EMPLOYMENT TRIBUNALS (SCOTLAND)

Case No: 4105151/2018

Held in Glasgow on 11 and 14 March 2019

Employment Judge: Mary Kearns

Miss M Girvan	**Claimant** **In Person**
Tracy Marshall	**Second Respondent** **In Person**
Anthony Camp	**Third Respondent** **In Person**

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

The Judgment of the Employment Tribunal following the Preliminary Hearing was that the clamant was not in the employment of The Badass Agency Limited as defined by section 83(2) Equality Act 2010 at the relevant time(s) and the Employment Tribunal accordingly has no jurisdiction to determine the claim.

REASONS

1. The claimant, who is 23 years of age was a director and shareholder of the now dissolved first respondent, The Badass Agency Limited from its inception on 27 November 2017 until 2 April 2018. Having complied with the early conciliation rules she presented an application to the Employment Tribunal on 1 June 2018 in which she claimed automatically unfair dismissal and disability discrimination. The first respondent - The Badass Agency Limited - was dissolved on 18 December 2018 and the Tribunal was advised of this by the second respondent on 12 February 2019. The Tribunal wrote to the claimant on 14 February asking whether it was her intention to seek the restoration of the company to the Register of Companies. The claimant was clear that she had no intention of seeking its restoration and she withdrew her claims insofar

as directed against the first respondent, which included her claim for automatically unfair dismissal. The only claims that can continue against the second and third respondents are the discrimination claims under the Equality Act 2010. (As to the competence of the case continuing against the individual respondents only, see Barlow v Stone [2012] IRLR 898 and Hurst v Kelly [2013] ICR 1225).

2. The claimant asserted that she is a disabled person in terms of section 6 Equality Act 2010 ("EqA"). The respondent disputed both disability and knowledge of disability at the relevant time. The first issue for determination at this Preliminary Hearing was whether the claimant was an employee for the purposes of the Equality Act (section 83(2)). If it is determined that the claimant was not an employee as so defined, the Tribunal has no jurisdiction to consider the claim and therefore no jurisdiction to consider the other preliminary issues of disability and knowledge of disability.

Anonymization of claimant

3. The claimant gave evidence in some detail in relation to the issue of her disability. Had it been necessary to make findings in fact based on that evidence in this judgment, I would have considered it appropriate to anonymize the judgment. However, that issue does not arise in light of the decision on employment status.

Evidence

4. The claimant gave evidence on her own behalf and called her mother, Mrs Yvonne Girvan, and a friend, Mr Axel Schneeburger. The second and third respondents gave evidence on their own behalf.

Issues

5. The issues for the Tribunal at this Preliminary Hearing were:-

   (i) Whether the claimant was in the employment of The Badass Agency Limited at the relevant time(s) as defined by section 83(2) Equality Act 2010; and if she was

(ii) the claimant's disability status at the relevant time(s); and

(iii) the respondents' knowledge of disability status;

Findings in Fact

6. The following material facts were admitted or found to be proved:

7. In or about mid 2017 the claimant was a college student doing a full-time course in social sciences. The course involved 2.5 days per week contact time in college. The claimant was also working part time doing administration work for her parents' business, although this sometimes amounted to as much as 39 hours' work per week. On top of this, she was doing some research work for an alternative modelling agency called 'Twisted'. Although she worked for the Twisted Agency for six months she was never paid for her work.

8. On or about 27 June 2017, while the claimant was working for Twisted, she met the third respondent. He has his own graphics, web design and IT support company and they met when they both responded to a Facebook advertisement to be involved in a promotional third-party video. The claimant and the third respondent met up in Waxy O'Connors in Glasgow. The third respondent attended hoping he might be instructed by the claimant to do a website for Twisted. However, the claimant complained to the third respondent about her treatment by Twisted and told him they were not paying their models. The third respondent told her that if she was thinking of starting her own agency then he had researched and designed a website wireframe and local concept for a modelling agency for a prospective client but that it had not gone ahead and the work was there. He said to her that if she wanted to start her own agency, he would be happy to sign on as long as his costs were covered.

