Neutral Citation Number: [2024] EAT 103

Case No: EA-2022-001024-NT

EMPLOYMENT APPEAL TRIBUNAL

Rolls Building
Fetter Lane, London, EC4A 1NL

Date: 25 June 2024

Before :

THE HONOURABLE MR. JUSTICE SHELDON

- -

Between:

(1) DR MARCUL BICKNELL
(2) THE BRITISH MEDICAL ASSOCIATION

Appellants

-and-

NHS NOTTINGHAM AND NOTTINGHAMSHIRE INTEGRATED COMMISSIONING BOARD

Respondent

- -
- -

Ms Nadia Motraghi KC and Professor Alan Bogg (instructed by **Gateley Plc**) for the **Appellants**
Ms Betsan Criddle KC (instructed by **Capsticks Solicitors LLP**) for the **Respondent**

Hearing date: 8 May 2024

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JUDGMENT

SUMMARY

Transfer of Undertakings

The ET found that there had not been a relevant transfer from a clinical commissioning body, the employer of the claimant Dr Bicknell, to the predecessor entity of the Respondent. The ET reached that conclusion by applying the judgment in *Nicholls v London Borough of Croydon* [2019] ICR 542 at §42: that commissioning in itself is not an economic activity for the purposes of regulation 5 of the Transfer of Undertaking (Protection of Employment) Regulations 2006 ("TUPE"), and that the commissioner must also provide goods or services itself on the market. As a result, the ET dismissed Dr Bicknell's claim for automatically unfair dismissal, and a claim for dismissal contrary to regulation 7(2) of TUPE. It also dismissed the BMA's claim for breach of regulations 13(2) and 13(6) of TUPE. On appeal, the claimants challenged the ET's understanding of *Nicholls* and, in the alternative, invited the appeal tribunal to depart from *Nicholls*.

Held: appeal is dismissed.

The ET had correctly understood what had been decided in *Nicholls* at §42: that commissioning in itself was not an economic activity for the purposes of regulation 5 of TUPE, and that the commissioner also needed to provide the goods or services on the market. *Nicholls* could only be departed from if it was manifestly wrong: *British Gas Trading Ltd. v Lock* [2016] 2 CMLR 40 at §75. The appeal tribunal entertained doubts about this conclusion in *Nicholls*, but it was not manifestly wrong and so could not be departed from.

The Honourable Mr Justice Sheldon

Introduction

1. This appeal concerns the reorganisation of commissioning arrangements for the NHS in the Nottinghamshire area. The appeal is brought by the Claimants, Dr Marcus Bicknell and the British Medical Association ("the BMA"), from a decision of the Employment Tribunal (Midland East) ("the Employment Tribunal"), sent to the parties on 13 August 2022. The Respondent is the NHS Nottingham and Nottinghamshire Integrated Commissioning Board ("NN ICB"). The Employment Tribunal dismissed Dr Bicknell's claim for automatically unfair dismissal, and a claim for dismissal contrary to regulation 7(2) of the Transfer of Undertaking (Protection of Employment) Regulations 2006 ("TUPE"), and also dismissed the BMA's claim for breach of regulations 13(2) and 13(6) of TUPE.

2. In reaching these conclusions, the Employment Tribunal found that there was not a "relevant transfer" from Dr Bicknell's employer, the NHS Nottingham City Commissioning Group ("NC CCG"), to the NHS Nottingham and Nottinghamshire Clinical Commissioning Group ("NN CCG"), the predecessor entity to NN ICB. The key issue on this appeal is whether the Employment Tribunal misdirected itself when reaching that conclusion.

Factual Background

3. Pursuant to changes made to the structure of the NHS by the Health and Social Care Act 2012, Clinical Commissioning Groups (CCGs) were established with responsibility for the commissioning of healthcare services for different geographical areas. In Nottinghamshire, there were originally seven CCGs, including NC CCG. Six of these CCGs merged on 1st April 2020 to create NN CCG. NN CCG was replaced by NN ICB

on 1st April 2022. (The Employment Tribunal did not decide whether or not there was a TUPE transfer from NN CCG to NN ICB, as NN ICB stated that if there was a TUPE transfer from NC CCG to NN CCG, it would not argue that there was no TUPE transfer to it from NN CCG).

The Employment Tribunal's Decision

4. The Employment Tribunal made findings of fact as to the background to the reorganisation of the CCGs within the Nottinghamshire area. It then considered whether there was a TUPE transfer, which was rightly identified as the key question that it needed to answer. At §87, the Employment Tribunal observed that "For there to be a transfer of an undertaking there has to have been the transfer of an economic entity from one person to another. An economic entity is an undertaking which carries on economic activity".

5. In deciding this question, the Employment Tribunal identified that it needed to undertake a "functional approach" to determine the nature of the activities of the transferor, referring to the decision of Lavender J. sitting in this tribunal in *Nicholls v London Borough of Croydon* [2019] ICR 542. At §90, the Employment Tribunal stated that it had to decide whether the activities of NC CCG constituted an "economic activity" or "public administrative functions", as only the former will be a "relevant transfer".

6. The Employment Tribunal looked first at what an "economic activity" was:

> "92.The definition of "economic activity" is perhaps best defined as "any activity consisting in offering goods and services on a given market" (see for example *Ambulanz Glockner v Landkreis Sudwestpfalz* [2002] 4 CMLR 21).

> 93.It is relevant to consider whether the activity consists in the provision of goods and services as opposed to merely acquisition and whether there is a market for the relevant goods or services.
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> 94.If there is a market, the provision of goods and services on that market is an economic activity (*Hofner and Elser v Macroton GmbH* (Case C-41/90) [1993] 4 CMLR 306, *Dr Sophie Redmond Stichting v Hendrikus Bartol and others* (Case C-29/91) [1992] 003 ECR I-3189 and *Scattolon v Ministero dell'Instruzione, dell'Universita et dell Ricerca* [2011] IRLR 1020).
>
> 95.It is relevant to that consideration whether the activity is capable of being carried on, at least in principle, by private undertaking with a view to profit (*Ambulanz Glockner, Diego Cali & Figli Srl v Servizi Ecologici Porto di Genova SpA* (SEPG) (Case C343/95) [1997] ECR I-1547; [1997] CMLR 484, CJEU).
>
> 96.There can be such a market even if the goods are provided by the state or a state authorised entity, all the goods or services are being provided by one state body to another and the entity providing the economic activity can be a public law entity, publicly funded, acting in the public interest and acting pursuant to statutory functions".

7. The Employment Tribunal then referred to the various functions of NC CCG:

> "97.CCGs were groups of local GP practices whose governing bodies included GPs, other clinicians such as nurses and secondary care consultants, patient representatives, general managers and – in some cases – practice managers and local authority representatives. "
>
> 98.The pre-2022 system for commissioning healthcare services was based on arrangements set out in the Health and Social Care Act 2012 (which amended the NHS Act 2006), which aimed to put GPs at the forefront of the commissioning process. To that end, CCGs had a statutory responsibility for commissioning most NHS services including urgent and emergency care, acute care, mental health services, community services and some specialised services. This involved assessing local needs, deciding priorities and strategies, and then buying services on behalf of the population from providers such as hospitals, clinics, community health bodies, etc. It is an ongoing process. CCGs had to constantly respond and adapt to changing local circumstances. They were responsible for the health of their entire population and measured by how much they improve outcomes.
>
> 99.In short, commissioning is essentially the process by which health and care services are planned, purchased and monitored. So, in this context "commission" means "buy". It does not mean "provide".

