Neutral Citation Number: [2020] EWHC 2461 (Admin)

Case No: CO/3627/2019

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
ADMINISTRATIVE COURT

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 18/09/2020

Before:

HELEN MOUNTFIELD QC
(SITTING AS A DEPUTY HIGH COURT JUDGE)

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Between:

(1) Simply Learning Tutor Agency Ltd
(2) Minerva Tutors Ltd
(3) Tutorfair Ltd
(4) Athena Tuition Ltd
(5) Think Tutors Ltd
(6) Bonas Macfarlane Tuition Ltd
(7) BYT Tuition Ltd
(8) The Profs Tuition Ltd
(9) Blythe Hall t/a Lionheart Education — **Claimants**

- and -

Secretary of State for Business, Energy and Industrial Strategy — **Defendant**

- -
- -

Tarlochlan Lall (instructed by **Direct Access**) for the **Claimants**
Esther Schutzer-Weissmann (instructed by **The Government Legal Department**) for the **Defendant**

Hearing date: 13 February 2020

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Approved Judgment

Covid-19 Protocol: This judgment was handed down remotely by circulation to the parties' representatives by email, release to BAILII and publication on the Courts and Tribunals Judiciary website. The date and time for hand-down is deemed to be 10:30am on 18 September 2020.

HELEN MOUNTFIELD QC:

INTRODUCTION

1. This application for judicial review is brought on behalf of a number of companies whose business is to introduce tutors to parents, who may then enter into contracts for services with the tutors to provide home tuition to their children. They also offer various collateral services such as collecting payments for the tuition services and passing them on to the tutors. During the course of argument, companies conducting businesses such as those operated by the claimants were referred to as 'tutor introducing companies'.

2. The claimants seek a declaration, which is of great significance to the operation of their business model, as to whether or not tutor introducing companies such as their own are obliged to comply with the terms of the Employment Agencies Act 1973 ("the EAA"). The question turns on whether tutors who are introduced to customers by a tutor introducing company, but thereafter provide services directly under contracts for services with the ultimate consumers of those services (usually the parents of children), are within the definition of employment in section 13 of the EAA. The claimants submit that the tutors who obtain work through their companies do not fall within that definition, properly construed, and so their businesses are not employment agencies or employment businesses for the purposes of the EAA.

3. The defendant is the Secretary of State within whose remit falls the regulation of employment agencies and employment businesses whose operation is governed by the terms of the EAA and regulations made thereunder. His primary position is that the questions posed by the claimants are not apt to be the subject of a declaration by the Administrative Court. He says that the claimants should operate within their understanding of the law, but if they are wrong, they will fall to be prosecuted under the terms of the EAA. Whether or not a particular business model falls within the EAA is a fact-sensitive question, so any declaration by this court would be hypothetical. So, he says (through Ms Schutzer-Weissmann), the administrative court should not accept jurisdiction, because there are more suitable alternative means available for resolving these questions and because resolution of whether any particular business falls within the ambit of the EAA depends on issues of fact in any particular context.

4. However, on the substantive point which the claimants seek to have determined, he says that those who are self-employed contractors operating under contracts for services are capable of falling within the definition of 'employment' for the purposes of the EAA. Consequently, his department's position, explained in correspondence with the claimants, is that tutor introducing agencies operating under the model put forward by them, do fall within the scope of the EAA and must comply with its terms.

LEGAL FRAMEWORK

The Employment Agencies Act 1973 and the Conduct of Employment Agencies and Employment Business Regulations 2003

5. The preamble to the EAA states that it is "an Act to regulate employment agencies and businesses: and for connected purposes".

6. Section 5 of the EAA empowers the Secretary of State to regulate employment agencies and employment businesses by means of regulations. The relevant regulations are the Conduct of Employment Agencies and Employment Businesses Regulations 2003 (SI 2003/3319) ("the Conduct Regulations"), to which I return below.

