



# EMPLOYMENT TRIBUNALS

**Claimant:** Mr S Korda

**Respondent:** Win2 Ltd

**Heard at:** Bristol

**On:** 7 & 8 March 2017

**Before:** Employment Judge Mulvaney

## Representation

Claimant: In Person

Respondent: Mrs Letenyei, Director

# RESERVED JUDGMENT

The judgment of the Tribunal was as follows:

## 1) Claimant's claims:

- a) The claimant's claim for failure to provide a written statement of terms of employment succeeded and the respondent is ordered to pay the claimant the sum of: £696.78;
- b) The claimant's claim for unlawful deduction from wages succeeded and the respondent is ordered to pay the claimant the sum of: £7,355.18;
- c) The claimant's claim for holiday pay succeeded and the respondent is ordered to pay the claimant the sum of: £418.03;
- d) The claimant's claim for breach of contract did not succeed and was dismissed.

## 2) Respondent's contract claim:

- a) The respondent's counterclaim for breach of contract succeeded and the claimant is ordered to pay the respondent the sum of £6,134.50.
- 3) The balance due to the claimant from the respondent is therefore £2,335.49 (£8,469.99 - £6,134.50).
- 4) The respondent is also ordered to pay the claimant's costs in the sum of £390.

# REASONS

1. By a claim form dated 16 March 2016 the claimant brought claims for failure to provide a written statement of terms and conditions, unlawful deduction from wages, holiday pay and breach of contract (notice pay). The respondent counterclaimed, claiming breach of contract by the claimant.
2. The respondent operates from leased premises in Bath and runs escape room games and detective tours. The claimant was employed to manage the respondent's operation in Bath and he was provided with on-site accommodation in a flat above the store. The respondent also employed part time staff who assisted the claimant. Mrs Letenyei, the owner and Director of the respondent, resides in Hungary.
3. The Tribunal heard evidence from the claimant and for the respondent from Mrs Letenyei, the Company owner and Director, Mr T Lingard, a friend of Mrs Letenyei's, Mr L Farkas, the manager who replaced the claimant and Mr L Killick the current manager. The claimant provided witness statements from five other witnesses who did not attend the Tribunal. This impacted on the weight that I attached to that evidence.
4. The case was originally listed to be heard with a one hour time allocation. When the respondent submitted a counterclaim the time allocated was extended to two hours and the case listed for hearing on the 28 September 2016. At the first hearing it became apparent that the issues were unclear and case management directions had not been complied with. The hearing was converted to a Preliminary Hearing, the issues identified and the case relisted with a one day time allocation on the 5 December 2016. At that hearing there had been further non-compliance with directions and the hearing bundle had more than doubled in size. At the hearing on the 5 December 2016, the parties agreed settlement terms and the case was provisionally relisted for hearing with a two day time allocation. The settlement subsequently failed and further difficulties arose between the parties in complying with directions for exchange of documents and agreement of the bundle. Another Case management Preliminary Hearing took place on the 10 February 2017 and new directions were given to address the difficulties between the parties.
5. In documents prepared for the Tribunal hearing, particularly the schedule of loss and the counter schedule the parties had included claims for matters such as rent compensation (claimant) and loss of business reputation (respondent) that had not formed part of the pleadings prior to the date of hearing. For the avoidance of doubt only those claims and counterclaims which had been referred to in the pleadings and identified in the issues fell to be determined in these proceedings. Both parties were representing themselves at the hearing and English was not their first language.

