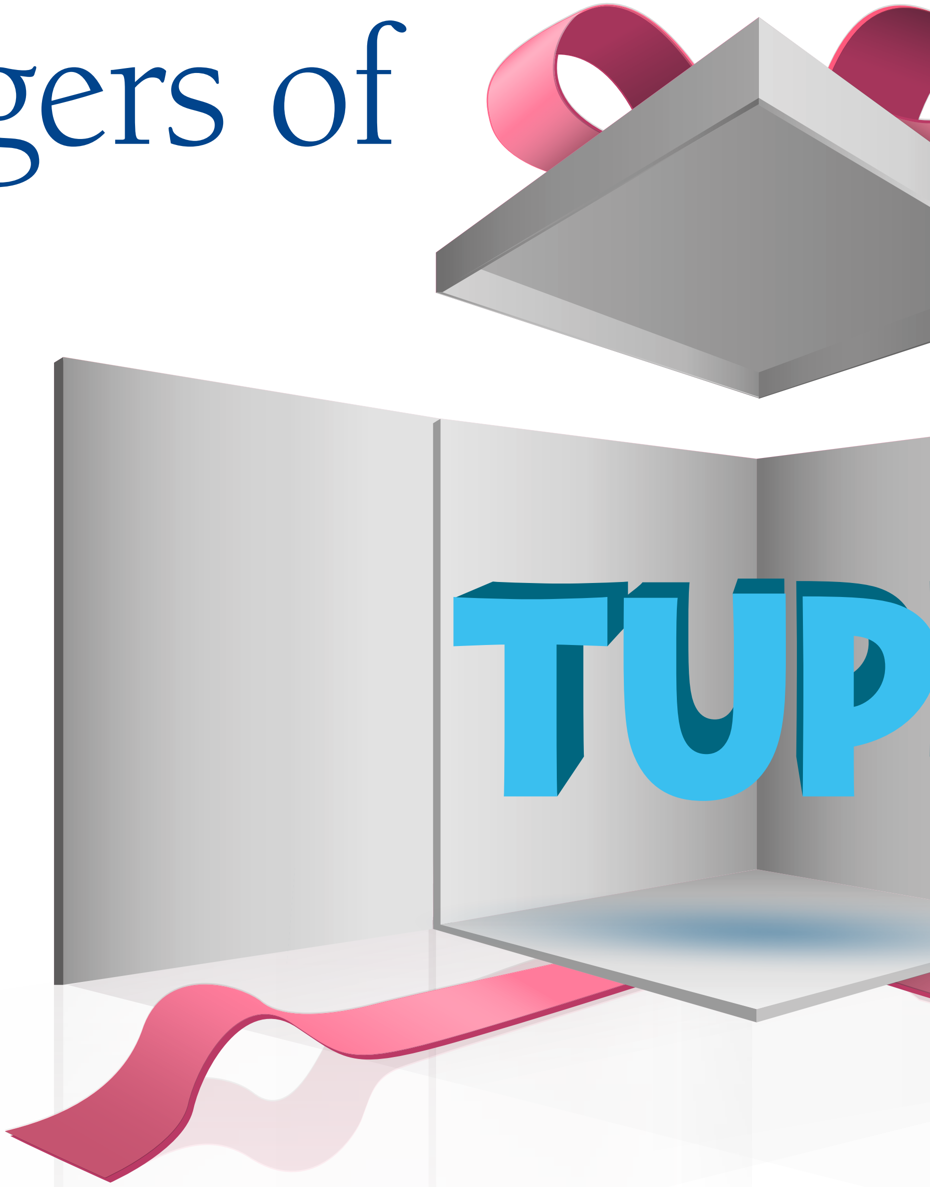
The dangers of



One of the key effects of the Transfer of Undertakings (Protection of Employment) Regulations 2006 (SI2006/246) (TUPE) is the protection of employees' terms and conditions following a transfer. Regulation 4 of TUPE operates to transfer all rights, powers, duties and liabilities under or in connection with a contract of employment to a transferee employer.

So what, then, are the obligations of that transferee employer in relation to the provision of the employees' benefits?

Providing employee benefits after transfer

Where an employee has a contractual right to a benefit, the transferee employer will be required by TUPE to continue to provide that benefit after the employee's transfer. However, where any contractual arrangement includes a power to vary or withdraw a benefit, then the transferee employer would generally be able to rely on those powers. TUPE simply preserves any existing contractual benefits; it does not improve them for the employees.