8. The Employment Tribunal identified that CCGs were creatures of statute, and set out the relevant duties of CCGs:

> "100. CCGs were of course creatures of statute. The law relating to CCG functions was set out in the National Health Service Act 2006 thus:
>
> "1I Clinical commissioning groups and their general functions
>
> (1) There are to be bodies corporate known as clinical commissioning groups established in accordance with Chapter A2 of Part 2.
>
> (2) Each clinical commissioning group has the function of arranging for the provision of services for the purposes of the health service in England in accordance with this Act.
>
> 2 General power
>
> The Secretary of State, the Board or a clinical commissioning group may do anything which is calculated to facilitate, or is conducive or incidental to, the discharge of any function conferred on that person by this Act"
>
> Chapter A2, Part 2 [sets out the general duties of CCGs as follows:]
>
> • To promote the NHS constitution
>
> • To exercise their functions effectively, efficiently, and economically
>
> • To improve the quality of services
>
> • To have regard to reducing inequalities
>
> • To promote involvement of patients
>
> • To enable patient choice
>
> • To obtain appropriate advice
>
> • To promote education and training
>
> • To promote research
>
> • To promote integration"

9. The Employment Tribunal explained at §101 that the core function of a CCG was "to arrange for the provision of health services. Thus, whatever the CCG does which is not

commissioning services (or monitoring) is subordinate to its overarching duty to commission healthcare services".

10. At §103, the Employment Tribunal stated that:

> "We note the evidence of C1 that NC CCG provided training to its staff, that it signposted patients to relevant services and undertook some other peripheral matters. We did not accept the claimant's evidence regarding the provision of pharmacy services which services are, we understand from the legislation commissioned by the NHS Board and not CCGs and we accept the point given in evidence by Dr Porter that the CCG was not registered to provide medical services and in our judgment it is extremely unlikely that it did so, and we find it did not."

11. The Employment Tribunal then addressed whether or not NC CCG carried out economic activity. It answered this question succinctly at §104-105, stating that:

> "104. In *Nicholls* . . . , Lavender J held at paragraph 42:
>
> "(1) the purchasing or commissioning of goods or services cannot in itself constitute an economic activity; but
>
> (2) a body which supplies goods or services on a market is carrying on an economic activity, both in supplying those goods or services and in purchasing goods or services for the purpose of that supply"
>
> 105. We find that the principal work of NC CCG was to commission healthcare services from providers to be delivered by those providers to the public. That falls squarely within the first limb of paragraph 42 of *Nicholls* and in our judgment, there is nothing in the present case to enable us to depart from that precedent. CCGs do not and NC CCG did not supply goods or services on a market. It was not, without more, undertaking an economic activity. In that case Regulation 3(5) applies and there was no relevant transfer when NC CCG was dissolved, and its work transferred to NN CCG".

The Employment Tribunal's conclusion, therefore, was that there was no "relevant transfer" from NC NNG to NN CCG within the meaning of TUPE.

12. The Employment Tribunal went on to consider the argument made by the Claimants that the purchasing of services to be provided by a third party could amount to an economic activity either in and of itself, or because that falls within the second limb of

§42 of *Nicholls*. The Claimants' argument was based on an analysis of the decision of the Court of First Instance and the Court of Justice of the European Union ("the CJEU") in *FENIN v Commission of the European Communities* (Case C-205/03) [2006] 262 CMLR 7. *FENIN* was a competition law case involving the purchase of medical goods and equipment for use in the Spanish health service. The Employment Tribunal's analysis was as follows:

> "108. We accept the points made by Ms Motraghi that the Court of Justice [in *FENIN*] has emphasised that activities which involve the offer of goods and services on a given market must be regarded as economic in nature notwithstanding that:
>
> a. they are not carried on with a view to making a profit (*The Dr Sophie Redmond Stichting* and *Re Business Transfers: EC Commission v United Kingdom* (Case C-382/92) [1995] I CMLR 345)
>
> b. they are entrusted to a body which forms part of the public administration or is governed by public law (*Collino and another v Telecom Italia SpA* [2002] ICR 38, and *Mayeur v Association Promotion de l'Information Messine* (APIM) (Case C-175/99) [2002] ICR 1316)
>
> c. they are carried out in the public interest or for the general good (*Mayeur*, and *Scattolon*).
>
> 109. But as we have found, a key point is that the CCG did not provide goods or services. Its central, key function was to commission others to provide principally services.
>
> 110. We understand that Ms Motraghi's challenge on this point is based on an analysis of the Advocate General's opinion in *FENIN*. We note that *FENIN* is not an employment case but a competition case. However, the relevant definitions in EU competition law are the same as those in the Acquired Rights Directive upon which TUPE is based.
>
> 111. The point made by Ms Motraghi was that the Advocate General in *FENIN* said it is appropriate in a commissioning case to consider what use the purchased goods will be put to and if that use is an economic activity, then so is the purchasing of the goods. In *FENIN* the Advocate General said as follows
>
> "There was no need to dissociate the activity of purchasing goods from the subsequent use to which they were put in order to determine the nature of that purchasing activity. The nature of the purchasing activity had to be determined according to whether or not the subsequent use of the purchased goods amounted to an economic activity. There was

> therefore no need to examine the purchasing activity of the SNS management bodies separately from the service subsequently provided"
>
> 112. Ms Motraghi says we should apply this approach and thus to not dissociate the commissioning of services by the CCG from their delivery by the actual providers of the services and if the delivery amounts to an economic activity, so does the commissioning (i.e. the purchasing) of them.
>
> 113. Significantly, the Court of Justice did not consider this aspect of the Advocate General's opinion because it determined that it was [not] part of the grounds of appeal it could accept as it was not argued in the courts below it, and thus it is not part of the Court's decision and remains the opinion of an Advocate General. In our judgment, we cannot be bound by the opinion of an Advocate General and ignore the binding precedent of the EAT as set out, in this case, in *Nicholls*."

13. Before the Employment Tribunal, it was argued by the Claimants that it was necessary to consider the ten-point test set out by Lavender J in *Nicholls* at §55 to determine whether an activity was economic or a public administrative function. The Employment Tribunal rejected this argument, stating at §114 that:

> "Given the clear judgment in *Nicholls* we do not consider that we need to go on to consider the ten points set out by Lavender J to try to determine whether the activity is or is not economic. That would be relevant if the position were not clear, but it is - the purchasing or commissioning of goods or services cannot in itself constitute an economic activity and given that the CCG does not supply goods or services (which is necessary for the second limb of paragraph 42 of *Nicholls* to apply) we consider that the *Nicholls* judgment means that the dissociative approach remains the default position".

