EMPLOYMENT TRIBUNALS

Claimant: Mr L Hannagan

Respondent: DNXB Group Limited

Heard at: London South Employment Tribunal by Cloud Video Platform

On: 19 May 2021

Before: Employment Judge Evans (sitting alone)

Representation
Claimant: Ms G Beech, pupil barrister
Respondent: Mr M Xiong, a director of the respondent

JUDGMENT

1) The claimant was not an "employee". His claims for unfair dismissal, wrongful dismissal and breach of contract therefore fail and are dismissed.

2) The claimant was a "worker".

3) The claimant's claim for compensation in respect of accrued but untaken holiday pay under regulation 14 of the Working Time Regulations 1998 succeeds and the respondent is ordered to pay the claimant £340.06.

4) The claimant's claim for unauthorised deductions from wages succeeds. The respondent is ordered to pay the claimant £13,579.38.

REASONS

Preamble

1. This has been a remote hearing to which both parties have consented. The form of remote hearing was video by Cloud Video Platform ("CVP"). A face-to-face hearing was not held because it was not practicable and all issues could be determined in a remote hearing.

2. The respondent dismissed the claimant with effect from 18 November 2019. The claimant presented a claim to the Tribunal on 8 April 2020 after a period of early conciliation running from 14 February 2020 to 14 March 2020.

3. The claim came before me at a hearing by CVP on 19 May 2021 ("the Hearing"). Submissions concluded at 4pm. I did not have time to reach a decision on the day and so reserved my judgment.

4. I had the following documents before me at the Hearing:

   4.1. A pdf running to 120 pages produced by the claimant named "Hearing Bundle 19.05.21 – Hannagan v DNXB Group – claim no.2301453.2020" ("CB");

   4.2. A pdf running to 57 pages produced by the respondent named "Respondent's Submission" ("RB");

   4.3. A pdf running to 16 pages named "31.03.21 Claimant's Amended Witness Statement" ("the claimant's statement"); and

   4.4. An excel spreadsheet named "Details of amounts claimed in br of contract claim".

5. During the course of the Hearing I heard oral evidence from Mr Xiong for the respondent. He had produced two witness statements dated 18 February 2021 and 21 April 2021 which were contained in RB. I also heard oral evidence from the claimant.

The issues

6. The claimant's claim included complaints of unfair dismissal, breach of contract, a failure to pay holiday pay and unlawful deductions from wages. The issues arising in those complaints had not been agreed before the Hearing. They were therefore agreed to be as set out below in a discussion at the beginning of the Hearing in which the claimant and respondent also clarified their basic factual cases to be as set out below.

The basic factual case

7. The claimant contends that he was the "employee" of the respondent (its managing director) from 7 July 2016 until his dismissal on 18 November 2019. He contends he was employed under an unwritten contract of employment which required him to work 35 hours a week. The claimant contends that with the exception of two payments he did not receive any of the money due to him under that contract.

8. Alternatively, the claimant contends that he was a "worker" and worked 35 hours a week.

9. The respondent contends that the claimant was neither an "employee" nor a "worker". The respondent contends that the claimant's only entitlement to receive an income from the respondent (except for an agreement reached in relation to Ancillary revenue) was as set out in clause 12.8 of the Shareholder Agreement. Under this provision the claimant was not entitled to receive any income unless the respondent made a "profit".

The Issues

10. The issues for the Tribunal to decide were agreed as follows.

    1) **Unfair dismissal (the Employment Rights Act 1996)**

a. Was the claimant an employee within the meaning of section 230 of the Employment Rights Act 1996 ("the 1996 Act")?

b. If so, there is no dispute that the claimant was dismissed.

c. What was the reason or principal reason for dismissal? The respondent says the reason was conduct. The Tribunal will need to decide whether the respondent genuinely believed the claimant had committed misconduct.

d. If the reason was misconduct, did the respondent act reasonably in all the circumstances in treating that as a sufficient reason to dismiss the claimant? The Tribunal will usually decide, in particular, whether:

   i. there were reasonable grounds for that belief;
   ii. at the time the belief was formed the respondent had carried out a reasonable investigation;
   iii. the respondent otherwise acted in a procedurally fair manner;
   iv. dismissal was within the range of reasonable responses.

e. If the claimant had been unfairly dismissed, should his compensation be reduced on the basis that there was a chance that the claimant would have been fairly dismissed anyway if a fair procedure had been followed, or for some other reason?

f. If the claimant had been unfairly dismissed, did he cause or contribute to his dismissal by blameworthy conduct and, if so, would it be just and equitable to reduce the claimant's compensatory award?

   I indicated that the remaining issues relevant to the issue of remedy for a successful unfair dismissal claim would, if necessary, be dealt with at a separate hearing.

