



EMPLOYMENT TRIBUNALS

Claimant

(1) Mr C Reeve
(2) Mr A Hayes
(3) Mr M Jones
(4) Mr P Bough
(5) Mr N Franklin
(6) Mr S Tisib
(7) Mr M Nellor
(8) Mr K Bone
(9) Mr A Tompkins
(10) Mr H Spiers
(11) Ms L Warr
(12) Miss R McConville
(13) Mr N West

v

Respondent

(1) Scion Technical Services Ltd
(2) Oxford University Hospitals NHS
Foundation Trust

Heard at: Norwich

On: 25, 26, 27, 28 June 2018

Before: Employment Judge Postle

Appearances

For Claimants (1):	In person
For Claimants (2), (3):	Mr Curtis, Counsel
For Claimants (4), (5), (6), (8), (9), (10):	Mr Reeve, Lay representative
For Claimants (7), (13):	Mr Griffiths, Counsel
For Claimants (11):	Miss Bowen, Counsel
For Claimant (12):	Not present & not represented
For Respondent (1):	Mr Jupp, Counsel
For Respondent (2):	Miss Winstone, Counsel

RESERVED JUDGMENT

1. There was no transfer of an undertaking between the first respondent and the second respondent.

RESERVED REASONS

The issues

1. This preliminary hearing arises out of a case management hearing in Reading, on 19 February 2018. It was agreed at that case management hearing the issues to be determined at this preliminary hearing are as follows:
 - 1.1 Was there, on or around, 30 June 2017, a relevant transfer from R1 to R2 for the purposes of regulation 3(1) of Transfer of Undertakings Protection of Employment Regulation (TUPE) ?
 - 1.2 Was there a service provision change, (SPC), within the meaning of regulation 3(1)(b), of TUPE?
 - 1.3 What activities were being completed under the contract?
 - 1.4 Was there an organised grouping of employees carrying out the activities transfer pursuant to regulation 3(3)(a) of TUPE?
 - 1.5 Did the activities under the contract continue after 30 June 2017?
 - 1.6 Did the activities under the contract cease to be carried out by R1 on the expiration of the contract?
 - 1.7 Did R2 intend the activities under the contract to be carried out by another service contractor after 30 June 2017? If so, by whom and when did they commence the activities?
 - 1.8 Did R2 intend that the activities under the contract were to be carried out by itself?
 - 1.9 Did R2 carry out the activities itself for any period of time, regardless of whether or not this was its intention?
 - 1.10 In the event there was any cessation in activities, did it prevent the application of TUPE to this matter?
 - 1.11 Were any activities or a single, specific event or task of short term duration within the meaning of regulation 3(3)(a)(ii) so that there was no relevant TUPE transfer?
 - 1.12 There are currently 13 claimants in this hearing, since then a number of additional claimants have issued claims and their claims

have been consolidated and stayed, pending the outcome of this preliminary hearing. These claims arise out of a dispute between the first and second respondent as to whether on the cessation of the first respondent's contract to provide services to the second respondent, the claimants' employment transferred to the second respondent by operation of TUPE. All of the claimants bring claims of unfair dismissal, automatic unfair dismissal, breach of contract and failure to comply with the duty to inform and consult. Some of the claimants bring claims for redundancy payments and holiday pay.

