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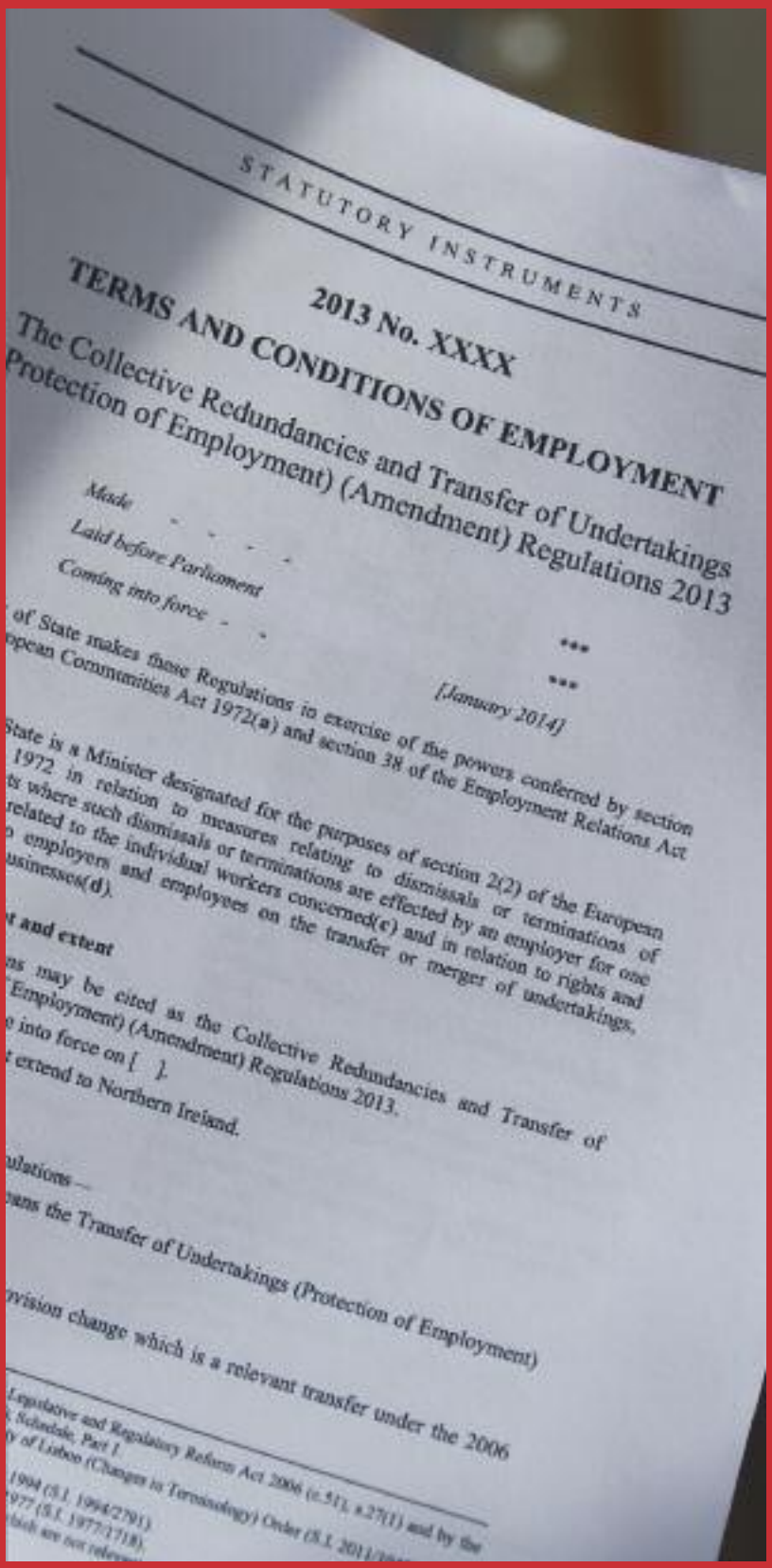
STATUTORY INSTRUMENTS

