Neutral Citation Number: [2022] EAT 140

Case No: EA-2021-SCO-000093-SH

EMPLOYMENT APPEAL TRIBUNAL

52 Melville Street
Edinburgh EH3 7HF

Date: 12 September 2022

Before :

THE HONOURABLE LORD FAIRLEY

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Between :

PONTICELLI UK LIMITED	**Appellants**
- and -	
MR A GALLAGHER	**Respondent**

- -
- -

Mr Brian Napier KC (instructed by Brodies LLP) for the **Appellant**
Ms Alice Stobart, of Counsel (instructed by Thompson Solicitors) for the **Respondent**

Hearing date: 23 August 2022

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JUDGMENT

SUMMARY

TRANSFER OF UNDERTAKINGS; Share Incentive Plan; obligation "in connection with" the contract of employment.

The claimant's contract of employment transferred to the appellant under **TUPE, 2006** on 1 May 2020. Prior to the transfer, he had been a member of a Share Incentive Plan operated by the transferor which he had joined in August 2018 pursuant to an agreement amongst the claimant, the transferor and the plan trustees. The appellant having refused to provide an equivalent scheme, the claimant brought proceedings before the Employment Tribunal in terms of sections 11 and 12 of the **Employment Rights Act, 1996**. The Tribunal upheld his claims and found that he was entitled, after the transfer, to participate in a scheme of substantial equivalence to that operated by the transferor (**MITIE Managed Services Limited v. French** [2002] ICR 1395). The appellant contended that the obligations created when the respondent joined the transferor's scheme did not arise either "under" the contract of employment or "in connection with" that contract (**Chapman v. CP Computer Group** [1987] IRLR 462). Accordingly, Regulation 4(2)(a) of **TUPE** did not apply. The claimant conceded that the obligations in question did not arise "under" the contract, but contended that they arose "in connection with" that contract. It was also argued that the Tribunal's order was not competent.

Held: Even if the obligations created by the August 2018 Partnership Share Agreement did not arise "under" the contract of employment, they plainly arose "in connection with" that contract for the purposes of Regulation 4(2)(a) of **TUPE**. **Chapman** had been decided without reference to the words "or in connection with" under what was then Regulation 5(2)(a) of **TUPE, 1981**. **Chapman** was, in any event, distinguishable. Since Regulation 4(2)(a) was engaged, the Tribunal had been correct to hold that **MITIE** applied. The order pronounced by the Tribunal was competent but should have referred to the statutory statement of particulars rather than to "terms and conditions of employment". Subject to that minor adjustment to paragraph 2 of the Tribunal's Judgment, the appeal was refused.

THE HONOURABLE LORD FAIRLEY:

Introduction

1. This is an appeal by Ponticelli UK Limited ("the appellant") against a Judgment of a full tribunal chaired by Employment Judge J M Hendry. The Judgment of the tribunal is dated 23 August 2021. The claimant in the proceedings before the tribunal was Mr Anthony Gallagher. He is the respondent to this appeal. For ease of reference, however, I will continue to refer to Mr Gallagher as "the claimant".

Relevant facts

2. Until 1 May 2020, the claimant was employed by Total Exploration and Production UK Limited ("TEPUK"). His most recent contract was dated 1 March 2019. On 1 May 2020, his employment transferred to the appellant under **TUPE** 2006. Since 1 May 2020, he has been employed by the appellant.

3. Prior to the **TUPE** transfer of 1 May 2020, the claimant participated in a Share Incentive Plan ("SIP") operated by TEPUK and known as the Total E&P UK Limited Share Incentive Plan. In terms of the rules of the plan, employees of TEPUK who had accrued at least 3 months service and who were resident and ordinarily resident in the UK for tax purposes were eligible to join. The plan was established by TEPUK to give eligible employees the chance to acquire shares in TEPUK's parent company, Total S.A. in a tax efficient way.

4. Participation in the plan was voluntary. No eligible employee was obliged to join the plan. The plan was not mentioned in the claimant's contract of employment.

