



**EMPLOYMENT TRIBUNALS (SCOTLAND)**

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**Case No: 4107416/20 (A)**

**Held on 21 June and 6 and 19 August 2021**

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**Employment Judge J M Hendry  
Members Ms D McDougall  
Mr A Atkinson**

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**Mr A Gallagher**

**Claimant  
Represented by  
Mr M A S Briggs,  
Solicitor**

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**Ponticelli UK Limited**

**Respondent  
Represented by  
Mr T Hadden,  
Solicitor**

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**JUDGEMENT OF THE EMPLOYMENT TRIBUNAL**

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**The unanimous decision of the Tribunal is:**

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**1. 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 and further,**

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**2. That the Claimant's application for a reference under Section 11 of the Employment Rights Act 1996 is well founded and the Tribunal declares**

**E.T. Z4 (WR)**

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

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## REASONS

1. The Claimant seeks a reference under section 11 of the Employment Rights Act 1996 (“ERA”) for the determination under section 12(2) (following a relevant transfer under TUPE to the Respondent on 1 May 2020) that he is entitled to be a member of a Share Incentive Plan (SIP) equivalent to the SIP of which he was a member prior to the transfer of his employment. The transferors were Total Exploration and Production UK Ltd (“TEPUK”).
2. In this case the facts were not in dispute rather the case turned on the application of the law to those facts.

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## Issues

3. There were a number of issues for the Tribunal to consider. The Tribunal had to decide whether or not the Claimant was personally barred from insisting on the reference, the nature of his rights under the transferor’s SIP and whether these were capable of transferring under TUPE because of the nature of that scheme, whether it was exhausted prior to the transfer, whether the Claimant was properly entitled to challenge his statement of terms and conditions to engage Section 11 of the Employment Rights Act (“ERA”).
4. It was accepted that the Claimant’s employment transferred under TUPE from Total Exploration and Production UK Limited (TEPUK) to the Respondent on 1 May 2020. It was also accepted that the Claimant was a member of TEPUK’s share plan, namely the Total E&P UK Limited Share Incentive Plan (the “SIP”).

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5. It was accepted that the Claimant's membership of the SIP terminated on 1 May 2020 and that a payment of £1,855 was made to him in the Respondent's June 2020 payroll purportedly in satisfaction of any rights to participate in a SIP.

5 **The Claimant's section 1 statement**

6. The basis for the Claimant's position was that his contract of employment with TEPUK prior to the TUPE transfer entitled him to participate in the SIP on the terms set out in the document titled "Total E&P UK Limited Share Incentive Plan Explanatory Booklet" dated October 2013 ("the 2013 terms"),  
10 This was the basis of the scheme offered and accepted by him and others. The terms of the offer were communicated to the Claimant by way of email attachment dated 13 July 2018. The text of the email and the presentation made prior to him joining constituted in the Claimant's view an offer to the Claimant to participate in the scheme. This offer was accepted by him and,  
15 as such, validly varied his contract of employment to include these terms.

7. The Respondent denied that the Claimant's contract of employment entitled him certain benefits under the SIP. The Respondent asserted that there was no reference to the SIP in the Claimant's written statement of terms. It was their position that it was a separate right. The Claimant asserted that Clause  
20 16 of the written statement of terms incorporated certain policies and procedures into his contract of employment. While the 2013 terms are not expressly listed as an example of one such policy, the list of examples is expressly stated as being non-exhaustive. It was the Claimant's position that the 2013 terms constitute one such policy and have contractual effect.

- 25 8. The Respondent asserted that the SIP was governed by the Total E&P Limited Share Incentive Plan Partnership Agreement (the 'SIP Agreement'), which was entered into between the Claimant, TEPUK, and EES Trustees Limited (the 'Trustees'). The SIP Agreement is subject to the SIP, which in turn is governed by the Trust Deed and Rules. The Claimant participated in  
30 the SIP by entering into the SIP Agreement on a voluntary basis.

9. The Respondent therefore asserts that the Claimant's entitlement to benefits under the SIP arose because of the Claimant's voluntary participation in the SIP through his entering into the SIP Agreement. His entitlement to benefits under the SIP Agreement did not form part of a statement purporting to be a statement under section 1 of the ERA. As such, there are no particulars capable of being confirmed, amended, or substituted by the tribunal under s12(2).
10. The Respondent's agent submitted that a s.11 reference to the tribunal can only be determined under s.12(2) where the Claimant sets out the particulars which require to be confirmed, amended or substituted. The particulars the Claimant seeks to have confirmed is as follows: "The Claimant has a right to participate in a scheme of substantive equivalence to the Total E&P UK Share Incentive Plan on the terms as set out in the Explanatory Booklet dated 2013". The terms of that agreement ought to be read subject to the provisions of reg.4, TUPE in light of the subsequent transfer. References to "Total E&P UK Limited" in clauses 1.1, 3.1(i) and (ii), and 3.3 (i) and (ii) should be replaced with the Respondent.

### **Transfer of share scheme rights by operation of TUPE**

11. Even if the Tribunal finds that there are particulars capable of being the subject of a determination under 12(2) (which is denied), the Respondent asserts that the SIP does not arise under or in connection with a contract of employment. The Respondent asserts that the SIP Agreement was a separate and discrete contract between the Claimant, TEPUK, and the Trustees. The Respondent refers to *Chapman v CPS Computer Group* [1987] 1 WLUK 56.
12. Even if the Employment Tribunal finds that there are particulars capable of being the subject of a determination under 12(2) (which is denied) and those particulars arise under or in connection with the Claimant's contract of employment (which is denied), the Respondent asserts that the status of the benefit of TEPUK's SIP was not contractual and so did not transfer under TUPE.

13. Did any rights under TEPUK's share scheme transfer to the Respondent by operation of Regulation 4(2)(a) of TUPE?

**Variation/termination of the SIP**

- 5 14. The Respondent further asserts that only employees of TEPUK are eligible to participate in TEPUK's SIP. Where an employee leaves the employment of the Total S.A. Group, the SIP provides that any shares *'must be sold or transferred into your name or the Company's vested share account within 90 days.'* The Respondent asserts that the Claimant had no entitlement capable of transferring to the Respondent because the SIP itself sets out what happens if an employee leaves employment. The Claimant's position is that this right should be read as only covering situations where the Claimant leaves employment other than by TUPE transfer. Any provision that terminated this right upon transfer would be void by operation of reg.18, TUPE.
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- 15 15. The Respondent further asserts that the SIP contains a provision for variation/termination of the SIP. The Respondent asserts that if the tribunal finds that any right of the Claimant's under the SIP transferred to the Respondent by operation of Regulation 4(2)(a), then the right to vary/terminate the SIP also transferred to the Respondent by virtue of Regulation 4(2)(a) of TUPE. In the event such a right did exist, The Claimant asserts that any variation would be void by operation of reg.4(4), TUPE.
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16. If the rights so transferred, The Respondent asserts that it exercised its right to vary / terminate the Plan via its offer to the Claimant to buy-out his benefit under the SIP.
- 25 17. The Claimant asserts that the Respondent "being unable to replicate or honour the Referrer's exact right in relation to the transferor's share scheme, must provide the Referrer with a right to a benefit of substantive equivalence to the Referrer's pre-transfer right in relation to the transferor's share scheme."