2013 No. XXXX

TERMS AND CONDITIONS OF EMPLOYMENT

The Collective Redundancies and Transfer of Undertakings Protection of Employment) (Amendment) Regulations 2013

Made - - - - ***

Laid before Parliament ***

Coming into force - - [January 2014]

of State makes these Regulations in exercise of the powers conferred by section opean Communities Act 1972(a) and section 38 of the Employment Relations Act

State is a Minister designated for the purposes of section 2(2) of the European 1972 in relation to measures relating to dismissals or terminations of s where such dismissals or terminations are effected by an employer for one related to the individual workers concerned(c) and in relation to rights and employers and employees on the transfer or merger of undertakings, usinesses(d).

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s may be cited as the Collective Redundancies and Transfer of Employment) (Amendment) Regulations 2013.

into force on [ ].

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ans the Transfer of Undertakings (Protection of Employment)

vision change which is a relevant transfer under the 2006

Legislative and Regulatory Reform Act 2006 (c.51), s.27(1) and by the Schedule, Part 1

of Lisbon (Changes in Terminology) Order (S.I. 2011/

1994 (S.I. 1994/2791)

977 (S.I. 1977/1718)

which are not relevant

Focus on changes to TUPE

General overview

Recent changes to the regulations and their significance

Pg 2

Collective agreements

These now have less protection than other terms in the contract of employment

Pg 4

Changes to terms and conditions

Complicated amendments to terms and conditions, dismissals and ETO reasons

Pg 6

Information and consultation

Major changes under TULRCA in relation to information and consultation provisions

Pg 9

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Richard Arthur looks at the recent changes to the TUPE regulations, and considers their significance in terms of the amendments that found their way into the new legislation as well as those that did not

Overview of the changes to TUPE

THE COLLECTIVE Redundancies and Transfer of Undertakings (Protection of Employment) (Amendment) Regulations 2013 (CRATUPE) came into force on 31 January.

These amend not only the 2006 version of TUPE (which implements the EU Acquired Rights Directive), but also the provisions of the Trade Union and Labour Relations (Consolidation) Act 1992 (TULRCA) relating to collective redundancies consultation.

The amended regulations preserve the main structure of the protections under TUPE

The changes followed a consultation by the Department for Business, Innovation and Skills (BIS) and the Department for Employment and Learning (DEL) in Northern Ireland, which started in January 2013 and was based on an entirely unconvincing narrative that TUPE was bad for business because it "gold-plated" (or over-implemented) the directive.

But the directive was never intended to be more than a partial harmonisation measure, setting minimum standards that individual member states could exceed if they so wished. The changes also reflect the government's policy of simply adopting the EU text when implementing EU measures.

The amended regulations preserve the main structure of the protections under TUPE. The principal safeguards, in the event of a TUPE transfer, continue to be the automatic transfer of employment, (some) protection from dismissal and variations to contractual terms, and information and consultation rights.

The government did not propose, nor has it made, any real changes to the 2006 regulations in terms of which employees transfer; the relaxation of the protections against dismissal and variation of contractual terms in the event of insolvency; the exclusion of pension entitlements and transfer-related (as opposed to collective redundancy) information and consultation (except for micro businesses).

However, it made substantial proposals for change in a significant number of areas that it either completely, or virtually, abandoned in the final version of CRATUPE.

These include the much sought after scalp (for the government) of Service Provision Changes (SPCs); remedies for dismissals where there is a substantial change in working conditions; and the transferor not being able to "borrow" the transferee's economic, technical or organisational (ETO) reason to justify a dismissal as fair.

The main changes relate to the treatment of terms and conditions derived from collective agreements, transfer-related variations to terms and conditions (and dismissals) and collective redundancy consultation.

The changes only apply to England, Wales and Scotland. The position is more complicated in Northern Ireland as SPCs are covered by separate regulations – the Service Provision Change (Protection of Employment) Regulations (Northern Ireland) 2006 – which make the same provision as TUPE in relation to SPCs. Although BIS and DEL consulted jointly on changes, the consultation process in Northern Ireland has taken more time and amendments applicable there are expected later in the year.

