EMPLOYMENT TRIBUNALS

BETWEEN

Claimant		**Respondents**
Ms Sharon Laura Loane	AND	The South Devon Players Limited (1) Sarah Gregori (2) Laura Jury (3) Tracy Jane Lawton (4)

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

HELD REMOTELY **ON** 25 February 2022
By Video Hearing Service

EMPLOYMENT JUDGE N J Roper

Representation
For the Claimant: **In person**
For the First and Third Respondents: **Mr T Westwell of Counsel**
For the Second Respondent: **In person**
For the Fourth Respondent: **In person**

JUDGMENT

The judgment of the tribunal is that the claimant does not come within the extended definition of "Employment" in section 83 of the Equality Act 2010, and her claims for disability discrimination are hereby dismissed.

RESERVED REASONS

1. This is the judgment following a preliminary hearing to determine the employment status of the claimant. During the course of the last week it became clear that this tribunal might not have territorial jurisdiction to hear all of the claimant's claims, and this point was determined first. This judgment should be read in conjunction with an earlier judgment of today's date which deals with those jurisdictional issues. The claimant's remaining claims are for direct disability discrimination; indirect disability discrimination; an alleged failure to make reasonable adjustments; and for harassment related to disability. Whether this Tribunal has jurisdiction to hear these claims turns on whether the claimant falls within the extended definition of "Employment" within section 83 of the Equality Act 2010.

2. I have heard from the claimant, who was cross-examined on behalf of the respondents. The second and third respondents gave evidence on behalf of all four respondents by way of written statements which were not challenged by the claimant.
3. There was a degree of conflict on the evidence. I have heard the witnesses give their evidence and have observed their demeanour in the witness box. I found the following facts proven on the balance of probabilities after considering the whole of the evidence, both oral and documentary, and after listening to the factual and legal submissions made by and on behalf of the respective parties.
4. The first respondent The South Devon Players Ltd is a not-for-profit company which operates a community theatre group based near Torbay in Devon. The second respondent Ms Gregory is a freelance actor who was performing with the first respondent company at the relevant times. The third respondent Ms Jury is a volunteer director of the first respondent company. The fourth respondent Ms Lawton is an amateur actor who was also performing with the first respondent company as an actor at the relevant times. The third respondent Ms Jury founded the first respondent company in 2005 in order to create opportunities for local people to become involved with theatre and to develop their portfolios so as to enable them to further their acting careers.
5. The claimant Ms Sharon Laura Loane was born with cerebral palsy. She is an actor who rehearsed for and performed in four different theatrical productions which were put on by the first respondent company in 2020 and 2021. The claimant lives in Northern Ireland. As a result of the Covid-19 pandemic the rehearsals and productions were all carried out remotely via Zoom. The claimant has confirmed that all material times she lived in Northern Ireland and dealt with the respondents remotely from Northern Ireland via Zoom.
6. The four productions on which the claimant worked were as follows. The first was "A Midsummer Night's Dream" in which the claimant first became involved in May 2020 and which was performed in June 2020. The second was "Jack the Ripper". The claimant requested an audition pack for this in June 2020 and auditioned in summer 2020. The play was performed in February 2021, but without the claimant, who had by that stage already ceased involvement with the first respondent company in January 2021. The third production was "Sir Walter's Women" for which she auditioned in about September 2020 and which was performed in November 2020. The fourth production was "Tales of Spooky Brixham" which was rehearsed from September 2020 and performed on 31 October 2020.
7. The claimant ceased involvement with the respondent in January 2021 following a disagreement which forms the subject of the claimant's discrimination claims. This was before "Jack the Ripper" was performed in February 2021.
8. A number of different written documents applied to govern the relationship between the claimant and the first respondent company for each of the productions in which she participated. The relevant ones were as follows. In the first place there is a standard "Performer Agreement" which the claimant signed for three of the four productions (she did not sign one for "Jack the Ripper" because she dropped out before it was performed). This document recorded the terms on which the parties understood they were operating. Secondly the first respondent company had a constitution which set out its objectives and membership arrangements. This document made it clear that "self-employed actors and crew … Join us on a production by production bases" and that "involvement as a performer is decided by audition". There was also a document entitled "Cast & Crew Rules of Conduct" which set out rules on conduct and confidentiality and aimed at abiding by Equity's policies on anti-bullying and antidiscrimination. Next there was a profit share policy setting out how the company's profit share arrangements for actors and crew members operated. There was also an equal opportunities policy which referred to the Equality Act 2010, and a social media policy designed to ensure that Performers' images from their participation were not misused on social media platforms.
9. The first respondent company arranged rehearsals at set times to be as flexible for its Performers as possible. Rehearsals for the productions in which the claimant was involved generally took place on a Sunday afternoon or occasionally Wednesday evenings. Performance dates were also booked after discussion with the Performers taking part bearing in mind their availability.

