



EMPLOYMENT TRIBUNALS

Claimants:

Mr T Savory & 58 Others
(See attached schedule)

Respondents:

- (1) South Western Ambulance Service NHS Foundation Trust
- (2) Vocare Limited

Heard at: Exeter

On: 20 to 24 November 2017

Before:

Employment Judge Fowell, sitting alone

Representation:

Claimants:	Mr J Heard, instructed by Thompsons Solicitors
First Respondent:	Mr T Pitt-Payne QC, instructed by DAC Beachcroft LLP
Second Respondent:	Mr D Reade QC, instructed by Square One Law

RESERVED JUDGMENT

There being no relevant service provision change, the claims against the Second Respondent are dismissed

REASONS

1. The various claims raised in these proceedings arise out of a tendering process whereby the Second Respondent, Vocare Limited ("Vocare"), took over the operation of the NHS 111 telephone service in Devon on 1 October 2016 from the First Respondent Trust ("the Trust"). This Preliminary Hearing was listed to determine whether this was a service provision change within the meaning of the TUPE Regulations 2006, so that the claimants' contracts of employment transferred automatically to Vocare. On this issue the interest of the Claimants and the Trust are aligned, since the main case for the Claimants was that there was indeed such a transfer.

2. The contract was in fact awarded to Devon Doctors Limited (Devon Doctors), who were already operating the GP Out of Hours service for Devon. They bid to continue offering this service in partnership with the 111 service, sub-contracting the latter to Vocare. All claims against Devon Doctors have now been withdrawn and the main remaining issue is whether, as a result of this change or series of changes, the Devon 111 service transferred to Vocare.
3. The hearing took place over four days commencing on Monday 20 November. From the Trust I heard evidence from Jennifer Winslade, Executive Director of Nursing and Governance, and Emma Wood, who was at the relevant time Executive Director of HR and Organisational Development. Vocare relied on testimony from four witnesses: Angela Cheek, their Head of Contracting; Barry Cooper, Operations Director; Michelle Lavin, who worked as a call adviser for the Trust until late August 2016 and is now working for Vocare; and Matthew McVicar, Acting Director of Shared Services with Devon Doctors. I also heard from three individual claimants: Hollie Williams, Marian Guest, and David Kirby, who worked as a Call Advisers or Senior Call Advisers for the Trust until the end of the contract. Finally, a further witness statement was served from another Claimant, Brian Matthews, who was unable to attend. I was also assisted by a well-organised bundle of about 600 pages.

Legal background

4. The main statutory provisions are as follows.

A relevant transfer

3.—(1) These Regulations apply to—

...

- (b) a service provision change, that is a situation in which—
 - (ii) activities cease to be carried out by a contractor on a client's behalf (whether or not those activities had previously been carried out by the client on his own behalf) and are carried out instead by another person ("a subsequent contractor") on the client's behalf; ...

and in which the conditions set out in paragraph (3) are satisfied.

(3) The conditions referred to in paragraph (1)(b) are that—

- (a) immediately before the service provision change—
 - (i) there is an organised grouping of employees situated in Great Britain which has as its principal purpose the carrying out of the activities concerned on behalf of the client;...

Findings

5. The 111 telephone service replaced the NHS Direct service in 2014. It remains a national service but is now commissioned locally. Members of the public call the service and the call handler makes use of the NHS Pathways software to direct them to the most appropriate treatment. The call handler may transfer the call to the out of hours GP service, advise

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them to contact their own GP during normal opening hours, or in more serious cases may direct them to the 999 emergency service.

6. The GP out of hours service operates between 6 p.m. and 8 a.m. during the week and all day on weekends and bank holidays. It therefore operates for about 70% of the week. During normal daytime hours the 111 service is quieter because there are alternatives available such as contacting a GP surgery.
7. Turning to the specific arrangements in place at the Trust before the change of contractor, there were a number of different roles involved in providing the service. The majority were Call Advisers, who took the calls and operated the software. Above them were the Senior Call Advisers who took a number of calls and also carry out compliance audits. References to call handlers below are to these two groups. In the early stages of the service there were some Assistant Call Advisors, who took initial contact details from the caller, but this level was phased out by 2016.
8. There were a number of clinical staff too – nurses and paramedics – to whom the call handler could turn for assistance. They might transfer the call to a clinician or arrange for a clinician to call the person back, and it was a legal requirement to have a clinician physically present in the call centre at all times. Finally, there were a small number of managers.
9. As with many call centres there was a high turnover rate or rate of attrition. During normal times this was about 40%, a figure which accords with other services around the country. Recruitment was therefore a constant struggle.
10. The Trust operated from two centres – the West Hub in Exeter and the East Hub in Dorset, which was smaller. At the outset of the contract in 2014 the Trust provided the service from these two hubs to the four counties of Cornwall, Devon, Somerset and Dorset. They operated what is known as a “blended model”. Calls would be received in both centres from the entire area and staff would answer the calls on a first-come, first-served basis. This approach therefore provided economies of scale and prevents a build-up of calls in any one area.
11. There are national key performance indicators or KPIs which have to be met, including that 95% of calls are picked up in the first 60 seconds, so an approach of this sort helped to ensure that the target was met. Statistics were published showing the performance for each area, and on a blended model the performance on this measure should be identical or near identical in every case. This is one way in which a potential bidder, such as Vocare, could establish how a service was being operated.
12. The alternative approach is what is known as a “stand-alone” model. Under this arrangement there is a dedicated group of employees providing the 111 service for each commissioning group. Those employees could be located in separate hubs, or even located together, but the telephone system would direct calls from their particular area to them first. The performance statistics would then reflect the success or failure of each

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team. In one area, for example, there might be a shortage of staff, leading to a lower proportion of calls taken in the first minute.

