# EMPLOYMENT TRIBUNALS

**Claimant:** Mr Wei Zhu

**First Respondent:** Mr Xiaohai Zheng
**Second Respondent:** Dekon Limited
**Third Respondent:** Dream in Reality Limited (a dissolved company)

**Heard at**: Birmingham Employment Tribunal by cvp

**On:** 8 February 2021

**Before:** Employment Judge Cookson sitting alone

**Representation**
Claimant: in person
Respondents: did not attend
Translator: Ms Zhang

JUDGMENT having been sent to the parties on 9 February 2021 and written reasons having been requested in accordance with Rule 62(3) of the Employment Tribunals Rules of Procedure 2013, the following reasons are provided:

# REASONS

## Background

1. The claimant was employed from 2011 until 24 August 2019 when, on his case, he was dismissed, and on the respondents' case, he resigned.

2. There is an issue about which of the respondents was the claimant's employer. The claimant says it was either the first respondent, who is an individual, or either the second or third respondents, which are companies owned and run by the first respondent. The claimant's position in this regard is set out in an email to the tribunal dated 20 March 2020, which he followed up with a further email on 22 April 2020.

3. The respondents say in their response that the second respondent was the claimant's employer.

4. The claimant claims unfair dismissal, wrongful dismissal, and a failure to pay wages including sales commissions and holiday pay. His claims in this regard were set out in an email to the tribunal (which was copied to the respondent's then solicitor) on 23 April 2020.

5. In his ET1 the claimant also said that he wished to claim in respect of "German subsidiary shareholder liability" but that part of the claim was dismissed on 20 March 2020 pursuant to the order of EJ Harding dated 13 March 2020.

6. This was listed before me for a two-day hearing. The respondents did not attend before me at the start of the hearing. Examination of the file showed that this hearing was convened after a previous hearing before Employment Judge Coghlin on 4 November 2020 when the case had previously been listed for a two-day hearing. The respondents did not attend on that occasion either and, as on this occasion, had offered no explanation. Neither party had complied with tribunal directions at the time of the first hearing. In light of this that hearing was adjourned to the hearing before me and further case management orders were made. In his order Employment Judge Coghlin said this "*It is essential that the respondents bear in mind that tribunal orders must be complied with by both parties. It is not enough to sit back and "let everything lie" as they did before. Further, their unexplained absence from today's hearing must not be repeated at future hearings".*

7. I adjourned the start of the hearing to enable the Tribunal clerk assigned to this case to try to contact the respondents by telephone. When she was unable to do so, I directed that she send an email to seek their attendance and adjourned the hearing to delay for several hours in the hope that this would secure some attendance or explanation. None was forthcoming.

8. This was the second occasion when the respondents had failed to attend hearing and they had received an express warning from Employment Judge Coghlin that an unexplained absence at a future hearing would not be acceptable.

9. I took into account that, in accordance with the Overriding objective in Rule 2 of the Employment Tribunal Rules of Procedure, I must ensure that cases are dealt with fairly and just and that includes, so far as practicable, that delay should be avoided, so far as compatible with proper consideration of the issues. I have also taken into account Rule 47, that if a party fails to attend or to be represented at the hearing, the Tribunal may dismiss the claim or proceed with the hearing in the absence of that party. Before doing so, it shall consider any information which is available to it, after any enquiries that may be practicable, about the reasons for the party's absence.

10. The claimant had produced a bundle of documents for this hearing which included a witness statement and he had sent this to the respondents. His bundle of documents includes evidence of attempts he had made to secure disclosure of relevant documents from the respondents. They had not responded and appear to have made no attempt to comply with the revised case management orders. That suggests that the respondents had no intention to engage with these legal proceedings.

11. I determined that it was in accordance with the overriding objective for this hearing to go ahead. I treated the respondent's joint response to the claim as written submissions. After the claimant affirmed his witness statement, I put the specific objections to the claimant's claim raised by the respondents in my questions to him.

12. In reaching my judgment I considered:

    a. A bundle of documents prepared by the claimant which runs to some pages and which includes his witness statement;

    b. The claimant's additional oral evidence;

    c. Employment Judge Coghlin's order from the hearing of 4 November 2020;

    d. Companies House records for the second and third respondents. I checked these online because there is reference in correspondence in the bundle from the first respondent which refers to the possible liquidation of the second respondent and to check the status of the third respondent which appears to have been dissolved after these legal proceedings were issued.

