

**EMPLOYMENT RIGHTS ON THE
TRANSFER OF AN UNDERTAKING**

A guide to the 2006 TUPE
Regulations for employees, employers
and representatives

JUNE 2009

This guide tells you about the provisions of the Transfer of Undertakings (Protection of Employment) Regulations 2006 (commonly known as the TUPE Regulations). It is not a legal document and for further advice see contacts on page 33.

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Introduction – The revised 2006 TUPE Regulations

On 6 April 2006, the revised Transfer of Undertakings (Protection of Employment) Regulations (called ‘the TUPE Regulations’ in this guidance) came into force.¹ The box at the end of this Section summarises the main changes to the previous 1981 TUPE Regulations which the revised 2006 Regulations introduced.

These Regulations provide employment rights to employees when their employer changes as a result of a transfer of an undertaking. They implement the European Community Acquired Rights Directive (77/187/EEC, as amended by Directive 98/50 EC and consolidated in 2001/23/EC).

This document provides guidance to employees, employers and their representatives in order to help them understand the Regulations and to help parties comply with their legal requirements. It gives general guidance only and should not be regarded as a complete or authoritative statement of the law.

The guidance in this publication applies equally to men and women but – for simplicity the masculine pronoun is used throughout.

Other rights already conferred by existing employment legislation are not affected by the Regulations and are explained in other guidance. This can be found for employees at www.direct.gov.uk/employment and for employers at www.businesslink.gov/employingpeople.

If, when you have read this document, you have any questions about the Regulations, you should contact Acas (the Advisory, Conciliation and Arbitration Service) on 08457 47 47 47 or at www.acas.org.uk.

¹ The Regulations are entitled the Transfer of Undertakings (Protection of Employment) Regulations 2006 (SI n). They updated the Transfer of Undertakings (Protection of Employment) Regulations 1981 (SI 1794), as amended.

Main Changes made in the 2006 TUPE Regulations

The 2006 Regulations introduced:

- a widening of the scope of the Regulations to cover cases where services are outsourced, insourced or assigned by a client to a new contractor (described as ‘service provision changes’);**
- a new duty on the old transferor employer to supply information about the transferring employees to the new transferee employer (by providing what is described as ‘employee liability information’);**
- special provisions making it easier for insolvent businesses to be transferred to new employers;**
- provisions which clarify the ability of employers and employees to agree to vary contracts of employment in circumstances where a relevant transfer occurs;**
- provisions which clarify the circumstances under which it is unfair for employers to dismiss employees for reasons connected with a relevant transfer.**

The rights and obligations in the 1981 Regulations remain in place, though the 2006 Regulations contain revised wording at some points to make their meaning clearer, as well as reflecting developments in case law since 1981.

Part 1 – Overview of the TUPE Regulations

Subject to certain qualifying conditions, the Regulations apply:

- (a) when a business or undertaking, or part of one, is transferred to a new employer; or
- (b) when a 'service provision change' takes place (for example, where a contractor takes on a contract to provide a service for a client from another contractor).

These two circumstances are jointly categorised as 'relevant transfers'.

Broadly speaking, the effect of the Regulations is to preserve the continuity of employment and terms and conditions of those employees who are transferred to a new employer when a relevant transfer takes place. This means that employees employed by the previous employer (the 'transferor') when the transfer takes effect automatically become employees of the new employer (the 'transferee') on the same terms and conditions (except for certain occupational pensions rights). It is as if their contracts of employment had originally been made with the transferee employer. However, the Regulations provide some limited opportunity for the transferee or transferor to vary, with the agreement of the employees concerned, the terms and conditions of employment contracts for a range of stipulated reasons connected with the transfer.

The Regulations contain specific provisions to protect employees from dismissal before or after a relevant transfer.

Representatives of affected employees have a right to be informed about a prospective transfer. They must also be consulted about any measures which the transferor or transferee employer envisages taking concerning the affected employees.

The Regulations also place a duty on the transferor employer to provide information about the transferring workforce to the new employer before the transfer occurs.

The Regulations make specific provision for cases where the transferor employer is insolvent by increasing, for example, the ability of the parties in such difficult situations to vary contracts of employment, thereby ensuring that jobs can be preserved because a relevant transfer can go ahead.

The Regulations can apply regardless of the size of the transferred business: so the Regulations equally apply to the transfer of a large business with thousands of employees or of a very small one (such as a shop, pub or garage). The Regulations also apply equally to public or private sector undertakings – and whether or not the business operates for gain, such as a charity.

Part 2 – Relevant transfers: Scope of the Regulations

The Regulations apply to 'relevant transfers'.

A 'relevant transfer' can occur when –

- a business, undertaking or part of one is transferred from one employer to another as a going concern (a circumstance defined for the purposes of this guidance as a 'business transfer'). This can include cases where two companies cease to exist and combine to form a third;
- when a client engages a contractor to do work on its behalf, or reassigns such a contract – including bringing the work 'in-house' (a circumstance defined as a 'service provision change').

These two categories are not mutually exclusive. It is possible – indeed, likely – that some transfers will qualify both as a 'business transfer' and a 'service provision change'. For example, outsourcing of a service will often meet both definitions.

Business transfers

To qualify as a business transfer, the identity of the employer must change. The Regulations do not therefore apply to transfers by share take-over because, when a company's shares are sold to new shareholders, there is no transfer of a business or undertaking: the same company continues to be the employer. Also, the Regulations do not ordinarily apply where only the transfer of assets, but not employees, is involved. So, the sale of equipment alone would not be covered. However, the fact that employees are not taken on does not prevent TUPE applying in certain circumstances.²

To be covered by the Regulations and for affected employees to enjoy the rights under them, a business transfer must involve the transfer of an 'economic entity which retains its identity'. In turn, an 'economic entity' means 'an organised grouping of resources which has the objective of pursuing an economic activity, whether or not that activity is central or ancillary'.

