

Universities will always act as employers in relation to construction projects, as they employ the design team (e.g. architects) via appointments and the building contractor via a building contract to design and construct a project. Where there have been issues with the works or services carried out in a construction project, a pay less notice must be served if an employer wants to pay less than the “notified sum” under any construction contract. The “notified sum” is typically the amount specified in the payment notice given by the employer or where the employer is in default, the amount specified by the contractor in the contractor’s default notice. Pay less notices apply equally to appointments and building contracts. Here we consider pay less notices in the context of building contracts, owing to recent developments in the law.

Serving a valid pay less notice

A pay less notice must set out the amount which a university considers to be due on the date of the notice and provide the basis for calculation of this amount. It is also vital that the pay less notice is served on the contractor no later than the prescribed period before the final date for payment. The prescribed period can be agreed between the parties in the building contract, failing which it will be seven days before the final date for payment. Provided the employer complies with these requirements they must then pay the amount specified within the pay less notice by the final date for payment. The contractor is entitled to dispute the amount specified in the pay less notice either by going to adjudication or by bringing court/arbitration proceedings.

Failure to serve a valid pay less notice

If the employer completely fails to serve a pay less notice, serves the pay less notice late or in the incorrect form then they are obliged to pay the “notified sum” by the final date for payment under the construction contract. If the employer fails to do so the contractor can suspend performance of its works under the building contract and give notice of its intention to refer a dispute to adjudication. An adjudicator will decide in the contractor’s favour and require the employer to pay the “notified sum” in full plus interest accrued.

Recent case of *Henia Investments Inc v Beck Interiors Ltd* ([2015] EWHC 2433 (TCC))

Employers will benefit from the outcome of the Henia case, where the court confirmed that employers can use pay less notices to lower the notified sum to take account of other claims they have against the contractor or deductions which the employer is allowed to make under the contract (e.g. liquidated damages).

Further, employers can use pay less notices to challenge the valuation of the contract sum. The contract sum is calculated by an impartial contract administrator who is appointed by the employer; and if the employer feels that the contract administrator has over-valued the works then they can use a pay less notice in order to remedy this.

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