



The Law Society

**Law Society response to the Department for  
Business, Innovation and Skills Call for Evidence  
on the Effectiveness of the TUPE Regulations 2006**

January 2012

supporting  
solicitors

## Introduction

The Law Society is the representative body for more than 140,000 solicitors in England and Wales ('the Society'). The Society negotiates on behalf of the profession, and lobbies regulators, government and others.

This response has been prepared by the Society's Employment Law Committee ('the Committee'). The Committee is made up of senior and specialist employment lawyers from across England and Wales. Committee members provide advice and representation to employers and employees through practice in City and regional firms, local government, industry, trade unions and law centres. Some Committee members are fee-paid employment judges.

## **Clarity and Transparency of 2006 Regulations Overall**

### **Q.1 Have the 2006 amendments provided greater clarity and transparency on application of TUPE rules?**

Yes.

Employment Tribunal statistics do not provide a breakdown for the numbers of claims where the issue is the application of TUPE. However, the experience of practitioners is that the 2006 amendments have provided greater clarity about the application of TUPE and this has led to a reduced number of TUPE claims proceeding to the Employment Tribunal. The greater clarity is further confirmed by the greatly reduced number of appeals to the Employment Appeal Tribunal since the 2006 amendments, which deal with the application of TUPE. A significant advantage of the 2006 amendments is that they provide less room for argument and more certainty which means fewer burdens on business and greater security for employees.

Some uncertainties undoubtedly remain-for example in the context of fragmentation of services after a transfer (*Clear Springs Management Limited*), share transfers (after *Gillam v The Print Factory*) and the application of Regulation 3(5) (the *Henke* exclusion). Any review of the application of TUPE could usefully provide further clarification in these areas.

But the 2006 amendments have added clarity.

### **Q.2 Do the 2006 Regulations provide enough transparency around employment rights and obligations being transferred to ensure a smooth transition? If not, how could this be improved?**

Broadly, yes.

The problem area is in relation to changes to terms and conditions-when a change is by reason of the transfer, or for a reason connected with the transfer, and when a potential

ETO reason is available (please see our response to Question 10). There will always be problem areas- such as realigning profit-related pay and share scheme structures and grievance and disciplinary procedures. These may well be best dealt with under the existing provisions.

**Q.3 Do employers and commissioners generally comply with the transparency obligations under the 2006 Regulations? If not, are there particular problems around timing and/or accuracy of the information they provide; and are the problems particularly noticeable in respect to transfers from the public or private sector?**

In our experience employers and commissioners do comply, albeit grudgingly, especially where there is a change in service provision.

The statutory obligation on transferors to provide Employee Liability Information (ELI) only arises 14 days prior to transfer and this can be problematic for transferees. The problem can be exacerbated in second-generation outsourcing situations where the present provider (transferor) is not the 'client' and they need access to the transferor's ELI well in advance of transfer; often to conduct the tendering process. The difficulty can be overcome in outsourcing situations by contractual provisions requiring the transferor to provide information at an earlier date but such 'exit provisions' are not commonplace. Such provisions also do not assist in standard (Regulation 3(1)(a)) transfer situations. Increasing the statutory period, to perhaps 28 days, may assist.

Where a transferor does not comply with the ELI obligations there can be significant problems in enforcement. The transferee needs to demonstrate that a loss has resulted from the breach of statutory obligations and the remedy is financial (standard minimum of £500 per employee). The enforcement provisions do not compel the provision of the information.

**Service Provision Changes**

**Q.4 Does inclusion of service provision changes within the 2006 Regulations provide benefits in terms of increased transparency and reduced burdens on business? If yes, what are these benefits? If no, what additional burdens have resulted from their inclusion?**

Undoubtedly, yes.

See answer to question 1.

**Q.5 Have the 2006 amendments led to less need to take legal advice prior to tendering or bidding for contracts?**

Yes.

The experience of practitioners is that there is less need to take legal advice about the application of TUPE.

**Q.6 Have the 2006 amendments led to fewer tribunals resulting from service transfers?**

Yes.

See answer to question 1.

**Q.7 Is the inclusion of service provision changes in principle helpful, but there are alternative models for their inclusion that would lead to improvements? What might these look like?**

Yes.

