

TUPE 2006

How TUPE Works

1. The original TUPE Regulations were enacted to implement the Acquired Rights Directive (EEC/77/187). That Directive was re-enacted Council Directive 2001/23/EC. The scheme of the Directive and the subsequent TUPE 2006 Regulations is to protect the employment rights of staff when the business transfers from one owner to another.
2. In legal terms, the protection is afforded to the employee by the imposition of a statutory novation of his contract of employment.
3. Put simply:-
 - (1) A is employed by B;
 - (2) B transfers his business to C;
 - (3) By the regulations, A, from the moment of transfer, becomes employed by C;
4. Significantly, it is not just the contract that is transferred, but by Regulation 4(2):
 - “(a) all the transferor’s rights, powers, duties and liabilities under or in connection with any such contract, shall be transferred...to the transferee; and*
 - ”(b) any act or omission before the transfer is completed, of, or in relation to the transferor in respect of that contract or a person assigned to that organised grouping of resources or employees shall be deemed to have an act or omission of or in relation to the transferee.”*

Thus, C steps into the shoes of B, inheriting the employee, A, and all rights and obligations arising historically from A's employment relationship with B.

5. The Rights and liabilities that transfer are:
 - (1) All contractual liabilities arising under or in connection with the employment;
 - (2) Statutory employment claims, EG discrimination claims;
 - (3) Contractual enhanced redundancy payments;
 - (4) Commission and incentive schemes;
 - (5) Liability for personal injury.

6. Regulation 5 transfers collective agreements from transferor to transferee. Regulation 6 transfers trade union recognition.

To which transfers does TUPE apply?

The Standard Transfer

7. Regulation 3(1)(a) provides:

“A transfer of an undertaking, business or part of a business situated immediately before the transfer in the United Kingdom to another person where there is a transfer of an economic entity which retains its identity.

Economic identity is defined in Regulation 3(2) as; *“an organised grouping of resources which has the objective of pursuing an economic activity, whether or not that activity is central or ancillary.”*

In *Cheesman v R Brewer Contracts Ltd*¹ the EAT analysed domestic and ECJ decisions and formulated a number of principles on the basis of which one could recognise an undertaking:

¹ [2001] IRLR 144 EAT

- a. As to whether there is an undertaking, there needs to be found a stable economic entity whose activity is not limited to performing one specific works contract, an organised grouping of persons and of assets enabling (or facilitating) the exercise of an economic activity which pursues a specific;
 - b. In order to be such an undertaking it must be sufficiently structured and autonomous but will not necessarily have significant assets, tangible or intangible;
 - c. In certain sectors such as cleaning and surveillance the assets are often reduced to their most basic and the activity is essentially based on manpower;
 - d. An organised grouping of wage-earners who are specifically and permanently assigned to a common task may in the absence of other factors of production, amount to an economic entity;
 - e. An activity of itself is not an entity; the identity of an entity emerges from other factors such as its workforce, management staff, the way in which its work is organised, its operating methods and, where appropriate, the operational resources available to it .
8. In *Wood v (1) Caledonian Social Club Limited (debarred) and (2) London Colney Parish Council*² the EAT has recently held that the temporary cessation of an economic entity's operation at the putative transfer date does not prevent a relevant transfer occurring. On the facts of this case there was a temporary cessation of a bar operation, due to the expiry of a premises licence certificate. It was plain that, by the date of the transfer, the Second Respondent had intended to obtain a fresh premises licence certificate and themselves re-open the bar, operating precisely as it had done under the First Respondent. It therefore concluded the economic entity did not cease on 16 September; it was temporarily suspended until the bar re-opened on 6 October, which was the date when the new licence was granted.

Service Provision Changes

9. Regulation 3(1)(b) extends the Regulations beyond that required by the Acquired Rights Directive to what are described as service provision changes, namely:

² UKEAT/0528/09/CEA

- (1) Where activities ceased to be carried by a person ('the client') on his own behalf but are carried out by another person on the client's behalf. (EG: A local authority transfers a service carried out in house to external providers)
 - (2) Activities cease to be carried out by a contractor on the client's behalf but are carried out by another contractor on the client's behalf. (EG: contractor A loses a street cleaning contract and that contract is then performed by contractor B).
 - (3) A contractor ceases to carry out an activity on the client's behalf and those activities are carried out instead by the client on his own behalf. (EG: bringing contracted services back in-house.)
10. In order for any of the scenarios set out in Regulation 3(1)(b) to amount to a valid transfer Regulation 3(3) must also apply. There must be, immediately before the service provision change, be:
- (4) An organised grouping of employees... which has as its principle purpose the carrying out of activities concerned on behalf of the client. (This can include a single employee Regulation 2(1))
 - (5) The client intends that the activities will, following the service provision change, be carried out by the transferee other than in connection with a single specific even or task of short-term duration.
10. In *Metropolitan Resources Ltd v Churchill Dulwich Ltd*³, HHJ Burke Q.C. gave guidance on the proper approach to service provision changes cases. The facts of that case were to do with the loss of a contract for the provision to the Home Office of accommodation for asylum seekers and its inheritance by another provider. The Judge set out the three categories of service provision change and distinguished those from the economic entity:

"27 "Service provision change" is a wholly new statutory concept. It is not defined in terms of economic entity or of other concepts which have developed under the 1981

³ [2009] I.R.L.R. 700

Regulations or by Community decisions on the Acquired Rights Directive prior to April 2006 when the new Regulations took effect. The circumstances in which service provision change is established are, in my judgment, comprehensively and clearly set out in regulation 3(1)(b) itself and regulation 3(3); if there was, immediately before the change relied upon, an organised grouping of employees which had as its principal purpose the carrying out of the activities in question, the client intends that those activities will be carried out by the alleged transferee, other than in connection with a single specific event or a task of short term duration, and the activities do not consist totally or mainly of the supply of goods for the client's use, and if those activities cease to be carried out by the alleged transferor and are carried out instead by the alleged transferee, a relevant transfer exists. In contrast to the words used to define transfer in the 1981 Regulations the new provisions appear to be straightforward; and their application to an individual case is, in my judgment, essentially one of fact."