2. Both respondents defend the claims. The first respondent maintains that the claimants' employment transferred to the second respondent under TUPE as a result of the service provision change. The second respondent denies that a TUPE transfer occurred at all.
3. In this tribunal, we have heard evidence from a number of witnesses, in particular:- Mr Stewart Cavanagh, Managing Director of the first respondents; Mr Malcom Bavin, Operations Manager of the first respondent; for the second respondents, Mr Mark Neil, Interim Director of Estates and Facilities; Mr Craig Merrifield, Senior Project Manager; Miss Bagnall, Head of Capital Programmes; Miss Claire Hennessey, Head of Operational States and Facility Services; There was a witness statement from a Ruth McConville, Administrative Co-ordinator for the first respondent who did not attend the hearing, all witnesses giving their evidence through prepared witness statements.
4. The tribunal also had the benefit of four lever arch files, consisting of 1,353 pages, the skeleton argument on behalf of the second respondent, and closing submissions on behalf of the second respondent and the first respondent's closing submissions in writing. Those submissions were amplified orally before the tribunal in closing. We also had brief submissions from Miss Bowen on behalf of Miss Warr; Mr Curtis on behalf of Mr Hayes and Mr Jones; Mr Griffiths on behalf of Mr Nellor. Not surprisingly their submissions were largely neutral as to where liability falls.
5. The tribunal also had the benefit of a number of authorities produced by counsel:-
Alno (UK) Ltd v Turner & Another UK EAT-0349-15-DA;
Astall & Others v Cheshire County Council 2005 IRLR 12;
Cheeseman v R Brewer Contracts Ltd. 2001 IRLR 144;
ECM (Vehicle Delivery Service) Ltd. v Cox & Other Court of Appeal 1162 1999;
Enterprise Management Services Ltd. v Connect Up Ltd. & Others 2012 IRLR 190;
Hunter v McCarrick 2013 ICR;
Klarenberg v Ferrotron Technologies GMBH 2009 IRLR 301;
London Borough of Islington v Bannon & Another UK EAT-0221-12-KN;
Metropolitan Resources Ltd. v Churchill Dullage Ltd. (in liquidation) 2009 IRLR 700; produced by Mr Jupp, Counsel, for the first respondent.

6. Counsel for the second respondent also referred us to authorities. Namely:-
Argile Coastal Services Ltd. v Mr I Sterling & Others 2012 UK EATS-0012-11-BI;
Metropolitan Ltd. v Churchill Dullage Ltd. 2009 ICR 138;
Enterprise Management Services Ltd. v Connect Up Ltd. 2012 IRLR 190;
Kimberley Group Housing Ltd. v Hambley 2008 ICR 1030;
Arch Initiatives v Greater Manchester West Mental Health NHS Foundation Trust 2016 ICR 607;
Spijkers v Gbroeders Benedik Abattoir CV 1986 2CMLR 296;
Cheeseman v R Brewer Contracts Ltd. 2001 IRLR 144;
ICTS UK Ltd. v Mahdi 2016 ICR 274.

The facts

7. The second respondent is a large acute NHS teaching hospital providing a wide range of general and specialist clinical services from sites in Oxfordshire.
8. Scion was engaged in a contractual relationship with the second respondents to conduct general maintenance, repairs and installation and construction at the Trust's sites, but predominantly the John Radcliffe Hospital, Churchill Hospital and Horton Hospital in Banbury. The first respondents had a full time presence on site and a dedicated space at the John Radcliffe Hospital, from which the contract was operated. That area included a space for welfare units, storage units, a fabrication area, a meeting room, administrative office space, management office space and a branch manager's office. There was also a waste point and small storage area within the Churchill site and a small storage location within the grounds of the Horton site.
9. It would appear during the period of the contract by the first respondent, they also worked at smaller locations associated with the trust for smaller tasks / projects, as and when they arose, mainly to do with renal wards and services delivered by the trust in the community. For larger projects the first respondents also had site set ups as the works and locations demanded.
10. Apart from the trust, the first respondents had four other clients. It would appear, most of the work undertaken by Scion was in respect of the contract of the second respondent.
11. Originally, the first respondents had been engaged under various contracts with the trust since the late 80's. That relationship had been based on a standard JCT measured term contract. Apparently, these types of contract are designed for use by clients who have a regular flow of maintenance, minor works and improvement projects that they require to be carried out by contractors over a period of time. As the work increases, the contracts

would go up the scale from originally NTC 4 to NTC 11, as a result of the work widening, increased complexity and the range of trades involved.

