IN THE COURT OF APPEAL CIVIL DIVISION **CASE NO: CA-2025-002386**
ON APPEAL FROM THE HIGH COURT OF JUSTICE
KING'S BENCH DIVISION
HER HONOUR JUDGE HOWELLS SITTING AS A JUDGE OF THE HIGH COURT
B E T W E E N

(1) EQUITY
(2) LYNDA HAY
KNOWN PROFESSIONALLY AS LYNDA ROOKE
(3) JACKIE CLUNE
(4) NICHOLAS SIMONS
KNOWN PROFESSIONALLY AS NICK FLETCHER
(5) DAVID WILLIAMS
KNOWN PROFESSIONALLY AS DAVID JOHN
(6) JASSA AHLUALIWA
(7) HYWEL MORGAN
(8) NATALIE BIGGS
KNOWN PROFESSIONALLY AS NATALIE AMBER
(9) TONIA CAMPELL
KNOWN PROFESSIONALLY AS TONIA DALEY-CAMPBELL

Claimants/Appellants

-and-

TALENT SYSTEMS EUROPE LIMITED
TRADING AS SPOTLIGHT

Defendant/Respondent

APPELLANTS' APPEAL SKELETON ARGUMENT – 17 November 2025
References to CA Core Bundle [CB] inserted 26 May 2026

Introduction

1. Employment agencies, as a business model, flourished following the conclusion of World War 2. Large numbers of demobilised members of the armed forces returned to the United Kingdom to a significantly different economy to that which they had left up to 6 years previously. The skills

developed during armed service were not always immediately apparent to civilian employers on their return, and the recruitment agency, operating similarly to the Labour Exchanges, helped find those returning from war find employment in civilian life.

2. By the late 20th Century however, some of the businesses operated in the UK had become a cause for concern, particularly for the high fees and low quality of service offered by them. The two concerns are apparent in the **Employment Agencies Act 1973 ("EAA"**) which provided for:
    a. the protection of workers, and work-seekers from exploitative practices by those who operate employment agencies and businesses; and,
    b. ensuring that those end-users who make use of employment agencies and businesses get what they pay for in terms of qualified staff able to perform the jobs sought and/or advertised.

3. The continued importance and use of employment agencies as a means of individuals getting paid for their labour is apparent from the detailed legislative proposals relating to guaranteed hours currently before Parliament as part of the Employment Rights Bill 2025.

4. A key feature of the EAA was drawing a legal distinction between those kinds of entities which:
    a. only provide services, including by way of information, for the purpose of finding persons employment with others; "employment agencies"[1] and,

[1] Section 13(2) EAA

b. go further than merely supplying services for the purpose of finding employment, and actually supply workers to an end user; "employment businesses".[2]

5. Section 6 of the EAA prohibits the charging of fees to persons for providing them services for the purpose of finding or seeking to find employment, save in such cases or classes of case as the Secretary of State may prescribe. The Employment Agencies Act 1973 (Charging Fees to Workers) Regulations 1976[3] had permitted fees to be charged to those seeking employment in occupations listed in the Schedule to those Regulations which specifically included "actors, singers, dancers and other performers".[4]

6. These regulations remained in force until 5 April 2004 when they were revoked by the Conduct of Employment Agencies and Employment Businesses Regulations 2003.[5] It is the Conduct Regulations which are currently in force and in issue in this case. Broadly the same category of workers (actors, musicians etc) are listed in Schedule 3 of the Conduct Regulations. As recorded in the judgment at paragraph 10 "*it is agreed that all those who subscribe to the Defendant's directory would fall within the category of Schedule 3 occupations*".

7. The publication known as *Spotlight* provides a service – by the means of providing information – for the purpose of performers finding employment with employers. It does this by providing hirers – casting agents and directors – with information about the performers. Quite simply, performers pay to have their profile included in the directory so that it is available to casting directors

[2] Section 13(3) EAA.
[3] SI 1976/714
[4] Referred to as "Performers" below.
[5] SI 2003/3319 – "the Conduct Regulations"

when casting for productions or agents when looking for client. It is therefore an agency within the EAA, and the Conduct Regulations. The Conduct Regulations, made under the powers in section 5 EAA are designed to permit the charging of fees to 'schedule 3' performers in certain circumstances. *Spotlight* is a publication squarely within Regulation 26(2). Paragraph (5) permits fees to be charged

> "…*by an agency in respect of the inclusion of information about the work-seeker in a* ***publication*** *provided that –(a) the publication is* ***wholly for one or both of the following purposes****, namely the purpose of* ***finding work-seekers employment*** *in,* **or** ***providing hirers with information about****, work-seekers in relation to any of the occupations listed in Schedule 3*[6]…" (emphasis added).

