THE EMPLOYMENT TRIBUNALS

Claimant		**Respondents**
Mr Z Pinkham	**v**	**(1) Adlify Limited** **(2) Blackmilk Media Limited**

Heard at: London Central **On**: 9 September 2019

Before: Employment Judge H Clark

Representation
Claimant: Ms L Moses - Counsel
Respondent: Mr P Tomison - Counsel

JUDGMENT

The judgment of the Tribunal is that:

1. **The Claimant was not employed by the Second Respondent.**
2. **The First Respondent unlawfully deducted £5,145.46 (accrued annual leave) from the Claimant's wages.**
3. **The First Respondent unlawfully deducted £27,711.57 (notice pay) from the Claimant's wages.**
4. **The First Respondent breached the Claimant's contract in failing to pay him outstanding wages and expenses amounting to £7,496.07.**
5. **The Claimant's claim for unfair dismissal is dismissed upon withdrawal.**

REASONS

1 By a Claim Form presented on 14 January 2019 claims of unfair dismissal, breach of contract, unlawful deduction from wages and breach of the Working Time Regulations (holiday pay) were made against the Respondents. These were denied in a Response Form dated 10 April 2019.

The Claimant withdrew his claim for unfair dismissal, as he did not have the requisite service. The First Respondent accepts that the Claimant was owed wages and holiday pay for July and August 2018 totalling £6,474.30.

2 In the course of establishing the issues between the parties, it became clear that the way the Claimant puts his case had changed from the particulars on his Claim Form. At the time of the presentation of his claim, he was acting in person and had allocated his claims separately between the two Respondents, with the bulk of his outstanding expenses being claimed from the Second Respondent, but the wages, notice and holiday pay claims being made against the First Respondent. This hearing was postponed from August 2019 because the Claimant had discovered that he had a form of legal expenses insurance and, accordingly, wished to seek legal representation. A postponement was granted on that basis and Ms Moses was instructed for this hearing. However, there was a delay in receiving approval from the Claimant's insurer, so Ms Moses did not have authority to incur costs until Friday 6 September 2019, the working day before the hearing. The Respondents, therefore, had no prior notice of the change in the way the case was put.

3 Part of the morning of the hearing was taken up with an application by the Claimant to amend his claim to permit him to pursue all elements of his claim against both Respondents in the alternative. This involved Ms Moses drafting a brief statement of case. The application to amend was opposed by the Respondents, but was, in large part permitted as it constituted a relabelling of the facts as originally pleaded. The Tribunal indicated to the Respondents that they would be afforded an opportunity to make further written submissions in light of the fact that Mr Tomison's skeleton argument (understandably) addressed the Claimant's case as originally pleaded. The Claimant was not permitted to amend his claim in relation to the expenses he asserted were owed by the First Respondent, because these had been admitted by the First Respondent and, accordingly, no evidence had been adduced in relation to them. Both the Respondents were, therefore, potentially prejudiced by the late application to amend the claim in respect of these expenses. It was not proportionate to postpone the hearing again to enable the Respondents to obtain any evidence in relation to these expenses.

<u>The Issues</u>

4. The issues which the Tribunal had to determine were:

4.1 As to the Claimant's employment status in relation to the Second Respondent (it is admitted that he was an employee of the First Respondent). It is the Claimant's case that the Respondents were his joint employers on the same terms with effect from 26 April 2018. The Respondents suggest that he was an independent contractor in relation to Blackmilk at all material times.

4.2. As to the Claimant's entitlement to the balance of outstanding pay/expenses promised by Mr Seeburg on 12 September 2018 (in the sum of £7,496.07) against both Respondents.

4.3 Whether there was an agreed early termination of the Claimant's employment with either or both Respondents, such that he is not entitled to the balance of his notice pay/accrued holiday pay. The notice pay is £27.711.57 and accrued holiday pay up to and including 29 November 2018 of £5,145.46.

4.4 In the alternative the Respondents suggest that the Claimant was in repudiatory breach of contract, which the Respondent(s) accepted on 5 September 2018 and, therefore, the Claimant had no entitlement to notice pay.

