

TUPE – all change or business as usual?

Introduction

Before the Transfer of Undertakings (Protection of Employment) Regulations 1981 (“TUPE”) employees frequently lost their jobs when businesses were sold and, if they were “lucky,” were rehired by the purchaser on inferior terms and conditions. The aim of TUPE is to safeguard employees’ rights in the event of businesses transfers. The Government began consultation on amendments to improve TUPE in September 2001. The new form TUPE was due to be in place by October 2005 but the timetable has been delayed until 6th April 2006.

Main changes to TUPE

The reason for change is that TUPE is operating less effectively than it might do in its current form. The main changes to TUPE aim to:

- clarify when TUPE applies
- ensure the provision of employee liability information by the transferor
- provide some scope for changing terms and conditions of employment

Changes to when TUPE applies

One of the most frustrating aspects of TUPE is uncertainty over whether it applies in any given situation without seven years of litigation to the European Court of Justice and back.

Case law incorporated

As currently drafted, TUPE applies to: “*a transfer of an undertaking.*” Case law over the years has greatly expanded our understanding of what this means. As amended, TUPE will incorporate the main thrust of this case law i.e. that TUPE applies to the transfer of an economic entity which retains its identity.

New rules dealing with service provision

In most cases service provision changes have and will continue to fall within the scope of TUPE. However, there have been uncertainties in some transfers involving service provision, particularly employee intensive service provision such as cleaning and security where, somewhat counter-intuitively, whether or not the employees actually transfer has been a key factor in whether or not there is a TUPE transfer.

The new TUPE rules aim to remove the uncertainty transferees can create by refusing to take on employees in order to prevent TUPE applying. In removing this uncertainty, TUPE will go further than the Directive. The Government's intention is to ensure a "level playing field" for contractors bidding for service contracts, so that tendering decisions are taken on commercial merit rather than on differing views as to the employment rights of employees.

Whilst the mainstream TUPE test incorporating the case law will cover most changes of service provision, in addition, there will also be a new test for first or subsequent generation outsourcing or insourcing. There is nothing in this new test to do with an "economic entity" or any requirement that it "retains its identity" post transfer. There simply needs to be an organised grouping of employees, which has at its principal purpose the provision of services to a client and that client then changes its service provider. There will therefore be a transfer even if the transferee has produced an innovative bid, for example, replacing a manual system for a computerised one. The policy rationale is that the employees stand a better chance of securing on-going employment with the transferee even in an innovative bid situation than with the transferor which has either outsourced or lost the work.

Notification of employee liability information

As TUPE currently stands, there is no obligation on the transferor to provide to the transferee, details of the employees and employment liabilities that will be transferred under TUPE. Those matters are therefore currently dealt with by contractual provisions and commercial pressures on the transferor to act reasonably in respect of the transferee and for the benefit of its employees who are to be transferred.

What information is to be provided?

In the revised TUPE there is a list of "employee liability information" which includes the identity and age of the transferring employees, basic terms and conditions information and disciplinary and grievance issues in the previous 2 years. This list approach is different from the approach which appeared in the draft Regulations where it was intended that all employee liability information would have to be provided. Whilst the list is quite detailed there are likely to be gaps in the information provided such as whether the employees are contractually entitled to enhanced redundancy pay.

Employee liability information is the type of information that in a traditional business sale would be gathered by a full due diligence exercise and backed by a comprehensive set of warranties against which a vendor would provide a detailed disclosure letter. In outsourcing contracts the practice has been contractually much less thorough although the HR departments of the transferor and transferee have often worked co-operatively to ensure a transfer of information and later a consequently smooth transfer of employees.

Who is to provide it, how and to whom?

The employee liability information is to be provided in writing (or by making it available in a readily accessible form which would presumably cover access to a data room) by the transferor to the transferee. It can be provided in more than one instalment and can be provided indirectly, through a third party. Any changes to the information must however, be notified in writing.

The new requirement is to provide the information to the transferee. There is no obligation to provide the information to a “client” on a retender. Where a client is running a tender, the information will often be very important to the client and to all the bidders to enable them to price their bids accurately. If the bidders do not have access to employee liability information they will inevitably reflect any perceived risk in the price they propose. The new TUPE rules do nothing to help clients in this situation get the most competitive price. The transferor could also delay providing the information on a subsequent generation procurement until the transferee is known, which is often late in the process given that negotiations are usually conducted with two or more bidders before the contract is finally awarded to one of them. Contracts will therefore still need to provide, on termination, for the provision of information to the client and to several bidders in a subsequent generation procurement process.

When is it to be provided?

The new TUPE rules require that the employee liability information is provided not less than 14 days before the transfer or if special circumstances make this not reasonably practicable, as soon as reasonably practicable thereafter. This approach differs from the draft Regulations which required the information to be provided in good time and in any event no later than the completion of the relevant transfer.

Whilst 14 days is more certain in its meaning than “in good time” it is probably a considerably closer to the transfer than most practitioners would have assumed “in good time” to mean. Either way the provision of the information will be unhelpfully late in most transfer situations. In a procurement for example, the transferee may be identified very late in the process (usually after the BAFO stage) and may be committed to the contract by the time the employee liability information actually comes into its possession. Contractual provisions are therefore still required in order to obtain employee liability information from a transferor early in the bidding process.

Sharp practice

According to the 2005 consultation document, the new rules will help to ensure transparency in the transfer process and prevent instances of sharp practice such as where, shortly before a transfer is completed, the transferor changes the terms and conditions and/or the composition of the workforce assigned to the undertaking in question, to the disadvantage of the transferee.

The new rules do no such thing. The transferee remains free to change the terms and conditions and/or the composition of the workforce as it sees fit but must simply inform the transferee that it has done so. Contractual provisions are therefore still needed to prevent this sharp practice.

Consequences of breach

For breaches of these requirements the transferee can complain to an Employment Tribunal where compensation can be awarded of not less than £500 per employee transferred unless the Tribunal considers it just and equitable to award a lower sum. This replaces the proposal in the draft Regulations that the High Court would be given jurisdiction to issue a penalty notice of up to £75,000.

Changes to terms and conditions of employment

As things currently stand, the law on changing terms and conditions is slightly confused but can probably be summarised as follows:

- terms and conditions of employment of transferring employees cannot be varied, even by agreement with the relevant employees, if the reason for the variation is the transfer or a reason connected with the transfer;
- this does not prevent the employer dismissing the employees and rehiring them on new terms, although in doing so, it risks claims for unfair dismissal; and
- any such dismissals will be *automatically* unfair unless the employer has an economic, technical or organisational reason entailing a change in the workforce.

The Government sees this as a perverse incentive for employers to dismiss employees rather than seek their agreement to a change in contractual terms. The changes to TUPE will allow for changes in terms and conditions for a reason connected with the transfer that is an economic, technical or organisational reason entailing changes in the workforce.

This change will have relatively little impact given that case law has already interpreted the expression “*entailing changes in the workforce*” as meaning changes in the “*overall numbers and functions of the employees.*” As things stand, most contractual variations are brought in to harmonise the terms of transferring employees with those of the transferee’s existing workforce. Such changes are often unlikely to involve a change in the overall numbers and functions of the employees and therefore would be void even under the revised provisions.

Conclusion

Almost five years after consultation first began, the proposed changes are a slightly disappointing mixed bag. In summary, the proposals are a combination of changes that are likely to make little or no difference (those that incorporate case law and those that purport to loosen the prohibition on changing terms and conditions), those that will hopefully provide more certainty (a new test of when TUPE applies to service provision changes) and those that make a major difference but still leave holes that need to be plugged by contractual provisions (provision of employee liability information).

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