



EMPLOYMENT TRIBUNALS (SCOTLAND)

Case No: 4102971/2023 & others as per attached schedule

Held in Glasgow on 15 and 16 January 2024

5 **Employment Judge Mary Kearns**

Mr R Bayne & others as per attached schedule

**Claimants
In Person**

10 **OCS Integrated Solutions Limited**

**Respondent
Represented by:
Mr W Rollinson -
Solicitor**

15 **JUDGMENT OF THE EMPLOYMENT TRIBUNAL**

The Judgment of the Employment Tribunal on liability was that:

(1) The following claims are dismissed:

4102974/2023 - Ms F Ryan;

4102977/2023 – Mr J Ramsay;

20 4102978/2023 – Mr A McGregor;

4102981/2023 – Mr C McCaulay;

4102983/2023 – Mr S Burton;

4102985/2023 – Mr R Burton.

(2) As accepted by the claimants, and subject to (3) below, the respondent has
25 permitted the claimants to exercise their rights under Regulation 13A of the
Working Time Regulations 1998. The claims under Regulation 13A Working
Time Regulations 1998 are dismissed;

(3) With regard to holiday pay calculated under Regulation 13 Working Time
Regulations 1998, the following claimants worked overtime with sufficient

regularity for it to form part of their normal pay for holiday pay calculation purposes for the periods indicated below. Their claims under section 23 Employment Rights Act 1996 succeed:

Case number	Claimant	Period for which overtime was part of normal remuneration
4102971/2023	Mr R Bayne	1/11/2021 – 31/12/2023
4102972/2023	Mr D Galt	17/5/2021 – 31/12/2023
4102973/2023	Mr W White	1/11/2022 – 31/12/2023
4102975/2023	Mr D Barker	17/5/2021 – 31/12/2023
4102976/2023	Mr M Hossack	1/12/2022 – 31/12/2023
4102980/2023	Mr J McPherson	1/9/2022 – 31/12/2023
4102982/2023	Mr B Adams	1/2/2023 – 31/12/2023
4102984/2023	Mr T Reid	1/2/2023 – 31/12/2023

- (4) Date Listing Stencils will be sent to the remaining parties for a remedy hearing.

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REASONS

1. The claimants are employed by the respondent in various roles at a newspaper and magazine printing works operated by a client of the respondent at Eurocentral, near Motherwell. On 16 May 2023, having complied with the early conciliation requirements, the claimants presented an application to the Employment Tribunal in which they claim holiday pay. The lead claimant is Mr Raymond Bayne. He attended the hearing accompanied by Mr Barker and Mr Reid, who are also claimants. Together, they represented the interests of all 14 remaining claimants. The claimant Mr Rafa Byrne (case number 4102986/2023) withdrew his claim on 10 September

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2023 and it was dismissed by Judgment dated 11 October 2023 (J45). Mr Bayne's duplicate claim 4102979/2023 was also withdrawn and dismissed.

Issues for determination

2. At a Preliminary Hearing on 6 September 2023, the issues for determination by the Tribunal were agreed to be as follows:

Statutory Leave

- (i) *Whether the respondent has refused to permit the claimants to exercise any right they have under Regulation 13 or 13A of the Working Time Regulations 1998 ("WTR") (in other words have they been denied their entitlement to their statutory holidays under the WTR)?; and*

Holiday Pay

- (ii) *Has the respondent failed to pay any amount due to the claimants under Regulation 16(1) of the WTR (in other words have the claimants been paid the correct amount of holiday pay for holidays actually taken – in particular having regard to overtime)?*

Amendment of Claim and Response

Amendment of Claims

3. By Direction of the President of the Employment Tribunals (Scotland) dated 11 December 2014, it was ordered that instead of having to keep presenting new claims in respect of an ongoing holiday pay dispute, claimants who had previously presented holiday pay claims may apply to amend them to add further claims that had accrued or arisen after the presentation of the original claims. By email dated 10 September 2023 the claimants applied to amend their claims to include payments beyond 16 May 2023 (the date of presentation of the original claim) until the final hearing date. The respondents did not oppose this application and it was granted on 19 October 2023. As at 15 January 2024 when this hearing took place, the overtime figures for the month of January were incomplete. The respondent had only been able to

produce the data to 31 December 2023. Thus, the position is considered and determined in this Judgment up to and including 31 December 2023. (The legal position concerning the inclusion of overtime in the calculation of regulation 13 holiday pay with effect from 1 January 2024 is set out in new WTR sub-paragraph 16(3ZA) introduced by the Employment Rights (Amendment, Revocation and Transitional Provision) Regulations 2023 and in force from 1 January 2024).

