

The Transfer of Undertakings
(Protection of Employment) Regulations 2006
("TUPE")

1. History

The original regulations, TUPE 1981, were introduced by a statutory instrument in 1981 to give effect to the Acquired Rights Directive ("the Directive") which had been adopted in 1977. The underlying Directive was revised in 1998 and consolidated in 2001, requiring member states to amend their implementing legislation to ensure compliance with the revised Directive. In the UK, the DTI issued consultation papers on their proposed revised regulations in September 2001 and March 2005. Some amendments to pensions issues were implemented by the Pensions Act 2004 and the Transfer of Employment (Pension Protection) Regulations 2004. The main revision is now however found in TUPE 2006. These new regulations were placed before Parliament on 7 February 2006 and are due to come into force on 6 April 2006. In addition to the regulations, the DTI has published a guidance note and an explanatory memorandum which can be found at www.dti.gov.uk/er/regs.htm. All references to specific regulations in this briefing note are the numbered regulations in TUPE 2006.

The underlying object of both TUPE 1981 and TUPE 2006 is the protection of employment and employment rights following the transfer of a business. The purpose of the Directive was to safeguard employees' rights in the event of transfers of undertakings, businesses or parts of businesses.

Courts in the United Kingdom are obliged to adopt a "purposive" interpretation of the Regulations, and in some cases the Directive may be relied upon directly by an employee. A significant amount of case law, both at the UK and the European level, has built up in relation to the interpretation of TUPE 1981 and much of this will remain relevant under TUPE 2006. There are however several new areas where the precise impact of the new regulations will need to be established by courts and tribunals.

2. When does TUPE apply?

TUPE applies whenever there is a "relevant transfer" as defined. TUPE 1981 confined this definition to transfers which involved the "transfer of an undertaking, business or part of an undertaking or business ... where there is a transfer of an economic entity which retains its identity", i.e. a business transfer. A significant amount of, often conflicting, TUPE-related case law however grew up around the interpretation of this definition in the context of contracting or outsourcing. The Government viewed the uncertainty created by the case law as unhelpful in the business environment. TUPE 2006 therefore expands the definition of "relevant transfer" to include what it has called, "service provision changes", i.e. situations where a service is contracted-out, where that contract passes to another person or where it is brought back in-house. Both these types of "relevant transfer"; the "business transfer" and the "service provision change" will be considered below.

2.1 “Business Transfers”

Regulation 3(1) confirms that TUPE applies wherever there is a transfer of control of an “economic entity” from one legal body to another, and where the economic entity transferred retains its identity after the transfer. This can accordingly be broken down into three elements namely:-

- a) Was there an “economic entity”?
- b) Has there been a transfer of control?
- c) Has the economic entity retained identity?

In answering these questions, consideration must be given to all the circumstances, weighing up the factors which point towards there having been a transfer of an undertaking against those which point towards there not have been a transfer. The most critical consideration is whether the effect of the transaction is to put the Transferee, i.e. the person or organization which has acquired the entity, in possession of an economic unit whose activities can be carried on without significant interruption.

The Regulations apply to all transfers of economic entities. The only specifically excluded transfers are the transfer of a ship from one party to another without any ancillary activities (regulation 3(7)) and administrative reorganisations of public administrative authorities or transfers of administrative functions between public administrative bodies.

The question of whether or not a relevant transfer takes place has been considered in various cases. Unfortunately, it is very difficult to make a simple assessment as many of the decisions in cases on this point conflict with each other. The most helpful case however, and the case that is, even now, regularly cited by courts when forming judgments as to whether or not a business transfer has occurred, is the European Court of Justice case of *Spijkers v Gebroeders Benedik Abattoir CV* [1986] 2 CMLR 296.

This case concerned a company which ran a slaughterhouse. The company became insolvent and closed down, dismissing all employees. It was purchased some time later, by which time it had entirely ceased activity and dissipated its goodwill.

The ECJ identified that, “...the decisive criteria for establishing the existence of a transfer within the meaning of the Directive is whether the entity in question retains its identity...”. To ascertain whether or not this has occurred, the ECJ stated that it is “necessary to take account of all the factual circumstances of the transaction in question” and went on to set out a number of factors which needed to be considered to establish whether or not a relevant transfer had occurred. However, the Court went on to say that in deciding whether this condition is fulfilled, “each of these factors is only part of the overall assessment and cannot be examined independently of each other”. Over the years, the list of

potentially relevant factors has become known as the “Spijkers shopping list” and has been used by courts in the UK and in Europe as the principal test for establishing when a transfer has occurred.

2.2 The relevant factors – The “Spijkers Shopping List”:-

1. Is there a legal transfer or merger?;
2. The type of business or undertaking;
3. The extent of transfer of machinery, factory premises, stock, equipment, plant tools and other physical artefacts;
4. The value of intangible assets at the date of the transfer;
5. The transfer of any employees;
6. Whether customers/clients are transferred;
7. The degree of similarity between pre and post transfer activities; and
8. The duration of any interruption in those activities.

