



# EMPLOYMENT TRIBUNALS

**Claimant:**

Mr Y Lasheen

v

**Respondent:**

Berkshire Training Services  
Limited

**Heard at:**

Watford

**On:** 29 and 30 March 2017

**Before:**

Employment Judge Skehan

**Appearances**

**For the Claimant:**

In Person

**For the Respondent:**

Mr Singh (legal representative from Cameron Clarke  
Lawyers)

## JUDGMENT

1. The claimant's claim for unfair dismissal succeeds. The respondent is Ordered to pay to the claimant an unfair dismissal award amounting to **£4075** to be paid **within 14 days from the date of this judgement**. The claimant's unfair dismissal award consists of a basic award calculated by reference to the claimant age and length of service in the sum of £675 and a compensatory award in the sum of £2700 together with an award in respect of loss of statutory rights in the sum of £400 and an award of £300 for failure to provide written particulars.
2. The claimant's claim for unlawful deduction from his wages contrary to section 13 of the Employment Rights Act 1996 in respect of unpaid wages for the period 1 September 2015 to 27 April 2016 succeeds. The respondent is Ordered to pay to the claimant the sum of **£5100** in respect of unpaid wages between 1 September 2015 and 27 April 2016 **within 14 days of the date of this judgement**.
3. The claimant's claim for breach of contract in respect of accrued but untaken holiday entitlement between the period 1 September 2015 and 27 April 2016 succeeds in part in respect of holiday entitlement accrued but untaken between the period of 12 November 2015 and 27 April 2016. The respondent is Ordered to pay to the claimant the sum of **£384.30** in respect of 12.81 days'

accrued but untaken holiday entitlement within **14 days from the date of this judgement.**

4. The claimant's claim for breach of contract in respect of:
  - 4.1. Additional expenses of £100 per day during the claimant's 11 day trip to Morocco between 25 February 2016 on 6 March 2016 is successful. The respondent is ordered to pay the sum of **£1100** to the claimant **within 14 days from the date of this judgement**
  - 4.2. Notice period is successful. The claimant was entitled to be paid for three weeks' statutory notice however no award is made under this heading as the notice period is accounted for within the unfair dismissal award and any further award would amount to double recover on the part of the claimant.
  - 4.3. non-payment for a mobile phone top-up is unsuccessful and dismissed.
5. The total amount payable by the respondent to the claimant under paragraphs 1 to 4 above within 14 days of the date of this judgement amounts to **£10,659.30.**

## REASONS

1. At the beginning of the hearing the respondent made an application for the claimant's claims to be struck out under Rule 37 of schedule 1 of the Employment Tribunal (Constitution etc.) Regulations 2013 on the grounds that that it was vexatious with no reasonable prospect of success. This application was refused on the basis that it would not be in the interests of the overriding objective of dealing with the case fairly and justly. To hear evidence sufficient to determine the application would risk duplication, additional cost, delay and waste of employment tribunal time, should the application be unsuccessful and the matter not eventually be heard within the allocated time frame.
2. The claimant told the tribunal that he had received some ad hoc advice from Reading Citizens Advice Bureau. He had hoped that a representative from the CAB would be available to represent him during the hearing however this was not possible. The claimant appeared person. At the commencement of the hearing, with the assistance of both parties we identified the issues to be determined by the employment tribunal as follows:  
  
Employee/Worker Status
3. Was the claimant an employee between 1 September 2015 and 27 April 2016? It was agreed between the parties that the claimant was an employee between 12 November 2012 and 31 August 2015. The respondent claimed that between 31 August 2015 and 27 April 2016 claimant was a self employed contractor. The claimant claimed that his employment continued until 27 April 2016.

4. If the claimant was not considered an employee between 1 September 2015 and 27 April 2016 was the claimant a worker as defined under section 230 of the ERA. The definition of 'worker' as set out below was revisited at the commencement of the hearing.

Unfair Dismissal

5. Was the claimant dismissed on 27 April 2016?
6. If it is found that the claimant was dismissed on 27 April 2016, was the dismissal unfair? If it is found that the claimant was dismissed on 27 April 2016, the respondent is not relying upon any fair reason for dismissal. The respondent's alternative position is that the claimant's performance and/or conduct which would either constitute contribution on the part of the claimant and/or make any award not just and equitable.

Breach of contract

7. Has the respondent breached the claimant's contract of employment by:
- 7..1. Failing to give notice to the claimant;
  - 7..2. Failing to pay accrued but untaken holiday entitlement
  - 7..3. Failing to pay a top-up of mobile phone expenses.
  - 7..4. Failing to pay expenses (claimed to be £100 a day) due during the periods 25 February to 6 March 2016 (11 DAYS) when the claimant visited Morocco with the respondent.

Unlawful deduction from wages

8. Did the claimant suffer an unlawful deduction from his wages under section 13 of the employment rights act 1996 in respect of his loss of earnings between 1 September 2015 and 27 April 2016. The respondent claims that the claimant was a self-employed person entitled to commission only during this time. The claimant claims that in his employment continued on the same terms and conditions as before including an entitlement to salary of £650 per month and commission.
9. It was agreed at the outset on day one of the hearing that I would hear evidence in respect of liability only. On conclusion of the evidence relating to liability on day two of the hearing, it was apparent that I would have insufficient time to provide a judgement on that day. Therefore in light of the overriding objective with a view to saving costs, I proceeded to hear the remainder of the evidence in relation to remedy on the basis that this would prevent the need for a further day of employment tribunal time should the claimant be successful in any of his claims.

