



Briefing14-16

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

**To: All Chief Executives, Main Contacts and APSE Contacts**

### Key Issues

- The EU Acquired Rights Directive (Council directive 2001/23/EC) led to the enactment of UK TUPE regulations which until recently were 'The Transfer of Undertakings (Protection of Employment) Regulations 2006
- The Government has now introduced new Regulations governing such transfers and these are known as the 'Collective Redundancies and Transfer of Undertakings (Protection of Employment) (Amendment) Regulations 2013
- These new Regulations came into force on the 31 January 2014 though some elements of the Regulations will not come into force until later
- This briefing highlights the main changes which will impact on the public sector in the context of liabilities, employment contracts and outsourcing arrangements

### **1. Introduction**

TUPE has become an increasingly important issue for local authorities. In terms of the delivery of public services many services have become fragmented and it is commonplace for elements of services, or full services, to be delivered through different providers including external private contractors.

Certain services have also been affected by new models of delivery, such as the development of academies and free schools within the education sector and, as a result, traditional delivery of services, such as school meals from a local authority catering services, are commissioned and procured by individual schools. All of these

changes have had a huge impact on the workforce and upon the liabilities of the local authority.

It is therefore essential, when making decisions about future service delivery models that the local authority takes into account the potential redundancy and TUPE liabilities arising from decisions made.

Since the TUPE regulations of 2006, which initially led to the development of a plethora of case law, the TUPE regulations have been through a relatively settled period. However the TUPE regulations have been subject to continual debate about the degree of protection really afforded, from employment rights campaigners, and from the business sector about the perceived complexity of the regulations.

The Government consulted on a range of proposed changes to the TUPE Regulations. This briefing covers the most pertinent changes from the perspective of the public sector reform agenda and the potential impact of the changes on public sector contracting.

## **2. What are the main changes that local authorities need to be aware of?**

### **a. Redundancy dismissals where the workplace changes as a result of a transfer will no longer be automatically unfair.**

Under the amended TUPE Regulations, the definition of 'entailing changes in the workforce' is extended to include a change in the location of the workforce.

This is important because this measure means that a dismissal in a TUPE context will not be automatically unfair if it is for an economic, technical or organisational reason entailing changes in the workforce, even where the dismissal is because of the transfer.

The scenario for a local authority would be that where a new contract arrangement is put into place and the new contractor decides to relocate its services the previous position was that those dismissals would have generally been regarded as automatically unfair. The new Regulations mean that this is no longer the case.

However employers must still meet the requirements for a 'fair' dismissal. Employees with over two years' service will be entitled to a redundancy payment subject to normal redundancy laws.

This issue has been an area of concern for a number of years. Whilst some may welcome the certainty of the legal framework, allowing for this to be regarded as a redundancy situation, it could nevertheless present new industrial relations considerations. Where a local authority presents new service delivery arrangements,

which involve a contract proposal which includes changes to work location, these are likely to be met with increased resistance if the outcome for employees will be de facto a redundancy rather than transfer situation.

**b. The transferee employer can carry out collective redundancy consultation with transferring employees before the transfer takes place.**

The rules on collective redundancy consultation are amended so that an employer that inherits employees as a result of TUPE, and needs to make redundancies, can carry out some or all of its consultation with the transferring employees before the transfer takes place. This in turn allows for the pre-transfer consultation period to count towards the statutory redundancy consultation periods of 30 / 45 days.

Although the transferor employer must agree to this pre-transfer consultation the difficulty presented by the new Regulations is that the redundancy consultation is being carried out by someone other than the current employer. This is perhaps one of the more controversial changes and could potential lead to more not less Tribunal claims since the Collective Redundancies Directive (1998/59/EC) make it clear that the consultation on redundancy must be carried out by the employer.

It should also be noted that pre-transfer dismissals carry a number of risks; for example how could fairness in the process be assured when the Transferee employer may have little knowledge of the workforce and may lack the requisite information upon which to make redundancy decisions? The transferee would also need to satisfy the test of 'meaningful' consultation under redundancy rules and again this could be problematic and lead to an increase in the number of Protective Awards at Tribunal.

**c. Variation to employees' terms and conditions**

When or if a new employer can vary terms and conditions following a TUPE transfer has always been an area of debate. The new Regulations provide that variations to contracts of employment will only be void where 'the reason for the variation is the transfer'.

New employers of transferred staff will now be able to vary terms and conditions where

- (i) there is an ETO\* reason entailing changes in the workforce (which as detailed above will now will include a change to place of work) and*
- (ii) the terms of the contract permit the variation.*

Guidance has been promised on how this new test will work in practice but the actual changes in the Regulations is with immediate effect.

Some practical considerations on this point is that the variation - even if justified by an ETO (economic technical or organisational) reason must be agreed just like any normal contractual change, therefore the amended Regulations do not give new employers an opportunity to simply disregard the terms and conditions of its staff and impose new terms and conditions upon them.

A further practical issue is that of the definition of an 'economic technical or organisational' reason carries a further point of definition being ' ETO reason **entailing changes to the workforce**'. This latter part - entailing changes to the workforce - means in effect through current case law the numbers and functions of the workforce. So, for example, an employer citing a desire to harmonise terms and conditions between an incoming transferring workforce and its own employees would not necessarily meet the test of an ETO reason. As noted above a relocation could constitute an 'ETO' reason for a variation to employees' terms and conditions.

