
TUPE, PENSIONS AND LOCAL AUTHORITIES

Introduction

1. This paper is written from the perspective of an employee and what claims he or she might bring to enforce his or her pensions rights.
2. The pension rights he or she might enjoy obviously give rise to the need for carefully drafted commercial agreements between the local authority and its contractors where contracting out, retendering or indeed insourcing takes place. This paper does not deal with the need to draft clauses in commercial agreements between the local authority and its contractors which deal with the consequences of TUPE and pensions of which there are many.

Summary

3. The basic position is this:
 - a. Whenever a local authority carries out a contracting out, re-tendering or insourcing exercise, TUPE will apply, the effect of which is that the employees transferred transfer across to the new contractor or back to the local authority on the same terms and conditions as those under which they worked prior the transfer;
 - b. In such a scenario, it is likely that the Local Government Pension Scheme will provide higher benefits than any scheme the contractor may have set up for its employees (see paragraphs 9 to 19);
 - c. Rights under an occupational pension scheme do not under the general law transfer upon a TUPE: Regulation 10 of TUPE. The Local Government Pension Scheme is such an occupational pension scheme as would be any final salary pension scheme or Group Personal Pension Plan set up by a contractor (see paragraphs 20 to 19.a);
 - d. Regulation 10 is subject to the Beckmann exception (now Regulation 10(3) of TUPE 2006). The Beckmann exemption permits rights which arise out of the rules of the pension scheme which are not which do not relate to benefits for 'old age, invalidity or survivors' to transfer (see paragraphs 23 to 52);
 - e. This has been interpreted as meaning (see paragraph 53):
 - i. a right to top-up benefits (payable as a bridge to normal retirement date) triggered by redundancy payable under public sector (non-trust based) pension schemes transfer under TUPE;

- ii. other benefits payable before normal retirement may also transfer as well. By way of example, if a scheme gives a right to retire early, that right may also transfer under TUPE;
 - iii. a right to be considered for a discretionary benefit (e.g. only with employer consent);
 - iv. however, only those parts of any benefit payable during the period before normal retirement date was not a benefit for 'old age' and so could transfer.
- f. The rights that remain within the "pensions exception" are (see paragraph 54):
- i. Pensions payable on or after normal retirement age (old age benefits);
 - ii. Pension payments which are made after normal retirement date (even though they started before that date);
 - iii. Ill health early retirement benefits (invalidity benefits);
 - iv. Benefits payable to members' dependants on the death of the member before or after normal pension age (survivors' benefits).
- g. However, in relation to employees who transferred after 2007, Regulation 10 and Beckmann are likely to be irrelevant. The Best Value Authority Staff Transfers (Pension) Direction 2007 provides that where a local authority engages in an outsourcing or retendering (contractor to contractor situation) exercise, the contractor is obliged as a consequence of the to provide the employees who are transferred as a result either with continued membership of the Local Government Pension Scheme or to provide membership of a scheme that is comparable. In addition, the Fair Deal Policy, the Pension Protection Regulations 2005 and Auto-enrolment may be relevant, applicable or provide rights beneficial to employees transferred. If the transfer were the result of insourcing, the employee becoming an employee of the local authority would of course be entitled to join the Local Government Pension Scheme and it is unlikely his existing pension rights would be better. The only situation where Beckmann could still apply is where a transferee elects to provide a pension arrangement which is comparable but which lacks discretionary pre-retirement benefits which exist in the Local Government Pension Scheme (see paragraphs 55 to 79);
- h. The transferor employee is under an obligation to provide information relating to pensions as part of the information and consultation exercise required when a TUPE transfer is proposed (paragraphs 81 to **Error! Reference source not found.**);
- i. An employee cannot resign and claim constructive dismissal or sue for breach of contract if pension rights are not preserved (see paragraphs 87 to 89).

What is TUPE?

