

## The Beckmann Judgment and its Consequences

1. In *Beckmann v Dynamco Whicheloe* [2003] ICR 50 the ECJ held that the right to an enhanced pension, payable to NHS employees who were made redundant at aged 50 or more, transferred under TUPE to her private sector employer. The case is important for, especially, public sector employees who had such rights while in the public sector. But it also applies to some private sector employees who had the benefit to an enhanced pension, typically post-50, if made redundant while employed by the transferor.
2. **The Acquired Rights Directive.** Now see Directive 2001/23/EC, replacing 77/187/EEC. The key provisions are:
  - (1) Art 3(1): “The transferor’s rights and obligations arising from (i) a contract of employment or (ii) an employment relationship existing on the date of the transfer shall, by reason of such transfer, be transferred to the transferee”
  - (2) Art 3(3): “Following the transfer, 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 in force or application of another collective agreement.”
  - (3) Art 3(4) [ex Art 3(3)]: “Unless Member States provide otherwise, paragraphs 1 to 3 shall not apply in relation to 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”.<sup>1</sup>
  - (4) See too obligation on Member State in second limb of Art 3(4).<sup>2</sup>
3. **TUPE 2006.** Implementing the Directive, TUPE reverse the common law rule that a transfer of employment amounts to a termination of a contract. Their practical effect will no doubt be the same as TUPE 1981, which were in force at

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<sup>1</sup> The reason for this exclusion is not clear: may be because of diversity and structure of such schemes make it impracticable for transferee to participate in pension arrangements: see Commission submissions in *Beckmann*.

<sup>2</sup> This was held to impose obligation on government, not the transferee, in *Warrener v Walden* [1993] ICR 967.

the time of *Beckmann*. They will be interpreted, so far as is possible, to give effect to *Beckmann*. The key provisions are:

- (1) Reg 4(1): "...a relevant transfer shall not operate so as to terminate the contract of employment of any person employed by the transferor.....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"
  - (2) Reg 4(2): "Without prejudice to paragraph (1) above....on completion of a relevant transfer-
    - (a) all the transferor's rights, powers, duties and liabilities under or in connection with any such contract 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 to have been done by or in relation to the transferee."
  - (3) Reg 10(1): "Regulations 4 and 5 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 Pension Schemes Act 1993; 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."
- (See too regulation 10(3)).
- (4) Reg 10(2): "For the purpose of paragraph (1) and (3), 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"

4. **The decision in *Beckmann*.** In *Frankling v BPS* [1999] ICR 347 NHS employees employed in payroll transferred to the private sector and were made redundant. The EAT held their rights to immediate payment of enhanced pension benefits in the event of a redundancy post-50 under s.46 Whitley Council (i) arose by virtue of relevant NHS regulations and not contract and so did not transfer

under TUPE; (ii) alternatively fell within regulation 7(1) and outside regulation 7(2), because they related to old age.

5. This decision was effectively reversed by *Beckmann*. Mrs B worked for health authority and her contract expressly incorporated the terms of the Whitley Council agreements. Under section 46 of WC, given effect by the applicable regulations,<sup>3</sup> while with the NHS she was entitled to an immediate enhanced pension if she was made redundant after reaching the age of 50 with at least five years' service. The benefits were paid by Secretary of State but subject to funding to date of normal retirement by the relevant NHS Trust. After transferring to a private sector body, DW, she was made redundant. She claimed her enhanced retirement pension. Before the ECJ, DW argued that (i) her early pension was an "old-age" benefit and (ii) the benefits arose in statute and not contract and were paid by the SoS and so did not transfer under the Directive.
6. Rejecting these arguments, the ECJ held (i) that in light of objective of Directive, Article 3(4) should be interpreted narrowly and consequently "old-age...benefits" are restricted to benefits payable when an individual reaches the end of his/her normal working life under the rules of the relevant pension scheme; (ii) obligations arising under Art 3(1) transfer to the transferee, regardless of fact that those obligations derive from or are implemented by a statutory instrument or of practical arrangements adopted for such implementation. The case then settled on return to the High Court.
7. The decision was confirmed in *Martin v South Bank University* [2004] ICR 1234, ECJ. Three nursing lecturers, employed on terms of Whitley Council while with NHS, transferred to SBU and rejected SBU terms and conditions. Whitley Council gave rights to enhanced retirement pension in event of ceasing to work on grounds of redundancy, in interests of efficiency of service or on organisational change. All three joined teachers' superannuation scheme, two transferring their existing NHS benefits into that scheme, under which the employer had a discretion to grant early retirement and to credit additional years of service in that event. Later two opted to take early retirement, for reason which would have fallen within s.46 of Whitley (in interests of efficiency of service). They claimed to be entitled to the benefits they would have obtained

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<sup>3</sup> At the time, the NHS (Compensation for Premature Retirement) Regulations 1981 and the NHS Superannuation Scheme Regulations 1980-95.

under NHS scheme.