14. Having decided that there was no "relevant transfer", the Employment Tribunal concluded that Dr Bicknell was not automatically unfairly dismissed. The Employment Tribunal decided, however, that had there been such a transfer the dismissal would have been automatically unfair, and that the NC CCG would not have had an "ETO reason" for his dismissal; and the dismissal would also have been unfair applying the ordinary test of unfair dismissal. The Employment Tribunal found that there was no jurisdiction for it to hear Dr Bicknell's claim for breach of contract. With respect to the claim brought by the BMA, the Employment Tribunal held that as there was no "relevant

transfer", there could be no failure to inform or consult under TUPE and so the BMA's claim also failed.

The Grounds of Appeal

15. The Claimants' appeal consists of three grounds:

    i) The Employment Tribunal misunderstood the test of economic activity;

    ii) The Employment Tribunal misunderstood the meaning of public administrative functions and the need to assess the same in cases where the Respondent relies on regulation 3(5) of TUPE/article 1(1)(c) of the Acquired Rights Directive;

    iii) The Employment Tribunal failed to identify all of the relevant "activities" of NC CCG or to give adequate reasons for excluding them as "services".

The Parties' Submissions

The Claimant's Submissions

Ground 1: The Tribunal misunderstood the test of an economic activity

16. The Claimants submit that the Employment Tribunal made three errors of law in considering the test of an economic activity. First, they say that there was a failure to understand §42 of *Nicholls*. Second, there was a failure to understand *FENIN*. Third, it is said that the Employment Tribunal failed to approach the question of "economic activity" in accordance with what was referred to as the "modern approach" to statutory interpretation.

The failure to understand §42 of *Nicholls*

17. Ms Motraghi KC, acting on behalf of the Claimants, submitted that the two limbs of §42 in *Nicholls* need to be read in light of Lavender J's analysis of the decisions in *FENIN*. The two limbs of §42 have to be read together. Limb 1, which states that "the purchasing or commissioning of goods or services cannot *in itself* be an economic activity" (my emphasis) is an endorsement of the "indissociability" principle derived from *FENIN*: that is, that the economic status of commissioning can only be determined by the subsequent use of those goods or services. Limb 2, which is preceded by the word "but" and states that "a body which supplies goods or services on a market is carrying on an economic activity, both in supplying those goods or services and in purchasing goods or services for the purposes of that supply", is simply an amplification of the need to consider the downstream use of the commissioned goods and services. It does not mean that the commissioner has to be the same body who supplies goods and services on the market.

18. Ms Motraghi KC submitted that the purchaser and provider do not need to be a "single entity". It is sufficient if the goods and services are supplied through a contractor. *FENIN* did not require there to be a "single entity", and the concept of a "single entity" would not have fit on the facts of *FENIN*, given that the claim alleged that 26 different bodies, including three separate ministries of the Spanish Government (known collectively as "the SNS") were guilty of an abuse of a dominant position. These entities would have been organisationally distinct from the specific healthcare providers that used the commissioned goods in the Spanish healthcare system.

19. Ms Motraghi KC contended that the following propositions can be derived from *Nicholls* at §42:

(i) It is not possible to assess whether the commissioning of goods and services is an "economic activity" without considering the downstream use of those goods and services.
(ii) The activity of commissioning is therefore indissociable from a consideration of the subsequent use of those goods or services.
(iii) Whenever the status of commissioning as an economic activity is at issue, the court cannot address that matter without assessing the downstream use of goods or services.
(iv) Where those commissioned goods or services are subsequently offered on a market, the commissioning itself will be an economic activity.
(v) Where those commissioned goods or services are not subsequently offered on a market, the commissioning itself will not be an economic activity.

20. Ms Motraghi KC contended that, in its reasons at §105, the Employment Tribunal erred in finding that as the NC CCG commissioned services it could not be engaged in an "economic activity". The Employment Tribunal essentially just read the first limb of *Nicholls* at §42 which says that purchasing cannot "in itself" be an activity. The Employment Tribunal needed, however, to read the first limb with the second limb of §42 by looking to see what happens downstream and consider if the commissioned goods or services are offered on the market. According to Ms Motraghi KC, it did not matter if it was a different entity which offered those services on the market.

21. Ms Motraghi KC contended that the Employment Tribunal's error of law was compounded by its analysis at §114 where it found that the default position under *Nicholls* was what it described as "the disassociative" approach: that is, treating the commissioning of the goods or services as separate from their subsequent use on the market. Ms Motraghi KC contended that this was the opposite of what was being said in *Nicholls*: in *Nicholls*, Lavender J acknowledged that the downstream use of commissioned goods and services was "indissociable" from the status of the commissioning itself.

The failure to understand *FENIN*

22. Ms Motraghi KC contended that the Employment Tribunal had failed to understand *FENIN*. This was reflected in its analysis set out at §§110-113. The quotation set out at §111 was said by the Employment Tribunal to be from the opinion of the Advocate General, but was in fact very similar (albeit not identical) to some paragraphs from the decision of the CJEU in *FENIN*. Ms Motraghi KC submitted that the Employment Tribunal had confused the Advocate General's Opinion for the CJEU's judgment, and had wrongly concluded that the requirement to consider downstream use was based on the Opinion and not the judgment. The Employment Tribunal's confusion led to it saying that the CJEU had not considered this aspect of the Opinion, and as a result it had to follow the decision in *Nicholls* as this was greater precedent than the Opinion.

23. Ms Motraghi KC submitted that had the Employment Tribunal correctly interpreted *FENIN*, it would have appreciated that the CJEU was endorsing the proposition that the status of commissioning as an "economic activity" could not be disassociated from whether the goods or services were subsequently provided on the market. That is, it was necessary to consider the downstream use of the commissioned goods or services to determine the economic character of the commissioning itself.

The failure to apply a purposive approach

24. Ms Motraghi KC contended that regulation 3(5) of TUPE carved out an exception from the scope of the regulations, and had to be read in a way which gave the greatest protection to employment rights. The Employment Tribunal ought to have examined the scope of "economic activity" using the "modern approach" to statutory interpretation, which called for consideration of the "context and purpose" of the legislative provision in question, referring to *Hassam v Rabot* [2024] UKSC 11 at §36.

In the TUPE context, Underhill P had stated in *OTG Ltd v Barke* [2011] ICR 781 at §21 that in any "doubtful case" where there was derogation from the purpose of protecting employees in the event of a transfer, the protective purpose must prevail.

25. It was submitted by Ms Motraghi KC that the Employment Tribunal had erred because there was no mention in its judgment of the "purpose" or "context" of TUPE: namely the protection of employment and employees' rights where there had been a change of employer in a relevant transfer. This was different to the context that applies in a competition law case, such as *FENIN*. The exception to "economic activities" for commissioning of goods and services (as reflected in the case of *FENIN*) had been developed in the context of competition law and had no basis in the text or purpose of the TUPE framework. Ms Motraghi KC contended that the Employment Tribunal should, therefore, have been cautious in its approach to *FENIN*: in the competition law context, Ms Motraghi KC said that it was necessary to consider whether an operator had the potential to distort the market; that was different to the question of whether employment rights should be safeguarded following a change of employer.

