THOMPSONS SOLICITORS

Make Work Pay: Call for evidence on Transfer of Undertakings (Protection of Employment) Regulations

Thompsons is the most experienced trade union, employment rights, and personal injury law firm in the country, with 19 offices across the UK. It acts only for trade unions and their members on employment and industrial relations issues.

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Current protections offered by TUPE

Question 1: To what extent do you agree or disagree that the current TUPE regulations strike the right balance between supporting employer needs and protecting employees' employment rights? Please explain your answer.

[ ] Strongly agree

[ ] Agree

[X] Neutral

[ ] Disagree

[ ] Strongly disagree

[ ] Other

We do not agree with the premise of the question. The purpose of the Transfer of Undertakings (Protection of Employment) Regulations 2006 is to protect employees' terms and conditions when, due to circumstances beyond the employees' control, their employment is transferred to a different employer. Such protection is necessary because of the inherent inequality in bargaining power which exists between employers and employees. The purpose of TUPE is not to support 'employer needs'.

Question 2: To what extent do you agree or disagree that the current TUPE regulations sufficiently protect employees' employment rights when a transfer takes place? Please explain your answer

[ ] Strongly agree

[ ] Agree

[ ] Neutral

[X] Disagree

[ ] Strongly disagree

[ ] Other

In our experience, a key area where the TUPE regulations do not sufficiently protect the rights of employees is in circumstances where a dispute arises, between the transferor and transferee, about whether or not TUPE applies and/or about which employees are in scope to transfer. Such disputes leave employees extremely vulnerable in that, typically, both the transferee and the transferor maintain that the employees are not their employees. This results in the employees being left in a position where not only do they suddenly have no job and no income but they do not even receive any notice pay, holiday pay or redundancy payment. The employees effectively become '*TUPE orphans'*.

Although the introduction of the provisions relating to service provision changes in 2006[1] significantly reduced the risk of a dispute about the application of TUPE, the problem has not been entirely resolved.

Two examples of such cases are:

1. A group of employees were employed by Manchester Working Limited ('MWL'), providing a public buildings maintenance and repair service to Manchester City Council. The council decided to re tender its public buildings maintenance and repair service. The successful bidder was Engie Services Limited ('Engie'). There was a dispute between MWL and Engie regarding whether or not 12 employees were in scope to transfer. On 1 May 2019, the 12 employees were turned away from an induction event for transferring employees, organised by Engie, and told that they should return to the MWL Manchester office. On doing so, they were informed by MWL that they no longer worked for MWL, leaving them jobless, with no redundancy, notice or holiday pay. The 12 employees were left with no option but to bring employment tribunal claims against both MWL and ESL, with the support of their union, in order to establish their employment rights. The case was not fully resolved until 2022.[2]

2. In 2012, Arch Initiatives ('Arch') tendered for and won a contract to oversee the management of addiction treatment patients, following a restructuring of the service by Bolton Council. The group of substance abuse workers, who provided the service, were employed by Greater Manchester West NHS Foundation Trust. The Trust's position was that there had been a service provision change and the substance abuse workers it employed should transfer to Arch under TUPE. However, Arch took the position that its contract was solely for managing addiction treatment patients and, as the roles of the substance abuse workers went beyond this, TUPE did not apply and Arch was not responsible for the employees. The employees, supported by their union,

[1] Following the decision of the Employment Appeal Tribunal in *Astle and Others v Cheshire County Council [2005] IRLR 12*, where there was a dispute over the question of whether or not TUPE applied, following a decision by Cheshire County Council to outsource its architectural services to a panel of consultants

[2] https://www.thompsonstradeunion.law/news/news-releases/employment-matters/manchester-property-maintenance-firm-workers-win-compensation-after-failed-employment-transfer-left-them-jobless See also : https://www.employeebenefits.co.uk/pay-strategy/2022/08/22/former-manchester-working-staff-compensated-for-failed-employment-transfer/

had no option but to bring employment tribunal claims against both the Trust and Arch. The employment tribunal ruled that the employees had been unfairly dismissed and this decision was upheld by the Employment Appeal Tribunal, *Arch Initiatives v Greater Manchester West Mental Health NHS Foundation Trust [2016] UKEAT/0267/15/RH*[3]. In essence, the EAT decision confirmed that there is nothing in TUPE to prevent a service provision change occurring where activities are split between more than one new contractor and where there is more than one organised group of employees.

Question 3: To what extent do you agree or disagree that the current TUPE consultation requirements are sufficient to ensure employees are informed and consulted with when a transfer takes place? Please explain your answer.

