

How to reboot your employment contracts

Legal compliance and protection

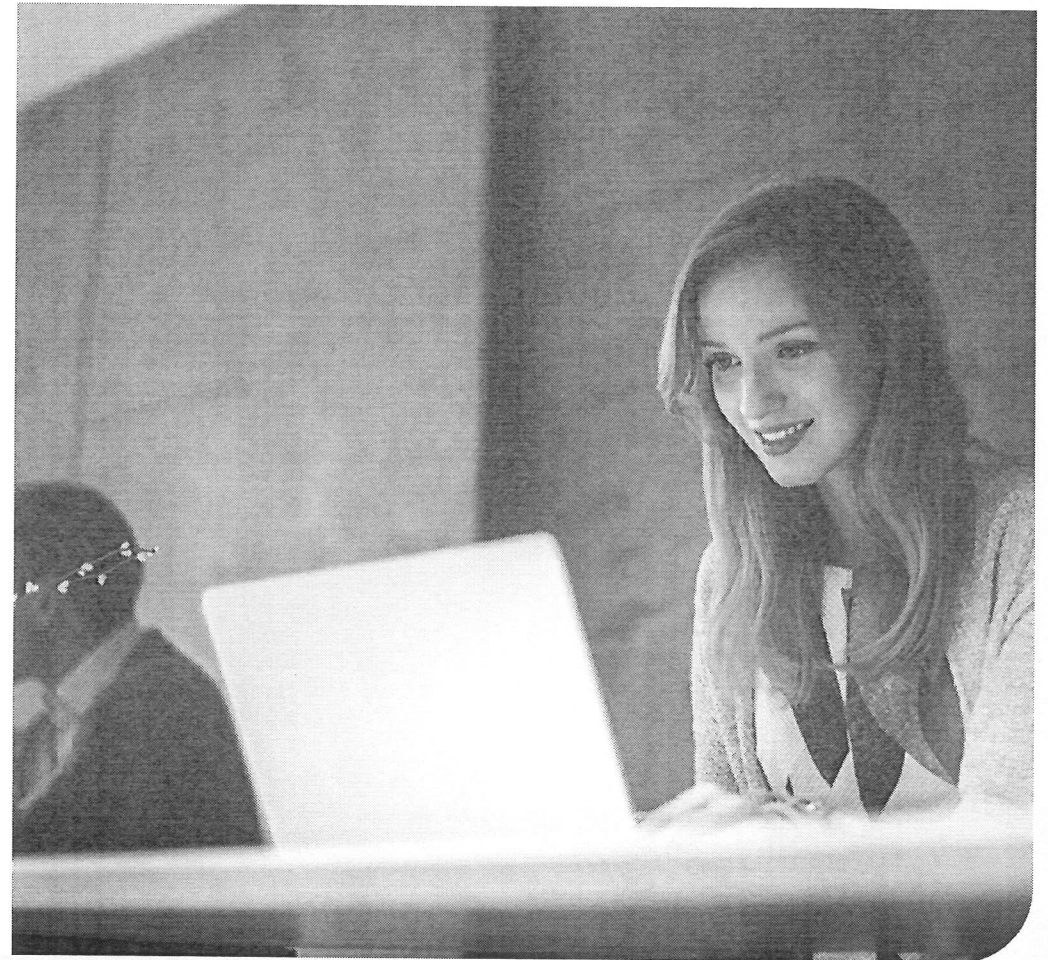
Section 1 ERA – Written Statement of Particulars

- Names of employee and employer
- Date employment began
- Date continuous service began
- Rate of pay
- Timing of payments
- Hours of work
- Holiday entitlement
- Job description
- Place of work
- Notice periods

The contract

Additional “must have” clauses:

- Deemed notice clause
- Deductions clause
- Definition of a ‘days pay’
- Holiday pay clause setting out different types of holiday and when taken
- Restrictive covenants and why PILON clauses are important
- Payment clauses that comply with NMW



Notice clause

General principle: Dismissal takes effect once communicated

Straightforward if told in person, but often employers often prefer to deliberate before reaching a decision

Written notice – does dismissal take effect from point at which it is delivered or when employee actually reads it?

Newcastle upon Tyne Hospital NHS Foundation Trust v Haywood, Supreme Court implied a term into all contracts:

Notice will only start to run from the **date** the employee has **received** the letter and had a **reasonable** opportunity to read it if the date is different

Delay in this case cost NHS Trust over £400k!

Tyne Hospital NHS Foundation Trust v Haywood

Mrs Haywood worked for the NHS for over 30 years. On 13 April 2011, she was informed that she might be made redundant following the merger of two NHS bodies. Both parties knew that if her employment terminated before her 50th birthday she would not be entitled to receive a reduced early retirement pension worth approximately £400,000. Mrs Haywood was entitled to 12 weeks' notice (the statutory minimum). The crucial date was **27 April**. Notice given on or after that would expire on or after her 50th birthday and would trigger her right to receive an early pension. Mrs Haywood had pre-booked an overseas holiday from 18 April to 27 April. The Trust issued written notice to terminate her employment on **20 April** which it sent by recorded delivery to her home and by email to her husband's email address. Mrs Haywood's father collected the letter from the Post Office on 26 April and she opened it when she returned home the following day. Her husband read the email notice on 27 April. The Trust argued that notice was effective from the date of delivery (which in this case was 26 April). Mrs Haywood argued that it was effective from the date she actually read it (the following day – 27 April).