Although Spijkers remains the principal authority in this area, there have been numerous other decisions which have dealt with the issue of whether there has been a transfer of a business which has subsequently retained its identity. Many of these cases dealt with contracting or outsourcing situations and the introduction of specific provisions in TUPE 2006 to deal with these situations may mean that some of the existing cases will become less relevant. The cases which have elaborated upon Spijkers can however help to provide clearer guidance. It must be remembered however that the application of TUPE will always need to be tested against the particular prevailing facts. Some decided cases do however give us some guidance on this issue. For example:

Foreningen af Arbejdsledere i Danmark –v- Daddy’s Dance Hall [1988] IRLR 315

In this case, Irma Catering had a lease with Palads Teatret which was determined on 28th January 1983 with effect from 25th February 1983. Mr Tellerup was an employee with the business operated by Irma Catering and was dismissed with notice expiring on 30th April 1983. On 25th February 1983 a new lease was granted by Palads Teatret to Daddy’s Dance Hall. Mr Tellerup was re-engaged by Daddy’s Dance Hall. He was later dismissed on 26th April 1983. A dispute arose about the terms of his employment which existed on the date of termination and the length of notice to which he was entitled from Daddy’s Dance Hall.

The ECJ held that the Directive applies to a situation where, after the termination of a lease, the owner of the undertaking leases it to a new lessee who continues to run the business. An indirect lease transfer is therefore capable of amounting to a TUPE transfer.

Rygaard –v- Dansk Arbejdstivesforening [1996] IRLR 51

A Danish building contractor Svend Pederson A/S, which was constructing a canteen for another company, called in a carpentry firm, Stro Molle, to complete work on ceilings and joinery. Mr Rygaard was dismissed by his original employer and was told that he would transfer to Stro Molle who would pay him until the end of his employment relationship. When Stro Molle dismissed him, he sued for wrongful dismissal.

The ECJ held that his transfer did not fall within the Directive. Mr Rygaard's claim was dismissed as the transfer did not relate to a "stable economic activity". The judges ruled that the building works unit in question was limited to carrying out one specific works contract and did not include the transfer of assets which would enable all or some of the activities of the transferring business to be carried out in a stable way. The judges repeated that the criteria for deciding whether a transfer fell within the scope of the Directive was whether the business retained its identity by carrying out the same or similar activities but it is clear that the mere completion of a one-off activity will not be sufficient to bring TUPE into play.

CWW Logistics Ltd –v- Ronald and Digital Equipment (Scotland) Ltd (EAT 774/98)

Mr Ronald was employed by Digital on part of its production process. This part was contracted out to CWW but Mr Ronald was made redundant. When CWW took over it continued using the same equipment. The ownership of the equipment however remained with Digital; CWW used it under an informal licence.

CWW argued that there was no transfer of assets as ownership of the equipment had not changed. The EAT held however that, even though ownership had not passed, the use of the equipment by CWW meant that there had been a transfer of assets and therefore TUPE applied.

It can be seen therefore that even though formal legal ownership of assets may not have transferred, the assumption of a right to use the assets involved in the business can bring TUPE into play.

2.3 When will TUPE not apply to a business transfer?

Fundamentally, the regulations will not apply where the three criteria set out at above are not fulfilled.

TUPE will not accordingly be applicable where there is no "economic entity".

Nor will the TUPE apply where there is no transfer of control of the business. This means that the regulations are inapplicable to any sale of a business by way of share transfer (the most common method by which businesses are sold).

The reason for this is that following the transfer of the company's shares, control of the business itself remains with the same legal entity, namely the limited company.

Finally, TUPE will not apply where the economic entity which transfers does not retain its identity following the transfer.

An interesting example of this last point can be found in the case of *Mathieson, Cheyne –v- United News Shops Limited* EAT 554/94

In that case, the two applicants were employed to manage a Hospital Trust Shop. The shop operated out of a portacabin and was used by visitors, patients and hospital staff. The hospital was re-developed and new shop units were built, with the operation of them being tendered out. UNS Limited won the contract and set up at the new shop. The two applicants were made redundant, but were offered re-employment with UNS Limited but on terms which they found to be unacceptable. They therefore claimed that there had been a transfer of an undertaking, and that they had been unfairly dismissed by reason of the transfer. The Tribunal found that the original shop had mainly sold newspapers, magazines, confectionery and flowers, whilst the new shop was a "major chain confectionery / newsagents / convenience store" which would be run on commercial lines, and which would have much longer opening hours. The identity of the original shop had been destroyed and replaced by an entirely new and different concept. Accordingly it was held that there had been no relevant transfer.

This concept of retention of identity was often used as a defence in contracting or outsourcing situations where the incoming contractor wished to try to avoid the application of TUPE. In these circumstances, particularly in second generation contracting, there is limited ability for the outgoing contractor to influence how the services are to be provided by the incoming contractor, or even to be aware of how the incoming contractor is going to manage the services. There was often therefore scope for the incoming contractor to argue that the way it was delivering the services was fundamentally different, such that the business had not retained its identity.

The provisions introduced in TUPE 2006 relating to "service provision changes" will now make those sort of arguments irrelevant in the context of contracting. The question of whether the identity of the business has been retained will still however be relevant in straightforward business transfers.

2.4 “Service Provision Changes”

The Government was keen to address, within TUPE 2006, the scope for confusion and debate that existed in the existing case law over the question of whether TUPE applied in contracting situations. A particular source of conflict arose from the ECJ decision of *Süzen* [1997] IRLR 255, which sought to distinguish between labour-intensive industries, e.g. cleaning or security services where there was little need for equipment or materials and asset-intensive industries, where the transfer of labour was less important to the business than the machinery and equipment that was used. In the former case, primary importance was to be attached to the question of whether a significant proportion, in terms of number or function, of the employees transferred and, if they did not, TUPE would not apply. In the latter case however, the transfer of employees was secondary to the question of whether or not a significant proportion of the assets used in the business had transferred.

Since that decision, the UK courts have sought to limit the apparent ease with which incoming contractors could seek to avoid the application of TUPE in labour-intensive industries by deliberately not taking on the employees engaged in the business. This often led to UK courts adopting some quite ingenious legal arguments to establish that TUPE applied. The insertion of new provisions in TUPE 2006 to address contracting and outsourcing issues should however make the whole area much more clear.