[ ] Strongly agree

[ ] Agree

[ ] Neutral

[X] Disagree

[ ] Strongly disagree

[ ] Other

Regulation 11 says that the transferor shall notify the transferee of employee liability information (i.e. provide information about the employees who will be transferring) not less than 28 days before the relevant transfer. Regulation 13 says only that the transferor should provide prescribed information to employee representatives, '*Long enough before a relevant transfer'* to enable consultation to take place. The prescribed information includes the measures which the transferee will take in relation to the transfer.

In our experience, the lack of a clear timescale, for the consultation process, can significantly undermine the effectiveness of the consultation, in that there is not always sufficient time for properly informed and meaningful consultation to take place.

This issue is compounded by the fact that Regulation 13(6) says that the duty to consult is engaged where the employer of an affected employee envisages that he will take measures in relation to an affected employee. '*Affected employees'* are defined in regulation 13(1) as '*any employees of the transferor or the transferee… who may be affected by the transfer.*' The difficulty with this definition is that the group of employees most likely to be affected by measures is the employees who will be subject to the TUPE transfer. At the point in time where consultation takes place, i.e. in advance of the transfer, this group of employees are employees of the transferor, they are not employees of the transferee. The effect of this drafting is that, technically, the transferee is not under a specific legal duty to consult with the representatives of the transferring employees about measures it intends to take which will affect them. This is a bizarre lacuna in the legal protection for employees, who are facing being TUPE transferred to a new employer.

[3] https://employmentappeals.decisions.tribunals.gov.uk/Public/Upload/15_0267fhwwATRN.doc

By way of an example of these concerns, we were involved in a case where a public sector employer had outsourced its facilities services (cleaning, catering and maintenance) to a private sector employer. Following a tender process, a different private sector employer secured the contract to provide facilities services to the public sector organisation. Three and a half weeks before the transfer was due to take place, the transferor informed the union that the transferee intended to move employees from monthly pay to fortnightly pay. Five days before the transfer, an equality impact assessment carried out by the public sector organisation noted that a high proportion of the transferring employees were from the BAME communities. The union surveyed its members and all but one, of those who responded, said that the proposed change would cause them financial difficult; a key concern for this group of low paid workers, was the difficulty in meeting their obligations to pay monthly direct debits for essential living costs, such as rent and fuel.

The union shared the results of the employee survey with the transferee. However, the transferee did not meaningfully engage with the union, regarding the concerns raised, and instead went ahead with its decision to move the employees onto fortnightly pay, with effect from the date of the transfer. Subsequently, the employees submitted grievances and employment tribunal claims. At the grievance hearing, the union presented evidence of the financial difficulties which had been caused to the employees by the change to fortnightly pay. Following the grievance hearing, the transferee agreed to give the employees the option to move back to monthly pay.

If the transferee had been subject to a legal duty to consult and if the process had allowed sufficient time for adequate consultation, then it is likely that this issue could have been resolved during consultation and the need for grievances and employment tribunal claims, as well as the financial worries and distress caused to the employees, could have been avoided.

These concerns could be addressed by amending the TUPE regulations so that:

1. The transferee is subject to a specific legal duty to consult with employee representatives about measures which it envisages it will take in relation to the transferring employees

2. There is a clear timeline for the information and consultation process. For example:

    (a) Employee liability information to be provided at least 90 days before the transfer.
    (b) Transferee to provide the transferor with information about any measures which it envisages it will take within 21 days of receipt of the employee liability information
    (c) Consultation about the TUPE transfer to begin at least 60 days before the TUPE transfer

3. Allowing employment tribunals to apportion liability, for failure to inform and consult, between the transferor and the transferee according to fault. This would not only incentivise both the transferor and the transferee to comply with the obligation

to consult, it would also be likely lead to fairer employment tribunal decisions as well as reducing the risk of further litigation between the transferor and transferee.

4. Increasing the remedy for failure to inform and consult to 180 days' pay to match the increased penalty for failure to inform and consult about collective redundancies and to provide a more effective deterrent against non-compliance

Question 4: To what extent do you agree or disagree that collective agreements are sufficiently protected under a TUPE transfer? Please explain your answer.

[ ] Strongly agree

[ ] Agree

[ ] Neutral

[X] Disagree

[ ] Strongly disagree

[ ] Other

Regulation 4A provides that, where a contract of employment includes provisions of collective agreements as may be agreed from time to time, regulation 4 does not transfer any rights under the collective agreement if the provision is agreed after the date of the transfer and the transferee is not a participant in collective bargaining. This regulation was introduced by then conservative government in 2014.

