TSSA staff Reps Bulletin

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TUPE AND PENSIONS

Introduction
Many TSSA members will at some point in their career have experienced on at least one occasion the operation of law when they were transferred from one employer to another under the provisions of the Transfer of Undertakings (Protection of Employment) Regulations.

Known as TUPE or the 'TUPE Regs', this crucial piece of legislation can apply when one of the two following main situations apply:

- business transfer such as the sale or purchase of part or all of a business as a going concern
- a 'service provision change' such as when a business outsources a service to an external contractor, the service is transferred between contractors or where the service is brought back in house by the original owner.

In this Reps Bulletin we will be looking at the general TUPE arrangements before considering in more detail what protection is afforded to employees' pensions.

Origins of TUPE
Originating in the European Union as the Acquired Rights Directive in 1981, the UK Government of the day met its Treaty obligations by introducing the TUPE Regulations in the same year.

In 2006, however, the UK law was overhauled by the Labour Government and updated to extend the legal provision to cover 'service provision change'.

However, in 2014, under the excuse of its Red Tape Challenge campaign, the Conservative Government sought to undermine or restrict certain elements of TUPE protections for employees, including by allowing changes to terms and conditions within a collective agreement a year after the transfer if, overall, the employees' terms and conditions are no less favourable than those which applied before the variation.

What is covered by TUPE?
When a TUPE transfer occurs, employees should see virtually all aspects of their employment contract transfer with them to the new employer including their:

- current terms and conditions of employment including pay and overtime rates;
- continuity of service
- redundancy payment arrangements

- arrears of pay, holiday pay and sick pay and any accrued holiday entitlement
- the terms of any collective agreement incorporated into the employment contract.[1]

There are a number of other aspects that also transfer but one area which only receives limited protection is that of pensions.

Are pensions covered at all by TUPE?
The response is complex but begins by answering that largely TUPE does not protect pensions. However, that response can differ dependent on whether a person is in a personal pension scheme or is a member of an occupational pension scheme.

What are the differences between the two schemes?
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 benefit. These can be final salary like the Railways Pension Scheme or the TfL Pension Fund or CARE (Career Average Revalued Earnings) like Network Rail's CARE arrangement;
- defined contribution (i.e. money purchase). An example is NR's Defined Contribution Scheme ; or
- a combination of both (known as a hybrid scheme).

A personal pension scheme on the other hand is a pension scheme operated by a third party provider, often an insurance company, who has the appropriate authorisation from the Financial Conduct Authority. They are usually defined contribution (money purchase) pension schemes that can come in different forms. Some TSSA members are, for instance, in Group Personal Pension schemes which are essentially a collection of personal pensions that carry a company logo but are provided by a third party.

How are members of personal pensions affected by TUPE?
Personal pensions are <u>not</u> covered by TUPE.

However, this means that the usual TUPE principles apply and that if the transferring employee has a contractual right with the existing employer, the new employer is obliged to match employee contributions up to a maximum of 6% employer contributions. The level of employer contributions the new employer is required to pay can be less provided they match what the previous employer was paying immediately before the transfer.

Where an issue may arise in relation to personal pensions is whether the new employer has an obligation to pay into

[1] See Pages 3 & 4 of CIPD's "A Guide to TUPE Transfers" (published June 2018) and available at: https://www.cipd.co.uk/Images/7697-a-guide-to-tupe-transfers-web_tcm18-44310.pdf

the previous employer's scheme. This will depend on the contractual right and whether it relates solely to the level of contributions or includes the named personal pension scheme. The minimum arrangement is that the new employer would have to put in place an equally generous scheme.

One important point is that "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"."[2]

How are members of an occupational pension scheme affected by TUPE?
The situation with occupational pension schemes is more complicated because, essentially, Regulation 10 of the TUPE Regs "carves out" the normal operation of TUPE meaning that the transferee (new employer) does not have to replicate or contribute to the transferor's (previous employer) pension scheme.[3]

However, this isn't the complete picture because there are two important legal elements that need to be taken into account:

- Beckmann and Martin cases;
- Pension Act 2004's minimum provision.

For some railway workers there is also the effect of the Railway Pension Protection arrangements.

Beckmann and Martin cases
Taken together, both of these European Court of Justice (ECJ) cases – Beckmann-v-Dynamco Whicheloe Macfarlane (2002) and Martin-v-South Bank University (2003) - introduced exemptions to the TUPE legislation which means that some pension rights under an occupational pension scheme can still pass under TUPE.

