

LAY OFF, GUARANTEE PAY & REDUNDANCY

June 2010

PERS

Unit 14
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What do my rights depend on?



This factsheet looks at your rights if you are laid off or put on to short-time working, especially whether you qualify for guarantee pay and whether you could claim redundancy.

Claiming redundancy from lay off is a complicated area of employment law and relatively few people will use this right. However, it is important to know what your options may be if these circumstances arise. Please take advice before taking action – you must be sure you can claim redundancy, and you must be sure you want to leave your job.

- ▶ Your rights will largely depend on whether or not your employer has a **contractual right** not to provide you with paid work when there is a reduced need for their product or service. **Most** employment contracts assume that the employer has an obligation to provide work and you have an obligation to perform it. However, some employers will write into the contract of employment that they may lay you off, or lay offs may be common practice in some industries - such as construction or clothing manufacture. If your employer lays you off and it is **not** written in your contract, or if it is not common practice, it may be a breach of your contract. If you or your workmates have been laid off in the past it may have become a term of your contract by custom and practice. **You must check whether or not your employer has a contractual right to lay you off before you decide what you can do about it.** Getting this wrong can seriously affect your entitlements.

See PERS leaflet no.1 “Contracts of Employment” for more information about contractual rights.

What is a ‘lay off’?

- ▶ Lay off means that your employer does not have sufficient work to justify requiring you to come in to work. In order to count for some of the possible entitlements below (guarantee pay or a redundancy claim), lay off must be for complete days – any work, even work done outside normal working hours, would mean that you are not actually laid off on a particular day.

What is ‘short-time working’?

- ▶ Short-time working is any period in which your hours of work have been reduced to a level where you are earning *less than half your normal wage*. As with lay offs, if your contract or common practice does not allow for short-time, you may have a claim for breach of contract – see below.

IF LAY OFF/SHORT-TIME IS ALLOWED UNDER YOUR CONTRACT

Should I be paid if I am laid off or on short-time?

- ▶ If your contract makes provision for lay off or short-time working, it may also specify whether you will be paid in these situations and how much. There may be a nationally agreed rate or a union agreement.

However, if there is no contractual right to pay you may still be entitled to a **statutory guarantee payment** if you are laid off. You must have been continuously employed by your employer for at least one month to qualify.

Statutory guarantee payments are payable for up to 5 days in any 3 month period. If you normally work fewer than 5 days a week, you will only be paid for the number of working days in your normal working week. This payment will be up to a maximum of £21.20 per day (from 1 February 2010).

You will only receive a guarantee payment for a complete day of lay off. If you are put on short-time, you will not be entitled to a guarantee payment.

Calculating your guarantee payment

- ▶ If you do not work a regular number of days per week then you must add up all the days you have worked in the previous 12 week period of normal working before your lay off and divide this by 12 to get your *average number of days worked per week*. This will be your number of days entitlement to a guarantee payment, up to a maximum of 5. You should not include in this calculation weeks in which you have been sick or on holiday.

The 3 month period is calculated in arrears. Only days when guarantee payments have been made within this period can count against your entitlement.

Your guarantee payment is calculated by multiplying the number of hours of your normal working day by your normal gross hourly rate, up to the maximum statutory payment, currently £21.20. Therefore, if your normal working day is short you may not receive the maximum guarantee payment.

Who is entitled to a guarantee payment?

- ▶ Most employees are entitled to receive a guarantee payment when they are laid off. However, you will **not** be entitled to a guarantee payment if:
 - You are not available to work on a day which otherwise might have qualified you for a guarantee payment.
 - You are genuinely not an employee.
 - You are not normally employed in Great Britain.
 - You have not been continuously employed for more than 1 month.
 - You do not have normal working hours either in your written contract or because of your usual pattern of working (this applies, for instance, to some insurance agents or sales reps).
 - You are a share-fisher, member of the police or the armed forces.
 - You have not been laid off for a complete day (a day is defined as the 24 hour period from midnight to midnight). This may apply even where work was done outside your normal working hours.
 - You refused a reasonable offer of suitable alternative employment – this need not be your normal occupation.
 - The reason for your lay off is industrial action at your workplace or that of an associated employer.