One effect of regulation 4A is that, where a public sector organisation decides to outsource part of its work to a private sector organisation, the employees who TUPE transfer to the private sector organisation are no longer be able to benefit from collective bargaining. In particular, they lose their right to benefit from annual pay increases negotiated between the public sector organisation and the unions. Private sector organisations who decide to tender for public sector work are able to do so on the basis that they choose not to participate in collective bargaining and choose not to honour agreed pay rises. This undermines collective bargaining and fails to adequately protect the terms and conditions of the public sector employees who transfer.

In the private sector, if employers are to be encouraged to participate in sector level collective bargaining, legislation such as TUPE has an important role to play in ensuring that there is a level playing field, i.e. that responsible employers, who are willing to participate in collective bargaining, do not lose out through being undercut by unscrupulous employers who choose not to participate in collective bargaining.

Labour's Plan to Make Work Pay said:

'Collective bargaining, whether in the public or private sector, at enterprise level or sectorally, makes a positive contribution to Britain's economy and will continue to do so with the next Labour government.'

Paragraph 4A should be amended so that it expressly provides that provisions of collective agreements agreed after the date of the transfer will transfer under regulation 4.

Question 5: To what extent do you agree or disagree that employee pension rights are sufficiently protected under a TUPE transfer? Please explain your answer.

[ ] Strongly agree

[ ] Agree

[ ] Neutral

[ ] Disagree

[X] Strongly disagree

[ ] Other

The current rules surrounding which pension rights transfer under TUPE are complex.

The general rule is that there is a '*pension exemption*' from the automatic transfer principle, i.e. rights relating to occupational pension schemes do not transfer under TUPE to the new employer (regulation 10(1)). However, under the Pension Act 2004 (together with the Transfer of Employment (Pension Protection) Regulations 2005 (SI 2005/649)) there are minimum pension provisions that the new employer has to provide following a TUPE transfer.

Regulation 10(2) provides a carve out to this 'pension exemption' so that *'any provisions of an occupational pension scheme which do not relate to benefits for old age, invalidity or survivors shall not be treated as being part of the scheme'* will transfer under TUPE. Regulation 10(2) gives statutory effect to the decision of the Court of Justice of the European Union in *Beckmann v Dynamco Whicheloe Mcfarlane Ltd* Case C-164/00, [2003] ICR 50 and thus the early retirement benefits that transfer under Regulation 10(2) are known as '*Beckmann Rights*'.

Following the decision in *Beckmann v Dynamco*, the High Court provided further clarification in *Proctor & Gamble Company v Svenska Cellulosa Aktiebolaget SCA and another* [2012] EWHC 1257 (Ch), [2012] IRLR 733. In *Proctor & Gamble* the High Court decided that the Beckmann Rights, which transfer to the Transferee under TUPE, are limited to benefits payable before normal retirement age.

However, there remains great uncertainty around the meaning of the wording in regulation 10(2). Following these decisions, there have been a number of claims brought in England & Wales, especially by public sector employees who transferred to the private sector and were made redundant after the age of 50. Partially due to a lack of extensive case law on the issue and a high level of complexity surrounding the transfer of pension, many of the claims have settled outside of court.

In light of this, regulation 10(2) should be amended to create greater certainty.

Firstly, greater clarity is needed as to the definition of the '*benefits for old age, invalidity or survivors*' which transfer to the transferee. At a minimum, the amendment should clarify that the rights which transfer under TUPE include those that become payable between the date of redundancy and the normal retirement age.

Secondly, in respect of the Beckmann Rights that do transfer, amendments to regulation 10(2) should clarify the extent of the funding obligations on the transferee by making appropriate provision for the transferee to make a top-up payment into the pension fund if the employee decides to take early retirement.

Finally, regulation 10(2) should also be amended to clarify how Beckman Rights are classified for the purposes of the Limitation Act 1980, i.e. whether they are contractual, tortious or trust rights.

Determining whether a 'relevant transfer' has taken place

Question 6: To what extent do you believe that it is clear when a 'relevant transfer' has taken place and TUPE regulations apply? Please explain your answer.