2) **Wrongful dismissal (the Employment Tribunals Extension of Jurisdiction (England and Wales) Order 1994) ("the Extension of Jurisdiction Order")**

a. Was the claimant an employee within the meaning of section 42 of the Employment Tribunals Act 1996?

b. If so, what was the claimant's notice period? *The claimant contends that it was three weeks. The claimant contends that his weekly pay at the date of dismissal was 35 hours at the National Minimum Wage rate of £8.21 giving weekly pay of £287.35 and that he should have been paid £862.05 notice pay.*

c. Was the claimant paid for that notice period? *The respondent accepts that he was not.*

d. If not, did the claimant do something so serious that the respondent was entitled to dismiss without notice?

e. If not, to what damages is the claimant entitled?

3) **Holiday Pay (Working Time Regulations 1998)**

a. Was the claimant a "worker" for the purposes of the Working Time Regulations 1998 ("the WTR")?

b. What was the claimant's leave year? *The claimant contends it was 7 July to 6 July each year and the respondent does not dispute that.*

c. How much of the leave year had passed when the claimant's employment ended? *135 out of 365 days in the leave year had passed.*

d. How much leave had accrued for the year by that date? *The claimant contends his annual entitlement was 28 days, i.e. 5.6 weeks. Therefore the number of weeks accrued was 135/365 x 5.6 = 2.071 weeks.*

e. How much paid leave had the claimant taken in the year? *The claimant contends that he had taken none.*

f. What is the relevant weekly rate of pay? *The claimant contends that the relevant weekly rate of pay was £287.35.*

g. How much was due to the claimant under regulation 14 of the WTR? *The claimant contends that 2.071 x £287.35 = £594.81 was due to him under regulation 14.*

4) **Unauthorised deductions (the Employment Rights Act 1996)**

a. Was the claimant a worker of the respondent within the meaning of section 230 of the 1966 Act (or section 54 of the National Minimum Wage Act 1998)("the NMWA")?

b. Did the respondent make unauthorised deductions from the claimant's wages and if so how much was deducted?

The claimant contends that he was paid nothing during his employment (apart from the two payments detailed below). The claimant contends that although the respondent made insufficient profit for him to be paid a salary in accordance with clause 12.8 of the Shareholders' Agreement in excess of the national minimum wage, he was nevertheless entitled to be paid 35 hours a week at the national minimum wage. ***The claimant did not contend that any amount in excess of his national minimum wage entitlement had been deducted from his wages.***

The claimant acknowledges that the effect of the Deduction from Wages (Limitation) Regulations 2014 is to cap the amount he can claim to two years.

The effect of section 17 of the NMWA is that the claimant's claim is for two years' pay at the rate of the national minimum wage today which is £8.91 per hour.

The claimant contends that he was engaged in "unmeasured work" (there being no specified hours or times when he had to work in his contract) and that the pay reference period was one month.

c. If so, how much is the claimant owed?

The claimant accepts that he received the following amounts in the following months which count towards the national minimum wage: £1050 paid on 5 August 2019 and £600 on 5 October 2019.

The value of the claim is therefore 52 (weeks) x 2 (years) x 35 (hours) x £8.91 = £32,432.40 less £1050 less £600.

5) **Breach of Contract (the Extension of Jurisdiction Order)**

a. Was the claimant an employee within the meaning of section 42 of the Employment Tribunals Act 1996?

b. Did this claim arise or was it outstanding when the claimant's employment ended?

c. Did the respondent fail to pay the employee the expenses set out in the spreadsheet titled "Details of amounts claimed in breach of contract" reduced by the amount of £4550 which he accepts was paid to him.

d. Was that a breach of contract?

e. How much should the claimant be awarded as damages?

The Law

Employment status

11. The respondent does not accept that the claimant was either an "employee" or a "worker".

12. The claimant may only pursue his claims of unfair dismissal and breach of contract if he was an employee. An employee is an individual who works under a contract of employment. This is defined by section 230 of the 1996 Act as a "contract of service or apprenticeship, where express or implied, and (if it is express) whether oral or in writing". It is similarly defined in section 42 of the Employment Tribunals Act 1996. The question of a contract of apprenticeship does not arise in this case.

13. There is no definition of a "contract of service" in the 1996 Act or the Employment Tribunals Act 1996. No single test is conclusive and the Tribunal must weigh up all the relevant factors and decide whether on balance the relationship between the parties is regulated by a contract of service. This approach was first taken in Ready Mixed Concrete (South East) Ltd v Minister of Pensions and National Insurance [1968] 2 QB 497 and has been developed in subsequent cases. It is now clear that four essential elements must be present for there to be a contract of service:

13.1. A contract must exist between the employee and the alleged employer;

13.2. There must be an obligation on the employee to perform work under that contract personally;

13.3. There must be mutuality of obligation. That is to say an obligation on the employer to provide work and a corresponding obligation on the employee to accept and perform any work offered; and

13.4. There must be an element of control over the work by the employer. The extent of the control required may vary enormously, depending on the nature of the role.

14. If these four essential elements are present, the contract may be one of service but the surrounding circumstances should be considered. Factors that may then be weighed in the balance can include:

14.1. Whether the person doing the work provides their own equipment;

14.2. Whether they hire their own staff;

14.3. The degree of financial risk that they take in doing the work;

14.4. Whether the work they do is an integral part of the alleged employer's business; and

14.5. The intention of the parties.

15. The higher the degree of personal responsibility an individual takes in any of these matters, the more likely it is that they will not be an employee.

