

PRESS CUTTING
CIPD
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Contractor changeovers still covered by Tupe

'Service provision change' stays within the revised transfer rules and other reforms are added

The Government has listened to the consultation responses it received on its proposed reform of Tupe and will not now be dumping service provision changeovers from the regulations. The reforms that remain should make Tupe easier to work with. No formal date for their implementation has yet been confirmed but it is understood that new regulations are planned for January 2014.

Contractors

The consultation had considered removing service provision changeovers from Tupe on the basis they constitute 'gold plating' of the EU legislation on which the regulations are based. Retaining those provisions is something of a surprise, but will be a considerable relief to those concerned. Removing them would have created enormous uncertainty about when Tupe applies to outsourcing and other transfers of service contracts. There will be a slight tweak to the legislation, following various recent cases, to clarify that for there to be a service provision change, the business activities in question must remain "fundamentally or essentially the same post transfer". Material changes in the nature of the service and the method of delivery may take a switch of contractor outside the scope of Tupe.

Information

Abolishing the requirement for transferors to supply transferees with employee liability information - such as the names, basic employment terms, recent disciplinary and grievance records of transferring employees - had been proposed. But this is to be retained and will need to be complied with no later than 28 days before transfer rather than 14 as currently. This is helpful for contractors, but some will argue 28 days before transfer is still not early enough.

Dismissals

Currently dismissals are automatically unfair when they are 'by reason of' or 'connected with' the transfer. It appears the 'connected with' qualification may be dropped, effectively matching Tupe's wording more closely to EU law. This may give employers greater scope to argue dismissals and contract changes are not prohibited by Tupe if made for other reasons. Amendments will also clarify that unilateral changes permitted by employees' contracts (for example, to their duties, job titles and so on) which could have been made in the absence of a transfer will also be permissible.

Relocation

A dismissal connected with a transfer is automatically unfair unless it can be justified by an ETO reason (an economic, technical or organisational reason entailing a change in the workforce). Hitherto dismissing an employee when a business relocates has not been covered by the ETO defence. Now it will be. However, employers will still need to handle the situation carefully to avoid unfair dismissal claims.

Consultation

Collective consultation is required for redundancy exercises affecting 20 or more employees, entailing 30 or 45 days' minimum consultation depending on the number of redundancies. When the new rules are in force, any Tupe consultation conducted before a transfer that leads to redundancies

will count towards compliance with the obligation to conduct collective redundancy consultation. This will make it easier for transferors and transferees to conduct redundancy exercises in relation to business sales, for example, because of relocation or downsizing.

Other changes

Under the revised rules, terms and conditions derived from collective agreements can be renegotiated one year from the transfer, provided the change is no less favourable overall to employees. Employers will welcome the increased flexibility this provides.

The government has rejected the suggestion that micro businesses (those with fewer than 10 employees) should be exempt from any of the changes being introduced. But these businesses will be able to consult staff directly about TUPE where there is no recognised union or existing employee representatives.

Terms derived from collective agreements will be 'frozen' at transfer. This is consistent with the recent decision in [Alemo-Herron](#), where the European court held that a transferee will not be bound post transfer by any changes to a collective agreement or pay negotiation arrangement to which it is not a party.

Charles Wynn-Evans is a partner and Kate Anderson an associate at Dechert