

Police Federation
Of England and Wales



Ffederasiwn Heddlu
Lloegr a Chymru

Established by Act of Parliament

Federation House, Highbury Drive, Leatherhead, Surrey KT22 7UY
Telephone 01372 352021 Fax 01372 352078
Email GenSec@polfed.org www.polfed.org

FROM THE DEPUTY GENERAL SECRETARY'S OFFICE

AW/sjr

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JBB Circular 08-2016

To: All Branch Board Chairmen and Secretaries
cc: Members of the Interim National Board

Dear Colleagues,

**OVERTIME AND PAYMENT FOR ADDITIONAL DUTY PERFORMED UNDER THE
POLICE REGULATIONS 2003**

This circular replaces JBB Circular 26/2015 in respect of the cases of *Vincent, Allard and Buckley v Chief Constable of Devon and Cornwall Police*. It explains:

1. The background to these cases;
2. The binding decision of the Court of Appeal;
3. Additional points to note; and
4. Action to be taken.

1. Background

These cases arose from claims brought by three retired Devon & Cornwall Covert Human Intelligence Source (CHIS) Handlers who frequently received calls from CHIS outside their normal working hours. Senior management imposed a cap on the amount of overtime, public holiday and rest day working they could claim for (including the appropriate time off in lieu of payment), meaning that the officers argued they had not received their full entitlement to payment under Police Regulations 2003 ("the 2003 Regulations") and the Secretary of State's Determinations made thereunder.

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Upon leaving their unit the officers brought a claim against the Chief Constable of Devon & Cornwall for failure to pay a statutory debt in respect of payments for overtime, public holiday and rest day working they were due under the 2003 Regulations.

The case largely rested on whether the officers had been recalled to duty. The Chief Constable disputed that the officers were performing a recall to duty when dealing with out of hours' calls, especially if it involved short periods of time. There was also a disagreement over the interpretation of the 2003 Regulations with regards to payment for working this additional time. The officers' claims could therefore not proceed until the Court made a determination on the correct interpretation of the 2003 Regulations.

At a hearing in October 2013 in the County Court, a judge found in favour of the claimants and upheld their interpretation of the 2003 Regulations.

The Chief Constable appealed to the Court of Appeal. The claimants also cross-appealed one point of the judgment arguing that the 30 minute disregards which apply to unplanned overtime performed at the end of a shift (i.e. casual overtime) should not be applied where an officer is recalled to duty between two rostered tours. In February 2015 the unanimous decision of the Court of Appeal was to dismiss the Chief Constable's appeal and to uphold the claimants' cross appeal.

The Chief Constable applied for permission to appeal to the Supreme Court. In July 2015 the Supreme Court refused the Chief Constable's application for permission to appeal.

As there has now been a determination on the correct interpretation of the 2003 Regulations, the cases will be remitted to the County Court to progress towards a final resolution.

2. The Court of Appeal's Decision

The decision of the Court of Appeal in the *Vincent, Allard and Buckley* cases is binding. It determined that:

- These officers, who were required as part of their role to handle contact from CHIS outside their rostered tours of duty¹, were performing "duty" within the meaning of the 2003 Regulations when they handled contact from those CHIS with authority from their Controller, even if that contact was restricted to contact by telephone i.e. the officers were recalled to duty.
- The one exception identified by the Court of Appeal was where a deregistered CHIS attempted contact with their former Handler and their Controller or Deputy Controller refused the Handler authority to engage with the CHIS.
- Therefore, in respect of recalls to duty performed between two rostered tours of duty before 1 April 2012 (and the changes introduced following the Winsor Review) and duty which the officers were required to do on public holidays and rest days, if the time worked as a result of the recall was less than four

¹ For references within this circular to "rostered tour of duty" also read "rostered shift"

hours, the officer would be entitled to a minimum of four hours' pay at the appropriate rate².

- Overtime performed by way of a recall to duty is not treated in the same way as casual overtime (when an officer is required to stay on unexpectedly at the end of his/her rostered tour of duty) and so it is not subject to any 30 minute disregard on the first four occasions on which it is performed.
- In addition, paragraph 1(g) of Annex G, whereby periods of less than 30 minutes of casual overtime are not taken into account, does not apply to overtime arising from a recall to duty.

The findings in these cases did not concern duty performed on a day of annual leave or a free day or any of the changes which have been introduced following the Winsor Review, including the removal of the 4 hour minimum for recalls between two tours of duty or the introduction of the unsocial hours' allowance and the on call allowance.

The decision in these cases was based on the facts as they applied in Devon and Cornwall. However, it is likely that CHIS Handlers in other Forces will be able to rely on the decision in these cases that they were performing 'duty' within the meaning of the 2003 Regulations when handling contact with CHIS outside their rostered tours of duty.

