Changing contractual terms (or not!) in a TUPE Transfer – Ferguson and ors v Astrea Asset Management Ltd [2020] UKEAT0139/19

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[ ] Judgment paragraph number

The Facts

1. This was EAT decision involving 4 individuals – Mr F, Mr K, Mr L and Mr P. They were all directors of Lancer; Mr F and Mr K were employees of that company, and Mr L and Mr P were employed by companies which contracted their services to Lancer.

2. Lancer managed the Berkeley Square Estate (comprised of approximately 140 properties in Mayfair and Kensington worth in the region of £5 billion) on behalf of its owners, the Abu Dhabi royal family under a management agreement terminable on 12 months' notice [2]. A new company, Astrea ('**the Respondent**') was subsequently appointed to manage the estate to commence in September 2017. There was no dispute between parties that there was a relevant TUPE transfer from Lancer to the Respondent [10].

3. In, or around, June 2017 the Claimants decided to update the Lancer staff contracts of employments and review their own terms. Mr K and Mr F signed new employment contracts dated 26 July 2017 which contained the following terms:

   (a) new rights to *guaranteed* bonuses amounting to 50% of salary (£576,000 and £402,000 respectively); and

   (b) new contractual termination payments amounting to a month's salary for every year served as a director of Lancer (said later to amount to £768,000 and £380,000 respectively as at September 2017) [7].

4. Similar changes were made to Mr L and Mr P's contract, including an extension of contractual notice periods from 12 to 24 months. The new contracts were provided to the Respondent on 1 September 2017, after the provision of the Employee Liability Information in later August 2017. In late September 2017, the Respondent wrote various letters, one of which confirmed that Mr K's employment would terminate with immediate affect by reason of gross misconduct and that it was not accepted that Mr L and Mr P would transfer but if they did, they would be dismissed for gross misconduct. In relation to Mr F, although he did transfer on 29 September 2017, he was dismissed for gross misconduct shortly after the transfer for his actions in relation to the new contracts.

The Employment Tribunal

5. The Claimants subsequently brought proceedings in the ET against the Respondent for unfair dismissal, contractual termination payments and 13 week's pay for the alleged breach of Regulation 13(4) of TUPE [10].

6. The ET found that Mr F had been unfairly dismissed and his award was increased by 25% for failure to follow the ACAS Code [10(1)]. Mr K was found to have been unfairly dismissed pursuant to regulation 7(1) TUPE as his reason for dismissal was the transfer, but any award was reduced by 100% due to conduct and that *Polkey* was applicable [10(2)]. In relation to Mr L and Mr P, EJ Goodman found that there was no claim against the Respondent as they were not assigned to a relevant grouping, and therefore did not enjoy protection under the Regs [10(3)].

7. The EJ further found, importantly for the purposes of this case summary, that in considering regulation 4(4) of TUPE, "in light of the abuse principle, the terms of the new contracts relating to bonus, termination payment and notice were in any event void because they were varied by reason of the transfer (see para 167 of the ET Judgment)" [10(4)].

8. The Claimants appealed on 4 grounds, but for the purposes of this article, centrally that the EJ was wrong to conclude that the new contractual terms relating to bonus, termination and notice were void.

The EAT

9. Before HHJ Shanks in the EAT, the interpretation of regulation 4(4) of TUPE was explored in some detail. Reg 4(4) reads as follows:

"(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.

...

(4) Subject to regulation 9…<u>any purported variation of a contract of employment</u> that is, or will be, transferred by paragraph (1), is void if the sole or principal reason for the variation is the transfer.

(5) Paragraph (4) does not prevent a variation of the contract of employment if—

(a) the sole or principal reason for the variation is an economic, technical, or organisational reason entailing changes in the workforce, provided that the employer and employee agree that variation; or

(b) the terms of that contract permit the employer to make such a variation" [emphasis added]

10. HHJ Shanks remarked that "there is no doubt that, given the EJ's finding…that the (sole) reason for the changes to the Claimants' contractual terms was the anticipated transfer, regulation 4(4) would render those new contract terms void if it was interpreted literally" [14]. The Claimants sought to argue that the variations referred to in regulation 4(4) above must be read as only referring to adverse variations to an employee (therefore protecting the variations that had been introduced in their circumstances) [14].

11. The EAT considered the Acquired Rights Directive and the choice of the word "safeguarding" in the recital, which necessarily connotes the protection against something negative or undesirable [15]. HHJ Shanks went on to consider that "it seems plain that a purposive interpretation would allow for and indeed require that adverse changes made by the transferor employer because of the transfer should be considered void. The issue is whether a provision which also voids other (possibly advantageous) changes made because of the transfer is compatible with the Directive" [15].

12. HHJ Shanks view was that, applying the European "broad purposive" approach to its interpretation, the words "any purported variation" in regulation 4(4) should be construed

to cover all types of variation, not just those which were adverse to the employee as proposed by the Claimants. His rationale for this was as follows:

> *'(1) This interpretation is consistent with the main purpose of the underlying Directive, as derived from the Directive itself and the EU case-law, which is to safeguard employee's rights, not to improve them;*
>
> *(2) It is not contrary to any European or English authority when properly analysed;*
>
> *(3) It avoids difficult questions which otherwise potentially arise as to whether a (purported) variation is or is not "adverse" to the employee and reduces the possibility of confusion as to what the terms of an employee's contract are from time to time and the matter being subject to the whim of the employee;*
>
> *(4) In so far as it might otherwise cause a deserving employee any kind of injustice there are other answers which are likely to cover the situation; and it would tend to reduce the possibility of injustice to a transferee employer in circumstances like those that have arisen in this case;*
>
> *(5) It appears to be consistent with other provisions within TUPE;*
>
> *(6) Finally, it is entirely consistent with the literal words used by the legislator' [23].*

13. He went on to hold that the EU abuse of law principle was satisfied (namely that EU law cannot be relied upon for abusive or fraudulent ends) [24] and that the EJ at first instance had reached an 'implicit conclusion' that the Claimants' case in relation to the new contractual terms involved an abuse of EU law [30].

14. Therefore, in relation to both the correct interpretation of regulation 4(4) and the EU abuse of law argument, the Claimants' appeal on this ground was bound to fail.

Comment

15. From a public policy perspective, the interpretation of regulation 4(4) to include both advantageous and disadvantageous contractual variations, especially in the context of this case, appears to be eminently sensible. It is clear from the judgment that the EAT would not be drawn on other interesting points, such as the "common law abuse principle", alleged breaches by the Claimants of their fiduciary obligations towards

Lancer as directors and the effect thereof in relation to Astrea, and the entitlement of Mr K and Mr F to the termination payments on the facts [31].

16. HHJ Shanks remarked that such points would potentially remain live should there be a further appeal [31].

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