18. Is the Claimant entitled to be provided with a benefit of substantial equivalence to the Claimant's pre-transfer right in relation to the transferor's share scheme?

5 19. The parties agree that the question of whether the arrangements put in place by the Respondent amount to a benefit of substantial equivalence is not a matter for this claim.

**Personal bar/affirmation**

10 20. If it is found that any obligations under the SIP did transfer to the Respondent, specifically a contractual right to participate in a scheme of substantial equivalence as the Claimant asserts:-

15 a. The Respondent asserts that the Claimant is personally barred from bringing the present claim. The Respondent asserts that the Claimant's acceptance of the arrangements set out in the scheme itself relating to the benefits built up in the scheme and the one off payment to the Claimant by the Respondent - both of which were accepted by the Claimant (albeit with an email of protest in relation to the payment) are actions that are inconsistent with him now seeking to rely on the terms of the SIP.

20 b. Has the Claimant, by continuing his employment with the Respondent affirmed the contract of employment, as the Respondent asserts?

**Evidence and submissions**

25 21. It was agreed that prior to the hearing that parties would work on a detailed list of agreed facts which they did (JB43). Parties lodged a joint bundle (JB1-31). They also lodged skeleton arguments and copies of relevant authorities.

**Agreed Facts**

We will set out the agreed facts which were as follows:

1. The Claimant is employed by the Respondent.
2. The date of the Claimant's most recent contract of employment is 1 March 2019. A copy is in the bundle at page 117. The contract is between Total Exploration and Production UK Limited (TEPUK) and the Claimant.  
5 TEPUK employed the Claimant prior to a TUPE transfer on 1 May 2020. There are no references to any entitlements under any share plans in that contract.

### **Claimant's participation in the SIP**

- 10 3. TEPUK operate a Share Incentive Plan ('SIP'). Under the SIP, shares in TEPUK's publicly listed parent company, Total S.E. are bought and held in the SIP by the SIP's trustees on behalf of the participants.
4. The SIP is administered by EES Trustees Limited (formerly named Mourant ECS Trustees Limited) in accordance with the TEPUK Trust Deed and Rules, as amended. A copy is in the bundle at page 45. A copy  
15 of the deed of amendment is in the bundle at page 84.
5. The Claimant was emailed on 13 July 2018 by Celia Macdonald, HR Director, on behalf of TEPUK. The email contained details of the SIP. A copy is in the bundle at page 113. A booklet was attached to the email which contained details of the SIP (the 'Explanatory Booklet'). A copy is  
20 in the bundle at page 90.
6. The Claimant completed an application form and he became a participant in the SIP on 24 August 2018.
7. The Claimant signed an agreement to confirm his participation in the SIP (the 'Partnership Share Agreement'). A copy is in the bundle at page 115.  
25 The Partnership Share Agreement was entered into between the Claimant, TEPUK, and EES Trustees Limited. Participation was voluntary. The Claimant was not required to participate in the SIP.

### **TUPE transfer from TEPUK to the Respondent**

- 30 8. The Claimant's employment transferred to the Respondent on 1 May 2020 under the Transfer of Undertakings (Protection of Employment) Regulations 2006.

- 5 9. Ahead of the TUPE transfer of employees from TEPUK to the Respondent, information and consultation meetings were held with the representatives of the transferring employees on the following dates: 27 February 2020: 5 March 2020: 12 March 2020: 19 March 2020: and 2 April 2020. Copies of the presentations referred to at those meetings are in the bundle at pages 124, 159, 191, 216 and 232.
- 10 10. During the consultation meeting on 12 March 2020, the Respondent indicated that it proposed that employees would be offered a one-off buy-out of the benefit under the SIP. The offer was discussed during the consultation process.
- 15 11. The Claimant received a letter from the Respondent on 27 April 2020 confirming that his employment would transfer to the Respondent on 1 May 2020. A copy is in the bundle at page 260. His contract remains the document referred to above at paragraph 2, subject to the measures discussed during the consultation process.
12. The Claimant's membership of the SIP terminated on 1 May 2020. The shares were transferred to the Claimant.
- 20 13. In a letter dated 10 June 2020, the Claimant was advised that he would receive £1,855 by way of a one-off payment as compensation for the fact that the Respondent was not in a position to provide a SIP. This amount and the approach to the SIP was the subject of consultation as part of the TUPE transfer. The amount was based on two times the Claimant's average contributions to the SIP for the last two years.
- 25 14. The Claimant sent an email to the Respondent on 10 June 2020 which stated: "*Please advise whoever you need to not to make the payment to me. I am currently in discussions with ACAS and my union regarding breach of contract for not transferring my share option during the TUPE from Total.*" A copy is in the bundle at page 263.
- 30 15. A payment of £1,855 (subject to required deductions) was made by the Respondent to the Claimant in the June 2020 payroll.
16. The Claimant has not repaid this amount.
17. ACAS received an Early Conciliation notification in respect of the claim on 24 October 2020. After the email of 10 June, the Respondent received



no further correspondence from the Claimant in respect of the share scheme until it received the notice of claim in December 2020.

### **Additional factual information**

- 5 22. The parties in the joint bundle produced documents which are not in dispute and which were referred to by both sides in the course of their submissions.

