

Holidays

Holiday

The right to take time off from work for holidays may arise under contract or statute. Holiday benefits both employer and workers by allowing the workers a period of relaxation and recuperation from their labours.

In the UK, the Working Time Regulations (WTR) 1998 gives workers a statutory entitlement to holiday. In general, it is not possible to contract out of these rights.

Entitlement to pay for holiday (and in lieu of holiday) is considered in Holiday pay.

Eligibility for statutory holiday

The right to holiday under the WTR applies to 'workers' and includes:

- o employees
- o those who undertake to provide work **or** services personally under a contract (express or implied) -- not including work carried out for a client or customer by individuals in business on their own account
- o Most of the government employees.

The right to holiday under the WTR does not apply to:

- o sea-fishermen
- o merchant sailors on inland waterways
- o crew members in civil aviation
- o children who are still school age

Statutory holiday entitlement

The basic entitlement under the WTR 1998 is to four weeks' annual leave in each 'leave year'. This four week period is now supplemented by additional annual leave, discussed below under Additional annual leave. There is no statutory entitlement to bank or public holidays, so any such days taken as leave count as part of the four weeks. According to Government guidance on the BusinessLink website (which is not binding on courts or tribunals): 'A worker's statutory paid holiday entitlement is 5.6 weeks (28 days for a worker working a five-day week). This can include public and bank holidays. The entitlement for part-time workers is calculated on a pro-rata basis.'

Statutory entitlement is not in addition to any contractual holiday entitlement: one is set off against the other.

The 'leave year' begins on:

References: WTR 1998, SI 1998/1833, reg 13(3)

- o the date set out in a 'relevant agreement' (generally a workforce agreement, collective agreement or other legally enforceable written agreement, such as an employment contract) or References: WTR 1998, SI 1998/1833, reg 2(1)
- o where there is no relevant agreement, 1 October in each year for workers first employed on or before 1 October 1998 or the date on which their employment started for workers first employed after that date

Additional annual leave

An entitlement to 1.6 weeks' 'additional annual leave' (ie an additional 8 days), bringing the total statutory annual entitlement to 5.6 weeks, subject to a maximum of 28 days, came into force on 1 April 2009. Transitional provisions as described below applied between 1 October 2007 (when the 'additional annual leave' entitlement was introduced at 0.8 weeks) and 1 April 2009. There is no qualifying period for the additional annual leave entitlement.

References: WTR 1998, SI 1998/1833, reg 13A(2)(e)

Payment in lieu of this additional holiday entitlement (the additional 0.8 weeks) was permissible until 1 April 2009, as a temporary measure to help employers with transitional arrangements.

References: WTR 1998, SI 1998/1833, reg 13A(6)(b)-(c)

The statutory right to 'additional annual leave' is disapplied in cases where the employer has, as at 1 October 2007, already implemented a right:

References: WTR 1998, SI 1998/1833, reg 26A

- o to 5.6 weeks' holiday entitlement (ie 28 days for workers who work a five-day week)
- o without possibility of payment in lieu, and
- o where any carry-over can be for no more than one year

This exemption from the statutory right to 'additional annual leave' continues to operate unless and until the employer changed its holiday entitlement rules in a manner which leads to a failure to meet the statutory requirements.

In the same way as with the basic entitlement, any time off for bank and public holidays may be included in the additional entitlement (eg if a worker already gets four weeks' leave plus time off for bank holidays (currently eight in England and Wales), the statutory requirements are satisfied).

References: BusinessLink website: holiday

Campbell & Smith v Greenwood [2001] IRLR 588

Overall statutory holiday entitlement should be calculated on a pro-rata basis for part-time workers (5.6 times their usual working week), regardless of whether or not they usually work on bank holidays.

References: WTR 1998, SI 1998/1833, reg 13A(2)

BusinessLink website: pay and time off on public and bank holidays

The maximum statutory holiday entitlement (basic plus additional) is capped at 28 days, although employers may give more contractual holiday than that.

References: WTR 1998, SI 1998/1833, reg 13A(3)

Some or all of the additional annual leave may be carried over to the following leave year, with the agreement of both the employer and the member of staff.

