

Will the pensions crisis ever stop?

It is now 15 years since Robert Maxwell dropped/fell/was pushed from The Lady Godiva and so triggered the pensions scandal within the Mirror group. Since then pensions have rarely been out of the headlines. If your company operates stakeholder or group personal pension arrangements, you may think that you are immune from change but Robert O'Donovan is not so sure.

If you don't run an occupational pension scheme, then you must have been feeling very pleased with yourself in recent years. If you have a group personal pension (GPP), the provider does most of the work and, as long as you pay a 3% contribution, there is no requirement to operate a stakeholder arrangement as well. Further, you can make your 3% contribution conditional on the employee contributing up to 3% as well.

For most companies operating stakeholder, the burden is less than dramatic for the very simple reason that reports indicate that the majority of stakeholder pension schemes have no members and no contributions. The facility is simply there to be taken if anyone wishes to use it but, given there is no requirement on the company to make contributions, there is little incentive for the employee to play his part.

There are indications that this world is going to change and recent reports indicate that political pressure is growing for compulsory employer contributions to

group personal pensions or stakeholder arrangements. What level of contributions are likely to be demanded? Nobody knows but possible solutions are 3% to match the group personal pensions stakeholder exemption or matching up to 6%, being the protection given on a TUPE transfer, or even 8% being the contribution recommended in the Turner report, split 5% employee (with tax relief) and 3% employer.

This could be a severe blow if introduced in a short period without warning. Over the coming years, one way round the problem might be to designate part of any pay increase awarded to employees as the employer's contribution to a stakeholder pension. For example, if you were going to award employees a 3% pay rise in any event, you could give them only 2% and put the other 1% into the pension fund as an employer contribution. By doing so, you in reality push the cost onto the employee.

Is GPP better or worse than stakeholder? We're probably not allowed to comment on financial implications but, from the legal angle, there are advantages in stakeholder. For example, is an employer with a GPP responsible for selecting a well performing provider, monitoring and changing providers? Answer – not yet decided, but possibly. In the case of stakeholder, there are statutory exclusions of employer liability for selecting and monitoring providers. So to a lawyer, stakeholder has an edge over GPP, but then legal liabilities are not the whole answer.

TUPE is dead. Long live TUPE

The Transfer of Undertakings (Protection of Employment) Regulations 1981 must be one of the most controversial pieces of legislation ever passed. They are controversial, not so much because of the intent behind them, but because of the difficulty in dealing with complicated concepts. The regulations, or “TUPE” as they have fondly become to be known, are now being revised and reissued and Robert O’Donovan had a look at some of the details.

Why TUPE?

The intent behind TUPE is to protect employees on a transfer of a business or undertaking.

Why do employees need protection?

The answer lies in the way a business is sold. If a business is sold by way of a share sale, that is to say it is run by a company and the owners of shares in that company sell their shares, then, as far as employees are concerned, there is no fundamental change to their position. Their contracts of employment before the sale were with the company and, after the sale they are still with the company. If the new owner decides to make changes then they have the protection of normal redundancy, unfair dismissal and discrimination legislation.

On the other hand the business could be sold “as a business”. This means that the buyer is not buying the shares in the company running the business but rather buys each and every asset separately. There are practical and tax advantages and disadvantages to each method of purchase but an attraction of buying assets separately is that the buyer knows exactly what he is getting. If one buys shares, one gets all the assets and all the liabilities including unwelcome liabilities.

On a sale of shares employees have the protection they have always had. On a sale of business, before TUPE, there was no guarantee of continuing employment on a sale and buyers could cherry-pick staff choosing the ones they wanted and rejecting those they did not want, whether fairly or unfairly. Now staff assigned to the business find their contracts automatically transferred.

