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# THE EMPLOYMENT TRIBUNAL

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**BETWEEN**

**Claimant**

**and**

**Respondent**

**Mr C Hurst**

**Saatchi and Saatchi Ltd**

**Held at London South**

**On 7 November 2018**

**BEFORE: Employment Judge Siddall  
Ms N Christofi  
Ms C L Oldfield**

## **Representation**

**For the Claimant: In person**

**For the Respondent: Mrs I Shrivastava, Counsel**

## **JUDGMENT**

The decision of the tribunal is that the claims are out of time, and they are dismissed.

## **REASONS**

1. This is a claim brought by the Claimant for failure to pay the national minimum wage, for holiday pay and for expenses.
2. We heard evidence from the Claimant himself. The Respondent did not give evidence.

3. The facts we have found and the conclusions we have drawn from them are as follows.
4. The Claimant worked for the Respondent for one day on 18 June 2013. He was an extra in an advertisement that the Respondent filmed on behalf of the mobile telephone network provider EE. He worked for eleven hours and he received a fee of £126.00.
5. The Claimant was booked to do the work by a casting agency called 2020 Casting Limited.
6. The Claimant was paid by 2020 Casting. We have seen a remittance advice dated 16 September 2013 which shows that a number of deductions were made from the gross fee. We note that there is a deduction for commission of £18.90 and for VAT of £3.78. The agency then deducts what it calls a 'book fee' of £59.00 for the year 2013. That reduces the sum actually paid to the Claimant to £44.32.
7. The book fee is an annual fee charged by a casting agency for including an actor in its 'book', a directory which is made available to clients and which encloses photos of the actors on its books. In past years the photos have been contained in a hard copy book, but nowadays most 'books' are on line.
8. It was the evidence of the Claimant which we accept that most actors had to sign up with one or more casting agencies to get any work as extras, and each casting agency would charge a booking fee. If the actor got no work the booking fee was not charged. However as soon as an actor did some work through the agency, the book fee would be applied. If an actor did no work for the whole of one year but then received a job the following year, two years booking fees would be deducted from the first payment.
9. Clients like the Respondent who were looking for extras would review the 'book' and select who was to be approached. The casting agency would then contact the actor and ask if they were available on the date sought. If not, the phone would be put down and the agency would go on to others on the list. If the actor was available, they would be booked for the work. It was the evidence of the Claimant that if you had been booked for the work, you could not get out of it. If you did not turn up, you would be 'blacklisted' and you would not get a job through that agency again. He gave the example of what happened on

another day where he had been booked for work but was then called for an audition later that day, but he was told that he could not be released to attend it even though on that occasion the second job would have been worth £37,000 and the day's work was worth £100.

10. On the 18 June 2013 he attended the place where the advert was due to be shot. He had been told to turn up in black but when he got there he was told that all extras had to be wearing colours. He went home and changed on the basis that he was promised that his travel expenses would be paid. (Ultimately he says that they were not and that this formed part of the claim). He said that there was a representative of the casting agency there who was directing the sixty or so extras where to go. However he said that this person did not do a great deal over the course of the day. For the most part, the extras were under the control of the production staff of the advert who told him when he could go to the toilet, when he could eat when he could move and when he needed to change his clothes. He said that the arrangement was that he had to stay there until he was told that he could leave. On this occasion he worked for eleven hours.
11. It is customary for actors to be asked to sign a release form. We have noted the form produced by the Respondent on page 206 of the bundle. The form refers to the advertiser, the campaign title and the production date. The release form grants a worldwide perpetual licence to the advertiser to use the actor's name, face voice and performance 'in consideration' for the fee.
12. The third paragraph of the form reads: 'The total fee is £90. The daily fee is £80.31. I will be paid an additional amount of £9.69 (12.07%) in respect of any statutory entitlement to annual leave under the Working Time Regulations 1998'.
13. The Claimant was also asked to sign a 'representation agreement' with the casting agency each year. Page 203 of the bundle is a copy of a letter from 2020 Casting inviting the Claimant to register for 2013. We have seen an example of a representation agreement for 2013 where the first paragraph reads: 'I the undersigned understand that upon payment of the agreed fee (for my inclusion into 2020 Casting's bespoke casting books, electronic book and database registry for 2014) and acceptance of my application, 2020

Productions Limited will represent me as my agent for a period of one year commencing 1 January 2014’.