### **Trust Deed & Rules of the Total E & P UK Plc Incentive Plan (JB10)**

*“3.5 Notwithstanding any provision of any other of these Rules whatsoever:*

10 (a) *the Plan shall not form part of any contract of employment between the Company, the Parent Company, a Subsidiary or any Associated Company and any Participant and it shall not confer on any Participant any legal or equitable rights (other than those constituted by the grant of Awards themselves) whatsoever against the Company, the Parent*  
15 *Company, a Subsidiary or an Associated Company directly or indirectly or give rise to any cause of action at law or in equity against the Company, the Parent Company, a Subsidiary or any Associated Company;*

20 (b) *Participation in an Award is a matter entirely separate from any pension right or entitlement a Participant may have and from his terms or conditions of employment and participation in the Plan shall in no respect whatever affect his pension rights or entitlements or terms or conditions of employment and in particular (but without limiting the generality of the foregoing) any Participant who ceases to be an employee of the*  
25 *Company, the Parent Company, a Subsidiary or any Associated Company shall not be entitled to any compensation for any loss of any right or benefit or prospective right or benefit under the Plan which he might otherwise have enjoyed whether such compensation is claimed by way of damages for wrongful dismissal or other breach of contract or by*  
30 *way of compensation for loss of office or otherwise howsoever and notwithstanding that he may have been dismissed wrongfully or unfairly (within the meaning of the Employment Rights Act 1996).”*

23. In relation to the SIP the Respondents prepared an explanatory booklet  
35 (JB12) which the Claimant and other participants had access:

40 *“10.1 If you are transferred to another company in the Total S.A. Group which does not participate in the Plan, you cannot be awarded any more shares under the Plan. Shares which have already been allocated to you must be left in the Plan for the remaining part of any Holding Period and you can continue to leave those shares in the Plan while you remain employed within the Total S.A. Group.*

10.7 *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 the Company's vested share account within 90 days from the date of cessation of your employment. There will be no income tax or NICs to pay, regardless of the length of time your shares have been held in the Plan.*

12.1 *The Plan is administered in accordance with the Trust Deed and Rules, a legally binding document governing the Plan. Copies of the Trust Deed and Rules are available for inspection, and you may arrange to see this document by contacting the Human Resources Department.*

12.2 *The Company may either vary or terminate the Plan. However, any such change will not affect your position with regard to shares that have already been bought for you.*

12.3 *This booklet is an explanatory guide only. In the event of any discrepancy between this booklet and the Trust Deed and Rules, the latter will take precedence. Notices given to the Company and the Trustees will only be effective when actually received by them and you are reminded that any dates and deadlines in the Plan must be strictly observed."*

24. A file copy of the application made by the Claimant to join the SIP is produced (JB13) Clause 1 is in the following terms:

*"I agree that taking part in the Plan does not affect my rights, entitlements and obligations under my contract of employment, and does not give me any rights or additional rights to compensation or damages if my employment ceases."*

25. On 13 July 2018 (JB14) the Claimant was given advice as to how to join the scheme:

*"Dear Anthony*

*TEPUK's on-boarding presentations referred to:*

- joining TEPUK's Share Incentive Plan (SIP)*
- joining TEPUK's Sports and Social Club (TSSC)*
- accessing your online payslip*

*and we now write with details of these and your employee/payroll no."*

26. The Claimant was issued with a contract of employment (JB16) at Clause 16 he made reference to policies and procedures:

*"16 **Policies and Procedures***

*There are certain Company policies and procedures which are contractual, examples of which include, but are not limited to:*

- 5
- *Information Security*
  - *Total Code of Conduct*
  - *Business Ethics*
  - *Anti-Fraud*

10 *The Company reserves the right to amend the contents of all such policies and procedures.”*

27. The Claimant was involved along with other staff in a TUPE carried out by the transferors. The TUPE consultation meeting took place on 2 April 2020. The Respondents advised employee representatives:

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- *Main points re Shares*
  - *We have been advised by TEPUK that all of the share schemes currently in place are non-contractual and may be removed at any time. Although the schemes have been in place for a long time, this does not automatically establish a contractual obligation to offer the schemes in the future.*
  - *TEPUK exercise their discretion annually whether to provide the benefit or not and it is not perpetual. The schemes could stop at any point.*
  - *Loss to the employee would be limited to their own actual loss, which is turn would be based on their usage of the schemes. An employee who had never used either scheme would find it difficult to establish that they have suffered loss by no longer being able to participate in it.*
  - *TEPUK have confirmed that the employees are able to sell their shares in either scheme before the 5 year vesting date and still benefit from the tax savings.*
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- *Share Incentive Plan –*
  - *With regards to the SIP we have taken the decision, as outlines to you in our consultation meeting, to make a cash offer to compensate employees who currently engage with the SIP for the loss of this benefit. Our offer is based on the value of TEPUK’s contribution to the scheme over the first 12 months after the transfer date (up to £3,000). This sum compensates transferring employees for the sums they would have received from TEPUK had they continued to engage in the scheme for a further 12 months. We see this as a generous outcome in the circumstances and more than we are obliged to provide.*
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- *Share Incentive Plan –*

- *PBS will offer a one-off buy-out of the benefit equal to 2 x the average employee contribution to the SIP partnership shares for the last 2 years up to a limit of £3,000.*

- *Capital Share Plan*

- *On the basis of the above analysis, we are unable to replicate this benefit. TEPUK have confirmed that they will waive the 5 year vesting period in respect of shares held in the Capital Share Plan for transferring employees, without any detriment to the corresponding tax treatment. The current market is volatile and the treatment TEPUK have set out is a significant benefit as it will allow transferring employees to chose the time to sell their shares. Accordingly, PBS have decided not to offer compensation for the loss of this benefit.*

*SIP Shares – the loss of SIP without the offer of substantial equivalence will be treated as detriment and breach of contract. Response on this has been included in Collective Consultation Meeting 5.”*

28. The Respondent decided not to replicate the SIP scheme and wrote to the transferor’s HR department setting out their position (JBp.258):

25 **“Share Incentive Plan (SIP)**

*We will not replicate a SIP therefore will offer a one-off buy-out of the benefit equal to 2 x the average employee contribution to the SIP partnership shares for the last 2 years up to a limit of £3,000*

*The average contribution will be calculated from 1<sup>st</sup> May 2018 – 30<sup>th</sup> April 2020.*

*Payable only to employees subscribed to SIP within the first 3 months after the transfer date.*

*Non-contractual, non-pensionable.*

*Payment will be subject to statutory deductions (tax and NI).”*

29. The Claimant and other staff were written to in relation to the proposed transfer by the Respondent company advising that the transfer date was the 1<sup>st</sup> May. The letter stated:

*“Having now completed the final stages of the consultation process, this is to confirm that on 1 May 2020 your employment will transfer when your existing contractual terms and conditions to Ponticelli except for those measures listed in the Appendix to this letter.”*

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30. The Respondent wrote to the Claimant on 10 June 2020 (JB30):

*“I am pleased to have let you know we are in a position to make a one off payment to you in the June payroll run.*