13. One of the benefits of this type of arrangement is that when the contract is re-tendered there is an identifiable body of employees dedicated to that particular work, and so this meets the “organised grouping” test for TUPE purposes. That would avoid the service provider becoming liable for redundancy costs. Some commissioning groups prefer this approach for other reasons: they get a dedicated group of staff focusing on their area, who may – it is thought – have a more detailed knowledge of the clinical provision available. It also allows for some local variation in the approach to call handling, so that for example the very young or very old can have an “early exit” from the call and be directed on the basis of their age to the GP out of hours service immediately rather than having the severity of their condition assessed by the call handler.
14. This more bespoke local arrangement is more expensive. All 111 services are contracted on a “pay per call” basis and the rates negotiated are higher if the commissioning group wants a stand-alone model. This reflects the increased staff costs to make sure that all foreseeable levels of demand are met.
15. Even a stand-alone service is not entirely without support. There is a national system for dealing with the small number of calls – about 5% of the total – which cannot be identified geographically, and which are therefore assigned at random to any of the national 111 services. This is known as “run-off” work.
16. Following changes to the NHS structure, these services are procured by Clinical Commissioning Groups (CCGs), who are generally organised on a county basis. The Trust dealt with a number of CCGs. In Somerset, Dorset and Cornwall the services were commissioned by the Somerset CCG, Dorset CCG and the Kernow CCG respectively. In Devon there were three separate CCGs, reflecting the presence of unitary authorities, but they operated jointly for these purposes and I will refer to them as the Devon CCG for convenience. The CCGs therefore have considerable input into the type of service required, and can contract for a blended or stand-alone service as they see fit.
17. The other partner in these arrangements is the NHS, which provides the software. Reports have to be provided to the NHS showing the performance of the service and they are notified of the telephone arrangements so that they can transfer the run-off calls appropriately.
18. During 2015 the Somerset CCG re-tendered its service and the successful bidder was Vocare. At that time the Somerset service was being operated from the West hub in Exeter as part of a blended service with the three other adjacent counties. There was therefore no organised grouping of employees to transfer to Vocare and the Trust did not suggest that this was a service provision change. They kept the relevant staff on, who continued to provide a service for the other areas. As already noted, attrition is high in these operations and so it is often possible to absorb additional staff rather than make redundancies.

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19. This exercise confirmed to Vocare that in July 2015 the Trust was operating a blended service for Devon, Cornwall and Dorset. It also illustrates the prevailing wisdom in this area, shared by service providers, CCGs, NHS and those bidding for such contracts, that with a standalone service TUPE applies, and if it is a blended service it does not.
20. The commercial reality is also that the bidder in such situations will hope that TUPE does not apply. There are usually economies of scale to be made from the successful bid, which are eroded if a substantial additional workforce has to be taken on. On the other hand, attrition may avoid redundancy costs, and if it is necessary to recruit and train local staff this too has a cost. Mr Cooper, on behalf of Vocare, suggested that the application of TUPE was cost-neutral in the case of the present takeover, but given the efforts made to dispute the application of TUPE, I conclude that they concluded that there was still a commercial advantage to avoiding TUPE. From the point of view of the Trust however there were no competing considerations: if TUPE did not apply they would become liable for the substantial and inevitable redundancy costs.
21. Even before the loss of the Somerset contract the Trust had given 12 months' notice, on 27 March 2015, that it would stop providing the Devon and Cornwall 111 service with effect from 31 March 2016. The inevitable consequence of that decision was that it would, within a matter of months of the loss of the Somerset contract, only be operating the Dorset 111 service.
22. That service too was undergoing change. In July 2015, at the same time that Vocare was taking over the Somerset service, the Dorset CCG requested that their service be operated on a stand-alone basis. This was agreed and accommodated by assigning the staff in the East Hub to this particular contract. From then on, the telephone system was changed so that Dorset calls went into the East hub as a priority, leaving the staff in the West hub to service the Devon and Cornwall contracts during the remainder of the notice period.
23. The two hubs continued to support each other however, since they could pick up calls for the other area when that area was overloaded. From a technical point of view this was easily achieved. On arrival at work each member of staff would log in to the computer system by inputting a personal identification number (PIN). In the West hub each PIN was prefixed with a zero when working on Devon and Cornwall calls. When Dorset was particularly busy, a manager would tell a call handler to log off and log back on again with a Dorset PIN, which was the same number prefixed with a six. The system was therefore something of a hybrid between a stand-alone model and a blended service.
24. The situation from the summer of 2015 therefore was that the Trust was operating a residual blended service for Devon and Cornwall from the West Hub. But the CCGs for each county commissioned the service separately, and the Trust was aware that at the end of one of these contracts they would become liable for substantial redundancy costs unless the workers in Exeter were somehow divided into two "organised groupings", one for Devon and one for Cornwall. Ms Winslade therefore

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wrote to the two CCGs in June 2015 proposing to embark on this process of “unblending”. It was not welcomed, and Devon CCG wrote back on behalf of both commissioning groups, worried about the effect on performance and asking that this not take place.

