



The Law Society

Transfer of Undertakings (Protection of Employment) Regulations 2006: Consultation on Proposed Changes to the Regulations

Response to the BIS consultation

April 2013



The Law Society

The Law Society of England and Wales is the independent professional body, established for solicitors in 1825, that works globally to support and represent its 166,000 members, promoting the highest professional standards and the rule of law.

This response has been prepared by the Society's Employment Law Committee and reflects the expertise of solicitors with daily experience of putting employment law procedures into practice. Our interest in employment law and practice is to secure 'good law making', to provide clarity for employers and employees, and to avoid unintended consequences. We offer our expertise and experience to help government shape and tailor its policies accordingly.

Question 1a

Do you agree with the Government's proposal to repeal the 2006 amendments relating to service provision changes?

No. The repeal of the service provision would be regrettable as it would:

- increase the number of costly and damaging disputes affecting both transferors, transferees and employees,
- increase the risk of commercial and legal uncertainty, and
- reduce employee protections.

The 2006 amendments have provided greater clarity about the application of TUPE. This has led to a reduced number of TUPE claims proceeding to the Employment Tribunal. This is further confirmed by the greatly reduced number of TUPE appeals to the Employment Appeal Tribunal since the 2006 amendment. It has also led to a more streamlined and cost-effective process for businesses involved in outsourcing. Repealing the amendment would increase uncertainty, thus creating an increase in disputes.

The service provision change provisions were introduced in part to address the pre-2006 uncertainty under domestic and European case law in respect of whether there was a traditional transfer of an undertaking in relation to labour intensive activities. After *Ayşe Süzen Gelnacker Gebäudereinigung GmbH, Krankenhausservice* [1997] IRLR 255, ECJ there was a significant concern that employees would not be adequately protected in a situation where there was a transfer of labour intensive activities but the new provider of those activities refused to take on employees for whatever reason. As HHJ Burke QC put it in *Metropolitan Resources Ltd v Churchill Dulwich Ltd* [2009] IRLR 190, EAT, the service provision change provisions were introduced "to remove or at least alleviate the uncertainties and difficulties created, in a variety of familiar commercial settings, by the need under TUPE 1981 to establish a transfer of a stable economic entity which retains its identity in the hands of the alleged transferee, particularly in the case of a labour intensive operation." The introduction of these provisions created precisely the certainty and 'level playing field' upon which their introduction in the first place was justified, avoiding in the context of labour intensive activities the uncertainty and chaos of the pre-2006 case law.

It is in no party's interest to return the law to the pre-2006 position. There would be increased litigation with consequent increased burdens on employers, claimant employees and the tribunal system.

Given the outcome of the 2006 amendments the suggestion that the service provision change provisions is a gold plating of the Acquired Rights Directive is misguided.

The case law since 2006 has narrowed significantly the differences between service provision changes and traditional transfers of undertakings. It is clear from that case law¹ that there will not be a service provision change where on the putative change, the activities in question do not remain substantially the same or similar. *Ward Hadaway v Love* UKEAT/0471/09 indicates that the activities in question must actually transfer and that simply appointment to takeover new work falls outside the scope of the service provision change (SPC) provisions. Fragmentation of service providers may take a situation outside the scope of the SPC provisions². The requirement that there be an organised grouping of employees whose principal purpose is the performance of the functions which are the subject of the putative service provision change has been interpreted in a strict manner³. Also, the client must remain the same on a putative service provision change as confirmed by the Court of Appeal in *McCarrick v Hunter* [2013] IRLR 26, CA.

As the differences between traditional transfers of undertakings and service provision changes have now further narrowed, the principal function of the service provision change provisions is to avoid TUPE failing to apply in circumstances where labour intensive activities, but not the associated employees, are transferred by outsourcing, retendering or in housing.

The SPC provisions also ensure a level playing field around which parties can, where possible, negotiate by way of contracts to allocate liabilities appropriately, to avoid dispute and minimise risk.

The experience of legal practitioners is that since the 2006 amendment there has been less need for organisations to take legal advice about the application of TUPE or for such disputes to be taken to employment tribunals. The gold plating problem may have arisen because the 2006 Regulations introduced the Category A and Category B concept. In reality, TUPE applies to most forms of outsourcing, insourcing and second round tenders, as encapsulated in the concept of service provision change. Perhaps the solution would be to abandon the unnecessary gloss of the Category A and Category B distinctions but retain the concept of service provision change as part of one, general definition of when TUPE applies.