10. The Performer Agreement included a clause to this effect: “If I miss rehearsals and make no contact before the start of rehearsals, that after the second incident, my role may be recast unless an unavoidable and critical emergency has occurred”. In practice the first respondent allowed Performers to miss rehearsals in the event of work and/or family commitments, or illness, even at short notice.
11. There was also a provision in the Performer Agreement to this effect: “If by actions by myself including of wilfully being late, not turning up, missing over 75% of agreed rehearsals, causing damage or disruption at venues, or other unprofessional behaviour, I incur extra expense for the production company (e.g. fitted costumes, extra venue or equipment hire, cancellation fees, etc) then I am fully liable to the production company for the expenses that I have caused them, and will reimburse that cost within 28 days.” The respondents explained that this provision was designed as a last resort for exceptional circumstances where the company might have been left seriously out of pocket (for instance were a venue charged cancellation fees which the company could not meet). However, the first respondent company has not exercised its rights under this provision at any stage against any Performer.
12. The First Respondent company operated a profit-sharing arrangement under which Performers and crew, including the claimant, were entitled to receive a share of the profits from performances in which they participated. The profit share policy recorded that “Each person involved in the production each receives an equal share of the ticket monies received by the company” (after deduction of venue hire costs). Performers were only entitled to profits for shows in which they actually appeared. Performers are only paid once the company had received payments from the venue or from attendees of performances conducted over Zoom. Under these arrangements the claimant had no entitlement to any pay for any productions unless and until a profit was made. In the event the claimant received £19.72 for “a Midsummer Night’s Dream”, £26 for “Sir Walter’s Women”, and £180 for “Tales of Spooky Brixham” (the last of these being funded in part by a grant from an external organisation which gave rise to the higher profit).
13. One of the key aims of the first respondent company has always been to help individuals to develop their acting portfolios and to develop their careers. Performers were encouraged to market themselves to the world at large throughout their time with the company. The claimant was provided with screenshots and video recordings of her performances with the company for her own acting portfolio.
14. The claimant also undertook other activities alongside her involvement with the company. On 11 June 2020 she informed the third respondent that she was studying with the Atlantic Theatre School. She was also engaged by an acting agency throughout the time that she was involved with the first respondent. At all material times the claimant marketed her skills on various freelance acting websites and the second and third respondents similarly marketed their skills as actors on major acting websites. However, some of those involved were not professional actors at all, for example the fourth respondent worked as a teacher throughout the period of her involvement. She also performed for several other amateur theatre companies in addition to the first respondent company.
15. Finally, the claimant asserts that she is a worker, which is disputed by the respondents. She does not assert that she was an employee under a contract of service.
16. Having established the above facts, I now apply the law.
17. The claimant’s remaining claims are for direct disability discrimination, indirect disability discrimination, failure to make reasonable adjustments, and harassment related to disability. These are brought under sections 13, 19, 21 and 22, and 26 of the Equality Act 2010 (“the EqA”). These provisions all require the claimant to be in employment, and there is an extended definition in section 83(2) EqA which provides “Employment” means – (a) employment under a contract of employment, a contract of apprenticeship or a contract personally to do work …”
18. A number of the relevant cases also refer to similar provisions in section 230 of the Employment Rights Act 1996 ("the Act"). Under that Act an employee is an individual who has entered into or works under (or, where the employment has ceased, worked under) a contract of employment. A contract of employment is defined as a contract of service or

