

**EMPLOYMENT LAW FOR CHARITIES SEMINAR
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**TRANSFER OF UNDERTAKINGS (PROTECTION OF EMPLOYMENT)
REGULATIONS 2006**

Highlighting the changes

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To my mind one case exemplifies the application of TUPE. That is the case of **Schmidt** [1994] IRLR 302. The facts of that case are very simple, it involved a single cleaner. A cleaning contractor was engaged. They already had all the staff that they required to undertake the contract but TUPE was held to apply.

There are three main areas which I will be looking at in this paper. The first is how can we identify whether or not TUPE applies and in particular how that is effected by the new regulations. Second, once TUPE is held to apply what does it actually mean. Third, with the Charity and wider Voluntary Sector being asked to get more involved with public service delivery, what is the TUPE position with local authority contracts.

Background

Ever since TUPE was first introduced in 1981 there has understandably been argument over whether or not it applied in any particular situation. What is an 'economic entity' for the purposes of the statutory definition of a 'relevant transfer'. There have been arguments about whether it includes not for profit organisations or those which should be making a profit but are simply failing to do so. There have been arguments over what must exist in order to create an "undertaking" capable of being transferred. Most recently these arguments have focused on creating a difference between an recognisable structured business comprising organised staff and assets and the simple provision of a service to a client. In the case of Mrs Schmidt this is the equivalent of saying that if a new contractor doesn't take the mop and bucket how can there be sufficient structure to create an undertaking. Cases have focused on whether assets are a substantial part and whether if a contractor avoids taking on assets they can avoid TUPE applying. This has created conflicting case law and through that uncertainty.

TUPE 2006 is intended to clear away that uncertainty. For this reason many of the existing provisions of the old rules have not changed. Where they have changed this is either:-

- to reduce or eliminate confusion or to address the case law conflict that now exist on interpretation; or

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- to update the provisions to allow for "user friendly" language where existing case law has created well established and undisputed principals.

What is a relevant transfer?

Under the new TUPE 2006 rules, a relevant transfer is:-

1. A transfer of an undertaking, business or part of an undertaking or business situated immediately before the transfer in the United Kingdom to another person where there is a transfer of an economic entity which retains its identity; or
2. Service provision changes where activities cease to be carried out by:-
 - 2.1 a person ("a client") on his own behalf and are carried out instead by another person on the client's behalf ("a contractor");
 - 2.2 a contractor on a client's behalf (whether or not those activities had previously been carried out by the client on his own behalf) and are carried out instead by another person ("a subsequent contractor") on the client's behalf; or
 - 2.3 a contractor or a subsequent contractor on a client's behalf (whether or not those activities had previously been carried out by the client on his own behalf) and are carried out instead by the client on his own behalf.

The service provision changes can be summarised as:

- contracting out;
 - re-tendering;
 - contracting in.
3. A service provision change requires that:-
 - 3.1 there is an organised grouping of employees which has as its principal purpose the carrying out of the activities concerned on behalf of the client;
 - 3.2 the client intends that the activities will, following the service provision change, be carried out by the transferee other than in connection with a single specific event or task of short-term duration; and
 - 3.3 the activities concerned do not consist wholly or mainly of the supply of goods for the client's use.

I'm sure that that will help to reduce or eliminate any confusion that you may have had.

The old - the economic entity

Existing case law on what will satisfy the relevant transfer test will continue to apply.

The following have all been held to amount to a relevant transfer: -

- **P Balk International A/S -v- Foreningen Af Arbejdsledere I Danmark** 10/87 [1989] IRLR 4, forfeiture of a lease followed by a sale of the freehold of the property to a new owner;
- **Daddy's Dance Hall A/S:** 32486 [1988] IRLR 315, the termination of a non-transferable restaurant and bar lease and the grant of a new lease;
- **Dr Sophie Redman Stitching -v- Bartol:** C-29/91[1992] IRLR 366 - transfer of a subsidy from one foundation engaged in assisting drug addicts to another;
- **Rask and Christensen -v- ISS Kantineservice A/S** [1993] IRLR 133 ISS agreed to take over the management of a canteen in return for a fee. Staff transferred but Phillips provided the premises, equipment and electricity free of charge and other consumables at cost.
- **Schmidt** [1994] IRLR 302. The facts of that case are very simple, it involved a single cleaner. A new cleaning contractor was engaged. They already had all the staff that they required to undertake the contract but TUPE was held to apply
- **Dines -v- Initial Healthcare Services** [1995] ICR 11.CA involved a re-tender transfer between an original and a new contractor to a health authority. The new contractor provided all of its own equipment and management but took on staff from the original contractor, but at lower rates of pay. The Tribunal and Appeal Tribunal held that in the absence of any assets at all passing there was no transfer of an undertaking or an 'economic unit'. The Court of Appeal reversed this and held that a transfer had taken place.
- **Charlton -v- Charlton Thermo Systems (Romsey) Ltd** [1995] IRLR 79 ICR 56 - when a company was struck off the Register of Companies for failure to file its returns it continued trading and the employees were kept on in circumstances where there was deemed to have been a transfer from the dissolved company to the former directors who became personally liable under TUPE to meet the employees resultant claims.

