TUPE's public-private divide

Bicknell (1) The British Medical Association (2) v NHS Nottingham and Nottinghamshire Integrated Commissioning Board [2024] EAT 103

Abstract

This note reviews the decision of the Employment Appeal Tribunal in *Bicknell (1) The British Medical Association (2) v NHS Nottingham and Nottinghamshire Integrated Commissioning Board* and its consideration of the limitation of the scope of the Transfer of Undertakings (Protection of Employment) Regulations 2006 to "economic activity." This limitation, when combined with the exclusion from the application of the transfer of undertakings legislation of "public administrative" reorganisations, creates a public-private divide - a "public sector exclusion zone" - in the application of the transfer of undertakings regime. This note argues that the doubts expressed by the EAT in *Bicknell* about the decision in *Nicholls & Anor v London Borough of Croydon & Ors* – in which it was held that the purchasing and commission of goods and services do not constitute an economic activity for the purposes of the transfer legislation - are well founded. The approach adopted in *Nicholls*, which was based on EU competition law authorities addressing the entirely different context of competition regulation, should therefore be revisited. Applying a purposive TUPE-specific approach, the purchasing and commission of goods and services should, depending on the factual matrix, be treated as capable of constituting an economic activity for the purposes of TUPE. This approach would, consistent with the objectives of the transfer legislation, enable the (better) protection of the employment of those engaged in purchasing and commissioning activities, whether or not conducted under the broad umbrella of the public sector, who are affected by reorganisations and similar exercises otherwise satisfying the requirements of a TUPE transfer.

Introduction

The Transfer of Undertakings (Protection of Employment) Regulations 2006[1] establish what can be described as a "public sector exclusion zone" taking certain transfers of staff and functions in the public sector context outside their reach. This is effected by the combination of the limitation of the scope of TUPE to those operations which constitute an "economic activity" and the exclusion from its application of what can be described as public sector reorganisations.

In relation to a "traditional" transfer of an undertaking,[2] the objective of an economic entity falling within the scope of the transfer legislation must be the pursuit of an economic activity.[3] The nature of the activity must be economic even if it is not pursued for commercial purposes,[4] and even if the relevant organisation is a public law entity, is publicly funded, acts in the public interest, or acts pursuant to statutory functions.[5]

Consistent with Article 1(1)(c) of the Acquired Rights Directive,[6] TUPE reg 3(5) provides that an administrative reorganisation of public administrative authorities or the transfer of administrative functions between public administrative authorities is not a "relevant transfer" for the purposes of TUPE.[7]

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[1] SI 2006/246 ("TUPE")
[2] For the purposes of TUPE reg 3(1)(a).
[3] TUPE reg 3(2) provides (emphasis added) that "[i]n 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." Notably, this requirement does not form one of the explicit elements of a service provision change for the purposes of TUPE reg 3(1)(b) which is framed by reference to the conduct of activities by or on behalf of a "client."
[4] Trade Union Reform and Employment Rights Act 1993, s 33 removed from the 1981 iteration of TUPE the exclusion of non-commercial ventures from its scope.
[5] *Nicholls & Anor v London Borough of Croydon & Ors* [2018] IRLR 988 [47]-[51], reflecting the considerable body of prior case law.
[6] 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, business or parts of undertakings OJ [2001] L82/16.
[7] See *Henke v Gemeinde Schierke and Verwaltungsgemeinschaft Brocken* [1997] ICR 746.

With regard to the public sector, the policy basis for this structure is presumably to ensure that those whose work concerns functions that are equivalent or akin in nature to private sector business/economic activities – especially those engaged in service provision or "delivery" - should potentially benefit from the same protections on a change of employer as private sector employees. In contrast, the work of those engaged on "core" state/public sector activities, concerning matters such as security, defence, and energy, is not equivalent or akin to business/economic activity and is conducted subject ultimately to democratic control which should determine their employment protection rather than the transfer of undertakings legislation.