25. In January 2016 the Devon contract was extended by agreement so as to expire on 30 September 2016. It may be that the Trust, although finding the service unattractive to run, was concerned about the looming deadline at the end of March and the impact of TUPE on the unblended service. Whatever the competing considerations, the Devon contract was then re-tendered and the Trust applied, only to withdraw from the process in February 2016.
26. Vocare were of course ultimately successful in taking over this contract, so from early in 2016 they were keen to establish whether the current Devon 111 service was being operated on a blended or stand-alone basis. Apart from the information exchanged in the course of the procurement exercise, a number of reports and performance indicators were available online and were scrutinised by Ms Cheek, the Head of Contracting. These showed practically identical performance standards, supporting the view formed the year before that this was a blended service.
27. Other statistics then came to hand from Devon Doctors. Mr McVicar, one of their senior managers, carried out his own analysis of the statistics. As already noted, Devon Doctors were the lead bidder, with the intention that Vocare would sub-contract the 111 service, so the two organisations were working together. And Devon Doctors were operating the GP out of hours service for both Devon *and* Cornwall, so he had access to a good deal of information about the calls they were receiving. Most of the calls received by the 111 service were ultimately transferred to Devon Doctors so the number of calls transferred to them from each county was, he concluded, a good indication of the proportion of calls from each area being received by the Trust. Although he had no information about the duration of calls, he knew the number of calls, and on each occasion they were given the name of the 111 call handler, where they were located and the address of the patient.
28. His analysis showed that most of the calls came from the West Hub. A certain amount came from the East Hub and others, as part of the national run-off process, came from all parts of the UK. Mr McVicar felt that by focusing on the West Hub data it would be possible to tell if they were operating a blended service because the proportion of calls passed to Devon Doctors would then be steady, and in proportion to population size. (The population Devon is bigger than Cornwall and so the normal ratio to be expected is 69/31.) That was indeed his conclusion. His first data sample covering the period from February to 21 March 2016. Although he anonymized the data, the list he compiled related to 184 individual call handlers and showed a 70/30 split.
29. He passed this information to Vocare who considered it reliable. It reinforced their view that this was a blended service. They did not disclose this information to the Trust at any stage, although they said they had their own data, so the Trust had no opportunity to comment on it.

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30. During the procurement process the Trust also had to provide Devon CCG with information about their workforce to provide to the bidders, so Vocare received more information by this official channel. The Trust compiled this information on 5 March 2016, and did not dispute the fact that this remained a blended service across Devon and Cornwall. Their spreadsheet listed each Call Adviser and Senior Call Adviser as assigned to the "Devon and Cornwall 111" team. Further, the Trust accepted and maintained throughout that none of the management staff involved, or the clinical staff, were specifically assigned to Devon and so they did not form part of the grouping of employees.
31. Mr McVicar then produced more data covering April to July 2016. The methodology was the same. On this analysis the proportion of Cornwall calls being transferred from the West Hub was, to the nearest percentage point, 24% in April and May, 25% in June and 27% in July. A good deal of time was spent during the hearing on these statistics. The Trust and Claimants considered them unreliable because Mr McVicar identified 311 individual call handlers during this period, a significant increase on the 184 in February and March. At around the same time the Trust identified a body of 126 call advisers and 14 senior call advisers as transferring. There had previously been 26 assistant call advisers too. Having explored in evidence various possibilities, including a higher attrition rate as the contract came to an end, with a consequent increase in the use of bank staff or agency staff, Mr Cooper for Vocare put forward the most plausible theory, noting that in each month the number of individuals transferring more than 10 calls was only between 150 and 161, so many of the 311 were staff who only transferred the odd call: this might include clinicians who had been passed a call to deal with, or managers doing the occasional call to retain their skills.
32. It remains unclear why the February/March figures did not also reflect the same number of fringe cases. It may be that attrition, particularly over the longer period of this sample, provides part of the explanation. Whatever the full cause, given the relatively small numbers involved from this fringe group the percentage totals still appear to give an accurate indication of the period in question. Even on the Trust's case, steps to separate the Devon and Cornwall teams were still in their infancy by the end of this period.
33. A number of changes took place over the summer months, beginning with a change of approach on behalf of the Kernow CCG. They had already agreed that the Trust would continue to provide the Cornwall 111 service until 30 November 2017. There would therefore be a period from 1 October 2016 when the Trust was still providing the service to both Dorset and Cornwall. Contrary to the previous view, expressed at the time of the change in the Somerset, in December 2015 Kernow CCG proposed and negotiated with the Trust a continuation of the current blended model until 30 September 2016, followed by a 14-month period to the end of November 2017 operating a stand-alone service. Various models were considered including a stand-alone service based in Cornwall, but this was discounted as too expensive, and so rather than separating out the staff in Exeter for this purpose it was agreed that a separate team would be established and located at the East Hub, alongside the Dorset team, servicing the Cornwall

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111 contract. That would leave the staff in the West hub at Exeter free to continue the Devon contract during the time remaining.

34. The Trust therefore directed their efforts to establishing this Cornwall team in Dorset during the summer and autumn of 2016 so as to be up and running on 1 October, the end of the contract, so achieving the separation of the Cornwall and Devon teams. This involved recruiting a whole new Cornwall team. The geographical distance between the two hubs is such that it was unrealistic for any of the call centre staff in Exeter to transfer to Dorset, and although this might ordinarily involve an excess of staff remaining in Exeter this would soon reduce by attrition.
35. Recruiting a new team in this way is not straightforward. The training course for call handlers takes about five weeks. There was limited space available in the East Hub and each trainee needed a computer to run the pathways software. Even if it were logistically possible to recruit and train the whole group in one exercise there would be safety concerns. The normal model operated by the Trust involved a period of supervision after training. The call handler would first observe a senior call adviser at work, would then be observed in turn, and would then spend a period physically located within a group of more senior advisers to have help on hand. It would take perhaps six months for someone to become fully experienced in the role. The recruitment exercise therefore had to be phased in over a period of time.
36. This approach was announced to staff at a meeting with the Chief Executive of the Trust on 26 May 2016. At the same time he informed them that Devon Doctors had secured the contract and would be subcontracting the 111 service to Vocare. A series of other steps taken during this period included issuing staff with altered payslips showing them as on the Devon 111 team rather than the Devon and Cornwall team, and issuing new joiners with separate contracts.
37. There was also a change in the telephone arrangements. Notice was sent to the telephone provider on 15 June 2016 to direct Cornwall 111 calls as a first priority to the East Hub. It is not clear however when this change took effect. Vocare maintains that it cannot have been on that date since no staff were then available in Dorset to take such calls. Given my findings below, I accept that the staff were not in place before September, so whatever the date of the changeover, it can have had no appreciable effect until September.
38. It follows that the dispute over the second set of statistics prepared by Mr McVicar proved to be something of a red herring. By the end of the period of in question – 31 July 2016 – none of the changes in the Cornwall team had come to fruition, and the service continued as a blended model as before.
39. While these changes were in the pipeline, there were rumblings of discontent from the Devon CCG. They wrote to Ms Wood, the Trust's HR director, on 12 August 2016 expressing concern that the Cornwall service had been moved and they had not been informed. This, they said, ought to have been agreed by the commissioners under the terms of the contract.