If you are not given a guarantee payment to which you **are** entitled, you can make a complaint to an Employment Tribunal within three months of the day you should have received the payment.

Can I claim benefits if I am laid off or on short-time?

- ▶ If you are laid off for more than a week, you can claim Jobseekers Allowance for the rest of your lay off period, after you have received your full entitlement to guarantee payments from your employer.

You may also be entitled to some state benefits if you are on short-time.

You may be entitled to Income Support or Tax Credits. You could seek advice from a welfare rights/benefits advice agency or a Citizens Advice Bureau to see which option is best for you in your situation. This will depend on a number of factors including your family circumstances, your earnings record, your previous claims and whether or not you think you are likely to lose your job completely in the near future.

Can I claim redundancy if I have been laid off or put on short-time?

- ▶ If your employer does have the contractual right to lay you off, you may be considered to be redundant if:
 - you have been laid off or on short-time (or a combination of both) for a continuous period of not less than 4 consecutive weeks **or**
 - you have been laid off/on short-time for not less than 6 weeks, of which no more than 3 weeks are consecutive, in the previous 13 week period
 - you have not received pay for the time you were laid off (or more than half a week's basic pay for short-time work).

Remember that you must have been employed for *at least 2 years* before you qualify for a statutory **redundancy payment**. See PERS leaflet no.6 "Redundancy" for more information.

How do I claim redundancy if my employer has the right to lay me off?

- ▶ If you qualify as redundant under the above conditions you need to go through a careful process of claiming that you are redundant in the following stages:

First, you should write to your employer, if possible as soon as you reach the necessary qualifying 4 (or 6) week point and definitely **no later than 4 weeks after the lay off or short-time has ended**:

- asking for redundancy pay because you have been laid off or put on short time working

Please refer to **model letter 2** below

Second, if your employer does not respond to this letter within 7 days, and does not offer you 13 weeks work to start within the next 4 weeks, you can claim redundancy pay if you resign from your job. To avoid paying redundancy the employer has to reply to the letter within 7 days, and offer 13 solid weeks work to start within four weeks. If the work doesn't materialise or the offer of work is withdrawn, you can claim redundancy through an Employment Tribunal.

IF YOUR EMPLOYER DOES NOT REPLY AND YOU WANT TO CLAIM REDUNDANCY PAY, YOU MUST WAIT AT LEAST 7 DAYS FOR YOUR EMPLOYER TO RESPOND. AFTER THAT YOU MUST GIVE NOTICE OF RESIGNATION IN WRITING WITHIN 4 WEEKS OF YOUR FIRST LETTER. IF YOU GET THESE STAGES WRONG IT MAY AFFECT YOUR ENTITLEMENT TO RECEIVE A REDUNDANCY PAYMENT.

Please refer to **model letter 3** of resignation below.

Third, If the offer of work is withdrawn in writing, you have to give notice of resigning within 3 weeks of the offer of work being withdrawn.

Fourth if your employer does not agree to the redundancy, you will have to make a claim to an Employment Tribunal within 3 months of your resignation. Please seek advice before applying to an Employment Tribunal. Contact PERS for information about who could help you with this.

NB It is important to keep good records of periods when you were laid off or on short-time and to ensure that you qualify for redundancy before writing to your employer.

NOTE: IF YOU SUCCESSFULLY ASK YOUR EMPLOYER TO CONSIDER YOUR JOB TO BE REDUNDANT IT WILL MEAN THAT YOU NO LONGER HAVE A JOB. BE QUITE SURE THAT THIS IS WHAT YOU WANT BEFORE YOU USE THIS PROCEDURE.

IF LAY OFF/SHORT-TIME IS NOT ALLOWED UNDER YOUR CONTRACT

What can I do if my contract has been breached?

- ▶ If lay off or short-time working is not allowed under your contract, then your employer will probably breach (break) their contract with you by introducing it.

See PERS Action Pack no. 1 “Changes to Employment Contracts” for more information on this subject.

The following options are open to you:

- Accept the change, claiming guarantee pay or state benefits if you qualify.
- Claim illegal deductions have been made from your wages.
- Refuse to accept the change and claim breach of contract in a county court.
- Resign your job and claim unfair constructive dismissal (provided you have at least one year’s continuous service with your employer).

