

THE BECKMANN CASE

**ASSOCIATION OF PENSION LAWYERS
IN IRELAND**

EVENING MEETING

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THE IMPLICATIONS OF THE BECKMANN CASE ON THE TRANSFER OF UNDERTAKINGS REGULATIONS, 1980 AND RELATED EU COUNCIL DIRECTIVES

THE CONTEXT

Council Directive 77/187/EEC of 14th February 1977 is a directive which was introduced to provide for the protection of employees in the event of a change of employer, in particular, to ensure that their rights were safeguarded. It captures asset transfers where an acquirer of a business or part of an undertaking or business takes over employees of the business.

It has been the subject of much case law and was amended in 1998 (98/50/EC), and more recently it has been codified by Council Directive 2001/23/EC. For the purpose of this paper I am only going to refer to the codified directive.

Some relevant provisions of the Directive:

“ARTICLE 3

1. **The transferor’s rights and obligations arising from a contract of employment or from an employment relationship existing on the date of the transfer shall, by reason of such transfer, be transferred to the transferee”.**
2. Member States may provide that, after the date of transfer, the transferor and transferee shall be jointly and severally liable in respect of obligations which arose before the date of transfer from a contract of employment or an employment relationship existing on the date of the transfer.
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 into force of application of another collective agreement...”

“ARTICLE 4

- (a) **Unless Member States provide otherwise, paragraphs 1 and 3 shall not apply in relation to employees’ rights to old-age, invalidity or survivors’ benefits under supplementary company or intercompany pension schemes outside the statutory social security schemes in Member States.**
- (b) Even where they do not provide in accordance with sub-paragraph (a) that paragraphs 1 and 3 apply in relation to such rights, Member States shall adopt the measures necessary to protect the interests of employees and of persons no longer employed in the transferor’s business at the time of transfer in respect of rights conferring on them immediate or prospective entitlements to old age benefits, including survivors’ benefits, under supplementary schemes referred to in sub-paragraph (a)”.

“ARTICLE 5

1. The transfer of the undertaking, business or part of the undertaking or business, shall not in itself constitute grounds for dismissal by the transferor or the transferee. This provision shall not stand in way of dismissals that may take place for economic, technical or organisational reasons entailing changes in the workforce...
2. If the contract of employment or employment relationship is terminated because the transfer involves a substantial change in working conditions to the detriment of the employee, the employer shall be regarded as responsible for termination of the contract of employment or of the employment relationship”.

Other key parts of the Directive relate to notification of employees affected of the transfer and consultation and a derogation for asset transfers on insolvencies.

Domestically, statutory instruments 306 of 1980 and 487 of 2000 enact the domestic provisions. The key features of these are explained below. Remember, of course, that it would be always possible to apply the terms of the Directive directly against any emanation of the State.

S.I. 306 of 1980

The salient provisions are:

- “3. The rights and obligations of the transferor arising from a contract of employment or from an employment relationship existing on the date of a transfer, shall by reason of such transfer, be transferred to the transferee.
4. (1) Following a 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 into force or application of another collective agreement.

(2) Regulation 3 of these Regulations and paragraph (1) of this Regulation 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 Social Welfare Acts, 1950 to 1979, but the transferee shall ensure that the interests of employees and of persons no longer employed in the transferor’s business at the time of the transfer in respect of rights conferring on them immediate or prospective entitlement to old-age benefits including survivors’ benefits, under such supplementary company schemes are protected.
5. (1) The transfer of an undertaking, business or part of a business shall not in itself constitute grounds for dismissal by the transferor or the transferee and dismissal, the grounds for which are such transfer, by a transferor or a transferee is hereby prohibited. However, nothing in this

Regulation shall be construed as prohibiting dismissals for economic, technical or organisational reasons entailing changes in the work-force.

- (2) If a contract of employment of an employment relationship is terminated because a transfer involves a substantial change in working conditions to the detriment of the employee concerned, the employer concerned shall be regarded as having been responsible for termination of the employment or of the employment relationship”.

The 2000 Regulations expanded the notification procedures under the earlier regulations where no Trade Union, Staff Association etc. arises and provides for a right of complaint to a rights commissioner where the information consultation regulation is infringed.

For background reading on relevant UK case law, I suggest that you look at Alastair Meeks’ paper on the APL website. He also has an interesting focus on what the Beckmann case may mean and explains the UK political framework in the run up to the Beckmann case.