The abandoned amendments

Top of the government's list of measures in TUPE, which "gold-plated" the directive, and therefore needed to be abolished, were SPCs. Introduced in 2006 in the face of widely acknowledged uncertainty as to whether TUPE applied in many contracting-out situations, these are not derived from the directive.

In other words, they are a UK-specific solution to a widespread problem with which the courts had been grappling since the decision of the European Court of Justice in the **Suzen** case. And by and large they worked, as evidenced by the dramatic drop off in the number of cases being appealed on the issue of whether there was a transfer since the 2006 version of TUPE came into force.

SPCs have been of benefit to both sides, demonstrated by the fact that 67 per cent of respondents to the BIS consultation were in favour of keeping them and the government was forced to back down. What it sought to portray as "gold-plating" was recognised by those with expertise as legal common sense.

This means that there will continue to be two types of TUPE transfers in the UK: so-called "business transfers", which reflect the position under the directive; and SPCs. In the end, the government only made a comparatively minor amendment to the definition of SPCs so that the "activities" after the transfer now have to be "fundamentally the same" as they were beforehand. The government claims that this amendment does no more than codify existing UK case law. The effects remain to be seen.

The government was forced to back down on some of its other proposals

The government was also forced to back down on some of its other proposals for change, partly because of constraints imposed by the directive. There is no change to the remedies available to employees who treat themselves as dismissed because of "a substantial change in their working conditions to their material detriment".

Transferors can still not borrow a transferee's ETO reason to justify a pre-transfer dismissal as fair (thereby thwarting the government's aim of making pre-transfer dismissals easier). And employee liability information still has to be provided by transferors to transferees, but 28 (instead of 14) days before the transfer. The more fundamental flaw in this provision remains – that there is no requirement for employee liability information to be given to trade unions.

Predictably, harmonisation of terms and conditions by reason of the transfer is still not permitted. However much the government wishes to implement this change (and, as was made clear in the BIS consultation, it really does), it is prevented from doing so by the directive. The government makes no secret of the fact that it is pressing the European Commission to introduce changes to the directive in order to allow harmonisation.

Jo Seery reviews the changes made by the recent amendments to the TUPE regulations in relation to the treatment of terms derived from collective agreements, and warns that they now have less protection than other terms in the contract of employment

Collective agreements and TUPE changes

THE AMENDMENTS in CRATUPE relating to collective agreements are the most insidious of all the changes and provide further evidence of the government's enthusiasm for dismantling collective bargaining.

Until the decision of the Court of Justice of the European Union (CJEU) in the **Alemo-Herron** case, terms contained in individual contracts of employment derived from collective agreements were treated by courts and tribunals in the UK in essentially the same way as other terms of the contract.

Terms derived from collective agreements are singled out and their protection downgraded

But under CRATUPE, these terms are singled out and their protection downgraded. The consequence is that terms derived from collective agreements now have less protection under TUPE than other terms.

Changes under CRATUPE

These changes operate at the level of the individual contract of employment and have been achieved in two ways.

First, terms derived from collective agreements can now be renegotiated between workers and their employer as long as the outcome takes effect at least one year after the transfer. This applies even if the reason for the variation is the transfer itself, thereby overriding the protections that apply to other terms and conditions.

This is subject to the requirement that, overall, the terms of the amended contract are no less favourable than those that applied previously. And obviously the employee must agree – though it is not difficult to anticipate the economic pressure that employers are likely to apply.

Secondly, CRATUPE provides expressly for a "static" approach to the transfer of terms derived from collective agreements. In other words, a transferred employee cannot now benefit from subsequent collective agreements negotiated between the transferor and their trade union following the transfer, if the transferee is not a party to those negotiations.

A good example is in local government, where individual contracts typically provide for entitlement to the benefit of National Joint Council (NJC) pay awards. Test cases in the Employment Appeal Tribunal had established that, under TUPE, entitlement continued after the transfer even though the transferee was not a party to the NJC machinery.

"Static" means that, from now on, only those collective agreements (and pay awards) in force at the date of the transfer will continue to bind the transferee if they are not a participant in the collective bargaining.