7. Section 5, so far as material provides:

> "The Secretary of State may make regulations to secure the proper conduct of employment agencies and employment businesses and to protect the interests of persons availing themselves of the services of such agencies and businesses, and such regulations may in particular make provision—
>
> (a) requiring persons carrying on such agencies and businesses to keep records;
>
> (b) prescribing the form of such records and the entries to be made in them;
>
> (c) prescribing qualifications appropriate for persons carrying on such agencies and businesses;
>
> (d) regulating advertising by persons carrying out such agencies and businesses;
>
> (e) safeguarding clients' money deposited with or otherwise received by persons carrying on such agencies and businesses;
>
> (ea) restricting the services which may be provided by persons carrying on such agencies and businesses;
>
> (eb) regulating the way in which and the terms on which services may be provided by persons carrying on such agencies and businesses;
>
> (ec) restricting or regulating the charging of fees by persons carrying on such agencies and businesses."

8. Section 13 is the definition section, and on its scope turns the ambit of the businesses whose operations may be regulated by regulations made under section 5 of the EAA. Section 13 provides, so far as material:

> "(1). "employment" includes –
>
> (a) employment by way of a professional engagement or otherwise under a contract for services;
>
> (b) the reception in a private household of a person under an arrangement whereby that person is to assist in the domestic work of the household in consideration of receiving hospitality and pocket money or hospitality only;

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;

…

(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 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; or
>
> (c) to providing a programme service (within the meaning of the Broadcasting Act 1990).

…

(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 custodial sentence passed by a criminal court in the United Kingdom, the Channel Islands or the Isle of Man;
>
> (ca) an early years childminder agency or a later years childminder agency (as defined in section 98 of the Childcare Act 2006);"

9. The Conduct Regulations made under section 5 of the EAA (which replaced earlier regulations) make provision to secure the proper conduct of employment agencies and employment businesses, and to protect the interests both of persons who obtain 'employment' using their services and of persons who use the services of workers supplied under them.

10. The Conduct Regulations therefore impose a number of requirements and restrictions on employment agencies and employment businesses as defined in section 13 of the EAA, in relation both to hirers (defined in regulation 2 as "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)", and work-seekers (defined in the same regulation as "a person to whom an agency or employment business provides or holds itself out as being capable of providing work-finding services)". Regulation 32 also extends the definition of "work seeker" to a worker seeker which is a company, subject to certain exceptions and modifications.

11. The requirements and restrictions which are imposed by the Conduct Regulations are sometimes for the protection of work-seekers through an employment agency or employment business; sometimes for the protection of hirers of workers whose services provided through an employment agency or employment business; and sometimes for the protection of vulnerable persons with whom work-seekers are to work.

12. For example (by virtue of regulation 5), employment agencies and employment businesses may not make provision of work finding services to a work-seeker conditional on the work seeker using other services for which the EAA does not prohibit the charging of a fee, or for hiring or purchasing goods; (by virtue of regulation 6) they may not subject or threaten a work seeker with detrimental action if they give notice of termination if that person contracts with or takes up employment with another person; (by virtue of regulation 7), an employment business may not supply workers for the purposes of breaking a lawful strike; and (regulation 8) an employment agency may not pay money to a third party for work performed by, or the introduction of, a worker. There are (regulation 10) restrictions on the charges which employment businesses can make directly or indirectly to hirers; and (regulations 12-15) restrictions on the terms of contracts as between employment agencies, employment businesses and work seekers or workers. There are also (in Part IV, regulations 18-22) regulations as to requirements to be satisfied in relation to the introduction or supply of a work seeker to a hirer, both as to checking on identities and qualifications and information to be supplied (notably) in relation to vulnerable people with whom work seekers may work); and there are various other provisions for special situations. Finally, there are detailed restrictions (in regulations 25 and 26) as to client accounts and (regulation 29) as to record keeping.

