EMPLOYMENT TRIBUNALS

Claimant: Mrs C Dakin

Respondent: Evolving Edge Limited

HELD AT: Manchester **ON:** 3 and 4 May 2018
27 July 2018
15 January 2019

BEFORE: Employment Judge Feeney

REPRESENTATION:

Claimant: 3 and 4 May In person
27 July Mr G Mahmoud, Counsel
Respondent: Mr J Wingfield, Lay Representative

JUDGMENT

The judgment of the Tribunal is that the:

1. The claimant was not an employee within the meaning of the Employment Rights Act 1996.

2. The claimant was an employee for the purposes of Equality Act 2010

3. The claimant was a worker within the meaning of Employment Rights Act 1996

4. The claimant application to amend her claim

   (a) to include a claim of sex discrimination under the Equality Act 2010

   (b) to add Sarah Brennan as a respondent

   succeeds

REASONS

1. The claimant brings claims of unfair dismissal, unlawful deduction of wages and maternity discrimination. A Preliminary Hearing/Case Management was held on 29 January 2018 by Judge Franey. He set out the issues in the case, in relation to the preliminary hearing was which was listed for 3 and 4 May.

2. The issues are as follows:-

2.1 Employment Status

2.1.1 Was the claimant employed under a contract of employment within Section 230(1) and (2) of the Employment Rights Act 1996, (ERA 1996) and therefore entitled to bring her unfair dismissal complaint.

2.1.2 If not, was the claimant employed under any contract meeting the requirements of Section 230(3)(b) of that Act and therefore a "worker" entitled to bring her complaint of unlawful deductions from pay.

2.1.3 If not working under a contract of employment was the claimant working under a contract personally to do work under Section 83(2)(a) of the Equality Act 2010 (Eqa 2010) and therefore entitled to bring her complaints of discriminatory treatment under that Act.

2.1.4 If the period was an employee what was the date upon which her period of continuous employment with the respondent began.

2.2 Amendment Application

Can the claimant amend to include a claim of sex discrimination in relation to matters already pleaded which may fall outside the protected period?

3. The application was received by the Tribunal on 25 January 2018 included in the completed agenda for the preliminary hearing case management submitted by the claimant.

4. The allegations comprising the amendment in relation to sex discrimination. The sex discrimination is as follows:-

4.1 29 August 2016 SB amended the ways of working document by adding that the parties should "use contraception in the future".

4.2 In November 2016 to January 2017 SB requested that the structure of the company be changed which had the effect of reducing C's

remuneration substantially. The structure was changed to the substantial disadvantage of C, C was misled and manipulated.

4.3 On 3 July 2017 C was accused of not wanting to grow the business in getting pregnant.

4.4 July 2017 SB failed to enquire about C's health, post-natal depression.

4.5 20 July 2017 hostile messages C is accused of not doing much work SB indicates that she wishes C to leave. SB states that she is not prepared to carry on like this, SB applied pressure on C to leave the business.

4.6 August and September 2017 SB refused to authorise a company accountant to apply for advance funding from HMRC following C's second period of pregnancy related absence (due to post-natal depression).

4.7 July to October 2017 C is denied SMP payments.

4.8 August to October 2017 significant pressure placed on C to leave, R threatens to defame C and block C from undertaking additional work.

4.9 August to September 2019 SB removes C's access to the invoicing system, transfers R's monies into her personal account and makes demand from C for alleged overpayment. SB accused C of fraud and made numerous false allegations against her.

5. There was also an application to amend by adding Sarah Brennan as second respondent in relation to the Equality Act claims. This application was received on 18 January 2018.

6. It should be noted that the claimant's existing claim is for

(i) Unfair (constructive) dismissal, ordinary and automatic unfair dismissal due to pregnancy and maternity.

(ii) Discrimination due to pregnancy and maternity under Section 18 of the Equality Act 2010

(iii) Unlawful deduction from wages.

Pre-Amble

7. The claimant cannot proceed with the constructive unfair dismissal claim unless she has employment status under the Employment Rights Act 1996 (ERA 1996). Therefore, that has to be decided before she can proceed to her substantive claim.

8. Equally the claimant cannot proceed with her putative sex discrimination claim and/or maternity discrimination claim unless she has employee status under the

Equality Act 2010, the definition of employee for the purposes of the Equality Act 2010 is different from that in ERA 1996.

9. The second issue is whether the claimant should be allowed to amend, the claimant's position is that most of the matters she relies on are already pleaded as maternity discrimination/ unfair dismissal but that as far as she relies on events falling outside the protected period these are to be pursued as sex discrimination and therefore an amendment is required. She states all the matters are already pleaded in her primary case.

10. Whilst this claim did begin on 3 May unfortunately the first day was spent entirely in reading and in applications and no evidence was started until 4 May. Accordingly, the matter was then re-listed for a further day on 27 July. Submissions were subsequently in writing.

11. An issue had arisen regarding without prejudice correspondence but at the hearing on 3 May the respondents withdrew their objection to the without prejudice correspondence stating that they did not mind it going in, what they objected to was the claimant using it when they could not, but now that it had been clarified that both parties agreed without prejudice correspondence could be relied on the respondent withdrawing their objection. Accordingly, I understood that the issue of "without prejudice" correspondence had fallen away. As it transpired the issue was raised again but having taken the view that the matter had been agreed I have made no adjudication on it.

Witnesses

12. For the claimant the claimant herself, Mr Johnathan Dakin, husband and Donna Neely, marketing consultant. Their evidence was accepted but they were not cross examined by the respondent. For the respondent Mrs Sarah Brennan,(SB) Director and Mr Robert Brennan, (SB) Accountant, husband of Sarah Brennan. There was an agreed bundle.

13. I have referred to businesses by initials or a generic description as their specific identity is not required. I have referred to the respondent's accountant as AL, he is referred to by the protagonists as Andrew at times. He was not a witness.

14. I have endeavoured to make findings relevant to the issues I have to decide and not in relation to the substantive case.

Tribunal's Findings of Facts

15. The claimant and Mrs Sarah Brennan were friends since September 2010 following SB being interviewed by the claimant for a role at Bruntwood (the claimant's then place of work). They worked together in promoting women in leadership and working mothers' issues.

16. The claimant and Mrs Brennan worked together at Bruntwood until April 2014 when Mrs Brennan went on maternity leave and the claimant left for full time employment at Swinton Insurance. Both individuals work in human resources and training. The claimant is a Godmother to Mrs Brennan's daughter. Whilst Mrs

Brennan was on maternity leave she and the claimant discussed setting up a business together. In April 2015 they decided to set the wheels in motion by setting up a company on paper on 8 April 2015. Each was a 50% shareholder and both were directors. Neither of them were intending to leave their jobs immediately as the claimant had only been at Swinton for twelve months and Mrs Brennan was on maternity leave.

17. SB intended to look after her daughter 2 days a week at home following her maternity leave.

2015

18. The claimant stated that she was working for the respondent from March 2015 but there was nothing specific from March she relied on. The claimant mentioned reclaiming mileage from October 2015, emailing content of a leadership scheme to SB in July discussing providing work to OG in May 2015.

19. In April a website domain was obtained and the claimant's friend Donna Neely was engaged to look at marketing for the business, in May there were negotiations to design a logo with a graphic designer and some stationary was bought. There was no employment contract.

20. In July a phoneline was purchased. In September and October more email addresses and phone lines were purchased. SB was paid for a hotel overnight stay. Between August and December Ms Neeley taught the claimant to use a design system called Canva which enabled her to design training materials in house. Insurance was obtained in August 2015. Website domains were bought in August too. AL was engaged as the company accountant from 21st September 2015.

