"Beckmann" rights are pension benefits, which, contrary to the general position, transfer under TUPE.

In the next of our back to basics series, Gowling WLG’s Combined Human Resources Solutions (CHRS) team provides a recap of the key points to be aware of and how these rights can be dealt with in practice.

Background

There is a specific pensions exemption in the Transfer of Undertakings (Protection of Employment) Regulations 2006 (TUPE) which carves out certain rights under an occupational pension scheme from the normal operation of TUPE. However, this exemption only applies to rights under an occupational pension scheme relating to "old age, invalidity or survivors' benefits".

The Beckmann case, and subsequent case law, considered the meaning of these words and the extent of the pensions exemption. Pension rights, which fall outside the exemption and which therefore transfer under TUPE, are therefore often referred to as "Beckmann" rights.

For further background, please see our "back to basics" note on TUPE and Pensions.

Leading cases - Beckmann and Martin

The two leading cases in this area were decided by the European Court of Justice (ECJ)
in the early 2000s.

**Beckmann v Dynamco Whicheloe Macfarlane Ltd**

This case concerned Mrs Beckmann, who worked for the NHS. Her employment was transferred to a new employer under **TUPE** and she was made redundant a couple of years after the transfer.

While employed by the NHS, Mrs Beckmann's employment terms provided for enhanced redundancy benefits. These were immediate payment of an early retirement pension from the NHS Pension Scheme, plus a top-up compensation payment from her employer (to compensate for the extra pension she would have built up if she had not been dismissed). There was also a lump sum payment above the statutory redundancy compensation.

On dismissal, Mrs Beckmann's new employer paid her the lump sum, but did not pay the compensation to top-up her pension. Mrs Beckmann sued for breach of contract and the case went as far as the European Court of Justice. In this case, the **ECJ** held that certain enhanced pension benefits on redundancy could not be classed as an "old age" benefit and so fell outside the pensions exemption. As such, they passed to the transferee under **TUPE**.

**Martin v South Bank University** [2001] IRLR 74

Around the same time as the Beckmann litigation, a similar issue arose in the case of Martin v South Bank University.

While the Beckmann case concerned enhanced redundancy benefits, Martin went even further. This case confirmed that early retirement rights are also not "old age, invalidity or survivors' benefits" and so they pass under **TUPE**.

**Further clarification - Proctor & Gamble**

Since 2002, there has only been one further reported case - The Proctor & Gamble Company v Svenska Cellulosa Aktiebolaget SCA and another [2012] EWHC 1257 (Ch). This case has confirmed that the principles from Beckmann and Martin, which considered the treatment of public sector pensions, apply equally to the private sector.

In this case, the High Court considered whether, and to what extent, early retirement
benefits in the transferor's pension scheme transferred under TUPE. They confirmed that:

- where the transferor's pension scheme provided for early retirement subject to employer consent, the employee's right to apply for early retirement and to have his/her application considered in good faith by the employer transferred under TUPE; and
- where the transferee granted early retirement, the transferee would not be liable for the full early retirement pension, but only for the enhancement to the pension. In other words, there could be no double recovery from both the transferor's scheme and the transferee.

Legal and practical issues arising from the case law

Parties involved in a TUPE transfer need to be aware that pension rights under a defined benefit occupational pension scheme relating to early retirement and redundancy transfer under TUPE. However, much uncertainty remains, in particular:

- It's not clear whether the class of Beckmann rights is limited to early retirement and redundancy or whether there could conceivably be other kinds of pension benefits which are not "old age, invalidity or survivors' benefits".
- Despite the helpful clarification in Proctor & Gamble, quantifying Beckmann liabilities is still challenging. Specialist legal advice will be needed to determine the nature of the rights that transfer and specialist actuarial advice will be needed to place a value on those rights.
- It's unclear whether and to what extent a transferee can make changes to Beckmann benefits post-transfer and/or what the impact is for the transferee if the transferor makes changes to its pension scheme.

Dealing with these issues in practice

Parties involved in a TUPE transfer can mitigate their risks by:

- careful due diligence before the transfer takes place to identify whether Beckmann rights are an issue. Where transferring staff have previously transferred under TUPE (for instance on a second or third generation outsourcing), this due diligence may need to look back to previous employers as well as the transferor's own pension arrangements; and
appropriate protections in the transaction documents. The parties should consider the use of warranties and/or indemnities in relation to Beckmann rights.