The nature and scope of the exclusion from the application of TUPE of the reorganisation of "core" administrative functions within the public sector pursuant to TUPE reg 3(5) is illustrated by the various cases addressing the application of that exclusion[8] along with the situations in which "TUPE-like" protection has been extended, pursuant to Employment Relations Act 1999 s 38, to public sector reorganisations otherwise falling outside the scope of TUPE.[9] However, in relation to the assessment of what constitutes an

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[8] For example, in *Institute of Chartered Accountants of England & Wales v Customs and Excise Commissioners* [1997] STC 1115, the operations of the Institute of Chartered Accountants were considered to be a regulatory public service and therefore not to be an economic activity. In *Adult Learning Inspectorate v Beloff* UKEAT/0238/07, the EAT upheld the ET's decision that OFSTED was a public administrative authority by virtue of its regulatory functions. In *Law Society of England and Wales v the Secretary of State for Justice and the Office for Legal Complaints* [2010] IRLR 407 the High Court considered that the Legal Complaints Service was a public administrative body, again on the basis that it was a public body whose functions involved the exercise of public authority.

[9] Examples include the Transfer of Undertakings (Protection of Employment) (Rent Officer Service) Regulations 1999, SI 1999/2511, the Transfer of Undertakings (Protection of Employment) (Transfer to OFCOM) Regulations 2003, SI 2003/2715, the Transfer of Undertakings (Protection of Employment) (RCUK Shared Services Centre Limited) Regulations 2012, SI 2012/2413, the Transfer of Undertakings (Protection of Employment) (Transfers of Public Health Staff) Regulations 2013, SI 2013/278, the Transfer of Undertakings (Protection of Employment) (Transfer of Staff to the Department for Work and Pensions) Regulations 2014, SI 2014/1139, and the Transfer of Undertakings (Protection of Employment) (Transfer of Police Staff to the National Crime Agency) Regulations 2019, SI 2019/2067.

economic activity, the exclusion from the scope of TUPE of more quasi-commercial activities, such as the healthcare commissioning activities considered in the cases which are the subject of this note, is a more challenging and controversial issue.

The key question in this context is where the dividing line is to be drawn between economic activity falling potentially within the scope of TUPE, even if conducted in the public sector, and "public administrative" activities. More specifically, the issue raised by the cases reviewed in this note is whether the commissioning and purchasing of goods and services should, for the purposes of TUPE, be considered to be a "service delivery" related function which is economic in nature – and therefore potentially within the scope of TUPE - or as part of the core exercise of public administration, in terms of the provision of public healthcare - to which TUPE should not be capable of applying. This can be an important question for public sector employees especially in light of the continued diversification of employment structures arising from ongoing marketisation and innovation in public service delivery.

In *Bicknell (1) The British Medical Association (2) v NHS Nottingham and Nottinghamshire Integrated Commissioning Board,*[10] the Employment Appeal Tribunal ("EAT") had the opportunity to address the operation of TUPE's public sector exclusion zone in the context of the merger of two clinical commissioning groups ("CCGs"), being organisations established under the Healthcare and Social Care Act 2012 to have responsibility for the commissioning of health care services for specific geographical areas. The claims which came before the EAT arose from the merger of the NHS Nottingham City Commissioning Group, along with other CCGs, into the NHS Nottingham and

[10] [2024] EAT 103.

