



# Employment Relations Act 2004

## 2004 CHAPTER 24

### PART 4

#### ENFORCEMENT OF MINIMUM WAGE LEGISLATION

#### 46 **Withdrawal and replacement of, and appeals against, notices**

(1) After section 22 of the National Minimum Wage Act 1998 insert—

##### **“22A Withdrawal of enforcement notice**

- (1) Where an enforcement notice has been served (and has not already been withdrawn or rescinded), an officer acting for the purposes of this Act may withdraw the enforcement notice by serving notice of the withdrawal on the employer.
- (2) Subsection (3) applies if an enforcement notice is withdrawn and either—
  - (a) no new enforcement notice is served in accordance with section 22B; or
  - (b) a new enforcement notice is so served, but the notice of withdrawal states that subsection (3) applies.
- (3) If an enforcement notice is withdrawn and this subsection applies,—
  - (a) after the withdrawal no penalty notice may be served under section 21 in respect of any non-compliance with the enforcement notice before it was withdrawn;
  - (b) if any penalty notice was so served before the withdrawal, it ceases to have effect and any appeal against it must be dismissed;
  - (c) any sum paid or recovered in respect of any such penalty notice must be repaid to the employer with interest at the appropriate rate running from the date when the sum was paid or recovered;
  - (d) any appeal against the enforcement notice must be dismissed;

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- (e) after the withdrawal no complaint may be presented or other civil proceedings commenced by virtue of section 20 in reliance on any non-compliance with the enforcement notice before it was withdrawn;
  - (f) any complaint or proceedings so presented or commenced before the withdrawal may be proceeded with despite the withdrawal.
- (4) In subsection (3)(c) “the appropriate rate” means the rate that, on the date the sum was paid or recovered, was specified in section 17 of the Judgments Act 1838.
- (5) Where subsection (3) applies the notice of withdrawal must indicate the effect of that subsection (but a failure to do so does not make the withdrawal ineffective).
- (6) Section 21(6) has effect subject to this section and sections 22B and 22C.

### **22B Replacement of enforcement notice**

- (1) This section applies if an officer withdraws an enforcement notice.
- (2) The officer may at the same time as he serves the notice of withdrawal (and if he is of the opinion mentioned in section 19(1) or (2A)) serve on the employer a new enforcement notice under section 19 relating to some or all of the workers to whom the old enforcement notice related.
- (3) The new enforcement notice may not relate to any workers to whom the old enforcement notice did not relate (but this is without prejudice to any power that arises apart from this section to serve an enforcement notice relating to those workers).
- (4) If the new enforcement notice contravenes subsection (3)—
- (a) the case shall be treated as falling within paragraph (b) (or, if none of the workers included in the old enforcement notice is included in the new enforcement notice, paragraph (a)) of section 19(6); and
  - (b) the new enforcement notice is not to be treated for the purposes of sections 22A(2), 22C(1) and 22D(1) as served in accordance with this section.
- (5) If the new enforcement notice includes a requirement under section 19(2) as respects a worker, it must relate to the sum due to the worker under section 17 in respect of the employer’s failure previous to the new notice to remunerate the worker as mentioned in section 19(2) (regardless of whether that failure occurred to any extent before or after the service of the old notice).
- (6) Subsection (5) is subject to section 19(2B) to (2D) as they apply in relation to the new enforcement notice; but section 19(2B) applies in relation to that notice as if the reference to 6 years before the date on which the notice is served were a reference to 6 years before the date on which the old notice was served.
- (7) The new enforcement notice must—
- (a) indicate the differences between it and the old enforcement notice that it is reasonable for the officer to consider are material; and

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- (b) unless the notice of withdrawal states that section 22A(3) applies, indicate the effect of sections 22C and 22D.
- (8) A failure to comply with subsection (7) does not make the new enforcement notice ineffective, but a notice that does not comply with that subsection is not to be treated for the purposes of sections 22A(2), 22C(1) and 22D(1) as served in accordance with this section.
- (9) The reference in subsection (1) to an enforcement notice does not include an enforcement notice served by virtue of this section.