The provisions in regulation 3(1)(b) now provide that TUPE will apply to situations referred to as “service provision changes”. These are defined as circumstances where:

- (i) a person (“client”) cease to carry out work on his own behalf but instead engages another person (“contractor”) to do work on his behalf (i.e. contracting-out or outsourcing);
- (ii) activities cease to be carried out by a contractor on a client’s behalf but are carried out instead by another person (“subsequent contractor”) on the client’s behalf (i.e. re-tendering);
- (iii) activities cease to be carried out by a contractor or subsequent contractor but instead are carried out by the client on his own behalf (i.e. bringing the work back in-house).

In order for regulation 3(1)(b) to apply, there must be an organised grouping of employees before the change whose principal purpose is carrying on services for the client. It is expressly stated however that the grouping of employees may be only one employee (regulation 2(1)). However there will not be a service provision change where:

- the contract is wholly or mainly for the supply of goods for the client's use. An example given in the Guidance is that this exemption would cover the regular supply of sandwiches and drinks for the client's canteen, as opposed to a contract to run the canteen which would be governed by TUPE; or

- the activities are carried out in connection with a single specific event or a task of short-term duration. The Guidance gives an example of a contract to provide security staff to protect athletes at a one-off event, such as the Olympic Games, as falling within this exemption.

Many service provision changes already fall within TUPE 1981 and the DTI Guidance acknowledges that some transfers will be both a business transfer and a service provision change.

The consultation paper issued in March 2005 suggested excluding professional business services, such as legal or accountancy services, from the scope of a "service provision change". This proposal did not however survive the consultation process, which brings into prospect the possibility that a team of lawyers or accountants who, in practice, work exclusively for one client, could transfer to a new firm if the client decides to move his work.

2.5 Transfers within public administration

Regulation 3(5) specifically provides that a reorganisation of a public administration or the transfer of administrative functions between public administrations will not be a relevant transfer. The Guidance indicates however, that such transfers are covered by the "Cabinet Office Statement of Practice, Staff Transfers in the Public Sector". In addition, section 38 of the Employment Relations Act 1999 gives the Secretary of State the power to put in place TUPE-equivalent protection where a transfer falls outside its scope. The Statement of Practice requires a public sector employer embarking on such a transfer to take steps to ensure that equivalent protection to that contained within TUPE is provided. The Guidance also notes that TUPE 2006 will apply to transfers from the public sector to the private sector and that any affected employees will also benefit from the Cabinet Office Statement of Practice.

3. Who transfers?

3.1 "Assigned" to the business

Regulation 4(1) provides that the contract of employment of "any person employed by the Transferor and assigned to the organised grouping of resources or employees that is subject to the relevant transfer" will not be terminated by the transfer but will instead be transferred to the Transferee. The coverage of the regulations is confined to employees and not individuals engaged on a contract for service. Care must however be taken over individuals who may not be classified as employed but who nevertheless, applying normal tests, are, in fact, considered to be employees.

The question of whether or not an employee is "assigned" to a transferring business or not has been considered by the courts on many occasions, often in the context of transfers of companies formerly forming part of a larger group. Where

there is a complex group of companies, and employees are engaged by a service company, this would seem to offer an easy route by which the application of the Regulations might be side-stepped.

There are a number of cases relating to this point, the principal ones all being decided at very much the same time:

Michael Peters Ltd –v- Farnfield and Michael Peters Group Plc [1995] IRLR 190

Mr Farnfield was employed as the Chief Executive of Michael Peters Group Plc (“the Group”). The Group was a holding company for 25 subsidiaries, four of which were located at Group headquarters. Mr Farnfield was responsible for overseeing the financial management and operations of all the subsidiary companies. The Group and subsidiaries got into financial difficulties and receivers were appointed. Mr Farnfield was then dismissed. The day after his dismissal, an offer was made for the purchase of the four subsidiary companies located at headquarters. Mr Farnfield complained of unfair dismissal, and the Employment Appeal Tribunal was faced with the question as to whether or not Mr Farnfield had been employed by the undertaking which was transferred. According to the sale agreement, the Transferors were the four subsidiaries individually and the Group was not a party to the sale. The EAT stated that it would be wrong to “pierce the corporate veil” and state that the business of the four subsidiaries was the same as the business of the Group. The EAT stated that the Group was not the Transferor, and Mr Farnfield was not therefore employed by the Transferor.

Contrast this however with:

Sunley Turriff (Holdings) Limited –v- Thompson and Others [1995] IRLR 184

Mr Thompson was employed by Lilley Construction Limited (“LC”), a member of a group of companies, as Group Accountant and Company Secretary. He held the same positions in Lilley Construction (Scotland) Limited (“LCS”). Much of the business of LCS was transacted by LC rather than LCS, which neither had, nor paid, any employees. On 8th January 1993, receivers were appointed to the Group. 10 days later the business of LCS and a substantial part of LC were sold to Sunley Turriff (Holdings) Limited. LCS was listed as the Transferor. Attached to the Sale Agreement was a list of employees who were to transfer to Sunley Turriff. Mr Thompson’s name was not on the list. Mr Thompson claimed unfair dismissal against Sunley Turriff claiming that by virtue of the Regulations he was employed in part of the undertaking transferred.

The Tribunal held that LCS was nothing more than a shell company, and that it was accordingly willing to lift the corporate veil, and hold that Mr Thompson was substantially employed by LCS. The EAT upheld that decision.