8. The ECJ held: (i) following *Beckmann*, rights contingent upon dismissal or grant of early retirement fell within Directive; (ii) the transferee could not offer employees less favourable terms on early retirement if the transfer was the reason for the change (unless they arose from collective agreement which ceased to apply), and here changes in order to bring about harmonisation of terms and conditions with those of existing employees was connected to the transfer; (iii) it was for transferee to ensure that employees were accorded early retirement on terms to which entitled while with transferor.
9. **The effect of *Beckmann*.** Since *Beckmann*, many (probably hundreds) of High Court cases settled for mostly public sector employees who transferred to the private sector and were then made redundant post-50. *Beckmann* sits a little uneasily with the English distinction between the trust under the pension scheme rules and the contract of employment.<sup>4</sup> But in general terms it is possible to claim that (i) while employed by the transferor the employee had a contractual or statutory right to enhanced pension rights e.g. if made redundant post-50 and (ii) that right, however formulated, transferred to the transferee. This achieves the result of *Beckmann*, which the Courts are required to do so far as is possible by means of interpretation.
10. The effect of *Beckmann* was recently considered in *Procter & Gamble v Svenska* [2012] IRLR 733. An appeal was brought but it is understood the case has now settled. It helps to resolve some issues but not all. Some of the difficult questions are highlighted below.
  - (1) What if the employee has no contractual right to the pension benefits, and the rights only arise in trust: do the pension rights still transfer? The answer is probably yes - in *Beckmann* the ECJ rejected the argument of DW that the rights arose in statute. Whatever the source of the rights, they should transfer because pensions are a form of deferred remuneration: see *Procter & Gamble* at para. 61.
  - (2) What if the benefits are discretionary or are payable only if the employer or trustees give their consent? The probable answer is that they still

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<sup>4</sup> On the intersection of contract and trust, see *Air Jamaica v Charlton* [1999] PLR 247, PC

transfer. In *Proctor & Gamble* an employee was only entitled to early retirement if the employer consented, but the court held the right to be considered fairly for such benefits, consistent with the duty of good faith, transferred. In some cases, employees may be able to demonstrate a right to the benefits based on custom and practice (but not if the discretion is statutory - a particular issue under the local government pension schemes).

- (3) What benefits in fact transfer - the benefits payable up to retirement, or those benefits *and* the “normal” post-retirement benefits? In *Proctor & Gamble* the answer was just benefits up to NRA.
- (4) What is the duty of the transferee: to provide the same benefits or to set up a broadly equivalent scheme?<sup>5</sup>
- (5) What if the employee had insufficient service at the point of transfer but does at the point of dismissal? I think she should still be put in the position she would have been if she remained employed with the transferor.
- (6) Can the transferee use the benefits in the transferor’s scheme to reduce its liability.<sup>6</sup> The answer is probably yes - see *Proctor & Gamble*.
- (7) To what extent can the transferee change the benefits after the transfer? Consider (i) contractual variation and ETO reasons (see *Manchester College v Hazel* [2014] EWCA Civ 72); (ii) dismissal and re-engagement (on this, and reflecting the uneasy distinction between dismissal and variation, see *Wilson v St Helens* [1998] ICR 1141, HL); and (iii) reliance on a power to alter the pension in the scheme itself.<sup>7</sup> It is hard to see how the now capped compensation for unfair dismissal could be an effective remedy for loss of the right to an enhanced pension, though this matter

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<sup>5</sup> See, on this, cases on ESOPs: see *Mitie Managerial Services v French* [2002] IRLR 512, EAT: duty to set up profit sharing scheme which was substantially equivalent to Sainsburys. But cf *Merckx* - employees entitled to same level of bonus as with transferor; and cf *Martin*.

<sup>6</sup> See, by analogy in context of tort claims, *Bernadone v Pall Mall* [2000] IRLR 487, CA (right to indemnity under insurance policy transferred to transferee)

<sup>7</sup> This may often be a change in connection with the transfer, as in *Martin* - changes there to bring about harmonisation were for a reason connected with transfer.

would need to be considered by the ECJ.

- (8) What if the rules of the scheme with the transferor changed after the transfer? Can the transferor then argue that if the employee had remained with the transferor, she would not have had the right to the enhanced pension when she was made redundant, so that she should not be better off with the transferee? This is a particular problem in the public sector, where the rules constantly change, typically to the detriment of the employee: see e.g. the NHS (Compensation for Premature Retirement) Regulations 2002 and the changes made to regulation E3 of the NHS Pension Scheme Regulations 1995, now limiting an early pension to those aged 55 after 6.4.10 (cf. *Alemo-Herron v Parkwood* [2013] ICR 1116).
11. **Conclusion.** The main thing with *Beckmann* claims is to spot them before it is too late (the limitation period is six years), and to beware of attempts to change the benefits by the transferee. The claims aren't easy and actuarial evidence is often necessary on e.g. loss. But I hope the above at least highlights the central issues.

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**12 February 2014**  
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