13. As noted above, work seekers who offer services through their own companies are included in the definition of work seekers by regulation 32, and may opt out of those

provisions intended for their own protection, but not for those to protect others (eg the provisions concerning information to be provided concerning those who may work with vulnerable people).

14. Schedule 3 of the Conduct Regulations identifies certain types of occupation (in the creative and sports industries) which are exempt from compliance with some, but not all, of the Conduct Regulations.

15. The intended protective purpose of the Conduct Regulations, and the various groups whose interests are intended to be protected by the them, are made particularly clear by the titles of the regulations in Part IV of the Regulations "Requirements to be satisfied in relation to the introduction or supply of a work-seeker to a hirer":

> "18. Information to be obtained from a hirer;
>
> 19. Confirmation to be obtained about a work-seeker;
>
> 20. Steps to be taken for the protection of the work-seeker and the hirer;
>
> 21. Provision of information to work-seekers and hirers;
>
> 22. Additional requirements where professional qualifications or authorisation are required or where work-seekers are to work with vulnerable persons."

16. As to enforcement of the Conduct Regulations, two routes are provided for in the EAA. By virtue of section 3A, on application by the Secretary of State, an employment tribunal may make an order prohibiting a person from carrying on or being concerned with the carrying on of an employment agency or a specified description of employment agency or employment business. An appeal lies to the Employment Appeal Tribunal on a question of law arising from a decision or proceedings before an employment tribunal (section 3D of the EAA). A person who, without reasonable excuse, fails to comply with a prohibition order is guilty of a criminal offence and can be subject to a fine upon trial by indictment or on summary conviction (section 3B of the EAA).

17. It is instructive, as counsel for the defendant pointed out, to note that the definition of an 'employment agency' in section 13 EAA was materially amended by Schedule 7 of the Employment Relations Act 1999, with the word "persons" being substituted for workers. The explanatory notes to the ERA 1999 said that this

> "ensures that the definition of employment agency activity includes the supply of services to companies as well as individuals, in line with the definition of "employment business" activity in section 13(3)."

That is what renders the extension of the Conduct Regulations to work-seekers who are companies (by regulation 32) intra vires the parent Act.

18. There were only two cases drawn to my attention on the terms of section 13 EAA. The first was the decision of the Employment Appeal Tribunal in ***Department of Trade & Industry v Webster & others*** [2000] EAT /539/999, which was an appeal against a

decision of the employment tribunal to dismiss an application by the Secretary of State to prohibit the appellants from carrying on, or being concerned with to the carrying on of any employment agency or employment business. The first instance hearing took nine days. The decision is not material to this decision, but it is notable that Lindsay P observed at [2] that:

> "There is a definition of 'workers' in section 13(1) which includes all those employed 'by way of a professional engagement or otherwise under a contract for services' and also, in effect, persons employed as au pairs. That definition does not purport to be exhaustive (it merely 'includes' what it then specifically describes) and we therefore do not take it to exclude but rather to include persons under contracts of service, that being the most common meaning of the word 'worker'. Accordingly, the business of providing information, even gratuitously, for the purpose of finding workers employment with employers amounts, subject to the exceptions we next mention, to an 'employment agency within the meaning of the Act. Section 13(4) provides exceptions for various limited forms of publication, display and broadcast, and sub-section (7) disapplies the Act as a whole to the specified areas there mentioned, none of which is relevant to the appeal before us".

It is fair to observe that whether the business entities under consideration amounted to employment agencies was not an issue in ***Webster***, so it would appear that those observations were made without submissions on the ambit of section 13 from counsel in that case.