The approach to be adopted by the Tribunal was however summed up by:

Duncan Web Offset (Maidstone) Limited –v- Cooper and Others [1995] IRLR 633

In this case, Passmore International Limited owned a number of subsidiaries in the printing industry. On 21st March 1994, one of its subsidiaries, Passmore Web Offset (Maidstone) which was in receivership, was transferred to Duncan

Web Offset. Mr Cooper was not taken on by Duncan Web after the transfer. Mr Cooper accordingly complained that he had been unfairly dismissed. Mr Cooper was the purchasing manager for the Passmore International Group. He was located at the Maidstone office, and involved in the daily business of that company. The Tribunal found that Mr Cooper was employed by the Maidstone company and assigned to that economic unit. Any duties which Mr Cooper carried out for other companies were carried out as an employee of Passmore Web Offset (Maidstone). Having made that decision, the EAT went on to consider what would happen where an employee was engaged by X to work exclusively on Y's business, and Y then transferred his business to Z. The EAT said that on the face of it the Regulations would not apply, but that Tribunals "will be astute to ensure that the provisions of the Regulations are not evaded by devices such as service companies, or by complicated group structures which may conceal the true position".

Tribunals will accordingly take a pragmatic view when faced with devices designed to avoid the application of the Regulations in this way. It may be that a Tribunal will state that the service company is employing the individual as an agent for the Transferor, or even argue that the service company is a party to the agreement alongside the Transferor.

Apart from the position of directors or managers with "group" responsibilities, the question of whether an employee is employed in the undertaking transferred also has particular relevance when only part of a business is sold. Several court decisions have attempted to clarify the application of TUPE in this area, the main one being the European Court of Justice case of *Botzen –v- Rotterdamsche Droogdok Maatschappij BV* [1986] 2 CMLR 50 the question as to whether or not an employee will transfer with the economic entity depends on whether or not the employee is assigned to that economic entity. This question of "assignment" has now been expressly incorporated in regulation 4(1) as forming part of the test of whether an individual employee should transfer.

This test has caused considerable difficulty in application. However, there have been a number of cases helping to clarify the issues to be considered.

Gale –v- Northern Hospital NHS Trust [1994] IRLR 292

In this case, the Court of Appeal applied the test by asking whether the employee was "part of the human stock" of the business being transferred. This meant that Mr Gale, who was a student nurse at the time of the transfer, was not assigned to a particular hospital even though he was working there at the time.

Duncan Web Offset (Maidstone) Limited –v- Cooper and Others [1995] IRLR 633

The facts of this case are set out above. During the course of the case the EAT set out the points which a Tribunal should consider when establishing whether or not an employee is "assigned" to the economic unit. The EAT stated that Tribunals should consider matters such as the amount or time spent on one part of the business or the amount of value given to each part by the employee the terms of the contract of employment showing what the employee could be required to do and how the costs to the employer of the employee's services were allocated between different parts of the business. The EAT also stated that there may be incidents where, despite being employed by one subsidiary, an

employee will in reality be assigned to be business of another part of the employer's group. The EAT stated that it was important to recognise that the contract of employment test (i.e. who employs the employee) is not the only matter for consideration.

Securicor Guarding Limited –v- Fraser Security Service [1996] IRLR 552

Securicor had two employees who worked exclusively at a single geographical site providing security services for Datamatic. The employees had mobility clauses in their contracts allowing Securicor to relocate them to alternative sites. This right was not however exercised prior to the Datamatic contract being passed to Fraser. The EAT said that since the employees were assigned to the Datamatic site to carry out their duties they were assigned to that part of Securicor's undertaking represented by the contract with Datamatic and accordingly transferred with that contract.

An Employment Tribunal will, however, look to see if the assignment is genuine. For example:-

Carisway Cleaning Consultants –v- Richards EAT (629/97)

Mr Richards was an employee of Carisway, a cleaning company. A disciplinary issue arose with regard to Mr Richards, consequent to which he was encouraged to accept a position on the "Chesham" contract which he did. Shortly later Carisway lost the "Chesham" contract to another contractor and Mr Richards' employment transferred to that contractor under TUPE. Mr Richards was shortly afterwards dismissed and a question arose as to who was the correct Respondent in an unfair dismissal claim. The EAT found that the assignment to Chesham was a sham and that Mr Richards had been deceived. On this basis they held that the assignment was not effective and that Mr Richards was not part of the undertaking transferred.

3.2 The right to object

The regulations expressly allow an employee to object to the transfer without any reason (regulation 4(7)). In such circumstances the employee will not be treated, for any purposes, as having been dismissed.

The Guidance states: "The Transferor may re-engage the employee on whatever terms they agree, though the continuity of employment will be broken". This would appear to suggest that objection and re-engagement may be used as a way of effecting changes in employees' terms (see below). However, the Guidance does not consider if it could be argued that the objection, in such cases, was not freely given.

4. What effect do the Regulations have?

4.1 The principle of automatic transfer

Where it is established that TUPE applies to the transfer of the whole or part of an undertaking the consequence of application of regulation 4(2) is essentially that the Transferee inherits virtually all of the Transferor's rights, powers, duties and liabilities with regard to the Transferor's employees who were employed in the undertaking or the part transferred, whose contracts of employment would otherwise have been terminated by the transfer, and who were employed immediately prior to the transfer (or who would have been employed immediately prior to the transfer had they not been unfairly dismissed for a reason connected with the transfer).

Transferring liabilities include:-

- i) The employee's terms and conditions of employment;
- ii) Any arrears of wages owing to the employees;
- iii) Any arrears of holiday or holiday pay owing to the employees;
- iv) Continuity of employment;
- v) Collective agreements;
- vi) Existing personal injury claims.