**The Law**

10. Section 230 of the ERA, which defines an "employee" and a "worker" is as follows (so far as material):

S 230 *Employees, workers etc*

(1) *In this Act "employee" means an individual who has entered into or works under (or, where the employment has ceased, worked under) a contract of employment.*

(2) *In this Act "contract of employment" means a contract of service or apprenticeship, whether express or implied, and (if it is express) whether oral or in writing.*

(3) *In this Act "worker" ....means an individual who has entered into or works under (or, where the employment has ceased, worked under)—*

*(a) a contract of employment, or*

*(b) any other contract, whether express or implied and (if it is express) whether oral or in writing, whereby the individual undertakes to do or perform personally any work or services for another party to the contract whose status is not by virtue of the contract that of a client or customer of any profession or business undertaking carried on by the individual;*

*and any reference to a worker's contract shall be construed accordingly.*

11. The definition of "worker" in regulation 2(1) of the Working Time Regulations 1998 ("the WTR") is in materially the same terms as section 230(3) of the ERA. A salesman earning commission from referrals who signed a contract which described him as a "self-employed salesman" was found to be a 'worker' in *Yorkshire Window Company Ltd v Parkes* UKEAT/0484/09.
12. Several different tests have been used to identify whether a contract of service (employment relationship) exists as oppose to a contract for service (self-employed relationship). Whether there is a contract of service falls to be determined by consideration of a number of factors (the multiple test) rather than one single test, and a common judicial starting point is the decision of *Ready-Mixed Concrete (South East) Limited v the Minister of Pensions and National Insurance* [1968] 2 QB 497. This case determined that the key tests for the existence of a contract of service were that: An agreement exists to provide the servant's own work or skill in the performance of service for the master ('personal service') in return for a wage or remuneration. There is control of the servant by the master ('control'). The other provisions are consistent with a contract of service ('other factors').
13. Section 94 of the Employment Rights Act 1996 (ERA) provides that an employee has the right not to be unfairly dismissed by his employer. Section 95(1)(c) of the ERA provides that:- "*if an employee resigns in circumstances in which they are entitled to terminate their contract of employment by reason of an employer's conduct that amounts to a dismissal*". As is explained in *Buckland v Bournemouth University* reported at [2010] IRLR 445CA, paragraph 20: "What circumstances can bring about a constructive dismissal is determined not by the [Employment Rights Act 1996] which is silent on the subject but by common law". The case of *Western Excavating v Sharp* [1978] is still good law in this area. "*If the employer is guilty of conduct which is a significant breach going to the root of a*

*contract of employment, or which shows that the employer no longer intends to be bound by one or more of the essential terms of the contract, then the employee is entitled to treat himself as discharged from any other performance. If he does so, then he terminates the contract by reason of the employer's conduct and he is constructively dismissed.*" The test is an objective test. A course of conduct can cumulatively amount to a fundamental breach of contract entitling the employee to resign and claim constructive dismissal following a last straw incident even though the last straw by itself does not amount to a breach of contract

14. A resignation need not be expressed in a formal way. Indeed, even a clear declaration of the intention to resign is not required. The fact of the employee's resignation may be inferred from his conduct and the surrounding circumstances. Johnson v Monty Smith Garages Ltd EAT 657/79. It is essential, however, that the resignation be somehow communicated to the employer, whether by words, writing or conduct.
15. A constructive dismissal is not always an unfair dismissal, and the tribunal will look at the employer's conduct and decide whether it acted fairly despite having breached the contract (Allders International Ltd v Parkins [1981] IRLR 68). In this case should a constructive dismissal be found, the respondent has not put forward a potentially fair reason for dismissal in accordance with section 98 of the ERA.
16. In a successful unfair dismissal case, the basic award is a statutory award calculated in accordance with the provisions of section 119 of the ERA 1996. The calculation involves multiplying the relevant factors of length of continuous service, age and a week's pay (as at the effective date of termination (EDT) as follows: One and a half weeks' pay for each year of employment after age 41. The ET will consider whether it is appropriate to make a compensatory award (section 118, ERA 1996). Section 123 of the ERA 1996 provides that the award shall be: "such amount as the Tribunal considers just and equitable in all the circumstances having regard to the loss sustained by the complainant in consequence of the dismissal insofar as that loss is attributable to action taken by the employer".
17. A claim for unfair dismissal is a claim to which section 207A applies and the relevant code of practice is the ACAS code of practice on disciplinary and grievance procedures. Section 123(6) of the ERA provides that: "*Where a tribunal finds that a dismissal was to any extent caused or contributed to by any action of the complainant, it shall reduce the amount of the compensatory award by such proportion as it considers just and equitable having regard to that finding.*" The contributory conduct must be conduct which is 'culpable or blameworthy' and not simply some matter of personality or disposition or unhelpfulness on the part of the employee in dealing with the disciplinary process in which he or she has become involved: Bell v The Governing Body of Grampian Primary School UKEAT/0142/07.
18. Section 13 of the ERA covers the rights of an employee or worker not to suffer unauthorised deduction from his wages. Workers have an entitlement to

paid holiday leave under the WTR. A worker is entitled to 5.6 weeks' annual leave in each leave year This is equivalent to 28 days for those who work five days a week. Under the WTR, a leave year commences on the date set out in a

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 relevant agreement, normally the contract of employment or a document incorporated into the contract of employment.

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 Where the leave year is not specified in a relevant agreement, the WTR provide that the leave year begins on the date their employment commenced and each anniversary of that date.

19. When an employee has been continuously employed for one month or more, they are entitled to receive a minimum period of notice of termination of employment from their employer under section 86, ERA 1996. This is known as the statutory minimum notice period. As the claimant did not have a written contract of employment he is entitled to three weeks' notice being one weeks' statutory notice for each year of continuous employment.

20. Section 38 of the Employment Act 2002 states the tribunal's must award compensation to an employee where, upon a successful claim being made under any of the tribunal jurisdiction is listed in schedule 5 (which includes unfair dismissal), it becomes evident that the employer was in breach of its duty to provide full and accurate written particulars under section 1 ERA. An award under section 38 is not dependent on the claim having been brought under section 11 ERA for a breach by the employer of the duty imposed by section 1 ERA. It is sufficient that the tribunal make a finding of the hearing that the employer was in breach of section 1 at the time the main proceedings were begun.

### The Facts

21. I heard evidence from Mr Hayat and Mrs Hayat on behalf of the respondent. I heard evidence from the claimant and Mr Smith on behalf of the claimant. These witnesses gave evidence under oath. Their witness statements were adopted and accepted as evidence-in-chief. The witnesses, apart from Mrs Hayat, were cross-examined.