Q. What business transfers are therefore covered by the Regulations?

A. The precise application of the Regulations will be a matter for the tribunals or courts to decide, depending on the facts of each case. However, the economic entity test would generally mean that the Regulations apply where there is an identifiable set of resources (which includes employees) assigned to the business or to a part of the business which is transferred, and that set of resources retains its identity after the transfer. Where just a part of a business is transferred, the

² See, for example, the decision of the Court of Appeal in *RCO Support Services v Unison* [2002] EWCA Civ 464 and *ECM v Cox* [1999] IRLR 559.

resources do not need to be used exclusively in the transferring part of the business and by no other part. However, where resources are applied in a variable pattern over several parts of a business, then there is less likelihood that a transfer of any individual part of a business would qualify as a business transfer under the Regulations.

Service provision changes

'Service provision changes' concern relationships between contractors and the clients who hire their services. Examples include contracts to provide such labour-intensive services as office cleaning, workplace catering, security guarding, refuse collection and machinery maintenance.

The changes to these contracts can take three principal forms:

- where a service previously undertaken by the client is awarded to a contractor (a process known as 'contracting out' or 'outsourcing');
- where a contract is assigned to a new contractor on subsequent re-tendering; or
- where a contract ends with the service being performed 'in house' by the former client ('contracting in' or 'insourcing').

The Regulations apply only to those changes in service provision which involve 'an organised grouping of employees ... which has as its principal purpose the carrying out of the activities concerned on behalf of the client'. This is intended to confine the Regulations' coverage to cases where the old service provider (ie. the transferor) has in place a team of employees to carry out the service activities, and that team is essentially dedicated to carrying out the activities that are to transfer (though they do not need to work exclusively on those activities). It would therefore exclude cases where there was no identifiable grouping of employees. This is because it would be unclear which employees should transfer in the event of a change of contractor, if there was no such grouping. So, if a contractor was engaged by a client to provide, say, a courier service, but the collections and deliveries were carried out each day by various different couriers on an ad hoc basis, rather than by an identifiable team of employees, there would be no 'service provision change' and the Regulations would not apply.

A service provision change will often capture situations where an existing service contract is re-tendered by the client and awarded to a new contractor. It would also potentially cover situations where just some of those activities in the original service contract are re-tendered and awarded to a new contractor, or where the original service contract is split up into two or more components, each of which is assigned to a different contractor. In each of these cases, the key test is whether an organised grouping has as its principal purpose the carrying out of the activities that are transferred.

It should be noted that a 'grouping of employees' can constitute just one person as may happen, say, when the cleaning of a small business premises is undertaken by a single person employed by a contractor.

Q. Are there any other exceptions?

A. Yes, the Regulations do not apply in the following circumstances.

- where a client buys in services from a contractor on a 'one off' basis, rather than the two parties entering into an ongoing relationship for the provision of the service.

So the Regulations should not be expected to apply where a client engaged a contractor to organise a single conference on its behalf, even though the contractor had established an organised grouping of staff – eg. a 'project team' – to carry out the activities involved in fulfilling that task. Thus, were the client subsequently to hold a second conference using a different contractor, the members of the first project team would not be required to transfer to the second contractor.

To qualify under this exemption, the one-off service must also be 'of short-term duration'. To illustrate this point, take the example of two hypothetical contracts concerning the security of an Olympic Games or some other major sporting event. The first contract concerns the provision of security advice to the event organisers and covers a period of several years running up to the event; the other concerns the hiring of security staff to protect athletes during the period of the event itself. Both contracts have a one-off character in the sense that they both concern the holding of a specific event. However, the first contract runs for a significantly longer period than the second; therefore, the first would be covered by the TUPE Regulations (if the other qualifying conditions are satisfied) but the second would not.

- where the arrangement between client and contractor is wholly or mainly for the supply of goods for the client's use.

So, the Regulations are not expected to apply where a client engages a contractor to supply, for example, sandwiches and drinks to its canteen every day, for the client to sell on to its own staff. If, on the other hand, the contract was for the contractor to run the client's staff canteen, then this exclusion would not come into play and the Regulations might therefore apply.

Transfers within public administrations

Both the Acquired Right Directive and the TUPE Regulations make it clear that a reorganisation of a public administration, or the transfer of administrative functions between public administrations, is not a relevant transfer within the meaning of the legislation. Thus, most transfers within central or local government are not covered by the Regulations. However, such intra-governmental transfers are covered by the Cabinet Office's Statement of Practice

'Staff Transfers in the Public Sector',³ which in effect guarantees TUPE-equivalent treatment for the employees so transferred.

Q. Are there any other statutory protections which may apply to employees transferring between public administrations?

A. Yes. Section 38 of the Employment Relations Act 1999⁴ provides a regulation-making power to the Secretary of State to provide TUPE-equivalent protections to cases or classes of cases falling outside the scope of the Acquired Rights Directive. As at February 2007, the Secretary of State has made two sets of regulations under this power.⁵ In addition, protections may be provided in case-specific legislation where that legislation effects a particular transfer within public administrations.

Q. What is the treatment of transfers from the public sector to the private sector?

A. These are covered by the Regulations in just the same way as transfers between private sector employers. In addition, there are other protections which apply to transfers from the public sector to the private sector. For example, the Cabinet Office's Statement of Practice 'Staff Transfers in the Public Sector' affords TUPE-style protections comprehensively to employees whose jobs transfer to the private sector, or whose job subsequently transfers between private sector employers. In this regard, the Local Government Act 2003 confers powers on the Secretary of State, the National Assembly of Wales and Scottish Ministers to require best value authorities in England, Wales and Scotland to deal with staff matters in accordance with Directions. The purpose of securing these powers was to enable the provisions of the Statement of Practice to be made a statutory requirement for those authorities. No Directions have yet been issued. The Local Government Act 2003 can be viewed on the DCLG website at www.communities.gov.uk.

The effect of the Regulations where employees work outside the UK

The Regulations apply to the transfer of an undertaking situated in the UK immediately before the transfer, and, in the case of a service provision change, where there is an organised grouping of employees situated in the UK immediately before the change.

³ This document may be found online at www.hm-treasury.gov.uk/d/staff_transfers_145.pdf

⁴ Section 38 of the Employment Relations Act 1999 empowers the Secretary of State to make provision by statutory instrument, subject to the negative resolution procedure, for employees to be given the same or similar treatment in specified circumstances falling outside the scope of the Acquired Rights Directive as they are given under the UK's legislation implementing that Directive.