5. The plan provided for several ways in which shares might be acquired by eligible employees who elected to join. First, those employees who joined the "Partnership and Matching Shares" part

of the plan could elect to buy shares by contributing up to 10% of their basic salary (subject to a cap of £125 per month) towards the purchase of shares on their behalf. Any shares so purchased were known as "Partnership Shares". For each Partnership Share purchased with up to 2% of basic salary, TEPUK contributed funds for the purchase of two further "Matching Shares". Secondly, those who elected to join the "Free Shares" part of the plan could be awarded shares up to a maximum value of £3,000 per year. The size of any Free Shares award was linked to the bonus payable under TEPUK's Key Performance Indicators Bonus Scheme. Thirdly, any dividends received on shares held in the plan were re-invested and used to purchase extra shares known as "Dividend Shares".

6. Members of the plan became the beneficial owners of any Partnership Shares, Matching Shares, Free Shares or Dividend Shares purchased on their behalf. The shares were held in trust in the name of EES Trustees Limited until they were sold or transferred out of the plan. The trustees managed the plan in accordance with a Trust Deed and Rules.

7. Clause 10.7 of the TEPUK's explanatory booklet about the plan stated *inter alia*:

> **"If the business, or part of the business, or subsidiary company in which you are employed is sold, then your shares must be sold or transferred to you or into [TEPUK's] vested share account within 90 days from the date of cessation of your employment."**

8. The claimant completed an application form and joined the Partnership and Matching Shares part of the plan with effect from 24 August 2018. He did so by entering into a "Partnership Share Agreement" with TEPUK and the plan's trustees. In terms of that agreement, he agreed that TEPUK was permitted to make monthly deductions of 5% of his salary to purchase Partnership Shares in the plan. For its part, TEPUK agreed to arrange for shares in Total S.A. to be bought with such deductions from salary, and to provide two Matching Shares for every Partnership Share bought with up to 2% of Basic Salary.

9. Clause 8 of the Partnership Share Agreement permitted the claimant to withdraw from the agreement by writing to his employer. In terms of Clause 9, he agreed that withdrawal from the agreement would not affect the terms on which he had agreed to buy shares already held for him in under the plan.

10. Before the Tribunal, it was an agreed fact that the claimant's membership of the TEPUK plan ended on 1 May 2020 and the shares then held on his behalf within the plan were transferred to him.

11. Thereafter, by letter dated 10 June 2020, the appellant wrote to the claimant to advise him that he would receive a one-off payment of £1,855 as compensation for the fact that the appellant was not going to continue, post-transfer, to provide a SIP. The amount of the compensation payment was twice the claimant's average contributions to the TEPUK SIP over the preceding two years.

12. The claimant sent an e mail to the appellant on 10 June 2020 asking them not to make the compensation payment to him due to ongoing discussions with ACAS and his union regarding the effect of the **TUPE** transfer on his entitlements to a SIP. The appellant nevertheless made a payment to the Claimant of £1,855 in the June 2020 payroll.

13. In his application to the tribunal, the claimant sought a determination under section 12 of the **Employment Rights Act, 1996** ("**ERA**") that he was entitled, as an employee of the appellant, to be a member of a SIP equivalent to the TEPUK plan. The claimant argued that his right to participate in an equivalent SIP (and the related obligations on the employer which arose when he joined the TEPUK plan in August 2018) transferred to the appellant under Regulation 4(2)(a) of **TUPE** on 1 May 2020.

Regulation 4 of TUPE

14. So far as material to this appeal, Regulation 4 of **TUPE** is in the following terms:

> **Effect of relevant transfer on contracts of employment**
>
> **4.—(1) … a relevant transfer shall not operate so as to terminate the contract of employment of any person employed by the transferor and assigned to the organised grouping of resources or employees that is subject to the relevant transfer, which would otherwise be terminated by the transfer, but any such contract shall have effect after the transfer as if originally made between the person so employed and the transferee.**
>
> **(2) Without prejudice to paragraph (1)… on the completion of a relevant transfer—**
>
> **(a) all the transferor's rights, powers, duties and liabilities under or in connection with any such contract shall be transferred by virtue of this regulation to the transferee; and**
>
> **(b) any act or omission before the transfer is completed, of or in relation to the transferor in respect of that contract or a person assigned to that organised grouping of resources or employees, shall be deemed to have been an act or omission of or in relation to the transferee."**