Findings of Fact

13. I make the findings of fact below on the basis of the material before me taking into account contemporaneous documents where they exist and the conduct of those concerned at the time. I have resolved such conflicts of evidence as arose on the balance of probabilities and my assessment of the credibility of the claimant and the consistency of his evidence with the surrounding facts.

14. The claimant was offered a job by the first respondent after he saw a job offered on a Chinese forum and attended for an interview. He was not provided with a contract of employment and when he asked for one he was told it was not necessary. The claimant did not feel able to press for a contract. There is no reference to any contract of employment in the respondents' response to the claim. He was not provided with written particulars of employment or any other document setting out his terms of employment.

15. The first respondent controls a number of companies which trade across the UK, Europe, the US and China including the second and third respondents. All three respondents appear to be associated employers for the purposes of the Employment Rights Act. The claimant told me that at various points in his employment he had been provided with payslips and letters referring to his employer as various of the different companies controlled by the first respondent but that those companies did not exist when he was first employed. He had also been paid directly from the first respondent from a personal account.

16. The second respondent is a company first incorporated on 4 February 2015 and the third respondent is a company first incorporated on 24 January 2018 and dissolved in March 2020. It does not appear to have been subject to any insolvency proceedings.

17. In the response it is pleaded that the claimant started employment with the second respondent on 25 October 2011. That cannot be correct if that company did not exist until 2015. Nor can the claimant have been employed by the third respondent which also did not exist at the time the claimant's employment began.

18. It is not denied that the claimant was employed at all, the response filed on behalf of the respondents accepts that the claimant was employed from 25/10/11, nor is asserted that that the claimant was employed by a different legal entity within the group of companies controlled by the first respondent.

19. The claimant undertook a wide range of duties spanning different companies in the group of companies controlled by the first respondent. This included working on a website and undertaking sales, but on occasion he also worked as the first respondent's personal assistant and driver. The claimant was given instructions on what to do by the first respondent. The first respondent was "the boss". As far as the claimant was concerned, he was employed by the first respondent and he worked for the first respondent rather than any particular company, but he brought claims against the other companies in light of documents he had received referring to other companies.

20. The claimant told me that the first respondent tends to use the companies interchangeably and without any formality. That is consistent with the evidence in the bundle which shows that the claimant has been sent pension enrolment letters referring to his employer as the second respondent but also another company, DIR Europe Limited and he was received payslips in the simply in the name Dream In Reality and in the name of the third respondent. There is also evidence that he has received salary payments directly from the first respondent.

21. In 2013 the claimant has asked to sign a deed relating to the ownership of some shares in a German company. A German notarised copy of that deed is included in the bundle of documents. The deed has been executed by the both the claimant and, personally, by the first respondent. The deed describes the first respondent as the seller.

22. The deed records this at clause 2:

| **2 Kaufpreis, Gegenleistung** | **2 Purchase price, return** |
|---|---|
| 2.1 Ein Kaufpreis betragt:EUR 10,000 (in Worten: zehntausend) | 2.1 The purchase price amounts to: EUR 10,000 (in words: tenthousand) |
| 2.2 Der Kaufpreis ist bezahlt. | 2.2 The purchase price has been paid. |

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| 2.2 Der Kaufpreis ist bezahlt. | 2.2 The purchase price has been paid. |

and this at clause 4

| **4. Garantien** | **4 Guaranties** |
|---|---|
| 4.1 Der Verkäufer,garantiert, dass die inden Vorbemerkungen enthaltenen Angaben richtig sind, die verkauften Geschäftsantelle nict mit Rechten Dritten belastet sind, er über die Geschäftsanteile frei verfügen kann, die Geschäftsanteile frei verfügen | 4.1 The Seller guarantees that the information contained in the preliminary statements are correct, the sold shares are not burdened by any third part, the shares are to his free proposal, the shares are fully paid in and no open or hidden repayment of deposits to the shareholder or to |

kann, die Geschäftsanteile voll einbezahit sind und keine offenen oder verdeckten Rückzahlungen der Einlagen an den Gesellschafter oder diesem nahe stehenden Personen erfolgt sind. Der Verkäufer garantiert ferner, dass keine Änderungen des Gesellschaftsvertrages gegenüber dem heutigen aus dem Handelsregister ersichtlichen Stand erfolgt sind. Eine darüber hindaus gehende Haftung wird ausgeschlossen Im Besonderen für Art und Umfang des Vermögens und die Ertragslage der Gesellschaft.

shareholder related parties have been carried out. The Seller further guarantees that no changes of the company's articles of association compared to the current wording have been resolved. Any further liability is excluded in particular concerning the nature and extent of the assets and operations of the company.