Nottinghamshire Integrated Commissioning Board, and depended on this merger constituting a "relevant transfer" for the purposes of TUPE.[11]

The ET[12] found that there was no relevant transfer for the purposes of TUPE, applying *Nicholls & Anor v London Borough of Croydon & Ors*[13] in which Lavender J's analysis comprised the following two limbs:

> (1) the purchasing or commission of goods or services cannot in itself constitute an economic activity; but
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> (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 and services for the purposes of that supply.[14]

In its findings of fact, the ET concluded (as noted by the EAT) that '[i]n 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".'[15] Consistent with this, the ET found 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.'[16] In conclusion, the ET found[17] that the 'principal work of [the] CCG was to commission healthcare services from providers to be delivered by those providers to the public,' that this fell "squarely" within the first limb of *Nicholls* and therefore did not

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[11] The specific claims in question were brought by a GP Clinical Lead employed by the NHS Nottingham City Commissioning Group for automatically unfair dismissal under TUPE reg 7 and unfair dismissal under TUPE reg 7(2) and by the British Medical Association for breach of TUPE regs 13(2) and 13(6) regarding collective information and consultation.
[12] Case Number: 2602790/2020.
[13] n 5.
[14] Ibid. [42].
[15] *Bicknell* (n 10) [7].
[16] Ibid. [9].
[17] Ibid. [11].

constitute the supply goods or services on a market. The CCG did not therefore "without more" undertaking an economic activity.[18]

The ET also rejected the claimants' argument that a proper interpretation of the EU law addressing the meaning of economic activity in the context of the purchasing and commission of goods and services should be treated as an economic activity, not least as it was bound by the authority in *Nicholls*. Since the requirement for an economic activity was not satisfied, there could be no TUPE transfer.[19]

On appeal to the EAT, the claimants argued that the ET misunderstood the test of what constitutes an economic entity, misunderstood the meaning of public administrative functions and the need to address this issue,[20] and failed to identify all the relevant activities of the relevant CCG or give adequate reasons for not treating them as services.[21] The opportunity therefore arose for the EAT to revisit the limitation on the protective scope of TUPE established by *Nicholls* – that the purchasing and commission of goods and services does not constitute an economic activity and therefore falls outside the scope of the transfer legislation.

The approach of EU competition law

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[18] Ibid.

[19] *Bicknell* (n 10) [13]. On the basis of this clear conclusion, the ET rejected the contention that it was necessary to consider the ten point test set out by Lavender J in *Nicholls* ((n 5) [55] addressed further below) to determine whether an activity is an economic activity or a public administrative function.

[20] This ground of appeal was given short shrift by Sheldon J at *Nicholls* (n 5) [66-68]. To paraphrase, once, as explained below, the relevant functions were held not to constitute an economic activity, there was no need for or obligation on the ET separately to consider whether they constituted the exercise of public administrative functions for the purposes of TUPE reg 3(5).

[21] This ground of appeal was also rejected as Sheldon J was satisfied that the ET did make sufficient findings with respect to the activities being scrutinised and gave adequate reasons for its decision (*Nicholls* (n 5) [66]-[68]).

Lavender J's conclusion in *Nicholls*[22] - that the purchasing and commission of goods or services does not constitute an economic activity - was based in essence on applying in the TUPE context the assessment of an economic activity for EU competition law purposes as established in *FENIN*[23] and associated cases. Constraints of space preclude detailed recitation or review of the extensive analysis of this case law conducted both in *Nicholls* and *Bicknell*. However, by way of summary of the EU competition law analysis, to adopt Whish and Bailey's commentary, '[e]conomic activity consists in offering goods or services on a market and '[i]t is not the mere possibility that private operators could carry on the activity that is decisive, but the fact that the activity is carried on under market conditions.'[24]

FENIN concerned a complaint that certain bodies responsible for the national health service in Spain had abused their dominant market position in relation to purchasing. The European Commission had rejected a complaint brought by a trade association representing affected organisations on the basis that the organisations in question were not undertakings i.e. an entity engaged in an economic activity. The General Court, upheld by the CJEU, held that, when providing healthcare to the public, the bodies in question did so as the basis of "solidarity" and this was therefore not an economic activity. The ancillary purpose of procurement of the relevant services was similarly considered not to be an economic activity.