### **22C Effect of replacement on penalties where section 22A(3) not applied**

- (1) If an enforcement notice is withdrawn and a new enforcement notice is served in accordance with section 22B, this section applies unless the notice withdrawing the old enforcement notice states that section 22A(3) applies.
- (2) Where this section applies, subject to subsections (3) and (5) the withdrawal of the old enforcement notice does not affect—
  - (a) any penalty notice that before the withdrawal was served under section 21 in respect of any non-compliance with the old enforcement notice;
  - (b) the power under section 21 to serve a penalty notice in respect of any non-compliance with the old enforcement notice before it was withdrawn.
- (3) If—
  - (a) before the withdrawal of the old enforcement notice a penalty notice was served which included an amount for a day's non-compliance with the old enforcement notice as respects a worker, and
  - (b) that amount could not validly have been included in the penalty notice if the old enforcement notice had been as it should have been according to the new enforcement notice,the penalty notice shall be treated as withdrawn under section 22E at the same time as the old enforcement notice is withdrawn.
- (4) Where subsection (3) applies, section 22F (power to replace penalty notice) applies—
  - (a) as if the cases mentioned in section 22F(1) as cases in which that section applies included the case where a penalty notice is by virtue of this section treated as withdrawn; and
  - (b) as if the references in section 22F(2) to the amount and particulars that the officer considers should have been stated in the penalty notice were to the amount and particulars that he considers should have been so stated if the old enforcement notice had been as it should have been.
- (5) A penalty notice served by virtue of subsection (2)(b) must not include an amount for a day's non-compliance with the old enforcement notice as respects a worker if, had the old enforcement notice been as it should have been according to the new enforcement notice, that amount could not validly have been included in the penalty notice.

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- (6) The words after paragraph (c) in section 22(3) shall not apply for the purposes of any appeal against a penalty notice continued in effect by virtue of subsection (2)(a) above or served by virtue of subsection (2)(b) above.

**22D Effect of replacement on appeals and civil proceedings where section 22A(3) not applied**

- (1) If an enforcement notice is withdrawn and a new enforcement notice is served in accordance with section 22B, this section applies unless the notice withdrawing the old enforcement notice states that section 22A(3) applies.
- (2) If an appeal has been made under section 19(4) against the old enforcement notice and the appeal has not been withdrawn or finally determined before the time when that notice is withdrawn—
- (a) that appeal (“the earlier appeal”) shall have effect after that time as if it were against the new enforcement notice; and
  - (b) the employer may exercise his right of appeal under section 19(4) against the new enforcement notice only if he withdraws the earlier appeal.
- (3) If an appeal is made under section 19(4) against the new enforcement notice (or by virtue of subsection (2) above has effect as if so made), section 19(9) and paragraphs (a) to (c) of section 21(7) apply in relation to any penalty notice—
- (a) continued in effect by virtue of section 22C(2)(a), or
  - (b) served by virtue of section 22C(2)(b),
- as they apply in relation to penalty notices served in respect of the new enforcement notice.
- (4) Where this section applies—
- (a) after the withdrawal of the old enforcement notice no complaint may be presented or other civil proceedings commenced by virtue of section 20 in reliance on any non-compliance with that notice before it was withdrawn;
  - (b) any complaint or proceedings so presented or commenced before the withdrawal of the old enforcement notice may be proceeded with despite the withdrawal and replacement of that notice.

**22E Withdrawal of penalty notice**

- (1) Where a penalty notice has been served on a person (“the employer”) (and has not already been withdrawn or rescinded), an officer acting for the purposes of this Act may withdraw the penalty notice if he is of the opinion—
- (a) that, in the case of each of the allegations of failure to comply with the enforcement notice in respect of which the penalty notice was served, the facts are such that an officer who was aware of them would have had no reason to serve any penalty notice on the employer; or
  - (b) that the amount of the financial penalty is too great because the penalty notice is incorrect in some of the particulars which affect that amount; or

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- (c) that the amount of the financial penalty is too great because its calculation is incorrect.
- (2) The withdrawal shall be effected by serving notice of the withdrawal on the employer.
- (3) If a penalty notice is withdrawn and is not replaced under section 22F—
  - (a) any sum already paid or recovered in respect of the penalty notice must be repaid to the employer with interest at the appropriate rate running from the date when the sum was paid or recovered;
  - (b) any appeal against the notice must be dismissed.
- (4) In subsection (3)(a) “the appropriate rate” means the rate that, on the date the sum was paid or recovered, was specified in section 17 of the Judgments Act 1838.

