

EDENRED (UK GROUP) LIMITED (APPELLANTS) AND ANOTHER V HER MAJESTY'S TREASURY AND OTHERS (RESPONDENTS) [2015] UKSC 45, ON APPEAL FROM [2015] EWCA CIV 236: THE APPELLANTS UNSUCCESSFULLY SOUGHT TO PREVENT THE MODIFICATION OF A PUBLIC CONTRACT ON THE BASIS THAT IT WAS IN BREACH OF EU PROCUREMENT LAW

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This appeal concerned a challenge to the decision by HM Treasury ('HMT') to use National Savings and Investments ('NS&I') to provide the necessary accounts services for HMRC to deliver the new government policy of tax-free childcare ('TFC'). This required an amendment to a contract between NS&I and Atos IT Services Ltd ('Atos'), NS&I having entered into an outsourcing contract for its own services with Atos in 2013. The Appellants argued that the proposed amendment of the contract between NS&I and Atos would involve the direct award of a public contract without a tender procedure contrary to EU and UK public procurement law. Each of the High Court, the Court of Appeal and the Supreme Court have held that there is no material variation of the existing public contract and no need for a further procurement process.

The facts

NS&I is a non-ministerial Government department and executive agency of the Chancellor of the Exchequer offering savings and investments products. NS&I also provides accounts and support services to other public bodies, so-called 'B2B Services'.

In 2011 NS&I commenced procurement of a contract for outsourcing its operational services, including B2B Services. In the OJEU Notice advertising the contract, NS&I described its B2B services and stated that it intended to expand these during the lifetime of the contract. Following the procurement process, in 2013 NS&I awarded the contract to Atos.

In March 2013 HMT and HMRC announced the introduction of TFC. The scheme would operate by parents opening a bank account, called a childcare account, for each of their children into which they, and other members of the family or employers, could pay money to be used for childcare costs.

Following a consultation process, in July 2014 it was announced that HMT and HMRC would use NS&I to provide and administer childcare accounts and supporting services in order to deliver TFC. TFC would be introduced by way of: (a) a memorandum of understanding between HMRC and NS&I setting out HMRC's requirements; and (b) a variation of the Atos contract.

The Appellants were economic operators providing childcare voucher services to employers in the context of the current arrangements, which are to be replaced by TFC. They argued that the proposed amendments to add TFC-related support services to the outsourcing contract with Atos would constitute an unlawful material variation so that that the Government was required under applicable EU procurement law and/or Article 56 TFEU to open the provision of TFC accounts to competition by an advertised procurement process.

The proceedings below

The Appellants brought proceedings in August 2014 and obtained interim relief in the form of an order preventing HMRC and NS&I implementing the provision of services under the TFC until further order.

Andrews J dismissed the claim at first instance. The Appellants appealed and their appeal was dismissed by the Court of Appeal in March 2015 (Sir Terence Etherton C, Underhill and King LJJ). The Appellants appealed that decision and the Supreme Court heard both the application for permission to appeal and also the substantive appeal at the same time (May 2015), so as to provide a prompt determination.

The Supreme Court's decision

Lord Hodge JSC, with whom the other Justices agreed, gave the leading speech of the Court. He explained the rationale behind the central question in the case: that is whether the proposed amendments to NS&I's outsourcing contract amounted to a material variation. Thus, amendments to an existing public contract only fall within the procurement regime – and fall to be treated in substance as the award of a new contract - if they involve a material variation.

Although the Appellants had brought their challenge under the Public Contracts Regulations 2006 (SI/2006/5) ('the 2006 Regulations'), during the course of the litigation successor regulations – the Public Contracts Regulations 2015 (SI 2015/102) ('the 2015 Regulations'), which implemented Directive 2014/24/EU ('the 2014 Directive') – had come into force. The validity of the proposed amendment was therefore to be tested by reference to the 2015 Regulations and the 2014 Directive.

Lord Hodge JSC considered first Regulations 72(1) and (8) of the 2015 Regulations, which define what constitutes a "substantial" modification of a public contract, and thus a material variation. The Appellants argued that the proposed variations were substantial because they represented a considerable extension of the scope of the original contract, to encompass services not initially covered (Reg 72(8)(d)). Lord Hodge JSC rejected this argument because:

(1) The contract which NS&I had originally entered into with Atos was for the latter to provide NS&I with operational services that would enable it to perform its established services but also so as to expand its B2B services up to the £2 billion maximum envisaged in the notice given in the OJEU.

