

UK Government Announces Changes To Business Transfer Rules

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This month, the UK government published its proposals to amend the UK's Transfer of Undertakings (Protection of Employment) Regulations 2006 (known as TUPE). The proposals are less radical than expected and will be brought into force in early 2014. Most notably there will be no repeal of the rule that many service provision changes amount to TUPE transfers. The fact that the government has backed away from its rhetoric about wider changes has generally been welcomed as favourable to those doing business in the UK. We briefly summarise what TUPE is, when TUPE applies and its key effects. Against this context, we then consider the proposed changes.

Summary of what is changing

- 1. It will generally be easier to change the workforce's place of work post-transfer.*
- 2. Employers can renegotiate terms derived from collective agreements in certain circumstances.*
- 3. Transferees will have greater certainty over employee terms derived from collective agreements.*
- 4. Transferees may be able to affect large-scale redundancies more quickly and cheaply.*
- 5. Transferors will need to provide detailed data on transferring staff at least one month before the proposed transfer.*
- 6. The rules around the need to elect representatives for businesses with 10 or fewer employees will be relaxed.*
- 7. In theory, it will be easier for an employer to vary terms and conditions or make dismissals in the context of a TUPE transfer.*

The Current Law

What is TUPE?

TUPE is the UK's implementing legislation for the Acquired Rights Directive (EU Directive), which aims to provide an EU framework to protect employee rights in the event of a transfer of undertakings, businesses or parts of undertakings or businesses.

When does TUPE apply?

TUPE applies in two scenarios: (i) on the sale of all or part of a business; and (ii) on a service provision change. It does not apply to share sales (unless combined with a reorganisation or an integration exercise).

In relation to the sale of all or part of a business, for there to be a TUPE transfer, an economic entity must transfer and retain its identity after the transfer. An economic entity is more than just a collection of assets. It is a stable, organised grouping of resources that has the objective of pursuing an economic activity. For an economic entity to retain its identity as a going concern after the transfer, there will normally be a transfer of most or all of its goodwill, employees, customers and tangible and intangible assets. If there is a sizeable period during which services are suspended or if the buyer intends to run the business very differently after the sale, TUPE may not apply.

We normally see TUPE transfers under the service provision change rules where there is an outsourcing, insourcing or a change in service provider. For there to be a TUPE transfer under these rules, there must be an organised grouping of employees before the change, that has as its principal purpose, the carrying out of the services in question on behalf of the client. A single employee can amount to an organised grouping. The services provided after the change must be fundamentally or essentially the same as those provided before. This means that some incoming service providers could seek to avoid a TUPE transfer if they provided services that are structured differently to those provided before the transfer.

The determination of whether TUPE applies to a deal or the award of a contract typically involves a fact-based analysis.

What is the impact of TUPE applying?

If TUPE applies, the affected employees will have certain rights and protections and the transferor and transferee will have certain duties and obligations. The key effects of TUPE can be summarised as follows:

- **Obligation to inform and consult** – The transferor and transferee must inform (and potentially consult) appropriate representatives of the affected employees. Appropriate representatives can be from a recognised trade union, existing employee representative or employee representatives elected for this purpose. The appropriate representatives must be provided with certain information prescribed in Regulation 13 TUPE and the information and consultation exercise must take place “in good time”, meaning long enough before transfer to allow the representatives to consult with the affected employees. The duty to consult, as well as inform, is triggered if “measures” are proposed that affect employees. If this is the case, consultation must be with a view to seeking agreement to the measures envisaged.
- **Obligation to provide employee liability information** – The transferor is under an obligation to notify the transferee of certain information regarding transferring employees at least 14 days before the transfer. This includes details of the employees’ ages, particulars of employment, information about actual and potential claims, grievances, disciplinary action, and applicable collective agreements.
- **Automatic transfer principle** – The affected employees (with their associated rights and liabilities) automatically transfer to the service provider or buyer on their existing terms and conditions of employment on the transfer date. There is an exception for rights under occupational pension schemes (see below). Collective agreements made with unions may also transfer automatically, as may union recognition itself.
- **Protection from changes to terms and conditions of employment** – Affected employees are protected from negative changes to terms and conditions resulting from the transfer or a reason connected to the transfer. Negative changes are void unless they result from “an economic, technical or organisational reason entailing a change in the

workforce" (ETO reason) such as redundancy. Employees can even, in certain circumstances, gain the benefit of positive changes without being bound by negative ones, in general, harmonising terms in the context of a TUPE transfer – particularly if it is happening soon after the transfer is fraught with legal risks.

- **Protection from dismissal** – Affected employees dismissed because of the transfer or a reason connected to the transfer, will have a valid claim for automatically unfair dismissal. The protection applies to dismissals before or after the transfer. Employees are also deemed dismissed if they resign because of a substantial change in working conditions to their material detriment, even if the change would not normally be sufficient to justify constructive dismissal. The only caveat to this protection is if the dismissal is for an ETO reason.
- **Pensions** – The position in relation to pensions and TUPE is complex. In short, most aspects of occupational pension schemes, apart from those relating to early retirement, are carved out from the automatic transfer principle of TUPE. This exemption does not apply to personal money purchase pension schemes and death benefit only schemes, which will transfer under TUPE.

