The *Beckmann* case – Practical implications for employers and trustees of occupational pension schemes

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Abstract This paper reviews the legal issues in the *Beckmann* case regarding the transfer of a right to early payment of pension on redundancy and whether such rights fall within the meaning of old age benefits and are thus excluded from the Acquired Rights Directive and Transfer of Undertaking (Protection of Employment) Regulations 1981. It considers the practical ramifications of the decision of the European Court of Justice that such benefits are not old age benefits and hence are not excluded from the application of the Acquired Rights Directive on a business transfer.

Keywords: *Acquired Rights Directive; Transfer of Undertaking (Protection of Employment) Regulations 1981; old age benefits*

Introduction

The decision of the European Court of Justice (ECJ) in the case of *Katrin Beckmann v. Dynamco Whicheloe Macfarlane Limited (Beckmann)*¹ in June 2002 has left employers and trustees of occupational pension schemes uncertain how to treat early retirement benefits in a business transfer. This paper will consider how the *Beckmann* case may affect business transfers that predate the decision, the uncertain areas that remain and some possible approaches to managing its implications in future business transfers.

In order to evaluate the implications of the *Beckmann* case it is first necessary to consider the background to the case and the arguments put forward to the ECJ.

European and UK legislation

Acquired Rights Directive (the Directive)²

European law governing the transfer of employment on a business transfer is set out in the Acquired Rights Directive 1977. Article 3 of the Acquired Rights Directive safeguards the rights of employees on a business transfer and provides:

‘3(1) The transferor’s rights and obligations arising from a contract of employment or from an employment relationship existing on the date of a transfer within the meaning of Article 1(1) shall, by reason of such transfer, be transferred to the transferee.

Member States may provide that, after the date of transfer within the meaning of Article 1(1) and in addition to the transferee,

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the transferor shall continue to be liable in respect of obligations which arose from a contract of employment or an employment relationship.

3(2) Following the transfer within the meaning of Article 1(1), the transferee shall continue to observe the terms and conditions agreed in any collective agreement on the same terms applicable to the transferor under that agreement, until the date of termination or expiry of the collective agreement or the entry into force or application of another collective agreement.

Member States may limit the period of observing such terms and conditions, with a proviso that it shall not be less than one year.

3(3) Paragraphs (1) and (2) shall not cover employees' rights to old-age, invalidity or survivors' benefits under supplementary company or inter-company pension schemes outside the statutory social security schemes in Member States.

Member States shall adopt the measures necessary to protect the interests of employees and of persons no longer employed in the transferor's business at the time of the transfer within the meaning of Article 1(1) in respect of rights conferring on them immediate or prospective entitlement, to old-age benefits, including survivors' benefits, under supplementary schemes referred to in the first sub-paragraph.'

Article 3(3) of the Acquired Rights Directive was amended³ in 2001 so that member states may, if they wish, bring occupational pension schemes within the ambit of the items that transfer on a business transfer.

Transfer of Undertakings (Protection of Employment) Regulations 1981 'TUPE'⁴

European Directives do not have direct effect in member states (although they are directly enforceable against the State) and national legislation is required to implement them. In the UK the provisions of the Acquired Rights

Directive were implemented by TUPE. Regulation 5 of TUPE provides:

'5. Effect of relevant transfer on contracts of employment etc

5(1) Except where objection is made under paragraph 4(A) below, a relevant transfer shall not operate so as to terminate the contract of employment of any person employed by the transferor in the undertaking or part transferred but any such contract which would otherwise have been terminated by the transfer shall have effect after the transfer as if originally made between the person so employed and the transferee.

5(2) Without prejudice to paragraph (1) above but subject to paragraph 4(A) below, on the completion of a relevant transfer:

- (a) all the transferor's rights, powers, duties and liabilities under or in connection with any such contracts, shall be transferred by virtue of this Regulation to the transferee; and
- (b) anything done before the transfer is completed by or in relation to the transferor in respect of that contract or a person employed in that undertaking or part shall be deemed have been done by or in relation to the transferee.