An alternative approach

26. Ms Motraghi KC made an alternative submission if it was found that the Employment Tribunal had properly understood *Nicholls* to mean that there can be no relevant "economic activity" where the relevant employer was mainly involved in the purchasing or commissioning of goods and services. Ms Motraghi KC submitted that this would mean that the dicta in *Nicholls* at §42 were wrong, as they would be inconsistent with the CJEU's decision in *FENIN*. According to Ms Motraghi KC, *FENIN* did not decide that the commissioner had to be the same body supplying goods and services on the market.

Ground 2: The Employment Tribunal misunderstood the test of public administrative functions

27. Ms Motraghi KC submitted that the Employment Tribunal erred by not applying the guidance from *Nicholls* on the meaning and identification of public administrative functions. The Employment Tribunal stated that it did not need to do so as a result of the *FENIN* analysis. Ms Motraghi KC contended that this approach was wrong. She referred to *Nicholls* at §45, where Lavender J had stated that the court or tribunal, having assessed the particular activities exercised by the entity being transferred, had to determine "whether those activities fall into one or other of two mutually exclusive categories": (1) where the activities constitute an economic activity, and (2) where the activities fall within "the less clearly defined category referred to . . . as 'exercising public powers'." Ms Motraghi KC described this as a "binocular" or a mandatory two-pronged approach, and said that both elements had to be considered. It was not sufficient to consider one alone, without considering the cross-check of the other.

28. When looking at the public administrative functions test, in *Nicholls* at §55, Lavender J had set out 10 relevant considerations that needed to be looked at. In the instant case, the Employment Tribunal erred in that it failed to consider these matters. Instead, the Employment Tribunal had brought its analysis to an end once it had decided that there was no "economic activity" as the matter involved commissioning.

29. When looking at whether the functions of NC CCG were public administrative functions, Ms Motraghi KC sought to compare them with the activities of the private medical insurer, BUPA. BUPA was said to be involved in the commissioning of

healthcare services for the private market, and so it was eminently possible for the commissioning carried out by NC CCG to be conducted by a private entity.

Ground 3: The Employment Tribunal failed to identify (all) the relevant "activities" of NC CCG or to give adequate reasons for excluding them as "services".

30. Ms Motraghi KC submitted that in considering the activities that the NC CCG was engaged in, the Employment Tribunal's analysis failed to address the monitoring or planning work that the NC CCG undertook, focusing only on the purchasing or commissioning of goods or services. Further, the Employment Tribunal did not deal with the activities of the NC CCG which were set out in the "Functions of CCGs" document that was presented to it.

The Respondent's submissions

Ground 1: The Tribunal misunderstood the test of an economic activity

31. Ms Criddle KC, for the NN ICB, contended that the Employment Tribunal had not misunderstood the test of an economic activity. The correct test was applied by the Employment Tribunal based on the case law summarised in *Nicholls*. An "economic activity" is the offer or provision of goods and services on a market. The claimants in *Nicholls* had advanced an argument that the purchase or commissioning of services, and specifically healthcare services, could of itself constitute an economic activity, and this argument was specifically rejected. Lavender J held in *Nicholls* that the commissioning had to be linked to the provision by the putative transferor itself of the healthcare services being commissioned if the commissioning was to be regarded as an economic activity. Ms Criddle KC submitted that this conclusion in *Nicholls* was entirely consistent with the decision of the CJEU in *FENIN*, and there was no basis for

treating competition law authorities with care when considering the application of TUPE. The cases on economic activity were applied equally in different fields of European Union law. Although the purpose of TUPE was to safeguard employees, this only applied to those who fell within the scope of a relevant transfer.

32. Ms Criddle KC submitted that when considering the meaning of regulation 3(5) of TUPE, the Employment Tribunal, and this appeal tribunal, were required to consider and apply the relevant European Union case law that prevailed as at the date of Implementation Agreement: that is the assimilated case law (see section 6(3) of the European Union (Withdrawal) Act 2018). This meant that *FENIN* needed to be applied.

33. In *FENIN*, the CJEU did not decide that the mere purchase or commissioning of goods or services amounts to an economic activity. Rather, it decided that the nature of purchasing or commissioning activity is determined by examining the use to which the commissioned goods or services have been put.

34. In the instant case, the Employment Tribunal was correct to decide that NC CCG did not use the services that it commissioned. NC CCG did not offer or provide any such services on the market. Accordingly, the Employment Tribunal was right to conclude that NC CCG was not engaged in economic activity. It did not matter that another entity might be involved in an economic activity when healthcare services were actually provided to the patient. There was no warrant for amalgamating the activities of the commissioner and the provider when they were two different persons.

35. In her oral submissions, Ms Criddle KC acknowledged that the Employment Tribunal's reasoning at §§107-113 appears to be muddled as to what was decided in *FENIN*. Nevertheless, this did not matter. The Employment Tribunal was right to follow the decision in *Nicholls*, which had correctly understood and applied *FENIN*. This tribunal

could only depart from the decision in *Nicholls* if it was "manifestly wrong" or decided *per incuriam*: see *British Gas Trading Ltd. v Lock* [2016] 2 CMLR 40 at §75. At the hearing before me, Ms Motraghi KC, on behalf of the Claimants, had accepted that *Nicholls* had not been decided *per incuriam*.

Ground 2: The Employment Tribunal misunderstood the test of public administrative functions

36. Ms Criddle KC submitted that the Employment Tribunal had not misunderstood the test of public administrative functions. The Employment Tribunal identified that the core function of the NC CCG was the commissioning of healthcare services. As this is not itself an economic activity, the Employment Tribunal was correct to follow *Nicholls* at §42. There was no requirement for the Employment Tribunal to go on to consider the guidance set out in *Nicholls* at §45 and weigh up the various indicia described by Lavender J in determining whether the putative transferor was carrying out public administrative functions.

37. Ms Criddle KC argued that, in any event, although there was no explicit weighting of the various indicia, this was done implicitly by the Employment Tribunal and its conclusion could not be impugned.

Ground 3: The Employment Tribunal failed to identify (all) the relevant "activities" of NC CCG or to give adequate reasons for excluding them as "services".

38. Ms Criddle KC contended that the Employment Tribunal clearly concluded that the core function of NC CCG was the commissioning of healthcare services. Everything else was found to be "ancillary to, and in support of that central commissioning

function". As such, the Employment Tribunal adopted the correct approach and did not need to give further reasons for its decision.

Discussion

39. I shall address each of the Grounds of Appeal in turn.

Ground 1: The Tribunal misunderstood the test of an economic activity

40. The Claimants' primary submission was that the Employment Tribunal had misunderstood the decision in *Nicholls* at §42: that Lavender J did not decide that the commissioner had to be the same body that supplies goods or services on the market. This submission is plainly wrong. It is clear that in *Nicholls,* Lavender J did decide that for commissioning to be an economic activity, the commissioner also had to supply goods or services on the market. That is what Lavender J said, or should be understood to have said, at §42 of *Nicholls*. This is reinforced by other passages of Lavender J's judgment, where he rejected the argument that commissioning can be an economic activity if the commissioner does not also supply those goods or services to the market.