Amendment of Response

4. By email dated 11 January 2024, the respondent requested leave to amend their grounds of resistance to clarify their defence in relation to the claimants' issue (i) claim that they had not received their statutory entitlement to additional annual leave under regulation 13A WTR. The respondent's amendment was in the following terms: *"The Respondent does not accept that the Claimants have been denied any part of their statutory entitlement to annual leave. The Claimants all work a contractual shift pattern of 4 shifts on and 4 shifts off (i.e. an 8 day shift rotation) without any guaranteed or compulsory overtime. The Respondent has calculated that this shift pattern equates to each claimant working 3.5 shifts per week ($4/8 \times 7 = 3.5$). In turn, 3.5 shifts per week gives a total annual entitlement to statutory leave (under Regulations 13 and 13A of the Working Time Directive 1998) of 19.6 shifts a year ($3.5 \text{ shifts} \times 5.6 \text{ weeks} = 19.6 \text{ shifts}$). That is made up of 4 weeks, or 14 shifts of Regulation 13 leave ($3.5 \text{ shifts} \times 4 \text{ weeks} = 14 \text{ shifts}$) and 1.6 weeks, or 5.6 shifts of Regulation 13A leave. The Claimants each received 20 shifts off as annual leave per year. This is in excess of their statutory entitlement."*

5. Once this amendment and explanation were brought to the attention of the claimants, they accepted that (subject to the second issue in relation to overtime) they had, in fact received their statutory entitlement to both Regulation 13 and Regulation 13A annual leave for the purposes of issue (i). Issue (i) was immediately and appropriately conceded by them. The remainder of this Judgment accordingly deals only with issue (ii).

Evidence

6. The parties lodged a statement of agreed facts and a joint bundle of documents ("J"). They referred to the latter by page number. So far as material, the statement of agreed facts is incorporated into the findings in fact below and shown in italics.

7. The respondent called Mr Thomas Shaw, Site Manager and Mr Steve Smith, Senior Site Manager as witnesses. Mr Barker gave evidence on behalf of the claimants. There were no real disputes about the facts of what happened. The case rests upon a question of interpretation.

Findings in Fact

8. The parties produced a statement of agreed facts in the following terms:

1 "Background"

1.1 *In November 2023, the Respondent changed its name from Atalian Servest Integrated Solutions Limited to OCS Integrated Solutions Limited. The certificate of incorporate on change of name is at page 49-51 of the bundle.*

1.2 *The claimants are all employed by the Respondent at NewsPrinters' – a client of the Respondent – premises in Eurocentral, Motherwell. The claimants are employed as Flexible Skilled Operatives with the exception of Derek Galt (Supervisor), Thomas Reid (Supervisor), Shaun Burton (Flexible Skilled Operative Team Leader) and David Barker (Flexible Skilled Operative Team Leader).*

2 Working Pattern

2.1 *The claimants all currently work on a night shift rota. The table below shows their hours. Thomas Reid was previously engaged on the day shift. His shift pattern did not vary significantly in terms of pattern (4 on 4 off) or in terms of the duration of each shift.*

<i>Eurocentral night shift hours, start and finish times.</i>						
<i>Sunday</i>	<i>Monday</i>	<i>Tuesday</i>	<i>Wednesday</i>	<i>Thursday</i>	<i>Friday</i>	<i>Saturday</i>
<i>Start Time</i>	<i>Start Time</i>	<i>Start Time</i>	<i>Start Time</i>	<i>Start Time</i>	<i>Start Time</i>	<i>Start Time</i>
19:00	19:00	19:00	19:00	19:00	19:00	18:00
<i>Finish Time</i>	<i>Finish Time</i>	<i>Finish Time</i>	<i>Finish Time</i>	<i>Finish Time</i>	<i>Finish Time</i>	<i>Finish Time</i>
05:30	05:30	05:30	05:30	06:00	06:00	04:30
<i>10.5 Hours</i>	<i>10.5 Hours</i>	<i>10.5 Hours</i>	<i>10.5 Hours</i>	<i>11. Hours</i>	<i>11. Hours</i>	<i>10.5 Hours</i>

2.2 *All claimants work a shift pattern of 4 shifts on and 4 shifts off, totalling 182.5 contractual shifts each year. 182.5 contractual shifts per year is inclusive of 20 days' annual leave entitlement, so the actual number of contractual shifts which would ordinarily be worked is 162.5 per year.*

5 2.3 *This shift pattern works out at around 37.5 hours' contracted work per week for operators and 38.5 hours contracted work per week for team leaders and supervisors who start their shift around half an hour earlier.*

10 2.4 *Overtime is not compulsory. It is voluntary. The claimants may be offered additional shifts, which are not guaranteed, and there is no contractual requirement for the claimants to undertake them.*