"30 The statutory words require the employment tribunal to concentrate upon the relevant activities; and tribunals will inevitably be faced, as in this case, with arguments that the activities carried on by the alleged transferee are not identical to the activities carried on by the alleged transferor because there are detailed differences between what the former does and what the latter did or in the manner in which the former performs and the latter performed the relevant tasks. However, it cannot, in my judgment, have been the intention of the introduction of the new concept of service provision change that that concept should not apply because of some minor difference or differences between the nature of the tasks carried on after what is said to have been a service provision change as compared with before it or in the way in which they are performed as compared with the nature or mode of performance of those tasks in the hands of the alleged transferor. ***A common sense and pragmatic approach is required to enable a case in which problems of this nature arise to be appropriately decided, as was adopted by the tribunal in the present case. The tribunal needs to ask itself whether the activities carried on by the alleged transferee are fundamentally or essentially the same as those carried out by the alleged transferor. The answer to that question will be one of fact and degree, to be assessed by the tribunal on the evidence in the individual case before it.***"

Local Government Considerations and 'TUPE plus'

Regulation 3(4)

11. Regulation 3(4) expressly provides that TUPE applies to "*public and private undertakings engaged in economic activities whether or not they are operating for profit*". Thus TUPE applies to outsourcing by local or central government to the private sector, outsourcing by local and central government of ancillary services to charities and other not for profit organisations.

Regulation 3(5)

12. Regulation 3(5) expressly provides that TUPE does not apply to an administrative re-organisation of public administrative authorities or the transfer of administrative functions between public administrative authorities. However, workers rights in such transfers (and others falling outside of TUPE) are protected in different ways as follows.

Ad hoc arrangements under section 38 of the *Employment Relations Act 1999*.

13. This section allows a minister to pass regulations governing transfers to which TUPE does not apply (e.g. as applied in the *Transfer of Undertakings (Protection of Employment)(Rent Officer Service) Regulations 1999*; (*Transfer of Undertakings (Protection of Employment) (transfer to OFCOM) Regulations 199*)

Directions pursuant to the Local Government Act 2003 s. 101 and 102

14. Section 101 and 102 of this Act make provision for directions to be made by the Secretary of State in respect of staff transfers in the public sector. Section 101 is concerned with terms and conditions on transfer. No direction has been issued under this section because the view has been taken that the implementation of TUPE 2006 has obviated the need for such.
15. S. 102 is concerned with ensuring comparable pension provision and a direction has been issued on the 27th June 2007 under that section. The direction, in summary, provides that in a contracting out situation the contractor who wins the tender must provide pension provision which is the same or better than that enjoyed by the employee when employed by the local authority. This may be achieved by the new employer becoming an 'admitted body' within the LGPS.

Public Sector Codes of Practice

16. There are three relevant Codes of Practice all of which pre-dated TUPE 2006 and which will continue to apply in cases not governed by the Regulations. These are
- (1) The Cabinet Office Statement on Staff Transfers 2000 in the Public Sector;
 - (2) The Code of Practice on Workforce Matters in Local Government 2003 (The 2003 Code);

(3) The Cabinet Office Code of Practice on Workforce Matters in Public Sector Service Contracts 2005 (The 2005 Code)

17. The *2003 Code* explicitly incorporates the *Cabinet Office Statement on Staff Transfers in the Public Sector 2000*. Further the *2003 Code* is annex D to ODPM circular 03/02/03. Paragraphs 28 to 76 and annexes C, D and E of this circular consists of statutory guidance⁴ on how local authorities might meet the ‘best value’ requirements of Part I of the *Local Government Act 1999*.

18. The *2003 Code* as statutory guidance sets out, as a matter of central government policy which has been accepted by consultation with local authorities, that whenever there is a situation in which,

“a service or function is contracted out, then re-tendered, brought back into the public sector, transferred within the public sector, or restructured and organised in a new way in a different part of the public sector”

There is, in effect, a strong presumption that TUPE will apply. Further, whilst there may be ‘exceptional circumstances’ where TUPE will not apply, no attempt should be made to orchestrate a non-TUPE situation. (see para 5 of the *Statement*). The *2003 Code* explicitly states that the even if TUPE does not apply in strict legal terms it should nevertheless be followed (para 5).

19. The *2005 Code* restates the *2003 Code* and also requires that new joiners to an outsourced workforce are employed on fair and reasonable conditions which are, overall, no less favourable than those of transferred employees. In addition the code requires that new joiners are provided with specified pension arrangements.

⁴ Pursuant to Section 3 (the general duty), Section 5 (Best Value Reviews), Section 6 (Best Value Performance Plans) and Section 19 (Contracts: exclusion of non-commercial considerations) of the Local Government Act 1999

20. It should be borne in mind that on 27 July 2010 Francis Maude, Cabinet Office Minister, was reported in the Financial Times to have said that he was “minded to abolish” the 2003 Code of Practice, so changes may well be afoot in this area.