**The issues to be determined are summarised as follows:**

## **Claimant's claims**

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6. Written contract: The claimant was not provided with written terms and conditions of employment, a fact that the respondent conceded.
7. Employment status: The claimant initially asserted that he was a shareholder and Director of the respondent company and not an employee. He subsequently conceded that Mrs Letenyei was the only shareholder and Director of the respondent and that he was an employee. He nevertheless contended that some payments received by him from the respondent were share dividends reflecting an agreement that he was a business partner of the respondent.
8. Unlawful deductions from wages: The claimant contended that based on the hours that he worked for the respondent his remuneration amounted to less than the national minimum wage. There was a dispute between the parties as to the remuneration received by the claimant and as to the hours that he worked. The claimant was provided with free accommodation by the respondent and the value of that accommodation when calculating the claimant's wage was an issue for determination.
9. Unpaid annual leave: The claimant claimed that he was entitled to statutory leave and that he had not taken his full leave entitlement at the date of his dismissal.
10. Breach of contract: It was not in dispute that the respondent dismissed the claimant without notice on the 2 November 2015. The respondent contended that it was not under an obligation to give notice as the claimant had committed gross misconduct justifying summary dismissal. It is for the respondent to prove on the balance of probabilities that the claimant actually committed the gross misconduct. If it did not do so, then the amount of notice to which the claimant was entitled was in issue. The alleged misconduct relied on by the respondent was:
  - 10.1. Making unauthorised use of the company debit card between June and October 2015 and using the debit card to purchase items for the claimant's own personal use without authority.
  - 10.2. Attempting to form a business relationship with another company in breach of his duty of fidelity.

**Employer's contract claim**

11. The respondent contends that the claimant was in breach of contract in two respects:
  - 11.1. The claimant used the respondent's business debit card for items of personal expense.
  - 11.2. The claimant removed items of equipment from the premises which were the property of the respondent.

**Findings of fact**

**Date of commencement of employment**

12. Mrs Letenyei and the claimant met in Hungary in May/June 2014. They knew each other from University some years previously and Mrs Letenyei was looking for someone to manage a newly developing business in Bath, hosting

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escape rooms and running detective tours. The claimant had relevant experience and skills and he offered to take on the role. It was agreed that he would do so. There was a dispute between the parties as to what was agreed between them as to the terms of the claimant's employment. Nothing was recorded in writing at the time. I found that there was limited discussion as to terms. The claimant was unemployed, unwell and keen to be given an opportunity. Mrs Letenyei was keen to get her business up and running. She was prepared to assist the claimant by paying for a surgical operation he needed and for his flight to the UK. I found that neither party addressed their minds to contractual terms as hours of work, holiday, notice etc.

13. It was the claimant's evidence that he arrived in Bath from Hungary in July 2014 and started work immediately at the respondent's business although he was not paid for working in July. Mrs Letenyei's evidence was that the claimant was provided with free accommodation at the premises in Bath in July. She said that he was recuperating from his operation the previous month so carried out some small pieces of work on a goodwill basis in July for which she made an ex gratia payment. She said that the agreement was that he should not formally start work until 1 August 2014. I found as a fact that the claimant was not an employee of the respondent's until 1 August 2014. A form in the bundle recording the claimant's details, which the claimant confirmed he had completed, set out his start date of employment as 1 August 2014 (p146). He had not sought any payment for work carried out in July 2014 prior to commencing these proceedings.

**Claimant's pay**

14. The claimant's evidence was that his agreement with Mrs Letenyei was that for the first three months of his employment as he built the business he would be paid £300 per month, receive free accommodation and £5 commission on each detective tour or escape room booking. The claimant referred to a document provided to him by Mrs Letenyei after his dismissal 15 months later in which she set out the offer she had made to the claimant before he started (p170). The document did include the terms referred to by the claimant but Mrs Letenyei's evidence was that the claimant rejected those terms, as she had recorded in the next paragraph of the document at p170, because he wanted a 'minimal salary', which she agreed; in addition he would receive a 30% and subsequently a 50% profit share. Mrs Letenyei's evidence was that the agreed minimum salary was £300 per month, with a further £500 paid in addition which would be counted towards the claimant's 30% and then 50% share of the business' profits. A document in the bundle (p188) prepared by the respondent at the time of the claimant's dismissal was consistent with Mrs Letenyei's explanation showing the claimant's salary as £300 and additional sums paid to the claimant comprising at least an additional £500 per month. Although neither of the respondent's documents at 170 or 188 contained the figures of £500 or of £800, it was not disputed that the figure of £801.36 was the salary figure that appeared in the claimant's payslips and was the salary figure given by the claimant in his application for working tax credit. I found that the salary arrangement was as described by Mrs Letenyei.
15. There was a dispute between the parties as to the sum that the claimant was actually paid during his employment. It was not disputed that he received monthly payslips which stated that his net salary was £801.36. The claimant confirmed that he applied for tax credit on the basis that he received a salary

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of £800 per month. The claimant's P60 for the tax year ending 5 April 2015 showed that he had earned £6,504 up to that date which was consistent with the claimant having been employed for just over 8 months at a salary of £801.36 per month.

