



# Enforcing the **National Minimum Wage**

A practical guide

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# Introduction

This guide is intended for advisers and union representatives who are in contact with, and in a position to help, low paid workers who may not be receiving the national minimum wage (NMW). It concentrates on how to assist with enforcement of the NMW and does not attempt to cover the full scope of the NMW legislation. For more information on the NMW rights and law please see the resources list at the end of this guide. Please note that although this guide has been prepared with care, it does not constitute legal advice.

Effective enforcement is essential for the success of the NMW legislation and to ensure that all workers who are entitled to the NMW receive it. Many of those who are not receiving the NMW will not be in a trade union. Trade unions have an opportunity to recruit new members while helping workers to secure their rights.

Enforcement only becomes an issue once it has been established that the NMW has not been paid to a qualifying worker. This introductory section of the guide therefore highlights certain essential preliminary matters which you will have to deal with before considering enforcement.

## Who is covered?

The vast majority of workers and employees are entitled to the NMW. A worker does not need a written or oral contract of employment to qualify for the NMW. Home workers, agency workers, domestic workers, piece and commission workers, part-time workers and those working for small firms may all be entitled to the NMW. There is no qualifying period; workers are entitled to the NMW from the start of their employment.

### Who is exempt?

The following groups are not entitled to the NMW:

- family members, including those working for a family business (except where they reside outside the family home of the employer)
- people working and living within their employer's family home, who are provided with free accommodation and meals and who share in the tasks and leisure activities of the household (e.g. au pairs)
- friends and neighbours helping each other out informally under no obligations
- some trainees on Government-funded schemes
- apprentices aged under 19, and older apprentices in the first year of their apprenticeship (this is under review in 2009)
- some students in higher education on work placements lasting up one year
- the armed forces, prisoners and share fishermen
- some mariners and offshore workers
- voluntary workers (who work for a charity, voluntary organisation, associated fund-raising body or statutory body and who do not receive any payments other than reimbursement of reasonable expenses and no benefits in kind except subsistence and accommodation reasonable in the circumstances of the employment)
- genuinely self-employed people; however, being treated as self-employed by HM Revenue and Customs (HMRC) for tax and national insurance purposes does not mean someone is necessarily treated as self-employed under the NMW legislation
- company directors, unless they also do work under an employment contract with their company.

## How much is the NMW?

Young workers are entitled to a lower rate than adult workers. Hourly rates are currently:

- Adult workers aged 22 and over **£5.73**
- 18 to 21-year-olds **£4.77**
- 16 and 17-year-olds **£3.53**

These rates apply from the first day of a worker's pay period which starts on or after 1 October 2008. The rates are likely to be increased again at the beginning of October each year.

Note that young people must be above the compulsory school age to qualify for the national minimum wage. This varies slightly in different parts of the UK.

Employers who provide their employees with accommodation free of charge can count an additional amount (the accommodation offset) towards national minimum wage pay. The maximum amount of the accommodation offset is currently £31.22 per week or £4.46 per day. There are special rules to work out national minimum wage pay if the employer charges the worker for the accommodation.

Commission-only workers, such as door-to-door salespeople and manufacturing homeworkers, may be paid in a slightly different way.

Phone the HMRC helpline for further details:  
**0845 6000 678.**

### How to calculate the NMW

Having established that a worker qualifies for the NMW and the rate at which they should be paid, you have to work out whether the worker is, or was, paid NMW. The NMW is an average hourly rate of pay, which must be averaged over the worker's pay reference period. There are rules governing what the pay reference period is, what counts as NMW pay and what hours the NMW must be paid for, and these rules vary according to the type of work being performed. These issues need to be explored when working out whether the worker is being paid the right amount.

#### For further guidance on this:

- Ring HMRC's NMW helpline - **0845 6000 678**
- Consult the TUC's National Minimum Wage calculator at [www.worksmart.org.uk/minwage\\_calc.php](http://www.worksmart.org.uk/minwage_calc.php)
- See the Detailed Guide to the National Minimum Wage published by BERR (the Department for Business, Enterprise and Regulatory Reform) [www.berr.gov.uk/files/file47736.pdf](http://www.berr.gov.uk/files/file47736.pdf)

# A worker's NMW rights

## The NMW rights in brief

The vast majority of workers aged 16 and over will qualify for the NMW. This gives them the following rights:

- to be paid at least the NMW for each hour worked
- to see their pay records (accompanied if they wish)
- not to be dismissed or suffer detriment for a reason connected with the NMW.

