

PENSIONS IN 30 PODCASTS

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The Transfer of Undertakings (Protection of Employment) Regulations and pensions

Key Points

- TUPE is a very complicated area of employment law. It is particularly difficult when it interacts with pension rights. Specific legal advice is advised if you are dealing with pension rights under TUPE.
- TUPE does not generally apply to pension benefits. As a result, an employee's entitlement to pension benefits do not generally transfer under TUPE. There are, however, three key exceptions to this rule:
 - Beckmann and Martin rights – rights to certain enhanced redundancy benefits and early retirement benefits may transfer under TUPE;
 - minimum pension rights that apply in certain specific circumstances and, if they apply, provide transferring employees with limited protection by requiring the receiving employer to provide pension benefits in line with prescribed minima; and
 - personal pension schemes – an individual's contractual rights in respect of a personal pension scheme (e.g. a Group Personal Pension (also known as GPPs)) will transfer automatically.

- The Transfer of Employment (Pension Protection) Regulations 2005
- Beckmann v Dynamco Whicheloe Macfarlane Ltd [2002] EUECJ C-164/00
- Martin v South Bank University [2003]EUECJ C-4/01
- Procter & Gamble v Svenska Cellulosa Actiebolaget SCA [2012] EWHC 1257

TUPE

Transfer of Undertakings (Protection of Employment) Regulations 2006 ("TUPE") applies Council Directive 77/187/EEC (the "Acquired Rights Directive") in the United Kingdom. Before 6 April 2006, the relevant legislation was found in the Transfer of Undertakings (Protection of Employment) Regulations 1981 ("TUPE 1981").

If TUPE applies (i.e. if there is a 'relevant transfer') there will be an automatic transfer of employees and their transferable contractual terms from the existing employer (the transferor) to the new employer (the transferee).

TUPE is a very complicated area of law that is covered in detail from the employment law perspective.. The rest of this fact card focuses on the interaction between TUPE and pensions.

Main Sources

- Council Directive 77/187/EEC (generally known as the Acquired Rights Directive)
- Transfer of Undertakings (Protection of Employment) Regulations 2006 (as amended)
- The Pensions Act 2004

TUPE and pension rights

Entitlement to pension benefits under occupational pension schemes do not, as a general rule, transfer under TUPE. This is because of a specific carve out in the Acquired Rights Directive that excludes benefits for old age, invalidity or survivors from the scope of protection. This is also known as the 'pensions exemption'.

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At a very high level, this means that there is no obligation for the new employer to replicate the terms of a transferring employee's membership of an occupational pension scheme.

Exceptions to the pensions exemption

There are, however, three key exceptions to the pensions exemption which are vitally important in respect of transfers under TUPE and rights to pensions.

1. Beckmann and Martin rights

Case law provides that a limited range of pension benefits are likely to transfer under TUPE. These are those benefits that the CJEU decided are not benefits for old age, invalidity or survivors. These have become known collectively as 'Beckmann and Martin rights' after the claimants in two landmark CJEU decisions:

- Beckmann v Dynamco Whicheloe Macfarlane Ltd; and
- Martin v South Bank University.

In summary, these rights are:

- enhanced redundancy benefits (e.g. rights to early retirement pensions payable on redundancy) (otherwise known as Beckmann rights); and
- early retirement benefits that are only available on the employee's dismissal from service or when the employee reaches a certain age (otherwise known as Martin rights).

Because these rights do not fall within the pensions exemption, if there is a transfer under TUPE these rights will transfer from the transferor to the transferee. As a result, if any liabilities arise to provide enhanced redundancy benefits or

early retirement benefits, the transferee will be responsible for providing those benefits.

The scope of Beckmann rights was considered and clarified in the Procter & Gamble case.

In particular, the decision in the Procter & Gamble case suggests that where the obligation to provide early retirement benefits passes to the transferee, the transferee is only liable for the cost of providing the pension between the employee's early retirement and their normal retirement date. The transferor remains 'on the hook' for the cost of providing benefits from the employee's normal retirement date.

2. Minimum pension rights under TUPE

TUPE 1981 ceased to apply with effect from 6 April 2006. For transfers on and after 6 April 2006 TUPE (i.e. the 2006 regulations) apply. Under TUPE the transferee is required to provide a minimum level of pension benefits in certain circumstances.

These circumstances are that:

- a transfer under TUPE has taken place; and
- under the transfer, an employee ceases to be employed by the transferor and is, instead, employed by the transferee; and
- immediately before the transfer there is an occupational pension scheme AND the employee is either:
 - an active member of the scheme; or
 - eligible to become an active member of the scheme; and
- the occupational pension scheme was either:

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- a defined benefit scheme; or
- a money purchase scheme where the transferor was either required to make contributions or had, in fact, made a contribution.

If these circumstances apply, the transferee is required to provide pension rights in line with ss. 257 and 258 of the Pensions Act 2004 and the Transfer of Employment (Pension Protection) Regulations 2005 (as amended with effect from 6 April 2014).

Pension protection rights

Broadly speaking, the pension protection rights that apply to transfers on and after 6 April 2014 are rights to eligibility of one the following:

- a) a defined benefit scheme which satisfies the standard required to contract out of the State Second Pension; or
- b) an occupational money purchase or stakeholder pension scheme which matches the employee's contributions up to a maximum of 6% of basic pay; or
- c) an occupational money purchase or stakeholder pension scheme which matches the transferor employer's level of contributions.

It is useful to note that if the transferee employer intends to use a contract-based arrangement, these obligations can only be fulfilled by using a stakeholder pension scheme.

It is also important to note that there is an opt-out to these TUPE provisions – the transferee and employee can agree to any other pension terms. However, the transferee can only do this after the TUPE transfer has occurred.

3. Personal pension schemes and pension rights

Personal pension schemes (sometimes referred to as contract-based pension schemes) are not subject to the pensions exemptions. Under TUPE, an employee's contractual rights in respect of personal pension arrangements will automatically transfer to the transferee.

This means that, for example, following the transfer, the transferee has an obligation to make the same contributions to the contract based pension scheme as the transferor made.

Common examples of personal pension schemes include Group Personal Pension Plans and stakeholder pension schemes.

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