12. It would appear, that the first respondents were initially the electrical contractors on site under an NTC contract, they were then offered mechanical contracts in the 1990's and from early 2000's the contract became a multi-trade contract under an NTC 9, at which it would appear a number of employees pursuant to TUPE from previous multi-trade service provider were inherited by the first respondents.
13. For reasons best known to the parties, the tendering process would take up to one year to complete. From an NTC 9 to an NTC 11 the official journal of the European Union was used. That is apparently where all tenders for the public sector, valued above a certain financial limit, must be published.
14. It would appear, through the course of the relationship between the first and second respondent, the trust did not get its act together re the tender before the contract in place with the first respondent was due to expire. This resulted in implementation of emergency procurement plans, ensuring the trust would have an authorised procurement channel for a period of up to one year. This is provided both parties are in agreement and apparently is a straight forward process. Commercially the mechanism for annual uplift is already formulated in the rates published by a national body.
15. Following the necessary tender process, the first respondent successfully tendered for the contract with the trust, which was a standard JCT measured term contract, (NCT 11), and was valued at four million pounds per year. The contract was to run initially for a period of four years from 5 January 2009 and was extended for a further four years from 5 January 2013 and was due to expire on 4 January 2017.
16. Two other companies were also appointed under what is called the overarching framework. They were Grey Bains and Sure LLP, provided architectural, civil, structural design and cost advice and Currie and Brown provided quantity surveyors to assess the cost of projects.
17. As the main contractor, the trust would instruct the first respondent to conduct work which would be measured and valued on the basis on an agreed schedule of rates. The orders / quote requests were received at the site office, either by the site internal mail or email. Each order was allocated, depending upon the trade and technical requirements, to a manager. The manager would then allocate this to an employee, or team of employees, to suit the requirement of the works they saw fit. Each works order was managed by a supervisor who would be responsible for all the operatives. In conjunction with the supervisor the order they would be supported by other supervisors in relation to technical competence as and when required.

18. It would appear that no contract was tendered by the Capital Programmes team as a frame work, the NCT 11 contract and the preceding versions were all utilised by other departments within the trust, including the trust's IT department and renal department's in respect of installing dialysis machines in patient's homes. Capital Programmes are managed by Miss Bagnall, (Head of Capital Programmes Development and the Estate of the Trust).
19. Furthermore, throughout the NTC 7 and 8, (spanning approximately 15 years), the work stream predominantly came from Capital Programmes. From NTC 9 – 11, (spanning 17 years), the amount of works ordered by other departments clearly increased and the first respondents would undertake full time roles for the operational estates department such as water temperature checks, shower hoses, flexible hose replacement and it would appear other departments within the trust piggy backed off the NTC in place.
20. The first respondents would therefore accept work from a number of people at the trust, including Craig Merrifield, Richard Mouldon, Bill Frizzle, Muz Carr, Geoff Wakling, Kevin Selwood from Capital Programmes and Graeme Brammer, Derek Monckton, Steven Cunningham and Mark Martin from estates. It would appear they would come with work orders or quote requests for any size of a job from £50 to over a million.
21. The trust had a dedicated budget for all maintenance work required. There would have been a five year capital spend plan for all the work that the first respondent were required to do under the contract. It is also the case that throughout the length of the contract, the trust would bid for government funding and obtain charitable donations which would also result clearly in an increase in work. The annual budget of the trust was announced in April. The first respondents saw a pattern in the work which then followed. Initially it would be quiet towards the end of an accounting period, but would increase as departments wanted to spend their budgets and there would be a flurry of invoices. There was always a continuous stream of work and projects.
22. With the contract due to expire on 4 January 2017, the trust would have to put the contract out to tender and the first respondents would naturally be invited to retender. It is clear that the first respondent thought they were unlikely to be successful. This was due to the fact that the trust now wanted to introduce new penalties, commercial rates and KPI's and a greater investment of time at no additional cost. Therefore, the cost of operating the contract would not have been viable to the first respondent.
23. The procurement process for the tender would have commenced in early 2016. However, in the spring of 2016 the second respondent started to discuss an extension to the contract to the 31 March 2017, to enable the tender process to take place. Mr Cavanagh was having discussions with Mr Barratt, (interim Senior Estate Sourcing and Contracts Manager at the time), and Pauline Bagnall and Craig Merrifield. It seems to have been