41. *Nicholls* was an appeal from a decision concerning the reorganisation of public health functions from the primary care trust to the local authority as part of an earlier reorganisation of the NHS. The individual claimants had been members of the public health team of a primary health care trust. The responsibilities of the team included commissioning third parties to provide public health services. At various places in his judgment, Lavender J referred to the argument that had been made to the employment tribunal that commissioning alone could be an economic activity. Lavender J stated on several occasions that this argument was wrong. Thus, at §79(3) Lavender J pointed out that:

> "One of the public health teams activities was commissioning the provision by third parties of services to members of the public. The claimants placed considerable emphasis on this. However, (a) this was not in itself an economic activity (see *FENIN* [2006] ECR I-6295); and (b) unlike North & West in *Bettercare Group Ltd v Director General of Fair Trading* [2003] ECC 40, the public health team did not have a contractual relationship with the recipients of those services."

42. At §87, Lavender J discussed the tribunal's findings of facts in *Nicholls*:

> "It is worth emphasising what was said about commissioning. As Dr Schwartz [a witness for the respondent] said, the trust had been primarily a commissioning body, with only a few small functions provided in-house. This no doubt explains why a significant focus of the evidence was on the commissioning role of the council. As to that, the claimants submitted: The commissioning of services which are economic activities is necessarily, in itself, an economic activity: see *Bettercare*."

At §88, Lavender J stated that: "I have already explained why this submission was wrong".

43. At §104, Lavender J referred to the tribunal's statement that it was "not persuaded that the involvement of private providers through the process of commissioning undermines the ultimate responsibility for the [council] for public health" and commented that this was "in effect, a rejection of the claimants' submissions that the public health team was carrying on an economic activity because it was commissioning third parties to provide services".

44. I consider that Lavender J's various statements that commissioning by itself could not be an economic activity and that it would only be an economic activity if the commissioner was also involved in the provision of the goods or services to the market were an essential part of his reasoning on the appeal in *Nicholls*; they were not merely *obiter dicta* or what has been described as "judicial dicta"[1]. These statements formed part of the legal framework against which the grounds of appeal were judged. Given

[1] See e.g. *Richard West and Partners (Inverness) Ltd. v Dick* [1969] 2 Ch. 424 at 431, per Megarry J.

that the Employment Tribunal in the present case followed the reasoning of Lavender J in *Nicholls*, I can only allow the appeal on this ground by departing from Lavender J's judgment.

45. According to well-established principles, I should only depart from a previous decision of this appeal tribunal if one of the exceptions identified by Singh J in *British Gas Trading Ltd. v Lock* [2016] 2 CMLR 40 at §75 is present. That is:

> (1) where the earlier decision was per incuriam, in other words where a relevant legislative provision or binding decision of the courts was not considered;
>
> (2) where there are two or more inconsistent decisions of this appeal tribunal;
>
> (3) where there are inconsistent decisions of this appeal tribunal and another court or tribunal on the same point, at least where they are of co-ordinate jurisdiction, for example the High Court;
>
> (4) where the earlier decision is manifestly wrong;
>
> (5) where there are other exceptional circumstances."

46. The decision in *Nicholls* was not *per incuriam* as the relevant case law was considered by Lavender J. Exceptions (2) and (3) do not apply here. As for exception (5), there are no exceptional circumstances present in this case. As for (4), Ms Motraghi KC submitted (in the alternative to her primary submission) that Lavender J was wrong to decide that the commissioner also had to be the provider or supplier to the market. That is not sufficient. To depart from Lavender J's decision, it is not enough for this appeal tribunal to entertain doubts about the analysis of another appeal tribunal, it is necessary to conclude that the decision was "manifestly wrong". In *Lock*, Singh J explained at §77 that a decision is "manifestly wrong" if it can be seen to be "obviously wrong ("manifest")."

47. I need to consider, therefore, whether Lavender J's analysis was obviously, or manifestly, wrong. The starting point for considering Lavender J's analysis is the relevant Council Directive from which TUPE derives: Council Directive 2001/23/EC on the approximation of the laws of the Member States relating to the safeguarding of employees' rights in the event of transfers of undertakings, businesses or parts of undertakings or businesses (also known as "the Transfer of Undertakings Directive"), which replaced and updated the Acquired Rights Directive 77/187/EC. The preamble to the Transfer of Undertakings Directive provides at (3) that "It is necessary to provide for the protection of employees in the event of a change of employer, in particular, to ensure that their rights are safeguarded". Article 1 of the Transfer of Undertakings Directive provides that:

> "(a) This Directive shall apply to any transfer of an undertaking, business, or part of an undertaking or business to another employer as a result of a legal transfer or merger.
>
> (b) Subject to subparagraph (a) and the following provisions of this Article, there is a transfer within the meaning of this Directive where there is a transfer of an economic entity which retains its identity, meaning an organised grouping of resources which has the objective of pursuing an economic activity, whether or not that activity is central or ancillary.
>
> (c) This Directive shall apply to public and private undertakings engaged in economic activities whether or not they are operating for gain. An administrative reorganisation of public administrative authorities, or the transfer of administrative functions between public administrative authorities, is not a transfer within the meaning of this Directive."

48. The focus of Article 1 of the Transfer of Undertakings Directive is on the "transfer of an economic entity . . . which has the objective of pursuing an economic activity". It applies broadly to public and private bodies, whether they are profit-seeking or not. A clear exception applies to a transfer which involves the "administrative reorganisation of public administrative authorities, or the transfer of administrative functions between public administrative authorities". This exception gives effect to the decision of the

Court of Justice in *Henke v Gemeinde Schierke* [1997] ICR 746 under the Acquired Rights Directive.

49. Article 1 of the Transfer of Undertakings Directive was given effect in domestic law by TUPE. Regulation 3 of TUPE provides that:

> "(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;
>
> . . .
>
> (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.
>
> . . .
>
> (4) Subject to paragraph (1), these Regulations apply to—
>
> (a) public and private undertakings engaged in economic activities whether or not they are operating for gain;
>
> . . .
>
> (5) An administrative reorganisation of public administrative authorities or the transfer of administrative functions between public administrative authorities is not a relevant transfer."

50. During the period when the United Kingdom was a member state of the European Union, domestic courts were obliged to interpret TUPE in accordance with the Transfer of Undertakings Directive and the jurisprudence of the CJEU interpreting that Directive. As the present case involves a dismissal that occurred before the expiry of the Implementation Period, that jurisprudence (the "assimilated case law") is binding on this appeal tribunal pursuant to the European Union (Withdrawal) Act 2018.

51. There was considerable case law from the CJEU as to the meaning and scope of an "economic activity". The most succinct description of an economic activity is that it

encompasses "any activity consisting in offering goods and services on a given market" (the Employment Tribunal in this case set out some of the key jurisprudence at §§92-96 (see §6 above)).