These changes apply to TUPE transfers taking place after 31 January 2014 and, in the case of re-negotiation of collectively bargained terms, where the variation is agreed on or after 31 January 2014.

Commentary

The first mechanism for achieving changes under CRATUPE uses a facility contained in the directive to limit the application of terms derived from collective agreements to one year from the date of the transfer. But that facility was a compromise designed to accommodate the very different collective bargaining conditions in, for example, France and Germany, where statutory consolidation of the outcomes of collective bargaining is more common on an industry and sector-wide basis.

It fails to accommodate the very particular conditions in the UK where the terms of collective agreements are generally unenforceable at collective level and are instead enforced almost exclusively through individual contracts of employment. Statute-backed, sector-wide enforcement of collective agreements is much to be preferred, but if enforcement of collectively bargained terms has to be through the contract of employment, then those terms should have at least the same level of protection as other terms. That is no longer the case.

Further, there are doubts about compliance with Article 11 of the European Convention on Human Rights. It seems that any attempt at renegotiation of terms derived from collective agreements will involve making an offer to give up those collectively bargained terms.

In the Wilson and Palmer -v- UK case, the European Court of Human Rights found that such an offer infringed the right to freedom of association protected by Article 11. It also remains to be seen how courts and tribunals will determine whether, overall, the terms of the amended contract are no less favourable than those applicable previously.

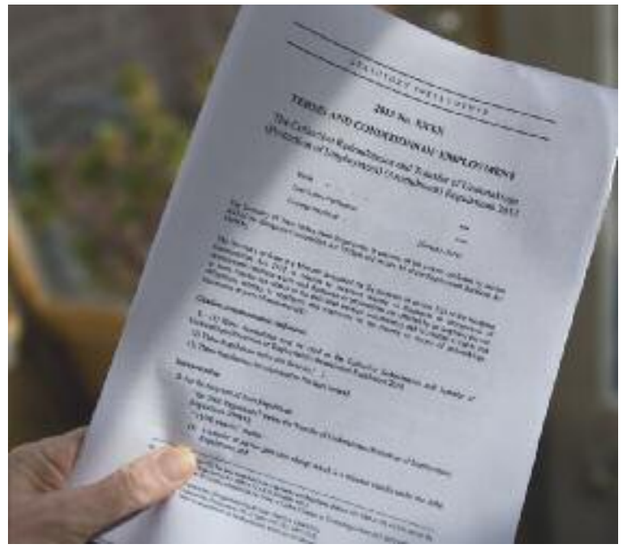
The second mechanism codifies in TUPE the recent controversial decision of the CJEU in the Alemo-Herron -v- Parkwood Leisure case. According to the CJEU the Directive required a "static" (as opposed to a "dynamic") approach to collectively bargained terms, because to permit a dynamic approach would mean infringing the transferee's "freedom to contract". This is very unconvincing, but the government has simply seized the opportunity to implement the CJEU's judgment.

The date when these changes come into force may well be significant, as they do not apply to TUPE transfers before 31 January 2014. It follows that, for transfers taking place before that date, the option to renegotiate collectively bargained terms will not apply. The application of the Alemo-Herron decision to TUPE transfers before that date is more difficult to predict.

Changes to terms and conditions

Claire Astin looks at the complicated amendments in CRATUPE to the provisions on changes to terms and conditions, dismissals and ETO reasons

Changes to terms and conditions, dismissals and ETO reasons



ALTHOUGH THE changes are subtle, the protection previously provided by TUPE has been undermined.

Under TUPE 2006

As far as variations were concerned, the 2006 version of TUPE sought to distinguish between:

- variations for a reason unconnected with the transfer (which were allowed)
- variations where the sole or principal reason was the transfer itself (not allowed)
- variations where the sole or principal reason for the variation was a reason connected with the transfer, that was not an "economic, technical or organisational reason entailing changes in the workforce" (ETO reason) (not allowed)
- variations where the sole or principal reason for the variation was a reason connected with the transfer, that was an ETO reason (allowed).

