

A Thorogood Special Briefing

Chapter 1

Background New TUPE

- Legislative background
- Consultation process
- Major problem areas with the 1981 Regulations

Chapter 1

Background New TUPE

Legislative background

The source/history of the Transfer of Undertakings (Protection of Employment) Regulations 2006 is as follows.

- EU Acquired Rights Directive
Adopted 14th February 1977. The full title of the Directive being as follows:
“Directive on the approximation of the laws of the Member States relating to the safeguarding of employees’ rights in the event of transfers of undertakings, businesses or parts of undertakings or businesses.”

The title makes clear the overriding purpose of the Directive; protecting employee rights in the circumstances of a transfer. This purpose has been fundamental to the development of case law regarding the applicability of the Acquired Rights Directive within the EU and, given the purposive approach to be adopted by UK courts and Tribunals, whereby UK legislation must be interpreted as far as possible to give effect to the purpose of the EU Directive which it was bought into force in order to implement, the interpretation given by UK courts and Tribunals to TUPE.

- The Transfer of Undertakings (Protection of Employment) Regulations 1981 (“**the 1981 Regulations**”)
Came into effect on 1st February 1982. Applied in relation to transfers taking place prior to 6th April 2006.
- The Amending Directive
Adopted 29th June 1998. The Amending Directive provided member states with a number of options regarding amending national legislation already in force to comply with the Acquired Rights Directive. The implementation date for the bringing into force of national legislation complying with the Amending Directive being 17th July 2001.
- The Transfer of Undertakings (Protection of Employment) Regulations 2006 (“**the 2006 Regulations**”)

Brought into force in the UK in order to implement the Amending Directive. The 2006 Regulations apply to transfers taking place on or after 6th April 2006. They revoked the 1981 Regulations.

Within the remainder of this report references to particular TUPE regulations will be to the 2006 Regulations unless otherwise indicated. References to “the Directive” shall be to the Acquired Rights Directive as amended, unless otherwise indicated.

Consultation process

Prior to the coming into force of the 2006 Regulations the DTI undertook a major process of consultation. In particular, a first consultation process following the publication of a consultation paper on 10 September 2001 (URN98/513) and a second consultation process following publication of a consultation document on 15 March 2005 (URN 05/926 (“**the Consultation Paper**”). These consultation papers are interesting reading insofar as they set out the DTI’s thinking regarding changes now implemented.

Major problem areas with the 1981 Regulations

Those seeking to apply TUPE have for many years had to deal with legal uncertainties; both in ascertaining whether TUPE applies in any given set of circumstances and its consequences. Much of this uncertainty has stemmed from conflicting approaches and authorities from the European Court of Justice (“**ECJ**”) on the Acquired Rights Directive and UK Courts and Tribunals on TUPE. In particular, in relation to the test for ascertaining whether TUPE will apply to second stage contracting out.

There is, therefore, a lengthy history of ECJ and UK case law regarding when TUPE will apply, characterised by changing levels of discordance between the approach of the ECJ and UK Courts and Tribunals and, as a result, differing levels of certainty as to when TUPE will apply. This has caused real practical problems for contractors who have understandably wanted certainty that if they inherited a workforce under TUPE on winning a contract, they could be sure that TUPE would similarly apply on their losing the contract so that they would not be left with an expensive workforce for which they no longer had a requirement.

UK Courts and Tribunals have noted what at times has been a far from satisfactory state. For example, in the case of *Complete Clean Ltd v Savage* (EAT 2002) the EAT memorably stated:

“the law in the UK is in a state of critical uncertainty. It is almost impossible to give accurate advice to [those] involved in possible transfers with any degree of certainty.”

In another memorable judgment, in the case of *AEEU v Lyndon Scaffolding* (EAT 2000), the EAT stated:

“We [the EAT] have watched, with some dismay, the apparent twists and turns in the decided cases on [the transfer definition], both in the European Court of Justice and domestically. That dismay is not so much for ourselves, but for those engaged in industry, whether employers, trade unions or employees, particularly in the service contracting fields, who cannot be expected to know precisely where they stand in any given situation.”

There have also been for many years a number of other difficult TUPE issues which have never been adequately clarified/resolved by the authorities.

In summary, some of the major practical problem areas pre the 2006 Regulations included the following:

- the application of TUPE to 2nd stage contracting out (discussed in Chapter 3, *rationale for new Type B Transfer*);
- the geographical ambit of TUPE/application to off-shoring (discussed in Chapter 4);
- TUPE information – difficulties of obtaining from first contractor on second stage contracting out (see Chapter 10, *The new obligation to notify of employee liability information*);
- the extent to which there is an obligation to consult appropriate representatives of transferring employees regarding the transferee’s envisaged measures (see Chapter 10, *The obligation to consult*);
- whether liability for failure to inform and consult transfers (see Chapter 10, *Will liability for failure to inform and consult transfer across to the transferee?*);
- TUPE dismissals – particularly the applicability of the ETO Defence to place of work redundancies (see Chapter 13, *Can a place of work redundancy provide an ETO defence?*);

- TUPE constructive dismissals (see Chapter 14, *Constructive dismissals under TUPE*);
- harmonising terms and conditions – the extent to which it has been possible for a transferee to harmonise terms and conditions after a TUPE transfer (see Chapter 12);
- dealing with the implications of *Beckmann* (see Chapter 8, *What pension rights can transfer under TUPE?*).