[ ] Completely clear: no improvement required

[ ] Mostly clear: it could be improved

[ ] Neutral;

[X] Mostly unclear: it should be improved

[ ] Completely unclear: it must be improved

[ ] Other

In our response to question 2 above, we have given examples of cases involving a service provision change where a dispute has arisen between a transferor and a transferee about the application of TUPE. Regulation 3 (1)(b) defines a service provision change as a situation in which:

(i) *activities cease to be carried out by a person ('a client') on his own behalf and are carried out instead by another person on the client's behalf ('a contractor');*

(ii) *activities cease to be carried out by 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*

(iii) activities cease to be carried out by 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,

and in which the conditions set out in paragraph (3) are satisfied.

…

(3) The conditions referred to in paragraph (1)(b) are that—

(a) immediately before the service provision change—

(i) there is an organised grouping of employees situated in Great Britain which has as its principal purpose the carrying out of the activities concerned on behalf of the client;

(ii) 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

(b) the activities concerned do not consist wholly or mainly of the supply of goods for the client's use.

In Arch Initiatives v Greater Manchester West Mental Health NHS Foundation Trust [2016] UKEAT/0267/15/RN, Arch Initiatives argued that the transfer of part of the constituent elements of a service could not form a service provision change and there could not be two organised groupings of employee with the relevant principal purpose. The Employment Appeal Tribunal noted that the word activities was not defined nor qualified, in the regulations, and concluded that there was nothing in principle to prevent there from being a service provision change involving only some of the activities forming part of the service.

Greater clarity could be achieved by amending regulation 3 to make it clear that a service provision change can occur where activities are split between more than one new contractor and there is more than one organised grouping of employees. In addition, guidance should encourage employers to co-operate with each other, in a constructive and pragmatic way, to resolve any issues which may arise, in relation to which part of the service a particular employee should be assigned to, having regard to the employee's job role, time spent on particular activities and the views of the employee representatives.

Question 7: If you have previously been involved in a TUPE process, in your view, what aspects of the process worked well? Please explain your answer.

We have not responded to this question, as it appears to be addressed to employers.

However, in general terms, our experience indicates that TUPE can work well when employers voluntarily disclose relevant information, at a sufficiently early stage in the process, and engage in a co-operative and meaningful consultation process.

Question 8: If you have previously been involved in a TUPE process, did you encounter any issues with the process?

We have not responded to this question, as it appears to be addressed to employers.

However, in our responses to questions 2-6,13, and 23 we have commented on our experience of aspects of the TUPE process which have not worked well for employees.

Question 9: At which stage of the transfer process did you encounter these issues? Please select all that apply.

We have not responded to this question, as it appears to be addressed to employers. However, please see our responses to questions 7 and 8 above.

Question 10: Which, if any, of these issues did you face during a TUPE process? Please select all that apply. Please explain your answer.

We have not responded to this question, as it appears to be addressed to employers. However, please see our responses to questions 7 and 8 above.

Question 11: To what extent do you agree or disagree that the TUPE process can be challenging for employers to navigate? Please explain your answer.

We have not responded to this question, as it appears to be addressed to employers.

However, we would reiterate our response to question 1. The purpose of the Transfer of Undertakings (Protection of Employment) Regulations 2006 is to protect employees' terms and conditions when, due to circumstances beyond the employees' control, their employment is transferred to a different employer. Such protection is necessary because of the inherent inequality in bargaining power which exists between employers and employees.

Question 12: In your view, how do you think the TUPE process could be made more efficient for employers?

Please see our response to question 11.

Question 13: In your view, how do you think the TUPE process could be strengthened to provide greater protections for employees' employment rights?

In our response to question 2 , we raised the issue of '*TUPE orphans*', a term which we use to mean the extremely harsh and wholly unfair way in which employees are treated where a dispute arises, between the transferor and the transferee, about the application of TUPE. Possible ways in which the fundamental issue of '*TUPE orphans*' problems could potentially be addressed would be through the introduction of a right to some form of interim relief for TUPE orphans, to ensure that they, at the very least, receive redundancy pay, holiday pay and notice pay in the interim period while the TUPE dispute is resolved.

For example, there could be provision for an expedited interim 1 day employment tribunal hearing, to take place within say 2 weeks of an employment tribunal claim being lodged and responded to, at which a Judge would make a preliminary finding, with regard to whether the transferor or transferee was likely to be responsible for the employees, and, if possible, make an order for re-instatement against the party found likely to be responsible for the employees or (if that were not possible) order one or both organisations to pay redundancy pay, holiday pay and notice pay to the employees, pending the resolution of the TUPE dispute.