The claimants' challenge to *Nicholls*

In seeking to establish that there was a relevant transfer in these circumstances, the claimants were inevitably hemmed in by the decision in *Nicholls* and sought to argue that Lavender J's decision did not mean that the purchasing and commission of goods and services alone could

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[22] n 5.
[23] *FENIN v Commission of the European Communities* [2006] 5 CMLR 7.
[24] Whish & Bailey, *Competition Law* (11th edn, Oxford: Oxford University Press, 2024) 85.

not be an economic activity. As Sheldon J put it,[25] the claimants' primary submission to the EAT in *Bicknell* was that the ET had misunderstood the decision in *Nicholls*.

The claimants argued[26] that whether the commissioning of goods and services is an economic activity cannot be assessed without considering the "downstream" use of those goods and services, arguing that their commission and subsequent use are "indissociable." On this analysis, to paraphrase, where goods or services that are commissioned are subsequently offered on a market, the commissioning itself will be an economic activity whereas commissioning/purchasing of goods and services will not be an economic activity if those goods or services are not so offered on a market.

Consistent with this, the claimants argued that Lavender J did not decide[27] that, in order for the purchasing and commission of goods and services to be an economic activity, the "commissioner" had to be the same body that supplies the goods or services on the market in question – and that therefore the purchasing or commission of goods or services alone could not be an economic activity. On their argument, the second limb of the test - 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 and services for the purposes of that supply - was 'simply an amplification of the need to consider the downstream use of the commissioned goods and services.'[28]

The EAT's assessment of *Nicholls*

The claimants' submissions on the substance of the *Nicholls* judgment were rejected as Sheldon J considered that Lavender J did say or 'should be understood to have said' precisely what the claimants challenged.[29] Indeed, variously in his judgment in *Nicholls* Lavender J

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[25] *Bicknell* (n 10) [40].
[26] Ibid. [19]-[20].
[27] *Nicholls* (n 5) [42].
[28] *Bicknell* (n 10) [18].
[29] Ibid. [40].

had made clear that it was wrong to argue that 'commissioning alone could be an economic activity.'[30] These statements were viewed by Sheldon J as "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.""[31] As a consequence, by reference to the principles identified in *British Gas Trading v Lock*,[32] the EAT concluded that it could only depart from *Nicholls* if that decision were "manifestly wrong,"[33] it not being enough for the EAT to "entertain doubts"[34] about the prior decision.

In his review of the challenge which the claimants in *Bicknell* mounted to the correctness of the decision in *Nicholls,* thereby to determine whether it was manifestly wrong and should be departed from, Sheldon J noted several uncontroversial points. He referenced the employment protective purpose of the Acquired Rights Directive,[35] its application broadly to public and private bodies whether profit seeking or not,[36] the obligation whilst the United Kingdom was a member state of the European Union to interpret TUPE in accordance with the Acquired Rights Directive,[37] and the exception from its scope of the "administrative reorganisation of public administrative authorities, or the transfer of administrative functions between public administrative authorities."[38]

More specifically with regard to the question of what constitutes an economic activity for the purposes of TUPE, Sheldon J, who made extensive reference in his judgment to the

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[30] Ibid. [41]-[43] citing Lavender J in *Nicholls* (n 5) [79(3)] [87] [88] [104].
[31] Ibid. [44].
[32] [2016] 2 CMLR 40 [75].
[33] With regard to the other grounds on which an EAT decision can be departed from, Sheldon J held (*Bicknell* (n 10) at [46]) that the *Nicholls* decision was not per incuriam as the relevant principles were applied, there were no relevant inconsistent decisions, and no other exceptional circumstances applied.
[34] *Bicknell* (n 10) 46.
[35] Ibid. [47].
[36] Ibid. [48].
[37] Ibid. [50].
[38] Ibid. [48].