21. In May there were discussions with a client about potential work delivering training. This was delivered in August, October and November 2015 the in February 2016. The claimant used her holiday to deliver the sessions before she left her employment on 13 November 2015. The money received for this work went to RB as the respondent did not yet have a bank account, it was used for set up expenses. SB argued it was not 'work' but to generate money for business expenses, and that they were keeping the company secret at that point. In fact at times savings had to be used to cover business expenses as no 'earnt' money was available. A payment was made to SB and RB to cover expenses in August 2015.

22. In April 2016 In reply to a government questionnaire SB recorded that the business commenced trading on 14 September 2015.

23. The business's purpose was to design and deliver training to schools and businesses, particularly in the areas of leadership and team development and also offering one to one coaching (although that was intended to be offered by Sarah Brennan only) , the only individuals referred to on the Evolving Edge website were the claimant and Sarah Brennan (SB).

24. The business was set up with very little agreement and in fact business overheads were initially covered from savings, the claimant and SB had equal rights over the bank account and only a single signature was required they had identical credit and debit cards, there was no shareholders agreement, no contract of employment and no pension or health provisions, no sick pay and no company policies or procedures, there were no job descriptions or holiday allowances. The claimant contended they agreed 30 days holiday but there was no such agreement documented or referred to in the many What's App messages the claimant exchanged with SB. I prefer SB's evidence that the only requirement was to tell the other when they intended going on holiday. If either party was unhappy as was considered later the company would have to be wound up /dissolved.

25. In the second half of 2015 each of them obtained an opportunity to provide training as a dry run for launching their business, SB by doing some work for a friend of her husband and taking holidays to do so. Mrs Dakin got a day's experience with her sister in law but was unable to do the work herself and arranged for a trainer to do it. The claimant's husband also managed to secure two days training at his place of work at the end of 2015 in order that they could test out materials on his colleagues.

26. Other training was delivered in 2015 for OG . This took place on 11th August, 21st October and 25th November 2015 then in February 2016. The claimant agreed that the payment for these training sessions were used to finance the businesses set up costs.

27. Training for a local Council was delivered on 2 November and 14 December and invoiced at £2160. Training was delivered for TFGM on 14th September and this was invoiced on 18th November for £1216. However, an outside trainer was used for this as it required specialist knowledge but the respondent received the payment.

2016

28. In the week commencing 25 January 2016 the claimant delivered some training work for another company for which payment was made to the Respondent but the claimant received all the money. (PU) It had been agreed that everything would be split 50/50 as at the time the business was set up it was anticipated they would bring the same amount of work and the cost of setting up would be split equally. However, the claimant took all the income from that work on the basis that Evolving Edge had not actually yet been launched. SB referenced this work with PU in 2016 which was undertaken by C without recourse to the respondent to support the contention the claimant was not a worker. The evidence from the claimant was that this was invoiced by the respondent and paid into the respondent's bank account and the respondent paid C for this work because at the time SB was still working at Bruntwood and receiving a full salary, and C was not. I accept the claimant's evidence on this point. In addition she agreed she also undertook work later for the MC foundation, a charity,for which she received £250 accounted for to the business but a further £250 as a 'gift'.

29. Mrs Brennan left Bruntwood in February 2016 and her evidence was that launched their website and business that month. The formal business launch was arranged at Burnley Football Club on 26 February where they ran a taster of the work to be offered. The claimant disputes this and says this was just a resilience training taster session.

30. Work undertaken from February to July 2016 was split 50/50.

31. The protagonists had a difference of opinion around March when the claimant was promoting open courses as opposed to bespoke courses for individual businesses as SB felt this was difficult to market when their brand had not built up however the claimant proceeded with this idea. They tried the open courses and made a loss. There was also a disagreement about the address to be used on mailings as the claimant did not wish to have an Alderley Edge address on as she was seeking business opportunities around Burnley and Lancashire and felt this would be off-putting. SB on the other hand was developing contacts around Cheshire where this would not make any difference. In fact, the claimant had gone ahead using the Burnley address without informing the claimant. SB felt that by April 2016 they were going under different directions under the Evolving Edge umbrella with the claimant wanting to pursue work in primary schools and SB in businesses and they agreed that they would focus on doing work in the areas they wanted. The claimant also applied for a mentor scheme without first agreeing this with SB and with the intention the mentor would be just for herself although SB did in fact join in on some of the sessions but only with the claimant's agreement.

32. At the time SB's husband was working as an unpaid book keeper. To assist in organising invoicing SB got a free trial of Quickbooks, the claimant arranged access to it for her father in law without consulting SB

33. On 26th April 2016 the company accountant advised "as soon as you think there is sufficient cash in the business to start taking a salary then I can get the company set up for payroll. Because there are two employees you will be able to take advantage of the Employment allowance which means you don't have to pay employer's NI on your salary. This means that your target salary is £11k" (i.e. the equivalent of the personal tax allowance.)

34. in June 2016 SB raised concerns with the claimant about spending £300 on refreshments for a free taster event in Burnley when there was no money in the business, (*the claimant relied on this incident as showing she had little control of the business)* There was a falling out about this for a number of days and as a result the claimant said she felt like quitting the business, they agreed they had different views on how the business should be run and the claimant said she would keep going for three months and then review how she felt. She said she needed to earn as she had frozen her mortgage but that was only a temporary arrangement.

35. SB secured some work in New York in July 2016 and they both travelled there to deliver it. At the time SB was doing coaching work which the claimant could not deliver but but the claimant was still receiving half the payment for this work even though she didn't do it herself.

36. In August 2016 the claimant advised SB that she was pregnant.

37. Around this time the claimant had produced a 'Ways of working' document which she relied on as showing they had in effect job descriptions *(the claimant relied on this to show she was under the control of the respondent*). SB says that the claimant produced this document 'off her own bat', that it was not in the nature of agreed job descriptions but contained some principles which would underpin the business and it was for discussion. SB agreed they had jointly created the content but reiterated that it had not been her idea to do so but the claimant's. The document was a sheet of A4 with headings such as confidentiality, accountability, commitment to trying ideas etc. the most practical and specific point was stick to weekly meetings, update to do list, share important information. I agree with SB's description of this document it was very general, it was clearly not complete, it did not contain any 'instructions'

38. There were also from time to time 'to do' lists with individual's name put against specific tasks including SB's husband RB.

39. By this stage SB felt she was doing far more of the work as much of it was coaching and yet the claimant was still receiving 50% payment.

40. On 31 August RB emailed to say 'we need to decide on a monthly salary for both of you until 31 March 2017".

41. Payroll was set up in September 2016. Until this point all payments to the claimant and SB had been via dividends and expenses. It was agreed in September that that the claimant and SB would receive a monthly salary equivalent to the personal tax allowance if possible the respondent says it is common practice to do this in business to utilise personal tax allowances. The claimant contends it is fraud if she is not an employee;that is not for me to decide here. On 4 September it was agreed that they would be paid £2000 a month until the end of the tax year to utilise the personal allowance.

42. In fact, the claimant received the following payments throughout her time with the respondent:

26 August 2015	£ 195.00
17 November 2015	£ 555.00
2 February 2016	£ 60.00
7 March 2016	£1,068.00
8 April 2016	£1,000.00
20 June 2016	£1,250.00
29 June 2016	£ 534.00
8 August 2016	£2,500.00
26 August 2016	£ 35.00

5 September 2016	£2,700.26
30 September 2016	£2,000.00
27 October 2016	£1,000.00
30 November 2016	£1,000.00
30 January 2017	£ 68.59
1 February 2017	£ 684.00
22 February 2017	£1,730.00
22 February 2017	£ 178.20
28 February 2017	£1,416.00
27 March 2017	£1,644.00
28 March 2017	£1,416.00
2 May 2017	£ 13.84
2 May 2017	£ 924.64
2 May 2017	£ 921.15
2 May 2017	£2,077.00
31 May 2017	£2,447.00
31 May 2017	£ 924.64
3 July 2017	£ 924.64
5 July 2017	£ 256.42
5 July 2017	£2,332.00
31 July 2017	£ 924.64
7 August 2017	£1,226.00
9 August 2017	£ 151.20

43. I find prior to September the claimant and SB were paid a mixture of expenses and dividends. I note that at no time during the hearing or in submissions did either party refer to any director's loan agreements. In cross examination it is of note that SB agreed the intention was to pay themselves a regular salary at some point.