23. In February 2019 the claimant received a letter from an insolvency practitioner in Cologne Germany stating that, despite the terms of the deed above, the payment for the shares had not been made and requiring the claimant to pay for the balance outstanding for the shares. The demand for payment was repeated in August 2019 when the insolvency practitioner, Dr Christoph Niering, says this

> According to the documents available to me, you are a shareholder with a share in the business of €100.000.00. When evaluating the debtor's business documents, I discovered a violation of the capital raising regulations. You are obliged to pay €100,000.00 in accordance with §19,5 GmbHG.

According to the balance sheet published in the Federal Gazette of 31 December 2011, the contribution of €50,449.50 to be paid on the share capital was paid. Despite repeated requests by the managing director of the aforementioned debtor, Mr Xiaohai Zheng, I was not presented with proof of the payment of the share capital. The turnover overview proved by Commerzbank AG on September 10, 2010 shows two payments with purpose "Payment from abroad". However, neither the sender nor the reason for the payment can be identified. Therefore, there are considerable concerns that the original contribution was not made properly.

24. The claimant raised the demand with the first respondent. The text messages show that at first the first respondent accepted that the liability was his problem and not the claimant's and in a series of text messages included in the bundle of documents, he told the claimant to seek to negotiate with the insolvency practitioner to see if the sum owed could be reduced or paid instalments. This proved to be unsuccessful and the claimant continued to press the first respondent to settle the debt.

25. It appears that this marked a turning point in the claimant's relationship with the first respondent. The first respondent began taking on new staff who took over duties from the claimant. When the claimant asked why this was happening, he was told it was to relieve the stress that that he was under but the claimant felt that he was being replaced.

26. From May 2019 the claimant's sales commission payment bonuses were withheld by the first respondent. The text messages suggest these were to be used to pay the German debt or perhaps to pay for legal advice in relation to them, the text messages are not entirely clear.

27. The claimant felt increasingly unwell due to the stress that he was under. On 6 August 2019 he was signed off sick by his GP until 20 August 2019 for a "stress related problem".

28. On 15 August 2019 the first respondent sent the claimant the following ultimatum by text (the bundle contains the original message and a translation; this is the translation):

> Mr Zheng –
>
> Transfer 9k to lawyer, the rest each month save 2k till 10k, you transfer then I transfer, if you accept, I hope your job not affected, otherwise considering so many years employment with me, I give you next Monday as deadline, if you don't reply don't back to office by then, I treat as automatically resign, I arrange new staff replacing you, thank you for these years hard work.

29. The claimant returned to work on 23 August 2019 but the following day the first respondent told him to stay home without pay, and that he was not to work unless he was contacted. The claimant is adamant that he did not resign at this time.

30. On 29 August and 2 September 2019, the claimant emailed the first respondent's accountant, Ms Val Schauker about the fact that he had not been paid his August wages but never received a response. Possibly in response to that second attempt at contact, the first respondent deleted the claimant from the work "whatsapp" group. He was required to return his keys.

31. Over the following weeks the claimant had some direct discussions with the first respondent via text about what he was owed for sales commission bonuses, and he acknowledges that he received some payments but was left owing £1179. He says he was never sent a P45.

32. Whilst he was trying to secure the respondent's cooperation in the preparation of this case for tribunal hearing the claimant was sent this email by the first respondent on 4 December 2020:

> Hello Z Wei:
> The company only own you may salary, and I don't know what document you are asking for.
> And I have no idea about this 100k euro between you and DIR GmbH.
> I should also inform your details the German tax office.
>
> Thank you
>
> Mr Zheng

33. The first respondent also said this later the same day

On Friday, 4 December 2020, 23:38:02 GMT, Dirsalonfurniture uk<dirsalon@googlemail.com> wrote:

W Zhu:
Can you please supply the proof of your payslips and I checked you were employed by Dream In Reality for the past years and the company is now into liquidation.
I think your case has nothing to do with Dekon, nor me.