16. There are other miscellaneous factors which may also be taken into account. The following may indicate the existence of a contract of service:

16.1. A prohibition on working for other businesses;

16.2. Control of the employee by a disciplinary code of the alleged employer;

16.3. Pay taking the form of regular wages or a salary;

16.4. The payment of sick pay or holiday pay;

16.5. Membership of a company pension scheme.

17. The claimant may only pursue a claim for holiday pay under the WTR if he is a "worker". A worker is defined by regulation 2 of the WTR as:

> *… 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;*

18. The claimant may only pursue a claim for unlawful deductions from wages under the Act if he is a "worker" for the purposes of section 230 of the Act. The definition contained there is essentially the same as that in regulation 2 of the WTR 1998.

19. The Supreme Court has recently considered who is a "worker". In Uber BV v Aslam [2021] UKSC 5, Uber argued that its drivers performed services for the taxi

customers, not for Uber, and this was clear from the contractual documentation. The drivers were not therefore "workers". The Supreme Court disagreed. It concluded that:

19.1. In cases in which worker status fell to be determined, the primary question was one of statutory (not contractual) interpretation;

19.2. It was inconsistent with the policy of protecting vulnerable persons via the wider definition of worker to make the written contract the starting point in deciding whether someone was a "worker";

19.3. This was reflected in the existence of anti-avoidance provisions prohibiting contracting out;

19.4. Whether someone is a worker should be discerned from all the facts. The terms of a written agreement should not be ignored but there is no legal presumption that a contractual document contains the whole of the parties' agreement and no absolute rule that terms set out in a contractual document represent the parties' true agreement just because an individual has signed it;

19.5. A person can be an employee or worker only during periods of actual working, where the nature of the work is casual, unless the arrangement is simply too casual to quality.

Unauthorised deductions and the national minimum wage

20. Section 13 of the 1996 Act provides that an employer may not make a deduction from the "wages" of a worker unless the deduction is required or authorised by virtue of a statutory provision or a relevant provision of the worker's contract or the worker has previously signified in writing their agreement or consent to the making of the deduction.

21. A Tribunal may not, however, consider so much of a complaint as relates to a deduction where the date of payment of the wages from which the deduction was made was before the period of two years ending with the date of presentation of the complaint (section 23(4A) of the 1996 Act).

22. Where a Tribunal finds a complaint under section 23 well-founded it shall make a declaration to that effect and order the employer to pay the worker the amount of any deductions made in contravention of section 13.

23. Section 1(2) of the NMWA provides that a "worker" qualifies for the national minimum wage provided they are working or ordinarily work in the UK under their contract and have ceased to be of compulsory school age.

24. The National Minimum Wage Regulations 2015 ("the NMWR 2015") set out in regulation 7 the process for determining whether the national minimum wage has been paid. In order to calculate a worker's average hourly rate it is necessary to divide the total qualifying remuneration in a given pay reference period by the total number of qualifying hours worked in that period.

25. Regulation 6 defines the pay reference period as being a maximum of a month or, if a worker is pad wages by reference to a shorter period, that period. Regulation 8 identifies remuneration to be included as qualifying remuneration.

26. Part 5 of the NMWR 2015 contains provisions enabling the calculation of qualifying hours worked. There are four distinct categories of work: time work, salaried hours work, output work and unmeasured work. The claimant contends that he performed unmeasured work, which is defined in regulation 44 of the NMWR 2015.

27. Section 17 of the NMWA implies a term into every worker's contract that they will be paid a rate which is not less than the national minimum wage. Further, when a worker has been paid less than the correct national minimum wage rate, they can claim the difference based upon the correct rate when the arrears are being determined as though that rate was in force throughout the period when the employer was in default.

28. Section 28 of the NMWA establishes a presumption that an individual qualifies for and was paid less that the national minimum wages unless the contrary is proved.

29. A worker may bring a claim in respect of a failure to pay the national minimum wage in the Tribunal either as a claim for unauthorised deductions or as a claim for breach of contract. In this case the claimant chose to purse the alleged failure as a claim that unauthorised deductions had been made from his wages.

Holiday pay under the Working Time Regulations 1998

30. Regulations 13 and 13A of the WTR provide between them that a worker is entitled to a total of 5.6 weeks' annual and additional annual leave in each leave year.

31. Regulations 13(9)(b) and 13A(6) of the WTR 1998 provide that leave to which a worker is entitled under each of those regulations may not be replaced by a payment in lieu except where the worker's employment is terminated.

32. Regulation 14 of the WTR gives a worker whose employment is terminated during the course of a leave year a right to a payment in lieu of accrued but untaken leave calculated in accordance with regulation 14(3). A claim for a failure to pay the amount due under regulation 14 may be brought under regulation 30.