16. Against this evidence, the claimant contended that the only part of his salary that was fixed was £300 per month and that, although he was in fact paid £801.36 per month by credit transfer, he had to give back to Mrs Letenyei 30% of £500 (£150) and subsequently 50% of £500 (£250) on a monthly basis. The claimant's evidence was that he paid these sums to Mrs Letenyei in cash on her visits to Bath from Hungary when they spent time going through the accounts together. The claimant did not produce his own bank statements to show cash withdrawals to support his evidence that he made cash payments to Mrs Letenyei. Mrs Letenyei's evidence was that the claimant had never repaid a proportion of his salary to her. I did not find the claimant's evidence on this point to be credible. His explanation for agreeing to repay money to Mrs Letenyei was that Mrs Letenyei got a tax benefit from the arrangement. This did not explain why he based his tax credit application on a higher rate of pay than he received. In the absence of any evidence to contradict the claimant's P60, his application for tax credit and his own payslips, I concluded that the claimant was paid a basic wage of £801.36 per month throughout his employment and that he did not repay any of that sum to the respondent.
17. It was not disputed that the claimant had the benefit of free accommodation from the respondent from 1 August 2014 until the end of August 2015. The respondent valued that benefit at £400 per month as Mrs Letenyei's evidence was that the respondent also paid the claimant's council tax and utility bills. The claimant disputed that the respondent paid his council tax but in any event for the purpose of calculating the claimant's pay under the National Minimum Wage Regulations, an employer can only offset a sum for accommodation and not for any other benefits. The applicable accommodation offset rates under the National Minimum Wage Regulations during the claimant's employment were £5.08 per day or £35.56 per week in 2014 and £5.35 per day or £37.45 per week in 2015.
18. The claimant contended that because the cost of the premises was included as an expense of the business and therefore reduced the amount of his profit share, he had in effect already paid for his accommodation through that calculation and so there should have been no additional charge. I concluded that the free accommodation provided to the claimant was a benefit received by him in his capacity as an employee of the business. As such the respondent was entitled to add the value of that benefit at the applicable rate in calculating the claimant's pay. It was also entitled to treat the cost of the lease of the premises as a business expense before calculation of profit.
19. On 17 July 2015 the claimant received from the respondent the sum of £6,725. The respondent's evidence was that this reflected the claimant's 30% profit share in the business for the period January 2015 to July 2015. The claimant contended that it was a share dividend and therefore did not represent earnings. However the claimant accepted that he did not own any shares in the respondent company and so could not have received a share dividend. I found that the sum was as described by the respondent; a sum

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representing a 30% share of the business profits for the months of January to July 2015 paid to the claimant as a salary enhancement.

20. In the period August to November 2015 the claimant continued to receive £801.36 net pay per month. The claimant received no authorized payment in respect of profit share for the period 1 August 2015 to 2 November 2015. In his witness statement the claimant at paragraph 12g stated: *'According to her last line of our revenue share my share was £5,846. (Bundle:188). It is almost exactly the same amount as her claims I stole from her. Did I steal it or was it my share?'* The claimant's wording suggests that he accepted that he had taken sums from the business during that period, despite his subsequent attempt to explain it as business expenditure (see paragraphs 35 – 39 below). Mrs Letenyei's evidence was that the sum of £5,846 shown at p188 reflected the unauthorized withdrawals from the respondent's bank account made by the claimant that she wished to discuss with him in October and November. In the event, that discussion did not take place as the claimant avoided meeting with Mrs Letenyei and by the time a meeting did take place, she had decided that she had to dismiss him.
21. It was Mrs Letenyei's evidence that following the claimant's dismissal the respondent had to meet a VAT liability amounting to £8,400 and corporation tax of £4,762. It was her evidence that there was no profit made by the company in the period 1 August 2015 to 2 November 2015. There was evidence in the bundle (p135 and 137) that VAT and corporation tax in these sums were paid and it was not challenged by the claimant. There was no further evidence to show that the business had made a profit in that period and I found that there was no profit share due to the claimant for the period August – November 2015.

