

# news

## They think it's all over – it is now!

The recent House of Lords' decision in *Preston*<sup>1</sup> has brought the last of the remaining part timer claims to an end. Most of the issues arising out of the original House of Lords' *Preston*<sup>2</sup> case were resolved by a series of decisions from the Employment Tribunal Chairman, Mr Macmillan, in 2002 but one issue has remained – the effect of TUPE<sup>3</sup> on part timer claims.

The House of Lords has now decided that the time limit for bringing a claim to the employment tribunal is 6 months from the date of the TUPE transfer.

### Background

- The potential application of TUPE on part timer claims has had a big impact on transactions and scheme mergers due to the ongoing uncertainty over which employer is liable for these claims.
- Many claimants have been waiting since 1994<sup>4</sup> to have their cases decided. For most, this House of Lords' decision will almost certainly be the end of the road.

### ET claims

A recap

- If a member has been excluded from joining a pension scheme due to her part time status she can claim backdated pensionable service up to 8 April 1976, but no earlier.
- If a contributory scheme, arrears of contributions must be paid.

### ET claims

Time limits

- Claims are usually brought in the employment tribunal (ET) although there is nothing to prevent a claim being referred to the Pensions Ombudsman. (All TUPE-related claims had been stayed pending the House of Lords' decision on this issue.)
- A time limit of 6 months from the date of termination of employment applies for bringing a claim to the ET. This time limit has been strictly applied by all ETs.
- The key question is what is the date of termination in the context of a TUPE transfer?

<sup>1</sup> *Preston & Others v Wolverhampton Healthcare NHS Trust and Others (No 3)* (formerly Powerhouse Retail Limited) (2006) UKHL 13

<sup>2</sup> (2001) 3 All ER 947

<sup>3</sup> The Transfer of Undertakings (Protection of Employment) Regulations 1981 (now replaced by 2006 Regulations)

<sup>4</sup> Prompted by 1994 ECJ rulings in *Vroege and Fisscher*

## TUPE

### Its relevance

- The effect of TUPE is to treat an employee's contract as continuous when transferred from the first employer to the second employer. But Regulation 7 of TUPE<sup>5</sup>, excludes the transfer of pension rights.
- The Unions argued this exclusion did not apply to the 6 month time limit for bringing part timer claims and that such an interpretation would create an unfair result as many people were not aware of the need to apply to the ET within 6 months of their TUPE transfer.
- The House of Lords held for the employer - the six month time limit runs from the date of transfer.

## Employers

- For transferee employers, who have taken on employees under a TUPE transfer, it is a huge relief as any employees still in employment would have been entitled to bring a claim at any time during the rest of their employment (plus 6 months).
- For transferor employers, it means they can bring all outstanding claims (which have been stayed) to a close after a decade of uncertainty.
- This should mark an end to the provision of indemnities for this type of part timer claim when transactions take place.

## Employees

- It is bad news for employees. Many claims will be out of time against their former employer and they have no cause of action against their current employer (the transferee).
- Many will feel rightly aggrieved that they were unaware that a 6 month time limit ran from the date of their TUPE transfer – and with some justification in view of the Court's own uncertainty on the subject.
- It is possible that some claimants will argue that, because they were not informed of the date of their TUPE transfer, it cannot apply – maybe something else for the Court to consider?

5 Now Regulation 10 of the 2006 Regulations

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