decisions on which Lavender J had based his decision in *Nicholls* and in particular on *FENIN,*[39] noted that nothing in the jurisprudence on TUPE or the Acquired Rights Directive addressed specifically whether the purchasing or commission of goods and services could amount to an undertaking in the employment context.[40] He considered that the first limb of Lavender J's formulation - that the purchasing and commission of goods and services cannot itself constitute an economic activity - was sound on the basis that this was "a correct understanding" of the explicit finding of the Court of First Instance in *FENIN.*[41]

He also considered the second limb of Lavender J's formulation – 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 – to be a "fair reading" of the relevant decisions on the basis of his detailed textual analysis, the specifics of which need not detain this commentary.[42]

In relation to the claimants' argument that the commission and provision of goods and services were indissociable, Sheldon J noted that the Courts in *FENIN* did not explicitly state that the commissioner of goods or services also had to be their provider in order for the relevant functions to constitute an economic activity – because that was not the question under consideration in that case. He concluded that, although the point was arguable, it was 'not obviously or manifestly wrong to decide that the commissioner must also offer the commissioned goods and services on a given market.'[43]

Nonetheless, Sheldon J did see "much force"[44] in the claimants' argument in essence that the analysis of what constitutes an economic activity should not be based on the

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[39] n 32.
[40] *Bicknell* (n 10) [52].
[41] Ibid. [57] citing *FENIN* (n 32) [36]-[37].
[42] Ibid. [58]-[59].
[43] Ibid. [60].
[44] Ibid. [61].

approach adopted in competition law decisions such as *FENIN* which address concerns about market distortions which "are not necessarily applicable to the employment context"[45] of the Acquired Rights Directive or TUPE.

Challenging *Nicholls*

It can be argued cogently that for the case law to adopt an approach to the assessment of what constitutes an economic activity for the purposes of TUPE which is based on EU competition law principles addressing entirely different regulatory objectives is inappropriate. As the claimants put it in *Bicknell*,[46] the competition law question of 'whether an operator has the potential to distort the market …[is] different to the question of whether employment rights should be safeguarded following a change of employer.'

The *FENIN* case law addresses the identification of which entities constitute market actors, by virtue of conducting economic activity, to which competition law regulation applies. TUPE does not seek to regulate competition on a market or markets or necessarily depend on the existence of a market for its justification or application, albeit it does to an extent seek to establish a level playing field for contractors. Rather, it seeks to protect workers affected by a change of their employer provided, inter alia, that the employer's operations entail the conduct of economic activity and do not otherwise fall within the public sector exclusion zone.

It is therefore argued that it would be more appropriate to apply a TUPE-specific approach reviewing the specific situation under consideration through the lens of TUPE's purpose of employment protection on a change of employer rather than by analogy with EU

[45] Ibid. [62].
[46] Ibid. [25].

competition law cases addressing entirely different contexts.[47] As the claimants put it,[48] '[t]he 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.' The linked questions that then arise are whether the purchasing and commissioning of goods and services "without more" - i.e. separate from service provision/delivery - should be capable of falling within the scope of TUPE and how the interpretation of the legislation should be refashioned to address that issue.

Reassessing TUPE's treatment of the purchasing and commission of goods and services

From an impressionistic standpoint, it may seem counterintuitive that a purchasing or commissioning function or activity – very common in the private sector - might not fall within the scope of TUPE by virtue of not constituting an economic activity whereas the transfer of a state funded mainstream school[49] would not be so disqualified.[50] A cogent argument can be made for the purchasing and commission of goods and services being capable of falling within the scope of TUPE as economic activity, even if conducted under the broad umbrella of the public sector and functionally separate from the delivery of those goods or services.

This argument contends that, dependent on the specific factual matrix under review, the purchasing and commission of goods and services are capable of being economic in nature on the basis that they are, or can be, intrinsic to the delivery of goods and services, not least by way of determining the identity and the terms of supply of the relevant provider.

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[47] It is perhaps ironic that, when EU law has so often ensured the protective application of TUPE through the purposive interpretation that it requires in order to ensure consistency with the Acquired Rights Directive and the purposes of the transfer legislation, resort to (an albeit separate body of) EU law has, in the context of the purchasing and commission of goods and services, been to the detriment of employment protection.