**Claimant's hours of work**

22. The claimant contended that he worked at least 72 hours per week. The store was open from 10am until 10pm six days per week and the claimant's evidence was that he was on duty throughout the store's opening hours. He therefore claimed to be working 12 hours per day six days per week making up the 72 hours claimed. His evidence was that his hours were agreed with Mrs Letenyei before he arrived in Bath. I did not believe that there had been an agreement between the parties about hours of work at any point in the claimant's employment. It was not consistent with the way in which the parties managed their business relationship which was characterized by a lack of formal discussion and documentation.
23. The opening hours of the store were not disputed. The claimant's role included not only hosting the rooms and the detective tours but marketing, cleaning, taking bookings, managing the accounts, managing employees etc. The claimant's evidence, which I accepted, was that it was in his interest to maximize the income from the store as some of his earnings were based on profit share.
24. Mrs Letenyei's evidence was that the claimant did not work for more than 40 hours per week but Mrs Letenyei was not present on a day to day basis at the store and so could not give direct evidence of the claimant's hours of work. The claimant produced witness statements from a part time employee which asserted that he worked more than 40 hours and also from workers at

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neighboring businesses who asserted that he worked long hours. These witnesses were not at the Tribunal to give evidence and I found the evidence to be of limited value as none of the witnesses were present at the premises on a day to day basis.

25. There were no time sheets to indicate the number of hours worked by the claimant. The claimant contended that in the same way as a shop worker is working whether there are customers in the shop or not, he was working during the store's opening hours as he was in effect on duty throughout that time. I found that the parallel was not exact as the claimant had a level of autonomy that a shop worker generally does not have. In addition customers booked the tours and escape games in advance through the internet so the claimant knew when customers would be arriving and for how long they would be engaged. He could therefore plan his day accordingly. Although the claimant said that bookings could be made minutes before the booking time, I found that this was an infrequent occurrence.
26. The busiest day of the week for bookings at the store was Saturday and the respondent's records showed that bookings were usually spread throughout the day on Saturdays, meaning that the claimant was likely to be working 12 hours on that day. Although the opening hours for the other days of the week were the same: 10am to 10pm, I did not accept that the claimant worked 12 hours on each of those days because bookings were considerably less frequent on those days. On the basis of the bookings for the last three months of the claimant's employment the average weekly number of booked hours at the store was 33 per week. I accepted the claimant's evidence that there was preparation work, work to be done at the end of a booking, and that he had to carry out his other duties, not all of which could be done whilst the events were taking place. However there were part-time employees engaged to assist the claimant. In addition the claimant had a considerable amount of autonomy over how he managed the store so that he could block out days if necessary and he was able to take holidays during which the store was closed for bookings. On the evidence before me I concluded that the claimant worked an average of 12 hours on Saturdays and 8 hours on each of the other five days that the store was open amounting to 52 hours per week in total.

**Holiday pay**

27. In the absence of any written statement setting out the respondent's holiday year or any other terms relating to holiday, I found that the claimant's holiday year ran from the date of the commencement of his employment: 1 August 2014, to the anniversary of that date the following year. The claimant had taken holiday during the first year of his employment and if there was any untaken holiday at the end of that period, there was no document giving an entitlement to carry forward holiday. The claimant's claim for untaken holiday could only be considered for the period 1 August 2015 to the 2 November 2015. Based on the claimant's working hours and the period of the holiday year leading up to his dismissal, I concluded that the claimant was entitled to 7.2 days holiday. The claimant had not taken any holiday during that period. There was an issue between the parties as to whether the claimant had taken the 1 November 2015 as holiday. I found that on 31 October 2015, Mrs Letenyei told the claimant to take the following day off, which he did. Under the Working Time Regulations an employer can only require a worker to take

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leave on a specific day if twice as many days' notice of the leave is given as the period to which the leave relates; in this case two days' notice was required. I found that insufficient notice was given and that the 1 November 2015 did not count as a leave day.