3. Additional Points to Note

It is also useful to bear in mind the following points:

- The minimum 4 hour provision for a recall between two rostered tours of duty was revoked with effect from 1 April 2012 following the Winsor Review. This now means that officers, by virtue of Annex G, paragraph 1(d), will have to work a minimum of a completed period of 15 minutes when recalled to duty between two rostered tours of duty (to include relevant travelling time) before they are entitled to claim an allowance for the recall to duty and will only be paid for completed periods of 15 minutes thereafter. The 30 minute disregards and requirement to work for 30 minutes before any casual overtime is taken into account is still to be ignored for the purposes of any recall to duty.
- Officers should be aware of their entitlement to compensation under the 2003 Regulations arising from duty they perform outside their rostered tours of duty. If officers wish to take action in respect of any failure to pay an allowance, including an overtime, public holiday, rest day or free day allowance, or failure to allow time off in lieu of the allowance then for nearly all claims there is a strict 6 year time limit from the date when the entitlement first arose.
- From 1 April 2012 any officers (including CHIS Handlers) who work between 8pm and 6am are entitled to the unsocial hours allowance for every full hour worked during that time.

² Although not an issue before the Court of appeal, there is one caveat to this provision under Police Regulations 2003 (Annex H, para 3(h)) for rest day working: if an officer works for no more than one hour from a rostered duty into a rest day, the rest day time to be reimbursed counts as the number of 15 minute periods actually completed.

- From 1 April 2013 an on call allowance of £15 per day was introduced as recompense for each day an officer spends any time on-call. This is an additional payment supplementing the officer's entitlement to any allowance for duty performed whilst on call.
- Forces may seek to limit officers' entitlement to payment for duty performed outside of normal rostered tours of duty through local agreements in order to try and manage budgets. However, the Determinations made under the 2003 Regulations set out a clear structure for officers to be compensated for overtime and work performed outside of their rostered duties. It is within the control of management to alter working patterns to provide coverage so as to reduce the need for overtime or time owed.

4. Action to be taken

JBBs should use this circular to approach forces to ensure that officers are properly compensated for both past and present recalls to duty and requirements to work on public holidays, rest days, free days and days of annual leave.

Where officers have not been properly compensated for past recalls to duty or requirements to work on a public holiday, rest day, free day, day in lieu of overtime or day of annual leave, either because they have not been paid the allowance required under the 2003 Regulations or they have not been allowed to take time off to which they were entitled, then the following course of action may be open to them.

Where they have not been paid an allowance then they may bring a claim in the county court for recovery of a statutory debt (i.e. the amount they ought to have been paid under the determination). Officers considering any such claim should bear in mind the following:

- (i) The question whether or not they were recalled to duty will be decided in accordance with the principles now established in *Allard & others*.
- (ii) Any claim will be subject to a 6 year time limit. Time starts from the date when the entitlement first arose and it stops running when the claim is issued at court.

Officers who are considering bringing a claim should act now and should not, for example, wait while they gather evidence.

- (iii) The revocation of the minimum 4 hours' provision for recalls to duty between two rostered tours of duty is not retrospective so officers who were recalled to duty between two rostered tours of duty before 1 April 2012 may still be able to claim a minimum of 4 hours for each occasion when they were recalled to duty.
- (iv) Further, and in any event, the minimum 4 hours' provision continues to apply in respect of each period of duty which any officer is required to

do on a public holiday or rest day³, and officers remain entitled to compensation when recalled to duty whilst on annual leave or a day in lieu of overtime, when the annual leave day/day in lieu of overtime is part of an absence from duty of at least 3 days, at least one of which must be a day of annual leave.⁴

In some cases, forces have attempted to introduce local agreements or schemes that limit entitlement to overtime allowances or time off in lieu. It is unclear how the courts will approach any such agreement and the outcome will be likely to depend on the circumstances of each agreement.

Conclusion

The circumstances of this case involved CHIS Handlers. However, there are other police officer roles where overtime is worked and officers may not be compensated in accordance with the 2003 Regulations e.g. search advisors, surveillance roles and other covert roles. New issues that have arisen for officers who have performed these other roles are still being explored.

If any officers wish to seek legal advice as a result of this Circular they should do so as soon as possible by submitting a C2 to the Constables' Central Committee. They must also attach the information requested in the Annex.

Officers should be made aware that the 6 year time limit for the debt element of these claims is likely to be strictly observed by the Courts and that time will only stop running when a legal claim is issued in court against the relevant Force.

If you have any queries in respect of this circular, please do not hesitate to contact me.

Yours sincerely,



Andy Ward
Deputy General Secretary

³ Subject to the caveat under Police Regulations 2003, Annex H, paragraph 3(h). If an officer works for not more than one hour from a rostered duty into a rest day, the rest day time to be reimbursed counts as the number of 15 minute periods actually completed.

⁴ PNB Circular 2014/8 provides separate compensation arrangements for rest days and free days within a period of absence from duty of five or more days, where at least one of those days is a day of annual leave. Annex O of the 2003 Regulations will be amended accordingly.