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*As was discussed at the consultation process, the sum has been calculated using 2 x your average employee contributions to the share incentive plan for the last 2 years up to a maximum of £3,000.....”*

31. The Respondent sent the letter at 08.38 (JBp.263). He responded (JBp.263):

*“Morning Lisa*

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*Please advise whoever you need to not to make the payment to me. I am currently in discussions with ACAS and my union regarding breach of contract for not transferring my share option during the TUPE from total.*

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*Thanks  
Anthony”*

### **Claimant’s submissions**

25 32. The Claimant’s solicitor first of all made reference to Regulations 42A and 44 of the TUPE Regulations and to Regulation 18. This provides at section 203 of the ERA applies to the Regulations. Section 203 of the ERA provides that:

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*“Any provision is ....void in so far as it purports to exclude or limit the operation of any provisions of” the TUPE Regulations. The Claimant’s primary provision was that the current circumstances were on all fours with the case of **French v. Mitie Management Services** [2002] IRLR 513 where it was held at paragraph 16 that: “the entitlement of the transferred employees in a case such as this is to participation in a scheme of substantial equivalence but one which is free from unjust, absurd or impossible features. In most cases, we would expect the transferee, to be able to negotiate a scheme of such equivalence with the transferred employees or their unions.”*

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33. Mr Briggs then turned to the contractual position prior to transfer arguing that the SIP scheme was incorporated into the Claimant’s employment contract.

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He indicated that Clause 16 of the employment contract made reference to

“certain company policies” which are not contained within the document nevertheless have a contractual effect. The Claimant’s position was that the share scheme was *ejusdem generis* with the policies mentioned. In the event that the Tribunal held that the scheme wasn’t incorporated by Clause 16, it was nevertheless he contended such a right does exist notwithstanding the fact that it not mentioned in the document titled Contract of Employment as such documents are not exhaustive. In response to the Respondent’s argument the Claimant has no right in contract to participate in a scheme in so far as it was entered into on a voluntary basis. He argued first of all it is inherent that all contracts are entered into on a voluntary basis and second it is in the nature of the contract that the Claimant was entitled to take or leave it. The transferor having introduced the scheme was bound to discharge the relevant obligations in respect of employees who choose to exercise that right until such times as either the contract was varied or terminated. The scheme was distinct from the discretionary bonus or some other ex-gratia benefit made on an *ad hoc* basis. Benefits were not concerned with the discharge of duties incumbent upon an employer under a contract of employment but are instead voluntary actions by the employer by means of the SIP to create a clear framework of expectations, rights and obligations. The right will, he submitted, transfer. There was no basis to argue that because it was tripartite rather than a contract between the Claimant and the transferor alone it could not transfer. The Trustees were administering the scheme for members who have the SIP as a benefit. The transferor offered a benefit to the Claimant who accepted it thus creating contractual rights.

34. He submitted that in the **French** case the EAT did not find that the right to participate had been frustrated by the transfer. The fact it did not turned instead indicated the right to participate in a scheme of “substantial equivalence” transferred shows that the tripartite approach suggested by the Respondent is incorrect. In relation to the case of **Chapman v. CPS Computer Group Plc** [1987] 1Wluk 56. That case concerned the proper interpretation of certain documents and the definition of redundancy and is

not helpful to the Respondent. It is doubtful in any event given the later authorities if the case is still good law.

- 5 35. The case of ***Chapman v Aberdeen Construction Group Ltd*** referred to by Mr Hadden concerned benefits payable under the scheme upon redundancy whether or not employees leaving a company's employment by reason of a relevant transfer amounted to a redundancy. It is not readily apparent why the case was relevant.
- 10 36. Turning to the issue of variation and termination of the SIP the fact the scheme provided for automatic termination did not assist the Respondent's position. The Claimant has not brought this reference on the basis of continued participation in the "old scheme" but on the basis of his entitlement to participate in a new scheme of substantial equivalence. If the Respondent's position was correct that the scheme operates to terminate on transfer such a clause would be void by operation of Regulation 18. There was no unfettered right to vary under the "old scheme" (Article 12.2 (JBp.108), Article 12.3 Clauses 22 and 23 (JBp.57)). The right under 12.2 is to terminate the "plan" it does not terminate the Claimant's right of entitlement to participate in a similar SIP transfer of unilateral or absolute discretion to vary or terminate the scheme in line with ***French***. What is transferred is the right to take part of an equivalent scheme.
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- 25 37. Mr Briggs then turned to personal bar and affirmation. These are principles of Scots Law (***Gatty v. Maclaine*** [1921] 1SLT 21). Before such a plea can be sustained the Respondent would be required to show that they had acted on the basis of representations that had been made by the Claimant. There was nothing in the agreed statement of facts to allow the Respondent to make this argument. There are no "inducing words of conduct" that would bar him.
- 30 The existence of the contractual term in question was a matter of fact. He was entitled to accept the payment while challenging the existence of the other term. The Claimant could not affirm the contract by continuing in employment. The Claimant has not asked the Tribunal to consider any

breach of contract nor has reliance been placed on whether such a breach would have been accepted or rejected by him. There was no acquiescence.

38. Mr Hadden set out his submissions as follows:

5 **Respondent's Position**

39. Prior to the transfer, the Claimant was employed by Total Exploration and Production UK Limited (which changed its name to Total Energies E&P UK Limited on 1 June 2021) (TEPUK). TEPUK operates a Share Incentive Plan ('SIP').

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40. The Claimant now seeks a statement in terms of s.12(2) of the Employment Rights Act 1996 ('ERA') confirming the particulars of his rights in relation to the SIP. The Respondent denies that the Claimant's section 1 statement contains any particulars relating to the SIP, or that the Claimant is entitled to any continuing benefits in connection with the SIP.

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**Application of EU Law**

41. The UK left the EU on 31 January 2020. A transition period applied until 11pm on 31 December 2020, during which time most EU law continued to apply to the UK. At the end of the transition provided, the European Union (Withdrawal) Act 2018 ('EUWA') (as amended) created a 'snapshot' of retained EU law. The snapshot of retained EU law continues to have effect in domestic law in the UK and can be relied upon in UK courts and tribunals unless or until it is amended. This includes EU derived domestic legislation such as TUPE.

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42. UK legislation which implemented an EU directive, such as TUPE, must continue to be interpreted in light



of the wording and purpose of the EU directive. TUPE must therefore continue to be interpreted in light of the Acquired Rights Directive (77/187/EC).

