Case Numbers: 2500557/2020 (V)
2500742/2020 (V)

THE EMPLOYMENT TRIBUNALS

Claimants: **Mrs M Crane (1)**
Mrs S Moody (2)

Respondents: **Hudson Catering Limited (1)**
Nu To Go Limited (2)

Heard at: **Nucastle Hearing Centre (by CVP)** **On: 8 April 2021**

Before: **Employment Judge Morris (sitting alone)**

Representation:

Claimants: **In person**
First Respondent: **Mr A Willis, solicitor**
Second Respondent: **Mr T Hussain, consultant**

RESERVED JUDGMENT

The judgment of the Employment Tribunal is as follows:

1. There was a transfer of an undertaking, business or part of an undertaking or business within the meaning of regulation 3(1)(a) of TUPE.

2. There was a service provision change within the meaning of regulation 3(1)(b)(ii) of TUPE.

This case will now be listed for a Private Preliminary Hearing at which directions will be made in preparation for the Final Hearing.

REASONS

Context

1. Today's Hearing arose from a Private Preliminary Hearing held on 18 December 2020 ("the December Hearing") at which it had been ordered, amongst other things, that there should be a Public Preliminary Hearing to determine the following issues:

1.1 "Was there a service provision change within the meaning of regulation 3(1)(b)(ii) TUPE."

1.2 "Was there a transfer of an undertaking, business or part of an undertaking or business within the meaning of regulation 3(1)(a) TUPE."

Representation and evidence

2. The claimants appeared in person and each gave evidence. The first respondent ("Hudson") was represented by Mr A Willis, solicitor, who called Mr K Hudson, a director, to give evidence on its behalf. The second respondent ("Nu") was represented by Mr T Hussain, consultant, who called Mr D Appleton, a director, to give evidence on its behalf.

3. The evidence in chief of or on behalf of the parties was given by way of written witness statements, which had been exchanged between them. I also had before me a bundle of agreed documents comprising some 220 pages. The numbers shown in parenthesis in these Reasons refer to page numbers or the first page number of a large document in that bundle.

Procedural issues

4. Other orders arising from the December Hearing included as follows:

4.1 All documents relevant to the above issues must be exchanged by 18 January 2021.

4.2 The parties' witness statements must be exchanged by no later than 19 February 2021.

4.3 No later than 7 days before today's Hearing, Nu must send to the Tribunal paper and electronic copies of the bundle of documents and witness statements.

5. Nu had not complied with the above orders. Under cover of an email timed at 21:22 the night before today's Hearing Mr Hussain had sent to the Tribunal and the other parties copies of Mr Appleton's "witness statement and two documents by way of disclosure". In his email he stated, "We apply for the witness statement and the documents to be admitted". The email does not contain even a hint of an apology or provide any explanation as to why the above orders had not been complied with or why the witness statement and documents were being provided so woefully late.

6. At the commencement of today's Hearing I raised this point with Mr Hussain who offered his apologies and explained that he had only recently taken over this case and that his colleague who had previously had conduct of it was sick. As to the witness statement, he suggested that there was no prejudice to the other parties by its late production as it was based on Nu's response (ET3), there was no new evidence and it would not put Hudson in any difficulties. Similarly, the additional documents comprised only two pages that would not prejudice the

parties. In summary, it was in the interests of justice to allow the witness statements and documents to be admitted.

7. Mr Willis explained that, in accordance with the second of the above orders, Hudson and the claimants had exchanged witness statements on 19 February but Nu had not done so. On 22 February he had spoken to Nu's representative who had stated that he did not think Nu had anything to add and he would probably not be submitting a witness statement. As to the third of the above points he had contacted the Tribunal and had been informed that Nu had failed to provide the documents or witness statements so he had taken to himself the task of uploading them. The Tribunal is obliged to Mr Willis for doing that. Mr Willis suggested that the late provision of the witness statement and documents gave rise to clear prejudice to Hudson not least that in Mr Appleton's witness statement he had referred to matters contained in Mr Hudson's witness statement, which had been in Nu's possession for some seven weeks.

8. I suggested to Mr Hussain that if it was right that Mr Willis had spoken to his colleague on 22 February, he could not have been ill whereupon Mr Hussain raised a second excuse in stating that he was aware that his colleague had had a baby.

9. I explained to the parties that I found myself in a difficult position. If I were to proceed with the Hearing, Nu's failure to comply with the orders did seem to have potentially disadvantaged the other parties. If I were to adjourn there would be inevitable delay (in light of my recent experiences that could possibly be until November this year) and these claims had been presented to the Tribunal approximately a year ago in, respectively, March and April 2020; there would also be increased costs.

10. The claimants both expressed a preference for the Hearing to go ahead given that the claims had been going on for a long time and, in Mrs Crane's case, she had needed to take time off work to attend the hearing.

11. I considered the points that had been made in the light of the overriding objective aspects of which include, "avoiding delay, so far as compatible with proper consideration of the issues" and "saving expense".

12. I explained that I was minded to allow the admission of Mr Appleton's witness statement and the documents but that I would adjourn for approximately one hour to read the papers and allow Mr Willis to consider the witness statement and new documents further and take instructions from his client.

13. At this point, Mr Willis raised a further matter; this relating to disclosure. He drew attention to an email from Nu dated 24 December 2019 relating to the fitting of the cafe "prior to us moving in". He explained that this was the earliest email that Nu had disclosed for the purposes of these proceedings, which he considered was extraordinary. I observed that it did seem unusual as a first communication but Mr Hussain explained that he was not aware of any other earlier documents, and Mr Appleton confirmed that this was the first written communication, all prior contact having been by telephone.

14. At this point, as indicated above, the hearing was adjourned. Upon reconvening I stated that having now read Mr Appleton's witness statement (which did not contain a great deal that was relevant to the issues to be determined at this Hearing, and did indeed reflect the content of the ET3) and the new documents I was even more inclined than previously to proceed with the Hearing but that I was open to persuasion. Mr Willis stated that he did not resile from his previous position, as he did believe that Hudson had been prejudiced, but his client did not want to incur further delay. Hence, the Hearing proceeded.

