Thompsons Trade Union Law Service: Head Office Briefing

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The NEW TUPE REGULATIONS January 2014

The new TUPE Regulations were laid before Parliament on 10 January and come into force on 31 January 2014. The new regulations, the Collective Redundancies and Transfer of Undertakings (Protection of Employment) (Amendment) Regulations 2013 ("CRATUPE"), amend the 2006 version, and also the provisions of the Trade Union and Labour Relations (Consolidation) Act 1992 ("TULRCA") relating to collective redundancies. This is the culmination of a process that began with a consultation by BIS in January 2013.

The stated policy aim behind CRATUPE was to improve and simplify the existing legislation and to remove what was described by the government as unnecessary "gold-plating" of provisions implementing the underlying EU Acquired Rights Directive. As it turns out, a significant proportion of the government's original proposals are not being implemented. This is in part due to the constraints of the Acquired Rights Directive, but also due to the breadth of opposition expressed to measures such as the proposed abolition of service provision changes. But damaging amendments are still made-especially in relation to collective agreements and collective redundancy consultation.

What is not Changing

1. CRATUPE does not abolish "service provision changes" ("SPCs"), which had originally been introduced in 2006 in the interest of certainty in contracting–out situations. The government proposed to abolish SPCs, which it described as "gold-plating" of the Acquired Rights Directive. 67% of consultees in the BIS consultation, from both sides of industry, were in favour of retention. 70% of consultees cited the difficulties in interpreting case law to determine whether a transfer had occurred or not prior to the introduction of SPCs in 2006. The only (more) minor amendment is the requirement that the activities after the SPC must be "fundamentally the same" as those carried out before it.

2. CRATUPE does not remove the transferor's obligation to provide employee liability information to the transferee prior to the transfer-although the information will now have to be provided 28, instead of 14, days before the transfer. The provision is still defective in that there remains no requirement for the information to be provided to trade unions.

3. CRATUPE does not alter an employee's right to claim that she or he has been dismissed if the transfer involves, or would involve, a substantial change in working conditions to the material detriment of that person.

4. The transferor remains unable to "borrow" a transferee's ETO reason for dismissal. It was accepted that this would narrow the pool in any redundancy exercise to the transferor's own workforce, and could be exploited by unscrupulous employers dismissing staff to inflate the price of the undertaking to be transferred.

What is Changing for TUPE transfers on or after 31 January 2014

1. Although SPCs are retained, provision is made that the activities before and after the transfer must be "fundamentally" the same. The rationale is that this reflects the case law. But employers will no doubt argue that this excludes yet further transfers from the scope of TUPE.

2. CRATUPE will permit the renegotiation of terms derived from collective agreements to take effect one year after the transfer even though the reason for making the change is the transfer itself. This is subject to the requirement that, overall, the terms of the amended contract are no less favourable to the employee than those that applied previously.

3. CRATUPE provides expressly for a "static" approach to the transfer of terms derived from collective agreements. In other words, a transferred employee cannot benefit from subsequent collective agreements negotiated between the transferor and his/her trade union following the transfer when the transferee is not a party to these negotiations. This overrides the previous UK case law to the effect that transferred employees were entitled to the benefit of pay awards negotiated after the transfer even though their new employer was not party to the collective bargaining machinery in question. This amendment codifies the recent controversial decision of the CJEU in Alemo-Herron and ors v Parkwood Leisure Ltd.

4. The circumstances in which terms can be varied in individual contracts of employment are also extended. Variations where the sole or principal reason is the transfer itself will be void. But that will not stand in the way of variations where the sole or principal reason is an "economic, technical or organisational reason entailing changes in the workforce" and the employee agrees to the variation. There is also a new provision permitting contractual variations where the terms of the contract allow for the variation. This may be seen as an encouragement for the use of widely drawn discretions to vary within the terms of contracts.