There could also be a power, for the employment tribunal to order an organisation which succeeded at the interim hearing, to pay a deposit; in anticipation that, in the event that the interim decision were to be reversed at a subsequent substantive hearing, a sum of money would be due to be paid the other organisation. A provision of this nature would likely act as an incentive for employers to resolve any disputes about the application of TUPE through discussion rather than through protracted and costly litigation.

Other ways in which TUPE could be improved, and which would be likely to reduce the risk of disputes about the application of TUPE arising include:

1. Clearer guidance for employers on TUPE, particularly with regard to the meaning of service provision changes, including practical examples and incorporation of appropriate principles established in case law.

2. Requiring the transferor to provide the transferee with employee liability information at an earlier stage in the TUPE process

3. Ensuring that TUPE consultation starts sufficiently early to allow time for discussion and resolution of any disputes about the application of TUPE.

4. Rectifying the omission of a duty on the transferee to consult with representatives of the affected employees about measures which the transferee intends to take in relation to the affected employees to facilitate meaningful consultation and resolution of issues about the scope of TUPE before the transfer takes place.

Further detail in relation to points 2-4 is set out in our response to question 3.

We have commented, on other ways in which TUPE could be strengthened to provide greater protection for employment rights, in our responses to the following questions:

- Question 4 - on improvements specific to collective agreements
- Question 5 - on improvements which are specific to pensions
- Question 6 – on improvements in relation to service provision changes
- Question 16 – on changes to terms and conditions
- Question 17 – on contractual variation clauses
- Question 23, - on the need to clarify the position in relation to beneficial contractual changes made by the transferee
- Question 24 - on the need to extend TUPE protection to workers.

Current guidance and support during a TUPE transfer

Question 14: In the process of undergoing TUPE, what support, if any, did you use?

We have not responded to this question, as it appears to be addressed to employers.

Question 15: How helpful do you believe the guidance (GOV.UK and Acas) currently available on TUPE is? Please explain your answer.

[ ] Very helpful: no improvement required

[ ] Somehow helpful: it could be improved

[ ] Neutral

[X] Somehow unhelpful: it should be improved

[ ] Very unhelpful: it must be improved

[ ] Other

Our comments on the guidance currently available are:

1. Information published on GOV.UK titled '*Business transfers, takeovers and TUPE' – undated*

   This guidance is very brief and needs to be supplemented by more detailed guidance. The website should have a clear and obvious link to more detailed guidance. (Currently, there is a link at the end, to the guidance referred to at point 2, but this should be more prominent, i.e. it should be visible in each section.)

   The section setting out the information which the transferor should provide to the transferee needs to be amended, to make it clear that regulation 11(2)(e) requires the transferor to provide the transferee with information about any collective agreement which will have effect after the transfer.

2. *Employment Rights on the transfer of an undertaking* – Department for Business Innovation & Skills - January 2014

   This guidance is currently available, through a link at the end of point 1: https://www.gov.uk/government/publications/tupe-a-guide-to-the-2006-regulations The website states that this guidance was last updated on 15 January 2014. Therefore, the guidance is now more than 12 years old and needs to be reviewed and updated.

   Updated guidance should incorporate appropriate principles established in recent case law and include more examples of practical scenarios, to assist employers in understanding and complying with their obligations under TUPE. In particular, it should provide clearer guidance on when the provisions relating to service provision changes will apply.

   Updated guidance should adopt a more purposive approach, in terms of guiding employers towards complying with the underlying purpose of TUPE, instead of towards looking for ways to avoid the application of TUPE. For example, page 10 of the current guidance says:

   '*However the activities might be divided up so much that there is no service provision* *change. This is often called "fragmentation" of the service, and it will depend upon the circumstances as to whether a service is so fragmented that it is not a service provision change.'*

This implicitly suggests that an employer might be able to avoid the application of TUPE by choosing to make arrangements designed to fragment a service. As we have set out in our response to question 2, disputes between employers over the application of TUPE have an extremely harsh and unjust effect on employees, who become '*TUPE orphans*', as well as leading to lengthy and expensive litigation.

(c) Acas guidance on '*TUPE transfers'* published on the Acas website – dated 26 February 2026

Again, whilst it contains useful practical suggestions for employers such as in relation to '*Making a transfer plan'* , this is relatively brief guidance, so far as the law is concerned, and there should be a clear link to more detailed guidance on the law.

In more general terms, we would also suggest that careful thought is given to how the available guidance is structured, in order to avoid any duplication or confusion. If, for example, the intention is that the guidance on the government website will provide a basic overview, with the ACAS guidance providing more practical guidance and The Department for Business and Trade issuing updated guidance focussing on legal aspects of the regulations, then this should be made clear in each set of guidance.