The Proposed Changes

The current government began a process of review of the effectiveness of TUPE in late 2011. In January 2013 the government published a consultation paper setting out proposed changes to TUPE. These suggested changes included, amongst other things, repealing the provisions that render service provision changes as TUPE transfers. On 5 September 2013, the government's response to the consultation paper was published. This response will now form the basis of regulations amending TUPE due to come into force in January 2014.

What will not change?

In several key areas, the final proposals have been watered down from those presented in January 2013. These include:

1. *No repeal of service provision change rules*

The government has been persuaded that service provision changes should remain TUPE transfers as this provides greater certainty for businesses and employees, prevents litigation and saves time and money on commercial transactions. However, the government will include a requirement (currently derived from case law) that for TUPE to apply to a service provision change the activities carried on after a change must be "fundamentally or essentially the same" as those carried on before.

2. *Transferor unable to rely on a transferee's ETO reason to justify pre-transfer dismissal*

Despite support from the business community to allow a transferor to rely on a transferee's ETO reason to justify pre-transfer dismissals, the government decided that this change might breach the underlying EU Directive and would increase general unfairness in the labour market.

3. *Employee still dismissed if they suffer a substantial change in working conditions to their material detriment, even if such change would not normally amount to a constructive dismissal*

TUPE will still provide that a transferred employee can resign because of a substantial change in working conditions to their material detriment, even if the change would not normally be sufficient to justify constructive dismissal.

What will change?

1. Workplace relocations

At present under TUPE the relocation of the employee's workplace following a transfer is not an ETO reason. As and when the amendments to TUPE come into force dismissals resulting from such relocations will no longer be automatically unfair. It is important to note that this change will not entitle employers to force staff to move locations unless their contracts contain a valid and reasonable mobility clause. The new rules will make clear that mobility clauses that could have been exercised before the transfer can still be exercised post-transfer. General principles of contract law will still apply in such situations (including the obligation to exercise the mobility clause in a way that does not breach trust and confidence).

2. Changes to collectively agreed terms and conditions

The prohibition under TUPE on changing certain contractual terms is being relaxed. In relation to terms derived from collective agreements, if the change takes place 12 months or more after the transfer and, overall, it is no less favourable to the employee, these changes will no longer be void. This does not equate to a universal power for the employer to vary or harmonise terms, but it will allow these specific changes (even if partly less favourable) to be valid. There is significant scope for litigation over whether a change is or is not less favourable overall.

In line with recent ECJ case law, the government is also proposing a further change so that collectively agreed terms will remain static as at the date of transfer and they will not be subject to subsequently negotiated changes between the parties to those collective agreements. This arises where employees leave the public sector for a private sector employer.

3. Collective redundancy consultation

When proposing 20 or more redundancies in a 90-day period, there is an obligation to collectively consult for 30 days (rising to 45 days for over 100 redundancies). Currently a transferee can only start collectively informing and consulting after the transfer. Under the proposed new law, the transferee will be able to begin consultation before the transfer. It is important to note that pre-transfer consultation is entirely voluntary and requires the transferor's agreement. Although consultation cannot finish and dismissals cannot happen before the transfer, this change should increase the speed and efficiency of any post-completion restructuring processes.

4. Employee liability information

The government has decided to increase the minimum time limit for providing employee liability information from 14 to 28 days before the date of the transfer.

5. Micro businesses

The government will allow employers with ten or fewer staff, where there are neither existing representatives, nor an independent trade union, to consult directly under TUPE with affected employees rather than having to elect representatives.

6. Changes to the automatic transfer principle and protection from dismissal

As stated above, at present TUPE provides that the variation (or purported variation) of an affected employee's terms will be void or their dismissal automatically unfair if the sole reason or principal reason is "the transfer itself" or "reasons connected with the transfer". This protection will be narrowed to prohibit changes or dismissals to those caused by "the transfer itself" only. (The exception for changes or dismissals for an ETO reason will remain.) The extent to which this technical change will lead to a practical impact is unclear and the government acknowledges there

will be “short term uncertainty” over the change. As a result, we anticipate that there will only be clarity once we have case law on the same.

Conclusion

Several of the proposed changes are welcome, including confirmation that a static approach should be taken to collectively negotiated contracts and that workplace relocation can amount to an ETO reason. Several of the proposals will lead to some satellite litigation, including whether a change to a collectively agreed term is, on the whole, less favourable and whether the reason for a change in terms/dismissal is the transfer itself or a reason connected to the transfer. However, in deciding not to pursue its most radical proposals, in particular changing the service provision rules, the government has avoided creating grounds for satellite litigation which will be welcomed by employers.



If you have any questions concerning these developing issues, please do not hesitate to contact one of the following Paul Hastings lawyers:

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