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ThinkHouse

TUPE AND PENSIONS - BACK TO BASICS

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Understanding and managing all of the employment and HR consequences of a TUPE transfer can be challenging. This is before throwing in the additional complexities of pension issues into the mix.



In the first of our back to basics series, the Combined Human Resources Solutions (CHRS) team set out an easy-to-follow guide to the key points you need to consider. They then provide you with the benefit of their experience with a series of top tips for applying the law in practice.

Key points for anyone dealing with Transfer of Undertakings Protection of Employment (TUPE) and pensions

- 1 TUPE aims to protect employees' rights when their business transfers to a new employer**

The UK implemented the EU's Acquired Rights Directive by laying the Transfer of Undertakings (Protection of Employment) Regulations 1981. These have been superseded by the Business Transfers Directive and the Transfer of Undertakings (Protection of Employment) Regulations 2006.
- 2 Personal pension schemes versus occupational pension schemes**

TUPE deals with rights under personal pension schemes differently to rights under occupational pension schemes. Rights in relation to personal pensions will transfer under TUPE and will become the responsibility of the new employer.
- 3 Most rights under occupational pension schemes are carved out of TUPE**

The pensions exemption in Regulation 10 of TUPE means that most rights under an occupational pension scheme are "carved out" from the normal operation of TUPE. For areas that are carved out, the transferee does not have to replicate or contribute to the transferor's pension scheme.
- 4 Certain rights under occupational pension schemes do transfer under TUPE**

The two key European Court of Justice (ECJ) cases of Beckmann and Martin established the principle that there are exceptions to the general pensions carve

out, which applies to old age, invalidity and survivors' benefits. Certain rights, such as enhanced redundancy and advantageous early retirement terms, were deemed not to fall into that category and thus were not subject to the carve out. These valuable rights will, therefore, be subject to transferring under TUPE.



Additional pension protections in related UK law

Although most rights under occupational pension schemes do not transfer under TUPE, this does not mean that new employers have no obligations in respect of pensions. Further regulations set out a minimum level of pension benefits that have to be provided by the new employers for their new employees.



Remember employer duties under workplace pension reform

Most employers in the UK have now passed their staging dates and are subject to employer duties under workplace pension reform. Employers should take special care to ensure that the interaction between TUPE and workplace pension reform is understood and does not produce any unexpected outcomes.

What is TUPE?

The European Union passed a series of measures aimed at protecting the employment rights of employees whose businesses transferred to new employers.

In the UK, the Acquired Rights Directive and the Transfers of Undertakings Directive were brought into effect by the Transfer of Undertakings (Protection of Employment) Regulations, first in 1981 and later updated in 2006 (**TUPE**).

In line with the EU policy, TUPE's main aims are to protect employees whose business is being transferred to another employer. To do this, it aims to ensure that, in connection with the transfer:

- employment is protected (i.e. substantially continued);
- employees are not dismissed;
- employees' most important terms and conditions of contracts are not worsened; and
- affected employees are informed and consulted through representatives.

Why are pensions treated differently under TUPE?

For many employees, their pension rights constitute one of the most important benefits under their contracts. It might be expected, therefore, that TUPE would protect these valuable rights.

There is, however, a specific exemption in TUPE which "carves out" most rights that employees have under occupational pension schemes from the normal operation of TUPE.

So, does that at least make it simple for those implementing TUPE in practice?

Unfortunately, no.

The "pensions exemption" does not mean that there are no pensions issues on a transfer of employees from one business to another under TUPE. The pensions exemption doesn't cover everything, and, even where it does apply, other legislation (in particular the Pensions Act 2004 and regulations made under it) steps in to protect employees' pension rights.

The pension consequences of a transfer mostly depend on what kind of pension arrangements the transferring employees participated in before the transfer.

What kinds of pension arrangement does the law distinguish between?

The key distinction is whether the transferor's pension arrangements are:

- an occupational pension scheme; or
- a personal pension scheme.

What is an occupational pension scheme?

An occupational pension scheme is usually set up in a trust, with trustees holding the pension scheme's assets separately to the employer's own assets. An occupational pension scheme may provide pension benefits that are:

- defined benefits (i.e. final salary or career average);
- defined contribution (i.e. money purchase); or
- a combination of both.

What is a personal pension scheme?

A personal pension scheme is a pension scheme operated by a third party provider who has the appropriate authorisation from the Financial Conduct Authority, typically an insurance company. They are almost always defined contribution (i.e. money purchase) pension schemes. Stakeholder pension schemes and group personal pension plans are examples of personal pension schemes.

What happens if the transferring staff are members of a personal pension scheme?

Rights under personal pension schemes are **not** covered by the pensions exemption, so the normal principles of TUPE apply.

This means that if membership of the personal pension scheme is a term of the transferring employees' contracts of employment, the transferee will have to honour that obligation after the transfer. So if the transferor was obliged to pay 5% of pensionable salary into the employee's personal pension before the transfer, this obligation will pass to the transferee on the transfer.

Does the transferee have to pay into the same personal pension scheme, or could it continue contributions into its own scheme?

The legal position will depend on whether the transferring employees have a contractual right to membership of a named personal pension scheme, or whether their right only extends to the level of contributions.

Where the transferee proposes to pay pension contributions into its own pension scheme (rather than the transferor's scheme) after the transfer, it should be consulted on as a "measure".

What happens if the transferring employees are members of an occupational pension scheme?

If the transferring employees are members of an occupational pension scheme, the position is slightly more complicated.

The pensions exemption in Regulation 10 of TUPE means that most rights under an occupational pension scheme are "carved out" from the normal operation of TUPE. This means that the transferee does not have to replicate or contribute to the transferor's pension scheme.

Beckmann and Martin rights

The wording of the pensions exemption means that some rights under an occupational pension scheme which do not relate to "old age, invalidity or survivors' benefits" do still pass under TUPE. Examples of these include advantageous early retirement terms and generous redundancy provisions. These are typically referred to as "Beckmann and Martin rights" after the two ECJ cases that discussed.

Minimum level of pension provision

Even where the pensions exemption does apply, the Pensions Act 2004 and regulations made under it step in to fill the gap. Where transferring employees were active members of an occupational pension scheme immediately before the transfer (or were in a waiting period but eligible to join in the future), this legislation requires the transferee to provide a minimum level of pension provision in the future.

The transferee can satisfy the minimum requirements in one of three ways:

1. Through a defined benefit pension scheme that complies with certain minimum quality standards;
2. Through a defined contribution (money purchase) pension scheme where the employer matches the employee's contributions up to a maximum of 6%; or
3. Through a defined contribution (money purchase) pension scheme where the employer:
 - a. contributes an amount not less than that which the transferor was contributing prior to the transfer; and
 - b. where the transferor was required to make pension contributions solely for the purpose of producing money purchase benefits for the employee - e.g. because of automatic enrolment.

What about auto-enrolment?

Where the transferee has passed its "staging date", auto-enrolment obligations under the Pensions Act 2008 will apply from "day one" following the TUPE transfer.

The transferee must therefore ensure that its pension arrangements after the transfer not only comply with TUPE and the Pensions Act 2004 requirements, but also that they are compliant with auto-enrolment requirements. We have produced a top tips guide which will help ensure you are on the right track for TUPE.

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