

## The Wait is Over for the new TUPE Regulations!



Three years after the Government announced its policy decisions on TUPE reform, the wait is finally over for the new TUPE Regulations. On 6 April 2006, the new Regulations will come into force, bringing with them a number of changes which are intended to bring clarity and greater commercial certainty to one of the most confusing areas of employment law.

It took two years for the Government to draft and produce the revised Regulations, which eventually became available for consultation in March 2005 (and were the subject of our May 2005 Update). The consultation ended in June 2005, and despite a planned date for implementation of 1 October 2005, the Regulations failed to appear. It turned out that there had been so many responses to the consultation that the Government needed nine months to consider and address all the concerns raised.

### The Key Provisions of the New Regulations

- A 'relevant transfer' will take place when there is a transfer of an "economic entity which retains its identity". This is defined as "an organised grouping of resources which has the objective of pursuing an economic activity, whether or not that activity

is central or ancillary". The new TUPE Regulations, for the first time, also expressly include service provision changes within the definition, making it clear that outsourcing is intended to be covered by TUPE. Subject to certain conditions, TUPE shall apply in circumstances of contracting out, a change in service provider and when a service is taken back in house.

- **Changing terms and conditions** – the general rule is transfer-related changes to terms and conditions are void even if the employee has agreed to them. The Regulations contain new provisions which allow for variations where: (i) the reason for the change is unconnected with the transfer; or (ii) the reason is connected with the transfer but is for an "economic, technical or organisational" ('ETO') reason entailing changes in the workforce. If the reason for the change is the transfer itself, the change will be void. Despite the new provisions, they will be of no assistance to employers attempting to harmonise employees' terms and conditions following a transfer. The only circumstances in which an employer will successfully produce standardisation across the workforce will be where there is a change to the overall numbers or functions of the employees in question.
- **Transfer-related dismissals** – the new rules provide clarification of previously confusing provisions. There are now, in effect, four types of dismissal, which are categorised as follows:
  - Unconnected with the transfer – potentially fair
  - Sole or principal reason is the transfer itself – automatically unfair
  - Connected with the transfer but not an ETO – automatically unfair
  - Connected with the transfer but for an ETO – potentially fair

The most typical case in which a transfer-related dismissal is potentially fair will be a genuine redundancy situation.

- **Notification rules** – this is one of the most welcome changes. There will now be a new requirement on the old employer (transferor) to provide specific information to the new employer (transferee), relating to the identities of the employees and all associated employment liabilities. It will not be possible to contract out of these provisions, and the information must be supplied not less than 14 days before the transfer (unless there are "special circumstances"). Failure to comply with these provisions could result in compensation

being awarded, the minimum award being £500 per employee. There is no upper limit! Note that the duty to provide employee liability information shall not apply to a transfer which takes place on or before 19 April 2006.

- **Information and consultation** – there are no substantive changes to the existing provisions on the transferor’s duty to inform and consult with employee representatives about the transfer. The most significant area of reform is in respect of liability where the transferor fails to comply, an area which has always been subject to some uncertainty. The new rules now make clear that buyers (transferees) and sellers (transferors) will have joint and several liability for failure to comply with information and consultation requirements.
- The new provisions on the **transfer of insolvent businesses** implement the Government’s policy of promoting a “rescue culture”. Certain debts will no longer pass to the transferee, and there will be greater latitude in relation to the changing of terms and conditions of employment than would otherwise arise. These provisions are subject to certain conditions being satisfied including a requirement that the change is made with the intention of safeguarding employment opportunities.
- **Pensions** – note that the important issue of transferring employees’ pension rights has been dealt with separately by the Government under the Pensions Act 2004 which came into force in April last year. Under these provisions employees who were members of or who were eligible to join an occupational scheme are entitled on transfer to have a scheme meeting certain tests provided by the new employer.

#### Potential Pitfalls

- Despite the confirmation that service-provision changes are to be covered by the Regulations, commentators believe that this new aspect of TUPE is one which is “ripe for litigation”. A level playing field may well be the outcome of the new provisions, but some ambiguity in the drafting of the exceptions is likely to cause significant problems. Regulation 3(a)(ii) provides that activities carried out “in connection with a single specific event or task of short-term duration” will not attract TUPE’s attention. Unfortunately, no further guidance is provided, leaving practitioners speculating on exactly where the line is to be drawn between contracts lasting a few weeks and those lasting a few years.
- In the majority of transactions, the time at which the transfer takes place is quite clear. It is only when the transfer takes place over a period of time that the question arises “when did the transfer actually take place?” In 2005, the European Court of Justice ruled that a TUPE transfer must occur on a particular date. The new Regulations (as with the old) however, appear to contradict the ECJ ruling. They state that a transfer may take place by a series of “two or more transactions”!
- The Regulations remove the territorial restrictions in TUPE, bringing it into line with other employment legislation. There is, however, no explicit provision as to the application of the

Regulations to employees working overseas or offshore on the Continental Shelf, leaving the position uncertain.

- Although the new notification provisions are being heralded as one of the most welcome innovations, it is worth pointing out that the information would in fact would be much more valuable if there was an obligation to produce it earlier. The requirement to share information no less than 14 days before the transfer will be of no assistance to bidders on a re-tendering exercise who need this information before bids are submitted. In addition, it is accepted that the provision will ensure much needed transparency, but the new Regulation 11 (5) does not actually prohibit the transferor from making last minute changes, provided these are notified to the transferee.

#### Conclusion

The new TUPE Regulations are, essentially, welcome, and they do indeed appear to bring clarity to what has been an extremely confusing and ambiguous area of law. Clarification is particularly welcome on the circumstances in which TUPE applies to outsourcing situations and the Regulations will, no doubt, encourage greater levels of communication between buyers and sellers of businesses. But all of this is to be read with a warning. As highlighted above, some aspects of the new Regulations have the potential to generate new litigation, and it will take time for these issues to be resolved.

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