Deduction from salary clauses

General prohibition of making deductions to workers wages: “an employer shall not make a deduction from wages of a worker employed by him” [s13(1) ERA]

Unless deductions:

- Authorised by statute;
- Agreed in the contract; or
- The worker has previously agreed in writing to the making of the deduction

Wages – very broad definition and includes ‘any sums payable to the worker in connection with his employment’

Timing and scope of authorisation

Deduction by written agreement/consent

- Must have agreement in place before deduction is made
- Clause must be clear about what is being authorised – any ambiguity will be construed against the party seeking to rely on it (usually the employer)

Consider this clause ...

- We reserve the right to make a deduction from your wages ... “where shortage or deficiency is found in money or stock for which you are responsible”

Overpayment of holiday & a “day’s pay”

Common situation – worker has taken more holiday than entitled to as at date of dismissal

Can’t make any deductions to recover this unless you have a contractual provision or worker agrees to the deduction before it is made

Regulation 14 Working Time Regulations ‘A **relevant agreement** may provide that, where the proportion of leave taken by the worker exceeds the proportion of the leave year which has expired, he shall compensate his employer, whether by a payment, by undertaking additional work or otherwise.’

Day’s pay

Context of holiday pay how much can you deduct if the employee has exceeded their allowance?

- Agreement should set out how it will be calculated – otherwise Apportionment Act likely to apply
- Court of Appeal in Agnew – said using 365 as the divider is not appropriate because including non working days:

Full time worker – 1/260 of salary

Part time worker – depends on working pattern but someone working 3/5 days – 1/156 of salary

Holiday clauses

All workers must receive at least **5.6 weeks** holiday each year [Regulations 13 and 13A WTRs 1998]

Additional 'rights' apply to four weeks leave required under the Working Time Directive

- Right to carry over holiday into next leave year if too ill to take it [for a limited period]
- Right to receive 'normal pay' [overtime, allowances, commission and possibly bonuses] – can't limit to basic pay

Is there an order in which the different types of holiday are taken?

- 'in the absence of detailed contractual provisions [the employer] is entitled to direct when holiday is taken. It therefore has the power to direct when Regulation 13 holiday should be taken" – **Bear Scotland and others** [2014]

Holiday clauses

1. Specify the order in which leave is taken – Directive should be taken first
2. Set out any restrictions that apply and when leave won't be granted
3. Decide how leave will accrue during first year and what happens when the employee leaves [deductions clause]
4. Explain 'use it or lose it principle' will apply unless exceptions provided by law

If not already doing so, start to include overtime and any other relevant payments in first 20 days pay to avoid potential for claims to go back many years

Averaging provisions (currently 12 weeks) changing to 52 weeks from April 2020

Restrictive covenants

Post termination restrictions are a **restraint of trade** and are only enforceable if they go no further than is necessary to protect the legitimate business interests of the party seeking to rely on them.

Different types:

- Requirement to maintain **confidentiality** to protect business interests
- **Non competition** covenant – prevents employee from competing against employer for specified period
- **Non solicitation** covenant – prevents employee from enticing customers to new business
- **Non dealing** covenant – prevents employee from providing services or dealing with certain contacts
- **Non poaching** covenant – prevents employee from poaching other employees
- **Team move** covenant – prevents employee from employing/facilitating employment of former colleagues

Restrictive covenants and reasonableness

Reasonableness of the covenant is judged **at the time the contract was agreed** and not when the employer is looking to enforce it

Extremely important to revisit covenants if:

- Employee's job role changes
- Nature of the business changes
- World has 'moved on'
 - Older the clause, the more likely will need to be examined to ensure still appropriate

Draft **reasonable restrictions** that are likely to be enforced – consider what's really important and avoid 'standard clauses' that apply to everyone

National minimum wage

Need to understand what type of contract your staff are engaged under

- **Time work** (work that is paid by reference to the time that a worker works such as hourly paid work)
- **Salaried hours work** (where the worker is paid for a fixed number of hours a year, paid in regular instalments)
- **Output work** (work paid according to the worker's productivity)
- **Unmeasured work** (a residual category which catches any other work)

Each category has its own anomalies and a worker may work on more than one basis during the same pay reference period

National minimum wage – pay reference periods

How frequently are staff paid?

Pay must correspond to **hours worked** during the **pay reference period**

Can be problematic where staff are paid in equal instalments – often to help them budget

Can't offset weeks/months where they have been overpaid to compensate for those when have been underpaid unless you have a compliant **salaried hours** contract

- John Lewis operated pay averaging and had to put aside **£36 million** to meet underpayments

Other problem areas regarding NMW

- Pay for sleep in shifts
- Enhanced rates (time work)
- Uniform costs (including asking staff to wear a particular type or colour of clothing)

Very easy to make mistakes

Law in some areas (sleep in shifts) in state of flux

Take advice if you are unsure

- Mistakes very costly – penalties of up to **£20k per worker** plus arrears which can go **back six years**

Checklist Summary

Do your contracts of employment

- Contain a notice clause?
- Enable you to make deductions from wages which reflect your business needs?
- Differentiate between different types of holiday, explain when holiday can be carried over, how over payment of holiday will be calculated (and recovered)?
- Correctly calculate holiday entitlement for part year staff?
- Contain relevant and appropriate restrictions to protect your business interests?
- Comply with the provisions of the National Minimum Wage Act?

Amending T & C's




- You will need the employee's consent to make some of these changes to their contractual terms
- Please contact us if you need help with this




Any questions?



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