8. The High Court erred in its approach to section 13(2) EAA by failing to consider the legislative framework of the Act and Regulations made thereunder in construing the approach to the definition of "employment agency". (Ground 1 of appeal - "**Incorrect Application of Employment Agency Test**".)

9. Thereafter the High Court erred in its interpretation of what could be a "work-finding service" under the Conduct Regulations (Ground 2 "**Wrong Interpretation of Work-finding Services**"), and had no basis for the conclusion that the fees in fact charged by the Defendant are no more than a reasonable estimate of cost (Ground 3 "**No Evidence")** .

Relevant factual background

[6] Note: in 2010 provisions were introduced to provide further protections to photographic and fashion models; those classes of work seekers are not the subject of this appeal.

10. The relevant facts are recorded in the judgment of HHJ Howells [CB/6/74]; paragraphs refer to the judgment:

    a. Spotlight began as a physical publication in 1927, and was ([1] – CB75)[7] "a directory in which performers could pay to publish information about themselves in a manner accessible to casting professionals". When published it was sent to casting directors. This would enable casting directors to peruse the publication and determine which of those actors who had paid to be featured, might be suitable to be cast.

    b. In 1997 Spotlight transitioned to become a digital platform and eventually the physical publication was phased out in 2016. What the Defendant has described as the "Core Service" remained fundamentally the same. An actor paid a fee to the business who published Spotlight to be featured in the publication which is then accessible to casting professionals. ([32] CB83 and [38] CB84)

    c. As set out in the Particulars of Claim at paragraphs 5 and 7, Spotlight describes itself as "the UK's leading casting resource" and as of January 2024 stated on its website that "99% of UK Productions cast[ed] via Spotlight's platform in 2023".

    d. The evidence of Ms Hay, the second Claimant was that performers pay the fee and have their details published in Spotlight in the hope that they would be cast: that they were work-seekers using the Defendant's service of having their information published with a view to finding employment. ([27] – CB82).

    e. At [30] (CB83) HHJ Howells sets out the evidence of Ms Hay, the Second Claimant as to the ownership of the Defendant; Ms Hay also set out in her statement the large increase in the number of subscribers on Spotlight, from around 65,000 in 2020 to 90,000 at the date she prepared her statement. In fact the total was stated in the Defendant's skeleton argument to be around 95,000 by the date of Trial. The position of the Claimants is that they have no idea how the cost of their inclusion is calculated.

    f. The position of the Defendant was that it was in an analogous position to directories such as Checkatrade, LinkedIn or Yell (previously Yellow Pages). ([36] – CB84) There was no evidence before the Court as to the business models of those entities, such as whether and if so how they

[7] References in this format are to the Core Bundle, at a page number.

charge, whether there are conditions to be met as to inclusion, nor as to what they see as their purpose.

g. While the parties agreed as to other services which Spotlight offer, the Claimants' contention was that these were "work-finding services" (see [27]-[29] CB82) whereas the Defendant stated that none of the "additional benefits provided to subscribers" were work-finding services (see [40] CB85). These include:
    i. emails tailored to *Spotlight* subscribers suggesting roles based upon each subscriber's profile, including, age, ethnicity, experience and abilities (see findings at [28] CB82 and [62] CB90).
    ii. The ability to find an agent ([29] CB83 and [35] CB84).
    iii. permitting subscribers to upload show reels and other similar materials to be seen by those perusing *Spotlight* to find work-seekers; ([34] CB84).
    iv. "boost events" as ticketed workshops designed to "*…educate and train performers in all aspects of our everchanging industry*" ([40] CB85)

Law

Employment Agencies Act 1973

11. So far as is relevant, section 13 EAA provides as follows:

> *(1) In this Act—*
>
> *"employment" includes—*
>
> *(a) employment by way of a professional engagement or otherwise under a contract for services;*
>
> *(b) …*
>
> *and "worker" and "employer" shall be construed accordingly;*
>
> *"employment agency" has the meaning assigned by subsection (2) of this section but does not include any arrangements, services, functions or business to which this Act does not apply by virtue of subsection (7) of this section;*
>
> *"employment business" has the meaning assigned by subsection (3) of this section but does not include any arrangements, services, functions or business to which this Act does not apply by virtue of subsection (7) of this section;*
>
> *"fee" includes any charge however described;*
>
> *…*

"prescribed" means prescribed by regulations made under this Act by the Secretary of State;

…

(2) For the purposes of this Act "employment agency" means the business (whether or not carried on with a view to profit and whether or not carried on in conjunction with any other business) of providing services (whether by the provision of information or otherwise) for the purpose of finding persons[8] *employment with employers or of supplying employers with persons for employment by them.*

(3) For the purposes of this Act "employment business" means the business (whether or not carried on with a view to profit and whether or not carried on in conjunction with any other business) of supplying persons in the employment of the person carrying on the business, to act for, and under the control of, other persons in any capacity.

