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Service Provision Changes and New TUPE

By Ray Wann and Christopher Walter

The long-awaited UK **Transfer of Undertakings (Protection of Employment) Regulations 2006** ("TUPE 2006") come into force on **6 April 2006**.

TUPE 2006, which replaces the 1981 regulations, is intended to:

- address the uncertainty surrounding the application of TUPE in outsourcing, insourcing and re-tendering exercises ("service provision changes");
- improve the quality of information available to in-coming contractors and other transferees ("employee liability information");
- create joint and several liability for any failure to inform and consult appropriate representatives in relation to the transfer;
- clarify the circumstances in which transfer-related dismissals and changes to terms and conditions of employment will be legally effective; and
- reduce employment liabilities for those transferees involved in insolvency "rescue procedures."

Service Provision Change

TUPE will continue to apply where, as in many business acquisitions, there is a transfer of an economic entity which retains its identity after the transfer.

TUPE 2006 will also apply to "service provision changes". A service provision change occurs where there is the transfer from one party to another of activities performed by an identifiable grouping of employees. An absence of transferring assets does not prevent TUPE applying.

TUPE 2006 will not apply where the activities:

- "consist wholly or mainly of the procurement or supply of goods" - for example, the supply of sandwiches by a catering company; or
- are to be provided in the context of a single event or task of short-term duration - for example, a contract to provide a single day's security at a marketing event.

Employee Liability Information

TUPE 2006 requires transferors to provide to transferees in writing or another readily accessible form "*employee liability information*" in respect of those employees affected by the transfer, at least 14 days before the relevant transfer occurs. Employee liability information includes:

- the identity and age of every employee;
- their statutory particulars of employment;
- details of any disciplinary or grievance procedures triggered or litigation filed within the previous two years relating to such employees' employment; and
- details of any collective agreements with employee representatives to which the transferee may or will become bound.

TUPE 2006 also allows the information to be provided in instalments and supplied directly to the transferee or through a third party.

The onus is therefore on the transferor to conduct certain due diligence for the benefit of in-coming contractors and other transferees. The benefit for transferees is clearly that they can assess more accurately the employment liabilities they are likely to inherit.

A transferor that breaches this obligation may be ordered by an employment tribunal to pay to the transferee whatever is just and equitable, but at least £500 per employee in respect of whom information has not been provided. The tribunal must consider the extent of any failure and the reason(s) for it when determining the appropriate award.

Failure To Inform and Consult

TUPE 2006 imposes joint and several liability on transferors and transferees that fail to consult collectively with affected employees. Prior to TUPE 2006, case law had imposed this liability on the transferee. This had the unfortunate consequence of providing the transferor with little incentive to participate in the process. TUPE 2006 should therefore

encourage transferors (now under threat of an award) to be more co-operative.

Contractual Changes and Dismissals

TUPE 2006 confirms that transfer-related changes to terms and conditions can be made for an economic, technical or organisational reason entailing a change in the workforce (“ETO”). Simple harmonisation of terms of employment with a transferee’s existing workforce will not amount to an ETO reason. A re-structuring of operations, involving either a change in the overall numbers, or functions, of employees generally would constitute an ETO reason.

Dismissals are automatically unfair if the sole or principal reason for the dismissal is either the transfer itself or a reason connected with it – unless the transferee can prove an ETO reason. ETO dismissals will be deemed by TUPE 2006 to be effected by reason of redundancy, so ensuring that employees with requisite service receive statutory redundancy payments.

An alternative approach to effecting changes to terms of employment is still for transferees to dismiss employees under their existing terms of employment and to re-engage on new terms, using compromise agreements to secure a waiver of any consequential claims. However, this is not watertight legally, is difficult to manage in practice and invites claims for unfair dismissal.

In practice, this means there continues to be little scope for transferees varying terms and conditions of employment and the ETO reason will only assist transferees in exceptional circumstances.

Insolvency

Where a transferor is in “*relevant insolvency proceedings*,” certain employee debts will not pass to the transferee and will instead be paid by the National Insurance Fund. It will also be possible in this context to vary terms of employment in non-ETO situations, if the changes are designed to safeguard employment opportunities, are agreed with appropriate representatives, and do not contravene applicable law.

Pensions

Parties to service provision changes will need to bear in mind the recent pension rules implemented in April 2005 by the Pensions Act 2004. Transferred employees with an occupational pension entitlement prior to the transfer are entitled following the transfer either to a minimum occupational pension or a contribution by the employer of up to 6% of base pay to a stakeholder pension scheme.

Principal Differences Between the Old and New Rules

TUPE 1981	TUPE 2006
Change in the identity of the economic entity after transfer may defeat the application of TUPE	Provided the activities are broadly the same, a difference in the way the service is provided will be unlikely to prevent the application of TUPE 2006
No obligation on the transferor to provide the transferee with information about the workforce before the transfer	Transferor must provide “employee liability information” within 14 days of transfer to avoid a minimum penalty of £500 per employee
Transferee liable for transferor’s failure to inform and consult with appropriate representatives of affected employees transfers	Transferor and transferee have joint and several liability in respect of any failure to inform and consult with appropriate representatives
In order for changes to terms and conditions of employment to be legally effective they had to be entirely unconnected with the transfer	Effecting changes to terms and conditions of employment is permissible under TUPE 2006, even if in connection with the transfer, where the transferee can demonstrate an ETO reason
With the exception of “hive-down” arrangements, no special exemption was available for the transfer of employment liabilities from transferor to transferee in insolvency situations	Certain employment liabilities will not transfer under TUPE 2006 in “relevant insolvency proceedings”

Practical Points

Given that one of the core purposes behind TUPE 2006, stated in the DTI guidance, is to widen “the scope of the Regulations to cover cases where services are outsourced, insourced or assigned”, the assumption has to be that future service provision changes will be caught by TUPE 2006, even where the way in which transferring activities are to be performed is likely to change significantly.

Agreements governing service provision change (and business acquisitions) should therefore address:

- *information and consultation procedures and liabilities arising from any failure to adhere strictly to the legislation;*
- *information sharing procedures, both at the beginning and end of the contract, and any financial risk relating to a failure on the transferor's part to comply with employee liability information obligations; and*
- *pension liabilities.*

For more information please contact any of the following Paul Hastings lawyers:

Christopher K. Walter 44-20-7710-2031
christopherwalter@paulhastings.com

Ray Wann 44-20-7710-2008
raywann@paulhastings.com

Chris Bracebridge 44-20-7710-2051
chrisbracebridge@paulhastings.com

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