Given that the purpose of the Regulations is the Protection of Employment, we agree that the inclusion of service provision changes in the TUPE Regulations is, in principle, helpful.

Prior to the 2006 Regulations deciding when outsourcing or the like was a relevant transfer needed to be dealt with on a case by case basis in the light of the 'tests' laid down by the ECJ in *Süzen*. That approach could be problematic, however, as questions of whether assets or workforce were transferring and, if so, to what extent, could dominate.

The widening of the scope of TUPE under the 2006 Regulations to include service provision changes has made this area of law less reliant upon precedents and has clarified the understanding of contractors and clients who are contemplating or involved in a service provision change.

Given the initial question is answered in the affirmative we have not considered the second element of the question about alternative models.

**Q.8 Should professional services be included in the definition of service provision and be covered by the Regulations?**

Yes.

Professional services should be included in the definition and be covered by the Regulations.

If the requirements of Regulation 3 are satisfied with regard to the provision of a professional service it is difficult to see why that service should not come within the ambit of the Regulations when a non-professional service would fall within the Regulations. Once more, regard should be had to the purpose of the Regulations: why should the employment of a solicitor not be protected when, in equivalent circumstances, the employment of a truck driver would be?

Any attempt to exclude professional services would also fall foul of the difficult task of defining what services are regarded as professional and then, in the light of that definition, deciding in a particular case what are and what are not professional services.

**Q.9 Would the exclusion of professional services lead to uncertainty over whether TUPE did or did not apply, requiring businesses to seek further legal advice?**

Yes.

The exclusion would lead to uncertainty requiring businesses to seek advice particularly with regard to the issue of defining professional services, which is referred to above.

**Harmonisation of Terms and Conditions**

**Q.10 Is the lack of provision for post-transfer harmonisation a significant burden? How might the regulations be adjusted to enable this whilst remaining in line with the Directive?**

Yes, although it depends on the perspective.

The lack of such provision can be a burden for transferee employers, which at times can be significant.

The inability to harmonise can also lead to equal pay issues. Whilst there is a defence to an equal pay claim of the differences being due to a TUPE transfer there are practical issues with employing a two (or more) tier workforce, particularly over a longer period. This can have even greater impact where there are public (e.g. civil service or NHS) to private sector transfers where 'broadly comparable' pensions rights are preserved under Fair Deal.

From the employer's perspective it also creates an anomaly with situations where there is no TUPE transfer (e.g. share sales) or where the employees have not been through a transfer at all. Whilst the Directive provides that contractual terms and conditions should be protected upon transfer the restriction on harmonisation means that those employees have additional protections than others in the workforce. Employers cannot unilaterally vary any

employee's contractual terms but in the case of TUPE transfers they cannot vary them at all, even with the employee's agreement, unless there is an ETO reason entailing changes in the workforce or the reason for the change is unconnected with the transfer.

It is probably right that variations because of the transfer (Regulation 4(4)(a)) should be void but it would be helpful if more flexibility could be introduced in relation to a variation for a reason connected with the transfer that is an economic, technical or organisational reason.

The difficulty with the present Regulations is the requirement that such an ETO reason must entail changes in the workforce and, further, that phrase has been interpreted in case law (eg. Berriman) as necessitating change in the numbers or possibly, functions of the employees. Relatively few contractual changes would involve such a change in the workforce and, from the employers' perspective the Regulations could be adjusted by addressing this 'overlay' applied by case law to provide that 'entailing changes in the workforce' can be much more than merely changing numbers or functions of employees.

Conversely, employees would argue that they are entitled under the Directive to transfer their contract of employment on all their current terms and conditions, and that there is not scope to restrict that right in domestic law. Employees would additionally argue that TUPE already deviates from the protections intended by the Directive in that it provides for contractual changes where there is an ETO reason entailing changes in the workforce.

**Q.11 Would it be helpful to have a provision limiting the future observance of terms and conditions derived from collective agreements?**

No.

While it would undoubtedly be regarded by employers as helpful to have such a provision, to do so would drive the proverbial 'coach and horses' through the employment protection purpose of the Regulations given that in certain industries the majority of terms and conditions are derived from collective agreements.

