Redundancy payments and lay-off: an appropriate balance?

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In a judgment that reconciles two contradictory EAT decisions from the 1980s, Langstaff P has ruled that contracts which provide for employee lay-off are not subject to an implied term that the period of lay-off should be reasonable.

It is fair to assume that not every employment lawyer can recite the details of ss.147-154 of the Employment Rights Act by heart. For those employees seeking a redundancy payment having been contractually laid off, however, the statutory scheme set out by those sections is vital, as is strict adherence to it.

Consisting of a system of notices from the employee and counter-notices from the employer, all to be made within statutory time limits, the scheme sets out the circumstances in which a redundancy payment can be claimed in such a situation.

Tiffen offered hope …

For those employees who have not successfully threaded the needle of the statutory scheme, the EAT decision of *Tiffen* has long held out some hope that the period of a contractual lay-off might nevertheless be found to be unreasonable. In *Tiffen*, an EAT presided over by Bristow J found that a contractual period of lay-off should not extend beyond that which was reasonable and that 'unless a time was specified in the contract, then the law implies that the lay-off is to be for not more than a reasonable time'.

… Dawson cast doubt …

Only a few years later, however, the decision of Lord McDonald in *Dawson* cast doubt upon *Tiffen* and left the state of the law in some uncertainty. As the judgment in that case put it: 'Where … an employer has a contractual right to lay off indefinitely he is, in the normal case, not to be regarded in breach of his contract simply by virtue of the passage of time.' That judgment was reached after consideration of the earlier EAT decision and, while an effort was made to constrain *Tiffen* to its own facts, confusion has reigned on the issue for three decades.

… until Craig ended the confusion

That confusion has now been eliminated by the judgment of Langstaff P in *Craig*, which came down unambiguously on the side of *Dawson*. In the judgment of the modern EAT, the statutory scheme set out in ss.147-154 ERA represents 'the appropriate balance between the rights of the employees and the interests of their employer' in a lay-off situation.

Mr Craig, who was laid off for just over four weeks, believed that his employer was in repudiatory breach due to the allegedly unreasonable length of the lay-off and claimed for constructive dismissal.

The EAT held that while there could be a situation in which during a period of lay-off an employer repudiated the contract through its conduct, there is no general implied term which restricts the lay-off to a reasonable period. Instead, the effect of the statutory scheme is to postpone any entitlement to a redundancy payment pursuant to lay-off for at least four weeks, but then increasingly to put the employee in control as to when after that payment should accrue.

Conclusion

Now, more than ever, those advising employees should make themselves familiar with ss.147-154 ERA. The common law will no longer look kindly upon a failure to comply with it, unless the conduct of the employer has breached the implied term of trust and confidence in some other way.

KEY:

Tiffen	*A Dakri & Co Ltd v Tiffen* [1981] ICR 256
Dawson	*Kenneth MacRae & Co Ltd v Dawson* [1984] IRLR 5
Craig	*Craig v Lindfield & Son Ltd* [2015] UKEAT/0220/15/LA