accepted by all of the parties, an extension of the contract was required as the trust needed to complete a tender process, in the intervening period work still had to be carried out. On 10 June 2016, Paul Barratt wrote to Mr Cavanagh proposing an extension of the contract to 31 March 2017, at the same time requesting a number of contractual variations, (553). In particular it was proposed that the first respondents provide at no additional cost to the trust, a named senior manager to pro-actively manage the production of health and safety files, operational maintenance manuals and as-built drawings to ensure compliance with the construction regulations 2015. Further, that the first respondents to provide at no additional cost, fully co-ordinated procurement construction testing commissioning, validation and equipping programme, Microsoft Project 2010 format and provide regular progress updates for projects as deemed necessary are instructed by the trust. The first respondent provide at no additional cost a named individual who would take overall responsibility for the delivery of minor works projects, regular meetings with the trust project officers to update on the status, price enquiry forms, programmes, production of final accounts and finally, the first respondents to provide a dedicated site manager for projects greater than £200,000. This letter went on to state that please note, *“During the extension period, the trust will be reviewing procurement of construction projects and therefore would be grateful if you could disclose employee liability information in accordance with TUPE regulations that can be passed on to potential suppliers as part of the procurement process.”*

24. The respondents replied on 8 August, confirming they were prepared to extend but two of the four new terms were not acceptable as they were simply financially unviable, (569). The first respondents ultimately did agree an extension with the trust on 31 March, on the same terms as the original contract.
25. On 1 December 2016, Paul Barratt then emailed Mr Cavanagh, (624), requesting the contract be further extended to 31 May because the trust, *“had a delay in launching the OJEU tender notice and this, of course, will have an effect on the date by which we will be able to award and commission the new arrangement.”* The suggestion from the letter was that the service would continue with whomever obtained successfully the new tender.
26. On 16 January 2017, Mr Cavanagh responded, (645), confirming the first respondents’ willingness to extend the contract, but would wish to do so until 30 June 2017, rather than 31 May, in order to coincide with the first respondents’ half year accounting period.
27. On 10 February 2017, the trust issued a procurement notice, (692), in what appears to be the local newspaper which seemed to suggest they intended to procure the services provided under the first respondent’s contract in a manner so as to avoid the OJEU tender process. They were requesting a whole host of different trades to submit applications to secure a place on the LPP DPS, that is the dynamic procurement system.

28. On 5 April 2017, there was a meeting between the first respondents and Pauline Bagnall, during which they were told the contract would end on 31 May and not 30 June.
29. On 26 April 2017, the first respondents wrote to the trust enclosing anonymised employment liability information for employees the first respondents believed were wholly or mainly assigned to the contract, (712). In May 2017, the first respondents received the cancellation of the June 2017 framework NTC meeting, though it is clear the NTC11 requirement would continue with the next meeting set for the 4 October 2017.
30. Around May, the first respondents were carrying out historical work that had been in the pipeline as there was a possibility they would not be providing the service after 31 May 2017, and therefore the first respondents were anxious to complete all the work they had started in order to comply with the terms of the contract and would not accept new orders on 16 / 17 May.
31. The first respondents wrote to the trust on 17 May, (720), informing them they had commenced the TUPE consultation process in the belief that a further extension to their contract was not agreed as a new contract or had not been appointed, the employees would then be transferred to the trust, who the first respondents believed would be responsible for delivering the services.
32. On 24 May, the respondents received email from Pauline Bagnall, *“As per recent discussions I am writing to let you know the trust has approved to an offer, an extension to your contract up to 31 March 2018. However, we are in a holding position while the letter is being generated”*, (724). On 25 May 2017, Jane Edwards, (Deputy Director of Procurement and Supply Chain), sent a letter to Mr Cavanagh, (733), confirming the trust would like to, *“offer an extension to our current agreement to 31 March 2018”*. At this stage the trust were not denying the first respondents’ belief that the application of TUPE would apply upon the contract ceasing with the first respondents.
33. The first respondents were not willing to agree to the terms proposed by the trust for the extension of the contract to March 2018, and this was confirmed on 30 May, (749). As the contract was due to expire the following day, the trust agreed a further one month extension to the 30 June, (748).
34. On 8 June, a letter was sent from the trust’s HR department to Mr Bavin, (763), the relevant parts read as follows:
 - 34.1 *“...the current NTC between the trust and Scion has been extended and is now due to expire on 30 June 2017. There have been negotiations to further extend the contract out to 31 March 2018, to allow time for the trust to carry out a public tender, to meet its*

obligations under the Public Contract's Regulations 2015. As part of this, the trust will be conducting a service review and the new contract is expected to have a redesigned service requirement to better meet the changing needs of the trust. ...