Case law developments after **Schmidt** and **Dines** sought to make a distinction between businesses where staff were dedicated to delivery and those where staff were not dedicated. This was seen in the case of **Suzen** [1997] IRLR 255 where the cleaner worked for a contract company and was not taken on by the new contractor. On the face of it the facts were very similar to **Schmidt** but the distinguishing feature, and the

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basis of the European Court of Justice holding that there was no transfer, was that in losing the contract the cleaning business of Mrs Suzen's employer had not ceased to exist. **Schmidt** was in essence a contracting out case so that when Mrs Schmidt's employer transferred her cleaning duties there was nothing left for her to do. **Suzen** was a second generation contracting out (or re-tender) case.

However subsequent cases such as **ECM (Vehicle delivery Services) Ltd -v- Cox** [1999] IRLR 559, CA have caused added complication. No assets transferred and the new contractor decided not to employ any of the employees. It was held that **Suzen** could not as a matter of public policy be used to deliberately get around the application of TUPE. If the parties arranged their affairs so as to avoid TUPE applying then the Courts would intervene.

However the ECJ went further in the case of **Oy Liikenne AB -v- Liskojarvi and Juntunen** [2001] IRLR 171 when it sought to make a distinction that in the case of a business that was heavily asset based, in this case bus services, a lack of a transfer of assets was a significant factor in determining that there was no transfer of an economic activity. The case is criticised on the basis that it ignored the issue of the potential for deliberately seeking to avoid the application of TUPE (and the Acquired Rights Directive) by the refusal to take on staff.

The case law continues to cause confusion, but the approach taken by the Courts is that there are a number of factors that must be weighed up, including what happens to staff and assets and the intention (express or otherwise) of the parties involved. Courts will also look at the practical effect, what was happening before and compare it to what happens after the transfer. Similarity, particularly where there is a seamless change such that customers are hardly affected, will push the indicators towards a relevant transfer.

The new - Service Provision Changes

To fall within the Service Provision Changes a contractor must have in place an identifiable team or "organised grouping" of employees dedicated to the particular client's needs. It is not a requirement that those individual employees work exclusively on that contract.

So although the service change provisions are intended to make it clear that labour intensive services such as office cleaning, workplace catering, security, refuse claiming and maintenance, are caught where there is no identifiable grouping of employees it will fall outside of the regulations. For example, where courier services are provided but each time a package is picked up for delivery a different courier is used, it will be difficult to identify which particular employees, if any, have been dedicated to that service and so the regulations would not apply.

Here the distinction is to identify the relevant grouping in the old employer and not

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changes that the new employer may wish to make. Under the old rules, pre TUPE 2006, developing case law was giving support to the argument that where the new employer proposed that the novel service delivery that this would take a transfer outside of TUPE. For example in the case of **Astle -v- Cheshire County Council** [2005] IRLR 12, EAT, the council contracted out its architectural staff in 1994 and following concerns over performance there was a re-tender in 1999. There were continued failings which it was suggested related to the original council staff who had transferred from the council to the first contractor and on the re-tender to the second contractor.

The Council sought to implement a market economy to source architectural services from a panel of approved consultants. None of the staff were appointed to the panel nor were they retained once the contract was terminated. It was argued that the decision to apply the market economy was to allow the best method of delivering service not as an attempt to avoid TUPE and on that basis it was held that the Regulations did not apply.

A similar case involved **Computer Centre (UK) Limited -v- Swanton 2004**. IBM contracted out computer maintenance in 2001 to a contractor who dedicated 8 employees to the work. Some worked from home, others on the client's site. In October 2002 a new contractor was appointed who decided not to take on any of the existing staff but used its existing employees to cover the workload, none of whom worked on site. Because the new contractor did not dedicate any staff it was held that there was no organised grouping of employees and that TUPE did not apply.

These have sometimes been called 'Innovative Bids'; where the new contractor sought to provide the service in a new way. Such argument will no longer find favour as the issue is whether the old employer had an organised grouping of employees dedicated to the work. However it is also relevant to consider what the client intends as this is part of whether or not the transfer satisfies the Service Change Provisions of TUPE 2006. This can allow innovative bids in a re-tender to survive and no doubt create further conflicting case law when compared to transfers that are by way of a contracting-out or contracting-in.