9. At a Mixed Martial Arts ("MMA") event called 'Forza' run by Twisted on or about 5 September 2017, the claimant met the second respondent who also worked for Twisted as a model. In conversation, the second respondent complained to the claimant that she had not been paid by Twisted for two months and the claimant said she had not been paid by them either. The

second respondent voiced her annoyance with Twisted and said that she knew that a friend of hers in the MMA sport had paid the agency for the models to be photographed holding up trophies as wrestling, kick-boxing and boxing participants for the publicity material yet Twisted had failed to pay the models. They agreed that Twisted was not well run and that there was no agency that worked for models, stood up for them or represented them. They discussed that there was a gap in the market and the claimant floated the idea that they could do the work directly themselves and run their own agency. The second respondent said that she had the work and contacts. The claimant said that she had been doing a lot of the administration and market research on the industry for Twisted, for which they had not paid her. After the MMA event the claimant was contacted by the models who had taken part asking why they had not been paid. She continued to mull over the agency idea.

10. In or about late October 2017 the claimant got back in touch with the third respondent and arranged to meet up with him again at Waxy O'Connor's. The claimant told the third respondent that she was still thinking about opening an alternative modelling agency. At that point she had not definitely decided to do it as she knew it would take a lot of time and energy. The third respondent said to her "*I have a service you could use. Cut me in and I'm quite happy to work with you."*

11. The claimant met up with the second respondent again a bit later in October 2017 and mentioned her meeting with the third respondent. She offered to introduce the second respondent to the third respondent as neither she, nor the second respondent had any technical knowledge or knew how to do website design and they agreed they would need this. After speaking to a couple of the models the claimant decided to take the idea forward. She agreed with the second respondent that she would speak to the third respondent and offer him an equal share. The claimant accordingly met up with the third respondent at Waxy O'Connor's. She told him that she was 'going to do it' and that if he helped with the website she would give him an equal share.

12. After that the parties chatted online about their preparations to start the agency. The three of them met up together at Waxy O'Connor's again around early November 2017 and decided that the agency would be called 'the Badass Agency'. The third respondent had done a few logos and they discussed these. They decided on a colour scheme and that the agency would be 'all-inclusive' rather than 'alternative'. This meant that it would act for tattooed and non-tattooed models, which would increase its client base. The third respondent went over the costs and the second respondent gave him the money to purchase the webspace, domain names etc. The parties discussed having a launch event at a night club called AXM on 23 February 2018. The third respondent said that he would do the logos for that and also prepare a slide show.

13. The three directors met up again towards the end of November and went to view the launch venue. They took notes of all the tasks that would need to be done. The claimant took the lead on this and the others volunteered what they would do. The claimant's parents are successful business people and she had taken some advice from them, which was that it should all be done officially by means of a limited company. The respondents said they were 'not fussed' about this, but the claimant insisted it be done that way. She said that she knew models who had worked for illegal agencies and was aware of the problems they had had and she did not want to make the same mistakes.

14. In November 2017 the claimant set up The Badass Agency Limited (referred to hereafter as "Badass" or "the agency") as a private company limited by shares and she registered it with Companies House. As agreed with the respondents, she registered the directors as herself and the two respondents. The shares were split three ways. There were 300 shares in total and each director had 100 shares. Each of the three directors was named as an 'individual person with significant control' on the relevant Companies House form. The certificate of incorporation was dated 27 November 2017. The claimant paid the cost of the Companies House registration out of her own pocket. The claimant also registered the company with HMRC for corporation tax. The company was not, at any stage registered for PAYE.

15. The directors agreed between them what their roles would be in the agency. The second respondent's role was 'sport' as she had a background in cage fighting and had a number of contacts in that area. The third respondent was in charge of the website, technology and graphic design and the claimant said she would be in charge of PR and administration. The agency did not have premises, so each of the directors worked independently from their own homes as and when they had time as they were all also involved in other work and activities. There were no set hours of work and none of them were ever paid any salary. The claimant set up a Paypal account for Badass and operated it. The second and third respondents were reimbursed some of their out of pocket expenses from the Badass Paypal account. The claimant thought they perhaps ought to have issued invoices for these, but this was never done. The three Badass directors were spread quite far apart geographically. The claimant was in Helensburgh, the second respondent was in Edinburgh and the third respondent was in Wishaw. The second respondent's address was used as the Badass address for Companies House and the website. Each party contributed some money toward the start-up. It was unclear whether or not these were directors' loans. The claimant did not regard them as such but there was no written agreement. The claimant put in £500 and the second and third respondents each put in £1,000. The claimant also paid a model £93 out of her own pocket. The company had the Paypal account but no bank account.