¹ See cases such as *Metropolitan Resources Ltd v Churchill Dulwich Ltd (in liquidation)* [2009] IRLR 190, EAT, *OCS Group UK Ltd v Jones and another* UKEAT/0038/2009, *Nottinghamshire Healthcare NHS Trust v Hamshaw and others* UKEAT/0037/2011 and *Johnson Controls Ltd v Campbell and another* UKEAT/0041/12.

² As demonstrated by cases such as *Clearsprings Management Ltd v Ankers* UKEAT/0054/08 and *Enterprise Management Services Ltd v Connect-Up Ltd and others* [2012] IRLR 190 EAT.

³ In cases such as *Argyll Coastal Services Ltd v Stirling* UKEATS/0012/11 and *Eddie Stobart Ltd v Moreman and others* [2012] IRLR 356.

Question 1b

Are there any aspects of the pre-2006 domestic case law in the context of services provision change cases which might need to be considered with a view to help ensuring that the test in such situations is aligned with that in the Directive (as interpreted by the Court of Justice of the European Union)?

If the proposal to repeal the service provision change provisions proceeds, and the Government's policy objective is to ensure that the principle established in *Ayşe Süzen* gains primacy in UK law⁴ then the amended legislation would need to address the case law⁵ with regard to the motive of the alleged transferee in not taking on staff. It would also need to address the analysis in *RCO Support Services Ltd v Unison* [2002] IRLR 401, CA in which *Ayşe Süzen* was considered to have been overstated in its importance.

Quite apart from the fact that the Law Society's view is that the service provision changes should be retained, any such amendment dealing with the *ECM* and *RCO* lines of authority would be fraught with potential difficulty. Depending on how the legislation was amended there might then be challenges. It could be arguable that it would unduly fetter the generality of the *Spijkers* factors, clearly established by the European Court of Justice as being the test by reference to which it should be established, as to whether there is a transfer of an undertaking.

Question 2

If the Government repeals the service provision changes, in your opinion, how long a lead in period would be required before any change takes effect?

(i) less than one year (ii) 1 - 2 years (iii) 3 - 5 years (iv) 5 years or more

As outlined in our answer to Question 1, removing the service provision change will cause problems. If the Government is minded to proceed the lead in period should be for as long as possible.

Do you believe that removing the provisions may cause potential problems? If yes, please explain your reasons.

A lead in period of 5 years or more will maximise the period over which commercial parties will be able to manage their work forces in order to address the consequences of the repeal. It will also give organisations the best chance of managing the potential uncertainty and additional liabilities.

⁴ Such that absent transfer of all or the majority of relevant employees there would be no TUPE transfer on a transfer of a service contract "without more".

⁵ *ECM (Vehicle Delivery) Ltd v Cox* [1999] IRLR 559, CA and other cases.

Question 3

Do you agree that the employee liability information requirements should be repealed?

No. The employee liability information requirements set out in the 2006 Regulations should not be repealed. Where there is no direct contractual relationship between the transferee and the transferor, the employee liability information requirements provide important protections, not only for the transferee⁶, but also for the employees by ensuring that their entitlements, as against the transferee, are clear. The assumption that in most TUPE transfers there is usually co-operation between the parties may be correct, but it does not justify removing protection from those without the commercial or other leverage necessary to ensure contractual protection or secure co-operation.

If any amendment is to be made then the employee liability information requirements of regulation 11 should be retained and expanded. This will enhance the protection of the smooth handling of a transfer process which they already provide. It would be helpful for two amendments to be made to the obligation to provide employee liability information. Both these amendments would address the concern that the employee liability information obligations are not working properly in some instances.

First, in terms of timescale, it would be helpful for the obligation to be to provide the information at an earlier stage than the long stop date of 14 days before transfer. In practice, 14 days too often becomes the default timing for provision of the relevant information. It would be preferable if the employee liability information were required to be provided as far in advance of transfer as reasonable practicable, or far enough in advance of transfer to enable the transferee to identify, and inform the transferor of, any measures it will take. This is a practical way of ensuring that transfer arrangements are effected smoothly and without undue haste. Bringing forward the obligation to provide employee liability information would facilitate the transfer process and improve the ability of employers to make speedy and effective decisions about staffing matters in relation to TUPE transfers.

Second, it would be helpful for the categories of employee liability information required to be provided to be expanded. This could include:

- full copies of employees' employment contracts,
- details of all applicable confidentiality and restrictive covenant provisions,
- details of all applicable employee consultation arrangements,
- copies of all applicable recognition agreements and collective agreements, and
- any contractual, customary and redundancy payments.

b) Would the answer be different if the service provision changes were not repealed?

No. The employee liability information obligation is important regardless of the form of the transfer in question - not least as it protects transferees in relation to any TUPE transfer who do not have the benefit of warranties, indemnities and other specifically negotiated transfer provisions.

