

About Thompsons

Thompsons is the most experienced trade union, employment rights and personal injury law firm in the country with 28 offices across the UK. On employment and industrial relations issues, it acts only for trade unions and their members.

Thompsons represents the majority of UK trade unions and advises on the full range of employment rights issues through its specialist employment rights department.

Introduction

The overriding aim of the TUPE regulations is to protect and preserve the rights of workers. The legislation does exactly that, no more and no less. Since 2006 the regulations have provided greater clarity to employers who more often than not are the ones who challenge whether TUPE applies, and this is borne out by the fact that there are now considerably fewer legal challenges on this issue.

Whilst clearer guidance using real cases is always welcome, amending the regulations without justification or any evidence that they are not working effectively is unnecessary and will lead to uncertainty and increased litigation.

Question 1: Have the 2006 amendments provided greater clarity and transparency on application of TUPE rules?

Yes. In our experience, since 2006, there have been fewer requests for advice in relation to the question as to whether or not there has been a business transfer. This demonstrates the considerable advantage of the 2006 amendments, which is that they provide less room for legal argument.

The changes therefore provide greater certainty for businesses, employees and employee representatives, meaning fewer burdens on business overall.

Question 2: Do the 2006 Regulations provide enough transparency around employment rights and obligations being transferred to ensure a smooth transition? If not, how could this be improved?

Yes they do. However, further guidance on what changes to terms and conditions are by reason of transfer, what changes are for a transfer related reason, and what constitutes an ETO reason would certainly be helpful. This should include case studies reflecting the principles set out in the following recent cases:

- Nationwide Building Society v Benn and Others [2010 IRLR 922;
- Spaceright Europe Ltd v (1) Bruno Baillavoine (2) Secretary of State for Business Innovation and Skills [2011] EWCA Civ 1565;

- Smith and others v Trustees of Brooklands College, EAT.

The latter case demonstrates that post-transfer changes can lawfully be made in certain circumstances, that the law in relation to harmonisation is often misunderstood, and that the inability of transferees to change terms and conditions post transfer is over-stated.

Question 3: Do employers and commissioners generally comply with the transparency obligations under the 2006 Regulations? If not, are there particular problems around timing and/or accuracy of the information they provide; and are problems particularly noticeable in respect to transfers from the public or private sector?

As this information is provided to the transferee, not to the employees or their representatives, we have no comment to make.

Question 4: Does inclusion of service provision changes within the 2006 Regulations provide benefits in terms of increased transparency and reduced burdens on business? If yes what are these benefits? If no, what additional burdens have resulted from their inclusion?

Yes. Including service Provision Changes (SPC) in the 2006 Regulations provides far greater certainty for all. Further, it provides fair competition between those bidding for contracts. In the vast majority of cases bids will now be submitted on the basis that TUPE applies - rather than bidders taking a chance that it won't, with all the resulting uncertainty for both businesses and employees that situation created. As stated in 1 above, our experience is that there are now less questions on this issue.

Question 5: Have the 2006 amendments led to less need to take legal advice prior to tendering or bidding for contracts?

Yes. As stated above, we receive fewer requests for advice on the question as to whether or not there has been a transfer. Any questions that we do get can often be dealt with by brief telephone advice. In our experience therefore, the clarification of the law has been beneficial.

Question 6: Have the 2006 amendments led to fewer tribunals resulting from service transfers?

That is our experience. Only four or five cases have gone to the EAT since the 2006 amendments, which suggests that the lack of clarity with regard to the scope and extent of TUPE is no longer a live issue.

Question 7: Is the inclusion of service provision changes in principle helpful, but are there alternative models for their inclusion that would lead to improvements? What might these look like?

Yes, for all of the above reasons the inclusion of SPCs has been helpful. We do not see a need for an alternative model. Further, as the EAT observed in **Metropolitan Resources Ltd v Churchill Dulwich Ltd [2009] IRLR 700**, "*the new SPC provisions appear to be straightforward and their application to individual cases is essentially one of fact for the ET to determine*". Those comments were recently reiterated in the case of **Pannu and others v Geo W King Ltd and others (UKEAT/0021/11/DA)**. We commend those comments to you.

Question 8: Should professional services be included in the definition of service provision and be covered by the Regulations?

Yes. Trying to exclude professional services would simply cause confusion and lead to further litigation as to what constitutes professional services. Further, professional services may be covered by the Rules on business transfers in any event. Presumably, this is why they were not excluded in the first place.

Question 9: Would the exclusion of professional services lead to uncertainty over whether TUPE did or did not apply, requiring businesses to seek further legal advice?

As stated in response to Q8 above, if they were excluded then affected employees could and would still try and argue that there has been a business transfer; and there would no doubt be further litigation in individual cases as to whether a business is a 'professional service' or not.

Question 10: Is lack of provision for post-transfer harmonisation a significant burden? How might the Regulations be adjusted to enable this whilst remaining in line with the Directive?

We are not aware of any evidence to suggest that it is. Nor do we see how it could be. Bidders for public sector contracts for example, should put together bids on the basis that TUPE will apply and therefore that the terms and conditions of transferring employees will be protected. As for adjusting the Regulations to enable harmonisation to take place, without breaching the Directive, we do not consider that is possible. We understand that the previous government carefully considered possible amendments to TUPE to allow for post-transfer harmonisation but concluded that it was not legally possible, under the Directive. We agree. The Directive itself would need to be changed for any such changes to be lawful. Any attempt to change TUPE without such changes to the Directive would no doubt result in legal challenges, and the resulting uncertainty such challenges would create for business and government.

