

Business transfers – do early retirement benefits transfer?

1 BACKGROUND

On a business transfer, the Transfer of Undertakings (Protection of Employment) Regulations 1981 (“TUPE”)¹ usually apply so that rights and obligations under employment contracts, an employment relationship or a collective agreement are transferred automatically from a seller to a buyer. The buyer is therefore obliged to replicate benefits going forward. But the legislation 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.

However, following the European Court of Justice’s (ECJ) decision of 6 November 2003 in *Martin and others v South Bank University*, there is a real risk that benefits payable on early retirement do transfer (even though normal retirement, dependants’ and ill-health benefits generally do not).

2 FACTS

The facts of the *Martin* case were similar to those of *Beckmann v Dynamco* (ECJ, 4 June 2002) in that they both concerned certain contractual rights payable through a public sector pension scheme.

The key question (of the nine referred to the ECJ) was whether certain rights to an early retirement pension and lump sum compensation under Ms Martin’s contract fell outside the TUPE pensions exception and therefore transferred to her new employer. The benefits were triggered by redundancy or voluntary early retirement on an organisational change or a change made in the interests of the efficiency of the service.

¹ TUPE is the legislation in the UK which implemented the “Acquired Rights Directive” (Directive 77/187/EEC)

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3 THE ECJ'S DECISION

The ECJ concluded that benefits such as those payable in the *Martin* case do transfer under TUPE. However, the ECJ's sweeping conclusion suggests that all early retirement pensions paid "by agreement between the employer and the employee to employees who have reached a certain age" transfer. The ECJ's reasoning seems to be that the "old age" part of the pensions exception under TUPE is confined to "the departure of an employee at the end of his or her normal working life as laid down by the general structure of the pension scheme".

In addition, the ECJ confirmed that any agreement between a buyer and its employees to provide less favourable benefits following a transfer will be invalid if the change is connected to the business transfer. The decision also potentially opens the door to retrospective claims by aggrieved employees.

4 SOME FURTHER QUESTIONS

The ECJ's decision raises difficult questions for sellers and buyers who now need to think even more carefully about the pensions implications of a business transfer. In particular:

- Is this simply a case of an unfortunate choice of words or does the ECJ intend that all early retirement pensions are caught by TUPE? If so, this could render the TUPE pensions exception pointless as employers may be unable to fund for early retirement without funding for pensions at normal retirement date.
- Alternatively, does the decision only apply to dismissals and other "agreements" for an employee to leave, and not to the employee leaving voluntarily?

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- If a seller makes a valid change to its early retirement practice before a sale, does the problem go away for the buyer?
- Given the ECJ's wording, do early retirements which fall to be decided solely by scheme trustees (i.e. not "by agreement between the employer and the employee") still fall within the pensions exception?
- Can the decision be confined to benefits payable under public sector schemes?
- As the UK Government was involved in the case, has it appreciated the potential implications of the ECJ's decision? What effect will it have on its stated intention² to require that, following a business transfer, a buyer will only have to make a matching contribution of up to 6% to a stakeholder pension (where those employees previously enjoyed the benefit of pension contributions)?

² "Simplicity, security and choice: Working and saving for retirement, Action on occupational pensions" published on 11 June 2003