Which one you choose will depend on your circumstances, in particular whether or not you think work will return, your length of service, what your chances are of finding alternative employment and thus whether you want or can afford to give up the job.

Should I be paid if I am laid off or on short-time?

- ▶ If you are laid off, you will probably qualify for guarantee payments as above. You may also qualify for state benefits, whether you are laid off or on short-time. However, if you accept the short-time working or return to work as normal after the lay off you may be considered to have accepted the change and therefore not be able to take the alternative actions for compensation described below.

What action can I take to recover lost wages?

- ▶ You could write to your employer when you are laid off or put on short-time and say that you do not accept this change to your contract and that you will consider taking legal action. **See model Letter 1 below.**

You could then:

- claim at an Employment Tribunal that illegal deductions have been made from your wages. You must claim within 3 months of the latest non-payment or short payment. If successful, the Tribunal will order your employer to make up the lost wages. If your employer dismisses you for making this claim, you can claim unfair dismissal no matter how long you have worked there *or*
- claim compensation at county court for breach of contract. If successful, your employer will be ordered to pay unpaid wages. You have up to 6 years to put in a claim. However, your employer could lodge a counter-claim against you for any breach of contract for which they consider *you* responsible. You could be vulnerable to dismissal, especially if you have worked for your employer for less than a year.

Can I claim redundancy if my contract has been breached?

- ▶ If your employer is in breach of your contract by introducing lay off or short-time, you may be able to claim unfair constructive dismissal and a redundancy payment. You can only claim constructive dismissal if you:

- do not accept the lay off or the short-term working arrangement *and*
- have at least one year’s continuous service.

You can only claim a redundancy payment if you:

- do not accept the lay off or the short-time working arrangement *and*
- have at least two years’ continuous service.

How do I claim constructive dismissal and redundancy?

In this situation, it does not matter how long the lay off or short-time working lasts, for it to count as a breach of contract. However, you should write a grievance letter objecting to the lay off or short time giving your employer the chance to restore work to you before you claim redundancy, otherwise a Tribunal might feel you had been unduly hasty.

If you return to work after a period of lay off, or you work the new short-time hours, you can be seen as having accepted this change to your terms and conditions and will lose your chance to claim constructive unfair dismissal. If you wish to return to work on short-time hours to see if the situation improves, you should first write to your employer saying you do not accept the change. See **model Letter 1** below.

If lay off is not allowed in your contract, you could resign and then claim unfair constructive dismissal for the 'fundamental breach' of your contract in failing to supply you with work. You will claim that you are in fact redundant because your job no longer exists. See **3 Final letter of resignation** below for how to do this. If your employer refuses to give you a redundancy payment, you would then have to make a claim to an Employment Tribunal.

Remember that you must have 2 years' continuous service with your employer to qualify for a redundancy payment. See PERS leaflet no. 6 "Redundancy" for more information.

NOTE: IF YOU SUCCESSFULLY ASK YOUR EMPLOYER TO CONSIDER YOUR JOB TO BE REDUNDANT IT WILL MEAN THAT YOU NO LONGER HAVE A JOB. BE QUITE SURE THAT THIS IS WHAT YOU WANT BEFORE YOU USE THIS PROCEDURE.

Please seek advice before you resign under these circumstances.

MODEL LETTERS TO YOUR EMPLOYER

1. LETTER DISAGREEING WITH A CHANGE TO YOUR CONTRACT

You should write a letter like this one if your contract does not allow for lay off or short-time working **but** you want to return to your job when work becomes available once more without losing the option of claiming unauthorised deductions/ breach of contract/ unfair constructive dismissal at a later date. Please note that in spite of sending this letter, you may be considered to have accepted the new working arrangement after as little as a month. You need to decide on your next step fairly quickly.

Your address

Your employer's name and address

Date

Dear **your employer's name**

Grievance Re: Lay off* / Short-time working*

I am writing to express my disagreement with the change in my contractual terms which means that I am no longer required to work or be paid for my normal contractual hours.