5. Similar amendments are made to the automatic unfair dismissal provisions. A dismissal before or after the transfer where the reason for the dismissal is the transfer itself is automatically unfair. But that is disapplied where the dismissal is for an ETO reason entailing changes in the workforce.

6. CRATUPE also makes provision for a change in the location of the workforce to be within the scope of an ETO reason. Previously to be an ETO reason there had to be a reduction in the numbers of the workforce or a change in the job functions of some of the workforce.

7. CRATUPE provides for a change in collective redundancy consultation obligations in TULRCA. Consultation by the incoming transferee, at its election and provided that the transferor agrees, which begins pre-transfer can count for the purposes of complying with collective redundancy obligations in relation to collective redundancies to take effect after the transfer.

8. Employee liability information will have to be provided to the transferee by no later than 28 (instead of 14) days before the transfer.

9. Micro businesses employing 10 employees or less will be entitled to inform and consult affected employees directly without the need to elect employee representatives when there is no independent trade union and no existing employee representatives.

Commentary

Although SPCs have been retained, some of the changes will be damaging-particularly those relating to collectively bargained terms and pre-transfer collective redundancy consultation. However, there will be questions as to whether some of the amendments contained in CRATUPE (and some pre-existing provisions) comply with the Acquired Rights Directive and the Collective Redundancies Directive.

1. The ability to negotiate changes to terms and conditions of employment deriving from collective agreements one year after the transfer will create a two-tier system of contractual rights. Those terms arising purely from the individual contract of employment will have greater protection against variation than those deriving from collective agreements. But questions will remain as to the lawfulness of the act of re-negotiation. It seems that the re-negotiation will involve the making of an offer to give up collectively bargained terms, which the European Court of Human Rights found to infringe Article 11 of the European Convention on Human Rights in the Wilson & Palmer v UK case.

2. Likewise, as a matter of contractual orthodoxy, there is no reason why a third party should not be bound contractually to arrangements to which it is not a party if that is what the contract provides. By providing for a "static" approach to the transfer of collective agreements under TUPE, CRATUPE again downgrades collectively bargained terms below the status of other terms in the contract.

3. Particularly damaging will be the transferee's ability to count pre-transfer consultation for the purpose of meeting the requirements of section 188 of TULRCA. The transferee will be able to implement redundancies more quickly after the transfer, with workers losing pay and holiday entitlement. Trade unions representing workers still employed by the transferor will be placed at a disadvantage attempting to engage with an incoming transferee employer with whose business they may not be familiar. There are arguments for saying that this aspect of CRATUPE does not comply with the Collective Redundancies Directive, which places the obligation to inform and consult squarely on the "employer". Before the transfer, the transferee will not be the employer.

4. The Government has decided that the definition of an ETO can be extended to cover a change in workplace location as well as a reduction in numbers or a change in job functions of the workforce. However the Acquired Rights Directive does not expressly provide for this. The CJEU may not therefore think any differently on this issue than the Employment Appeals Tribunal did in Tapere v South London and Maudsley NHS Trust where a change in location on transfer was ruled to amount to unfair dismissal.

5. The Acquired Rights Directive prohibits variations to the contract of employment where the reason for the variation is the transfer itself. The 2006 version of TUPE arguably did not comply with the Directive. Those arguments are perpetuated in CRATUPE . The CJEU appears to take a more wide-ranging approach than the UK courts as to when a variation is by reason of the transfer. And, according to the CJEU, when the reason for the variation is the transfer, the variation will be void.

6. As its justification for relaxing the consultation rules for micro-businesses, the government cites Article 7(5) of the Acquired Rights Directive. But Article 7(5) applies to undertakings which, "in terms of the numbers of employees, meet the conditions for the election or nomination of a collegiate body representing the employees". That is a different situation.

Some of the worst excesses of the proposed amendments have not materialised. But the end result is yet further dismantling of collectively bargained terms and conditions, and incursions into collective redundancy consultation, as well as other instances of the weakening of the protection provided by TUPE.

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