14. Paragraph 2 states that ‘in the event of my working, I authorise 2020 Productions Limited to invoice for my services on my behalf as required and to deduct their commission of 15% from my earnings prior to issuing payment to me’. It goes on to say ‘but I understand that any work accepted is entirely at y own discretion’. Paragraph 3 contains a disciplinary procedure which will apply ‘if my behaviour falls below the standards set out in the ‘Little Blue Book’.
15. His principal complaint in relation to his work on 18 June 2013 is that the deduction of the book fee by 2020 Casting means that the sum he earned for that day is considerably lower than the national minimum wage. He also complains about the failure to pay him holiday pay, the failure to reimburse him for his expenses incurred when he had to go home to change.
16. In relation to the claim for expenses, we note that on 9 May 2018 the successor organisation to 2020 Casting offered to pay the Claimant half his travel if he could produce a copy of his original receipt.
17. The Claimant’s case is that casting agencies have very large numbers of actors on their books. They aim to give as many as possible a days work because as soon as they do this they are able to deduct the book fee from the daily rate. However he says that very large numbers of actors either receive no work in a year or very little work. He points out that the effect of the current arrangements is that, as in his case, an actor can end up doing eleven hours work for £44.
18. It is very clear from the evidence provided by the Claimant that for almost twenty years he has been waging a tireless campaign to establish the employment rights of actors such as himself, a campaign that he is now unlikely to benefit from personally.
19. He has been in communication with HMRC, with his MP, with government ministers, with Equity and with the Low Pay Commission to try and improve the pay arrangements for actors.
20. In August 2003 the Claimant brought a claim against 2020 Casting Limited alleging that he had not been paid national minimum wage in relation to some work he had done for London Weekend Television. This claim was dismissed

at a preliminary hearing. The tribunal accepted that he was a worker and was entitled to the protection of the National Minimum Wage legislation. However it decided that on this occasion his contract was not with the agency but with the television company, who were not named as a respondent.

21. We have also seen a copy of an Employment Appeal Tribunal decision dated 22 June 2004 (UKEAT/0111/04/ILB) in which the Claimant had brought a claim against Galloway Limited t/a G2 a different casting agency. The EAT held that: ‘an actor (as an agency worker) has an entitlement as worker within the National Minimum Wage Act 1998 by section 34, but by section 34(2) only as against the Film/Theatre producer not the agency’.
22. Of course the claim in this case relates to work that the Claimant did in 2013. His claim was not lodged with the tribunal until 28 February 2018, over four years later.
23. The Claimant said that until 2016 he was not aware of the existence of regulation 13 of the National Minimum Wage Regulations 2015. Regulation 13 states that:

**‘Deductions or payments as respects a worker’s expenditure**

**13.** The following deductions and payments are to be treated as reductions if the deduction or payment is paid by or due from the worker in the pay reference period—

(a) deductions made by the employer, or payments paid by or due from the worker to the employer, as respects the worker’s expenditure in connection with the employment;

(b) payments to any person (other than the employer) on account of the worker’s expenditure in connection with the employment unless the expenditure is met, or intended to be met, by a payment paid to the worker by the employer’.

24. The Claimant’s case is that the ‘book fee’ represents ‘worker’s expenditure in connection with the employment’. As a result it reduces the sum paid for the purpose of the NMW Regulations and in this case amounts to a breach.
25. The Claimant did not bring a claim in 2016. Instead he sought to enforce his rights through HMRC by persuading them to carry out an investigation. On 12 February 2018 HMRC wrote to him to advise him that they considered him to be self-employed and not a worker for National Minimum Wage purposes. The Claimant brought his claim to the tribunal around two weeks later.

**Decision**

26. The claim is clearly out of time. The three month time limit expired on 17 September 2013. We must go on to consider whether it was reasonably practicable to bring the claim in time (48(3) of the Employment Rights Act 1996).
27. At the time that the Claimant worked for the Respondent he was fully aware of how tribunals worked and the importance of time limits, as he had previously brought two claims to the employment tribunal.
28. The Claimant states that he could not have brought his claim until 2016 when he 'came upon' regulation 13. We do not consider that ignorance of the law operates as a valid argument in this case. By this point the Claimant had already bought two sets of proceedings in relation to national minimum wage legislation. In any event, that does not explain why the Claimant did not bring a claim in 2016 but waited for another two years. His explanation for this further delay is that he was waiting for a response to his complaint made to HMRC. It seems to us that in 2016 the Claimant had a choice – he could have sought to bring an out of time claim for breach of the National Minimum Wage legislation against the Respondent or he could seek to pursue the matter through HMRC. He chose the latter course of action. We are not satisfied that either statute or case law allows us to make a finding, on this basis, that he had brought his claim within such additional period as was reasonable.
29. It follows that the claims for holiday pay and for unpaid expenses are also out of time.
30. The matter could stop there. However we realise that this issue is one of great importance both to the Claimant and to other actors in a similar situation. In all the circumstances we think it appropriate to set out some preliminary views of how we might have approached this matter, had the claim been brought in time.
31. Section 54 of the National Minimum Wage Act 1998 describes a worker as a person who works under 'any other contract, whether express or implied and whether oral or written 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’.