Criminal responsibility is however expressly excluded from transfer.

Most rights under occupational pension schemes were historically excluded from transfer under TUPE although the issue has been subject to much judicial debate (see below). The position has however been modified by the Pensions Act 2004 (see below).

The rights accruing to the Transferee include:-

- i) The right to sue an employee for breach of contract committed prior to the transfer; and
- ii) All disciplinary letters and proceedings and all personnel matters.

4.2 Pension rights

As has been seen, TUPE provides that any employees engaged in an undertaking immediately before a transfer of that undertaking will be transferred with the business. The employees will transfer on their existing terms of employment. However there is an exception in regulation 10 in relation to any rights relating to an occupational pension scheme insofar as they relate to old age, invalidity or survivor's benefits. Those rights are expressly excluded from transfer.

The question of whether particular provisions of occupational schemes fall within the scope of "old age, invalidity or survivors' benefits" has been the matter of a great deal of judicial debate. In particular, employees have claimed that rights on early retirement, particularly to enhanced redundancy payments under pension schemes or to enhanced pension benefits, often found in public sector pension schemes, do transfer. The European Court of Justice in the case of Beckmann –v- Dynamco Whicheloe Macfarlane Limited [2002] IRLR 578, resolved this long-running debate by confirming that such enhancements do not fall within the exemption and thus do transfer.

Changes to the transfer of pension rights were also implemented by sections 257 and 258 of the Pensions Act 2004 and the Transfer of Employment (Pension Protection) Regulations 2005. These came into force on 6 April 2005.

The Act imposes obligations on the Transferee after a TUPE transfer where there was an occupational pension scheme in place prior to the transfer and:

- the transferring employees were active members of the scheme, were eligible to be active members, or would have been eligible if they had been employed for longer.
- in the case of money purchase schemes, the Transferor was, or would have been, required to contribute to the scheme or, if the case of active members, was not required to make contributions but did so.

In these cases the Act requires the Transferee to make "relevant contributions" to a stakeholder scheme or ensure that the transferring employees are, at the "relevant time" eligible to be, active members of an occupational pension scheme and:

- in the case of money purchase schemes, make "relevant contributions".
- in other cases, satisfy the statutory standard referred in section 12A of the Pension Schemes Act 1993 or comply with such other requirements as may be prescribed (referred to in the Regulations as the "alternative standard").

Those schemes which are not money purchase schemes will comply with the "alternative standard" under section 258(2)(c)(ii) of the Act if they provide:

- for members to be entitled to benefits worth at least 6% of pensionable pay (as defined in the scheme) for each year of employment together with the total amount of any contributions made by them and, where members are required contribute to the scheme, for them to contribute not more than 6% of their pensionable pay; or
- for the Transferee to make relevant contributions to the scheme on behalf of each of its employees who are active members.

The Transferee's pension contributions will be "relevant contributions" for the purposes of the Act if they are made in respect of each period for which the employee is paid remuneration, the employee also contributes to the scheme in respect of that period and the amount contributed in respect of each period is:

- where the employee's contribution in respect of that period is less than 6% of his gross basic pay, at least equal to the amount of the employee's contribution.
- where the employee's contribution in respect of that period equals or exceeds 6% of his gross basic pay, at least 6% of that pay.

4.3 Collective agreements

TUPE also transfers to the Transferee any collective agreements made with recognised trade unions and any recognition agreements where the business retains a distinct identity following the transfer. The consultation in March 2005 also stated that regulations will be introduced to ensure that declarations made by the Central Arbitration Committee (CAC) and applications to the CAC for recognition will also be transferred.

5. Can terms and conditions be amended in connection with a transfer?

5.1 TUPE 1981

For many years under TUPE 1981, the view taken by lawyers was that the provisions of the regulations applied to prevent changes to terms and conditions at the time of the transfer itself, but did not effect the ability of an employee to agree amendments prior to or after a transfer in the normal way. However, that view was completely overturned by the case of *Wilson and Others –v- St Helens Borough Council* [1998] IRLR 706.

In this case, the contracts of transferred were varied, with the agreement of the employees' union, to provide less favourable terms and conditions. The employees subsequently applied to Tribunals contending that the variation was void and that they were entitled to the terms and conditions which they had enjoyed prior to the transfer. The EAT found that the reason for the variation in the employees' terms and conditions of employment was the transfer itself and held that the purported variation was void.

The EAT decision was appealed and ultimately considered by the House of Lords together with an appeal in the similar case of *Meade and Baxendale –v- British Fuels Limited*. The facts in *Meade* were very similar to those in *Wilson*, the primary difference being that the employees in *Meade* were dismissed and re-engaged on new contracts with reduced terms. The Court considered Regulation 5(1) of TUPE 1981 which provided that a transfer did not terminate a contract of employment, but that it was to have effect as if made with the Transferee. The Court considered that a pre-transfer

dismissal, which was effected solely because of the transfer, was to be treated as “ineffective”. The Court considered that it was necessary to look at the objective circumstances in which the dismissal occurred in determining whether the reason for the dismissal was the transfer. However, the Court considered Regulation 8, which drew a distinction between dismissals, which were unfair because the reason for them was the transfer, and those dismissals, which were not automatically unfair because they were for an economic, technical or organisational (“ETO”) reason entailing a change in the workforce. If the employment contract was terminated for an ETO reason it was not to be regarded as terminated by the transfer.

The law lords held that a variation of terms and conditions was only invalid if it was agreed on or as part of the transfer itself. A variation could be due to the transfer even if it came later. They considered however that there would be a time when the link with the transfer would be broken or no longer effective.

