



EMPLOYMENT TRIBUNALS (SCOTLAND)

5 **Case Nos: 4102738/2020, 4102748/2020, 4102747/2020, 4102746/2020, 4102740/2020, 4102741/2020, 4102743/2020,
4102739/2020, 4102751/2020, 4102752/2020, 4102750/2020, 4102749/2020, 4102753/2020 & 4102742/2020 (P)**

Held on 6, 7, 8, 9 & 10 December 2021 & 27 January 2022

10 **Employment Judge N M Hosie
Members E Farrell
V Lockhart**

15 **Mr C I Nunez Medina**

**1st Claimant
Represented by
Ms K Fraser,
Aberdeen CAB**

20 **Ms A Blaszczyk**

**2nd Claimant
Represented by
Ms K Fraser,
Aberdeen CAB**

25 **Ms K Killingback**

**3rd Claimant
Represented by
Ms K Fraser,
Aberdeen CAB**

30 **E.T. Z4 (WR)**

Ms B Nalepa

4th Claimant
Represented by
Ms K Fraser,
Aberdeen CAB

Ms F Nugent

5th Claimant
Represented by
Ms K Fraser,
Aberdeen CAB

Mr R Fernandes

6th Claimant
Represented by
Ms K Fraser,
Aberdeen CAB

Ms M Galas

7th Claimant
Represented by
Ms K Fraser,
Aberdeen CAB

Mr N Chabwa

8th Claimant
Represented by
Ms K Fraser,
Aberdeen CAB

Ms J Wilkosz

9th Claimant
Represented by
Ms K Fraser,
Aberdeen CAB

Mr G Gordon

10th Claimant
Represented by
Ms K Fraser,
Aberdeen CAB

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Mr A Podgorski

11th Claimant
Represented by
Ms K Fraser,
Aberdeen CAB

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Mr R Rojecki

12th Claimant
Represented by
Ms K Fraser,
Aberdeen CAB

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Mr Z Mizhimakoski

13th Claimant
Represented by
Ms K Fraser,
Aberdeen CAB

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Mr C Iliescu

14th Claimant
Represented by
Ms K Fraser,
Aberdeen CAB

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The Rox Hotel LLP

**Respondent
Represented by
Ms E Evans-Jarvis,
Senior Litigation
Consultant,
Península**

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JUDGMENT OF THE EMPLOYMENT TRIBUNAL

The unanimous Judgment of the Tribunal is that:-

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- (1) the respondent acted in breach of its obligations, in terms of s.188 of the Trade Union & Labour Relations (Consolidation) Act 1992;
 - (2) the respondent shall pay a protective award of seventy (70) days' remuneration to each of the claimants, in terms of s.192 of the 1992 Act;
 - 10 (3) the respondent shall pay, by way of notice pay, compensation for failure to provide a written statement of terms and conditions of employment, redundancy pay and holiday pay, to each of the claimants specified, the sums detailed in the attached Schedule; and
 - (4) the claimants' breach of contract claims (except in respect of notice) and the respondent's breach of contract counterclaims are dismissed.
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REASONS

1. These cases, which were combined, have something of a history, the claim form having been submitted as long ago as 21 May 2020. The claims comprised a variety of complaints against the respondent by a number of claimants, of many different nationalities. After various case management hearings, Tribunal Orders and Directions and extensive correspondence, the claims proceeded to a Hearing before a full Tribunal on 6 December 2021. The Hearing lasted a number of days. The Joint Bundle of documentary productions ran to some 677 pages (“P”).
2. In the course of the Hearing, in accordance with the “overriding objective” in the Rules of Procedure, the Tribunal gave oral Judgments in respect of the claims for protective awards, whether or not the claims for accrued holiday pay could be carried forward and the effective date of termination for each claimant. These Judgments are detailed below.
3. At the conclusion of the Hearing, the parties’ representatives were directed to liaise with a view to reaching agreement on the sums which were due to each claimant. Helpfully, on 24 January 2022, the Tribunal was advised that agreement had been reached in accordance with a spreadsheet which is reflected in the attached Schedule and incorporated into the Judgment, by way of reference. Further confirmation was provided by the parties’ representatives on 27 January, that, “*the spreadsheet shows the agreed compensation for:*
 1. *Notice pay (there are 2 tabs based on different claims);*
 2. *Holiday pay (there are 2 tabs based on different claims);*
 3. *Failure to provide a written statement of terms and conditions;*
 4. *Redundancy pay and*