5(3) Any reference in paragraph (1) or (2) above to a person employed in an undertaking or part of one transferred by a relevant transfer is a reference to a person so employed immediately before the transfer, including, where the transfer is effected by a series of two or more transactions, a person so employed immediately before any of those transactions.

7. Exclusion of occupational pension schemes.

7(1) Regulations 5 and 6 above shall not apply:

- (a) to so much of a contract of employment or collective agreement as relates to an occupational pension scheme within the meaning of the Social Security Pensions Act 1975 or the

- Social Security Pensions (Northern Ireland) Order 1975;5 or
- (b) to any rights, powers, duties or liabilities under or in connection with any such contract or subsisting by virtue of any such agreement and relating to such a scheme or otherwise arising in connection with that person's employment and relating to such a scheme.

7(2) For the purposes of paragraph (1) above any provisions of an occupational pension scheme which do not relate to benefits for old age, invalidity or survivors shall be treated as not being part of the scheme.'

Interaction between TUPE and the Acquired Rights Directive

TUPE should implement the Directive and the courts must then strive to apply TUPE in a manner consistent with the Directive. In the past there have been concerns raised about defective implementation of the Acquired Rights Directive.

Following the decision of the Employment Tribunal and subsequently the Employment Appeal Tribunal⁶ in *Warrener*, Regulation 7(2) was inserted.⁷ This made clear that occupational pensions were only excluded from transferring to the new employer to the extent that they related to old age, invalidity and survivors' benefits. As occupational pension schemes only pay pension and death benefit, it was difficult to envisage what, if any, aspect of an occupational pension scheme was not covered by the exclusion.

The ECJ in *Beckmann* has looked more closely at the meaning of 'old-age benefits' and has held that it is no longer correct to assume that all benefits paid through an occupational pension scheme are excluded. This raises concerns that the wording of TUPE prior to 1993 failed to implement the Directive consistently and could give affected

individuals a right of action against the UK Government for failure to implement the Acquired Rights Directive in the period until the date of the change in 1993.⁸

The *Beckmann* decision

Background to the case

Mrs Beckmann was employed by the NHS under a contract of employment which declared the General Whitley Council (GWC) conditions of service to be applicable. Her employment was transferred to Dynamco Whicheloe Macfarlane (DWM) on 1st June, 1995.

Section 45 and 46 of the GWC conditions applied on dismissal by reason of redundancy.

Section 45 of the GWC conditions provided a contractual entitlement to payment of a lump sum redundancy payment.

Section 46 applied if the employee was aged over 50 at the time of redundancy and had 5 years' qualifying service in the NHS pension scheme. If the employee fulfilled these criteria then they were entitled to:

- early payment of the pension and lump sum benefits accrued under the NHS pension scheme based on years of pensionable service and salary at the date of termination of employment (the ERP) under section E3 and 6(1) and (2) of the NHS Pension Scheme Regulations 1995;⁹ and
- an additional payment of compensation by means of an annual allowance to reflect the amount by which the retirement pension would have increased if the employee had remained in service but based on the member's actual pensionable service and subject to a maximum of 10

additional years, plus a lump sum of three times this additional annual payment.

The lump sum compensation abated the section 45 redundancy lump sum if the member received between 6 and 2/3rds and ten additional years. The redundancy lump sum could be abated to nil if the member received the maximum additional payment under GWC 46 (the 'Compensation').

The obligation to pay the Compensation was imposed via the National Health Service (Compensation for Premature Retirement) Regulations 1981.¹⁰ Under Regulations 4(3) and 4(2) the employer had no direct contractual obligation to pay the Compensation element to the employee. Instead this was a liability of the Secretary of State for Social Services. The employer was, however, liable to reimburse the cost of the Compensation and early payment of the ERP to the Secretary of State for Social Services.

When Mrs Beckmann was made redundant by DWM on 6th May, 1997 she was aged over 50 and had over 14 years' continuous employment but received only the lump sum redundancy payment under GWC 45 and not the ERP or Compensation payable under GWC 46. Her active membership of the NHS pension scheme had ceased when her employment was transferred to DWM in 1995.

The issue in question was whether liability for payment of the ERP and Compensation under GWC 46 had passed to DWM by virtue of TUPE.

