

Proposed Changes to TUPE Regs

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Johanna Johnson considers the Government's proposals aimed at simplifying the application of the Transfer of Undertakings (Protection of Employment) Regulations 2006 (SI 2006/246).

Introduction

On 17 January 2013 the Government published a consultation seeking views on a number of proposals aimed at simplifying the application of the Transfer of Undertakings (Protection of Employment) Regulations 2006 (SI 2006/246) ("TUPE") (see <http://www.lexisurl.com/CSR1>). In general, the proposals are deregulatory and employer-friendly. Responses to the consultation are requested by **11 April 2013**.

Key proposals

Service provision changes

Proposal: To repeal the relevant sections of TUPE relating to service provision changes so that the definition of transfer is aligned with the definition in the Acquired Rights Directive (2001/23/EC) (the "Directive").

Comment: These provisions essentially brought more transfers in relation to the insourcing of services within the scope of TUPE. This "gold plating" of the Directive was primarily intended to provide greater legal certainty and to benefit small and medium-sized businesses which could bid against larger incumbents knowing that, if successful, they would inherit the necessary staff to perform the service.

The Government acknowledges that these intended benefits may not have eventuated, and additional burdens on businesses may have been created. As it turns out, many businesses are frustrated that a change in service provider does not necessarily relieve them of poor-performing personnel, and litigation and disputes frequently arise, for example, as to who is "assigned" to the service and in situations where activities are divided between several providers. Businesses also find that cost savings on second generation outsourcings are difficult to realise.

Should the proposal be adopted, the TUPE definition of transfer will track the definition in the Directive so that the following, more restrictive, criteria for a service provision change will apply. There must be:

- a transfer of an economic entity which retains its identity;
- an organised group of staff assigned to a common task which is to be carried out by another employer; and
- either a transfer of significant tangible or intangible assets, or a taking over by the new employer of a major part of the workplace in terms of numbers and skills.

The Government points to *Ayşe Süzen v Zehnacker Gebäudereinigung GmbH Krankenhausservice and another* (C-13/95) [1997] All ER (EC) 289 for guiding principles on service provision changes under the Directive definition of transfer.



Johanna Johnson

Associate, White & Case LLP

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Employee liability information

Proposal: To repeal the specific requirements regarding the notification of employee liability information but generally require the transferor to disclose information to the transferee where it is necessary for the parties to comply with information and consultation obligations.

Comment: Currently the provisions of TUPE are prescriptive in requiring a transferor to provide a transferee with employee liability information (including the identity and age of transferring employees, the particulars of employment applying to such employees, etc.) at least 14 days before the transfer.

Removing the 14-day timeframe but maintaining a general requirement to disclose information as necessary to comply with TUPE, the Government suggests, will encourage transferors to be responsive to the business needs of transferees. Perhaps slightly wary, however, of how flexibly the transferor may treat the notion of cooperation, the Government will provide guidance and possibly model terms for contracts.

It can be expected that transferors will be keen to provide information when requested by a transferee to avoid any liability under regulation 13 of TUPE, particularly if the transferee states that such a request is “necessary” for it to comply with its obligations to inform and consult.

Restrictions on changes to terms and conditions and protection against dismissal

Proposal: To change the wording of the provisions:

- restricting changes to contracts;
- giving protection against dismissal; and
- concerning a substantial change in working conditions to the material detriment of the employee, so that they more closely reflect the wording of the Directive and, where relevant, case law of the Court of Justice of the European Union (the “ECJ”).

Comment: The Government has concluded that, on the basis of the existing law interpreting the Directive, “there is a very high risk that any provision allowing parties to agree to variations to terms and conditions for the purpose of harmonising terms and conditions would be incompatible with the Directive.”

In attempting to provide some comfort to employers frustrated with having their hands tied in relation to harmonising terms and conditions of employment following a transfer, the Government proposes to re-draft regulations 4(4) and 4(5) such that the scope for varying a contract post-transfer will be wider. Currently TUPE restricts changes where the sole or principal reason for the change is not only the transfer, but also a reason “connected with” the transfer (and arguably any change is “connected with” the transfer if it relates to pre-transfer terms and conditions).