Consideration and findings of fact

15. Having taken into consideration all the relevant evidence before the Tribunal (documentary and oral), the submissions made by or on behalf of the parties at the Hearing and the relevant statutory and case law (notwithstanding the fact that, in pursuit of some conciseness, every aspect might not be specifically mentioned below), I record the following facts either as agreed between the parties or found by me on the balance of probabilities.

    15.1 Hudson is an independent contract catering company, which was founded in 2009. In 2013 it entered into an agreement (127) with the North East Ambulance Service NHS Foundation Trust ("NEAS") to provide "Catering Vending and Hospitality Services" at its headquarters at Bernicia House, Newburn, Newcastle upon Tyne ("the Service Agreement"). Mr Appleton suggested that some 350/400 NEAS staff work at Bernicia House.

    15.2 The provision of such services commenced on 2 September 2013. The Service Agreement provided, amongst other things, that Hudson would be responsible for the supply of staff, regulatory compliance and maintaining accounts while NEAS would provide and maintain the premises and equipment, and be responsible for the utilities. This was a fixed cost agreement whereby NEAS would pay a fixed amount to Hudson each month from which, having provided the agreed services at its cost, it would retain any surplus (or profit) as a management fee. An element of this arrangement was that NEAS subsidised the service provided by Hudson and, therefore, the cost of food etc provided to its customers.

    15.3 A consequence of Hudson entering into the Service Agreement was that the claimants became its employees by virtue of the Transfer of Undertakings (Protection of Employment) Regulations 2006 ("TUPE"). This was because at this time they were each were employed by Host Catering Ltd and had previously been employed by Avenance Catering Ltd, both of which businesses having provided services to NEAS similar to those to be provided by Hudson.

    15.4 Mrs Crane was employed as Catering Manager/Chef, her employment with Avenance having commenced on 22 November 2001 and continued continuously thereafter by virtue of TUPE. Mrs Moody was employed as Catering Assistant. She had similarly been employed by both Host Catering and Avenance, her continuous service having commenced on 8 September 2003.

15.5 Although at one stage there had been three Hudson employees engaged in providing the services to NEAS at Bernicia House, during approximately the last six years there had only been the two claimants. To cover absences, for example holiday or sickness, another employee of Hudson would occasionally be assigned to work there or occasionally agency staff would be brought in. The claimants had worked solely at Bernicia House in performance of the Service Agreement and had not undertaken any work elsewhere. Mrs Crane had been employed for between 32½ and 37½ hours from Monday to Friday inclusive each week; Mrs Moody for 18½ hours each week, also Monday to Friday. They worked fairly autonomously, organising the workload in the canteen and being able to decide what to do, when and where

15.6 Mrs Crane had a fairly extensive job description (121), key elements of which included responsibility for operational matters including coordinating and managing all catering and associated services (such as food production, menus, ordering and storage of goods), customer service, sales development, health and safety, finance and responsibilities for staff. In evidence she described her duties as including cooking breakfast and lunch choices, filling the vending machines, cash handling and book work. Mrs Moody also had a fairly extensive job description (125) with similar key elements albeit she was responsible to Mrs Crane.

15.7 Breakfast included traditional English breakfast, hot breakfast rolls and toasties, a continental alternative (including fresh scones, pastries, teacakes, croissants, toast and preserves) cereals, yoghurt, fresh fruit and smoothies. Lunch choices included freshly made soup and two hot main course choices (freshly made that morning, which changed daily) with a selection of vegetables. Also available daily were 'prepared to order' sandwiches and wraps, jacket potatoes with a choice of toppings, a 'self-help' salad bar, quiche, 'cooked to order' omelettes, paninis, toasties, cakes, fresh fruit, cold and hot drinks including 'bean to cup' coffee. Additionally, a vending machine, with a microwave alongside to heat certain items, was available seven-days a week providing hot and cold drinks, food, snacks and confectionery. All food was prepared and made on-site apart from sandwiches sold from the 'grab and go' display that were bought in.

15.8 The food prepared by the claimants would be set out on a counter and served to customers from there. Primarily food was served within the canteen at Bernicia House but NEAS employees could order hospitality (such as sandwiches and hot drinks for meetings) that would be provided elsewhere in the building.

15.9 Although the Service Agreement was with NEAS, members of the general public working elsewhere on the business estate on which Bernicia House was located could make use of the canteen facilities although this had recently fallen away somewhat after NEAS had required that its staff should be given priority. There was some dispute between the evidence of Mr Hudson and the claimants regarding public access to the premises. Mr

Hudson stated that the public had had access but that NEAS had said that should be stopped. The evidence of both claimants was that public access had continued up to the end of the Hudson contract although latterly the public had to sign into the building and the claimants would ensure that NEAS staff would be given priority in the queue. Mr Hudson's evidence might be accurate as to what should have happened but I prefer the evidence of the claimants 'on the ground' as to what actually did happen.

15.10 In January 2019, NEAS requested a change to the catering being provided by Hudson, with which it complied but that had a negative financial impact on its management fee and it suffered a loss from September 2019. Hudson sought an increase in the catering subsidy provided by NEAS but that was declined on 6 November 2019 (138). Further, NEAS was unwilling to allow Hudson to increase its selling prices to make its operation more commercially viable. In the circumstances Hudson decided to withdraw from the Service Agreement and, by email of 11 November 2019, gave the required three months' notice of termination to NEAS the final day of operation being said to be Friday, 7 February 2020 (136). In that email, Mr Hudson noted that he would inform the claimants accordingly of the decision. He continued, "I also bring to your attention point 4b(ii) in the attached contractual agreement regarding the matter of redundancy costs, should this be under consideration". That is a reference to that numbered clause of the Service Agreement, which provides that NEAS agrees to indemnify Hudson against "any staff termination costs redundancy costs incurred by the Company [*i.e. Hudson*] arising from changes initiated or agreed by the Customer [*i.e. NEAS*]" (130).

15.11 Throughout January 2020 Hudson was in communication with NEAS employees by telephone and email seeking information as to who would be the new provider of the catering service in order that the necessary steps required by TUPE could be taken. As Mr Hudson explained in evidence, he principally sought to discover whether NEAS would continue to provide a catering service (in which case he was satisfied that TUPE would apply) or not provide a catering service and make an alternative use of the premises (for example, as a newsagent or hairdresser), which would give rise to a redundancy situation for the claimants.