References: WTR 1998, SI 1998/1833, reg 13A(7)

Note that additional annual leave is **not** excluded from the calculation of average weekly working hours under the Working Time Regulations. By contrast, the basic four-week holiday entitlement is treated as being 'excluded days' under the regulations. The effect of this is that any time off taken as part of the basic statutory four-week allowance will not reduce the average number of hours worked during the relevant 'reference period', which is used to calculate average weekly working hours for the purpose of determining whether there is compliance with the 48-hour maximum working week (see Hours -- The maximum working week). By contrast, the additional 1.6 weeks' (or 0.8 weeks' between 1 October 2007 and 1 April 2009) holiday is **not** considered as 'excluded days'. Hence time off taken as part of the **additional** annual leave during the relevant reference period **will** reduce the average number of hours worked. In effect, statutory additional annual leave is, in this respect, treated the same as contractual leave in excess of the basic four-week entitlement.

References: WTR 1998, SI 1998/1833, regs 4(6)-(7), 13

Statutory holiday accrual

Where a worker is first employed after the start of his leave year, he will be entitled only to the portion of his annual entitlement equal to the portion of his leave year remaining at the start of his employment. In subsequent years, the worker may in theory take all of his annual holiday entitlement in one period at the start of the leave year, subject to notice requirements.

References: WTR 1998, SI 1998/1833, reg 13

Prior to 1 October 2007, if the portion of his annual entitlement included a fraction of a day, it had to be rounded up to a whole number of days, but this provision was repealed with effect from that date.

References: WTR 1998, SI 1998/1833, reg 13(6)

Leave entitlement under the WTR 1998 may be taken in instalments but:

References: WTR 1998, SI 1998/1833, reg 13(9)

- o it may not be carried over from one leave year to the next, and
- o it may not be replaced by a payment in lieu of holiday entitlement except:
 - where the employment ends, or
References: WTR 1998, SI 1998/1833, reg 13(9)
 - in the case of *additional* annual leave entitlement, payment in lieu of that portion of leave entitlement *only* was permissible until 1 April 2009. This is not the case for any leave year that started on or after 1 April 2009
References: WTR 1998, SI 1998/1833, reg 13A(6)(b)-(c)

During the first year of employment, a worker may at any time only take holiday that has already accrued. Requests to take leave in the first year are subject to the same notice requirements as any other leave. Holiday in the first year accrues at the rate of one-twelfth of the annual entitlement on the first day of each month of that year. The statutory provisions do not make it clear whether a worker who starts employment in the middle of a month is entitled to one twelfth of his annual holiday entitlement on his first day of employment or whether he has to wait until the first day of the next calendar month. DTI (now BIS) guidance suggest that the entitlement exists from the first day of employment.

References: WTR 1998, SI 1998/1833, reg 15A(1)-(2)

A worker must request leave by giving notice to his employer. The employee's notice must be twice as many days in advance of the start of the leave as the leave's duration, so, for example, two weeks in advance for one week's holiday, or four weeks in advance for a fortnight's holiday.

References: WTR 1998, SI 1998/1833, regs 15(1), 15(4)(a)

The employer may require the worker:

References: WTR 1998, SI 1998/1833, reg 15(2)

- o to take annual leave on particular days (for example Christmas shutdowns), or
- o not to take leave on particular days (for example no leave to be taken during August for workers in the hospitality industry)

The employer's notice under Regulation 15(2) must be:

- o twice as many days in advance of the start of the leave as the leave's duration, where holiday must be taken on particular days
References: WTR 1998, SI 1998/1833, reg 15(4)(a)
- o the same number of days in advance as the duration of the leave, where leave is *not* to be taken on particular days
References: WTR 1998, SI 1998/1833, reg 15(4)(b)

Problems concerning accrual and carry-over of annual leave

Interaction between annual leave and sick leave

It is fairly safe to assume that, under the Working Time Regulations, annual leave rights do accrue whilst a worker is on sick leave, even if he is off sick for the whole of the relevant leave year, following the House of Lords' judgments in *Stringer*.

References: HMRC v Stringer [2009] IRLR 677, HL

In fact, the House of Lords in *Stringer* made no express ruling on the point, as it was conceded by the employer. However the Court of Appeal's judgment was implicitly overturned, which allows the law to revert to the state it had under the pre-existing EAT authorities, *Kigass*, *List Design* and *Canada Life*, all of which agree that holiday rights do accrue during sick absence.

