TUPE and collateral rights to participate in employee share schemes

SAM WHITAKER, Shearman & Sterling (London) LLP

The EAT's decision in Gallagher demonstrates the wide scope of what is captured under the automatic transfer principle under TUPE, but still leaves many unanswered practical questions about how rights in connection with employee share schemes are to be treated under TUPE.

Background under TUPE

Regulation 4(2)(a) of TUPE sets out the scope of what is transferred on a TUPE transfer. It provides that 'all the transferor's rights, powers, duties and liabilities under or in connection with any such [employment] contract shall be transferred by virtue of this regulation to the transferee'. Regulation 4(2)(b) provides that 'any act or omission before the transfer is completed, of or in relation to the transferor in respect of that [employment] 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 facts

The claimant was originally employed by Total Exploration and Production UK (TEPUK). It operated a Share Incentive Plan (SIP), which allowed employees (including the claimant) who met the SIP eligibility requirements to acquire shares in TEPUK's French listed parent company, Total SA. Participation in the SIP was voluntary and was implemented through a partnership share agreement, entered into between each participant, TEPUK and the SIP trustees. The SIP arrangements (and the partnership share agreement) were separate to and not referred to at all in the claimant's employment contract.

On 1 May 2020, the claimant's employment contract transferred from TEPUK to Ponticelli UK Ltd (Ponticelli) under TUPE. Following the TUPE transfer, Ponticelli informed the claimant that it was not intending to provide a SIP post-transfer but, as compensation, he would receive a one-off payment equal to twice his average contributions to the TEPUK SIP over the preceding two years. The claimant requested Ponticelli not to make the compensation payment to him (pending discussions with Acas and his union regarding the effect of TUPE on his entitlements to a SIP following transfer) but, nonetheless, the payment was made in the June 2020 payroll.

The claimant then applied to the employment tribunal, seeking a declaration under s.12 of ERA that he was, following transfer, entitled to be a member of a SIP equivalent to the TEPUK SIP. He argued that his right to participate in an equivalent SIP (and the related obligations on the employer when he first joined the TEPUK SIP) transferred to Ponticelli under reg 4(2)(a) of TUPE.

The employment tribunal decision

The employment tribunal held that the claimant's right to participate in the SIP was 'caught' by reg 4(2)(a). The claimant was only entitled to participate in the SIP because he was an employee of TEPUK and it was a benefit for TEPUK employees such as him. Looked at broadly, it was part of the overall financial package of employees. In the tribunal's view, it would undermine the purpose of TUPE and potentially encourage attempts to try to avoid transferring financially significant benefits on a transfer if it was not regarded in that way. As such, the tribunal held that the claimant's terms and conditions of employment should reflect the obligation to provide him with a share incentive scheme of substantial equivalence in accordance with the *Mitie* decision.

The EAT decision

Ponticelli's appeal to the EAT rested on one point only. It submitted that reg 4(2)(a) of TUPE did not apply because the claimant's rights and obligations in respect of the TEPUK SIP did not arise either 'under' or 'in connection with' his employment contract. It submitted that it was clear that the right to participate in the SIP did not arise 'under' the employment contract, not least because the claimant's contract made no mention of the SIP and the SIP stated in various places that it did not form part of the claimant's contract. Ponticelli therefore submitted that this case could be distinguished from *Mitie* in which the relevant employment contract contained an express

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entitlement to participate in a profit-sharing scheme. It also submitted that the SIP was effectively a form of collateral contract which did not create obligations 'in connection with' the employment contract. In this regard, it relied on the Court of Appeal's decision in *Chapman*. In *Chapman*, it was held that TUPE had no application to a contract relating to share incentives (in that case share options) which was separate and distinct from the employment contract.

The EAT noted that the tribunal's use of the word 'caught' was unfortunate as it did not indicate which of the two alternatives under reg 4(2)(a) (ie 'under' the employment contract or 'in connection with' it) applied. Nonetheless, the EAT upheld the tribunal's decision. It held that, even if the obligations created by the partnership share agreement did not arise 'under' the contract of employment, they clearly arose 'in connection with' it and were therefore within the scope of reg 4(2)(a). The EAT noted various matters that pointed towards it being connected to his employment contract, including that the deductions for the purchase of shares were made from the claimant's salary, that certain 'matching shares' were granted to participants at no cost to them, that the claimant was eligible to participate in the SIP because of his status as an employee of TEPUK and that SIP was directly connected to the way in which the claimant was remunerated as an employee.

The EAT noted the *Chapman* decision but said that it was not clear that the Court of Appeal in that case had been asked to consider the words 'in connection with' under reg 4(2)(a). It further noted that, because of that, the *Chapman* decision had subsequently been heavily criticised academically. Furthermore, the EAT stated that the share scheme in *Chapman* was not the same as the SIP (although it is not clear why the fact that the *Chapman* decision concerned a share option scheme, whereas the *Gallagher* case concerned a SIP, meant that *Chapman* was capable of being distinguished on that basis). As such, the EAT held that *Chapman* did not present any obstacle to the tribunal's conclusions. Accordingly, the claimant's rights in respect of the SIP arose in connection with his employment contract and they transferred in the way envisaged by the *Mitie* decision, so that Ponticelli was obliged to provide him with a share scheme of substantial equivalence.

Comment

In one sense, the EAT's decision confirms what many practitioners already suspected, namely that the distinction drawn in the *Chapman* decision between the employment contract (to which TUPE applies) and collateral contracts relating to share incentives (to which, according to the Court of Appeal in *Chapman*, TUPE may not apply), is difficult to square with the wide scope of what is captured by reg 4(2)(a).

However, because the EAT's decision was confined to one narrow issue about the scope of reg 4(2)(a), it did not consider the wider question as to whether, if the transferor's share scheme contains a unilateral power for it to terminate the share scheme (as is common in SIP plan rules and indeed in other types of employee share plans), does that mean that the scheme of substantial equivalence that must be put in place by the transferee can also contain such a power and the transferee can effectively rely on that power to terminate the share scheme arrangements on transfer? In principle, that would seem arguably correct on the basis that TUPE is there to preserve existing rights and obligations but not to enhance them. If that is right, then, in principle, even if the employee has a right to participate in a share scheme of substantial equivalence, such a right might, in practice, be relatively worthless because the transferee could arguably exercise such a unilateral right to terminate the scheme on transfer.

Of course, the *Gallagher* decision also provides no further guidance on the question that has been left hanging ever since the *Mitie* decision, namely as to how similar a replacement scheme needs to be to meet the test of being 'substantially equivalent'. That question needs further and much needed guidance from the appellate courts.

KEY:

ERA	Employment Rights Act 1996
Gallagher	*Ponticelli UK Ltd v Gallagher* [2022] EAT 140
TUPE	Transfer of Undertakings (Protection of Employment) Regulations 2006 (SI 2006/246)
Chapman	*Chapman and Elkin v CPS Computer Group Plc* [1987] IRLR 462
Mitie	*Mitie Managed Services Ltd v French* [2022] IRLR 521