On 24 November SB and the claimant met to discuss changing the payment arrangements to make them more fair. The accounts highlighted that SB was

bringing in the majority of the work and delivering it but the claimant taking 50% which SB could not afford to continue in that way. SB said that the claimant agreed this was a situation and therefore the initial suggestion was from the claimant that if one them brought in the client, delivered the work they should get 100% of the profit, SB had suggested 95%. So that the other director, likely to the claimant would get 5% whatever the situation. There was then discussion about having a partnership agreement drawn up setting out how the money would be split, there was a meeting on 14 December at SB's house and it was suggested that shares should be issued.
44. SB also agreed some work she had brought in before this agreement could still be split 50/50.

45. The issue of SMP for the claimant arose at the end of 2016. The accountant wrote to the claimant and SB copied to RB on 29th December stating " I've attached a maternity Pay calculator for Caroline and the various assumptions about due date etc shown at the bottom – if those are wrong please let me know and I'll update the calculator. The 8-week period we discussed has already passed …". He added I have attached details of the process to request advance payment of SMP from HMRC …" Again, the claimant relied on this to show she was an employee and pointed out that SB raised no objection to it. SB says that she relied on the accountant's professional advice that the claimant was entitled to the payments and was simply copied into the correspondence, she was not agreeing with any proposition that the claimant was an employee by reading the email. On 1st February 2017 there was a further exchange, this time SB was just copied in, wherein the claimant stated she would like to start her maternity leave from 6th March and the accountant advised what information he needed from her. SB pointed out that at no time was a MATB1 form provided to her or was put on file with the company. Further it was the claimant who arranged for the money to be paid upfront to the company so that the money could then be passed on to her.

2017

46. At the end of January, the claimant undertook work for a charity to which LS, another consultant the claimant knew, was connected. She said it was billable,i.e. the respondent could bill it although it was only £500 as it was for a charity - the MC foundation. It is correct that SB did not know about this in detail but there was no disagreement about the claimant doing it at the time.

47. On 22nd January there was an email from RB summarised the situation going towards the year end, discussing paying expenses and how much money would be needed for ongoing expenses etc. The claimant pointed to this as an example of how little control she had over the business but I do not accept this it was explanatory, it had some suggestions which could have been queried. Likewise, RB's ongoing emails regarding payments, in one he advises the claimant as to the benefits and disadvantages of taking amounts as salary or dividends in relation to her student loan vis a vis paying corporation tax.

48. On 25 January the claimant asked SB to check what their profit share arrangement was and SB said she thought from memory it was 95% split for work

brought in by one of them and solely delivered by that person and reminded the claimant that she had proposed 100%. She was happy to stick to 95/5 if she wished to but thought 100% would be easier as the calculations were onerous for the small amounts at issue. I have not made a finding on the eventual outcome of this as it is one of the claimant's discrimination claims.

49. At the end of February 2017 JDX, a major client offered the business more work and SB suggested that the claimant got involved in it on her return from maternity leave but she would begin by doing it herself. The claimant then went on maternity leave in March 2017.

50. The claimant received SMP from 6 March to 7 May 2017. The claimant placed some reliance on this and argued that SB had agreed it. (It later transpired that C was not entitled to SMP although she would have been entitled to maternity allowance.) SB says that she was just copied into the email exchange about SMP with the accountant and didn't engage with it although she did comment that the fact they had paid themselves a salary in what she believed was the relevant period meant her SMP payment would also be a reasonable amount – SB referred to this as lucky. The claimant points out SBs name and contact details are on the SMP form. I find that SB was a bystander to this process which took place between the claimant and the accountant. I note that the claimant decided on her period of maternity leave with no discussion or interference from SB.

51. This form also said that the business began on 8th April 2015.

52. On 28 March which was nine days after her baby was born the claimant contacted SB and said she wanted to do the training in April with SB, SB was shocked as it was so soon after the birth but in the end the claimant did come along and deliver some of the JDX training. Due to the JDX work it was possible to take a salary between April and September.

53. On 7 April 2017 RB emailed the accountant to ask what monthly salary he recommended as they had obtained regular work through an 11 month contract with a major client "given that there will be enough money each month over the year to pay each of them the £11k we aimed for last year" the accountant AL replied that £958 a month worked out best from a tax and NI perspective. RB replied "that's great please assume those salaries for the whole year then with C's SMP taken into account (so I'll make up to 958 with salary and the rest as dividend for her monthly amount this month). "Therefore, the intention now that there appeared to be sufficient money coming into the business was to pay a basic £958 as salary then any actual profit remaining to be distributed after expenses as dividends. The £958 therefore had no relationship with actual amounts earnt and did not relate to work undertaken.

54. In cross examination SB stated that it had always been their intention to pay themselves a salary however there was no evidence that it was ever going to be more than the personal allowance.

55. The claimant in June 2017 applied for an Entrepreneurial Spark Growth Programme without telling SB only mentioning it once an application deadline had passed. SB referred to this as it showed how the claimant on this occasion and on others acted independently. The claimant also advised SB that she wanted to do things more collaboratively and plan more which had fallen by the wayside as SB and the claimant had not been agreeing regarding how to develop the business and what type of work to undertake. The claimant said if that couldn't happen she would consider leaving the business. The claimant also recommended a number of people who would be able to help SB undertaking work if she did leave the business.

56. The claimant also obtained some work with FCM in June 2017 which was undertaken by LS. The text messages between the claimant and SB shows this was agreed as she says 'yep get her booked'.

57. The claimant received a P60 for the tax year 2016/7 recording an overall salary of £7516.

58. The claimant gave evidence as recounted above as to what she actually received from 25th August 2015 to 9th August 2017. These amounts varied widely. After the agreement the claimant received less than the proposed basic salary of £958 on five occasions although only by £34 on three of those occasions**.**

59. On 2 July the claimant had referred to an exit strategy and that she wouldn't let SB down in relation to existing work and the claimant's final message in this chain was "I wouldn't feel right leaving and not saying how I feel, at least we tried more than most people would do, I feel much clearer today as all going to be ok, I'll work out what we have left to do jointly and send it over to you". There were then discussions about how the claimant would leave, for example, did she need to sign an agreement stating she wouldn't approach Evolving Edge clients for future work.?

60. On 3 July 2017 the claimant also offered to pay the claimant's husband £100 per month for the accounts which he had been doing for free up until then. She made two payments before the relationship broke down.

61. On 7 July the claimant said 'I am trying to pick up extra bits to do on my own (associate stuff)'.

62. On 20 July the claimant suggested partnering up with other associates to deliver training. of us – that how we have grown the brand and what we agreed to do as a business" **.** SB sent a message (via WhatsApp) to the claimant in reply , saying:

> "I'm sorry but if you think it's ok to run a business where I do work under EE and that only in the way we always agreed I would (coaching etc) and grow the brand that you go off and collaborate with other partners in a completely separate way, adding nothing to the EE brand and working a way we never agreed, in fact outright agreed we wouldn't do, then we need to wrap up EE as soon as possible unless you can buy me out. On so many levels that just can't possibly work. Isn't what we agreed when we set the business up and isn't something I can be part of. I can't work in partnership with someone who tells me they want to leave then makes decisions on the operations on the

business and partnering with other people without even mentioning it to me, and simply says they have the right to change their mind when I'm uncomfortable with that."