16. It was agreed among the directors that they would publicly announce the agency in January 2018, once the claimant had officially left Twisted. They also agreed that there would be a launch event in February. The second respondent paid for Tshirts, flyers and software costing a total of around £850. The claimant transferred money from the Paypal account to the third respondent to cover further costs incurred in setting up the website.

17. A number of models registered with the agency. (By March 2018 around 12 models had signed up.) The claimant drafted contracts for the models which stated that they were self-employed. There was also a 'non-disclaimer clause' to say that the models were not allowed to release information about the

clients' events. The idea was that the agency would find work for the models who were registered with them and the models would pay the agency 20% commission from their earnings on the relevant jobs.

18. The claimant did most of the Badass administration. The PR and marketing were initially done by word of mouth. The claimant and second respondent contacted people who were running events and encouraged them to use the agency. For example, the claimant contacted the owner of a festival called 'Incineration' and he hired two of the agency's models to go to London for the event.

19. The claimant's legal relationship with Badass was that of director and shareholder. None of the parties had any written contract with the agency of any description. There was no overarching written agreement. No one else in the agency ever gave the claimant instructions about what to do. The claimant and the other directors were self-motivating and each decided for herself or himself what needed to be done. If the claimant decided something needed to be done, she would do it. The parties primarily kept each other informed about what they were doing by means of an online administration chat group.

20. The parties had agreed that the profits would be shared equally, but they never really got to the stage where they were trading at a profit. The claimant controlled the Paypal account but she also used her own personal bank account at times for business purposes. She began to feel that her account was no longer her own. At one stage she made an error transferring revenue from an event to the business Paypal account and accidentally transferred it to her personal account, then had to transfer it back. Models had to wait a month to get their payments. After one event it was agreed that the three shareholders would get £190 each but the claimant never got her share. The agency had no employees and could not have supported any. In particular, it was not set up for the directors to be employees and there was never any discussion or agreement that this would happen. Badass could not have afforded the liabilities employees would occasion because it did not have a regular source of income. It would not have been able to pay pension contributions, the minimum wage, maternity pay or sick pay. The agency was

registered with HMRC for payment of corporation tax but not for PAYE purposes. The long-term plan was for the directors to be paid dividends in 3 to 5 years if the agency was successful. There was no mechanism in place for handling what would happen if someone did not do what they had agreed to do. There was no disciplinary or grievance procedure.

21. Towards the end of January 2018 the second respondent, who was pregnant, went into premature labour at 28 weeks and gave birth to a son on 27 January 2018. Her son was in the Neonatal Intensive Care Unit in Fife and was very unwell. The second respondent lives in Edinburgh but she stayed with her mother in Glenrothes at this time to be near her son. She also had to divide time between the hospital and her other three children. The second respondent did not take maternity leave and was not paid statutory maternity pay, nor was there ever any expectation on her part or on that of the other directors that she would be entitled to any.

22. The Badass launch event was set for 23 February 2018. The second respondent attended the event and did what she could for it, but she was prevented by her personal circumstances from giving the agency as much time as she would have wanted. There were a number of hiccoughs with the launch event, but it went ahead and made a small profit of £500.

23. After the launch event, the three directors had intended to meet up and draw up a 'partnership agreement' setting out how things were going to work going forward. The third respondent was worried that they had not at that stage established a viable economic model. They had a few attempts at arranging to meet but this was difficult because of the second respondent's circumstances. One date that was arranged had to be postponed because the third respondent broke down on the way there.

24. On or about 11 March 2018 the three directors of Badass made another attempt to meet up together for a discussion about the way forward. Unfortunately, the claimant's car broke down on the motorway and she did not manage to attend. The intention in meeting was to draw up an agreement,

set up a bank account and go over the invoices. The meeting never did take place.