19. The second authority on the terms of section 13 EAA is *Accenture Services Ltd v Revenue & Customs Commissioners* [2009] EWHC 857 (Admin), which concerned the scope of a VAT concession available to "employment businesses" as defined in section 13(3) EAA. At paragraphs [25] and [26], Sales J (as he then was) observed that the EAA was relevant to those proceedings only because HMRC had chosen to formulate the concession by reference to the definition of "employment business" contained in it. He explained that the EAA "required employment agencies and businesses to be licensed and created a power for the Secretary of State to make regulations to secure their proper conduct" and observed that "The 1973 Act engages a wide notion of employment "which is capable of including certain engagements under contracts for services as well as employment in the strict sense of engagement under a contract of employment (contract of service)".

FACTUAL BACKGROUND

20. The issues came before the court in the following way.

21. Private tutoring for children at home has become a big business. The claimants each run a business the object of which is to introduce a self-employed tutor or tutors to clients, usually the parent of children who wish to purchase tuition services from the tutors.

22. The claimants identified a number of common features to their businesses which they claimed to be material. In short, the parent client ('hirer' in the language of the Conduct Regulations, if these apply) pays an introduction fee to the business, and then enters a contract for services with the tutor themselves if the tutor accepts an engagement with them. The parent client then pays money into a client account held by the agency, which pays the money across to the tutor.

23. However, the claimants contend that the terms of the EAA do not apply to their businesses, because the tutors in question do not (they say) come within the definition of employment in section 13 of the Act.

24. Disputes as to the application of the EAA first arose in July 2017, when the Department for Enterprise, Innovation and Skills ("BEIS") started an investigation into Tutorfair, the third claimant. There was extensive correspondence between BEIS and Tutorfair between July 2017 and October 2018 concerning the application of the EAA to them.

25. BEIS started enquiries into Simply Learning Tuition Agency (the first claimant) in August 2018, and into Minerva and the Profs (the second and eighth claimants) in September 2018. Further correspondence followed, and from February 2019, the claimants began to act in concert, submitting joint representations to the defendant to the effect that the EAA did not apply to their operations, which submission was accompanied by counsel's opinion.

26. The Employment Agency Standards Inspectorate, an agency of the defendant, then started a sector wide consultation on this issue, and agreed not to proceed with any enforcement action against any of the claimants until that process was concluded.

27. On 11 July 2019, BEIS wrote to the claimants collectively expressing its view that the EAA applied to the claimants' businesses, and that it was no longer prepared to engage in further explanation or negotiation on this matter.

28. The claimants sent a letter before action to the defendant on 22 August 2019, and, on 11 September 2019, lodged this application for judicial review. Permission was granted on 6 November 2019.

29. The consultation process had been interrupted by the requirements of purdah imposed by the calling of the General Election which was held in December 2019, and by the time of the hearing of this application for judicial review, it had not concluded.

JURISDICTION

30. The issue between the parties was a short but important question of construction of 'employment' for the purposes of section 13 of the EAA. If the claimants were right on their construction of section 13, then they were not bound by any of the terms of the Conduct Regulations, and the defendant had no power to enforce those Regulations against them. If the defendant was right, then the protections provided by the Conduct Regulations, for work-seekers, hirers and vulnerable persons to whom tutoring services might be provided, all applied to the claimants.

31. However, the defendant took a preliminary objection to the hearing of this application, namely, that the court ought not to determine an application as to the scope of the

application of the EAA on the basis of theoretical facts, when there was no ongoing investigation or action into the activities of any of the claimants. Again, there was extensive correspondence, until July 2019, concerning the application or otherwise of the Act to them.

32. Ms Schutzer-Weissmann accepted, for the defendant, that an applicant for judicial review with sufficient interest could seek a declaration where the court considers

> "it would be just and convenient for the declaration to be made" "having regard to (a) the nature of the matters in respect of which relief may be granted by mandatory, prohibiting or quashing orders; (b) the nature of the persons and bodies against whom relief may be granted by such orders; and (c) all the circumstances of the case": section 31(2) of the Senior Courts Act 1981 and rule 54.3 of the Civil Procedure Rules.