The fundamental distinguishing feature therefore was whether the sole or principal reason for the variation was the transfer itself (in which case the variation would always be void), or whether it was a reason connected with the transfer (in which case the variation would be permitted, provided it was for an ETO reason).

The government says that the idea behind these amendments is to "align" TUPE with the directive

Similar provisions were made in relation to dismissals in the context of a transfer. Dismissals where the sole or principal reason was the transfer itself, or a reason connected with the transfer that was not an ETO reason were automatically unfair.

But dismissals where the sole or principal reason was one connected with the transfer that was an ETO reason were potentially fair.

A very particular definition of the words "changes in the workforce" had been reached by the courts in the case of **Delabole Slate -v- Merriman**, which could only mean either a change in headcount or a change in job description.

In relation to variations, there was a further twist. If the transfer involved a substantial change in working conditions to the material detriment of the person concerned, that person could treat themselves as dismissed.

Under CRATUPE

The scheme for variations to terms and conditions under CRATUPE operates as follows (assuming, at each stage, that the employee agrees to the variation):

- a variation where the sole or principal reason is the transfer itself is void
- a variation where the sole or principal reason is an ETO reason is permitted
- a variation allowed by the terms of the contract is permitted (even if the reason for the variation is the transfer itself)
- a variation for a reason not in any way connected with the transfer is permitted.

As such, CRATUPE has removed reasons "connected with the transfer". The distinction becomes one between a variation where the sole or principal reason is the transfer itself (in which case the variation is void), and a variation where the sole or principal reason is an ETO reason in which case the variation is permitted. The government says that the idea behind these amendments is to "align" TUPE with the directive.

CRATUPE also extends the definition of the words "changes in the workforce", which will now encompass not only changes in headcount and job descriptions, but also a change in the place where the employer carries on their business, or work of a particular kind.

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This was designed by the government, at the request of employers, to enable dismissals to be fair in the event of a change of job location (whether the change was permitted by the contract or not).

In **Tapere -v- South London and Maudsley NHS Trust**, the Employment Appeal Tribunal concluded that, where an NHS worker treated herself as dismissed on account of a change of job location that amounted to a substantial change to her working conditions to her material detriment, that dismissal could not be justified as fair under the 2006 version of TUPE. This was because a change in work location was not within the definition of an ETO reason. It seems that a dismissal in those circumstances could now be justified as fair.

Importantly, these protections do not apply if the terms in question are derived from collective agreements, the variation takes effect at least one year after the transfer and overall, the amended terms are no less favourable to the employee.

Transfer-connected dismissals

Similar changes are also made by CRATUPE to the provisions on transfer-connected dismissals. Any dismissal before or after the transfer that is by reason of the transfer is automatically unfair. But that principle is disapplied if the sole or principal reason is an ETO reason.

The same extension is made to the meaning of the words "changes in the workforce" embedded in the definition of an ETO reason so as to include changes in work location. As under the 2006 regulations, where the reason is an ETO reason, then the dismissal will either be by means of redundancy or for some other substantial reason.

➲

➲ Insolvency

The provisions in the 2006 regulations are preserved in relation to variations and dismissals in the context of insolvency (with a consequential amendment to the circumstances of "permitted variations" to contracts of employment).

The protections against dismissal and variation do not apply at all where the transferor is subject to insolvency proceedings with a view to liquidating their assets. There is a modified regime for "permitted variations" involving "appropriate representatives" where the transferor is the subject of insolvency proceedings not with a view to liquidating their assets.

These changes apply to TUPE transfers taking place on or after 31 January 2014 and, in the case of dismissals, where the employer gave notice of dismissal on or after that date.

Commentary

It is strongly arguable that the second category of allowed variations to the contract of employment (where the variation is for an ETO reason) simply perpetuates an aspect of non-compliance with the directive found in the 2006 regulations. The provisions in the directive relating to the transfer of terms and conditions, unlike the provisions relating to dismissals, contain no exception if the reason is an ETO reason.