(2) Whilst the initial stated value of the contract in the award notice was £660,000,000, the same notice, the procurement process and the final contract envisaged the expansion of NS&I's business and required the outsourcing partner to provide the operational services to achieve that expansion.

(3) Economic operators could have been in no doubt as to the extent of the services they might have to provide to NS&I, albeit that they would not know the public bodies to whom NS&I would provide B2B services or the public policies which the future B2B services would support.

(4) The prohibition against modifying a contract without a fresh procurement process to encompass services not initially covered (as contained within the 2015 Regulations and 2014 Directive), was not to be interpreted as banning the modification of a public contract, where that extension had been envisaged in the initial contract and which had committed the economic operator to undertake it and to have the resources to be able to do so.

For these reasons the Supreme Court dismissed the appeal.

Lord Hodge JSC went on to consider the Appellants' challenge to the Court of Appeal's conclusion based on Regulation 72(1)(a). That regulation permits contracts and framework agreements to be modified, without the need for a new procurement process, where the modifications had been provided for in "clear, precise and unequivocal review clauses". Lord Hodge JSC indicated that the review clauses provided for in the contract were sufficient for the proposed amendment, but held that the scope of such review clauses as defined in the Directive and the Regulations was not "acte clair". However, in view of the findings in relation to Regulations 72(1) and (8) it was unnecessary to decide the question for the purposes of the appeal and no reference to the CJEU was required.

The Appellants also raised a further alternative argument, namely that there was in substance a public service contract between HMRC and Atos (as opposed to between NS&I and Atos) and that this had not been made pursuant to the procurement regime. Lord Hodge JSC concluded that there was nothing in this alternative argument. This was primarily because it ignored the proper factual context of the case but also because reliance upon a particular section of the Childcare Payments Act 2014 (s. 16) by the Appellants, to make good their argument, had been misplaced, as they had misinterpreted that section.

As the Court concluded that the respondents were not in breach of EU procurement law, no question of a breach of Article 56 TFEU arose.

Comment

This is the first procurement case on the issue of material variations to a public contract to have reached the Supreme Court. It is also the first case decided on the basis of the 2015 Regulations. It provides some insight into how the Court views the EU procurement regime. Lord Hodge JSC focussed on the practicalities of the operation of an outsourcing contract, stressing that it was difficult to see how a Government department or other public body could outsource services that were essential to support its own operations and accommodate the occurrence of events and the changes of policy that are part of public life without the need for some change. It is in this context that the Supreme Court approached the question of whether the services were covered by the contract resulting from the procurement, including its provisions for amendment of the contract. The Court appears to have been keen to adopt a practical, fact-led approach.

It is also of note that the Supreme Court was unmoved by the Appellants' argument that such an interpretation of the provisions on contract change was open to abuse. In this respect Lord Hodge JSC held: *"There may be circumstances in which a court could conclude that a public authority had designed a contract as a means of avoiding its obligations under EU law. In such cases the contract might be open to challenge under EU law as an abuse of right. But here there is no challenge to the validity of the Atos contract."*

It is interesting that the Supreme Court chose to find principally on the basis of the "no substantial change" provisions of Reg. 72, rather than on the basis of there being clear review clauses in the contract. Lord Hodge JSC indicates that he would have favoured an additional finding that the changes were covered by the contract itself, but the Court seemed to think that the legal position was not so clear that it could give a final view. This aspect of the judgment is likely also to lead to more litigation in the future.

It remains to be seen whether other contracting authorities will seek to utilise the Supreme Court's decision to argue more readily that where a public contract which envisaged future changes is to be modified, no new procurement process is required. It will depend, however, on a careful assessment of the facts and the terms of the advertisement and the contract, as well as the nature of the contract itself. *Edenred* might be seen as an extreme example in that way, an important aspect of the outsourcing contract being future expansion of just the sort of services with which the case was concerned.

Philip Moser QC, Ewan West and Anneliese Blackwood appeared on behalf of Her Majesty's Treasury, Her Majesty's Revenue and Customs and NS&I, instructed by the Government Legal Department.

The comments made in this case note are wholly personal and do not reflect the views of any other members of Monckton Chambers, its tenants or clients.