⁶ In terms of knowing which employees it will inherit and on which terms.

c) Do you agree, that there should be an amendment to regulation 13 to make clear that the transferor should disclose information to the transferee where it is necessary for the transferee and transferor to perform their duties under that regulation?

It would be helpful to make an amendment to regulation 13.

For a transferee to understand the liabilities which it will be inheriting, and to be able to identify any future measures, the transferee needs to be in full possession of the facts. They also need to be made aware of the relevant information far enough in advance of the transfer to have time to make decisions. As noted above, it would be appropriate to calibrate the timing of the obligation. This will provide employee liability information by obliging the transferee to inform the transferor of the measures which it proposes to take.

However, the Law Society believes that the prescriptive nature of the employee liability information obligation, and its statutory footing as an obligation, is the preferable way of ensuring efficient transfers. A specific obligation and timeline, enforceable by specific penalties, is preferable to the uncertainty and increased regulation which could result from the incorporation of a generic information obligation into regulation 13 requiring transferors to provide transferees with enough information to enable them to assess the situation with regard to measures.

Question 4:

Do you agree with the Government's proposal to amend the restrictions in regulation 4 on changes to terms and conditions so that the restrictions more closely reflects the wording of the Directive (article 4, which is in relation to dismissals) and the CJEU case law on this subject?

Yes, although we do not necessarily agree with the drafting set out at 7.42. Agreeing changes that could have been agreed had there not been a transfer is prohibited under the CJEU's interpretation of the Directive if the reason for the change is the transfer.

We agree that it would be sensible for TUPE to adopt the wording 'transfer itself' as used in the case law and Article 4. That wording is clearer than 'by reason of the transfer'.

(a) If you disagree please explain your reasons

n/a

(b) Do you agree that the exception for economic, technical or organisational (ETO) reasons entailing changes in the workforce should be retained?

Yes. If TUPE is amended to refer to the 'transfer itself' (or 'by reason of the transfer'), in accordance with Article 4 for dismissals, guidance would be required on when an 'ETO reason entailing changes in the workforce' justification could be used to make post-contract variations.

Question 5:

The Government is considering using article 3.3 of the Acquired Rights Directive to limit the future applicability of terms and conditions derived from collective agreements to one year from the transfer. After that point variations to those terms where the reason was the transfer would be possible provided that overall the change was no less favourable to the employee. Is this desirable in your view?

Yes. A cap would be helpful, from an employer's perspective, given the Advocate General's opinion in *Parkwood Leisure Ltd v Alemo-Herron & others* which indicates that under TUPE a 'dynamic' interpretation will apply to collectively agreed terms.

(a) Please explain your answer

In sectors, particularly the public sector, where a large proportion of employees' terms are set out under collective agreements many of those agreements state that terms can be amended 'from time to time' as agreed with national/local negotiating bodies. Where the transferee is not a member of those national bodies the employer's ability to manage the employment relationship and the terms of employment will be fettered under the 'dynamic' interpretation. Placing a cap on the period of time in which those provisions remain 'dynamic' in line with Article 3(3) would limit that effect and would allow employers, employees and trade union representatives to negotiate terms suitable for that workplace going forward.

Such a cap would not change any contractually incorporated collectively agreed terms, which are 'static' in nature (i.e. do not have a 'time to time' element) and are in existence at the date of transfer (e.g. a contractually promised 3 year pay deal). The employees would not be placed in a less protected position after the capped period expires than if there had not been a transfer. The employer would not be able to make any contractual changes because of the 'transfer itself' without an ETO reason entailing changes in the workforce.

(b) Do you agree that there should be a condition that any change after the one year period which is by reason of the transfer should be no less favourable overall than the terms applicable before transfer?

Yes.

(c) If the outcome of *Parkwood Leisure v Alemo-Herron* litigation is that a static approach applies under TUPE do you think that such an approach would provide useful flexibility for changing such terms and conditions? Please explain your answer

In the event that there is a static approach (which is unlikely given the Advocate General's opinion of 19 February 2013) then any collectively agreed terms that are contractually incorporated should only be varied in line with usual contractual principles. The employer should negotiate variation of those terms as any other term of the contract.

Any unincorporated terms in collective agreements are provisions that can be amended and renegotiated. If a cap is applied to collective agreements this may provide an opportunity for the entire agreement to be renegotiated earlier (depending

on the duration of the collective agreement) but this can occur in any event prior to the expiry of the agreement.

(d) Do you think there are any other changes that should be made regarding the continued applicability of terms and conditions from a collective agreement (bearing in mind the limitations of Article 3(3) of the Directive)?

