EMPLOYMENT TRIBUNALS

Claimant: **Mr J Priday**

Respondent: **Elemental Digest Ltd**

Heard at: **Southampton by Cloud Video** **On:** **5-6 October 2020**

Before: **Employment Judge Reed**

Representation
Claimant: Mr J Bromige, counsel
Respondent: Mr N Siddall QC, counsel

JUDGMENT having been sent to the parties on 22 October 2020 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

1 In this case the claimant Mr Priday said he had been unfairly dismissed and that he was owed certain moneys by the respondent, Elemental Digest Ltd ("EDL"). For EDL it was denied that Mr Priday had been either an employee or a worker of theirs, such that he could not take forward his claims. This was a preliminary hearing held by Cloud Video in order to determine Mr Priday's employment status.

2 I heard evidence from Mr Priday and, on behalf of EDL, from Mr Ash and Mr Palmer. All three were at the relevant time directors of EDL. In addition, my attention was directed to certain documents and I reached the following findings of fact.

3 EDL was incorporated in 2012. It was set up to exploit a process for recovering and recycling abattoir and industrial by-products. Mr Priday became a director in 2013. Thereafter until his removal in 2019 he essentially had two relationships with EDL. In his role as director, it was agreed among the parties that he would undertake his duties unpaid, as did his fellow directors. The expectation, or at least the hope, was that if the business took off they would reap the rewards via their shareholdings. This was acceptable to all of the directors because they all had other business interests that could provide them with an income.

4 As distinct from Mr Priday's directorship he undertook extensive paid work for EDL. Mr Priday is a commercial finance professional and a tax accountant. He is also legally qualified. He is a director of several companies in his family's group of companies, the Pridis group. It was via companies in that group, and particularly Pridis Consulting Ltd ("PCL"), that he worked for EDL. Throughout the period of his involvement with EDL he supplied invoices for the professional work he was undertaking for the company and those invoices, in the name of companies in the Pridis group, and especially PCL, were paid by EDL. The work undertaken by the Pridis companies was the accounting, insurance, legal and other services required by a company such as EDL. Mr Priday also undertook work for other companies in the Pridis group and PCL undertook work for other clients.

5 At first, payment to the Pridis companies was made by standing order but Mr Ash felt this was too expensive and in 2016 it was replaced by what was called a good faith fee principle agreement. In order to keep fees down, the understanding was that Mr Priday would do his best to undertake duties for EDL, via the Pridis companies, before 9am and after 4pm. The terms of the arrangement clearly indicated an expectation on the part of both parties that Mr Priday would be carrying out the work himself.

6 On 1 December 2016 Mr Ash wrote to Mr Priday about the fees being charged and stated "we definitely need to employ you direct – it would be a much less complex management of fees and time!". On the face of it, such a statement was incompatible with Mr Priday being an employee but Mr Priday did not reply to suggest that he was an employee.

7 From late 2016 EDL was in discussions with potential funders. Draft director service agreements were drawn up which it was intended would be executed if funding was put in place. Such documents were produced for Mr Priday and clearly had any of them been signed he would have become an employee (albeit of another company in the EDL group). However, at least while Mr Priday was a director, the service agreements were not signed or put in place.

8 In October 2019 a dispute arose between Mr Priday and his fellow directors in connection with the fees invoiced by the Pridis companies and as a consequence he was removed as a director.

9 Under s230 of the Employment Rights Act 1996 an employee means an individual who has entered into or works under a contract of employment ie a contract of service. A worker means an individual who has entered into or works under either a contract of employment or any other contract whereby the individual undertakes to do or perform personally any work or services for another party to the contract whose status is not that of a client or customer of any profession or business undertaking carried on by the individual.

10 For Mr Priday I was urged to conclude that he was an employee of EDL, alternatively a worker, from the inception of his work for EDL, or if not, from 2016 when the good faith fee principle agreement came into effect.

11 For him to succeed, I would have to be satisfied that there was a contract of some sort direct between himself and EDL. I concluded there was not.

12 At no stage was Mr Priday "on the books" of EDL. He was not treated as an employee. Payment was made on invoices rendered by various companies in the Pridis group. Those invoices might be in respect of work carried out by other employees in the Pridis group, not just Mr Priday. VAT was being charged on the fees. Mr Priday was not on the payroll of EDL and nor was there any involvement of PAYE. It is perhaps worth mentioning that the tasks undertaken by the Pridis group for EDL included tax and payroll. Mr Priday could simply have added himself to the payroll if he genuinely considered himself an employee.

13 Mr Priday indicated in his tax returns that he was an employee of various Pridis companies but not EDL. As he pointed out in evidence, his tax return would be populated by figures produced by PAYE returns, which clearly would not indicate he was employed by EDL. However, the result was that if he was an employee of EDL, he was making returns that he knew were untrue. He could have taken steps to address and rectify that situation but chose not to. That indicated to me that he did not believe EDL was his employer.