Submissions

33. Ms Beech for the claimant relied almost completely on her written submissions, which ran to 20 pages, a copy of which is on the Tribunal's file. They summarise the claimant's factual case and then set out at length the relevant legal framework. They quote extensively from Secretary of State for Business, Enterprise and Regulatory Reform v Neufeld [2009] ICR 1883 as support for the proposition that someone who is a shareholder and director of a company may also be an employee under a contract of employment.

34. At [29] Ms Beech identified the following points as supporting the claimant's arguments in relation to employment status:

    34.1. He was accountable to and under the direction of Mr Xiong who monitored his work "closely";

    34.2. Mr Xiong "brought the claimant on board to execute his idea";

34.3. The claimant was not able to take holiday when he wished;

34.4. Mr Xiong thought of the claimant as an employee which was evidenced by the disciplinary and dismissal letters and the ET3;

34.5. The claimant worked full-time for the respondent and had no other jobs or business interests at the material time;

34.6. The claimant was not providing services to the respondent as a business in his own rights, "nor was he a client or customer of the respondent";

34.7. Some salary was paid to the claimant and he was on payroll;

34.8. The claimant was providing services personally.

35. In her very brief oral submissions, Ms Beech explained (in answer to a question I had asked) that it appeared that the first time the claimant had raised issues about the non-payment of salary in writing was in his letter dated 13 November 2019 (CB page 82). However he had raised the issue of Ancillary revenue previously by letter and it could be inferred that he was unhappy about the lack of pay. Ms Beech also confirmed that the claimant's claim in respect of unauthorised deductions was that the respondent had failed to pay him the national minimum wage, rather than any higher amount.

36. I offered Mr Xiong a brief adjournment for him to prepare his closing submissions. He declined this. His submissions were limited to him contending that the Tribunal had no jurisdiction to consider the claims brought because the claimant was neither an employee nor a worker.

Findings of fact

37. I have taken account of all the evidence before me when making these findings of fact but of necessity I do not refer to all of it in them.

General findings in relation to the relationship between the respondent and the claimant

38. The claimant and Mr Xiong were in contact from around February 2016 (CB page 98 is a tennis club booking from 23 February 2016). The claimant was in the process of leaving his then employment and was looking for new opportunities. Mr Xiong had a business idea which was to set up an online platform or marketplace in China which would enable UK businesses to market their products and services in China. The claimant had technical and other expertise that was relevant to this project.

39. The respondent company was established in the UK on 7 July 2016 with the claimant taking the necessary steps at Companies House. At the date the respondent company was established, the claimant and Mr Xiong each owned 50% of its shares. They were also both also appointed directors for the purposes of the Companies Act 2006 ("statutory directors"). Following the establishment of the respondent company, the claimant was referred to as its managing director (his business card at CB 106) and in due course this was also how he was

described on the respondent's website (CB page 97). Mr Xiong was described as the CEO. Their email footers also described both of them as "Founder" (CB pages 86 and 87).

40. It is common ground that no *written* contract was entered into at the beginning of the claimant's involvement with the respondent setting out the terms of any employment. Nor were any terms of employment reduced to writing in any other document prepared at that point or subsequently (subject to what was set out in the Shareholders' Agreement, to which I return below).

41. Indeed, I find that when the respondent was established, no agreement was reached with Mr Xiong on behalf of the Respondent about the hours or days the claimant would work, what holidays he might take or any salary which might be payable to him. In the absence of any written contract, I make these findings in light in particular of the claimant's own oral evidence in which he said that there was no agreement in relation to annual leave and that the "expectation" was that he would work full-time. When I asked him whether particular hours of work for each day or a minimum number of hours had been agreed he said "no, not as such". Equally, so far as salary was concerned, the claimant in his oral evidence referred on several occasions to an "expectation" that his salary would be £50,000 rather than an agreement to this effect. The tenor of his evidence in this respect reflected paragraph 5 of this witness statement in which he comments that "I was repeatedly told that salary would be forthcoming…" He does not refer to any express agreement being reached at the beginning of his involvement with the respondent in relation to the amount of any salary. Further, the existence of any such agreement would be inconsistent with the Shareholders' Agreement which he entered into in November 2017, which did not provide for any minimum level of salary.

42. The claimant's role in the UK – which was largely unsupported by any employees although Mr Xiong was also involved - was to carry out the tasks which needed to be completed in the UK for the respondent's business to be established. I find that a headline view of these tasks is reflected by what is set out in paragraph 6 of his witness statement. In broad terms, the claimant was trying to find British companies which would use the online platform or marketplace which was being established to sell their products and services in China.

43. Mr Xiong, on the other hand, was using his contacts in China, his knowledge of how business is done in China and, doubtless, his knowledge of languages spoken in China to deal with the Chinese end of the business. This resulted in a wholly owned subsidiary of the respondent being established in China and employees being employed there.