3 Pay

15 3.1 *The claimants are paid a basic hourly rate of pay. They are paid in monthly instalments on or around the 14th day of each month. The Respondent's payroll team works out each claimant's average contracted hours per week (37.5 / 38.5 as above), multiplies this by 52 weeks and then divides that figure by 12 to establish a monthly salary so as to ensure an even rate of basic pay each calendar month. The basic rate of pay may be adjusted to reflect shifts which are not worked because of sickness or other absence and a deduction will be made from that month's basic salary. Additional shifts worked are paid at the*

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relevant claimant's hourly rate of pay or an "acting up" rate if the Claimant is acting up, or the rate of pay agreed with the Respondent's client, NewsPrinters, if different from the Claimant's normal hourly rate of pay.

5 3.2 *Additional shifts are paid as an addition to the basic, contractual monthly salary. A sample pay slip for Raymond Bayne is at page [52] of the bundle and covers a pay period when annual leave was taken and when additional shifts were worked. Annual leave is not shown as a separate payment on payslips. Overtime is.*

10 **4 Annual Leave Entitlement**

4.1 *The claimants are entitled to 20 shifts off per holiday year. There is no statutory or contractual holiday entitlement in addition to this.*

4.2 *The holiday year runs from 1 January to 31 December .*

15 4.3 *Leave must be taken in 5 blocks of 4 shifts. A letter was sent to the claimants in August 2019 advising them of this (pages 156-173 of the bundle).*

4.4 *In 2022 the Claimants were given an additional days' annual leave for the Queen's platinum jubilee and the Queen's death. An additional day off was given for the King's coronation in 2023.*

20 **5 Holiday Pay**

5.1 *Overtime pay received for additional shifts worked in excess of contracted shifts is not included when calculating holiday pay.*

6 **Data**

25 *Pages 174-198 of the bundle set out data covering hourly pay; basic pay received; overtime shifts worked; and overtime pay received."*

9. The following further material facts were admitted or found to be proved:

10. As pages 179 – 198 show, the claimants worked the following additional shifts by way of voluntary overtime:

Claimant/ Case no	Overtime 2020	Overtime 2021	Overtime 2022	Overtime 2023
R. Bayne 4102971/23	None	Aug x1; Nov x4;	Jan x7; Feb x7; Mar x7; Apr x6; May x9; Jun x1; Jul x3; Aug x3; Sep x11; Oct x4; Nov x6; Dec x7	Jan x3; Feb x5; Mar x5; Apr x3; May x5; Jun x3; Jul x3; Aug x7; Sep x3; Oct x3; Nov x4; Dec x3
D. Galt 4102972/23	Apr x5; May x1; Jun x2; Jul x1; Aug x2; Nov x4	Jan x2; Feb x2; Mar x11; Apr x2; May x5; Jun x5; Jul x5; Aug x2; Sep x2; Oct x3; Dec x10	Jan x4; Feb x5; Mar x3; Apr x1; May x3; Jun x7; Jul x9; Aug x5; Sep x4; Oct x7; Nov x8; Dec x6	Jan x6; Feb x3; Mar x7; Apr x5; May x4; Jun x4; Jul x4; Aug x2; Sep x1; Oct x6; Nov x4; Dec x10
W. White 4102973/23	May x1;	None	Nov x3; Dec x5	Jan x6; Feb x1; Mar x3; Apr x3; May x2; Jul x2; Sep x4; Oct x2; Nov x4; Dec x1
F. Ryan 4102974/23	Aug x1	Mar x3; Jun x1; Aug x1;	Feb x1; Mar x3; Sep x1; Oct x1	Jan x1;
D. Barker 4102975/23	Jan x2; Feb x1; Mar x1; Apr x4; June x3; Aug x3; Nov x7;	Feb x2; Mar x8; Apr x2; May x6; Jun x3; Jul x7; Aug x11; Sep x7; Oct x7; Dec x8	Jan x11; Feb x8; Mar x4; Apr x8; May x3; Jun x8; Jul x7; Aug x4; Sep x9; Oct x12; Nov x7; Dec x10	Jan x9; Feb x7; Mar x6; Apr x4; May x4; Jun x6; Jul x6; Aug x6; Sep x6; Oct x9; Nov x4; Dec x8
M. Hossack 4102976/23	Apr x3;	Jul x2; Aug x1; Sep x3; Dec x4	Dec x1	Jan x3; Mar x3; Apr x4; May x1; Jun x1; Jul x2; Aug x1; Sep x4;