The Tribunal's Judgment and Reasons

15. The Tribunal identified the issue before it as being whether the right to participate in a SIP similar to the one provided by TEPUK transferred "as part of the contract of employment" (para. 91). At para. 104, however, the Tribunal referred to the issue before it in slightly broader terms:

> **"It is the obligation to provide such a scheme (no better and no worse) that is the issue in the present case and whether *this obligation* transfers." (*emphasis added*)**

Having regard to the way in which Regulation 4(2)(a) of **TUPE** is framed, the latter formulation of the issue before the Tribunal was the more accurate.

16. The unanimous decision of the Tribunal was:

> **"That following the transfer of the Claimant's contract of employment to the Respondent company on the 1 May 2020 the Claimant became entitled to participate in a Share Incentive Scheme of substantive equivalence or comparable value to the Share Incentive Scheme operated by his former employers Total Exploration and Production UK Limited".**

17. The Tribunal thereafter found that the application under section 11 **ERA** was well founded, and made a declaration that:

> **"…the terms and conditions of employment should reflect the obligation to provide him with a Share Incentive Scheme of substantive equivalence to the Total E&P UK Share Incentive Plan on the same terms as set out in the Explanatory Booklet dated 2013".**

18. The essence of the Tribunal's reasons was set out at para 105 of its reasons:

> **"Our view is that the right to participate in the SIP is 'caught' by the wording of Regulation 4(2)(a). The Claimant was only entitled to participate in the SIP because he was an employee of the company. It was a benefit for employees of TEPUK such as the Claimant. It was Revenue approved. Looked at broadly it was part of the overall financial 'package'. It would, in the view of the Tribunal, undermine the purpose [of] the Regulations and possibly encourage attempts to try to avoid transferring financially significant benefits on a transfer if it was not regarded as such. We do not accept that the terms of the SIP are capable of isolating the agreement from the effect of the Regulations."**

Summary of submissions

Appellant

19. A number of arguments that had been advanced on behalf of the appellant before the Employment Tribunal were not ultimately insisted upon in this appeal. The arguments that were not further insisted upon were that:

a) the benefit of participating in the TEPUK plan was not contractual in nature (ET para 56);

b) the rules of the TEPUK plan had the effect of validly terminating any entitlement that the claimant had to continue participate in it, or in any equivalent scheme, following the transfer (ET paras 59-61);

c) to hold that the an obligation to continue a SIP could be enforced against the appellant would be to confer a greater right on the claimant than he had enjoyed pre-transfer (ET, paras 62 and 63);

d) the appellant had validly exercised a power to terminate the SIP during the pre-transfer consultation process and / or in buying out the benefit post-transfer (para. 69);

e) the rules of the TEPUK plan precluded the claimant from seeking compensation (ET, paras 75 and 76); and

f) the claimant was personally barred from bringing the claim (ET, paras 85-87).

20. Mr Napier did not seek to argue that the Tribunal had erred in rejecting any of those arguments. The appeal, so far as it concerned the applicability of Regulation 4(2)(a) of **TUPE**, was confined to a single point. Whilst conceding that rights and obligations arose when the claimant joined the TEPUK plan in August 2018, Mr Napier argued that such rights and obligations did not arise either "under" the contract of employment or "in connection with" that contract. Accordingly, he submitted that Regulation 4(2)(a) simply did not apply.

21. The Employment Tribunal's use of the metaphor "caught by" in para. 105 was unfortunate as the Tribunal had not specified which of the two alternative routes under Regulation 4(2)(a) it had concluded applied here to transfer the obligation(s) in question. To that extent, the reasoning at paragraph 105 was not **Meek** compliant.