At the present time, discussions to extend the current NTC have not reached a mutually acceptable conclusion. Failing any last minute agreement, the agreement will expire at the end of this month and the trust will not be issuing any further works order to Scion under the NTC. Should the agreement expire, the trust will not be appointing a replacement contractor to take over from 1 July 2017, even on an interim basis, but will wait until a contractor is appointed following the public tender. Further, the trust has made a business decision that it will not be providing the NTC service in house from 1 July 2017.

On the basis of the above, the trust have been advised that there will be no transfer of undertakings as defined in the TUPE regulations. Scion staff currently working on the NTC will not acquire any rights to transfer to either the trust or some other organisation. The trust does not consider it has any obligations under the TUPE regulations to offer employment to Scion staff and will not be doing so. Further, it would appear, at the present time, that any new contractor appointed through the expected tender, is similarly unlikely to have TUPE obligations to Scion staff, owing to the break in service of at least nine months and possibly longer. Once the current NTC expires, the trust's view is that there will be no transfer of undertakings to which employers will acquire rights to transfer whether to the trust or to a new contractor.

I note that you have written to certain Scion staff informing them that they will acquire rights under TUPE. This is not correct and the trust has not accepted this position, I therefore ask that you write to those staff correcting the record. It will be for Scion to redeploy staff or make them redundant if their roles are affected by the decision to end the NTC..."

35. Around early June, Mr Cavanagh was approached by Belinda Bolton, (Director of Operations), to discuss the contract. The meeting was held on 13 June between the two, in an effort to resolve the current stalemate. Mr Cavanagh informed Miss Bolton that if the contract was to be extended, he required a management fee to break even to March 2018.

36. On 14 June, the first respondents responded to the HR department of the second respondent,

“... It is our view that should the current contract not be extended, then TUPE would apply to the employees on the contract. It is clear that the trust envisages the continuation of the work on which the employees are engaged, either on an ongoing basis or with effect from the commencement of the retendered contract.

Either way, it is our view that the employees will be eligible to transfer with the work, either to an alternative contractor, or to the trust in the meantime. To date we have been communicating with the employees, but have written to them about their rights under TUPE. However, we consider this is now a requirement and in support of this I have asked Ashley Gough, HR Business Partner, to contact you directly. This will ensure that the necessary arrangements for a potential TUPE transfer can be made....”
(779).

37. On 16 June, the HR department for the second respondent, responded to Mr Gough of the first respondents by email, (783),

“Hi Ash... further to our conversation, once you have drawn up all TUPE documentation, would you mind sending this to Laura Bic, Head of Corporate Services, so that she can liaise with you on this matter going forwards. Best wishes...”

38. Unfortunately, no agreement could be reached between the first and second respondent over an extension of the contract to the following March.

39. On 30 June, the trust wrote to the first respondent, (868), in the following terms,

“... The trust will not bring the NTC contract in-house and has no intention to appoint a single replacement contract or for the next nine months. In the period pending the completion of the substantive NTC replacement procurement exercise, projects for small building or maintenance works will be minimised and any that are required will be out sourced, on a one off basis, to a range of contractors appointed for individual matters.

... The trust remains with the view that there is no relevant transfer under the regulations. In the short term the activity is in part ceasing and in part fragmenting, with a clear plan that involves no intention to appoint a future long term single provider in the next nine months. The trust also questions, in the light of your recent comment, that you will be changing some staff whether this is an organised grouping of staff within Scion that has its purpose the provision of the service to the trust.