Thank you

Mr Zheng

34. A few days later in reply to a question about the dissolution of the third respondent, the first respondent replied in these terms

On Tue, 8 Dec 2020 at 22:34, Dirsalonfurniture uk
dirsalon@googlemail.com wrote

> Hello Wei Zhu:
> As you were employed by Dream In Reality Ltd and I would not be able to assist you on behalf of Dekon Co Ltd. This case should also be sent to Liquidation if there is any result.
> I have not received your English translations and I have nothing to do for your German gmhb.
>
> Mr Zheng

35. The emails above about the shareholding are in my view somewhat disingenuous. The letter from the German insolvency practitioner refers to his "repeated" attempts to obtain confirmation from the first respondent, who is referred to as the managing director of the company, about the share transaction and the first respondent executed a deed as the seller in which the disputed shareholding was transferred to the claimant and in which he confirmed that the purchase payment had been paid. It cannot be true that the first respondent "have nothing to do for [sic]" the German shareholding or that "it has nothing to do with me". It would appear that the first respondent has at least some legal questions to answer in relation to the shares transfer although not before this tribunal. The German shareholding is a matters over which this tribunal has no jurisdiction but the denial of any knowledge or responsibility in terms of the German shareholding is still relevant in my assessment of the weight I should attach the statements made in correspondence by the first respondent given that he has chosen not to give evidence before me.

36. Although in the email of 8 December 2020 from the first respondent asserts that the claimant was employed by the third respondent for the "past years", the response filed by the respondents' solicitors pleaded that the claimant was employed by the second respondent. No application to amend the response was ever filed and this assertion is inconsistent with the pension enrolment letters. I note that no explanation for these striking discrepancies if offered.

37. It appears likely to me that the first respondent is willing to make assertions in correspondence and other documents, whatever their legal or practical importance, that suit his intentions at the time even if they are inconsistent with things that have been said previously or with other documents or surrounding facts. This has led me to conclude that I can attach little or not weight to the facts asserted in the response form. I have taken this into account in my findings of fact above and the conclusions I have reached below.

Findings in relation to loss

38. The claimant has struggled to find new employment. He did a small amount of casual employment and worked for the respondent again for a while in January but was never paid. The pandemic and lockdown has made it very difficult for him to find other employment. In light of the current difficult economic circumstances, I do not doubt that this is true. The respondent has not submitted any evidence that the claimant has failed to mitigate his loss. I find that on the balance of probabilities it will be at least 6 months before the claimant is able to find alternative employment.

39. The response form contains allegations about a failure to return a workplace key and in relation to a website domain name. In relation to the key the claimant says that everyone had a key and it was simply an oversight and as the response form acknowledges he has returned this now. In relation to the website, the claimant says that he has not changed anything. The website is linked to the German domain so he had held onto it but he does not use it. In the circumstances I see no reason for me to make any findings about that.

40. The response denies that the claimant was paid the remuneration he claims and says that he was only paid a basic salary. However, the text messages between the claimant and first respondent show that the claimant was paid a sales commission bonus. There was discussions between the claimant and the first respondent about that in which the first respondent appears to accept that the claimant is entitled to these payments. In the absence of documentary evidence suggesting otherwise I find that the claimant was entitled to the sales commission bonuses on a monthly basis as part of his ordinary remuneration.

41. I find that the claimant was paid a basic salary of £20,000 per annum with sales commission bonuses on top. In the three months before the termination of his employment the claimant had earned net sales commission payments of £1639, £1000 and £920. The claimant was off sick for part of this time and I accept that his usual payments are likely to have been higher as a result but I do not have information to enable me to make further findings about that.

42. I have calculated the claimant's earnings on the following basis for the 2019/2020: that is salary of £1666.67 per month gross, or £384.62 per week, that equates to £329.54 net. Based on the information provided to me I calculate that the claimant's average sales commission in the three months prior to the termination of his employment was £273.69 net. That means the claimant's net weekly pay was £603.23 which equates to gross weekly pay of £786.60.

