



13-10 Proposed changes to the Transfer of Undertakings Protection of Employment (TUPE) regulations

Key issues;

- This briefing covers the current consultation on changes to TUPE following a call for evidence conducted by Government in 2013.
- The consultation on proposed changes closes on the 13th April 2013
- The changes proposed are significant for local authorities and their workforce, in particular in relation to outsourced contracts or proposals to otherwise transfer staff, in to new service delivery models.

1. Introduction

The Transfer of Undertakings Protection of Employment (TUPE) Regulations stem from European law in the form of the Acquired Rights Directive 1977. This Directive was revised in 1998 and a consolidated Directive was adopted in 2001[2001/23/EC]. In order to ensure UK legislation is compliant with EC law the domestic government of EU countries introduce their own regulations, which, from time to time are revised as EC law develops or new case law is set. The last major revision to TUPE regulations within the UK was in 2006 [The Transfer of Undertakings (Protection of Employment) Regulations 2006 SI 2006/246]. These regulations introduced a number of changes, including provisions which relate to 'service provision changes', which are of particular significance in a local authority context, where certain types of services are subject to transfer to new employers.

In 2012 the Government called for evidence on the efficacy of the TUPE regulations, as they currently stand, and, as a result of responses to the call for evidence, has now issued a consultation paper. This paper seeks views on amending TUPE in a number of areas. This briefing therefore outlines the main proposed changes, the background to those changes and provides commentary on the impact of the changes should they become part of a new regulatory framework. This briefing is not intended to form a legal advice note, and the proposed changes have yet to be agreed or introduced.

2. Why does the Government wish to change TUPE protections

According to the Government's consultation paper there is a commitment to review employment law for *'employers and employees, to ensure they maximise flexibility for both parties while protecting fairness and providing the competitive environment required for enterprise to thrive'*.

Certain changes to employment law have already taken place, such as changes to the qualifying period for bringing an unfair dismissal claim, which means that employees must have two years' service before being eligible to bring a claim for unfair dismissal, compared to the previous rule of one years' service.

There are also further planned changes under the Enterprise and Regulatory Reform Bill which will introduce changes to dispute resolution procedures prior to a Tribunal, and which also

include arrangements for 'settlement agreements' and 'protected conversations' (although it is unclear how far these vary from existing arrangements such as compromise agreements and 'without prejudice' conversations. Proposals for 'no fault dismissals' have however now been rejected.

The Government has also confirmed its intention to change provisions within the Trade Union and Labour Relations (Consolidation) Act 1992 (TULRCA) which relate to the way employers consult workforce representatives during large-scale redundancies; a major change is reducing the 90 day 'redundancy consultation period' to 45 days. ACAS has been instructed to produce new guidance and it is likely the redundancy consultation changes will take place in the spring.

Therefore, as part of this over-arching review of employment law and employment rights, consideration on the rules around TUPE, is taking shape and proposals to change TUPE have been brought forward by Government. The consultation document on TUPE changes makes specific reference to public sector outsourcing stating *'The Impact Assessment regarding this consultation indicates that there are currently between 26,500 and 48,000 TUPE transfers taking place each year, with the number of employees affected likely to be between 1.42 million and 2.11 million per year. The number of transfers is unlikely to reduce in the future; indeed the Government's plans to reform the public sector and open public services will mean TUPE being applied in a growing number of situations'*.

Clearly the proposals are designed around a deregulatory framework, to remove what Government regards as unnecessary regulation, which it is claimed by some, hinders business and enterprise, and in the case of TUPE hinders public sector reform.

3. What are the proposed changes?

The areas for consultation set out by Government seek views on a number of aspects on the current TUPE Regulations 2006 and these include the following areas:-

Service provision changes: The term 'service provision changes' covers situations whereby a contract to provide a service to a client is let, re-let or ended by bringing the service back in-house. The 2006 Regulations set out a number of conditions that must be met in order to fall within the scope of the Regulations; the main one being that in the case of a service provision change an organised group of employees must exist immediately prior to the change, which has as its principal purpose, to provide the service in question to the client. For example in the case of a cleaning contract that is specific to a school then the staff working on that contract.

The consultation seeks views on whether this provision should be repealed bringing the Regulations back to their pre-2006 status; arguments in this regard centre around Government suggestions that the 2006 provisions have actually imposed unnecessary burdens on business. In theory, it is argued, the service provision changes work in favour of SMEs who can bid for work against incumbents in the knowledge that if they are successful they will inherit the staff to carry out the work. However, this also means they necessarily take on employment liabilities too, which can be a disincentive to bid. It is also argued re-tendering a contract often occurs where the client is unhappy with those working on it and knowing that if the contract changes hands, the same personnel would still be working on the contract is a reason not to bother re-tendering.