This section explains these rights in more detail.

## The right to be paid the NMW

All workers who qualify for the NMW are entitled to be paid at least the NMW, whether or not this right is stated in a written or oral contract.

## The right of access to records

Employers must keep sufficient records that show that the NMW is being paid.

Workers who suspect that they are not receiving the NMW have the right to see and copy their pay records. The request must be made in writing (a 'production notice').

Workers have the right to be accompanied to see their records. They may wish to take a staff representative, a union officer, an adviser or a colleague with them. If they wish to be accompanied, this must be stated in their request to see the records.

The employer must produce the records at the workplace or another agreed place within 14 days or a later time if this is agreed with the worker. The worker must be given reasonable notice of the time and place.



### The right to protection against detriment and dismissal

All workers have the right not to suffer detriment or dismissal for a reason connected with the NMW.

For example, a reason connected with the NMW is either that the worker tried to assert their right to the NMW, or the employer had legal action taken against them under the NMW Act as a result of action taken by the worker, or the worker qualifies, or will qualify or believes that they qualify, for the NMW.

It is automatically unfair to dismiss an **employee** for a reason connected with the NMW. Note that this does not apply to 'workers', who are not employees (seek further legal advice on this issue).

However, the right not to suffer detriment for a reason connected with the NMW does apply to workers whether or not they are also employees and can be relied upon when the detriment is dismissal. The compensation available to workers who are dismissed for a reason connected with the NMW is the same as that available for employees making claims of unfair dismissal.

'Detriment' means something that the employer has done or not done which has caused damage or disadvantage to a worker. Examples of detriment could include harassment, missing out on a pay rise awarded to other staff, or changes to a worker's terms of employment and dismissal.

#### Detrimental changes to terms of employment might include:

- reducing pay rates, working hours or holiday entitlement
- changing general duties, resulting in demotion
- reducing or removing benefits such as clothing or site allowances, or consolidating them with basic pay (if this has not been negotiated as part of a wage settlement).

# How can NMW rights be enforced?

**A worker may seek advice from you for any of the following reasons:**

- non-payment or suspected non-payment of the NMW
- employer's refusal or failure to show pay records
- detrimental action by the employer for a reason relating to the NMW
- dismissal for a reason relating to the NMW
- breach of contract relating to the NMW.

There are a number of steps you can take to help the worker claim their NMW rights. It will be important at the outset to find out as much information about the worker's claim as you can.

## **Checklist – information to seek from worker**

There are a number of questions it will be useful to ask the worker at the outset to help establish the nature of the case.

### **a) In all cases:**

- Is the worker in a trade union? If so, has s/he approached the union for assistance?
- Does the worker have any payslips?
- If so, are the hours worked and pay rates recorded accurately on the payslips? If not, has the worker kept their own records?

### To check whether the worker qualifies for the NMW, and at what rate:

- How old is the worker?
- Does the worker fall into any of the groups not entitled to the NMW listed in the introductory section?
- Does their employer provide the worker with accommodation and is there any charge for that accommodation?

### b) Where the worker is still employed and is (or was) not receiving the NMW:

- Has the worker raised the issue with the employer? If so, what was the response?
- Are any of the worker's colleagues not receiving the NMW?
- If the worker is now receiving the NMW but was not receiving it at an earlier date, when was the last under-payment? If less than three months ago, it will be possible to make their own claim to an employment tribunal but urgent action may be required. There are special processes which must be followed by employees taking their own cases to employment tribunals. Alternatively workers may ask HMRC to investigate their complaint.
- If the last underpayment was more than three months ago action can still be taken via HMRC or through the County Court.

### c) Where the worker has left or been dismissed after not receiving the NMW:

- What were the circumstances of the dismissal? Did it follow the worker raising the issue of NMW payment with the employer?
- How long ago did the worker leave the job? If it is less than three months ago, it will still be possible to make a claim to an employment tribunal but urgent action may be required (see **employment tribunals** below).

- If it was more than three months ago action can still be taken through the County Court to recover any underpayments of the NMW.
- d) Where the employer has failed or refused to give access to the worker's pay records:**
- How long ago did the worker ask to see the records?
  - Did they put the request in writing?
- e) Where the worker has had their hours reduced or allowances consolidated:**
- When did the change take place?
  - Was this part of an agreement negotiated with a trade union?
  - Did the worker object to the change when it happened?