⁵ The Transfer of Undertakings (Protection of Employment) (Rent Officer Service) Regulations 1999, SI 1999/2511 and the Transfer of Undertakings (Protection of Employment) (Transfer of OFCOM) Regulations 2003, SI 2003/2715.

However, the Regulations may still apply notwithstanding that persons employed in the undertaking ordinarily work outside the United Kingdom. For example, if there is a transfer of a UK exporting business, the fact that the sales force spends the majority of its working week outside the UK will not prevent the Regulations applying to the transfer, so long as the undertaking itself (comprising, amongst other things, premises, assets, fixtures & fittings, goodwill as well as employees) is situated in the UK.

In the case of a service provision change, the test is whether there is an organised grouping of employees situated in the UK (immediately before the transfer). For example, where a contract to provide website maintenance comes to an end and the client wants someone else to take over the contract, if in the organised grouping of employees that has performed the contract, one of the IT technicians works from home, which is outside the UK, that should not prevent the Regulations applying to the transfer of the business. However if the whole team of IT technicians worked from home which was outside the UK, then a transfer of the business for which they work would not fall within the Regulations as there would be no organised grouping of employees situated in the United Kingdom.

Part 3 – Contracts of employment

The employer's position

When a relevant transfer takes place, the position of the previous employer and the new employer in respect of the contracts of the transferred employees is as follows:

- The new employer (ie. the transferee) takes over the contracts of employment of all employees who were employed in the 'organised grouping of resources or employees' immediately before the transfer, or who would have been so employed if they had not been unfairly dismissed by reason of the transfer.⁶ The new employer cannot pick and choose which employees to take on. It follows that they cannot terminate contracts and dismiss employees just because the transfer has occurred (see Part 4 below for more detail). However, the new employer does not take over the contracts of any employees who are only temporarily assigned to the 'organised grouping'. Whether an assignment is 'temporary' will depend on a number of factors, such as the length of time the employee has been there, and whether a date has been set by the transferor for his return or re-assignment to another part of the business or undertaking.
- The new employer takes over all rights and obligations arising from those contracts of employment, except for criminal liabilities and some benefits under an occupational pension scheme [see below]. This means that they will inherit any outstanding liabilities incurred by the transferor employer by his failure to observe the terms of those contracts or for failure to observe employment rights. So, an employee may make a claim to a court or an employment tribunal against the new employer for, say, breach of contract, personal injury or sex discrimination, even though the breach of contract, injury or discrimination occurred before the transfer took place.
- The new employer takes over any collective agreements made by or on behalf of the transferor employer in respect of any transferring employees and in force immediately before the transfer.
- Where the transferor employer voluntarily recognised an independent trade union (or unions) in respect of some or all of the transferred employees, then the new employer will also be required to recognise that union (or unions) to the same extent after the transfer takes place. However, this requirement only applies if the organised grouping of transferred employees maintains an identity distinct from the remainder of the new employer's business. If the undertaking does not keep its separate identity, the previous trade union recognition lapses, and it will then be up to the union and the new employer to renegotiate a new

⁶ The words 'or who would have been so employed had they not been unfairly dismissed for a reason connected with the transfer' appear in the Regulations to prevent employers from dismissing the employees immediately before the relevant transfer takes place to make the business a more attractive proposition to a purchaser.

recognition arrangement. It should be noted that where at the time of the transfer a union is recognised by the transferor employer via the statutory recognition procedure, then different arrangements apply.⁷

Q. Can the transferor employer select the employees who transfer across?

A. No. He cannot retain individuals who were assigned to the organised grouping immediately before the transfer. However, this does not prevent the transferor from retaining those individuals whom he had permanently re-assigned to other work outside the 'organised grouping' in advance of a transfer.

Q. Does this mean that the new employer must actually employ a person who was unfairly dismissed before the transfer where they had previously worked in the entity or grouping which then transferred?

A. No. There is no obligation on the new employer to provide a job to such former employees of the transferor. However, they are responsible for all outstanding liabilities relating to such persons which result from their former employment. So, the new employer would be the respondent should a former employee complain to an employment tribunal that he was unfairly dismissed. The employment tribunal may order reinstatement or re-engagement.

Q. How can the new employer ensure he does not suffer a loss for a failure of the transferor employer prior to the transfer?

A. It is common practice for the new employer to require the transferor employer to indemnify him against any losses from such pre-transfer breaches of contracts or employment law. Also, the Regulations require the transferor to inform the new employer in advance of the transfer about such liabilities towards the employees. (see Part 5 below).

The employee's position

When a relevant transfer takes place, the position of the employees of the transferor and new employer is as follows:

– Employees employed in the 'organised grouping' immediately before the transfer automatically become employees of the new employer. However, an employee has the right to object to the automatic transfer of their contract of employment if he so wishes, as long as they inform either the transferor or the new employer that he objects to the transfer of his contract to the transferee. In that case, the objection terminates the contract of employment and the employee

⁷ The statutory recognition procedure is positioned in Schedule A1 of the Trade Union and Labour Relations (Consolidation) Act 1992, and under the procedure, the Central Arbitration Committee (CAC) is empowered to award recognition to independent trade unions. Regulations may be made, in due course, under paragraph 169B of Schedule A1, inserted by section 18 of the Employment Relations Act 2004, to ensure that declarations made by the CAC, and applications made to the CAC, are appropriately preserved in the event of a change in the identity of the employer. No regulations under this power have yet been made.

is not treated for any purpose as having been dismissed by either the transferor or the new employer. Moreover, the employee is considered to have resigned and would therefore not be entitled to a redundancy payment. The transferor may re-engage the employee on whatever terms they agree, though the continuity of employment will be broken.

– An employee's period of continuous employment is not broken by a transfer and, for the purposes of calculating entitlement to statutory employment rights, the date on which the period of continuous employment started would usually be the date on which the employee started work with the old employer.⁸ This should be stated in the employee's written statement of terms and conditions; if it is not, or if there is a dispute over the date on which the period of continuous employment started, the matter can be referred to an employment tribunal. (For further details, www.direct.gov.uk/employment).