Dismissal

Because of Transfer

21. If an employee is dismissed whether before or after the transfer, he shall be treated as unfairly dismissed (Regulation 7) for the purposes of the ERA;

“If the sole or principal reason for his dismissal is (a) the transfer itself; or (b) a reason connected to the transfer that is not an economic, technical or organisational reason entailing changes in the workforce..”

The usual remedies for unfair dismissal will therefore be available to the employee.

Constructive Dismissal

22. Regulation 4(9) permits an employee to resign and claim constructive dismissal where a relevant transfer has involved substantial changes in the working conditions to his material detriment. Whilst no damages will be payable in respect of notice not worked in this circumstance the employee can present a constructive dismissal claim.
23. Note also, that Regulation 18 prevents the parties from contracting out of the protection afforded by the regulations.

The ETO Defence

24. Although a dismissal by reason of a transfer is deemed to be unfair (Regulation 7(1); Regulation 7(2) provides a defence in cases where the sole or principal reason for the dismissal that is a reason connected with the transfer that is an:

“economic, technical or organisational reason entailing changes in the workforce of either the transferor or transferee before or after a relevant transfer

This operates by providing that the ETO dismissal is either for redundancy if the provisions of section 98(2)(c) of the ERA are satisfied or for some other substantial reason (within the meaning of s.98 ERA). An ETO reason is not absolute defence. The Tribunal must consider whether the dismissal in the circumstances in which it was made was fair or unfair, which determination (having regard to the reason shown by the employer)

25. Note that the ETO reason must be one which entails change in the workforce. Thus, where the transferee retains the workforce but imposes changes in terms and conditions so that they resign and claim constructive dismissal, the employer cannot rely on the ETO reason (*Delabole Slate Ltd v Berriman*⁵). This decision was distinguished and the provision given a wider construction in *Crawford v Swinton Insurance Brokers Ltd*⁶ so that a change in whole job content affecting the whole workforce may be sufficient to amount to a change in the workforce.
26. It should be noted that the transferor cannot rely on the transferee’s ETO reason. If the transferee dismisses in anticipation of the transferor’s requirements then the dismissal will be automatically unfair and the liability would transfer to the transferee. (see *Hynd v David J Armstrong*⁷).

Changing Terms and Conditions for an ETO Reason

27. Following transfer, those employees transferred remain employed on the terms and conditions under which they worked prior to transfer. Thus, the transferee may be faced with a situation in which the transferred employees are employed on different terms to his existing employees. His aim would be to equalise their terms and conditions.

⁵ [1985] IRLR 305

⁶ [1990] IRLR 42

⁷ [2007] CSIH 16

28. One might have thought that this was possible with the consent of the employees: a consensual variation of a contract of employment is perfectly permissible means of varying a contract. The EAT, however, held in *Wilson v St. Helens Borough Council*⁸ that the new employer may not change terms and conditions if the reason for the change is the transfer. Although that case eventually went to the HL, the higher courts were concerned primarily with other matters. The HL did say, obiter, that
- (1) a variation of terms without a dismissal which is due to a transfer is invalid, but
 - (2) once the causal link with the transfer is broken, there can be a valid consensual variation.
29. Regulation 4(5) now permits consensual variations but only where the sole or principal reason for the variation is an ETO reason or reason not connected with the transfer.
30. One, albeit risky way out of the conundrum is for the transferor to dismiss the transferring employees and the transferee re-employ them on new terms *Meade and Baxendale v British Fuels Limited*⁹). This has the effect that the employees are entitled only to the new terms. There is a risk, however, of a finding of unfair dismissal, especially since the dismissal is deemed to be automatically unfair if the reason or primary reason for it is the transfer (Regulation 8(1)). Just this happened in the case of *Cornwall County Care Limited v Brightman*¹⁰. In order to avoid liability, the employer will have to demonstrate that that dismissal was for an ETO reason entailing changes in the workforce.
31. In summary, variations to contracts of employment are permitted so long as the reason for the variation is an ETO reason. Simple 'harmonisation' of terms and conditions is not permitted. Although passage of time between the transfer and any changes in terms and conditions will weaken the link between the transfer and the variation, there is no hard and fast rule as to this.

⁸ [1996] IRLR 320

⁹ [1998] IRLR 706

¹⁰ [1998] IRLR 228

Insolvency

32. The effect of Regulations 8(1) and 8(7) is to divide cases into those where there are terminal insolvency proceedings in which cases the main provisions of TUPE do not apply, and other non-terminal proceedings, described as ‘relevant insolvency proceedings’ where TUPE does apply but where there is a relaxing of the severity of the provisions as they relate to the transference of debts and changes in terms and conditions.

a. To which Insolvency Proceedings do the main provisions of TUPE not apply?

33. The first issue therefore is, to which insolvency proceedings do the main provisions of TUPE (regulations 4 [effect of relevant transfers on contract of employment] and 7 [Dismissal of employee because of relevant transfer]) not apply? Regulations 8(1), (6) and (7) provides that:

“(1) If at the time of a relevant transfer the transferor is subject to relevant insolvency proceedings paragraphs (2) to (6) will apply.

(6) In this Regulation “relevant insolvency proceedings” means insolvency proceedings which have been opened in relation to the transferor not with a view to the liquidation of the assets of the transferor and which are under the supervision of an insolvency practitioner.

