



LAY OFF AND SHORT-TIME WORKING

1. What is Lay-off?

Section 147(1) of the Employment Rights Act 1996 provides that a week of lay-off can take place on the following basis:

- 1.1 An employee's remuneration depends on him being provided with work of the kind, which he is employed to do;
- 1.2 An employee is not entitled to any remuneration under his contract for that week because the employer does not provide the employee with any work.

2. What is short-time working?

Section 147(2) of the Employment Rights Act 1996 provides that short-time working is where the employee's remuneration for the week is less than half of a week's pay due to reduction of the work provided by the employer to the employee (work which the employee is contractually employed to do).

3. How can an employee be lawfully laid-off?

- 3.1 There must be an expressed provision in the employee's contract of employment to this effect. If there is no contractual right for the employer to do so then the lay-off will be a fundamental breach of contract entitling the employee to resign and claim constructive dismissal. The employee may also claim a redundancy payment if this is for reason of redundancy, as well as unfair dismissal or constructive dismissal (if the period of laying-off is unreasonable).
- 3.2 In the absence of an expressed term, an employer can claim that it is an implied term of the contract and must then satisfy a strict test to do so. The employer will need to show that there is a custom of lay-off within that business and that the custom is "reasonable, certain and notorious". The employer will also need to show that "no workman could be supposed to have entered into service without looking to it as part of the contract". The lay-off must also be for a reasonable period (see *A Dakri & Co Ltd v Tiffen & ors* [1981] CR256). A reasonable period is generally a period which does not exceed four weeks, a period longer than four weeks can be considered by a tribunal to be a fundamental breach of contract, entitling the employee to claim constructive dismissal on grounds of redundancy. If the employee wishes to make a claim for redundancy payment, he can do so by following the statutory procedure.
- 3.3 In certain circumstances an employee can remain in employment while being laid off or on short time working in breach of contract and claim Unlawful Deductions from wages.

4. When is lay-off or short time working not applicable?

- 4.1 If there is no contractual right whether expressed or implied in the contract;
- 4.2 If there is no custom in the business for doing so and the employees' remuneration does not depend on them being provided with work;

- 4.3 If an employee is sick and not available for work during the lay off or short time period.

5. How to claim a redundancy payment when laid-off or on short-time work

Chapter III of Part XI of ERA 1996 sets out a scheme that allows employees to claim redundancy payment. The prerequisites are as follows:

- 5.1 An employee must have been laid-off for four or more consecutive weeks or for a total of six weeks (no more than three being consecutive) in any period of 13 weeks;
- 5.2 An employee must give his employer a “notice of intention to claim”. The employee must give this notice within four weeks of his last week of lay-off or short-time working;
- 5.3 An employer can then serve a counter-notice within seven days of service of the employee’s notice if he wishes to dispute liability; in such case, an employee can then make a claim to the ET to decide the outcome.
- 5.4 An employee is required to terminate his contract of employment by serving written notice to the employer. The notice period is a week or the contractual notice period, whichever is the longest. The employee must serve the written notice of termination of employment within three weeks of the employer’s failure to give a counter-notice or withdrawal of the counter notice. In cases where the case is decided in the ET, the notice must be served on the employer within three weeks of the ET’s decision.

6. Employer’s Defence/Counter Notice

The only defence available to the employer is that at the time of the employee’s service of intention to claim, it was reasonably expected that the employee would, not later than four weeks after that date, enter into a period of employment for at least 13 continuous weeks (without being laid-off or on short-time hours).

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