The Hearing

5. The Tribunal heard oral evidence from the Claimant and from Mr Seeburg for the Respondents. They were both cross-examined on their evidence. The Tribunal also had the benefit of a joint bundle of documents running to 294 pages. The evidence finished at 15.45 and directions were made for the exchange of written submissions, given the late amendment to the Claimant's claim. Ms Moses served her written submissions on the Respondents by 12 noon on Monday 16 September, Mr Tomison responded by 4pm on Friday 20 September. Ms Moses was given leave to respond on any matter of law by 4pm on 25 September 2019. She did so in submissions received on 23 September 2019, which went beyond pure matters of law.

The Law

6. The law on status which the Tribunal has to apply is set out in section 230 of the Employment Rights Act 1996. An employee is defined as:

> "*an individual who has entered into or works under or where the employment has ceased worked under a contract of employment"*

A contract of employment is a:

> *"contract of service or apprenticeship whether expressed or implied and if it is expressed whether oral or in writing*."

It is possible for a Claimant to be an employee for some purposes but not for others. A determination by an Employment Tribunal would not necessarily bind the tax authorities or the civil courts in a personal injury or health and safety case.

7. It is uncontroversial that for an employment relationship to exist the case law suggests that a number of minimum features are required: a contract (not necessarily in writing); an obligation to perform work personally (albeit that a limited or occasional power of delegation might not be fatal); mutuality of obligation, that is to say an obligation on the employer to provide work and an obligation on the employee to accept and perform the work offered; an element of control over the work by the employer. If these features are present, the contract maybe a contract of employment but it is not necessarily so. The Tribunal will then look at all the other features of the relationship, such as who provided the equipment, whether the worker hires staff, the degree of financial risk taken by the worker, whether the work done is an integral part of the employer's business, the intention of the parties, the method of remuneration and taxation, whether payment is made for sickness or holiday, whether there are pension arrangements and whether there is a disciplinary or grievance procedure which applies to the worker. Where documentary interpretation is not involved, it is generally a question of fact whether a contract is one of service or for services. No single issue is conclusive so one cannot simply say that because a Claimant was not taxed on PAYE, he or she was, therefore, not an employee. The Tribunal must look at the reality of the situation.

8. On the question of employment status, the parties referred the Tribunal to the well known cases of *Ready Mix Concrete (South East) v Minister of Pensions and National Insurance [1968] 2 QB 497* and *Carmichael v National Power Plc* [1999] 1 WLR 2042, *Lee Ting Sang v Chung Chi-Keung* [1990] 2 AC 374 and *Pimlico Plumbers Ltd v Smith* [2018] UKSC 29.

9. This is an unusual case in that it is alleged that, although the Claimant was initially engaged by the Second Respondent pursuant to a written "freelancer" agreement, it is suggested that a subsequent contract of employment was expressly agreed and the terms of that contract were implicitly exactly the same terms as his employment by the First Respondent. This would mean that both Respondents owe the Claimant expenses and notice pay. Ms Moses relies on a passage from Chitty [17-02] "*joint liability arises when two or more persons the promise do the same thing. There is only one obligation, and consequently, performance by one discharges the others."*

10. Ms Moses also referred the Tribunal to a passage in *Ali v Petroleum Company of Trinidad and Tobago* [2017] UKPC 2 concerning the circumstances in which a contractual term should implied per Lord Hughes at paragraph 5: "*it is enough to reiterate that the process of implying a term into the contract must not become the rewriting of the contract in a way which the court believes to be reasonable, or which the court prefers to the agreement which the parties have negotiated. The term is to been implied only if it is necessary to make the contract*

work, and this it may be if (i) it is so obvious that it goes without saying (and parties, although they did not, ex hypothesi, apply their minds to the point would have rounded on the notional officious bystander to say, and with one voice, "oh, of course") and/or (ii) it is necessary to give the contract business efficacy. Usually the outcome of either approach will be the same. The concept of necessity must not be watered down. Necessity is not established by showing that the contract would be improved by the addition. The fairness or equity of a suggested implied term is an essential but not a sufficient precondition for inclusion. And if there is an express term in the contract which is inconsistent with the proposed implied term, the latter cannot, by definition, meet these tests, since the parties have demonstrated that it is not their agreement."