... The trust takes no responsibility for your decision to inform your employees that regulations will apply in these circumstances and encourages you to revisit this. By asserting that TUPE applies, you have not suggested that they will transfer to the trust which is inconsistent with your suggestion that they will be told to report to the trust. However, in the light of your letter, the trust has no choice but to revoke security smart pass cards for Scion staff this evening. This is because it is not appropriate for individuals whose identities are not known, and who are not working on site, to have unrestricted access to the hospital including clinical areas. Employees who are working to complete the outstanding works under the contract will report to the security office on level 2 on starting work on Monday for new passes to be issued, other employees not engaged will be refused passes to enter the site and will remain your responsibility.”

40. It would appear, whilst the contract continues, even when the first respondents were not accepting new work from the trust, it was still coming in. There was a demand for general maintenance.
41. It appears, following the ending of the contract in June, Curry and Brown and Grey Bains and Sure LLP were still instructed and remained on site.
42. It would also appear that the trust has recruited for various trades based on the three sites that were the subject of the first respondent contract. The trust maintains it is not taking the work in-house or increased its capacity of expertise to take on the work carried out by the first respondents under the contract. It would appear, on pages, 973-977. In the eleven months following the expiration of the contract the Trust has employed a number of different contractors to complete works as and when required. It would further appear, (1354) and (1445), there are single specific projects, short term, and once the work is complete, it would appear there is no expectation of further work.

The law

43. The relevant law is governed by the Transfer of Undertakings (Protection of Employment) Regulations 1981, commonly referred to as TUPE. In this case we are dealing with a service provision change. In that respect we are concerned with Regulation 3(1)(b), states that the TUPE regulations apply to, “a service provision change”, where the conditions set out in Regulation 3(3) are satisfied.

Regulation 3(1)(b) goes on to define the three types of service provision changes, which are as follows:

- 43.1 Where activities cease to be carried out by a person, (a client), on his own behalf and carried out instead by another person on the

client's behalf, (a contractor), Regulation 3(1)(b)(i). That is known as 'contracting out', or 'outsourcing'.

43.2 Where activities cease to be carried out by the 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 is Regulation 3(1)(b)(ii). This deals with the change of contractor, usually following a retendering process and is sometimes referred to as a 'second generation contracting out'.

43.3 Where activities cease to be carried out by a contractor, or subsequent 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 by the client on his own behalf, Regulation 3(1)(b)(iii). This is called 'contracting in' or 'insourcing'.

44. Clear guidance providing a step by step approach can be found from His Honour Judge Peter Clarke's summary of the authorities in, Enterprise Management Services Ltd. v Connect Up Ltd. and Others 2002 IRLR 190, EAT:

44.1 The employment tribunal's first task is to identify the activities performed by the in house employee, (in and out sourcing situation), or the original contractor, (in a retendering or insourcing situation).

44.2 The tribunal then has to consider the question whether these activities are fundamentally the same as those carried out by the new contractor, (out sourcing or retendering), or in-house employees, (insourcing). There are, and will be cases where the activities have become so fragmented that they fall outside the service provision regime.

44.3 If the activities have remained fundamentally the same, the tribunal will then ask itself whether, before the transfer, there was an organised grouping of employees which had as its principle purpose the carrying out of the activities on behalf of the client.

44.4 Following this, the tribunal should then consider whether the exceptions in Regulations 3(3)(b) and (c) apply: namely, whether the client intends that the transferee post the SP service provision changes and will carry out the activities in connection with a single specific event, or task of short term duration and whether the contract is wholly or mainly for the supply of goods for the client's use.

44.5 Finally, if the tribunal is satisfied that a transfer by way of a service provision change has taken place, it should consider whether each individual claimant is assigned to the organised grouping of employees.

Conclusions

45. Following the agreed issues to be determined by the tribunal as set out at the original case management hearing. What activities were being completed under the contract? It seems clear that the activities performed by Scion as set out in the contract titled NCT 11 were,

“the employer requires maintenance and minor works to be carried out in the John Radcliffe Hospital in Oxford, Church Hill Hospital in Oxford, Horton Hospital in Banbury and associated residential buildings:- refurbishment, new build and maintenance of health care facilities and associated buildings.”