43. The claimant says that he was owed 13.3 days holidays at the time his employment ended.

## The law

Unfair Dismissal

44. Section 94 of the Employment Rights Act 1996 (ERA):
    (1) An employee has the right not to be unfairly dismissed by his employer.

45. Section 95 ERA Circumstances in which an employee is dismissed.
    (1) For the purposes of this Part an employee is dismissed by his employer if (and, subject to subsection (2) only if)—

    (a)the contract under which he is employed is terminated by the employer (whether with or without notice)....
    (b)he is employed under a limited-term contract and that contract terminates by virtue of the limiting event without being renewed under the same contract, or
    (c)the employee terminates the contract under which he is employed (with or without notice) in circumstances in which he is entitled to terminate it without notice by reason of the employer's conduct.

(2)An employee shall be taken to be dismissed by his employer for the purposes of this Part if—
(a)the employer gives notice to the employee to terminate his contract of employment, and
(b)at a time within the period of that notice the employee gives notice to the employer to terminate the contract of employment on a date earlier than the date on which the employer's notice is due to expire;
and the reason for the dismissal is to be taken to be the reason for which the employer's notice is given.

46. In this case the respondents accepts that the claimant was an employee and that his dates of employment are correct, although of course the identity of the employer is disputed. It is accepted that the claimant has the two years' service necessary to claim unfair dismissal.

Identity of the employer

47. Contracts of employment are formed in the same way as other legal binding contracts. They require offer and acceptance, consideration and an intention to create legal relations. Importantly in terms of this case the terms of and parties to a contract are determined when the contract is entered into. Once agreed the terms of a contract can only be varied in certain specific ways including by consent, by operation of law or through a right in the contract to vary its terms.

48. Who the parties to a contract are will be determined during negotiations to enter into it and will usually be specified if necessary, in the contractual offer. Of course, it is common for an individual offering a contract of employment to do so behalf of a corporate employer, but if that is the case the person acting on behalf of the company must be clear on whose behalf they are acting and who the employer will be. A person who says "I offer you employment." without being more specific is making an offer that they personally will be the employer.

49. Section 1 of the Employment Rights Act[1] provides

Statement of initial employment particulars.
(1)Where an employee begins employment with an employer, the employer shall give to the employee a written statement of particulars of employment.

(2)Subject to sections 2(2) to (4)—
(a)the particulars required by subsections (3) and (4) must be included in a single document; and
(b)the statement must be given not later than the beginning of the employment.

(3)The statement shall contain particulars of [amongst other matters]—
(a)the names of the employer and employee.

50. Determining who an employer is usually a straightforward matter of looking at the contract of employment or the written statement of particulars to see what the intentions of the parties was when the contract was entered into. If no such document exists it will be necessary to look at the facts of the case to determine the intentions of the parties at the time.

51. I note for completeness that it is possible for an employer to change in the course of a contract but the usual occasion when that happens without an employee's consent is if there is a transfer of an undertaking in accordance with the Transfer of Undertakings (Protection of Employment) Regulations (usually simply called TUPE). However, if such a transfer occurs there would have

[1] As in force at the relevant time

to evidence of a transfer and the employer would be expected to have informed their employees that the employer had changed as well as complying with the other statutory provisions in relation to information and, in some situations, consultation. There is no suggestion of such a transfer here. It may also be possible for an employer to assign or novate a contract to another employer without an employee's consent but I am not aware of an implied right to assign or novate a contract without the consent of the other party. There is no evidence of such an express contractual provision. I note that the response form nor in any information supplied to the tribunal is it suggested that the claimant began employment with one employer and this was transferred to another in the course of his employment.

Termination of employment

52. The question I must determine is "Who really terminated the contract of employment?". If an employee is told that he or she has no future with an employer and is expressly invited to resign, that employee will be regarded as having been dismissed (see for example *East Sussex County Council v Walker* 1972 ITR 280, NIRC).

53. Resignation requires action by the employee. A resignation is the voluntary termination of a contract of employment by the employee. The contract will not actually come to an end until the employee has communicated his or her resignation to the employer, either by words or by conduct.