63. On 20th the claimant had said " I want to work with you corroboratively as I felt out on a limb … I spoke to you about it and we agreed we talked about exiting, you then said we needed to carry on with existing work and I agreed, I can't just do that work until January/February so I looked for other stuff that I can do on my own, I then realised that maybe doing separate work won't be too bad as I can work with other people like me, Donna, Louise, Naja etc so I am feeling in a much better place now, plus I have worked really hard like you so try to create a plan B that didn't involve throwing it all away, I don't want you to feel stressed … we work brilliant together …".

64. On 20th July SB had also said "we'll just need to make sure you do your formal resignation addressed to the company before you take on any associate work". Therefore, there was no expectation that the claimant would do this work whilst still part of the respondent business

65. Another issue arose in July 2017 relevant to these issues. The claimant tendered for work with GM growth hub for 121 leadership training. She included SB's name on this as she did not want to be accused of 'doing her own thing' and said she discussed it with SB on 2nd August. But SB was annoyed later as she said she knew nothing about it. The tender also included 2 individuals who could help with the work if the tender was successful**.**

66. Meanwhile on 2 August when the claimant returned from holiday SB and she met and SB suggested that either the company be wound up or SB bought the claimant's shares. The claimant stated she would prefer SB to buy her shares and have the option to work as an Associate for SB in the future. The claimant had just won some work and she wanted to retain it, which she could do under this arrangement. In this meeting SB said that they agreed the company was virtually worthless and the majority of the work and clients were SB's but SB was still prepared to pay her something for it.

67. No further communication was received regarding how much the claimant wanted for her shares so SB emailed her asking about it on 8 August and on 9 August she replied saying she would sell them for £35,000. SB felt this was a ridiculous amount but responded offering to sell her shares to the claimant for £25,000. The claimant then seemed to appear to change her mind about exiting the business and stated, "following the changes we made to the business in December 2016 I believe we now have a workable arrangement that can continue in the short term". This was a reference to the profit share agreement of December 2016.

68. SB was planning to do a piece of work on the 16 August, originally to be delivered with the claimant but due to the breakdown of their relationship on 10 August she emailed the claimant and suggested that it would be inappropriate to deliver the session together and in any event that the claimant wasn't qualified to deliver it as it involved using Psychometric Testing which she was not certified to use. The claimant however replied saying even if she did not take part she still wanted paying for the session whether she delivered it or not. SB wrote again saying that in the line with their agreement she wasn't obliged to pay her for work

she delivered by herself and it was the same if the claimant delivered work by herself. In fact, the claimant had received an advance payment for this work which she ought to have on that basis have returned but never did so.

69. On 12 August 2017 SB stated:

> "One client that I do not currently provide a service to but that I will be contacting is GM Growth Hub. When you tendered for this work you not only included my name in the tender without even telling me that you were tendering, you also indicated the type of work that I would do. You have used my qualifications and experience to win work that I knew nothing about and I certainly won't be tied into work that I did not agree to. If that wasn't bad enough you also added two people to the tender that I have never even met. Again, you didn't even tell me what you were doing. As far as I am concerned your actions were completely unacceptable and not those of a responsible director. In the absence of an agreement about the future of Evolving Edge I will writing to that client to inform them that I was put forward for that work with absolutely no knowledge of the fact that I had been, and will therefore not be involved in its delivery."

70. There was further discussion with the claimant's husband on 16 August about the future of the business to which SB replied saying "a genuine attempt to resolve matters was encouraging but large amounts of money were not on the table to pay for the claimant's shares".

71. On 17 August Mr Dakin requested that the company be wound up, he said "I have spoken to Caroline and we want to wind the company up straightaway, you can then both arrange to work with your existing clients in separate businesses. As it is not my company can you make the necessary arrangements for the winding up of the company, I'll make sure any necessary paperwork is completed from this end". SB contacted the claimant to ensure she agreed with this and the claimant confirmed this on 18 August.

72. In this email Mr Dakin said "you have said that winding up the company is likely to take longer than envisaged, this brings up the question around Caroline's income during this period, Caroline was signed off sick by her GP on 14 August so I have been making enquiries into what she is entitled to, as she is off sick following the 39 weeks following the birth of a child the procedure is for statutory maternity pay to be awarded from the business instead of statutory sick pay, when it gets to the relevant stage of the winding up process Andrew will need to provide a form which enables Caroline to claim maternity allowance from the DWP should she wish to do so. I'll be contacting Andrew independently in respect of the statutory maternity pay as he will need to see the sick note and as it is unlikely that he has dealt with this situation before he will probably need me to provide the HMRC guidance notice, have you already made him aware of the situation in respect of the winding up of the company".

73. Mr Dakin also suggested that salary was paid as normal and accounts finalised as part of the winding up process, he believed there was sufficient cash in the business to do this however SB was concerned as the business might have other liabilities that needed to be paid first. Mr Dakin also said the claimant should be paid

for sick leave and that he should sign off RBs accounts before they were sent to AL as the claimant was too ill to be contacted directly.

74. SB replied on 22 August asking for the claimant's sick note as she was not aware that she was "off sick", she also pointed out that the claimant had deleted her from the shared Microsoft Office account and the business Canva account details so she could no longer access these. They were paid for by the business and property of SB's was stored in the Canberra account which she needed access to and she felt this was stopping her carrying out her normal course of business". She said it was not acceptable behaviour from a director of the company and there would be financial consequences for SB if her access was not. She went on to say "as I have already explained there is no contractual obligation for me to provide Caroline with work from my clients, she wasn't needed at JDX and will not be paid, she would not have been able to do it anyway as according to you the doctor signed her off sick two days before, as far as I am concerned that is the end of the matter, there is nothing to resolve and Rob's calculations remain correct, again his figures are correct regarding the percentages Caroline was only involved in 45% of the work, she did not deliver in August which you have appear to have included so she owes the business £403.20 overpayment plus £160 to cover overheads".

75. Regarding the proposal to pay salaries she went on to say "although it may appear Evolving Edge has a cash surplus this is all allocated to the payment of various taxes and invoices which I have now ringfenced in order to protect both mine and Caroline's tax and VAT provisions, Andrew has been informed of what I have done and why, I have done this because you have made it clear that she is unable to deal with these matters and I don't trust you having access to that money through her as you appear to view the balance in the account as money to be dipped in to with no regard to other commitments, there is actually an overall deficit of around £5k when the VAT due in September and corporation tax are included which future invoices that are due in will just about cover, there is nothing left for salaries and as a matter of interest I will not be paid a salary in August either, I have however left £150 in the account to cover direct debits until the end of the month and I will transfer across monies for future direct debits as and when they are needed".

76. SB did remove the majority of money into a private account in order she says to protect it from Mr Dakin. She informed the accountant of what she had done and why and would move money back into the account to ensure that all direct debits and standing orders were covered as and when required.

77. On or around 23 August SB discovered that the claimant had frozen the business bank account.

78. At the beginning of September SB managed to have the account unfrozen.

79. On 9 September the claimant rejected ways forward but did not suggest what she wanted to happen. SB gave evidence that she now believes that the claimant was stalling to get through to January, in order that she would have accumulated two years' service to bring an unfair dismissal claim. During a holiday in September SB discovered that Mrs Dakin had locked her out of one of her own email accounts using SB's own login details. She regained access but then found that the claimant had done this again, there was then communication between SB and the claimant

regarding settling the situation and offers regarding the amount to be paid for the shares.

80. On 26 September the claimant attended a meeting at Blackburn College to discuss work to be delivered in March 2018 and discovered that SB had rung them already and said that the EE logo should not be used on any materials and that they could choose whether C or SB did the work but both of them would not be doing it. The respondent in submissions stated that the claimant had undertaken work fro Donna Neely in September but whilst her solicitor did later indicate she had invoices to submit for work done there was no specific reference to Ms Neely and the claimant was not asked about this accordingly I can make no finding that such work was done. There was nothing to stop the claimant undertaking work under the respondent's banner and keeping 100% of the monies paid but she had to account to the respondent for it first and await its disbursement by the accountant as ofcourse there may be expenses which the respondent needed to pay to which she was obliged to contribute. .