4. TUPE applies to a relevant transfer which is either:

- a. 'a transfer of an undertaking, business or part of an undertaking or business ... to another person where there is a transfer of an economic entity which retains its identity': Regulation 3(1) of TUPE 2006; or
 - b. a service provision change as defined by Regulation 3(1)(b) and 3(3) of TUPE 2006.
5. 'Service provision change' is the TUPE 2006 jargon for a contracting out of services. It is drafted so as to apply to:
 - a. an initial contract out ('outsourcing') Reg 3(1)(b)(i);
 - b. a re-tendering of the contract - Reg 3(1)(b)(ii); and
 - c. a contracting back in-house again ('insourcing') – Reg 3(1)(b)(iii).
6. By Regulation 3(4)(a) of TUPE 2006, they apply to 'public and private undertakings engaged in economic activities whether or not they are operating for gain' which is subject to Regulation 3(5): An administrative reorganisation of public administrative authorities or the transfer of administrative functions between public administrative authorities is not a relevant transfer. This exception, commonly known as the Henke exception could apply in a central government to local authority transfer. However, in such circumstances the central government Fair Deal arrangements would be engaged to preserve pension rights.
7. Generally, where a local authority outsources, retenders or insources a contract there will be a service provision change for the purposes of Regulation 3(b) of the Transfer of Undertakings (Protection of Employment) Regulations 2006.
8. The consequence of which is that Regulation 4 determines that those employee's contract terms and conditions are carried across from transferor, whether that be the local authority or a contractor which has provided a local service on behalf of the local authority, to the transferee whether that be a contractor or the local authority. In addition, Regulation 5 provides that any collective agreement will also transfer.

Pension Schemes

9. What is a pension? This may seem an unusual question but the difference between what is truly a pension and what is a benefit provided under a pension scheme which is not a pension is relevant to the Beckmann exemption. A pension is best understood as a regular income that a person receives in retirement.
10. The most basic pension provision in the United Kingdom is the State Pension. If an employee pays sufficient National Insurance Contributions over his or her working life, he or she will be entitled to this on retirement. Although the right to a State Pension is dependent on having worked, it is not a contractual right. As such it falls

outside TUPE altogether which is solely concerned with the transfer of rights under a contract of employment.

11. A local authority provides its employees as a term of their contract of employment, the right to join the Local Government Pension Scheme. The rules of the scheme are made through statute. The enabling act is the Superannuation Act 1972. Regulations made pursuant to it set out the rules. The rules have been altered on many occasions. The various iterations of the Local Government Pension Scheme are to be found in:
- a. the Local Government Superannuation Regulations 1974;
 - b. the Local Government Superannuation Regulations 1986;
 - c. the Local Government Pension Scheme Regulations 1995;
 - d. the Local Government Pension Scheme Regulations 1997;
 - e. the Local Government Pension Scheme (Benefits, Membership and Contributions) Regulations 2007;
 - f. the Local Government Pension Scheme Regulations 2013
12. The Local Government Pension Scheme was a ‘defined benefits scheme’. This meant that the benefits the employee enjoyed upon retirement are not calculated by reference to how much he has put into the pot but in accordance with defined rules. Historically, the Local Government Pension Scheme operated on a final salary basis, involving an accrual rate of sixtieths and with the ability to commute part of the eventual pension for a lump sum.
13. The local government scheme has now switched the basis of accrual from final salary to Career average revalued earnings schemes. In local government in England and Wales (not in Scotland), the change took place on 1 April 2014. Below is a table setting out some of the changes:

	2008 LGPS The Local Government Pension Scheme (Benefits, Membership and Contributions) Regulations 2007 & others	2014 LGPS The Local Government Pension Scheme Regulations 2013 & others
Benefit basis	Final salary (1/60th)	Career average. 2.04% (1/49th) of pensionable earnings each year, revalued in line with CPI Member contributions

		Tiered contributions based on salary bands, rising from 5.5% to 7.5%.
Member contributions	Tiered contributions based on salary bands, rising from 5.5% to 7.5%.	Tiered contributions based on salary bands, rising from 5.5% to 12.5%.
Normal retirement age	65	The later of age 65 or state pension age
Retirement benefits	A pension based on 1/60th accrual for each year of pensionable service. Optional commutation of pension for increased lump sum at rate of 1:12.	A pension based on accrual of career-average pension of 2.04% per year of pensionable service revalued at CPI. Optional commutation of pension for increased lump sum at rate of 1:12.
Death benefits	3 × pensionable pay	3 × pensionable pay
Ill-health benefits	Tier 1. Immediate payment with service enhanced to normal pension age (65). Tier 2. Immediate payment with 25% service enhancement to normal pension age. Tier 3. Temporary payment of pension for up to three years.	Tier 1. Immediate payment with service enhanced to normal pension age. Tier 2. Immediate payment with 25% service enhancement to normal pension age. Tier 3. Temporary payment of pension for up to three years.