52. There does not appear to be any case in which the CJEU considered whether commissioning or purchasing goods and services could amount to an economic activity in the employment context: that is, under the Acquired Rights Directive or the Transfer of Undertakings Directive. In the competition law context, this question was considered in the case of *FENIN*. The same had been considered in the domestic law context by the Competition Appeal Tribunal's decision in *BetterCare*. Both cases were described and analysed by Lavender J. in *Nicholls* as follows:

> "29. *Bettercare* was an appeal to the CCAT against the decision of the Director General of Fair Trading that the North and West Belfast Health and Social Services Trust ("North & West") was not an undertaking for the purposes of Chapter II of the Competition Act 1998 in relation to its activity of entering into contracts with the operators of nursing and residential care homes.
>
> 30. The CCAT explained (in paras 112, 119, 131–133 and 180) that there had been delegated to North & West the duty under article 15(1) of the Health and Personal Social Services (Northern Ireland) Order 1972 (SI 1972/1265) to "provide or secure the provision of such facilities (including the provision or arranging for the provision of residential of other accommodation …) as it considers suitable and adequate."
>
> 31. North & West operated eight care homes itself, providing 189 beds. It also contracted with independent care home providers for the provision of a further 604 beds in care homes: see paras 182–183. North & West entered into agreements with both the residents of its care homes and the residents of the independent care homes who were there pursuant to contracts entered into by North & West. North & West's agreements with the residents were the same in each case: see para 141. The agreements with the residents covered the fees payable by the residents. As provided for in articles 36(2) and 99(4) of the 1972 Order, the fees paid by each resident to North & West depended on the resident's means: see paras 113 to 115, 142, 187 and 188. Understandably, the CCAT regarded the residents of both types of care home as North & West's customers: see para 254.

32. The CCAT was obliged by section 60 of the Competition Act 1998 to act with a view to ensuring that there was no inconsistency between: (1) the principles it applied and the decisions it reached; and (2) the principles laid down by the Treaty on European Union and the Court of Justice and any relevant decisions of the Court of Justice. The CCAT referred (in para 189) to the definition of an economic activity as one which involved offering goods and services on the market. But it did not regard this (or a different formulation, namely "any activity directed at trade in goods and services") as "necessarily exhaustive" as to what an economic activity might be, especially having regard to what it called a "key consideration" (raised by Advocate General Jacobs in para 71 of his opinion in *Cisal di Battistello Venanzio & Co Sas v Istituto nazionale per l'assicurazione contro gli infortuni sul lavoro* (Case C-218/00) [2002] ECR I-691), namely whether the undertaking in question "is in a position to generate the effects which the competition rules seek to prevent." (See also paras 249 and 250 of the CCAT's judgment.)

33. In paras 191–201 the CCAT gave several different reasons for concluding that North & West was an undertaking carrying on an economic activity. It carried out a "cross-check" on its approach in paras 202–220. It then went on in paras 221–289 to consider, and reject, various arguments to the contrary advanced by the Director General.

34. One of the reasons given by the CCAT for holding that North & West was carrying on an economic activity was that it was offering services to care home residents for a fee: see, in particular, paras 201, 254, 264 and 274–275. This is perhaps most clearly expressed in para 264:

"the legal analysis in this case is that North & West, having purchased the 'bed' in question, then 're-supplies' that bed by means of a further contract with the resident who is liable to pay North & West the cost of his accommodation, up to his available means. Here again, it seems to us that that is activity of an 'economic' character, albeit in a social context."

35. This analysis seems to me to be entirely consistent with the definition of an economic activity as one which involves offering goods and services on a market. However, the other reasons given by the CCAT for its conclusions are more difficult to square with that definition and, as will appear, are inconsistent with the Court of Justice's decision in *FENIN*. In particular:

(1) The CCAT expressed, or appeared to express, the view that it was an economic activity in itself for North & West to enter into commercial contracts with care home operators: see, in particular, paras 191–194 and 195–199. This is inconsistent with the decision in *FENIN* .

(2) The CCAT also relied on the fact that North & West itself operated eight care homes: see para 200. This lent support to the conclusion that North & West provided services to the residents of independent care

homes, but would perhaps not be a sufficient reason in itself for concluding that North & West was providing services to those residents and so carrying on an economic activity in connection with which it entered into contracts with the care home operators.

36. Finally, in relation to *Bettercare*, I should mention the CCAT's consideration of the potential application of the Henke exception: see paras 81, 82, 85, 86, 172–175 and 224–226. *Eurocontrol* [1994] ECR I-43 and *Diego Cali* [1997] ECR I-1547 were cited, but seemingly not *Henke v Gemeinde Schierke* (Case C-298/94) [1997] ICR 746 itself. The CCAT's conclusion, in para 175, was:

"It seems to us that the factual situations which arose in *Eurocontrol* and *Diego Cali* are different from the situation in the present case. In particular, we are not here concerned with regulatory or administrative decisions of the kind normally classified by the European Court as 'the exercise of official authority'."

(ii) *FENIN*

37. *FENIN* (Case C-205/03) [2006] ECR I-6295 concerned the purchase of medical goods and equipment for use in the Spanish national health service ("the SNS"). The suppliers of such goods alleged that the bodies managing the SNS were abusing their dominant position in the relevant market. This gave rise to an issue whether the SNS managing bodies were carrying on an economic activity when they bought medical goods and equipment for use in the SNS.

38. The decision of the Court of First Instance (which is reported at [2003] 5 CMLR 1) was summarised as follows by Advocate General Polares Maduro in para 7 of his opinion:

"In the judgment under appeal, the Court of First Instance dismissed the action brought by *FENIN* and held that the Commission had correctly applied the concept of an undertaking within the meaning of articles 82EC and 86EC of the EC Treaty. That court adopted a three-stage approach in reaching that conclusion. First, in para 36 of the judgment, it distinguished between purchasing and supplying activities, stating that: 'It is the activity consisting in offering goods and services on a given market that is the characteristic feature of an economic activity … not the business of purchasing, as such.'

"The Court of First Instance went on to hold that: 'It would be incorrect, when determining the nature of that subsequent activity, to dissociate the activity of purchasing goods from the subsequent use to which they are put.'

"It is therefore necessary to consider whether or not the use of the purchased goods amounts to an economic activity. The Court of First Instance based its analysis on *Poucet and Pistre v AGF* and *Cancava* (Joined Cases C-159/91 and C-160/91) [1993] ECR I-637 and

Fédération Française des Sociétés d'Assurance v Ministère de l'Agriculture et de la Pêche (Case C-244/94) [1995] ECR I-4013, in order to hold, in para 39 of the judgment under appeal, that: 'The SNS, managed by the ministries and other organisations cited in the applicant's complaint, operates according to the principle of solidarity in that it is funded from social security contributions and other state funding and in that it provides services free of charge to its members on the basis of universal cover.'

"Accordingly, the purchasing activities linked to an activity which was not of an economic nature were classified in the same way. The organisations covered by *FENIN*'s complaint were accordingly not undertakings for the purposes of articles 82EC and 86EC."