However the Service Change Provisions continues to allow scope for the old employer to offload undesirable employees by assigning them to the particular contract which is to be transferred. Whether or not an individual has been assigned to a particular contract is a matter of fact to be determined by a Tribunal.

In practice it is common for a contractor to shift its staff around its different clients in order to ensure that there is flexibility to meet its commitments. This is in part the basis of the decision in **Suzen**. But where a contractor knows that it is about to lose a contract, if it continues to swap staff around those staff will not form an organised grouping and they will not be caught under TUPE. This will leave the contractor with too many employees when the contract comes to an end and it will need to deal with the cost of any resultant redundancies. There is a real incentive, in the days, weeks or months leading up to the loss of a contract to a new service provider, that the contractor

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will start to permanently assign its undesirable staff to that contract in order to shift the burden of dealing with those individuals to the new employer. Remember that in seeking to permanently assign such staff the contractor does not really need to take account of any individual rights because claims in relation to breaches of those rights will pass under TUPE to the new employer. This is demonstrated in the case of **Fairhurst Ward Abbots Ltd -v- Botes Building Ltd and others** 2004 CA where before losing part of a maintenance contract the employer moved 6 maintenance workers permanently to the part being taken over by the new contractor. For good measure the employer also moved a supervisor onto the contract, who had never previously worked on it, together with an employee who was on long term sickness absence. The new contractor took on no assets and argued that it had not taken on the staff so that **Suzen** should apply. However the Tribunal held that **ECM** applied and the reason no staff had been taken on was to avoid TUPE in the first place. The 6 had worked on the contract and were assigned to it, the supervisor had never worked on the contract and did not transfer. The person on sick was to be treated like any one on holiday or maternity in that they remained employed even though they are not at work and the question whether they are assigned to the contract was a matter of fact.

Exceptions

From this it is clear that where there is no organised grouping of employees then a simple change in service providers will not amount to a relevant transfer. Other situations which will not be caught under the new service provisions or generally under TUPE are as follows:

One-off Contracts

With the inclusion of service provision transfers within the definition of a relevant transfer for the purposes of TUPE there is a danger that any service provider will be caught. One off contracts are expressly excluded. Whether or not a contract is one-off, a series of unconnected one-off contracts or a long-term relationship governed by an umbrella contract will be a matter of fact for a Tribunal to determine. For example:-

1. a company engages the services of an events organiser in order to make arrangements for the hosting of a centenary celebration.
2. the company uses the same events co-ordinator to host its annual Christmas party each year.
3. the company has a number of different sites around the country and holds regular cross-site staff, departmental and companywide meetings using the same events co-ordinator to book conferences, accommodation and travel facilities.

Which of these will be a service provision change? Remember the issue will still be

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whether or not there is an organised grouping of employees dedicated to that service. Where the events organiser establishes a 'project team' then this will be satisfied.

The length of the contract will also be relevant as to whether or not it is truly one-off. Security for the London 2012 Olympics is already in place and will continue for the next 6 years. Security for competing athletes will be put in place during the hosting of the Olympics itself. The former is unlikely to be a one-off contract albeit it is centred on a single event because of its duration.

Supply of Goods

Here the distraction must be between something that is solely related to goods, for example, bottled water that might go into the office water coolers, or the printer that provides your paper. Where there is an element of service delivery this exception may be lost, for example, your printer sources all of your stationery requirements ensuring appropriate quality and stock control.

Specific Rules about when there is or isn't a transfer still apply

TUPE 2006 continues to specify certain situations where the Regulations will not apply:

Share Transfers

TUPE is designed to cover the transfer of employment from one employer to another. Where a company transfer is effected by a sale of its shares the employer, the legal entity that is the company does not change even though its members, the shareholder, may do so.

Asset Sales

Where it is simply assets, for example equipment, that is being sold by a company replacing old equipment, TUPE will not apply. However, this is clearly a question of degree and a matter of fact to be determined by a Tribunal particularly where employees may not be transferred in order to get around the application of TUPE. For example, where an employer buys replacement equipment and will continue to need employees albeit there may be an issue of retraining, there has been no transfer of the employers business. This may be the case even where the purchaser of that equipment is required to recruit additional staff in order to operate what for him may be new or additional equipment.

Administrative Functions of Public Bodies

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The Regulations do not apply to the administrative reorganisation of public administrative authorities or the transfer of administrative functions between public administrative authorities and I shall touch on the specific provisions that apply to local authorities below.

As well as where the Regulations will apply:

Public and private undertakings engaged in economic activities whether or not they are operating for gain

A series of two or more transactions.