– Transferred employees retain all the rights and obligations existing under their contracts of employment with the previous employer and these are transferred to the new employer. This means that their previous terms and conditions of employment carry over to the new employer. The main exception to this rule concerns the treatment of occupational pensions.

Q. How are occupational pensions treated when a relevant transfer occurs?

A. Occupational pension rights earned up to the time of the transfer are protected by social security legislation and pension trust arrangements.

The new employer is not required to continue identical occupational pension arrangements for the transferred employees. However, where transferred employees were entitled to participate in an occupational pension scheme prior to the transfer, the new employer must establish a minimum level of pension provision for the transferred employees. This minimum 'safety net' requires the new employer to match employee contributions, up to six per cent of salary, into a stakeholder pension, or offer an equivalent alternative.⁹ In the public sector, the Government will continue to follow the policy set out in the HM Treasury note 'A Fair Deal for Staff Pensions'. As explained in Part 2, the Local Government Act 2003 contains provisions for Directions to be issued to best value authorities concerning contracting-out exercises. The Act also provides that those Directions should make certain provisions concerning pension benefits for the local authority staff affected by those exercises. The Directions have not yet been issued.

Changes to terms and conditions

The Regulations ensure that employees are not penalised when they are transferred by being placed on inferior terms and conditions. So, not only are their pre-existing terms and conditions transferred across on the first day of their

⁸ It may be earlier, for example, where the employee had been subject to a previous TUPE transfer.

⁹ These arrangements were introduced by the Pensions Act 2004. Further information on these aspects of the Act can be found on the Department for Work and Pensions (DWP) website www.dwp.gov.uk.

employment with the new employer, but employees may not validly waive their acquired rights. The Regulations therefore impose limitations on the ability of the new employer and employee to agree a variation to terms and conditions thereafter. In particular, the new employer must never vary contracts where the sole or principal reason is:

- the transfer itself; or
- a reason connected with a transfer which is not ‘an economic, technical or organisational reason entailing changes in the workforce’.

If contracts are varied for these reasons, then those variations are rendered void by the Regulations.

The same restrictions apply to the transferor where he contemplates changing terms and conditions of those employees who will transfer to the new employer in anticipation of the transfer occurring.

As mentioned, the underlying purpose of the Regulations is to ensure that employees are not penalised when a transfer takes place. Changes to terms and conditions agreed by the parties which are entirely positive are not prevented by the Regulations.

Q. What is the difference between an action that is by reason of the transfer itself and that which is for a reason which ‘is connected with’ the transfer?

A. Where an employer changes terms and conditions simply because of the transfer and there are no extenuating circumstances linked to the reason for that decision, then such a change is prompted by reason of the transfer itself. However, where the reason for the change is prompted by a knock-on effect of the transfer – say, the need to re-qualify staff to use the different machinery used by the transferee – then the reason is ‘connected to the transfer’.

Q. What is an ‘economic, technical or organisational’ reason?

A. There is no statutory definition of this term, but it is likely to include:
(a) a reason relating to the profitability or market performance of the new employer’s business (ie. an economic reason);
(b) a reason relating to the nature of the equipment or production processes which the new employer operates (ie. a technical reason); or
(c) a reason relating to the management or organisational structure of the new employer’s business (ie. an organisational reason).

Q. What is meant by the phrase ‘entailing changes in the workforce’?

A. There is no statutory definition of this term, but interpretation by the courts has restricted it to changes in the numbers employed or to changes in the functions performed by employees. A functional change could involve a new requirement on an employee who held a managerial position to enter into a non-managerial role, or to move from a secretarial to a sales position.

The Regulations also provide some freedom for a transferor employer or the new employer to agree with an employee to vary an employment contract before or after a transfer. The employer and employee can agree to vary an employment contract where the sole or principal reason is:

- a reason unconnected with the transfer; or
- a reason connected with the transfer which is ‘an economic, technical or organisational reason entailing changes in the workforce’.

A reason unconnected with a transfer could include the sudden loss of an expected order by a manufacturing company or a general upturn in demand for a particular service or a change in a key exchange rate.

It must be remembered that other elements of employment law continue to apply to contracts in the context of a TUPE transfer. Therefore an employer cannot validly impose new terms and conditions without the agreement of employees. Any changes would have to be agreed by the employee or by his union representatives on his behalf.

Q. Does this freedom to vary contracts permit the new employer to harmonise the terms and conditions of the transferred workers to those of the equivalent grades and types of employees he already employs?

A. No. According to the way the courts have interpreted the Acquired Rights Directive, the desire to achieve ‘harmonisation’ is by reason of the transfer itself. It cannot therefore constitute ‘an ETO (economic, technical or organisational) reason connected with a transfer entailing changes in the workforce’.

Q. Is there a time period after the transfer where it is ‘safe’ for the new employer to vary contracts because the reason for the change cannot have been by reason of the transfer because of the passage of time?

A. There is likely to come a time when the link with the transfer can be treated as no longer effective. However, this must be assessed in the light of all the circumstances of the individual case, and will vary from case to case. There is no ‘rule of thumb’ used by the courts or specified in the Regulations to define a period of time after which it is safe to assume that the transfer did not impact directly or indirectly on the employer’s actions.

Q. How do the Regulations affect annual pay negotiations or annual pay reviews?

A. These should be little affected, and should continue under the new employer in much the same way as they operated with the transferor employer.

Part 4 – Dismissals and redundancies

The general law on unfair dismissal and redundancies applies in situations where a relevant transfer occurs or is in prospect. For example, the employer must follow the appropriate procedures when handling the dismissals,

On 6 April 2009, the mandatory 'three-step' processes for disciplinary and dismissal procedures raised by an employer and for grievances raised by an employee were repealed and replaced by a new framework based on the provisions of the Employment Act 2008. Employment tribunals will decide cases on the basis of what is 'fair and reasonable' and a revised Acas Code of Practice and non-statutory guidance on disciplinary and grievance procedures establish the principles of what an employer and employee should do. Employment tribunals will have discretionary powers to adjust awards by up to 25 per cent if an employee or employer has acted unreasonably in not following the principles in the new Acas Code.

As a result, employees and employers will have greater flexibility to deal with workplace discipline and grievance issues in a way which suits them best.

The TUPE Regulations also provide some additional protections which limit the ability of employers to dismiss employees when transfers arise.