14. A particular individual's rights and the scheme rules which apply to that individual will depend on many factors but principally the date on which he or she joined and how long he or she has been a member.

15. In addition to the above, the LGPS provides discretionary benefits, such as early retirement in normal health or on redundancy. These are the kind of rights which are likely to be subject to the Beckmann exception.

16. The Local Government Pension Scheme is an occupational pension for the purposes of Section 1 the Pensions Schemes Act 1993.
17. A personal pension, in contrast, is unlike the Local Government Pension Scheme more like a traditional savings vehicle. Individuals pay money into a pension “pot” or “fund”. There may be a gap of many years, perhaps decades, between when the contributions are made and when the benefits are received. Such schemes are often referred to as “money purchase” schemes. Anyone can join such a scheme; the right of membership does not arise from the contract of employment. The member’s right to join and belong to one is not dependent upon him or her having a contract of employment. They therefore fall outside TUPE altogether.
18. However, some private employers may give their employees a contractual right to join a personal pension scheme and agree to pay its own contributions into the scheme. Such a scheme is known as a Group Personal Pension Scheme. Whilst such a scheme has most of the characteristics of a personal pension scheme, it is defined as an occupational pension for the purposes of Section 1 the Pensions Schemes Act 1993 and Regulation 10(1)(a) of TUPE 2006. Businesses that contract with the local authority to provide services are private employers and may have such schemes in place.
19. Whilst the benefits under the Local Government Pension Scheme have diminished over time, they are still better than the benefits a person would obtain as a member of a personal pension scheme or a Group Personal Pension Scheme for the following reasons:
 - a. the value of the pension of a member of the Local Government Pension Scheme is not dependent on the performance of the fund. Whilst a pension fund could have a stratospheric performance and provide a windfall this not the experience of the markets since at least the early 1990s;
 - b. in many employment contracts in the private sector there is no specific contractual right to a particular level of pension provision. This is because many employment contracts do not refer to a specific level of pension benefit, but instead refer to the pension being offered on the terms of a scheme, often based on a booklet, which often specifically reserves the right of the employer to withdraw or terminate the pension. Furthermore, if the pension is a Group Personal Pension Plan the right is little more than the right to invest in the pot (with a small employer contribution which of itself without growth would never provide sufficient income in retirement). However, the opposite is true of the Local Government Pension Scheme where an employee’s pension rights

are set out in detail in the Regulations made pursuant to the Superannuation Act 1972.

Regulation 10 of TUPE: Exclusion from Transfer of Occupational Pension Rights

20. The consequence of being an occupational scheme is that, under the general law, an employee's right to participate in, or right to benefits under, in it do not transfer under TUPE.

21. Regulation 10 of TUPE 2006 provides that:

- (1) **Regulations 4 and 5 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.**

22. Regulation 10 is a wide exclusion which can have the effect of reducing the expectations of an employee in such circumstances. The employee would be left with his or her preserved rights under the seller company's scheme but with no corresponding pension rights as regards future service or as regards any shortfall resulting from being treated as an early leaver in the transferor company's scheme in relation to past service.

The Beckmann Exception (/Regulation 10(2) of TUPE 2006)

23. Regulation 10(2) of TUPE 2006 provides that:

For the purposes of paragraphs (1) and (3), any provisions of an occupational pension scheme which do not relate to benefits for old age, invalidity or survivors shall not be treated as being part of the scheme.

24. The current TUPE regime is set out in the Transfer of Undertakings (Protection of Employment) Regulations 2006 which replaced the Transfer of Undertakings (Protection of Employment) Regulations 1981. TUPE 2006 came into effect on 6 April 2006.

25. The original TUPE Regulations 1981 (SI 1981/1794) were passed in order to comply with Directive 77/187/EEC (the EC Acquired Rights Directive 77/187 Directive').