Decision of the High Court and questions referred to the ECJ¹¹

The High Court, at first instance, considered the *Frankling* case.¹² In that case the EAT decided that the right to the

ERP and Compensation within section 46 of the GWC were statutory entitlements and, although the cost fell on the employer, there was no direct contractual liability between employer and employee which could be transferred under Regulation 5 of TUPE. The EAT also held that the benefits related to old age and fell within Regulation 7(1) as old age benefits within an occupational pension so that they did not transfer under TUPE, even though they were triggered by redundancy and not old age.

The High Court in *Beckmann* considered the strongly persuasive decision in *Frankling*, but took heed of the argument that the purpose of the Directive was to protect employees' rights and the severance benefits under GWC 46 were exactly the sort of rights that should be preserved by operation of Article 3 of the Directive and Regulation 7 of TUPE. The High Court decided that the issues were not entirely clear and referred the following questions to the ECJ:

- 1 Is the entitlement to early payment of pension and lump sum and/or the annual allowance and lump-sum compensation, a right to old-age, invalidity or survivors' benefits within Article 3(3) of the Acquired Rights Directive (and therefore excluded from the operation of the automatic transfer under the Directive)?
- 2 If not, does the transferor have an obligation from the contract of employment which transfers by reason of the transfer of the undertaking and renders the transferee liable to pay benefits to the employee on dismissal?

Opinion of the Advocate General to the ECJ¹³

Before the ECJ considers a case the Advocate General considers the issues

and presents an opinion to the ECJ. Advocate General Alber (AG) delivered his opinion in *Beckmann* on 13th December, 2001. The AG considered the arguments presented to the High Court.

On the issue whether the ERP and compensation were old-age benefits that were excluded from the Directive, Mrs Beckmann argued:

- that they were not as they were payable by reason of dismissal and not by reason of old-age;
- the fact that there is a minimum age before these benefits are payable does not automatically make them old-age benefits as they are triggered by dismissal and not age. This argument is supported by the case of *Roberts v. Tate & Lyle*¹⁴ where the High Court held that pensions payable on dismissal were not old-age benefits;
- the system of abatement as between the redundancy payment under GWC 45 and the ERP and Compensation under GWC 46 emphasised the underlying nature of the benefit as compensation for dismissal;
- it was important to look at the legal nature of the benefit and not the source from which it was paid although it is important that the employer is legally obliged to pay the benefit.

On the second question Mrs Beckmann contended that the benefits derived from the contract of employment or employment relationship and were therefore transferred under Article 3(1). Further, as the rights derived from a collective agreement they would also have been transferred by virtue of Article 3(2), and the fact that the collective agreement was implemented by statutory instrument was irrelevant as is the fact that they are paid by the Secretary of State.

DWM argued that:

- the benefits were old-age benefits and covered by the exception to Article 3(3);
- the fact the benefits are paid before normal retirement age does not alter their character;
- the ERP and Compensation under GWC 46 were never intended to compensate for redundancy, that was the purpose of the payment under GWC 45;
- on the second question, the GWC 46 rights derive from a statutory instrument, had no place in the contract of employment and placed no obligation on the employer to pay the employee but merely created a duty to reimburse the Secretary of State.

The European Commission took the view that:

- the position was not clear and that it was necessary to analyse the nature and purpose of the benefits, conditions for grant, method of funding and method of calculation of benefits;
- the ERP fell within the exception to Article 3(3);
- the purpose of the Compensation payment was unclear and left the issue open.

In considering the ERP the AG noted that the Directive does not define 'old-age benefits'. The case of *Roberts v. Tate & Lyle* showed that an ERP paid on dismissal was not necessarily an old-age benefit, but as the purpose of that case was to determine whether the benefit was within the Equal Treatment Directive it did not have to decide whether it was an old-age benefit and hence the case was of limited assistance.