Unfair dismissal

54. If an employee is dismissed, they will be unfairly dismissed unless the employer shows that the reason for dismissal is one of the fair reasons set out in s96 of the ERA. Procedural matters of fairness are not relevant in this case because no fair reason is pleaded in this case.

Wrongful dismissal

55. Section 86 ERA Rights of employer and employee to minimum notice, provides:

(1)The notice required to be given by an employer to terminate the contract of employment of a person who has been continuously employed for one month or more—

(a)is not less than one week's notice if his period of continuous employment is less than two years,

(b)is not less than one week's notice for each year of continuous employment if his period of continuous employment is two years or more but less than twelve years, and

(c)is not less than twelve weeks' notice if his period of continuous employment is twelve years or more.

Accordingly, in this case and based on the claimant's agreed dates of employment, if he was dismissed, he was entitled to seven weeks' notice of termination in accordance with this statutory provision. The claimant does no claim that he had a contractual entitlement to longer notice.

Unlawful deductions

56. Section 3 Right not to suffer unauthorised deductions.

(1)An employer shall not make a deduction from wages of a worker employed by him unless—
(a)the deduction is required or authorised to be made by virtue of a statutory provision or a relevant provision of the worker's contract, or
(b)the worker has previously signified in writing his agreement or consent to the making of the deduction.

Failure to provide written particulars of employment

57. It is a key element of the claimant's case that he was not provided with a written contract of employment or any written particulars of his employment. No such document is referred to in the response nor has one been disclosed before this hearing in accordance with the tribunal orders.

58. Section 38 of the Employment Act 2002 failure to give statement of employment particulars etc.
(1) This section applies to proceedings before an employment tribunal relating to a claim by [a worker] under any of the jurisdictions listed in Schedule 5.

(3) If in the case of proceedings to which this section applies—
(a) the employment tribunal makes an award to the [worker] in respect of the claim to which the proceedings relate, and
(b) when the proceedings were begun the employer was in breach of his duty to the [worker] under section 1(1) or 4(1) of the Employment Rights Act 1996,
the tribunal **must**[2], subject to subsection (5), increase the award by the minimum amount and may, if it considers it just and equitable in all the circumstances, increase the award by the higher amount instead.

(4) In subsections (2) and (3)—
(a) references to the minimum amount are to an amount equal to two weeks' pay, and
(b) references to the higher amount are to an amount equal to four weeks' pay.

(5) The duty under subsection (2) or (3) does not apply if there are exceptional circumstances which would make an award or increase under that subsection unjust or inequitable.

## Discussion, conclusions and my reasons

*Who was the claimant employed by?*

59. The claimant cannot have been employed by the second or third respondents when he was first employed in 2011, they simply did not exist. In terms of the pleaded case it is impossible for the claimant to have been employed by the second respondent but no explanation for this is offered by the respondents' solicitor in the response form nor is a history of employment pleaded which could explain this discrepancy.

[2] My emphasis

60. The claimant was offered employment by the first respondent. If the first respondent intended to make that offer on behalf of another legal person, including a company, the first respondent was obliged to make that clear to the claimant. He failed to do so.

61. The claimant was offered employment by the first respondent. He worked for the first respondent across the group of companies following the instructions of the first respondent. Sometimes the claimant worked as a personal assistant or a personal driver. The claimant was subject to the control of the first respondent and it is was the first respondent who terminated his employment. Those are all facts consistent with the claimant being employed by the first respondent.

62. At one point in the correspondence in the bundle the first respondent says the claimant "you were employed by the third respondent for the past years" (see above) but if this is intended to suggest that the claimant's employer had changed to the third respondent for the last 18 months or so of his employment, the respondent had no right to unilaterally change the claimant's terms of employment to change the parties to the contract and as I have noted, it has never been suggested there was a TUPE transfer nor are there are any fact in this case which suggest such a transfer of employment. The claimant was never told that his employer had changed. I have concluded that the references to the claimant being employed by different companies, both in the course of these proceedings and in earlier correspondence to the claimant about his pension and pay may have reflected the intentions of the first respondent, but that did not change the contract entered into in 2011. The fact that significant tax and other significant documents were produced reflecting the first respondent's intentions without reflecting the contractual position does not mean that the contract was changed, it means HMRC and the relevant pensions companies were provided with incorrect information.