25. On 27 March 2018 tragedy struck. The second respondent's baby son died. She was devastated and needed support and time to grieve. Unfortunately, the claimant's disability affected the way she interacted with the second respondent at this time and the claimant was also suffering from anxiety because there was a lot going on in her own life. Relations between the claimant and the other two directors became extremely strained and ultimately, there was a breakdown in communication. The second respondent told the third respondent that she could not continue with the agency and wanted to leave. The third respondent said that if she did so, the agency would be disbanded. The claimant resigned as a director of the agency on 1 April 2018, but held onto her shares. She was under considerable pressure at that time with exams for her course and high anxiety levels.

26. On or about 12 May 2018, having taken some advice, the second and third respondents gave the claimant three options: 1. The second and third respondents would leave the agency and the claimant could absorb the Badass debts of around £2,415 and take over the agency herself; 2. The claimant could leave, not owing her share of the debts, but still receiving any profit from events that had taken place while she was involved; or 3. The agency could be dissolved.

27. The agency was ultimately dissolved on 18 December 2018.

Discussion and Decision

Employment status

28. I have addressed this issue first because it affects whether this Tribunal has jurisdiction to consider the claim at all, by which I mean that if the claimant and remaining respondents were not employees (as defined by the EqA) of

the now dissolved first respondent (The Badass Agency Limited) then the Tribunal cannot hear this claim. This Tribunal, being a statutory body, only has the jurisdiction specifically conferred on it by Act of Parliament. Section 120 Equality Act 2010 sets out the Tribunal's jurisdiction under the Act. It provides, so far as relevant as follows:

"***120 Jurisdiction***

(1) An employment tribunal has, subject to section 121, jurisdiction to determine a complaint relating to –

(a) A contravention of Part 5 (work);

(b) A contravention of section 108, 111 or 112 that relates to Part 5"

29. Part 5 refers throughout to "Employment". In order to be covered by its terms, this claimant must (at the relevant time) have been in "employment" and this is interpreted in section 83 at the end of Part 5, so far as relevant in the following terms:

"***83 Interpretation and exceptions***

(1) This section applies for the purposes of this Part.

(2) "Employment" means –

(a) Employment under a contract of employment, a contract of apprenticeship or a contract personally to do work;

(b) ……..."

"Contract of employment"

30. Section 83(2)(a) of the Equality Act 2010 ("EqA") defines "employment" as "*employment under a contract of employment ….or a contract personally to do work*". Turning to the first limb, the circumstances in which directors can be said to be employed under a "contract of employment" have been often considered by the courts. Company directors are office holders and can be removed from office by a vote at a company general meeting. They are not automatically employees of the company but can become so by entering into a contract of employment express or implied. In small companies such as the former first respondent the status of a director may be unclear. There is a body of case law

which has arisen mainly in the context of the recovery of wages, holiday and redundancy payments from the Secretary of State by former directors of insolvent companies. In distilling the principles from the case law, it is important to bear in mind that they are considering "employment" as defined in the narrower Employment Rights Act sense and not the wider EqA sense.

31. In Fleming v Secretary of State for Trade and Industry 1997 IRLR 682 the Court of Session held that a tribunal was entitled to conclude that a director and majority shareholder in an insolvent company was not an employee for the purpose of claiming a redundancy payment from the Secretary of State. The facts that Mr F was a majority shareholder, had elected not to draw a salary from the company, had personally guaranteed company loans and had no written terms of employment were held to point away from there having been an employment relationship. However, the Court held that whether a person is an employee is a question of fact to be determined on the particular circumstances of each case by the tribunal.

32. In Secretary of State for Trade and Industry v Bottrill 1999 ICR 592 the Court of Appeal upheld a tribunal finding that the claimant was an employee of a company despite being managing director and sole shareholder in circumstances where the claimant had a written contract of employment, was paid a salary by PAYE, worked regular hours, was entitled to sick pay and holiday pay, did not work anywhere else and did not receive director's fees. The Court proposed some helpful considerations for tribunals when addressing this issue: Is there a genuine contract between the company and the shareholder? If so, how and why did it come into existence and what did each party do under the contract? What sort of relationship does the contract give rise to? The degree of control is always important, but the tribunal should consider not just who has the controlling shareholding but where the real control lies.