44. There was an investment round in 2017 which resulted in a Shareholders' Agreement being signed in relation to the respondent. Clause 12.8 of the Shareholders' Agreement provided as follows:

> *12.8 In consideration of Mingming Xiong, Liam Hannagan and Mrs Wang providing their service as CEO, Managing Director and Director respectively they shall be entitled to a salary on the following basis: The salaries are worked out on 60% of profit and then divided 40% to Mingming Xiong, 40% to Liam Hannagan and the remaining 20% to Mrs Wang for year 1. Year 2 will be 35% to Ming and Liam, 30% to Mrs Wang or as otherwise decided by the board meeting.*

45. It is not in dispute that no salary was paid to Mr Hannagan under the terms set out in the Shareholders' Agreement. Mr Hannagan did not set out in his witness statement how much he contended should have been paid. Nor was his schedule of loss (CB page 118) drafted by reference to such amounts. However, in his oral evidence he said that under the terms of the Shareholder Agreement he should have been paid a salary of £10,000 in each of Year 1 and Year 2. Mr Xiong did not accept that such amounts were payable, saying no profit had been made.

46. By early 2019, the claimant had received no income from the respondent, despite his involvement having begun in 2016. The claimant was displeased with that state of affairs and, at least partly in response to it, an agreement was reached that he and Mr Xiong would receive "commission" on paid "Ancillary revenue" (RB page 52). I find that this was in addition to and separate from the distribution of "profit" referred to in the Shareholders' Agreement.

47. Payments of £1050 (July 2019) and £600 (September 2019) were made to the claimant (CB pages 108 and 107) and I accept that unchallenged oral evidence of Mr Xiong that this was "Ancillary revenue".

48. I find that by mid-2019 the respondent had not begun to produce anything like the income the claimant had hoped would be produced to generate profit which might result in him receiving a substantial income from it. By his account, 40% or 35% of 60% of its profit for the two years following the signing of the Shareholders' Agreement would have amounted to £10,000. This was not accepted by Mr Xiong and the Profit and Loss accounts shown at RB page 12 onwards show gross profit of £11,316 for the year July 2017 to June 2018, £16,145 for the year July 2018 to June 2019 and £5,528 for July 2019 and June 2020.

49. I find that the respondent's lack of commercial success resulted in tensions between the claimant and Mr Xiong by early 2019. Mr Xiong contended that further investment from third parties was necessary for the survival of the respondent. There was therefore a further round of investment in May 2019 which resulted in the claimant's shareholding in the respondent being reduced to 30%. The claimant was unhappy with this dilution of his investment in the respondent and also suspicious of how the funds raised were used – he believed part of it was paid to Mr Xiong in China (claimant's statement, paragraph 12). The claimant was also by this time suspicious about whether the income of the Chinese subsidiary was being properly accounted for.

50. Relations deteriorated further when Mr Xiong tried to introduce further investors (and so further dilute the claimant's stake in the respondent) in June 2019. This resulted in Mr Xiong finding fault with two historic expense claims of the claimant. A directors' meeting took place on 17 September 2019 (CB page 65) which recorded an issue in relation to the claimant's expenses.

51. Matters escalated with Mr Xiong attempting to remove the claimant from the respondent's bank mandate. I find that the email from HSBC at page 25 of RB sets out what occurred. In broad terms, on Mr Xiong attempting to remove the claimant from the bank mandate, the claimant contacted HSBC and told them that there was a dispute between the respondent's directors. This resulted initially in an inhibit being placed on the accounts and subsequently a new bank mandate being revoked and internet banking being suspended. HSBC accept that they acted in breach of their own terms and conditions, but the underlying reason for the disruption to the respondent's banking was the conflict between Mr Xiong and the claimant.

52. Having taken legal advice, the respondent wrote to the claimant on 24 October 2019 requiring him to attend a disciplinary meeting on 7 November 2019 (CB page 58). The four disciplinary charges relate to the disruption to the respondent's banking arrangements and the disputed expense claims. The letter states "The possible consequences arising from this meeting might be: Termination of your employment".

53. Following the meeting on 7 November 2019, it seemed that the differences between the respondent and the claimant might be resolved by the claimant attending HSBC with Mr Xiong on 11 November 2019 and "unlocking" the respondent's bank account. The text message from Mr Xiong to the claimant at CB page 115 demonstrates that Mr Xiong saw the disciplinary process as a way of obtaining leverage over the claimant. However the account was not "unlocked" and on 13 November 2019 the respondent wrote to the claimant (page 79 of CB) stating, in respect of the meeting on 7 November 2019:

> *At this meeting it was decided that:*
>
> - *Your conducts were still unsatisfactory and that you be dismissed and terminated of your employment. [Sic]*
>
> *I am therefore writing to you to confirm the decision that you be dismissed and terminated [sic] of your employment.*

54. As at the date of the Hearing, the claimant remained a shareholder and director of the respondent. The dispute between the claimant and Mr Xiong is considerably broader than that contained in the claim presented to the Employment Tribunal.

Additional findings relevant to the issue of employment status

55. I find in accordance with answers given by Mr Xiong in cross examination that to the extent that the claimant was required to do any work for the respondent he was required to do it in person. He could not send anybody else to do it in his place.

56. I find in accordance with answers given by Mr Xiong in cross examination that the respondent was not a client or customer of any profession or business undertaking carried on by the claimant.