#### **d. Changes to the deadlines for the old employer to provide the new employer with employee liability information**

The new Regulations require the transferor to provide employee liability information to the transferee employer much earlier in the process than was previously the case; moving from 14 days prior to transfer date to at least 28 days prior to transfer date. In practice with large scale transfer it would make sense for information to be shared much sooner than this. This new requirement does not come into effect until on or after 1 May 2014.

Employee liability information consists of:

- The identity of the employees who will transfer
- Their age
- Statements of their employment particulars
- Collective Agreements
- Disciplinary proceedings within the previous two years
- Grievances raised by those employees within the previous two years
- Legal action taken by the employees against the employer in the previous two years and potential legal actions

#### **e. Service provision changes**

The 'service provision changes' when first introduced provided some much needed clarity which addressed a shortfall in the original Acquired Rights Directive. Previously the focus on determining whether TUPE applied to a transfer in service intensive industries was under constant debate; most typically in areas like, building cleaning, catering, and security services. This was because the main definition to determine the

application of TUPE was on the transfer of an 'economic entity' and because such services are often contracted without the transfer of assets, this would typically involve the transfer of some but not all contracts and would not include the sale of a full business. This meant that many employees fell outside the scope of TUPE. In 2006 TUPE Regulations were introduced to ensure that such arrangements would fall within the scope of TUPE.

Under the TUPE consultation carried out by the Coalition Government it was initially suggested that the service provision changes would be withdrawn, taking the TUPE Regulations back to a pre-2006 position.

However the new Regulations have retained the 'service provision changes' rules albeit with some amendments. This is welcomed by APSE since the absence of the service provision changes would have left local authorities in a very difficult and potentially costly situation. For example, where the local authority provides a catering service to a school, and that school decides to appoint a new provider for school meals (rather than the local authority caterer) then the local authority would be left with the redundancy liabilities for those staff engaged on the provision of school meals for that school. Moreover the catering staff themselves would be left without the protection of TUPE, enabling them to continue in employment, albeit with the new contractor.

Under Regulation 3(1)(b) a service provision change requires:

- A change in the identity of the service provider
- An organised grouping of employees whose principal purpose before the transfer was to provide that services and
- For the activities carried on after the change in service provision to be 'fundamentally the same' as those carried on previously

The test of 'fundamentally the same' could potentially leave it open for incoming contractors to accentuate differences in the service in order to avoid TUPE. Local authorities should be mindful of this; as this could wrongly inflate their own liabilities. Whilst the Government states its intention behind these amendments are simply to codify the current case law the real test of the new Regulations, on service provision changes, will be very much dependent on how a Tribunal in future cases determines this test.

Although the Government was at pains to point out in the consultation exercise that the Regulations should not prevent innovative new ways of delivering services it is perhaps now, more than ever, critical for procurement units to liaise closely with frontline service managers. This will help to ensure that the structure of contracts does not jeopardise the application of TUPE where it is fair and proper to do so.

#### **f. Protection from dismissal changes - greater scope to dismiss following a transfer**

The new Regulations provide that pre and post transfer dismissals will be unfair where 'the reason for the dismissal is the transfer' however this removes the existing prohibition on dismissals for reasons '**connected to the transfer**' which are removed.

Further, the prohibition on dismissals where the reason for the variation is the transfer itself will be lifted where the dismissal is for an ETO reason entailing changes in the workforce of either the transferor or transferee before or after a relevant transfer (and this will include a change to place of work).

This amendment in the new Regulations applies where the TUPE transfer and the notice of dismissal (or, where no notice is given, the effective date of termination) falls on or after the commencement date of the 2013 Regulations (i.e. 31 January 2014). There is to be no lead-in period for these amendments.

This is a significant change and narrows the basis for challenge for an unfair dismissal on a TUPE transfer. These changes also link to the changes to an ETO reason 'entailing changes in the workforce'. It effectively signals that genuine workplace redundancies will no longer be considered to be automatically unfair. Given TUPE is intended to allow the contract of employment to continue, albeit under a new employer following a transfer, many commentators view this as a fundamental shift away from the founding principles of the Regulations themselves.

### **3. APSE comment**

Whilst this briefing is not intended to form comprehensive legal advice for APSE member authorities it does highlight some significant changes to the TUPE Regulations. Local authorities need to be mindful of these changes when considering the future delivery of public services and should always seek detailed legal advice.

As many authorities move towards localised socio-economic strategies, to develop responsible contracting arrangements, such as the introduction of Living Wage policies, they need to be mindful that procurement of services does not undermine these objectives.

Equally during times of austerity councils will not wish to increase their own liabilities for both challenge and redundancy payments through either the wrongful application of the new Regulations or by inheriting redundancy liabilities which ought not to arise in the first place.

APSE is currently developing a Masterclass on the new TUPE regulations, designed specifically with local authorities and frontline services in mind. If you would like to register your interest in this one-day master class please contact [mbaines@apse.org.uk](mailto:mbaines@apse.org.uk)

Workforce matters are also regularly considered at APSE's service delivery models advisory group. This along with other APSE advisory groups is free to attend for APSE member authorities and you can register for this and other APSE advisory groups at [www.apse.org.uk](http://www.apse.org.uk)

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