The additional TUPE protections

Neither the new employer (the transferee) nor the previous one (the transferor) may fairly dismiss an employee:

- because of the transfer itself; or
- for a reason connected with the transfer, unless that reason is an 'economic, technical or organisational (ETO) reason entailing changes in the workforce.'

If there is no such reason, the dismissal will be automatically unfair.

If there is such a reason, and it is the cause or main cause of the dismissal, the dismissal will be fair as long as an employment tribunal decides that:

- the employer acted reasonably in the circumstances in treating that reason as sufficient to justify dismissal; and
- the employer met the other requirements of the general law on unfair dismissal.

Also, if the dismissal occurred for reason of redundancy, then the usual redundancy arrangements will apply, and the dismissed employee could be entitled to a redundancy payment.

The onus lies on the dismissing employer to show that the dismissal falls within the ETO exemption to the automatic unfairness rule. Neither the Regulations nor the Acquired Rights Directive define what an ETO reason may be. The courts and tribunals have not generally sought to distinguish between each of the three ETO categories, but rather have treated them as a single concept.

To qualify as an ETO defence, an economic, technical or organisational reason must be one 'entailing changes in the workforce.' The courts have held that this means a change in the numbers of people employed or a change in employees' particular functions.

Constructive dismissal

As described in Part 3, employees can object to a transfer and, by doing so, terminate their contracts. In many cases, those employees will not be able to claim unfair dismissal because they have in effect resigned and therefore have not been 'dismissed'. However, transferred employees who find that there has been or will be a 'substantial change' for the worse in their working conditions as a result of the transfer have the right to terminate their contract and claim unfair dismissal before an employment tribunal, on the grounds that the actions or proposed actions of the employer had constituted or would constitute a de facto termination of their employment contract. An employee who resigns in reliance on this right cannot make a claim for pay in lieu of a notice period to which they were entitled under their contract.

This statutory right exists independently of an employee's common law right to claim constructive dismissal for an employer's repudiatory breach of contract.

Q. What might constitute a 'substantial change in working conditions'?

A. This will be a matter for the courts and the tribunals to determine in the light of the circumstances of each case. What might be a trivial change in one setting might constitute a substantial change in another. However, a major relocation of the workplace which makes it difficult or much more expensive for an employee to transfer, or the withdrawal of a right to a tenured post, is likely to fall within this definition.

Q. Does this mean it is unlawful for the new employer to make such 'substantial changes in working conditions' and it is automatically unfair when an employee resigns because such a change has taken place?

A. No. The Regulations merely classify such resignations as 'dismissals'. This can assist the employee if he subsequently complains on unfair dismissal because he does not need to prove he was 'dismissed'. However, to determine whether the dismissal was unfair, the tribunal will still need to satisfy itself that the employer had acted unreasonably, and there is no presumption that it is unreasonable for the employer to make changes.

TUPE and redundancy

Dismissals on the grounds of redundancy are permitted by TUPE, as they will normally be for an ETO reason, although the new employer will need to make sure that the redundancy is fair within other employment legislation: eg. selection for redundancy is fair, and not based simply on the fact that the person is a transferred employee.

Dismissed employees may also be entitled to a redundancy payment if they have been employed for two years or more. Employers must also ensure that the required period for consultation with employees' representatives is allowed. More details are available for employees at www.direct.gov.uk/employment and for employers at www.businesslink.gov.uk/employingpeople. Entitlement to redundancy payments will not be affected by the failure of any claim which an employee may make for unfair dismissal compensation.

Where there are redundancies and it is unclear whether the Regulations apply, it will also be unclear whether the transferor or new employer is responsible for making redundancy payments. In such cases employees should consider whether to make any claims against both employers at an employment tribunal.

Part 5 – Information and consultation rights

This section discusses:

- (a) the requirements in the Regulations for the transferor employer to provide information to the new employer about the transferred employees before the relevant transfer takes place; and
- (b) the requirements in the Regulations on both the new and transferor employers to consult representatives of the affected workforce before the relevant transfer takes place.

These requirements are discussed in turn.

(a) Disclosure of ‘employee liability information’ to the new employer

The transferor employer must provide the new employer with a specified set of information which will assist him to understand the rights, duties and obligations in relation to those employees who will be transferred. This should help the new employer to prepare for the arrival of the transferred employees, and the employees also gain because their new employer is made aware of his inherited obligations towards them. The information in question is:

- the identity of the employees who will transfer;
- the age of those employees;
- information contained in the ‘statements of employment particulars’ for those employees;
- information relating to any collective agreements which apply to those employees;
- instances of any disciplinary action within the preceding two years taken by the transferor in respect of those employees in circumstances where the statutory dispute resolution procedures apply ¹⁰ or from 6 April 2009 the Acas Code of Practice on disciplinary and grievance procedures;
- instances of any grievances raised by those employees within the preceding two years in circumstances where the statutory dispute resolution procedures apply ¹¹ or from 6 April 2009 the Acas Code of Practice on disciplinary and grievance procedures; and

¹⁰ These circumstances are set out in the Employment Act 2002 (Dispute Resolution) Regulations 2004.

¹¹ Ditto.

– instances of any legal actions taken by those employees against the transferor in the previous two years, and instances of potential legal actions which may be brought by those employees where the transferor has reasonable grounds to believe such actions might occur.

If any of the specified information changes between the time when it is initially provided to the new employer and the completion of the transfer, then the transferor is required to give the new employer written notification of those changes.

The information must be provided in writing or in other forms which are accessible to the new employer. So, it may be possible for the transferor to send the information as computer data files as long as the new employer can access that information, or provide access to the transferor's data storage. Likewise, in cases where a very small number of employees are transferring and small amounts of information may be involved, it might be acceptable to provide the information by telephone. However, it would be a good practice for the transferor to consult the new employer first to discuss the methods which he can use.

The specified information may be given in several instalments, but all the information must be given. The information may also be provided via a third party. For example, where a client is re-assigning a contract from an existing contractor to a new contractor, that client organisation may act as the third party in passing the information to the new contractor.

This information should be given at least two weeks before the completion of the transfer. However, if special circumstances make this not reasonably practicable, the information must be supplied as soon as is reasonably practicable.