### Breach of contract

28. The claimant was verbally dismissed on the 2 November 2015 by Mrs Letenyei. Mrs Letenyei's evidence was that she had learned that the claimant was making unauthorized withdrawals from the company bank account. Although it was not known at the time whether there was a business explanation for some of those withdrawals, the significant increase in the withdrawals was unexplained and had not been authorized by Mrs Letenyei. Furthermore the respondent's account had been used by the claimant to make personal purchases in the total sum of £1,029.48. These items were shown on the respondent's bank statements and I was satisfied that the claimant had not sought Mrs Letenyei's consent to those purchases before he made them.
29. In addition, Mrs Letenyei had found out that, without any discussion with her, the claimant had approached another company, Blispa, and was negotiating with it an agreement for it to use the respondent's premises for its own detective tour. Mrs Letenyei had been trying without success to meet with the claimant during October to go through the accounts and to ask about the unauthorized withdrawals. She had asked to meet him at 10am on the 2 November 2015. She knew (although she had not been told by the claimant) that the claimant had a meeting booked with Blispa for midday on that day. The claimant texted her in the morning to say he was ill and could not meet her before 2pm. Mrs Letenyei checked that the claimant had attended a meeting with Blispa at midday on that day by talking to the Director of Blispa. She decided in the light of those two matters that the claimant was in breach of his duty of fidelity to the company; that this amounted to gross misconduct and left her with no alternative but to dismiss him.
30. There was evidence in the bundle of the negotiations that had been conducted by the claimant with Blispa and also of the claimant's personal expenditure on the company bank account. The claimant did not dispute the allegation about meeting with Blispa or deny that he had used the company account for personal expenditure. I found that on the balance of probabilities the claimant had committed the alleged misconduct.

### Employer's contract claim

#### Unauthorized cash withdrawals and items of personal expenditure

31. Up until July 2015 Mrs Letenyei had been thinking of going into business with the claimant on a related venture but had had second thoughts and decided that she would not do so. Mrs Letenyei's evidence was that her relationship with the claimant deteriorated after she told him that she would not be going into business with him. It was her evidence that during this period the claimant made a significant number of unauthorized cash withdrawals from the company bank account. The claimant had made unauthorized withdrawals from the company bank account during a visit to Hungary in December 2014 and Mrs Letenyei had made clear to him that he should not



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do so again. Mrs Letenyei said that after she had told him not to do so, the claimant had not made any unauthorized withdrawals until June 2015. Mrs Letenyei's evidence was that from June 2015 the claimant made a number of cash withdrawals from the company bank account amounting to £4,165.04 (p144). He also drew on the company account for some items of personal expenditure amounting to £1,029.48 in total (p143).

32. The claimant's evidence was that he made no withdrawals from the company account without receiving authorization in advance from Mrs Letenyei. I did not find this evidence to have been credible. The bank statements showed that sometimes a number of separate cash withdrawals were made on the same day for relatively small amounts. It seemed unlikely that the claimant would have obtained authority for each such withdrawal. In addition in the case management summary made at the Preliminary Hearing on 10 February 2017, Employment Judge Pirani recorded that the claimant admitted some use of the business bank card for his own benefit although he contended that it was part of the agreement between him and Mrs Letenyei that enabled him to do so. The claimant argued that it was part of the dividend to which he was entitled.
33. In essence the claimant's case seemed to be that because under his agreement with Mrs Letenyei he was entitled to a 30% share of the business profits, he could withdraw sums from the company account in performance of that agreement. This amounted to authorization by the respondent. This conflicted with the claimant's evidence that he repaid sums of £150 and £250 to Mrs Letenyei on a monthly basis as part of their agreement. I found that the claimant's evidence lacked consistency and changed depending on the point that he was seeking to argue at any one time. I found his evidence generally to lack credibility. Mrs Letenyei's evidence by contrast was more consistent and more often supported by the documentary evidence and I found her evidence to be generally more credible than that of the claimant. I found on the evidence presented that the claimant did not have authorization to make the cash withdrawals from the respondent's account that he did during July to November 2015.
34. There were a number of documents in the bundle in which the respondent listed or summarized the cash withdrawals made by the claimant from the respondent's bank account during this period. P144 contained the list finally relied on by the respondent which showed a total of £4,165.04 in unauthorized cash withdrawals. The bank statements for June 2015 – November 2015 (54 – 80), cross referenced with the respondent's list at p144 and showed that those cash withdrawals had been made from the respondent's account during the period. The previous months' statements showed very few cash withdrawals having been made which indicated that this was a change from the financial activity on the respondent's account in preceding months. The claimant and Mrs Letenyei were the only people who had debit cards for the respondent's account and the claimant was the only individual in the UK able to make such withdrawals. The respondent also provided transaction details for a number of the withdrawals in June to November 2015 which showed that the withdrawals were made with the claimant's debit card (82 – 97).
35. The claimant had produced a response to the respondent's ET3 (180 -184) in which he gave explanations for the 'Alleged illegal use of bank account'. The