				Oct x2; Nov x3; Dec x1
J. Ramsay 4102977/23	None	Sep x1	Sep x1	Jan x1; Mar x1; Jun x1; Aug x2; Sep x2; Oct x2; Dec x1
A. McGregor 4102978/23	None	None	None	Mar x4; Apr x2; Sep x1; Dec x2
J. McPherson 4102980/23	Jan x1;	Aug x1	May x2; Sep x7; Oct x2; Nov x3; Dec x3	Jan x1; Feb x1; Mar x3; Apr x1; May x1; Jun x2; Jul x1; Aug x4; Sep x4; Oct x3; Nov x3; Dec x3
C. McCaulay 4102981/23	May x1; Sep x1;	None	Mar x1;	None
B. Adams 4102982/23	Jan x1; Nov x1.	Apr x1; May x5; Jun x2; Aug x3; Sep x6; Oct x1; Dec x2	Mar x3; May x2; Jun x3; Sep x4; Oct x3; Nov x2	Feb x1; Mar x4; Apr x3; May x4; Jun x4; Jul x3; Aug x5; Sep x2; Oct x3; Nov x2; Dec x4
S. Burton 4102983/23	Apr x2; Sep x1; Nov x4;	Apr x2; May x1;	Nov x1	Sep x2;
T. Reid 4102984/23	May x6; Aug x1; Oct x2; Dec x2	May x1; Dec x1	Mar x1; Apr x2; Jun x3; Sep x1; Oct x2;	Feb x2; Mar x5; Apr x3; May x4; Jun x2; Jul x1; Aug x3; Sep x5; Oct x2; Nov x3; Dec x4
R. Burton 4102985/23	Mar x2; Apr x2; Oct x3; Nov x2;	Apr x1; May x4; Jul x4; Aug x2; Dec x1	Jan x6; Mar x1; Sep x3	Mar x1; Aug x4; Sep x3; Oct x2; Nov x3; Dec x4

11. The claimants having complied with the early conciliation requirements, the ET1 in this case was presented to the Employment Tribunal on 16 May 2023.

Applicable Law

12. Until 1 January 2024, Regulation 16 WTR provided so far as relevant as follows:

“16 Payment in respect of periods of leave

- (1) *A worker is entitled to be paid in respect of any period of annual leave to which he is entitled under regulation 13 [and regulation 13A], at the rate of a week's pay in respect of each week of leave.*
- 10 (2) *Sections 221 to 224 of the 1996 Act shall apply for the purpose of determining the amount of a week's pay for the purposes of this regulation, subject to the modifications set out in paragraph (3) [and the exception in paragraph 3A].*
- (3) *The provisions referred to in paragraph (2) shall apply –*
- 15 a) *as if references to the employee were references to the worker;*
- b) *as if references to the employee's contract of employment were references to the worker's contract;*
- c) *as if the calculation date were the first day of the period of leave in question; and*
- 20 d) *as if the references to sections 227 and 228 did not apply.*
- e) *subject to the exception in sub-paragraph (f)(ii) as if in sections 221(3), 222(3) and (4) and 224(2) and (3) references to twelve were references to –*
- 25 (i) *in the case of a worker who on the calculation date has been employed by their employer for less than 52 complete weeks, the number of complete weeks for which the worker has been employed, or*

(ii) *in any other case, 52; and*

f) *in any case where section 223(2) or 224(3) applies as if –*

(i) *Account were not to be taken of remuneration in weeks preceding the period of 104 weeks ending –*

5 (aa) *where the calculation date is the last day of a week, with that week, and*

(bb) *otherwise with the last complete week before the calculation date; and*

10 (ii) *the period of weeks required for the purposes of section 221(3), 222(3) and (4) and 224(2) was the number of weeks of which account is taken."*

13. By Statutory Instrument 2023 No. 1426 'The Employment Rights (Amendment, Revocation and Transitional Provisions) Regulations 2023 made on 19 December 2023, which came into force on 1 January 2024, the following relevant paragraphs were added to Regulation 16 WTR:

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"(3ZA) In the case of entitlement under regulations 13 and 15B, the following types of payments are to be included when determining the amount of a week's pay for the purposes of this regulation –

(a) *.....*

20 (b) *.....*

(c) *other payments, such as overtime payments, which have been regularly paid to a worker in the 52 weeks preceding the calculation date."*

14. Sections 221 to 223 of the Employment Rights Act 1996 (applied by Regulation 16 WTR) state so far as relevant to this case as follows:

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"Employments with normal working hours

221 General

(1) *This section and sections 222 and 223 apply where there are normal working hours for the employee when employed under the contract of employment in force on the calculation date.*

5 (2) *Subject to section 222, if the employee's remuneration for employment in normal working hours (whether by the hour or week or other period) does not vary with the amount of work done in the period, the amount of a week's pay is the amount which is payable by the employer under the contract of employment in force on the calculation date if the*
10 *employee works throughout his normal working hours in a week. [Time work]*