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Furthermore, the Kernow CCG were not aware of the change. Ms Wood responded on 26 August 2016 downplaying the significance of the changes. She informed them that the Trust had made a technical change on 19 June to the call handling procedures to support the transition of the Cornwall service to Dorset so that the Cornwall service was now routed through the Dorset hub and that this had been agreed with Kernow. She confirmed that there had been no transfer of staff and no change in the workforce so this did not constitute a change to the “service delivery structure” such as would require the agreement of the commissioners.

40. As may be expected, there was correspondence between the parties over the summer and autumn over whether TUPE applied. The Trust’s position, expressed in its letter of 18 July 2016, went further than it ought in stating,

“The staff at the Exeter call centre are employed to answer Devon 111 calls and do not carry out work on Cornwall calls (other than an overflow basis, to which see below)”.

41. By then, no staff had been recruited into Dorset to deal with the Cornwall contract, so the use of the word “overflow” in this context is apt to mislead, indicating as it does calls from the national network. Staff in Exeter were still working as before on the Cornwall service.

42. As part of the transfer process there was consultation between the Trust and the relevant union – Unison. They advised their members on 27 July 2016 of the need for the Trust to show an organised group of employees, adding

“Clearly we know that this has not happened robustly within [the Trust] and as such this has caused some confusion on whether staff are, or are not assignable to the moving contracts...”.

43. Direct, one-to-one, consultations also took place between the Trust and its own staff. During those meetings each staff member was briefed on the proportion of Devon or Cornwall calls they had been taking, as shown by the Trust’s data, based on the proportion of time spent logged on dealing with all calls. The approach adopted was that anyone spending more than 65% of their time on Devon calls would be assigned to the Devon team, but given the relevant population sizes and the fact that about 70% of calls originate in Devon, this did nothing to distinguish between employees, and in the event they were all assigned to Devon.

44. In Dorset, the first recruits completed their training on 22 August having completed a training course which began on 11 July 2016. It was not until 6 September however that separate PINs were assigned to Dorset and Cornwall staff so that each would take calls from their area as a priority and this, I conclude, is when they began work in earnest as a separate group. An internal email on 2 September from Ms Winslade notes that she had two different reports on when staff “will be on the floor and ready”.

45. Then on 8 September, after the new PINs have been allocated, an email from the Trust to Kernow CCG updating them on progress (page 408)

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recorded that they were now in the fifth phase of recruitment with 16 full-time call handlers recruited and 15.28 FTE part-time call handlers. It went on to state that the aim was to achieve 34 FTE call advisers and that on present projections they would achieve 22 by 3 October, rising to 28.29 by 8 October and 33.18 – essentially the full complement – by 17 October.

46. The concern had been expressed (page 411) about what would happen if the number of call advisers fell below 50% of those required – “the danger zone” – which was met with the response that Dorset staff would be asked to do overtime work for Cornwall. This approach was criticised at the hearing on the basis that it was an attempt to present a misleading picture: rather than use staff from the West Hub, who were presumably underutilised, management was asking Dorset staff to do more so as to make it appear that Cornwall was no longer reliant on the West Hub.
47. The position for clinicians was different however. Here it was accepted in the same document that there was a shortfall and this could only be met with help from Exeter.
48. The Trust was therefore in a race to get the Cornwall service up and running by 1 October 2016, so that those in Exeter would, by default, only be concerned with calls from Devon. Attempts were made on both sides to monitor the effectiveness of these changes. According to the Trust's figures, the amount of time spent on “run-off work” – by which they meant any non-Devon work – to the nearest percentage point was as follows: 37% in June; 19% in July; 20% in August; then in the period from 5 to 18 September, 9%; from 19 to 25 September, 8%; and from 26 to 27 September, the last four days of the contract, 3%. On this basis they claim that the services had achieved separation.
49. The 37% figure for June is rather more than Mr McVicar calculated of 25%. Then in July the figures reverse. Mr McVicar's figures suggest 27% against 19% for the Trust.
50. The Trust's figures were challenged. They had been extracted from earlier more detailed figures and the comparison is instructive, since the earlier figures show higher numbers from Cornwall. At page 456 of the bundle are figures prepared by the Trust for the Exeter call centre between 5 and 18 September 2016. It is a large table. Each call handler is listed in one column, next to figures for their contracted hours and the total amount of time spent logged on to the IT system. The time is then divided in adjacent columns between time spent on Devon 111 calls and time spent on Dorset and Cornwall 111 calls, described as “run off” time. Calls from other areas have been excluded. On this basis, the division of time is 79.83% in Devon against 20.06% elsewhere, or about 80/20. This differs from the figure now put forward by the Trust for that period of 9%, or 8.77%.
51. This lower figure comes from a very similar table at page 590. It is difficult at first glance to distinguish the two. There is the same list of staff and their contracted hours. The total time spent logged onto the system is also set out as before. The percentage figures have now changed however. The eventual figure of 8.77% is expressed as the percentage of

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time spent on what are described as run-off calls *whilst the employee was logged onto the IT system.*

