

## Staff Issues

### QUICK GUIDE

#### PAYING STAFF / ABANDONMENT / REDUNDANCY / LEAVE / SICK LEAVE

##### Pay

In most cases, employers will also have a duty to pay normal pay, even if the employees have been prevented from working, and irrespective of whether they are waged or salaried. The determining factor is whether they are ready and willing to work. If so, then (subject to the terms of the applicable employment agreements) they must be paid.

If an employer is not financially able to continue to pay wages, the parties may agree to a temporary discontinuance of work during which wages need not be paid. However, the express agreement of the employees will be necessary. The key for employers in such situations will be open communication with their employees as to the state of the business and the employer's ability to continue to pay wages indefinitely.

Employers should also consider obtaining employees' consent to take annual leave. Where employees have accrued annual leave, and the parties have been unable to agree to when it shall be taken, employers can only require that annual leave is taken after providing 14 days' notice.

##### Abandonment

Employment legislation does not specify a number of days before an employee is deemed to have abandoned their employment.

An employer is not entitled to assume that because a worker has not reported for work, he or she has abandoned his or her employment. There can be many reasons why an employee may not turn up to work but has not informed the employer. Best practice suggests that, if an employee is not able to get into work and cannot let their employer know, they should ensure someone tells the employer on their behalf, so that the employer knows what has happened.

If an employee has not reported to work and has not contacted the employer, the employer should try to contact the employee, in order to find out why they have not turned up. When contacting the employee, the employer should ask questions to find out whether the employee has actually abandoned the employment or if they have a valid reason for their absence. The employer should listen to the employee with an open mind. The employer should also consider any other information it has related to the employee's absence, such as medical certificates, or conversations with family members of the employee, in deciding whether there has been actual abandonment of employment.

There may be a clause in their employment agreement which states that, after a specific number of days' unauthorised absence (typically three days) the employee may be required to provide medical certificates or undergo a medical examination or the employee's employment may be terminated. An employer cannot rely solely on such a clause to dismiss an employee, even if an employee has agreed to it. If an employer is going to end an employment relationship, they should act fairly and reasonably and have a good reason for doing so.

##### Redundancy

A redundancy happens when an employer ends an employee's employment because:

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- a position filled by an employee is no longer needed, or
- the employer has made a genuine decision for commercial reasons to discontinue employment.

An employer must have a genuine work-related reason for a redundancy. These include:

- cutting staff numbers to increase business efficiency
- restructuring business operations, including a change in the organisation's roles or location
- closure of the business
- outsourcing, and
- sale of the employer's business.

You must follow a fair process. This could include:

- giving appropriate notice about any redundancy proposal
- being open minded to alternatives to redundancy, such as redeployment, and
- offering counselling and career advice services.

Generally, there is no right to redundancy compensation unless employers and employees and/or their union have agreed to it. This can be done before or after an actual redundancy is planned. It is also up to the parties to decide what any redundancy compensation should be.

However, in some restructuring situations, employees (who do certain catering, cleaning, caretaking, laundry and orderly work) can ask the Employment Relations Authority to decide what redundancy entitlements they should receive.

An employee's annual leave entitlement should be included in their final pay.

#### Leave

Leave should be addressed on a case-by-case basis. Some employees may feel comfortable returning to work while some may find it difficult. For employees who are distressed and need time to regroup, the business should consider offering the employee sick leave or annual leave. Employees with specific needs to address, such as looking after sick or injured dependents, may be able to use special leave as provided under the Holidays Act 2003.

Employees who need to address partial or complete destruction of their homes may need additional assistance. Employers may need to examine what they can provide within the business' ability and means. Employees who do not have the option to take special leave, but need time off for whatever reason, can make a request for annual leave.

Staff are refusing to come in to work, but work is operational what do I pay?

Under the provisions of the Health and Safety in Employment Act 1992, an employee can refuse to perform work that they have reasonable grounds to consider that it may be dangerous. In such a situation, the employer should ensure that they have taken 'all practicable steps' to provide a safe workplace. All practicable

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steps means everything a reasonable person would do, given the severity of the risks, what is known about them, and the availability and cost of safeguards.

If the workplace has been cleared as safe, the hazards have been removed or isolated, and the employee can access the workplace, then an employer can refuse to pay that person if they refuse to attend work. The employee may be able to take sick leave if they are too ill or injured to work (or are caring for a dependent or spouse / partner who is ill or injured), or take annual holidays with your agreement. In some circumstances this may ultimately lead to an employer being able to terminate the employment relationship if the employee continues to refuse to work; again we recommend seeking advice before acting in this regard.

#### Sick Leave

Under the Holidays Act 2003, for most employees there is a minimum provision of five days' paid sick leave after the first six months of continuous employment. An additional five days' paid sick leave is gained from that point on, after each subsequent 12 month period. Employment agreements can provide for more generous sick leave provisions.

Employees who do not meet these eligibility requirements can, however, access sick leave in some circumstances.

- an average of at least 10 hours per week, including
- at least one hour per week or 40 hours per month.

Employees on a series of fixed-term agreements, or employees sometimes described as "casual", would become entitled to sick leave if they meet this test

Employees are required to inform the employer at the earliest opportunity of the intention to take sick leave – preferably before they are due to start work, but otherwise as early as possible after falling sick.

The employer has the right where the employee is sick or injured for three or more consecutive calendar days to require the employee to provide proof, such as a medical certificate, of the injury or illness. The employer can ask for proof of illness within three calendar days if they have reasonable grounds to suspect the sick leave is not genuine, they inform the employee as soon as possible, and they agree to meet the employee's reasonable expenses in getting this proof.

#### When can sick leave be taken

Sick leave can be used when an employee is sick or injured, or when the employee's spouse or a dependent person (such as a child or elderly parent) is sick or injured and needs care.

At any time where the employee does not have a sick leave entitlement (including during the first six months of employment), the employer and employee can agree to the employee anticipating the sick leave entitlement. In this case, any sick leave taken can be deducted from the next entitlement that arises.

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