39. There were two grounds of appeal to the Court of Justice (described as two parts of a single plea). The second ground was that the Court of First Instance should have held that the purchasing activity was economic in nature because the provision of medical treatment by the SNS was economic in nature. The Court of Justice held that this ground was inadmissible, because this issue was not raised before the Court of First Instance. The first ground of appeal was that the purchasing activity was in itself an economic activity.

40. Advocate General Polares Maduro considered *Bettercare Group Ltd v Director General of Fair Trading* [2003] ECC 40 (in para 24 of his opinion), but went on to say as follows in paras 65 and 66, in terms which were inconsistent with the wider interpretation of "economic activity" adopted in *Bettercare*:

"65. The appellant claims that, in determining whether the purchasing activity of the SNS was economic in nature, the Court of First Instance should have considered whether it was liable to have anti-competitive effects in order not to create 'unjustified areas of immunity'. However, such a criterion cannot be accepted, since it would amount to subjecting every purchase by the state, by a state entity or by consumers to the rules of competition law. On the contrary, as the judgment under appeal rightly pointed out, a purchase falls within the scope of competition law only in so far as it forms part of the exercise of an economic activity. Moreover, if the appellant's argument were to be adopted, the effectiveness of the rules relating to public procurement would be reduced. The link established between the conduct complained of by the complainants and the non-economic activity of the organisation referred to was also at the heart of the reasoning applied in *Eurocontrol* in order to hold that competition law did not apply. It was held that the receipt of a payment by *Eurocontrol* was not economic in nature, since it was made in the course of carrying out a non-economic activity.

"66. *Ambulanz Glöckner*, which was cited by the appellant in support of its position, confirms on the contrary the approach taken by the Court of First Instance, since the Court of Justice did not accept in that case that the refusal of a public authority to grant an authorisation to a carrier

> should be considered under article 81EC, as that decision did not represent the exercise of an economic activity, but, on the contrary, sought to regulate and circumscribe it. Thus, where a purchase is linked to the performance of non-economic functions, it may fall outside the scope of competition law. That conclusion is consistent with the economic theory according to which the existence of a monopsony does not pose a serious threat to competition since it does not necessarily have any effect on the downstream market. Furthermore, an undertaking in a monopsonistic position has no interest in bringing such pressure to bear on its suppliers that they become obliged to leave the upstream market. There is therefore no reason to set aside the judgment under appeal on the ground that it incorrectly interpreted the case law relating to whether or not a purchase is an economic activity."
>
> 41. The Court of Justice [2006] ECR I-6295 agreed, saying, in paras 25–27:
>
> "25. The Court of First Instance rightly held, in para 35 of the judgment under appeal, that in Community competition law the definition of an 'undertaking' covers any entity engaged in an economic activity, regardless of the legal status of that entity and the way in which it is financed (*Höfner v Macrotron GmbH* (Case C-41/90) [1993] 4 CMLR 306 , para 21; and *AOK-Bundesverband v Ichthyol-Gesellschaft Cordes, Hermani & Co* (Joined Cases C-264/01, C-306/01, C-354/01 and C-355/01) [2004] 4 CMLR 22 , para 46). In accordance with the case law of the Court of Justice, the Court of First Instance also stated, in para 36 of the judgment under appeal, that it is the activity consisting in offering goods and services on a given market that is the characteristic feature of an economic activity (*Commission v Italy* (C-35/96) [1998] 5 CMLR 889, para 36).
>
> "26. The Court of First Instance rightly deduced, in para 36 of the judgment under appeal, that there is no need to dissociate the activity of purchasing goods from the subsequent use to which they are put in order to determine the nature of that purchasing activity, and that the nature of the purchasing activity must be determined according to whether or not the subsequent use of the purchased goods amounts to an economic activity.
>
> "27. It follows that the first part of the single plea raised by *FENIN* in support of its appeal, that the purchasing activity of the SNS management bodies constitutes an economic activity in itself, dissociable from the service subsequently provided and which, as such, should have been examined separately by the Court of First Instance, must be dismissed as unfounded."

53. At §42 in *Nicholls*, Lavender J. drew the following conclusion from these cases:

> "It follows that: (1) the purchasing or commissioning of goods or services cannot in itself constitute an economic activity; but (2) a body

> which supplies goods or services on a market is carrying on an economic activity, both in supplying those goods or services and in purchasing goods or services for the purpose of that supply."

54. At §43, Lavender J stated that:

> "Before leaving *FENIN*, it is helpful to note what Advocate General Polares Maduro said in para 26 of his opinion, which, although expressly directed to competition law, is surely equally applicable to the present context:
>
> "In seeking to determine whether an activity carried on by the state or a state entity is of an economic nature, the court is entering dangerous territory, since it must find a balance between the need to protect undistorted competition on the Common Market and respect for the powers of the member states. The power of the state which is exercised in the political sphere is subject to democratic control. A different type of control is imposed on economic operators acting on a market: their conduct is governed by competition law. But there is no justification, when the state is acting as an economic operator, for relieving its actions of all control. On the contrary, it must observe the same rules in such cases. It is therefore essential to establish a clear criterion for determining the point at which competition law becomes applicable. In principle, the rules of competition law apply only to economic operators who participate on a market and not to states, save where they pay aid to undertakings (articles 88–92EC). However, the need for consistency means that if a state ratifies decisions taken by undertakings or if it conducts itself in practice as an economic operator, articles 81–86EC may apply to it."

55. At §47, Lavender J. addressed the definition of "economic activity", stating that the definition was settled: it was "[a]ny activity consisting in offering goods and services on a given market is an economic activity". At §48, Lavender J stated

> "It is clearly relevant for these purposes for the court to consider: (1) whether the activity consists in the provision of goods and services (as opposed, for example, to the mere acquisition of goods or services: see *FENIN* [2006] ECR I-6295); and (2) whether there is a market for the relevant goods or services."

56. I heard considerable argument as to whether or not Lavender J. had correctly understood *FENIN*, and whether in any event the principles of *FENIN* were applicable to TUPE given that the context of a competition law case is very different from one involving provisions to safeguard employment.

57. The key paragraph in Lavender J's judgment in *Nicholls* is §42. The first limb of that paragraph – "(1) the purchasing or commissioning of goods or services cannot in itself constitute an economic activity" – is a correct understanding of what was decided by the Court of First Instance in *FENIN*. That is what the Court of First Instance said at §36: "it is the activity consisting of offering goods and services on a given market that is the characteristic feature of an economic activity . . . not the business of purchasing, as such". This was further explained by the Court of First Instance at §37:

> Consequently, an organisation which purchases goods - even in great quantity - not for the purpose of offering goods and services as part of an economic activity, but in order to use them in the context of a different activity, such as one of a purely social nature, does not act as an undertaking simply because it is a purchaser in a given market. Whilst an entity may wield very considerable economic power, even giving rise to a monopsony, it nevertheless remains the case that, if the activity for which that entity purchases goods is not an economic activity, it is not acting as an undertaking for the purposes of Community competition law and is therefore not subject to the prohibitions laid down in Articles 81 (1) EC and 82 EC.

This analysis of the Court of First Instance was approved by the CJEU at §26-27 (as quoted by Lavender J in *Nicholls*: see §51 above): that is, the purchasing activity is not "an economic activity in itself, dissociable from the service subsequently provided".