It would appear it was for ongoing provision of those services by Scion as the permanent contractor.

46. It was clear that there was a contractual expectation for both the capital and operational work. The Trust did have a small in-house team which appeared to carry out planned, preventative maintenance and Scion clearly did the majority of the major maintenance work as well as capital work. At the same time Scion appeared to, where further expertise was required, sub-contract work out.
47. In addition, the Trust had a long standing team of reactive maintenance workers who responded to 24 hour calls across the site and following the end of the contract, it appeared, the workforce was only expanded by one tradesman, and the two building technician teams were not new, they appear to have been in existence previously.
48. It is clear, the Trust during the time Scion had the contract, used other third party contractors to carry out various types of work.
49. The second question was, was there an organised grouping of employees carrying out the activity pursuant to Regulation 3(3)(a) of TUPE? This was a more difficult question, as there appeared no evidence of an organised grouping of employees which was less than the whole of Scion’s entire workforce, deliberately organised for the purpose of carrying out the activities required by a particular client contract and who work together as a team. Furthermore, there was no evidence from the remaining employees of Scion, on whether there was in fact an organised grouping, the evidence of the two remaining groups, appears that they were not so organised (Linda Warr and Ruth McConville). There is simply no evidence to conclude that there was an organised grouping.
50. The next question is, did the activities under the contract continue after the 30 June 2017? Clearly some of the activities continued after the 30 June, however, they did so on a much reduced basis and appears to have been carried out in a very fragmented way by a number of ad hoc contractors.

There were clearly no contracts for service issue, like the MCT 11 contract.

51. Did the activities under the contract cease to be carried out by R2, at the expiration of the contract? The tribunal agrees with Counsel on this question as this makes no sense. They had been carried out by Scion. Scion then ceased to carry out the majority of the activities other than unfinished orders that they were to see through to completion after the contract was completed, clearly these works would not have ceased in the middle but as soon as the contract came to an end.
52. Did the Trust intend the activities under the contract be carried out by another sub-contractor after 30 June 2017? And if so by whom? And when did they commence the activities? It is clear the intention was in due course to put the contract out to procurement to find a new contractor. However, for reasons best known to the Trust, this did not happen as they simply were not ready to start the procurement process. Clearly, they hoped that an extension to the contract would be agreed with Scion pending the Trust getting its act together. That didn't happen and in the end procurement had not even begun when the contract had come to an end and thus the Trust appointed a number of sub-contractors to carry out the work as and when required.
53. Did the Trust intend the activities under the contract to be carried out by itself? That's seems to be a fanciful suggestion. The Trust is a healthcare provider and clearly is not in the business nor has the expertise to carry out the activities formerly carried on by Scion.
54. Did the Trust carry out the activities itself for any period of time, regardless of whether this was their intention? Clearly, they did not carry out the activities of Scion apart from routine maintenance work. Any major work were carried out by a number of sub-contractors. The Trust simply did not have the expertise to carry out major works and is any event, we repeat, a healthcare provider.
55. In the event there was any cessation in activities, did it prevent the application of TUPE to the matter? It is accepted there was no cessation of activities, there was clearly a large reduction in the amount of work. That does not prevent the application of TUPE, however, the reduction affected the Trust's decision making in deciding not to go for one major contractor in the procurement process because they had not got their act together, sorting out the procurement process, instead contracting the work out to various sub-contractors on what appears to be a one off basis.
56. Were there any activities for a single specific event, or tasks of short term duration with the meaning of Regulation 3(3)(a)(ii), so that there was no relevant transfer? Clearly all the ad hoc orders, tended to be a one off task.

57. It is clear there was no transfer of activities providing an ongoing service of refurbishment, new build and maintenance of healthcare facilities and associated buildings from the first respondents to the second respondents from 30 June 2017.

58. Finally, the tribunal found the task somewhat difficult in that one felt the first and second respondent were selective in the evidence before the tribunal which made the task all the more difficult in reaching its conclusions.

Employment Judge Postle

Date 31/10/2018

Sent to the parties on: 31/10/2018

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For the Tribunal Office