(7) Regulations 4 and 7 do not apply to any relevant transfer where the transferor is the subject to bankruptcy proceedings or any analogous insolvency proceedings which have been instituted with a view to the liquidation of the assets of the transferor and are under the supervision of an insolvency practitioner.”

34. The BERR Guidance on TUPE 2006¹¹ is not particularly illuminating it provides that:

“It is the Department’s view that “relevant insolvency proceedings” [i.e. those to which TUPE applies] 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 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”

¹¹ A guide to the TUPE 2006 Regulations for employees, employers and representatives (March 2007: www.berr.gov.uk/files/file20761.pdf)

35. As matters stand it can be said with some confidence that Regulation 8(7) includes personal bankruptcy and compulsory liquidation. It probably also covers a creditors voluntary liquidation as this only has as its purpose the ultimate, albeit orderly, liquidation of the company. It is difficult to see how it could cover members voluntary liquidation (cf BERR Guidance) given that a declaration of solvency is required before any such liquidation – these can hardly be said to be analogous to bankruptcy
36. What of administration? Because the purpose of administration is to rescue the company as going concern it might be thought that administration proceedings will always be “relevant insolvency proceedings” within the meaning of Regulation 8(6) and TUPE will always “bite”. In *Oakland v Wellswood (Yorkshire) Ltd*¹² the EAT have held this is not so. In that case the joint administrators expressly recorded in their report that they did not consider that the first objective of administration (rescuing the old company as a going concern) was achievable and therefore they moved onto consider the second objective of achieving a better result for the creditors as whole than would be likely if the company were wound up (without first being in administration). The ET held, as a fact, that the administration was instituted with a view to the liquidation of the assets of the company. Judge Peter Clarke held:

I accept that where joint administrators continue to trade the business with a view to its sale as a going concern any relevant transfer in those circumstances will attract TUPE protection for employees under Regulation 4. However, that is not what happened in the present case on the facts found Having first been consulted by the Claimant on behalf of Oldco on 23 November 2006 it is clear from [the joint administrator’s] report that it soon became apparent that due to its weak financial position it was not possible for the administrators to continue trading the business. Instead, immediately following their appointment on 6 December 2007 they took immediate steps to sell the assets to Newco, who took on the lease of Oldco’s premises whilst retaining the book debts in Oldco. This was seen as the best course for realizing the optimum return for creditors in the final liquidation of Oldco. In my judgment the Judge was entitled to conclude that the appointment of Joint administrators was with a view to the eventual liquidation of the assets of Oldco, by way of a CVL.

37. It can be seen that the focus therefore has to be on what the purpose of the proceedings was at the time they commenced. It is also of some note that Judge Clarke expressly declined to revisit

¹² [2009] IRLR 250. This has been overturned by the Court of Appeal on a different point, although Moses LJ considered that it was strongly arguable that the EAT’s decision was liable to challenge.

the old ECJ case law (such as *Abels*¹³, *D’Urso*¹⁴ and *Jules Dethier v Dassy*¹⁵), as to the extent to which transfers following various kinds of transferor insolvency attracted TUPE protection, as Article 5(1) of the Acquired Rights Directive 2001/23 was designed to consolidate European law as expressed in these authorities and this was transposed word for word into Regulation 8(7).

b. The application of TUPE 2006 to “Relevant Insolvency Proceedings”

38. As noted above in cases where TUPE applies to relevant insolvency proceedings, namely, those which have been opened ‘not with a view to the liquidation of the assets of the transferor’. In such cases the effects of TUPE are mitigated as follows:

- (1) Some liabilities will not transfer;
- (2) There are permitted variations to terms and conditions

c. Liabilities that do not transfer

39. Regulation 8(4) prevents the transfer of liability under Regulation 4 for unpaid sums due to transferring employees provided that such sums fall with the Chapter VI of Part IX and Part XII of the ERA. These include:

- (1) Statutory redundancy pay;
- (2) arrears of pay up to 8 weeks;
- (3) notice pay;
- (4) holiday pay;
- (5) basic award compensation;
- (6) guarantee payments;

¹³ [1986] ECR 469

¹⁴ [1992] IRLR 136

¹⁵ [1978] IRLR 266

(7) protective awards.

The National Insurance fund will meet these claims up to the applicable limits. Any balance owing above those limits will be payable by the transferee.

d. Permitted Variations

40. Regulation 9 allows the transferor or the transferee (or insolvency practitioner) to agree certain permitted variations to employment contracts via appropriate employee representatives i.e. trade union representatives or elected or appointed employee representatives.

e. Appropriate Representatives

41. These are:

- (1) Trade union representatives
- (2) Employees elected or appointed to a representative body (not for the purpose of the regulation) for example a pre-existing works council or employee forum.
- (3) Employees elected for the purpose of this Regulation and in accordance with the procedure for elections set out in Regulation 14.

It is envisaged that the same person will be the employee representatives under for the purposes of this Regulation as for the purposes of Regulation 13.

f. The purpose of the variation under Regulation 9

42. The permitted variation under Regulation 9 is not to be confused with variations which are permitted for ETO reasons (Regulation 4(5)(a)). The variation under Regulation 9 must be which:

- (1) The sole or principal reason for the transfer and is not an economic, technical or organisational reason entailing a change in the workforce (permitted in any event); and

- (2) It is designed to safeguard employment opportunities by ensuring the survival of the undertaking, business or part of the undertaking or business that is transferred.

g. Formalities

43. In the case of a non-trade union representative then such an agreement must:

- (1) Be signed by the representatives or a duly authorised agent;
- (2) Before being signed a copy of the text and such guidance as may be reasonably be required should be sent to all employees to whom it is intended the variation will apply.

