

# TUPE 2006

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## Introduction

The long awaited Transfer of Undertakings (Protection of Employment) Regulations 2006 ("TUPE 2006") came into force on 6 April 2006 and implement the European Acquired Rights Directive of 2001. TUPE 2006 applies to the whole of the UK however the service provision changes required a separate piece of implementing legislation in Northern Ireland called the Service Provision Change (Protection of Employment) Regulations (Northern Ireland) 2006 which contain identical provisions to those set out in the main Regulations.

The aim of TUPE 2006 is to bring clarity to the area of transfers by simplifying the operation of transfers while maintaining protections in place for employees. However, like any new piece of legislation there are areas which remain uncertain and it will be some time before we will be in a position to judge whether TUPE 2006 has achieved its goals.

## Scope of the Regulations

Under the old TUPE regime the main source of litigation stemmed from uncertainty in relation to service provision changes, i.e. outsourcing or insourcing, and whether they constituted a transfer.

"Relevant transfer" is now defined to include "Service Provision Changes" so that a relevant transfer will include a service provision change where there is an organised grouping of employees whose main purpose is to carry out the service (other than on a one off basis). The transferee is not required to carry out the activities in an identical manner post-transfer.

Given the general confusion in this area over the years and the vast amount of case law generated by the ECJ, this change has largely been welcomed. However, there are likely to be problems in determining whether the event or task is of short term duration and it is advisable to address this issue at contract drafting stage.

Original proposals to limit the provisions to exclude professional services firms, such as lawyers and accountants, have thankfully been abandoned by the Government.

## Contracts of Employment

As with the 1981 Regulations, the contracts of employment of transferring employees will transfer to the transferee as a result of the transfer. However, under the old regulations any changes to the transferring employees' terms of employment for a reason connected with the transfer were void. TUPE 2006 alters the position so that changes are only void if the sole or principal reason is:

- The transfer itself; or
- A reason connected with the transfer which is not an economic, technical or organisational reason ("ETO") entailing changes in the workforce

Therefore, a variation for an ETO reason may be effective in law and variations unconnected with the transfer are permissible. The difficulty may be in establishing that the variation is unconnected with the transfer.

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DTI guidance states that although there is no statutory definition of “entailing changes in the workforce”, it includes changes in the numbers employed or the changes in the functions performed.

It was argued during the consultation process that agreed changes to terms and conditions should be permitted, however the Government concluded that this would not be consistent with the Acquired Rights Directive and it will therefore remain difficult to agree changes to employee’s terms and conditions of employment on foot of a transfer.

## **Dismissals and Redundancies**

A new statutory right has been created for employees where there has been, or will be, a substantial change in their working conditions to their material detriment as a result of the transfer. Employees who find themselves in such a situation will now have the right to terminate their contract and claim unfair dismissal (but not pay in lieu of notice). This right exists independently of an employee’s common law right to claim constructive dismissal in response to an employer’s repudiatory breach of contract.

This is a significant change, however, given that there is no definition of “working conditions” in the Regulations it is likely to generate litigation. The resignations are treated as dismissals as opposed to automatically unfair dismissals and a Tribunal will still be required to consider whether an employer has acted unreasonably. The statutory dismissal procedures will not apply and therefore any failure on the part of the employer to follow those procedures will not render the dismissal “automatically unfair”.

Employers are not permitted to dismiss employees because of the transfer or for a reason connected with the transfer which is not an ETO reason entailing changes in the workforce. Therefore if there is no ETO reason the dismissal will be automatically unfair and DTI guidance provides that the onus is on the employer to show that a dismissal falls within the ETO exemption to the automatic unfairness rule.

## **Information and Consultation Rights**

### **Provision of Employee Information**

Regulation 11 imposes a new obligation on the transferor to notify the transferee of the following information in relation to transferring employees:-

- Identity and age;
- Information contained in the employees’ written particulars of employment pursuant to the Employment Rights (Northern Ireland) Order 1996;
- Information about disciplinary or grievance procedures taken within the previous two years in circumstances where the statutory dispute resolution procedures apply;
- Any legal action taken by an employee against the transferor within the previous two years and any potential legal action where the transferor has reasonable grounds to believe such actions might occur;
- Information about any collective agreement which will have effect after the transfer.

The information must be given at least 14 days before the relevant transfer unless special circumstances make it not reasonably practicable to do so.

Where the transferor is in default of this provision, the transferee may lodge a claim with the Industrial Tribunal and may be awarded not less than £500 for each employee in relation to whom the information was not provided or a smaller sum where the Tribunal thinks it just and equitable.

In reality, the parties to a transaction involving a transfer would usually obtain this information through a due diligence process. However it will be of particular use in the case of service provision changes where there is often no contractual relationship between outgoing and incoming contractors and there is no requirement for outgoing contractors to provide information to the new employer.

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## Consultations With Affected Employees

TUPE 2006 addresses the present uncertainty in relation to liability for failure to inform and consult employees in providing that both the transferor and transferee shall be jointly and severally liable in respect of any award made where the transferor has failed to inform and consult.

It had been held in the case of *Alamo Group v Tucker* [2003] IRLR that liability was transferred to the transferee, even where the duty to inform the workforce had fallen on the transferor and the new Regulations therefore reverse this position. TUPE 2006 do not deal with the failure to inform and consult in a redundancy situation and therefore liability will continue to transfer to the transferee in accordance with the *Kerry Foods Ltd v Creber* [2000] IRLR case.

## Insolvent Businesses

Regulations 8 and 9 have introduced positive changes in an effort to make insolvent businesses more attractive to potential purchasers. Under Regulation 8, where the insolvent business is in administration, some of the pre-existing debts owed to employees will be met by the Secretary of State out of the National Insurance Fund as opposed to passing to the transferee.

Regulation 9 now makes it possible to vary the employee's contract. For example rates of pay may be reduced or less favourable terms and conditions may be introduced in order to facilitate the disposal of the business. Changes will only be permitted, however, where the transferor, administrator or transferee reaches an agreement with employee representatives (not individual employees) and the variation must not breach any other statutory entitlements. The changes must be made with the intention of safeguarding employment opportunities by ensuring the survival of the transferred undertaking and DTI guidance states that the provisions do not apply where there is a winding up by either creditors or members where there is no such transfer.

## Conclusion

TUPE 2006 introduces a number of potentially significant changes to the previous regime;

- the possibility of negotiating legally binding changes to terms and conditions to enable the rescue of an insolvent business;
- the imposition of joint and several liability for failure to inform and consult;
- the penalty on transferors not providing basic information to transferees;
- clarification of "Service Provision Changes";
- employee right to resign and claim unfair dismissal if substantial and materially detrimental changes to terms and conditions results from the transfer.

Time will tell whether the Government's objective that after TUPE 2006 "everyone should know where they stand..." will be realised in practice; time and, of course, litigation!

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