RATIONALE FOR THE DIRECTIVE

As you know, the reason for the introduction of the Directives was to protect employees in the event of the business being sold. When a company is sold the employees’ contracts of employment automatically transfer to the buyer because the contracts are between the company and the employees, but until the legislation was introduced to change the law the same wasn’t true for the sale of a business. Employees remained with the seller unless the buyer entered into a new contract of employment with each employee. That put employees of such businesses at a considerable disadvantage on such transfers.

However, Article 4 of the Directive has a carve-out for “ 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”. This meant that such rights did not transfer. Until the Beckmann case it had been assumed that all of the bundle of pension rights springing from pension arrangements outside the Social Welfare Acts are not within the ambit of the regulations.

PREVIOUS DECISION

The UK EAT decision in *Frankling v BPS Public Sector* [1999] OPLR 295 was a forerunner to Beckmann. Like Beckmann, here a pension on redundancy arose between age 50 and normal retirement date, calculated by reference to the normal retirement pension. It was held that the pension entitlement, arising under a statutory scheme, fell outside the rights which would transfer under the general words of the UK Regulations even if the relevant pensions exception regulation did not exclude the pensions aspects. The EAT did not agree that the redundancy pension was outside the scope of the pensions exception and thus it was covered.

BECKMANN

On very similar facts, the same question was raised in *Beckmann v Dynamco Whicheloe Macfarlane* [2000] PLR 287. The UK High Court was asked to consider whether a redundancy pension in the NHS Scheme transferred under the UK transfer regulations. It referred the matter to the ECJ.

Whilst the Advocate General gave a long reasoned opinion as to why the redundancy pension entitlement transferred, the ECJ appears to have given very little reasons.

Let us look at some of the salient facts.

Mrs. Beckmann worked within the UK NHS for a Health Authority under General Whitley Council (GWC) conditions of service. Her employer was transferred to the respondent (DWM) on 1st June 1995 and she was dismissed for redundancy as from 6th May 1997.

Section 45 of the GWC conditions of service deals with lump sum redundancy payments. They are paid by the employer.

Section 46 of the GWC Conditions of Service sets out when certain early retirement entitlements arise for those aged between 50 and retirement age, with at least five years service within the NHS superannuation scheme. An early retirement pension, a lump sum on retirement, an annual allowance and a lump sum compensation payment arise. These early retirement benefits may have the effect of reducing the lump sum redundancy payments under Section 45 depending on the value of the early retirement benefits.

On being made redundant Mrs. Beckmann received from DWM the lump sum redundancy payments. She received no early retirement benefits although she met the qualifying conditions. She sought a declaration that she was entitled to these benefits and an order that DWM pay them.

It was noted that the early retirement benefits are paid by the Secretary of State with the early retirement pension and lump sum on retirement pension being paid from the NHS scheme. But they have to be reimbursed to the Secretary of State by the NHS administration.

Two questions were referred to the ECJ.

1. Was the entitlement to early payment of pension and retirement lump sum and/or to the annual allowance and lump sum compensation a right to old-age, invalidity or survivors' benefit within the meaning of Article 3(3) of Council Directive 77/187/EEC?
2. Secondly, if and to the extent that the answer to question 1 is no, is there an obligation of the transferor arising from the contract of employment, the employment relationship or the collective agreement...which transfers by reason of the transfer of the undertaking and renders the transferee liable to pay the benefits to the employee on dismissal?

The Arguments

Mrs. Beckmann (and the UK Government) argued that the Section 46 benefits were not tied to the risk of old-age even though they are paid from a specific age. They derive from a specific mechanism applicable to redundancy in specific circumstances.

It would be appropriate to apply the exception narrowly.

Mrs. Beckmann suggested that to consider that an early retirement pension paid in the event of redundancy to be old-age benefit would be to allow discrimination between employees dismissed after a transfer of an undertaking: some of those employees would always be able to claim benefits linked to redundancy as a result of undertakings by their previous employer, whereas others would no longer be able to claim the early retirement pension which their previous employer would be obliged to pay them in the same circumstances. She also argued that neither form of arrangement implemented on redundancy nor the body which actually makes the payments can be taken as decisive. What is relevant is that the benefits would ultimately have been paid, not by the retirement scheme proper, but by the employer, that is to say the NHS where she still had been employed until her dismissal.

DWM contended that the benefits were old-age benefits. The early payment of the benefits which are, by their nature, old-age benefits, does not alter their nature in any way. The benefits are calculated exactly like the usual NHS old-age benefits. The early retirement benefits are not paid to compensate for loss of a job, which is the purpose of the redundancy payments provided by Article 45.