APSE comment: In the context of local authority contracts in areas such as traded services with schools, such as catering and cleaning, a more fragmented client base through the development of Academies and Free Schools, and greater devolved budgets can often result in outsourced service contracts. The service provision changes in this regard have helped local authorities manage this situation by ensuring that local employment, particularly within a predominantly female part-time workforce, continues. As well as the socio-economic benefits of this it also helps

avoid redundancy liabilities on the public purse. Whilst undoubtedly the Regulations are complex it would appear regressive to simply remove the service provision changes; in any event removal could still lead to legal challenge surrounding the non-application of TUPE and the scope of the EC Directive, as well as challenges surrounding redundancy and dismissals within domestic employment law. If an incoming contractor is unable to meet TUPE obligations it is questionable as to whether or not the business is a sustainable one, to undertake a service, for essentially a public sector client base.

Employee liability information the information which must currently be provided by the transferor to the transferee is set out in regulation 11(2) and essentially covers:

- The identity and age of the employee; the particulars of employment that an employer is obliged to give an employee (under section 1 of the Employment Rights Act 1996 / Article 33 of the Employment Rights (Northern Ireland) Order 1996)¹⁵; information about any disciplinary action, grievances, claims or possible claims in relation to an employee within the last two years
- Information of any collective agreement which will transfer over under regulation 5(a).
- Regulation 11 requires that this information is provided at least 14 days before the relevant transfer, unless there are special circumstances which make this not reasonably practicable. If there are special circumstances, the information must be provided as soon as reasonably practicable. The transferee can complain to an Employment Tribunal about the transferor's failure to provide the information, and may receive compensation if the failure is established.

The results of the Government consultation exercise found that many respondents complained that detailed information about employees was passed onto the new employer at the last minute (14 days prior to transfer); such delays created difficulties in areas such as setting up payroll arrangements. Some respondents also pointed to misperceptions about restrictions under the Data Protection Act (which have in fact already been clarified by the Information Commissioner in the case of TUPE transfers) and an inability to otherwise comply with obligations under Regulation 13 which relates to disclosure of measures upon transfer by the new employer.

The Government is therefore proposing to repeal the Employee Liability Information requirements in Great Britain (with the Northern Ireland Executive yet to make its own decision in that regard) and to amend Regulation 13; such an amendment to Regulation 13 (Duty to inform and consult representatives) will be made *'to make it clear that the Transferor should disclose information to the Transferee that is necessary for the parties to carry out their information and consultation obligations'*. Coupled with new guidance and model contract clauses the Government believes these measures will both simplify arrangements and encourage co-operation between the parties, since liabilities could be apportioned for failure by the parties to follow TUPE obligations.

APSE comment: There is currently much confusion on Employee Liability Information, with often genuine misunderstanding about what information could or should be disclosed, for example, lists of employees that could be anonymous but still contain sufficient detail to help the parties establish matters of liability. In many cases it is prudent to include better employment information as part of a tendering process. However, taking a deregulatory approach will not necessarily lead to less confusion, or indeed less litigation. The changes could send out a very mixed message to those involved in TUPE transfers. It is important for all parties to not only

understand but to comply with their TUPE obligations and for employees to have the security of knowing that a new employer is clear about their obligations.

Restrictions on changes to terms and conditions and protection against dismissal: The consultation paper references that TUPE contains restrictions on changes to terms and conditions. Under Regulation 4(4) an employee's terms and conditions cannot be varied – even if both parties agree to the change – if the variations are connected with the transfer. The only exception is where the changes are due to an economic, technical or organisational reason entailing changes in the workforce (otherwise known as an 'ETO' reason). Changes which are not connected to the transfer are permitted to the extent that they are permitted generally under the law (for example that they must be reasonable).

The consultation paper suggests that the Government is minded to amend current TUPE regulations along the lines of making it clear that the TUPE regulations should not prevent an employer and employee, where a contract of employment is, or will be, transferred, from agreeing a variation to that contract **if they could have agreed such a variation had there not been a transfer**. They also suggest that the Regulations should not prevent the employer and employee, whose contract of employment is or will be transferred, from agreeing a variation of that contract if the reason for the change is an economic, technical or organisational reason entailing changes in the workforce.

