



Silverman Sherliker's Nicholas Lakeland offers his expertise on the TUPE laws

Transfer of Undertakings – what you need to know

The editorial team at *Leisure Report* refer to the Transfer of Undertakings regulations as the “Tofu”, because they love a good acronym, but in this case the acronym is uncannily accurate.

Tofu has a consistency which is dense and can be bit sticky. Both of these are qualities which can easily be attributed to the new Transfer of Undertakings (Protection of Employment) Regulations 2006 (“TUPE”) (“The Regulations”) which came into force on the 6th April 2006. They implement the European Community Acquired Rights Directive and replace the 1981 Regulations.

The new regulations have introduced a number of changes, including:

Service provision changes

The scope of the regulations has been widened to include ‘service provision changes’. This amendment has been made to assist in clarifying the law in relation to outsourcing. The new provisions apply in cases in which services are contracted in or out, or re-assigned to a new contractor. The provisions will apply if the services:

- are provided by an organised grouping of employees who were carrying out the activities before the transfer;
- the activities are not “one off” or a short term service provision;
- there is an ongoing relationship between the grouping and the organisation to whom the services are provided;
- the activities do not consist wholly or mainly of the supply of goods for the client’s use.

Although introduced as a measure to bring the law into line with decisions already made by the courts, the provisions are in any event a significant development and will result in many more transfers finding themselves regulated by TUPE than under the previous regulations.

Information

A new duty has been imposed on transferring employers from 19th April 2006 to supply employee information to the transferee employer about the employees to be transferred. Such information must be provided at least two weeks before the completion of the transfer and must be provided in writing or in a readily accessible form. Any subsequent changes to the information provided must also be notified in writing. A prudent course of action in the future will always be the incorporation of this requirement into any agreement dealing with the transfer which is being negotiated. The failure to provide this information can result in the transferee making a complaint to an Employment Tribunal and a tribunal can award compensation for any loss which the transferee has incurred as a result. There is a minimum level of compensation of £500 per employee unless such an award was considered by

the tribunal to be “unjust”.

The information to be provided includes:

- each employee’s identity and age;
- their statement of terms and conditions of employment;
- any disciplinary proceedings or grievance issued in the last two years by or against them;
- any court or tribunal cases brought by the employees in the last two years, or any court or tribunal cases which the transferor has reasonable grounds to believe that an employee might bring;
- any collective agreement which will have effect after the transfer.

Consultation

The requirement that employee representatives be consulted is carried forward into the new regulations, which also require that transferors must provide employees with greater precision of the date or proposed date of the transfer instead of just an expected date. A failure to consult the workforce now brings with it a “joint and several” liability on a transferor and transferee as opposed to liability falling on the transferee only, as under the old laws.

Insolvency

In line with the changes in the Enterprise Act 2002, designed to make corporate insolvency ‘faster, fairer and focused on rescue’, TUPE has introduced provisions to make it easier for insolvent businesses to be transferred and thus encourage their rescue. Rescuing insolvent companies is encouraged by a provision stating that a number of employment liabilities and debts will not pass to transferees. These are:

- arrears of pay (up to a maximum of eight weeks at a maximum £290 gross per week);
- holiday pay (up to a maximum of six weeks at a maximum £290 gross per week).

Employees who are transferred after a rescue, who were unfairly dismissed by the transferor by reason of the transfer or who were dismissed for a potentially fair reason can all claim payments as statutory debts from the secretary of state, therefore relieving the transferee of the burden of these liabilities. The payments included are:

- statutory redundancy pay;
- notice pay (to the statutory maximum);
- basic award of their unfair dismissal claim (current maximum £8,700); however the buyer would be liable for any shortfall on redundancy and notice pay, and any unfair dismissal compensation.

Uniquely, the transferor may also vary employees’ contracts where the variations are “to safeguard employment opportunities by ensuring the survival of the undertaking”, provided the variations are agreed with appropriate representatives and a copy of the agreement is provided to all employees affected. This is broader than the requirement that

the variation is on grounds of an Economic Technical of Organisational (“ETO”) reason, which are the criteria normally used and which in the past have had to be applied in all transfers.

Automatic unfair dismissal

The regulations now provide for three categories of possible dismissals:

- where the sole or principal reason for the dismissal is the transfer itself or a reason connected with the transfer that is not an ETO entailing changes in the workforce – this is treated as automatically unfair dismissal under the Employment Rights Act 1996.
- where the sole or principal reason for the dismissal is a reason connected with the transfer that is an ETO entailing changes in the workforce of either the transferor or transferee before or after a relevant transfer – here the dismissal is to be regarded as having been for the potentially fair reason of redundancy or for some other substantial reason.
- where the sole or principal reason for the dismissal is unconnected to the transfer, the regulations will not apply and therefore the usual unfair dismissal principles will apply.

The right to resign

There is also a new right for an employee to resign if the transfer will involve a substantial change in his working conditions to his material detriment, even if this does not constitute a fundamental breach of his contract. A constructive dismissal situation will arise whereby the employee will be deemed to have been dismissed on notice and unable to claim pay in lieu of notice for any unworked notice period, creating a new right under TUPE 2006.

Contract variations

The regulations clarify the ability of employers and employees to agree to vary contracts of employment where there is a relevant transfer. These may now be permitted if the sole or principal reason is not the transfer itself but is a reason connected with the transfer that is an ETO reason entailing a change in the workforce. This is subject to the change being agreed between the parties to the agreement, or with their representatives.

Conclusion

Unfortunately the transfer of undertakings is a subject area which is complex and therefore usually best left to the experts. The secret to avoiding falling foul of these regulations is to take early advice and to prepare in good time before the sale of parts of a business or the transfer of a contract.

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