15.12 Those employees of NEAS were, however, resistant to the suggestion that TUPE applied; indeed, from the content of the emails the attitude of some could be described as being uncooperative. It was made clear from the outset that NEAS would not be transferring any Hudson "staff to the new provider" (134). It is, of course, not a matter of whether NEAS would be transferring any staff whether such transfer would occur as a matter of law and fact. No explanation was given as to why TUPE did not apply although in an email dated 24 January 2020 (159) it was stated that one of Hudson's emails had been forwarded "for further legal clarity" and NEAS was "pulling together a direct comparison between the current subsidised canteen service from Hudson and the commercial option we are exploring. This should evidence the fundamental differences between the two and

will update when we receive a response". In fact no such update was ever provided. Ultimately, NEAS brought these exchanges to a close in an email of 31 January 2020 in which it was stated, "I must stress that there is no entity (commercial or otherwise) that are replacing Hudson, and/or will accept the transfer of staff from the current subsidised canteen service. Not sure we can express this in any simpler terms nor repeat further".

15.13 In the circumstances, Mr Hudson met the claimants on 5 February 2020. He explained that in his view TUPE did apply in this situation and, therefore, their respective employments should be transferred to the new company. He had, however, been unable to communicate with that company because NEAS had failed to identify it. He confirmed that the claimants' final day of work for Hudson would be Friday, 7 February 2020 although, as a gesture of goodwill, they would be paid until 29 February. He suggested that the claimants should seek legal advice. These matters were confirmed to the claimants by letter of 6 February 2020 (189b).

15.14 Nu is a relatively new business, which commenced trading in 2017. It was approached by NEAS following Hudson's decision to terminate the Service Agreement. NEAS granted Nu a licence to occupy the same premises as had been occupied by Hudson (202). The licence fee is said to be "£0 per calendar month", the Permitted Use is, "For the provision of commercial food preparation & sale" and the Premises are defined as being, "Kitchen and canteen area" shown on an appended plan. There is no dispute that these comprise the same premises as NEAS had provided for Hudson's use.

15.15 In addition to contact by telephone there was a fairly significant amount of email correspondence between Nu and NEAS in the seven weeks are so before Nu started trading from the premises. This was aimed at both parties ensuring that the premises and equipment were what was required and NEAS keeping its staff informed as to the change in the catering arrangements (164 - 189).

15.16 Nu started trading from the premises on 17 February 2020. It did not take over any equipment or other assets directly from Hudson. That said, it did continue to make use of certain of the same equipment (which had been provided by NEAS for Hudson to use) such as the oven and fridges. NEAS also provided for Nu's use two fridges, a barista coffee machine, a food processor and a smoothie maker and removed (at Nu's request) a fryer and three stainless steel tops (165). NEAS also undertook some remodelling of the premises and created a 'drive-through' window.

15.17 The nature of Nu's operation is somewhat different to that of Hudson. The only formal arrangement Nu has with NEAS is the Licence Agreement (202). Nu does not receive any subsidy from NEAS and operates on what has been described as a "nil cost" rather than a "fixed cost" basis. On the nil cost basis, NEAS does not pay a monthly fee. Instead, Nu operates by seeking to generate enough income to cover all expenses and make a

profit. One difference between the two bases is that prices charged by Hudson to its customers were agreed with NEAS whereas Nu alone fixes the prices it charges.

15.18 Key differences between the operations of the two respondents are as follows:

15.18.1 As described above, Hudson operated a counter-service. Nu's operation is more akin to restaurant service in that customers order and pay for the food that they want from a comprehensive menu, a check will then be written and taken into the kitchen where the food is prepared and served to the customers to eat at their chosen table. Everything is cooked to order apart from sandwiches, salads and the apple crumble all of which are nevertheless made that day.

15.18.2 At the time of the putative transfer Nu operated six days a week, not opening on Sundays. This compares with Hudson's five days a week (NEAS having said that it did not consider it necessary for Hudson to operate at weekends) albeit the vending machine and microwave were always available.

15.18.3 At its busiest times Nu has three employees working at the premises compared with Hudson's two.

15.18.4 Unlike Hudson, Nu prepares food for customers to buy in bulk, sells food from a 'drive-through' window and delivers to other NHS buildings away from the NEAS site.

15.18.5 In Nu's operation NEAS staff do not have any priority over the general public. As Mr Appleton put it, it is a matter of whether or not a seat is available.

15.19 The comprehensive nature of Nu's menu referred to above is a matter of record (184 to 188) and need not be set out in any great detail here. Suffice it to say (and accepting that this summary probably does not do justice to what Nu had on offer) that breakfast included wraps, savoury bowls, steak and eggs, eggs and omelettes, avocado dishes, pancakes, apple crumble and toast while lunch included soup, salmon, steak and eggs, satays, pizzas, pancakes, apple crumble, burgers, salads, wraps, sandwiches and side dishes.

Submissions

16. After the evidence had been concluded the claimants and the other parties' representatives made submissions which addressed the issues that, as indicated above, were to be determined at this Hearing. It is not necessary for me to set out the submissions in detail here because they are a matter of record and the salient points will be obvious from my findings and conclusions below. Suffice it to say that I fully considered all the submissions made along with the statutory

and case law cited by the respondents' representative and the parties can be assured that they were all taken into account into coming to my decision.

17. That said, the key points made by Mr Hussain on behalf of Nu included as set out below.

17.1 There had neither been a relevant business transfer nor a service provision change.

17.2 First, there was the nature of the contract. Hudson operated a completely different business on a fixed cost basis with NEAS having the final say as to whether the general public had access. This compared with Nu operating on a no cost basis. It was a separate commercial entity – a fully-fledged commercial restaurant, open to the general public, in which food is cooked to order with a barista, a smoothie machine and a drive-through window.

17.3 NEAS is not a client of Nu it simply provides space by licence.

17.4 The claimants were dismissed by Hudson for redundancy well before the issue of TUPE was raised by Hudson as an afterthought in January 2020. They were not employed immediately before the transfer, their dismissals being for a reason that was not connected to the transfer.

