

## TUPE: what business needs to know about the retention of employment model

[Dean Fuller](#), 26 Oct 2012



The retention of employment model (RoE) was developed by the Department of Health to limit the number of non-clinical staff forced to transfer to the private sector from the NHS under private finance initiative (PFI) schemes.

RoE works as follows:

1. Employees opt-out of the transfer of their employment under reg. 4(7) of TUPE.
2. If employees opt-out their employment terminates immediately. They have not been dismissed and are treated as if they had resigned.
3. The employees are immediately re-employed by the public sector employer with continuity of service and pension rights preserved.
4. 4. The employees are seconded to the private sector provider, but remain employed by the public sector employer.

In theory RoE allows employees to remain as members of the relevant NHS pension scheme, which would not be possible if they transfer to the private sector. It would be expensive for a private sector employer taking on ex-NHS employees to provide a Government Actuary's Department certified pension scheme, as required under the Cabinet Office Statement of Practice *Staff Transfers in the Public Sector*.

Stage four is problematic. RoE is designed to fit in with the long-term nature of PFI contracts which can last 30 years. Is this feasible?

The Celtec case involved the transfer of staff to Training and Enterprise Councils (TECs) in 1990. The staff continued to be employed by the Department of Employment (DoE) until 1993, working under secondment arrangements for the TECs. In 1993 the staff became employees of the TECs. What was the date of transfer of employment? The European Court of Justice (ECJ) held it is the point in time when responsibility for carrying on the business passes. The House of Lords, applying the ECJ decision, held the employees transferred

from the DoE to Celtec when it assumed responsibility in 1990, despite the fact all the parties believed that they were only seconded to Celtec until 1993.

In Celtec Lord Hope said "...it is open to an employee whose ...employment would otherwise be transferred automatically from the transferor to the transferee...of his own free will to withdraw from this arrangement by declining to enter the employment of the transferee...It does not enable effect to be given to an employee's wish to continue to be employed by the transferor while continuing to be employed in the unit to which he has been assigned after its transfer to the transferee."

Is this the death of RoE? Probably not provided the employee: (i) is given a choice whether or not to transfer (ii) decides not to transfer (iii) objects to transferring and (iv) enters into a new contract permitting secondment.

Following a review in 2009 the use of RoE by the NHS is now restricted to soft facilities management in PFI schemes (eg catering, cleaning and so on) and staff working in independent sector treatment centres. RoE remains feasible but not without legal danger. Parties adopting RoE must carefully document each stage.

The rationale for RoE may have become diluted (at least in the NHS) but perhaps an opportunity for protecting the pension rights of affected employees in other settings is being overlooked.

**Dean Fuller, senior associate Fox Lawyers**