The Government intends to adopt the narrower language used by the Directive and the ECJ such that only changes as a consequence of the “transfer itself” or “by reason of the transfer” will be restricted.

Unfortunately for employers, ECJ case law suggests that adopting the narrower language of the Directive will not mean that an agreed change to terms and conditions for the purpose of harmonisation is permissible. However, as the Government notes, it will mean that TUPE is not more restrictive than the Directive.

Similarly with the provision relating to protection against dismissal (regulation 7), the Government intends to amend the wording such that the wider scope of a dismissal “connected” to a transfer is limited by the narrower “by reason of the transfer” language of the ECJ and similar language of the Directive.

Other proposals

In brief, the Government also proposes to:

- limit to one year the length of time that a transferee must honour the terms and conditions agreed as part of a collective agreement prior to transfer (the Directive gives Member States the scope to do this but TUPE does not currently adopt any such limitation);
- amend regulation 4(9) such that it essentially “copies out” article 4(2) of the Directive which would likely remove the scope for unfair dismissal claims where the change in working conditions is not a breach of contract or a repudiatory breach of contract;
- extend the meaning of “entailing changes in the workforce” to include a change in the location of the workplace—this would be a positive change for transferee employers who would no longer face claims for automatic unfair dismissal in genuine redundancy situations;

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- allow the transferor to rely upon the transferee's economic, technical or organisational ("ETO") reason entailing changes in the workforce in respect of pre-transfer dismissals of employees;
- allow consultation by the transferee with representatives of the transferring employees who may be affected by proposed redundancies to count for the purposes of the requirements to consult on collective redundancies—taken together with the proposed change to allow the transferor to rely upon the transferee's ETO reason, this proposal may encourage rescue of insolvent businesses by effectively allowing any redundancies to take place prior to transfer if not all staff of the insolvent business are required by the transferee; and
- permit micro businesses (those with ten or fewer employees) to inform and consult with employees directly rather than elect employee representatives (in circumstances where there is no recognised union or existing employee representatives).

Guidance

The Government intends to provide guidance only in respect of:

- the application of TUPE to agency workers;
- what constitutes a "reasonable" time to allow employees to elect representatives in the context of consultation obligations under TUPE; and
- whether a particular employee is "assigned" to a transferring part of a business.

No change

Insolvency

The Government notes that TUPE "copied out" the Directive's generic description of the different types of insolvency proceedings. As suggested by its proposed deregulatory changes in respect of, for example, service provision changes, it appears that the Government is in favour of the approach of "copying out" provisions of the Directive and relying on case law for clarification.

The Government points to *Key2law (Surrey) Ltd v DeAntiquis* [2011] All ER (D) 194 (Dec) as an appropriate case for clarity on which types of proceedings fall under the different categories of insolvency proceedings in TUPE (though it should be noted that leave to appeal to the Supreme Court has been given in this case, and it is expected to be heard in **July 2013**).

Joint and several liability for pre-transfer obligations

The Government favours the certainty of the current rule (i.e., that all liability for pre-transfer employment obligations passes to the transferee), and acknowledges the scope for use of indemnities in respect of pre-transfer employment obligations.

Timing of changes

Save for in respect of any repeal of the service provisions changes, the Government does not propose to have any significant lead-in period for the intended changes. The Government appreciates that service providers are likely to have entered into contracts assuming that TUPE will apply at the end of the contract (such that redundancy costs if the contract is lost have not been accounted for). Accordingly, the Government is consulting on an appropriate lead-in time for repeal of the service provision changes.

Conclusion

The Government states that its proposals are designed to "simplify" TUPE and make business transfers "easier". There also seems to be tacit recognition that "gold plating" is costly, and that the bare provisions of the Directive are better suited to times of austerity (though it can be sensed that the Government, given the chance, would like to strip back the Directive as well). The proposals are, however, largely employer-friendly, and "copying out" provisions from the Directive should simplify matters, particularly where there is already settled case law.

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