(4) The reference in subsection (2) of this section to providing services does not include a reference—

(a) to publishing a newspaper or other publication unless it is published wholly or mainly for the purpose mentioned in that subsection;

(b) to the display by any person of advertisements on premises occupied by him otherwise than for the said purpose;

(c)to providing a programme service (within the meaning of the Broadcasting Act 1990).[9]

…

(7) This Act does not apply to—

(a)any business which is carried on exclusively for the purpose of obtaining employment for—

(i)persons formerly members of Her Majesty's naval, military or air forces; or

(ii)persons released from a [F12custodial sentence passed by a criminal court in the United Kingdom, the Channel Islands or the Isle of Man…

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[8] As originally enacted, this (and similar) references to "persons" was limited to "workers". "Persons" was substituted by paragraph 7 of Schedule 7 to the Employment Relations Act 1999 with effect from 6th July 2004.

[9] By section 71(1) of that act, this is the same definition as in Part 3 of the Communications Act 2003.

Subsection (7) EAA goes on to list a number of employers, professionals and services that are excluded from the scope of the act (such as former service personnel). None of those, very lengthy, definitions include actors or those who use the Defendant's services.[10]

12. Section 6 EAA makes it a criminal offence for an employment agency or business to seek or receive fees from any person for the provision of services finding, or seeking to find, employment. This is however subject to regulations made by the Secretary of State.[11]

13. As referred to above, the position of performers has been subject to regulations permitting the charging of fees by agencies since at least 1976. The Employment Agencies Act 1973 (Charging Fees to Workers) Regulations 1976 (SI 1976/714) had permitted fees to be charged to seeking employment in occupations listed in the Schedule to those Regulations – specifically including "actors, singers, dancers and other performers". These regulations remained in force until 5 April 2004 when they were revoked by the Conduct of Employment Agencies and Employment Businesses Regulations 2003. It is the 2003 Regulations which, as amended, remain in force.

14. There is limited case law which assists with the interpretation of section 13 EAA. The only case directly on point found by researches of either party below is of ***R (on the application of Simply Learning Tuition Agency Ltd and others) v Secretary of State for Business, Energy and Industrial Strategy***.[12] In ***Simply Learning***, the claimant agency sought a declaration that they were not either an employment agency, or an employment business. Their principal argument

[10] Either as a work-seeker or an employer.
[11] Section 6(1) EAA.
[12] [2020] EWHC 2461 (Admin), [2021] ICR 79.

was that as they only introduced suppliers to customers, nothing they did resulted in the "employment" of tutors by end users. Essentially their argument was that they only facilitated a business-to-business transaction and did no more than bring the two sides together.

15. Rejecting that argument, Helen Mountfield QC, sitting as a Deputy High Court Judge, said:

> *"53. My reading of section 13(1), having heard full argument on the matter, is that section 13(1) was intended to include all arrangements through which a business supplies people personally to perform work to a third party, whether or not that is regarded as employment, professional engagement or self-employment under a contract for services as a matter of common law.*
>
> *54. This reading of "employment" would in my view be obvious on a literal reading of the language of section 13 EAA, but the fact that the language is intended to comprehend a wide and inclusionary range of ways of being a "worker" is even more obvious when one considers the broad protective purpose of the EAA and the Conduct Regulations.* ***They are intended to protect, not only those seeking work through employment agencies or businesses, but also those seeking to obtain the benefit of that work through such businesses, and vulnerable people who may be the subjects of such work.*** *It would be contrary to this policy and inconsistent with this drafting to seek to construe the word "employment" before contract for services as restricting as opposed to expanding the definition of employment in section 13."* (emphasis added)

<u>Conduct of Employment Agencies and Employment Businesses Regulations 2003</u>

16. These regulations ("the Conduct Regulations") are made under section 5 EAA and relate to section 6 EAA. so far as is relevant, regulation 2 (interpretation) says:

> *In these Regulations, unless the context otherwise requires—*
> *"the Act" means the Employment Agencies Act 1973;*
> *"advertisement" includes every form of advertising by whatever means;*
> *" agency" means an employment agency as defined in section 13(1) and (2) of the Act and includes a person carrying on an agency, and in the case of a person who carries on both an agency and an employment business means such a person in his capacity in carrying on the agency;*

…
"employment business" means an employment business as defined in section 13(1) and (3) of the Act and includes a person carrying on an employment business, and in the case of a person who carries on both an employment business and an agency means such a person in his capacity in carrying on the employment business;
"hirer" means a person (including an employment business) to whom an agency or employment business introduces or supplies or holds itself out as being capable of introducing or supplying a work-seeker;
"publication" means any publication whether in paper or electronic form other than a programme service within the meaning of the Broadcasting Act 1990;
…
"work-finding services" means services (whether by the provision of information or otherwise) provided—
(a) by an agency to a person for the purpose of finding that person employment or seeking to find that person employment;
(b) by an employment business to an employee of the employment business for the purpose of finding or seeking to find another person, with a view to the employee acting for and under the control of that other person;
(c) by an employment business to a person (the "first person") for the purpose of finding or seeking to find another person (the "second person"), with a view to the first person becoming employed by the employment business and acting for and under the control of the second person;
"work-seeker" means a person to whom an agency or employment business provides or holds itself out as being capable of providing work-finding services.