5. *Protective award.*”

4. The Tribunal was also advised that it had been agreed that there would be no award of expenses to or by either party, that the claimants’ breach of contract claims (apart from the claims for outstanding notice) and the respondent’s breach of contract counterclaims should be dismissed; and that the respondent had agreed not to pursue any claims against any of the claimants in the civil courts, or otherwise, in respect of matters arising from their employment at the Hotel.
5. The Judgment reflects this agreement and the Tribunal’s oral Judgments.

10 **Protective award**

6. The following is the majority oral Judgment we delivered in the course of the Hearing.
7. We first considered when the duty to consult arose. In this regard, the Tribunal was divided (one member dissenting). The majority was of the view that the duty to consult in terms of s.188 of the Trade Union & Labour Relations Act 1992 arose on 10 January 2020 when the respondent received the Report from Hospitality 7 that there was nothing more they could do and the only option was to close the Hotel. The majority was of the view that the duty to consult arose then as the obligation to consult arises before the employer has set its mind on dismissal.
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8. In arriving at that view the majority was mindful of the guidance in ECJ case *Junk v. Kubnel* [2005] IRLR 310 and the EAT Judgment in *UK Coal Mining Limited v. NUM* [2008] ICR 263.
9. The dissenting member was of a different view. In her view the duty to consult only arose on 17 March 2020 when the respondent received the letter from KPMG (P.327).
10. However, the Tribunal was of the unanimous view that there were no “special circumstances” which meant that there was no requirement to consult. Such special circumstances as were alleged and, in particular, the impact of Covid Pandemic only came into effect *after* the duty to consult arose. It is only special circumstances *at the time* the duty to consult arises and thereby obviates the requirement to consult.
11. The majority view prevails. Notwithstanding that the duty to consult arose on 10 January, there was no meaningful consultation with the claimants.
12. We then turned our attention to the length of the protective award and what would be just and equitable, with reference to s.189(4)(b). Having regard to the fact that Ms Rintoul, the respondent’s principal at the Hotel was on maternity leave at the relevant time, which created gaps in management arrangements, the fact they did not avail themselves of advice at the time and the fact that the failure did not appear to be deliberate and as they put it they were “*trying to do their best by their employees*”, we decided that the period of the protective award should be reduced from 90 days to 70.

Carrying forward holiday pay

13. The following is the unanimous oral Judgment we delivered during the Hearing.
- 5 14. The issue for the Tribunal was whether there was an entitlement, either by way of statutory provision or contractually, to carry forward accrued holidays into the following holiday year which started on 1 April.
- 10 15. So far as the statutory position was concerned, we first considered the special rules which allow the carrying forward of annual leave which were introduced by the Working Time Corona Virus Regulations 2020. However, these regulations only came into force on 27 March 2020 and they could only be engaged where it was not reasonably practicable for the worker to take some or all of the holidays to which they were entitled due to the effects of the Corona Virus. We were of the unanimous view, therefore, that these Regulations did not engage in the present case.
- 15 16. We then went on to consider the contractual position. Apart from one signed contract which was produced, which included the “no carry over provision”, we did not have sight of any other contracts which contained that provision.
- 20 17. There was clear provision for “no carry forward” in the Employee Handbook (P.286 for example) but it was not established in evidence that all the claimants were given a copy of the Handbook or were aware of its terms despite copies being available throughout the Hotel.

18. However, there was clear, unchallenged, evidence from all the witnesses that they were aware that holidays could not be carried forward.

19. There was some evidence from Ms Aleksandra Blaszczyk (“Ola”) that she may have been allowed to carry forward a few days’ holidays, on one occasion, at some time, in her several years’ employment at the Hotel, but she was uncertain and we did not consider that evidence to be reliable.

20. She also said that she had asked Ms Rintoul in March 2020 to take holidays later in the year. That was refused and that was accepted by her.