17.5 The focus should not be on the skills of the claimant but on the businesses of the respondents, which were completely different. This case is the opposite of that in OCS Group v Jones EAT 0038/09 in which the incoming contractor provided a sandwich bar while the outgoing contractor had provided a full catering service. Hudson simply stating that because there is food service and it is fundamentally the same is not enough if it is not premised on valid evidence. Reliance is placed upon the decisions in Enterprise Management Services Ltd v Connect-up Ltd UKEAT 0462/10 (in which there had been significant differences in the provision of IT services) and G4S Justice Services (UK) Ltd v Anstey [2006] IRLR 588 (in which employees dismissed for misconduct by the transferor were reinstated and were transferred). The claimants in this case were dismissed for redundancy on or around 11 November 2019 (144), which had nothing to do with the transfer, were not offered a right of appeal and were not aware of a TUPE transfer.

18. The key points made by Mr Willis on behalf of Hudson included as follows:

18.1 The claimants were not made redundant at any point. Hudson's email of 11 November 2019 (144) was sent to NEAS not to the claimants, and the eventual letter to the claimants of 25 February 2020 does not say that they were redundant or that their employments had been terminated. This was clearly a TUPE scenario and they were directed to contact Nu. If, following Hudson's termination of the contract, the NEAS' space had been used as a hairdresser or newsagent Hudson would have had to pay redundancy to the claimants.

18.2 There was a business transfer. The timescale was that on 11 November 2019 Hudson gave notice to the client. It vacated the premises on 7 February 2020 and, on 17 February 2020, the new provider took over providing catering services in respect of which, according to its ET3s, it had been approached by NEAS in November 2019. Existing staff and assets were deliberately not taken on and it is open to the Tribunal to determine, nevertheless, that TUPE applied. This is a question of fact not whether NEAS or Nu consider it applied.

18.3 Determining whether there is a transfer involves a two stage process (Whitewater Leisure Management v Barnes [2000] ICR 1049:

18.3.1 Is there an economic entity constituting an undertaking which retains its identity?
18.3.2 Is there a relevant transfer?

18.4 The decision in Cheeseman v R Brewer Contracts Ltd [2001] IRLR 144 sets out a number of considerations for Tribunal Judges. In this case, the organised grouping of persons is the claimants (the help from outside only being if there was a temporary need); the economic activity is the canteen; it is more than one-off or casual given their respective employments of 16 and 18 years; it is structured and autonomous; the claimants worked only there and nowhere else and being permanently assigned constituted the entity; being in the service sector it is labour-intensive and the assets are its staff.

18.5 The difference between a fixed cost and commercial contract is a red herring. The focus needs to be on the entity, which has to be the activity the claimants were undertaking at the time. Just because there was no agreement does not mean that TUPE did not apply. The operation they were assigned to permanently was the catering. How similar that operation was before and after the transfer is a matter for the Tribunal. There can be a relevant transfer even if assets are not passed.

18.6 Nowhere does NEAS explain why TUPE did not apply and Hudson received no information regarding the identity of the new provider, which was hiring new staff when the claimants were still employed at the premises. They had worked there continuously without interruption and the 10-day gap between the Hudson and the Nu operations can be bridged.

18.7 There was an economic entity (the claimants) its principal purpose being to carry out an activity on behalf of a client. Both respondents had contracts with NEAS and were providing a service they had contracted for. The fact that there is not a formal service agreement is not relevant as Nu is not free to do whatever it wants and cannot ignore the instructions from its contracted party. There was no great distinction before or after the transfer. The operations were fundamentally the same albeit not identical.

18.8 There was also a service provision change. Hudson had staff organised appropriately to provide a service for the client who would transfer to Nu as they had done previously

19. The key points made by Mrs Crane included as follows:

19.1 They did not believe that Mr Appleton did not know of their existence.

19.2 They had had a fantastic rapport with NEAS, although it had changed when a new manager had taken over.

19.3 They were here to get justice.

19.4 It is not their fault that Hudson pulled out and they had not known who was taking over.

20. The key points made by Mrs Moody included as follows:

20.1 She agreed with the above points made by Mrs Crane.

20.2 Mr Hudson had said they should hangout for redundancy but who was expected to pay? Neither of them knew who was taking over.

20.3 On 5 February they were told that they would be finished on 7 February 2020 and they had not received a notice period. Right until then they had been led to believe that they would be deployed to different sites.

The Law

21. The principal UK statutory provisions that are relevant to the issues in this case are to be found in TUPE and are as follows:

"A relevant transfer

3. — (1) These Regulations apply to —

(a) a transfer of an undertaking, business or part of an undertaking or business situated immediately before the transfer in the United Kingdom to another person where there is a transfer of an economic entity which retains its identity;

(b) a service provision change, that is a situation in which —

(i)activities cease to be carried out by a person ("a client") on his own behalf and are carried out instead by another person on the client's behalf ("a contractor");

(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; or

(iii)activities cease to be carried out by a contractor or a 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 instead by the client on his own behalf,

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

(2) In this regulation "economic entity" means an organised grouping of resources which has the objective of pursuing an economic activity, whether or not that activity is central or ancillary.

(2A) References in paragraph (1)(b) to activities being carried out instead by another person (including the client) are to activities which are fundamentally the same as the activities carried out by the person who has ceased to carry them out.

(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;

(ii)the client intends that the activities will, following the service provision change, be carried out by the transferee other than in connection with a single specific event or task of short-term duration; and

(b) the activities concerned do not consist wholly or mainly of the supply of goods for the client's use."

22. Also of relevance is the case law, which can be found in abundance in relation to the TUPE regulations and the Acquired Rights Directive of the EU Council, No. 2001/23. I first note the following in respect of a business transfer under regulation 3(1)(a) of TUPE.

