

# Lay offs & Short-time working

A Comparative Regional Perspective

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## Introduction

- ◆ *“It is [in] the absence of any statutory provisions or scheme governing layoffs that it may be useful when there is collective bargaining for parties to consider always incorporating a provision governing layoff in their collective agreement...”*

# Contents

- ◆ Definitions
- ◆ Common law treatment
- ◆ Circumstances of lay off; short time
- ◆ Duties of Employer
- ◆ Remedies of Employee

## Definitions (B)

- ◆ **Barbados** -ERA2012; s. 38 (2) –
- ◆ *An employee shall be taken to be **laid off** for a week where*
  - ◆ *(a) he is employed under a contract on terms and conditions such that his remuneration under the contract depends on his being provided by the employer with work of the kind which he is employed to do; but*
  - ◆ *(b) he is not entitled to any remuneration under the contract in respect of the week because the employer does not provide work of that kind for him*

## Definitions (B)

- ◆ **Barbados** -ERA2012; s. 38(3) –
- ◆ *An employee shall be taken to have been placed on **short time** if, by reason of a diminution in the work provided for the employee by the employer, being work of a kind which under his contract the employee is employed to do, the remuneration of the employee for the week is less than half a week's wages*

## Definitions (B2)

- ◆ **Barbados** –Severance Payments Act; Cap. 355A
- ◆ *Lay-off and short-time* 18. (1) Where an employee is employed under a contract on such terms and conditions that his remuneration thereunder depends on his being provided by the employer with work of the kind which he is employed to do, he shall for the purposes of this Act be taken to be **laid off** for any week in respect of which, by reason that the employer does not provide such work for him, he is not entitled to any remuneration under the contract.

## Definitions (B2)

- ◆ 18. (2) Where by reason of a diminution in the work provided for an employee by his employer (being work of a kind which under his contract the employee is employed to do) the employee's remuneration for any week is less than half a weeks' pay (calculated in accordance with paragraph 6 of the First Schedule) he shall for the purposes of this Act be deemed to be kept on **short-time** for that week.
- ◆ 18. (3) In this section the expression "week ", in relation to an employee whose remuneration is calculated weekly by a week ending on a day other than Saturday, means a week ending with that other day, and, in relation to any other employee, means a week ending with Saturday.
- ◆

## Definitions (G)

- ◆ **Guyana –TESPA 1997** : No express definition of "lay offs" or "short-time" but provides-
- ◆ **Lay offs.** 14, (1) *No employer shall lay off an employee except where the employer is empowered by this Act to terminate the employment of the employee because of redundancy under section 12.*
- ◆ 14. (2) *No lay off under subsection (1) shall exceed six weeks.*
- ◆ 14. (3) *Any employer who contravenes the provisions of this section shall be liable on summary conviction to a fine of fifteen thousand dollars.*

## Definitions (J)

- ◆ **Jamaica** –Employment (T&RP) Act 1974, s. 5A (3)
- ◆ 5A. (3) For the purposes of this section-
- ◆ (a) an employee is **laid off** without pay if, other than on disciplinary grounds-
- ◆ (i) he is laid off without pay in accordance with the terms of his employment; or

## Definitions (J)

- ◆ (ii) the circumstances of his employment are changed so that for some period he receives no pay pending a decision by his employer to reinstitute previous, or similar circumstances of employment; and
- ◆ (b) a person may, subject to regulations, be regarded, during any period, as laid off without pay notwithstanding that during that period he receives some pay or is engaged to work for limited times only.

## Definitions (J)

- ◆ 5A. (4) Regulations may make provision for-
  - ◆ (a) the form of notice to be given for the purposes of subsection (1);
  - ◆ (b) determining the extent (if any) to which periods of lay-off during which an employee receives some pay, or is engaged to work for limited times only, may be regarded, for the purposes of this section, as a period of lay-off without pay;
  - ◆ (c) resolving any doubt or dispute as to the date on which lay-off commences for the purposes of this Act.

