

## TEMPORARY LAY-OFF AND SHORT-TIME WORKING

**November 2021**

From time to time employers may experience a temporary shortage of work and it may be necessary to lay-off all or some of their employees in order to preserve long-term employment security. If temporary lay-off is being considered there are important aspects of employment and contract law to take into account. The right to lay-off employees without pay depends on the contractual position, for example, whether it is permitted by the contract of employment. Where it is imposed by an employer without a contractual right to do so, employees could pursue claims to the civil court and/or to an Industrial Tribunal. The Employment Rights (Northern Ireland) Order 1996 provides for employees to be paid a guarantee payment if they are on a period of lay-off or short-time working. Further provisions establish a procedure whereby employees who are laid off can, in certain circumstances, claim a redundancy payment.

This information note provides some general information on the right to place employees on temporary lay-off/short time working and the rights of employees who are temporarily laid off.

### **Meaning of Lay-Off and Short-Time Working**

Article 182 of The Employment Rights (Northern Ireland) Order 1996 states that an employee is taken to be laid off for a week if they are employed under a contract of employment for which their wage is dependent on work being provided for them, but no work is provided for them in that week and thus no wage is paid for that week.

An employee is taken to be kept on short-time working if there is a reduction in the work provided for them in that week to the extent that their wage for that week is less than half a week's pay.

An employee who has been put onto a period of lay-off or short-time working for 4 or

more consecutive weeks or for a series of 6 or more weeks within a period of 13 weeks may be entitled to claim a redundancy payment. The process for claiming a redundancy payment is discussed later in this information note.

*Please note that references to 'lay-off' throughout this Information Note also include a reference to short-time working.*

## The Contractual Position

Employers do not have an automatic right to lay-off employees without pay. The right to do so depends on the contractual position. A lay-off term can be incorporated into an employee's contract by being:

- Expressly written in;
- Included in a collective agreement which is itself incorporated into the individual contract of employment;
- Implied through custom or practice; or
- Agreed by the employer and employee concerned.

**It should be noted that a contract exists as soon as an employer and employee agree upon terms and conditions of employment, even though there might be nothing in writing.**

Where lay-off is introduced by an employer without a contractual right to do so or without express agreement, the employees concerned could remain in their jobs and pursue a claim to recover lost wages for the days/weeks that work was not provided. Alternatively, provided they have the requisite service they could choose to resign and claim that they have been constructively dismissed. Constructive dismissal claims can arise when employees resign because their employer has significantly breached the employment contract. However, such claims do not necessarily lead to findings of unfair dismissal. The fairness aspect would have to be determined by an Industrial Tribunal, which would take into account such matters as the reason(s) for the employer's action.

**The right to pursue a claim of unfair (constructive) dismissal normally applies to employees who have completed one year's service at the time of the dismissal.**

To ensure fairness it is recommended that care should be exercised when selecting employees for temporary lay-off. For example, an employer who chooses to place temporary staff only on lay-off could be viewed as treating fixed-term employees less favourably. Equally, a period of lay-off could result in a claim for redundancy payment if it is for a duration of 4 or more consecutive weeks or for a series of 6 or more weeks within a period of 13 weeks. Therefore, an employer could face claims of unfair selection

for redundancy or discrimination as a result of the selection process.

## Time Restriction on Contractual Lay-Off

Where the contract allows for lay-off but does not specify a limit on its duration, constructive dismissal claims could still arise. This could result where employees consider the lay-off has been prolonged for an unreasonable length of time. Few guidelines exist as to what constitutes a reasonable time in this context and it will depend on the facts in each case.

In the absence of an express or an implied right to lay-off, it is recommended that an employer consult employees with a view to obtaining their agreement on both the nature and extent of the lay-off. Even where a time limit is specified, it would be wise to keep the lay-off period as short as possible depending on business needs.

## Statutory Guarantee Payments

Even though a contract may permit lay-off without pay, Article 60 of The Employment Rights (Northern Ireland) Order 1996 requires that employees who are laid off throughout a day '*because of a shortage of work of the kind they are employed to do, or any other occurrence affecting the normal working of the business*', (for example, floods, power failures), must be paid a guarantee payment. The payment is limited to a maximum of 5 days in any period of 3 months. Where an employee contractually works less than 5 days in a normal week, the limit shall be that number of days, for example, if someone normally works a 4 day week, the entitlement is limited to 4 days in any period of 3 months. Where the number of days normally worked varies from week to week, an average is taken over the 12 complete working weeks preceding the week in which the lay-off occurred.