References: Kigass Aero Components v Brown [2002] IRLR 312

List Design Group v Douglas and Catley [2003] IRLR 14

Canada Life v Gray and Farrar (UKEAT/0657/03/SM)

A gloss was added to *Stringer* by the EAT in *Larner*. Where a worker is absent from work for the whole of a pay year due to sickness, his entitlement to paid annual leave does not depend on the worker submitting a formal request for such leave before the end of the relevant pay year, because that worker, unlike a fit employee who similarly fails to make a request, does not 'have the opportunity' at any time during that year to take her annual leave, and instead the worker has the right to have the leave entitlement carried over to the following year.

References: NHS Leeds v Larner UKEAT/0088/11/CEA

It seems clear, therefore, that a fit employee who fails to make a request for leave during the whole of the pay year is likely to *lose* his right to take the holiday, particularly where the employer's terms provide for that.

References: NHS Leeds v Larner UKEAT/0088/11/CEA

In *Pereda*, the ECJ ruled that, under the Working Time Directive, where a worker is on sick leave for a period during which he would otherwise be on annual leave, and either is prevented from taking some of his annual leave entitlement as a result, or does not wish to take annual leave whilst sick, he must be permitted to take that unused portion of his annual leave entitlement at a later date, even if it has to be carried over into a subsequent leave year.

References: Pereda v Madrid Movilidad (Case C- 277/08)

The ECJ's decision in *Pereda* goes beyond its decision in *Stringer*.

References: Stringer v HMRC; Schultz-Hoff v Deutsche Rentenversicherung Bund [2009] IRLR 214, ECJ

The ECJ in *Stringer* limited itself to deciding that:

- o an employee may be allowed to take annual leave during a period of sick leave
- o only where a worker was prevented from taking annual leave during sick leave that annual leave could be carried over into a subsequent leave year

Thus, prior to *Pereda*, it seemed arguable, given that the Working Time Regulations do allow workers to take annual leave during periods of sick leave, that:

- o the long-term sick were not **prevented** under UK law from taking annual leave, and so
- o the inability under the Working Time Regulations to carry over annual leave rights to a subsequent holiday year did not represent a failure properly to implement the Working Time Directive

Pereda goes a step further and says a worker can **choose** whether or not to take annual leave during sick leave and, if he chooses not to do so, the worker must be allowed to take the period of leave at a later date, even if that later date is in a subsequent leave year.

Therefore, following *Pereda*, it would appear that the WTR 1998 do not properly implement the Working Time Directive in this respect, given:

- o the prohibition on carrying forward annual leave in regulation 13(9)(a)
References: WTR 1998, SI 1998/1833, reg 13(9)(a)
- o the employer's ability (in effect) to prevent the employee taking leave on particular days in regulation 15
References: WTR 1998, SI 1998/1833, reg 15

Employees in the public sector can circumvent these issues and rely directly on the ruling in *Pereda*. Those in the private sector cannot and will either have to:

- o persuade a tribunal that the WTR 1998 can be interpreted to comply with the ruling in *Pereda*, which is likely to be difficult given the clear prohibition on carrying leave entitlement over to the next holiday year in regulation 13(9)(a), or
References: WTR 1998, SI 1998/1833, reg 13(9)(a)
- o bring a *Francovich* type claim against the UK government for their failure properly to implement the Working Time Directive
References: *Francovich v Italian Republic* [1992] IRLR 84

Note that the ECJ's ruling in *Pereda* concerns only the four weeks' annual leave required under the Working Time Directive. The principles in the decision do not expressly apply to:

References: *Pereda v Madrid Movilidad* (Case C- 277/08)

- o the additional 1.6 weeks' leave to which workers are entitled under the WTR 1998
References: WTR 1998, SI 1998/1833, reg 13(1), 13A
- o any additional contractual holiday entitlement

However, it is arguable that the principles in *Pereda* also apply to additional leave under the WTR 1998, if one:

- o takes a purposive interpretation of the WTR 1998 in light of the aims of the Working Time Directive, and
- o applies, by analogy, the ECJ's comments in *Merino Gómez* regarding domestic maternity leave rights which go beyond the requirements of the underlying EU Directive
References: *Merino Gómez v Continental* [2004] IRLR 407

For further information on additional annual leave, see Additional annual leave.

