

TUPE & PENSIONS – Chris Haswell PCS

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The TUPE regulations exclude pensions per se. However, certain other law applies to protect worker's pensions on transfer. This must be seen in the context of the government's consultation on 'Fair Deal' (see below) which is likely to water down the protections and the ongoing reform of public service pensions.

This presentation should give union reps a step by step guide to how to tackle the pension issue.

When an employer decides to transfer work or is taken over, for pension purposes you will need to have quite a lot of information about the workforce affected.

Q1. Is this a public to private sector transfer?

The first step is to find out which regulations apply to pensions. If it is a public sector to private sector transfer then 'Fair Deal' applies. However there are a number of questions about what is public sector work and then if that is determined there are circumstances where 'Admitted Body' status applies. This is whereby staff are eligible to stay in their existing scheme such as NHS, LGPS or TPS. The Superannuation Act 1972 excludes civil servants from this (despite union pressure) and civil servants get 'broadly comparable' pensions on transfer as do others when admitted body status doesn't apply. Transfers within the public sector mean a bulk transfer from one scheme to another with appropriate pay adjustments for contribution rate differences.

Q2. Is this a secondary transfer?

Have these members been through all this before? If so then was it a public to private transfer? Under 'Fair Deal' 2004 regulations which govern transfers of pensions from public to private sector, second generation transfers still should be treated as public to private. This may change. Although different provision could apply to staff not involved in the original transfer, administratively it should be argued that it is easier to treat all staff the same.

Q3. What is the next step?

Look at the group of workers transferring, age profile, length of service transferring to the new employer? Talk to the workforce, hold members meetings. Are there redundancies happening before the transfer? Look at the profile afterwards, older members may have taken early retirement. What do people want to do? Pensions do not transfer automatically. People may feel the scheme they are leaving is safer long term so will preserve their benefits others will have a long working future and want to transfer. Union reps should not give financial

advice. You could try to get the employer to provide drop in sessions with financial advisors, otherwise use union membership provision.

Q4. If this is a transfer under 'Fair Deal' what happens next?

The new pension provision must be put in place so that there is cover for 'death in service' as well as continuity of employment from the day of the transfer. Sometimes this means a lot of pressure to put something in place quickly, but it has to be right.

Assuming this is a public private transfer and the 'broadly comparable' provision applies then the employer must decide if there is to be:

- **a bespoke scheme** for this group, time consuming and costly but possibly can be design to the specific needs of the workforce.

- can they slot into an **existing scheme of the new employer** big companies like EDS will have won contracts before and have a few different schemes for ex public sector workers that they may be able to add workers to.

- do they need to **put out for tender** the provision of an **off the shelf scheme** with a GAD passport. There are a few companies such as Prudential, Citrus and Federated pensions that will bid for this work. They all have existing similar provision for ex- public sector employees. Check with your union pension officer.

A GAD Passport is the certification the Government Actuaries Department gives to a scheme set up for a group of workers moving from public to private sector to guarantee that benefits are 'broadly comparable'. Some unions like to get this checked by their own actuaries, that will vary.

There may be a beauty parade of providers, unions need to be careful on how much they get involved. Observer status is often useful so there is an understanding of the process. Questions all parties need to ask are about the long term sustainability of the scheme and accountability to members. For example trustee or similar arrangements may be important (MyCSP example). Firms bidding for a contract might not be concerned with the long term as they might lose the contract in 5 years so the unions need to ask the question what if that happens?

Q5. This is not a 'Fair Deal' situation but private to private what is the situation?

We are assuming that there is an occupational pension scheme as defined by the 2004 Pensions Act. Some DC schemes won't meet the requirements.

Occupational pensions are expressly excluded from transferring except provisions that do not relate old age, invalidity or survivors benefits. Predictably this has spawned a lot of case law around what is meant by those terms. The effect of this exclusion means that the new employer does not have to provide a new scheme but as pension is deferred pay the

employees argue to have a replacement scheme (Adams & ors v.Lancs CC and anor 1996 ICR 935, ChD refers.)

There are obligations outside TUPE for ongoing pension benefits to be provided in appropriate circumstances i.e. there could be a collective refusal to transfer or in theory a breach of contract or constructive unfair dismissal for the loss of the right to an occupational pension.

There is an obligation on EU member states to protect immediate and prospective rights. The Pensions Act 2004 S258 requires:

- A replacement pension scheme that is either:
- A defined benefit scheme in relation to which the level of benefits meets a statutory minimum standard and to which the employer contributes a specific rate that should match the employees contribution up to 6% of pensionable pay.
- A stakeholder or money purchase occupational pension scheme
There is no requirement that death or ill health benefits are mirrored.

In conclusion it is important to be aware of what provisions apply, where to seek more help and guidance and talk to members about what they need from a new pension scheme.

Useful links:-

<http://www.pensionsadvisoryservice.org.uk/> Pensions Advisory Service

<http://www.gad.gov.uk/services/Staff%20Transfers/> Government Actuaries Dept.