Variation of terms and conditions of employment

Question 16: To what extent do you agree or disagree that the current circumstances that an employer can change the contractual terms and conditions of an employee (e.g. ETO reasons), strikes the right balance between supporting employer needs and protecting employees' employment rights? Please explain your answer.

[ ] Strongly agree

[ ] Agree

[ ] Neutral

[X] Disagree

[ ] Strongly disagree

[ ] Other

The focus of questions 16-19, on the ability of employers to change terms and conditions, is inappropriate. The underlying purpose of the Transfer of Undertakings (Protection of Employment) Regulations and the Acquired Rights Directive is to protect employees' terms and conditions when, due to circumstances beyond the employees' control, their employment is transferred to a different employer. Such protection is necessary because of the inherent inequality in bargaining power which exists between employers and employees.

In Foreningen af Arbejdsledere i Danmark v Daddy's Dance Hall A/S [1988] IRLR

315, the European Court of Justice confirmed that the objective of the Acquired Rights Directive is to ensure, as far as possible, the safeguarding of employees' rights in the event of a change of proprietor of the undertaking and to allow them to remain in the service of the new proprietor on the same terms and, therefore, a worker cannot waive the rights conferred by the Directive.

Regulation 4 provides that '*Subject to regulation 9, any purported variation of a contract of employment that is, or will be, transferred by paragraph (1), is void if the sole or principal reason for the variation is the transfer'*. However, regulation 4(5) provides the following two exceptions where variations are permitted if:

> *"(a) the sole or principal reason for the variation is an economic, technical, or organisational reason entailing changes in the workforce, provided that the employer and employee agree that variation; or*
>
> *(b) the terms of that contract permit the employer to make such a variation."*

The effect of regulation 4(5)(a) is that TUPE will permit a contract variation if the sole or principal reason for the variation is '*an economic, technical, or organisational reason*' (an 'ETO reason'). However, for an ETO reason to be valid, it must be shown to entail a 'change in the workforce', i.e. a variation in the numbers or functions of the workforce such as through redundancy or restructuring.

This requirement that the ETO reason relied on must entail a change in the workforce is an important and necessary constraint on the ability of employers to make changes following a TUPE transfer. In particular, it prevents transferees from making changes to terms and conditions for the purpose of harmonising the terms of the transferred employees with those of its existing workforce. In *Martin v South Bank University [2004] 1 CMLR 15, [2004] IRLR 74* the ECJ confirmed that harmonisation will be regarded as a change by reason of the transfer, therefore any attempt to harmonise terms and conditions will be void.

If harmonisation were to be permissible then the whole purpose of TUPE, i.e. protecting the contractual rights of the transferring employees, would be fundamentally undermined.

Even the previous conservative government accepted that harmonisation would not be lawful. A Government Response to Consultation on the TUPE Regulations dated September 2013 says, '*there is a very high risk that any provision allowing parties to agree variations to terms and conditions for the purpose of harmonising those terms would be incompatible with the Directive.'*[4]. This conclusion is also reflected in the January 2014 BIS guidance, which says that '*the desire to achieve 'harmonisation' is by reason of the transfer itself. It cannot therefore constitute 'an economic, technical or organisational reason entailing changes in the workforce'*.[5]

[4] https://www.gov.uk/government/consultations/transfer-of-undertakings-protection-of-employment-regulations-tupe-2006-consultation-on-proposed-changes

[5] See *Employment Rights on the Transfer of an Undertaking: A Guide to the 2006 TUPE Regulations (as amended by the Collective Redundancies and Transfer of Undertakings (Protection of Employment) (Amendment) Regulations 2014) for Employees, Employers and Representatives*, available at https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/275252/bis-14-502-employment-rights-on-the-transfer-of-an-undertaking.pdf at page 23.

In the event that the Government were to make changes, designed to make it easier for employers to change terms and conditions, such that UK TUPE legislation no longer provided the same degree of protection for employees as the Acquired Rights Directive, then this would place the UK in breach of international law, i.e. the UK would be in breach of its obligations under the UK/EU Trade and Co-operation Agreement[6], which provides that the UK and the EU have made a '*commitment to uphold their respective high levels of protection in the areas of labour and social standards'* defined, in Chapter 6 to include '*fundamental rights at work'* and *'fair working conditions and employment standards'.*

We are strongly of the view that the current constraints, on when a transferee can vary the terms of a contract, should not be diluted. The only change which would be appropriate is that the position in the original version of regulation 4(4) should be reinstated, i.e. the position should be that contractual changes are void not only where the sole or principal reason is the transfer but also where the sole or principal reason is a reason connected with the transfer.