21. Otherwise, there was no evidence of any custom and practice of employees being allowed to carry forward accrued holidays into the next holiday year, starting on 1 April. The evidence from the witnesses was consistent and corroborative:

- They were aware of how to apply for holidays.
- Holidays were only ever refused if the request clashed with another employee who was due to be on holiday at the same time.
- The claimants were all aware their holidays had to be taken by 31 March or they would “lose them”. They could not be carried forward.

22. The evidence was overwhelming. We had no difficulty, therefore, arriving at the unanimous view that there was no entitlement to carry forward accrued holidays.

23. However, the subsequent agreement between the parties was that any overpayments by the respondents in this regard would not be pursued and that the claimants would not pursue any breach of contract claims (apart from their claims for outstanding notice pay).

5 **Effective date of termination**

24. This was another issue in the case in respect of which the Tribunal issued an Oral Judgment during the Hearing. The Judgment was unanimous. It was in the following terms.

10 25. The Employment Rights Act 1996 defines the date of termination for many employment rights and it is essential to know the precise date on which the contract of employment is regarded as having been terminated. The date is called the effective date of termination ("the EDT"). We reached a view which was unanimous. In short, the respondent's position is that the EDT was 27 March 2020 when a text message (P.347) was sent by the Hotel Manager, Claire Rintoul, and the Hotel Owners, to all members of staff, apart from George Gordon, we understand.

15 26. The claimants' position is that the text message did not determine the EDT, but rather the EDT did not arise and did not fall to be calculated until the claimants actually *received* letters from the respondent confirming the termination of their employment, by reason of redundancy. Although these letters were dated 21 March 2020, it was not disputed by the respondent that they were not received by the claimants until various dates between 30 March and 14 April.

27. We took no issue with the summary of the case law by the claimants' representative.
28. We found the EAT case of *Mitie Security v. Ibrahim* [2010] UKEAT/0067/10, to which we were referred, to be of particular assistance. This case highlights that notice to terminate is not effective until actually given by the employer; the notice must be effectively communicated; and there must be an ascertainable date on which employment is to end. A warning that dismissal is inevitable by a certain date will not amount to a dismissal.
29. The text of 27 March, relied upon by the respondent, does not satisfy either of these conditions. Notice was not effectively communicated. There is no ascertainable date on which employment is to end. Although it says that the Hotel has "ceased trading", it is silent on the EDT and how each claimants' notice period will impact on the EDT. Indeed, there is no reference to notice at all. It simply says that: "*Letters will be coming out to you in due course.*" Also, the fact that after receiving the text message Mr Medina, the General Manager, was still seeking clarification, demonstrated that notice had not been effectively communicated (P.360).
30. The fact that salaried employees were paid their wages to 31 March and hourly paid employees to 21 March, is nothing to the point. Nor is the fact that the Pandemic had affected the hospitality industry significantly and had created uncertainty.
31. Further, the letters which were received on various dates between 30 March to 14 April, only served, in our view, to support the claimants' position that the text of 27 March did not establish the EDT. Some of these stated: "*Length of notice to be worked (if any). As and when required in the month ahead* (P.355) for example. Others stated: "*Length of notice to be worked (if any) none* (P.621 for example).

32. Also the P45s which were sent to all claimants gave as the leaving date 30 March 2020 which, on balance, favoured the claimants' position.
33. In arriving at our view we were also mindful of the case of **Chapman v. Letheby** [1981] IRLR 440, to which we were referred, that if the effect of a dismissal letter is unclear it should be construed in a way that is most favourable to the employee.
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34. For all these reasons, therefore, we arrived at the unanimous view that the submissions by the claimants' representative were well-founded, by and large, and are to be preferred. In short, the EDT in the present cases could only be determined on or after the claimants' received their dismissal letters, dated 21 March in the period from 30 March to 14 April.
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35. However, when determining the EDT for each claimant a distinction requires to be drawn given the different terminology used in the letters.
36. In **Addams v. GKN Sankey Ltd** [1980] IRLR 416 the EAT explained that the phrase "*PILON*" is imprecise because it can have two possible consequences depending upon whether it is used in a colloquial sense or in a legal one. The colloquial usage is where the employee can be regarded as having been dismissed with notice, but given a payment in lieu of working out that notice. In that case the EDT is the date in which the notice expires in accordance with s.97(1)(a) or s.145(2) of the Employment Rights Act 1996.
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37. The "legal usage" is where the employee is regarded as having been dismissed immediately with payment in lieu of the notice of which he or she has been deprived. In that case, the EDT is the date upon which termination takes effect (s.97(1)(b) or s.145(2) of the 1996 Act).
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38. So far as the present cases are concerned, therefore, those claimants who received letters using the terminology, “*Length of notice to be worked (if any): as and when required in the month ahead*” (such as P.355), fall into the first category and the EDT, in the absence of a contractual notice period, will be the date on which the statutory notice expires following the date of receipt of the dismissal letter.

