

Effectiveness of Transfer of Undertakings (Protection of Employment - TUPE) Regulations 2006

31 January 2012

Russell Square House
10-12 Russell Square
London WC1B 5EE

T 020 7331 2000
F 020 7331 2040
www.intellectuk.org

Contact: Theodora Kalessi
T 020 7331 2058
E theodora.kalessi@intellectuk.org

Introduction

Intellect is the trade association for the UK technology industry. Intellect members represent around 8% of UK GDP, £92bn of Gross Added Value and employ 1.2m people. Intellect provides a collective voice for its members and drives connections with government and business to create a commercial environment in which they can thrive. Intellect represents over 750 companies ranging from SMEs to multinationals. As the hub for this community, Intellect is able to draw upon a wealth of experience and expertise to ensure that its members are best placed to tackle challenges now and in the future.

Our members' products and services enable hundreds of millions of phone calls and emails every day, allow the 60 million people in the UK to watch television and listen to the radio, power London's world leading financial services industry, save thousands of lives through accurate blood matching and screening technology, enabled the Oyster system, which Londoners use to make 28 million journeys every week, and are pushing Formula One drivers closer to their World Championship goal.

In the past 12 months 14,500 people have visited Intellect's offices to participate in over 550 meetings and 3,900 delegates have attended the external conferences and events we organise.

Overview

Service Provision Changes

By way of overview, the Committee is of the view that the introduction of the service provision changes regime in 2006 was, on balance, helpful - in that it provided additional clarity in terms of when TUPE applies. The Committee believes that additional clarity is preferable albeit that it creates a slightly wider ambit in terms of when TUPE will apply, in comparison with the more traditional (multi-factorial) test.

That said, the Committee was strongly of the opinion that the Government should provide clarity as to what "activities" actually means, including in particular how similar the activities must be before and after the transfer. This is particularly relevant to the technology sector where the outgoing party may be providing a solution using a different platform or approach in comparison with the new provider.

Provision of employee liability information

The Committee was unanimous in its view that the transferor should be obliged to provide employee liability information at an earlier stage in the process, so as to enable a prospective transferee to accurately tender for the business/services. The current 14 day time limit creates delay and uncertainty and generally impedes the tendering process, which favours the incumbent service provider.

Regulations should also be adopted so as to ensure that there are no changes to the employee liability information "other in the normal course of business", so as to prevent the transferor creating additional expense to prevent the services being transferred or otherwise "dumping" unnecessary staff members on the services (for example, so as to avoid termination costs).

Pre- transfer costs and liabilities

More controversially, there was a voice of opinion that TUPE should be amended so as to render the transferor and transferee jointly and severally liable for employment costs and liabilities which arise before the transfer, in the same way that such parties are liable for the consequences of a failure to inform and consult. The absence of such a provision again favours the incumbent service provider which, on balance, is considered to be bad for business.

Clarity and Transparency of 2006 Regulations Overall

Question 1: Have the 2006 amendments provided greater clarity and transparency on application of TUPE rules?

Intellect members feel that the introduction of the service provision changes regime in 2006 was, on balance, helpful - in that it provided additional clarity in terms of when TUPE applies. Intellect believes that additional clarity is preferable albeit that it creates a slightly wider ambit in terms of when TUPE will apply, in comparison with the more traditional (multi-factorial) test. That said, Intellect members were strongly of the opinion that the Government should provide clarity as to what “activities” actually means, including in particular how similar the activities must be before and after the transfer. This is particularly relevant to the technology sector where the outgoing party may be providing a solution using a different platform, approach or staff skill-sets or approach in comparison with the new provider.

Question 2: Do the 2006 Regulations provide enough transparency around employment rights and obligations being transferred to ensure a smooth transition? If not, how could this be improved?

It is generally clear what type of liabilities will transfer under TUPE as a matter of law. From a practical perspective, however, there is concern that the employee liability information need only be provided 14 days before the transfer - see above.

Question 3: Do employers and commissioners generally comply with the transparency obligations under the 2006 Regulations? If not, are there particular problems around timing and/or accuracy of the information they provide; and are problems particularly noticeable in respect to transfers from the public or private sector?

