

Employment Law Update London



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TUPE & Collective Issues

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What are we doing?

Review of TUPE



WHAT IS TUPE?

Transfer of Undertakings (Protection of Employment) Regulations 2006 - came into force on 6 April 2006.

TUPE is derived from European Community law, to fulfil the UK's obligations under the EC Council Directive 77/187 (**Acquired Rights Directive**)

TUPE operates to preserve an employee's contractual employment rights that the employee had before the transfer.



WHAT IS PROTECTED?

- All the old employer's rights, powers, duties and liabilities
- Continuous employment
- Collective agreements
- Recognition
- All contractual rights
- Match pension contributions



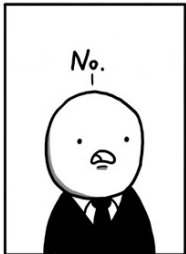
Two types of transfer

- Business Entity Transfer
- Service provision change

CAN TERMS AND CONDITIONS BE VARIED POST TRANSFER?

Acquired Rights Directive

- No express provisions to permit harmonisation or variation.
- Mandatory prohibition on contract variations where reason for variation is the transfer - *Daddy's Dance Hall* [1988] IRLR 315, ECJ



Which terms and conditions are being varied?

Different treatment for:

1. Individual Terms
2. Terms derived from Collective Agreements

Variation of Individual Terms



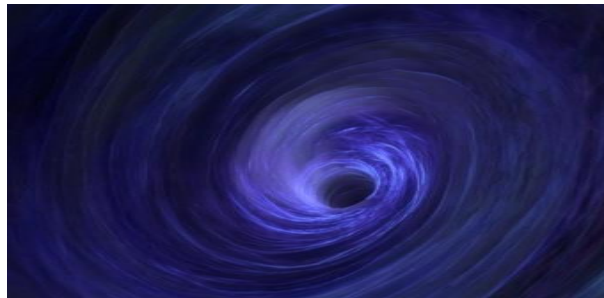
What is permitted? reg. 4(5)

- (a) the **sole or principal reason for the variation is an economic, technical, or organisational** reason entailing changes in the workforce, provided that the employer and employee agree that variation; or
- (b) the terms of that contract permit the employer to make such a variation.

Variation of Individual Terms

VOID if sole or principal reason for the variation is the transfer.

(Daddy's Dance Hall [1988] IRLR 315, ECJ)



Variation of Individual Terms

What is the Real reason for the variation?

Transfer will be sole or principal reason if:

- ❑ harmonisation - *Martin v South Bank University* [2004] IRLR 74 ECJ
- ❑ Transferee changed terms and conditions because it has taken over undertaking or service

BIS Guidance on TUPE:

- 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 the reason for the change is the transfer.
- an “*unrelated reason*” /non-transfer related reason could be the sudden loss of an expected order, an upturn in demand for a particular service, or a change in a key exchange rate.

Variation of Collectively Agreed Terms and Conditions



- Dynamic terms and conditions frozen at the point of transfer
- Collective agreements may be varied a year post transfer



Variation of Collectively Agreed Terms and Conditions



Alemo Herron v Parkwood Leisure Ltd [2013] C-426/11 - regulation 4A provides that transferred contracts do not bind the transferee to any term of a collective agreement agreed *after* the date of the transfer if the transferee is not a participant in the collective bargaining machinery.

Variation of Collectively Agreed Terms and Conditions



- Permissible where the variation takes effect on a date more than one year after the date of the transfer; and
- following the variation, the rights and obligations of the employee's contract, considered together, are no less favourable to the employee than those which applied immediately before the variation (reg. 4(5B)).

Variation & reg 4(9)



But unilateral variation of terms and conditions could give rise to a constructive dismissal claim if it involves a substantial detrimental change in working conditions per reg 4(9)



Making an offer to give up collectively bargained Ts & Cs

- *Wilson, Palmer & Doolan v UK* [2002] IRLR 568, ECHR 552: making of an offer to give up collectively bargained terms and conditions infringed Article 11 of the European Convention on Human Rights
- *Bugden & Ors v LB Bromley* [2014] ET Case no: 2360959/2013

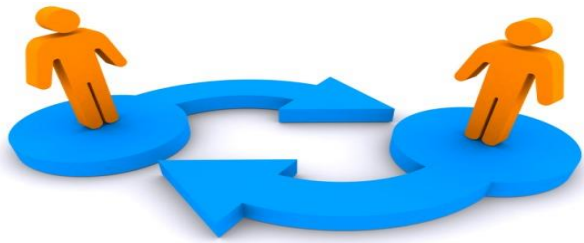


INFORMATION & CONSULTATION

Obligation to inform and consult

Regulation 13 TUPE: The transferor and transferee have an obligation to **inform** and (if appropriate) **consult** with recognised trade unions or elected employee representatives in relation to any affected employees.





Affected employees

“...those who will be or may be transferred or whose jobs are in jeopardy by reason of the proposed transfer, or who have job applications within the organisation pending at the time of transfer”:

UNISON v Somerset County Council & Ors [2009]

UKEAT/0043/09/

When should information be provided



“long enough before the relevant transfer to enable the employer of any affected employees to consult the appropriate representatives of any affected employees” - Reg 13 (2) TUPE.

- ***Cable Realisations Ltd v GMB Northern*** [2008]: breach of 13(2) where information provided on 15 August 2007 prior to a transfer on 3 September when there was an annual shutdown between 20 and 31 August.
- ***LLDY Alexandria Ltd (Formerly Loch Lomond Distillery Company Ltd) v Unite the Union & Ors*** [2014] - 10 business days insufficient time to enable proper consultation.

Information to be provided – reg 13

- (a) the fact that the transfer is to take place, the date or proposed date of the transfer and the reasons for it;
- (b) the legal, economic and social implications of the transfer for any affected employees;
- (c) the measures which he envisages he will, in connection with the transfer, take in relation to any affected employees or, if he envisages that no measures will be so taken, that fact; and
- (d) if the employer is the transferor, the measures, in connection with the transfer, which he envisages the transferee will take in relation to any affected employees who will become employees of the transferee after the transfer by virtue of regulation 4 or, if he envisages that no measures will be so taken, that fact.

(2A) Where information is to be supplied under paragraph (2) by an employer—

- (a) this must include suitable information relating to the use of agency workers (if any) by that employer; and
- (b) “suitable information relating to the use of agency workers” means—
 - (i) the number of agency workers working temporarily for and under the supervision and direction of the employer;
 - (ii) the parts of the employer's undertaking in which those agency workers are working; and
 - (iii) the type of work those agency workers are carrying out.

Where a Transferee fails to provide information



Allen v Morrisons Facilities [2014] UKEAT/0298/13/DM

- transferred employee cannot bring a claim against a transferee
- A claim would have to be brought against transferor who could join the transferee under reg 15(5)



Agency Workers

Suitable information about the use of agency workers:

- ***London Borough of Barnet v UNISON & NSL***
UKEAT/0191/13/- failure to provide information on numbers of agency workers employed by transferor/employer

QUESTIONS?