(3) *Subject to section 222, if the employee's remuneration for employment in normal working hours (whether by the hour or week or other period) does vary with the amount of work done in the period, the amount of a*
15 *week's pay is the amount of remuneration for the number of normal working hours in a week calculated at the average hourly rate of remuneration payable by the employer to the employee in respect of the period of twelve weeks ending –*

a) *Where the calculation date is the last day of a week, with that*
20 *week, and*

b) *Otherwise, with the last complete week before the calculation date. [Piece work]*

(4) *In this section references to remuneration varying with the amount of work done includes remuneration which may include any commission*
25 *or similar payment which varies in amount.*

(5) *This section is subject to sections 227 and 228.”*

“223 Supplementary

(1) *For the purposes of sections 221 and 222, in arriving at the average hourly rate of remuneration, only –*

a) *The hours when the employee was working, and*

b) *The remuneration payable for or, or apportionable to, those hours, shall be brought in.*

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(2) *If for any of the twelve weeks mentioned in sections 221 and 222 no remuneration within subsection 1(b) was payable by the employer to the employee, account shall be taken of remuneration in earlier weeks so as to bring up to twelve the number of weeks of which account is taken....”*

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“Employments with no normal working hours

224 *Employments with no normal working hours*

(1) *This section applies where there are no normal working hours for the employee when employed under the contract of employment in force on the calculation date.*

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(2) *The amount of a week's pay is the amount of the employee's average weekly remuneration in the period of twelve weeks ending -*

(a) *where the calculation date is the last day of a week, with that week, and*

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(b) *otherwise with the last complete week before the calculation date.*

(3) *In arriving at the average weekly remuneration no account shall be taken of a week in which no remuneration was payable by the employer to the employee and remuneration in earlier weeks shall be brought in so as to bring up to twelve the number of weeks of which account is taken.*

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(4) *.....”*

15. Section 13 ERA provides so far as relevant as follows:

“13 Right not to suffer unauthorised deductions

(1) *An employer shall not make a deduction from wages of a worker employed by him unless—*

5 (a) *the deduction is required or authorised to be made by virtue of a statutory provision or a relevant provision of the worker's contract, or*

(b) *the worker has previously signified in writing his agreement or consent to the making of the deduction.*

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(3) *Where the total amount of wages paid on any occasion by an employer to a worker employed by him is less than the total amount of the wages properly payable by him to the worker on that occasion (after deductions), the amount of the deficiency shall be treated for the purposes of this Part as a deduction made by the employer from the worker's wages on that occasion”.*

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16. Section 23 ERA provides:

“23 Complaints to employment tribunals

(1) A worker may present a complaint to an employment tribunal—

20 (a) *that his employer has made a deduction from his wages in contravention of section 13...*

(b)

(2) *Subject to subsection (4), an employment tribunal shall not consider a complaint under this section unless it is presented before the end of the period of three months beginning with –*

25

(a) *In the case of a complaint relating to a deduction by the employer, the date of payment of the wages from which the deduction was made....*

(3) *Where a complaint is brought under this section in respect of –*

5 (a) *A series of deductions or payments, or*

(b) *.....*

The references in subsection (2) to the deduction or payment are to the last deduction or payment in the series or to the last of the payments so received.

(4) *.....*

10 (4A) *An employment tribunal is not (despite subsections (3) and (4)) to consider so much of a complaint brought under this section as relates to a deduction where the date of payment of the wages from which the deduction was made was before the period of two years ending with the date of presentation of the complaint.”*

15 17. Section 27 ERA provides:

“27 Meaning of 'wages' etc

(1) *In this Part 'wages', in relation to a worker, means any sums payable to the worker in connection with his employment, including—*

20 (a) *any fee, bonus, commission, holiday pay or other emolument referable to his employment, whether payable under his contract or otherwise....”*

Discussion and Decision

18. The claimants originally thought that they had not received their additional 1.6 weeks' annual leave under regulation 13A WTR. However, as stated above,
25 once the respondent's position on issue (i) was communicated to and understood by them, they readily conceded that the respondent was correct

and abandoned that part of the claim. This section accordingly only considers issue (ii).

19. As Mr Rollinson submits, the remaining issue before this tribunal is a relatively simple one: have the claimants worked overtime with sufficient regularity for it to form part of their normal pay for holiday pay calculation purposes? Although data was provided to the Tribunal going back to 2020 - in case this should be required for calculation purposes - this Judgment is not concerned with holiday pay which was paid before the period of two years ending with the date of presentation of the complaint. (Section 23(4A) ERA). Thus the holiday pay under consideration here is the regulation 13 holiday pay which was paid between 17 May 2021 and 31 December 2023 (see paragraph 3 above).