52. So, the first table distinguished between time logged on and time handling calls, which is much less. If, for example, a call handler is logged on one evening for 200 minutes, he or she may spend 100 minutes dealing with 111 calls. If, of that 100 minutes, 80 were spent on Devon calls and 20 on Dorset and Cornwall calls, the first set of figures would show this run-off time as 20% of the total. But the second set of figures would show this 20 minutes against the 200 minutes *logged on*, and give a figure of 10%. Again, I find that approach apt to mislead and so do not place reliance on those figures.
53. I have not been provided with the earlier type of data for each of the periods in question so it is not possible to generate more reliable figures for each period of time, but the clear implication is that the number of non-Devon calls is substantially greater, and probably at least double the amount claimed, as it is in the period from 5 to 18 September. To repeat, the Trust's figures show 9% from 5 to 18 September instead of about 20%, then 8% from 19 to 25 September. This is little changed indicating that the actual proportion was still close to 20%. The claimed percentage drops to 3% in the last four days, which may well therefore be over 6%, against a historical average of about 29%, although it seems likely that this too has been affected by the efforts to get Dorset staff to help out in the final stages.
54. So much for the Trust's figures. As the end of the contract approached Mr McVicar produced some more of his own. According to these, there was a division of time of 65/35 in August. This does not seem surprising given the evidence that recruitment had not begun to take effect until September. August is also the peak tourist season in Cornwall, when the population grows appreciably. As just noted, the Trust's figures claim that the figure was 20%, but given the flawed methodology just discussed, I prefer Mr McVicar's approach and conclusions.
55. The last figures he produced were for the period 12 to 18 September during this period he listed 118 call handlers and the prospective split was approximately 79/21. I note too that these figures concentrate on Cornwall and exclude any Dorset figures. That figure tallies very closely with the corrected figures from the Trust, as shown at page 456 onwards, showing about 20% for the period to 18 September. I conclude therefore during this period to 18 September the proportion remained at 20%.
56. What does that reveal about the position at the end of the contract? The proportion of Cornwall calls taken is now impossible to establish with any confidence, but the position changed little on the Trust's figures between the period from 8 to 15 September, when the true figure was about 20%, and the following period from 18 to 25 September. That indicates that levels stayed close to 20% into the last week of the contract. There was then a sharp dip then on the Trust's figures to 3% although the methodology is misleading. The real figure is likely to have been at least double that. Even so, it was much less than before.

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57. The figures were supported by other evidence. Marian Guest, who worked in the West Hub to the end, gave evidence that they noticed the number of Cornwall calls dropping off towards the end, although it was difficult to keep track - the county area just popped up briefly on the screen at the beginning of the call. So I accept that there was a real reduction. There are two possible explanations for this: either other staff were recruited, or Dorset staff were making increased efforts, by way of overtime or otherwise, to cover.
58. Although there were five phases of recruitment, with a view to a full complement by 17 October, those new people had to be trained, and would not be fully effective even after the training. There was no suggestion that training courses could be done simultaneously. Hollie Williams, another Claimant from the West Hub, who had not been to the East Hub, said that it was known to be tiny and there had been discussion about using the training room to sit the new recruits, which would of course have prevented further training. In any event, each trainee needed a desk and computer. As already noted, the first course began on 11 July and ended on 22 August, but the new trainees were not able, for whatever reason, to commence any work in earnest until about 8 September. The next batch of recruits must have been at least five weeks behind them, and so could not have come on stream before the end of the contract. I note too that apart from clues left in the contemporaneous emails, no evidence was led by the Trust about the actual training course and numbers involved.
59. It follows that only the first batch of trainees would have been available to change the position in the latter part of September. They may have grown in confidence and expertise over that post-training period and been able to make a greater contribution, but that seems a marginal gain, particularly given the undoubted pressure to take as many calls as possible. It does not seem sufficient to explain the extent of the claimed drop. If the existing staff were enough by the end of September to reduce the proportion of Cornwall calls to 3% or even 6%, it is hard to see why so many further recruits were necessary. I conclude therefore that no effective steps were taken between 25 and 30 September to reduce the volume of calls from Cornwall, which remained at or shortly below the 20% level, and that staff from the Dorset team were assisting in taking these calls to help disguise the position.
60. Drawing together these threads, and summarising the effect of the various changes made during September 2016, I conclude that:
- a. About 35% of calls handled by the West Hub in August 2016 were from Cornwall, slightly more than usual.
 - b. No change took place to the telephone arrangements in Devon throughout, with staff logging on with a PIN beginning with a zero and taking calls on a first-come, first-served basis from Devon and Cornwall.
 - c. There was no appreciable change in the position until after the first new call handlers were recruited into the East Hub and had completed their training, from 8 September 2016.

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- d. From around that point, Cornwall calls began to be dealt with as a first priority in the East Hub. Calls they could not deal with were still picked up in the West Hub.
- e. The East Hub continued to be supported by the clinicians and management from the West Hub.
- f. No new recruits were trained before the end of the contract, and although there was a reduction in the calls taken in the West Hub, this was largely achieved by last-minute efforts made by the Dorset team.