[48] *Bicknell* (n 10) [25].

[49] As described by Lavender J in *Nicholls* (n 5) [23(4)].

[50] See *Clifton Middle School v Agnew* [1997] ICR 808.

These functions should be capable of being treated as economic activity since they are, or can be, an essential, albeit prior, element of the delivery of goods and services and can therefore more in the nature of an economic activity than a "core" governmental/public authority function. That these activities/functions are potentially by nature akin to business decisions and operations supports the argument that those performing them should potentially fall within the scope of the transfer legislation on a change of employer.

On this analysis, the gloss which *Nicholls* places on the concept of economic activity in the TUPE context – barring the purchasing and commissioning of goods and services conducted separate from their delivery from falling within the scope of TUPE while allowing the transfer legislation to apply where goods and services are purchased/commissioned and delivered by the same person – creates an artificial distinction in the application of the transfer legislation which runs counter to its objective of the protection of the employment of those conducting activities which are economic in nature. The necessity to consider whether there is a market for the relevant goods and services[51] also presents a material obstacle to the potential application of TUPE to the purchasing and commission of goods and services but also falls away if the competition law approach is dispensed with.

Against this, there are policy arguments for maintaining the approach adopted in *Nicholls*. A "bright line" rule, providing that the purchasing and commission of goods and services cannot constitute an economic activity for the purposes of TUPE, promotes certainty. Moreover, the *Nicholls* approach ensures that the employment protection of those engaged in the determining delivery of public services is as a policy/administrative matter falling under democratic control rather than the employment protection conferred by TUPE.

Revising the approach of TUPE – back to basics

[51] *Nicholls* (n 5) [48(2)]-[50].

The potential application of TUPE to the purchasing and commission of goods and services alone would most straightforwardly be achieved simply by dispensing with the principle established in this regard in *Nicholls*. To revoke the principle established in *Nicholls* would replace a hard and fast rule which can run counter to the employment protective purpose of TUPE with a return to the fact sensitive enquiry of whether the purchasing and commission of goods and services are economic in nature in the situation being scrutinised. The observations of Beldam LJ in *Institute of Chartered Accountants of England and Wales v Customs and Excise Comrs*[52] encapsulate well the approach which would then apply in the context of the purchasing and commission of goods and services:

> I conclude that the concept of an economic activity is an activity which typically is performed for a consideration and is connected with economic life in some way or another. It is not an essential characteristic that it should be carried on with a view to profit or for commercial reasons, but it must be an activity which is analogous to activities so carried on. An activity which consists in the performance of a public service is not of an economic nature particularly where the activity is one typically of a public authority.

Applying this approach, the purchasing and commission of goods and services would clearly be capable, depending on the factual matrix, of falling within the scope of TUPE. The fact that the function of purchasing and commission of goods and services can be provided by external procurement specialisists the private sector undermines the argument consistent with *Nicholls*, that the purchasing and commission of goods and services are, as Beldam LJ put it, activities to which "the idea of commercial exploitation with a view to profit or gain is alien."[53] In the specific healthcare and CCG contexts that *Nicholls* and *Bicknell* addressed,

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[52] [1997] STC 1115.
[53] Ibid. quoting the CJEU in *SAT Fluggesellschaft mbH v European Organisation for the Safety of Air Navigation Control* (Case C-364/92) [1994] 5 CMLR 208.

the actual and/or potential marketisation and privatisation of health services also demonstrate that the functions under review are capable of commercial/economic operation and are therefore potentially economic in nature.

