

CLIENT ALERT

TUPE or not TUPE ... more of a foresight saga?

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The Transfer of Undertakings (Protection of Employment) Regulations 2006 (“TUPE”) have been finalised and are ready to come into force on 6 April 2006. These Regulations stem from a 2001 EU Directive, which the UK was required to implement into domestic law.

The original Acquired Rights Directive was introduced on 14 February 1977 – our own valentines massacre! The laudable aim of the EU Directive was to ensure that employees’ rights were safeguarded in the event of a change of employer and to allow them to remain in the employment of the new employer on the same terms and conditions as previously agreed.

The Directive was implemented in each European member state independently. In the UK, the infamous Transfer of Undertakings (Protection of Employment) Regulations 1981 were introduced, and have been a great source of work for employment lawyers in the UK ever since, such was the uncertainty of the provisions.

The amended Acquired Rights Directive came into force in March 2001, which obliged the UK to amend the law governing the transfer of undertakings. The UK Government issued consultation documents to interested parties and consultation on the proposed regulations commenced in earnest - we have been waiting ever since for the law change.

The Regulations have now been published and the main changes are as follows:-

- Comprehensive coverage of service provision changes.

For the benefit of international readers, much court time has been occupied over the last years on the thorny issue of whether the old Regulations covered outsourcing and contracting out. The various decisions led to significant uncertainty, and the government recognised that this uncertainty led to commercial disparity, certainly where one company was tendering on the basis that the regulations did not apply and another was tendering on the basis that it did.

The new Regulations make clear that service provision changes (i.e. first and subsequent generation contracting-out, and contracting-in) are covered when there is an organised grouping of employees whose principal purpose is to carry out the contracted-out activities. There are a limited number of specified exceptions, such as where the service is for a single event or task of short-term duration.

Commentators agree that, regrettably, this area is still far from resolved – regular readers will know that the issue of service provision around outsourcing, re-tendering and in-sourcing has been a bugbear for many years, and the issue looks set to continue to occupy significant court time.

- Provisions clarifying the effect of TUPE on transfer-related dismissals and changes to terms and conditions.

Variations to individual contracts of employment remain void unless:

- the principal reason for the variation is an economic, technical or organisational reason entailing changes in the workforce; or
- the transferor is insolvent and either the transferor or the transferee agree the variation with the appropriate representatives of the employees

- Provisions making it easier for insolvent businesses to be transferred to new employers.

Liability for redundancy, notice and other payments are not transferred to the transferee.

- The introduction of a requirement on the transferor to supply information about transferring employees to the transferee

This should make the change of employer operate more efficiently in future as the transferor is obliged to provide information to the transferee about the transferring workforce and the associated rights and obligations that the new employer is taking on.

This information is to be provided at least a fortnight before the transfer and failure to provide the information will enable a claim to be brought - with a minimum award of £500 per employee, unless the tribunal considers it to be just and equitable to award a lesser sum.

- Transferor and transferee become jointly and severally liable for any failure to inform and consult with the transferring employees.

The government announced in 2005 its aim that after the reform *"everyone should know where they stand ... so that employers can plan effectively in a climate of fair competition and affected employees are protected as a matter of course."*

The Regulations come into force on 6 April. Whilst the government sought to bring clarity to a complex area, new legislation inevitably brings with it uncertainty, and new TUPE is no different to any other area. Whilst most of us are relieved that the regulations have finally been published, after an air of expectancy for 5 years, in a very tangible sense the waiting has only just begun as we wait for the courts to opine on the meaning of the legislation.

- At the end of February France's Parliament adopted new equal opportunity legislation to eliminate gender-based salary differentials by 2010 and reinforce legal and financial protection offered to women after maternity leave. Studies from the National Statistics Institute have shown that French women regularly earn up to 20% less than men for equal work, a gender gap that Chirac notably termed "unacceptable". The new equal opportunity law aims to close the gap between male and female pay through mandatory collective bargaining at the company or sectoral level over the coming three years.
- Still in France, there are currently proposals which, if implemented, would enable companies with more than 20 employees to make younger staff (under 26 years of age) redundant at any point in the first two years of a contract. Unions are protesting that this means an entire generation of employees will be working in a culture of uncertainty, and a good deal of unrest has ensued.

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