In Beckmann, the ECJ held that pensions payable below normal pension age were not "old age" benefits, and accordingly would transfer under TUPE. This included:

- enhanced pension rights on redundancy
- early retirement benefits

In Martin, the ECJ confirmed the Beckmann judgement and went onto add that rights contingent on either dismissal or early retirement by agreement with the employer also do not fall within the TUPE exclusion and so would transfer.

Pension Act 2004's minimum provision
Despite the effects of TUPE not applying to pensions (except in the specific circumstances identified in the Beckmann and Martin cases), the

[2] "TUPE and Pensions – Back to Basics" by Hannah Beacham, published 3rd October 2017 by Gowling WLG and available at: https://gowlingwlg.com/en/insights-resources/articles/2017/tupe-and-pensions-back-to-basics/?utm_source=Mondaq&utm_medium=syndication&utm_campaign=View-Original
[3] From Gowling WLG article

Pensions Act 2004 does ensure a minimum provision.

This works on the basis that where the transferring employees were members of an occupational pension scheme that the transferor is required to contribute to (or had contributed to prior to the transaction taking place), the new employer will have to provide a certain minimum level of pension benefits for the transferring employees.

The Pensions Act 2004 requires the buyer to put in place either:

- an occupational defined benefit pension scheme which meets certain minimum criteria (including benefits worth at least 6% of pensionable pay per year or matched contributions up to 6% of pensionable pay); or
- a defined contribution arrangement (either an occupational pension scheme or a group personal pension scheme – see the section above about personal pensions).

The point here, of course, is whether these minimum arrangements enable members to continue to expect to receive the same level of future benefits or to save for retirement at the same level as they may have been doing before TUPE.

Members are also likely to ask the question about what happens to what they have already contributed to a pension scheme with their current employer?

If my existing pension doesn't transfer under TUPE, what happens to what I have paid in already?
Known as "subsisting rights" or 'past service accrual', Section 67 of the Pension Schemes Act 1995 protects what members have already contributed to their pension scheme. If any change is ever proposed, there is a legal process that has to be gone through, including in most circumstances requiring individual member's written consent. The Pensions Regulator also has powers to impose fines on trustees and scheme employers where the law is breached.

For members who experience TUPE and have to start a new pension, what they have accrued in their previous scheme will effectively be frozen (dependent upon the rules of the scheme it may also be the subject of annual inflation uplifts to maintain something of its value). They will become known as a "deferred" member of that scheme until they either claim it at retirement or, prior to that event, are able to obtain a cash equivalent transfer value (CETV) into another pensions scheme.

Members considering CETVs are often recommended – and in some cases, obligated – to take advice from a suitably qualified and FCA authorised Independent Financial Adviser.

Railway Pension Protection arrangements
Members of the Railways Pension Scheme (RPS) who fulfil the criteria of pensions protection introduced shortly after British Rail was privatised in

November 1993 should not see their pension affected by TUPE transfers. This is because a duty exists on railway employers to provide an adequately funded occupational pension scheme which fulfils the protection requirements for staff with protected status. If you have a query about whether you are protected or not, please download the detailed RPMI leaflet at this link:

https://cdn.rpmi.co.uk/mp-sitefinity-prod/docs/default-source/rayn/guides-for-active-(contributing)-members/guide-to-protected-rights.pdf?sfvrsn=bf5c257_2

Reps' Action
It is suggested that reps familiarise themselves with the contents of the Bulletin and share it with members.

Acknowledgements and references
TSSA wishes to acknowledge the following sources that have been used to compile the Bulletin:

"A Guide to TUPE Transfers" published by the Chartered Institute of Personnel and Development in June 2018. Available to download from: https://www.cipd.co.uk/Images/7697-a-guide-to-tupe-transfers-web_tcm18-44310.pdf

"TUPE and Pensions – Back to Basics" by Hannah Beacham, published 3rd October 2017 by Gowling WLG and available at: https://gowlingwlg.com/en/insights-resources/articles/2017/tupe-and-pensions-back-to-basics/?utm_source=Mondaq&utm_medium=syndication&utm_campaign=View-Original

"Regulation of Retirement Provision, Core Unit 2 Study Manual", 2021 Edition, Pensions Management Institute at: https://static.s123-cdn-static-d.com/uploads/2445726/normal_6046307be4dce.pdf

Disclaimer
This Reps Bulletin is intended as a guide and does not pretend to be a definitive statement of law. What appears is meant to enable reps to be aware of the potential issues and to be able to draw members' attention to those factors.