5 43. The EUWA also provides for the incorporation of 'retained case law'. Section 6(7) of the EUWA provides that this comprises of domestic and CJEU decisions from before the end of the transition period that relate to retained EU law.

10 44. UK courts and tribunals must continue to follow retained case law and retained general principles of EU law until a relevant UK court departs from that body of case law and principles, or until UK legislation modifies the relevant retained EU law in terms of section 6 of the EUWA.

### **Claimant's Contract of Employment**

15 45. The Claimant asserted, at paragraph 4 of the list of issues, that his contract of employment with TEPUK prior to the TUPE transfer entitled him to participate in the SIP. This is on the grounds of his having been made an offer to participate in the SIP, which he claims validly varied his contract of employment upon his acceptance. The Respondent denies that the Claimant's contract of employment entitled him to participate in the SIP. There  
20 was no reference in the Claimant's contract of employment to any terms relating to a SIP.

25 46. Further, the email to the Claimant inviting him to participate in the SIP was incapable of validly varying the Claimant's contract of employment. The Respondent submitted that such an implied variation would be inconsistent with the express written term of the SIP Agreement, under which the Claimant agreed that participation in the SIP: '*does not affect my rights, entitlements and obligations under my contract of employment, and does not give me any*

*rights or additional rights to compensation or damages if my employment ceases.'* (paragraph 1 under Rights and Obligations, page 110 of the bundle).

5 47. The Respondent also does not accept that the Explanatory Booklet was incorporated into the Claimant's contract of employment by operation of clause 16 of the Claimant's contract of employment as the Claimant asserts at paragraph 5 of the list of issues. Clause 16 refers to certain contractual policies and procedures. Again, it is submitted that the express terms of the SIP Agreement (namely the extract referred to above that participation in the SIP 'does not affect my rights, entitlement and obligations under my contract of employment') prevail and any provisions relating to the SIP did not form part of the Claimant's contract of employment.

15 48. Further, the SIP Explanatory booklet (which the Claimant asserts was incorporated into his contract) specifically states at 12.3 that the booklet:

*'is an explanatory guide only. In the event of any discrepancy between this booklet and the Trust Deed and Rules, the latter will take precedence.'* (Page 108 of the bundle).

20 49. The Rules of the Plan, at 3.5(a) (on page 67 of the bundle) makes clear that:

25 *'the Plan shall not form part of any contract of employment between the Company, the Parent Company, a Subsidiary or any Associated Company and any Participant and it shall not confer on any Participant any legal or equitable rights (other than those constituted by the grant of Awards themselves) whatsoever against the Company, the Parent Company, a Subsidiary or an Associated Company directly or indirectly or give rise to any cause of action at law or in equity against the Company, the Parent company, a Subsidiary or any Associated Company'.*

30 50. The Respondent asserts that the Claimant's contract of employment with the Transferor did not entitle him to participation in the SIP.

### **Transfer of Share Scheme Rights by operation of TUPE**

51. To determine what terms relating to the SIP form part of the Claimant's contract of employment (if any), it is necessary to determine what was capable of transferring to the Respondent by operation of TUPE.
- 5 52. The Respondent submits that the SIP does not arise under or in connection with a contract of employment. The Respondent refers to **Chapman v CPS Computer Group [1987] 1 WLUK 56** per Lord Justice Glidewell on paragraphs 2 and 3 of page 5.
- 10 53. The Claimant signed an agreement to confirm his participation in the SIP (the 'Partnership Share Agreement'). A copy is in the bundle at page 115. The Partnership Share Agreement was entered into between the Claimant, TEPUK, and EES Trustees Limited. As in **Chapman**, this case concerns not the Claimant's contract of employment for the purposes of Regulation 4(1) of  
15 TUPE, but a separate and discrete contract between the Claimant, TEPUK and the Trustees. TUPE therefore did not apply to transfer any of the Claimant's rights in relation to the SIP to the Respondent.
54. *The Respondent submitted that **Chapman** could be distinguished from cases  
20 such as **Martin v Lancashire County Council Bernadone v Pall Mall Services Group 2001 ICR 197, CA** and **Secretary of State for Employment v Spence 1986 ICR 651**, which relate, respectively, to rights under a third-party employers' liability scheme, and to obiter comments about the potential for TUPE to apply to transfer obligations wider than contractual obligations,  
25 such as obligations arising in tort.*
55. The Respondent submitted that **Chapman** was directly on point with the current case and should be followed in this case as it concerned a share option agreement which the Claimants entered into on a voluntary basis  
30 following an offer to do so by their employer.

56. Even if the Tribunal found that there are particulars capable being the subject of a determination, and those particulars arise under or in connection with the Claimant's contract of employment, the Respondent submitted that the benefit of participating in TEPUK's SIP was not contractual and so did not transfer under TUPE. Share scheme arrangements which are purely discretionary and non-contractual are not capable of being transferred under Regulation 4(4). The Respondent referred to **Jefferies v Powerhouse Retail Ltd EAT 1328/95** per Mummery J on the final paragraph of page 4.

### Leaving employment under Rules of SIP

57. Only some employees of TEPUK's group are eligible to participate in TEPUK's SIP. The SIP contains provisions outlining which employees within TEPUK's group are eligible to participate in the SIP, namely those who are employees of a Participating Company. A 'Participating Company' under the definitions of the Rules of the Plan is *'the Company (being TEPUK) and such of its Subsidiaries as are parties to this Deed or have executed deeds of adherence to the Plan under clause 16 of the Trust Deed.'* (Page 62-63 of the bundle).

58. Where an employee ceases to be in relevant employment, Rule 12 of the Rules of the Plan sets out what happens if an employee ceases to be in Relevant Employment, namely he: *'must remove his Shares from the trust within 90 days from the cessation of such Employment.'* (Page 83 of the bundle). 'Relevant Employment' means *'employment by the Company or any Associated Company.'* (Page 65 of the bundle).

59. The Respondent's position was that the Claimant had no right capable of transferring, as the Rules of the Plan set out what happens if an employee leaves employment in terms of the SIP. Those provisions validly terminated any entitlement the Claimant had to participate in TEPUK's SIP.

60. Further, the purpose of the Trust Deed which set up the SIP is to *'establish a trust for the employee share ownership plan... which satisfies Schedule 2 to*

5 *the Income Tax (Earnings & Pensions) Act 2003'* (clause 1, page 47 of the bundle). In terms of that act, ('ITEPA'), an employee's shares cease being subject to a share incentive plan when *'the participant to whom the shares were awarded ceases to be in relevant employment at a time when the shares are subject to the plan.'* (para 97(1)(b) Sch 2 ITEPA). 'Relevant employment' means employment by the company or any associated company (para 95(2) Sch 2 ITEPA). Sections 498(1) and (2)(c) of ITPEA stipulate that a participant will not be liable to income tax on shares ceasing to be subject to a share incentive plan where shares cease to so subject because the participant ceases to be in relevant employment due to a relevant transfer within the meaning of TUPE. The statutory regime therefore also clearly sets out what happens when an employee ceases to be in relevant employment.