I consider this to be a fundamental breach of my contract. Unless you are able to restore my hours or suggest another acceptable solution, I will have to consider legal action to recover my financial losses.

continued overleaf

{In the meantime I shall continue to work to the new arrangement under duress. Please do not take this as indicating in any way that I accept the present situation as my new contractual agreement.}

Yours sincerely

Your signature

Your name printed

**Delete as appropriate*

Paragraph in {...} is optional.

2. LETTER ASKING FOR REDUNDANCY (OR RE-ENGAGEMENT)

The letter below is a model you can use to claim redundancy if your contract of employment does allow for lay off or short-term work, but you have not had your normal work for the required period of time (see section one of this factsheet). Remember you must have worked continuously for your current employer for two years before you can claim a redundancy payment.

Your address

Your employer's name and address

Date

Dear **your employer's name**,

I have been **laid off*** / **on short-time working*** for at least **4 consecutive weeks*** / **6 out of 13 weeks***.
I wish to claim redundancy pay.

(Alternatively, you can write back to me within 7 days agreeing to restore my normal working hours within 4 weeks. Normal working would have to be expected to last for at least 13 weeks*)

Yours sincerely,

Your signature

Your name printed

**Insert or delete as appropriate. Give dates.*

You may want to use the paragraph in brackets if your main aim is to get back to work, and not use it if what you want is redundancy pay.

If your employer fails to respond within seven days you have an automatic right to claim redundancy pay.

ALWAYS KEEP EXACT DATED COPIES OF THE LETTERS YOU SEND, AND EITHER HAND DELIVER THEM OR SEND THEM RECORDED DELIVERY.

3. FINAL LETTER OF RESIGNATION

Send this letter *at least a week but no later than 4 weeks after Letter 2* if you want to claim redundancy pay and:

- your contract does allow for lay off or short-time *and*
- you have written Letter 2 above *but*
- your employer does not respond to the letter within 7 days (9 if you posted the letter), refusing you redundancy pay *and*
- does not offer you 13 weeks work to start within the next 4 weeks *and*
- you have sufficient length of service to claim unfair constructive dismissal and redundancy.

PLEASE NOTE THAT YOU MUST SEND THIS LETTER WITHIN 4 WEEKS OF LETTER 2.

You can also use a version of this letter *straight away* (or shortly after sending Letter 1) if:

- your contract does not allow for lay off or short-time working *and*
- you have sufficient length of service to claim unfair constructive dismissal and redundancy.

In this case, you would refer to your earlier letter (Letter 1) and point out again that lay off is a fundamental breach of your contract and that you intend to claim constructive unfair dismissal at Employment Tribunal. In that situation you don't have to give notice of resignation, but your employer would normally be obliged to pay you in full for your notice period if you do give notice and if you are willing to work your notice, whether or not work is provided.

Your address

**Your employer's name
and address**

Date

Dear **your employer's name**,

Further to my letter of {**date letter1 or 2 was sent, which must be under 4 weeks before the date you send this letter**}, I have not received any reply.

I am therefore entitled to redundancy pay if I give you notice of resignation.

Please accept this notice of my resignation which will take effect from **1 week {or contractual notice period}** of the date of this letter.

Please forward my redundancy pay at your earliest convenience. I am willing to work my notice. If you do not provide me with work you are still obliged to pay me my normal pay for the notice period. Please also forward pay for holidays that I have earned but not taken

I hope to hear from you soon.

Yours sincerely,

Your signature

Your name printed

Always keep exact dated copies of the letters you send and either hand deliver them or send them recorded delivery.

If you find you do need to proceed to an Employment Tribunal with your claim, you must do this within 3 months (6 months for redundancy pay) from the date of this letter.

PAY & EMPLOYMENT RIGHTS SERVICE

**Unit 14 Batley Enterprise Centre
513 Bradford Road
Batley WF17 8LL**

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PERS advice service is open at the following times:

Monday:	10am to 1pm
Tuesday	10am to 4pm & 5.30pm to 7.30pm
Wednesday:	10am to 4pm
Thursday:	10am to 4pm
Friday:	10am to 1pm

www.pers.org.uk

E mail: advice@pers.org.uk

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