17. Regulation 26 provides for "Circumstances in which fees may be charged to work-seekers" in the following terms:

> *(1) Subject to paragraphs (3) and (4), the restriction on charging fees to work-seekers contained in section 6(1)(a) of the Act shall not apply in respect of a fee charged by an agency for the service provided by it of finding or seeking to find a work-seeker employment in any of the occupations listed in Schedule 3.*[13]

[13] It is not in dispute that, at least in general, members of the First Claimant union (and in particular the remaining Claimants) fall within the definitions in schedule 3 as *Actor, musician, singer, dancer, background artist, extra, walk-on or other performer*. Referred to in this skeleton as "Performers".

(2) Where paragraph (1) applies, subject to paragraph (5), any fee charged by the agency may consist only of a charge or commission payable out of the work-seeker's earnings in any such employment which the agency has found for him.

…

(5) Paragraph (2) shall not apply to any fee charged to a work-seeker who is not a work-seeker seeking employment as a photographic or fashion model, by an agency in respect of the inclusion of information about the work-seeker in a publication provided that—

(a) the publication is wholly for one or both of the following purposes, namely the purpose of finding work-seekers employment in, or providing hirers with information about work-seekers in relation to, any of the occupations listed in Schedule 3 other than photographic or fashion model; and

(b) either—

(i) the only work-finding service provided by the agency or any person connected with it to the work-seeker is the service described in this paragraph; or

(ii) the fee charged to the work-seeker amounts to no more than a reasonable estimate of the cost of production and circulation of the publication attributable to the inclusion of information about that work-seeker in the publication; and

(c) in addition to the requirements in regulations 13 and 16, in so far as they are applicable, the agency has, before it entered into the contract with the work-seeker by reference to which the fee is to be charged, made available to him a copy of a current edition of the publication (or, where the publication exists only in electronic form, given him access to a current edition of the publication) in which it is offering to include information about him; and

…

***(e) where an agency proposes to include information about a work-seeker seeking employment as an actor, background artist, dancer, extra, musician, singer or other performer in a publication**, for 30 days from the date of the agency and the work-seeker entering into a contract for such a service, whether written or oral and whether or not expressly mentioning fees permitted under this paragraph—*

(i) the agency shall not charge a fee permitted by this paragraph to a work-seeker; and

(ii) the work-seeker shall be entitled without detriment or penalty to cancel or withdraw from any such contract with immediate effect by informing the agency of such cancellation or withdrawal, and before entering into any such contract the agency shall inform the work-seeker of the right to cancel or withdraw from any such contract and the time limit for exercising that right;

(f) where an agency proposes to include information about a work-seeker referred to in sub-paragraph (e) in a publication*, after the date of the agency and the work-seeker entering into the contract referred to in that sub-paragraph, the agency shall make available to the work-seeker a copy of the information and at the same time shall inform the work-seeker of the right to object, its effect and the time limit for exercising that right and for 7 days from the date on which the agency first makes available a copy of the information to the work-seeker—*

(i) the agency shall not charge a fee permitted by this paragraph to a work-seeker;

(ii) the agency shall not include the information in the publication; and

(iii) the work-seeker is entitled to object to any aspect of the information relating to the work-seeker to be included in the publication by informing the agency of the objection;

(g) where sub-paragraph (f) applies and the work-seeker informs the agency of an objection, the agency shall not charge a fee or include the information in the publication until the work-seeker's reasonable requirements have been addressed (even if addressing the requirements takes longer than the period referred to in that sub-paragraph); and

…

(6) The restrictions on charging fees to work-seekers contained in section 6(1)(a) of the Act shall not apply to any fee consisting of a charge to a work-seeker in respect of the purchase of or subscription for a publication containing information about employers provided that —

(a) this is the only work-finding service provided by the agency or any person connected with it to the work-seeker; and

(b)the agency has made available to the work-seeker a copy of a current edition of the publication (or, where the publication exists only in electronic form, given him access to a current edition of the publication) in advance of the work-seeker purchasing or subscribing for it… (emphasis added)

GROUND 1: "Incorrect Application of Employment Agency Test"

Statutory interpretation in general

18. As recorded at [16] CB79, there was no substantial dispute between the parties as to the approach to be taken to statutory interpretation; the court must look for the meaning which conveys the legislative intention. This is summarised in

