

TUPE- Transfer of Undertaking

The Collective Redundancies and Transfer of Undertakings (Protection of Employment) (Amendment) Regulations 2014 came into force on 31 January 2014. These Regulations augment the current TUPE Regulations (Transfer of Undertakings (Protection of Employment) Regulations 2006) rather than replace them. Despite there having been a previous suggestion that the service provision changes contained in the 2006 Regulations be abolished, the service provision change provisions are in fact staying although an amendment will be made clarifying that for TUPE to apply the service provision must be “fundamentally or essentially the same” before and after the transfer. The other main changes which will be introduced by the 2014 Regulations are as follows:

- Transferees can elect to collectively consult with transferring employees regarding redundancies before the transfer provided the transferor agrees. This will count towards the 30 or 45 day collective redundancy consultation period and will allow the transferee to finalise dismissals shortly after the transfer.
- An employee’s right to claim automatically unfair dismissal is limited to situations where the transfer is the reason for the dismissal. Under the current regime a dismissal will be automatically unfair if the reason for dismissal is the transfer itself or a reason connected with the transfer. This change suggests that employees will have to demonstrate that they were dismissed in close proximity to the transfer in order to claim that their dismissal was automatically unfair.
- Post-transfer changes to location can amount to an “economic, technical or organisational reason entailing changes in the workforce” (an ETO reason) so that redundancies due to a simple change of location will not be automatically unfair. At the moment a dismissal connected with the transfer will be automatically unfair unless it is for an ETO reason. Often a transferee requires the same number of employees but in a different location and therefore cannot satisfy the ETO test.
- The prohibition on contractual changes following a TUPE transfer will be limited to situations where the transfer is the reason for the change. Under the current regime changes to contractual terms are not permitted if the reason for the change is the transfer itself or a reason connected with the transfer. In addition, contractual changes will be permitted where the change is permitted by the terms of the contract, for example if the contract allows the employer to change the employee’s place of work.
- Contractual terms which derive from a collective agreement can be varied provided the variation takes effect at least one year after the transfer date and the employee’s terms “when considered together” are no less favourable following the variation.
- Where a transferee inherits contractual terms derived from a collective agreement, the transferee will not be bound by

terms and conditions negotiated in future through collective bargaining arrangements to which they are not a party.

- The transferor must provide certain information regarding the transferring employees at least 28 days before the transfer. This is an increase from the current requirement to provide such information 14 days before the transfer. This will apply to transfers which take place 3 months after the regulations come into force.
- Employers with fewer than 10 employees may directly consult affected employees in cases where there are no existing appropriate representatives. This will apply to transfers which take place 6 months after the regulations come into force.

These changes are in the main good news for employers. In particular the ability to start collective redundancy consultation prior to the transfer (subject to the agreement of the transferor) resolves one of the more difficult practical issues for employers under the old TUPE regime. To ensure compliance with the old regime employers had to wait until the transfer had taken place before commencing their redundancy consultation. The removal of transfer-connected reasons from the protection against dismissal and the restriction on varying employment contracts should give employers greater flexibility when managing employees who have been transferred. The Government intends to issue guidance on the new TUPE provisions and this will hopefully help to clarify the practical impact of the changes.

An Early Day Motion (EDM) has been tabled in Parliament calling for the annulment of the Collective Redundancies and Transfer of Undertakings (Protection of Employment) (Amendment)

Regulations 2014. EDMs are used for reasons such as publicising the views of individual MPs, drawing attention to specific events or campaigns, and demonstrating the extent of parliamentary support for a particular cause or point of view; there is, however, very little prospect of EDMs being debated.

It is unlikely, therefore, that this EDM will result in the annulment of the regulations although it is worth watching this space.