Employers generally comply with the obligation, particularly if they are reminded about it by the transferee - which commonly occurs. That said, there was some experience of only brief or limited information being provided. Some Intellect members suggested that the full role description is supplied – possibly following a slightly longer elapse time – for all staff making a contribution to the service.

Service Provision Changes

Question 4: Does inclusion of service provision changes within the 2006 Regulations provide benefits in terms of increased transparency and reduced burdens on business? If yes what are these benefits? If no, what additional burdens have resulted from their inclusion?

Yes – see above.

Question 5: Have the 2006 amendments led to less need to take legal advice prior to tendering or bidding for contracts?

Broadly speaking, there is greater clarity as to when TUPE will apply, although legal advice still needs to be taken in relation to the other aspects, such as assignment and proportion of employee time servicing the undertaking.

Question 6: Have the 2006 amendments led to fewer tribunals resulting from service transfers?

We suspect that the Government would be in a better position than us to access the relevant information and assess this matter.

Question 7: Is the inclusion of service provision changes in principle helpful, but there are alternative models for their inclusion that would lead to improvements? What might these look like?

Yes – see above.

An alternative model that was suggested involved altering the implications of TUPE in the event that the contract with the outgoing service provider is terminated on the grounds of poor performance or breach of contract, although this did not comprise the majority view – not least because it would be complicated to apply, but also because it could arguably lead to individual staff members being penalised for mismanagement by the outgoing service provider

Question 8: Should professional services be included in the definition of service provision and be covered by the Regulations?

Yes. It was felt that a definition of 'professional services' should be treated in a consistent manner.

Question 9: Would the exclusion of professional services lead to uncertainty over whether TUPE did or did not apply, requiring businesses to seek further legal advice?

Yes, such an exclusion would lead to unnecessary complexity and uncertainty.

Harmonisation of Terms and Conditions

Question 10: Is lack of provision for post-transfer harmonisation a significant burden? How might the Regulations be adjusted to enable this whilst remaining in line with the Directive?

The provisions dealing with post-transfer harmonisation are considered to be unduly complex and overly burdensome, particularly for small businesses. It is questioned whether any additional protection needs to be applied, especially where individuals are protected in any event under *inter alia* the standard unfair dismissal regime.

Question 11: Would it be helpful to have a provision limiting the future observance of terms and conditions derived from collective agreements?

Yes - we would suggest a "static" interpretation.

Question 12: Would it be helpful to agree with employees a renegotiation of their contract provided that overall the resulting contract was no less favourable than at the point of transfer?

It would be helpful to include provisions so that changes to terms and conditions can be agreed with employees. Intellect members did not necessarily consider that this should be limited to the circumstances where the changes were “no less favourable than at the point of the transfer”, not least because terms and benefits will be much more valuable to certain employees than others and accordingly this would probably lead to unnecessary complexity and litigation. Intellect members believe that the inclusion of such provisions would result in a reduction of back office costs and complexity and would also offer re-assurance to transferring staff.

Insolvency and Liabilities

Question 13: Should more be done to clarify the application of TUPE in insolvency situations? If so, would this require changes to the legislation, for example, by setting out which insolvency procedures fall under which provisions, or would more detailed guidance than currently provided be sufficient?

Cases have broadly clarified what should occur in these situations, although there was some concern that the relevant provisions are poorly drafted, do not accurately reflect the insolvency regime and are difficult to understand.

Question 14: Have the 2006 amendments meant that transferees (ie businesses taking over the contract) have a greater awareness of potential liabilities, and has this helped to reduce transaction costs and risks? If not, how could this be improved?

Whilst the inclusion of provisions dealing with employee liability information in the 2006 amendments has increased awareness, there is an issue as to whether the information is provided in time – see above.

Question 15: Should liability for pre-transfer obligations be transferred entirely to the transferee as is the case currently in the Regulations ie should the business taking on the contract take on all the liabilities of the business or part of the business they are taking over? Or should both parties be jointly liable, as permitted by the Directive.

The majority of Intellect members felt that the transferee and transferor should be jointly and severally liable for:

- acts and omissions up to the date of the transfer; and
- payment of salary and other benefits up to the date of the transfer,

in the same way that such parties are currently liable for a failure to inform and consult. However, some Intellect members felt that if this liability for pre-transfer obligations includes employment costs (e.g. non-payment of wages) might increase the complexity in commercial contractual negotiations.