She pointed out that an application must be refused

> "if it appears to the court to be highly likely that the outcome for the applicant would not have been substantially different if the conduct complained of had not occurred": section 31(2A) of the Senior Courts Act 1981.

33. She also accepted that while declarations are a matter of discretion for the court, and negative declarations are unusual, where a negative declaration would help to ensure that the aims of justice are achieved, "the courts should not be reluctant to grant such declarations", which "could perform a positive role", albeit there should be caution in extending the circumstances in which a negative declaration could be granted (*Messier-Doughty v Sabena* [2001] 1 All E.R. 275, per Lord Woolf at [41]-[42]).

34. The question was whether, in all the circumstances, it is appropriate to make a declaration, the court will take into account "justice to the claimant, justice to the defendant, whether the declaration would serve a useful purpose and whether there are any other special reasons why or why not the court should grant the declaration" (*Financial Services Authority v Rourke* [2002] CP Rep. 14 Neuberger J).

35. However, she submitted that the letter of 11 July 2019 could not properly be regarded as a 'decision' capable of being the subject of an application for judicial review, and that this was not an apt case for the court to accept jurisdiction, because the business models of the introduction companies and characterisation of "each and every tutor using the companies by themselves and others" and the nature of the relationship between "each and every tutor and the pupil/parent" was unclear.

36. So, she submitted, a purely advisory declaration in hypothetical circumstances would serve no useful purpose, and the claimants lacked standing to seek a declaration.

37. However, it did not seem to me that this was a purely hypothetical claim for an advisory declaration which could have no practical effect. Each claimant was conducting a business, involving work-seekers, hirers and (in most cases) vulnerable service users, ie children. Evidence was served on behalf of each claimant to the effect that the basic business model set out in the grounds applied to them, but that they did not regard the

EAA as applying to them. The defendant had expressed a clear view that the EAA, and the regulatory burdens which it imposed on the businesses (or, putting it another way, the regulatory protections and safeguards it provided for tutors, parents and children) did apply to the claimants.

38. Given the genuine dispute of view as to the application of the EAA and the Conduct Regulations at all, I did not consider that waiting to see whether or not the Conduct Regulations applied and were enforced through an employment tribunal (which could involve lengthy investigations of fact as well as legal argument) constituted a suitable alternative remedy – not least because, if the claimants acted on their own view of the law, but proved wrong, they were likely to have failed to offer protection which they were required by statute to provide to large numbers of tutors, parents and vulnerable children; but if they acted on the Secretary of State's view, and this proved unwarranted, they would have needlessly complied with a regulatory burden which they were not required to do. For that reason, it could not be said that the resolution of this dispute would make no difference to the parties' actions in any event.

39. It was clear that the outcome of these proceedings would have substantial business implications, regulatory and financial, for each of the claimants. Depending on my judgment, they may have to make substantial amendments to the way that they operate to ensure that they comply with the law.

40. For these reasons, I accepted (as the deputy judge who granted permission accepted on a preliminary basis in his permission decision) that the claimants did have standing, and, like him, I am satisfied that this was a case in which it is suitable to make a declaration as to the ambit of the EAA.

THE ISSUE OF CONSTRUCTION

41. The claimants sought a declaration that where an operator (A) merely introduced suppliers (T) to customers or clients (P), which was the business operating model for each of their businesses, as described in the grounds of claim and witness statements, they did not do anything which resulted in 'employment' of tutors by either themselves or the parents who hired the tutors. Nor did the operators, A, provide a tuition service or impose any obligations on tutors to provide tuition services. They provided introduction services combined with payment collection and administrative services. Consequently, they submitted, they did not fall to be treated as employment agencies or employment businesses as defined in sections 13(1) to (3) EAA; accordingly the requirements of the EAA and the Conduct Regulations did not apply to them, and the defendant had no regulatory jurisdiction over them.