Going back in essence to first principles in this way would remove the difficulties presented by *Nicholls* so that the employment of those within the public sector conducting activities which are, to adopt Beldam J's phrase, "connected with economic life" would thereby be more effectively protected. Nonetheless, the change of approach advocated for in this note would not obviate the need for detailed scrutiny of the activities being considered – the "functional" approach described in *Nicholls*.[54] Whether in relation to the requirement for TUPE to apply that there be an economic activity or the exclusion from the scope of TUPE of public sector reorganisations, divining the precise delineation of TUPE's public-private divide will remain intensely fact sensitive.

The challenges which this functional approach can face - and would still face even if the principle established in *Nicholls* were revoked - are illustrated by Lavender J's observations in *Nicholls*. Noting that *Nicholls* was not an easy or clear-cut case, he observed that, whilst it was not suggested that the public health team whose activities were under scrutiny was exercising any coercive i.e. public powers, it 'could be argued that at least some, if not all, of the activities of the public health team constituted the sort of activities which are normally carried out by civil servants of one kind or another.' [55] Against this, the claimants 'contended, in effect, that most, if not all, of the public health team's activities were capable of being outsourced.'[56]

To revoke the principle established in *Nicholls* that the purchasing and commission of goods and services is not an economic activity for the purposes of TUPE would also of

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[54] Ibid. [212].
[55] Ibid. [79].
[56] Ibid.

course not remove the need, where relevant, to consider the exclusion of public sector reorganisations from the scope of TUPE pursuant to TUPE reg 3(5). Lavender J's summary in *Nicholls* of the approach to this issue[57] was not challenged in *Bicknell* and remains an invaluable guide to the assessment of what constitutes the exercise of "public authority" as well as indicating what, in the public sector context, will not be an economic entity.

Very much in summary, the application of TUPE reg 3(5) is to be assessed by reference to considerations such as whether the activity is necessarily carried out by public entities or is an essential function of the state or a "core state activity," has always been carried out by public entities, involves the exercise of "prerogatives outside the general law," involves the exercise of rights and powers of coercion, is a "public service to which any idea of commercial exploitation with a view to profit is alien" or "cannot conceivably be carried out within a competitive system", has an exclusively social function, is typically that of a public authority, is carried out in the public interest or for the benefit of the whole community, and whether it involves providing services in competition with those offered by operators pursuing a profit.

Standing back with the benefit of these considerations to assess the concept of economic activity against its counterpoint, albeit not mirror image, the exercise of public authority, the blanket exclusion by *Nicholls* of the purchasing and commissioning of goods and services separate from their provision again appears unduly restrictive of the scope of TUPE in light of its employment protection objectives for those conducting business or business-like activities, whether within or outside the public sector. This point is particularly stark when one considers the examples provided by Lavender J in *Nicholls* of 'areas of activity which may well fall within the scope of the exercise of public authority'[58] such as

[57] *Nicholls* (n 5) [55].
[58] Ibid. [59].

regulatory functions, general and fiscal administration, justice, security, and national defence.[59]

In addition, nothing in this analysis of course removes the unavoidable complexity potentially arising when an organisation conducts both economic activities and public administrative activities.[60]

Conclusion

To conclude, it can be argued cogently that the purchasing and commission of goods and services, even if distinct from their provision or delivery, should, depending on the factual matrix in question, be capable of constituting an economic activity for the purposes of TUPE. This approach would, consistent with the objectives of the transfer legislation, enable the (better) protection of the employment of those engaged in purchasing and commissioning activities, whether or not conducted under the broad umbrella of the public sector, who are affected by reorganisations and similar exercises otherwise satisfying the requirements of a TUPE transfer. It is therefore to be hoped that the Court of Appeal will soon revisit the exclusion of the purchasing and commission of goods and services from the scope of TUPE established by *Nicholls* and doubted in *Bicknell*.

[59] Ibid.

[60] Addressed by Lavender J in *Nicholls* (n 5) [64]-[68] where he noted at [68] that '... a transferred entity which caried on activities involving the exercise of public authority would not be treated as an economic entity merely because it carried on some ancillary activities of an economic nature.'