In the case of **Astley -v- Celtec Limited 2002 IRLR 269**, Celtec was the Training and Enterprise Council for North East Wales established in 1989 to take over the management and training and enterprise facilities from the Department of Education. A number of Celtec staff were Civil Servants seconded for a period of three years who in 1993 were given the option of returning to the Department of Education or resigning and taking up positions with Celtec. Some took up the offer of working with Celtec and in 1998 when a redundancy situation arose they sought to refer to their Civil Service terms for the calculation of their redundancy entitlement. The Tribunal held that the transfer had taken place over a period between 1989 and 1993 and that each time one of the seconded employees became directly employed by Celtec there was another transaction in the series which amounted to the transfer of the undertaking from the Department of Education to Celtec.

The House of Lords referred to the European Court of Justice the question whether there was a requirement to fix the transfer at a particular point in time.

The European Court of Justice provided its ruling in January this year and confirmed that it is possible to abandon a particular date as being the date of transfer but only where:-

1. the employees terms and conditions are the same when the transfer of their contract takes place as when the decision to transfer was made;
2. the terms of the transfer are defined at the start with the only variable being the date on which an individual contract of employment may transfer; and
3. the employee consents to a deferred transfer.

What is the effect of a Relevant Transfer?

Before TUPE was first introduced in 1981 the general position in law was that a transfer of a business from one employer to another had the effect of automatically terminating the contracts of employment for all of the staff employed. As a dismissal this did give

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rise to a potential claim for wrongful or unfair dismissal but principally a claim for redundancy against the old employer. Where the reason for the transfer was insolvency there were generally no funds to pay any redundancy entitlement.

In addition, where the purchaser of the business did want to take on additional staff they could be selective and if they offered employment to any of those being dismissed because of the transfer they were free to do so on whatever terms and conditions they wished. There was no claim and no rights against a transferee.

The Acquired Rights Directive (77/187/EEC), on which TUPE is based, sought to "provide for the protection of employees in the event of a change in the employer". TUPE 2006 continues this. The effect of TUPE is to automatically transfer the employment of affected employees from the old employer (the "transferor") to the new employer (the "transferee") in such a way as though the original contract was made between the employee and the transferee. This includes all of the rights and obligations under that contract in relation to the employee, including any acts or omissions by the transferor which are therefore deemed to be acts or omissions of the transferee.

There has been a great deal of case laws on this particular point in order to try and identify exactly what does or doesn't pass.

Civil Liabilities

It will only apply to civil liabilities, under the terms of the contract of employment or by virtue of the employment relationship. It does not extend to criminal liabilities for example breach of health and safety. However a breach of health and safety is likely to give rise to a breach of trust and confidence and where there were ongoing breaches prior to the transfer there is a good likelihood that breaches will continue after the transfer until the transferee has taken any remedial action.

Collective Agreements

Whether or not this will include updates or revisions to national terms including pay reviews will depend upon the exact wording.

For example, in the case of **Whent -v- T Cartlege Limited** [1997] IRLR 153 EAT the contract of employment stated that pay and conditions would be in accordance with a National Joint Conditions Agreement. Following transfer the new employer de-recognised the trade union and the union advised its members that the collective agreement was no longer applicable. The employee subsequently argued that pay was still linked to the NJC Agreement and this was upheld by the Tribunal. It was relevant that the contract referred to collective agreements as "amended from time to time".

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In **Ackinlose -v- Gateshead Metropolitan BC** [2005] IRLR 79, EAT, the contract of employment was subject to the National Joint Conditions for Manual Employees (the White Book). The White Book was subsequently replaced by the Green Book. It was held that the contract expressly referred to the White Book and did not incorporate any subsequent changes.

Personal Injury Claims

Other Benefits

What about benefits which have no comparator? In the case of **Mitie Managerial Services Ltd -v- French and others** [2002] IRLR 512, EAT, prior to transfer the employees had been entitled to a profit share scheme. The new employer had nothing comparable. The EAT held that a strict interpretation of TUPE was not appropriate and would not be used to create something that was unjust, absurd or impossible. Nonetheless the transferee was required to put in place a profit share scheme which was substantially equivalent.

Rights which do not pass

Any part of a contract of employment which relates to an occupational pension scheme does not transfer. However, this only applies to benefits in relation to old age, invalidity or survivor's benefits. This is a very narrow exclusion. For example a death in service benefit would transfer, so too would a contractual right to enhanced benefits which may be triggered by some other event such as redundancy or retirement on ill health as these are not triggered by age. This is demonstrated in the case of **Beckman -v- Dynamco Whicheloe Macfarlane Ltd** [2003] ICR 50. The employee was a member of the NHS superannuation scheme which included a provision that employees aged over 50 with five years plus service were entitled to the immediate payment of a retirement pension and other benefits if they were made redundant

Also not excluded will be a contractual right in relation to an employers pension contributions on behalf of the employee.