apprenticeship, whether express or implied, and (if it is express) whether oral or in writing. Under section 230(3) of the Act a worker means an individual who has entered into or works under (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 profession or business undertaking carried on by the individual. (A worker who satisfies this test in sub-paragraph (b) is sometimes referred to as a "limb (b) worker").

19. I have considered the following cases to which I have been referred: South East Sheffield Citizens Advice Bureau v Grayson [2004] ICR 1138; Hashwani v Jivraj (London Court of international Arbitration Intervening) [2011] ICR 1004; MacAlinden (t/a Charm Offensive) v Lazarov and Ors UKEAT/043/13; Halawi v WDFG UK Ltd (t/a World Duty Free) [2015] IRLR 50; Windle and Anor v Secretary of State for Justice [2016] ICR 721; Alemi v Mitchell and anor [2021] IRLR 262; Pimlico Plumbers Ltd & anor v Smith [2018] IRLR 872; and Uber UV and Ors v Aslam and Ors [2021] ICR 657.
20. The cases relating to "limb (b)" worker status under section 230(3)(b) of the Act are relevant in the sense that there is no significant difference between that definition and the extended definition of employment under the EqA (see for instance Pimlico Plumbers).
21. In determining whether the claimant was an employee in the extended sense under the EqA, the starting point is not the terms of any written agreement between the parties but the reality of the relationship between them (per Lord Leggatt in Uber at 76).
22. In order to satisfy s83(2) EqA the claimant must establish that she was engaged under "a contract personally to do work" (because she does not assert that she was employed under a contract of employment or apprenticeship). Further, in order to demonstrate that she performed services for and under the direction of the company, in return for which she received remuneration, the claimant will need to satisfy three requirements: the existence of a contract; an obligation of personal service; and subordination and/or dependency.
23. To develop these further, the claimant must show that she worked and was paid "under a contract" (Halawi), and whether the arrangements between the claimant and the first respondent company imposed "any contractual obligations on her actually to do any work … in return for consideration" (Grayson). Given that section 83(2) EqA requires that there must be a contract "personally to do work" the claimant must show that the obligation to do the work was owed by the claimant "personally". In Hashwani, Lord Clarke identified the question as being: "whether, on the one hand, the person concerned performs services for and under the direction of another person in return for which he or she receives remuneration or, on the other hand, he or she is an independent provider of services who is not in a relationship of subordination with the person who receive the services". Important factors for determining the requirement of "subordination and/or dependency" include (per Uber 73 – 75); (a) whether the claimant was integrated into the undertaking; (b) whether the claimant was able to market her services to anyone else; (c) the degree of control exercised by the company over working conditions and remuneration; and (d) whether the claimant worked intermittently on a casual basis for the company, because if so this "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" (per Underhill LJ in Windle).
24. In the first place there was no "overarching" or "umbrella" contract which governed the entire relationship between the claimant and the first respondent company. The claimant was only involved with the company on a project by project basis. She was free to choose whether or not to participate in any production. If she did wish to participate, she was required to contact the company to express interest and then either had to audition, or she could accept any offer to participate. In between these projects there was no subsisting relationship between the parties.
25. In addition, there was no separate contract which required the claimant to work in respect of any individual production. The only recourse which the first respondent company had for breach of contract arose not just if the claimant failed to carry out a minimum number of

rehearsals or failed to appear, but if she did either of those things and the company also incurred significant expenses. It was held in Grayson that the fact that the company could not bring a claim for breach of contract against the claimant simply for terminating involvement indicates that there was no binding obligation on the claimant to work. There was therefore no contract falling within the definition of employee in the extended sense.

