse the demotion, the employee will be entitled to severance pay, as long as the reason for refusal is justifiable.

Should such refusal of demotion, as opposed to retrenchment be unreasonable, the employee will not be entitled to severance pay in terms of Sub-Sections 41(2) and 41(4) of the Basic Conditions of Employment Act 75 of 1997.

Employers must always obtain the employee's consent to a demotion, in writing, as it entails the changing of an employee's terms and conditions of employment. This means a demotion cannot be imposed unilaterally by an employer without consulting with the employee. Should an employer demote an employee without affording the employee the right to be heard, it could amount to an unfair labour practice with the employer being liable to the employee for either reinstatement or compensation.

In the case of a dismissal for operational requirements, an employer may suggest that the employee consider accepting an inferior position to the one previously held, with a reduction of salary as an alternative to retrenchment. This may assist with small, medium and large businesses having to accommodate the financial distress that the COVID-19 has and will still bring to the economy of South Africa.

Remember, consultation aimed at seeking alternatives to retrenchment is imperative.

Please note, this content does not constitute legal advice and you are advised to seek professional assistance.

For more information visit, <https://www.lexisnexis.co.za/news-and-insights/covid-19-resource-centre>

ABOUT THE AUTHOR

Kayla Shadiack is a senior associate at Christodoulou & Mavrikis Inc and the head of the Labour Law Department, writing on behalf of LexisNexis South Africa. She advises clients and appears at the Labour Court, CCMA and Bargaining Council, and disciplinary hearings and settlement negotiations where necessary.

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