Separate from TUPE are rights granted under the Pensions Act 2004 and in **The Transfer of Employment (Pension Protection) Regulations 2005**. These provide that where an employee has the benefit of an occupational pension scheme then following a transfer of that employee's contract of employment pursuant to TUPE, the new employer will be obliged to make arrangements to provide for the continuation of pension benefits. However there is no obligation to match the type or value of any scheme and the new scheme can be a defined benefit (final salary), defined contribution (money purchase) or stakeholder arrangement. The new arrangements need have no

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reference to the pre-transfer benefits and the Regulations establish a minimum standard for an employer to match an employee's contributions to a maximum of 6% of basic pay

These are minimum requirements and it is clear that where an employee is contractually entitled to more than 6% by way of pension contributions then that right will bind a new employer under TUPE.

It should be noted that the pension benefits provided under the Pensions Act and Regulations 2004 are not subject to the TUPE restrictions on subsequent variations. Where employers are obliged under the Pensions Act 2004 to provide pension benefits these may be subsequently varied although the employer will need to take account of contractual and statutory rights including new consultation obligations that apply to changes in pension provision.

The Right to Object

It is not possible to force an employee to work for someone that they do not want to work for. Accordingly TUPE continues to provide that an employee can object to the transfer of their contract. An objection, which must be communicated to either the old or new employer will have the same effect as resignation, i.e. the employee is not dismissed and will have no right to bring any claim for wrongful or unfair dismissal.

There are no procedural requirements for the objection to be in writing. Nor does the employee have any rights to be advised of the consequences of objecting. Nonetheless at a practical level it is advisable for employers to seek written confirmation that the employee has exercised their right to object in order to assist in limiting any potential subsequent dispute over whether or not a dismissal took place.

In **Hay -v- George Hanson (Building Contractors) Limited** [1996] IRLR 427, EAT, the employee objected to a transfer and tried to secure continued employment on other work and subsequently a redundancy package. It was held the employee had validly objected to the transfer and the effect of that was that he had resigned from employment and was not eligible or entitled to any redundancy.

There is an exception to this general position with regard to the employee's objection to a transfer. Where an employee can establish that the proposed transfer involves a substantial change in working conditions to his material detriment then the employee has the option of treating his employment as terminated by reason of dismissal. The employee's rights are against the transferor not the transferee as the contract of employment never transfers. The claim is only one for unfair dismissal and no notice period is required. This is an extension to the original, pre TUPE 2006 provisions where the objection was to the 'identity of the employer'

This is in effect a claim for constructive dismissal and the employee would, as in any constructive cases, have to demonstrate that the changes which the transferee would have

made amounted to a fundamental breach of contract. It remains to be seen whether the transferor will still be able to rely upon the ETO defence which I refer to below.

Contract Changes

The old rules were held to prevent any change to employee's terms and conditions once there had been a relevant transfer. Even where employees had agreed to the changes they had been held to be void, i.e. have no effect.

In **Credit Suisse First Boston (Europe) Limited -v- Padichy** [1998] IRLR 504 the bank wanted to secure the services of key employees for a period of 12 months following a transfer. New terms were offered including a beneficial bonus payment and changes to post termination restrictive covenants removing a 12 month non-solicitation covenant in favour of a three month non-compete clause. The changes were agreed and the employees received a substantial bonus but then went to work for a rival during the non-compete restricted period. It was held that as the reason for the change was a reason connected to the transfer the non-compete clause was unenforceable even though the changes overall were beneficial to the employees.

Case law has also demonstrated that an employee dismissed two years after a TUPE transfer for refusing to accept a change in an important contractual term was dismissed for a reason connected with that transfer (**Taylor -v- Connex South Eastern Ltd**). There is no general rule of thumb for when a change will be free from being in connection with the transfer.

TUPE 2006 seeks to make clear that changes can be made but only in limited circumstances. Changes can be made:-

1. Where they are unconnected with the transfer, as at present. For example,
 - when an employer holds an annual pay review for staff transferred employees can have the benefit of wage increases;
 - where following the transfer there has been a change in working conditions such as a new contract has been won or a contract lost, an employer is free to make any relevant changes to deal with such situations;
 - harmonisation of terms and conditions between transferred and existing staff is not permitted as this clearly relates to the transfer itself.
2. Where the change relates to the transfer but is for an economic, technical or organisational change entailing changes in the workforce.