11. Mr Tomison relies on the guidance of the Court of Appeal in *James v Greenwich London Borough Council* [2008] ICR 545 at paragraph 30 concerning the implication of a contract of employment (albeit in the context of agency workers):

"*the real issue in "the agency worker" cases is whether a contract should be implied between the worker and the end-user in a tripartite situation of worker/agency/end-user rather than whether, as in "the casual worker" cases where neither the worker nor the end user as an agency contract, the irreducible minimum of mutual obligation exists. In the agency worker cases the problem in implying a contract of service is that it may not necessary to do so in order to explain the worker's provision of work to the end user or the fact of the end user's payment of the worker by the agency. Those facts and the relationships between the parties are explicable by genuine express contracts between the worker and the agency and the end user in the agency, so that an implied contract cannot be justified as necessary."*

12. The Tribunal's jurisdiction in relation to unlawful deduction from wages derives from section 13 of the Employment Rights Act 1996. Wages are defined in section 27 to explicitly exclude 27(2)(b) "*any payment in respect of expenses incurred by the worker in carrying out his employment."* Thus, any claim for unpaid expenses relies on the Employment Tribunal Extension of Jurisdiction (England & Wales) Order 1994. If the Claimant is not an employee, there is, therefore, no scope for claiming outstanding expenses as a worker from the Employment Tribunal. Such a claim would have to be made in the County Court.

Factual Background

13. At the material times, the First and Second Respondents were associated companies – part of Adlify Media Holdings Limited. Mr M Seeburg was a director and shareholder of both companies, which occupied the same office space in London. The First Respondent ("Adlify") was incorporated on 1 October 2017 and is an adtech company, which ceased to operate in October 2018. The Second Respondent ("Blackmilk") is a marketing consultancy, which is still in existence.

14. It is agreed that the Claimant was employed by Adlify as Managing Director from 15 January 2018 pursuant to a written contract of employment dated 18 November 2017. He resigned this employment on 30 August 2018 and there is a dispute between the parties as to whether there was an agreed termination on either 5 September 2018 or whether he is entitled to his full three months' notice until 29 November 2018.

15. The Claimant entered into a "freelancer" agreement with Blackmilk on 18 November 2017. The written agreement entitled the Claimant to commission on work brought into the Blackmilk by him. He was described as a "Board Adviser" to Blackmilk and was given a Blackmilk email address in addition to his Adlify email address. No commission was paid (or is claimed) under that agreement and it is not suggested that written agreement gave rise to a relationship of employment between the Claimant and Blackmilk. However, it is said by the Claimant that from 26 April 2018, it was agreed that the Claimant would be employed by Blackmilk. This is disputed by the Respondents.

16. The Claimant's written contract of employment with Adlify entitled him to a salary of £140,000 per annum rising to £180,000 from 16 June 2018 plus a profit related bonus. His duties were contained at clause 6 and included an obligation at 6.1.5 to:

"use your best endeavours to promote, protect, develop and extend the business of the Group;"

At 6.1.9:

comply with all regulations, reasonable requests and instructions relating to the Company or to any Group Company made by the Board (or anyone authorised by it);

At 6.1.10 "*spend the whole of your time, attention and ability to carrying out your duties with due care and attention."*

And at 6.1.11 to

"*well and faithfully serve the Company to the best of your ability and use your best endeavours to promote the interests of the Company and any relevant Group Company;"*

It is accepted that Blackmilk is such a Group Company. Mr Seeburg was CEO of both Adlify and Blackmilk, which were owned by the same BVI Company, Adlify Media Holdings Limited.

17. At the start of his employment with Adlify on I January 2018, the Claimant's efforts were largely focused on Adlify, which was developing a Supply Side Platform using a Polish company to develop this. It was the Claimant's unchallenged evidence that he advised Adlify that there was no need to develop its own platform (with associated costs), thus saving Adlify a significant amount of money. Using existing technology, a Supply Side Platform was operational by the end of April 2018. However, it had become clear that there was limited demand for the Platform, so there was a dearth of customers.

18. In April/May 2018, the Claimant claims he was asked by Mr Seeburg to refocus his time and efforts on Blackmilk rather than Adlify, as his primary work at Adlify was complete. The Claimant suggests that between 5 May and 5 September 2018 he spent twice as much time working on Blackmilk business rather than Adlify. Whilst he did not allege in his written witness statement that a particular agreement was reached concerning his employment by Blackmilk, he asserted in his oral evidence that he had a meeting with Mr Seeburg on 26 April 2018 at which this was agreed. The Claimant was told to pause work on Adlify and to be Managing Director of Blackmilk. It is common ground that the Claimant produced a strategy document for Blackmilk in May 2018 which lists him as Blackmilk's Managing Director – Advising/Business Development in its organogram, but Mr Seeburg rejects any suggestion that the Claimant's status in relation to Blackmilk changed in April 2018.