Bennion on Statutory Interpretation 8th Ed at 11.1, drawing on well-established authorities including ***R v Secretary of State for the Environment, Transport and the Regions Ex p Spath Holme Ltd***[14] and more recently *R* ***(on the application of Project for the Registration of Children as British Citizens) v Secretary of State for the Home Department; R (on the application of O) v Secretary of State for the Home Department***.[15] As set out at [20] CB80, the High Court quoted from the judgment of Lord Leggat JSC in ***Uber B.V. & ors v Aslam & ors*** ,[16] that "The modern approach to statutory interpretation is to start with the purpose of a particular provision and to interpret its language, as far as possible, in the way which best gives effect to that purpose."

19. It was correct for the Judge to record in [15] CB79 that "*what the parties and witnesses may have previously understood to be the legal position, and the stance they have previously taken to the central issues of whether the Defendant is an employment agency is not necessarily central to the determination albeit it provides interesting context*." At [57] CB89 while she again states that "*the views of others are not in any way determinative of this matter",* she goes on to set out the evidence of Ms Wiffen who gave evidence for the Defendant, that according to her senior decision makers at Equity took the view that the Conduct Regulations did not apply to the Defendant; however this was not evidence confirmed by the Claimants.

20. The legislative purpose of the EAA and the Conduct Regulations can be found in Helen Mountfield QC's judgment in ***Simply Learning*** at [54] CB89. In a similar vein, HHJ Howells at [21] CB80 recorded that "*the purpose of the Act would appear to be to provide protection to both agencies and the work-seekers by*

[14] [2001] 2 AC 349
[15] [2022] UKSC 3, [2023] AC 255
[16] [2021] UKSC 5, [2021] 4 All ER 209

regulation as to how such agencies should be conducted and the prohibition of charging upfront fees." The EAA, and the Conduct Regulations, protect those seeking work from what might otherwise be exploitative behaviour by those providing services to work-seekers. Up front fees can be charged to those seeking work; but only in circumstances provided for in regulations. While HHJ Howells states that the "potential consequences for the Defendant" of being found to be an employment agency "would be significant" (at [58] CB90), noting that penalties may be imposed, that is not the position for this Defendant. Section 6 EAA makes clear that certain agencies are permitted to charge a fee, and the Conduct Regulations specifically provides for fees which can be charged to those in Schedule 3 occupations for inclusion in a publication. The sole question here was whether there were other work-finding services in addition to inclusion in the publication, such that the fee in question should be limited to the reasonable cost of inclusion.

Failed to have any or proper regard to legislative intent of the provision

21. Both HHJ Howells and the Defendant take the wrong starting point when considering the meaning of the ordinary words used in section 13(2) EEA. In the court below, the Defendant's starting point recorded at [46] (CB87) of the judgment, was that *Spotlight* is no more than a platform, and it offers no more than a means of advertising.[17] HHJ Howells appears to have accepted this submission at [53] (CB88):

> "*In my judgment the provision of the Directory [i.e.* Spotlight*] is a number of steps away from a service for the purpose of finding persons employment. The ambit and role of Spotlight's directory is narrow. There is no service provided by Spotlight to vet, amend, or improve a performer's information and profile. That is entirely in the hands of the performer. There is no managing of money on behalf of the performer if employment is ultimately found (as there was in the Simply Learning case). Spotlight does not pass the performers' profiles on,*

[17] This is notably the same error in starting point made by Uber in ***Uber v Aslam***.

or make recommendations. They simply "host" the details on their platform for others to peruse and consider as appropriate. There is no acting as a "middleman" in that sense"

22. The judge went on to say at [54] (CB89):

> "*I accept the submission by the Defendant that Spotlight's business and purpose has not changed since it was conceived as a hard copy directory. The fact it is now online does not change its purpose. The fact that the Directory has a search function whereby casting directors and the like can search for a performer with a particular characteristic is, in my judgment, simply a more sophisticated search function than would have been contained in an index in a hard copy directory. That does not change the purpose of the Directory; it simply improves its functionality. I reject the Claimants' submission that the publication serves no other purpose than to permit work-seekers to find employment and provide employers with persons for employment by them.* ***It is in my judgment a marketing tool to promote the identity and skill set of the performer. That is markedly different.***" (emphasis added)

23. The justification for this conclusion by HHJ Howells is that *Spotlight* is a "*marketing tool to promote…the performer…*". This is however the essential element of a service intended to help a person or person find employment.