## Contact the employer

The worker may already have raised the issue of the NMW with the employer with no result. The worker may want you to raise it with the employer on their behalf. If there is a grievance procedure, you should consider with the worker the possibility of using it (note that workers have the right to be accompanied at grievance and disciplinary hearings by a workplace colleague, a trade union official or a trade union representative).

Before taking any action on behalf of the worker, it will be useful to establish whether there are other workers in the same workplace also not receiving the NMW. In many cases, an approach by an adviser or a trade union representative may be enough to prompt the employer to start complying with the law.

### Contact HM Revenue and Customs

If contacting the employer directly does not work, or if the worker is reluctant to raise the issue with their employer due to the fear of victimisation or discrimination, the next step should be to decide whether to take their own case to tribunal or whether to ask HMRC to investigate. HMRC has the remit of enforcing payment of the NMW. There is a National Minimum Wage Helpline for enquiries and complaints. One of the 16 NMW compliance teams will follow up individual complaints.

#### The helpline can be contacted:

**By telephone:** the NMW helpline no. is  
**0845 6000 678**

Open Monday to **Friday 9.00am–5.00pm**.  
Callers can be assisted in 30 different languages.  
Calls will be charged at local rates.

**Online**, using the relevant online complaint form at: **[www.hmrc.gov.uk/nmw/complaint.htm](http://www.hmrc.gov.uk/nmw/complaint.htm)**

#### **In writing:**

National Minimum Wage  
Enquiries  
Freepost PHQ1  
Newcastle upon Tyne  
NE98 1ZH

Ideally using the complaint form downloaded from: **[www.hmrc.gov.uk/nmw/nmw\\_complaint\\_form.pdf](http://www.hmrc.gov.uk/nmw/nmw_complaint_form.pdf)**. The complaint form is also included with this booklet.

## What do the compliance officers do?

Once the helpline has received a complaint they pass it on to the NMW Central Information Unit who allocate it to the compliance team that covers the area where the employer is based. The Central Information Unit collects information about complaints and considers cases of NMW non-payment. Their information comes from different sources:

- complaints made direct by workers or ex-workers, either via the helpline, online or in writing
- complaints made by third parties: trade unions, advisers, workers' relatives and friends etc. – many of these will be complaints made on behalf of or about a particular worker

However, the compliance teams also investigate employers identified through risk assessment as being at risk of not paying the minimum wage.

In each case, whether initiated by a complaint or through risk assessment, compliance officers may look across the whole workforce to identify any workers who have not been paid the minimum wage.

NMW compliance officers follow up all the complaints they receive. They do this by approaching the employer; they do not divulge that the visit is as a result of a complaint. In a typical investigation, the employer and workers will be interviewed and records examined. compliance officers will take steps to ensure that the NMW is paid (including any back pay).

### The advantages of using HMRC are:

- An approach by HMRC may be enough to persuade employers to comply and any arrears will be enforced for workers who have not been paid NMW.

- Compliance officers have special powers to seek information and enforce compliance.
- They can follow up complaints without giving the name of the worker who has complained about possible non-payment of the minimum wage, thus protecting the anonymity of the worker.

Workers who have suffered detriment or dismissal as a result of the NMW (e.g. had their hours reduced or been victimised or dismissed as a result of raising the NMW) need to take their claims to an employment tribunal or the civil courts. For more information on this, see below.

Compliance officers will act to recover underpayments for former workers if they had not been receiving the NMW and can use formal powers against the employer in relation to workers who have left.

### **Before contacting the NMW Helpline...**

It is important to discuss with the worker all the possible consequences of taking this action. A worker whose employer believes that they have reported them to HMRC may be vulnerable to bad treatment or even dismissal by the employer. Workers are protected by law against detriment or dismissal resulting from their attempts to be paid the NMW, and unions and advisers (but not HMRC) can help them to take a case to an employment tribunal on these grounds, if necessary. It is worth noting that a successful case against dismissal is likely to lead to financial compensation rather than reinstatement. A worker who fears bad treatment by their employer as a result of action being taken should make this clear to the compliance officers, and ask that their name is not released to the employer. Some workers may prefer to have the support of other workers before making a complaint.