19. The Claimant has produced a printout of his email traffic with and on behalf of Blackmilk to demonstrate that a large proportion of his work related to Blackmilk's business. As the Tribunal was only provided with a snapshot of the Claimant's emails, a meaningful comparison cannot be made with the situation before his alleged employment by Blackmilk. However, it is common ground that the Claimant's involvement with Blackmilk increased in the course of the spring of 2018. For instance, the Claimant was involved in finding new shared offices for the Respondents, reducing their monthly rental from £17,000 to £6,000 per month. Both tenancies were in the name of Blackmilk, although the office space was also used by Adlify. The Claimant interviewed a new employee for Blackmilk in the US and travelled to the US to setup new business meetings for Blackmilk. The Claimant was entitled to claim expenses from Blackmilk under his "freelancer"

agreement (clause 4) and was to be remunerated for new business, so travelling to the US to try expand Blackmilk's client base is wholly consistent with this agreement.

20. Both Adlify and Blackmilk had cash flow problems in the early summer of 2018 and the Claimant personally agreed to pay rent on the original premises of £16,500 to enable a deposit to be paid on the new, cheaper premises. The Claimant paid £16,500 using his personal credit card and was subsequently reimbursed for this by Adlify as his employer. In July 2018 the Claimant was again asked to cover the last month's rent at the old premises in the sum of £18,117 on the basis that he would be reimbursed for this. Part of this payment is still owed to the Claimant. Further, the Claimant's July and August 2018 salaries were not paid in full (£3,237 remains outstanding). In spite of assurances that the shortfall would be reimbursed to him, they were not.

21. By email dated 2 August 2018 to Mr Seeburg the Claimant expressed his frustration at the partial and late payment of his salary. He added,

"*you also mentioned you would like me to have more of a vested interest in the BMM business and have kindly offered me a total of 1% equity of the company. Given I came on board to manage Adlify's SSP/supply business and was given 5% equity, I feel it's only fair to be given the same amount given the effort and care I have put into this business. I'm keen to continue to help you drive this business and create a scalable global Marketing agency/consultancy and feel the above shows my vested interest in Adlify/BMM but also assures me that you are committed to my future within the company. Also in the interest of creating parity amongst the three of us, I propose we change my job title to Chief Revenue Officer where I will continue my current duties but will also be responsible for any rates and pricing approvals before communicated to external clients, management of the P&L and financial projections and will contribute to overall growth management and strategies. Let me know your thoughts and if we were are on the same page I would like this written into a new contract."*

22. In his witness statement the Claimant explained that on 17 August 2018 Mr Seeburg "*officially stated that my position would officially change and that I would become more involved in Blackmilk Media*." At this time, it was agreed that the Claimant's 5% shareholding in Adlify would be exchanged for a 5% shareholding in Blackmilk. Throughout the Claimant's employment, he was always issued with payslips bearing Adlify's name, albeit in the last few months of his employment, such salary as he was paid was financed by a loan from Blackmilk to Adlify, albeit it was paid from Adlify's bank account.

23. On 17 August 2018 Mr Seeburg wrote to the Respondents' Accountants stating that; "*[the Claimant's] position is currently changing and since he will now be involved more and more in BMM we wanted to reflect this in the share structure. Therefore we would like him to have 5% shares in the Blackmilk Group Holdings (Global BVI) and give his shares in the Adlify Group Holdings back to the Adlify Media Group."*

24. On 30 August 2018, the Claimant resigned by email to Mr Seeburg in the following terms:

"*Guys I can't deal with the continuous lies anymore. I mentioned this before and can't work. Max I have been so patient with you and continuously tried to help you and this is how you thank me. I'm honestly saddened this is the way you treat your team. Please take this as my three months notice."*