The case of *Buchner*¹⁵ was of greater assistance as it considered the difference between old age and invalidity pensions. In that case a pension payable on incapacity subject to an age condition was not an old-age pension because it was only granted to those who were suffering from incapacity. In the view of the AG, an old-age benefit would be payable solely as a consequence of achieving a particular age and not subject to any other condition such as dismissal or incapacity. The imposition of an additional age condition in relation to early payment of benefits on dismissal merely limits the size of the potential class of beneficiary. Accordingly, the AG supported the contention of Mrs Beckmann and the UK Government that the benefit was not an old-age benefit as the trigger for payment was dismissal not age and the derogation in the Directive in Article 3(3) should be interpreted narrowly; hence, he said 'benefits which are not unequivocally old-age benefits should fall within the general rules in Article 3(1) and (2) of the Directive'.

The different nature of the ERP was also underlined by the separate method of funding to which the employee did not contribute as compared to the normal retirement pension where the employee did contribute. The fact the employer was not liable to the employee was irrelevant; it was the act of the employer in dismissing the employee that triggered the benefit and the cost was borne by the employer. Similarly, the abatement of the GWC 45 redundancy payment by the amount of the ERP underlined its purpose as compensation for dismissal and underlines the equivalent status of the benefits.

The fact that the benefit was payable under a statutory instrument did not mean it lost its status as a collective agreement.¹⁶

The AG concluded that the same

arguments applied to the Compensation.

With respect to the second question, the AG indicated that the GWC 45 and 46 rights derived from a Collective Agreement and hence could be covered by the Directive. They had to be implemented by statute but the fact that they were implemented by statute did not mean they lost their status especially as they are specifically incorporated in to the contract of employment. Hence they were obligations under a contract of employment, employment relationship or collective agreement within Article 3(1) and (2) and transferred to the transferee.

Decision of the ECJ¹⁷

The decision of the ECJ was brief and did not comment in detail on all of the arguments put forward and evaluated by the AG. The ECJ, however, agreed that the derogation of old-age invalidity and survivors' benefits within occupational pension schemes from the Directive should be interpreted narrowly and replied to the two questions as follows:

- 1 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 under supplementary company or inter-company pension schemes within the meaning of Article 3(3) of Council Directive 77/187/EEC ... on the approximation of the laws of the member states relating to the safeguarding of employees' rights in the event of transfers of undertakings, businesses or parts of businesses.
- 2 On a proper construction of Article 3 of Directive 77/187, the obligations applicable in the event of the dismissal

of an employee, arising from a contract of employment, an employment relationship or a collective agreement binding the transferor as regards that employee, are transferred to the transferee subject to the conditions and limitations laid down by that Article, regardless of the fact that those obligations derive from statutory instruments or are implemented by such instruments and regardless of the practical arrangements adopted for such implementation.

Comments on the decision and areas of uncertainty

Although the answer to the first question refers to the transfer of rights payable in the event of dismissal, it is the narrow definition that is applied to old-age benefits that gives rise to the most difficulty¹⁸ in applying the decision. The ECJ indicates that 'old-age, invalidity and survivors benefits' will be construed narrowly and they regard old-age benefits as benefits payable solely and automatically by reason of achieving a particular age. Given the further comments about the insignificance of the practical arrangements for payment of benefits, the courts may well hold that the obligation to provide early retirement benefits (whether discretionary or not) pass under TUPE irrespective of the fact they are paid via an occupational pension scheme that does not transfer. Transferee employers could then be liable to pay out early retirement benefits without the supporting funds which remain preserved in the transferor's scheme.

In Beckmann the ERP was a contractual right payable automatically upon fulfilling the criteria (age, years of service and dismissal). The greatest surprise is not so much the transfer of the Compensation element, but the liability to pay the ERP which has been

preserved in the transferor's scheme but which the transferee is liable to pay. Many occupational pension schemes have early retirement benefits that require the prior consent of the employer and/or the trustees and it is unclear whether their discretionary nature (ie, non-contractual), is sufficient to differentiate these benefits or whether they fall within the less well defined territory of the 'employment relationship' and are still within the scope of the Directive.

