Briefing

Employment

BURGES SALMON

January 2014

Changes to TUPE - What you need to know

Changes to the TUPE regulations come into effect in stages from 31 January 2014.

The changes are not as far reaching as originally proposed and, on the whole, most of the changes are likely to be welcomed by employers. In particular, following consultation, the government has decided not to remove the service provision change rules as it considered that doing so could create greater uncertainty for businesses.

The main changes are:

Service provision change

The service provision change rules will remain the same except that there is a minor change to clarify that, for there to be a service provision change under TUPE, the activities carried out on or after the change must be "fundamentally" the same as those carried on by the transferor.

What does this mean in practice?

Clarifying that the activities must be "fundamentally" the same simply reflects current case law and so this change will not have any effect in practice. When deciding whether there is a service provision change, it remains important to consider the services that have been provided before the transfer and whether those services are fundamentally the same after the transfer. Where there are significant changes being made to the services by a new contractor or the services are being split up so they no longer resemble the original services, there may be an argument that TUPE does not apply.

Dismissals and changes to terms and conditions

Changes have been made to the provisions that restrict changes to terms and conditions and protect against dismissals so they more closely reflect the wording in the Acquired Rights Directive and ECJ case law. Dismissals will now be automatically unfair where the reason or principal reason for them is the transfer, whereas previously a dismissal for a reason connected with the transfer would be automatically unfair. This may give employers more flexibility but the basic position remains that any dismissal in the context of a TUPE transfer may give rise to some risk and should be carefully managed.

Dismissals for an economic, technical or organisational reason entailing changes in the workforce (an ETO reason) are still permitted and will not be automatically unfair. In addition, a change of place of work is now included within the scope of an ETO reason, so genuine place of work redundancies will not now be automatically unfair.

What does this mean in practice?

The inclusion of genuine place of work redundancies within the scope of an ETO reason will be welcome news to contractors as relocations often occur during outsourcing transactions and it will now be easier to manage a relocation following a transfer. Although redundancies due to a change in location following the transfer will not be automatically unfair, it will still be necessary to carry out a fair redundancy process in the normal way to avoid claims for unfair dismissal.

Variations to terms and conditions

There will continue to be restrictions on variations to terms and conditions if the sole or principal reason for the variation is the transfer. However, an amendment to TUPE will allow a contractual variation if:

- the sole or principal reason for the variation is an ETO reason, provided that the employer and employee agree to the variation; or
- the terms of the contract permit the employer to make the variation.

What does this mean in practice?

This change to TUPE will apply to transfers on or after 31 January 2014 and where the variation is agreed on or after 31 January 2014 or, in the case where the variation is not agreed, it starts to have effect on or after that date. The fact that the exemption for an ETO reason includes a change of location will be particularly useful for employers where there is a change in place of work and the employee and employer agree to vary the contract to allow for the new place of work.

Collective agreements - changes to terms and conditions

Terms and conditions of employment derived from collective agreements will be able to be renegotiated from one year after the date of the transfer, even where the reason for seeking to change the terms is the transfer. However, this is subject to the proviso that the overall changes must be no less favourable overall to the employees.

What does this mean in practice?

This may give transferees greater flexibility to change terms and strengthen their position in negotiations with unions. However, with the caveat that the changes must be no less favourable overall to the employees, the employer's ability to make changes to terms and conditions may in practice be limited.

Collective agreements – static approach

A new regulation has been included to provide that the so-called "static approach" should be adopted with regard to collective agreements that transfer. This means that the transferee employer will only be bound by the terms of collective agreements in force at the date of the transfer (and not any changes agreed afterwards under collective agreements to which the transferee employer is not a party).

What does this mean in practice?

This change is simply to reflect current case law following the ECJ's decision in *Alemo-Herron v Parkwood*. Although the amendment is not strictly necessary, it is intended to provide greater certainty and will be welcome to employers.

Redundancy consultation

Pre-transfer TUPE consultation can count for the purposes of complying with collective redundancy consultation obligations in certain circumstances.

What does this mean in practice?

This will be welcome to transferees who might otherwise have to delay carrying out restructuring or redundancies. In order to benefit from this, the transferee will need to notify the transferor in writing that it wishes to consult and the transferor will need to agree to it. As the transferor has no obligation to co-operate with pre-transfer consultation, it can refuse if it feels it will unsettle the workforce. However, where the transferor agrees, it will enable consultation to be completed prior to, or sooner after, the transfer and may result in lower costs for the transferee.

Employee liability information

The obligation for the transferor to provide employee liability information will remain. However, for transfers which take place on or after 1 May 2014, the transferor will be required to provide employee liability information at least 28 days before the transfer (rather than the current 14 days).

What does this mean in practice?

The scope of the employee liability information remains the same but the increase in the time limit will allow transferee employers to receive information earlier in the process, although in most cases obtaining the information 28 days before the transfer will still be too late in the process to be of much use, so transferees should press for information earlier.

Micro-businesses

New regulations will allow employers with fewer than 10 employees to consult directly with affected employees rather than through elected representatives (so long as no existing representatives are in place). This will apply to transfers which take place on or after 31 July 2014.

Contact us

Roger Bull
Partner

+44 (0) 117 902 2701
roger.bull@burges-salmon.com

Chris Seaton
Partner

+44 (0) 117 939 2213
chris.seaton@burges-salmon.com

Adrian Martin
Partner

+44 (0) 117 939 2279
adrian.martin@burges-salmon.com

BRM0727 01 14