Alternatively, employees may have a contractual entitlement to participate in a particular benefit, but the employer may reserve discretion as to the scope or terms of the benefits. A typical example of this would be access to private medical insurance, where an employee may have a contractual right to participate in the scheme but the employer would reserve discretion as to the scope of cover to be provided. A transferee employer would therefore be obliged to continue to provide that particular benefit, but will maintain discretion over its scope.

Employees might also enjoy a range of non-contractual arrangements and benefits. Where a benefit is wholly discretionary, then the transferee employer would not be obliged to continue to provide it after transfer. However, some caution should be exercised before withdrawing discretionary benefits completely because of the possibility of a breach of the implied mutual duty of trust and confidence. There is also the possibility that a discretionary benefit may have become contractual through custom and practice.

Some particular types of employee benefit can create problems for transferee employers.

Flexible benefit schemes

Employees who participate in a flexible benefits scheme can choose from a range of available benefits and select a package that suits them best, typically up to a maximum overall value. Employees will be given a range of core benefits as standard, with the option to select other benefits depending on lifestyle. These are commonly paid for by way of salary sacrifice.

Flexible schemes are typically offered by larger employers that have the resources to establish such a scheme. Problems can arise, therefore, with transfers to smaller employers that do not have such schemes already in place. What is the transferee employer obliged to put in place in those circumstances?

Where a flexible benefit scheme is contractual in nature, then the effect of TUPE is that the right to participate in that scheme would transfer. It is irrelevant whether or not the employer has chosen to participate because TUPE will transfer the right to participate even if an employer has not actually chosen to join the scheme. However, in practical terms, an employee may be less likely to be concerned about the withdrawal of benefits that he or she has chosen not to access.

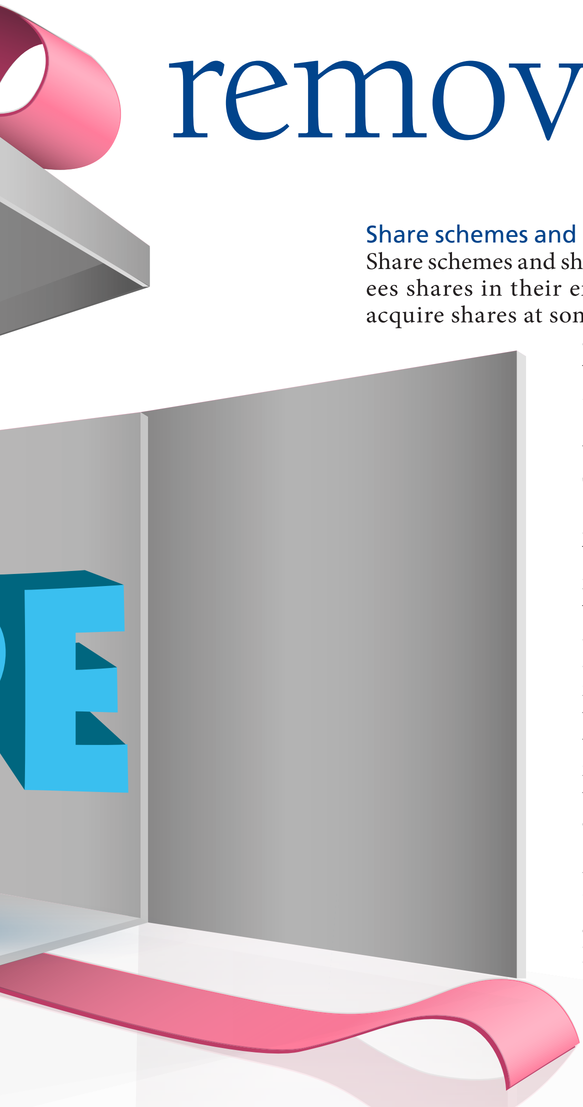
Where a flexible benefits scheme is discretionary, there will be no obligation to offer a matching scheme after transfer. However, an employer would not generally be permitted to withdraw all an employee's benefits, even if they are discretionary, because of the risk of a breach of the duty of trust and confidence.

The employer should consider the range of benefits that the employee has chosen and that are capable of transfer and consider its options.