20. The relevant facts are as follows: the claimants in this case all work on a night shift rota, under which they work a basic shift pattern of four shifts on and four shifts off totalling 182.5 basic contractual shifts each year. (162.5 are ordinarily worked, allowing for holidays). The shift details are set out in the findings in fact above. The basic shifts do not vary significantly in terms of pattern or duration. Thus the basic working hours for operators are 37.5 per week. For team leaders and supervisors, basic hours are 38.5 per week because they start their shifts half an hour earlier. For these basic hours, the claimants receive fixed basic pay each month adjusted for sickness and other absence. Their basic monthly salary is calculated by working out each claimant's average contracted basic hours per week (either 37.5 or 38.5), multiplying it by 52 weeks and dividing by 12. Holiday pay is included in basic pay so that when claimants take annual leave, their monthly basic pay remains the same. Although the claimants work shifts, they exclusively work night shifts, and because of this, their basic remuneration does not vary according to the time of day (as it might if they worked a mix of night and day shifts).

21. Overtime is voluntary and is worked by additional shifts, not by extra hours on basic shifts. Overtime shifts are shown separately on pay slips (J218). Overtime hours are not used in the calculation of a week's pay for holiday pay

purposes and this is the nub of the dispute between the parties. The respondent argues that they have correctly excluded voluntary overtime payments from their calculation of a week's pay for the purposes of Regulation 13 holiday pay. The claimants' case is that they are entitled to have their overtime taken into account in relation to holiday pay and that their holiday pay has accordingly been incorrectly calculated and they are owed the shortfall. Put shortly, there is a disagreement about whether voluntary overtime should be included in 'normal working hours' for the purpose of calculating a week's pay.

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- 10 22. A volume of case law has developed in this area with its roots in EU law. In the case of Dudley Metropolitan Borough Council v Willetts [2017] IRLR 870 the claimants worked additional voluntary overtime for which they were paid. An issue arose as to whether these (and other) payments ought to be included in a week's pay for holiday pay calculation purposes in respect of the four weeks' holiday pay due under Regulation 13. (Regulation 13 gave effect to the Working Time Directive and was governed by EU law). The Employment Appeal Tribunal ("EAT") (per the President, Mrs Justice Simler as she then was) held at paragraph 37 that: *"EU law requires that normal (not contractual) remuneration must be maintained in respect of the four-week period of annual*
- 15 *leave guaranteed by Article 7 [of the Working Time Directive]. That overarching principle means that the payments should 'correspond to the normal remuneration received by the worker' while working: see Williams and Lock. The purpose of this requirement is to ensure that a worker does not suffer a financial disadvantage by taking leave, which is liable to deter him*
- 20 *from exercising this important right from which there can be no derogation."* The EAT held that each element of pay is to be assessed in light of this overarching principle and the objective of Article 7 *"which is to maintain normal remuneration so that holiday pay corresponds to (and is not simply broadly comparable to) remuneration while working.."* (Paragraph 39). The
- 25
- 30 The Court made the general observation that one risk of excluding payments for voluntary overtime normally undertaken was that employers might set artificially low levels of basic contracted hours and categorise the remaining working time as 'voluntary overtime' which does not have to be accounted for

in respect of paid annual leave. The “*current proliferation of zero hours contracts*” was cited as an example.

23. In relation to what is meant by “normal”, the Court stated at paragraph 40:
5 “..for a payment to count as ‘normal’ it must have been paid over a sufficient period of time. This will be a question of fact and degree. Items which are not usually paid or are exceptional do not count for these purposes. But items that are usually paid and regular across time may do so.” Further guidance was given in paragraph 44, where the learned judge said this: “*It seems to me that applying the overarching principle established by the CJEU in Williams and*
10 *Lock, in a case where the pattern of work, though voluntary, extends for a sufficient period of time on a regular and/ or recurring basis to justify the description ‘normal’, the principle in Williams applies and it will be for the fact-finding tribunal to determine whether it is sufficiently regular and settled for payments made in respect of it to amount to normal remuneration.*”
- 15 24. The Judgment of the EAT in the Dudley case was considered and approved by the Court of Appeal in East of England Ambulance Service NHS Trust v Flowers and others [2019] IRLR 798. In that case, the claimant ambulance service employees argued inter alia that the calculation of their holiday pay should have taken account of ‘voluntary’ overtime (additional voluntary shifts).
20 The Trust argued that voluntary overtime should not be taken into account. (Since it was accepted that the Trust was an emanation of the state, the case was brought under the Working Time Directive rather than the domestic WTR. However, as the WTR give effect to the Directive, the ratio of the case applies equally to the WTR.)
- 25 25. The EAT held that voluntary overtime should have been taken into account in the calculation of holiday pay under article 7 of the Working Time Directive. The Trust appealed to the Court of Appeal. It relied on paragraph 46 of the CJEU Judgment in Hein v Albert Holzkamm GmbH [2019] CMLR 689 which said that: “*given its exceptional and unforeseeable nature, remuneration*
30 *received for overtime does not, in principle, form part of the normal remuneration that the worker may claim in respect of... paid annual leave*”. In paragraph 47, the CJEU contrasted this with cases where: “*the obligations*