## Does the worker want to be named?

A worker can request that the compliance officers do not release their name to the employer, and this request will be respected. However, if it becomes necessary to serve an enforcement notice on the employer or file a claim against the employer at a tribunal the worker's name must be cited and the worker could be asked to act as a witness.

You can make also anonymous complaints to the helpline on behalf of a worker who has asked to remain unidentified. The compliance officers will investigate the case, but if there is no named worker to report back to, you and the worker will receive no more information about the case.

## Who should contact the helpline?

The compliance officers encourage workers to contact the NMW Helpline themselves, so that details are received first-hand, and if the worker is happy to do this they should do so.

## The role of the adviser/union representative

Some workers will prefer you to contact the helpline on their behalf and the helpline staff are happy to take complaints made by third parties on behalf of workers.

HMRC are able to feed back information to advisors as well as workers providing that the worker you are advising gives HMRC written authority to do so.

The complaint form below includes a box that the worker must complete in order to authorise HMRC to discuss the case with you.

It is important to name yourself as the individual whom the compliance officers are authorised to contact, and not just your organisation. The form should be given to the compliance officer dealing with the case.



### Checklist of information required for making a complaint

- the worker's name, address and telephone number (can be omitted but see above)
- the worker's age
- the employer's name, address and telephone number
- how the worker is paid (e.g. by the hour, piece work, annual salary)
- rate of pay
- pay reference period (e.g. paid weekly, monthly or in some other way)
- hours of work
- whether they are allowed any breaks and whether these are paid breaks
- whether the worker has been provided with accommodation by the employer and whether there are any charges for this
- whether the employer is making any deductions or taking any payments from the worker (e.g. for uniforms, tools, transport or meals)
- whether the worker is still not receiving the NMW
- whether the worker is now receiving the NMW, and if so when the employer raised wages to the NMW rate
- date of leaving if the worker has left the employment.

### What happens once the complaint has been made?

The main steps are set out below.

- A simple information query will be dealt with immediately; however, if you are making a complaint the details will be entered on a

computer and a reference number will be assigned to the case.

- The NMW Helpline will pass the complaint to the NMW Central Information Unit for allocation to a compliance team. Once a compliance officer in a team has received the complaint, they will write to the worker confirming that they are now dealing with the complaint and giving them a contact and telephone number. They will also write to the adviser/union representative if this has been authorised by the worker (see above).
- In some cases, if it emerges that the worker or their representative has misunderstood their position, the compliance officer may deal with the complaint without contacting the employer.
- In most cases, the compliance officer will make contact with the employer within 30 days of receiving the complaint and arrange to visit the employer.
- In the meantime, the compliance officer may try to find out more information from the worker or from their adviser/union representative where they believe that this will further the investigation.
- Once the compliance officer has visited the employer, their next steps will depend on what they have found out during their visit.

### Next steps for the compliance officers

In many cases, a visit from a compliance officer will be enough to persuade an employer to comply and start paying the NMW (and to pay any arrears owed).

If not, compliance officers have various enforcement powers that they can use. Clearly, they will not use these unless they believe that the employer is not paying the NMW or is not supplying the information they need to assess whether the NMW is being paid.

Firstly, the compliance officers have the legal right to **see the relevant records**, copy those records and have them explained. They can also ask to speak to relevant staff (e.g. payroll staff) about

this information. They have the right to enter the employer's premises to get this information.

At the time when this booklet was written, the following regime applies. However, it is likely that this will be replaced with a new penalty regime in April 2009 (see below).

### The 2008 enforcement and penalty regime

If the compliance officer finds that an employer is not paying the NMW, they can serve an **enforcement notice** requiring the employer to pay the worker the NMW up to the date of the notice and to pay the NMW in the future. An **enforcement notice** can apply to more than one worker. An employer can appeal to an employment tribunal against the enforcement notice within four weeks from the date on which the notice was sent.

If an employer who has been served an enforcement notice still fails to pay the NMW as requested, the compliance officer can serve a **penalty notice** on the employer, which requires the employer to pay a penalty to the Secretary of State.

The penalty notice must set a date by which the employer must pay the penalty. This deadline must be more than four weeks from the date when the notice is sent, as the employer is allowed that long to appeal to an employment tribunal against the penalty notice.