## Definitions (T&T)

- ◆ **Trinidad & Tobago** –No express definition of lay off or short-time but per Thomas Felix P. in **SWUTT v Arcelormittal Point Lisas Ltd.[2016]**
- ◆ *“A layoff in fact is a temporary suspension of an employee’s contract of employment at the employer’s instigation due to no fault or misconduct by the employee with the intention that the employee resumes the contract when the situation causing the layoff has abated. It is less drastic than termination for redundancy...”*

## Common law treatment

- ◆ **Devonald v Rosser [1906] 2 KB 728**
- ◆ In a test case, Mr Devonald was a tinplate rollerman at Rosser & Sons' factory in Cilfrew, South Wales. He was paid for each completed box of 112 tin plates. His contract said he was required to do the tasks set by the employer and that he would get 28 days' notice before termination. Unfortunately, tinplates were in decline and the employer announced the plant would close in two weeks. There was a six-week period, therefore, when the employer gave no work. The question was whether the employer had to pay, given that payment was really according to piece.

## Common law treatment

- ◆ It was held that an implied term of employment contracts is that when there is no work available to be done, the employer must bear the risk by continuing to pay wages.

## Circumstances of lay off...

- ◆ **WHERE** Economic realities necessitate at least a temporary reduction of staff
- ◆ **BUT** Dismissal a last resort only -Consequences of job loss to worker and business;
- ◆ **AND** it may prove impossible for employer to re-negotiate or re-structure terms of contracts;

## Circumstances of lay off...

- ◆ Per Thomas Felix P.
- ◆ *“Layoff in times of depressed prices and economic challenges has been a strategy in our industrial relations culture and practice for decades...It is less drastic than termination for redundancy...”*

## Circumstances of lay off... (B)

- ◆ Barbados –ERA2012; s. 38 (1):
- ◆ *Except where there is an agreement to the contrary in a contract of employment, an employer shall not lay off an employee, or place an employee on short-time,*
- ◆ *(a) except for one or other of the reasons specified in subsection (4); and*
- ◆ *(b) unless the requirements of subsections (5), (6) and (7) are complied with...*

## Circumstances of lay off...(B)

- ◆ REASONS:-
- ◆ *That the employer has temporarily ceased or intends temporarily to cease to carry on the business for the purposes of which the employee was employed by him or has temporarily ceased, or intends temporarily to cease to carry on that business in the place where the employee was so employed; **OR***
- ◆ *The requirements of the business for employees to carry out work of a particular kind or for employees to carry out work of a particular kind in the place where the worker was so employed, have temporarily ceased or diminished or are expected temporarily to cease or diminish...*

## Duties of Employer...(B)

- ◆ REQUIREMENTS:-
- ◆ Before laying off the employee or placing him on short-time, employer must:
- ◆ Carry out the stipulated consultations
- ◆ Supply the employee, the trade union recognized for purposes of bargaining on behalf of the employee and the Chief Labour Officer with a written statement of the facts that require the action

## Duties of Employer (B)

- ◆ Statement must contain
- ◆ (i) particulars of the facts referred to in subsection (4) relevant to the lay off or short time action
- ◆ AND
- ◆ (ii) the number and categories of affected employees and the period during which the action is to be carried out where other employees are affected

## Duties of Employer (B)

- ◆ REQUIREMENTS:-
- ◆ (i) Consultations with the affected employees or their representative
- ◆ Must commence not later than six (6) weeks before any employee is laid off or placed on short-time
- ◆ Must be completed within reasonable time

## Duties of Employer (B)

- ◆ Shall be in respect of –
- ◆ (i) the proposed method of selection of employees to be laid off or placed on short-time
- ◆ (ii) the proposed of carrying out the lay off or short time action...including the period over which the action is to take place
- ◆ (iii) any measures that the employer might be able to take to find alternative employment for affected employees and to mitigate for them the adverse effects of the action

## Circumstances of lay off...(G)

- ◆ **GUYANA –TESPA 1997**
- ◆ *Termination of employment due to redundancy.* 12. (1) The employer may terminate the employment of the employee because the employee is redundant under the provisions of subsection (2).
- ◆ 2. (2) The employee is redundant under subsection (1) where in relation to his employer's business where he is employed, his termination of employment is or is part of a reduction in the work force that is a direct result of -

