

**Case No: 1810094/2018 and others
(see Schedule)**

2. The Respondent's application relates to the Tribunal's finding that the bonus payments paid as a supplement to the Claimants' basic hourly rate were to be taken into account as part of their "week's pay" for the purposes of Regulations 13 and 13A of the Working Time Regulations 1998 (the WTR) ("the finding"). At the Hearing, the parties agreed that the Claimants had normal working hours and that the Claimants' remuneration for employment in normal working hours did not vary with the amount of work done in the period. Applying Section 221(2) of the Employment Rights Act 1996, the amount of a week's pay was therefore "the amount which is payable by the employer under the contract of employment in force on the calculation date if the employee works throughout his normal working hours in a week".
3. In its application for reconsideration, the Respondent submits that "it is not the case that it automatically follows that any sum payable under the contract is an amount which is payable for working during normal hours of work". The Tribunal accepts that. The Tribunal was satisfied, however, that, once the Respondent had set the targets and bonus rates for the coming year, whatever bonus enhancement applied because a target had been met was part of the amount that was payable by the Respondent if the Claimants worked throughout their normal working hours in a week (paragraph 30 of the Tribunal's reasons).
4. The Respondent submits that the finding is inconsistent with the fact that the bonus enhancement was profit-related so that a Claimant could work through his normal hours of work and not be entitled to any bonus payment. The Tribunal accepts that a Claimant might not be entitled to a bonus enhancement if the relevant target had not been met. That did not mean, however, that, if the bonus enhancement was payable because the target had been met, it was not part of the amount that was payable if the Claimant worked throughout his normal working hours in a week. The Tribunal can see no inconsistency here.
5. The Respondent also submits that the finding was inconsistent with the Tribunal's other finding that the bonus enhancement was not referable solely to normal hours of work, but would also be paid for overtime hours. The Tribunal again can see no inconsistency. Section 221(2) requires the enhancement to be taken into account only in relation to payment for normal hours of work.
6. The Respondent submits that the Tribunal failed to address the fact that a payment may be contractual in nature but nevertheless not be a payment due because an employee has worked their normal hours of work in any given week. The Tribunal accepts that, but repeats what it says in paragraph 3 above.
7. Finally, the Respondent points out that the bonus enhancement was variable, depending upon whether targets were met. Since Section 221(2) provides no mechanism for averaging out variable payments when calculating a week's pay, it must be read, the Respondent submits, as being limited to payments of basic pay for normal hours of work only.
8. Regulation 16(3)(c) WTR provides that the calculation date for the purposes of calculating remuneration during leave is the first day of the period of leave in question. Section 221(2) ERA provides that the sum payable is "the amount

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which is payable . . . under the contract of employment in force on the calculation date if the employee works throughout his normal working hours in a week". The Tribunal accepts that this reference to "a week" rather than "that week" suggests that this provision is based on an assumption that the employee's payment for working normal working hours will not be varying from week to week. The Tribunal notes, however, that an employee's pay for working throughout their normal working hours is very likely to change from time to time to reflect such matters as pay rises, changes in an employee's normal working hours and pay cuts. Section 221(2) must, therefore, be capable of applying even where there are changes in an employee's pay from one week to the next. The Tribunal considers that Section 221(2) should be read as meaning that holiday pay should be what would be payable to the employee for working through their normal working hours in the week in which the calculation date falls. That would include, for example, any pay rise that has taken effect that week. It would also include, in the case of these Claimants, any bonus enhancement payable in that week.

9. The Tribunal concludes that the Judgment should be confirmed.

Employment Judge Cox

Date: 9 July 2019

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1810094/2018 – Mr P Dixon
1810095/2018 – Mr N Horn
1810096/2018 – Mr M Johnston
1810097/2018 – Mr P Lockwood
1810100/2018 – Mr G Taylor
1810103/2018 – Mr D Wilsher
1811041/2018 – Mr M Michalewicz