

No Detriment Guarantee Can Have A Costly Effect

Katy Wedderburn looks at a recent case which highlights the importance of carrying out a proper investigation of contractual rights in TUPE transfers.

In *Whitney v. Monster Worldwide Ltd* it was accepted that, under TUPE, there was no statutory transfer of rights under an occupational pension scheme. However, in these proceedings, the Chancery Division of the High Court was asked to consider whether pension rights and liabilities had been transferred to the new employer by virtue of ordinary contract law.

It was claimed that certain key employees had been given a “no detriment guarantee” in relation to changes that had been made to their pension provision. The court agreed that the guarantee was a legally enforceable obligation and thus the employer was liable to pay over £900,000. Mr Whitney was a long-standing employee of MSL Group Ltd (“MSL”), between 1975 and 1997.

The share in MSL’s holding company were acquired, by TMP Worldwide Holding Ltd, in February 1997.

In July 1997, the new owner transferred the trading activities of MSL to another subsidiary, TMP Worldwide Ltd, and this subsidiary changed its name to Monster Worldwide Ltd (“Monster”). Mr Whitney’s employment transferred to Monster under TUPE and he was employed by Monster from July 1997 to December 1997.

In January 1979, whilst employed by MSL, Mr Whitney had joined the company’s final salary pension – he was then aged 33. This scheme paid two thirds of final salary to members after 30 years’ membership. In 1989, the final salary scheme was wound up and replaced by a money purchase scheme. This was likely to pay much less than the final salary pension scheme.

Mr Whitney claimed MSL had entered into a legally enforceable contract with him and 27 other key employees in the form of a “no detriment guarantee” that they would be no worse off under the money purchase scheme.

He argued that this obligation had transferred to Monster as a matter of contract law (both sides having accepted that it could not have transferred under TUPE). In defence of the action, Monster, firstly, disputed the fact that MSL and these key employees had entered into such a contract. Secondly, Monster argued that even if such a contract existed, it had not transferred and that its terms were not enforceable against Monster.

The Court upheld the claim stating that the no detriment guarantee had evolved from a statement of intention into a legally enforceable obligation.

Although the guarantee was “not comprehensively spelt out in a written document”, Mr Whitney was able to satisfy the court of its existence, including that it was referred to and disclosed in the acquisition documentation from February 1997. The Court

concluded that there had been a novation of all of Mr Whitney's pension rights in July 1997 when Monster took over the money purchase scheme.

As a result of this decision Mr Whitney became entitled to the sum of £908,303.78 – being the cost of supplementing the benefits from the money purchase scheme so that it would provide benefits at the same level as would have been provided under the final salary scheme.

This decision has been appealed by Monster, leaving the legal community and employers engaged in TUPE transfers alike to turn their attention to the Court of Appeal to see if this decision is upheld or overturned in October 2010. However, in the interim, this decision is likely to be persuasive. Employers should exercise caution when dealing in TUPE transfers, and particularly where they are the transferee, they should engage in proper diligence.

Katy Wedderburn is a Partner in the Employment Law Group at MacRoberts LLP and is accredited as a specialist in Employment Law. For further information please contact katy.wedderburn@macroberts.com

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