Q. What is the 'statement of employment particulars'?

A. All employers are under a legal obligation to provide each employee in writing with basic information about their employment. That information is called the 'written statement of employment particulars' (for employees see <http://www.direct.gov.uk/employment> for employers see www.businesslink.gov.uk/employingpeople.

Among other things, the written statement must set out the remuneration package, the hours of work and holiday entitlements.

Q. What are grievances that fall within the Acas Code of Practice on disciplinary and grievance procedures ?

A. Broadly speaking, these are grievances which could give rise to any subsequent complaint to an employment tribunal about a breach of a statutory entitlement. The Acas Code of Practice on disciplinary and grievance procedures is available at www.acas.org.uk/CHttpHandler.ashx?id=1041

Q. What is the 'disciplinary action' which must be notified to the transferee?

A. This is action taken under the Acas Code of Practice on disciplinary and grievance procedures. They do not include oral or written warnings or suspensions on full pay. For guidance, see www.direct.gov.uk/resolvingdisputes and www.businesslink.gov.uk/employingpeople.

Q. How will the new employer decide whether it is reasonable to believe that a legal action could occur?

A. This is a matter of judgment and depends on the characteristics of each case. So, where an incident seems trifling – say, where an employee slipped at work but did not take any time off as a result – then there is little reason to suppose that a claim for personal injury damages would result. In contrast, if a fall at work led to hospitalisation over a long period or where a union representative raised the incident as a health and safety concern, then the transferor should inform the transferee accordingly.

Q. Can the transferor supply some information in the form of staff handbooks, sample contracts or the texts of collective agreements?

A. It is open to the transferor to provide such documentation if it would assist. Providing information in that form might also be easier for both parties to handle. Again, it would make sense for parties to discuss in advance how information should be provided.

Q. What are the circumstances where it may not be reasonably practicable to provide the information two weeks in advance of the transfer occurring?

A. These would be various depending on circumstances. But, clearly, it would not be reasonably practicable to provide the information in time, if the transferor did not know the identity of the new employer until very late in the process, as might occur when service contracts are re-assigned from one contractor to another by a client, or, more generally, when the transfer takes place at very short notice.

Q. Can the transferor and the new employer agree between themselves that this information should not be provided by contracting out of the requirement?

A. No. There is no entitlement to contract out of the duty to supply employee liability information because that would disadvantage the employees involved.

(b) Consultations with the affected workforce

The Regulations place a duty on both the transferor employer and new employer to inform and consult representatives of their employees who may be affected by the transfer or measures taken in connection with the transfer. Those affected employees might include:

- (a) those individuals who are to be transferred;
- (b) their colleagues in the transferor employer who will not transfer but whose jobs might be affected by the transfer; or
- (c) their new colleagues in employment with the new employer whose jobs might be affected by the transfer.

Long enough before a relevant transfer to enable the employer to consult with the employees' representatives, the employer must inform the representatives:

- that the transfer is going to take place, approximately when, and why;
- the legal, economic and social implications of the transfer for the affected employees;
- whether the employer envisages taking any action (reorganisation for example) in connection with the transfer which will affect the employees, and if so, what action is envisaged;
- where the previous employer is required to give the information, he or she must disclose whether the prospective new employer envisages carrying out any action which will affect the employees, and if so, what. The new employer must give the previous employer the necessary information so that the previous employer is able to meet this requirement.

If action is envisaged which will affect the employees, the employer must consult the representatives of the employees affected about that action. The consultation must be undertaken with a view to seeking agreement of the employee representatives to the intended measures.

During these consultations the employer must consider and respond to any representations made by the representatives. If the employer rejects these representations he must state the reasons.

If there are special circumstances which make it not reasonably practicable for an employer to fulfil any of the information or consultation requirements, he must take such steps to meet the requirements as are reasonably practicable.

Who should be consulted about the transfer?

Where employees who may be affected by the transfer are represented by an independent trade union recognised for collective bargaining purposes, the employer must inform and consult an authorised official of that union. This may be a shop steward or a district union official or, if appropriate, a national or regional official. The employer is not required to inform and consult any other employee representatives in such circumstances, but may do so if the trade union is recognised for one group of employees, but not for another.

Where employees who may be affected by the transfer are not represented by a trade union as described above, the employer must inform and consult other appropriate representatives of those employees. These may be either existing representatives or new ones specially elected for the purpose. It is the employer's responsibility to ensure that consultation is offered to appropriate representatives. If they are to be existing representatives, their remit and method of election or appointment must give them suitable authority from the employees concerned. It would not, for example, be appropriate to inform and consult a committee specially established to consider the operation of a staff canteen about a transfer affecting, say, sales staff; but it may well be appropriate to inform and consult a fairly elected or appointed committee of employees, such as a works council, that is regularly informed or consulted more generally about the business's financial position and personnel matters.

Arrangements for elections

If the representatives are to be specially elected ones, certain election conditions must be met:

- the employer shall make such arrangements as are reasonably practical to ensure the election is fair;
- the employer shall determine the number of representatives to be elected so that there are sufficient representatives to represent the interests of all the affected employees, having regard to the number and classes of those employees;
- the employer shall determine whether the affected employees should be represented either by representatives of all the affected employees or by representatives of particular classes of those employees;
- before the election the employer shall determine the term of office as employee representatives, so that it is of sufficient length to enable relevant information to be given and consultations to be completed;
- the candidates for election as employee representatives are affected employees on the date of the election;

- no affected employee is unreasonably excluded from standing for election; and
- all affected employees on the date of the election are entitled to vote for employee representatives.

The employees entitled to vote may vote as many candidates as there are representatives to be elected to represent them; or, if there are to be representatives for particular classes of employees, for as many candidates as there are representatives to be elected to represent their particular class of employee.

The election is conducted so as to secure that:

- so far as reasonably practicable, those voting do so in secret; and
- the votes given at the election are accurately counted.

Where an employee representative is elected in accordance with these rules but subsequently ceases to act as such and, in consequence, certain employees are no longer represented, another election should be held satisfying the rules set out as above.

