JOINT CONCILIATION COMMITTEE OF THE
HEATING, VENTILATING AND DOMESTIC ENGINEERING INDUSTRY

COMPRISING: **113**
Building & Engineering Services Association — Unite – the Union

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TO EMPLOYERS AND EMPLOYEES IN THE HEATING, VENTILATING, AIR CONDITIONING, PIPING AND DOMESTIC ENGINEERING INDUSTRY

Dear Sir/Madam

Advisory Note in Response to the Recent Employment Appeal Tribunal Judgment concerning Calculation of Holiday Pay

As signatories to the B&ES Operative National Agreement, the Association and the Union ("the Parties") have jointly reviewed and considered the implications of the Employment Appeal Tribunal (EAT) judgment in the cases of *Bear Scotland Ltd v Fulton*, *Hertel (UK) Ltd v Woods* and *Amec Group Ltd v Law* concerning the provisions of the Working Time Regulations relating to calculation of holiday pay [UKEATS/0047/13/BI; UKEAT/0160/14/SM and UKEAT/0161/14/SM].

The Parties have agreed the **Advisory Note** which is attached at Appendix 1.

Signed on behalf of and as authorised by
BUILDING & ENGINEERING SERVICES ASSOCIATION
P. D. RIMMER, Head of Employment Affairs and Skills

Signed on behalf of and as authorised by
UNITE – THE UNION
B. McAULAY, National Officer for Building, Construction and Allied Trades

APPENDIX 1 to JCC LETTER 113

ADVISORY NOTE agreed between the Building and Engineering Services Association ("the Association") and Unite the Union ("the Union") in Response to the Recent Employment Appeal Tribunal Judgment concerning the Calculation of Holiday Pay

Introduction

As signatories to the B&ES Operative National Agreement, the Association and the Union ("the Parties") have jointly reviewed and considered the implications of the Employment Appeal Tribunal (EAT) judgment in the cases of *Bear Scotland Ltd v Fulton, Hertel (UK) Ltd v Woods* and *Amec Group Ltd v Law* concerning the provisions of the Working Time Regulations relating to calculation of holiday pay [UKEATS/0047/13/BI; UKEAT/0160/14/SM and UKEAT/0161/14/SM].

In doing so, the Parties have decided, for the time being, not to amend the terms of the B&ES National Agreement ("the National Agreement"). Instead, they have decided to issue this agreed interim Advisory Note in the expectation that this will:

- encourage Employers to adjust their practice in calculating holiday pay, to reflect the recent EAT judgment referred to above; and

- advise Operatives what they can expect in terms of the level of holiday pay they are due to receive when on holiday.

The Judgment

The basic principle behind the EAT judgment is that – consistent with the requirements of the Working Time Regulations – a week's pay for the purposes of annual leave shall continue to be calculated in accordance with the existing provisions of the Employment Rights Act 1996, which defines a "week's pay". A week's pay is the amount of remuneration for the number of normal working hours calculated at the average hourly rate payable by the Employer in respect of a period of 12 weeks before the holiday is taken. The basis for calculating holiday pay has not changed. The EAT judgment has simply clarified the elements of pay that need to be taken into account when undertaking the holiday pay calculation.

The EAT ruling applies only to the 20 days' holiday derived from the European Working Time *Directive*. Pay for any holiday entitlement above 20 days, such as the remaining 11 days' holiday of the National Agreement, is unaffected by the EAT judgment.

Agreed Guidance

<u>Hours of Work, Overtime and Daily Travelling Allowance Payments</u>

The effect of the EAT judgment is that guaranteed and normal non-guaranteed overtime, and allowances such as the Daily Travelling Allowance of the National Agreement (but not fares), should be considered when calculating an Operative's holiday pay for the first 20 days' entitlement of the holiday year.

Guaranteed overtime is where the Employer is obliged to offer and pay for agreed overtime for their workforce and members of the workforce are obliged to work it. There is no guarantee to overtime working under the terms of the National Agreement.

Non-guaranteed overtime is where there is no obligation on the employer to offer overtime, but if the Employer does offer overtime, the Operative is obliged to work it. There are no such obligations under the terms of the National Agreement.

There is nothing in the EAT judgment which means that voluntary *ad hoc* overtime working should be taken into account when calculating an Operatives' holiday pay entitlement.

Holiday Entitlement and the Level of Holiday Pay to be Paid

The National Agreement holiday year runs from 1 February to 31 January.

The holiday entitlement of the Agreement comprises 31 days' holiday, including 23 days' annual holiday and 8 days' recognised holiday entitlement.

The Parties agree that for full-time employees 20 days' holiday should be paid at the level required by the EAT judgment.

The Parties have also agreed that the 20 days referred to above should comprise the *first* 20 days holiday taken in the industry holiday year.

To ensure new starters who commence employment with an employer part way through the industry leave year are not disadvantaged, the Parties have agreed that new starters shall commence their holiday entitlement with holiday pay at the level required by the EAT judgment. In these circumstances, the level of holiday pay required by the EAT judgement will be paid for the proportion of 20 days *pro rata* to the proportion of the holiday year outstanding at the time the Operative commences his employment with the Employer concerned.

Reference Period for Calculating Holiday Pay

Consistent with the relevant requirements of the Employment Rights Act 1996, the Parties have agreed that the 12-week averaging period for the purposes of calculating holiday pay is consistent with the requirements of the industry and should remain at 12 weeks.

The Parties have agreed that the calculation date which is used to determine the 12-week period shall be the Employer's normal wage calculation date of the pay period immediately before the pay period in which the period of leave is due to commence.

Sickness Absence

If the 12-week reference period referred to above includes a period of sickness absence for which Weekly Sickness and Accident Benefit of the National Agreement and Statutory Sick Pay are paid, any such week(s) is/are ignored and an equal number of earlier week(s) is used to form the full 12 weeks upon which the averaging calculation outlined above is based.

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