



Layoffs and short-time working

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Employment partner, Sarah Rushton, considers the issues surrounding this topic.

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Agreeing a variation in working hours can deprive employees of guarantee payments

"Layoffs" and "short-time working" used to be common in manufacturing industries (and some employers expressly retain a contractual right to put employees on short-time working or lay them off if there is a dip in trade). With the economic downturn, the practice has become more widespread. It is a way for an employer to save money and may help avoid the need to make redundancies.

Laying off employees means the employer provides them with no work and no pay for a period while retaining them as employees. Short-time working means providing employees with less work (and reduced pay) for a period while retaining them as employees.

Guarantee pay

Section 28(1) of the Employment Rights Act 1996 (ERA) provides that, in certain circumstances, when an employer fails to provide work "throughout a day during any part of which an employee would normally be required to work in accordance with his contract of employment, the employee is entitled to a statutory guarantee payment." In other words, employees should get a guarantee payment in the event of short-time working or layoff.

Breach

There will be a breach of contract where an employer lays off employees or puts them on short-time working without the contractual right to do so. However, the alternative to a layoff or short-time working is usually redundancy. Given the poor state of the jobs market, more employees appear willing to agree at least a short-term variation of their terms of employment in order to avoid the possibility of being let go altogether.

Facts

This was the situation recently in the recent case of *Abercrombie & Others v Aga Rangemaster Ltd*. In order to avoid redundancies, the employer entered into an agreement with the GMB union, whereby the GMB put a proposal to its members for a temporary reduction in working hours to 34 hours a week, with no working on Friday and an equivalent reduction in pay. The proposal was accepted.

The short-time working was initially intended to be from 1 January 2009 to 26 June 2009. When trading

did not improve, the reduced hours working was extended by agreement until December 2009. The arrangements came to an end with effect from 31 December 2009.

After the employer refused to confirm that guarantee payments would be paid during the period of reduced hours, a grievance was lodged by the GMB. This was not upheld. A claim for unlawful deduction of wages and non-payment of guarantee payments was then made to the employment tribunal.

Tribunal decision

The tribunal found there was a clear temporary variation to the employees' contracts of employment. As a consequence of that variation, the employees were not "normally required to work" on Fridays and therefore were not entitled to a guarantee payment for the period they were not working. The employees appealed to the EAT.

EAT judgment

The Employment Appeal Tribunal dismissed the appeal. It accepted that the fact that an agreed variation of contract is temporary does not prevent there being a change to employees' "normal working hours" for the purpose of considering an entitlement to guarantee payments under section 28(1) of ERA 1996. The EAT therefore applied a very restrictive interpretation of the entitlement to guarantee payments.

Implications

The purpose of a guarantee payment is to assist employees who are put on short-time working, leaving them with reduced pay, which was precisely the situation here. It now appears that where there is agreement to vary working patterns (as opposed to an employer imposing a contractual right to lay off employees without pay), that varied pattern will become the normal working pattern and the employees will be deprived of any guarantee payment. While this is good news for employers it seems grossly unfair to employees who are, after all, trying to assist the financial viability of the business by sacrificing part of their entitlement to salary.

If you wish to discuss how the content of this article please contact Sarah Rushton.

This article was first published on People Management on 14 December 2012 and is a direct link to the original article is available here: <http://www.peoplemanagement.co.uk/pm/articles/2012/12/layoffs-and-short-time-working.htm>

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