The legislation does not specify how many representatives must be elected or the process by which they are to be chosen. An employment tribunal may wish to consider, in determining a claim that the employer has not informed or consulted in accordance with the requirements, whether the arrangements were such that the purpose of the legislation could not be met. An employer will therefore need to consider such matters as whether:

- the arrangements adequately cover all the categories of employees who may be affected by the transfer and provide a reasonable balance between the interests of the different groups;
- the employees have sufficient time to nominate and consider candidates;
- the employees (including any who are absent from work for any reason) can freely choose who to vote for;
- there is any normal company custom and practice for similar elections and, if so, whether there are good reasons for departing from it.

Rights of employee representatives

Representatives and candidates for election have certain rights and protections to enable them to carry out their function properly. The rights and protections of trade union members, including officials, are in some cases contained in separate provisions but are essentially the same as those of elected representatives described below. (For further details of the rights of trade union members see the

Department's guidance: Union membership: rights of members and non-members at www.berr.gov.uk/whatwedo/employment/employment-legislation/employment-guidance/page20829.html

The employer must allow access to the affected workforce and to such accommodation and facilities, eg. use of a telephone, as is appropriate. What is 'appropriate' will vary according to circumstances.

The dismissal of an elected representative will be automatically unfair if the reason, or the main reason, related to the employee's status or activities as a representative. An elected representative also has the right not to suffer any detriment short of dismissal on the grounds of their status or activities. Candidates for election enjoy the same protection. Where an employment tribunal finds that a dismissal was unfair, it may order the employer to reinstate or re-engage the employee or make an appropriate award of compensation (see also www.direct.gov.uk/en/Employment/RedundancyAndLeavingYourJob/Dismissal/index.htm). Where an employment tribunal finds that a representative or a candidate for election has suffered detriment short of dismissal it may order that compensation be paid.

An elected representative also has a right to reasonable time off with pay during normal working hours to carry out representative duties. Representatives should be paid the appropriate hourly rate for the period of absence from work. This is arrived at by dividing the amount of a week's pay by the number of normal working hours in the week. The method of calculation is similar to that used for computing redundancy payments see www.direct.gov.uk/en/Employment/RedundancyAndLeavingYourJob/Redundancy/index.htm

Part 6 – The position of insolvent businesses

To assist the rescue of failing businesses, the Regulations make special provision where the transferor employer is subject to insolvency proceedings.

First, the Regulations ensure that some of the transferor's pre-existing debts to the employees do not pass to the new employer. Those debts concern any obligations to pay the employees statutory redundancy pay or sums representing various debts to them, such as arrears of pay, payment in lieu of notice, holiday pay or a basic award of compensation for unfair dismissal.¹² In effect, payment of statutory redundancy pay and the other debts will be met by the Secretary of State through the National Insurance Fund. However, any debts over and above those that can be met in this way will pass across to the new employer.

Second, the Regulations provide greater scope in insolvency situations for the new employer to vary terms and conditions after the transfer takes place. As was discussed in Part 3, the Regulations place significant restrictions on new employers when varying contracts because of the transfer or a reason connected with the transfer. These restrictions are in effect waived, allowing the transferor, the new employer or the insolvency practitioner in the exceptional situation of insolvency to reduce pay and establish other inferior terms and conditions after the transfer. However, in their place, the Regulations impose other conditions on the new employer when varying contracts:

- the transferor, new employer or insolvency practitioner must agree the 'permitted variation' with representatives of the employees. Those representatives are determined in much the same way as the representatives who should be consulted in advance of relevant transfers (see Part 5 for more details);
- the representatives must be union representatives where an independent trade union is recognised for collective bargaining purposes by the employer in respect of any of the affected employees. Those union representatives and the transferor, new employer or insolvency practitioner are then free to agree variations to contracts, though the speed of their negotiations may be faster than usual in view of pressing circumstances associated with insolvency;
- in other cases, non-union representatives are empowered to agree permitted variations with the transferor, new employer or insolvency practitioner. However, where agreements are reached by non-union representatives, two other requirements must be met. **First**, the agreement which records the permitted variation must be in writing and signed by each of the non-union representatives (or by an authorised person on a representative's behalf where it is not reasonably practicable for that representative to sign). **Second**, before the agreement is signed, the employer must provide all the affected employees with a copy of the

¹² The Regulations also provide for the payment of these sums on the date of the transfer even though they may not have actually been dismissed by the transferor on or before that date, as would normally be a requirement for such payments.

agreement and any guidance which the employees would reasonably need in order to understand it;

- the new terms and conditions agreed in a 'permitted variation' must not breach other statutory entitlements. For example, any agreed pay rates must not be set below the national minimum wage; and
- a 'permitted variation' must be made with the intention of safeguarding employment opportunities by ensuring the survival of the undertaking or business or part of the undertaking or business.¹³

Q. What types of insolvency proceedings are covered by these aspects of the Regulations?

A. These provisions are found in Regulations 8 and 9. Those two Regulations apply where the transferor is subject to 'relevant insolvency proceedings' which are insolvency proceedings commenced in relation to him but not with a view to the liquidation of his assets. The Regulations do not attempt to list all these different types of procedures individually. It is the Department's view that 'relevant insolvency proceedings' mean any collective insolvency proceedings in which the whole or part of the business or undertaking is transferred to another entity as a going concern. That is to say, it covers an insolvency proceeding in which all creditors of the debtor may participate, and in relation to which the insolvency office-holder owes a duty to all creditors. The Department considers that 'relevant insolvency proceedings' does not cover winding-up by either creditors or members where there is no such transfer.

¹³ In addition, the sole or principal reason for the permitted variation must be the transfer itself or a reason connected with the transfer which is not an economic, technical or organisational reason.

Part 7 – Remedies

This document has set out a number of rights and duties for employees, their representatives and a right for the new employer to receive information from the transferor employer. This section describes how these rights can be enforced and remedies obtained.

(a) Rights for employees and their representatives

If any employee considers that their contractual rights have been infringed, they may be able to seek redress through the civil courts or the employment tribunals. However, before doing so employees are advised to discuss these issues with Acas (the Advisory, Conciliation & Arbitration Service) on 08457 47 47 47 or at www.acas.org.uk or to seek their own independent legal advice, through their trade union, from a local office of the Citizens' Advice Bureau or from a local law centre.