Outsourcing

One area of uncertainty had been whether the outsourcing of a function amounted to a transfer of an undertaking and whether the transfer of an outsourced function from one supplier of the service to another was itself a transfer of an undertaking. Take for example office cleaners. The client is dissatisfied with Company A, which supplies his cleaners, and so he appoints another company, B, to supply them. If TUPE applies, then the staff who gave rise to the client’s dissatisfaction in the first place may be transferred to Company B and so continue to clean the office!

Before 6 April, it was almost a matter of chance as to whether TUPE applied to such a transfer. However, as from 6 April, in such a situation TUPE will almost certainly apply. In the above example, that would mean that the original cleaners preserve their job continuity and that the client would have to use other means to improve the quality of service he receives.

Outsourcing from Government

Under TUPE all the liabilities of the old employer pass to the new employer, for example, liability for personal injury claims also pass to the buyer. However, this leads to a practical difficulty. The buyer’s employer’s liability insurer would take the view that the injury pre-dated cover under the insurance and refuse to pay. In such a situation, judges decided the transferee could actually claim under the transferor’s employers liability insurance policy. That is why, today, if you ask us to assist in a business acquisition, we usually ask for details of current and historic employers liability policies from the seller.

There was a problem if one took staff from a Government department as normally employers liability insurance was not provided for. The transferee might have to discharge an old personal injury claim without insurance cover. This gap is now being filled so that, if you take Government employees under TUPE and there is a pre-existing injury, the Government organisation and your entity will be jointly and severally liable.

This still seems unfair. Why joint and several? Why not leave liability entirely with the Government?

Arrangements should be made for the liability to fall on the Government by Agreement although in the writer's experience, certainly in the past, this has been easier said than done.

Opting-out?

Can you opt out of TUPE? Yes, but you need to plan in advance. If part of a business is being transferred, you can re-assign staff to other parts of your business in advance of the transfer. Aim to do this with the agreement of staff, as depending on circumstances an inappropriate re-assignment could give rise to a constructive dismissal.

Harmonising contract terms on transfer

A frequent area of difficulty arises after a transfer when the buyer wishes to harmonise terms of employment between existing staff and the staff arriving as a result of the transfer. Under old TUPE, an agreed variation to the employee's original terms of employment is void and therefore the employee can revert to the original contract as and when it suits. On the other hand, dismissal and subsequent re-engagement on the varied terms does seem to be effective in varying contracts. The end result is the same but the procedure involved determines whether the variation is effective or not.

Presumably the idea is that, if there is a dismissal, at least the employee could, if he wished, take his chances with a constructive dismissal claim.

This arrangement, with its focus on form rather than substance, is not reformed by the new regulations. In fact, if anything it is strengthened in that there is an express regulation that variation of contracts can be agreed only if the sole or principal reason for the variation is economic, technical or organisational, entailing changes in the workforce, or for a reason unconnected with the transfer.

Pensions

To the casual reader occupational pensions simply do not pass under TUPE although, if the transferor operates a personal pension arrangement, the transferee is obliged to set-up an identical arrangement. For practical reasons, new arrangements may or may not be with the same pension provider but this does not seem to cause any difficulty.

In fact, occupational pensions are protected up to a point. The relevant legislation is tucked

away in the Pensions Act 2004 and regulations made under it. It is a pity that pensions were not brought into the scope of the new regulations.

Transferees will be relieved to know that there is no obligation on them to replicate final salary or defined benefit type occupational pension schemes which are causing so much difficulty at the moment. All they will have to do is to provide money purchase pension arrangements with a matching contribution from the employer of up to 6% per annum. This is probably a fraction of the true value of a final salary pension and utilising a TUPE transfer remains a possible method of terminating final salary obligations without breach of contract.

Liability information

The transferor is now to be under a duty to provide information about transferring employees to the transferee. To an extent this will duplicate information we would ask for in warranties. However, as there will be a short, three month, limit for claims, we expect most transferees will want warranty protection as well.