25. At the time of the Claimant's resignation, his salary with Adlify was £180,000 per annum plus pension. Section 9 of the contract entitled a Claimant to 26 days holiday plus bank holidays each year with the holiday year running from 1 January to 31 December. This was more than the statutory minimum of 28 days. The notice required after completion of a probationary period was three months, with the Company having the ability to pay in lieu of notice or to place the Claimant on a form of garden leave. Clause 11.3 of his contract provided as follows:

"*the Company is under no obligation to vest in or assign to you any powers or duties or to provide any work to you and the Company may at its discretion at any time including during any period of notice given by either party change your duties and/or suspend you from the performance of some or all of your duties and/or exclude you from any premises of the company… And/or require you to work from home."*

26. Clause 11.4 of the Claimant's contract with Adlify confirms that salary will not cease to be payable by reason of any requirement to work from home under clause 11.3, albeit throughout any such period the Claimant was obliged to act as an employee of the Company and to comply with his obligations under the agreement. The agreement could be terminated without notice in the event that the Claimant was guilty of gross misconduct.

27. Although the Respondents assert that the Claimant is only entitled to outstanding holiday pay accrued as at 5 September 2018, if the Tribunal were to determine that the relevant date is 29 November 2018, the parties are agreed that the relevant figure would be £5,145.46.

28. At a meeting between Mr Seeburg and the Claimant on 5 September 2018 in a coffee shop away from the Respondents' offices Mr Seeburg told the Claimant that he should no longer come into the office, but should work from home. The Claimant was understandably upset at the underpayment of his salary and the failure to honour promises about his expenses, so this was a decision which the Claimant readily understood and complied with. The Claimant suggests that Mr Seeburg told him that he was only willing to pay out 1 months' notice, notwithstanding the Claimant's contractual entitlement to 3 months' notice. He suggests that Mr Seeburg threatened to close down Adlify if the Claimant insisted on 3 months' notice. Mr Seeburg account in his witness statement is that "*We agreed at that meeting that we understood Zac's employment to be at an end. I understood Zac's employment had terminated on 5 September 2018."*

29. In an email dated 11 September 2018 Mr Seeburg concerning the Claimant's outstanding expenses, Mr Seeburg added:

"on a slightly different note: we got a few questions about your whereabouts and decided to communicate to the team that we are going separate parts from now on. I kept it on good speaking terms mentioned only that new opportunities arise for you but would also allow you to and more time in NYC - something we cannot offer as we are only focusing UK GER and IN moving forward. Did not get any further questions, so I guess it was fine. Hope that is okay."

This was sent from Mr Seeburg's Blackmilk email address.

30. By email dated 12 September 2018 the Claimant outlined his outstanding wages and stated:

"*my last official contractual employment with Adlify is currently 29 November 2018. You mentioned you would like to propose a settlement deal for an early departure but I will need this in writing from your solicitor before I consider anything, can we put some time in the diary this week to discuss."*

31. Mr Seeburg responded on the same day with an overview of the payments he considered to be outstanding to the Claimant, apart from his September salary, amounting to £21,963.31. In November 2018 an application was made to Companies House for the Adlify to be struck off the register.

Submissions

32. Ms Moses submits that the Claimant was employed by both Respondents and that performance by one of them of a joint obligation, discharges performance by the other. She relies both on a passage in Chitty in this respect and the IDS

Employment Handbook (Volume 3 [2-110] to the effect that a secondee could be an employee of both their original employer and a third party during a secondment if control, mutuality of obligation and personal performance are present. It is said that the Claimant had a conversation with Mr Seeburg on 26 April 2018 at which he was told to pause his activities for Adlify and "*fully immerse myself in Blackmilk under the same guise as my current contract."* The Claimant suggests that Blackmilk expressly agreed to employ him on 26 April 2018 or, alternatively in August 2018. It is the Claimant's case that whilst the terms of that employment can be implied, there is no need to imply the fact of the contract.

33. Ms Moses relies on a passage in the IDS Employment Handbooks at Volume 3 [1-3] "*it is perfectly possible for one person to have two jobs with separate employers at the same time, provided those jobs are compatible with the other - see, for example, Prison Officers Association and ors v Gough and anor* EAT 0405/09. *Therefore, the mere existence of one contract does not mean the employee is unable to form another to run concurrently."*

34. Mr Tomison suggests that the High Court rejected the concept of joint employers in the context of collective bargaining in *R (on the application of the IWGB) v Central Arbitration Committee* [2019] IRLR 530. As Ms Moses points out, the relevant part of the High Court's judgment was not cited in support of this proposition, which is at odds with *Viasystems* (below). In any event, the Respondents submit there was no express agreement between Blackmilk and the Claimant that the former would employ the latter, albeit by August 2018, this was envisaged for the future.