Annex

Information to be provided by members wishing to bring a claim for overtime payments and allowances due under the Police Regulations 2003

If you wish to take action in respect of any failure to pay any allowance or failure to allow time off in lieu then for nearly all claims there is a strict 6 year time limit from the date when the entitlement first arose. Time will only stop running when a legal claim is issued in Court against the relevant Chief Officer.

If you are seeking to bring a claim for overtime payments and allowances due under the Police Regulations 2003, please can you provide the following information when submitting a C2 request for legal advice. This information will assist the solicitors in immediately assessing the matter and, in particular, whether a protective claim needs to be issued.

Most of the information requested should be within your immediate knowledge and so should be fairly easy to provide, it should not require you to obtain any documents.

However, if you do not have the information requested, you should not delay in submitting a request for legal advice if your entitlement to overtime payments and allowances first arose more than 6 years ago.

1. What is the role you are/were performing and in which you are seeking to claim payment for overtime/allowances? E.g. CHIS Handler, Undercover Officer, Cover officer etc.
2. Which unit(s)/department(s) did you work in when the entitlement to overtime payments/allowances arose?
3. When did you join the department(s)/unit(s) in which you are seeking to claim for overtime payments/allowances (please try and give specific dates, rather than just stating a year)?
4. Was the unit(s) you worked in part of a collaboration with other forces or organisations? If so, please provide details of the other forces/organisations which formed part of the collaboration.
5. Are you still in the department/unit?
6. If no, state when you left and where you are now working (or when you retired, if applicable)
7. What is your rank now and what was your rank when you worked in the unit/department (if different). Please include details (and dates) if you acted up at all in the unit/department?
8. Why were you not paid your entitlement to overtime payments and allowances under the Police Regulations?

9. Are you currently being permitted to claim your full entitlement to payment, allowances or time off under the Police Regulations 2003 for doing duty out of hours?
10. What was your normal working day/hours whilst working in the department/unit?
11. If you work or worked part time or condensed hours, please provide details of the hours and days you worked whilst in the unit(s)/department(s).
12. Did you perform the following types of overtime/duty out of hours and if so, did you receive the correct rate of pay or TOIL for this:
 - a) Being required to start your tour of duty earlier than the rostered start time
 - b) Being required to remain on duty after your tour has ended (if so, state whether you were given notice of this at the commencement of your tour)
 - c) Being recalled to duty between two rostered tours (as per the case of *Vincent, Allard & Buckley*, this would include where you are obliged to deal with calls out of hours)
 - d) Being required to do duty on a rostered rest day (as per the case of *Vincent, Allard & Buckley*, this would include where you are obliged to deal with calls out of hours)
 - e) Being required to do duty on a public holiday (as per the case of *Vincent, Allard & Buckley*, this would include where you are obliged to deal with calls out of hours)
 - f) Being recalled to duty whilst on leave (as per the case of *Vincent, Allard & Buckley*, this would include being obliged to deal with calls out of hours)
13. Have you been required to be 'on call' since 1 April 2013 and if so, have you received the allowance of £15 per day for this?
14. Have you been paid the unsocial hours allowance, where applicable (for each full hour worked between 8pm and 6am)?
15. Please list the names of the officers you worked with in the unit/department (including your sergeants and inspectors)
16. If possible, please provide the information below. Due to the changes to some of the entitlements introduced by the Winsor reforms in April 2012, it is necessary to separate out some of the information pre and from April 2012:

Prior to April 2012 (if applicable):

- (a) On average, how many times a week (or a month if easier) do you think you dealt with calls out of hours **between two rostered tours of duty**?
- (b) On average, how many times a week (or a month if easier) do you think you dealt with calls **on rest days**?

From 1 April 2012

- (c) On average, how many times a week (or a month if easier) do you think you dealt with calls out of hours **between two rostered tours of duty** where you completed at least 15 minutes of duty (including writing up notes and any follow up work required)?
- (d) On average, how many times a week (or month if easier) do you think you dealt with calls **on rest days**?

From 1 April 2013

- (e) On how many days since April 2013 have you been "**on call**". Please identify actual days you were formally on call and also state whether you were still required to do deal with calls on days when you were not formally on call
- (f) Further to (e), if you were on call, did you receive £15 per day for each day you were formally on call?

Entire period of time worked in the unit

- (g) On average, on how many **public holidays** during the last 6 years (or since you joined the unit if less than 6 years ago) do you think you have been required to do duty?
- (h) On average, over the last 6 years (or since you joined the unit if less than 6 years ago), on how many days of **annual leave (or whilst taking TOIL)** do you think you have been required to do duty?
- (i) What was your salary (hourly rate if possible), during the last 6 years (or since you joined the unit if less than 6 years ago). If your salary changed over the last 6 years, please provide details of the changes too.

17. How much do you think you are owed for unpaid overtime and allowances due over the last 6 years? How have you calculated this?

18. Please provide any other information that is relevant to your potential claim.

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