Consultation

Consultation remains a strong feature just as before. A quirk of the previous legislation was that if the transferor failed to inform or consult representatives then, whilst it was the transferor who was at fault, the liability to pay compensation to staff would, under TUPE, pass to the transferee. This did not cause any great difficulty where transferor and transferee obtained legal advice as a typical purchase agreement would provide an indemnity from transferor to transferee. On informal transactions, however, there was arguably a considerable degree of unfairness. Now transferor and transferee are jointly liable – a step in the right direction, but still not entirely fair and still requiring an agreement between transferor and transferee to apportion liability.

Where does this get us? Whilst there have been some useful areas of clarification the extension of TUPE to outsource contracts increases the chance of new difficulties. In all probability, the changes do not mean that TUPE will disappear from the Employment Tribunals.

Robert O'Donovan 0207-227-7278
robert.o'donovan@rlb-law.com



Ask REG

For those who have not been introduced to REG.

Who is REG? REG (otherwise known as RadcliffesLeBrasseur Employment Group) is a friendly, approachable and yet knowledgeable character and appears as a (fairly) regular feature in our Update to answer those employment law questions you were too afraid to ask.

Dear REG

I have had to suspend an employee for 4 weeks pending a disciplinary investigation. The investigation is now complete and the decision was made to dismiss the individual. This decision to dismiss does not seem to be being contested. On the other hand, the employee says that he is entitled to accrued holiday pay during the period that he was suspended and this seems to me to be unfair given that he was not working at the time. What is the correct position?

While we can see why you are upset on this point your employee is in the right. The days of suspension without pay disappeared in 2004 when the Employment Act 2002 was implemented and no disciplinary process may now take place without full investigation. A consequence of this is that suspension without pay was effectively eliminated. Suspension without pay now constitutes a disciplinary sanction and by definition, at the beginning of the suspension, there would not have been a full investigation and the sanction could not be fair. Therefore, suspension at the moment has to be on full pay and on normal contract terms. So one accrues holiday.

Quite frequently one sees provisions to the effect that if an individual is given notice then accrued holiday has to be taken during the notice period. It is therefore tempting to suggest drafting a contract so that, during a period of suspension, accrued holiday would have to be taken. Quite simply this will not work. Forcing an individual to take accrued holiday during a period of suspension, which might not be convenient to him, would once again be a disciplinary sanction and so outlawed unless there has been prior investigation.

REG invites you to email your questions to reg@rlb-law.com. You can also telephone or email any of us and we will pass your questions on. Look out for REG's answers to your questions in forthcoming issues of the Employment Update.

Workshop/Seminar News

Dates for your diary:-

18 May: Age Discrimination

14 September: Avoiding legal pitfalls in recruitment

16 November: Annual Seminar

New compensation limits

For those who have not spotted them yet, the amount of a week's pay for compensation purposes has now increased to £290 per week. That means that the maximum redundancy award (at least until October) is £8,700. The maximum compensatory award for unfair dismissal has also increased to £58,400.

In October, redundancy payments may be revised to eliminate the ageist element in the calculation and we will report as and when details are finalised.

5 Great College Street
Westminster
London SW1P 3SJ
Tel +44 (0)20 7222 7040
Fax+44 (0)20 7222 6208
LDE 113

6-7 Park Place
Leeds LS1 2RU
Tel +44 (0)113 234 1220
Fax+44 (0)113 234 1573
DX 14086 Leeds Park Square

25 Park Place
Cardiff CF10 3BA
Tel +44 (0)29 2034 3035
Fax+44 (0)29 2034 3045
DX 33063 Cardiff 1

info@rlb-law.com
www.rlb-law.com

RadcliffesLeBrasseur offers a complete solution to all your legal requirements. We have particular expertise in five focus areas – Corporate, Health, Property, Tax & Private Client and Charities.

RadcliffesLeBrasseur

If you require any further information regarding the issues mentioned in this bulletin please contact Robert O'Donovan or Sejal Raja.

robert.o'donovan@rlb-law.com
sejal.raja@rlb-law.com

Readers should take professional advice before taking any action based on this bulletin.