Blank

A Thorogood Special Briefing

Chapter 2 Circumstances where TUPE can apply

- General application
- Share saves
- Joint venturing

Chapter 2

Circumstances where TUPE can apply

General application

TUPE may apply to a broad range of transactions including:

- the acquisition or disposal of a business (or part);
- an internal transfer of a business (or part) within a corporate group (as confirmed in the case of *Allen v Amalgamated Construction*);
- the contracting-out of in-house services, switching of contractors or transferring of services back in-house. Following the coming into force of the 2006 Regulations, referred to as “service provision changes”.

TUPE will only apply however, if there is a “Relevant Transfer”; the transfer of an undertaking or part of an undertaking in the case of a Type A business transfer (within Regulation 3(1)(a) TUPE, when construed to comply with the Directive) and, in the case of a Type B Transfer, within Regulation 3(1)(6) TUPE

Share saves

TUPE will not apply to a share sale as, in a share sale scenario, the employer remains the same, the company whose shares are being sold, and there is, therefore, no change in the legal entity employing the employees. Confirmation that this is the case was provided by the EAT in the case of *Brookes v Borough Care Services*.

The recent Court of Appeal decision in *Millam v The Print Factory Limited* confirms, however, that on/following a share sale there may nonetheless be a TUPE transfer if in practice the business of the acquired company is taken on by a company within the purchaser’s group (see discussion of case in Chapter 3).

In July 2007 the Transport & General Workers Union, as part of its campaign against private equity, called for TUPE to be widened to cover share sales. Given that, as already flagged, in the context of a share sale TUPE is not necessary as a mechanism to transfer employees continuity and rights; employees

remaining employed throughout by the Company in whom the shares are sold, the rationale for this is questionable. This is particularly so given that the criticisms made by the unions of private equity investors principally focus on a failure to consult in relation to large redundancy exercises, in relation to pension changes and generally in relation to business developments. In relation to all three there is however, existing legislation in place which imposes more rigorous information and consultation obligations than imposed by TUPE; respectively, TULCRA, the Occupational and Personal Pension Scheme (Consultation by Employers and Miscellaneous Amendments) Regulations 2006 and the Information and Consultation of Employee Regulations, which now apply to undertakings employing 100 or more.

The main point in favour of the unions' argument is what they refer to as a "loophole in share transfers", the absence of any obligation to inform and consult in advance of a share transfer. It can of course be argued that it does not matter that the legal identity of the employing entity is the same, what matters is the change of ownership which can impact on staff. Therefore, an obligation to inform and consult should arise. In reality of course what the unions would want is a power to veto such transfers which would not arise even if TUPE were widened to cover share sales.

An interim report of the House of Commons Treasury Committee on private equity has asked for guidance from the Government to clarify the application of TUPE to share acquisitions following conflicting testimony to the Committee in relation to the issue. A final report is due in October 2007. It seems unlikely, however, that the Government would wish to widen TUPE to apply to share sales in circumstances where the rationale for doing so seems limited and where it would leave itself open to the charge of unnecessarily burdening companies with further regulation and unnecessary cost were it to do so.

Interestingly, in a European Commission report to examine the effects of the Directive published on 18 June 2007, the Commission, in response to a proposal by the European Confederation of Trade Unions, indicated that it did not believe that the Directive should be revised to extend the definition of transfer to include a change of control. This being on the basis that:

"although a change of control can lead to changes in the undertaking, the employees' legal position vis-à-vis the employer is unchanged."

Joint venturing

A joint venture arrangement may involve a TUPE transfer. There are a number of potential scenarios.

Scenario 1 – A and B joint venture to carry on a business/ provide a service previously carried on/provided by each of them individually

A and B both carry on a particular business or provide themselves with a particular service in house. A and B decide to collaborate in carrying on that particular business or providing that service in the future through a joint venturing arrangement. A and B set up a new company, “JV Co”, to carry on the business in the future. In this scenario there may be a TUPE transfer from A and B respectively to JV Co of the staff who previously were assigned by A and B to the business/provision of the service.

Alternatively, A or B may have previously outsourced the service or part of the service to an external contractor in which case there may be a TUPE transfer from that external contractor to JV Co.

Scenario 2 – A and B joint venture to carry on a business/provide a service for the first time

A and B have not previously carried on a particular business or provided themselves with a particular service. They decide for the first time to do so through a joint venturing arrangement. In this scenario, on the basis that a business was not previously carried on or a service previously provided by A or B, TUPE can not apply. Even if employees of A and B are offered employment by JV Co or seconded to JV Co, they can not have previously been assigned to that business/that service, and the requirements for a relevant transfer (Type A or B as discussed in Chapter 3) would not be met.

Clearly detailed advice should be taken dependent on the detailed circumstances of any given joint venturing scenario.