Dependant on the outcome in the case of Parkwood Leisure Ltd v Alemo-Herron & others, should it be held that there is a 'dynamic' interpretation of collectively agreed terms and conditions then it may be helpful, from the employers' perspective, to have a limitation under Article 3(2) to cap the period of time in which post-transfer changes by the transferor have to be observed. A 'dynamic' interpretation for an enduring period would arguably fetter the ability of the employer to manage the employment relationship.

**Q.12 Would it be helpful to agree with employees a renegotiation of their contract provided that overall the resulting contract was no less favourable than at the point of transfer?**

Undoubtedly, most employers would find such a provision helpful. Ever since the decision of the House of Lords in the conjoined appeals of Wilson and Mead and Baxendale most

people have considered it to be illogical that changes that employees have willingly agreed to are void, and can be declared to be void many years after the event.

Sufficient protection should be afforded to employees by the proposal that the resulting contract must be no less favourable. From the employees perspective it is not consistent with the purpose or intent of the TUPE legislation for renegotiation to take place. It is likely that any renegotiation will involve possible external pressure on employees to accept new or amended contracts.

**Q.13 Should more be done to clarify the application of TUPE in insolvency situations? If so, would this require changes to the legislation, for example, by setting out which insolvency procedures fall under which provisions, or would more detailed guidance than currently provided be sufficient?**

No.

On 20 December 2011, in Key 2 Law (Surrey) LLP v D'Antiquis and others, the Court of Appeal resolved the uncertainty which competing EAT decisions had produced with regard to whether TUPE applies to transactions out of administration and decided that administrations always fall within the scope of TUPE, thereby removing any ability to evade its application based on the precise circumstances in which administration was decided upon. Now that the Court of Appeal has clarified this issue there is in our view no need to make any changes to the legislation to clarify its application in insolvency situations as the main area of uncertainty has been removed. That said, if the current process leads to substantial amendments to TUPE, the introduction of revised Regulations would present a good opportunity to remove any doubt by specifying precisely which insolvency procedures fall within and outside the scope of TUPE both in relation to Regulation 8(7) and 8(6) of the 2006 Regulations.

**Q.14 Have the 2006 amendments meant that transferees ( ie businesses taking over the contract) have a greater awareness of potential liabilities, and has this helped to reduce transaction costs and risks? If not, how could this be improved?**

Anecdotally, yes.

We do not have precise survey or other statistical material available to form a fully informed view of whether the 2006 amendments meant that transferees have a greater awareness of potential liabilities and whether this has helped reduce transaction costs and risks. That said, anecdotally, the 2006 Regulations, particularly with regard to the introduction of the concept of the service provision change, have had and still have considerable visibility amongst transferees so the risk of parties becoming responsible for unexpected liabilities is perhaps reduced. The certainty that the service provision change concept has delivered and the information provision process which the obligations relating to employee liability information requires, have in our view reduced transaction costs and risks through the certainty they produce.

**Q.15 Should liability for pre-transfer obligations be transferred entirely to the transferee as is the case currently in the Regulations ie should the business taking on the contract take on all the liabilities of the business or part of the business they are taking over? Or should both parties be jointly liable, as permitted by the Directive**

No.

There is force in the argument that in line with some other European jurisdictions, liability for pre-transfer obligations should be joint and several (as is the case in respect of awards for failure to inform and consult under Regulations 13-15). From a commercial perspective, the argument for making liability for pre-transfer obligations joint and several is that it increases the likelihood of an employee being able to enforce any claim properly. Moreover, it can be argued that the mere fact of a TUPE transfer should not of itself absolve a transferor from liability for its defaults if the employee in question wishes to enforce his or her claim against the defaulting transferor employer, rather than the transferee employer with whom the employee may wish to maintain a relationship unscarred by litigation arising from historic events for which the transferee was not responsible.

The counter argument is that transferees stand in the shoes of transferors and should do so for all purposes. Providing for the transferee to be liable for pre-transfer obligations avoids complex litigation and disputes about the allocation of any compensation awarded as between the transferor and the transferee which can in many but not all circumstances protect itself by way of commercial indemnities against pre-transfer liabilities. Where the transferor ceases to exist, the current position also provides for employees to have a cause of action and, as indicated previously, the general awareness of TUPE provisions ensures that parties negotiate contracts mindful of the transfer of liability provisions. We are unaware of any particular level of concern at the current formulation.

