Amendments To Tupe: 4 Key Changes


The 2014 Regulations apply to all TUPE transfers or contract variations after 31 January 2014, although some changes, for example, the changes to the provision of Employee Liability Information from 14 to 28 days, came into effect on 1 May 2014 and the rules on a micros businesses duty to inform and consult came into effect on 31 July 2014.

SERVICE PROVISION CHANGE

The extension of TUPE to Service Provision Change (SPC) was brought about by the 2006 Regulations rather than the amendments to the Acquired Rights Directive in 1998.

There was no reference to any need for the service or the activities to be the same or similar after the transfer.

However, as a result of caselaw developments, it was recognised that there would only be an SPC if the service after the transfer was the same or similar to that before the transfer and that the SPC rules would not apply if there was a fundamental change to the service.

The leading cases on this point are: Metropolitan Resources Ltd v Churchill Dulwich Ltd [2009] IRLR 211, Enterprise Management Ltd v Connect Up Ltd [2012] IRLR 190 and Johnson Controls Ltd v (i) Campbell and (ii) United Kingdom Atomic Energy Authority (EAT/0041/12).
The case law is now reflected in the 2014 Regulations (New Regulation 2A) which states that the reference to activities in Regulation 3(1)(b) is a reference to “activities which are fundamentally the same as the activities carried out by the person who has ceased to carry them out”.

Note the observation on this point by Elias LJ in Hunter v McCarrick [2012] IRLR 26:

“There may be issues where a purposive interpretation is appropriate with respect to the service transfer provisions...for example it may be necessary not to be too pedantic to the question whether the activities carried on before and after the transfer are sufficiently similar to amount to the same service.” (see, for example the EAT’s ruling in London Borough of Islington v Hannon and another (EAT 0221/12)).

Also note the observation of Langstaff J in Johnson Controls: the first task for the ET is to identify the relevant activities carried out by the original contractor and the second task is to consider whether the activities carried on by the subsequent contractor are fundamentally or essentially the same as those carried on by the original contractor.

The question is essentially a question of fact: Minor differences may be properly disregarded but even a small change in percentage terms may be sufficiently significant to amount to a fundamental change so a 15% variation in the work required in an IT contract (excluding curriculum work) was considered sufficiently fundamental in the Enterprise Management Services case referred to above.

**CHANGE TO THE RULES ON CONTRACT VARIATION**

The next key change applies to both ‘ordinary’ TUPE transfers and SPC transfers.
Under the 2006 Regulations (Regulation 4(4) and Regulation 4(5)), a variation in contract terms was void if the reason for it was the transfer itself (or a reason connection with the transfer) unless it could be shown that the reason amounted to an “economic, technical or organisational reason entailing a change in the workforce”.

It was thought that this reflected ECJ and domestic case law (see Daddy’s Dance Hall [1988] IRLR 315 and Credit Suisse v Padiachy [1998] IRLR 84).

The 2014 Regulations (Regulation 6) make three important changes:

- TUPE protection only applies the variation is the transfer itself;
- ETO entailing a change in the workforce is extended to cover changes in the employee’s place of work;
- The changes are permitted by the terms of the contract or are agreed between the parties.

Note special provisions apply where the variation is made as a result of a collective agreement (Regulation 6(5)(B) (the Alemo-Herron codification).

The relationship between these changes and the employee’s right to resign under Regulation 4(9) is not entirely clear. For example where an employer purports to exercise its right to vary the contract under the terms of the contract itself, can an employee still argue that there has been a material change to his or her detriment? (Rossiter v Pendragon plc [2002] IRLR 483).

It has been suggested that the ETO defence to contract variations is in breach of EU law.
The implications of the other changes are considered below.

**CHANGE TO THE RULES ON DISMISSAL**

Under the 2006 Regulations, a dismissal was automatically unfair if the sole or principal reason for it was the transfer or a reason connected with the transfer unless the employer could show an ETO entailing a change in the workforce. In such circumstances it was still necessary to show that the dismissal reason namely redundancy or SOSR was fair in accordance with ordinary principles of fairness.

The 2014 Regulations (Regulation 8) make two important changes:

- TUPE protection only applies if the ‘sole or principal” reason for dismissal is the transfer itself;

- ETO entailing a change in the workforce is extended to cover changes in the employee’s place of work.

The Government’s intent is to reduce the burdens on business of TUPE variations and dismissals but there is considerable doubt whether the first change makes a great deal of difference in practice: the test being one of causation (*Wilson v St Helens Borough Council* [1998] IRLR 706).

The second change—extending an ETO to a change in the employee’s workplace—does make a difference because although there was case law that a change in the workplace could amount to an ETO, the EAT recently ruled *in Donnelley Global Documents Solutions Group Ltd v Besagni and ors (EAT/0397/13)* that a change in place of work did not “entail a change in the workforce”. The 2014 Regulations cover both.
There are however doubts whether these changes may be in breach of EU law and that the ECJ has used the words “transfer” and connected with the transfer interchangeably.

It has also been suggested that the extension of an ETO to a change in place of work is contrary to EU law.

**CHANGE TO THE RULES ON REDUNDANCY CONSULTATION**

An important but less publicised change is that under the 2014 Regulations the transferee may take the benefit of pre-transfer consultation over collective redundancies.

The 2014 Regulation add a new Section 198(A) and 198(B) to the Trade Union and Labour Relations (Consolidation) Act 1992.

The new rules apply where-

- There is or is likely to be a transfer;
- The transferee is proposing to dismiss as redundant 20 or more employees at one establishment within a period of 90 days or less;
- The individuals who work for the transferor and who are to be or likely to be transferred to the transferee’s employment under the transfer include one or more individual who may be affected by the proposed dismissal or measures taken in connection with the proposed dismissal.

If these conditions are met, the transferee may elect to consult or start to consult representatives of affected employees before the transfer takes place if the transferor agrees to this. This is known as “pre-transfer” consultation.
The election can only be made if the transferee notifies the transferor and the transferor agrees to it and it is open to the transferee to advise the transferor of a change of heart.

Where such pre-transfer consultation takes place, this can be taken into account and reduce the period of any protective award.

It has again been suggested that these provision are contrary to the Collective Redundancies Directive 98/59.

Under the pre-existing TUPE rules, there are doubts as to the role of the transferee in the consultation process and the ET’s ability to make an award against the transferee.

In Allen and ors v Morrisons Facilities Services Ltd [2014] IRLR 514 the EAT ruled that there is no duty on the transferee to provide information to the employees of the transferor and therefore if the employees settle their claims against the transferor, it is not open to them to bring a separate claim against the transferee.

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