Employment Law

Simpson Millar LLP Solicitors

www.simpsonmillar.co.uk

February 2014

Changes to TUPE from 31st January 2014

The Transfer of Undertakings (Protection of Employment) Regulations 2006 (TUPE) implemented the EU Acquired Rights Directive ("the ARD"). TUPE governs transfers usually from sellers of a business (transferor) to buyers of the business (transferee). If TUPE is applicable, employees of the transferor become employees of the transferee on their existing terms of employment.

The previous position was that if the transferee made any changes to the terms of employment of the transferring employees, these were void if the reason for the change was the transfer itself or a reason connected with the transfer which was not an 'economic, technical or organisational reason entailing a change in the workforce' (ETO). Similarly, if any employees were dismissed, the dismissal would be automatically unfair if the sole or principal reason for the dismissal was the transfer itself or a reason connected with the transfer that was not an ETO reason.

Early last year, the Government published a Consultation asking the public for their view on how TUPE could be improved. In September 2013, the Government published its Response to the Consultation listing a number of amendments to the Regulations. The stated aim of the amendments was to increase the effectiveness of the UK labour market and make the transfer process fairer for both employers and individuals. However, the TUC warned that the Government's plans to 'weaken' the TUPE regulations would 'drive down terms and conditions for vulnerable workers and make privatisation cheaper and quicker'.

The draft Regulations were published on 31 October 2013 and came into force on 31 January 2014.

Service Provision Change

For TUPE to apply to a change of service provider the activities carried out before and after the change now have to be 'fundamentally the same'.

Under Regulation 3(1)(b) there is a relevant transfer where 'activities' cease to be carried out by the client and he either hires a contractor to do the work, engages another contractor to carry out the work in place of the first contractor or decides to carry out the work in house. This is known as a service provision change. (The term 'contractor' is defined to include a sub-contractor so a service provision change can include a contractor sub-contracting work and changes of sub-contractor.)
A new Regulation 3(2A) defines 'activities' as 'activities which are fundamentally the same as the activities carried out previously'. This means that a change in the service provider will not necessarily mean that TUPE applies, for example, if the new contractor provides the service in a different way.
The TUC has commented that this will affect low-paid workers such as cleaners or workers in social care and catering, where work is usually outsourced and it is more likely to have a greater adverse impact on women, who tend to be hired for work in this arrangement, than on men.

Employee liability information

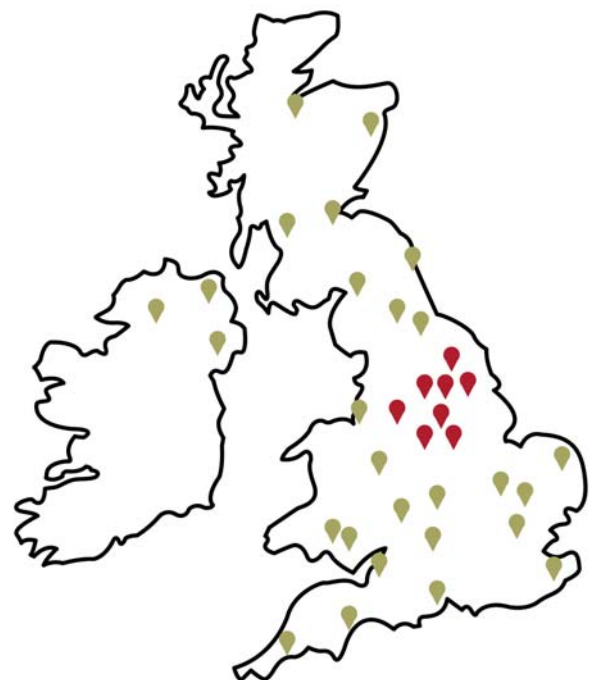
Transferor to provide information to transferor at least 28 days before the transfer.

Regulation 11 places a duty on the transferor to provide specific information to the transferee prior to the transfer. Regulation 11(2) provides a list of the type of information to be provided including the identity and age of the employee, information on any current disciplinary or grievance procedures and collective agreements which will have effect after the transfer. Regulation 11(6) stated that this information must be provided not more than 14 days before the transfer. Many of the responses felt that 14 days was too short a time and the Government has amended Regulation 11(6) so that the information will now need to be provided 28 days before the transfer. (There will still be the exception for "special circumstances"). The new timescale will only apply to transfers which take place 3 months after the amended Regulations come into force on 31st January 2014. It is hoped that if the transferee receives this information earlier, they can plan earlier in relation to the process and so comply with its obligations to inform and consult affected employees sooner.

Weaker Restriction on Changing Terms and Conditions after a Transfer

The old regulation 4(4) stated that a variation of a contract will be void if the sole or principal reason for the variation is the transfer itself or a reason connected with the transfer that is not an economic, technical or organisational reason entailing changes in the workforce. Regulation 4(5) only allowed a variation if the sole or principal reason for the changes is unconnected with the transfer or a reason connected with the transfer that is an ETO reason. The new Regulation 4 changes the ‘the sole or principal reason’ to simply ‘the reason’. This means that any variation will only be void if ‘the reason’ for the variation is the transfer itself and there is no ETO reason. This appears to mean that the ETO defence will now apply where the reason for the variation is the transfer itself. It is uncertain as to whether or not this complies with European law. In any event, there are likely to be many cases where it is difficult to draw the line between a change due to the transfer and a change due to a reason connected with the transfer.