Submissions

- 61. I was greatly assisted by skeleton arguments from all parties and written closing submissions. Since they are on the tribunal record I will only briefly summarise the rival submissions, beginning with those for Vocare Ltd
- 62. I was referred to 12 cases altogether, comprising:
 - a. Enterprise-v-Connect-Up [2012] IRLR 190;
 - b. Argyll Coastal Services-v-Sterling [2012] UKEATS/0112/11 (Lady Smith);
 - c. Arch Initiatives v Greater Manchester West Mental Health NHS Foundation Trust [2016] [CR 607];
 - d. OCS v Jones [2009] UKEAT/OO3 8/09 (HHJ Ansell);
 - e. Rynda v Rhijnsburger [2015] IRLR 394;
 - f. Eddie Stobart Ltd v Moreman [2012] IRLR 356;
 - g. Tees & Esk NHS v Harland [2017] IRLR 486;
 - h. ECM v Cox [1999] IRLR 559;
 - i. Astle v Cheshire County Council [2005] IRLR 12;
 - j. Amaryllis Limited v McLeod (EAT 9th June 2016: UKEAT/O273/15/RN, unreported);
 - k. Johnson Controls Ltd v Campbell & UKAEA [2012] UKEAT/0041/12/JOJ; and
 - l. Ottimo Property Services Ltd v Duncan [2015] ICR 859
- 63. Mr Reade QC is set out four principal arguments:
 - a. The client in question before and after the purported transfer were not the same: before the transfer the Trust was jointly commissioned by the Devon and Cornwall CCGs; afterwards the service was only provided to Devon.
 - b. Further, or alternatively, the activities were fundamentally different before and after the purported transfer in that they began as a blended service and ended as a stand-alone service.
 - c. That the activity in question was the provision of the 111 telephone service for Devon, and this was carried out not only by the call handlers but also by the management and, crucially, the clinicians, who did not transfer.
 - d. Finally, the efforts made by the Trust to establish a separate team in Exeter were too little and too late.
- 64. The first two of these points were closely linked. He referred me to the contract in question, both of which referred to combined metric reports across the Devon and Cornwall service, together with the evidence of

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correspondence sent on behalf of both groups and the concern expressed by Devon CCG that there were no longer receiving a blended service. This was evidence of a common intent – a phrase used in *McCarrick v Hunter*. It was also clear from *Ottima*, he submitted, that a client can be plural or joint. Similarly, Devon contracted for a blended service with Cornwall and were not getting that after 1 October 2016. The cases showed, he submitted, that the change in activities could be quite small so as not to be fundamentally the same. In *OCS v Jones* the changes were as a canteen, which changed from providing a range of hot and cold meals to pre-prepared sandwiches and salads. In *Enterprise Management Services*, which involved the provision of IT support to about 300 schools, there was a change in the service in that there was no further support for curriculum systems which represented 15% of the work Enterprise staff were carrying out.

65. The next issue concerned the clinicians. He submitted that it was clear on the evidence that clinicians were vital to the operation of the service and they had not transferred. The question of activity is broader than simply tasks and in each of the authorities the service in question had a degree of autonomy. For example, in *Arch Initiatives*, the local authority contracted out its drug and alcohol services to an NHS Trust, and although it separated out the service into the case management function and the delivery function, each had a degree of autonomy. Here, the call handlers as a group were not independently capable of delivering any service.
66. His final point about the changes being too little too late have already been extensively considered on the facts. In his initial skeleton argument he had also suggested that it was in some way illegitimate to make arrangements in this way specifically with a view to avoiding the application of TUPE, but in the event he confined himself to submitting that the Tribunal should look at the reality of the situation and ignore efforts to manipulate the position, such as by getting Dorset staff to take more calls. No real issue was taken with this formulation.
67. Mr Pitt-Payne QC, who made submissions on behalf of the Trust, which were adopted by the Claimants, submitted that all the requirements of the service provision change were met. He reminded me that this was a national service involving NHS pathway software and uniform KPIs, and so was fundamentally the same after the transfer.
68. He was dismissive of the suggestion that the client was Devon *and* Cornwall, noting that the contracts round four different periods and there was no evidence that either party had to get the consent of the other before tendering or agreeing any extensions. Each conducted their own procurement arrangements. Further, the question of it being a blended or stand-alone service was about the mode of performance, not the activities. It could not be maintained that Devon, for example, was contractually entitled to a blended service since this depended in part on the views of other CCGs.
69. On the clinician point he referred me in particular to paragraph 17 and 18 of the *Arch Initiatives* case which provide, with some emphasis:

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17. ...Regulation 3(1)(b)(ii) identifies an SPC as a situation in which “activities” cease to be carried out by the outgoing provider and are carried out instead by another person. The word “activities” is not defined, and nor is it qualified in any way by words that could have been used to qualify it. For example, the provision could have said “the activities”, “all of the activities” or “the principal activities”. ***There is nothing in the Regulations that expressly requires that the relevant activities should constitute “all of the activities” carried out by the outgoing contractor.***

18. Nor, in my judgment, is there any justification for substituting or equating the word “activities” with the word “service”. That could have been done, but it was not. It seems to me that the fact that the service that is subject to an SPC can comprise “activities” connotes that the relevant activities in a particular case may be a subset of the whole of the activities carried out by the transferor, as Ms Tether submits. Mr Gorton’s reliance on the absence of any express reference to “part of an activity” in contrast to the reference to “part of an undertaking” does not support his argument in light of the wording of the Regulations. Given that this Regulation is framed by reference to “activities” rather than “the service”, it was unnecessary to provide expressly that there can be an SPC in relation to part only. ***Since “activities” is undefined, there is nothing in principle to prevent some only of the activities that form part of service from being considered in the context of an SPC.***

70. Applying this approach, he submitted that there was nothing to prevent the call handlers as a group providing the activities in question and being an organised grouping. Further, the changes which took place in the East Hub left the West Hub conducting Devon work only. There was no need for any change in the PIN numbers, and these various changes which came about in stages - for good operational reasons - were not simply happenstance.

Application of the Law to the Facts

71. The starting point is the guidance from HHJ Peter Clark in *Enterprise Management Services Ltd v Connect-Up Ltd* regarding service provision changes or SPCs. At paragraph 8 he set out the following principles:

(1) The prospective SPC in this case arises under reg. 3(1)(b)(ii), that is where ‘activities’ cease to be carried on by a contractor (here, Enterprise) on a client’s (LCC) behalf and are carried on instead by a subsequent contractor (Connect).

(2) The expression ‘activities’ is not defined in the Regulations. Thus the first task for the Employment Tribunal is to identify the relevant activities carried out by the original contractor ...