57. I find that although the claimant and Mr Xiong would meet weekly for much of the period from mid-2016 to November 2019, Mr Xiong exerted little control over the timing and nature of the claimant's activities for the respondent. In this respect I preferred the evidence of Mr Xiong which was to the effect that the job titles of Managing Director and CEO were really for external consumption and that the day-to-day reality was that they expected one another to do what was necessary for the business to succeed rather than Mr Xiong exercising clear management control of the claimant. I prefer the evidence of Mr Xiong in this respect because:

    57.1. It was reflected in emails exchanged between them about holidays and availability for meetings. For example, in the WeChat message at RB page 35 there is a discussion between Mr Xiong and the claimant about who will attend a meeting. Mr Xiong says the meeting is at 3.30pm and says "can you make it? I can meet her?". The response is "Sorry No chance I will be collecting my son from school" and the reply is "ok, I go and let you know the result". Obviously, many employees may break off work to collect a child from school with their employer's consent, but the tone of the messages from the

claimant is not one which suggested that he needed any such consent **or** that he was in principle under any obligation to be working at any particular time. Equally, the messages at RB page 36 did not suggest that the claimant needed Mr Xiong's permission to go on holiday, and indeed the claimant produced no emails showing him seeking such consent. (He did refer to the email at CB page 110 to suggest that he was required to work even when on holiday but I do not accept that this is what it demonstrates and note that it is in response to a message from the claimant saying "We should meet him ASAP"). The tone of emails between the claimant and Mr Xiong generally is of communications between equals, not of communications between two individuals occupying different positions within a corporate hierarchy.

57.2. It reflected the reality of the situation: the claimant was receiving no salary, there was no infrastructure in the UK, no office, no equipment and no employees. There was, I have found, no agreement in relation to salary prior to November 2017 and no agreement generally about the hours or days the claimant would work or what holidays he might take.

58. I find that the underlying reality of the relationship between Mr Xiong and the claimant was that they agreed to set up a business venture together – the respondent – in the hope that it would become a profitable company which would be of value to them as its two shareholders. Further shareholders were of course subsequently introduced.

59. Turning to other matters relevant to the issue of employment status, I find:

59.1. The claimant provided all his own equipment (with the exception of business cards). He worked from home.

59.2. He took a very substantial degree of financial risk. He agreed no salary at the outset and the salary payable to him under the Shareholders' Agreement was entirely dependent on a profit being made.

59.3. There was no prohibition on the claimant working for other businesses.

59.4. There was no agreement that the claimant would receive holiday pay or sick pay or that he would be a member of a pension scheme (and, indeed, he did not received holiday pay).

59.5. The establishment of a payroll process in July 2019 as reflected in the emails at CB pages 53 and 54 was done to provide a means to pay Ancillary revenue. It was not a precursor to the payment of a salary to the claimant.

59.6. The only correspondence of substance sent by the respondent to the claimant which adopts terminology suggesting that the claimant was an employee was that sent by the respondent in relation to the disciplinary meeting held with the claimant on 7 November 2019 and his subsequent "dismissal". I accept Mr Xiong's evidence that the disciplinary meeting was held because he had been advised that this was necessary by solicitors. This is reflected in the quality of the written English in the letter dated 24 October 2019 at RB page 26. Mr Xiong's written English, displayed throughout the bundles, is such that he would have been unable to write that letter as it is written.

59.7. As Ms Beech explained in her closing submissions, the claimant did not raise the non-payment of **salary** in writing until after he had received the

respondent's letter of 13 November 2019 purporting to dismiss him. In his letter of 13 November 2019 at CB page 84 he noted:

> *I also raise the fact that I have only received remuneration of around £1,8000 over the preceding three years of employment with the company. I understand that this is a breach of national minimum wage regulations within the UK. I raise this as a formal grievance with the company.*

59.8. Although the respondent did not expressly deny that the claimant was an "employee" or "worker" in the ET3 which Mr Xiong returned to the Tribunal (the respondent not being professionally represented), on a fair reading of the ET3 as a whole, the respondent is ambiguous about the claimant's employment status. For example, although on the continuation sheet the ET3 refers to the termination of "his employment", at 5.3 Mr Xiong refers to the claimant as "one of the Founders of the Business" and in box 6.1 notes "The claimant wasn't recruited by Mr Xiong. In fact, the claimant is one of the two founders of the business".

Other findings

60. I have found above that there was no agreement as to exactly what hours and days the claimant was required to work. Turning to the hours he actually did work, there was a significant dispute about the hours the claimant worked on the business of the respondent. In his witness statement at paragraph 49 the claimant states:

> *I worked full-time hours to at least 9am to 5pm Monday to Friday.*

61. In his oral evidence, as noted above, he said that the "expectation was to work full-time". When I asked him about his normal working day he said that he would be "entirely available full-time, at least 9-5".

62. Mr Xiong on the other hand had said in the ET3 that the claimant worked 14 hours a week (its box 5.1). In his oral evidence he said the claimant worked "maybe two hours a day", but that over the course of the year the large number of holidays taken by the claimant meant that on average he worked 5 or 6 hours a week.