24. When stating in at [53] (CB88) that the provision of the Directory "*is a number of steps away from a service for the purpose of finding persons employment*", there is no indication of what these "steps" might be. It is hard to see how the particular service of enabling work-seekers to place their profiles in a publication (specifically envisaged in both the EAA[18] and the Conduct Regulations[19] as being one that might one carried out by an employment agency) is evidence of <u>not</u> being one such service. There is nothing either in section 13 EAA nor

[18] *…publishing a newspaper or other publication…published wholly or mainly for the purpose [of finding persons employment]* – section 13(4)(a)

[19] Regulation 26(5).

regulation 26 of the Conduct Regulations which requires any more than the provision of information.

25. Equally as irrelevant are the judge's conclusions that "*There is no service provided by Spotlight to vet, amend, or improve a performer's information and profile…*"[20] The service is the publication itself, and nowhere does HHJ Howells address why these additional steps are necessary before a service it provided, or what the purpose of publishing *Spotlight* is beyond connecting a work-seeker with an employer. That is not a sustainable position.

26. The analogy drawn by of the judge in respect of a dating service is wholly erroneous. At [52] (CB88) she asks if a dating service which allowed a person to upload a profile, which led to a relationship and then marriage, could be said to be providing a service for the purpose of creating marriages. This is akin to saying that paying for a profile in *Spotlight* is for the purpose of winning an Oscar or Olivier award. That is not the Claimant's case, nor was it in any material sense the Defendant's. The purpose of putting a profile on a dating site is to show availability to go on a date. The service of *Spotlight* is the provision of information about performers to casting professionals; it enables performers details to be seen by casting directors and agents, so that the performers can try and find employment. No other employment agency guarantees a final outcome of a particular engagement. It is not clear why *Spotlight* would need to guarantee that outcome.

27. As to the analogies identified by the Defendant and accepted by the Judge, with businesses such as Checkatrade or Yell, the court erred in placing weight on

[20] At [53] – CB58.

these and asking "*…what is the real difference between such a business model and that of the Defendant?*" (at [52] CB88). First, that does not in any way inform the correct analysis of the statutory test. Of more practical importance is that they were not parties before the court and did not provide any evidence about their business model or, crucially, their purpose in making the publication.

28. As was submitted below, such comparisons ought properly to have been treated with extreme caution where Parliament has chosen to place those in 'schedule 3 occupations' into a particular category when it comes to the Conduct Regulations. Many of the protections available to other workers do not apply to them. If recourse to the business models of companies not parties to the litigation is relevant, many of those who advertise through bodies such as Checktrade are genuinely self-employed or indeed are companies. That places them in completely different situations to artist who frequently goes on to take up employment on Equity terms and conditions. The provisions of section 13 of the EAA and the Conduct Regulations are clear in their scope, and include situations where information is provided in a publication. The Defendant business is squarely within this definition.

(b) Failed to have regard to the context of s13(2) within the section and statute as a whole

29. The judge erred in failing to have regard to section 13(2) EAA within the context of the the statute as a whole, as Lord Hodge DPSC explained ***PRCBC***, at [29]:

> *"Words and passages in a statute derive their meaning from their context. A phrase or passage must be read in the context of the section as a whole and in the wider context of a relevant group of sections. Other provisions in a statute and the statute as a whole may provide the relevant context."*

30. In considering the scope of section 13(2) EAA, the judge erred in failing to have regard to the words of the statute which state that:
    a. the provision of information is sufficient to satisfy the definition;
    b. it is not necessary for the provision of information to actually achieve employment; section 6 EAA in setting out restrictions on charging persons seeking employment refers to services *for the purpose of finding* ***or seeking to find*** employment. (emphasis added)

31. The court further erred in failing to have any real regard to section 13(4) EAA in construing the scope of what can be a *service for the purpose of finding persons employment*. Section 13(4)(a) sets out that newspapers and other publications are not within section 13(2)[21] unless they are *published wholly or mainly for the purpose mentioned in the sub section*.[22] In the same way, section 13(4)(b) says that the display of advertisements on premises, so long as the premises is occupied for another purpose, is outwith subsection (2).[23]

32. In consequence, a noticeboard displaying vacancies, "help wanted", or advertisements such as "services available" will not amount to an employment agency if, for example, it is within a local shop. If however they are displayed it is a premises solely for such adverts (for example an employment business), it will be. Similarly, a newspaper which has job adverts or positions wanted will not be an agency if that is simply one element of the publication, after, for example, news and sports reporting. The fact that a newspaper would be within the scope of sub section (2) if it was wholly or mainly for the purpose within that sub section makes it apparent that there is no requirement for additional "steps" between the service of providing information – either that

[21] And hence meeting the definition of an employment agency.
[22] i.e. for the purpose of finding persons employment with employers.
[23] And so is not an employment agency.

there is a vacancy, or information that a person is seeking employment – which must be shown before a business can satisfy the definition.

Considering the assistance afforded by subsequent regulations under the Act.