22. I was provided with witness statements on behalf of the respondent from Mr Rakhra, Mr Aziz, Mr Siraj and Ms Hafhaf who did not attend the employment tribunal to give evidence. I was provided with witness statements on behalf of the claimant from Ms Saha Zarquane, Mr Alaa, Mr Abdel Monsef, Mr Tossonosman and Mr Shehata who did not attend the employment tribunal to give evidence. I explained to the parties that as these witnesses were not present to give evidence under oath or face cross-examination I could give little weight to their witness statements. I was provided with a bundle of documentation consisting of approximately 800 pages. References to page numbers in this judgement are references to that bundle unless otherwise indicated.

23. As is not unusual in these cases the parties have referred in evidence to a wider range of issues than I deal with in my findings. Where I fail to deal with any issue raised by a party, or deal with it in the detail in which I heard, it is not an oversight or an omission but reflects the extent to which that point was of assistance. I only set out my principal findings of fact. I make findings on the

balance of probability taking into account all witness evidence and considering its consistency or otherwise considered alongside the contemporaneous documents.

24. By claim form received at the Employment Tribunal on 16 July 2016 the claimant claimed unfair dismissal, redundancy payment, notice pay, holiday pay, arrears of pay, other payments. The claim was defended and the respondent lodged their response form. Prior to the hearing the claimant had confirmed that he had ticked the "redundancy payment" box in error on the claim form and the claim for a redundancy payment had been dismissed by the employment tribunal.
25. The respondent is based in Slough and runs short residential courses in the UK for international students. It provides a variety of training courses, relating to business services. It aims to engage students from around the world and arrange and organise short residential courses in the UK together with accommodation and trips in the UK. The students pay a fee to the respondent for this.
26. There was confusion on the part of the claimant and respondent in respect of the claimant's start date. Both the claimant and Mr Hayat gave conflicting evidence that the claimant commenced employment for a company called Berkshire College for Higher Education Ltd on 1 February 2012 and the claimant's employment was subsequently transferred to the respondent. We both also claimed that the claimant's employment commenced on 12 November 2012. During cross-examination the claimant accepted that his work for Berkshire College for Higher Education Ltd was on a self-employed basis and that Berkshire College for higher education Ltd was a wholly separate company to the respondent and the claimant commenced his employment with the respondent on 12 November 2012.
27. From 12 November 2012 to 31 August 2015, it was agreed that the claimant worked on a part-time basis for 20 hours a week. He was paid £650 gross a month and entitled to receive a commission of 5% on revenue that he generated. His most recent job title was regional director. The claimant had no written employment contract or section 1 ERA statement. Mr Hayat's evidence was that other employees were provided with employment documentation however the claimant was considered a close friend, similar to family and no written contract was provided for the claimant.
28. I heard evidence in respect of the respondent's requirement for its employees to provide daily progress reports. Both Mr Hayat and Mrs Hayat confirmed that it was of utmost importance to the respondent to ensure that all employees, particularly those working remotely, submitted these reports. It was the respondent's evidence that the claimant was obliged to send in daily reports in a similar way to other employees. Mr Hayat confirmed that he withheld pay from a former employee, Sahar, as she had not completed the essential daily progress reports. Mr Hayat said that wages were only paid to that employee when her daily progress reports were completed. The claimant's evidence was

that he, as regional director, was responsible for his team and required to ensure that they (the team) submitted their daily progress reports however he was exempt from this requirement.

29. Mr Hayat said that in June 2016 he raised performance issues with the claimant. Mr Hayat claimed that the claimant was expected to submit a daily report of his activities however this had not been completed throughout his employment and referred to page 358 of the bundle which purported to be brief meeting notes of a one-to-one meeting between Mr Hayat and the claimant. This document states: *“No daily progress reports, low business, nothing coming in whole of summer 2015 or Winter 2015.”*

30. Mr Hayat's evidence on matters leading up to September 2015 was not consistent. Within his witness statement (para 26) he said that in June 2015 *“..... I explained that we could not continue with his employment under the circumstances. He [the claimant] pleaded that, we retain him in a self-employed capacity instead, as this would give him freedom and flexibility of working at his own pace without the pressure or demands of performing to set employees levels. He also requested specifically to carry on with his company phone line so he can make business calls for us to get some business in his new self-employed role as well...”* Later at paragraph 78 Mr Hayat states that *“at the above initial formal meeting on 25 June 2015, in my discussion with the claimant, I informed him that due to his serious lack of performance, the respondent company could no longer sustain his salary which was now £650 per month net. That, we would need to give him notice to terminate of two months, which would bring his employment position to an end on 31 August 2015.”* During cross-examination Mr Hayat said that he had told the claimant that he could not continue to employ the claimant and the claimant had told him that he [the claimant] respected the second chance he was given. Mr Hayat said that it was agreed, in light of the claimant's performance issues that the claimant would change from an employee to a self-employed contractor. Mr Hayat claimed that the letter contained at page 60 of the bundle was handed to the claimant. This letter stated:

*RE: working for BTS from home on self-employed basis*

*Further to our meeting today, I am pleased to confirm that we agree to accept your request of working from home on commission only basis from 1 September onwards. This means any business you generate from your region we will give you 5% commission on the gross Fee paid to us. BTS is not obliged to provide you wages salary sickness pay, holiday allowance, travel to work costs pension or other payment benefits whatsoever. Please note that you will be working as an independent contractor and you will not be an employee of Berkshire training services. In this context you shall be wholly responsible for all income tax and national insurance and other similar contributions or taxes [SIC]*

31. Mr Hayat said that he had asked the respondent's accountants to prepare the claimant's P45 however the claimant's P45 was not processed until 16 May 2016. The bundle contains a letter from the respondent's accountants at page 139 stating *“We act as accountants for Berkshire Training Services Limited. Due to a change of software in September 2015, we were unable to report P45 notification for RT1 of our client's employee, [the claimant].....”*