**Q.16 Is the provision on 'Economic, Technical or Organisational reason entailing changes in the workforce' sufficiently clear? Would additional guidance be helpful and if so, in what form?**

Yes.

The combination of case law and existing Government guidance is in our view adequate in terms of explaining the provisions of the Regulations in respect of ETO reasons although, as set out in Question 10 above, it is the our view that the 'entailing changes in the workforce' element of the definition is restrictive. If new Regulations are implemented with new guidance, this would provide a good opportunity for existing guidance to be updated to reflect the case law developments since the Regulations came into force.

There is a further related issue. There is a lack of clarity as to when a dismissal (or variation) is by reason of the transfer-and therefore automatically unfair (or void)- and when a dismissal (or variation) is for a reason connected with the transfer-and therefore an ETO may be potentially be available. Additional guidance would be of assistance.



**Q.17 Are there other areas of TUPE that would benefit from additional guidance/clarification?**

Yes.

The specific areas where we consider that additional guidance and clarification would be helpful are:

- (i) the related topics of changing terms and conditions (see our answer to Question 12 above) and the ability of transferees to offer benefits of “substantial equivalence” to those enjoyed by transferring staff with the transferor where those benefits cannot be replicated or the parameters of the pre-transfer contractual entitlement do not read across sensibly to the transferee’s operations. Particular examples of items which can be problematic to deal with in this context include benefits and bonuses.
- (ii) the scope of Regulation 3(5). It has been established by case law (*Henke v Gemeinde Schierke*) that exclusion from the scope of the Acquired Rights Directive is not on the basis of the public-law nature of the bodies in issue but by the fact that the ‘*transfer relates to activities involving the exercise of public authority*’. There is currently no statutory definition of “exercise of public authority” or “exercise of public powers”. Case law currently indicates that administrative assistance to schools (*Scattalon*), telecommunications services (*Collino*), information services for a municipality (*Mayeur*) and home help services and surveillance services for the armed forces’ medical supplies depot (*Sanchez Hidalgo* and *Ziemann*) do not fall within that definition. However, inspection of further education and work-based training (*Beloff*) and legal complaints services (*Law Society of England & Wales*) do fall within the exemption and are excluded from the Directive. Clarification of the scope of Regulation 3(5) would assist in transfers involving public sector bodies where significant legal fees can be incurred by the parties in establishing a view of whether or not TUPE applies to the transfer.

**Implementation of TUPE in other EU Member States**

**Q.18 Do you have experience of the implementation of the Acquired Rights Directive (TUPE) in other EU Member States? If so, are there any problems you have encountered, or conversely are there lessons that the UK could learn, from their implementation of the Directive?**

No, aside from an observation that clients who have employees in various European jurisdictions often feel there is inconsistency (i.e. that the TUPE provisions are more stringent in England and Wales) because other European countries have not included service provision changes in their domestic legislation.

## **TUPE and other areas of employment law**

### **Q.19 Have you experienced problems from the interaction of TUPE with other areas of employment law?**

Yes.