These may include:

- honouring the entire range of benefits that employees have chosen to participate in, notwithstanding that they may be expensive;
- withdrawing some benefits, which may be low risk where those benefits are discretionary and/or only a handful of employees participate in fringe benefits of no great value;
- substituting its own range of benefits for particular benefits that it proposes to withdraw – where the overall package of benefits is similar, in practical terms the risk of challenge is low, although the circumstances of individual employees must be considered; or
- seeking to harmonise terms and conditions with those offered to existing employees, although the circumstances when that can be done successfully are limited – and outside the scope of this article.

removing staff perks



To what extent is an employer obliged to preserve employee benefits following a TUPE transfer? **James Green** finds out.

Share schemes and share option schemes

Share schemes and share option schemes grant employees shares in their employing entity or an option to acquire shares at some point in the future. How then does a transferee employer deal with an employee's right to acquire shares in its old employer?

This question was considered in the case of *MITIE Managed Services Ltd v French and Others [2002] IRLR 512 EAT*. Mrs French and her colleagues were employed by a supermarket and participated in a profit-sharing scheme under which employees received cash or an award of shares. When French and the colleagues transferred to a new employer, they argued that they remained contractually entitled to participate in the supermarket's profit-share scheme, even though they were no longer employed by that company.

The Employment Appeal Tribunal held that it was "unjust" and "absurd" to require French's new employer to honour such a term. In such circumstances, the employees were entitled to participate in a scheme of "substantial equivalence", as was consistent with the overriding purpose to protect employees in the context of a TUPE transfer.

Where employees have a right to participate in such a scheme, therefore, a transferee employer would be required to allow participation in its own scheme (provided that it was substantially equivalent), put in place a phantom scheme that matches the scheme provided by the old employer, or offer a cash incentive that is equivalent to the value of benefits in the previous share scheme.

Cycle-to-work schemes

Cycle-to-work schemes are tax-efficient arrangements whereby an employer purchases bicycles and equipment for the benefit of an employee, then loans the bike and equipment to the employee for a period, during which the employee repays the debt to the employer by way of a salary sacrifice arrangement.

If employees have a contractual right to participate in such a scheme, they will have the right to participate in the scheme with the transferee. A transferee would need to consider joining such a scheme if it does not currently participate in one.

The transferor employer faces a particular difficulty with cycle-to-work arrangements because the bicycle is in the possession of the transferring employees, who will owe a debt to their employer.

The transferor employer has a number of options. It could require the employee to return the bicycle, although that may be unattractive because many employers would not want to deal with the disposal of large numbers of bicycles. Alternatively, the employer may permit the employee to retain the bicycle, but require the employee to repay the debt in full from net pay without tax exemptions.

It may be possible to negotiate a provision for the transferee to recover the debts from employees as part of the overall commercial arrangements on a transfer. In such circumstances, transferee employers may argue that the transferor's rights under the hire agreements are capable of being transferred under TUPE and therefore they could be enforced by the transferee employer against the employee.

Typically, in commercial transactions, these issues are resolved between the parties without the need for litigation, and accordingly that approach has not been tested in any decided cases. It will, of course, require the cooperation of both parties. A similar analysis would apply to laptop loan schemes or other hire arrangements that are structured by way of salary sacrifice.

Risks

As with any proposal to vary terms and conditions, a transferee employer faces a number of risks. These risks are brought into sharper focus because of the additional protections an employee enjoys in a TUPE transfer.

The withdrawal of a contractual right to participate in a benefit may give rise to a claim for a breach of contract or an unlawful deduction from wages where the benefit is monetary in nature.

In addition, the effect of TUPE is that changes to terms and conditions may be ineffective, even where the employee consents to the change.

In certain circumstances, the withdrawal of a benefit may give rise to a fundamental breach of contract, entitling the employee to resign and claim for constructive unfair dismissal. If an employee can establish that such a dismissal is connected with a TUPE transfer, then it will be automatically unfair.

Even where there is no fundamental breach, risks can arise. The proposed withdrawal of a benefit by a transferee that gives rise to a substantial change in the working conditions to an employee's material detriment may entitle an employee to treat him or herself as dismissed pursuant to reg.4(9) of TUPE. Such a claim is similar to a standard constructive unfair dismissal claim, although there is no need to establish a fundamental breach.

Where a transfer is likely to give rise to changes to employee benefits, therefore, employers should give careful consideration to their obligations to inform and consult with employee representatives to flush out any possible challenges. Where appropriate, employers should seek appropriate indemnity protection in the commercial documentation.

THE AUTHOR

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More TUPE guidance is available on XpertHR, including: how to arrange the election of employee representatives for informing and consulting on a TUPE transfer; how to carry out a due diligence exercise; and how to change the payment method for employees.

www.xperthr.co.uk/topics/employment-rights/tupe