26. Regulation 7 of TUPE 1981 was materially the same in its terms as Regulation 10(1)(a) and (b) of TUPE 2006. In other words, Regulation 7 provided that TUPE did not apply to:

- a. to so much of a contract of employment or collective agreement as relates to an occupational pension scheme within the meaning of the relevant predecessor statutes to 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.
27. Under TUPE 1981 it was held that:
- a. TUPE 1981/the Business Transfers Directive did not entitle an employee to equivalent pension benefits after the transfer: Walden Engineering Co Ltd v Warrener [1993] ICR 967;
 - b. Regulation 7 of TUPE 1981 which excluded the transfer of a right to an occupational pension complied with the Business Transfers Directive: Adams v Lancashire County Council [1997] ICR 834, CA; The Court of Appeal confirmed that Regulation 7 of TUPE 1981 was effective and a proper transposition of the Business Transfers Directive. The Court of Appeal held that there is no obligation under the Business Transfers Directive on a transferee/purchaser to provide any occupational pension benefits following a TUPE transfer. The Court of Appeal followed the decision of the EFTA Court in Eidesund v Stavanger Catering A/S: C-2/95 [1996] IRLR 684 where it was found that there was no duty on a private contractor to provide an occupational pension scheme for former local government catering workers.
28. Article 3(3) of the Business Transfers Directive provided that the provisions of TUPE preserving terms and conditions of employment and collective agreements:
- 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.**
29. Article 3(3) was not originally transposed into TUPE 1981. However, Section 33 of the Trade Union Reform and Employment Rights Act 1993 amended Regulation 7 of TUPE 1991 (for transfers after 30 August 1993) so as to make it clear that any provisions in an occupational pension scheme that do not relate to benefits for old age, invalidity or survivors (e.g. a redundancy benefit found in certain public sector schemes) were treated as not being part of the scheme (so that liability for those other benefits will pass to the transferee).
30. In Hagen v ICI Chemicals and Polymers Ltd [2002] IRLR 31, QBD (held to apply to an actionable negligent misrepresentation as to future position, made by the transferor and not transferred to the transferee), Elias J (as he then was) sitting in the High Court construed the exception widely.

31. The ECJ, however, took the opposite approach. The ECJ held that the exceptions are to be interpreted strictly: Beckmann v Dynamco Whicheloe Macfarlane Ltd: C-164/00 [2003] ICR 50, [2002] IRLR 578.
32. In Beckmann the ECJ ruled that early retirement benefits and benefits intended to enhance the conditions of such retirement did not fall within the meaning of rights to old-age pension schemes and so the obligation to pay such benefits did transfer to the new employer. They were an exception to the exception. These are so-called Beckmann rights. These principles were applied by the ECJ in Martin v South Bank University: C-4/01 [2004] IRLR 74. Both cases involved the right to an early retirement pension on redundancy.
33. The Business Transfers Directive was renegotiated and reissued as Directive 2001/23/EEC PII ('the Acquired Rights Directive'). However, the Acquired Rights Directive was not transposed into English law until TUPE 2006 which came into effect on 6 April 2006. Art 3(4) of ARD 2001 re-enacted Art 3(3) of the Acquired Rights Directive.
34. TUPE 2006 introduced Regulation 10(2) of TUPE 2006. This provides for the exclusion of provisions ... which do not relate to benefits for old age, invalidity or survivors'. This transposed in express terms Article 3(3) into statute and gave effect to the decisions of the ECJ in Beckmann and Martin.
35. The application of the distinction as to what does and does not transfer is illustrated by Procter & Gamble Co v Svenska Cellulosa Aktiebolaget SCA [2012] IRLR 733: the High Court held that the **employees' right to be considered for early retirement benefits transferred under TUPE, whereas benefits payable after normal retirement age (including those first triggered as early retirement benefits) do not transfer.**

Beckmann

36. Beckmann involved a quantity surveyor who was employed by the North West Regional Health Authority of the National Health Service (NHS) from September 1982 to May 1995. During that time, she was a member of the NHS Superannuation Scheme. Pension benefits were agreed between NHS employers and recognised trade unions, recorded in a collective agreement and implemented by section 46 of the General Whitley Council Conditions of Service and two sets of implementing Regulations. Ms Beckmann's contract of employment incorporated the General Whitley Council Conditions.
37. The terms meant that if she had been dismissed for redundancy while employed by the NHS she would, if aged between 50 and normal retirement date and with five years' qualifying service in the scheme, have been entitled to:

- a. an early retirement pension and early payment of a lump sum; and
 - b. compensation, by means of an annual allowance, for the amount by which the early retirement pension would have been increased if a specified further period of years had been added to actual years of service, together with lump-sum compensation of three times this annual allowance.
38. The payments in (a) would have come from the NHS scheme while those in (b) would have been paid by the Secretary of State; however, the dismissing NHS employer would have been obliged to make contributions to the Secretary of State reimbursing the costs of the package.
39. The undertaking in which Ms Beckmann worked was transferred to a private company on 1 June 1995 by a transfer to which TUPE 1981 applied. Her membership of the NHS Superannuation Scheme ceased except for the right to pension benefits payable from normal retirement date.
40. The private sector purchaser/transferee dismissed Ms Beckmann for redundancy in May 1997 when she was aged over 50. She was entitled to a lump-sum redundancy payment but to none of the severance benefits provided by section 46 of the General Whitley Council Conditions of Service and the Regulations.
41. The case was referred to the ECJ, which held that:
- a. The pension exclusion in the ARD must be interpreted narrowly¹; and
 - b. 'only benefits paid from the time that an employee reaches the end of his normal working life as laid down by the general structure of the pension scheme in question ... can be classified as old age benefits, even if they are calculated by reference to the rules for calculating normal pension benefits'.
42. The ECJ decided that **benefits payable by a pension scheme after age 50 on the redundancy of an employee** are not 'old age benefits'. So, the rights to those benefits did transfer and the new employer (transferee) was liable to pay them.

Martin

43. Ms Martin, Mr Daby and Mr Willis were employed at Redwood College of Health Studies as nursing lecturers under conditions of employment of the General Whitley Council. They were active members of the NHS Pension Scheme.
44. In 1994, as part of the initiative by the government to move nursing education into the private sector, the college became part of South Bank University and, accordingly, Ms Martin and colleagues were informed that as from November 1994 they would be

¹ para 30.

employed by South Bank University. In the letter it was stated that there was no compulsion to accept the terms and conditions of employment of the University; however, they were not able to remain members of the NHS Pension Scheme.

45. Ms Martin and her colleagues became members of the Teachers' Superannuation Scheme but chose not to accept the terms and conditions contained in employment contracts with South Bank University and accordingly remained on the terms and conditions of their employment contracts at the time of the transfer. In particular, it was claimed that their rights under Article 46 of General Whitley Council's conditions of service still applied.
46. Article 46 provided for an immediate payment of enhanced retirement pension and compensation in three circumstances:
 - a. on an employee ceasing work due to redundancy;
 - b. in the interests of the efficiency of the service; or
 - c. on organisational change.
47. Ms Martin and Mr Daby subsequently took early retirement in circumstances which the Employment Tribunal found to be 'in the interests of efficiency of the service'. The terms offered by South Bank University were less favourable than under the General Whitley Council's conditions and, consequently, they claimed entitlement to enhanced benefits in accordance with Article 46 of General Whitley Council's conditions of service
48. The ECJ followed its decision in Beckmann and held that the scope of the exclusion from transfer of rights relating to 'old age' was to be interpreted narrowly.
49. In Beckmann the ECJ held that benefits payable by a pension scheme after age 50 on the redundancy of an employee were not 'old-age' benefits. The ECJ decided in Martin that rights contingent upon either dismissal or early retirement by agreement with the employer should be treated no differently from benefits payable on redundancy: neither falls within the scope of the 'old-age' benefits exception and therefore both transfer to the transferee on a business sale. The ECJ stated that this is the case regardless of the fact that the obligations which are transferred derive from statutory instruments, as in the case of the TSS.
50. Rights contingent upon either dismissal or premature retirement by agreement with the employer were not 'old-age' benefits. The Advocate General was of the opinion that '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 can be classified as 'old age' benefits'. The rights under Article 46 were early retirement rights contingent on dismissal rather than on reaching a certain age.

Therefore, they did not fall within the exclusion and transferred under the Acquired Rights Directive.

Procter & Gamble

51. In The Procter & Gamble Company v Svenska Cellulosa Aktiebolaget [2012] EWHC 1257 (Ch) Hildyard J in the High Court provided guidance on TUPE and the transfer of pensions. However, the emphasis of the judgment is different as it related to a dispute between transferor and transferee. The dispute in the case arose from the failure by the parties to agree the appropriate price adjustment amount. SCA's actuaries calculated that its exposure to Beckmann risk was significant in financial terms. Procter & Gamble's actuaries, meanwhile, disagreed and calculated the risk to be nil, leaving a £19m gap. Furthermore, it relates to private sector pension scheme.
52. The judgment sheds some light on the question of what early retirement or redundancy pension benefits (so-called 'Beckmann benefits') transfer with employees under TUPE. In particular, Hildyard J decided that:
- a. a right to be considered for a discretionary benefit (e.g., only with employer consent) could transfer; but
 - b. a limited interpretation must be given to the ECJ decision in the Beckmann case, so that commonly only that part of any benefit payable during the period before normal retirement date was not a benefit for 'old age' and so could transfer.

