

## TUPE transfers – new pension protection

Having been watered down by successive European Court decisions, the pensions exemption under TUPE<sup>1</sup> will face a radical shake up from 6 April 2005. The changes are being wrought under the Pensions Act 2004 and will finally fulfil the Government's aim of providing some degree of pension protection to transferring employees. But who is "protected" and what form does this protection take?

### TUPE

#### The current exception

- In short, where TUPE applies the purchaser (or "transferee") of a business has to honour the pre-transfer employment rights and obligations of transferring employees.
- But rights under occupational pension schemes which relate to old age, invalidity or survivors' benefits do not transfer.
- Two relatively recent European Court<sup>2</sup> decisions have significantly weakened the scope of this exception in relation to redundancy and early retirement benefits.

### TUPE protection

#### In a nutshell

- From 6 April 2005, the new Pensions Act protection kicks in whenever TUPE applies to a transfer and the seller (or "transferor") of the business has an occupational pension scheme.
- Transferees will have to offer prescribed minimum pension provision to "transferring employees".
- Transferring employees include members of the transferor's scheme, those eligible for membership, plus anyone in a waiting period.

### Form of Protection

#### Transferee choice

- Transferees have a number of options including offering transferring employees membership of their defined benefit (DB) scheme or providing defined contribution (DC) benefits.
- A key point is that the form and level of benefits are not dictated by the transferor's scheme.

NB: the Pensions Act also leaves the door open for the transferee and employees to agree something different again going forward.

1 The Transfer of Undertakings (Protection of Employment) Regulations 1981 – on a business transfer, most rights and obligations arising from contracts of employment, collective agreements or the employment relationship automatically transfer from the old to the new employer

2 Beckmann v Dynamco / Martin and Others v South Bank University

## Offering DB benefits

### The minimum

- If the transferee wishes to offer transferring employees membership of its DB scheme, the scheme must either:
  - (a) satisfy the reference scheme test;
  - (b) provide benefits the value of which "equals or exceeds 6% of pensionable pay for each year of employment" together with the total amount of member contributions<sup>3</sup>; or
  - (c) be a scheme to which the transferee makes "relevant contributions" (see box immediately below).
- "Pensionable pay" (see option (b)) is the remuneration used in the scheme rules to calculate benefits / contributions.
- Options (b) and (c) do not sit easily with the traditional DB scheme model but are apparently intended as a simple "catch-all".

## Offering DC benefits

### The minimum

- DC benefits can be offered either through an occupational pension scheme or by designating a stakeholder.
- Where a transferee chooses this route, it must make "relevant contributions" which are matching contributions of up to 6% of the employee's basic pay.
- The intention seems to be that employees should be given the option of contributing up to 6% (even if contributions to the transferor's scheme were pitched at a lower level).

## Impact?

### And a word on the future

- Given the new legislation, from April 2005, transferees involved in TUPE transfers need to ensure that they cover the pensions angle.
- But schemes cannot escape the spectres of *Beckmann* and *Martin* and the effect that these cases may have on pension provision.
- Finally, the Department of Trade and Industry has recently begun a separate TUPE consultation exercise with a view to updating the main TUPE regulations. We are watching with interest.

<sup>3</sup> Members cannot be required to contribute more than 6%

This edition of Sackers Extra news is part of a series focusing specifically on pensions reform. Our Pensions Reform Team will continue to keep you abreast of the key issues throughout this period of pensions simplification. If you would like further information please contact our Pensions Reform Team.

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