Some areas of uncertainty are:

- What is the nature of the obligation transferred? Does the obligation transfer even if it is discretionary? If so is it to pay contributions or benefits? If it is to pay benefits is the obligation restricted to early payment of the pension accrued post transfer and is it only payable up to normal retirement age, on the basis that it then becomes an old age benefit?
- In the case of a discretionary right: is it simply to have the right exercised properly? Where the discretion was vested in the transferor employer and trustees, who will exercise the discretion that was vested in the transferee trustees after the transfer?
- Will the courts ignore the separation between the employer and the pension scheme, if so what are the obligations of any transferee pension scheme and is the benefit payable if the employee does not join the transferee scheme and the benefit would only be payable if the individual was an active member of the transferor pension scheme?
- Can the obligation be removed either before or after a business transfer?
- Can the transferee claim a right of contribution from the transferor?

Other commentators²⁰ have considered the legal merits of some areas of

uncertainty which are therefore not rehearsed again here; instead, this paper will consider what, if any, practical steps can be taken to manage this uncertainty pending clarification.

The decision of the ECJ in *Beckmann* has been sent back to the UK High Court which must now give judgment. It is therefore possible that some of the issues surrounding the practical aspects of implementing the judgment will be clarified. The case is not, however, due to be heard for some time and will not need to consider the extent to which any other early retirement pension payable in circumstances other than dismissal may be transferred. There, is however, a further case (see below) on its way to the ECJ which may assist.

Will the issues referred to the ECJ in *Martin v. South Bank University* clarify the position post-*Beckmann*?¹⁹

This case was referred to the ECJ earlier this year (before the decision in *Beckmann*) and again concerns the GWC conditions and the NHS pension scheme and the extent to which these obligations transferred to the South Bank University. Some of the questions cover the same ground as *Beckmann*, but others go further and seek confirmation as to whether ERPs payable on dismissal or otherwise that require employer consent are rights and obligations that pass on transfer. This may assist in clarifying the extent to which discretionary obligations are transferred. Further questions focus on the ability to vary or remove employment rights post transfer.

The questions the United Kingdom employment tribunal has asked the ECJ are as follows:

- Do rights which are contingent upon either dismissal or premature

retirement by agreement with the employer fall within the definition of 'rights and obligations' within the meaning of Article 3.1 of the Directive?

- Is the employee's entitlement to the payment of early superannuation benefits and lump sum compensation on redundancy/in the interests of the efficiency of the service/and/or on organisational change, is a right to an old age, invalidity or survivors' benefit within the meaning of Article 3.3 of the Directive?
- If and to the extent that the answer to question 2 is 'no' is there an obligation on the transferor arising from the contract of employment, employment relationship or the collective agreement within the meaning of Article 3.1 and/or 3.2 which transfers by reason of the transfer of the undertaking and renders the transferee liable to pay benefits to the employee on dismissal?
- If the answer to questions 2 and 3 are 'no' and 'yes' respectively, may the employee, nonetheless, agree to forego his/her entitlement to early payment of pension and lump sum and/or the annual allowance and lump sum compensation in circumstances where the transferee's pension scheme does not entitle him or her to the same benefits in the same circumstances or at all, and he/she:
 - (i) becomes a member of the transferee's pension scheme; makes contributions to it and/or has contributions made to it on his/her behalf by the transferee employer;
 - (ii) becomes a member of the transferee's pension scheme, makes contributions to it and has contributions made to it on his/her behalf by the transferee

employer and successfully applies to transfer his/her accrued benefits from the transferor's pension scheme into the transferee's pension scheme?

- If so, what are the criteria by which the national court should decide whether, in such circumstances, the employee has agreed?
- Are Articles 3.1 and/or 3.2 of the Directive to be interpreted as precluding the transferee from offering transferred employees the option of taking early retirement on the basis of early retirement benefits that are less beneficial than those to which they are entitled as a consequence of the effect of the Directive?
- Is the answer to the foregoing question affected if, when taking early retirement on terms less beneficial than those to which they are entitled under the Directive, the transferee states that no early retirement benefits will be available in future?
- Where the parties have agreed that the employee will take premature retirement on the terms offered by the employer, what criteria should the national court apply in determining whether the transfer of the undertaking is the reason for that agreement in accordance with the principle enunciated by the Court in *Foreningen af Arbejdsledere v. Daddy's Dance Hall*, case 324/86?
- If the effect of Article 3 of the Directive is to preclude the transferee from offering transferred employees the option of taking early retirement on the basis of early retirement benefits that are less favourable than those to which they are entitled under the effect of the Directive, what are the consequences for employees who accept early retirement on the basis offered to them by the employer?