What is an Economic, Technical or Organisational Reason? (the "ETO")

It is for the employer to prove that the ETO exists. There is no statutory definition but guidance given by the DTI suggests that:

- an economic reason relates to the profitability or market performance of the transferee's business;
- a technical reason relates to the nature of the equipment or production process which the transferee operates; and
- an organisational reason relates to management or organisational structure of the transferee's business.

However, the reason must entail changes in the workforce. Again there is no statutory definition but this has been interpreted restrictively by the Courts to refer to changes in either the numbers employed or to changes in the functions performed by the employees transferred. The ETO can be that of the transferor or the transferee before or after the transfer. However it must be made clear who is dismissing and whose ETO is being relied upon.

Insolvency Provisions - Promoting Rescue

An employer is insolvent or bankrupt if they are unable to pay their debts as they fall due. TUPE 2006 provides a mechanism for an employer and "appropriate representatives" to agree permitted variations in insolvency situations. Appropriate representatives will mean either union representatives and/or employee representatives appointed by the affected employees. Such employee representatives may include representatives appointed under Information and Consultation Regulations where their authority includes the right to represent staff in contract negotiations. If not, then specific elected representatives will need to be appointed.

A 'Permitted Variation' is a variation of the contract of employment where the reason is connected to the transfer but is not an ETO and "it is designed to safeguard employment opportunities by ensuring the survival of the undertaking..."

There is already a dispute as to whether these provisions will be workable in practice. In May this year a vote in the Lords was narrowly defeated by only 2 votes seeking to revoke the TUPE 2006 regulations on the basis that the insolvency provisions in particular were unworkable and had failed to take account of the views of insolvency practitioners particularly in terms of clarity as to when the provisions would actually apply and of absolving the liquidators of any liabilities that would not now pass to the transferee. It therefore remains to be seen whether these provisions are used in the future and what, if

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any, advantage there is to seeking this particular method of varying contracts which cannot be achieved by establishing an ETO.

Dismissal

Everyone will be familiar with the general position that a dismissal for a reason connected with a relevant transfer will be automatically unfair.

It is important to recognise that an employee dismissed for reasons in connection with the transfer is still subject to the eligibility rules under the Employment Rights Act 1966 which means that they must have one years continuous employment in order to bring a complaint of unfair dismissal in an Employment Tribunal.

TUPE 2006 does introduce further clarity in that dismissal is permitted if it is for a reason not connected with the transfer, for example in relation to the employees conduct or capability. The usual dismissal rules with regard to establishing a fair and challenging an unfair dismissal apply.

A dismissal is also permitted if it is for a reason in connection with the transfer where it is an ETO. Again however it is important to note that such a dismissal is also subject to the usual dismissal rules and the test of fairness. A dismissal for an ETO will be a dismissal for redundancy or for some other substantial reason.

Who is liable to pay?

Where an employee would have been employed in the undertaking transferred but for an unfair dismissal then the contract of that employee is deemed to transfer along with the liability for any unfair dismissal.

However, it is important to note that TUPE will render as unfair any dismissal of an employee for a transfer related reason even if that employee doesn't transfer for example because they are not assigned to the part of the business which is transferred. As such the transferor remains liable for its staff and the transferee liable for its staff. It is only a dismissal of an employee assigned to the particular part transferred or whose employment would have transferred where liability passes to the transferee.

Information and Consultation

TUPE contains its own consultation rights which would need to be satisfied and the failure to satisfy gives rise to a stand alone complaint that can be made to an Employment Tribunal. Two requirements exist in TUPE 2006, being:-

1. The disclosure of "employee liability information" to the transferee;

2. Information to and Consultation with representatives of the affected employees.

Employee Liability Information

Changes introduced by TUPE 2006 seek to address one of the difficulties that has arisen particularly where there is no direct relationship between the old and new employers, commonly where a local authority is re-tendering a contract. In these cases it is not uncommon for the new employer to have no information at all about the staff that they will be required to take over following a TUPE transfer.

TUPE 2006 requires that the transferor provides to the transferee a specified set of information to assist in understanding the rights, duties and obligations in relation to those employees who will transfer. The information required is:-

- The identity of the employees who will transfer;
- The age of those employees;
- Information contained in the written statement of particulars, which all employers are required to give to their employees;
- Information relating to any collective agreements which apply;
- Instances of disciplinary action within the preceding two years where the statutory dispute resolution procedure apply;
- Instances of any grievances raised by those employees within the preceding two years where the statutory dispute resolution procedures apply;
- Instances of any legal action taken by those employees against the transferor in the previous two years;
- Instances of potential legal actions which may be brought where the transferor has reasonable grounds to believe such actions may arise.