44. The obvious point that arises is that the consultation process envisaged by Regulation 9 is potentially cumbersome in circumstances where there are no trade union representatives recognised by an employer. It is inevitable that elections would take time and there may be a real unwillingness by the workforce to step forward and volunteer. One is hardly likely to be popular if one is trying to sell reductions in terms and conditions to one's fellow workers! Time is often a commodity that insolvent businesses do not have. It should also be noted that if the employees fail to elect representatives there is no equivalent to Regulation 13(11) i.e. individual consultation which would mean that were this situation to arise there could be no question of there being any permitted variations being made pursuant to Regulation 9.

h. Insolvency Proceedings 'opened' or 'instituted'

45. Regulations 8(6) applies to relevant insolvency proceedings which are 'opened'. Regulation 8(7) applies to insolvency proceedings which have been 'instituted'. In both cases the process has to be under the supervision of an insolvency practitioner. Insolvency practitioner is given the same definition as in the Insolvency Act 1988. s. 388 of that Act provides:

- "A person acts as an insolvency practitioner in relation to a company by acting*
- (a) as a liquidator, provisional liquidator, administrator or administrative receiver.*
 - (b) Where a voluntary arrangement in relation to the company is proposed or approved under Part 1 as nominee or supervisor.*

46. These provisions were considered in *Secretary of State for Trade and Industry v Slate*¹⁶. In that case the directors on advice decided to put the company into a creditors voluntary liquidation. Advice was taken from an insolvency practitioner. He was appointed by the directors on the 25th July 2006. The employees were made redundant on the 26th July. A new company purchased the business on the 27th July. The members meeting was not until after the transfer. As at the date of transfer:
- (1) The insolvency practitioner had not been appointed he was merely advising (this only occurs at the creditors meeting) and therefore the process was not under his supervision.
 - (2) The insolvency proceedings had not commenced (it only commences on the resolution being passed at a members' meeting (s. 86 of the insolvency Act 1986).
47. The EAT held that the following principles apply:
- (1) The rules in the Insolvency legislation as to when insolvency proceedings are opened or instituted apply to TUPE cases.
 - (2) There is no difference between insolvency proceedings being 'opened' and proceedings 'instituted'.
48. It is not sufficient for an insolvency practitioner to be involved in the process, the insolvency proceedings must be under the supervision of an insolvency practitioner as defined by s. 388 of the Insolvency Act 1986.

¹⁶ UKEAT/0119/07

EMPLOYEE LIABILITY INFORMATION

49. Under Regulation 11 the transferor is required to notify the transferee of the employee liability information of any person employed by him who is assigned to the organised grouping of resources and employees subject to the transfer.

50. Employee Liability Information means

- (1) Identity and age of employee.
- (2) Particulars of employment.
- (3) Information of any;
 - (a) Disciplinary procedure against an employee;
 - (b) Grievance procedure taken by an employee;

Within the previous 2 years in circumstances in which a Code of Practice issued under Part IV of the Trade Union and Labour Relations Act 1992 which relates exclusively or primarily to the resolution of the disputes applies.

- (c) information of any court or tribunal claim or action:
 - (i) brought by an employee against the transferor in the previous 2 years.
 - (ii) That the transferor has reasonable grounds to believe that the employee may bring against the transferee, arising out of the employee's employment.
- (d) Information relating to any collective agreement.

51. The Information must be made available in writing or in a readily accessible form and made available as at a specified date not more than 14 days before being provided to the transferee. The information must include any employee dismissed immediately before the transfer.

52. Any change must be notified not less than 14 days before the transfer.

53. If there is a failure to provide the information, the transferee has 3 months from the date of the transfer to bring a claim. Subject to limited exceptions of the tribunal uphold the complaint it

must award compensation of not less than £500 per employee. In assessing compensation it must have regard to any loss sustained by the transferee and the terms of any contract between the transferor and transferee.

TUPE 2006 – DUTY TO INFORM AND CONSULT

a. The Requirements

54. Regulation 13(2) requires an employer to:

Long enough before a relevant transfer to enable the employer of any affected employees to consult the appropriate representatives of any of affected employees, the employer shall have to inform those representatives of:

- 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; and
- 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 such 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.

55. It is crucial to appreciate that an employer does not have to consult in every case though he does have to provide the specified information; the duty to consult will only arise if the employer intends to take measures in relation to affected employees (see below but c.f. the *Cable Realisations* case – see below).

56. The Court of Appeal has considered the scope and nature of the transferor's duty to provide information about the legal implications of the transfer under Regulation 13 in *Royal Mail Group Ltd v Communication Workers Union*¹⁷. Lord Justice Waller held that the language of Regulation 13(2) was not the language of strict liability or warranty. He upheld the earlier decision of the EAT in the case and stated that in his view the language of Regulation 13(2)(b) obliges the employer to describe what he *genuinely believes* to be the legal, social and economic implications. An employer will need to demonstrate that it has actually considered the legal, economic and social implications to establish a basis for its belief if it transpires that in fact the effects turn out to be different to those that it has informed its employees about.
57. The obligations to consult and inform do not apply to non-business transfers i.e. sales of companies by way of disposal of share capital: *Milliam v The Print Factory (London) 1991 Ltd*¹⁸. The logic being that in such circumstances there is no change of employer since the company that employs the employees remains the same, though the ownership of that company's shares has changed.
58. The effect of the Regulations is that an employer must inform and consult about a proposed transfer, even if ultimately the transfer does not take place, this, it might be thought, is no more than common sense, but it appeared to have been in question until the EAT expressly addressed it in *Banking Insurance and Finance Union v Barclays Bank plc*¹⁹.