APSE comment: In the consultation itself it is recognised that any new provisions would need to be interpreted in line with the case law of the CJEU. So for example this would mean that even agreed change to terms and conditions, for the purpose of harmonising those terms and conditions, would not be permissible on the basis of the existing case law. Whilst Government argues that changes could reduce the risk of the Directive being interpreted in a way which is more restrictive than the original directive it provides cold comfort to both employers and employees. There is still huge uncertainty as to the efficacy of changes or the risks associated with the proposed changes. This could in fact therefore result in greater cost to employers and increased uncertainty, and possibly lead to more litigation from employees and their trade unions.

Economic, technical or organisational reasons for dismissal: The 'ETO' criteria is recognised by many as being at the heart of TUPE as the aim of the Directive is to avoid workers being placed, solely by reason of a transfer, in an unfavourable position to that which they previously enjoyed with the original employer. The Directive (and the current TUPE Regulations) provides protection against dismissal where the grounds for the dismissal is the transfer itself. However, this does not protect employees from dismissals for *'economic, technical, or organisational (ETO) reasons entailing changes in the workforce'*. Therefore currently under TUPE, where the sole or principal reason for a dismissal is the transfer itself or it is connected with the transfer, the dismissal is treated as automatically unfair for the purposes of unfair dismissal law, unless the reason is an ETO reason.

However there are a number of points that have been raised by Government during the consultation including ***dismissals arising from a change of location*** and ***dismissals based on future conduct of the transferee***. The consultation paper also raises concerns about the meaning of 'entailing changes in the workforce'. The consultation points out that the courts have confined '*entailing changes to the workforce*' to the numbers employed or to changes in the functions performed by employees, but that this does not follow the definitions of redundancy under the Employment Rights Act 1996, and therefore does not cover situations where there is a redundancy situation, in relation to the place of work, but which does not change the overall numbers of the workforce.

The papers explains that this means that if, because of the transfer, the transferee employer intends to carry on the business in a different location, but with the same number of staff overall,

then any dismissals as a result of the change of location will be automatically unfair (in respect of staff who have the applicable qualifying period for unfair dismissal purposes). This is narrower than the meaning of redundancy under the Employment Rights Act 1996 (and in Northern Ireland the Employment Rights (Northern Ireland) Order 1996) and a dismissal which could be fair on the basis of redundancy under that Act, could be automatically unfair under TUPE (because it does not entail a change in the workforce so is not classed as an ETO). Had there not been a transfer and the employer had sought to make the location change, then the dismissal would have been capable of being fair for unfair dismissal purposes. The Government is concerned that this could act as a barrier in outsourcing arrangements.

There is therefore a proposal that TUPE should be amended so that a change in the location of the workplace is within the meaning of 'entailing changes in the workforce' and therefore can be classed as an ETO. For employees dismissed by the employer in this situation, the proposed change would mean that although they would be unlikely to have a claim for automatic unfair dismissal, the usual protection against unfair dismissal, and in respect of redundancy, in the Employment Rights Act 1996, would still apply.

APSE comment: The Government has asked whether or not there is agreement that 'entailing changes in the workforce' should extend to changes in the location of the workforce, so that 'economic, technical or organisational reasons entailing changes in the workforce' covers all the different types of redundancies for the purposes of the Employment Rights Act 1996. This will be a thorny issue for local authorities that appear to be seeing increasing proposals from those tendering for public services to locate those services outside of current locations. With increasing use of remote technologies many will feel it is disingenuous to invoke TUPE at all if in reality the new employer simply intends to transfer the jobs and services to a new location.

Similarly the issue of '**dismissals based on future conduct of the transferee**' is raised in the paper. The effect of this principle is that a dismissal prior to transfer, which is connected with the transfer, is automatically unfair even if there is an ETO, but that ETO relates to the transferee's future conduct of the business (for example, that the transferee needs fewer employees to continue the work). If the transferor does dismiss employees who would have transferred in anticipation of the transfer, the liability for automatic unfair dismissal transfers over to the transferee. Hence the way to avoid this liability for automatic unfair dismissal (where there is an ETO) is for the employees to remain employed by the transferor and then be dismissed following the transfer by the transferee.

Government therefore argues that a number of respondents, to the call for evidence, raised concerns that these provisions are unduly restrictive and should be amended. It is argued that in some cases, employment is continued for longer than the business requires even though there is an ETO and that a transferee may have to employ the employees very briefly, in a location where it has no premises, (i.e. where the transferor was located) only to make them redundant.