33. Personal service, mutuality of obligation and control are sometimes referred to as the "irreducible minimum" of an employment contract, suggesting that normally if one of them is not established the relationship is not one of employment in the narrower sense. In relation to the first two questions posed

in Bottrill (previous paragraph - Is there a genuine contract between the company and the shareholder? If so, how and why did it come into existence and what did each party do under the contract?) it is helpful to consider whether there was mutuality of obligation. Mutuality of obligation arises where a respondent is under an obligation to provide work and a claimant is under an obligation to do it in return for remuneration. The significance of mutuality is that it determines whether there is a contract in existence between the parties at all. I did not conclude in this case that there was mutuality of obligation between the claimant and the first respondent, such that a contract of employment either express, implied, written or oral existed. Not only was there no written contract here, there was no evidence of the parties ever having discussed having employment status or service contracts for themselves as directors. There was, in other words no evidence that a contract with the former first respondent had ever come into existence. On top of that, there was no way the fledgling company could have borne the liabilities that their employment would have incurred at that time, not least the second respondent's statutory maternity pay. There was accordingly significant evidence that the claimant was not an employee.

"Contract personally to do work"

34. That is not the end of the matter because it is the wider definition in the EqA that applies to this case. However, whilst the definition of "employment" in the EqA covers a wider group of workers than are covered by the unfair dismissal provisions in the Employment Rights Act 1996, it is still necessary to fall within its terms. It has been held in the case law that the definition of "worker" and that of "employee" in the anti-discrimination legislation are aligned and that cases on one are authoritative on the other (James v Redcats (Brands) Ltd [2007] IRLR 296 EAT; Jivraj v Hashwani [2011]2011 IRLR 827 relying upon Allonby v Accrington & Rossendale College [2004] ICR 1328 ECJ (para 68); Secretary of State for Justice v Windle & Arada [2016] IRLR 628 CA).

35. As set out above, section 83(2)(a) of the Equality Act 2010 ("EqA") defines "employment" as "*employment under a contract of employment ….or a contract*

personally to do work". Paragraph 554 of Harvey on Industrial Relations and Employment Law/Division L Equal Opportunities/ Employees: Discrimination against persons employed states: "*'Employment for these purposes depends, first of all, upon the person employed having a contract of some sort. If it is not a contract of service, it must be a contract which places the provider of services under some obligation to do so. The absence of a contract between the claimant and the respondent to a discrimination case can, thus be fatal."* In Fenoll v Centre d'aide par le travail 'La Jouvene' [2016] IRLR 67 the Court of Justice of the European Union ("CJEU") held that a disabled person attending a work rehabilitation centre could be a 'worker' for the purposes of the Working Time Directive 2003/88/EC. Applying a broad interpretation of who qualifies as a 'worker' for the purpose of the protection of EU law, the CJEU held that "*the essential characteristic of an employment relationship was that 'for a certain period of time a person performs services for and under the direction of another person in return for which he receives remuneration'"*. (Harvey paragraph 555.02). Thus, in relation to the second limb of the section 83(2)(a) definition, as with the first it is necessary that there was a contract between the claimant and the now dissolved first respondent. If it was not a contract of service, was it a contract which placed the claimant as provider of services under some obligation to do so? Mutuality of obligation is not a pre-condition for section 83(2)(a) 'employment' but it is a relevant consideration capable of shedding light on the nature of the relationship. Per Underhill LJ in Secretary of State for Justice v Windle and Arada CA [2016] IRLR 628 "*the fact that a person supplying services is only doing so on an assignment by assignment basis may tend to indicate a degree of independence, or lack of subordination, in the relationship while at work which is incompatible with employee status even in the extended sense."*

36. I have concluded that whilst the claimant did choose to supply her personal services to the Badass Agency, she was not under any contractual obligation to do so. She was the driving force behind the venture and she chose whether, when and how she worked. The Agency was not under any obligation to provide her with work, nor was she entitled to payment of remuneration for the work she

chose to do. She would have been entitled to share any profits but that is a different issue. There was also a complete lack of subordination or direction in the working relationship between the claimant and her former agency which is incompatible with employee status even in the wide sense in which that is defined in the EqA.