32. Mrs Hayat's evidence included at paragraph 23 "..... There was a follow-up formal meeting held on 2 July 2015 with the claimant where Sardar again discussed our company concerns with him. In response, the claimant acknowledged a serious lack of performance and delivery pleaded with Sardar the termination would stigmatise him. That, instead, as he already had a region and team in place, if we could instead shift him from an employed status to a self-employed position. That, way he could continue working with the exact same team and region, without the restrictions and controls of being an employee and if he could retain the former position of regional director. That, he would continue on a commission basis only. He was no longer to be bound by the same terms and conditions and expectations as an employee..."
33. Other than the single meeting notes referred to above there was no documentation setting out the claimant's obligation to provide daily reports or highlighting any concern that the respondent had in respect of an absence of such reports. The claimant denied that the performance meeting alleged to have taken place on 25 June or that the follow-up meeting of 2 July occurred. The claimant's evidence was that he had not seen either the notes of the alleged meeting or the letter referred to above at page 60 of the bundle prior to the disclosure exercise. The claimant said that the two pieces of documentation were fabrication on the part of the respondent created after the event. There was no discussion in respect of or change in his status from September 2015 and his employment as regional director carried on as before. In September he was informed by Mr Hayat that the respondent had financial difficulties and would not be able to pay the claimant salary until November. At this time the claimant had a good relationship with the respondent and was happy to continue working as he believed the respondent would pay him his salary when it was able to do so.
34. Mr Hayat denied that he had ever promised to pay the claimant any salary from September 2015. He also denied that the respondent experienced at any financial difficulty and referred to its accountant's report page 406 of the bundle as evidence that the company did not have financial difficulties. Mr Hayat referred to email correspondence between himself and the claimant in early September 2015 relating to the claimant's absence and return from holiday of evidence of the claimant's self-employed status.
35. I was referred to page 408 of the bundle being an email from the respondent to the claimant on 6 December 2015 at 20:55 giving detailed instructions to the claimant relating to Sahar. At the end of this email the respondent states: ..... Mr Yahia please acknowledge this mail and please make an arrangements to speak to Sahar and discuss/support her new business on daily basis. On 6 December 2015 timed 23:51 the claimant responds stating "well received. Sahar starts at 9 AM with the school and finishes at 5 PM if she continue or at 6 PM if she takes a break. I will forward her daily emails. She calls me every morning when she arrives but I will ask her for the log in email [SIC]. Mr Hayat replied on Monday, 7 December 2015 " ..... that very good. Just make sure she send log in email to you every morning when she starts and send you daily report when she finishes. If she is out on appointments then she must tell you in advance[SIC]" On 6 January 2016 Mr Hayat sent an email to the claimant and

other recipients stating: *"Dear Gillian, Please make sure that you copy Mr Yahia in all communication with Sahar... Her daily reports are relating to sales so she must carry on sending them to Mr Yahia ...."*

36. Mr Hayat said that from 1 September 2015 onwards, the claimant carried on, but now in a self-employed capacity. The claimant continued to work from his home address with the telephone line provided by the respondent, he was allowed to retain the same title as before-regional director. The respondent fully engaged with the claimant in his changed self-employed capacity as it did before.
37. The claimant was invited by an educational establishment in Morocco to attend its graduation event at the end of February 2016. This was expected to be a 2/3 day trip. It was the claimant's evidence that an invitation was initially extended personally to him and his wife without reference to the respondent. This was disputed by Mr Hayat. In any event it was later agreed between the claimant and the respondent that the claimant would travel with Mr Hayat to Morocco for 11 days. An itinerary, promoting the respondent to overseas students was planned in Morocco. There was a dispute between the parties as to whether the travel and accommodation costs were paid by the Moroccan school or the respondent. Mr Hayat said that the respondent met the travelling and accommodation costs incurred during the visit. The claimant had travelled on previous occasions with the respondent promoting the respondent's business. On these previous occasions, the claimant had been paid a travel allowance or pocket money allowance and this sum is referred to by the claimant as the 'mission salary'. The claimant claims that he is entitled to £100 per day while he was in Morocco working on behalf of the respondent.
38. The bundle included a complete set of payslips for the claimant up to August 2015. The respondent said that the claimant had received his payslips in the normal way. The claimant claimed that he had only received three payslips from the respondent being February March and April 2015 and had not seen the remainder of the payslips until the disclosure exercise. The claimant claims that the three payslips were provided by the respondent in response to a request made by the claimant connected to his daughter's visa application. Mr Hayat was asked cross examination why, if the claimant's performance had been poor, was the claimant awarded a pay rise in March 2015. Mr Hayat said that the pay rise offered to the claimant in March 2015 was in response to the claimant's personal circumstances financial hardship as highlighted by the claimant to Mr Hayat during Christmas 2014.
39. Mr Hayat said that he received a complaint from Ilyas Siraj on 30 March 2016. As a result of this complaint, Mr Hayat launched an investigation into whether the claimant had failed to engage with the respondent's recruitment managers in Morocco as the respondent had wished him to. The respondent relied on a witness statement from Mr Siraj was not present the tribunal. The statement stated that: Mr Siraj joined the respondent as a business manager in Morocco on 27 February 2016. He had been allocated to a team managed and coordinated by [the claimant]. The work he was involved in, required regular communication and contact by email and telephone with the UK. Although he was in the team of [the claimant], he quickly realised that [the claimant] was not

communicating with him and his colleague. He noticed that [the claimant] only communicated with the manager in the office and he found this very odd and unhelpful to his work. He felt isolated and marginalised by this approach complained about it on 30 March 2016. The respondent relied on the witness statement of Miss Arib Hafhaf. This witness was not present at employment tribunal. I note that the respondent claimed that she worked as a business manager in February 2016 for the respondent in Morocco. She complains that the claimant provided no support for however a colleague 'Zerqane' was working closely with the claimant. The statement says *"even though I was sending my daily progress reports to [the claimant] but he was not contacting or helping me at all the time [SIC]."*

