

## TUPE and pension rights: the Procter & Gamble case

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Pension briefing

### HIGHLIGHTS

In *The Procter & Gamble Company v Svenska Cellulosa Aktiebolaget SCA* the High Court considered to what extent early retirement liabilities pass on a business transfer under the business transfer regulations – the Transfer of Undertakings (Protection of Employment) Regulations 2006 (TUPE).

Although occupational pension scheme rights do not transfer under TUPE, this exception applies only to employees' rights to "old age, invalidity or survivors' benefits". As a result of two European Court (ECJ) cases in 2002 and 2003, *Beckmann v Dynamco Whicheloe Macfarlane* and *Martin v South Bank University*, some early retirement rights provided under a scheme will transfer because they fall outside the exception. But the ECJ judgments left considerable scope for doubt about the precise ambit of the benefits that transfer or do not transfer under TUPE. The Procter & Gamble case offers guidance on some of these grey areas.



### Procter & Gamble case: the facts

Procter & Gamble (P&G) agreed to sell its European tissue towel business to SCA under an asset sale and purchase agreement (SPA). This involved the TUPE transfer of 129 P&G employees to SCA. The transferring employees were active members of the defined benefit section of P&G's pension scheme.

The SPA provided that SCA would be liable for any accrued pension liabilities that passed to it under TUPE and the purchase price was subject to an adjustment to reflect these liabilities. There was no indemnity for these liabilities in the SPA.

Under the trust deed and rules, normal retirement age (NRA) was 65 and early retirement was allowed, with the consent of the employer, for both active and deferred members, from age 55. There were also two "enhancements" that went with early retirement: a temporary bridging pension to state pension age and a smaller reduction for early payment for those who had accrued 15 or more years of service.

The issue for the High Court was whether the transferring employees' rights to early retirement benefits transferred under TUPE to SCA.

### BACKGROUND: BECKMANN AND MARTIN

The starting point with an asset sale is that employees who are members of a transferor's occupational pension scheme cease to earn future benefits under the scheme and become deferred members. The law provides that these employees are entitled to a minimum amount of pension provision after the TUPE transfer but this does not need to reflect the original arrangements and in most cases will not do so – see box below.

But although occupational pension scheme rights do not transfer under TUPE, this exception applies only to employees' rights to "old age, invalidity or survivors' benefits". The ECJ held in *Beckmann* that early retirement benefits paid on redundancy did not amount to "old age benefits". An entitlement to an early retirement pension if an employee was

made redundant after age 50 was not excluded under the Directive and therefore liability passed to the transferee. *Martin* confirmed that other early retirement rights (not just those paid on redundancy) could transfer.

### TUPE and pensions

TUPE safeguards employees' rights in the event of a transfer of a business (or a part of a business) or change in service provision (such as outsourcing, insourcing or reassigning an outsourcing contract). TUPE does not apply to share sales.

Employee rights are protected by automatically transferring the employees from the seller to the buyer on their original terms and conditions. But there is an exception to this for "old age, invalidity or survivors' " benefits under an occupational pension scheme which do not generally transfer. Instead, the purchaser is required to provide either:

- a defined benefit pension scheme with minimum benefits, or
- access to a defined contribution scheme or stakeholder pension scheme with an employer contribution equal to either (a) that of the employee's (capped at 6% of basic pay) or (b) the transferring employer's contributions for money purchase benefits for the employee.

The obligation to provide and contribute to a personal pension scheme will pass under TUPE to the purchaser if the transferring employees had a contractual right to the arrangements.

Obligations on employers to auto-enrol workers into a pension scheme, which took effect from October 2012, are in addition to (and operate separately from) TUPE

### PROCTER & GAMBLE CASE

The facts are set out in the box above. The issue the High Court had to consider was whether the transferring employees' rights to early retirement benefits transferred under TUPE to the buyer and, if so, what liabilities would be assumed by the buyer and how those liabilities should be

valued for the purpose of the purchase price under the sale and purchase agreement.

The High Court held that:

- The transferring members had a right (pre-transfer) to take early retirement with the employer's consent, so what passed under TUPE was the right to have a request for early retirement benefits considered in good faith.
- The buyer would not be liable for the full amount of any early retirement benefits. The transferring employees became deferred members of the seller's scheme as a result of the TUPE transfer, entitled to a deferred pension valued up to and payable at normal retirement age (NRA). The transfer under TUPE of the full early retirement pension liability would have resulted in "double recovery" or windfalls for the employees; hence the buyer was liable only for the early retirement enhancements (which were not provided for in the deferred pension from the seller's scheme).
- The buyer only had to bear the cost of any early retirement benefits until NRA. Benefits paid after NRA, to support the recipient after retirement, constitute "old age benefits" so do not pass under TUPE, regardless of the fact that the pension might first have come into payment before NRA.

#### WHERE ARE WE NOW?

The *Procter & Gamble* case resolves three key questions around the scope of the TUPE exception:

- the right to be considered for early retirement will pass to the transferee employer. An argument that the seller did

not owe any contractual obligation to provide pension benefits to the transferring employees and so no such obligations passed under TUPE was rejected;

- the right to pension instalments payable after a member passes NRA *will not* pass under TUPE;
- the liability for early retirement pensions assumed by the transferee extends only to enhancements which would not be satisfied by the provision of a deferred pension from the seller's scheme.

But questions remain, such as:

In the *P&G* case, transferring employees stopped accruing future service as a result of the transfer. Could these lost pension benefits also pass under TUPE?

How does the buyer go about exercising the duty to consider early retirement requests in good faith? How would the right be valued? What are the consequences if consent is refused? How does the buyer provide the enhancements?

The main effect of *Beckmann* has been on the due diligence process and this is unlikely to change. The purchaser's advisers have to look very carefully at the scheme documentation to see what (if any) redundancy or other early retirement enhancements it may have to replicate and the purchaser often asks the seller to indemnify it for any liabilities, although this is not always forthcoming of course. In practice, sellers expect prospective purchasers to factor the cost of any redundancies (including the pension scheme cost) into their bid prices and this is likely to remain the position going forward.

This note is written as a general guide only. It should not be relied upon as a substitute for specific legal advice.

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