Question 17: In your view, to what extent do you agree or disagree with the reasons, as outlined above, for being able to vary employment contracts (ETOs)? Please explain your answer.

[ ] Strongly agree

[ ] Agree

[ ] Neutral

[x] Disagree

[ ] Strongly disagree

[ ] Other

For the reasons set out above, in response to question 16, our view is that the original version of regulation 4(4) should be reinstated, i.e. the position should be that contractual changes are void not only where the sole or principal reason is the transfer but also where the sole or principal reason is a reason connected with the transfer.

We are also concerned about the potential for employers to write widely drafted variation clauses into employment contracts, giving the employer a wide discretion to vary contractual terms. We are aware that solicitors advising employers are suggesting that employers should consider doing this, in preparation for the forthcoming change in the law relating to fire and re-hire. One (of many) examples of such advice is:

[6] https://commission.europa.eu/strategy-and-policy/relations-united-kingdom/eu-uk-trade-and-cooperation-agreement_en

***2. Build in appropriate flexibility now, before the changes take effect** – this may involve adding general flexibility clauses into contracts where none exist (albeit being aware of the limitations described above) or increasing the scope of employer discretion in contracts.*[7]

We are concerned that contractual variation clauses have the potential to undermine the purpose of the TUPE regulations in that transferees may seek to rely on them, to make transfer related detrimental changes to terms and conditions, following a TUPE transfer.

Regulation 4(4) should be amended to make it clear that contractual variation clauses may only be relied on for the purpose of making minor administrative changes and may not be relied on to make substantive detrimental changes to terms and conditions of employment.

Question 18: To what extent do you agree or disagree that the circumstances where employers can change the contract terms and conditions of an employee (for example using ETO exemptions), following a transfer, are sufficiently clear and specific? Please explain your answer.

[ ] Strongly agree

[ ] Agree

[ ] Neutral

[X] Disagree

[ ] Strongly disagree

[ ] Other

For the reasons set out above, in response to questions 16 and 17, our view is that:

1. The original version of regulation 4(4) should be reinstated, i.e. the position should be that contractual changes are void not only where the sole or principal reason is the transfer but also where the sole or principal reason is a reason connected with the transfer.

2. Regulation 4(4) should be amended to make it clear that contractual variation clauses may only be relied on for the purpose of making minor administrative changes and may not be relied on to make substantive detrimental changes to terms and conditions of employment.

Question 19: If answered strongly disagree, disagree, or other to question 18, what further guidance/clarifications do you think will be most beneficial and why? Please explain your answer.

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[7] https://www.farrer.co.uk/news-and-insights/navigating-fire-and-rehire-reforms-a-practical-guide-to-variations-in-employment-contracts/

Please see our response to question 18.

We also consider that the guidance should be updated, further information about this issue is set out in our response to question 15.

Question 20: To what extent do you agree or disagree that the overall cost of TUPE-protected transfers is too high for businesses? Please explain your answer.

[ ] Strongly agree

[ ] Agree

[ ] Neutral

[ ] Disagree

[X] Strongly disagree

[ ] Other

We disagree with the premise of the question. Government policy on employment rights should not be determined by inviting business to put forward subjective arguments that a long-standing and fundamental part of employment rights[8] is too costly for business.

In '*Labours' plan to make work pay*', the Labour Party gave a commitment not only that it would:

'*strengthen the existing set of rights and protections for workers subject to TUPE processes*'

but also that:

Labour believes strong collective bargaining rights and institutions are key to tackling problems of insecurity, inequality, discrimination, enforcement and low pay. When workers are empowered to act as a collective, they can secure better pay and conditions.

TUPE is an essential part of the protection of the rights of employees and in creating a level playing field for employers. Without TUPE protection, unscrupulous employers, who refuse to engage in collective bargaining, would be free to undercut more responsible employers by submitting lower cost bids for work and then cutting the pay and conditions of the employees who are TUPE transferred.

Question 21: Please provide information on the types of costs that businesses need to consider during a TUPE-protected transfer and where in the process these costs occur.

We have not responded to this question, as it appears to be addressed to employers.

[8] The original Transfer of Undertakings (Protection of Employment) Regulations were introduced in December 1981, nearly 45 years ago

Question 22: If have been through a transfer process, please provide an estimate of the total cost of the transfer for your business.

We have not responded to this question, as it appears to be addressed to employers.