The amount of the guarantee payment is reviewed annually and is subject to a specified maximum (or the employee's normal rate of pay if that is less). It is also subject to deductions of Income Tax and National Insurance.

To qualify for payment employees must:

- Have at least one month's continuous service;
- Not be provided with work for the whole of a normal working day;
- Not refuse suitable alternative employment; and
- Comply with any reasonable requirements imposed by their employer to ensure that their services are available.

Employees who do not receive a guarantee payment to which they consider they are

entitled, can complain to an Industrial Tribunal. A complaint should be made within 3 months of the day on which they should have received a guarantee payment. Tribunals have discretion to accept complaints made outside this time limit only if they can be satisfied that it was not reasonably practicable to make the claim within 3 months.

**Guarantee payments are not payable where employees are laid-off in consequence of a trade dispute involving their employer or an associated employer. For further information see:**

[Employers - nibusinessinfo - Guarantee Payment - entitlement](#)

[Employees - nidirect - Guarantee Payments](#)

## **Special Statutory Procedure for Claiming Redundancy**

Where employees have been either laid-off or put on short-time working for 4 or more consecutive weeks or for a series of 6 or more weeks (of which not more than 3 weeks were consecutive, e.g. the 6 weeks cannot be made up of a 4 week and a 2 week period) within a period of 13 weeks, they have an option to claim a redundancy payment as they have a qualifying period of lay-off. The procedure for doing this is very technical and must be followed strictly. It can be summarised as follows:

### **Step 1 – Notice of intention to claim**

An employee must give their employer written notice stating that they intend to claim a redundancy payment because of lay-off or short-time working. This is referred to as a notice of intention to claim (NIC) and must be sent to the employer within 4 weeks following a qualifying period of lay-off.

A notice of intention to claim a redundancy payment is separate from an employee's notice to leave employment. The employee can give in their notice to leave before the notice of intention to claim or at the same time. If the employee has been laid off or put on short-time working for 4 or more consecutive weeks (or 6 or more weeks in 13), the employee does not prejudice the claim for a redundancy payment if they then leave the employment, provided notice to leave is given detailed in Step 3 – Resignation.

### **Step 2 – Counter-notice by employer**

Upon receipt of an NIC an employer may opt to serve a counter-notice to an employee. This **must** be in writing and **must** clearly state that liability for a redundancy payment will be contested. This must be done within 7 days of service of the NIC.

If the employer has served a counter-notice within the period specified above, the employee will have **no** right to a redundancy payment unless they apply to an Industrial

Tribunal. The employer's only defence to a claim (provided that the employee has complied with the requirements of the procedure) is that, at the date of service of the NIC, there was a reasonable prospect that the employee would, not later than four weeks after that date, resume normal working for a period of not less than 13 weeks during which the employee would not be laid-off or put on short-time. The employer can only use this defence if the employee has been served a valid counter-notice. Therefore, it is suggested that a counter-notice includes a statement to this effect.

### **Step 3 – Resignation**

In order to be entitled to a redundancy payment under this scheme an employee must give notice to terminate their contract of employment. The period of notice that the employee must give is that which is required by their contract of employment, or, in the absence of any clear, agreed notice period, a minimum of one week. The employee must clearly state the period of notice they are giving, for example, one week (or longer contractual notice) as failure to do so can render their claim for a redundancy payment invalid. While an employee is not required to put this notice in writing, it may avoid any doubt around the legitimacy of their claim for a redundancy payment if they do and clearly state the notice period they are giving.

This notice must be given if the:

- Employer has not served a counter-notice, **within four weeks of service of the NIC**;
- Employer has served a counter-notice but subsequently withdraws it, **within three weeks of the withdrawal**; or
- Employee has been awarded a redundancy payment by a Tribunal, **within three weeks from the date of receipt of the decision**.

### **Step 4 – Industrial Tribunal action for non-payment of redundancy pay**

If the employer fails to pay the redundancy pay following the termination of employment by the employee, the employee may then pursue a claim for redundancy pay to the Industrial Tribunal. The normal time limit for making such a claim is 6 months from the effective date of termination. However, the employee should follow the employer's grievance procedure or the procedure outlined in the Agency's [Code of Practice on Disciplinary and Grievance Procedures](#), to allow for the resolution of the grievance relating to non-payment of redundancy pay. An Industrial Tribunal can take into account any **unreasonable** failure to follow the grievance aspects of the Agency's Code of Practice and may financially penalise employers or employees.

**This Information Note is for guidance only and should not be regarded as a complete or authoritative statement of the law which can only be given by the courts.**