Complaining to an employment tribunal

An employee can make a claim to an employment tribunal by completing a claim form, available from jobcentres, law centres and Citizens' Advice Bureaux, or online at www.employmenttribunals.gov.uk. This will generally need to be done within a specified time limit.

You can complain to an employment tribunal if you are:

- an employee who has been dismissed or who has resigned in circumstances in which they consider they were entitled to resign because of the consequences or anticipated consequences of the transfer (see Part 4). An employee must complain within three months of the date when their employment ended. See guidance on www.direct.gov.uk/en/Employment/ResolvingWorkplaceDisputes/Employmenttribunals/DG_10028122 It may be unclear whether claims should be made against the previous or the new employer. In such cases, employees should consider whether to claim against both employers;
- an elected or trade union representative, if the employer does not comply with the information or consultation requirements (see Part 5). A representative must complain within three months of the date of the transfer;
- a representative or candidate for election who has been dismissed, or suffered detriment short of dismissal. A complaint must be made within three months of the effective date of termination (or, in the case of a detriment short of dismissal, within three months of the action complained of);

- a representative who has been unreasonably refused time off by an employer, or whose employer has refused to make the appropriate payment for time off. A complaint must be made within three months of the date on which it is alleged time off should have been allowed or was taken;
- an affected employee where the employer has not complied with the information or consultation requirements other than in relation to a recognised trade union or an elected representative. A complaint must be made within three months of the date of the transfer.

In any one of the above cases the tribunal can extend the time limit if it considers that it was not reasonably practicable for the complaint to be made within three months. For further detail, see www.direct.gov.uk/en/Employment/Resolvingdisputes and <http://www.businesslink.gov.uk/employingpeople>

- an employee who wishes to claim a redundancy payment. The application should normally be made within six months of the dismissal (see www.direct.gov.uk/en/Employment/RedundancyAndLeavingYourJob/Redundancy/index.htm for employees and www.businesslink.gov.uk/employingpeople for employers).

If a representative complains to an employment tribunal that an employer has not given information about action proposed by a prospective new employer, and if the employer wishes to show that it was 'not reasonably practicable' to give that information because the new employer failed to hand over the necessary information at the right time, the employer must tell the new employer that he or she intends to give that reason for non-compliance. The effect of this will be to make the new employer a party to the tribunal proceedings.

An employee must have at least 12 months' continuous service before they can make a complaint of unfair dismissal for a TUPE-related reason.¹⁴

Awards made by an employment tribunal

If complaints are upheld, awards may be made against the previous or new employer, depending on the circumstances of the transfer as follows:

¹⁴ Exceptionally, this qualifying period does not apply where an employee claims that he was unfairly dismissed for asserting his TUPE rights.

a) Unfair dismissal awards

Employment tribunals may order reinstatement or re-engagement of the dismissed employee if the complaint is upheld, and/or make an award of compensation. Further details are at www.direct.gov.uk/en/Employment/RedundancyAndLeavingYourJob/Dismissal/index.htm and www.businesslink.gov.uk/employingpeople.

b) Detriment awards

The employer may be ordered to pay compensation to the person(s) concerned. The compensation will be whatever amount the tribunal considers just and equitable in all the circumstances having regard for any loss incurred by the employee.

c) Information and consultation awards

The defendants in consultation cases may be either the transferor or new employer, or both of them – the choice is for the complainant to make. Where either the transferor or the new employer is the sole defendant, he may seek to join the other employer to the case. Where joining occurs, both the transferor and the new employer are liable to pay compensation to each affected employee for a failure to consult. In such cases, it will be a matter for the tribunal fairly to apportion the compensation between the two parties.¹⁵ The compensation cannot exceed 13 weeks' pay. If employees are not paid the compensation, they may present individual complaints to the tribunal, which may order payment of the amount due to them. These complaints must be presented within three months from the date of the original award (although the tribunal may extend the time-limit if it considers that it was not reasonably practicable for the complaint to be presented within three months).

Q. Are there any procedures which a complainant may need to follow before making an application to the employment tribunal?

A. Yes, for some of the jurisdictions mentioned above. For details see www.direct.gov.uk/resolvingdisputes

(b) The right of the transferee employer to 'employee liability information'

This entitlement is described in Part 5. If the transferor does not comply, then the new employer can present a complaint to an employment tribunal. If the tribunal finds in favour of the new employer it will make a declaration to that effect. Also, the tribunal may award compensation for any loss which the new employer has incurred because the employee liability information was not provided.

¹⁵ Alternatively, where judgment is given against a sole defendant, that employer may be able to recover a contribution from the other employer by suing him in the civil courts.

The level of compensation must be no less than £500 for each employee for whom the information was not provided, or the information provided was defective. So, if information was not provided for 10 of the transferring employees, then the minimum compensation would be £5,000. However, the tribunal may award a lesser sum if it considers that it would be unjust or inequitable to award this default minimum payment.

Q. When would the tribunal not award the minimum award of compensation because it was unjust or inequitable?

A. That would of course be a matter for the tribunal. But it might be fair to assume that trivial or unwitting breaches of the duty may lead to a tribunal waiving what would otherwise be a minimum award of compensation.

Sources of further information

Acas

Helpline: 08457 47 47 47

Helpline for text phone users: 08456 06 16 00

www.acas.org.uk

businesslink.gov.uk

www.businesslink.gov.uk/employingpeople

Department for Business, Innovation and Skills (BIS)

Enquiry line 020 7215 5000

www.berr.gov.uk

BIS guidance

Employment rights on the transfer of an undertaking: a guide to the 2006 TUPE regulations for employees, employers and representatives

www.berr.gov.uk/files/file20761.pdf

Guidance on employment rights and responsibilities can be found on the government central websites:

For employees see Directgov

For employers see businesslink.gov.uk

Department for Communities and Local Government

Enquiry helpdesk: 020 7944 4400

www.communities.gov.uk

Department for Work and Pensions (DWP)

www.dwp.gov.uk

Directgov

www.direct.gov.uk/employment

Tribunals Service

Enquiry helpline: 0845 795 9775

www.employmenttribunals.gov.uk

Department for Business, Innovation and Skills

www.bis.gov.uk

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