35. It is the Respondents' case that there was a mutual agreement to terminate the Claimant's contract of employment with Adlify on 5 September 2018, but, in the alternative, that Adlify was entitled to dismiss him for gross misconduct (failing to carry out his duties during his notice period).

Conclusions

36. It is uncontroversial that an employee can be employed by more than one employer at the same time. However, the example cited by Ms Moses on its facts is very different from the circumstances in this case, as the two employers in *POA and others v Gough* were not said to be joint employers. The employees concerned performed jobs as both union officials and prison officers, for which they were separately paid by the two Respondents. However, in the course of the judgment in that case at paragraph 20, the following observation was made:

"*Before turning to the Grounds of Appeal, it is appropriate to explain that a person can have two jobs with separate employers at the same time providing they are*

compatible with each other. This point was made clear by Rix LJ in Viasystems (Tyneside) Limited v Thermal Transfer (Northern) Limited [2005] IRLR 983 *in which it was said that:-*
"76…In my judgment, there is no doubt that there has been a long standing assumption that dual vicarious liability is not possible, and in such a situation it is necessary to pause carefully to consider the weight of that tradition. However, in truth, the issue has never been properly considered. There appears to be a number of possible strands to the assumption. Two are mentioned by Littledale J: the formal principle that a servant cannot have two masters; and the policy against multiplicity of actions. As for the first, even if it be granted that an employee cannot have contracts of employment with two separate employers at the same time and for the same period and purposes – and yet it seems plain that a person can (a) have two jobs with separate employers at the same time, provided they are compatible with one another; or (b) be employed by a consortium of several employers acting jointly – nevertheless that does not prevent the employee of a general employer being lent to a temporary employer"

37. The concept of being employed by a consortium of several employers acting jointly or indeed the concept of being seconded to a third party who also becomes an employer is analogous to how it is said that both Respondents were the Claimant's joint employers as at the date of his resignation in this case. As a matter of principle, therefore, the Tribunal accepts that it is conceptually possible that the Claimant could have been employed by the Respondents jointly. The Tribunal has been unable to identify any passage in *R (on the application of the IWGB) v Central Arbitration Committee* [2019] IRLR 530 which conflicts with *Viasystems*. Whether the Claimant was so employed in practice is a different matter and depends, in part, on the Tribunal's findings of facts. It has been clarified by the Claimant that a contract of employment was expressly agreed between the Claimant and Mr Seeburg (on behalf of Blackmilk) either on 26 April 2018 or in August 2018. It is not suggested that such a contract arose by implication.

38. The Claimant accepted in cross-examination that his contract of employment with Adlify envisaged that he would be promoting the interests of Blackmilk when required to do so. He was given a working job title with Blackmilk (of Board Adviser) when he was working under the express freelancer agreement. He also accepted that he was provided with both Adlify and Blackmilk email addresses from the start of his association with both Companies, at which time it is accepted that the Claimant was not employed by Blackmilk. As such, the extent to which the Tribunal can draw inferences from the Claimant's use of his Blackmilk email address or his having a job title in relation to Blackmilk is limited. When the Claimant was dealing with the outside world on Blackmilk's behalf (as was contemplated he would from the outset of their relationship), there were sound business reasons for him to have a named role. The contractual and practical

arrangements set out at the start of the Claimant's relationship with both Respondents envisaged involvement in the affairs of both of them and provided a structure both for his remuneration and recovery of expenses.