81. On the 6 October it is relevant to note that the claimant's solicitor indicated the claimant had invoices to pay into the business.

82. On 17 October 2017 there appeared to be an agreement. By this stage SB had a new business opportunity and was stating that she intended to resign as the offer which had appeared to be agreed was now stalling.

83. On 30 October the claimant resigned, new directors were then appointed to close down the company and SB also resigned. SB's father took on one of these directorships and wrote to the claimant on 5 November asking her if she had any outstanding invoices which needed paying and requesting she return company assets, also as to whether she wanted future communications sent directly to her or her solicitor, again on 18 November he was anxious to obtain the printer which belonged to the company.

84. On 29 November the claimant began the process of bringing a Tribunal claim. Subsequently the claimant's solicitor stopped acting for her and because Mr Wingfield had been advised not to contact the claimant directly but only through a solicitor, he was then unable to contact her.

85. The claimant stated that the company had no assets, certainly no cash in hand and therefore it was unlikely any award would be paid

86. The claimant approached ACAS on 31st October under the early conciliation process and her certificate was discharged on 2nd November. The certificate was in the name of this respondent. The claimant issued proceedings on 22 November 2017 and at box 2.1 named SB. As has been noted before this box is confusing as it asks who is the person or organisation you are claiming against. It was accepted on the grounds that the difference was a minor error i.e. the reference to SB on the claim form, and ordered to be served on this respondent. On 18 January the claimant emailed the tribunal to point out she had wished to also issue a claim against SB. She enclosed an additional ACAS certificate naming SB applied for on 17 January and discharged on 18 January 2018. As the primary time limit was 29 January she believed she was in time. She did not issue a new claim form.

The Law

<u>Employment Status Employment Rights Act 1996</u>

87. Section 230 of the Employment Rights Act 1996 defines an employee as follows:-

> "in this Act "employee" means an individual who has entered into or works under (or where the employment has ceased worked under) a contract of employment.
>
> In this Act a contract of employment means a contract of service or apprenticeship, whether express or implied, and if it is express whether oral or in writing.
>
> In this Act, worker means an individual who has entered into or works under or (or where the employment has ceased worked under) –
>
> (a) A contract of employment; or
>
> (b) Any other contract, whether express or implied and if it is express whether oral or in writing, whereby the individual undertakes to do or perform personally any work or services for another party to the contract whose status is not by virtue of the contract that of a client or customer of any professional business undertaking carried on by the individual".

88. In **Ready Mix Concrete 1968** three questions were set out to be answered in defining a contract of employment.

88.1 Did the worker undertake to provide his own work and skill in return for remuneration;

88.2 Was there a sufficient degree of control to enable the worker fairly to be called an employee;

88.3 Were there any other factors inconsistent with the existence of a contract of employment.

89. In **Cotswold Development Construction Limited -v- Williams 2006** it was suggested there should be a four-fold approach.

(i) Was there one contract or a succession of shorter ones;
(ii) If one contract did the claimant agree to undertake some minimum amount of work for the company in return for pay;

(iii) If so, was there sufficient degree of control to make it a contract of employment;

(iv) If there was insufficient control or other factors negating employment was the claimant nevertheless obliged to do some minimal work or a reasonable amount of work personally thus qualifying him as a worker.

90. The right to control rather than day to day control is what is required, White and **Todd -v- Trentback SA 2013 EAT**. A case which specifically addressed the situation of a director also claiming to be an employee, **Secretary of State for Business and Enterprise and Regulatory Reform -v- Neufeld and Howe 2009 Court of Appeal** which established that it is possible for a director who owns all the shares in the company or is the sole director to also be an employee. It was said that "it is no answer to the claim creation of such a contract that the controlled condition essential to it is not satisfied, the answer to that point even in relation to a one-man company case is that the company and the one man are not the same person, in Lee's case the employer was the company and the employee was Mr Lee. The control necessary for the purpose of the claim contract of service was exercisable by the company and it made no different that in practice so long as Mr Lee remained the sole governing director that the control would be and was exercised by him as the company's agent.

91. In the **Secretary of State for Trade and Industry -v- Bottrill 1999** the EAT said the shareholding of the person in a company by which he alleges he was employed is a factor to be taken into account because it might tend to establish either that the company was a mere simulacrum or that the contract under scrutiny was a sham. The court said " In our judgment it would be wrong to say that a controlling shareholder who as such ultimately had power to prevent his own dismissal by voting his shares to replace the board was outside the class of persons given rights under the Act of 1996 on an insolvency."

92. In Newfeld the issue of salary was also addressed and it was argued it was not a determining matter that salary was not always received, if in fact it was established that the individual was contractually entitled to it, it was said that the fact that the person did not take the salary could not retrospectively diminish the right to the salary.

93. In **Euro Panel Processing Co Limited -v- Nimo EAT 91** a company manager did not draw a salary for ten months despite working full time, the EAT held that the other advantage that he enjoyed, payment of expenses, pension contributions, use of the company car was sufficient to preserve the employment relationship during the ten month period.

94. Also, an individual may choose not to exercise their right to draw a salary, this does not automatically lead to the conclusion that they are not an employee, **SOS for Business, Innovation and Skills -v- Knight 2014 EAT.** Neither, does the failure to agree a salary or wages indicate a contract of employment is yet to be formed. **Stack -v- Ajar-Tech Limited 2015 Tribunal**. It was found there was an express agreement, the claimant would work for the respondent with an implied term that he would be paid a reasonable amount for his services and hence he was an employee. This was upheld eventually by the Court of Appeal.

95. The respondents relied on the case of **Dugdale -v- DDE Law Limited EAT 2017**, which concerned a claimant and two others incorporated the respondent company as a solicitors practice and worked in it as solicitors from 2008 to 2014 the claimant like his fellow directors did not enter into any express contract of employment, written or oral, with the respondent and received payment by loans later repaid from dividends on her shares with a small notional payment of salary equivalent to the personal tax allowance, the Employment Judge commented that the directors acted like partners would have done in a traditional partnership and held that the claimant was not an employee of the respondent during this period. That case differed in that although payment was received as salary up to the tax threshold as here above that payments were received as loans which were paid back from dividends, and there were difference in control as the claimant was a minority shareholder as there were three shareholders. The EAT said that permissible conclusion had been reached.

<u>Employee under the Equality Act 2010</u>

96. Section 83(2)(a) of the Equality Act 2010 states that:-

(2) Employment means:-

(a) Employment of a contract of employment a contract of apprenticeship or a contract personally to do work; the definition therefore is broader of an employee under the Equality Act in particular in relation to the third category a contract personally to do work.

97. The number of cases in relation to contract personally to do work actually arise under unlawful deductions legislation and whistleblowing provisions

98. The original leading case under what was then the Sex Discrimination Act is **Mirror Group Newspaper Limited -v- Gunning Court of Appeal 1986.** Mrs Gunning applied to take over her father's "agency contract" for distribution of Sunday newspapers, she was refused on the basis of her having family commitments, however it was found that her work did not come within the definition of employment as it was not a contract personally to execute any work or labour, and the execution of such personal work or labour must be the dominant post of the contract, in this case she just needed to organise distribution, she did not have to do it. The dominant purpose test has been questioned in a number of cases and the Supreme Court said that the dominant purpose was relevant but was not exclusively determinative, that was in **Gavraj -v- Haswani 2011 SC**. The fact that an individual does not perform all of the work personally does not necessary mean the dominant purpose test will not be met, so long as the contracting party performs the essential part of the work, some of it can be delegated. It can be an implied obligation, it does not have to be express, as being a significant amount of case law about the right to substitute and whether this undermines the dominant purpose being to carry out the work personally. The right to provide a replacement must be limited in some way if it is not to prevent the worker for claiming protection under discrimination legislation. Usually it is the case that the replacement must be suitable, or that the approval of the other party to the proposed replacement must be sought. However, a blanket right to provide a substitute is unlikely to meet the requirement of personal service,

however, it was also shown that that substitution clause is not a sham and that it is genuine clause see **Auto Clenz Limited -v- Belcher 2011 SC.**

Worker under 1996 Act

99. Section 233B of the Employment Rights Act 1996 is the same test as section 83 of the Equality Act 2010, substantially. It requires the tribunal to distinguish between a situation where an individual is not an employee but neither are they truly self employed by being in business on their own account.

