

# Quick fire information

## My employee didn't work out their notice period – what can I do?



A provision requiring an employee to provide one month's notice of termination or, alternatively, to lose one month's income or wages (known as the "Forfeiture Provision") is ruled unenforceable by the Employment Court. So what can you do as an employer?

Before trying to recover damages from an employee, such as deducting the un-worked notice period from their final pay, you need to demonstrate the following:

- **That you as an employer want to safeguard your rightful performance interests.**
- **That such interests are proportionate to the amount you are attempting to recover.**
- **A contractual ability to do so.**

To demonstrate these points, the court will look at the following tests:

### Time the contract was entered into

Instead of when the breach occurred, the court looks at when the contract was signed. If the employee resigned and didn't complete their notice period during a busy time, therefore an inconvenient time to the employer, the court will not consider the inconvenience to be sufficient to deduct the un-worked notice period from an employee's final pay.

### Loss caused by breach

In addition to taking into account the loss resulting from the breach (contractual damages), the courts may also take into account how non-performance may affect the parties' larger business interests that the contract is intended to advance or safeguard. How much did the company lose as a result of the employee not fulfilling their notice period?

### Proportionality

This is when courts determine if there was a negotiating power imbalance. This is especially important because of the "inherent inequality of power in employment relationships" **So how could you prove your loss?** Perhaps, Losing prospective clients resulted in opportunity costs, and your business suffered a loss when the directors or other senior staff members had to take on the employee's responsibilities. But this may not be enough. In the most recent decision, this argument was held invalid.

The court concluded that there was no proof the directors put in more hours as claimed or received more compensation for filling in for the employee. Furthermore, the Court was unable to calculate the financial impact to the business, even if under-staffing may have resulted in the loss of prospective customers. These issues demonstrated that the Forfeiture Provision did not accurately predict damages or reflect easily measurable financial losses resulting directly from the failure to provide notice.

### Key Takeaway

Please come to us and address the matter before bringing an employee before the ERA or Court for a breach of contract because they did not complete their notice period. Focusing on replacing the employee rather than attempting to recoup damages can end up saving you more money in the long run.