The Commission thought it was necessary to look at the nature of the benefits to which Mrs. Beckmann claimed entitlement. One had to look at the nature of the pension scheme which provides for the benefits in each case. One had to look at special criteria which should be taken into account in determining whether the benefits fell within the exemption: their financing method, nature and purpose, conditions for grant and method for calculation. It appears that the Commission did not have adequate information for it to fully argue its case, but concluded that the early retirement pension and lump sum on retirement are benefits paid under a pension scheme within the meaning of the relevant article and thus exempt. DWM could not participate in the NHS superannuation scheme but the conditions for becoming eligible for the benefits and the purpose of the early retirement pension and lump sum accords with those of normal retirement benefits under a pension scheme. However, the NHS employer has to pay the Secretary of State a contribution to compensate for the cost of the payment of these two benefits but the Commission did not know how this contribution is financed. In the event of the death of Mrs. Beckmann would her survivors retain the benefits as in the case of her pension scheme? This was relevant the Commission felt, but didn't know what the answer was.

The Commission could not decide whether the annual allowance and lump sum compensation payment could be regarded as benefits under a pension scheme. It seemed to be tending to the conclusion that if they were they would also be exempt.

It did not know if these benefits were paid under the NHS superannuation scheme or not or whether they were intended to provide income during the period preceding retirement or to pay compensation for redundancy. Again it raised the query as to what happened in the event of Mrs. Beckmann's death, would her survivors be entitled to survivors' benefits deriving from these payments? It reserved its position as to whether or not these two payments were exempt.

So what did the Court say?

The Decision

It said that you had to construe an exception strictly. Consequently, "it is 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, and not benefits paid in circumstances such as those in point in the main proceedings (dismissal for redundancy) that can be classified as old-age benefits, even if they are calculated by reference to the rules for calculating normal pension benefits."

Consequently, in response to the first question it ruled that early retirement benefits and benefits intended to enhance the conditions of such retirement, paid in the event of dismissal to employees who have reached a certain age, such as the benefits at issue in the main proceedings, are not old-age, invalidity or survivors' benefits under supplementary company or inter-company pension schemes within the meaning of Article 3.

Having so ruled, it was necessary for the Court to answer the question as to whether the transferor's obligation transferred to the transferee who is liable to pay those benefits to the employee on dismissal. Mrs. Beckmann, supported by the UK Government and the Commission, argued that the right to the benefits at issue derive from her contract of employment or her employment relationship with the NHS. Her contract expressly provided that she would be able to benefit from the provision of Section 46 of the GWC Conditions of Service (early retirement redundancy pension). That section derived from a collective agreement and consequently she argued that the transferor's obligation also transferred to the transferee because her entitlement derived from a collective agreement. The fact that various statutory instruments were adopted to give an enabling structure on the GWC conditions of service is irrelevant. The NHS was in the public sector. Neither was it relevant that the benefits were paid by the Secretary of State before being reimbursed by the Health Authority.

The respondent attempted to successfully argue that the fact that the benefits were provided by statutory instruments and that payments were made by the Secretary of State meant that the relevant parts of the Directive did not apply. Besides which, the Health Authority had obligations toward the Secretary of State and not to the employees. Also, the respondent had no obligation toward the Secretary of State.

This did not wash with the Court. There were no further exceptions to the dis-application of the general rule that employment rights transferred other than those affecting old-age, invalidity or survivors' benefits. Consequently, all employment rights of employees are covered unless specifically exempt.

Thus, neither the fact that the rights and obligations arising from the employment contract or an employment or a collective agreement which binds the transferor derived from statutory instruments or were implemented by such instruments, nor the practical arrangements adopted for such implementation can have the effect that such rights or obligations are not transferred to the transferee.

So, consequently, Mrs. Beckmann was found to have an entitlement to these benefits. There appears to be an issue as to who pays them? The Court indicated that it is up to the UK High Court to decide whether the benefits arose from her contract of employment, her employment relationship with the transferor employer or from a collective agreement which bound the transferor and would also bind the transferee under Article 3(2) of the original Directive.

