

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

**COMPRISING:**

Building Engineering Services Association

**121**

Unite –the Union

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02 July, 2018 [amended 02.08.18]

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

Dear Sir/Madam

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

**Important:** The joint Advisory Note attached at Appendix 1 to this JCC Letter supplements and updates information contained in JCC Letter 113 [dated 24 April 2015] concerning the provisions of the Working Time Regulations relating to the calculation of holiday pay

As joint signatories to the BESA Operative National Agreement, the Association and the Union (“the Parties”) have considered the implications of the recent Employment Appeal Tribunal (EAT) judgment in the case of *Dudley Metropolitan Borough Council v Willetts and Others* [UKEAT/0334/16/JOJ] which considered whether payment for **voluntary** overtime that is normally worked is within the scope of the Working Time Regulations and therefore included in *normal remuneration* for the purposes of calculating holiday pay.

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

Signed on behalf of and as authorised by  
BUILDING ENGINEERING SERVICES ASSOCIATION  
P L SAMUELS, Head of Employment Affairs

Signed on behalf of and as authorised by  
UNITE THE UNION  
B McAULAY, National Officer for Construction

## APPENDIX 1 to JCC LETTER 121

**UPDATED 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 in relation to **voluntary** overtime.

As joint signatories to the BESA Operative National Agreement, the Association and the Union (“the Parties”) have considered the implications of the Employment Appeal Tribunal (EAT) judgment in the recent case of *Dudley Metropolitan Borough Council v Willetts and Others* [UKEAT/0334/16/JOJ] concerning the provisions of the Working Time Regulations relating to calculation of holiday pay. This updated Advisory Note does not amend the terms of the BESA National Agreement (the Agreement”) but, instead, serves to:

- Encourage Employers to adjust their practice in calculating holiday pay, to reflect the 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 Judgments

The earlier EAT cases referred to in JCC Letter 113 – *Bear Scotland Ltd v Fulton, Hertel (UK) Ltd v Woods and Amex Group Ltd v Law* - all considered whether guaranteed and normal non-guaranteed overtime should be considered as part of normal remuneration for the purposes of calculating holiday pay.

The recent *Dudley* case, however, considered whether payment for voluntary overtime that is normally worked is now also within the scope of the Working Time Regulations and therefore included in *normal remuneration* for the purposes of calculating holiday pay.

The basic principle behind all the judgments is that 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 remains changed. The *Dudley* case clarifies further elements of pay that need to be taken into account when undertaking the holiday pay calculation.

The EAT rulings mentioned above apply only to the 20 days’ holiday derived from the European Working Time Directive (so called. *Euro-leave*). Pay for any holiday entitlement above 20 days, such as the remaining 11 days’ holiday of the National Agreement [12 days with effect from 1.2.2020), is unaffected by the EAT judgments.

### Agreed Guidance

**Voluntary** overtime means overtime, which the Employer is not obliged to offer, and which the Operative is not obliged to accept if it is offered. The National Agreement provides for such voluntary overtime working.

The effect of the *Dudley* judgment means that the calculation of holiday pay in respect of voluntary overtime that is normally worked should now be considered when calculating an Operative’s holiday pay for the first 20 days’ entitlement of the holiday year. JCC Letter 113 confirmed that allowances such as the Daily Travelling Allowance of the National Agreement (but not fares) should also be considered when calculating an Operative’s holiday pay.

There is nothing in the judgment which means that *sporadic* or *ad hoc* overtime working should be taken into account when calculating an Operative's holiday pay entitlement.

The advice provided in JCC Letter 113 concerning holiday entitlement and the level of holiday pay to be paid, reference period for calculating holiday pay and sickness absence remains unchanged, and is repeated below for completeness.

#### 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<sup>1</sup> 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.

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.

\*\* END \*\*

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<sup>1</sup> *With effect from 1.2.2020 holiday entitlement will increase to 32 days', comprising 24 days' annual and 8 days' recognised.*