Implications of the judgments

53. Following the ECJ decisions in Beckmann and Martin and the decision of the High Court in Proctor and Gamble the position is that:
- a. a right to top-up benefits (payable as a bridge to normal retirement date) triggered by redundancy payable under public sector (non-trust based) pension schemes transfer under TUPE;
 - b. other benefits payable before normal retirement may also transfer as well. By way of example, if a scheme gives a right to retire early, that right may also transfer under TUPE;
 - c. a right to be considered for a discretionary benefit (e.g., only with employer consent) could transfer; but
 - d. however, only those parts of any benefit payable during the period before normal retirement date was not a benefit for 'old age' and so could transfer
54. The rights that remain within the "pensions exception" are:
- a. Pensions payable on or after normal retirement age (old age benefits) Pension payments which are made after normal retirement date (even though they started before that date) still fall within this definition.
 - b. Ill health early retirement benefits (invalidity benefits);

- c. Benefits payable to members' dependants on the death of the member before or after normal pension age (survivors' benefits).

The Best Value Authority Staff Transfers (Pension) Direction 2007

55. However, the Beckmann exemption does not now have much application in the local government context.

56. With effect from 1 October 2007, the Best Value Authority Staff Transfers (Pension) Direction 2007, made under Section 101 of the Local Government Act 2003 has applied to local authority transfers. From 1 October 2007 it became a statutory requirement for local authorities to require contractors to:

- a. Give their employees continued access to the LGPS; or
- b. access to a scheme certified by an actuary as 'broadly comparable' to the LGPS.

57. Specifically, the contract must provide for two points:

- a. That the contractor shall secure "pension protection" for each transferring employee. This is defined as rights to acquire pension benefits that are "the same as, or count as being broadly comparable to or better than those he had, or had a right to acquire, as an employee of the authority".
- b. That the transferring employees can enforce the provision of the pension protection against the contractor. Transferring employees are defined as those that transfer under TUPE ((Paragraphs 5 and 6, 2007 Direction.)

58. Paragraph 5 of the Order expressly provides for such provision in an outsourcing exercise. Paragraph 7 of the Order expressly provides for such provision in a retendering (contractor to contractor situation). The order does not expressly provide for such provision in the case of insourcing. However, such provision is unnecessary as any employee of a local authority has the right to join (or re-join) the Local Government Pension Scheme.

59. A private contractor providing services to an outsourcing local authority may be admitted to the LGPS as an admission body (regulations 5 and 6, LGPS Administration Regulations). A contractor can therefore provide the transferred employees with unbroken membership of the LGPS. To obtain "admitted body status", a contractor must enter into an admission agreement with the outsourcing authority and the administering authority of the relevant LGPS fund (see Admission agreements).

60. Admitted body status, rather than the provision of a broadly comparable pension scheme, is generally the option preferred by employees. The main reason for this is the simplicity of remaining in a familiar scheme that enjoys the security of being

guaranteed by the state. Nevertheless, the choice between becoming an admitted body, and offering a broadly comparable pension scheme, is technically the contractor's, rather than the transferring employees' or the outsourcing authority's.

61. Through an admission agreement, the contractor agrees to comply with the terms of that agreement and the legislation governing the LGPS.
62. The LGPS provides discretionary benefits, such as early retirement in normal health or on redundancy. These are the kind of arrangements which are likely to fall into the Beckmann exception. If the contractor participates in the LGPS, the outsourcing agreement will usually contain a provision requiring the contractor to follow the authority's policy on discretionary benefits.
63. Regulation 60 of the LGPS Regulations 2013 requires all scheme employers, including admission bodies, to issue a written policy statement on how it will exercise certain discretions provided by the LGPS, to keep it under review, and to revise it as necessary.
64. However, the contractor does not have to honour discretionary benefits if it provides its own scheme.
65. If the contractor is providing benefits through its own scheme, the outsourcing agreement will not usually require the contractor to provide the same or broadly comparable discretionary benefits. Since the transfer of transferring employees from the local authority to the contractor is a relevant transfer for the purposes of TUPE, it is arguable that at least benefits on early retirement and redundancy will transfer in any event due to the Beckmann exception, so will transfer in any event.