39. In the run up to Adlify's demise and prior to the Claimant's resignation, it is common ground that Blackmilk was providing financial support to Adlify and from the spring of 2018, the Claimant's day to day duties were increasingly focused on Blackmilk's operations. The Tribunal is not satisfied, however, that there was an express agreement between Blackmilk and the Claimant on 26 April 2018 that the former would employ the latter from that date. There was no reference to such an agreement in the Claim Form or in the Claimant's written witness statement. This evidence emerged in oral evidence and then not in terms that "a contract of employment was agreed", but that "*Mr Seeburg asked me to be MD of Blackmilk"*. His witness statement set out, "*Max asked me to refocus my time and efforts on the Blackmilk Media business as this is what was needed to drive revenue into both businesses."* Whilst some allowance can be made for the fact that the Claimant was representing himself when he prepared his witness statement, failing to include reference to an express agreement to change his status and job title in relation to Blackmilk on 26 April 2018 in his witness statement is nonetheless a glaring omission. Whilst Mr Seeburg could not remember the detail of what was said at the meeting on 26 April 2018, he was clear that there was no agreement to employ the Claimant and he stated that it was the Claimant who gave himself the proposed title of MD on the organogram.

40. The parties' respective conduct after 26 April 2018 is not consistent with an express agreement to change the Claimant's status in relation to Blackmilk. Although it is clear that the amount and nature of work the Claimant performed for Blackmilk gradually changed and increased in the spring of 2018, because there was limited work to do for Adlify, the Claimant's contract with Adlify contemplated that he could be required to work for other group companies, which included Blackmilk. Contrary to Ms Moses submissions, however, there is no evidence that there was mutuality of obligation between the Claimant and Blackmilk, in particular for Blackmilk to provide the Claimant with work. The Claimant's provision of work to Blackmilk is explained by a term of his contract with Adlify and the context in which the work was performed (a diminution of work for Adlify). It may not have been contemplated by the parties at the outset of their relationship that the Claimant would become as involved as he did in the internal affairs of Blackmilk, this involvement was not inconsistent with the terms of two written contracts which were in place. The Claimant's own evidence in his witness statement was that he was asked to increase his involvement in Blackmilk, "*to drive revenue into both business*." Further, the parties' correspondence in August 2018 does not support the suggestion that the Claimant had been employed as Blackmilk's Managing Director in April 2018 or with the Claimant's own witness evidence that it was on

17 August 2018 that Mr Seeburg "*officially stated that my position would officially change and that I would become more involved in Blackmilk Media".* Such a statement is at odds with the Claimant's primary case that he had been employed by Blackmilk as its Managing Director since April 2018.

41. When the parties set up their respective relationships in November 2017, they did so in an organised manner with written agreements. It is reasonable to expect that, had there been an oral agreement between the Claimant and Mr Seeburg to terminate the freelancer agreement with Blackmilk and put an employment contract in place, that this too would have been put in writing – the more so given it is accepted that the Claimant's employment by Adlify is said to have continued alongside the claimed employment relationship with Blackmilk. Although legally tenable, joint employment by two employers is an unusual arrangement, which would give rise to potential challenges as to the division of the Claimant's labour and liabilities between two employers. If such an arrangement had been agreed between the parties on 26 April 2018, the Tribunal would expect to have seen a more formalised arrangement in the weeks following the alleged agreement, given the parties' previous course of dealing. It was not until August 2018 that the Claimant requested a "new" contract. The Tribunal has no doubt that if the Claimant had been offered and accepted employment with Blackmilk in April 2018, he would have (quite reasonably) asked for confirmation of that change in status in writing.

42. Further, had there been an express agreement to employ the Claimant on 26 April 2018, there would have been no reason for Blackmilk to provide an inter-company loan to Adlify in order to enable the latter to make salary and expense payments to the Claimant. Doing so was wholly inconsistent with Blackmilk's being the Claimant's employer jointly with Adlify with effect from 26 April 2018. In all the circumstances, the Tribunal does not accept that the Claimant was expressly offered employment with Blackmilk as its Managing Director in April 2018.

43. In August 2018 there is evidence that the parties' contemplated a change in the contractual arrangements between them. By this time it was realised that Adlify's business was not viable and the Claimant sought and was given a transfer of his share interest from Adlify to Blackmilk. Ms Moses suggests that the Claimant's request for a new job title and involvement with Blackmilk to be "*written into a new contract*" suggests that he was seeking written confirmation of something that had been already been agreed back in April 2018. The Tribunal does not agree. The Claimant's request for a "new contract" on 2 August 2018 more logically refers to a "new" contract with Blackmilk, to replace his freelancer agreement. The use of the word "new" implies a change from the existing arrangement as opposed to a written version of an earlier oral agreement.

