

Further changes to TUPE

The Collective Redundancies and Transfer of Undertakings (Protection of Employment) (Amendment) Regulations 2014 (“TUPE 2014”) came into effect on 31 January 2014. The first set of amendments are now in force with further changes due to come into force throughout 2014. A new Acas guide to TUPE 2014 changes has also been published which is available [here](#).

Contractual variations

It will continue to be the case that changes to employees’ terms and conditions will be void if the sole or principal reason is the transfer. Previously, changes to terms and conditions for a reason “connected to the transfer” were also invalid but this has now been removed. However, organisations should continue to be cautious when making any contractual change. The BIS guidance states that some changes which were previously regarded as transfer connected may be interpreted as by reason of the transfer. The harmonisation of contractual terms without a business reason remains unlawful.

TUPE 2014 now provides that changes are permissible:-

- where the variation of terms incorporated from a collective agreement takes effect more than one year after the transfer and the new terms are overall no less favourable. What constitutes “less favourable” terms in this context will need to be determined by case law; or
- where collective agreed terms are renegotiated after the transfer, without the transferee’s involvement. In other words, the incoming employer will still be bound by the collective agreement in force at the time of the transfer, but will no longer be bound by changes negotiated and agreed by the outgoing employer after the date of transfer if the incoming employer is not a party to the process.

It remains the position that changes may also be permissible in the following circumstances:-

- the sole or principal reason is an economic, technical or organisational reason entailing changes in the workforce (“ETO reason”) and the employee agrees the change. An ETO reason must involve a change to workforce numbers or job functions; or a change to work location as set out below
- where the contract of employment allows the variation in question.

Change in workplace location

A common change in a transfer scenario is a change to workplace location. The expression “changes in the workforce” now specifically includes a change to the workplace so that a

dismissal due to a change in workplace will not be automatically unfair. However, the fairness of such a dismissal may still be challenged under the ordinary unfair dismissal rules.

Activities

The meaning of “activities” within the Regulations is now “activities which are fundamentally the same as the activities carried out by the person who has ceased to carry them out”. This change reflects existing case law.

Dismissals

It will continue to be automatically unfair to dismiss an employee because of the transfer itself. However, the reference to reasons “connected to the transfer” has been removed. Dismissals may therefore be fair if:

- the reason for the dismissal is an economic, technical or organisational reason entailing changes to the workforce; or
- the dismissal can be shown to be for other fair reasons and the employer followed a fair procedure.

Redundancies

Where an employer proposes to make 20 or more redundancies in a 90 day period, the collective consultation requirements are triggered and a 30 or 45 day consultation must be followed depending on the numbers involved. Where there are fewer than 20 employees being made redundant, there is still a requirement to consult individually but there are no prescribed time limits. In practice, transferees often begin consultation before the transfer and TUPE 2014 now expressly allows for the period of collective consultation to start before transfer and run concurrently with TUPE consultation. The transferor must agree to the pre-transfer consultation but there is no obligation for the transferor to provide information or assistance.

Employee liability information

Transferors are now required to provide transferees with Employee Liability Information 28 days before the transfer rather than 14. Employee Liability Information consist of:-

- the identity and age of the employees who will transfer;
- the information set out in the transferring employees’ written particulars of employment;
- information regarding any collective agreements in place;
- any disciplinary proceedings taken against an employee or grievance brought by an employee in the previous two years;

- any legal action taken by those employees in the previous two years, and any potential legal actions.

Micro businesses

In relation to transfers taking place on or after 31 July 2014, micro businesses (10 or fewer employees) may consult directly with the workforce rather than electing or appointing representatives.

Jane Klauber

Partner

+44 (0)20 8394 6483

Jane.Klauber@russell-cooke.co.uk

This material does not give a full statement of the law. It is intended for guidance only and is not a substitute for professional advice. No responsibility for loss occasioned as a result of any person acting or refraining from acting can be accepted by Russell-Cooke LLP. © Russell-Cooke LLP. June 2014

www.russell-cooke.co.uk