58. As for the second limb of Lavender J's judgment at §42 which reads: "but (2) a body which supplies goods or services on a market is carrying on an economic activity, both in supplying those goods or services and in purchasing goods or services for the purpose of that supply", this is a fair reading of the Courts' decisions. The factual scenario presented to the Courts was of a party (SNS) that was understood to be involved in both the purchasing of goods and the provision of services, and a fair reading of the Courts' decisions is that if the provision of the healthcare services by SNS had been an

economic activity (and not a social activity), then SNS' purchasing activities would also have been regarded as, or part of, an economic activity.

59. Thus, at §37 of its decision, the Court of First Instance referred to the purchase of goods "in order to use them", which suggests use by the purchaser itself. Similarly, at §40, the Court of First Instance referred to "the organisations in question also do not act as undertakings when purchasing from the members of the applicant association the medical goods and equipment which *they require* in order to provide free services to SNS members". The CJEU, in its decision, referred merely to "the subsequent use of the purchased goods" (see §26) and to "the service subsequently provided" (see §27), which could refer to two different entities. However, given the factual scenario that was before the CJEU, it is fair to infer that the court was referring to the purchaser and the provider as being the same entity.

60. Lavender J deduced from the decision in *FENIN* that, as a matter of principle, the commissioner of goods or services also had to be their provider. The Courts in *FENIN* did not say that expressly, as that was not the question that they were considering, and so it is arguable that this deduction was wrong. Nevertheless, it is not obviously or manifestly wrong for Lavender J to have made that deduction. It fits with the general proposition that an economic activity involves "any activity consisting in offering goods and services on a given market" (see, for instance, *Ambulanz Glockner v Landkreis Sudwestpfalz* [2002] 4 CMLR 21); and so for commissioning to be an economic entity, it is not obviously or manifestly wrong to decide that the commissioner must also offer the commissioned goods and services on a given market.

61. I do entertain some doubt, however, as to whether the principles established in (or deduced from) *FENIN*, a competition law case, should have been applied to the

employment arena. Ms Motraghi KC argued that, in the competition law context, the test of "economic activity" is concerned with whether an operator had the potential to distort the market, and this is different from the Acquired Rights Directive/Transfer Directive context which is concerned with the safeguarding of employment rights following a change of ownership or reorganisation. I see much force in that argument.

62. The competition law context of *FENIN* was illustrated by the analysis of the Advocate General in his Opinion at §66:

> "where a purchase is linked to the performance of non-economic functions, it may fall outside the scope of competition law. That conclusion is consistent with the economic theory according to which the existence of a monopsony does not pose a serious threat to competition since it does not necessarily have any effect on the downstream market. Furthermore, an undertaking in a monopsonistic position has no interest in bringing such pressure to bear on its suppliers that they become obliged to leave the upstream market."

The same concerns are not necessarily applicable to the employment context of the Acquired Rights Directive or Transfer Directive. It is arguable, therefore, that the "purposive" interpretation called for by Ms Motraghi KC so as to safeguard employment rights upon a reorganisation such as occurred here calls for a different analysis in the employment context.

63. I cannot say, however, that Lavender J's application of *FENIN*, a competition law case, to the TUPE context was manifestly wrong, as it is well recognised that the CJEU has applied the same definition of an "economic activity" (that is, any activity consisting in offering goods or services on a given market) in both competition law and Acquired Rights Directive or Transfer Directive cases: see eg. *Scattolon v Ministero dell'Istruzione, dell'Università e della Ricerca* (Case C-108/10) [2012] ICR 740 at §43; and *Piscarreta Ricardo v Portimão Urbis EM SA* (Case C-416/16) [2017] ICR 1451 at §34.

64. In my judgment, therefore, although I do entertain doubts about Lavender J's analysis in *Nicholls* that commissioning is not an economic activity for the purposes of TUPE where the commissioner does not provide the goods or services on the market itself, it is not obviously, or manifestly, wrong. Accordingly, in line with the approach adopted in *Lock,* it is not appropriate for me to find that the Employment Tribunal erred in law in following *Nicholls*. If the analysis in *Nicholls* is wrong, that needs to be corrected by the Court of Appeal.

65. With respect to the Claimant's further argument under this ground of appeal – that the Employment Tribunal's understanding of *FENIN* was muddled -- I agree. Nevertheless, this did not impact on its ultimate decision. The Employment Tribunal made it clear that it was following the judgment in *Nicholls* that commissioning by itself could not amount to an economic activity, and that the commissioner also had to be a provider.

Ground 2: The Employment Tribunal misunderstood the test of public administrative functions

66. I do not consider that the Employment Tribunal erred by failing to consider whether the *Henke* test/regulation 3(5) of TUPE was satisfied. The Employment Tribunal found that the activities of the NC CCG did not constitute an "economic activity" for the purposes of TUPE, as the NC CCG's primary responsibilities were those of commissioning healthcare services. According to Lavender J's analysis in *Nicholls* (as discussed under Ground 1), this meant that there could not be a "relevant transfer". It was not necessary, therefore, for the Employment Tribunal to go on to determine whether or not regulation 3(5) of TUPE was satisfied by examining whether the NC CCG was exercising public administrative functions, using the checklist of factors that Lavender J identified in *Nicholls* at §55.

67. At §45, Lavender J stated that the court or tribunal had to determine whether an entity's activities fell within one or other of two mutually exclusive categories (i) economic activity, or (ii) the *Henke* category. Where there has been a finding that the entity's activities do not fall within (i), there is no need for the employment tribunal to go on to consider whether it falls within (ii).

68. Ms Criddle KC sought to persuade me that the Employment Tribunal did go on to examine whether the NC CCG was engaged in public administrative functions. This argument is not borne out by the Employment Tribunal's reasoning in this case. It did not address its mind to Lavender J's checklist in *Nicholls*: indeed, the Employment Tribunal specifically stated that it did not need to do so. Accordingly, had I decided that it was necessary for the checklist propounded by Lavender J to be gone through, I would have found that the Employment Tribunal had erred in law and would have remitted the case for it to carry out that exercise.

Ground 3: The Employment Tribunal failed to identify all of the relevant activities of NC CCG or to give adequate reasons for excluding them from services

69. In my judgment, the Employment Tribunal did make sufficient findings with respect to the relevant activities of NC CCG and gave adequate reasons for why NC CCG needed to be treated as a commissioning entity.

70. I have set out at §§8-10 above the Employment Tribunal's findings with respect to the functions of NC CCG. The Employment Tribunal stated clearly at §101 of its decision that the NC CCG's core function was to arrange for the provision of health services, such that whatever was done other than commissioning or monitoring services was subordinate to its core role. The Employment Tribunal explained the basis for this finding: that this derived from the statutory framework. The other functions or activities

of the CCG described at §§102-103 of the Employment Tribunal's decision, were clearly ancillary to that core function. In my judgment, there was no requirement for the Employment Tribunal to say anything more about these matters.

Conclusion

71. For the foregoing reasons, I dismiss this appeal.