40. At paragraph 101 of Mr Hayat's statement he says "... *Even as a self-employed person, there was not any particular improvement in the claimant's work - recruiting of students.*" The respondent was also concerned in respect of a large volume of calls to Egypt appearing on the claimant's telephone log. The claimant and the respondent had a discussion following an award ceremony event on 2 April, where the claimant had attended in support of the respondent. The respondent describes this discussion as heated and claims have discussed the 'performance' issues as set out above and concerns in respect of telephone usage. The claimant said that he had discussed the lack of salary with the respondent but denied that the discussion was heated.
41. The respondent had arranged for and paid for a telephone line in the claimant's home address to allow the claimant to complete his work. Mr Hayat said he became concerned that the claimant was making a large volume of calls to Egypt. Due to the political situation in Egypt, the respondent was not concentrating on that area for the development of its business. Mr Hayat suspected that the claimant was either misusing the landline or in some way unlawfully competing with the respondent by pursuing some personal and business opportunities in Egypt. Mr Hayat arranged on the 16<sup>th</sup> or 17<sup>th</sup> of April to disconnect the claimant's telephone line and claimed to have informed the claimant of his actions. The claimant claimed to be unaware of this plan to disconnect his landline.
42. The claimant was asked why he waited until April 2016 to raise the issue of non-payment of salary. The claimant's response was that he had initially believed that payment would be made, this situation continued until April. The claimant's relationship with the respondent had been good until this time. He raised the issue of non-payment informally however in April he contacted ACAS and was advised to raise the issue formally in writing. It was agreed between the parties that the claimant claimed and was paid commission on only one occasion between September 2015 and April 2016 being in April 2016. This commission was paid in cash by the respondent.
43. On 18 April 2016, the claimant emailed the respondent stating: *"Dear Sardar, You asked me to send you the calculations for my commission of the April groups from Morocco and I did that. You said that we will sit and talk about my salary. Please advise when are these two issues going to take place. Thank you."* On 19 April 2016 the respondent responded: *"okay I deal today"*. On 25

April 2016 the claimant sent an email to the respondent stating: *“Dear Sardar, I have been asking my salary since September 2015. The last time was 18 April 2016. I request that my salary to be reinstated as of the end of this month and the amount of £5710 salary for the period from September 2015 till March 2016 and mission abroad salary of 11 days to Morocco on business from 25 February 2016 to 6 March 2016 and top up mobile phone business calls to reach my bank account by 5 May 2016 ...The above amount does not include the salary of April 2016. I will stop doing the job till I get the due amount. This period could be deducted from my annual leave. On 26 April 2016 the respondent responded: “Dear Mr Yahia, thanks for your email. Please clarify what is mission salary and when did we agree paying for your travelling time? Kind regards .*

44. The claimant said that on 27 April 2016 he realised that his landline had been disconnected by the respondent and he was prevented from working. During cross examination the claimant said that on 27 April he could no longer do his job he was prevented from working and had not been paid. He asked “what else was I to do?”. The claimant said he was “not verbally told [of his dismissal ] but practically told. The claimant took the stopping of his telephone line and no salary as a message. He had been working eight months waiting for pay. The claimant said that he did not walk out but that respondent took the tools he needed to work and didn’t need to say [that he was dismissed]. The claimant said that he believed he had been dismissed because following 27 April 2016, in mid-May, he had been informed by his former colleague Gillian Wilson that Mr Hayat had told her that he [the claimant] had been dismissed. The claimant also claimed that his work email account was stopped respondent on 27 April 2016. I was referred to an email of 27 April 2016 on page 135 of the bundle sent by the claimant to the respondent complaining that his telephone line had been disconnected.
45. Following 27 April 2016 the claimant set up his own business, Anya Travel. The claimant was cross-examined at length in relation to his current business Anya Travel. The claimant confirmed that this business was set up through a limited company. This limited company was in existence during his employment however it was a dormant company and not trading. This was supported by companies’ house documentation. Following the termination of his employment the claimant commenced this business. The claimant denied that he was in any way acting improperly or unlawfully during his employment with the respondent.
46. The respondent claimed that the claimant had been running Anya Travel for some time prior to 27 April 2016. The respondent claims that the claimant’s prime and predominant concentration was promoting and making links to contacts in Egypt and using these contacts to promote the claimant’s own private company, Anya Travel which he ran with his wife. The respondent considered that the claimant was operating this company silently and discreetly from it. Mr Hayat said that the claimant that a large volume of calls to Egypt during July (45 calls) and August 2015 (170 calls). During this time, the schools in Egypt were on holiday. Recruitment to the respondent’s courses is done from these overseas schools and universities. The respondent suspected that these calls made by the claimant were not for the respondent’s benefit but for the claimant’s personal benefit. The claimant has personal family connections in Egypt, he has an

Egyptian bank account and Anya Travel has an Egyptian business collection. Since 27 April 2016 the claimant has produced marketing information for Anya Travel using similar wording and the same picture as used by the respondent in its marketing documentation. Following the termination of his employment the claimant contacted two of his former contacts and a former colleague to work with him in Anya Travel.

47. I heard from Mr Smith on behalf of the claimant. Mr Smith gave evidence in relation to an application made by the claimant supported by the respondent for the claimant to become a member of the Slough Conservative party between September 2015 and April 2016. It was an eligibility criteria of this application that the claimant should either be a resident, own property or be working within the region. Mr Smith confirmed that it was his understanding that the claimant's eligibility, supported by the respondent, was based on the fact that the claimant was employed by the respondent.
48. I was referred to holiday taken by the claimant at the end of August/beginning of September 2015. It was agreed between the parties that no paid holidays were taken by the claimant between September 2015 and 27 April 2016. The claimant clarified that his claim in respect of holiday pay was restricted to holidays accrued but untaken during this time. The claimant gave no details of any holiday taken prior to September 2015.
49. The respondent repeatedly claimed during the course of the hearing that the claimant's claim was a desperate, opportunistic, malicious claim directed personally at Mr Hayat. Mr Hayat claimed that the claimant had "blackmailed him" due to the claimant's knowledge of Arabic language. There was considerable bad feeling between the parties evident during the hearing. For the sake of completeness, I note that the parties wished to bring various additional matters to my attention such as those matters connected to the Slough Conservative party. Other than to the extent mentioned above these were entirely irrelevant to the issues identified within this claim.
50. The claimant confirmed that following the termination of his employment with the respondent he commenced working in Anya Travel. It took him some time to arrange his first course. The first course organised by Anya Travel took place in August 2016 and he first received revenue from Anya Travel in September 2016. The claimant claims that his loss of earnings arising from his dismissal lasted from the date of the termination of his employment with the respondent until 31 August 2016.

### **Conclusions**

51. I found the claimant overall to be a helpful witness. There were occasions during the course of the hearing where the claimant had misunderstood or failed to grasp the nuance of a question or written document. While the claimant's English is very good and no interpreter was requested or required by the claimant, English is the claimant's second language. I found his evidence to be consistent and reasoned and considered him a credible witness. I found no

evidence to support any claim that the claimant's claim was desperate, opportunistic or malicious or directed personally at Mr Hayat.