33. If there was any question that Parliament intended the words of section 13(2) EAA to encompass the 'directory' published by the Defendant, the regulations enacted under EAA put the question beyond doubt. Even on a brief reading of regulation 26 of the Conduct Regulations, it is apparent from subparagraphs (5)(e) and (5)(f) that one permissible means by which fees might be charged is to performers who have paid, or will pay, a fee to be included in a publication. It is hard to conceive of a more direct definition of the service provided in the form of *Spotlight* than this one.

34. Breaking down the elements of section 13(2) EEA, one could ask the following questions:

    a. was the Defendant carrying out a business (whether or not carried on with a view to profit and whether or not carried on in conjunction with any other business);
        i. this was not seriously in dispute and in any event the answer is "yes";
    b. did that business, in the form of publishing *Spotlight* provide a service (whether by the provision of information or otherwise);
        i. yes, it provided information to potential casting directors and others about Performers who were seeking to be cast i.e. seeking work;
    c. was the purpose of publishing *Spotlight* to find persons employment;
        i. yes, employment, per ***Simply Learning***, is widely defined and in any event per section 13(1)(a) could have led to either a professional engagement of a person, or the formation of a contract for services or any wider formulation of employment bearing in mind the statutory definition is expressed not to be exclusive;
    d. was *Spotlight* a publication;

i. This was not in dispute and again the obvious answer is yes, accordingly the Defendant was not an agency unless the following tests are met;

e. was *Spotlight* published wholly for mainly for the purpose of finding persons employment;
   i. HHJ Howells does not appear to address this question. This is perhaps as it does not appear that the Defendant put forward any other collateral reason for publishing *Spotlight* other than it viewed the publication as a platform and did not believe itself to be an agency. Neither is a reason for the publication as opposed to an argument;
   ii. One might perhaps have expected there to be some form of reasoning such as "*The Times* newspaper might carry adverts, but is not an employment agency" if this were part of HHJ Howells's reasons for her judgment;

f. was any prospective employment with "employers";
   i. "employer" is construed in accordance with the wide definition as in ***Simply Learning*** as per section 13(1) EEA – if the answer to e. is yes, then logically people seeking to cast Performers are employers.

35. It was accordingly wrong for the judge to find that the Defendant was not an agency.

GROUND 2: Wrong Interpretation of Work-Finding Services

36. Perhaps understandably given the judge's finding on what is Ground 1, the judgment below only lightly dealt with the remaining issue relating to work-finding services. The essential reasoning of the High Court on this point was at [62] (CB90):

> "*…In any event, the Claimants in submissions only dealt with the provision by the Defendant of "tailored" emails about possible jobs, access to studios and workshops and the provision of an agent -finding service (as opposed to the ten alleged services listed in the Claimants' Response). Without providing in depth exploration and analysis of the evidence, I would have difficulty in accepting that any of these were "work-finding services" pursuant to the Conduct*

Regulations. The "tailored" emails did not appear to be particularly tailored and were sent out automatically. There was no human input. It was not a service separate from the platform in any event. The access to studios for recording was a service open to members of the public, at a cost, in the same way as one could hire a restaurant or village hall. The workshops covered a number of discussions and panels covering matters from script analysis and techniques. It was a service to improve skills and wellbeing. The agent finding service was no more than the performers stating on their profile that they wished to find an agent, leaving it up to an agent to contact them. It did not amount to a work-finding service. In any event it was not a separate service as it was a feature of the Directory. Again, these services were a number of steps removed from what the Conduct Regulations were intended to cover. All such services contended for by the Claimants were services that merely enable an individual to improve their skills or marketability."

Failure to apply the statutory test

37. The whole of the judge's conclusions in [62] (CB90) after the sentence beginning "*Without providing in depth exploration analysis of the evidence…*" fails to engage with the statutory test. It fails to ask the relevant questions of (1) whether there were any services provided, and (2) whether if there were they were "work-finding" services.

38. "Work-finding services", in contradistinction to "employment", has an exhaustive definition in regulation 2:

> *services (whether by the provision of information or otherwise) provided—*
>
> *(a) by an agency to a person for the purpose of finding that person employment or seeking to find that person employment;*
>
> *(b) by an employment business to an employee of the employment business for the purpose of finding or seeking to find another person, with a view to the employee acting for and under the control of that other person;*
>
> *(c) by an employment business to a person (the "first person") for the purpose of finding or seeking to find another person (the "second person"), with a view to the first person becoming employed by the employment business and acting for and under the control of the second person;*

39. At [62] (CB90) the Judge neither asks whether the tailored email was a service (whether by way of provision of information or not), nor whether the purpose in sending the emails was to find a person employment. There is a failure to address the correct test in reaching a conclusion on this point. This infects the judge's conclusion that the only work-finding service was the publication of *Spotlight*.