Additional considerations

Question 23: In your view, have the TUPE regulations resulted in any unintended consequences for individuals with a protected characteristic under the Equality Act 2010 or different socioeconomic background? Please explain your answer.

[X] Yes

[ ] No

[ ] Do not Know

[ ] Other

We are aware of the recent EAT decision in *Alpha Anne & Others v Great Ormond Street Hospital for Children NHS Foundation Trust* [2026] EAT 15[9] where a group of cleaners, 78% of whom were of BAME background, worked at Great Ormond Street Hospital for a contractor up until 1 August 2021, when clearing services were brought bank in house by the Trust. Following the transfer, the Trust did not immediately pay the claimants in accordance with the *Agenda for Change* collective agreement. The Trust adopted the position that regulation 4 rendered void any transfer related variation of a transferred contract of employment, even where the proposed variation benefits employees. The employees brought a claim for indirect race discrimination. The Employment Appeal Tribunal found that the Trust had indirectly discriminated against the employees.

Our view is that the dispute which arose in this case could have been avoided, if the TUPE regulations had expressly made it clear that it is permissible for the transferee to make changes to terms and conditions, which are to the benefit of the transferring employees. The Department for Business Innovation & Skills guidance dated January 2014 (page 18) states that the employer may vary terms and conditions:

> *E. When changes are entirely positive from the employee's perspective. The underlying a purpose of the Regulations is to ensure that employees are not penalised when a transfer takes place. Changes to terms and conditions which are entirely positive are not prevented by the Regulations.*

The guidance reflects the decision of the Supreme Court in Power v Regent Security Services Ltd [2007] EWCA Civ 1188[10]. In that case the Supreme Court held that a positive consensual post transfer variation, increasing Mr Power's contractual retirement age from

9 https://assets.publishing.service.gov.uk/media/6970bde4f6aa424b452e33f4/Mr_Alpha_Anne___Others_v_Great_Ormond_Street_Hospital_for_Children_NHS_Foundation_Trust__2026__EAT_15.pdf

10 https://www.bailii.org/ew/cases/EWCA/Civ/2007/1188.html

60 to 65, was not void under regulation 4 of TUPE. The Supreme Court held that the aim of TUPE was to safeguard the acquired rights of employees on the transfer of an undertaking, safeguarding the rights of employers was not the aim and it would, therefore, be inconsistent with the aim of protecting the workforce to refuse them benefits contractually conferred by the transferee.

In Ferguson v Astrea Management Ltd UKEAT/0139/19/JOJ[11], the Employment Appeal Tribunal concluded that regulation 4 rendered void all contraction variations made because of a transfer and not just those which were adverse to the employee. However, the Ferguson case involved unusual facts in that the claimants were company directors who had made arrangements, shortly before the transfer, for their employment contracts to be substantially improved to provide for guaranteed bonus payments and generous new termination payments.

Whilst the decision is understandable, on the unusual facts of the case, the Ferguson case has created unhelpful uncertainty, with regard to whether or not regulation 4 permits beneficial changes, and this uncertainty needs to be resolved, so that the TUPE regulations clearly reflect the Supreme Court's decision in Power v Regent Security Services Ltd and are consistent with the guidance.

Question 24: Is there anything else you would like to share your reflections on, that was not covered by the previous questions?

In two first instance decisions, *McCririck v Channel 4 Television Corporation (1) and IMG Media (2)* Case No 2200478/2013 and *Dewhurst & ors v Revisecatch Limited (t/a Ecourier) & Anor* Case No 2201909/2018 employment tribunals have held that TUPE applies to those who are '*workers*' as well as to '*employees*'. We consider that these decisions rightly reflect the changes in employment practices since 1981[12], in particular the rise of bogus self-employment. The Dewhurst case concerned individuals who were working as cycle couriers. Our view is that TUPE should be amended, to extend protection to workers, pending the Government's proposed review of employee and worker status. This could be done by amending the regulations to define 'employee' to include individuals who work under a contract where they undertake to do work personally (except where the other party to the contract is a client or customer of a profession or business undertaking carried on by the individual) as per the definition of worker in section 230 (3) of the Employment Rights Act 1996.

Thompsons Trade Union Law Group

1 July 2026

[11] https://www.gov.uk/employment-appeal-tribunal-decisions/duncan-ferguson-and-others-v-astrea-asset-management-ltd-ukeat-0139-19-joj
[12] TUPE regulations have been in place since the implementation of the Transfer of Undertakings (Protection of Employment) Regulations 1981