This case may therefore clarify matters further but at the time of writing could take up to a year to reach the ECJ.

How can transferee employers and trustees deal with business transfers completed prior to the Beckmann case?

Transferee employers and trustees may resist paying any ERP benefits, discretionary or otherwise, on the grounds that the position remains unclear and argue that any legal proceedings should be stayed pending clarification. Payment may also be resisted if the employee did not elect to become an active member of the transferee's scheme and active membership would have been a precondition to payment of the benefit.

Transferee employers may pay the ERP benefits in full and seek recovery from the transferor as some have suggested that there is legal authority for a right of recovery against transferors,²⁰ or alternatively make payment of the ERP conditional upon the employee consenting to the transfer of the accrued rights from the transferor scheme.

Employers could attempt to vary the conditions of employment. However, this is far from straightforward as current case law²¹ means that post-transfer variations may be ineffective where the reason for the variation is the transfer. As an alternative, the transferee may choose to dismiss the employees and re-engage them on different terms and conditions of employment but this route is also dangerous. The dismissal itself may crystallise payment of a benefit under the scheme and, in addition, the transferee employer may well be left to deal with employment claims, eg unfair dismissal.

Transferee employers may need to amend their pension schemes or exercise the power of augmentation power in order to pay ERP benefits. The trustees of such schemes may wish to resist any amendments or exercise of the scheme augmentation, unless funding is provided in advance to prevent any strain on the fund and adverse impact on existing members.

How could transferor and transferee employers deal with future business transfers?

Transferor employers will be keen to make their business attractive to buyers. Groups of companies may therefore prefer to manage businesses via separate subsidiary companies so that the company rather than the business is sold, thus avoiding the application of TUPE. This would need careful management to avoid TUPE applying to a pre-transfer restructuring. For example the parts of the business the transferor wishes to retain may be removed prior to the sale of the company.

Transferor employers may wish to amend or close their pension scheme and amend terms of employment to vary early retirement and dismissal rights. This assumes variation is achievable within a workforce. This may not be easy, particularly where the workforce is unionised or the employer needs to offer a competitive package in order to retain the workforce. In addition, varying conditions of employment may well lead to claims against the employer and if a business transfer was in contemplation, claims may be brought both against the transferor employer and the transferee employer.

Where a transferee employer knows that he will be making redundancies, he may require the transferor employer to make the employees redundant

pre-transfer. This will crystallise the funding liability with the transferor but will not assist with future redundancies or future claims for early retirement benefit. In addition, the transferor will inevitably require the additional cost of the ERP and any compensation to be paid by the transferee. Equally, such actions will, almost certainly, lead to employment claims against both the transferee and transferor which the transferee may be obliged to fund on behalf of the transferor. That said, if financially viable, this route does allow access to pension funds supporting the pension accrued up to the date of transfer. However, this assumes all accrued pension rights are preserved in the transferor's pension scheme. If there have been a series of business transfers, this may not be correct.

Transferee employers may seek indemnities from transferors to assist in funding payment of any ERP liabilities. These requests are likely to be resisted by transferors especially where the liability has always been underfunded or where the benefit is provided via a pension scheme.

Can we be certain what is meant by 'invalidity and survivors' benefits' provided through an occupational pension scheme

An invalidity pension should be easy to recognise given the Inland Revenue restrictions on the meaning of incapacity and the age from which the benefit can be paid through an occupational pension scheme. The case of *Buchner* also assists in confirming that, even where there are other conditions to payment, the inclusion of a requirement that the member must be incapacitated will clearly identify the benefit as an invalidity benefit.