15 61. The Claimant can have had no entitlement capable of transferring to the Respondent because the SIP and ITEPA clearly sets out what happens if an employee leaves employment with the Respondent.

20 62. The Respondent referred to **Jackson v Computershare Investor Services plc [2007] EWCA Civ 1065**, per Lord Justice Mummery at paragraph 31. TUPE cannot be used to create rights that did not exist prior to the transfer.

25 63. Further, he argued TUPE preserves existing rights but it does not create them where none existed. By extension, it does not operate to enhance existing rights. If the Employment Tribunal were to hold that the obligation to continue the SIP indefinitely could be enforceable against the Transferor, it would be allowing the Claimant the benefit of a greater right than that which he would have enjoyed had his employment transferred to another company in the Total S.A. Group which did not participate in the Plan. It is not the objective of TUPE to improve the situation of the employee, rather it is merely to preserve his existing rights. The Respondent refers to **Viggosdottir v. Islandspostur HF [2002] IRLR 425** at 979.

30 64. Finally, the Claimant could not enforce a continued right to participate in the SIP against TEPUK. As TUPE preserves existing rights only, it cannot give

the Claimant a right against the Respondent that he did not have against TEPUK.

5 65. The Claimant's entitlement to participate in the SIP therefore validly dealt with by operation of the provisions of the SIP.

66. The Respondent submitted that Regulation 18 of TUPE did not alter this position, as the Claimant has submitted at paragraph 12 of the list of issues.

10 67. The Respondent also referred to the cases of Tomlin v EDS ET case No. 2702211/07 and Nokia - decision of the German Federal Labour Court, 12 February 2003, case no. 10 AZR which consider the extent to which share awards in a parent company can transfer to a transferor under TUPE (and the German equivalent).

15 **Variation/Termination**

68. The Respondent submitted that if the tribunal found that any right of the Claimant's under the SIP did transfer to the Respondent by operation of Regulation 4(2)(a), and were not validly dealt with by the operation of SIP's provision for leaving the employment of TEPUK, then TEPUK's right to vary/terminate the SIP also transferred to the Respondent by virtue of Regulation 4(2)(a) of TUPE.

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69. The Respondent submitted that it validly exercised the power to vary/terminate the SIP during the consultation process and the offer of the one-off non-contractual offer to the Claimant to buy-out his benefit under the SIP.

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70. Paragraph 22 of the Trust Deed provides that *'The Directors may, with the Trustees' written consent, from time to time amend the Plan*, subject to the provisos in that clause. (Page 57-58 of the bundle).

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71. Paragraph 23 of the Trust Deed provides that the Plan shall terminate: '*(a) in accordance with a Plan Termination Notice issued by the Directors acting on behalf of the Company to the Trustees under paragraph 89 of the Schedule*'. (Page 57 of the bundle).
- 5
72. For the avoidance of doubt, while the Respondent consulted on the SIP during the consultation process, the definition of measures is extremely wide. The term 'measures' is not defined in TUPE, however the Respondent refers to the case of **Institution of Professional Civil Servants and Others v Secretary of State for Defence [1987] 3 C.M.L.R. 35** at paragraph 12. The Respondent's decision not to replicate the SIP was a measure under that definition. Consultation on the SIP was not an acknowledgement that the SIP was part of the contract of employment.
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73. In terms of the operation of regulation 4(4), the Respondent submitted that Claimant's entitlement to the participate in TEPUK's SIP was non-contractual. The Respondent's variation of the SIP would therefore fall outside of the scope of regulation 4(4).
- 15
74. If the Tribunal finds that the Claimant's entitlement to participate in the SIP was contractual such that Regulation 4(4) could potentially apply to the Respondent's decision to withdraw the SIP and offer the one off payment (as the Claimant asserts at paragraph 13 of the list of issues), the Respondent submits that the transfer was not the sole or principal reason for the decision to withdraw the SIP. The Respondent refers to **Waugh v Mitie Ltd ET Case No.2202302/19**. The reason for the variation/termination of the Claimant's entitlements under the SIP was not the transfer. Rather it was the fact that the transferee (the Respondent) was not a participating company in the SIP – in a similar way as if employment had moved to another company in TEPUK that did not participate in the SIP.
- 20
- 25
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75. Finally, while the claim is not one for a monetary sum, even if the Claimant has a contractual right, and that right transferred to the Respondent, and was

not validly varied/terminated by the Respondent, the Claimant was excluded by Rule 3(b) of the Rules of the Plan (to which the Share Partnership Agreement is subject) from seeking compensation. (Page 67 of the bundle).

- 5 76. The Respondent submitted that Rule 3.5(b) is an exemption clause of the type referred to in the case of **Micklefield v SAC Technology Ltd [1990] 1 W.L.R. 1002.** The Respondent submits that, if the right to participate in the SIP transferred to the Respondent, then the benefit of the exemption clause under Rule 3.5(b) has also so transferred. The Respondent also refers to  
10 paragraph 1 of the Partnership Share Agreement (under Rights and Obligations, page 110 of the bundle), which contains a similar provision.

#### **RIGHT TO A BENEFIT OF SUBSTANTIAL EQUIVALENCE**

- 15 77. The Claimant asserted that the Respondent *'being unable to replicate or honour the Referrer's exact right in relation to the transferor's share scheme, must provide the Referrer with a right to a benefit of substantive equivalence to the Referrer's pre-transfer right in relation to the transferor's share scheme.'* (paragraph 7 of the paper apart to the ET1, page 16 of the bundle).
- 20 78. The principle of substantial equivalence was referred to in the case of **Mitie Managed Services Ltd v Mrs HM French & others 2002** UKEAT 408001204.
- 25 79. The Respondent's argument was that **Mitie** can be distinguished from the present case. The Claimants in that case were found to have an express contractual right to participate in the transferor's profit-sharing scheme, as their contracts of employment contained a profit-sharing clause. The Respondent refers to paragraphs 3 and 8 of the decision.
- 30 80. The Respondent has submitted that no such contractual entitlement exists in the present case.
81. Even if the Employment Tribunal finds that such an entitlement under the Claimant's contract of employment did exist, which is denied, the Respondent submits that the **Mitie** decision is problematic. How can a tribunal determine



whether a scheme is substantially equivalent – particularly if the specific tax benefits are simply not available in a new scheme.