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39. Those claimants who received letters using the terminology: “*Length of service to be worked (if any): none*” fall into the second category and their EDT is the date of receipt of the dismissal letter.

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S/4102738/2020 & Others

SCHEDULE

<u>ET1</u>	<u>ET3</u>	<u>Name</u>	<u>Received letter</u>	<u>Effective Date of Termination</u>	<u>Notice period in weeks</u>	<u>Notice pay claimed</u>	<u>Notice pay received from the Respondent</u>	<u>Agreed notice pay owed by the Respondent</u>	TOTAL	<u>Weekly wage before NMW increase</u>	<u>Weekly wage after NMW increase</u>
1	12	Adrian Podgórski	06/04/2020	06/04/2020	1.00	£348.80	£328.40	£20.40	£1,593.93	£328.40	£348.80
3	4	Beata Nalepa	02/04/2020	02/04/2020	8.00	£2,790.40	£2,082.50	£707.90		£328.40	£348.80
8	5	Fiona Nugent	31/03/2020	30/04/2020	7.00	£2,441.60	£1,970.40	£471.20		£328.40	£348.80
13	7	Magdalena Galas	03/04/2020	30/04/2020	4.33	£1,511.47	£1,245.18	£266.29		£328.40	£348.80
14	8	Nigel Chabwa	31/03/2020	30/04/2020	4.33	£1,511.47	£1,473.33	£38.14		£340.00	£348.80
15	13	Radoslaw Rojecki	06/04/2020	06/04/2020	1.00	£348.80	£328.40	£20.40		£340.00	£348.80
16	15	Zoran Mizhimakoski	30/03/2020	05/04/2020	1.00	£139.52	£131.36	£8.16		£131.36	£139.52
5	17	Costin Iliescu	30/03/2020	05/04/2020	1.00	£348.80	£287.35	£61.45		£340.00	£348.80

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<u>ET1</u>	<u>ET3</u>	<u>Name</u>	<u>Notice pay received from the Respondent</u>	<u>Weekly pay</u>	<u>Notice pay claimed</u>	<u>Agreed notice pay owed by the Respondent</u>	TOTAL
7	6	Efeo Rodney Fernandes	£1,833.05	£423.01	£2,115.06	£282.01	£1,354.01
9	10	George Duncan Gordon	£1,248.00	£420.00	£1,820.00	£572.00	
12	3	Kinga Killingback (Indraszczyk)	£3,500.00	500	£4,000.00	£500.00	

<u>ET1</u>	<u>ET3</u>	<u>Name</u>	<u>Weekly pay</u>	Agreed compensation for failure to provide written statement of T&Cs owed by the Respondent	TOTAL
1	12	Adrian Podgórski	£348.80	£697.60	£3,012.32
5	17	Costin Iliescu	£328.40	£656.80	
14	8	Nigel Chabwa	£348.80	£697.60	
15	13	Radoslaw Rojecki	£348.80	£697.60	
16	15	ZORAN MIZHIMAKOSKI	£131.36	£262.72	