Fair Deal Policy

66. The Fair Deal is a non-statutory policy setting out how pensions issues are to be dealt with when staff are compulsorily transferred from the public sector to independent providers delivering public services.
67. Fair Deal 2013 applies to:
 - a. Central government agencies.
 - b. The NHS.
 - c. Maintained schools (except to the extent that the Best Value Authorities Staff Transfer (Pensions) Direction 2007 applies) and academies.
 - d. Any other part of the public sector "under the control of Government ministers where staff are eligible to be members of a public service pension scheme".

68. The Fair Deal Policy does not apply to Local Government. However, given the Local Government Pension Scheme is very similar to the other state pension schemes which all created by regulations made pursuant to the Superannuation Act 1972, only in rare situations will the local government provision be less than that of the rest of the public sector.
69. On 10 January 2019 the Ministry of Housing, Communities and Local Government published Local Government Pension Scheme: Fair Deal - Strengthening pension protection for consultation.
70. The proposals are a significant change to the current system that applies on compulsory transfers to service providers where the employees are members of the LGPS and apply a modified version of the current Fair Deal to such transactions. The basic principle is the same as the current Fair Deal policy, that is, transferring employees should be allowed to remain in the LGPS when they join their new employer. The proposals include new amending regulations which will amend the LGPS Regulations 2013 to provide the new framework and that introduce new terms for practitioners to understand. The consultation closed on 4 April 2019 and the response is still outstanding.
71. It does sometimes happen that there are transfers from other parts of the private sector which would be covered by the Fair Deal Policy. In the fairly recent case of Nicholls v London Borough of Croydon [2018] IRLR 988 EAT, the Claimants worked in the public health team of a Primary Care Trust ('PCT'), which was responsible for the provision of public health functions. Their employment transferred from the PCT to the London Borough of Croydon (the 'council'). That is one example of a transfer where the Fair Deal Policy would have applied. The issue in that case was whether Regulation 3(5) which provides that 'An administrative reorganisation of public administrative authorities or the transfer of administrative functions between public administrative authorities is not a relevant transfer' (commonly known as the Henke exception).

Pensions Act 2004 and the Pension Protection Regulations 2005

72. Sections 257 and 258 of the Pensions Act 2004 and the Transfer of Employment (Pension Protection) Regulations 2005 SI 2005/649 (from 6 April 2005) provide a degree of protection in relation to occupational pension scheme rights upon a transfer to which the regulations apply.
73. The Pensions Act 2004 requires a transferee to offer transferring employees the opportunity to participate in an occupational or stakeholder pension scheme following the transfer where the transferring employees were eligible to participate in an occupational pension scheme prior to the transfer. In the event that the transferor's occupational pension scheme is a defined benefit scheme, the transferring employees

will be protected and, if the transferor's occupational pension scheme is a defined contribution (that is to say a 'money purchase') scheme, the transferring employees will be protected if the transferor pays contributions to that scheme. Whilst this would apply to an outsourcing exercise by the local authority, in most circumstances the obligations under The Best Value Authority Staff Transfers (Pension) Direction 2007 would render compliance with this obligation.

74. This protection applies to transferring employees who are active members of the transferor's occupational pension scheme, but also extends to applying to transferring employees who are eligible, or who are in a waiting period, to join the scheme.
75. The transferee can choose whether to provide a defined benefit or a defined contribution scheme for the future (and this is regardless of the type of scheme the transferor has).
76. In circumstances where the replacement scheme is not a money purchase scheme (i.e., it is a defined benefit, mixed benefit or hybrid scheme), the level of benefits must meet a statutory minimum standard. The arrangements must either:
 - a. meet the requirements set out in the reference scheme test (which is the minimum benefit standard required for defined benefit schemes that are contracted out of the State pension) (Pensions Schemes Act 1993 s 12A); or (
 - b. where the transferor's scheme does not meet the requirements of the reference scheme test,
 - i. provide benefits for members the value of which is at least equal to 6% of pensionable pay for each year of employment, together with the total of any contributions made by the member, and where members are required to contribute to the scheme, for them to contribute at a maximum rate of 6% of pensionable pay, or
 - ii. provide for the transferee to match the employee's contributions up to 6% of pensionable pay. Pensionable pay for these purposes is as defined under the rules of the scheme.