Holiday pay and the long-term sick

The House of Lords in *Stringer* held that repeated failures to pay holiday pay may be claimed as a series of unlawful deductions from wages under the ERA 1996, which remedy is in addition to that which exists under the Working Time Regulations themselves.

References: ERA 1996, ss 13, 23

WTR 1998, SI 1998/1833, reg 30

However *Stringer* leaves the law in this area in a state of some uncertainty, raising significant practical problems. Workers on long-term sick leave may, although still employed, be on zero pay after a while. Thus it matters if they are entitled to take statutory annual leave during sick leave, as during such annual leave they would be entitled to their normal rate of pay.

It is of particular importance where such a worker has been off sick for more than one leave year. If he has not been paid (or not paid fully) for annual leave in each leave year, can he seek payment in respect of the earlier years, or is any claim restricted to the latest leave year?

Analysing the combined effect of *Stringer*, *Kigass*, *List Design* and *Canada Life*, It would appear that the domestic position is now as follows:

- o whilst still employed, a worker cannot seek (and an employer may not provide) payment in lieu of annual leave
References: WTR 1998, SI 1998/1833, reg 13(9)(b)
- o however, where a worker takes annual leave, but is not paid (or not fully paid) for the leave he has taken, he may bring a claim for the shortfall at any time during the three months following the date that the unpaid money falls due, even though he remains employed. He need not wait for termination of employment. Such a claim may be brought under either the Working Time Regulations or the deduction from wages regime
References: WTR 1998, SI 1998/1833, regs 16(1), 30(2)(a)

ERA 1996, ss 13, 23

HMRC v Stringer [2009] IRLR 677, HL

- o in any given leave year, throughout the whole of which the worker is employed, that worker is entitled to payment in respect of his full annual leave entitlement, irrespective of whether or not he takes that leave, and irrespective of whether or not he requests that leave under regulation 15
References: WTR 1998, SI 1998/1833, regs 13(1), 15, 16(1)

List Design Group v Douglas and Catley [2003] IRLR 14

- o Canada Life v Gray and Farrar (UKEAT/0657/03/SM)
on termination of employment:
 - a worker is entitled to payment in lieu of untaken annual leave entitlement which accrued during the final leave year
References: WTR 1998, SI 1998/1833, reg 14
 - a worker is also entitled to payment in respect of unpaid annual leave entitlement which relates to previous leave years, provided such earlier failures to pay together constitute a 'series of deductions' within the meaning of the ERA 1996
References: ERA 1996, s 23(3)(a)

HMRC v Stringer [2009] IRLR 677, HL

- this entitlement to claims for previous leave years exists even if the worker did not take annual leave during those previous years, and/or did not request leave under regulation 15
References: WTR 1998, SI 1998/1833, regs 13(1), 15, 16(1)

List Design Group v Douglas and Catley [2003] IRLR 14

Canada Life v Gray and Farrar (UKEAT/0657/03/SM)

A number of things remain unclear:

- o can a worker, *whilst he is still employed*, bring a claim for unpaid holiday pay, in respect of leave which he has not in fact taken, or sought to take under regulation 15, despite the prohibition on payments in lieu under regulation 13(9)(b), or must he wait until his employment is terminated?

References: WTR 1998, SI 1998/1833, regs 13(9)(b), 15

- o given that (1) a failure to pay holiday pay due under regulation 16 amounts to a deduction of wages under the ERA 1996, and (2) a worker has rights to holiday pay in respect of his full annual leave entitlement, whether or not he takes that leave, and (3) the employer is not allowed, at any time before termination, to make a payment in lieu of leave, on what date (for the purpose of the time limit under the ERA 1996) does the 'deduction' occur in respect of unpaid holiday pay due for annual leave which has not been taken? Since the employer is *not allowed* during employment to make a payment in lieu of leave that has not been taken, how can it be said, whilst the employment continues, that the employer has made a 'deduction'?