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claimant's explanations were disputed by the respondent. Specifically, Mrs Letenyei contended that she had personally paid a part time worker, Mrs Szekeres' wages rather than the claimant, who said that he had paid her £2,500 in cash. Mrs Szekeres worked for the respondent from June to October, 72 hours per month in the first four months and 104 in the last month. The bank statements showed no payments made to Mrs Szekeres in that period. Ms Korda, another part timer who worked 75 hours for the respondent in September 2015 was paid £405.50 by credit transfer in that month (75). The statements for the months of June to October showed no similar regular amount of cash withdrawal to corroborate the claimant's evidence that he was withdrawing cash to make payments to Ms Szekeres in respect of her part time hours. In the absence of any corroborative evidence from the claimant that he paid cash to Ms Szekeres I did not find that he did so or that he was authorized to do so.

36. The claimant claimed (184) that he paid £480 in cash to the cleaning lady. A witness statement presented to the Tribunal by the claimant from a Ms Rosario stated that she cleaned the premises on 10 Mondays for 3 hours at £12 per hour, although Ms Rosario did not attend court to give her evidence on oath and be cross examined on it. There was no regular corresponding cash withdrawal which corroborated the claimant's evidence, but it was not challenged by Mrs Letenyei and I accepted the claimant's evidence that this was a business payment for which he withdrew cash albeit not one specifically authorized by the respondent.
37. The claimant contended that £1,000 expenditure was for a car purchase, insurance and tax, however there was no date given as to when this purchase was made and no breakdown of the individual costs so it was not possible to verify it. There was no evidence of a cash withdrawal of this size in the bank statements to corroborate the claimant's evidence and I did not find that this explained any of the cash withdrawals shown in the bank statements. To the extent that the claimant made withdrawals in respect of his personal use of the car these are dealt with under items of personal expenditure below.
38. The claimant stated that £1,080 was withdrawn to pay legal fees to Mr Tomlinson. The bank statement at p57 showed a payment of this sum to Mr Tomlinson from the company bank account. In his oral evidence the claimant said that he had withdrawn the money not knowing that Mr Tomlinson was to be paid by credit transfer but there is no corresponding cash withdrawal shown in the bank statements. I did not accept that this explained any of the claimant's cash withdrawals.
39. In summary therefore I found that of the £4,165.04 listed by the respondent as unauthorized cash withdrawals, all, apart from the sum of £480 paid to Ms Rosario, were in fact unauthorized and unexplained as business expenditure and that the claimant had therefore taken the sum of £3,685.04 unlawfully from the respondent.
40. In addition, I found that the claimant had used the bank card to purchase items for his own benefit in the sum of £1,029.48. These items were listed by the respondent at p143 and I did not accept the claimant's explanations for having used the company account for this personal expenditure which was that he was authorized to do so by Mrs Letenyei. Mrs Letenyei denied giving any such authorization and I preferred her evidence on this point to that of the

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claimant. The items included cash withdrawals for car use for which the claimant had provided no supporting documentation and some items of furnishing and kitchen equipment bought for his new accommodation.

Removal of goods following dismissal

41. Following his dismissal, the claimant asked Mrs Letenyei if he could keep the keys to the premises, so that he could retrieve a few personal items. The claimant then removed from the premises:

- 41.1. a computer valued at £175,
- 41.2. a wi-fi router valued at £60,
- 41.3. a mobile phone belonging to the company valued at £752 (based on 16 month's payments of £47),
- 41.4. a laptop valued at £232.98,
- 41.5. the master keys to the premises valued at £50, the retention of which necessitated the respondent changing the locks at a cost of £150.