*The consequences of the failure to provide written particulars in this case*

63. The first respondent did not provide the claimant with a contract of employment and he failed to comply with his legal obligation to provide the claimant with a statement of his written particulars of employment. If this document had been provided there would not any uncertainty about who the employer was and what the claimant's contractual entitlements to pay were. I am concerned that this employer has sought to hide behind the confusion this state of affairs has created to seek to avoid his legal obligations. That is demonstrated by the shifting arguments put forward about who the employer was on the part of the respondents. For this regard I regard the breach of the obligation to provide written particulars to be particularly serious.

64. **I find that is just and equitable to award the higher amount of 4 weeks' pay under s38 of the Employment Act 2002 (a week's pay is subject to the same cap as for the calculation of the basic award). That award is £2210.**

*Was the claimant dismissed?*

65. There was no intention on the claimant's part to end his employment. All he wanted was for the first respondent to sort out the German shareholding issue. The fact that he did not agree to transfer a significant sum to the claimant does not mean that he resigned. There is no such thing as an "automatic resignation". The fact that the first respondent had transferred the claimant's duties to other members of staff suggests that the first respondent had decided to bring his employment to an end sometime before, but in any event the claimant was dismissed by the first respondent when the claimant did not do what he was told and the date of the dismissal was the day when he was told to go home without pay. I have no hesitation in finding that the claimant was dismissed on 24 August 2019.

*Was the claimant unfairly dismissed?*

66. No fair reason for the dismissal was offered by the respondent. It follows that his dismissal was unfair contrary to s94 of the ERA.

67. In compensation the claimant is firstly entitled to a basic award.

68. **Based on his age and length of service, the claimant is entitled to a basic award of £4462.50**

69. I concluded that the claimant faces a further period of unemployment after this hearing of around 6 months. He told me that he has found finding a job difficult in light of the economic pandemic and the effects of lockdown and I have no reason to doubt that. He told that he received £1,500 for some casual work during this time. He also worked against for a while for the first respondent in January 2020 but was not paid for that so I have ignored that for calculation purposes when I assess the claimant losses from dismissal from the purposes of the compensatory award.

70. The claimant has suffered an immediate loss of net earnings of 69.3 weeks which is 41,803.84. deducting the monies the claimant has received for casual work that is £40,303.84. I would award £450 for loss of statutory rights and £15,623.66 for future loss. However, I must apply the statutory cap set out in s124 of the Employment Rights Act which caps compensation at 52 weeks gross pay.

71. In preparing these written reasons I have realised that I made a typographical error in my original judgment and will ask the staff to issue a certificate of correction with my minor correction. **The correct figure for the compensatory award is £40,903.20.**

Was the claimant wrongfully dismissed?

72. The claimant was entitled to seven weeks' notice of the termination of his employment and he received none. **He is entitled to damages for the failure equivalent to 7 weeks net pay which is £4,222.61**

Did the claimant make unlawful deductions from the claimant's wages?

73. The response form says this

9. With regard to payments alleged to be due and owing to the Claimant in relation to the period prior to his resignation without notice, and pending the provision by the Claimant of a schedule of loss, the Second Respondent's position is that it declined to make any such payment to the Claimant because he wrongfully withheld keys to company premises (which he has now returned) and wrongfully transferred the Second Respondent's website domain names and email login details to himself at the time when he resigned. The School Respondent will reconsider its position with a view to narrowing the issues once the schedule of loss is served and once the website domain names and email login details are transferred back to it.

74. There is no denial that the claimant is owed the monies he claimed in his claim form but rather a suggestion the first respondent was not prepared to pay those monies until the claimant did what the respondents wanted about the website. There is no evidence that the respondent was entitled to make a deductions in relation to those sums' accordance with s13 of the ERA and I have found that the claimant was entitled to sales commissions bonuses and to unpaid holiday pay. **The claimant is entitled to £1170 plus £2,202.48 (calculated as a gross sum which will have to be subject to appropriate PAYE deductions) in respect of holiday pay that he was owed.**

**Employment Judge Cookson**

Date 26 February 2021
JUDGMENT SENT TO THE PARTIES ON

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FOR THE TRIBUNAL OFFICE