

TUPE pension protection regulations published

1 BACKGROUND

Draft regulations have been published for consultation to help fulfil the Government's aim of replacing the pensions exemption under The Transfer of Undertakings (Protection of Employment) Regulations 1981 (TUPE) with pensions protection for transferred employees.

The draft regulations, The Transfer of Employment (Pension Protection) Regulations 2005, will implement the new requirements under the Pensions Act 2004 that on a TUPE transfer certain employees will qualify for pension protection. Comments on the draft regulations (which are intended to come into force on 6 April 2005) are invited by 21 January 2005.

We briefly summarise the proposed new legislation below.

2 THE CURRENT TUPE EXCEPTION

If TUPE applies to the transfer of an undertaking, most employment rights and obligations automatically transfer from the old employer (transferor) to the new employer (transferee). The transferee of a business is therefore obliged to replicate benefits going forward.

But TUPE contains an important exception for rights under occupational pension schemes that relate to old age, survivors' and invalidity benefits, which means that these rights do not transfer. (Although two recent European Court¹ decisions have significantly weakened the precise scope of this exception, by creating the real risk that the transferee has to replicate early retirement benefits for transferring employees.)

3 THE NEW TUPE PROTECTION

On a TUPE transfer, sections 257 and 258 of the Pensions Act 2004 will provide minimum benefits to transferring employees who were either members of the transferor's occupational pension scheme or were eligible for membership. The form of

¹ *Beckmann v Dynmaco and Martin and others v South Bank University*

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protection is generally dependent upon the type of pension scheme operated by the transferee so, for example:

- if the scheme is money purchase, the transferee must make "relevant contributions";
- if the scheme is final salary, it must satisfy the scheme reference test or "such other requirements as may be prescribed".

But, in both cases, the transferee could also have the option of making "relevant contributions" to an employee's stakeholder pension.

The draft regulations make it clear that:

- "relevant contributions" are matching contributions of up to 6% of the employee's basic pay;
- the prescribed alternative for final salary schemes applies only where both the transferor's and the transferee's schemes are **not** money purchase. The transferee will have the option of providing a scheme under which the "overall value" of benefits is at least equal to those under the transferor's scheme. Whether this is more or less stringent than the standard "reference scheme" test will depend upon the nature of the transferor's scheme.

4 THE ROAD AHEAD

Some form of pension protection on a TUPE transfer has long been on the Government's agenda. But we have moved away from the more rigid proposals originally put forward in the Government's September 2001 consultation paper. Nevertheless, the new requirements look set to play a significant part in business sales and restructurings from April 2005.