The distinction between these differences is, I think as follows: if the rights derive from her contract of employment or her employment relationship existing on the date of transfer the rights transfer under Article 3.1. If the rights derive from a collective agreement they must be observed on the same terms until the termination or expiry of the collective agreement or entry into force or application of another agreement. But Member States are entitled to limit the period for observing such times provided it is not less than one year. Presumably, this means that were her rights to be regarded under UK law as only deriving from a collective agreement then, if under UK law those terms only remained in force for say, eighteen months, they would have not been in force at the time of her dismissal for redundancy and therefore would not apply.

PRACTICAL IMPLICATIONS

Some comforting thoughts (I hope). The UK NHS scheme is unfunded. In my experience it is unusual for a private sector arrangement and indeed a public sector arrangement: see Commission on Public Service Pension generic benefits¹ for early retirement pensions to arise on redundancy so, it is possibly the case that the terms of the judgement will have limited scope in the context of redundancy.

Prior to the Pensions (Amendment) Act 2002 this may have been an issue for old style (especially non-contributory) pension schemes with members who had substantial pre-1991 service. Frequently, such schemes gave special entitlements on leaving service due to redundancy which had the effect of recognising pre-1991 service. Those rights would not have been fully preserved on leaving service and on an asset transfer the bulk transfer payment may not have captured all the pre 1991 service. Possibly, there may be individuals who were transferred pre 1st June, 2002 and are subsequently made redundant by the transferee who may be able to obtain a greater entitlement on leaving service as a result of Beckmann.

However, this narrow scope argument may be less promising in the context of early retirements. Most schemes create some type of early retirement options. The exposure arises where they are not cost neutral. It may be that these rights would transfer, however, again, presumably, in practice, it is likely to be early retirement with company consent and also possibly trustee consent. In those circumstances,

¹ Reviewed in Part II of the Commission's Final Report published November, 2000.

presumably, it would be the new employer and new set of trustees who would require to give the consent. Maybe, it is only early retirement pensions payable on dismissal transfer and not other retirement options, but this seems too narrow a view. On the other hand, it is open to subjectively say that taking voluntary early retirement will trigger a payment at the end of the employee's "normal working life" even though it pre-dates normal pension age. On this interpretation only early retirements arising on dismissal are caught. But, is this at the end of his normal working life "as laid down by the general structure of the scheme"? Objectively, this tends to indicate the exemption applies to pensions from NRD, but if the general structure admits of early retirements which take place at the end of an individual's normal working life you can get the same conclusion (i.e. that voluntary early retirements continue to be exempt.)

To focus on employment rights that transfer you have to look at Article 3.1 again. **"The transferor's rights and obligations arising from a contract of employment or from an employment relationship existing on the date of a transfer shall, by reason of such transfer, be transferred to the transferee"**

If you exclude from the bundle of rights and obligations employees' rights to old-age, invalidity or survivors' benefits under non-social welfare schemes, a lot of rights might transfer.

You need to think if the rights derive from the employment contract or relationship or from the pension scheme.

It is also unclear as to whether the entire pension transfers or only that part from date of redundancy to normal retirement date.

Outs?

Are there any outs? On the facts, the redundancy pension was only payable until normal retirement date and it only applied to a statutory state scheme, which was unfunded.

In 1990 after Barber there was a lot of hope that that decision only applied to contracted-out schemes but subsequent judgements ruled this out. Consequently, one assumes Beckmann will not only apply to statutory schemes which are unfunded giving rise to pensions in a redundancy situation.

Due Diligence

It goes without saying that, more than ever, it would be necessary to review carefully scheme documentation prior to an asset purchase. The benefit structure will need to be analysed to see if it contains any special rights not covered by the exemption and, in particular, a focus on early retirement rights and any redundancy issues will be relevant. A check of the early leaver rule will also be necessary.

Costing

It is clear that even if there are separately identifiable rights which are not covered by the exemption, in a defined benefit situation (and the focus of this talk is on such

types of schemes) it would be necessary to cost accrued entitlements, I suppose. This may require an adjustment to the consideration where it is likely to be inappropriate for the transferor's pension scheme trustees to increase the value of the transfer payment going across.

More than ever, in the context of purchase from receivers or by white knights of businesses in difficulty, check out the pension scheme to ensure that it does not carry hidden liabilities.

Changing the Pension Terms

Would it be possible to change the pension terms after a transfer?

It is settled law that employees cannot waive their rights under the Directive even if in their favour².