44. Mr Seeburg agreed to the share transfer, which was arranged, but there was no express or implied agreement to a "new" contract between the Claimant and Blackmilk (or, indeed, to the Claimant's proposal that he become Chief Revenue Officer). There was an acceptance that the Claimant would become "more involved" with Blackmilk from mid-August 2018, but the nature of any "new contract" was not discussed and certainly not agreed. The direction of travel was undoubtedly towards the Claimant becoming an employee of Blackmilk rather than Adlify (not in addition to), but the Tribunal is not satisfied that an agreement had been reached between the Claimant and Blackmilk by the date of the Claimant's resignation from Adlify on 30 August 2018.

45. Given the financial difficulties of both Respondents at the time, it was by no means clear that the Claimant would have been employed on the same terms, particularly as to salary, by Blackmilk. As set out above, an arrangement involving joint employers is a highly unusual one, such that the Claimant's (mutually understood and admitted) continued employment by Adlify is not consistent with there having been a concluded agreement that Blackmilk would employ the Claimant. The Tribunal is conscious that its conclusions result in the Claimant's obtaining a judgment against a Company with no assets. That is highly regrettable given the Claimant's conspicuous loyalty to and flexibility with both Respondents. The Tribunal's judgment does not prevent the Claimant from recouping expenses from the Second Respondent, as some, if not all, of the outstanding expenses he claims, may be due to him from the Second as well as the First Respondent on a joint and severable basis. As the Claimant was not employed by the Second Respondent, this Tribunal has no jurisdiction to determine this, however.

Termination Date

46. The Claimant's written contract contained a form of garden leave (11.3), entitling Adlify to require him to work from home during which time there was no obligation on Adlify to assign him any duties. The Claimant clearly thought he had been placed on garden leave by Mr Seeburg from 5 September 2018 and described his understanding of his position in oral evidence as that of being at the disposal of the business, but that he could not look for any other work. He understood Mr Seeburg's reasons for putting him on garden leave. Mr Seeburg was asked in evidence whether the Claimant was assigned tasks which he refused to do. Mr Seeburg accepted that no requests to work were made of the Claimant during his notice period. The Respondents' case thus appears to rest on the Claimant's alleged failure to undertake "off-boarding" activities.

47. It is the Respondents' case that an oral agreement was reached between the Claimant and Mr Seeburg on 5 September 2018 for an early termination of the

Claimant's employment during his notice period. This is wholly inconsistent with the Claimant's email of the 12 September 2018, in which he sets out his own understanding of his last day of employment, being 29 November 2018. It is clear from that email that the Claimant is open to an earlier termination on agreed terms, but he requested something in writing from Adlify's Solicitors. It is not suggested that any such written agreement was reached. As the Claimant observed at the end of his cross-examination, why would he have agreed to forego 2 months' notice? That was particularly so given he was owed unpaid salary and expenses by Adlify and such goodwill as he felt for either Company had (understandably) been exhausted. The Tribunal finds, without hesitation, that the Claimant did not agreed to an early termination of his employment notwithstanding Mr Seeburg's attempts to persuade or engineer him to do so.

48. It was submitted in the alternative that the Claimant was in repudiatory breach of contract, which breach Adlify accepted on 5 September 2018. It is suggested that the Claimant was required to work during his notice period on "off-boarding" matters, but failed to do so from 30 August 2018 until 5 September 2018. Firstly, this submission ignores the prior breach by Adlify in failing to pay the Claimant's agreed salary and repayment of the Claimant's loan, which is what prompted the Claimant's resignation. Secondly, Mr Seeburg confirmed in cross examination that he had not asked the Claimant to perform any work between 5 September until the end of his notice period. In those circumstances and in light of the terms of paragraph 11.3 of his contract with Adlify, which confirmed that when on garden leave Adlify had no obligation to provide work, the suggestion that the Claimant was guilty of gross misconduct in failing to work, when no work was allocated to him is wholly without merit. If there were specific "off-boarding" activities which Adlify considered the Claimant should have performed, an instruction should have been given to him to that effect. It was not.

49. The parties are agreed that the outstanding notice pay to which the Claimant is entitled based on an employment termination date of 29 November 2018 was £27,711.57 and the outstanding holiday pay amounts to £5,145.46.

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Employment Judge Clark

Dated: 3 October 2019

Judgment and Reasons sent to the parties on:

18 October 2019

For the Tribunal Office