No.

Question 6:

Do you agree with the Government's proposal to amend the wording of Regulation 7(1) and (2) (containing the protection against dismissal because of transfer) so that it more closely reflects the wording of the Directive (article 4) and the CJEU case law on the subject?

Yes. We agree that it would be sensible for TUPE to adopt the wording 'transfer itself' as used in the case law and Article 4.

There is some confusion about the difference between dismissals (or variations) which are by reason of the 'transfer itself' prohibited and those which are for a reason 'connected with the transfer' thus permitted if there is an ETO reason entailing changes in the workforce. Guidance is required on this matter.

(a) If you disagree please explain your reasons

n/a

(b) Do you agree that the drafting of restrictions to terms and conditions in regulation 4 and the drafting of the protection in relation to dismissal (regulation 7) should be aligned?

Yes.

Question 7

Do you agree that TUPE should be amended so that regulations 4(9) and (10) are replaced by a provision which essentially copies out article 4(2) of the Directive?

Yes – the proposed change is a sensible amendment to the regulations.

However, the proposed change will do nothing to address one of the main difficulties practitioners face when advising their clients – where the liability for a dismissal arising under regulation 4(9) rests? Is it with the transferor or transferee? Clarification of this point, either in the regulations or the detailed guidance, would be welcome.

Question 8

Do you agree with the Government's proposal that 'entailing changes in the workforce' should extend to changes in the location of the workforce, so that 'economic, technical or organisational reason entailing changes in the workforce' covers all the different types of redundancies for the purposes of the Employment Rights Act 1996?

Yes – the construction of the economic, technical or organisational (ETO) reason should match the definition of redundancy as proposed.

Question 9

Do you consider that the transferor should be able to rely upon the transferee's economic, technical or organisational reason entailing changes in the workforce in respect of pre-transfer dismissals of employees?

Yes, in limited circumstances and subject to several caveats.

For employers the current regime is on occasion unwieldy since it can require consultation to be carried out under TUPE by the transferor⁷ and again by the transferee⁸. The position is even more onerous where the transferee proposes to undertake 20 or more redundancies as a result of a TUPE transfer as this imposes additional collective consultation requirements under section 188 TULR(C)A 1992.

In either case, the current regime gives rise to the inefficient practice of the transferor consulting under TUPE pre-transfer about the transferee's proposed redundancies (as regulation 13 measures) and the transferee then individually (and potentially collectively) consulting about the same proposals post-transfer. This can amount to a clear duplication of effort with consultation effectively being carried out on the same subject matter twice.

For transferred employees the longer period of post-transfer consultation required under the exiting regulations increases their period of paid work and the time they have in which to find alternative work.

Dismissal by the transferor, in reliance on the transferee's ETO, means that issues such as common pooling and selection across both employee groups will be avoided. This in turn could lead to the transferring employees being automatically selected for redundancy i.e. the transferee choosing to dismiss just the transferring employees rather than taking a more balance approach across the entire workforce post-transfer.

One of the main protections afforded by TUPE is to protect the employees of an undertaking acquired by a transferee – and historically this has included seeking to avoid a buyer of a business from downsizing staff pre-transfer in order to acquire only the assets or goodwill of a business without its underlying workforce.

The transferor should not borrow the transferee's ETO if by doing so they significantly undermine employee protections.

⁷ On the basis a post transfer redundancy is a "measure" under regulation 13.

⁸ As part of individual redundancy consultation post-transfer.

Question 10

Should there be an amendment to ensure that any actions of the transferee before the transfer takes place count for the purposes of the requirements to consult on collective redundancies (under the Trade Union and Labour Relations (Consolidation) Act 1992), therefore allowing consultations by the transferee with staff who are due to transfer to count for the purposes of the obligation to consult on collective redundancies?

Yes.

As the consultation suggests, in circumstances where a dismissal for redundancy is to take effect immediately on or after transfer, there is a logical conundrum which the law has not solved. The transferee cannot inform and consult for collective redundancy purposes with the transferor's employees because they are not their employer until transfer. The transferor also cannot do so because it will not be the party dismissing.

If there is co-operation between the parties, a legal fiction can be created by providing for joint information and consultation, in advance, backed by appropriate indemnities. However, those provisions are not always possible, particularly when the parties are in competition (e.g. a competitive second round tender). In any event, they do not bind the employees or their representatives. This always leaves the transferee theoretically vulnerable to a claim for failure to inform and consult, whatever arrangements are agreed between the parties.