- (i) Difficulties can be encountered in relation to unfair dismissal. For example, where a transferee is located many miles away from the transferor (outside of any reasonable area of mobility) then employees personally often have no option but to object to transfer. Whilst the transferee fully accepted TUPE applies to the transfer they nonetheless face unfair dismissal/breach of contract claims on the basis that they have made a significant change to the terms of employment (location of work) such that the employees feel they have no option but to object to transfer. TUPE does not provide any mechanism for dealing with such situations as it simply provides that the contracts transfer unless the employees object to transfer (in which case it will be treated as a dismissal by virtue of Regulation 4(9)). In practical terms many transferors and transferees will agree to consult on and share the costs of making redundancy payments to those employees who reasonably feel they cannot agree to the transfer, but in the absence of compromise agreements there is a risk of litigation.
- (iii) Where there are legal requirements for employment with the transferee that do not apply to the transferor there can be difficulty. For example, if there is a transfer of staff into the civil service under TUPE there can be a conflict where individuals do not meet the nationality requirements. Although they will have a legal right under TUPE to transfer the transferor is legally prohibited from employing them if they do not meet the civil service nationality requirements. Similar issues can arise where there are security clearance requirements with the transferee that the transferring employees cannot meet and which were not previously required for the performance of the role with the transferor.
- (iv) The inter-relationship between TUPE and equal pay law is complex and problematical both substantively and procedurally in relation to time limits and evidence. The Court of Appeal in Guttridge v Sodexho & Ors (2009) IRLR 721 accepted that once a claimant had established an equality clause with the old employer a contractual right to enforce that clause (but not the equality clause itself) transferred to the new employer under TUPE. This gave employees the right to bring equal pay proceedings against both the transferor and transferee employers but that right was time limited by section 2 and 2ZA the Equal Pay Act 1970 to six months after the termination of her employment with the transferor. The Court therefore found that the time limit for bringing a claim expired 6 months after the date of transfer. In terms of establishing a claim based on historical discrimination in pay, it is now common for claimants and comparators to end up employed by different employers post-transfer with the old employer holding much of the relevant documentary evidence. In practical terms TUPE transfer adds a further level of complexity to already complex discrimination claims.

**Q.20 The Government is also calling for evidence on collective redundancy consultation rules. Please identify any issues that you have in terms of how the TUPE Regulations and the rules on collective redundancy consultation fit together.**

- (i) There can be practical difficulties created by the fact that legally the transferor cannot use transferee's ETO reason to reduce the workforce prior to transfer. Likewise, the transferee cannot consult, pre-transfer, with their future staff on intended restructuring and possible redundancies post-transfer. In some cases, where the transferee is clear that they do not require some or all of the transferring staff (and do not have their own current staff doing similar roles) it can mean that employees transfer and immediately face the uncertainties of a re-organisation and/or a period of redundancy consultation. Whilst it is important to protect the rights of employees in transfer situations the practical effect can, in some cases, be to extend their period of employment and delay their redundancy for just a few weeks or months and this can have a significant detrimental effect on staff morale, business efficiency and cost for those involved.
- (ii) There can be difficulties for employers handling consultation when part of the workforce is transferring whilst another part are facing possible redundancy (e.g. in a business closure situation where a discrete part of the undertaking is being sold). The consultation periods and obligations on employers are substantially different.
- (iii) In practice, if employees wish to object to transfer because of contractual issues e.g. significant change in location then employers will often carry out the more lengthy redundancy consultation, in what is technically a TUPE situation and where the decision has already been made to transfer the undertaking, to avoid litigation.

**Q.21 Do you have particular concerns around the application of TUPE to different managerial levels of employees within the same organization? If so, what are these and how would you like to see them addressed, bearing in mind the requirements of the Directive?**

No, aside from the fact that there can be difficulties ascertaining the date of transfer in situations where management/senior staff are requested to assist the transferee in establishment and set-up before the transfer of function.

**Q.22 Have the developments in case law since 2006 raised issues that mean the 2006 Regulations would benefit from updating?**

Yes.

As set out in Question 17 above, case law on the application and extent of Regulation 3(5) has developed nationally and at European level since 2006 and statutory clarification would assist.

See also Question 16 above in relation to 'reasons connected with the transfer'.

**Q.23 Are there other areas of the Regulations that would benefit from change/review? Conversely, are there areas that it is important to keep?**

Yes. See Question 3.

The provisions in Regulation 14 for the election of 'employee representatives' may also be apt for review because, for smaller employers, they often have little practical effect. In practice employees in small businesses will not wish to go through the process of electing employee representatives or the staff levels will be such that employers will usually consult with all their staff and in effect they will all be 'employee representatives'.

It may also be appropriate to review the current provision that prevents employees from waiving, within a compromise agreement, their right to bring a claim in respect of the employer's failure to inform and consult under TUPE, or failure to pay compensation equivalent to a protective award.

**Q.24 Are there any other issues you wish to raise?**

Consideration should be given to extending TUPE protection to agency workers who have acquired rights under the Agency Worker Regulations 2010. At present, not being "employees", they have no protection under TUPE in the event of a transfer.