

Earlier this year the Government published a consultation seeking views on how it should reform the TUPE Regulations 2006. It has today published its [Response](#) to the Consultation, outlining the changes it intends to make to the Regulations to improve how they work. The good news is that the Government has on the whole listened to what businesses had to say and in a number of important respects has consequently changed its initial proposals to amend the 2006 Regulations. The key changes are:

- **The service provision change rules are here to stay:** The big news is that in light of the strength of the opposition to the Government's initial proposal to repeal the service provision change rules, it has decided to retain them. According to the Response, 67% of respondents were against repeal, 28% supported it and 5% gave no comment. Most respondents agreed that the benefits, in particular the relative legal certainty brought by specifically including service provision changes in TUPE, outweighed any potential benefits that may arise from their removal. The Government is still proposing to amend the wording to reflect the approach set out in recent cases, namely that for there to be a service provision change, the activities carried on after the change in service provision must be "fundamentally or essentially the same" as those carried out before it.
- **Employee Liability Information:** In another turnaround, the Government has said that it will retain the Employee Liability Information provisions. In fact, rather than repealing them it will extend the time before the transfer when this information must be given to the transferee from 14 to 28 days. Again, this volte-face reflects the strength of opposition to the Government's proposals – 75% of respondents were against the repeal.
- **Restrictions on changes to terms and conditions:** TUPE contains restrictions on making changes to terms and conditions. In short, employers can only change terms and conditions in the context of a TUPE transfer if the changes are not connected to the transfer or if the variations are due to an "economic, technical or organisational reason (ETO) entailing changes in the workforce", the latter being more or less impossible to show. The Government wants to give employers more flexibility to make changes, but is restricted in how far it can go because of its duty to comply with the Acquired Rights Directive and European case law, the original source of that condition. It has decided to go ahead with its proposals to change the wording of the provisions restricting changes to terms and conditions to better reflect the wording of the European Directive, although the exact wording has yet to be finalised. By mirroring the wording of the Directive it hopes to be able to give employers and maybe also Employment Tribunals a bit more room for manoeuvre, ideally to allow changes which may be detrimental in certain respects but still overall leave the employees no worse off.
- **Protection against dismissal:** In line with its intention to change the wording restricting changes to terms and conditions, the Government also intends to change the wording of the dismissal provisions to reflect more closely the wording of the Directive. In the same way as in relation to terms and conditions, the Government hopes that by mirroring the wording of the Directive it can also widen the scope for employers to effect dismissals in a TUPE context. Quite how remains unclear.
- **Collective redundancy rules and interactions with TUPE requirements:** The Government consulted on proposals to allow transferees to engage with transferring employees before a transfer about proposed redundancies. In light of the responses, the Government has decided to go ahead with this proposal and to amend the collective consultation provisions set out in the Trade Union and Labour Relations (Consolidation) Act 1992 to make it clear that consultation which begins pre-transfer can count for the purposes of complying with the collective redundancy rules, provided that the transferor and transferee can agree that access and where the transferee has actually carried out meaningful consultation.
- **No changes to Regulations 4(9) and (10):** Employees will continue to have a right under Regulation 4(9) to resign (but treat themselves as dismissed) if a transfer involves or would involve a substantial and detrimental change in their working conditions. This is in addition to their rights to object to the transfer regardless of any adverse impact and to resign and claim constructive dismissal in response to a fundamental breach of their contract. The Government had proposed to replace the current Regulation 4(9) wording with a provision which would remove the scope for unfair dismissal claims where the change in working conditions is not a breach of contract or a fundamental change, i.e. not one that would entitle the employee to resign and claim constructive dismissal outside the context of a TUPE transfer. On reflection it has decided not to amend Regulations 4(9) and (10) because it thinks that changing the remedy would be adding unnecessary complexity to the TUPE Regulations 2006 (or maybe it was just too difficult to draft something appropriate!). This is a regrettable conclusion so far as employers are concerned, though it may be tempered somewhat by the point below.
- **Dismissals arising from a change of location:** Under the current rules, where the sole or principal reason for a dismissal is the transfer or is connected with the transfer, the dismissal is treated as automatically unfair unless it is for an "ETO reason entailing changes in the workforce". Because the definition of "entailing changes in the workforce" has been confined by the UK courts to changes in the number employed or to changes in the functions performed by employees, any dismissal as a result purely of a change in location, for example, would be automatically unfair. The Government is therefore planning to amend TUPE to make it clear that a change in the location of the workplace is within the meaning of "entailing changes in the workplace" and can therefore be classed as an ETO reason for a dismissal.

- **Dismissals based on future conduct of transferee:** The Government had been planning to allow a transferor to rely upon a transferee's ETO reason in respect of pre-transfer dismissals. So if, for example, a transferee would have grounds for making the employees redundant post-transfer (e.g. because it no longer required employees in that location), the transferor would be able to rely upon that reason for making the dismissals pre-transfer. The question then would be whether the dismissal was fair in all the circumstances judged on ordinary principles, rather than its being automatically unfair. Based on the responses received, however, the Government has decided not to amend the Regulations to allow a transferor to rely on a transferee's economic, technical or organisational reason to dismiss an employee prior to a transfer. This is also unfortunate, making smooth transfers more difficult to achieve than necessary and delaying pointlessly dismissals which everyone knows will happen on transfer anyway.
- **Collective agreements:** The TUPE Regulations will be amended to make it clear that the Courts should adopt a static approach to the transfer of terms derived from collective agreements, i.e. only collective agreement terms in force at the date of the transfer will bind a transferee (the "static" approach"), and not those entered into after the transfer (the "dynamic" approach). This reflects the ECJ's recent judgment in **Parkwood Leisure v Alemo-Herron**, which said that the Acquired Rights Directive disallows the dynamic approach where the transferee cannot participate in the negotiation of relevant collective agreements concluded after the date of the transfer. Of possibly greater interest is the Government's proposal to amend the TUPE Regulations so that after one year, the restriction on variations to contracts will no longer apply in respect of changes to terms derived from, or incorporating, collective agreements, provided that any change (which is by reason of the transfer) is no less favourable overall. This change will not give employers the ability to unilaterally change such terms – any variation would still be subject to the general law relevant to changing terms and conditions.
- Allowing micro employers (those with 10 or fewer employees) to inform and consult affected employees directly where there is no recognised independent union, nor any existing appropriate representatives i.e. to remove the obligation to procure the election of staff representatives.
- The Government will work to improve TUPE guidance.

The Government intends to lay the new Regulations before Parliament in December 2013 and there will be transitional provisions in relation to each amendment. There is talk that the Regulations will come into force in January 2014, but this has not been confirmed by the Government.

The contents of this update are not intended to serve as legal advice related to individual situations or as legal opinions concerning such situations nor should they be considered a substitute for taking legal advice.

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