arising from the employment contract require the worker to work overtime on a broadly regular and predictable basis.” Based on these paragraphs, the Trust argued that overtime did not have to be taken into account in the calculation of holiday pay unless it was both compulsory and ‘broadly regular or predictable’. The Court of Appeal held (at paragraph 32) that: “*The CJEU case law establishes clearly that the question in each case is whether the pattern of work is sufficiently regular and settled for payments made in respect of it to amount to normal remuneration.*” With regard to paragraphs 46 and 47 of Hein, the Court held that the distinction being drawn was between exceptional and unforeseeable overtime payments on the one hand and broadly regular and predictable ones on the other.¹

26. As Mr Rollinson rightly pointed out, Statutory Instrument 2023 no 1426, the Employment Rights (Amendment, Revocation and Transitional Provisions) Regulations 2023 came into force on 1 January 2024. The relevance of these Regulations for present purposes are that they amend Regulation 16 WTR by adding a new sub-paragraph (3ZA), under which overtime payments “*which have been regularly paid to workers in the 52 weeks preceding the calculation date*” are to be included when determining a week’s pay for the purposes of regulation 13 with effect from 1 January 2024. The position is therefore somewhat simplified going forward.

¹ Note regarding continuing effect of EU Law following ‘Brexit’

In relation to the four weeks’ paid holiday under Regulation 13, the underlying principles come from EU legislation and case law. These continue to have effect for present purposes for the following reasons: After the referendum on the United Kingdom’s membership of the EU, Parliament passed the European Union (Withdrawal) Act 2018 (“EU(W)A”), which provided for the withdrawal of the UK from the EU on ‘exit day’ (31 January 2020). On that date the European Communities Act 1972 was repealed. A further transition/implementation period preserved the effect of EU law after ‘exit day’ until 31 December 2020 (‘IP completion day’). Section 2 of the EU(W)A provided for EU derived domestic legislation to continue to have effect in domestic law after IP completion day. Furthermore, under section 6 of the EU(W)A, lower courts and tribunals are required to continue to have regard to decisions of the CJEU made prior to IP completion day (31 December 2020) as to the correct interpretation of the EU legislation which the domestic law implements. The Retained EU Law (Revocation and Reform) Act 2023 retains five categories of EU law as it was on 31 December 2020. The WTR is retained under the 2023 Act.

27. In summary, the case law principles I have to apply to this issue are as follows:

(i) *The overarching principle is that holiday pay should ‘correspond to the normal remuneration received by the worker’ while working, so as to ensure that he is not deterred from taking his leave because he suffers a financial disadvantage by doing so.*

(ii) *For a payment to count as ‘normal’ it must have been paid over a sufficient period of time. This will be a question of fact and degree. Items which are not usually paid or are exceptional do not count for these purposes. But items that are usually paid and regular across time may do so.*

(iii) *Where the pattern of work, though voluntary, extends for a sufficient period of time on a regular and/ or recurring basis to justify the description ‘normal’, the principle in Williams applies and it will be for the fact-finding tribunal to determine whether it is sufficiently regular and settled for payments made in respect of it to amount to normal remuneration. The question in each case is whether the pattern of work is sufficiently regular and settled for payments made in respect of it to amount to normal remuneration.”*

(iv) The distinction is between exceptional and unforeseeable overtime payments on the one hand and broadly regular and predictable ones on the other.

(v) Going forward, new sub-paragraph (3ZA) (in force from 1 January 2024), provides that overtime payments “*which have been regularly paid to workers in the 52 weeks preceding the calculation date*” should feature in the calculation of holiday pay.

28. The number of overtime shifts worked by each claimant was provided on an agreed spreadsheet at pages 179 to 198 of the bundle. I have summarised this evidence in the findings in fact in the table at paragraph 10 above.

29. During the period under consideration – 17 May 2021 to 31 December 2023 - the following claimants clearly did not - in my view - work overtime on a

sufficiently regular and/or recurring basis or over a sufficient period of time such that it was sufficiently regular and settled for payments in respect of it to amount to normal remuneration: F. Ryan; A McGregor, C McCaulay; and S. Burton. Their cases are dismissed.

