Article Information

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What do you mean by ordinary? Regular overtime, regular public holiday work, ordinary time earnings and the impact on superannuation contributions

What pay is earned for ordinary time work, and what is pay earned for other work, especially when an employee is engaged on an aggregate or annual salary?

For Bluescope, the answer to this question at its Port Kembla operation could have run into millions of dollars in compensation for unpaid superannuation. However, in May 2019, the Full Court of the Federal Court overturned an earlier decision and determined that components of pay for 'additional hours' and public holiday work were not part of Ordinary Time Earnings and are not superable. The Full Court's approach is potentially of much wider application as to when there is a binding legal obligation to pay superannuation.

Background

Bluescope's Port Kembla operations were covered by industrial arrangements that required employees to work additional hours (beyond standard hours) and they were regularly called on to do so. In a first-instance decision in February 2018, the Court determined that there was no practical distinction between standard and additional hours, or work done on public holidays from any other work day and as a result, the whole of the salary paid was Ordinary Time Earnings (**OTE**), on which Bluescope was obliged to make superannuation contributions.

Bluescope appealed, and the appeal decision issued in May 2019, *Bluescope Steel (AIS) Pty Ltd v Australian Workers' Union* [2019] FCAFC 84 (***Bluescope***). The appeal decision dealt with:

- what constitutes OTE for the purpose of making superannuation contributions; and
- whether the *Superannuation Guarantee (Administration) Act 1992* (Cth) (**SGA Act**) and the *Superannuation Guarantee Charge Act 1992* (Cth) (**SGC Act**) create a binding legal obligation on employers to make superannuation contributions on behalf of employees.

This case involved a number of employees with multiple industrial instruments applicable to them. Of importance was that under the industrial instruments, the employees were paid an annualised or aggregate salary. Employees working under an annualised salary system worked up to 43.5 hours per week (38 hours plus 5.5 'additional hours'). Further, as well as those engaged under the aggregate salary system, they were rostered to work on public holidays. The annualised and aggregate salaries included payment for not only the base salary but also the additional hours and public holidays.

The issues in the case were, first, whether the 'additional hours' and 'public holidays' components of the annualised salary were OTE. Secondly, whether public holiday payments included in the annualised or aggregate salary were OTE.

What are Ordinary Time Earnings?

'OTE' is defined in s 6 of the SGA Act. Prior to the *Bluescope* decision, the interpretation of OTE was heavily influenced by the decision in *Quest Personnel Temping Pty Ltd v Commissioner of Taxation* [2002] FCA 85 (***Quest***), which opened the door to inclusion in OTE of hours worked beyond a fixed standard where doing so had become "*so regular, normal, customary or usual that the additional hours are to be regarded as ordinary hours for a particular employee*". In this way, the decision in *Quest* was taken as determinative that all regular or customary overtime should be included in the calculation of OTE.

However, the Bluescope appeal decision included that 'to use *Quest* as authority for the proposition that in the definition of

OTE the phrase ordinary hours of work simply means the ordinary or usual or normal hours worked, is both to misunderstand *Quest* and to misconstrue the definition.'

A key passage from one of the separate judgements in the Bluescope appeal is that:

'*... The meaning that best reflects ... the text, context, purpose and history of the provision is earnings in respects of ordinary or standard hours of work at ordinary rates of pay as provided for in a relevant industrial instrument, or contract of employment, but if such does not exist (and there is no distinction between ordinary or standard hours and other hours by reference to rates of pay) earnings in respect of the hours that the employee has agreed to work or, if different, the hours usually or ordinarily worked.'*

In a separate and consistent judgement, it was put that the additional hours prescribed by the relevant industrial instruments did not fall under the rubric of ordinary hours of work, but constituted overtime amounts which were distinctly identifiable. Even where an employee receives regular overtime payments, ***it will not mean that the payments cease to be characterised as being paid in respect of overtime***. The fact that additional hours may have been actually worked on a customary basis is not the point.

Ultimately, the Full Court held that the work undertaken during 'additional hours' and on public holidays was not ordinary hours of work and as such, could not constitute earnings in respect of ordinary time.

At Port Kembla, the industrial instruments separated salary components for 'additional hours' and defined the ordinary hours of work.

In addition to ordinary hours being defined, the fact that the calculation of 'additional hours' and public holidays attracted penalty rates of pay was taken as an indication that these hours were not a part of the ordinary hours of work, something which the *Quest* decision appeared to reject. This apparent change in interpretation may mean that employers who have employees routinely working overtime could have been overpaying superannuation contributions due to an inflated OTE calculation.

The decision in *Bluescope* appears to be in line with the views of the Commissioner of Taxation as set out in Superannuation Guarantee Ruling SGR2009/2. While SGR2009/2 does not have the force of law, it states broadly that overtime payments are not OTE. This is so whether the payments are calculated at an hourly rate or the employee gets a specific loading, or an annualised or lump sum component of a total salary package, that is expressly referable to overtime hours as remuneration for overtime hours worked.

Is there a binding legal obligation?

When compulsory superannuation was introduced, it operated by imposing an additional tax charge on an employer who had failed to make required superannuation contributions to a complying fund on behalf of an employee. Contributions were not (and were not intended to be) made directly to employees, in order to preserve superannuation entitlements for use in retirement, when the trustee of the complying fund would release the benefits to the employee. The SGA Act and SGC Act only create an incentive for employers to make the required contributions in order to avoid a charge under the SGC Act.

The Bluescope appeal decision confirmed that as a result, there was no basis to make an order that unpaid superannuation would be paid for the benefit of the particular employee. If a superannuation contribution had been unpaid, the loss was directly suffered by the complying superannuation fund. The consequence for the employer was (at that time) only that it would suffer an additional taxation charge.

The way in which unpaid superannuation contributions are able to be recovered has subsequently been altered by new legislation, after the circumstances in the Bluescope appeal first arose. In the very bland-sounding title of the *Treasury Laws Amendment (2018 Measures No. 4) Act 2019*, the ATO Commissioner has been given the power to direct an employer to pay an unpaid superannuation guarantee charge amount (including the unpaid superannuation and interest, which is transferred by the ATO to the employee's complying fund), and introduces a new offence and penalties for failing to comply with such a direction. Unlike superannuation contributions, this charge is not a deductible expense and is likely to be more costly to the employer than simply making contributions based on an employee's OTE.

Given the decision in *Bluescope*, where overtime pay (including for regular or customary overtime) is specifically identifiable, employers need to re-consider whether it is included in the calculation of OTE for superannuation purposes.

In determining if overtime pay can be distinguished from OTE, it is important to consider the relevant industrial instruments or contract of employment and the relevant rates of pay for standard hours of work in comparison to other hours.

Employers should review their superannuation practices in the light of *Bluescope*. If you are unsure of the requirements

regarding superannuation contributions, contact a member of Piper Alderman's Employment Relations team for assistance.