The fictional consultation process is usually designed to include the obligations under both TUPE and collective redundancy even though the process for information and consultation under each law is different. This situation needs to be resolved. TUPE consultation is about the impact of a proposed transaction while redundancy consultation involves an attempt to avoid dismissals for redundancy. A proposed redundancy is a measure which needs to be included in TUPE consultation but, without much more significant changes to the law than is envisaged here, consultation about the redundancy measure does not require the provisions of s.188 of TULR(C)A 1992 to be incorporated into the TUPE consultation.

What is needed is one or both of the following changes to TULR(C)A 1992:-

- (i) Despite not being the employer at the time of consultation, the transferee may inform and consult with employees about a proposed redundancy exercise which will not take place until after transfer; and/or
- (ii) If the transferee becomes involved in a consultation process for TUPE before transfer, which includes reference to the proposed redundancy exercise as a measure, that will suffice for collective redundancy purposes. (This would mean not having to satisfy most of the requirements of s.188).

A fair redundancy selection process rightly requires pooling the transferee's employees with the employees transferring over. What complicates the exercise is the practical issue of who can realistically carry out a fair assessment. It may be hard for the managers of the transferee to best judge because they do not know the transferred workforce. It would help if there was advice as to how to best resolve

practical considerations such as these. Unless this is done it is likely that transferees will be reluctant to take advantage of any permission to engage in information and consultation with the transferor's employees.

The Government proposes to leave the choice of whether to inform and consult before the transfer to the parties, rather than make it compulsory. This is correct, as sometimes the redundancy exercise can be properly carried out long enough after the transfer to avoid the conundrum.

Question 11

Rather than amending Regulation 13(11) to give clarity on what a 'reasonable time' is for the election of employee representatives do you think our proposal to provide guidance instead would be more useful?

Yes.

The proposal to provide guidance would be more useful than attempting to give clarity through legislation, for the reasons set out in paragraph 7.92 of the consultation.

In our response to Question 12, we point out some anomalies in the approach to micro businesses. However, a reasonable time for such businesses could be quite short, whereas such a period for larger businesses may need to be longer, in order to allow for the employer's invitation to be considered. This is particularly important because the impact of applying regulation 13(11) appears to be that the employees would then be entitled to receive information but not be consulted.

Question 12

Do you agree that regulation 13 should be amended so that micro businesses are able to inform and consult with affected employees directly in cases where there is not a recognised independent union, nor appropriate existing employee representatives (under regulation 13 (3)(b)(i)), rather than have to invite employees to elect representatives?

Yes. The Law Society recognises that micro businesses without existing representatives will often prefer to consult the workforce directly.

That said, the problem identified in the consultation paper is not as significant as might appear. The same result of dealing directly with affected employees can be brought about by relying upon Regulation 13(11). Thus, having discussed and agreed this approach with their employees, employers can invite affected employees to elect representatives. If the employees decline or fail to do so, the employers are able to deal directly with those employees. The employer can also get around the problem by making all the employees representatives.

Strictly, however, that approach only requires employers to give the information to the employees and not to consult them. The Law Society would not wish that to be translated into any amendment such as is proposed in the consultation paper. On the contrary, we agree with the proposal that businesses should be required both to inform and consult directly with affected employees.

The threshold of ten or fewer employees is appropriate. The threshold should not be applied to twenty employees as the position in relation to the Collective Redundancy Consultation Scheme (far from being not an exact analogy as is mentioned in the Consultation Paper) serves a completely different purpose.

Question 13

Do you agree that micro businesses should be included under all the proposed amendments to the TUPE regulations?

Yes. The Law Society agrees with the arguments advanced in paragraph 7.106 of the consultation paper.

We cannot identify any aspect of the proposed changes that are likely to impose additional costs on micro businesses.

Question 14

Do you agree that apart from the proposals in relation to service provision changes, there are no other proposals which give rise to the need for a significant lead-in period?

Yes, depending upon what is meant by significant lead-in period. Clearly businesses will need time to adjust to other changes⁹ but the typical lead-in period for such changes, coupled with the usual transitional provisions and savings referred to at paragraph 7.107 of the consultation paper will suffice.

Question 15

Have you any further comments on the issues in this consultation?

No.

Question 16

Do you feel that the Government's proposals will have a positive or negative impact on equality and diversity within the workforce?

The impact of the Government's proposals on equality and diversity within the workforce is, by and large, likely to be neutral. One exception could be the proposal to expand the meaning of "entailing changes in the workforce" to cover changes in the location of the workforce. One can well imagine that such an amendment will impact adversely on less mobile employees, including lower wage earners and secondary earners, or those with caring responsibilities¹⁰.

⁹ Such as the proposed repeal of the requirements in respect of the provision of employee liability information.

¹⁰ These groups are more likely to be women.