42. They submitted that this was correct as a matter both of linguistic and purposive construction, and that the EAA could not apply to every contract for services or self-employed business provided through the introduction of an operator, A, because the definition of 'employment' contained a contrast with a 'contract for services' or self-employment, or independent contracting. The claimants' argument was that the defendants had failed to give sufficient weight to these words of limitation.

43. The claimants sought to draw an analogy with the familiar (but difficult) distinction in employment law between the concept of an employee employed under a contract of service and a self-employed person employed under a contract for services. This is a

distinction which runs through much employment law. Thus, they submitted, there must be some limits to the concept of "employment *by way of* a professional engagement *or otherwise under* a contract for services" and so the words "by way of" and "under" must qualify the type of engagement by way of a contract of services which fell within the ambit of section 13; the word 'includes' must catch some but not all contracts for services and professional engagement.

44. The claimants made reference to the recent decision of the UK Supreme Court in *Pimlico Plumbers Ltd & Another v Smith* [2018] UKSC 29, and the guidance it offered as to whether a recipient of services is a 'client' or a 'customer', for the purposes of determining whether the person providing the services was engaged under a 'contract of service' or a 'contract for services'. The key indices of providing services as a contract of services were operating – and being presented as operating – as an independent operator, and not being integrated or subordinated into the operations of another. They submitted that the tutors in these cases did not operate under a contract of service either as regards the claimants (they did not work for the claimants, and the claimants did not undertake to provide tutors or tuition to the parents); or as regards the parents (because, unlike say au pairs, they were not integrated into the client families, and were not subordinate to them). Thus, they said, tutors offered services under contracts for services, but were not 'employed *under'* such contracts.

45. They also claimed that this accorded with the purpose of the EAA, which was to protect the public from improper practises by employment agencies, to secure the proper conduct of employment agencies and employment businesses and to protect the interests of persons availing themselves of the services of such agencies. They suggested that employment agencies existed to find workers employment, often permanent employment, whereas employment businesses employed workers themselves and sent them to work for others on a temporary basis. They submitted that this was not the sort of situation in which their businesses, which operated only as introduction and fee collection businesses, operated. Moreover, they submitted that there was no need for regulation, since if tutor introduction companies of the type they offered acted unethically, they would be driven out of the market.

46. I found these arguments wholly unpersuasive, both as a matter of language and as a matter of purpose.

47. Firstly, the natural reading of the language of section 13 of the EAA is that adopted by Lindsay J in the *Webster* case (see paragraph 18 above). Unlike much employment legislation, the EAA does not rely on a common law understanding of who is 'an employee'. The meaning of 'employment' in this context is a wide and compendious one, intended to include both those workers who would fall within the normal common law definition of employment under a contract of service, but also the many workers who would fall outside the definition of 'employee' in employment law, who offer their services in some other way.

48. In other words, even those contracts for services not generally included in the definition of employment for other purposes *are* included in this Act, and, as section 13 continues, "'worker' and 'employer' shall be construed accordingly" (and correspondingly broadly) in this Act and for these purposes.

49. This reading is supported by the definition of 'employment agency' which is "assigned' by section 13(2) "for the purposes of this Act" – i.e there is a specific statutory definition assigned by the language Parliament used in this context which would oust any narrower definition.

50. Moreover, the definition of 'employment agency' in section 13(2) itself is very wide – and its meaning does not depend on common law definitions of "employment" but (as section 13(1) states) "has the meaning assigned by subsection (2) …". Likewise the term "employment business" also "has the meaning assigned to it by subsection (3) …".

51. I accept the defendant's submission that the reason the term "employment" was defined in this context to include engagement "under a contract for services" was specifically to broaden the types of work and work seeking covered by the EAA, since the term 'contract for services' is the term commonly contrasted with 'contract of service'. As Sales J (as he then was) explained in the *Accenture* case at [26], the 1973 Act broadened the definition of employment to contain (for its purposes) "certain engagements *under* contracts for services" as well as "employment in the strict sense of engagement under a contract of employment (contract of service). He repeated this limited observation at [40], when he said that "by virtue of section 13(1) of the 1973 Act, "employment" includes some forms of engagement under a contract for services (ie where the employment business does not itself possess the full rights of management control which would make the contract a contract of employment in the sixth sense) and the definition of "employment business" includes supply of persons engaged by the business on such terms, the notion of "control" in section 13(3) cannot be directly equiparated with the degree of control which an employer has in relation to the activities of its employee".