23. As submitted by Mr Willis, in Cheeseman, the EAT approved the approach set out in Whitewater Leisure Management Limited that it was "quite plain that there are two questions to be asked and answered" as follows:

> "whether or not there was an identifiable business entity constituting an undertaking within the meaning of the Regulations; and, secondly, assuming such could be determined, whether or not there was a relevant transfer"

24. Addressing the first of those questions, economic entity is defined in regulation 3(2) as set out above. In that regard, having considered relevant decisions of

both the UK courts and the ECJ, the EAT in Cheeseman set out the following principles with regard to whether an economic entity exists:

24.1 "As to whether there is an undertaking, there needs to be found a stable economic entity whose activity is not limited to performing one specific works contract, an organised grouping of persons and of assets enabling (or facilitating) the exercise of an economic activity which pursues a specific objective"; (it being noted that the reference to "one specific works contract" is to be restricted to a contract for building works)."

24.2 "In order to be such an undertaking it must be sufficiently structured and autonomous but will not necessarily have significant assets, tangible or intangible."

24.3 "In certain sectors such as cleaning and surveillance the assets are often reduced to their most basic and the activity is essentially based on manpower."

24.4 An organised grouping of wage-earners who are specifically and permanently assigned to a common task may in the absence of other factors of production, amount to an economic entity."

24.5 An activity of itself is not an entity; the identity of an entity emerges from other factors such as its workforce, management staff, the way in which its work is organised, its operating methods and, where appropriate, the operational resources available to it."

25. As for whether there has been a transfer, the EAT set out the following principles:

25.1 "As to whether there is any relevant sense a transfer, the decisive criterion for establishing the existence of a transfer is whether the entity in question retains its identity, as indicated, inter alia, by the fact that its operation is actually continued or resumed".

25.2 "In a labour intensive sector it is to be recognised that an entity is capable of maintaining its identity after it has been transferred where the new employer does not merely pursue the activity in question but also takes over a major part, in terms of their numbers and skills, of the employees specially assigned by his predecessors to that task. That follows from the fact that in certain labour intensive sectors a group of workers engaged in the joint activity on a permanent basis may constitute an economic entity".

25.3 "In considering whether the conditions for existence of a transfer are met it is necessary to consider all the factors characterising the transaction in question but each is a single factor and none is to be considered in isolation".

25.4 "Amongst the matters thus falling for consideration are the type of undertaking, whether or not its tangible assets are transferred, the value of its intangible assets at the time of transfer, whether or not the majority of

its employees are taken over by the new company, whether or not its customers are transferred, the degree of similarity between the activities carried on before and after the transfer, and the period, if any, in which they are suspended".

25.5 "In determining whether or not there has been a transfer, account has to be taken, inter alia, of the type of undertaking or business in issue, and the degree of importance to be attached to the several criteria will necessarily vary according to the activity carried on".

25.6 "Where an economic entity is able to function without any significant tangible or intangible assets, the maintenance of its identity following the transaction being examined cannot logically depend on the transfer of such assets."

25.7 "Even where assets are owned and are required to run the undertaking, the fact that they do not pass does not preclude a transfer."

25.8 "Where maintenance work is carried out by a cleaning firm and then next by the owner of the premises concerned, that mere fact does not justify the conclusion that there has been a transfer."

25.9 "More broadly, the mere fact that the service provided by the old and new undertaking providing a contracted-out service or the old and new contract-holder are similar does not justify the conclusion that there has been a transfer of an economic entity between predecessor and successor."

25.10 "The absence of any contractual link between transferor and transferee may be evidence that there has been no relevant transfer but it is certainly not conclusive as there is no need for any such direct contractual relationship."

25.11 When no employees are transferred, the reasons why that is the case can be relevant as to whether or not there was a transfer."

25.12 The fact that the work is performed continuously with no interruption or change in the manner or performance is a normal feature of transfers of undertakings but there is no particular importance to be attached to a gap between the end of the work by one sub−contractor and the start by the successor."

26. Also of relevance to the question of when an economic entity retains its identity is the guidance in the decision of the ECJ in Spijkers v Gebrobroeders Benedik Abattoir C.V. [1986] ECR 1119 in which (in what has been described as a "multifactorial approach") it was said that "it is necessary to take account of all the factual circumstances of the transaction in question" including the following:

26.1 the type of business or undertaking;

26.2 the transfer or otherwise of tangible assets;

26.3 the value of intangible assets at the date of transfer;

26.4 whether the majority of the staff are taken over by the employer;

26.5 the transfer or otherwise of customers;

26.6 the degree of similarity of activities before and after the transfer; and

26.7 the duration of any interruption in these activities.

That said, the ECJ made clear that these are merely factors in an overall assessment and cannot be considered in isolation; thus suggesting that not all the factors need to be satisfied in order for regulation 3(1)(a) to apply.

27. Finally, and more generally, in Cheeseman, the EAT provided additional guidance including as follows:

27.1 "The necessary factual appraisal is to be made by the National Court."

27.2 The directive applies where, following the transfer, there is a change in the natural person responsible for the carrying on of the business who, by virtue of that fact, incurs the obligation of an employer vis−a−vis the employees of the undertaking, regardless of whether or not ownership of the undertaking is transferred."

27.3 The aim of the Directive is to ensure continuity of employment relationships within the economic entity irrespective of any change of ownership …. And our domestic law illustrates how readily the Courts will adopt a purposive construction to counter avoidance."

28. I have set out 'the Cheeseman guidelines' above in relation to whether an economic entity exists and whether it retains its identity following a putative transfer. There are, however, two other questions arising from regulation 3(1)(a) of TUPE: namely, whether the entity is "situated immediately before the transfer" in the UK and whether there was a transfer "to another person".

29. In this case, the answer to the first question is self-evident and nothing more needs to be added. In answering the second question the Courts have taken a purposive approach. It is established, for example, that TUPE can apply to the granting, terminating, surrendering or assigning of a lease of property where a business is intrinsically linked to such property and where as a result the business changes hands and continues to be run as essentially the same business. TUPE can also apply to the conferring of a franchise, licence or concession and where, for example, a licensee enters into a contractual arrangement to carry out a business activity, the fact that certain key tangible and intangible assets of the business continue to be owned by the person conferring the licence will not necessarily prevent the operation of the regulations.

30. In Foreningen af Arbejdsledere i Danmark v Daddy's Dance Hall A/S [1988] IRLR 315, the ECJ restated its approach in Landsorganisationen i Danmark v Ny Mølle Kro [1989] ICR 330 that the Directive "applies as soon as there is a change of the natural or legal person responsible for operating the undertaking who, consequently, enters into obligations as an employer towards the employees working in the undertaking, and it is of no importance to know whether the ownership of the undertaking has been transferred". I also note from the first of these decisions that it is irrelevant that there is no contractual or other direct relationship between the transferor and the transferee so long as the undertaking in question retains its identity.