- 5 82. The Respondent submitted that the Claimant was not entitled to participate in a scheme of substantial equivalence.

### **Claimant's Section 1 Statement**

- 10 83. Section 1 of the ERA (as applicable at the time the Claimant's section 1 statement was made) did not require that the Claimant be given any particulars in relation to the SIP. While section 1 of the ERA was updated with effect from 6 April 2020 to require that section 1 statements must include particulars of *'any other benefits provided by the employer that do not fall within another paragraph of this subsection'* under s.1(4)(d) of the ERA, the updated information requirement provisions only applied to employees who started their employment on after 6 April 2020. Neither TEPUK or the Respondent was or is under any obligation to provide an updated section 1 statement to the Claimant.

- 20 84. In any event, the purpose of section 1 of the ERA was to provide employees with information (including particulars which are required to be given by section 1 of the ERA which are not contractual). Even if the Tribunal confirms that the Claimant's section 1 statement includes a reference to the SIP (which is denied), that finding is not determinative of there being a right that is capable of transferring by way of TUPE or of being enforceable against the Respondent. Therefore, even if there are any particulars capable of being determined by a reference under s12(2), the Respondent submitted that any particulars relating to the SIP were non-contractual and therefore not capable of transfer.

### **Personal Bar/Affirmation**

- 30 85. The Respondent submitted that the Claimant was personally barred from bringing the present claim. Mr Hadden argued that the Claimant, by his conduct in accepting the shares from TEPUK (which he received free of

income tax or NICs) and accepting the one-off payment from the Respondent referred to at paragraph 15 of the list of agreed facts, gave rise to a justifiable belief on the Respondent's part that the Claimant was no longer interested in enforcing his rights against it.

5

86. The Respondent referred to the case of **Davies v City of Glasgow Friendly Society 1935 S.C. 224**, per Lord Anderson at page 240. The Claimant's acceptance of the shares and the receipt of the tax benefit from TEPUK following the transfer of his employment and the acceptance of the one-off payment from the Respondent (albeit with an email of protest in relation to the payment) are actions that are inconsistent with him now seeking to rely on the terms of the SIP.

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87. Being personally barred, the Claimant cannot now seek to exercise his asserted rights in connection with the SIP.

### **Discussion and Decision**

#### **Legal Framework**

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88. The purpose of the Regulations is to protect employees' rights where a business is sold. It was accepted that there had been a relevant transfer under Regulation 3 which had transferred the Claimant's contract of employment to the Respondent.

89. Regulation 4 provides:

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#### ***“Effect of relevant transfer on contracts of employment***

*4.—(1) Except where objection is made under paragraph (7), 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), but subject to paragraph (6), and regulations 8 and 15(9), on the completion of a relevant transfer—*

5 *(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*

10 *(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."*

90. Any consideration of the Regulations must now take place in the light of the UK leaving the EU on the 31 January 2020 and the retention of some aspects  
15 of European Law.

91. The core issue in this case is what transfers, if anything, and whether the right to participate in a SIP similar to the one provided by the former employer transfers. It is accepted that the Claimant's contract of employment transfers  
20 but is the right to be a member of the SIP part of that contract?

92. The first point to note is that Section 4(2) provides that all the transferor's rights and obligations "under or in connection with" the contract transfer. The net is cast wide no doubt to further the aims of the Regulations to protect  
25 employees caught up in a transfer.

93. We were referred to the case of **Chapman** a Court of Appeal case involving a share option agreement. It provided that the rights could only be exercised by an employee at a particular point unless there was an intervening event  
30 such as redundancy. The Plaintiffs were transferred by operation of TUPE to another company and tried to exercise their share options. It held that the transfer was not a redundancy and that the share option scheme was a separate contract which remained in force. With respect to Mr Hadden we do

not think this case assists him as it was raised as a breach of the share option contract and not as a claim that the Option Scheme transferred under TUPE.

94. We were also referred to another case called **Chapman v Aberdeen Construction Group Plc**, a Scottish case, that again involved a share option scheme. Mr Chapman was dismissed and lost his rights under the scheme so he sued for damages. There was no reference to the TUPE Regulations in the case. However, any limited relevance it has relates to the proposition, accepted by the court, that as the contract provided that there would be no claim in damages if the Claimant was dismissed his claim (for damages) was not sound. We did not believe that this added much to Mr Hadden's argument that the SIP should 'stand- alone'.

95. The German Federal Labour case of **Nokia** (10 AZR 299/02) involved a stock option plan. The option allowed senior managers to subscribe for new shares. There was a transfer following the sale of the company and it was held that the rights under the scheme did not transfer. However, our understanding was that this was on the basis that the agreement was not with the employer (who was sold) but with the parent company. At page 145 it is recorded: "*If a business is transferred to another owner as a result of a legal transaction, the latter takes on the rights and obligations from the employment relationship existing at the time of the transfer...*" (and there is then reference to the German Civil Code which may or may not reflect the same wording as our domestic regulations (we were not told)). The circumstances here are that the contractual relationship was with the employers not another company. The Judgment does not in our view assist us.

96. The Respondent's representative then pointed to the case of **Jeffries v Powerhouse Retail Ltd** and contended that this was authority for the proposition that the SIP did not transfer and such SIP's are not capable of transferring as they was discretionary. That case related to whether two

previous exercises of discretion to pay enhanced redundancy as ex gratia payments was an obligation that transferred to the new employer. The case turned on its facts that the Tribunal was entitled to hold that no obligation could arise from these specific events involving as they did exercises of discretion. In other words, the employees' contracts did not contain the contractual obligation contended for.