However, a later 1993 decision of Rask³ indicated that the ECJ said that Article 3 of the Directive must be interpreted as meaning...“the terms of the contract...may not be varied” but qualified this by the statement: “The Directive does not however preclude a variation of the employment relationship with a new employer insofar as national law allows the employment relationship to be altered in a manner unfavourable to employees in situations other than the transfer of an undertaking provided that the transfer of the undertaking itself is not the reason for the alteration” (emphasis added)

So the key is that some other reason has to be given which doesn't relate to the transfer. There is UK authority⁴ indicating that variations in terms and conditions could be permitted if falling within the category of economic, technical or organisational reasons entailing changes in the workforce. These allow, in certain circumstances, for termination of employment in the context of a transfer.

It will probably be difficult to rely on this exemption so you cannot bank on it.

Power of Amendment

Reliance on the power to enable the transferee to rid itself of the consequence of the Beckmann decision is likely to have the same consequences as directly changing the employment rights.

Trustees

Beckmann is silent because it was an unfunded scheme and trustees were not involved. In a worse case scenario the ECJ could take a Coloroll approach⁵ where it treated trustees effectively as agents of the employer and fixed them with the employer's liability for misdeeds. Any such liability could only be that of the buyer's scheme trustees since the seller's scheme trustees can do nothing or next to nothing to remedy the buyer's wrong-doing. If the buyer's scheme trustees are aware of the

² Daddy's Dancehall [1988 IRLR315 (ECJ Decision)]

³ [1993] IRLR

⁴ Wilson/Meade [1998 IRLR]

⁵ Coloroll Pension Trustees v Russell [1994] OPLR 179

position then there is a greater danger that they are fixed with liability for the Transfer Regulations-transferred benefits as agent of the employer. This might be a risk for schemes where the trustees are senior executives involved in the transaction and on transfers within industry-wide schemes with separate benefit structures for different employers.

Operative Date of Judgement

The judgement contains no limitation period and thus it is an open issue as to the fact that it applies since the Transfer Regulations came into effect on 3rd November 1980.

Notification Implications

The Transfer Regulations contain a strong focus on the requirement to notify affected employees of, inter alia, the legal, economic and social implications of the transfer for the employees and any measures envisaged in relation to the employees. This information needs to be provided in good time prior to implementation of the transfer. When advising on pensions heretofore, as practitioners, we may have safely ignored the impact of the Directive and Transfer Regulations (due for an overhaul which has been promised by the Department). Henceforth, we shall need to not only identify which, if any, pension rights transfer but also ensure that we fully understand the scope of the Directive and the Regulations. Accordingly, we shall need to obtain a clearer understanding of for example, whether the transferred pension rights derive from a collective agreement, contract of employment or an employment relationship as difference consequences flow. Also, if the judgement is effectively retrospective prior (inadvertent) inadequate notifications means that the Regulations have been breached. Employees generally have 6 months from the date of breach in which to complaint to a Rights Commissioner⁶.

For transactions already consummated it is appropriate to review existing situations (or at least notify the client) in case Beckmann type rights have already transferred. A claim will not be made against the transferee until the triggering event arises, i.e. the redundancy or other grounds of early retirement. So it's preferable for an employer to have prior warning so it can take appropriate action.

Also of relevance in any talk on the Regulations is a reference to the Hagen Case⁷ where the transferor was liable for negligent misrepresentation to transferring members as it was found to have had too great an error of margin in estimating the value of the new pension promise post-transfer. ICI were unsuccessful in pleading that this tortious liability transferred to the transferee notwithstanding that the Court of Appeal⁸ had held torts are capable of transfer under the UK Regulations. In Hagen, the High Court did not apply Bernadone because the tort (negligent misrepresentation) related to pensions which did not transfer. So now that some elements may, this part of the judgement is a bit wobbly.

⁶ See S.I. No. 487 of 2000: Regulation 5.(3).

⁷ Hagen & Ors v ICI Chemicals & Polymers Ltd & Ors 2002 PLR1.

⁸ In Bernadone v Pall Mall Services Group [2000] IRLR 48T

CONCLUSION

I am feeling my way as to what Beckmann means. These thoughts are very much work in progress. I think, going forward, more focus on due diligence, warranties and maybe even mirror image schemes (unlikely, I suspect) will arise. Definitely pension lawyers now have to embrace the ins and outs of the Transfer Regulations⁹ to ensure the pensions bits that transfer are adequately communicated.

For the past, until we have a clearer idea of the retrospection, or nay, it's sensible to get in touch with clients who might be adversely affected by a pre-Beckmann transfer.

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⁹ See Transfer of Undertakings by Gary Byrne, Blackhall 1999.