52. The evidence given by both parties in respect of the claimant's start date was confused. I find that the claimant commenced his employment with the respondent on 12 November 2012. It was accepted by the parties that between 12 November 2012 and 31 August 2015 that the claimant was employed as a regional director. He worked 20 hours a week and was paid £650 per month in addition to his commission entitlement of 5% on revenue generated by him.
53. The respondent's evidence was that they placed utmost importance on the submission of daily progress reports by the employees to the extent that they refused to pay wages to Sahar in the absence of such reports and that the claimant was obliged to submit the daily reports however he failed to do so throughout his employment. I find it unusual, particularly as other employees were followed up by email, that there is no email correspondence to the claimant asking him to fill out the daily progress reports. At no time during the time when the parties agreed that the claimant was an employee was the claimant's pay delayed because of the absence these daily reports. I find it more likely than not that the claimant, as regional director, was obliged to have his team fill out these daily reports however the claimant, himself, was exempt from this daily requirement.
54. I now consider the claimant status from September 2015. The respondent claims that the claimant was free from its control during this time and was properly considered to be a self-employed person. I refer to the emails sent to the claimant as set out above. It is clear from these emails that the respondent expects the claimant to undertake work on its behalf on a daily basis. .... *please make arrangements to speak to Sahar and discuss/support her new business on daily basis..... Please make sure that you copy [the claimant] in all communication with Sahar... Her daily reports are relating to sales so she must carry on sending them to [the claimant].*
55. The respondent's case appears to be that they had performance issues with the claimant but rather than properly address those performance issues, they purported to change the claimant's status from an employee to a self-employed person: meaning to stop paying him his £650 monthly wages. I was referred to the emails detailed above showing the claimant to have daily duties and responsibilities for the respondent from September 2015 despite the respondent's claims that the only financial obligation to the claimant was to pay commission at 5% and that the claimant only received one payment of commission that was paid in cash in April 2016 for the period 1 September 2015 to 27 April 2016. The respondent's case was that, the claimant was undertaking the daily managerial duties set out in the above emails for free. I find this unlikely to be the case. While I gave little weight to witness statements where a witness is not in tribunal to face cross-examination, the respondent's case, supported by witness statements drafted on behalf of the respondent, clearly show that Ilyas Siraj and Arib Hafhaf expected the respondent to be carrying out day to day duties in 2016. When the respondent believed that the claimant was not carrying out such duties, the respondent claims to have launched an 'investigation' into

alleged poor performance and lack of responsiveness on the claimant part. All of this strongly suggests that the claimant continued to be an employee until 27 April 2016.

56. Had the respondent believed that the claimant had no legitimate expectation to pay, I consider it more likely than not, that the respondent would have immediately questioned the claimant's reference to salary within the claimant's 26 April email I set out above. The respondent's response questioning only the 'mission salary' tends to corroborate the claimant's evidence.
57. I note the respondent's evidence that it was not in financial difficulty as of September 2015, I accept that this may well be the case however Mr Hayat's own evidence included the statement: "*..the respondent company could no longer sustain his salary which was now £650 per month net*". Even accepting that the respondent was solvent and making a profit at the relevant time, does not preclude the respondent requesting to delay payment of the claimant's salary. I accept the claimant's evidence on this point and find it more likely than not that the respondent informed the claimant that due to financial constraints, the claimant's wages would be delayed.
58. Although the respondent stated that it wished to issue the P45 in September 2015, fact remains that the P45 was not issued until May 2016. I do not consider the letter received from the accountants as outlined above to constitute satisfactory evidence to explain this delay. The fact that the claimant's P 45 was not issued until May 2016 tends to corroborate the claimant's evidence that the documentation was produced after the event to support the respondent's claim. I find it more likely than not that the claimant did not have sight of the purported minutes of the one-to-one meeting said to have occurred on 25 June or the letter of 2 July 2015 prior to the disclosure exercise. Even if I had accepted that the letter dated 2 July 2015 had been sent to the claimant, this letter does not correspond factually with the respondent's evidence. This letter is, even if I accepted that it was sent, insufficient to terminate the claimant's employment and create a new self-employed relationship. The question as to whether or not the claimant was employed or self-employed as a legal question and even if the employee had agreed to the change in status as alleged by the respondent, I do not believe that such an arrangement would have constituted a legitimate self-employed relationship. I acknowledge the respondent's argument in respect of change of control and the claimant being able to specify his own manner of working following September 2015 however I do not accept this to be the case as set out above. It may well be that the respondent had intended to or wished to terminate the claimant's employment in September 2015. However, considering the evidence as a whole I conclude on the balance of probabilities that no such action was taken and the claimant's employment continued as before with no change to his terms and conditions of employment.
59. The respondent submitted that the claimant never communicated orally or in writing any concerns or objections to his new status. On consideration of the evidence as a whole, including the respondent's contemporaneous emails to the claimant, I conclude that it is more likely than not that there was no change in the

claimant obligations or responsibilities from September 2015 and therefore no reason for the claimant to question this point.

