The Transfer of Employment (Pension Protection) (Amendment) Regulations 2013

Response from Thompsons Solicitors

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Introduction

Thompsons is the most experienced trade union, employment rights and personal injury law firm in the country with 28 offices across the UK. On employment and industrial relations issues, it acts only for trade unions and their members.

Thompsons represents the majority of UK trade unions and advises on the full range of employment rights issues through its specialist employment rights department.

We are concerned that the proposals contained in this consultation will remove rights provided to employees by primary legislation. This may be a drafting error, but we urge ministers to consider very carefully our responses to the questions, in order to avoid the redrafted regulations being declared ultra vires by the courts.

Q1 Do you consider that the proposed changes to regulation 3 will correctly reflect the original policy intention as set out in the Explanatory Memorandum attached to the 2005 Regulations, and do the changes make the regulations workable in practice? If you do not believe that this has been achieved, please set out detailed reasons.

We do not believe that the proposed changes will correctly reflect the original policy intention as set out in the Explanatory Memorandum attached to the 2005 Regulations; nor do the changes make the Regulations workable in practice.

The starting point must be SS.257 and 258 *Pensions Act 2004*. S.257 imposes an obligation on a transferee to make pension contributions to a money purchase scheme pension (MPS) of a transferring employee in one of 4 situations, viz:

(1) where the transferor is obliged to make contributions to the scheme (S.257 (2) (b) (i));
(2) where the transferor employer is not obliged to make contributions but has made one or more such contributions (S.257 (2) (b) (ii));
(3) where the transferring employee is not an active member of the MPS but is eligible to join it and the transferor would have been obliged to make contributions to the scheme if the employee had been an active member of it (S.257 (3)); and
(4) where the transferring employee is not an active member of the MPS or eligible to join it but would have been so eligible if he had been employed by the transferor for a longer period and the transferor employer would have been obliged to make contributions to the scheme if the employee had become eligible and then become an active member of it (S.257 (4)).

This primary legislation therefore clearly gives an option to transferring employees to ask the transferee employer to make contributions to a MPS post transfer, in the four situations outlined above.

On our reading of the amendment to Regulation 3, these rights, derived from primary legislation, would be over-ridden by secondary legislation. That would clearly be ultra vires. In particular, proposed Regulation 3 purports to allow a transferee to limit contributions to a MPS to the contributions made by the transferor employer immediately before the transfer – see proposed Reg 3 (1C). That would mean that the transferee employer would not be obliged to make any contribution if the transferor employer had not made any

contribution in the period immediately before the transfer. It cannot be right that the Regulations take away rights given to transferring employees by the Pensions Act 2004.

Further, there would be no obligation on a transferee employer to make contributions to a MPS post-transfer where the employee was not an active member of the scheme pre-transfer either because they had not chosen to take up active membership pre transfer; or because they did not satisfy the schemes' eligibly rules (e.g. did not have sufficient service) pre transfer. Again, it cannot be right that the draft Regulations, if enacted, would take away rights given to transferring employees by the Pensions Act 2004.

Yet further, proposed Reg 3 (1B) and (1C) purport to allow a transferee employer to limit contributions to a none MPS to contributions which are not less than the contributions made by the transferor in respect of the employee immediately before the transfer. In relation to a final salary pension scheme (FSPS) which requires an employer to pay 25% of a transferring employee's gross salary immediately before the transfer, that is of course to an employee's benefit; but we doubt that can be the government's intention. Nor, presumably, can it be government's intention that if the employer is enjoying a contribution holiday (admittedly not common in the current financial climate but which was common in the relatively recent past) then there would be no continuing obligation on a transferee employer to make any contribution to the FSPS post transfer.

Yet further still, we do not accept that it was not the legislative intent behind the 2005 Regulations to allow employees the choice, post transfer, of increasing their contributions, leading to a corresponding obligation on the employer to increase its contributions, up to a maximum of 6%. Paragraph 3 of the Explanatory Note to the 2005 Regulations contains the words "the employee is, or is eligible to become, an active member". Such words clearly reflect the possibilities provided for in S. 257 (3) or (4).

Paragraph 5 of the Explanatory Note clearly envisages the possibility, or at the very least allows for the possibility, that transferring employees can increase their contributions to a MPS post transfer, in which case the transferee employer's contributions must also be increased; subject to the maximum level of 6% allowed for by the 2005 Regulations. The level of contributions is not pegged to the level of the contributions made by the employee at the time of transfer. In other words, there is nothing in the Explanatory Note to suggest that the level of future contribution of the transferee employer's contributions should be set in stone by reference to the contributions made at the time of transfer. Such "intent" would in any event cut across the rights created by the primary legislation itself, as set out above.

Finally, please note the following drafting amendments required in any event. First, in draft Regulation 3 (1) (b), the word "of" needs inserting between the words "requirements" and "paragraph"; second, the reference in proposed Regulation 3 (1A) to S.258 (2) **(h)** of the 2004 Act Pensions Act 2004 should presumably be to S.258 (2) **(b),** since there is no S. 258 (2) (h)?

In the light of the above, we would respectfully request that the government withdraws the proposed Amendment Regulations and looks at this issue again.

Q2. Do you consider that the proposed introduction of an alternative method of satisfying the 'relevant contributions' will remove the risk that transferee employers might face substantially higher pension contributions than the transferor employer whilst maintaining the principle of adequate pension protection for transferring employees?

Much of our response to this question is contained in the discussion above. In short, we consider that the proposed amendment will contradict express rights granted under primary legislation; and take away the legitimate right of employees to join a scheme post -transfer, or to increase their contributions post transfer, leading to a corresponding obligation on their employer to start making contributions to a scheme post-transfer, or to increase its contributions – up to the current maximum level of 6%.

Many MPSs give employees the option of how much to contribute – with a corresponding obligation on the employer to match the employee's contributions, up to certain maxima, as set out in the MPS Rules. The proposed amendment will take away that right, leaving the employee in a worse position post-transfer.

Further we do not accept that the current Regulations will leave the transferring employee in a "*more favourable position than they would have been had they remained with the transferor*" (Part 2, consultation document, paragraph 15). On the contrary, and subject always to the maximum set out in the 2005 Regulations of 6%, they are simply being kept in the same position post transfer that they would have been

in pre-transfer.

As for the mention of a two tier workforce, referred to in paragraph 15, we are entirely sympathetic to the government's concerns about the same. We do not think those concerns are valid in relation to pensions however, given the discussion above.

Further, given the government's current concerns about a two tier workforce, we would urge the government to look again at the decision to abolish the Two Tier Codes, which themselves are leading to the re-establishment of a two tier workforce post transfer - since transferee employers are now allowed to employ new starters to work alongside transferee employees on the same public sector contract on inferior terms to their transferring colleagues, including pensions.

It appears to us to be wholly contradictory that such a situation can be deemed by government to be acceptable; whereas the possibility that transferring employees will simply retain existing rights to increased pension contributions from their employer post transfer is not.

Such apparent inconsistencies appear to leave the government open to accusations that its intention is to "dumb down" workers' rights post transfer, rather than enable transferring workers to retain and protect existing rights. We cannot believe that is government's intention; assuming it isn't, we trust that the draft Regulations will be withdrawn. In any event, in their current form, they are likely to be struck down by the courts as ultra vires.

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