37. According to Harvey paragraph 557.01, the traditional test was whether the 'predominant purpose' of the contract was the execution of personal work. That involved asking a) whether the person was under an obligation personally to do work, and if so b) whether that was the dominant purpose of the contract. However, in Jivraj v Hashwani SC [2011] IRLR 827 the Supreme Court held that the focus should be on the contract and the relationship between the parties rather than solely on the dominant purpose of the contract. In that case, an arbiter was appointed under a joint venture agreement which required that he be Ismaili. The question arose as to whether the rejection of a non-Ismaili proposed arbiter by one party amounted to unlawful religious discrimination. The Supreme Court held *inter alia* that the arbiter would not be in "employment" as defined by the anti-discrimination legislation because, although the dominant purpose of the contract was for the arbiter to personally perform the work, which could not be delegated to another, crucially, he would not do so under the direction of the parties. Similar considerations apply to the claimant in this case. She was the architect of the agency. She was not directed by it in any sense.

38. In Allonby v Accrington & Rossendale College and others [2004] IRLR 224 the test laid down by the European Court of Justice (approved by the Supreme Court in Jivraj) was whether the individual concerned performs services for and under the direction of the other party to the contract in return for remuneration, as opposed to being an independent provider of services who is not in a relationship of subordination with that other party. Thus, although the dominant purpose of the contract may be personal work, it may not be personal work under the direction of the other party to the contract. The ECJ also laid down the following relevant principles in Allonby: that the category of 'worker' is not intended to include independent providers of services who are not in a relationship of subordination with the person who receives the services; and

that the question whether an 'employment' relationship exists for these purposes is to be answered in each particular case by having regard to all the factors and circumstances by which the relationship between the parties is characterised.

39. In summary then, none of the parties had any written contract with the agency of any description. There was no overarching written agreement. There was no mutuality of obligation, (not that that is, on its own determinative on the wider definition of "employment" in the EqA). There was no obligation to pay the claimant or provide her with work. The claimant and the other directors all had other commitments, which they worked around. The agency did not have premises, so they each worked independently from their own homes as and when they had time. There were no set hours of work and none of the parties were ever paid any salary. The claimant's legal relationship with the agency was that of director and shareholder. No one else in the agency ever gave her instructions about what to do. The parties were self-motivating and each decided for herself or himself what needed to be done. The parties had agreed that the profits would be shared equally, but they never really got to the stage where they were trading at a profit. The agency could not have supported any employees and was not set up for the directors to be employees. It would not have been able to pay pension contributions, the minimum wage, maternity pay or sick pay. The agency was registered with HMRC for payment of corporation tax but not for PAYE purposes. The long-term plan was for the directors to be paid dividends in 3 to 5 years if the agency was successful. There was no mechanism in place for handling what would happen if someone did not do what they had agreed to do. There was no disciplinary or grievance procedure.

40. Put shortly, the claimant's case that she had a contract of employment with or a contract personally to do work for the agency as defined in section 83(2)(a) does not succeed on the facts. The Tribunal accordingly has no jurisdiction to consider the case.

41. There was evidence that in or around May 2018 the three directors had intended to meet up and draw up a 'partnership agreement' setting out how things were

going to work going forward. I did consider whether the claim might be addressed under the provisions of the EqA applicable to partnerships (sections 44 to 46). However, the definition of "partnership" for those provisions has the same meaning as that contained in the Partnership Act 1890. That Act states in section 1(1): *"Partnership is the relation which subsists between persons carrying on a business in common with a view of profit*." However, it then goes on to say that the relation between the members of any company or association that is registered under the Companies Act is not a partnership within the meaning of the 1890 Act. Thus, it is clear that the provisions of the EqA relating to partnerships do not apply to this case.

Employment Judge **Mary Kearns**

Date of Judgment **04 April 2019**

Entered in register and copied to parties **17 April 2019**