b. When to Consult

59. There is no definition of '*long enough before*' within the Regulations and it will therefore be treated as a question of fact in each individual case. Article 7 of the Directive states that the obligation should be performed 'in good time', which arguably adds little in terms of interpretation. What can be said with certainty is that there is no set period for consultation because this point was argued before the EAT in *Baxter v Marks & Spencer plc*²⁰ where it was

¹⁷ [2009] IRLR 1046

¹⁸ [2007] IRLR 526

¹⁵ [2009] IRLR 108, affirmed on appeal [2009] EWCA Civ 1045

¹⁹ [1987] ICR 495

²⁰ EAT/0162/05

submitted that by analogy with the minimum consultation periods under s.188 Trade Union and Labour Relations (Consolidation) Act 1992 that there should be a minimum period of 30 and 90 day consultation periods. The EAT rejected the submission and held that there was no authority to support the submission – indeed one might readily have expected the drafters of the Regulations to have specified minimum periods of consultation if that had in fact been the will of Parliament.

60. There will always be a question of timing since logically one can only determine whether consultation has taken place ‘long enough before’ if one knows when the ‘**relevant transfer**’ has actually happened. The ECJ has held in *North Wales Training and Enterprise Council Ltd v Astley*²¹ that the date of the actual transfer is the date on which the responsibility as employer for carrying on the business of the unit transferred passes from the transferor to the transferee. The importance of this is that this will be a definite point in time, which cannot be delayed by one or other party and it is therefore this date which ought to be treated as the date when the relevant transfer takes effect. From this date it will be possible to reckon backwards and assess whether any consultation has been carried out long enough before it.

c. Who should be consulted?

61. Regulation 13(3) defines who ‘**appropriate representatives**’ are:
- a. If the employees are of a description in respect of which an independent trade union is recognised by their employer, representatives of that trade union or
 - b. In any other case, whichever of the following employee representatives the employer chooses, from:
 - (a) Employee representatives appointed or elected by the affected employees otherwise than for the purposes of Regulation 13 who (having regard to the purposes for and the method by which they were appointed or elected) have

²¹ [2005] IRLR 647

authority from those employees to receive information and to be consulted about the transfer on their behalf;

- (b) Employee representatives elected by any affected employees, for the purposes of this Regulation in an election satisfying the requirements of Regulations 14(1).

62. It should be noted that where (a) an employer has invited any of the affected employees to elect employee representatives; and (b) the invitation was issued long enough before the time when the employer is required to give information in Regulation 13(2) to allow them to elect representatives by that time; then the employer is treated as complying with the requirements of Regulation 13 in respect of those employees if he complies with the requirements as soon as reasonably practicable: Regulation 13(10)

63. Further pursuant to Regulation 13(11) if the employer has invited affected employees to elect representatives and they fail to do so within a reasonable time then the employer must give to each affected employee the information that he is required to give under Regulation 13(2).

d. Elections

64. Elections of employee representatives are governed by Regulation 14(1)The requirements for the election of employee representatives under Regulation 13(3) are that—

- (a) the employer shall make such arrangements as are reasonably practicable to ensure that the election is fair;

- (b) the employer shall determine the number of representatives to be elected so that there are sufficient representatives to represent the interests of all affected employees having regard to the number and classes of those employees;

- (c) 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;

(d) before the election the employer shall determine the term of office as employee representatives so that it is of sufficient length to enable information to be given and consultations under Regulation 13 to be completed;

(e) the candidates for election as employee representatives are affected employees on the date of the election;

(f) no affected employee is unreasonably excluded from standing for election;

(g) all affected employees on the date of the election are entitled to vote for employee representatives;

(h) the employees entitled to vote may vote for 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, may vote for as many candidates as there are representatives to be elected to represent their particular class of employee;

(i) the election is conducted so as to secure that—

(i) so far as is reasonably practicable, those voting do so in secret; and

(ii) the votes given at the election are accurately counted.

(2) Where, after an election of employee representatives satisfying the requirements of paragraph (1) has been held, one of those elected ceases to act as an employee representative and as a result any affected employees are no longer represented, those employees shall elect another representative by an election satisfying the requirements of paragraph (1)(a), (e), (f) and (i).

65. This process is mandatory and an employer should ensure that he complies with all of its elements.

e. Information, Measures and Consultation

66. The **'information to be supplied'** should be provided in writing to the appropriate representatives: Regulation 13(5).
67. The information and consultation obligations apply where there is any transfer, irrespective of whether employees are assigned to the undertaking being transferred. This means that an employer will need to provide information and consult with a wider group than those employees who are simply being transferred. The obligation is to consult with **'affected employees'**, which may well be a much broader category of individual than those who are subject to transfer. The EAT in *UNISON v Somerset County Council*²² suggested a common sense and pragmatic interpretation of 'affected employees' to mean "those who will or may be transferred or those whose jobs are in jeopardy by reason of the proposed transfer, or who have job applications within the organisation pending at the time of the transfer. We do not think that definition extends to the whole of the workforce, nor to everyone in the workforce who might apply for a vacancy in the part transferred in the near future".
68. There is no definition of **'measures'** within the Regulations or the Directive, but it will plainly be interpreted widely and given a common sense interpretation. In *Institution of Professional Civil Servants v Secretary of State for Defence*²³ Millett J was called upon to consider the Dockyard Services Act 1986 which had provisions that were essentially identical to those contained in what is now Regulation 13, when he came to consider the meaning of measures he said that it was "...a word of the widest import, and includes any action, step or arrangement [...] Despite the width of the words it is clear that manpower projections are not measures at all; though positive steps to achieve planned reductions in manpower levels otherwise than through natural wastage would be".
69. More recently in *Baxter v Marks & Spencer Plc* the EAT considered what constituted 'measures' and held that on the facts of this case that the 're-focusing of emphasis as to how a job was to be carried out was merely a change of emphasis within the agreed job description and was not a measure in connection with the relevant transfer, but was instead an 'inevitable administrative consequence of the transfer'. This case is of course fact sensitive, but if the EAT was to apply this