97. Both parties referred to the case of *Mitie*. That case concerned a profit sharing scheme that the employee participated in. It was Inland Revenue approved. After a transfer the employee sought a declaration under S11 of the ERA regarding their rights under the scheme. It was argued on behalf of the Respondent, much in the same way as argued here, how could the employers, in practical terms, provide a profit sharing scheme based on another company's profits. Their own scheme was not Inland Revenue approved. The factual basis for the scheme was set out as follows:

*".....the Employment Tribunal proceeded on the basis of the following agreed facts:*

*(a) The Sainsburys' scheme is an Inland Revenue approved profit sharing scheme under which eligible employees received either a cash payment or awards of Sainsburys' shares provisionally allocated to them in accordance with the rules of the scheme.*

*(b) Although the scheme is discretionary, Sainsburys' directors had exercised their discretion positively every year from 1980 to 1999.*

*(c) The scheme is operated on an annual basis related to the consolidated profits of the company and its subsidiaries in the relevant accounting period.*

*(d) The amount of each cash payment or number of shares is a fraction of pay level and length of service, there being no individual performance element.*

*(e) Awards of shares vest and may be transferred to participants after two years.*

*(f) After three years from the allocation date, the shares may be released to the participants free of income tax.*

*(g) In order to participate in the scheme, an employee must have been employed in the Sainsburys group for one financial year on 3 April in the year of payment and continue in service until 21 July of that year."*

98. The EAT adopted a purposive approach and held that the obligation that transferred was to provide a scheme of 'substantial equivalence'. The

practical difficulties were left answered. It is this case that we ultimately viewed as being both in point and binding on us.

99. We accepted that it is possible to try and work out the likely financial value of any scheme to an employee and either replicate it, buy it out or refuse to provide one and pay damages for breach of contract. In the present case the Respondent attempted to buy out the Claimant's interest (although not fully or clearly accepting they had a legal obligation to do so) and it was only at the final stage the Claimant refused to accept. There were question marks as to the way in which the sum was calculated but these were not issues we were required to determine.
100. It is recognised by courts and tribunals, and by us, that problems frequently occur when trying to match schemes such profit sharing schemes on a transfer. The fact that liabilities transfer is testament to the rights transferring such as in the case of ***Unicorn Consultancy Services Ltd v Westbrook and Others (2000) IRLR 80.***
101. Here the Respondent's SIP was established in 2002 and amended in 2005 (JBp85). It was Revenue approved and allowed employees to acquire shares in the company. The Deed provided for termination at Clause 23.1 by the giving of notice by the Trustees (JBp57). Clause 3.5 provided that the contract did not form part of the contract of employment (JBp67).
102. The Explanatory Booklet set out the way in which the scheme operated (The documents appears to have been created in October 2013 JBp90) That Booklet stated at page 1:

5            *“The Share Incentive Plan (“the Plan”) has been established by Total E&P UK Limited ( the “Company”) to give you the opportunity to acquire shares in parent company Total S.A., in a tax -effective manner. Your shares are bought and held in the Plan for you by EES Trustees Limited (the “Trustees”). You can acquire for types of shares through the Plan.”*

103.    The SIP Agreement provided at clause 1 (JBp110) that taking part in the Plan did not *“affect my rights, entitlements and obligations under my contract of employment and does not give me any rights or additional rights to compensation or damages if my employment ceases”*.

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104.    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.

105.    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 his overall financial “package”. It would, in the view of the Tribunal, undermine the purpose the Regulations and possibly encourage attempts to try and 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.

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#### Personal Bar

106.    The Respondent argued that the Claimant was personally barred from taking these proceedings as he had effectively compromised (acquiesced) his claim by accepting the sum sent by the Respondent to ‘buy out’ his rights to a SIP. We were referred to the case of ***Davies v City of Glasgow Friendly Society***. In that case the court recorded that the reasons why the Trustees had acted as they did and proposed to act was made ‘abundantly clear’ to the Pursuer (Page 237) and he was now barred from objecting. That case turned on its merits as does this one.

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107. The Claimant received a payment in satisfaction of his rights under the SIP. although he had emailed on the 10 June asking for the payment not to be made. It was made in the June payroll and paid directly into his account. It was not clear to us why the Respondent had calculated the sums in the way they had. We accept that it might not be an easy matter. If the SIP had transferred and the Respondent had refused to honour their obligations then the Claimant and others would be entitled to damages.

108. The Respondent had written to the Claimant and to others who had transferred setting out why they were doing this (JB 30) but the payment was not tendered on the basis that it was in full settlement of the Claimant's rights it simply refers to the consultation that had taken place "*in relation to the TEPUK share plans*".

109. The Claimant has not returned the payment and it is unclear whether he has put it in a separate account until the litigation is finished or taken it "to account" as it were of any possible claim he might have in the future for damages if he is successful here. There was no evidence before us that he had accepted the payment in some positive way in satisfaction of his claim or had compromised his position. The money was simply put in his account. The situation is analogous to that of a payment being tendered in full and final settlement and such an attempt to unilaterally bind a party into accepting such a tendered sum has failed in the past although in perhaps slightly different circumstances the principle applies. (**Gilbey Vintners Scotland Ltd. v Perry 1977 S.L.T. (Sh. Ct.) 48** and **Modelux Linen Services Ltd v Redburn Hotel Ltd, 1985 S.L.T. (Sh. Ct.)**)

#### Greater Rights/Termination of SIP

110. It was argued that the operation of TUPE could not enhance the Claimant's rights and we agree with that proposition. It was argued that if the SIP entered into with TEPUK was open to termination then that would remain so



on any transfer or in the terms of any equivalent scheme. That must be correct, however, there was no evidence that the scheme was in fact terminated. A feature here was the Respondent no doubt for its own reasons were careful not to unambiguously acknowledge that the scheme transferred or even a right to participate in such a scheme of equal value transferred. In these circumstances it's difficult to envisage how they could terminate a scheme that they did not recognise transferred and they did not formally attempt to do so with reference to the written terms of the SIP. Even if the matter was wholly discretionary the Respondent would not have an entirely free hand. As was recognised in the case of ***Braganza v BP Shipping (2015) UKSC 17*** a discretion has to be exercised rationally and the effect would be to remove an important financial benefit which might in turn be struck down as an avoidance of the terms of the Regulations.

111. Finally, we considered whether Section 1 and Section 11 of the ERA are engaged. We accept that the remedy provided in Section 11 is not a particularly "good fit" and not designed specifically as a remedy for the sort of situation we have here. In ***Mitie*** it was suggested that this was "probably" the correct process and we accept that this is hardly a ringing endorsement. However, the Claimant here is in our view entitled to a remedy and a declaration in the terms used in ***Mitie*** having been accepted by higher courts as the only means available to rectify the situation he finds himself in then that is the remedy we will employ.

112. It is the foregoing reasons that we accept that the Claimant is entitled to the remedy sought. In making these orders we fully recognise the relative lack of clarity in the law and the difficult position it puts a transferee employer in and the numerous practical difficulties that can arise when faced with a situation

like this one but to do otherwise would be to undermine the purpose of the Regulations.

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**Employment Judge**

**JM Hendry**

**Dated**

**23 August 2021**

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**Date sent to parties**

**23 August 2021**