52. The claimants sought to emphasise the word "certain" and "some" in these observations by the judge in *Accenture*; but in my judgment, those readings must be read in the context of the dispute before him, in which it was being submitted that the businesses in question were not employment businesses because workers were not operating "under the control of" the businesses in question to the extent that would be required for those businesses to be regarded as their employers at common law.

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.

55. This context is relevant. The purpose of drawing a distinction between the employed and the self-employed in the context of employment legislation is to delineate the types of worker who are protected as 'employees'. It is in that context that cases such as *Pimlico Plumbers* were decided. The context of the EAA and the Conduct Regulations is very different.

56. The original purpose of that legislation was to require certain kinds of employment introduction and/or supply businesses to be licensed (section 1 of the Act), and to require them to comply with certain regulatory requirements as specified in the Conduct Regulations, in order protect, both those who may offer services for hire through employment agencies and employment businesses and also the people who receive services through them. (After this judgment was handed down in draft, the Claimants pointed out that section 1 of the Act had, in fact, been repealed; nonetheless, the fact that the licensing structure had been repealed did not alter the fact that the purpose of the Act was to impose particular protective regulatory requirements on employment agencies and employment businesses which are not imposed on other businesses).

57. That protective purpose is made quite clear by the very extensive protections contained in the Conduct Regulations for hirers in terms (for example) of the information they are entitled to receive from an employment agency or employment business which holds itself out as providing workers of one kind or another. It is particularly clear in the protections afforded under regulation 22 in relation to employment which requires professional qualifications or authorisations to be obtained, or where work-seekers are to work with vulnerable people. The agency or business which holds itself out as making work seekers available for work has an obligation itself to check on the qualification and suitability of such work seekers in such situations, not to protect the workers themselves, but those who may avail of their services. And it is also clear from the fact that, after the language of the EAA was broadened in 2009, the Conduct Regulations apply even to a person who provides his or her own services through a limited company; and while such persons can opt out of some protections provided to them under the Conduct Regulations, they cannot opt out of the 'vulnerable persons' provisions.

58. In short, where a business holds itself out as a 'middleman' between a person who needs services and the person offering to supply them, the protective terms of the EAA and the regulatory requirements of the Conduct Regulations will usually apply to the 'middleman' business, for the protection of work-seekers, hirers, and work-users.

59. The distinction between a person employed under a contract of service and a person employed under a contract for services at common law is intended to identify which workers have the status of an 'employee' and the benefits which flow from it, and those who do not.

60. But in the context of the wider purposes of the EAA, 'employment', 'employment agency' and 'employment business' are all expressly defined to include types of work which would not normally be included in this concept. The statutory definition of "employment" is said both to be a definition "*In this Act*" and also "*to have the meaning assigned to by*" subsection 13(2) which starts "*For the purposes of this Act*…", which purposes are broader than the protection of workers themselves. So I agree with the defendant that definitions of 'employee', and other terms or concepts imported from

other contexts are inapplicable in the context of the EAA and its purposes, where employment has been given a specific, broad, statutory definition.

CONCLUSION

61. For these reasons, I refuse the claimants' application for a declaration that the EAA does not apply to their businesses. I will make a declaration that the definition of 'employment' in section 13(1) of the EAA includes in its application persons, whether natural or legal, including tutors, who provide their services on a self-employed basis as an independent contractor, and the meanings assigned to "employment agency" and "employment business" for the purposes of the Act must be construed accordingly.