The information is to be provided in a form which is accessible to the transferee. This allows information to be provided in writing or in some electronic format but will also allow the information to be provided in verbal form, for example on the telephone, particularly where only a few employees may be involved. The information can be provided by or to any third party identified for that purpose, for example lawyers and accountants advising on a proposed transfer. The method of providing the information should be agreed between the transferor and the transferee.

The requirement to provide the identity of the employees transferring will limit the

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opportunity for the transferor to assign undesirable staff but it is unlikely that this will put an end to this practice entirely because the information is not required to be provided until at least 14 days before the transfer or if the circumstances do not allow that (for example because of short notice of the transfer itself, but not because of any failure to act on the parts of the transferor) then as soon as is practicable which will leave the transferor more than sufficient time to make any relevant assignment of employees.

The information requirements are not as generous as they may at first appear. For example, it refers to the written statement of particulars and not the contract of employment. All employees are entitled to receive a written statement of particulars, basic information about their employment. The statement does not include additional information as set out in contracts such as confidentiality agreements and restrictive covenants or information which may be set out in a staff handbook. In addition, reference to past disciplinary action and the raising of grievances only refer to those which are subject to the statutory procedure. This will not include oral or written warnings or any grievance which wasn't raised in writing. The requirement to give details of any likely legal action remains uncertain. Clearly, where an employee has had a significant injury at work the transferor has some notice that a claim may follow. It is unclear but, at this stage, unlikely that the transferor would have to notify any anticipated grievance as a pre-cursor to an employment tribunal claim since it may be considered reasonable to take the view that until a formal grievance has been made (and disclosed in its own right), then no legal proceedings are likely.

Information and Consultation

There are two obligations; being to inform and, separately, to consult with representatives of employees who may be affected by the transfer. It is important to note that this will include not only:

1. individuals who are to be transferred; but also
2. colleagues in the transferor who will not transfer but whose jobs may be affected; and
3. new colleagues in the transferee whose jobs may be affected by the transfer.

The obligation to inform requires the following information to be provided;

- the fact that a transfer is to take place;
- approximately when it is to take place;
- the reason for the transfer;
- the legal, economic and social implications of the transfer for affected employees;

- measure that the employer envisages that it will take in relation to affected employees;
- the transferee must identify whether he intends to take any measures in relation to those transferred employees and details of the changes that are envisaged;
- there is also an obligation on the transferor to disclose whether he believes the transferee will be taking any measures and, if so, what he thinks they may be.

This information should be provided to all affected employees, i.e., not only those who are to be transferred. Taking measures is not defined but it can encompass any significant alteration to existing working conditions or practices. The obligation to inform and consult arises as soon as reasonably practical which will be long enough before the transfer to enable consultation to take place.

The Duty to Inform

Case law confirms that the duty to inform is triggered where there is proposed or planned transfer even if it does not take place - **Banking Insurance and Finance Union –v- Barclays Bank Plc** [1987] ICLR 495. Also, where there are to be any collective redundancies affecting 20 or more employees at any single establishment in a period of 90 days or less, the statutory redundancy consultation requirements will provide minimum consultation periods from 30 days, together with further information requirements.

The obligation is to inform and consult with appropriate representatives. This may be a recognised trade union or where one does not exist or cover all of the affected employees, employee appointed representatives who have suitable authority to be consulted in relation to a transfer. This may include representatives appointed under the Information and Consultation Regulations but it is important to understand the limits on the authority of any existing representatives and where that does not extend to consultation in relation to a transfer to ensure the election of representatives. The obligation is on the employer to assist in facilitating the election. If ultimately no representatives are appointed, the employer is not then obliged to inform or consult directly with the affected employees but there is nothing to prevent the employer doing so. However, the employer cannot decide to inform and consult directly without having first satisfied its obligation with regard to the election of appropriate representatives.

Employee representatives do have certain rights and protections in order to enable them to carry out their functions properly. This includes the employer allowing access to the affected employees and to such accommodation and facilities, such as use of the telephone, as may be appropriate. Employee representatives do have protection against dismissal and detriment connected to their status or activities as a representative.

The Duty to Consult

The duty to provide information applies to every transfer but the duty to consult only arises where the relevant employer envisages that there will be measures taken in relation to any affected employee. There is a greater duty placed on the employer to show that there has been a genuine attempt to inform, consult and reach agreement in relation to any measures that are proposed. However, there is no duty to consult about the mere possibility of measures and the duty will only arise once it is clear that measures will be taken.

The transferor is only obliged to consult with the appropriate representatives of its own employees and not with the representatives of the employees who will transfer as it is the transferee who will envisage taking any measures in relation to them after the transfer. The transferor's duty in relation to transferring employees is to provide them with information concerning the measures about which the transferee will take.