The decision of the House of Lords was disappointing in that it did not expressly deal with the status of an agreement to vary terms and conditions without a dismissal. In this respect, the decision of the ECJ in *Daddy’s Dance Hall* remained binding. Accordingly, an agreed variation in terms and conditions was invalid if the reason for the variation is the transfer itself. This applied even if the variation is advantageous to the employee. This approach was followed by the High Court in *Credit Suisse First Boston –v- Padiachy* [1998] IRLR 504 and the Court of Appeal in *Credit Suisse First Boston –v- Lister* [1998] IRLR 700. This caused significant difficulties for employers in establishing a reason for a variation other than the transfer itself.

One potential mechanism for achieving harmonisation of terms and conditions on a transfer was to proceed with mass dismissals coupled with offers of re-engagement on fresh terms. This however had clear employee relations implications as well as the potential exposure to multiple claims of unfair dismissal.

5.2 TUPE 2006

A specific change to the law has however been implemented by TUPE 2006. The position, under TUPE 1981, that any changes to the transferring employees' terms of employment for a reason connected to the transfer are void, will change under regulation 4(4). Changes will now only be void if the sole or principal reason is:

- the transfer itself; or
- a reason connected with a transfer which is not an ETO reason entailing changes in the workforce.

By contrast however, regulation 4(5) provides that it will be possible to make changes to employment terms before or after a transfer where the sole or principal reason is:

- a reason unconnected with the transfer; or
- a reason connected with the transfer which is "an economic, technical or organisational reason entailing changes in the workforce".

The Guidance explains the difference between an action that is "by reason of the transfer itself" and one which is "for a reason which is connected with the transfer". It states that, "Where an employer changes terms and conditions simply because of the transfer and there are no extenuating circumstances linked to the reason for that decision, then such a change is prompted by reason of the transfer itself. However, where the reason for the change is prompted by a knock-on effect of the transfer - say, the need to re-qualify staff to use the different machinery used by the Transferee – then the reason is "connected to the transfer"."

The Guidance also states that an ETO reason is likely to include:

"(a) a reason relating to the profitability or market performance of the Transferee's business (i.e. an economic reason);

(b) a reason relating to the nature of the equipment or production processes which the Transferee operates (i.e. a technical reason); or

(c) a reason relating to the management or organisational structure of the Transferee's business (i.e. an organisational reason)."

It also expands on the term "entailing changes in the workforce", stating that, "There is no statutory definition of this term, but interpretation by the courts has restricted it to changes in the numbers employed or to changes in the functions performed by employees. A functional change could involve a new requirement on an employee who held a managerial position to enter into a non-managerial role, or to move from a secretarial to a sales position."

In summary, TUPE 2006 restates the old law that a variation to terms and conditions of employment which is for a reason unconnected to the transfer will not be declared void. Whilst it is still not going to be possible to vary terms where the reason is the transfer itself, it establishes that if an employer can establish an ETO reason which entails changes in the workforce then the variation can be effective. As the Guidance reminds however, notwithstanding the existence of an ETO reason, care must be taken to implement the variation by following normal principles.

TUPE 2006 also introduces new rules allowing terms and conditions of employment to be varied in insolvency situations (see below).

5.3 Substantial changes in working conditions

Regulation 4(9) of TUPE 2006 introduces a new right for transferring employees to resign if the transfer involves a substantial change in their working conditions to their **material** detriment. In this situation, the employee will be treated as dismissed (with notice) by the employer. They will therefore not be able to claim pay in lieu of notice, but will still have any statutory rights. This is a change from the regulation 5(5) of TUPE 1981, under which employees could claim to have been constructively dismissed where they resigned following a substantial change in their working conditions to their detriment provided it amounted to a fundamental breach of contract.

The phrase "substantial change in working conditions" will be a matter for the courts and the tribunals to determine in the light of the circumstances of each case. However, the Guidance suggests that "a major relocation of the workplace which makes it difficult or much more expensive for an employee to transfer, or the withdrawal of a right to a tenured post, is likely to fall within this definition"

The Guidance makes it clear that it will not necessarily be unlawful for the Transferee to make "substantial changes in working conditions". TUPE 2006 will merely mean that resignations in such cases are treated as a dismissal; the tribunal will still have to decide if the dismissal was unfair. It also notes that the statutory dismissal and disciplinary procedures ("DDP") will not apply in these circumstances, so any failure by the employer to follow a DDP will not make the dismissal automatically unfair.

It is unclear whether the employee has to follow a statutory grievance procedure ("GP"). A GP need not normally be followed where the complaint is about dismissal, but "dismissal" is defined narrowly for these purposes to mean only an express dismissal or the expiry of a fixed term contract. It does not include constructive dismissal. However, regulation 4(9) of TUPE 2006 states that the employee who resigns as a result of a detrimental change to working conditions on a transfer shall be "treated for any purpose as having been dismissed by the employer". This makes it unclear whether the employee is treated as dismissed for the purposes of the Dispute Resolution Regulations, or whether the narrow

definition of dismissal in those regulations prevails. If the former, then no GP applies. If the latter, then the employee must at least put the complaint in writing to the employer and wait 28 days before bringing an unfair dismissal claim.

5.4 Constructive dismissal

An employee also has the ability to resign and claim constructive unfair dismissal where the Transferee commits a repudiatory breach of contract. Such a dismissal may be unfair under normal principles or it may be automatically unfair under regulation 7(1).

Before bringing such a claim an employee would normally have to follow a statutory GP.