31. I now turn to certain of the case law in relation to a service provision change within the meaning of regulation 3(1)(b)(ii) of TUPE in relation to which, as set out above, there can be three types of change.

32. Guidance on the approach to be adopted by an employment tribunal can be drawn from the decision in Enterprise Management Services Ltd v Connect-up Ltd [2012] IR LR 190, EAT in which the following principles were identified:

    32.1 "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 …. on a client's …. behalf and are carried on instead by a subsequent contractor".

    32.2 "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".

    32.3 "The next (critical) question for present purposes is whether the activities carried on by the subsequent contractor after the relevant date …. 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."

    32.4 "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".

    32.5 "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;
    (ii) the client intends that the transferee, post-SPC, will not carry out the activities in connection with a single event of short-term duration;
    (iii) the activities are not wholly or mainly the supply of goods (rather than services) for the client's use".

32.6 "Finally, by reg. 4(1) the Employment Tribunal must decide whether each Claimant was assigned to the organised grouping of employees".

33. More recently, in Rynda (UK) Ltd v Rhijnsburger [2015] EWCA Civ 75 it was stated that a four-stage test emerges from the case law when consideration is being given to whether there has been a service provision change as follows:

> "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.

Application of the facts and the law to determine the issues

34. The above are the salient facts, submissions and legal principles relevant to and upon which I based my judgment in respect of the agreed issues that are to be determined at this Preliminary Hearing, which are set out in paragraph 1 above.

A business transfer

35. Once more, I consider first a business transfer under regulation 3(1)(a) of TUPE.

36. In this regard I address the two questions set out in Whitewater Leisure Management Limited: first, whether there was an identifiable business entity constituting an entity; secondly, if so, whether there was a relevant transfer. In answering those questions I seek to apply the guidance I draw from the decision in Cheeseman.

An identifiable business entity constituting an undertaking?

37. As to the first question, by reference in turn to the five factors set out above I find as follows:

37.1 Hudson operated a stable economic entity the activity of which was not limited to performing one specific works contract. It involved an organised grouping of persons (the claimants) and of assets enabling (or facilitating) the exercise of an economic activity which pursued a specific objective of providing a canteen-style restaurant within the NEAS headquarters building, which included planning menus, procuring supplies and preparing, cooking and serving breakfasts and lunches and sandwiches and other snacks throughout opening hours; and snacks etc from a vending machine at weekends. Given that reference to "enabling (or facilitating)", I am satisfied that it matters not that the assets were primarily owned and provided by NEAS.

37.2 The undertaking was sufficiently structured and autonomous. There was no challenge to the evidence of the claimants that although subject to the

overall direction of Mr Hudson and the key NEAS employee, essentially, they got on with their respective jobs in relation to the provision of the economic activity. The evidence of Mrs Moody was succinct, "I started at 10.30. I knew what I was doing and got on with it".

37.3 To an extent repeating the first of above points the activity was essentially based on manpower but there were also assets in the two principal areas of the canteen: first, the cooking, preparation and serving area and, secondly, the eating area.

37.4 The organised grouping of wage-earners (the claimants) was specifically and permanently assigned to the common task of the activity. They did not work elsewhere for Hudson and, indeed, had respectively worked in the same NEAS premises doing essentially the same work since November 2001 in the case of Mrs Crane and since September 2003 in the case of Mrs Moody.

37.5 Thus, factors such as the workforce, management staff, the way in which its work is organised, its operating methods and, where appropriate, the operational resources available to it produce the identity of the entity and not activity of itself.

A relevant transfer?

38. I turn to consider the second question of whether there has been a transfer and again draw guidance from the decision in Cheeseman.

39. The "decisive criterion" is said to be whether the entity retains its identity as indicated, amongst other things, by the fact that its operation is continued or resumed. I have thought long and hard about this crucial aspect of this case and in doing so have brought into account other relevant elements of the guidance in Cheeseman including findings as follows:

39.1 The entity was not particularly labour-intensive and Nu did not take on Hudson's employees but that does not necessarily indicate the absence of a transfer: see ECM (Vehicle Livery Service) Ltd v Cox [1999] ICR 1162, CA.

39.2 Assets were not transferred from Hudson to Nu but that does not preclude a transfer: see, Merckx v Ford Motors Co. (Belgium) S.A. [1997] I.C.R. 352. That said, in this case there was a transfer of assets in the sense that NEAS provided equipment for Hudson to use in its premises some of which Nu continued to use, and provided new equipment at the request of Nu.

39.3 I do not regard the gap of some 9 days between the end of the Hudson activity and the beginning of the Nu activity to be of significance: see, Ny Mølle Kro.

39.4 The customers remained essentially the same and no particular importance is to be attached to the short period during which the activities were suspended.

39.5 There was similarity between the activities carried on before and after the putative transfer (see below) although I accept that similarity alone does not justify the conclusion that there has been a transfer of an economic entity between the predecessor and successor: Sanchez Hidalgo v Asociacion de Servicios Aser (C173/96).

39.6 There was no contractual link between Hudson and Nu but that is not conclusive as there is no need for any such direct contractual relationship and even in the absence of any agreement TUPE can still apply: Daddy's Dance Hall A/S and Sanchez Hidalgo.

40. It is clear from the decision in OCS Group that an approach that both respondents provided some form of catering is too simplistic. There are clear differences, which I have set out above. In summary, Hudson operated a counter-service while Nu's operation is more akin to restaurant service; Hudson operated five days a week while at the material time Nu operated six days a week; although in both operations the general public can access the facility, NEAS staff no longer have any priority. Other differences to which I give less weight are that Nu prepares food for customers to buy in bulk, sells food from a 'drive-through' window and delivers to other NHS buildings away from the NEAS site.