(3) The next (critical) question for present purposes is whether the activities carried on by the subsequent contractor after the relevant date, here 1 April 2009, are fundamentally or essentially the same as those carried on by the original contractor. Minor differences may properly be disregarded. This is essentially a question of fact and degree for the Employment Tribunal (Metropolitan, para. 30).

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(4) Cases may arise (e.g. Clearsprings) where the division of services after the relevant date, known as fragmentation, amongst a number of different contractors means that the case falls outside the SPC regime, as explained in Kimberley (para. 35).

(5) Even where the activities remain essentially the same before and after the putative transfer date as performed by the original and subsequent contractors an SPC will only take place if the following conditions are satisfied:

(i) there is an organised grouping of employees in Great Britain which has as its principal purpose the carrying out of the activities concerned on behalf of the client;

72. Sub-paragraphs (4) and (5) above relate to fragmentation and a change in the service, which are the subject of Mr Reade's first two submissions. Neither of these were pleaded.

73. In my view there is no real basis for the submission of that Devon and Cornwall were jointly acting as clients in this instance. This is almost self-evident given that they each had separate contracts with the Trust to provide the 111 service. The contracts followed separate procurement exercises. The extent of any common intent appears limited to the fact that at some of the period under consideration they both had contracts with the Trust, the contracts having overlapping durations, and they collaborated during this period on the use of a blended model. This does not seem to me to affect their autonomy, whether as to future arrangements or the type on service.

74. Nor can I accept that the distinction between a blended and a stand-alone service is as significant as suggested. It is not a term of either contract. The Deed of Variation under which Devon CCG extended the Devon contract to expire on 30 September 2016 (page 94) contains reference to the Trust supplying weekly "Devon and Cornwall Combined metrics reports", but at the time this contract was agreed there was no question that this was the blended model in effect and those were the reports available. For this blended service across Devon and Cornwall to be a term of the contract would require the express agreement of both CCGs.

75. The next point therefore is to identify the relevant activities. The *Arch Initiatives* case dealt with a slightly different situation in that the service in question was separated into two groups by the outgoing contractor and tendered separately. The submission which was rejected in such clear terms by the EAT was that this approach by the outgoing contractor ran counter to the regulations and in short that where a service was divided up in this way TUPE did not apply.

76. Here, the service tendered was the whole 111 service. Unlike in *Arch Initiatives*, the new contractor is now also providing that whole service, and so the question has to be whether there was an organised grouping of employees carrying out *that service*. It is perfectly permissible for a service to be split into groups and tendered or taken over piecemeal but that is not what occurred here.

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77. In *Rynda v Rhijnsburger*, Jackson LJ set out guidance on the correct approach at paragraph 44 which may be set out as follows with some additional spacing for clarity:

“I would summarise the principles which emerge from the authorities as follows. If company A takes over from company B the provision of services to a client, it is necessary to consider whether there has been a service provision change within regulation 3 of TUPE.

- The first stage of this exercise is to identify the service which company B was providing to the client.
- The next step is to list the activities which the staff of company B performed in order to provide that service.
- The third step is to identify the employee or employees of company B who ordinarily carried out those activities.
- The fourth step is to consider whether company B organised that employee or those employees into a “grouping” for the principal purpose of carrying out the listed activities.”

78. So the first stage is to identify the service which the outgoing contractor was providing and which the new company has taken over. That first stage is therefore straightforward: it was the NHS 111 telephone service.

79. From that it follows that the activities which their staff performed to provide that service comprised:

- a. handling the call;
- b. using the NHS Pathways software to decide on the outcome;
- c. providing initial clinical advice by telephone where appropriate.

80. In the same way, the employees who ordinarily carried out those activities were:

- a. the call handlers
- b. the clinical staff supporting them; and
- c. management staff overseeing the service.

81. The last step is to consider whether the Trust organised those employees into an “organised grouping” for the principal purpose of carrying out these activities, and so the clinical and management staff have to be included in that consideration, even though none of them is a Claimant.

82. This therefore involves a consideration of the position immediately before the award of the new contract, having regard both to the practical steps taken to separate out the Devon and Cornwall teams and also the various staff members involved in carrying out those activities.

83. The fact that clinical staff were not regarded by the Trust as part of that organised grouping, or were not regarded by Vocare as part of the transferring group, is not decisive. Vocare took the view that no staff were transferring. The Trust appear to have adopted the view that since the clinical staff were supporting the Cornwall service in Dorset, who lacked their own clinicians, it would be detrimental to their case to include them in the claimed organised grouping. Nevertheless they were based in the West Hub and were continuing to provide services to the Devon contract to the

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end, even though they were also assisting on the Cornwall contract. This dual role does therefore muddy the picture but it does not in my view mean that the proper approach is to exclude them from the picture altogether. The organised grouping of employees in this case therefore is simply the staff employed at the West Hub in Exeter, and the remaining question is whether or not they were organised for the principal purpose of carrying out these activities for Devon CCG.

84. In *Amaryllis Ltd v McLeod* it was held that “principal purpose” does not mean the sole purpose but rather the dominant purpose: it is not enough that the relevant department carries out “significant work” for the client, it must be organised for the principal purpose of carrying out that work.