The principle originally expressed in the Daddy's Dance Hall case is apparently rigid - an employee is not entitled to waive the protection afforded by the automatic transfer of their terms and conditions. And, much more so than the UK courts and tribunals, the CJEU has also been prepared to treat a lesser degree of "transfer connection" as sufficient to cross the threshold of a variation being by reason of the transfer itself.

A variety of arguments have been put forward for suggesting that variations for ETO reasons are permitted by the directive. Principal among them are (i) that the directive permits dismissals for an ETO reason, therefore it must permit the "lesser" incursion of variations for an ETO reason; and (ii) the more recent CJEU cases show a relaxation of the rigid protection of terms and conditions. However, neither is convincing and it is perhaps surprising that the CJEU has not already been asked to determine a reference for a preliminary ruling on this issue.

It seems rather odd for the government to have added a provision permitting variations to a contract of employment where the contract already permits the change. If the change is permitted, it stands to reason that the contract itself doesn't need to be changed. That said, employers may be encouraged by the amendment to introduce unilateral variation clauses.

Arguably, the provisions contained in the 2006 regulations entitling an employee to treat a substantial change in their working conditions to their material detriment as a dismissal by their employer have been under-used by employees and unions.

It is therefore worth remembering that it is not necessary for the employee to demonstrate a breach of the contract of employment – a substantial change in their working conditions to their material detriment is sufficient.

But this option will always need to be considered very carefully because exercising the right (probably) involves treating the employment as terminated. However, the extension of the meaning of the words "changes in the workforce" within the definition of an ETO reason will mean that dismissals are more likely to be fair.

It is also important that there is no change to the principle that a transferor cannot rely on a transferee's ETO reason for a dismissal. This preserves the decision in the case of Hynd -v- Armstrong and ors and means that it is still difficult for employers to accelerate dismissals so as to take effect before the transfer.

Finally, it should not be assumed that the extension of the meaning of "changes in the workforce" necessarily complies with the directive, as considered by the Employment Appeal Tribunal in Tapere -v- South London and Maudsley NHS Trust and Abellio London Ltd -v- Musse and ors.

Andrew James looks at changes to the information and consultation provisions under TUPE to TULRCA and considers their significance

Information and consultation provisions

ALTHOUGH THE TUPE provisions have not been amended substantially, major and controversial changes have been introduced to TULRCA so that pre-transfer collective redundancies consultation by the transferor will count for the purpose of post-transfer redundancies.

As the core information and consultation provisions in TUPE are essentially unchanged by the 2013 amendments, the transferor still has to provide information as to:

- the fact of, date of and reasons for the transfer
- the legal, economic and social implications for affected employees
- the measures the transferor envisages they will take in connection with the transfer
- the measures the transferor envisages the transferee will take in connection with the transfer.

The information must be provided long enough before the transfer to enable consultation to take place. An employer who envisages taking measures must consult with the employee representatives.

The only minor change is that micro businesses (those employing fewer than 10 employees) are now entitled to inform and consult affected employees without the need to elect employee representatives when there is no independent recognised trade union and no existing employee representatives. ➲

Micro businesses are now entitled to inform and consult affected employees directly without the need to elect employee representatives when there is no independent recognised trade union

The government is using CRATUPE to amend the collective redundancies obligations in the Trade Union and Labour Relations (Consolidation) Act

➲ However, the government is using CRATUPE to amend the collective redundancies consultation obligations contained in the Trade Union and Labour Relations (Consolidation) Act (TULRCA).

Under the changes, the transferee can count pre-transfer consultation on collective redundancies towards compliance with their consultation obligations in relation to post-transfer redundancies.

In the BIS consultation, the government cited a number of so-called justifications. These included possible confusion arising under the obligation to inform and consult under both TUPE and TULRCA; the impact on employees of having to undergo two consultations in quick succession; and the impact on employee representatives.

But the real reason was what the government called "business efficiency" – the desire to make it easier for transferees to make workers redundant faster. This is achieved by inserting new sections into TULRCA.

The new provisions apply where:

- there is, or is likely to be, a relevant transfer under TUPE
- the transferee is proposing to dismiss as redundant 20 or more employees at one establishment within a period of 90 days
- employees who are, or are likely to be transferring, include one or more employees who may be affected by the proposed dismissals or by measures taken in connection with them.