²² [2010] IRLR 207

²³ [1987] IRLR 373

distinction more widely as a matter of principle it would potentially limit the scope of the consultation process, because an employer may well argue that any particular step is not a measure but an inevitable administrative consequence of the transfer taking place.

70. If an employer of affected employees is considering making a change that would affect an employee in connection with the transfer then this would likely be considered a 'measure'. On a strict interpretation of Regulation 13(6) the obligation to consult only applies to the employer of an affected employee who envisages that he will take measures in relation to that employee that are connected with the relevant transfer. This would mean, if strictly applied, that if a transferee was considering making redundancies as part of the relevant transfer, but that the transferor was not, i.e. such redundancies would take effect post transfer, then there would not be a strict obligation upon the transferor to consult and the obligation upon the transferee would only arise post transfer, because it is only then that he becomes the employer of the affected employees.
71. It has been suggested by one commentator²⁴ that Article 7 of the Directive would require consultation to take place by a transferor in circumstances where he could envisage measures being taken in respect of affected employees taken not by him as their employer but actually taken by the transferee. In such a case the transferor's obligation to consult on such a measure would be engaged by Article 7(2) of the Directive. It is accepted by that commentator that this would be a strained interpretation of the Article and it is not consistent with the express wording of Regulation 13(6) and in relation to a similar point the Scottish EAT in *UCATT v Amicus (and others)*²⁵ has concluded that the duty to consult does not extend to the transferee in respect of measures proposed by a transferee *post* transfer. The effect of this decision is that affected employees who are being transferred to a transferee will have been made aware that measures are to be taken in relation to them post transfer, but they will have no right to be consulted about those measures. This decision is considered to be controversial by the current editors of Harveys who describe it as driving a 'coach and horses' through Regulation 13. They argue that the purpose of making consultation mandatory in measures cases is to protect the

²⁴ Dr John McMullen, Leeds University

²⁵ UKEATS/0007/08/MT & UKEATS/0014/08/MT

affected employees rights and they point out that in the majority of cases it will be the transferee rather than the transferor who will be envisaging taking measures post transfer, therefore if the transferee does not have any obligation to consult post transfer then affected employees in the majority of TUPE cases will simply not have effective rights to consultation.

72. It is suggested that as a matter of good HR practice a transferor ought always to consider consulting over measures, whether or not he can strictly rely upon Regulation 13(6) because the workplace benefits of taking such a step will almost always be enormous.
73. Mandatory '**Consultation**' must be carried out with a 'view to seeking employee representatives agreement to the intended **measures**' Regulation 13(6). The employer must allow appropriate representatives access to affected employees and it has to afford them such accommodation and facilities as may be appropriate Regulation 13(8). Again each case will turn on its facts and the size of the particular undertaking and size of the proposed transfer will be of great significance. But plainly employers ought to be allowing the representatives access to communication facilities phone and email being the obvious ones, and they ought probably to allow them meeting facilities as well.
74. The scope of the obligation to consult has been considered by Millett J in *Institution of Professional Civil Servants v Secretary of State for Defence*²⁶ where he examined the relevant provision under the Dockyard Services Act 1986, which was in identical terms to Regulation 13 and concluded that the reference to consultation at the start of Regulation 13(2) was a reference to voluntary consultations which the unions could seek on any topic once they had the requisite information, but which the transferring employer was not compelled to grant if he chose not to do so. His Honour Judge Peter Clark in *Cable Realisations Limited v GMB Northern*²⁷ has recently come to a similar conclusion where he held that a "reasonable employer will not necessarily limit consultation to the **measures** being taken" and he referred to the industrial relations benefits of consulting in relation to all the matters set out in Regulation 13(2). On the facts of this case the transferor had provided information shortly before the transfer date and at a time when the factory in question was closed for its summer shutdown, which meant that the

²⁶ [1987] IRLR 373

²⁷ [2010] IRLR 42 (EAT)

employee representatives had little practical opportunity to consult with the transferor employer. It was held that the provision of information 'long enough before' the transfer date meant long enough before that date to permit employee representatives to seek consultation upon that information.