<u>CLAIMANT'S NAME</u>	<u>ET1 NUMBER</u>	<u>ET3 NUMBER</u>	AGREED REDUNDANCY PAY OWED BY THE RESPONDENT TAKING INTO CONSIDERATION THE CAP, INCREASE IN NMW & REDUNDANCY PAY RECEIVED	TOTAL £1,244.00
Carlos Nunez	4	1	£58.50	
Fiona Nugent	8	5	£706.80	
Nigel Chabwa	14	8	£17.60	
Beata Nalepa	3	4	£92.40	
Magdalena Galas	13	7	£368.70	

<u>ET1</u>	<u>ET3</u>	<u>Name</u>	<u>Date of termination</u>	<u>Received letter advising of dismissal</u>	<u>Weekly wage applicable</u>	<u>Daily pay</u>	<u>Agreed Holiday entitlement</u>	<u>Agreed holiday pay outstanding</u>
1	12	Adrian Podgórski	06/04/2020	06/04/2020	£348.80	£69.76	0.5	£34.88
2	2	Aleksandra Blaszczyk	30/04/2020	30/03/2020	£500.00	£100.00	2.4	£240.00
3	4	Beata Nalepa	02/04/2020	02/04/2020	£348.80	£65.68	0.2	£13.14
4	1	Carlos Nunez	30/04/2020	02/04/2020	£673.08	£134.62	2.4	£323.08
7	6	Efeo Rodney Fernandes	30/04/2020	31/03/2020	£423.08	£84.62	2.4	£203.08
8	5	Fiona Nugent	30/04/2020	30/04/2020	£348.80	£69.76	2.4	£167.42
12	3	Kinga Killingback (Indraszczyk)	30/04/2020	07/04/2020	£500.00	£100.00	2.4	£240.00
13	7	Magdalena Galas	30/04/2020	03/04/2020	£348.80	£69.76	2.4	£167.42
14	8	Nigel Chabwa	30/04/2020	08/04/2020	£348.80	£69.76	2.4	£167.42
15	13	Radoslaw Rojecki	06/04/2020	06/04/2020	£348.80	£69.76	0.5	£34.88

TOTAL £1,591.32

ET1	ET3	Name	EDT	Weekly wage	Daily rate	Agreed outstanding holidays	Agreed outstanding holiday pay
5	17	Costin Iliescu	30/03/2020	£328.40	£65.68	4.60	£302.13
9	10	George Duncan Gordon	31/03/2020	£420.00	£84.00	10.00	£840.00

TOTAL £1,142.13

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ET1	ET3	Name	Hours p/w	Rate of pay applicable at date of termination	Weekly pay (gross) - WITH INCREASE TO NMW where appropriate	Date of termination	Protective Award Period	Agreed Protective award compensation
1	12	Adrian Podgórski	40	£8.72	£348.80	06/04/2020	70 days	£3,488.00
2	2	Aleksandra Blaszczyk		na	£500.00	30/04/2020	70 days	£5,000.00
3	4	Beata Nalepa	40	£8.72	£348.80	30/04/2020	70 days	£3,488.00
4	1	Carlos Nunez		na	£673.07	30/04/2020	70 days	£6,730.70
5	17	Costin Iliescu	40	£8.21	£328.40	30/03/2020	70 days	£3,284.00
7	6	Efeo Rodney Fernandes		na	£423.07	30/04/2020	70 days	£4,230.70
8	5	Fiona Nugent	40	£8.72	£348.80	30/04/2020	70 days	£3,488.00
9	10	George Duncan Gordon		na	£420.00	31/03/2020	70 days	£4,200.00
11	9	Julia Wilkosz	40	£7.70	£308.00	30/03/2020	70 days	£3,080.00
12	3	Kinga Killingback (Indraszczyk)		na	£500.00	30/04/2020	70 days	£5,000.00
13	7	Magdalena Galas	40	£8.72	£348.80	30/04/2020	70 days	£3,488.00
14	8	Nigel Chabwa	40	£8.72	£348.80	30/04/2020	70 days	£3,488.00
15	13	Radoslaw Rojecki	40	£8.72	£348.80	06/04/2020	70 days	£3,488.00
16	15	ZORAN MIZHIMAKOSKI	16	£8.21	£131.36	30/03/2020	70 days	£1,313.60

Employment Judge N. Hosie

Date of Judgement: 2nd March 2022

Date sent out to Parties: 2nd March 2022