14 Mr Priday certainly did the bulk of the work invoiced. However, he was also undertaking other work, for other companies in the Pridis group.

15 In 2014 he was granted generous share options and it was suggested that this was some sort of reward for and recognition of the work he was doing "over and above" that of an ordinary director. That did not seem to make sense. I was satisfied that it was fully understood by him that work qua director would be carried out without charge. The share option was "delayed gratification", in the same way as the expectation that the share value would rise.

16 On the face of it, this was a perfectly ordinary commercial arrangement between corporate entities. There was no question of EDL forcing Mr Priday (or more accurately his company) to contract in this way. Mr Priday at no time suggested that he needed to go on EDL's books and be paid via PAYE. He said that the reason for that was that EDL could not manage the cash flow. That did not seem to make sense. Whether described as fees or salary, EDL would incur indebtedness as a result of the work he was undertaking.

17 Mr Priday placed much reliance on the draft service agreements produced in connection with the efforts to find funding. In my view they largely undermined his case. These were documents that would regulate the relations of the parties if funding was put in place. In other words, they reflected a situation that, as it happens, never came about. Mr Priday would become an employee if the contracts were concluded: unless and until they were, he was not.

18 To put the matter another way, a director's service agreement is precisely the sort of document one would have expected the parties to have concluded when Mr Priday became an employee. None ever was.

19 Mr Priday was in a position to point to certain aspects of the relationship that were consistent with his being an employee. He wore a uniform. He referred to himself as having been an employee in an email of 23 December 2013.

20 There was also certainly a personal aspect to the good faith fee principle agreement – the reference to the hours to be worked clearly indicated an expectation that Mr Priday would be carrying out duties personally. However, that was simply a reflection of what the parties knew, namely that although the contract would be with companies in the Pridis group, he had the expertise required and the likelihood was that he would be doing the bulk if not all of the work. He still continued to submit invoices as before.

21 New articles of association were adopted by EDL in October 2019 shortly before the departure of Mr Priday. It was suggested that they contained a quasi disciplinary procedure for directors and as such should be taken to support the suggestion that he was an employee. However, it was perfectly clear that Mr Priday's fellow directors did not consider him an employee. I could hardly infer that they had decided to implement this procedure in order to recognise that he was. In any event, I did not believe the new articles had any impact upon the legal relationship between the parties.

22 On a straightforward analysis, what the arrangement between the Pridis companies and EDL appeared to be was an agreement between companies. If that was right then there was no obligation upon Mr Priday to perform any work personally and no contract direct between him and EDL. There will be circumstances in which it is right to pierce the corporate veil and perhaps imply the existence of a contract. That will particularly be so where the apparent, commercial arrangement does not reflect reality. There was no reason to do so here. Mr Priday was and is an experienced businessman. He knew full well what sort of arrangement he was entering into. This was an arm's length agreement between corporate entities. There was no contract direct between Mr Priday and EDL so it followed that he could not have been either an employee or a worker. It followed that his claims fell to be dismissed.

23 The respondent sought its costs. The power to award costs is contained in rule 76 of the Employment Tribunal Rules of Procedure 2013. That rule obliges me to consider whether to make an order where I consider, inter alia, that a party has acted unreasonably in bringing proceedings or the claim had no reasonable prospect of success.

24 I was satisfied that Mr Priday had indeed acted unreasonably in taking proceedings and that his claims had no reasonable prospect of success. As I have mentioned, what he would have had me conclude was that I should ignore the appearance of the corporate arrangement but I could not see how he could ever have expected that I would do so. It was obvious in my view that he had no personal contract with EDL and therefore that his claim would fail.

25 That is the first stage of the process and effectively gives me a discretion whether to award costs. I must still decide how to exercise that discretion and I must bear in mind that an order for costs is very much the exception in the employment tribunal.

26 However, I concluded that it would be appropriate to award costs. I believed Mr Priday was fully aware how weak his case was. He was an experienced man of commerce who went into his dealings with EDL with his eyes open. The evidence of his tax returns made it clear what he believed. This claim was, in my view, a "try on".

27 The weakness of his case was brought to his attention in the very response from the respondent, whose solicitors followed up with two "Calderbank" letters to the same effect.

28 There was certainly an argument that costs should be awarded from the commencement of proceedings. I could not see how at any stage Mr Priday could sensibly have thought his claims had merit. However, I was prepared to approach the matter in this way. He was entitled to "cast his bread upon the water" and see what position the respondent might take. The respondent pointed out the weakness in his case and it was appropriate to allow him some time to consider his position. For that reason, I felt it was more appropriate to consider that he should be permitted to commence the proceedings "risk free" and to award costs only from the effluxion of the warning in the respondent's solicitors' letter of 1 May 2020. Accordingly, the claimant was directed to pay the respondent's costs from 8 May.

29 I was informed that those costs were likely to exceed £20,000 and accordingly I directed that they be determined at detailed assessment.

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Date: 22 November 2020

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