60. For the sake of completeness, If I am wrong in relation to the claimant having employee status following September 2015, I consider whether the claimant had worker status during this time. At the commencement of the hearing I revisited the definition of 'worker' set out above. Even if the claimant was not an employee following September 2015, I heard no evidence or submissions that would give any reason to think that the claimant was genuinely a self-employed individual. The claimant entered into a contract with the respondent to do or perform work personally. There was no suggestion whatsoever that the claimant was carrying on a "profession or business undertaking" and the respondent "a client or customer" of that undertaking. This simply was not the case. I find that should the claimant not be an employee, he was without any doubt a worker of the respondent's.
61. I refer to the evidence given by Mr Smith. In essence Mr Smith's contribution was that the respondent had supported a claim made by the claimant that Mr Smith understood to mean the claimant was 'employed' by the respondent. I accept the respondent's submissions that the eligibility criteria within the Conservative party application referred to by Mr Smith and included within the bundle referred to 'working' and did not specify employment status. It appeared possible on the face of the form for 'working' to refer to both employed or self-employed work. I therefore gave little weight to this particular aspect of the evidence.
62. I accept that it is surprising that the claimant waited until April 2016 to put his concerns in respect of a lack of payment of salary in writing. However have heard from both parties that the relationship between them prior to this dispute was strong. The respondent described the claimant is similar to family. The claimant's evidence that he expected the respondent to pay his salary when it was in a financial position to do so is accepted on the balance of probabilities. I also note the respondent's submission that the claimant only raised issues in respect of the salary when the respondent raised issues with the claimant on the matters are set out by Mr liyas above. I accept that the respondent had performance concerns in respect of the claimant's work however, there were not set out in writing. The fact that the respondent may have considered that 'performance issues' or even 'misconduct issues' may exist does not allow the respondent to withhold wages. I find the fact that the respondent considered these 'performance issues' to exist in March/April 2016 and to warrant an investigation on the part of the respondent corroborates the claimant's claims that he was an employee, entitled to be paid a salary. If the respondent raised 'performance related' issue or indeed any issue with the claimant in late March early April 2016, it would not be unusual for this to cause a deterioration in the relationship between the parties and it would only be expected, that the claimant who had waited patiently for payment of wages since September 2015 would put his concerns in respect of non-payment of wages on a more formal footing.
63. Regardless of how the invitation to Morocco arose or whether expenses were paid by the Moroccan educational institution or the respondent, the claimant



travelled to Morocco with Mr Hayat, and participated in activities for the benefit of the respondent. The claimant had travelled with the respondent previously and I accept that a daily allowance had been paid on previous trips. I find that on the balance of probabilities, it was an implied term of the claimant's contract with the respondent that a daily allowance would be paid when the claimant was abroad working on behalf of the respondent.

64. I had no evidence whatsoever in respect of any claim for a top-up card mobile phone expenses.

65. I now turn to the events of April 2016 and the termination of the claimant's employment. I note that the respondent's submission that the claimant should not be allowed to take unfair advantage of seeking to embellish expanding his claim at the hearing itself and the claimant has had at least ad hoc legal advice from the Reading CAB.

66. Mr Hayat claimed that the respondent's intention to disconnect the claimant's home telephone line was communicated to the claimant in mid-March. I accept that the respondent gave notice to the telephone line provider that it wished to disconnect telephone line, but there was no correspondence with the claimant setting out the position. It was the respondent's evidence that this line was disconnected due to serious concerns it had relating to potential unlawful competition on the part of the claimant. Looking at the evidence as a whole, I find it more likely than not, that the claimant was not informed of the planned disconnection of his telephone line prior to 27 April 2016. Other than arranging for the claimant's phone line to be disconnected on 27 April 2016, the respondent did not take any action to terminate the claimant's contract of employment.

67. Neither party claim that the employment continued past 27 April 2016, neither say the employment terminated by mutual consent. The claimant's evidence was that on 27 April 2016 he realised that his landline had been disconnected by the respondent was prevented from working. During cross examination, the claimant said that on 27 April he could no longer do his job he was prevented from working and had not been paid. What else was he to do? he asked. By stopping work and refusing to undertake any more duties on the part of the respondent he demonstrated his resignation by way of his conduct. I find that the claimant's conduct constituted a resignation in accordance with *Johnson v Monty Smith Garages Ltd*. I conclude from the claimant's evidence, that the claimant resigned on 27 April 2016 by stopping work without giving notice although he did not use that terminology.

68. Even though the claimant has not phrased his claim as a constructive dismissal claim, the definition of dismissal includes where *an employee resigns in circumstances in which they are entitled to terminate their contract of employment by reason of an employer's conduct*. As I have found that the claimant resigned, I now look to see whether or not this resignation constitutes a constructive dismissal scenario. Prior to final submissions, I requested that the respondent address this potential scenario, in particular whether the withdrawal of the telephone line could potentially, following non-payment, be viewed as the

'last straw', triggering a constructive dismissal scenario. The respondent's submission was that the claimant had not put his case as a constructive dismissal claim and the onus was upon him to put that case forward not the employment tribunal. I note that the respondent's representative had already addressed this matter in paragraph 33 of his written representations that states "*there was no active dismissal, as such, on the part of the respondent, on 27 April 2016. Very clearly, the claimant has become more and more angry with heightening situation, and stopping of the telephone line was a trigger for him – his 'final straw'. The claimant stopped his working relationship with the respondent of his own volition. He was not forced or told to stop by the respondent.*" I also note for the sake of completeness, paragraph 11 of the written submissions being "*the claimant admitted in a variously convoluted way, that he chose to stop working on 27 April 2016, following the stopping of a telephone line to his home. Two days prior on 25 April 2016 he had stated in an email to Sardar Hayat that unless he pays he will "I will stop doing the job .....*"

69. On consideration of all the evidence it is obvious to me that although the claimant has not used the words 'constructive dismissal', his claim falls squarely into the definition of a constructive dismissal. The factual circumstances complained of by the claimant was set out within his ET1 and have not changed during the course of the hearing. 'Constructive dismissal' is included within the statutory definition of dismissal, and I am happy that this claim has been pleaded by the claimant and the respondent has had full knowledge of it and had a reasonable opportunity to respond to it.

70. In the circumstances, I have found that the claimant is an employee who has not been paid a salary from September 2015 to 27 April 2016. The non-payment of salary is a significant breach of the employment relationship going to the root of a contract of employment and shows that the employer no longer intends to be bound by that essential term of the contract. The circumstances meet the definition of a constructive dismissal are set out within Western Excavating. It follows that the claimant is entitled to treat himself as discharged from any other performance under that contract. This is what the claimant did and therefore he has terminated the contract by reason of the employer's conduct and he is constructively dismissed. I note that the event that triggered the claimant's resignation was not the non-payment of salary but the removal of the claimant's home telephone line, this was in effect the 'last straw' for the claimant. This was not a fundamental breach of the claimant's contract of employment in itself, but taken alongside non-payment of the claimant's salary it constituted a cumulative fundamental breach and the constructive dismissal scenario is defined within the ERA.

71. I note that the claimant also referred to the removal of access to his email address. However, in light of the email sent from this address 27 April, I find it more likely than not that the email address remained active and was not withdrawn.