Survivors' benefits are likely to cover

all benefits payable on death of a member even where they are not payable to a dependant or spouse/child. There are arguments that a benefit that could be payable other than to a natural person eg to a charity, could fall outside the scope of the term. As some death-in-service lump sums are referred to in the contract of employment and simply paid via the pension scheme, it may be prudent to replicate this benefit in any event. This can be relatively inexpensive to achieve without undue administrative burden.

How soon will the position be clarified?

At the time of writing the High Court has not set a date to consider the response of the ECJ in *Beckmann*. The *Martin* case is likely to be considered by the ECJ within the next 12 months and it is hoped that the DTI will reply to the consultation document²² on the reform of TUPE within the same timescale. There may, however, be areas that remain uncertain even following these cases and this uncertainty may continue for a number of years.

Conclusion

The decision in *Beckmann* has wide-ranging implications. It is clear that removing, varying or replacing the rights to an ERP post transfer will prove difficult or impractical, yet the obligation to replicate an ERP may impose a substantial liability on the transferee employer without any underlying assets. It may also affect the way that businesses are managed and sold to avoid the application of TUPE.

The Directive has recently been amended to allow member states to bring pensions within the scope of TUPE if they so wish. The early consultation on

the revision of TUPE earlier this year indicated that the UK Government wished to do this.

The Directive also contains permissive options so that Member States can restrict the inability to change collective agreements to a period not less than a year post transfer. Will businesses exert political pressure to include this power within TUPE and allow post transfer variations to terms of employment? In the light of the recent consultation and the stated intent of the Government to include pensions within TUPE, this seems unlikely to be subject to favourable consideration.

References

- 1 *Beckmann v. Dynamco Whicheloe Macfarlane Ltd* judgment of the ECJ [2002] All ER(D) 05 (Jun).
- 2 Acquired Rights Directive 11/187/EEC.
- 3 Council Directive 2001/23/EC — Council Directive of 12th March, 2001 on the approximation of the laws of the member states relating to the safeguarding of 'employees' rights in the event of transfers of undertakings, businesses or parts of undertakings or businesses.
- 4 Transfer of Undertaking (Protection of Employment) Regulations 1981. SI 1794.
- 5 Now section 1 Pension Schemes Act 1993.
- 6 *Walden Engineering Co Ltd v. Warrener Employment Appeal Tribunal* decision [1993] PLR 296 and the decision of the Industrial Tribunal [1991] PLR 2.
- 7 Trade Union Reform and Employment Rights Act 1993 S33(5).
- 8 *Andrea Francovich v. Italy* (c-6/90) & *Danila Bonifaci v. Italy* ECJ 19/11/1991.
- 9 The National Health Service Pension Scheme Regulations 1995 SI 300.
- 10 National Health Service, England and Wales, The National Health Service (Compensation for Premature Retirement) Regulations 1981 SI 1263.
- 11 *Beckmann v. Dynamco Whicheloe Macfarlane Ltd*, OPLR referral to the ECJ by the High Court QBD.
- 12 *Frankling and others v. BPS Public Sector Ltd*, decision of the EAT [1999] I.C.R.
- 13 *Beckmann v. Dynamco Whicheloe Macfarlane Ltd*, opinion of the Advocate General Alber.
- 14 *Roberts v. Tate & Lyle* [1986] ECR para 703.
- 15 *Buchner and others* [2000] ECR I-3625.
- 16 *Commission v. France* [1998] ECR I-5325.
- 17 Cited at 1 above.
- 18 See paragraph 32 of ECJ Judgment at 1 above.
- 19 *Ms S.G. Martin, Mr R.K.A. Daby and Mr B.J. Willis v. South Bank University*, Reference for a preliminary ruling by the Employment Tribunal, West Croydon

- (United Kingdom), by order of the court of 5 January 2001 (Case C.4/01) 2001/C6/(3).
- 20 Meeks, A. (2000) 'TUPE: The latest twists', paper delivered to the Association of Pension Lawyers Spring Conference.
- 21 *Wilson v. St. Helens Borough Council* [1999] 2 AC 52.
- 22 Department of Trade and Industry (2001) 'Transfer of Undertakings (Protection of Employment) Regulations 1981 (TUPE): Government proposals for reform', Public consultation document.