If the employer still refuses to comply, the compliance officer can **make a claim to an employment tribunal or recover the debt via a county court on the worker's behalf**.

In the worst cases, HMRC can also **prosecute the employer**. Willful refusal to pay the NMW and failure to keep NMW records is a criminal offence liable for a fine of up to £5,000.

## The 2009 penalty regime

The Employment Act 2008 will change the law in order to strengthen the NMW regime by introducing a penalty for all employers caught underpaying their workers, increasing the maximum fines available to the courts and giving compliance officers the power to remove employer's records as part of an investigation. The new legislation also makes all arrears payable to the worker at the current NMW rate, which will give workers extra money in long-running cases. The new rules are likely to take effect in April 2009.

## What information will you and the worker be given while a complaint is being processed?

The compliance officer will inform the worker of what action they are taking and what stage the process has reached. They will discuss further action, particularly the possibility of taking a claim to an employment tribunal with the worker. If the worker has requested it and given authorisation, the compliance officer will contact you at the same time as they contact the worker.

## Making a claim in an employment tribunal

It is not possible to make an anonymous claim against an employer in an employment tribunal; it will be necessary for the worker to be named.

## Who should make the claim?

HMRC compliance officers have the resources and experience to make claims of NMW non-payment in respect of a worker or workers. To date (December 2007), compliance officers have taken a large number of cases to an employment tribunal and they have an excellent success rate.

However, HMRC only have powers to take cases of NMW non-payment. They cannot take cases of

detriment (see section one) or dismissal or refusal of access to records. If a case involves detriment or dismissal or access to records as well rather than NMW non-payment, it will be necessary for the worker to make the claim supported by their union representative or adviser.

Claims can be presented to an employment tribunal on one (or more) of four grounds:

### 1. Non-payment of the NMW

If the tribunal finds against the employer, it will order the employer to pay to the worker(s) the money owed.

### 2. Refusal of access to records

A worker can make a claim to a tribunal if their employer fails to give the worker access to pay records. If the tribunal finds against the employer, it can order the employer to pay the worker a sum of 80 times the hourly adult NMW rate.

### 3. Detriment or dismissal

If the worker believes that the action (or inaction) which caused the detriment or dismissal was for a reason connected with the NMW, they may make a complaint to an employment tribunal.

### 4. Unfair dismissal

Employees (but not other workers) can make claims of unfair dismissal against their employer. Dismissal of an employee as a result of eligibility for or requests to be paid the NMW is automatically unfair.

**Example:** Ms Smith (who is 17 years old) was paid £3.53 an hour. Shortly before her 18th birthday, she was sacked and the job was offered to Ms Jones who is only 16. If Ms Smith believes that the reason for her dismissal was her eligibility for a higher rate of the NMW, she could make a claim of unfair dismissal.

## In all cases:

- Workers have the right to enforce their rights to the NMW from day one of employment, and the rights exist regardless of hours worked, or firm size.
- The time limit for making a complaint to an employment tribunal is three months from the date of the infringement, whether this be underpayment (in which case the limit runs from the date of the latest underpayment), failure to produce records, detriment (in which case the limit runs from the incident complained of) or dismissal. Note that this time limit is likely to be tightened from April 2009 onwards.
- The burden of proof in all cases of underpayment (but not unfair dismissal) is on the employer. This means that so long as the worker's claim is made in good faith, the employer must prove that the worker was not entitled to the NMW, or was receiving the NMW or was dismissed for a reason not connected to the NMW (depending on the case).

## Using the civil courts

The main reason for using the civil courts rather than the employment tribunal to enforce NMW rights is if the three-month time limit for employment tribunal claims has been exceeded. It is possible to use the civil courts to enforce NMW rights because NMW rights are implied terms in contracts of employment. The time limit for claims in civil courts is six years from the date of the breach of contract.

## Supplying local labour market information to HMRC

Union representatives and advisers are in a good position to know or suspect that a particular employer(s) is not paying the NMW. You can feed this information to the NMW Helpline in exactly the same way as making a complaint on behalf of a worker. It will be treated as an anonymous complaint, and the Compliance Officers will follow

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up the case with the employer according to the same steps laid out above. You will not get feedback on the case, although, as mentioned above, you can ask for the case reference number, which will enable you to feed in to the investigation any further information that you obtain. Last year (2007/8) HMRC followed up all of the 2,000-plus complaints that they received.