### **22F Replacement of penalty notice with notice imposing lower penalty**

- (1) This section applies if a penalty notice is withdrawn because the officer is of the opinion mentioned in section 22E(1)(b) or (c).
- (2) The officer may, at the same time as that notice is withdrawn, serve by way of replacement a new penalty notice under section 21 in which—
  - (a) the amount of the financial penalty is the amount (which must be less than that in the old penalty notice) that the officer now considers should have been the amount stated in the old penalty notice; and
  - (b) the particulars stated under section 21(2)(c) to (e) are as he now considers they should have been in that notice.
- (3) The new penalty notice must indicate—
  - (a) the differences between it and the old penalty notice that it is reasonable for the officer to consider are material, and
  - (b) the effect of subsections (4) to (7),but a failure to comply with this subsection does not make the new penalty notice ineffective.
- (4) If a sum was paid or recovered in respect of the old penalty notice—
  - (a) an amount equal to that sum (or, if more than one, the total of those sums) shall be treated as having been paid in respect of the new penalty notice; and
  - (b) any amount by which that sum (or total) exceeds the amount payable under the new penalty notice must be repaid to the employer with interest at the appropriate rate running from the date when the sum (or, if more than one, the first of them) was paid or recovered.
- (5) In subsection (4)(b) “the appropriate rate” means the rate that, on the date mentioned in subsection (4)(b), was specified in section 17 of the Judgments Act 1838.
- (6) Subsection (7) applies where—
  - (a) a new penalty notice is served by virtue of this section; and

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- (b) an appeal has been made under section 22(1) against the old penalty notice and has not been withdrawn or finally determined before the time when that notice is withdrawn.
- (7) In such a case—
- (a) that appeal (“the earlier appeal”) shall have effect after that time as if it were against the new penalty notice; and
  - (b) the employer may exercise his right of appeal under section 22 against the new penalty notice only if he withdraws the earlier appeal.
- (8) The reference in subsection (1) to a penalty notice does not include a penalty notice served by virtue of this section.
- (9) This section is without prejudice to any power arising apart from this section to serve two or more penalty notices in respect of the same enforcement notice.”
- (2) In section 19(6) of the National Minimum Wage Act 1998 (c. 39) (cases where appeals against enforcement notices are allowable), in paragraph (c)—
- (a) in sub-paragraph (ii), for “incorrect;” substitute “too great; or”; and
  - (b) after that sub-paragraph insert—
    - “(iii) that the notice contravenes subsection (2B) above;”.
- (3) In section 22(3) of that Act (cases where appeals against penalty notices are allowable), for paragraphs (b) and (c) substitute—
- “(b) that the amount of the financial penalty is too great because the penalty notice is incorrect in some of the particulars which affect that amount; or
  - (c) that the amount of the financial penalty is too great because its calculation is incorrect.”
- (4) Nothing in subsections (2) and (3) affects sections 19 and 22 of the National Minimum Wage Act 1998 as those sections have effect for the purposes of the Agricultural Wages (Scotland) Act 1949 (c. 30).
- (5) In each of—
- (a) section 3A(2)(c) of the Agricultural Wages Act 1948 (c. 47), and
  - (b) Article 8A(2)(c) of the Agricultural Wages (Regulation) (Northern Ireland) Order 1977 (S.I. 1977/2151 (N.I.22)),
- (enforcement of agricultural wages legislation in England and Wales and Northern Ireland respectively), for “22” substitute “22F”.