6. Dismissals

6.1 The principle of automatic unfairness

Regulation 7 provides that where either before or after a transfer, an employee is dismissed, that employee shall be treated as unfairly dismissed if the reason or principal reason for his or her dismissal is the transfer or a reason connected with it. In effect, the Regulations provide that dismissals connected with a business transfer are automatically unfair.

There is an escape route in that the Regulations provide that the dismissals will not be automatically unfair where an economic, technical or organisational reason ("ETO reason") entailing changes in the workforce of either the Transferor or the Transferee before or after a relevant transfer, is the reason or principal reason for dismissing the employee. However where an ETO reason exists, it will still be necessary to show the dismissal was fair and reasonable in accordance with the normal principles governing the fairness of dismissals. If the ETO reason amounts to redundancy then the dismissed employees will be entitled to redundancy payments.

6.2 ETO reasons

Whether a dismissal is genuinely for an ETO reason depends on the facts of the case. It has been held that if the employer simply wants to alter terms and conditions of employment, this does not count as an ETO reason, because there must be a change in the workforce. If the reason for the dismissal is the desire to effect a sale or to enhance the value of the business, it is not an ETO reason because an ETO reason must actually relate to the conduct of the business.

It appears from recent case law that if a claim is brought the Tribunal must decide whether the reason or principal reason for dismissal is either the transfer or an ETO – it cannot be both. It is accordingly not open to a Tribunal to decide that employees were dismissed in connection with the transfer (e.g. because the Transferee did not need them) but that

that was an ETO (because the Transferee intended to reorganise the business and change the workforce post transfer). The Tribunal must decide which was the principal reason in these circumstances.

7. Insolvency Situations

Frustration was regularly expressed about the inflexibility of TUPE 1981 regarding changing terms and conditions, particularly where a business had gone into receivership but where the prospect of some form of corporate rescue being achieved. Regulation 9 of TUPE 2006 contains new provisions that aim to assist the rescue of failing businesses.

These provisions will apply where the Transferor is subject to insolvency proceedings which are under the supervision of an insolvency practitioner and are not "with the view to the liquidation of the assets of the Transferor". This would include an administration, but arguably not other forms of insolvency proceedings.

To make the failing business more attractive to a prospective purchaser, regulation 8 provides that some of the existing debts to the employees will be met by the Secretary of State out of the National Insurance Fund (subject to certain limits) rather than passing to the Transferee. Only the debts to the employees that fall outside the payments made by the Secretary of State, or which exceed the statutory limits, will still pass to the Transferee.

In addition, regulation 9 gives greater scope to vary the employees' contracts in a rescue situation. However, when making such changes:

- the Transferor, Transferee or insolvency practitioner must agree the change with appropriate representatives of the employees.
- the representatives must be union representatives if an independent trade union is recognised for collective bargaining purposes by the employer in respect of any of the affected employees.
- in other cases, non-union representatives may agree changes but:
 - (i) the agreement which records the changes must be in writing and signed by each of the non-union representatives (or, where personal signature by a representative is not reasonably practicable, by a person authorised on their behalf); and
 - (ii) before the agreement is signed, the employer must provide all the affected employees with a copy of the agreement and any guidance which they would reasonably need in order to understand it.
- the new terms must not breach any other statutory entitlements.
- the sole or principal reason for the change must be the transfer itself or a reason connected with the transfer which is not an economic, technical or organisational reason and it must be made with the aim of safeguarding

employment opportunities by ensuring the survival of the undertaking or business or part of the undertaking or business.

It does not appear from the regulations that an individual employee needs to agree the change to their contract for it to be effective in these circumstances; it is sufficient (indeed essential) that the representatives of affected employees have agreed.

The DTI states in the Guidance that it believes that these provisions apply where there are any insolvency proceedings in which the whole or part of the business or undertaking is transferred to another entity as a going concern. It also believes that they do not apply where there is a winding-up by either creditors or members where there is no such transfer.

When the Transferor is subject to bankruptcy or analogous proceedings under the supervision of an insolvency practitioner with a view to the liquidation of its assets (for example, bankruptcy and compulsory winding up), regulation 8(7) provides that the normal safeguards for employees against transfer-related changes to their terms and transfer-related dismissals will not apply. The DTI is of the view that TUPE is most unlikely to apply in such cases, as it is rare that the business will survive.

8. Information and Consultation

Regulation 13 of TUPE imposes obligations which require a Transferor and Transferee to provide specific information to representatives of the respective employees who will be affected by a transfer. In addition, if the Transferor or Transferee envisage taking measures in relation to their employees, they are required to consult the representatives of those employees in good time with a view to seeking agreement.

8.1 A summary of the obligations

The principal elements of Regulation 13 are as follows:-

- The employer (whether Transferor or Transferee) has an obligation to inform appropriate representatives of affected employees long enough before a relevant transfer to enable consultation with the appropriate representatives on various matters in relation to the transfer; and
- The employer has an obligation to consult the appropriate representatives of any affected employees in relation to whom the employer envisages taking measures. The consultation is to be with a view to seeking the agreement of the appropriate representatives to measures to be taken. However, the obligation to consult only

arises in the event that the employer envisages that he will, in connection with the transfer, be taking measures in relation to any affected employees.

The matters to be notified by both the Transferor and Transferee to their respective employees are:-

- the fact of the transfer;
- when approximately the transfer is to take place;
- the reason for the transfer;
- the legal economic and social implications of the transfer for the affected employees;
- whether and if so what measures it envisages it will take in connection with the transfer in relation to affected employees.