Total: £1,419.98

42. The claimant accepted that he removed these items from the premises although he contended that he returned the router at a later date. Mrs Letenyei's evidence which I accepted was that by the time the claimant had returned the router she had had to buy a replacement. It was the only means the business had of accessing the internet and its online booking system. The claimant's evidence was that he took the router to repair it. I did not accept the claimant's evidence on that point. It was not credible that, having just been dismissed, the claimant would have decided to take the router from the business in order to repair it. Mrs Letenyei's evidence was that she had used the router on the 1 November and there had been nothing wrong with it. The level of the claimant's ill feeling towards Mrs Letenyei following his dismissal is apparent in the transcript of facebook and text messages from him to her (p147), for example: *'I would like to get my the money back until noon. It would be good if it did not edge back. Because I can be very unpleasant. Since I don't have any money it's all the same to me. Think about that carefully.'* I found that the taking of the items listed was consistent with the claimant wishing to cause damage to the respondent's business and create leverage for a settlement agreement.

**Conclusions**

43. In reaching my conclusions I considered all the evidence I heard and the documents to which I was referred and which I regarded as relevant. I also had regard to the submissions of the parties.

**Written contract:**

44. S1 Employment Rights Act 1996 (ERA) provides that not later than two months after starting employment, an employee must be provided with a

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written statement of terms of employment. It was not disputed that the claimant was not provided with a written statement of terms of employment.

45. S38 Employment Act 2002 (EA) provides that if an Employment Tribunal finds in favour of an employee in relevant proceedings (including claims under s23 ERA for unlawful deductions from wages), and the respondent has failed to provide a written statement in compliance with s.1(1) ERA, the Tribunal must award two weeks' pay or, if it thinks it just and equitable to do so, four weeks' pay.
46. For reasons set out below, I found in favour of the claimant in his claim for unlawful deductions from wages and so I concluded that I should award the claimant the minimum of 2 weeks' pay under s38 EA. I did not consider that it would be just and equitable to award the higher 4 week sum to the claimant because the casualness and opacity of the arrangement was in large part down to the fact that the claimant and Mrs Letenyei were friends at the outset and the informality of the arrangement held some benefits for the claimant.
47. I awarded the claimant the sum of £696.78 (NMW weekly rate: £348.39 x2).

**Unlawful deductions from wages:**

48. I concluded that the claimant was an employee of the respondent and that as such the National Minimum Wage Regulations (NMW) applied to him. The claimant was paid on a monthly basis and therefore the pay reference period is one month. The national minimum wage rate that applied in 2014 was £6.50 per hour and in 2015: £6.70 per hour. Based on my finding as to the claimant's hours of work (52 per week; 225.33 per month), I concluded that he should have been paid a minimum of £1,464.64 per month in 2014 and £1,509.71 per month in 2015.
49. On the facts found I concluded that the respondent paid the claimant a salary of £801.36 per month. In addition the claimant was provided with accommodation and the offset rate for accommodation under the NMW Regs. was £5.08 per day or £35.56 per week in 2014 and £5.35 per day or £37.45 in 2015. The accommodation offset rate per month in 2014 was £154.09 (£35.56 x 52/12) and in 2015: £162.28 (£37.45 x 52/12).
50. The claimant's salary in 2014 was therefore £955.45 (£801.36 + £154.09) and in 2015 up until 1 September 2015; £963.64 (£801.36 + £162.28). From the 1 September 2015 to 2 November 2015, the claimant's salary was only £801.36 per month as he had moved out of the respondent's accommodation.
51. The claimant was paid a sum in respect of profit share on the 17 July 2015. The respondent's evidence was that this related to the period January to July 2015. Reg 9 NMW provides that payments made by an employer in respect of an earlier pay reference period have to be treated as payments in respect of the current pay reference period only, unless one of the exceptions apply under reg 9(1)(b) or 9(1)(c). Reg 9(1)(b) provides that payments paid by the employer in the following pay reference period can be included in the earlier pay reference period. The reg 9(1)(c) exception only applies where the employee is under an obligation to keep a record of hours worked and so did not apply in this case.

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52. I concluded that under reg 9(1) NMW the payment made in July by the respondent could only be counted as part of the claimant's salary for the months of June and July 2015 and not for January to May 2015. Adding half of the sum of £6,725 to the claimant's salary for June and July 2015, meant that his salary amounted to £4,324.78 (£3,362.50 + £962.28) in each of those months, representing a sum of £19.19 per hour which was well in excess of the national minimum wage for that period. There was therefore no unlawful deduction made by the employer in June and July 2015.