32. We do not agree with Mrs Shrivastava’s submission that the Claimant is self-employed and worked for the Respondent on the basis that they were a client of his business. We note that was HMRC’s conclusion, and that may be correct for tax purposes but we do not agree that it reflects his status in law. There are likely to be actors within the profession who are able to dictate their own terms for working and have a high degree of control over what they do. That was not the case for the Claimant. He was dependent for work on registering with a variety of casting agencies. There is no evidence that he had his own website or was able to offer his services direct to clients, nor was he able to negotiate his own fee. Once he had accepted an assignment, he had very little control over when he arrived, when he left or how he performed his work. We accept that he was obliged to provide his services personally. Indeed it appears that he would have been selected personally from the ‘book’ of photos provided by the casting agency. He was not permitted to send someone else in his place if he had another engagement to go to.
33. We are therefore satisfied that the Claimant meets the definition of a ‘worker’ for the purposes of the National Minimum Wage Act.
34. We have had great difficulty in deciding whether the Respondent or 2020 Casting would be the ‘employer’ in relation to the national minimum wage claim. We understand why the Claimant brought his claim against the Respondent only. He had been directed to do this by the two earlier tribunal decisions. However we fear that these cases must have turned on their particular facts. Had this claim not been out of time, we would have adjourned the hearing and joined 2020 Casting Limited or its successor company as a second respondent. We would also have ordered the disclosure of further documents.
35. The reasons why this issue have given us such a problem are as follows. The examples of the ‘representation agreement’ required by 2020 Casting are both very short and, in our view, do not reflect the totality of the relationship between the Claimant and the company. For example there is no description of the services to be provided by 2020 Casting in return or the book fee. Whereas at one level, a casting agency might argue that the fee is simply consideration for

inclusion in the 'book' we have noted the Claimant's evidence that the agencies effectively act as 'gatekeepers' in terms of any work for extras as in the majority of cases, this is the only way in which work will be allocated. We note also that the Claimant was booked by the Respondent through the agency and that he was paid through the agency.

36. We have not seen the terms of any agreement between 2020 Casting Limited and the Respondent so we do not know whether there is an agreement to supply staff to them in relation to jobs such as the advertisement filmed on 18 June 2013.
37. If 2020 Casting Limited is acting as an employment agency, it does not seem to be issuing details of its terms in compliance with regulation 13 of the Conduct of Employment Agencies Regulations 2003. Those regulations provide an exemption to the usual rule about employment agencies charging a fee to work-seekers, at paragraph 26. However a casting agency does not seem to be otherwise exempt from the requirements of the regulations.
38. The release form appears to be the only document relating to the relationship between the Claimant and the Respondent. Although that document does seek a 'release' from the Claimant in relation to any intellectual property in the use of his image and performance, as might be expected in relation to the creation of a film, the document goes on to set out the financial terms on which the Claimant will do the work. This suggests that there is a contractual relationship between the Respondent and the Claimant, as opposed to a contract between the Respondent and the casting agency.
39. Without having the benefit of submissions on behalf of 2020 Casting Limited, on the basis of the evidence available to us we have reached the tentative conclusion that the Claimant was engaged by the Respondent in this case and not by 2020 Casting Limited. We say this for the following reasons: first, the release form which is headed 'Saatchi and Saatchi' refers to the payment of a fee to the Claimant and also to his entitlement to holiday pay. Second, the representation agreement requires the Claimant to authorise 2020 Casting Limited to issue an invoice *on his behalf* for his services, which suggests that the Claimant would otherwise invoice the client direct. Third we have noted that on page 198 there is an email from 2020 Casting suggesting that the



Respondent would normally have been responsible for obtaining a contract from the Claimant – which would not usually have happened if he was engaged by the agency and not by the client. Fourth we have noted a rate card from the BBC on page A39 of the Bundle which refers to background or ‘walk-on’ artists as having an entitlement to holiday pay. All of these factors, in our view, point to the engagement arising between the actor and the production company rather than with the casting agency.

40. We have considered section 34 of the National Minimum Wage Act 1998 which addresses the situation where it is not clear whether a person is employed by an agency or by a client, and suggests that in such a case it is the party that pays the individual that has responsibility under the national minimum legislation. That would point to 2020 Casting Limited as the employer. Nevertheless that is not determinative in this case as the representation agreement that the agency only issues an invoice to the client *on behalf* of the individual; suggesting that it would otherwise go to the production company direct, and he would be paid direct by them. We have noted that at paragraph 14 of the EAT judgment referred to above, the tribunal applied section 34 and found that as a result the production company was the responsible party as they had the obligation to pay the claimant, whether or not the payment was made through the agency or was made direct.
41. We have considered the Claimant’s submission made in correspondence dated 19 November 2018 that section 48 of the National Minimum Wage Act applies but we do not accept this: there is no situation of a ‘superior employer’ arising here.
42. In the absence of further information about the relationship between the Claimant and 2020 Casting Limited, and between 2020 Casting Limited and the Respondent we are not able to resolve this matter. Whilst some factors point towards the Respondent as the ‘employer’ for the purposes of this claim, other factors point to 2020 Casting Limited acting as an employment agency and assuming liability under regulation 34. In light of this dilemma we are not able to go on to consider the application of regulation 13 to this situation. As the claim is in any event out of time, it is not necessary for us in this case to take

any further steps to try and resolve the dilemma. Nor would it be appropriate for us to do so.

43. We appreciate that the Claimant may be disappointed that his claim has not succeeded because of a time point and that the central issue remains unresolved. We recognise how important this issue is to him. We have set out our comments above in the hope that they will be of assistance in relation to the wider issue for actors in general. We would like to commend the Claimant for his perseverance in pursuing this complex issue for the benefit of others in his profession.

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Employment Judge Siddall  
Date: 18 December 2018