The thrust of the argument from some business respondents is that the transferor should be able to rely upon the transferee's ETO to dismiss prior to transfer and the question should be whether the dismissal is fair in all the circumstances, rather than that it is automatically unfair. This is said to benefit employers with business planning, organisation and decreasing costs (e.g. it would spare employers the cost of keeping open redundant buildings).

Again for local authorities this would potentially prove to be a thorny issue. If the suspicion is that instead of TUPE staff are de facto entering into redundancy negotiations resistant to alternative

forms of service delivery, through outsourced contracts, is likely to be stepped up and resisted. Equally like the other changes proposed there is no guarantee that both parties to a transfer will not ended up wrapped up in legal wrangling, over both interpretations of newly amended Regulations and the purposes of the original Directive itself, which was to protect staff on the transfer of a business from simply being dismissed.

The treatment of TUPE, and companies who become insolvent, who are responsible for local authority contracts, such as the recent case of Connaught opened up many questions about TUPE and contract continuity so changes in this area will be closely followed by local authorities.

Duty to inform and consult representatives: The consultation paper ties together two issues of importance which relate to the duty to inform and consult on collective redundancy rules and interaction with TUPE information and consultation requirements (regulation 13). Government has already reduced the consultation rights on collective redundancy from 90 days to 45 days. The consultation on TUPE covers situations where there is an overlap between TUPE and redundancy consultation requirements, and which may affect the situation of employees and a future employer, prior to a transfer taking place. As a transferee employer is not actually the 'employer' before the transfer takes place, there is some doubt as to whether any consultation with transferring staff, prior to transfer, by or on behalf of the transferee, for collective redundancy purposes, can count towards satisfying redundancy consultation requirements. This, according to the respondents to the consultation means that as pre-transfer consultation cannot count, then the process is delayed, until after the transfer and any redundancies could not take effect until the end of the applicable period.

The Government sees advantage in allowing collective redundancy consultation by the transferee with the employees who are likely to transfer to take place before the transfer.

The Government has therefore proposed that it intends to legislate to enable pre-transfer consultation to count towards collective redundancy requirements; it does not intend requiring consultation by the transferee with the transferring staff prior to the transfer under either the collective redundancy consultation rules, or under TUPE. The Government argues that this approach would be *'too prescriptive and might detract from what is most appropriate in all the circumstances. It is noted that the TUPE regulations are designed to allow time for consultation, and such engagement will usually be advantageous from an employee relations perspective'*.

APSE comment: Whilst the over-laps in consultation requirements may seem to hinder discussions on post-transfer restructuring at the pre-transfer stage (which cannot currently take place) the suggested legislation, enabling pre-transfer consultation 'to count' could lead to more unscrupulous contractors using this mechanism to 'cherry-pick' which staff it wants to take upon a transfer. Equally there are likely to be barriers to this route, if for example a contract is lost from one contractor to a rival company, since it would depend upon information about the current workforce, and access to the current workforce, being made available to the incoming party. In the context of the length of redundancy consultation being reduced as well this could be seen as allowing fast-track redundancy to take place rather than a genuine commitment to the principles of TUPE. Equally however the current over-lap situation can create uncertainty for the staff involved in awaiting the passage of different timescales before being able to plan their future employment prospects.

There are also proposed changes to consultation requirements which relate to micro-businesses. It is argued that there should be amendments to the law in order to prevent breaches by small employers who have taken a proportionate approach to consultation and these changes are to allow consultation with individuals and would particularly apply to non-unionised workplaces.

However, if there is a recognised independent trade union, then there would still have to be consultation with its representatives and, likewise, if there are existing employee representatives, who would have authority to receive information and be consulted, they too would need to be consulted. The existing protections for employee representatives against dismissal and detriment would not be available to the individual employees, though there would be remedies for failure to inform and consult on an individual basis. The threshold for a 'micro-business' is likely to be along the same UK definition of a micro enterprise, which means a business with 10 or fewer employees.

Whilst at first glance this many seem insignificant, in respect of larger local authority contracts, it could become a potential issue in the context of the white paper on public service reform. The white paper seeks mechanisms for local authority contracts to be more readily available to small to medium enterprise, mutuals and cooperatives.

APSE conclusion: The proposed amendments to TUPE are complex and are likely to be contentious. Government has asked for final responses to the consultation by the 11th April 2013 and APSE will be submitting a response to this. If you have any further comments or queries that you would like APSE to place into our response please contact Mo Baines on mbaines@apse.org.uk