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INDUSTRIALS INSIGHT

April 2014

Employer Friendly Changes in the UK's Laws on Transfers of Business and Outsourcing

The changes, effective January 31 2014, give employers greater flexibility to:

- change terms and conditions of the transferring employees
- dismiss employees in certain situations
- bring forward the RIF collective consultation timetable

The UK, in common with other EU Member States, first implemented the EU's Acquired Rights Directive (ARD) 32 years ago in regulations called Transfer of Undertakings (Protection of Employment) Regulations (TUPE). TUPE does three main things:

1. transfers those employees assigned to the relevant business unit to the new employer together with their existing terms and conditions;
2. gives special protection against dismissal; and
3. requires the relevant employers to inform and consult about the TUPE transfer with the workforce through their representatives.

Since TUPE is designed to protect employee rights, the UK labor courts (employment tribunals) have interpreted these heavily in favor of employees. This has had the effect of placing unnecessary burdens and costs on business, particularly in outsourcings. The UK Government has implemented changes to TUPE to lighten the load on employers for transfers on or after January 31, 2014.

Changes to Terms and Conditions of Employment

Since one of the main aims of the ARD is to preserve the status quo on employees' terms and conditions, employers have been prevented from either harmonizing the transferring employees onto the same terms as their existing workforce or agreeing changes with the transferring employees. The courts have ruled that even mutually-agreed changes are null and void if they were *connected* with a TUPE transfer. Since almost anything done to the transferring employees can be traced back (and so "connected" with) the TUPE transfer, this previously tied companies' hands from making efficiencies.

This was particularly so for outsourcings where the required savings are often to be found in reducing the employment costs.

The UK Government has therefore produced a number of measures to give employers a bit more flexibility for changing employees' terms and conditions. These include the following.

Nullity Rule Narrowed

Changes in terms and conditions of employment will only be rendered null and void where the *principal reason* for the change is the TUPE transfer itself. If the reason is just connected with the transfer, the nullity rule is dis-applied.

Agreed Changes

Where the company and the employees agree changes to terms and conditions, these will now be valid as long as there is an economic, technical or organizational reason for it entailing changes in the workforce (ETO reason). This is interpreted narrowly to mean changes relating to the day-to-day running of the business entailing changes in the numbers or functions workforce – for example, changes in location, job duties, hours of work etc. An ETO reason does not cover changes in the remuneration or benefits package.

Flexibility/Mobility Clauses

Due to an unnecessarily restrictive interpretation by the employment tribunals, even where the employer pre-transfer had the contractual right to make changes (such as through flexibility/mobility clauses), employees could resign and claim constructive dismissal if these changes were significant and to their detriment. The Government has now enacted that if the employment contracts allowed the employer to make changes pre-transfer, that right is inherited by the new employer post-transfer.

Collective Agreements

Changes in terms and conditions negotiated through a collective agreement with trade unions will now be valid provided that:

- the variation takes effect on a date more than one year after the transfer date;
- it only applies to TUPE transfers which occur post on or after January 31, 2014; and
- after the variation, the rights and obligations in the employee's contract, *when considered together*, are *no less favorable* to the employee than those which applied immediately before the variation.

The UK employment tribunals had historically taken the view that where a transfer of employees meant that their new employer was (unlike the transferor) not a participant, a centralized, sector or national collective bargaining structure, those employees still benefited from **future** changes in their terms and conditions negotiated through that structure. This created an impossible position for companies. The UK has now enacted that this will no longer be the case, as long as the new employer is not a participant in that old collective bargaining process. So, as at the moment of transfer, existing terms and conditions negotiated in collective agreements will transfer with them, but not future ones.

Dismissals

Under TUPE, dismissals connected with a TUPE transfer were automatically unfair, giving rise to compensation of up to about £90,000 (approximately US$148,500), if they were connected with a TUPE transfer but not for an ETO reason (see above).

From 31 January 2014, this automatic unfairness rule will only apply where the principal reason for a dismissal is the TUPE transfer itself. Again, the wider net of "*connected with*" is abolished, making it possible for employers to justify such dismissals.

Somewhat bizarrely, the employment tribunals had also decided that that a relocation caused by a TUPE transfer did not constitute an ETO reason. The new rules now state that it does.

Collective Consultation

Where a company proposes to dismiss 20+ employees for a RIF within a 90 day period, they must inform and consult with either recognized trade unions or elected employee representatives. If the number to be let go is more than 100, then the consultation period is 45 days; if it is between 20-99, the consultation period is 30 days.

Some TUPE transfers necessitate this consultation process to take place pre-transfer so that the excess workforce can be dismissed as at the transfer date. In the past, such pre-transfer consultations were held not to count towards the 45/30 day periods. The new regulations now permit this, provided that the outgoing employer agrees to it and allows access to the employee representatives/employees.

Collective consultation with the representatives of all affected employees is also required for all TUPE transfers, regardless of the numbers impacted. Where a company has fewer than nine employees, it does not have to hold elections to establish employee representatives. Instead, it can now simply consult directly with all of the nine employees together.

To discuss how we can help you contact:

Fraser Younson
Partner
Labor & Employment
T +44 20 7655 1325
E fraser.younson@squiresanders.com

Cip Beredo
Partner
Corporate
Industrial Products Group Leader
T +1 216 479 8280
E cipriano.beredo@squiresanders.com

Fraser Younson is a partner in the Labor & Employment team in our London office. He is an acknowledged expert on TUPE, having written two books on it and lectured extensively on the subject in the UK and Europe. He has recently been advising the UK Government on these latest changes including on policy, the drafting of the legislation and the Government's new Guide to TUPE.

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