41. I consider the above to be the key differences in the two operations. Contrary to the submission made by Mr Hussain I do not consider to be relevant the precise nature of the contractual relationship that Hudson and Nu respectively had and have with NEAS: i.e a Service Agreement or a Licence. In this regard, in the evidence of Mr Appleton and the submissions made by Mr Hussain the point was strongly made on behalf of Nu that, unlike in the case of Hudson, it operated a genuinely commercial restaurant facility that was wholly independent of NEAS. I certainly recognise the legal difference between the Service Agreement NEAS entered into with Hudson and the Licence Agreement it entered into with Nu. Beyond those formal agreements, however, I am not satisfied that there was the total independence that was portrayed by Mr Appleton and Mr Hussain. I have referred above to the amount of email correspondence between NEAS and Nu before it started trading from the premises, which was aimed at ensuring that the premises and equipment were what was required and NEAS keeping its staff informed as to the change in the catering arrangements (164 - 189). Included in that email correspondence are the following (the emphasis is added):

41.1 NEAS cooperating in remodelling the premises and providing new equipment (164).

41.2 Mr Appleton referring to Nu carrying out relevant operations "at the NEAS canteen".

41.3 The NEAS contact commenting, "once we establish that the food will be a success" (168).

41.4 Mr Appleton reminding that contact that "it was mentioned about maybe putting something on for weekend staff" (172).

41.5 NEAS requesting Nu to provide a list of typical things that it offered in order that "staff can get a flavour of what is coming" (181).

41.6 Relevant NEAS staff internally discussing notification to its employees of the "catering provision at HQ" (177), its communications team putting out information regarding Nu's impending arrival and Nu being asked to provide further information, "I'd like people to start getting excited about it" (182). Such information being required so that it could be circulated on the NEAS intranet as, "we'll be putting out to staff in the coming weeks to promote you starting on 17 February" (189).

42. Arising from the above, NEAS ultimately issued two notifications to its employees, both headed "Changes to catering at HQ" and both apparently dated 5 February 2020. The first (189f) referred to NEAS having been "exploring opportunities with a view of leasing the space out and to provide a sustainable restaurant in the building" in relation to which it had "identified a possible partner …. and agreed a 6 month trial with …. [*Nu*] … who will occupy the canteen from Monday 17 February". That notification explained that due to some rearrangements being made to the premises, "employees will need to make alternative arrangements for seating over the lunch period and there will be no food service during that week. We apologise for any inconvenience this may cause but we look forward to welcoming Nu to Go". The second notification (189g) contained similar information for employees including that from 10 February "there will be no catering provision" and "employees will need to make alternative arrangements for seating over the lunch period and there will be no food service available" (again I have added emphasis).

43. In light of the above I repeat that I am not satisfied that there was the distinction between NEAS and Nu that Nu now seeks to make or that the NEAS employees were not intended to continue to be the principal beneficiaries of the catering arrangements. I accept that such distinction is consistent with certain of the correspondence between NEAS and Hudson; for example, in an email dated 21 January 2020 the NEAS contact states that the new arrangements being explored are not a continuation of the canteen service provided by Hudson, do not fall within the scope of TUPE and is not for the principal "benefit of NEAS or its staff in that no service is being provided" (163). I consider the above summary of email correspondence belies that statement. I also note that the statement that "no service is being provided" is inconsistent with that in the NEAS email of 6 January 2020 that NEAS would not be transferring any Hudson "staff to the new provider" (134). That email of 21 January continues, "We acknowledge that the commercial offering will be the provision of food, however the food offering will be substantially different (i.e. not fundamentally or essentially the same) to that provided by Hudson via the subsidised canteen service." While noting the

obvious reference to the legal 'tests', I am not satisfied that the Nu provision is substantially different.

44. In my consideration of this "decisive criterion" of whether the entity retains its identity I have brought into account the factors considered in Spijkers, reminding myself that my focus must be on the identity of the entity transferred rather than on the nature of the businesses of the transferor and transferee as a whole.

    44.1 The type of business or undertaking is obviously not identical but, as explained, I consider it to be sufficiently similar.

    44.2 I have addressed above the transfer or otherwise of tangible assets.

    44.3 The value of intangible assets at the date of transfer is essentially limited to the availability of the premises and the goodwill of the business primarily with NEAS employees but also with members of the public in the locality, and remained the same before and after the putative transfer.

    44.4 The majority of the staff were not taken over by Nu, indeed, no staff were taken over but are be that does not necessarily indicate the absence of a transfer: see ECM (Vehicle Delivery Service) Ltd.

    44.5 As mentioned above, customers in the form of NEAS employees and members of the public in the locality continue to make use of the facility; indeed the employees at least were encouraged to do so by NEAS in the promotional literature referred to above.

    44.6 I have addressed above the issue of the degree of similarity of activities before and after the transfer.

    44.7 I have also addressed the issue of the short duration of the 9-day interruption in these activities.

45. In this connection I remind myself that although the ECJ stated in Spijkers that the degree of similarity of activities before and after the transfer was a relevant factor in relation to the issue of whether an economic entity has retained its identity, minor changes in the way in which activities are carried out might not change the essential identity of the entity in question: see, Porter v Queen's Medical Centre (Nottingham University hospital) [1993] IRLR 486, QBD. Likewise, as included in the Cheeseman guidance above, in Suzen v Zehnacker [1997] ICR 662 ECJ, it was stated that "an entity cannot be reduced to the activity entrusted to it. Its identity also emerges from other factors, such as its workforce, its management staff, the ways in which its work is organised, its operating methods or indeed, where appropriate, the operational resources available to it."

46. To conclude my consideration of whether there has been a transfer, I repeat that I acknowledge the legal difference between the Service Agreement NEAS entered into with Hudson and the Licence Agreement it entered into with Nu but regardless of that difference in the form of the respective agreements I am

satisfied that there was a sufficient relationship (based upon the Licence and the practical arrangements) between NEAS and Nu. To allow businesses to circumvent TUPE by changing the formal basis of a legal relationship from a Service Agreement to a Licence Agreement, in circumstances where there is otherwise such commonality between the operations of the two business, would undermine the "Protection of Employment" purpose of TUPE.