## Circumstances of lay off...(G)

- ◆ a) the modernisation, automation or mechanisation by the employer of all or part of the business;
- ◆ (b) the discontinuance by the employer to carry on all or part of the business;
- ◆ (c) the sale or other disposition by the employer of all or part of the business;
- ◆ (d) the reorganisation of the business by the employer to improve efficiency;

## Circumstances of lay off...(G)

- ◆ (e) the impossibility or impracticability for the employer to carry on the business at its usual rate or level or at all due to
- ◆ (i) a shortage of materials;
- ◆ (ii) a mechanical breakdown;
- ◆ (iii) a *force majeure*; or
- ◆ (iv) an act of God;

## Circumstances of lay off...(G)

- ◆ (f) a reduced operation in the employer business made necessary by economic conditions, including a lack of or change in markets, contraction in the volume of work or sales, reduced demand or surplus inventory.

## Duties of Employer (G)

- ◆ 12. (3) Prior to terminating the employment of any employee pursuant to this section, the employer shall-
- ◆ (a) inform as early as possible but not later than one month from the date of the existence of any circumstances mentioned in subsection (2), the recognized trade union, or if none exists, the employee or the employee's representative and the Chief Labour Officer of -

## Duties of Employer (G)

- ◆ (i) the existence of any of the circumstances mentioned in subsection (2);
- ◆ (ii) the reasons for the contemplated termination of employment;
- ◆ (iii) the number and categories of the persons likely to be affected;
- ◆ (iv) the period over which such termination is likely to be carried out; and
- ◆ (v) such other matters as may be relevant;

## Duties of Employer (G)

- ◆ b) consult as early as possible but not later than one month from the date of the existence of any of the circumstances mentioned in subsection (2), with the recognised trade union, or if none exists, the employee or the employee's representative and to the Chief Labour Officer, on the possible measures that could be taken to avert or mitigate the adverse effects of such circumstances in relation to employment generally and the employees concerned;

## Circumstances of layoff...(T&T

- ◆ **Trinidad & Tobago**
- ◆ **SWUTT v Arcelor Mittal [2016] per Thomas Felix P:**
- ◆ *“The parties in this case seem to accept that the Company had the right to layoff in a redundancy situation or at least the assertion by the Company that it had such a right is not contested by the Union...”*
- ◆

## Circumstances of lay off (T&T)

- ◆ *Per Addison Khan P. in **TIWU v Consolidated Appliances Ltd.** [1986]*
- ◆ *“The practice of a temporary layoff is well recognized in industrial relations practice. A temporary layoff is a remedy which may be utilized by an employer to obtain relief where circumstances beyond his control warrant its implementation. It is a right which an employer may use only when the circumstances demand it. It must not be abused or be as a result of a whimsical decision. It must be required by the circumstances which must be beyond the control of the employer and not of his own making...”*

## Circumstances of lay off (T&T)

- ◆ *Per ICTT in **TIWU v Bata Ltd.** [1987]*
- ◆ *“It is a well established practice... that the employer is entitled to lay off temporarily the necessary number of workers where, in the course of business, circumstances arise which make this necessary...”*

# Duties of the Employer

- ◆ *“In our view, regardless of whether or not the Company has the right to lay off its workers, since it is the Company that is initiating the layoff, it is only fair and equitable that the spotlight be on **whether the Company acted in accordance with the principles and practices of good industrial relations and the duty in respect of trust and confidence in exercising what it considers to be its right...**”*
- ◆ *In the absence of such provisions, this Court is guided by the accepted procedures followed in similar cases that have come before it.*

# Duties of the Employer (T&T)

- ◆ *“In our view, **consultation** with a RMU is an integral part of the procedural duty of employers where redundancy or layoff is contemplated. This consultation must be fair and adequate to allow the RMU the opportunity to deliberate and to respond to what has been contemplated by the Company. The level of consultation which is required with the Union can be no less than the type of consultation which is contemplated in redundancy and retrenchment cases as provided by the RSBA. It must be pointed out that in a layoff, it is the Company who benefits by not having either to pay wages or to pay severance benefits. The only hope for the laid off worker is re-employment...”*