85. This was endorsed in *Tees Esk and Wear Valleys NHS Foundation Trust v Harland*, which is particularly instructive. It involved a body of employees undergoing rapid change. The contract in question was to provide nursing care to a patient with severe learning difficulties. To begin with, he required 27 staff. This reduced by stages until he needed only four-to-one care, then one-to-one care during the day and rarely at all during the night. By the time of the purported transfer the Trust identified a grouping of 11 staff who were providing this service, although in fact the Tribunal found that by that stage many of them were employed on other tasks. Eady J. held

“In my judgment, the best way to answer this question is to return to the words of the regulation. Adopting that approach, it is apparent that it is not simply the carrying out of the activities that means that the existence of the organised grouping meets the relevant condition; the carrying out of those activities has to be the principal purpose of that grouping, whether or not it is in fact carrying them out at any particular time. ***If the grouping in fact carries out other work, that might well point to its organisation being for a purpose other than the activities relevant to the service provision change. Similarly, if the grouping comprises far too many employees than would be necessary for the activities in question, that might suggest either that not all the staff concerned were in fact assigned to it or that the real purpose behind the organisation of the group was other than the carrying out of the relevant activities for the client.***

These are possibilities that an ET might properly consider relevant to its assessment, but it would not be sufficient to identify the actual activities being carried out by the organised grouping without determining its principal purpose.”

86. Unlike in the present case therefore, the group of employees was less and less focused on the service as the end of the contract approached, but the same issues arise in the process of “unblending” underway on this occasion.

87. Undoubtedly, a small number of members of that group – the clinical staff and no doubt some management staff – carried out other work on behalf of the Cornwall contract. The call handlers were also carrying out most of their work for the Devon contract.

88. It is also true that some steps had been taken to designate the staff in the West Hub as members of a different team, but these appear rather

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superficial. Differently worded contracts were issued to new joiners, but that would not have any effect on the existing staff. They had different pay statements, although Michelle Lavin gave evidence that she did not notice this at the time, or indeed any other attempts to group her under a different banner. There were meetings with management at which the efforts in Dorset were explained but again that did not have any direct effect on the staff in the West Hub, save that some noticed by the end of the contract that the number of Cornwall calls had diminished. The telephony remained largely the same, in that Cornwall calls which could not be managed in Dorset were transferred to Exeter and dealt with indiscriminately by the staff there, in the same priority as Devon calls. Even without the essential contribution of clinical staff, the Cornwall 111 service could not have operated without the continued support from the West Hub throughout September.

89. The concern therefore is not that some work was carried out for another client but that the staff in the West Hub were organised to provide a service to the two clients jointly. The Trust accepts that this was the case until June 2016, when it says that the telephony was changed over, and on that basis TUPE would not apply. At the risk of labouring the point, Cornwall calls average about 29% of the total. It follows from my findings above that about two thirds of this, approximately 20%, was still being dealt with in the West Hub to the end, or at least would have been but for efforts by the Dorset team to take as many of these calls as possible.
90. Looking at the reality of the situation therefore it appears to me that the position was little altered by the end of September, and that the dominant or principal purpose of this grouping remained to provide the 111 service to both Devon and Cornwall.
91. Accordingly, on this preliminary issue, I find in favour of the Second Respondent, Vocare Limited

Employment Judge Fowell

Date: 1 December 2017

JUDGMENT & REASONS SENT TO THE PARTIES ON

11 December 2017

FOR THE TRIBUNAL OFFICE

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(See attached schedule)

	Case no.	Claimant
1.	1400119/2017	Mr T Savory
2.	1400120/2017	Mr J Baker
3.	1400121/2017	Mrs C Bale
4.	1400122/2017	Mrs K Ballard
5.	1400123/2017	Mr O Barnard
6.	1400124/2017	Mrs S Barry
7.	1400125/2017	Ms W Bartlett
8.	1400126/2017	Mr M Beavis
9.	1400127/2017	Mrs R Bennett
10.	1400128/2017	Mrs S Boardman
11.	1400129/2017	Mrs J Boland
12.	1400130/2017	Mr M Brimacombe
13.	1400131/2017	Mrs K Buss
14.	1400132/2017	Mrs J Cable
15.	1400133/2017	Mr N Chapman
16.	1400134/2017	Miss A Correia
17.	1400135/2017	Mrs H Douglas
18.	1400136/2017	Mrs K Doyle
19.	1400137/2017	Ms G Durham
20.	1400138/2017	Mrs J Gowing
21.	1400139/2017	Mr S Gubb
22.	1400140/2017	Mrs M Guest
23.	1400141/2017	Miss A Hookings
24.	1400142/2017	Mr A Hillman
25.	1400143/2017	Miss R Hunt
26.	1400144/2017	Mr A Johnson
27.	1400145/2017	Mrs D Kahana
28.	1400146/2017	Mr D Kirby
29.	1400147/2017	Mrs C Kyle
30.	1400148/2017	Ms A Lesniewska
31.	1400149/2017	Ms J Lowenthal
32.	1400150/2017	Mr B Matthews
33.	1400151/2017	Mrs J McCann
34.	1400152/2017	Mr D Moffatt
35.	1400153/2017	Mr R Mortimer
36.	1400154/2017	Mr P O'Shea
37.	1400155/2017	Miss A Page
38.	1400156/2017	Mrs C Perkins
39.	1400157/2017	Mrs A Piercy
40.	1400158/2017	Mrs C Pilkington
41.	1400159/2017	Mr R Prior
42.	1400160/2017	Miss J Pritchard
43.	1400161/2017	Mr G Reed
44.	1400162/2017	Ms P Rosewell
45.	1400163/2017	Mr D Savicevic
46.	1400165/2017	Mrs A Simmonds
47.	1400166/2017	Mrs T Stanton
48.	1400167/2017	Mr M Sullivan
49.	1400168/2017	Miss A Taplin
50.	1400169/2017	Ms C Taylor
51.	1400170/2017	Mrs C Townsend
52.	1400171/2017	Mrs S Warner
53.	1400172/2017	Mrs K Weir
54.	1400173/2017	Mrs L Weir

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55.	1400174/2017	Mr M White
56.	1400175/2017	Mrs E Wilding-Webb
57.	1400176/2017	Miss H Williams
58.	1400177/2017	Miss K Wills
59.	1400178/2017	Mrs D Woodes