53. The claimant claims unlawful deductions from wages in respect of the whole period of his employment August 2014 to November 2015. His claim was brought within three months of the last of the deductions on 2 November 2015. I considered whether the payments in June and July 2015 which interrupted the series of deductions meant that the series of deductions prior to June 2015 could not be part of the series of deductions that continued after July 2015 so that the claim in respect of the earlier period was out of time. Applying the judgment in the case of *Bear Scotland Ltd v Fulton and another UKEATS/0047/13*, I concluded that as the gap was only 2 months, this was insufficient to break the series of deductions and the claim in respect of the earlier period was not out of time. The claimant therefore has claims for the period 1 August 2014 to 31 May 2015 and for the period from 1 August 2015 to the 2 November 2015, no unlawful deduction having been made in June or July 2015, applying my conclusion in para 52 above.

54. The claimant's claim in respect of deductions for the periods 1 August 2014 to 31 December 2014, 1 January 2015 - 31 May 2015 and 1 August 2015 to 2 November 2015 is in time and I calculate the sums due as follows:

1/8/14 – 31/12/14 (5 months)

NMW: £7,323.20 (£1,464.64 x 5); pay received: £4,777.25

(£955.45 x 5):

Difference: £2,545.95

1/1/15 – 31/5/15 (5 months)

NMW: £7,548.55; (1,509.71 x 5); pay received: £4,818.20 (£963.64 x 5):

Difference: £2,730.35

1/8/15 – 31/8/15 (1 month)

NMW: £1,509.71; payment received: £963.64;

Difference: £546.07

1/9/15 -31/10/15 (2 months)

NMW: £3,019.42 (£1,509.71 x 2); pay received: £1,602.72 (£801.36 x 2), Difference £1,416.70

1/11/15– 2/11/15

NMW: £116.11 (17.33 hours @ £6.70); pay received: £0.

Difference: £116.11

**Total Difference between NMW and pay received: £7,355.18**

55. I therefore award the claimant the sum of £7,355.18 for his unlawful deduction from wages claim.

**Unpaid annual leave:**

56. On the facts found I concluded that the claimant was owed for 7.2 days untaken annual leave for the period 1 August 2015 – 2 November 2015. The

sum he is owed is £418.03 (7.2 x NMW daily rate £58.06) and I award the claimant that sum.

**Breach of contract:**

57. On the facts found, I concluded that the respondent had proved on the balance of probabilities that the claimant committed the gross misconduct that he was alleged to have done, namely the unauthorized use of the respondent bank account and the formation of a business relationship with another company, both of which breached his duty of fidelity as an employee and fundamentally breached the trust and confidence the respondent was entitled to have in him as its employee. I concluded that the respondent was entitled to dismiss him without notice as a result of his misconduct. There was therefore no breach of contract in relation to failure to give notice and no compensation due to the claimant.

**Summary of awards made to claimant**

58. In summary the sums awarded to the claimant are as follows:

Failure to provide written statement:	£ 696.78
Unlawful deduction from wages:	£ 7,355.18
Holiday pay:	<u>£ 418.03</u>
Total	£8,469.99

**Employer's contract claim**

59. On the facts found I concluded that the claimant had breached the implied duty of fidelity in his contract of employment by using the respondent's bank account to make unauthorized cash withdrawals and to purchase items for his personal use. The claimant's removal of goods belonging to the respondent immediately following his dismissal was also a breach of the implied duty of fidelity.

60. The respondent is awarded compensation of £3,685.04 in respect of the unauthorized cash withdrawals; £1,029.48 in respect of the purchase of personal items and of £1,419.98 for the unlawful removal of the respondent's goods, amounting to £6,134.50 in total

**Costs**

61. The respondent is ordered to pay costs to the claimant under Rule 75(1)(b) in the sum of £390 in respect of the issue and hearing fee paid by the claimant in these proceedings.

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Employment Judge Mulvaney

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Date 17 March 2017

RESERVED JUDGMENT & REASONS SENT TO THE PARTIES ON

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FOR EMPLOYMENT TRIBUNALS