## Resources list

### Department for Business, Enterprise and Regulatory Reform

A wide range of information is available on the BERR website:

[www.berr.gov.uk/employment/pay/national-minimum-wage/index.html](http://www.berr.gov.uk/employment/pay/national-minimum-wage/index.html)

The National Minimum Wage Order Line can also provide relevant leaflets including:

A detailed guide to the national minimum wage

**National minimum wage – a short guide for employees**

**National minimum wage – a short guide for employers**

All free of charge and available from tel **0845 845 0360**

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### Trades Union Congress

Congress House  
Great Russell St  
London WC1B 3LS

Tel: **020 7636 4030**

Fax: **020 7636 0632**

[www.tuc.org.uk](http://www.tuc.org.uk)

The TUC's Worksmart website gives advice about the minimum wage and pay in general:

[www.worksmart.org.uk/](http://www.worksmart.org.uk/)

Online minimum wage calculator:

[www.worksmart.org.uk/minwage\\_calc.php](http://www.worksmart.org.uk/minwage_calc.php)

Polish language version of the minimum wage calculator:

[www.pracawbrytanii.eu/zarobki-w-brytanii/kalkulator-minimalnej-placy/](http://www.pracawbrytanii.eu/zarobki-w-brytanii/kalkulator-minimalnej-placy/)



There are independent employment advice charities in Yorkshire and Manchester that give specialist advice by telephone and in writing to advisers and union reps as well as workers on all aspects of the NMW and other employment rights. They also provide training for advisers/union reps on employment law.

### **Greater Manchester Pay and Employment Rights Service**

4th floor

Swan Buildings

20 Swan St

Manchester M4 5JW

Advice line: **0161 839 3883**

email: **info@gmemploymentrights.org.uk**

website: **www.gmemploymentrights.org.uk/**

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### **Pay and Employment Rights Service (Yorkshire)**

Unit 14

Batley Enterprise Centre

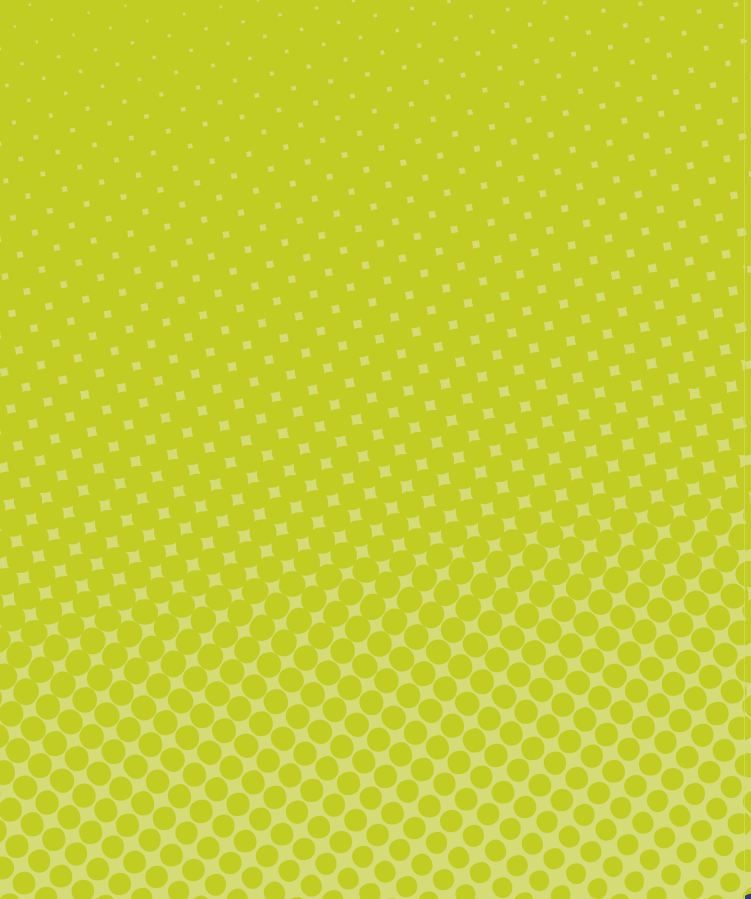
513 Bradford Road

Batley WF17 8LL

Advice line: **01924 428 030**

Email: **admin@pers.org.uk**

Website: **www.pers.org.uk**



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