In those circumstances, the transferee may opt to start consultation with representatives of affected employees (including transferring employees) about the dismissals before the transfer takes place.

However, the transferee can only opt to start consultation before the transfer with the agreement of the transferor. The exercise of that option by the transferee must be made by written notice to the transferor.

Once that has happened (and the transferor has agreed), the provisions of TULRCA on consultation apply, despite the fact that the transferee is not yet the employer of the affected employees.

The transferor may provide information or other assistance to the transferee to help the transferee meet their redundancy consultation obligations. Any failure on the part of the transferor to provide information or other assistance to the transferee does not constitute "special circumstances" so as to make it "not reasonably practicable" for the transferee to comply with their collective redundancy consultation obligations.

The transferee can retract their election to start consultation before the transfer and if they do, any pre-transfer consultation that has taken place will be of no effect.

Commentary

These amendments to TULRCA will make it virtually impossible for representatives to represent transferring employees. There are also serious questions as to whether they comply with the Collective Redundancies Directive.

Provided that the transferor agrees to the transferee opting to start consultation before the transfer, representatives of the transferor's affected workforce face the prospect of two information and consultation exercises going on simultaneously – one under TUPE and the other under TULRCA.

It is only during the TUPE information and consultation process that the representatives are going to gain an understanding of the implications of the transfer for affected employees, and the measures that the transferor and the transferee envisage taking.

It is absurd to expect the representatives to be in a position to undertake collective redundancy consultation for post-transfer redundancies while the TUPE information and consultation process is ongoing.

The trigger for engaging the new provisions is a light one. First, there doesn't even have to be a concluded position that a transfer will take place. It only has to be "likely".

There is the prospect of representatives being drawn into redundancy consultation exercises with intended transferees that then drop out. The lack of certainty of the transfer will also be taken as an indication that pre-transfer redundancy consultation can start at an early stage in the TUPE transfer process.

Secondly, the transferring individuals do not even have to include an employee who will be dismissed. There just needs to be one or more person who may be affected by the proposed dismissals or by measures taken in connection with them.

If the dismissals are proposed from within the transferee's existing workforce, then the transferee still has to inform and consult the employee representatives of their own workforce.

But it is not at all clear how that information and consultation is intended to be coordinated with the information and consultation that is taking place with the representatives of the transferor's workforce.

There is also a very real danger that transferees will not make proper provision for aggregation of the pool for collective redundancies across the combined workforce of the transferring employees and their own pre-existing workforce.

The amendments make it more likely that the transferring workforce will be treated separately from the transferee's existing workforce, which runs counter to the objectives of both TUPE and TULRCA.

The provisions on remedy demonstrate the artificiality of the amendments. If a tribunal orders a protective award whereby a transferee has to pay remuneration for a protected period in respect of the transferring employees, the transferor has to be treated as the employer when it comes to calculating the period and rate of pay, so long as part of the protected period falls before the transfer.

In other words, the transferee is deemed to be the employer to enable pre-transfer consultation to count, but cumbersome provision has to be made to accommodate the fact that, before the transfer, the employee's wages are paid by the transferor.

This in turn demonstrates the strong case to be made that the amendments do not comply with the Collective Redundancies Directive.

The CJEU has been quite clear in saying that the only party on whom obligations to inform and consult are imposed is the employer, and the CJEU takes that to mean any person who stands in an employment relationship with the workers who may be made redundant.

Before the transfer, the transferee is not the employer of the transferor's workforce.

In addition, the Collective Redundancies Directive has consistently been interpreted as requiring that consultation be meaningful. The invidious position in which employee representatives will be placed for the reasons outlined above mean that the potential for observing that requirement has been seriously called into question.

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The Spirit of Brotherhood by Bernard Meadows

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Contributors to this edition:
Richard Arthur, Claire Astin, Andrew James, Jo Seery
Editor: Alison Clarke
Design & production: www.rexclusive.co.uk
Front cover picture: Rex Anderson

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