22. It was clear that a right to participate in a SIP plan did not arise "under" the contract of employment. There was no mention of the TEPUK SIP plan anywhere in the claimant's contract of employment dated 1 March 2019. Various terms of the plan (e.g. Rules 3(5)(a) and (b) of the Trust Deed and Rules) stated that the plan was not part of any employment contract. The application form by which the claimant had joined the plan expressly provided that the plan did not affect his rights, entitlements and obligations under his contract of employment. In that regard, the position of the claimant fell to be distinguished from that of the employees in **MITIE Managed Services Limited v. French** [2002] ICR 1395. In **MITIE**, the contracts of employment expressly conferred a right to participate in the particular profit-sharing scheme with which that case was concerned.

23. Mr Napier further submitted that, so far as the second limb of Regulation 4(2)(a) was concerned, a collateral contract of the type under consideration did not, as a matter of law, create obligations "in connection with" the contract of employment. In developing that argument, he founded principally upon the decision of the Court of Appeal in **Chapman v. CP Computer Group** [1987] IRLR 462. **Chapman** concerned entitlements under a stock option scheme run by the employer's group of companies. The terms of the scheme provided that the right to exercise an option was triggered by an employee ceasing to be an employee of a group company by reason of redundancy. The Court of Appeal concluded that the option was triggered when the employer's business transferred under **TUPE**, 1981 since the transfer gave rise to a redundancy situation within the meaning of the stock option scheme. Glidewell LJ had expressed the view that,

> **"…the [TUPE] regulations, though they are entirely relevant to the question whether or not an employee has been dismissed or is still employed under the same contract of service have no application to the question which we are considering, that is to say when whether the phraseology of [the stock option rules] the Option Holder has ceased to be an employee by reason of redundancy as defined in section 81(2) of [the Employment Protection (Consolidation) Act, 1978]."**

24. **Chapman** had never been over-ruled. It was an essential part of the Court of Appeal's analysis that the right to participate in the share option scheme in question did not transfer under the regulations.

25. Finally, Mr Napier submitted that even if an obligation to provide an equivalent plan had transferred to the appellant, the Employment Tribunal did not have the power to grant the particular remedy sought. Whilst section 1(4)(da) of the **ERA** required the employer to provide a written statement of "any other benefits provided by the employer that do not fall within another paragraph of this subsection", that provision had only been added to the section with effect from 6 April 2020. The obligation to provide a written statement of particulars in this case arose on 1 March 2019. In these circumstances, a declaration under section 12 **ERA** was not competent.

Claimant

26. Ms Stobart conceded that the obligation to provide the plan did not arise "under" the employment contract. She submitted, however, that an obligation to provide the plan plainly arose "in connection with" the employment contract once the claimant had joined the TEPUK plan in August 2018. That obligation continued until lawfully terminated. Since there was now no suggestion that the mutual rights and obligations created when the claimant joined the plan had ever been validly brought to an end either before or after the transfer, the only possible conclusion was that they subsisted following the transfer and would continue to subsist until lawfully terminated.

27. On a fair reading of the Employment Tribunal's reasons, that was what it had concluded at para 105. The factors referred to by the Tribunal in that paragraph were consistent with such an approach, which was correct in law. The court in **Chapman** had not been addressed on the effect of the words "or in connection with" in what was then Regulation 5(2)(a) of **TUPE, 1981**. In any event, **Chapman** was distinguishable because the SIP which the Tribunal had been considering in this case

was not the same thing as a stock option plan and did not create the same kind of rights and obligations.

28. In short, the Tribunal had been entitled to conclude that the rights and obligations which arose when the claimant joined the TEPUK plan in August 2018 arose "in connection with" the claimant's contract of employment, were capable of transferring, and did transfer in precisely the way envisaged in **MITIE Managed Services Limited v. French** [2002] ICR 1395.

29. On the issue of the competence of an declaration under section 12, Ms Stobart submitted that the claimant fell within the transitional provisions of paragraph 7 of Schedule 2 to the **ERA** as an "existing employee" and was entitled to rely upon the provisions of section 4 **ERA** to request an updated statement following the transfer.