f. Special Circumstances

75. An employer does have a defence if he has failed to consult or inform but only if there are '*special circumstances*' which render it not reasonably practicable to perform the duty and in the circumstances he has taken all reasonably practicable steps towards performing the duty: Regulation 13(9). There is no definition of 'special circumstances' within the Regulations. It is noteworthy that there is a similar defence open to an employer under s.188 Trade Union and Labour Relations (Consolidation) Act 1992 and decisions made in relation to that section are likely to be of assistance when considering Regulation 13(9). By the very nature of a business transfer speed and secrecy are likely to be of great importance, this means that consultation with affected employees may be difficult to undertake thus the Tribunals may be persuaded to find special circumstances more readily than they would in a multiple redundancy situation. That said it is important to consider the import of 'special', given that speed and secrecy are fairly commonplace in these transfers one would expect a Tribunal to require something over and above the norm to qualify as 'special' and to thus provide a defaulting employer with a defence under Regulation 13(9). In *Bakers' Union v Clarks of Hove Ltd*²⁸ it was stated that the 'circumstances' in question should be special in the sense that there are something 'unforeseen, unexpected, out of the ordinary' (a decision in relation to s.188(7) TULR(C)A 1992). On this analysis a sudden and unforeseen liquidation could constitute special circumstances, whereas if it was obviously coming for a while an employer would have difficulty establishing that the liquidation was unforeseeable. Further it should be noted that even if special circumstances are established the employer must go further and prove that it was not reasonably practicable to comply, or fully comply, with the obligation because of those circumstances: *Union of*

²⁸ [1978] IRLR 366, CA

*Construction, Allied Trades and Technicians v H Rooke & Son Ltd*²⁹ (a decision under the forerunner to s.188 TULR(C)A 1992).

76. It should be borne in mind that Article 7 of the Directive does not provide an employer with a 'special circumstances' defence, which means that it will be open to representatives of employees to argue that the defence under Regulation 13(9) should be interpreted particularly narrowly.
77. In addition the BERR guidance on redundancy consultation³⁰ suggests that the Stock Exchange rules do not preclude employee representatives being informed and consulted in advance of collective redundancies involving price sensitive information. It is likely that the same would apply in the case of information and consultation under TUPE.

g. Consequences of failing to consult

78. The '*remedy for failure to consult and inform*' is a complaint that is presented to an employment tribunal pursuant to Regulation 15(1):
- a. In the case of a failure relating to the election of employee representatives, by any of the employees who are affected employees;
 - b. In the case of any other failure relating to employee representatives, by any of the employee representatives to whom the failure related;
 - c. In the case of a failure relating to the representatives of a trade union, by the trade union; and
 - d. In any other case, by any employees who are affected employees.

²⁹ [1978] IRLR 204

³⁰ www.berr.gov.uk/er/redundancy/consult-p1833a.htm

79. In *Howard v Millrise Ltd t/a Colourflow Ltd (in liquidation)*³¹ the EAT held that where there is no recognised trade union then the employer is duty bound to invite its employees to elect representatives.
80. An employee representative will not have locus to bring a claim directly against a transferee who has failed to provide the information that it is required to give a transferor under Regulation 13(4), such that the transferor cannot properly discharge its duty to provide information to the employee representative under Regulation 13(2)(d). If such circumstances arise then an affected employee representative ought to claim against a transferor for a failure to inform under Regulation 13(2)(d) and then leave the transferor to take whatever action it deems appropriate (presumably contribution proceedings) against the transferee: *Mitie Group v Mullineaux*³².
81. A complaint may be brought to an employment tribunal that there has been a failure to consult 'long enough before the relevant transfer', even though the transfer in question has not yet taken place: *Banking Insurance and Finance Union v Barclays Bank plc*³³. The cause of action accrues when the failure takes place and does not depend upon the relevant transfer actually having taken place. Thus a complaint could be brought for a failure to consult over a proposed transfer that does not in fact actually complete.
82. If a complaint made under Regulation 15 is found to be well founded then the Tribunal may award '**appropriate compensation**' which is a sum that does not exceed 13 weeks' pay as the Tribunal considers just and equitable having regard to the seriousness of the failure of the employer: Regulation 16(3). A week's pay is to be calculated by reference to sections 220 to 228 Employment Rights Act 1996. Note the cap applied under s.227 ERA 1996 (currently £380) will not be applicable to a week's pay for a claim brought under Regulation 15. As to the appropriate date from which the calculation is to commence see Regulation 16(4).

³¹ [2005] ICR 435

³² UKEAT/0708/04/DM

³³ [1987] ICR 495, EAT

83. In *Sweetin v Coral Racing*³⁴ the EAT held that the approach taken by the Court of Appeal in *Susie Radin Ltd v GMB*³⁵, which was a case that concerned the quantum of a protective award made under s.188 TULR(C)A 1992, should also be applied when determining compensation due under Regulation 15. It follows that compensation for failure to inform and consult is penal in nature, the Tribunal will have a wide discretion in each case, the default may vary in seriousness from the technical to the flagrant, deliberateness will be important, as would whether an employer had received legal advice, the proper approach in a case where there has been no consultation is to start with the maximum period and then reduce it if there are mitigating circumstances justifying a reduction. In *UK Coalmining Ltd v NUM*³⁶ (s. 188 case) the tribunal decision that a lack of candour and giving a false reason for the redundancies warranted maximum award was upheld on appeal.
84. Prior to 2006, if compensation was awarded to a trade union or employees on the grounds that a transferor failed to consult, the liability for this award transferred to the transferee. This has been tempered by Regulation 15(10) which makes both the transferor and transferee jointly and severally liable for the compensation. The effect of this Regulation is to incentivise a transferor to comply with the Regulations because a liability for failure to do so will no longer pass exclusively to the transferee. In practice such liabilities are generally dealt with by way of indemnities, given by the transferor to the transferee as part of the relevant transfer, but in circumstances where such indemnities are not given Regulation 15(11) makes the continuing liability clear.

JEFFREY JUPP

JONATHAN BERTRAM

1st November 2010

³⁴ [2006] IRLR 252

³⁵ [2004] IRLR 400

³⁶ UKEAT/0397/06