

## ■ Lay-offs and short-time working — alternatives to redundancies?

**Huw Cooke of Burges Salmon LLP looks at the use of lay-offs and short-time working as possible alternatives to making redundancies.**

Wouldn't it be nice to read some good news for a change? With fresh rounds of redundancies a daily occurrence, good news is, frankly, in short supply. However, even in the grim economic times we now find ourselves, compulsory redundancies are not the only way for employers to reduce workforce costs. In this article, we consider the use of lay-off and short-time working as possible solutions.

Even those employers that are prepared to make redundancies could do worse than read on. This is because employers that fail to consider ways of avoiding redundancies could find themselves on the wrong end of substantial claims if they then go on to make redundancies. These could include claims for failing to carry out collective consultation adequately and/or unfair dismissal.

Turning to lay-off and short-time working in more detail, the first point to address is what we mean by these terms. An employee is *laid off* when he or she is not provided with any work by his or her employer and the situation is expected to be temporary.

*Short-time working* occurs where the employer reduces the hours the employee is required to work either by reducing the number of working days and/or the hours the employee works in a day. This in turn enables the employer to reduce the amount of pay.

In certain circumstances, an employee who has been laid off or put on short-time working may subsequently become entitled to a statutory redundancy payment (subject to satisfying certain qualifying conditions — see below).

The imposition of lay-off or short-time working would be a fundamental change to an employee's terms and conditions of employment. This means that an employer can

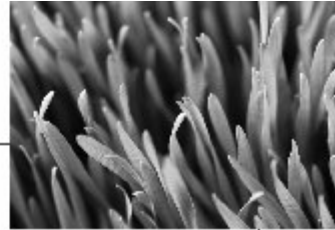
only impose lay-offs or short-time working where there is a contractual right to do so or with consent (see below). This contractual right may be contained:

- (a) in the employees' contracts of employment; or
- (b) in a relevant collective agreement (by virtue of which the right is incorporated in individuals' contracts of employment); or
- (c) implied by past custom and practice (although this can be difficult to establish).

If, therefore, an employer imposes lay-offs or short-time working without having the right to do so, the affected employees could bring a number of claims including claims for unlawful deductions from wages, constructive unfair dismissal, notice pay and redundancy pay.

However, if you do not have an existing right to impose lay-offs or short-time working, you may be able to get your employees to agree to this change to their terms and conditions if you explain that the reduction in hours may prevent or reduce the need for compulsory redundancies. Effective communication with your workforce will be key to seeking workforce "buy-in". Care needs to be taken though as collective consultation obligations may be triggered in certain circumstances.

Even where employers have the contractual right to impose lay-offs and/or short-time working, implementation of the new regime should be handled sensitively. Clear communication and, if necessary, consultation with the workforce will be crucial. As part of the exercise, employers should consider which areas of the workforce will be affected, how long the measures will be in place, how any new work patterns will operate, etc. Employers should also identify how pay will be reduced and what will happen to any contractual benefits calculated by reference to wages or hours worked during the period of lay-off or short-time working. By way of example, in relation to pensions, contributions (under a



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money purchase scheme) or benefits (under a final salary scheme) would usually be reduced.

In addition to a possible contractual entitlement (eg contained in a collective agreement) to some kind of payment for unworked hours, employees may be entitled to a statutory guarantee payment.

The right to a guarantee payment may arise where an employer does not provide work to an employee *throughout a day* during which he or she would normally be required to work under his or her contract of employment because there is either:

- (a) a reduction in the need for work that the employee is employed to do; or
- (b) any other event which affects the normal working of the business in relation to the type of work the employee is required to do.

A guarantee payment can only be made in respect of a complete working day lost — ie payment is not required in respect of a day in which some work is provided.

The employment legislation also provides that, in certain circumstances, employees who are laid off or on short-time working, as per the statutory definition (see box), may be entitled to claim a statutory redundancy payment without actually having been made redundant. This area is complex. However, in brief, where he is laid off or kept on short-time for four or more weeks in a row, or for six weeks out of thirteen weeks, the employee may be entitled to claim a redundancy payment without waiting to be dismissed for redundancy. The employee must give notice in writing to the employer of his intention to claim and must subsequently give notice to terminate his employment. The employee will not be entitled to the payment if normal working is expected within 4 weeks for a period of no less than 13 weeks provided the employer

contests the payment by issuing a counter-notice.

The definition of lay-off and short-time working for statutory redundancy payment purposes:

- An employee will be laid off for a week if his or her wages under his or her contract depend on the employer providing him or her with work of the kind he or she is employed to do, but he or she is not entitled (under his or her contract) to wages in respect of that week because his or her employer does not provide such work (eg pieceworkers).
- An employee is on short-time working if his or her wages for the week are less than half a week's pay because of a reduction in work provided to him or her by the employer.

### Practical steps for employers considering lay-offs and/or short-time working

- Check whether you have the contractual right (whether express or implied) to impose lay-offs and/or short-time working.
- Consider reducing daily working hours rather than removing a whole working day which could result in the making of guarantee payments.
- Check contracts and collective agreements for any contractual entitlement to payment for unworked days or hours.
- If you do not have the contractual right to impose lay offs or short-time working, seek agreement from employees.
- Plan how best to communicate effectively with your affected workforce.
- Beware of inadvertently triggering claims for statutory redundancy payments. ■