A complaint can be made to an employment tribunal if there is a failure to consult. Compensation cannot exceed 13 weeks pay (a weeks pay is capped at the statutory rate which is currently £290). A tribunal has the power to apportion any compensation between the transferee and the transferor on the basis of where the tribunal considers that the failure to consult lay. The statutory dispute resolution procedures will apply to such a complaint meaning that the employee will first have to lodge a grievance.

There is also the right for the transferee to present a complaint to an employment tribunal if the required employee liability information has not been provided. Compensation will be calculated on the basis of a minimum of £500 for each employee for whom the information was not provided or where it was defective but the tribunal can reduce the total amount of compensation, i.e., if there are 100 employees, compensation would be in the region of £50,000, if it considers that it would be just or equitable to do so.

Code of Practice on Staff Transfers in the Public Sector

As I note above purely administrative transfers by Public Bodies fall outside of the Acquired Rights Directive and TUPE. TUPE 2006 does not change this.

In general terms administrative transfers are subject to specific statutory provision which may apply TUPE principals. In addition, intra-governmental transfers are covered by the Cabinet Office Statement of Practice "Staff Transfers in the Public Sector", issued in January 2000. Contracts between Public Bodies and the Private or voluntary sectors are covered by similar provisions in Office of the Deputy Prime Minister's Code of Practice on Workforce Matters in Local Authority Service Contracts (March 2003). The Codes have been recently revisited and confirmed by the Cabinet Office Code of Practice on

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Workforce Matters in Public Sector Service Contracts (March 2005) which also added alternative dispute resolution procedures to the Codes.

The principal behind each Code is the same. 'The intention of the public sector body should be to select only providers who offer a package of terms and conditions which will secure high quality service delivery throughout the life of the contract'. TUPE should apply to a transfer and in circumstances where it does not apply in strict legal terms, the principles of TUPE should be followed and the staff involved should be treated no less favourably than had TUPE applied.

The changes in TUPE 2006 making express inclusion of service changes as satisfying a relevant transfer does mean that it is less likely that contracts between the public and private sector are likely to fall outside of TUPE. However it remains to be seen whether local authorities can be persuaded to accept a simple application of TUPE. It is likely that contractors will have to proceed on the basis that in virtually all cases TUPE will apply **and** they will continue to be required to adhere to the Codes of Practice in addition. It is not uncommon for contractors for public sector contracts (particularly for high value contracts) having to agree not to change employee terms and conditions, for any reason, for some certain period of time after transfer.

The unique feature of the Code is that it makes provision beyond TUPE. The Code also seeks to prevent the emergence of a two tier workforce by ensuring that new joiners are provided with fair and reasonable terms and conditions of employment which are overall no less favourable than those of the transfer employees the new joiner will work alongside

The contractor also needs to be aware of the potential joint and several liability in personal injury which was introduced by the changes in TUPE 2006. Public Sector employers are exempt from the obligation to have employer's liability insurance. The benefit of such insurance would normally transfer under TUPE allowing a new employer to call on the old employers insurance company to pay up where there is an existing injury. As that insurance benefit does not exist the liability will fall to be shared between the new employer and the Public Sector employer.

In addition the pension transfer provisions under the Pensions Act 2004 and The Transfer of Employment (Pension Protection) Regulations 2005 are likely to have little effect. The Code does have slightly more beneficial provision in that the contractor is required to have "broadly comparable" pension provisions. The Code requires either:-

- membership of a local government pension scheme;
- membership of a good quality final salary based defined benefits or defined contribution scheme; or
- membership of a stakeholder scheme.

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Similar to the pension transfer provisions there is an obligation for an employer to match contributions up to at least 6%.

However the HM Treasury statement on "Transfers from central government - Fair deal for staff pensions" continues to highlight the difference between a defined benefits (Final Salary) scheme, where the risk falls on an employer to fund, and a defined contributions (Money Purchase) scheme where the risk fall on an employer to make a sufficient contribution. The position of the Government Actuary Department is that the defined contributions scheme are unlikely to be regarded as "broadly comparable" to the defined benefits scheme which created pressure for contractors to make provisions which are more beneficial than the minimum contributions required under the Pension Regulations.

New starter provisions continue to go beyond anything that TUPE will provide.

Summary

The new rules introduce:

- a widening of the scope of the Regulations to be clear on their coverage of service provision changes;
- a new duty to provide employee liability information to the new transferee employer;
- provisions intended to make it easier for insolvent businesses to be rescued; and
- clarification of when contract variations can be agreed.

It remains to be seen whether TUPE 2006 will be able to reduce or eliminate confusion or whether it addresses the case law conflict that now exist on interpretation which is its stated intention. It seems unlikely.

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