References: ERA 1996, s 23(2)(a)

WTR 1998, SI 1998/1833, reg 13(9)(b)

- o likewise, under the Working Time Regulations themselves, a claim for unpaid holiday pay must be made within three months of the date on which the payment ought to have been made. If the leave was not in fact taken, when is the date when payment in respect of that leave ought to be made? Since the employer is *not allowed* during employment to make a payment in lieu of leave that has not been taken, how can it be said, whilst the employment continues, that such a payment has fallen due? Is it perhaps the case that, under the Working Time Regulations, holiday pay in respect of leave that was not taken only becomes due on termination of employment (when the prohibition on payments in lieu under regulation 13(9)(b) ceases to apply)? If that is right, the three month time limit for such claims would only start to run on termination of employment

References: WTR 1998, SI 1998/1833, regs 13(9)(b), 30(2)(a)

- o where an employer has failed to pay holiday pay for several years running, but then on termination makes an appropriate payment in lieu (under regulation 14) of untaken holiday which has accrued during the final leave year, does this break the chain in any 'series of deductions' argument? Would this mean that the last in the series of deductions was the failure to pay for the *previous* year's holiday entitlement? If so, and that previous leave year finished more than three months before termination, would the worker be prevented from claiming holiday pay in respect of any previous year under the deduction from wages regime, because such a claim would be being made more than three months after the final deduction in the series? The answer to these questions:

References: WTR 1998, SI 1998/1833, reg 14

ERA 1996, s 23(3)(a)

- depends firstly on when the 'deduction' in respect of any previous year's holiday pay entitlement is deemed under the ERA 1996 to have been made. If it is deemed to be made at the end of the leave year in question, then the employer might succeed in preventing claims for the earlier years. However, as noted above, holiday pay in respect of leave not actually taken arguably does not fall due until termination of employment, in which case the deductions for all such payments relating to earlier years would only be deemed to be made then, so claims in respect of all of them would all be in time if made within the three months following termination

References: ERA 1996, s 23(2)(a)

- depends secondly on when holiday pay in respect of leave not actually taken, relating to a leave year other than the final one, becomes payable under the Working Time Regulations themselves. As noted above, given the prohibition on payments in lieu during employment, arguably such holiday pay in respect of all previous leave years only becomes due on termination of employment. If this is right, once again claims for holiday pay in

respect of leave not taken during any leave year prior to the final one would all be in time if claimed within the three months following termination
References: WTR 1998, SI 1998/1833, regs 13(9)(b), 30(2)(a)

In short, it seems plain that the law relating to back-claims of holiday pay, particularly in the case of those on long-term sick leave, will continue to be unclear in a number of important respects until the Court of Appeal deals head-on with the outstanding issues which the House of Lords failed to resolve in *Stringer*.

Interaction between annual leave and maternity leave

All workers on maternity leave continue to accrue statutory holiday entitlement and some workers may also accrue any additional contractual holiday entitlement. See: Maternity leave -- Holiday entitlement during maternity leave for further information.

References: Merino Gómez v Continental [2004] IRLR 407

When statutory holiday may be taken and the notice requirements

Workers can choose when to take holidays but must give notice to their employer. Employers and workers can agree how and when to give notice of when leave is to be taken but, in the absence of agreement, notice must:

References: WTR 1998, SI 1998/1833, reg 15

- o be at least twice as many days in advance of the intended holiday period as the length of the intended holiday
- o specify the period to be taken as holiday

For example, a worker who wishes to take one week's holiday must give at least two weeks' notice of his intention to take that holiday.

Employers can specify times that workers must take leave or must not take leave, for example for a Christmas shutdown, but must give notice to the worker. Where the employer is specifying when the worker is to take holidays, the notice must specify when the holiday is to be taken and must be given at least twice as many days in advance as the length of the holiday. Where the employer is specifying when holiday is not to be taken, the notice must again specify the relevant dates and must be given as far in advance as the length of the period when holiday is not to be taken. For example, if an employer wishes a worker to take one week's holiday on particular dates, he must give notice to the worker at least two weeks' in advance of the first of those dates. If, however, he does not want the worker to take holiday during a particular week, he must give notice at least a week in advance.