100. The Supreme Court in **Bates van Winklehof v Clyde & Co LLP [2014] SC** stated:

> "Generally there are three tests to establish if a person is a worker or self-employed:
>
> (a) Is there an express or implied contract to perform work or services?
>
> (b) Is there an express or implied obligation to perform the work or services personally?
>
> (c) Is the worker performing the work or services in the context of running a business where the other party is a client or customer?"

101. In **Byrne Brothers (Formwork) Ltd v Baird [2002] EAT** it was held the intention was clearly to create an intermediate class of protected worker made up from individuals who were not employees but equally were not carrying on a business in their own name.

102. In the recent cases of **Uber v Aslam [2017] EAT and Pimlico Plumbers Limited v Smith [2018]** the main test remains the obligation of personal performance: the obligation "personally to do the work" may be an implied one (**Manku v British School of Motoring Limited [1982] ET**). However, the fact that the individual does not actually perform all of the work personally will not necessarily mean that the contract is not a contract personally to do work. So long as the contracting party performs the essential part of the work he or she is free to assign or delegate other aspects to another person. For example, a solicitor may delegate some of the legal work in a case to an assistant and rely on a secretary to carry out ancillary tasks like typing and posting letters and other documents (**Kelly & Anor v Northern Ireland Housing Executive [1998]**).

Law on Amendments

103. Guidance as to whether or not to allow an application to amend is given in the case of **Selkent Bus Company -v- Moore 1996 EAT**, the overarching principle was stated by Mummery J to be "whenever the discretion to grant an amendment is invoked the Tribunal should take into account all the circumstances and should balance the injustice and hardship of allowing the amendment against the injustice and hardship of refusing it."

104. Mummery J went on to set out a non-exhaustive list of factors relevant to the exercise of discretion.

A. The nature of the amendment;

B. The applicability of time limits;

C. The timing and manner of the application.

105. It was stressed however that the paramount consideration remains that of comparative disadvantage, the Tribunal must balance the disadvantage to the claimant caused by refusing the amendment against the disadvantage to the respondent caused by allowing it. In respect of the nature of the amendment it was said in **Selkent** "applications to amend are many different kinds ranging on the one hand from the correction of clerical and typing errors to addition of factual details to existing claims and the additional substitution of other labels for facts already pleaded to on the other hand the make of an entirely new factual allegation which change the basis of the existing claim. The Tribunal has to decide whether the amendments sought is one of the minor matters or is a substantial alteration pleading a new course of action. Where an amendment merely involves relabelling facts that were fully set out in the claim form the amendment will in most circumstances be very readily permitted **TGWU -v- Safeway Stores Limited EAT** 2007. If, on the other hand, it introduces a whole new claim it is important to consider time limits as part of the overall balancing exercise.

106. In respect of time limits Mummery J observed that of a new complaint or cause of action is proposed to be added by way of amendment it is essential for the Tribunal to consider whether that complaint is out of time and if so, whether the time limits should be extended under the applicable statutory provisions. It is not an absolute bar however that a claim is out of time. The Tribunal has to consider whether the claim would have been out of time even if included in the original claim form. In terms of comparative hardship, the claimant suffers no disadvantage by the refusal of the amendments as the newly introduced claim would inevitably fail on the time limit grounds.

107. In respect of the timing and manner of the application the guidance in **Selkent** was "an application should not be refused solely because there has been a delay in making it there are no time limits laid down in the regulations for the making of amendments, the amendments may be made at any time – before, at, even after the hearing of the case, a delay in making the application is, however, discretionary factor. It is relevant to consider why the application was not made earlier and why it is now being made – for example the discovery of new facts or new information appearing from documents disclosed on discovery. Under the Section 109(1) of the Equality Act 2010 an employer is liable for acts of discrimination and harassment or victimisation (note the definition of employer/employee in the Act as opposed to in the 1996 Act) carried out by its employees in the course of employment. This says that anything done by a person (A) in the course of A's employment must be treated as also done by the employer. Three things must be established:-

(i) That there was at the relevant time an employment relationship between the employee and the alleged discriminator.

(ii) That the conduct occurred in the course of employment;

(iii) That the employer did not take all reasonable steps to prevent the conduct in question.

108. Part of the **Selkent** balancing exercise may involve examining the proposed amendment claim on its merits, the weaker the allegations the less disadvantage there will be to the claimant in refusing to allow the claimant to introduce it. However, it has to be a clear-cut case.

Adding an additional respondent under 2010 Act

109. In relation to the addition of a party Rule 35 of the Employment Tribunals (Constitution and Rules of Procedure) Regulations 2013, Schedule 1 states that the Tribunal may on its own initiative or on the application of a party or any person wishing to become a party add any person as a party by way of substitution or otherwise if it appears that there are issues between that person and any of the existing parties falling within the jurisdiction of the Tribunal which it is in the interests of justice to have determined in the proceedings and may remove any party wrongly included. It is common in discrimination cases to in addition to the actual employer add a named individual who allegedly perpetrated discrimination. Rule 29 allows an application to add a party under Rule 34 to be applied at any stage of the proceedings even where the time limit for bringing a claim against a separate respondent has expired. The same principles apply as apply to any other amendment i.e. the Selkent Bus Company Limited -v- Moore 1996 EAT and as set out in Cocking -v- Sandhurst (Stationers) Limited and Another 1974 a Tribunal cannot refuse to add a respondent solely on the ground that a relevant time has expired.

110. The claimant also relied on the case of **Mist -v- Derby Community Services NHS Trust 2015** where the EAT held that early conciliation is not necessary to include a new respondent where there was a discrepancy between the name of the prospective respondent given on a EC certificate and the name on the ET1. Further in **Science Warehouse -v- Mills 2015** the EAT held that early conciliation is not necessary to amend an existing claim to include a new but related cause of action.

Claimant's Submissions (Summary)

Employee

111. The roles and responsibilities document shows that the claimant did have specific tasks to do.

112. The claimant was specifically tasked with developing training materials and using the Canva. She was called Learning Consultant. Day-to-day tasks were established by way of a "to do" list at regular meetings.

113. The claimant began to undertake work from April 2015 when work was undertaken to set up the company i.e. purchasing a domain name, using Ms Neeley, tendering for a logo design with training being delivered to OC Limited on 11 August 2015, 21 October 2015, 25 November 2015, 11 February 2016 and 23 February 2016. Training was delivered for TGM on 14 September 2015 and 18 November

2015. Training was delivered for BC on 2 November 2015 and 14 December 2015. These clients were invoiced. The business was not launched in February 2016. A taster event was held on resilience training. It was clear that the claimant had to personally deliver work and that if the business was to use an associate this had to be approved by SB. The fact that the claimant was permitted to undertake work directly for a client prior to February 2016 and retain the money does not militate against this. She could not delegate or turn down work. She could clearly not offer a substitute.

Control

114. It was submitted that the company controlled the claimant's work, for example SB refused to allow the claimant to continue with the work for GM Growth Hub. SB wanted a sick note. The respondent had a strong brand, independent of the claimant and SB. RB made a lot of the financial decisions.

Salary

115. Payments were received from August 2015 onwards. They were irregular and largely expenses. SB in cross examination said they always intended to take a salary. A regular salary was received from September 2016 onwards. A payroll system was set up in September 2016 and a regular amount was mainly received.