It was noted that second generation outsourcings involve transfers from the outgoing service provider to an incoming service provider without such parties having a direct contractual arrangement. It is often possible for the client to control this situation provided it has negotiated an appropriate agreement with the outgoing service provider at the outset of that arrangement. However, the issue which often arises is that the client has not negotiated an agreement with the outgoing service provider (particularly in the context of smaller transactions) - which means that either the client or the incoming service provider takes on a considerable risk in terms of picking up these liabilities.

In turn, the Government should oblige the outgoing service provider to pick up liability for acts and omissions and other costs and expenses which occur whilst it is an employer. This would mean that the Regulations would cease to favour the incumbent in a re-tendering exercise.

Guidance

Question 16: Is the provision on ‘Economic, Technical or Organisational reason entailing changes in the workforce’ sufficiently clear? Would additional guidance be helpful and if so in what form?

It would be useful to restate what “economic, technical or organisational” means, perhaps in the form of statutory guidance. It was also noted that the reference to “entailing changes to the workforce” unduly limits the ability of employers to make changes and has given rise to a considerable amount of confusion. Again, some guidance would be welcome, particularly by smaller businesses.

Question 17: Are there other areas of TUPE that would benefit from additional guidance/clarification?

Yes, particularly in relation to the following concepts:

- assignment – what does this mean;
- joint and severable liability – how does this work;
- temporary workers – what does this involve; when is someone ‘temporarily assigned’ to the business or activities being transferred?
- “Beckman and Martin” type pension liabilities – although we note that pensions are excluded from the ambit of the consultation
- Contribution made to the undertaking – who stays and who moves with the work
- Timeliness and comprehensiveness of roles information

Implementation of TUPE in other EU Member States

Question 18: Do you have experience of the implementation of the Acquired Rights Directive (TUPE) in other EU Member States? If so, are there any problems you have encountered, or conversely are there lessons that the UK could learn, from their implementation of the Directive?

Intellect members had considerable experience of dealing with transfers on a cross-border basis. There is a general sense that other jurisdictions take a more balanced, considered and less litigious view, which may be because they are more used to working with worker committees and similar groups. There was some experience of jurisdictions (e.g. German) where there was clarity as to when changes to terms and conditions could be made, potentially after a specified period following the transfer - which was generally felt to be helpful.

TUPE and other areas of employment law

Question 19: Have you experienced problems from the interaction of TUPE with other areas of employment law?

Certainly one issue which has arisen involves the interaction between TUPE and the collective redundancy consultation obligations. Often TUPE transfers involve a change of location by the transferee and the question which has arisen is whether it is possible to consult on a collective basis before the transfer in relation to the redundancies which will occur immediately after the transfer itself. If this is not possible, it can lead to inefficiencies arising in circumstances where the transferee needs to continue the employment for a limited period of time even though it does not have any local facilities and therefore cannot utilise the workforce effectively. Again, the current arrangement favours the incumbent service provider and therefore impedes business.

Question 20: The Government is also calling for evidence on collective redundancy consultation rules. Please identify any issues that you have in terms of how the TUPE Regulations and the rules on collective redundancy consultation fit together.

See above.

Other

Question 21: Do you have particular concerns around the application of TUPE to different managerial levels of employees within the same organisation? If so, what are these and how would you like to see them addressed, bearing in mind the requirements of the Directive?

It would be potentially unfair to distinguish the application of TUPE between different managerial levels.

Question 22: Have developments in case law since 2006 raised issues that mean the 2006 Regulations would benefit from updating?

See above.

Question 23: Are there other areas of the Regulations that would benefit from change/review? Conversely are there areas that it is important to keep?

See above.

Question 24: Are there any other issues you wish to raise?

It was felt that it was somewhat disproportionate to have to provide information relating to agency workers given the context of the other information that needs to be provided as part of the pre-transfer information process. There is also a lack of clarity as to what “social” measures, etc should entail which can lead to somewhat stilted and unhelpful information being provided. Again, some guidance would be appreciated, particularly by smaller businesses.

Also, some Intellect members felt that it would be beneficial if the transferor, in the event of a service being relocated when there is no ongoing role post transfer, was allowed to commence redundancy consultation with employees prior to transfer.

Finally, it was suggested that pension issues are agreed during commercial negotiation rather than via fixed requirements.