26. It also seems that the claimant had no obligation to work personally for the first respondent company, because she was permitted to send a substitute to rehearsals (although it was more usual for the company to ask a crewmember to stand in).
27. In addition, the claimant was not subordinate to or dependent on the company. The claimant had the ability to market her services as an actor to the world at large whilst still involved with the company and indeed was encouraged to do so. She was not integrated into the first respondent company's organisation. She was free to carry out acting work with other companies, or work of any other kind, at any time she was not actively involved in a rehearsal or performance. The rehearsal schedules and show dates were deliberately set at times to allow those involved to complete their other commitments including amateur or professional acting commitments.
28. The case of MacAlinden also involved an actor who worked on other projects alongside her work for the respondent theatre production company. HHJ David Richardson commented at [25] "This description is strongly suggestive of a person who has embarked on a professional business undertaking. She appears to be actively marketing her services as an independent person to the world in general rather than being recruited to work for any individual as an integral part of our individual's operations. She was, no doubt, immersed in the respondent's play once she had been cast in it; but she was not integrated into the respondent's theatre production business." In that case this company was held to be a client or customer of a profession carried on by the claimant, and she fell outside the limb (b) definition of worker.
29. In Uber at [75] it was stated that "the correlative of the subordination and/or dependency of employees and workers in a similar position to employees is control exercised by the employer over their working conditions and remuneration." In this current case the degree of control exercised by the first respondent company was very limited. The claimant was afforded flexibility as to when she worked, and if she chose to discontinue participating in any production she was free to cease involvement without notice. Although there was a theoretical right for the company to seek reimbursement if the claimant missed rehearsals or performances which then (in addition) caused expense, the reality of the relationship was that this potential entitlement had never been exercised against anyone, and in the claimant's case, the first respondent did not exercise it when she dropped out of "Jack the Ripper" a week before the performance.
30. In addition, the first respondent company's control over any sums received by the claimant was very limited because it was determined entirely by the level of ticket sales. The primary purpose behind the profit share arrangements was to recompense people towards expenses incurred, and the fact that there were very small sums involved was consistent with this purpose. The company was in reality an amateur dramatics group which involved a number of performers who were hobbyist actors (including the fourth respondent to this case). Also, in Grayson, the fact that expenses were paid to the individual volunteers was insufficient for them to be classified as employees in the extended sense.
31. In conclusion I find that the claimant was not engaged under "a contract personally to do work" within the meaning of s83(2) EqA. There were no contractual obligations on her actually to do any work in return for consideration. The first respondent's constitution made it clear that "self -employed actors and crew … join us on a production by production basis". The claimant worked intermittently on a casual basis for the company, which indicated 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 (per Underhill LJ in Windle). The reality of the arrangement was that the first respondent is a not-for-profit community theatre company and the claimant was a self-employed actor who was not integrated into the first respondent's business. She was never subordinate to or dependent on the first respondent company. Any remuneration was mimimal, and it depended on a

net share of ticket sales in the hope of discharging expenses, without any guarantee of the same.

32. For all of the above reasons I find that the claimant has not satisfied the extended definition of "Employment" in section 83(2) EqA and accordingly I hereby dismiss her claims of disability discrimination.
33. For the purposes of rule 30(6) of the Employment Tribunals Rules of Procedure, the issues which the tribunal identified as being relevant to the claim are at paragraph 1; all of these issues were determined; the findings of fact relevant to these issues are at paragraphs 4 to 15; a concise statement of the applicable law is at paragraphs 16 to 19; how the relevant findings of fact and applicable law have been applied in order to determine the issues is at paragraphs 20 to 32.

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Employment Judge N J Roper
Dated 25 February 2022

Judgment sent to Parties on
08 March 2022 By Mr J McCormick

For the employment tribunal