Pensions Act 2004: Auto-enrolment

77. Under new legislation introduced from 1 October 2012, UK employers will eventually be required to automatically enrol certain eligible workers, known as jobholders, into a pension scheme and to pay a minimum level of contributions to the scheme.
78. Although the auto-enrolment regime came into effect on 1 October 2012, each employer was informed in advance of its own "staging date" from when it needed to comply. An employer's staging depended on the size of its PAYE scheme, with the largest schemes being required to comply first. For more background information, see Practice note, Auto-enrolment: overview.

79. The practical effect is that a receiving employer under a TUPE transfer needs to comply with two regimes, specifically:
- a. The pension protection provisions of the PA 2004 and the Pension Protection Regulations. Pension protection will apply for: those employees who are part of the transfer and who were members of the transferring employer's pension scheme (irrespective of whether they are eligible jobholders or not); and those employees who were not scheme members but were eligible to join the scheme (for example, because they were in a waiting period or they had elected to opt out of membership).
 - b. The employer auto-enrolment duties of the PA 2008. These will mean a transferring employee will have to be assessed by the receiving employer to establish his auto-enrolment status. An eligible jobholder must be auto-enrolled in a scheme which satisfies the employer duties of the PA 2008, although the receiving employer can choose to operate a waiting period of up to three months before a jobholder becomes entitled to be auto-enrolled.
80. However, where The Best Value Authority Staff Transfers (Pension) Direction 2007 applies it is unlikely that auto-enrolment would yield something better for the employee than the Direction would.

Obligation to Consult

81. A trap for the unwary is that the exclusion of pension obligations under Regulation 10 does not extend to the duty to inform and consult representatives under Regulation 13 of TUPE 2006.
82. Regulation 10 imposes a duty on the employer (i.e., both the transferor and transferee) to inform and, depending on the precise circumstances, to consult appropriate representatives of their affected employees.
83. Accordingly, information will need to be provided and employee representatives consulted about any measures to be taken in connection with a transfer in relation to pensions. Employees could have claims based on negligent misrepresentation if they are given misleading information about pensions: Hagen v ICI Chemicals and Polymers Ltd [2002] IRLR 31, HC. The essence of such a claim would be, 'had I been properly informed by the transferor as to whether my pension would transfer, I would not have agreed to the transfer or obtained another employment at another local authority'. The transferor is therefore liable for my loss of pension.
84. Elias J rejected a claim that there was an implied duty on ICI to take reasonable steps to keep employees informed of their benefits and pension rights. Counsel for the employees had argued that this was a positive duty (outside the statutory duty under

TUPE 2006) on the employer to inform employees, rather than simply to take care over information actually given.

85. Elias J considered that no such duty arose under previous case law (see Scallly v Southern Health and Social Services Board [1992] AC 294, HL) or the general obligation of trust and confidence owed by an employer, but that if employers chose to give information, they should ensure it was correct to avoid the risk of a claim.
86. In Hagen, Elias J held that any liability for a negligent misstatement in relation to occupational pensions would stay with the seller/transferor and not transfer to the purchaser/transferee. Hagen was a decision made in relation to TUPE 1981; however, the relevant provision of TUPE 2006 follows broadly the same wording and the pre 2006 decisions should be followed.

Constructive Dismissal

87. Under TUPE 1981, there was potentially always a risk that if a buyer/transferee did not provide comparable pension benefits, a transferring employee could choose to resign and claim constructive dismissal under Regulation 5(5) of TUPE 1981, which provided for the right to refuse to transfer if employees can show that their working conditions would be adversely affected.
88. This is no longer the case. Regulation 10 (3) of TUPE 2006 provides that:
An employee whose contract of employment is transferred in the circumstances described in regulation 4(1) shall not be entitled to bring a claim against the transferor for—
(a) **breach of contract; or**
(b) **constructive unfair dismissal under section 95(1)(c) of the 1996 Act, arising out of a loss or reduction in his rights under an occupational pension scheme in consequence of the transfer, save insofar as the alleged breach of contract or dismissal (as the case may be) occurred prior to the date on which these Regulations took effect.**
89. For good measure Regulation 10(3) also provides that an employee cannot bring a claim for breach of contract if he or she chooses not to resign.

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