- 5 30. I found the cases of Mr J. Ramsay and Mr R Burton more difficult to decide. For ease of reference, their overtime records were as follows:

J. Ramsay 4102977/23	None	Sep x1	Sep x1	Jan x1; Mar x1; Jun x1; Aug x2; Sep x2; Oct x2; Dec x1
R. Burton 4102985/23	Mar x2; Apr x2; Oct x3; Nov x2;	Apr x1; May x4; Jul x4; Aug x2; Dec x1	Jan x6; Mar x1; Sep x3	Mar x1; Aug x4; Sep x3; Oct x2; Nov x3; Dec x4

31. Mr Rollinson submitted that where someone is paid monthly, if they do not receive a payment for overtime every month during the leave year then it cannot be said to be part of their regular or normal pay. However, the case law is not as specific or prescriptive as that. The cases suggest that payments may count as normal remuneration *‘where the pattern of work, though voluntary, extends for a sufficient period of time on a regular and/ or recurring basis to justify the description ‘normal’; and that: “items that are usually paid and regular across time may count as normal.* The Cambridge dictionary defines *“usually”* as *“in the way that most often happens”* and *“regular”* as: *“existing or happening repeatedly in a fixed pattern with equal or similar amounts of space or time between one and the next; even”*. With regard to what would amount to a ‘sufficient period’ for monthly paid employees, it seems to me that working regular additional shifts a month for eleven months would justify the description ‘normal remuneration’ for these purposes. Also, given the shift pattern, a gap of one month might occur without preventing the pattern from being regular across time, for example if an employee was on holiday or on sick absence. However, a larger gap than a month would disrupt the pattern. Applying these principles, Mr R Burton has a gap of around five
- 10
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- 20
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or six months between the overtime worked in September 2022 and March 2023. Thereafter, the payments do not become regular until August 2023. Whilst Mr R Burton may qualify going forward into the summer of 2024 if he continues to undertake regular overtime, I do not find that he currently meets the test of 'overtime usually paid/ on a regular or recurring basis over a sufficient period'. The same applies to Mr Ramsay. His overtime at the start of 2023 was sporadic or occasional. He did work overtime from August to December 2023 in every month except November. In any event, applying the case law to these months, it seems to me that payment for the months from August to December 2023 would not currently amount to payment over a sufficient period of time to count as part of normal remuneration. Again it may well do so in future if he continues with the current pattern but it does not, in my view count at present. The cases of J Ramsay and R Burton are accordingly also dismissed.

32. The remaining claims succeed in respect of the periods indicated:

Case number	Claimant	Period for which overtime was part of normal remuneration
4102971/2023	Mr R Bayne	1/11/2021 – 31/12/2023
4102972/2023	Mr D Galt	17/5/2021 – 31/12/2023
4102973/2023	Mr W White	1/11/2022 – 31/12/2023
4102975/2023	Mr D Barker	17/5/2021 – 31/12/2023
4102976/2023	Mr M Hossack	1/12/2022 – 31/12/2023
4102980/2023	Mr J McPherson	1/9/2022 – 31/12/2023
4102982/2023	Mr Bola Adams	1/2/2023 – 31/12/2023

4102984/2023	Mr Thomas Reid	1/2/2023 – 31/12/2023
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M Kearns

Employment Judge

6 February 2024

Date

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Date sent to parties

8 February 2024

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I confirm that this is my Judgment in the case of R Bayne & Others v OCS Integrated Solutions Ltd 4102971/2023 and that I have signed it by electronic signature.

MULTIPLE REF 4100452

LIST OF CLAIMANTS

Claim No	Claimant Name	Respondent
4102972/2023	Derek Galt	OCS Integrated Solutions Limited
4102976/2023	Michael Hossack	OCS Integrated Solutions Limited
4102977/2023	John Ramsay	OCS Integrated Solutions Limited
4102971/2023	Raymond Bayne	OCS Integrated Solutions Limited
4102975/2023	Derek Barker	OCS Integrated Solutions Limited
4102980/2023	James McPherson	OCS Integrated Solutions Limited
4102979/2023	Alex McGregor	OCS Integrated Solutions Limited
4102981/2023	Christopher McCaulay	OCS Integrated Solutions Limited
4102984/2023	Thomas Reid	OCS Integrated Solutions Limited
4102982/2023	Bola Adams	OCS Integrated Solutions Limited
4102983/2023	Shaun Burton	OCS Integrated Solutions Limited

4102985/2023	Ryan Burton	OCS Integrated Solutions Limited
4102986/2023	Rafa Byrne	OCS Integrated Solutions Limited
4102974/2023	Frances Ryan	OCS Integrated Solutions Limited
4102973/2023	William White	OCS Integrated Solutions Limited