The long-trailed changes to the Transfer of Undertakings (Protection of Employment) Regulations came into force on 31 January 2014, together with updated TUPE guidance. What impact will these changes have on business sales and outsourcing scenarios?

The key changes businesses need to be aware of

For transfers on or after 31 January 2014:

- for there to be a 'service provision change', the activities must be 'fundamentally' the same pre and post transfer
- there will be new tests for making fair dismissals or valid contractual changes and variations are permitted if allowed under the terms of the contract
- dismissals following a post-transfer relocation will not be automatically unfair as changes to the location of a workforce will be within the 'economic, technical or organisational' exception
- transferees can renegotiate employees' contractual terms incorporated from collective agreements, provided it is more than one year after the transfer, the changes are agreed and the rights and obligations under the employees' contract are no less favourable to the employees (when considered together) than those which applied immediately before the transfer
- confirmation that where contracts of employment incorporate provisions of collective agreements which may be agreed from time to time (e.g. future pay rises), the transferee is
not bound by any future changes agreed after the transfer where the transferee is not a party to the collective bargaining for that provision

- a transferee can 'elect' to conduct (or to start to conduct) collective consultation for redundancy purposes pre-transfer (where 20 or more redundancy dismissals are proposed at one establishment). However, the transferor must agree and there are certain notification requirements. The transferee can subsequently 'cancel' this 'election' and any consultation done so far will not count

Plus for transfers on or after 1 May 2014:

- the transferor must provide employee liability information 28 days (rather than 14 days) before the transfer

Plus for transfers on or after 31 July 2014:

- 'micro-businesses' (fewer than 10 employees) can directly inform and consult with employees in certain circumstances where there are no appropriate representatives

**New Service Provision Change definition**

After all the government talk about removing gold-plating and getting rid of the 'Service Provision Change' (SPC) concept, the government conceded that it was actually more of a help than a hindrance.

The SPC concept brings a degree of certainty to parties and it is staying. However, the new regulations confirm that the 'activities' which transfer must be 'fundamentally the same as the activities carried out by the person who has ceased to carry them out'. This new definition applies to transfers occurring on or after 31 January 2014.

Hopefully, the final wording adds clarity and avoids the risk of considering activities which were carried out at any time (in the past), even by different contractors. Practically, the change is unlikely to have a significant impact because it is intended to reflect current case law. Of course, there is still the possibility that parties will try and manipulate the situation to suggest the activities are no longer 'fundamentally' the same but that was always the case.

**Collective agreement changes**

There are two changes in respect of collective agreements. Firstly, the future applicability of terms and conditions 'incorporated from a collective agreement' can be limited post-transfer,
even if the sole or principal reason for the change is the transfer.

However, the changes will only be valid if they take effect:

- more than one year after the date of the transfer;
- the rights and obligations in the employee’s contract, when considered together, are no less favourable to the employee than those which applied immediately before the variation; and
- the change is agreed by the employee in the normal way.

This provision is limited to transfers which take place on or after 31 January 2014 (as is the case for the provisions on changing 'normal' terms not incorporated from a collective agreement).

We may see challenges to this provision because there is some doubt that it is compatible with European law given that it relates to the employee’s contractual terms rather than the terms of a collective agreement.

However, the immediate difficulty employers face is understanding what the 'no less favourable' requirement means. Is this a subjective or an objective test? Unfortunately, the new Guidance does not help. The Guidance only says that it is only the terms incorporated from the collective agreement which the employer can make 'less favourable' rather than other contractual terms. However, an employer can agree new individual beneficial terms to offset the less favourable changes.

Given there is no certainty as to the meaning of the term 'no less favourable', this will be a matter for case law and employers might be reluctant to make changes until this is clearer.

Secondly, there is express confirmation that a 'static' approach will apply to contractual terms incorporated from a collective agreement (typically for pay rises from time to time) where the transferee is not a party to the negotiations post-transfer.

In other words, where contracts of employment incorporate provisions of collective agreements which may be agreed from time to time (e.g. future pay rises), the transferee will not be bound by any changes agreed after the transfer where the transferee is not a party to the collective bargaining for that provision.

This amendment only applies to transfers which take place on or after 31 January 2014. However, the 'static' approach follows the decision by the Court of Justice of the European Union (CJEU) in the case of Alemo-Herron and Others v Parkwood Leisure Ltd, so it seems likely a similar approach would apply to transfers before 31 January 2014 as a result of
European law.

**Employee Liability Information (ELI) extension**

For transfers taking place on or after 1 May 2014, the transferor will have to give ELI information to the transferee 28 days (rather than 14 days) before the transfer. Of course, in most cases, this fall back protection isn't an adequate substitute for contractual obligations and protection.