116. Tax was deducted from September 2016.

117. The claimant received SMP. She submits SB knew about this and agreed it.

118. The claimant could not take holidays without SB’s knowledge.

Personal Service

The claimant was expected to undertake work personally as it evident from the various text messages

Worker

119. It was submitted the claimant was a worker from April 2015 on the grounds that she did work for the company. Training material she used was provided by the company. The company paid all expenses. Emails and communications with the clients emanated from the company. Payments were made to the company, services were billed by the company. The claimant's payments came from the company. The claimant was accounted for to HMRC from September 2016 as an employee. The claimant received SMP. The claimant did not supply her services to the respondent via another limited company.

Date of Employment

120. It is submitted that this was as soon as the company was incorporated.

Amendments

121. The claimant is seeking to re-label her existing claim. She has already claimed section 18 discrimination.

122. The claimant submits that primarily her claims fall within the protected period but if they do not they are required to be put as sex discrimination. Deciding whether or not the claimant was still on maternity leave is fact sensitive, but this remains re-labelling some of the claimant's allegations as sex discrimination rather than as section 18 discrimination.

123. The application was lodged on 25 January 2018 within the primary time limit.

Adding Sarah Brennan as the second respondent

124. The claimant actually named Sarah Brennan on the ET1 form although the ACAS certificate was in the name of the current respondent, and early conciliation undertaken in respect of Mrs Brennan took place between 17 and 18 January 2018 within the primary limitation period. There is no requirement for any additional evidence and SB will be giving evidence anyway.

125. The claimant could be left without a remedy given that there appears to be no money in the respondent's account.

Respondent's Submissions (Summary)

I have noted that a number of matters were referred to in the respondent's submissions which had not been canvassed in cross examination of the claimant. Accordingly, in line with the general rules of evidence, I have ignored these. It is something which does sometimes arise when a party has no legal representation.

Employment Status

Re: SMP

126. The claimant arranged this herself with the accountant who was not a lawyer. SB had no involvement in approving anything.

Salary

127. The claimant did not receive a salary some months and certainly did not receive a regular salary. The agreed amount of £924.64 (eventually) was to take advantage of the personal allowance only.

128. The claimant was also given options as to how she would like to be paid

129. The use of the word "employee" from time to time by the accountant does not signify anything.

Control

130. Nobody could tell the claimant what to do. SB and the claimant would agree what would happen although from time to time they disagreed and were obliged to resolve the situation. The claimant could not be dismissed. There was no requirement to have permission for holidays. The request for a sick note was

insignificant and because SB had no knowledge of the claimant being sick at the time.

131. The roles and responsibility document was created by the claimant in June 2016.

132. No profit was received by Mrs Dakin or Mrs Brennan until after the launch of the business in 2016. The first dividends of £1,000 each were paid in mid-April 2016. Any payments received were used to reimburse set-up costs already incurred.

133. The claimant completed associate work at the end of January for which she took the whole of the payment.

134. There was no requirement as to the number of hours the claimant had to work or why she had to work.

Worker Status

135. From time to time the claimant could use someone else to perform her work without SB's agreement. She did do work as an associate for other companies i.e. PU and MCF.

136. In July 2017 the claimant says, "I am trying to pick up extra bits to do on my own (associate stuff)"

137. The claimant carried out work for Ms Neeley in September 2017, therefore despite SB's concerns about this the claimant undertook work as an associate or otherwise as and when she wanted. She did not own any materials. (however this is new evidence it was not canvassed at the hearing)

Amendments

138. The claimant returned to work on 8 May and everything after that is in the protected period. She is out of time in relation to her primary case in respect of non-protected period claims.

139. The claimant has legal knowledge yet chose not to make a claim of sex discrimination. The sex discrimination be treated as a new claim brought on 25 January and she would need to demonstrate a discriminatory act took place within the three months prior to 25 January.

Amendment 2 – adding Sarah Brennan as a respondent

140. The respondent should be the company as this was the purpose of setting up the company and they were solely responsible for debts and obligations. If the claimant fails to establish employment status the claim will not go ahead in respect of all claims apart from the section 18.

141. Adding Mrs Brennan, who has always promoted women in the workplace, would cause her significant reputational damage.

Conclusions

I have considered both parties' submissions, if any in particular are not mentioned it is because I have not considered them significant, relevent or correct.

Equality Act 2010 status

142. Was the claimant an employee for the purposes of the Equality Act 2010.? The claimant does come within the definition of employee for the purposes of the 2010 Act as she clearly had to deliver work personally. He respondent argues the claimant could send a substitute. I disagree other consultants were used by agreement when neither the claimant or SB deliver the training but wished to fufil the contract for business reasons. In any event Gavraj establishes that the fact that an individual does not perform all of the work personally does not necessarily mean the dominant purpose test will not be met as long as the essential part of the work is undertaken.

Worker Status under the 1996 Act

143. I find the claimant was a worker for the purposes of the 1996 Act (and unlawful deductions claim) in that she had to provide personal service.

144. In terms of whether she was in business on her own account she did on a few occasions do work for which she only received payment. In relation to PU this was agreed because the SB was still employed by Bruntwood. The MCF occasion was not objected to (although there has since been an issue regarding whether the claimant hid part of the payment,) at the time the fee was billable through the respondent. So the claimant was not obtaining and undertaking business separately for which she charged herself and received direct payment.

145. These were insufficient for a finding to be made that she was truly self-employed seeking work from wherever she could and that the respondent was simply one of her clients. There may be a case for saying that by the time the relationship was seriously breaking down the parties had in effect agreed to go their own way and the claimant was by that stage starting to find her own work however there was no evidence of the claimant actually undertaking independent work prior to her resignation. Neither was to do so acceptable to the respondent. For example, on 20 July SB said, "if you are working with them in projects then your partnering with them and it isn't what we have always done I have never done that, I bring in work to the business for us to deliver between us or one of us, that is how we have grown the brand and what we agreed to do as a business". The claimant replying, "I would never do a project without including you if it was something that you could do which is most things". Further the claimant appeared to change her plans so there was no fixed intention eve then. Further the claimant's solicitor wished to put invoices through the business in October 2017.

146. Regarding whether she had to personally undertake the work she did have to do the work personally either she would deliver it herself or co deliver it with SB She could not send a substitute. On the limited occasions (two) that anyone other that

SB or the claimant delivered work this was not as a substitute for the claimant - it was by agreement because neither of them could deliver the work in question but thought it politic to accept the work to advance the brand

Amendments to Sex Discrimination Claim under the Equality Act 2010

147. The claimant wished to amend to include a sex discrimination case in relation to detrimental treatment which occurred outside the protected period and an application to do so was included in her response in the Agenda form on 25 January 2019 which was emailed to the Tribunal and the respondent, and which was prepared for a Case Management Preliminary Hearing discussion to take place on 29 January.

148. Her claim form was submitted on 22 November 2017, she had resigned on 30 October 2017 and she had consulted ACAS on 31 October, the certificate being discharged on 2 November. The claimant had named Sarah Brennan in Section 2 of her claim form but the ACAS conciliation form was issued in the name of Evolving Edge Limited.

149. The claimant says that all the facts are contained in her original claim form and she is just seeking a relabelling on the basis that it could be argued she had returned to work and consequently that some of the incidents after May 2017 fall outside the protected period.

150. The application was lodged on 25 January 2018 which is within the primary time limit in any event, time would normally have expired for a discrimination claim on the 29 January even with an early conciliation extension.

151. The claimant's application to amend succeeds it is a relabelling of already pleaded facts by putting them under a different section of the Equality Act 2010. It is the same cause of action, discrimination. It was applied for within the primary time limit and it would simply have been otiose to issue another claim.