## Duties of the Employer (T&T)

- ◆ ***Para 42:** “Moreover, even if there is such a right, the implied duty of respect trust and confidence which an employer owes to the employee requires **reasonable notice** of such an action even if such notice was not stipulated in the Collective Agreement...”*

## Remedies of the Employee (B)

- ◆ **Barbados** –ERA 2012; s.39:
- ◆ Complaint to Employment Rights Tribunal
- ◆ ERT may declare complaint well-founded and
- ◆ AND order the Employer to pay to the Employee a sum that is fair and just in the circumstances
- ◆ Three month limitation period from date of lay off or within such period as Tribunal considers reasonable

## Remedies of Employee (B)

- ◆ **Barbados** –Severance Payments Act, Cap 355A
- ◆ *Right to severance payment for lay-off or short time.* [1972-27, 1985-23]
- ◆ 6. (1) Where an employee has been laid off or kept on short-time for
  - ◆ (a) 13 or more consecutive weeks; or
  - ◆ (b) a series of 16 or more weeks (of which not more than 12 were consecutive) within a period of 26 weeks, then, if the employee, within 4 weeks after the relevant date, gives notice in writing to his employer indicating (in whatsoever terms) his intention to claim a severance payment in respect of the lay-off or short-time (in this section and section 7 referred to as “a notice of intention to claim”) the employee is, subject to this section, entitled to a severance payment for being laid off or kept on short-time.

## Remedies of Employee (B)

- ◆ 6. (2) For the purposes of this Part “the relevant date” in relation to a notice of intention to claim or a right to a severance payment pursuant to such notice means the date on which the last of the 13 or more consecutive weeks referred to in paragraph (a) of subsection (1) or the series of 16 or more weeks referred to in paragraph (b) of that subsection, as the case may be, came to an end. [1985-23.]

## Remedies of Employee (B)

- ◆ 6. (3) Where an employee has given notice of intention to claim
- ◆ (a) he is not entitled to a severance payment in pursuance of that notice unless he terminates his contract of employment by a week's notice which (whether given before or after or at the same time as the notice of intention to claim) is given before the end of the period allowed for the purposes of this paragraph (as specified in subsection (5) of section 7); and
- ◆ (b) he is not entitled to a severance payment in pursuance of the notice of intention to claim if he is dismissed by his employer (but without prejudice to any right to a severance payment because of the dismissal):

## Remedies of Employee

- ◆ 6. (3A) If an employee is required by his contract of employment to give more than a week's notice to terminate the contract, the reference in paragraph (a) of subsection (3) to a week's notice shall be construed as a reference to the minimum notice which he is so required to give.

## Remedies of Employee (B)

- ◆ 6. (4) Subject to subsection (5), an employee is not entitled to a severance payment in pursuance of a notice of intention to claim if, on the date of service of that notice, it was reasonably to be expected that the employee (if he continued to be employed by the same employer) would, not later than four weeks after that date, enter upon a period of employment of not less than 26 weeks during which he would not be laid off or kept on short-time for any week. [1985-23.]
- ◆ 6. (5) Subsection (4) shall not apply unless, within seven days after the service of the notice of intention to claim, the employer gives to the employee notice in writing (in section 7 referred to as a “counter-notice”) that he will contest any liability to pay to him a severance payment in pursuance of the notice of intention to claim.

## Remedies of Employee (B)

- ◆ 6. (6) For the purposes of this section and section 7, “week”, in relation to an employee whose remuneration is calculated weekly by a week ending on a day other than Saturday, means a week ending on that other day, and, in relation to any other employee, means a week ending with Saturday. [1972-27.]

