



# Legal Brief on common holiday issues

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## 1. When holiday is taken

**Case scenario – “Rachel has insisted on taking leave in December during her employer’s busiest time of year because she wishes to go abroad with friends who have already booked their holiday”.**

A worker cannot insist on when they take leave, the time at which holiday is taken must normally be agreed with the employer. If the employer has particular busy times during the year which they wish to prevent workers from taking annual leave, they should have a relevant clause in the worker’s contract reflecting this.

Under the Working Time Regulations 1998 workers are entitled to take four weeks annual leave a year plus an additional eight days (which includes bank holidays) and may take such annual leave on such days as they choose by giving statutory notice to their employer. The notice required is at least twice the period of the leave to be taken, i.e. if a worker wishes to take a day’s holiday they will need to give at least two days notice. However, an employer may refuse the worker permission to take the leave requested by giving notice within the equivalent period of leave, i.e. a day’s notice for a day off.

An employer can vary notice requirements by including relevant clauses into the workers’ contracts.

## 2. Sickness whilst on holiday

**Case scenario – “Chloe goes on holiday to Ibiza, has a dodgy paella, spends most of the holiday incapacitated and wants to reclaim it when she comes back to work”.**

In light of the decision in the *Pereda* case, which held that a worker who falls sick during a period of scheduled annual leave has the right to take the lost annual leave at a different time, Chloe’s employer should pay her sick pay for the period in which she was incapacitated and credit her back those days to her annual leave entitlement to be taken at a later time.

Further to the European Court of Justice’s decision in *Stringer* and *Pereda*, this would be the case even if the scheduled holiday period in which Chloe became ill fell at the end of the holiday year resulting in that credited holiday entitlement being rolled over to the next holiday year.

## 3. Part-timers and bank holidays

**Case scenario – “John works Tuesday and Thursdays, his employers have a standard contractual holiday entitlement applicable to all staff (pro rata for part time workers) of 25 days plus bank holidays, he has raised a grievance as he is only receiving 25 days holiday due to his contractual hours not coinciding with bank holidays”.**



Failing to pay John in respect of bank holidays falling outside of his contracted hours or not increasing his holiday entitlement on a pro rata basis to account for the additional bank holiday leave he is entitled to is likely to amount to less favourable treatment on the grounds of his part-time working status and a breach of contract.

#### **4. Unauthorised extended holiday**

**Case scenario – “Jane had booked two weeks holiday but instead of returning to work the next working day following her holiday she took an additional two days leave without contacting her employer”.**

The employer should investigate why Jane took two additional days which were unauthorised and why she did not contact her employer to seek approval prior to taking the additional days. In the absence of a suitable explanation the employer should invoke the disciplinary procedure.

#### **5. Deductions for excess holiday entitlement upon termination**

**Case scenario – “Jack has resigned from his employment after 7 months service having taken two additional days holiday over and above his accrued statutory holiday entitlement. His employer has deducted a sum equivalent to two days leave from his final salary”.**

There is no statutory provision providing an employer with the right to make deductions in respect of excess holiday taken. In the absence of a relevant clause permitting the employer to make such a deduction which is contained within the contract of employment (or other contractual document) and has been signed by the worker prior to the deduction, the making of the deduction will be unlawful.

#### **6. Long-term sick leave and holiday pay upon termination**

**Case scenario – “Rebecca has been signed off work due to an injury caused in a car accident for 18 months’, her employer has now terminated her employment on capability grounds. Rebecca is claiming that she is entitled to a payment in lieu of her contractual holiday (30 days holiday per annum) for the complete 18 month period.”**

In light of the decision in the *Stringer* case Rebecca would be entitled to be paid in lieu of her accrued statutory holiday entitlement during the 18 month period. This just relates to the statutory four week entitlement and not the additional 1.6 week entitlement. However, if there is a clause in Rebecca’s contract entitling her to a payment in lieu of accrued holiday upon termination, her employer would be acting in breach of contract and unlawfully deducting monies from her wages, by failing to pay her for her full accrued contractual entitlement.

#### **7. Unlawful deduction of wages for non-payment of holiday and time limits**

**Case scenario – “James has been signed off work due to a serious back condition since 1 June 2000, his holiday year ran from January to December, his employer terminated his employment on capability grounds on 1 May 2012 paying him in lieu of his accrued holiday entitlement for the period 1 January to 1 May 2012 only upon termination. James has presented a claim of unlawful deduction of wages.”**



Although James could claim a payment for accrued holiday entitlement during the period June 2000 to December 2011, subject to any decision to limit the accrual period in light of the Advocate General's opinion in the *Schulte* case, his claim of unlawful deduction would be technically out of time.

Under the Employment Rights Act 1996 workers must bring a claim of unlawful deduction of wages within three months of the last deduction in the series (i.e. December 2000 deduction and December 2011 deduction. This would mean that the time limit for bringing the unlawful deduction of wages claim in respect of holiday entitlement for period 1 June 2000 to 31 December 2011 would have expired on 30 March 2012 and so James would be time-barred from bringing his claim.

There have been a few Employment Tribunal decisions on this point, most of them finding that the payment of the current holiday year broke the series of deductions time-barring claims for previous holiday years where the three month time limit had expired. However, there is an Employment Tribunal decision which held that, as payment in respect of accrued annual leave only becomes payable upon termination, the three month time limit should run from that date, thus avoiding the claim from becoming time-barred. No doubt this will be the subject to future litigation.

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