In addition, the Transferor must inform the appropriate representatives not only of the measures the Transferor envisages it will take in relation to affected employees but also of the measures the Transferee envisages it will take in connection with the transfer. The Transferee must accordingly provide the Transferor with information regarding any measures it proposes to take in sufficient time to enable the Transferor to comply with its notification obligations.

The “appropriate representatives” may be either employee representatives elected by the employees or representatives of a recognised trade union. If the employees are of a description in respect of which an independent trade union is recognised by their employer then the consultation must take place with representatives of that trade union. If there is no recognition of an independent trade union then the appropriate representatives will be employee representatives appointed or elected by the affected employees. These could be representatives elected for the specific purpose or representatives who have been elected for other purposes but who, having regard to the purposes for and the method by which they are appointed or elected, have authority to receive information and to be consulted about the proposed transfer.

Regulation 14 sets out a detailed mechanism for the election of employee representatives.

“Affected employees” who must be informed and consulted are defined as the employees of the Transferor or Transferee who may be affected by the transfer or measures taken in connection with it.

In the event that the employer fails to notify or consult as required by TUPE it may still establish a defence, if it can show that there were “special circumstances” rendering it not reasonably practicable to comply and that it took such steps to comply as were reasonably practicable in the circumstances. However, this defence is interpreted very narrowly. The employer will be treated as having complied with the notification and consultation obligations if it takes steps to comply as soon as reasonably practicable after the election of employee representatives where the employer has invited

affected employees to elect representatives, but the employees have taken so long to do so that the employer can no longer comply with its obligations.

In the event of a failure to comply with the notification or consultation obligations there is a right to complain to an employment tribunal. The complaint is to be made by the appropriate representatives or if there are none by any affected employees. The complaint must be presented to an industrial tribunal before the end of the three month period beginning with the date of the relevant transfer. If the complaint is upheld the tribunal must make a declaration to that effect and has a power to order the employer who has not complied to pay compensation to such categories of affected employees as specified by the tribunal of up to thirteen weeks' pay.

8.2 Timing of consultation

The employer is under a duty to provide the requisite information long enough before the relevant transfer to enable consultation with appropriate representatives. It will be for an employment tribunal to assess in each case whether sufficient or insufficient time was left for consultation to take place. Consultation is actually only required where either Transferor or Transferee envisages "taking measures" (see below) in relation to affected employees. If they do not envisage taking any such measures, then in theory since there is no obligation to consult, the information might be provided at any time before the transfer. In practice, employment tribunals are likely to take a dim view of this.

Consultation should occur when the proposals are still at a formative stage and adequate information on which to respond adequate time to respond should be provided. There should also be conscientious consideration of the response to consultation.

8.3 "Taking measures"

This is not defined in TUPE. However, in the case of *Institution of Professional Civil Servants –v- Secretary of State for Defence* [1987] IRLR 373 the court considered "measures" to be a word of the widest import including any positive "action, step or arrangement" taken in connection with the transfer. The weight of opinion is that the transfer itself, without any specific changes in conditions of employment, does not constitute a "measure".

9. Provision of employee information to Transferee

9.1 The obligation

Regulation 11 imposes a new obligation on the Transferor to provide certain information to the Transferee about the transferring employees before the relevant transfer takes place. It will be necessary to provide:

- the identity and age of the employees who will transfer.
- information contained in those employees' written particulars of employment under section 1 of the Employment Rights Act 1996.
- information on any collective agreements affecting those employees which will still have effect after the transfer.
- any disciplinary proceedings taken against an employee or grievance brought by an employee in the previous two years to which the Employment Act 2002 (Dispute Resolution) Regulations 2004 applied.
- any legal actions taken by those employees against the Transferor in the previous two years, and any such potential legal actions where the Transferor has reasonable grounds to believe such actions might occur.

The information must be provided in writing or in "other forms which are accessible to the Transferee". The Guidance suggests that it may be possible to send computer data files or provide access to the Transferor's data storage. Alternatively the Transferor could supply staff handbooks, sample contracts or collective agreements. It also suggests, where only a few employees are transferring and small amounts of information are involved, it might be acceptable to provide the information by telephone. The information may however be given in more than one document and may be given through a third party.

The information should be given not less than 14 days before the transfer or, if special circumstances make this not reasonably practicable, as soon as is reasonably practicable. Once the relevant information has been provided, the Transferor must provide written notification of any changes.

The Guidance states that whether it was reasonably practicable to provide the information in time would depend on the circumstances. However it suggests that "it would not be reasonably practicable to provide the information in time, if the Transferor did not know the identity of the Transferee until very late in the process, as might occur when service contracts are re-assigned from one contractor to another by a client, or, more generally, when the transfer takes place at very short notice."

It is not possible to contract out of the obligation to provide this information but it would be possible for the parties to indemnify each other in the transfer agreement.

9.2 Failure to provide the employee information

If the Transferor does not provide the relevant employee information to the Transferee then the Transferee can bring a claim in the employment tribunal. The award (if any) is to be such amount as the tribunal considers just and equitable having regard to the Transferee's loss and any contractually agreed terms between the Transferee and Transferor.

Furthermore, the award must be such amount as the tribunal considers just and equitable and:

- at least £500 for each employee in respect of whom the information was not provided (or was defective); or
- a lesser sum if the tribunal considers that it would be unjust or inequitable to award this minimum payment. The Guidance suggests that "trivial or unwitting breaches of the duty may lead to a tribunal waiving what would otherwise be a minimum award of compensation".

This briefing note is intended solely as a summary of the law as at 20 March 2006. No responsibility can be accepted for the completeness or accuracy of the contents or for any observations or views expressed, and professional advice should be taken in relation to any specific problems.

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