Analysis and decision

30. When the claimant entered into the Partnership Share Agreement to join the TEPUK plan on 28 August 2018 a contract was thereby created containing mutual rights and obligations between the claimant on the one hand and TEPUK on the other. In particular, the claimant agreed to deductions being made at source from his monthly salary and TEPUK agreed to use the amounts of those deductions to purchase shares for him. TEPUK also agreed to provide the claimant with additional Matching Shares at no further cost to him. The plan was not open to all members of the public. The claimant's eligibility to join it arose from his status as an employee of TEPUK. In these circumstances, even if the obligations created by the August 2018 Partnership Share Agreement did not arise "under" the contract of employment, they plainly arose "in connection with" that contract for the purposes of Regulation 4(2)(a) of **TUPE**.

31. It is not apparent that the Court of Appeal in **Chapman** was asked to consider the effect of the words "or in connection with" in what was then Regulation 5 of **TUPE**, 1981. That aspect of

the regulation is not referred to anywhere in the court's reasons. Largely due to that deficiency, **Chapman** has been the subject of significant academic criticism. Professor McMullen states that there is "an area of doubt" about **Chapman** and suggests that "it is perhaps to be doubted whether [it] would be followed today[1] . John Bowers QC *et al* state that the reasoning in **Chapman** is "open to question" *inter alia* because there was no consideration by the court of whether the share option scheme under consideration set out rights and liabilities "in connection with" the contact.[2] The IDS Handbook *Transfer of Undertakings* (March 2020 edition) suggests that "although **Chapman** has never been overruled or officially doubted…it is likely that this point would be decided differently today."[3]

32. In any event, and as Ms Stobart correctly submitted, the particular share option scheme in **Chapman** was not the same as the SIP with which the Tribunal was concerned in this case. The TEPUK plan was directly connected to the way in which the claimant was remunerated for his services as an employee. It also involved the provision to him of Matching Shares paid for entirely by his employer. As the Tribunal correctly noted, it was part of the claimant's broader financial package of benefits as an employee.

33. I do not, therefore, consider that **Chapman** represents any obstacle to the conclusion reached by the Employment Tribunal. The obligations of TEPUK under the Partnership Share Agreement with the claimant plainly arose "in connection with" his contract of employment and thus fell within the scope of Regulation 4(2)(a). In the absence of any suggestion that the mutual rights and obligations under the Partnership Share Agreement were terminated prior to the transfer, they transferred on 1 May 2020 in precisely the way envisaged by the EAT in **MITIE Managed Services Limited v. French.**

[1] McMullen, *Business Transfers and Employee Rights*, 7-66.1
[2] Bowers, *Transfer of Undertakings* A3.22.1
[3] IDS Handbook *Transfer of Undertakings* (March 2020 edition), para. 3.67

34. As I have already noted, Mr Napier did not seek to argue that the obligations under the Partnership Share Agreement were validly terminated pre or post transfer. The issue of how and when such obligations might be varied or terminated does not arise in this appeal.

35. So far as the competence of para. 2 of the Tribunal's Judgment is concerned, I agree with Ms Stobart that section 1(4)(da) **ERA** applies. The fact that the claimant's most recent contract with TEPUK was entered into in March 2019 is irrelevant. When the transfer occurred on 1 May 2020, the identity of his employer changed, as did the fact that his entitlement was not to ongoing membership of the TEPUK plan but to membership of a plan of substantive equivalence. Both of those changes required to be notified under section 4 **ERA**.

36. For these reasons, the appeal against para. 1 of the Tribunal's Judgment of 23 August 2021 is refused. Para. 2 of the Tribunal's Judgment of 23 August 2021 requires some limited adjustment to reflect the fact that the transferred obligation arose from the collateral Partnership Share Agreement rather from the contract of employment itself. I will accordingly set aside paragraph 2 of the Judgment of 23 August 2021 and substitute the following:

> **"2. That the Claimant's application for a reference under section 11 of the Employment Rights Act, 1996 is well founded and it is therefore determined in terms of section 12 of that Act that the written statement of particulars to which he is entitled under Part 1 of the Act should include reference to an obligation to provide him with a Share Incentive Scheme of substantive equivalence to that provided to him prior to 1 May 2020 under and in terms of the Partnership Share Agreement amongst the claimant, Total E&P UK Limited and EES Trustees Limited dated 28 August 2018"**