There is a new Regulation 4(5)(b) where a contractual variation will be permitted if the reason for the variation is the transfer and the terms of that contract allow the employer to make the variation. There is case law that such clauses permitting a variation are restricted to the circumstances at the date the contract was entered into, for example a mobility clause will be restricted post transfer to the transferor’s geographical location and a transferee will not be able to rely on it to transfer an employee to one of its locations.



Weaker Restriction on Changing Terms and Conditions Governed by a Collective Agreement after Transfer

The ARD provides that member states can provide that terms in a collective agreement can be changed one year after the transfer. TUPE did not contain any such provision. Regulation 4(4) is now amended to allow an agreed variation to the terms of a collective agreement after a year by reason of the transfer itself, for example to harmonise terms post transfer. This change gives employers more flexibility to cut pay and change terms post-transfer. However, such a change is subject to the proviso that the new terms must be 'no less favourable' overall.

Regulation 4(2)(a) states that on a relevant transfer, all the transferor's rights, powers, duties and liabilities under or in connection with any such contract are transferred to the transferee. It was unclear how this applied to collective agreements which were incorporated into employment contracts which were amended from time to time. It was uncertain whether a transferee post-transfer was subject to agreed terms which had not been negotiated (dynamic approach) or whether a transferee was only bound to those collective terms that applied at the point of the transfer (static approach). The Government has amended the Regulations to provide for the static approach. A new Regulation 4A is now inserted to state that 'where a contract incorporates provisions of collective agreements as may be agreed from time to time, Regulation 4(2) does not transfer any rights, powers, duties and liabilities if the provision of the collective agreement is agreed and comes into force after the date of the transfer and the transferee is not a participant to the collective bargaining'.

Weaker Protection against Dismissal due to Transfer

Regulation 7 stated that an employee's dismissal will be automatically unfair if, either before or after the transfer, the employee is dismissed if the sole or principal reason is the transfer itself or a reason connected with the transfer which is not an ETO reason. Regulation 7(2) provided that a dismissal will be potentially fair if the sole or principal reason is a reason connected with the transfer that is an ETO reason. During the call for evidence, concerns were raised that Regulation 7 went wider than the ARD because it covered cases where the sole or principal reason is 'connected' to a transfer which is not reflected in the ARD. The responses also raised that there was no definition for an ETO reason and that it did not cover changes in location. Regulation 7 is now amended so that a dismissal will be only be automatically unfair if the reason for the dismissal is the transfer. Even then, a dismissal will still be potentially fair if it takes place for an ETO reason. Before, an ETO reason had to be for an economic, technical or organisational reason entailing a change in the workforce. The new Regulation 7(3A) defines 'changes in the workplace' to include a change of place where the workforce is to work. This change is intended to make it easier for transferees to dismiss employees because it has removed dismissals that are only 'connected' with the transfer and prevents redundancies because of a transfer due to a change of location from being automatically unfair under TUPE.

Transferor Can Now Consult About Proposed Collective Redundancies of Transferring Employees before the Transfer

Where redundancies take place after a TUPE transfer, there may be obligations which overlap in relation to informing and consulting under TUPE and over collective redundancies. The Government supported the view that consultation should be allowed to start before the transfer so that the transferee could consult with the transferring employees about proposed collective redundancies prior to the transfer. Regulation 3 of the new Regulations introduces new sections 198A and 198B of the Trade Union and Labour Relations (Consolidation) Act 1992 stating the conditions which apply to pre-transfer consultation. Consultation before the transfer can now count for the statutory obligations to consult over collective redundancies if the transferor and transferee can agree and where the transferee carries out a meaningful consultation. It is hoped that this will prevent additional costs on transferees and reduce the impact on employees who may have to go through two consultation processes. There is no obligation on the transferee to consult prior to the transfer.

New Government Guidance on TUPE

The Government has published a new guide to TUPE taking into account the changes which can be found at https://www.gov.uk/government/publications/tupe-a-guide-to-the-2006-regulations. The new guidance states that it is to help employers, employees and their representatives understand the TUPE Regulations and to help them comply with their legal requirements. It gives examples of factors to be taken into account in deciding what is a 'reasonable' time to elect representatives. It also provides further guidance on the duty of the transferor to disclose employee liability information to the transferee and on when dismissals will be automatically unfair.

Small Businesses Will Now be able to Consult Affected Employees Directly Where there is no Trade Union or Elected Employee Representatives

The Government felt that the consultation requirements under Regulation 13 were too onerous on micro-businesses. There is now a new Regulation 13(A) to allow micro-employers to inform and consult affected employees directly where there is no independent Trade Union or any elected employee representatives. This will only apply to an employer who employs fewer than 10 employees. The aim of this amendment is to reduce the burden on smaller businesses. This will only be applicable to transfers take place after 31st July 2014 after the Regulations have come into force.

www.simpsonmillar.co.uk

Calls may be charged and costs may vary depending on your service provider. © Simpson Millar Solicitors LLP 2014. This newsletter contains information on current legal issues applicable at the time of printing. Note there may have been changes subsequently that have not been incorporated in to this material. This newsletter is intended for information purposes only and it's content should not be applied to any particular set of facts or relied upon without legal or other professional advice. Simpson Millar are a limited liabiliy partnership in England and Wales. No. OC313936. Registered office is: 27 St Paul's Street, Leeds LS1 2JG. Vat number: 235 9349 40. Authorised and regulated by the Solicitors Regulation Authority: Registration no: 424940.