63. I did not find the evidence of either the claimant or Mr Xiong in relation to the hours worked by the claimant to be entirely plausible or consistent with the documentary evidence. So far as that of the claimant was concerned, I found a lack of plausibility in the suggestion that as one of the main shareholders in the respondent, who was receiving no pay, he felt an expectation to be available full-time and that consequently he was working or available to work "at least 9-5". Further, such evidence is not entirely consistent with the way he dealt with the possibility of a meeting at the time of the school run: his response does not suggest that he felt any obligation to be available at any time that was inconvenient to him. Equally, so far as the evidence of Mr Xiong was concerned, I found his oral evidence that the claimant was on holiday for half the year implausible (in the lack of any supporting documentary evidence of significance).

64. When there is no clear documentary evidence relating to a particular issue in a case, and the matter is dependent on the recollections of witnesses, those recollections tend to be skewed to some extent by a natural desire on the part of the witness to support their own case. I find that this is what has happened in this

case. The claimant's position (as clarified in the discussion at the beginning of the Hearing in relation to his unauthorised deductions claim) was that he worked 35 hours a week. The respondent's position as that he worked 5 or 6. I find that in fact the average number of hours worked was on the balance of probabilities 20 hours, approximately mid-way between their two figures. I find that those hours were worked Monday to Sunday, rather than just on weekdays.

Conclusions

Employment status

65. In order for a contract to be formed it is necessary for there to be an offer, acceptance, consideration, intention to create legal relations and certainty.

66. It was clearly not possible for the respondent to form a contract with the claimant until it had been established in July 2016. I conclude that in fact the respondent did not form any contract with him at that point. Rather what happened was that the claimant and Mr Xiong agreed between themselves that they would establish the respondent – being its shareholders – and that they would also be its statutory directors. They labelled themselves "Managing Director" and "CEO" for the purposes of presenting their new business venture to the outside world, but until the Shareholders' Agreement was signed in November 2017 they were acting in their capacity as owners (i.e. Shareholders) in the business which they were trying to establish from scratch. The claimant was not working pursuant to a contract with the respondent. This was reflected in the language which he used when describing initial discussions with Mr Xiong about remuneration: it was couched in the language of "expectation" rather than contractual rights. The discussions focused on the income which he hoped would be achieved if the business were a success. It was also reflected in the fact that the claimant had no written contract with the respondent in force from July 2016 and, equally, he has not produced a board meeting minute or memorandum setting out terms of appointment.

67. I conclude that this changed on 24 November 2017 with the signing of the Shareholders' Agreement, in which both the claimant and Mr Xiong are both defined as "the founders". I conclude that as a result of this agreement the claimant entered into a contract pursuant to which he would be paid a salary as managing director. The salary would only be payable if a profit were made.

68. I conclude in light of my findings of fact above that there was an obligation on the claimant to perform his work as managing director personally and there was mutuality of obligation.

69. I conclude that there was very little day to day control exercised by the respondent over the claimant. However, one would not expect there to be significant day to day control of a managing director. The factor is of very limited relevance in deciding whether the claimant was an "employee".

70. Turning to the question of whether the contract formed in November 2017 was one of employment, I have concluded that it was not, when all of the following factors are weighed in the balance:

    70.1. The origin of the claimant's relationship with the respondent was not that he was "recruited" by Mr Xiong. Rather they jointly established the respondent to execute a business idea of Mr Xiong.

70.2. The contract formed in November 2017 was never reduced to writing other than to the extent that it was set out in Clause 12.8 of the Shareholders' Agreement. There was no board minute or memorandum setting out any other terms. The claimant could not clearly state what its terms were in relation to matters such as hours of work or holidays, because such matters had not been agreed. There was no prohibition on the claimant working for other businesses. The claimant did not receive a regular salary or holiday pay and was not the member of a pension scheme. The contract formed did not therefore contain any of the provisions that the contract of employment of a managing director would normally include, except a provision relating to salary (which was in itself highly unusual in that it provided that no salary at all would be payable unless a profit were made).

70.3. The claimant was provided with no equipment (save business cards) or office by the respondent.

70.4. There was no clear allocation of duties or responsibilities to the claimant and no documentation relating to the same. The work he and Mr Xiong each did was simply directed to getting the business up and running rather than fulfilling the terms of a job description or contract of employment. He was not monitored closely by Mr Xiong as claimed, although he met regularly with him.

70.5. The claimant took a degree of financial risk that would be most unusual for an employee: he agreed to receive no salary at all unless a profit was made.

70.6. Although the claimant was integrated into the business as an employee would normally be and did not hire his own staff, the scale of the enterprise and his commitment to it as a major shareholder inevitably required his day-to-day involvement and also resulted in practically no employees being taken on.

70.7. The claimant did not raise the issue of the non-payment of salary in writing until November 2019. This reflected the fact that he understood that "salary" was in fact the distribution of profit rather than anything akin to the payment of a "wage".