152. There is no detriment to the respondent save the new label – they have known the allegations since the claim was issued. There would be considerable detriment to the claimant who may be barred from pursuing her claim under section 18 Equality Act 2010 if she cannot pursue it under Section 11.

Adding a second respondent

153. The claimant obtained an early Conciliation Certificate against SB on 17 January which was discharged on 18 January, again, the ACAS certificate was obtained during the primary time limit. The facts she relies on are exactly the same as in the claim form which was originally served on this respondent.

154. The claimant is entitled to take action against an employed within the meaning of the Equality Act 2010 but also against an individual who it is alleged was involved in the discrimination, this is not something available under the Employment Rights Act 1996, accordingly legally the claimant has the right to do so.

155. I can see no objection to adding SB as a second respondent in this case. Whilst there may be little point in many cases where a respondent has indicated they take vicarious responsibility for the actions of their employee or agent and do not rely on the reasonable steps defence that is not the case here. In addition, the claimant has a strong factor in her favour that the company may have no resources to pay any award she obtains. Further she named SB in her claim form and obtained an EC certificate in her name within the time limit.

156. In these circumstances the claimant's amendment is allowed adding R2. .

157. Whilst I appreciate the points made by the respondent it is that it could cause SB reputational damage and it results in the case being put in a very personal way which in many situations where the employer is taking responsibility for the actions of an agent or employee is unnecessary. However, it is the claimant's right to do so and in this case she has cogent reasons for wishing to do so given the financial position of the first respondent.

Employee Status

158. Was C an employee.? This is a complex case as is often the case where the putative employee is also a director of a company. There was no contract of employment in this case and therefore it requires consideration of all the elements of the employment status test as defined over the years by a considerable volume of case law.

159. The respondent's ultimate argument is that they rely on the Dugdale case as authority for saying that where people are in business together and sharing a profit they are not employees. While the EAT upheld that decision every case is different on its facts and what was seen as significant in that case was that the claimant and the other directors were remunerated by taking money out of the company which was then credited to their director's loan account and was repaid by declaring dividends out of the company's profits. There was no express contract of employment and an Employment Judge declined to imply one, the EAT upheld that the Employment Judge was entitled to place weight on the remuneration arrangements, whilst it is true that the amount of pay can vary under a contract of employment it is not a normal feature of a contract of employment that payment is taken by means of loans in variable amounts repaid by dividends at the end of the year.

160. Whilst this is not the situation here as in this case we have a hybrid situation where the claimant and SB were paid up to the personal allowance as employees would be, then the intention was that they would receive a profit share over and above this and over time depending on the amount of profit the company made and with the percentage changing from an initial 50/50 to a somewhat more complicated arrangement. Payment of a regular amount described as salary is not determinative. The authorities caution against a 'magic bullet' approach.

161. The claimant emphasised in submissions that SB had agreed in cross examination that it had be the intention to pay themselves a salary when funds allowed. However the reality is that funds only allowed a limited salary,further that it was limited for tax reasons not just earnings reasons, that it would not be paid if the money was not there. In the 2016/17 tax year the claimant and SB could have paid

themselves more but they chose not to, taking dividends instead if they were available.

162. The claimant urged me to rely on the fact that the Accountant had described her as an employee in relation to the personal allowance situation however that is a somewhat simplistic approach, the Accountant's view even if thoughtfully formed on the basis of some legal knowledge which it was not could not be determinative. The claimant also states that if she was not an employee this arrangement was a fraud on HMRC.

163. However, there are very many cases where an individual agrees to be employed on a self-employed basis and pays tax on that basis but then will later argue they were an employee and a Tribunal will agree with them. The tax situation is something which then has no doubt to be rectified.

164. In my view, the unreliability of the payments even in relation to the personal tax allowance and the fact that overall the payments were dependent on the business making a profit is a factor which militates against employment status. There was an agreement to receive the basic salary (but only when there was predicted there would be enough money to do this) so it was not purely a profit share arrangement, but it was not so significant as to detract from the overall position and indeed that basic amount could not always be paid if there was insufficient money in the business' account.

165. Neither is it a situation where it was contractually agreed the claimant would be paid £1,000 a month however she didn't take that £1,000 per month but expected that it would be reimbursed and/or she would be entitled to sue the company for that £1,000 a month if it was not reimbursed. If for eg the JBX work was cancelled the claimant would not have expected to receive even the £928 unless the funds were otherwise available.

166. I also take in to account that on occasions RB gave the claimant options as to how she could be paid re salary and/ or dividends in order to maximise her tax position and take her student loans into consideration. Again that was inconsistent with employee status. Further she paid him at least two gratuities of £100 for the unpaid help he had given, again inconsistent with employee status.

167. Whilst in my view the remuneration arrangements are a significant factor all the relevant factors are considered on the basis that there is no "magic bullet" to resolve an employment situation.

168. In this case, there are a lot of factors, some of which point towards employee status, some of which do not. I have particularly looked at the issue of control.

169. I do not accept that the claimant was under the control of the respondent, the claimant was in a collegiate relationship with SB and all steps had to be agreed between them and/or confirmed within the principles the business had set out to run on, hence SB's complaints that C partnering other people in July 2017 and her fury over the claimant tendering for work without her agreement such as the GM Hub. However, she could not stop her doing so she could only dissolve the business.

170. The development of principles governing the business does point to an overarching control of both SB and the claimant in that work brought in should conform with those principles, however firstly it was aspirational the principles did not constitute rules and the claimant deviated from this when she wanted (running open courses for example, applying for opportunities without the SB's knowledge) which ultimately led to the business ending.

171. Neither could the business as a separate entity control the claimant if she failed to show up for a training session the only recourse again would have been to dissolve the business .there was no disciplinary procedure which could have been accessed using for eg an independent HR company.

172. The claimant said she had to undertake the work brought in by the respondent but in fact there was room to say no as SB did when the work was something she felt was inappropriate. Whilst the claimant did not say no the possibility was there.

173. In relation to SMP again this was claimed by the Accountant without much thought being attached to the process and indeed the process was driven by the claimant. The fact that SB was copied in I do not attach much weight to as there was no conscious process by which SB was aware SMP was related to employment status. No one approved anything it was in effect the claimant organising her own maternity pay through the accountant. When SB said it was lucky they had received so much in the weeks which would be used for calculating SMP it was very much a bystander comment. I do not accept it shows SB consciously agreeing the claimant was an employee. That said ofcourse opinions are not wholly relevant if at all.

174. In respect of other matters cited by the claimant I find that the claimant did not have to obtain permission for holidays she simply had to let SB know the dates for planning purposes. There was no agreement as to how much holiday the claimant was entitled to, it was up to the individual. She was not required to produce sick notes, I accept SB's explanation for why she required sick note on the one occasion. There were no policies or procedures. Nor were there any agreed hours.

175. Control is a difficult concept when directors are involved - it feels artificial and clearly the respondent in making its case mistook control for subordination to SB. However in any event there were insufficient factors to establish control.

Note

176. Finally for the avoidance of doubt I heard a lot during the hearing from the respondent side about the fact that the claimant could undertake associate work as when she wanted however on reviewing the evidence and documents there was very little to support this proposition and I have not considered to be a major factor when assessing all three employment status issues.

<u>Length of Service</u>

177. I find that the claimant if she had been an employee that she was employed from the 11 August 2015 when she started undertaking paid training for the respondent which was after all the core business the respondent was involved in. There was some preparatory work done before that but this was undertaken on a goodwill basis to get the business established and it was never intended that this

would be invoiced in any way. It matters not if the claimant 'dragged' on the process of ending the business relationship in order to acquire two years service. I make no finding in relation to that.

178. Accordingly, the claimant would have had sufficient service had she been an employee to qualify for unfair dismissal rights.

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Employment Judge Feeney

Date: 16 July 2019

JUDGMENT AND REASONS SENT TO THE PARTIES ON

18 July 2019

FOR THE TRIBUNAL OFFICE

[JE]