As stated in our answer to Q2 above, it would however be helpful if BIS Guidance could include further examples of what could amount to changes by reason of the transfer etc.

Question 11: Would it be helpful to have a provision limiting the future observance of terms and conditions derived from collective agreements?

We do not consider that such a change would be helpful. The terms of collective agreements are only enforceable by reason of them being incorporated into the contracts of employment of individual employees. Contracts cannot be changed other than by agreement or by dismissal and re-engagement. Limiting the future observance of the terms derived from collective agreements would amount to a change by reason of the transfer and be unlawful and unenforceable and simply lead to more uncertainty for employers and legal claims by those involved – against the transferee and against government.

The case of **Parkwood Leisure Limited (Respondent) v Alemo-Herron and others (Appellants) [2011] UKSC 26** is now going to the CJEU for a preliminary ruling. This case will no doubt provide further clarification on the enforceability of collective agreements, post transfer. But it is for the CJEU to determine this issue, not governments of member states, save by reason of changes to the Directive itself.

Question 12: Would it be helpful to agree with employees a renegotiation of their contract provided that overall the resulting contract was no less favourable than at the point of transfer?

Again, the question starts from a false premise – that it is possible for employees to agree adverse changes to their contracts of employment. It is clear that such changes are not enforceable – see the **Daddy’s Dance Hall case**, [1998] IRLR 315. TUPE over-rides the common law of contract in this regard.

Question 13: Should more be done to clarify the application of TUPE in insolvency situations? If so, would this require changes to the legislation, for example, by setting out which insolvency procedures fall under which provisions, or would more detailed guidance than currently provided be sufficient?

Clarification has recently been provided in insolvency cases by the Court of Appeal in the case of **OTG Ltd v Barke & Ors**. BIS Guidance should be amended to reflect that.

Question 14: Have the 2006 amendments meant that transferees (ie businesses taking over the contract) have a greater awareness of potential liabilities, and has this helped to reduce transaction costs and risks? If not, how could this be improved?

Yes. The 2006 amendment provide greater clarity and transparency, which results in fewer risks and transactional costs. Most businesses will now bid for contracts on the basis that TUPE will apply, which helps to create a level playing field, hence encouraging, for example, innovation in working practices to improve value for money, rather than adverse changes to terms and conditions of employment.

Question 15: Should liability for pre-transfer obligations be transferred entirely to the transferee as is the case currently in the Regulations ie should the business taking on the contract take on all the liabilities of the business or part of the business they are taking over? Or should both parties be jointly liable, as permitted by the Directive.

We are content with the law as it currently stands. It provides certainty. Further the transferor usually ensures that the transferee provides legal indemnities to the transferor, on a TUPE transfer.

Question 16: Is the provision on ‘Economic, Technical or Organisational reason entailing changes in the workforce’ sufficiently clear? Would additional guidance be helpful and if so in what form?

Yes it would be helpful to have concrete examples based on real cases not scenarios. See our response to Q2 above – the same three cases are relevant here.

Question 17: Are there other areas of TUPE that would benefit from additional guidance/clarification?

Yes. How the regulations apply to pensions could undoubtedly be a lot clearer. We refer also to our response to the government’s consultation on the *Fair Deal policy: Treatment of pensions on compulsory transfer of staff from the public sector* and attach it for information.

Question 18. Do you have experience of the implementation of the Acquired Rights Directive (TUPE) in other EU Member States? If so, are there any problems you have encountered, or conversely are there lessons that the UK could learn, from their implementation of the Directive?

No.

Question 19: Have you experienced problems from the interaction of TUPE with other areas of employment law?

The cross over between TUPE and equal pay law can create issues, though these are more as a result of the complexities of equal pay legislation and the time limits in equal pay claims rather than with the TUPE regulations themselves.

The Court of Appeal in **Guttridge v Sodexho & Ors (2009) IRLR 721** found that the time limit for bringing a claim expires six months after the date of transfer. This has the effect of barring many claimants from pursuing claims for historic pay discrimination.

Equal pay claims connected to a transfer involve evidential difficulties as claimants and comparators may be employed by different employers post-transfer with the old employer holding much of the relevant documentary evidence.

Question 20: The Government is also calling for evidence on collective redundancy consultation rules. Please identify any issues that you have in terms of how the TUPE Regulations and the rules on collective redundancy consultation fit together.

The obligations to inform and consult under TUPE are simple and straight-forward. They reflect good practice and are not unduly onerous. The rules are relatively easy to comply with. Perhaps more Guidance might assist businesses to comply.

Question 21: Do you have particular concerns around the application of TUPE to different managerial levels of employees within the same organisation? If so, what are these and how would you like to see them addressed, bearing in mind the requirements of the Directive?

No we do not. We are concerned that the question implies that TUPE might apply to non-manual staff but not to managerial levels of employees. The Directive applies equally to all levels of staff. Sometimes difficult questions arise in relation to the issue as to whether employees are assigned to a particular contract – but that problem cannot be solved by simply excluding managerial staff.

Question 22: Have developments in case law since 2006 raised issues that mean the 2006 Regulations would benefit from updating

No.

Question 23: Are there other areas of the Regulations that would benefit from change/review? Conversely are there areas that it is important to keep?

No. For the reasons given above, the changes have been beneficial, creating greater certainty and transparency for all.

Question 24: Are there any other issues you wish to raise?

We have no other issues to raise.

Further information:

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