72. As I have found that the claimant has been constructively dismissed by the respondent, I note that no potentially fair reason for dismissal has been put forward by the respondent and conclude that the claimant has been unfairly

dismissed. I now turn to examine whether or not there was any contribution on the part of the claimant or any other reason why it would be considered neither just nor equitable to provide any award of compensation to the claimant. At no time has the respondent sought to put any performance related issue in writing to the claimant. In the circumstances do not accept that there is any performance related issue that could reasonably be taken into account in respect of any award made to the claimant.

73. I note the respondent's concerns in respect of excess telephone used by the claimant during the course of his employment. I accept that a large volume of calls was made by the claimant to telephone numbers in Egypt. However, there was no allegation that the respondent was put to any extra expense because of these calls and the documentation suggests that these additional calls to Egypt did not increase the amount of the telephone bill. There was no written policy available to the claimant in relation to appropriate use of the telephone line. The claimant had family in Egypt and I see no reason why the claimant should not use this telephone line to contact his family. I note the respondent's main concern in relation to use of the telephone line was a suspicion that the claimant was somehow unlawfully competing with the respondent. I'm unable to understand this allegation. The respondent's evidence was that since the political unrest within Egypt, the respondent was not concentrating on Egypt as a potential source of students. Therefore, as the claimant was only working part-time for the respondent, even if he was concerned with an alternative business concentrating on an area where the respondent was not active I am unable to identify any potential wrongdoing on the part of the claimant. I appreciate that the respondent may well not wish the telephone line for which it pays to be used for any alternative interest whatsoever, however in the absence of any written contract or policy I am unable to identify any wrongdoing on the part of the claimant. I also note that at no time did the respondent put any concerns it may have had in writing.

74. I note the respondent's complaint that the claimant had been unlawfully competing by running Anya Travel during the course of his employment with the respondent. Again, the claimant had no written contract of employment with the respondent. The claimant worked for the respondent only on a part-time basis. I accept the claimant's evidence that Anya Travel was dormant throughout the claimant's employment and this is supported by the Company House documentation. I note the respondent's complaint that the claimant has since the termination of his employment, contacted former contacts and employees of the respondent with a view to working with them the benefit of Anya Travel and that the claimant has used similar marketing material within Anya Travel to that used by the respondent. Again, I note there is no written contract of employment. I'm unable to identify any wrongdoing in the claimant's part from the evidence provided by the respondent.

75. In summary, I have considered in detail the allegations raised by the respondent against the claimant and I find that there is no evidence of any wrongdoing on the part of the claimant or anything that could reasonably be considered behaviour that would warrant a reduction in any financial award to the claimant.

76. I find that the claimant has taken all reasonable steps to mitigate his loss. I accept the claimant's evidence that he had no earnings from Anya Travel prior to September 2016. I have considered whether or not any uplift or reduction should be made in accordance with the ACAS code of practice. In my opinion there appears to have been failure on both sides to comply with the relevant codes of practice and I consider it inappropriate to make any uplift or reduction to the claimant awards for this reason.
77. It was accepted that the claimant was not provided with a section 1 statement and for this reason I have awarded the claimant an additional two weeks pay.
78. I accept the respondent's submission that the claimant appeared to be generally unaware of any claim that he may have in respect of holiday pay however holiday pay was clearly pleaded within his ET1. The claimant's comment 'what is holiday pay?' does not prevent him from recovering his statutory minimum entitlement. In the absence of any contract or policy document, the claimant's holiday year ran from 12 November in accordance with the WTR. I was referred to email correspondence within the employment tribunal bundle and there was corroborating oral evidence from both parties relating to holidays taken by the claimant in August 2016. The only particularisation provided by the claimant for his holiday entitlement claim was that he was not paid for any holiday period between 1 September and 27 April 2016. It is for the claimant to particularise his claim. As the claimant has not shown any evidence to support his claim for holiday pay for the holiday year ending 11 November 2015, I conclude that the claimant has taken the entirety of his holiday entitlement (prior to September 2015) that accrued up to 11 November 2015. During the period from 12 November to 27 April 2016 being 23 weeks and six days, the claimant accrued 12.81 days' holiday and he is entitled to be paid for his accrued but untaken holiday entitlement.
79. In light of the circumstances and facts found above I conclude that the claimant has been wrongfully dismissed and his claim for his notice pay succeeds. As the claimant does not have a written contract of employment, as he has been employed for three full years, he is entitled to 3 weeks' statutory notice. However, I note that the claimant's notice period has been accounted for within the unfair dismissal award and therefore any additional award in respect of notice period will constitute a double recovery part of the claimant. Therefore, no award is made in respect of the claimant's notice period.

### **Summary**

79. The claimant was unfairly dismissed. The claimant is entitled to a basic award of £3775. As the claimant is over 41, this is calculated at 1.5 times his weekly salary of £150 multiplied by his 3 full years of service amounting to £675. The claimant is entitled to a compensatory award reflecting his loss of earnings from the date of termination being 28 April 2016 until 1 September 2016 being 18 weeks at £150 per week giving a total of £2700. The claimant is entitled to compensation in respect of his loss of statutory rights in the sum of £400 and a

payment of £300 for failure to provide written particulars in accordance with section 38 of the Employment Act 2002.

- 80. The claimant is entitled to payment of £100 per day expenses in accordance with the implied term in his contract of employment for the period 25 February 2016 to 6 March 2016. The total amount outstanding is £1100.
- 81. The claimant is entitled to payment in respect of his outstanding salary for the period between September 2015 and 27 April 2016 in the sum of £650 per month giving a total amount of £5100.
- 82. I heard no evidence in relation to the claimant's claim in respect of a top-up fee for his mobile phone and this claim is dismissed.
- 83. The claimant is entitled to payment in respect of accrued but untaken holiday entitlement of 12.81 days' holiday accruing between 12 November 2015 and 27 April 2016 amounting to £384.30.
- 84. The claimant's breach of contract claim in respect of his notice period is successful but no award is made for the reasons set out above.

\_\_\_\_\_  
Employment Judge Skehan  
5 June 2017

Date: .....

Judgment and Reasons

Sent to the parties on: .....

.....  
For the Tribunal Office