

- 1 The Transfer of Undertakings (Protection of Employment) Regulations 2006, SI 2006/246 (TUPE) provides the only context in which Beckman rights matter. The question, to which answers remain as unclear as ever, now is whether they are still important. The relevant provisions of TUPE are regulations 3, 4 and 10. In the absence of a binding court decision, it is likely that 'employee' as defined in TUPE includes 'worker'.
- 2 There are one or possibly two questions to determine whether pension rights are or are not excluded from the automatic transfer of a transferring employee's contract of employment.

first Is the pension scheme in which the transferring employee has rights an occupational pension scheme as defined in the Pension Schemes Act 1993, s1? If the answer is 'No', the pension rights pass under TUPE, and the second question need not be asked.

secondly If the answer to the first question is 'Yes', do the rights consist of or include rights 'which do not relate to benefits for old age, invalidity or survivors'? If the answer is 'No', the pension rights are excluded from the transfer, but if the answer is 'Yes', those rights, which are commonly called Beckman rights, pass under TUPE.
- 3 The importance of Beckman rights is that they might be of significant value, but no assets are transferred to fund them, and therefore they must be financed by the transferee.
- 4 Beckmann rights take their name from the ECJ decision in Beckmann v Dynamco Whicheloe Macfarlane Ltd [2002] IRLR 578 (ECJ). The most common example is that, usually in public sector but sometimes in paternalistic private sector final salary (or other defined benefit) schemes, a member is entitled to an early retirement pension, which is not reduced actuarially for early payment, if his or her employment is terminated on the grounds of redundancy or business efficiency.
- 5 Mrs Beckmann had been employed by the NHS and her employment was transferred to DWM under TUPE. When DWM dismissed her for redundancy it refused to pay her the early retirement pension, lump sum and other benefits to which she would have been entitled under the NHS scheme on the grounds that those benefits were excluded from TUPE. The ECJ held that:

Early retirement benefits and benefits intended to enhance the conditions of such retirement, paid in the event of dismissal to employees who have reached a certain age, such as the benefits at issue in the main proceedings, are not old-age, invalidity or survivors' benefits ... within the meaning of Article 3(3) of Council Directive 77/187/EEC

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- 6 The extent of the Beckmann rights is still unclear, but the old age exemption is, according to the later ECJ case of *Martin v South Bank University* case [2004] IRLR 74 (ECJ), limited to
 - ... only benefits paid from the time when an employee reaches the end of his normal working life as laid down by the general structure of the pension scheme in question ...
- 7 Both Beckman and South bank concerned public sector pension schemes. The case of *Procter & Gamble v Svenska Cellulosa* [2012] EWHC 1257 (Ch), in which members had a right to retire early with the employer's consent, confirmed that the principles apply also to private sector schemes and decided that a transferring employee's right to apply for early retirement and to have the application considered in good faith was a right which transferred under TUPE.
- 8 Apart from *Procter & Gamble* there are no reported decisions how the Beckmann liability is to be calculated. In this case the parties had agreed an adjustment of the purchase price according to whether or not whether certain pension liabilities transferred under TUPE. The court decided that the transferee was liable for only the enhancements to the member's benefits and not the benefits from his or her normal pension age, so the member does not benefit from the windfall of both the benefits as enhanced and the benefits payable by the scheme from his or her normal pension age.
- 9 There is also a determination of the Pensions Ombudsman in *Hunter v Atos* (81760/2) on 28 October 2011 that the complainant, who had the right to only a deferred pension in his former employer's pension scheme, did not have any Beckman rights. In this case the rights in issue were rights of contributing members on leaving employment. Determinations of the Pensions Ombudsman are not precedent binding on the courts, and therefore cautious transferees and their advisers might wait until the point is decided by the courts or at least it is explored further in legal commentary. Nevertheless determinations by the Ombudsman might be useful as guidance, even if only as a reminder to check whether the enhanced rights are available to members with deferred rights.
- 10 Beckman rights can be derived from not only the transferor's scheme, but the scheme(s) of previous employers, if any of the transferring employees had acquired Beckman rights in earlier employment and brought the rights with them on previous TUPE transfers.
- 11 Transferees still need to either (a) examine the rules of occupational pension schemes, in which the transferring employees have accrued benefits and to require appropriate warranties by the transferor and either indemnities or adjustments to the price to reflect the amount of any Beckman liabilities or (b) take a deep breath and chance it.

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