47. I also acknowledge the existence of certain practical differences but consider the essential difference to be what might be described as being the level of operation provided by the two respondents: that of Hudson might be categorised as being more in the nature of a canteen facility whereas that of Nu might be categorised as being more in the nature of a restaurant facility. Fundamentally, however, each of the respondents provided quality catering in the form of mainly freshly prepared hot and cold breakfasts and lunches (both with varied choices) alongside hot and cold drinks, sandwiches and snacks; and did so in the same premises of NEAS and, although with some public access, primarily for the benefit of its staff. I am satisfied that without that last element of staff-benefit NEAS would not have subsidised the catering provided by Hudson and provided to Nu, at no cost, the premises and equipment that it did.

48. Stepping back and considering all of the evidence before me in the round, I am satisfied that the business entity of Hudson retained its identity after Nu began to provide catering in the premises.

49. For the above reasons, I am satisfied, on balance of probabilities, that there was in this case "a transfer of an undertaking, business or part of an undertaking or business" within the meaning of regulation 3(1)(a) of TUPE.

50. That being so, I need not consider the alternative issue before me whether there was a service provision change within the meaning of regulation 3(1)(b)(ii) of TUPE but I do so for completeness lest my above decision had been to the contrary.

A service provision change

51. In this case, it is the second of the situations provided for in regulation 3(1)(b) that is potentially relevant; namely whether activities cease to be carried out by a contractor on a client's behalf and are carried out instead by a subsequent contractor on the client's behalf. This situation is commonly referred to as being 'second-generation contracting'. In this connection I remind myself of the change introduced into the regulations on 31 January 2014 with the addition of regulation 3(2)(A) to reflect the established case law (particularly in Metropolitan Resources Ltd v Churchill [2009] ICR 1380) that the activities in question are to be "fundamentally the same".

52. In assessing whether there has been in this case a service provision change I seek to apply the guidance I draw from the elements in the decision in Enterprise Management Services Ltd that are relevant to the facts of the case before me, also bringing into account the four-stage test set out in Rynda (UK) Ltd.

52.1 My first task, therefore, "is to identify the relevant activities carried out by the original contractor". Those activities carried out Hudson are fully set out above. In essence, they involved the provision of a canteen-style restaurant within the NEAS headquarters building, which included planning menus, procuring ingredients, preparing, cooking and serving breakfasts and lunches and providing sandwiches and other snacks throughout opening hours.

52.2 The next question is said to be the "critical" question of whether the activities carried on by Nu are fundamentally or essentially the same as those carried on by Hudson; minor differences being disregarded. I remind myself that in Metropolitan Resources Ltd it was made clear that a tribunal should take a commonsense and pragmatic approach concentrating upon relevant activities rather than upon detailed differences between what is done by the transferor or transferee or upon the manner in which each respectively performed or performs the relevant tasks. In essence the question becomes whether the activities carried out by both respondents were essentially the same. Having noted the facts and decision in the case of OCS Group, I am not satisfied that the changes of menu and style of the catering and the change from counter-service to restaurant-service amounts to the activities of the two respondents not being fundamentally the same. I repeat that, fundamentally, each of the respondents provided quality catering in the form of mainly freshly prepared hot and cold breakfasts and lunches (both with varied choices) alongside hot and cold drinks, sandwiches and snacks; and did so in the same premises of NEAS and, although with some public access, primarily for the benefit of its staff. Thus, for the reasons set out above in relation to my findings that there was a relevant transfer in the sense of a business transfer I am similarly satisfied that the activities carried on by the two respondents in this case are, indeed, fundamentally the same.

52.3 That being so it is necessary to consider whether the conditions contained in regulation 3(3) of TUPE are satisfied, which I am satisfied they are. In particular, for the reasons also set out above in relation to my findings that there was a relevant transfer in the sense of a business transfer, I am satisfied that the Hudson operation amounted to an organised grouping of employees in Great Britain which had as its principal purpose the carrying out of the activities concerned on behalf of the client, NEAS. The other two conditions are not applicable to the facts of this case.

53. An issue, which is not directly addressed in either of the above two cases, is that regulation 3(1)(b)(ii) of TUPE is predicated upon the activity being carried out before and after the putative transfer on a "client's behalf". I address this specifically because Mr Hussain placed such reliance upon the Licence Agreement between NEAS and Nu not constituting NEAS a client of Nu. As set out above, however, I do not consider to be relevant the precise nature of the contractual relationship that Hudson and Nu respectively had and have with NEAS and I am not satisfied as to the distinction between NEAS and Nu and the independence of the latter that Nu now seeks to portray. I repeat the point made above in relation to the business transfer aspect of this Judgment that to allow

businesses to circumvent TUPE by changing the formal basis of a legal relationship (in this case from a Service Agreement to a Licence Agreement) in circumstances where there is otherwise such commonality between the operations of the two business, would undermine the "Protection of Employment" purpose of TUPE.

54. That being so, again stepping back and considering all of the evidence before me in the round, I am satisfied, on balance of probabilities, that the situation in this case does constitute a service provision change as defined in regulation 3(1)(b)(ii) of TUPE.

Conclusion

55. In conclusion, having considered all the evidence before me (written and oral) and the submissions made in the context of the statutory and case law referred to above, my judgment is that in the above circumstances I am satisfied in relation to the two issues to be determined at this Preliminary Hearing as follows:

    55.1 There was a transfer of an undertaking, business or part of an undertaking or business within the meaning of regulation 3(1)(a) of TUPE.

    55.2 There was a service provision change within the meaning of regulation 3(1)(b)(ii) of TUPE.

A further preliminary hearing

56. At the December Hearing it had been ordered that the Public Preliminary Hearing conducted today would be followed immediately by a Private Preliminary Hearing the purpose of which was said to be "to make directions for a Final Hearing".

57. In the event, for want of time, it was not possible to give judgment as to the issues considered at the Public Preliminary Hearing and then proceed to a Private Preliminary Hearing. That being so, a further Private Preliminary Hearing will be arranged on the first available date at which such directions referred to above will be made.

58. By no later than 28 May 2021 the parties must inform the Tribunal of which dates they will not be available to attend such a Private Preliminary hearing (which will be conducted by telephone) during July and August 2021.

EMPLOYMENT JUDGE MORRIS

JUDGMENT SIGNED BY EMPLOYMENTJUDGE ON 19 April 2021

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