70.8. The only point at which the respondent clearly treated the claimant as an employee was when it invited him to a disciplinary meeting and terminated his "employment". However the context for these actions was the conflict what arose during 2019 between the claimant and Mr Xiong. They did not reflect a desire by the respondent to "dismiss" the claimant due to misconduct. Rather the disciplinary proceedings were simply a weapon used by Mr Xiong in that conflict. This is reflected by the text message referred to at paragraph 53 above. The immediate focus for the conflict at that time was control of the respondent's bank account.

71. I therefore conclude that the claimant was not an "employee" for the purposes of the 1996 Act or the Employment Tribunals Act 1996 and consequently his claims for unfair dismissal, wrongful dismissal, and breach of contract all fail and are dismissed.

72. However, I do conclude that the claimant was from 24 November 2017 a "worker" of the respondent for the purposes of the WTR, the 1996 Act and the NMWA. This is because he entered into a contract with the respondent in November 2017

to provide his services as managing director, he was required to provide those services personally, and the respondent was not a client or customer of any profession or business undertaking carried on by the claimant. The last two of these three points were expressly conceded by Mr Xiong when being cross-examined.

The claims for holiday pay and unauthorised deductions from wages

73. Turning to the claimant's claim for holiday pay, I find that the claimant's leave year was 7 July to 6 July. I find that his annual entitlement was to 5.6 weeks' holiday pursuant to regulations 13 and 13A of the WTR. I conclude in light of my findings of fact above that at the date of dismissal the claimant worked 20 hours a week. I conclude that when his employment terminated 135 days had elapsed in the final leave year, that he had taken no leave in that final leave year, and that consequently he was entitled to a payment of 135/365 x 5.6 = 2.071 weeks' pay. The claimant contended that a week's pay was 35 hours at £8.21/hour but in light of my conclusions in relation to hours worked it was, applying the same formula used by the claimant, in fact 20 x £8.21= £164.20. Consequently the claimant is entitled to a payment of £340.06 under regulation 14 of the WTR in respect of accrued but untaken holiday pay.

74. Turning finally to the claimant's claim for unauthorised deductions, in light of my conclusions above that the claimant became a worker on 24 November 2017 and was dismissed as such on 18 November 2019, the claimant was not paid the national minimum wage for nearly all of the 103 weeks and 4 days when he was entitled to be paid it between 24 November 2017 and 18 November 2019. It is of course not possible for a "worker" to contract out of their right to receive the national minimum wage and so the fact that the Shareholders' Agreement did not provide for any minimum level of salary is not relevant. Unauthorised deductions were therefore made from the claimant's wages in breach of section 13 of the 1996 Act. I turn now to the calculation of the amount deducted.

75. The "pay reference period" for the claimant pursuant to regulation 6 of the NMWR 2015 is a month because he was not paid wages by reference to a period shorter than a month. I conclude that the claimant performed "unmeasured work" as defined by regulation 44 of the NMWR 2015. Consequently the hours of unmeasured work per pay reference period are 20 in each week of each month from 24 November 2017 to 18 November 2019. However, by virtue of section 23(4A) of the 1996 Act, the claimant cannot recover any amount deducted before 8 April 2018, that is to say before the period of two years ending with the date of presentation of the claim.

76. The amount of the National Minimum Wage claimed in respect of each of the reference periods (i.e. months) has not been set out by the claimant. However, for practical purposes, the amount due may be calculated as follows.

77. Ms Beech for the claimant conceded that the amount of £1050 was paid in respect of the reference period August 2019 and £600 in respect of the reference period October 2019. Each of those months had 31 days. In light of my findings of fact above about the number of weekly hours worked and when, I find that in each of those months the number of hours worked will have been 31 x 20/7 = 88.57 and so the national minimum wage due now for each of those months would have been 88.57 x £8.21 = £727.16. Consequently, there was no shortfall in August 2019 but the shortfall for October was £127.16.

78. That amount needs to be recalculated to reflect the current national minimum wage rate as follows pursuant to section 17 of the NMWA: (£127.16/£8.21) x £8.91 = £138.00

79. I find that the hours of unmeasured work from 1 November to 18 November 2019 will have been 18 x 20/7 = 51.43 and so the amount due in respect of that month is (again by the application of section 17 of the NMWA) 51.43 x £8.91 = £458.24.

80. The remaining pay reference periods are from 8 April 2018 to 31 July 2019 (a total of 480 days) and September 2019 (30 days). The total number of days in those reference periods is therefore 510. Given that I have found the claimant worked 20 hours per week spread over each 7-day period, the national minimum wage calculation for these remaining pay reference periods can be reduced to (510 x 20/7) x £8.91 = £12,983.14.

81. The total amount unlawfully deducted from the claimant's wages as a result of the non-payment of the national minimum wage was, therefore, as follows:

Month(s)	**Amount in £**
8 April 2018 to 31 July 2019 and September 2019 (510 days)	12,983.14
August 2019	0
October 2019	138.00
November 2019	458.24
TOTAL	13,579.38

82. The respondent is ordered to pay the claimant the total sum due.

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Employment Judge Evans

Date: 3 June 2021