Emails are not "particularly tailored"

40. This is an irrelevant consideration. As set out above, the questions are whether a service is provided, and what the purpose of providing the service is. No one could sensibly suggest that a company providing customer services by way of an Artificial Intelligence agent that answers the most common questions automatically is not providing a service. The nature and quality of that service, and hence its purpose, would depend on why it is provided.

41. The lack of any specific human interaction is not part of, or relevant to, either of the questions the judge was obliged to consider.

Emails not separate to *Spotlight*

42. This is again an irrelevant consideration to the question of whether something is a work-seeking service in the first place. It is only relevant to the question of whether a maximum fee is imposed. HHJ Howell's analysis at [62] (CB90) is that this stage is never reached.

43. The correct question was whether there was a service at all. Not whether it is best categorised as a single service or separate ones. If there was any kind of service, only then court is then obliged to consider its purpose. HHJ Howells did not conduct either analysis.

Access to studios open to members of the public

44. "Who has access to a service provided by the Defendant?" is not one of the relevant questions posed by either section 13 EEA, or regulations 26 of the Conduct Regulations. While it is implicit in HHJ Howells finding that studio access was a service as it was akin to hiring a restaurant or a village hall crucially however, HHJ Howells failed to explain why "…*a service to improve skills…*" was not for the purposes of helping a work-seeker obtain employment. It might observed that improving skills is a crucial means by which one might seek to increase their chances of obtaining employment.

Agent finding service only stating on profile that a person wished to find an agent

45. As with much of [62] (CB90), this sentence reaches a conclusion that appears to omit any reference to the correct statutory test. That test, by regulation 26(5)(b) expressly can include the provision of information. The fact that a person wishes to have an agent is "information" which is provided by the Defendant.

46. There is no analysis of why this information being provided is not a work-finding service other than the bald statement that it is not and it is not separate from *Spotlight*. There is no analysis of whether the other conditions in regulation 26(5)(b) of the Conduct Regulations are met.

Services were "a number of steps removed from what the Conduct Regulations were intended to cover"

47. As this passage does not express what services the Conduct Regulations *were* intended to cover, it is difficult to discern what led HHJ Howells to the conclusion there were a number of steps between, what the services where, and why they were not for the prescribed purpose of finding employment.

All services were intended to improve skills or marketability

48. It is not clear why services which are intended to improve skills and marketability are not also able to amount to work-finding services. Improving skills and marketability is the key means by which work-seekers improve their

chances of gaining employment. Far from these services suggesting something other than helping people find employment, these services were one of the key methods by which Performers might find work.

49. HHJ Howells's judgment is not supported by the evidence, and indeed appears to run contrary to the entire purpose of the regulations. The reasoning in the judgment is not sustainable and accordingly this ground of appeal ought to succeed as well.

Ground 3: "No Evidence in relation to the costs of production"

50. The purpose of this ground of appeal is to preserve the Claimants' ability to argue (either in this court or on remission to the High Court) that the Defendant ought to be limited to charging them, and hence all subscribers to *Spotlight*:[24]

> *…no more than a reasonable estimate of the cost of production and circulation of the publication attributable to the inclusion of information about that work-seeker in the publication…*

51. The Claimants have invited the Defendant in correspondence to agree that this point would remain at large absent Ground 3. The Defendants have however refused to do so. Accordingly, this ground of appeal remains live to preserve this point as a question of remedy.

52. The position of the Claimants has always been to seek information from the Defendant as to the number of profiles they host, and how they calculate the "reasonable estimate of the cost of production and circulation" of a work-seeker. The letter before action asked for evidence of how this is reviewed, and for agreement to jointly instruct an appropriate expert to calculate the reasonable cost.

[24] Regulation 26(5)(b)(ii) of the Conduct Regulations.

53. Given the Defendant's denial of even being an employment agency, a declaration has been sought as to which provision of regulation 26(5)(b) of the Conduct Regulations it falls within.

54. The scant information given by Mr Hood in his witness statement about the costs of maintaining the platform and hosting data rising, along with office rents and staffing expenses, does not begin to satisfy the statutory requirement. The lack of evidence perhaps explains why the judge does not make a finding that the fees are a reasonable estimate of costs, but says (at [63] – CB91) "I would have very real difficult on the evidence" in so concluding. This finding is unsustainable.

Conclusion

55. The Court is accordingly invited to:
    a. allow the appeal and set aside the order of the High Court;
    b. declare that:
        i. the Defendant is an employment agency within the meaning of section 13(2) EEA;
        ii. that the fees the Defendant is permitted to charge to a work seeker, must be no more than a reasonable estimate of the cost of production and circulation of the publication in accordance with Regulation 26 of the Conduct Regulations;
        iii. remit the question of whether the fees charges by the Defendant are such a reasonable estimate; and,
    c. order that the Defendant do pay the Claimants' costs of the trial and appeal.

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