An employer is entitled to insist that workers take all leave during periods of pre-ordained rest, ie during periods when the worker would not be working anyway. So, for example:

References: Russell v Transocean International Resources [2012] IRLR 149

- o the employer of a schoolteacher can insist that all annual leave is taken during the school holidays and not during term-time
- o the employer of a shift worker whose shifts require him to work for only 26 weeks of the year, in a constant alternating pattern of two weeks on followed by two weeks off, can insist that all annual leave is taken during the weeks in which the worker is not rostered to work

There is no need for a notice under regulation 15 to specify actual dates, provided that the employee knows when he can, or cannot, take his annual leave (eg in *Transocean*, it was sufficient for the employer to notify the offshore oil rig workers that they had to take their annual leave during a period when they were rostered to be on onshore 'field break').

References: Craig v Transocean International Resources [2009] IRLR 519, EAT (appealed on other grounds)

An employer and worker may agree to other notice provisions by way of a 'relevant agreement' (ie in a work-force agreement, collective agreement or other legally enforceable written agreement, such as an employment contract).

References: Industrial and Commercial Maintenance v Briffa (UKEAT/0215/08/CEA, UKEAT/0216/08/CEA)

WTR -- part-time workers and annualised hours

There are no special provisions in the WTR for part-time workers. Their position is the same as full-time workers: if they normally work three days a week, their annual holiday entitlement will be:

- o a basic entitlement of four weeks at three days a week (ie 12 days a year), plus
- o an additional annual leave entitlement of 1.6 weeks at three days a week (ie a further 4.8 days a year)

There are no special provisions for workers with contracts providing for annualised hours or other atypical working arrangements. The logical approach for those with annualised hours is to divide their annual number of hours by 9.286 (nine and two sevenths) to give the number of hours over 5.6 weeks, which would be their annual holiday entitlement. Further guidance (which is not binding on courts or tribunals) is given on the BusinessLink website.

Contractual holiday entitlement

The Working Time Regulations 1998 provide minimum entitlement to holiday but an employee's or worker's contract may entitle him to more generous holidays.

Any contractual holiday entitlement must be included in an employee's written statement of particulars (see Written statement of particulars).

References: ERA 1996, s 1(4)(d)(i)

Most employees and workers will have express terms in their contracts setting out holiday entitlement. In the absence of express terms, certain terms relating to holidays may be implied. In some industries, for example, a right to take time off work for bank holidays may be implied through custom and practice.

References: Harvey BI[17.10]

Tucker v BL [1978] IRLR 493

As a matter of contract, holiday should be taken at a time ultimately determined by the employer, the employee being obliged to obey reasonable and lawful orders from his employer.

References: Cresswell v IR [1984] IRLR 190

However, employers are also subject to an implied term not to act in a manner which is calculated to destroy or seriously damage the relationship of trust and confidence between employer and employee. This means they must not unreasonably refuse an employee's request to take holiday.

References: Imperial Pension v Imperial Tobacco [1991] IRLR 66

An express agreement about holiday entitlement may specify the dates of the holiday year during which entitlement accrues and also whether holiday entitlement accrued but not used in one holiday year may be carried over into the next holiday year. These provisions may be implied through custom and practice if not expressly agreed.

Statutory holiday entitlement between 1 October 2007 and 1 April 2009

Between 1 October 2007 and 1 April 2009, the entitlement to additional annual leave is calculated proportionally, depending on when the leave year starts. For example, a worker:

References: WTR 1998, SI 1998/1833, reg 13A(2)

- o whose leave year starts on 1 April

- o who works a five day week, and
- o who received 20 days including bank and public holidays during the leave year 1 April 2006 to 31 March 2007
- o would have been entitled to two additional days for the six-month period from 1 October 2007 to 31 March 2008, in respect of the leave year 1 April 2007 to 31 March 2008

Similarly, where an annual leave year began after 1 April 2008 but prior to 1 April 2009, the transitional provisions entitle workers to:

References: WTR 1998, SI 1998/1833, reg 13A(2)(d)

- o all the initial 0.8 weeks additional annual leave, plus
- o a proportion of the further 0.8 weeks, calculated pro rata, depending on when the leave year started

The transitional provisions also provide that additional leave which accrued prior to 1 April 2009 (ie the initial 0.8 week increase) may still be replaced with a payment in lieu.

References: WTR 1998, SI 1998/1833, reg 13A(6)(c)