## Remedies of Employee (B)

- ◆ 7. (1) Where, in a case where an employee gives notice of intention to claim and the employer gives a counter-notice, the employee continues or has continued, during the next four weeks after the date of service of the notice of intention to claim, to be employed by the same employer, and he is or has been laid off or kept on short-time for each of those weeks, it shall be conclusively presumed that the condition specified in subsection (4) of section 6 was not fulfilled.
- ◆ 7. (2) For the purposes of section 6 (1) and subsection (1), it is immaterial whether the 13 or more consecutive weeks referred to in paragraph (a) of section 6(1) or the series of 16 or more weeks referred to in paragraph (b) of that section consist wholly of weeks for which the employee is laid off or wholly of weeks for which he is kept on short-time or partly of one and partly of the other.

## Remedies of Employee (B)

- ◆ 7. (3) For the purposes mentioned in subsection (2), no account shall be taken of any week for which an employee is laid off or kept on short-time where the lay-off or short-time, is wholly or mainly attributable to a strike or a lock-out, whether the strike or lock-out is in the trade or industry in which the employee is employed or not and whether it is in Barbados or elsewhere.
- ◆ 7. (4) Where the employer gives a counter-notice within 7 days after the service of a notice of intention to claim and does not withdraw the counter-notice by a subsequent notice in writing, the employee shall not be entitled to a severance payment in pursuance of the notice of intention to claim except in accordance with a decision of a tribunal.

## Remedies of Employee (B)

- ◆ 7. (5) The period allowed for the purposes of paragraph (a) of subsection (3) of section 6 is as follows, that is to say
  - ◆ (a) if the employer does not give a counter-notice within 7 days after the service of the notice of intention to claim, that period is three weeks after the end of those seven days
  - ◆ (b) if the employer gives a counter-notice within those seven days, but withdraws it by a subsequent notice in writing, that period is three weeks after the service of the notice of withdrawal;
  - ◆ (c) if the employer gives a counter-notice within those seven days and does not so withdraw it and a question as to the right of the employee to a severance payment in pursuance of the notice of intention to claim is referred to a tribunal, that period is three weeks after the tribunal has notified to the employee its decision on that reference.

## Remedies of Employee (B)

- ◆ 7. (6) For the purposes of paragraph (c) of subsection (5)) no account shall be taken of any appeal against the decision of the tribunal or of any proceedings or decision in consequence of such an appeal.

## Remedies of Employee (G)

- ◆ **Guyana** –TESPA 1997; s. 14 (3)
- ◆ 14. (3) Any employer who contravenes the provisions of this section shall be liable on summary conviction to a fine of (G\$15 000) fifteen thousand dollars.

## Remedies of Employee (J)

- ◆ **Jamaica** –Employment (T&RP) Act 1974; ss. 5A (1), (2)
- ◆ *Option to treat layoff as dismissal on ground of redundancy [6/1986 S. 3.]*
- ◆ 5A. (1) For the purposes of section 5, an employee who has been laid off without pay for a period in excess of one hundred and twenty days may by notice in writing to the employer elect to be regarded as dismissed by reason of redundancy from such date (not being less than fourteen days nor more than sixty days after the date of the notice) as may be specified in the notice, which date shall, for the purposes of this Act, be regarded as the relevant date.
- ◆ 5A. (2) Where a notice is given pursuant to subsection (1) then, subject to section 6 (3) and (4), (*disentitlements from redundancy payment*) the notice shall for the purposes of this Act have effect, in accordance with its terms, as if it implemented a dismissal of the employee on the ground of redundancy on the relevant date.

## Remedies of Employee (T&T)

*Para. 83 -The Company failed to treat and enter into negotiations with the Union in good faith for the purpose of collective bargaining contrary to Section 40 of the IRA;*

**Para. 84 -The Company pay a fine of \$4000.00 on or before 24th March, 2016 for failure to treat and enter into negotiations with the Union in good faith for the purpose of collective bargaining contrary to the provisions of Section 40 of the IRA.**

## Conclusion

- ◆ While for the sake of clarity, there should be statutory provision for the rights of the individual worker in respect of layoffs, the concept of “good industrial relations practice” may be availed of to effect a just result!