**Collective redundancy consultation**

There are some key amendments to deal with the practical difficulties businesses face in a transfer which involves a redundancy situation. These issues are particularly acute in relocation, for example an outsourcing to a new provider located elsewhere.

The Trade Union and Labour Relations Consolidation Act 1992 (TULRCA) will be amended to allow the transferee to elect to conduct (or start) collective redundancy consultation pre-transfer (provided both parties agree and the transferee follows a specified notification process).

There is no specific commencement date for these sections other than the general commencement date of the regulations (31 January 2014), so on that date transferees will be able to rely on these provisions to elect to start pre-transfer consultation in respect of subsequent transfers.

This option will potentially save employers time and costs (such as wages and protective awards) as transferees will not need to wait until after the transfer to start a collective redundancy process (as was previously the case).

However, the process is far from simple and the transferee must ensure the consultation is meaningful to avoid protective awards. This may mean that the option of pre-transfer consultation is not as attractive as it first seems.

The first thing to note is that pre-transfer consultation only applies where the transferee is proposing to dismiss as redundant 20 or more employees 'at one establishment' (within a period of 90 days or less) rather than across the whole business. Readers may recall the recent USDAW decision (USDAW v WW Realisation 1 Ltd) where the EAT ruled that the words 'at one establishment' should be deleted from section 188 TULRCA. The effect of deleting these words is that the duty to collectively consult arises when there are 20 or more redundancy dismissals proposed, anywhere in the business (within a period of 90 days).
The USAW case has been referred to the Court of Justice of the European Union but currently there is a different test for when collective redundancy consultation can start and when a transferee can elect to conduct pre-transfer consultation.

Electing to conduct pre transfer consultation

The transferee may elect to consult (or start to consult) representatives of affected transferring individuals about the proposed dismissals before the transfer takes place (pre-transfer consultation).

However, the transferor must agree to it and the transferee must give written notice to the transferor. While the transferor’s agreement to the pre transfer consultation does not need to be in writing, clearly this would be helpful for evidential reasons. Also, it would seem sensible to obtain the transferor’s agreement to the election before issuing the notice.

Once the transferee has made the election to carry out pre-transfer consultation, the provisions of sections 188 (duty of employer to consult...representatives) to 189 (Complaint...and protective award) TULRCA largely apply as if the transferee already employed the transferring individuals and as if those individuals were already employed in the transferee's establishment.

This is helpful in terms of identifying the information to be given in respect of collective consultation, such as the method of selecting the employees to be made redundant. However, the transferee will need to have all the relevant information. For example, if the transferring individuals have any enhanced redundancy rights, that information is needed in order to confirm the proposed method of calculating the redundancy payments.

Who to consult?

The transferee must inform (and if necessary consult) the trade union representatives of the transferring individuals, if the transferor recognises one for those employees.

For the transferee’s current employees, the transferee must consult the trade union representatives of the trade union it recognises for those employees, if there is one.

In any other case, the transferee can choose pre-appointed representatives or newly elected representatives in the usual way and in accordance with the election requirements under TULRCA. This means that the appropriate representatives in respect of the transferring staff could be employees of either the transferor or the transferee, provided they meet the
requirements for employee representatives of the transferring individuals. However, the transferee would still need to ensure the representatives have access to the transferring staff, use of accommodation and other facilities.

Strangely, although the transferor must agree to 'pre-transfer consultation', there is no specific obligation on it to co-operate with the transferee in the process. Instead, the Regulations merely confirm that the transferor 'may provide information and other assistance to the transferee to help' it comply with the collective consultation requirements.

However, the transferee must ensure that the appropriate representatives are allowed access to the affected transferring individuals and that such accommodation and other facilities as may be appropriate are afforded to those representatives. While this clearly requires the transferor's co-operation, the transferor's failure to co-operate will not amount to a 'special circumstances' defence rendering it not reasonably practical for the transferee to comply and avoid a protective award claim.

This is an area where the parties are likely to want to agree co-operation and indemnity provisions, if possible. Also, transferees will need an appropriate paper trail to prove compliance with the requirements. It is up to the transferee to prove that a 'transferor agreed to an election' and that the transferee gave proper notice.

Cancelling pre-transfer consultation

The transferee can cancel a pre-transfer consultation election at any time by giving written notice to the transferor. In that case, anything done under the amended sections 188 to 189 has no effect so far as it was done in reliance on that election. This is helpful if, for example, the transferee believes the consultation is not meaningful or if the transferor is not co-operating.

If the transferee had notified an appropriate representative, a transferring individual or the Secretary of State of the election or the proposed dismissals, the transferee must notify him or her of that cancellation as soon as reasonably possible. Although these notifications do not need to be given in writing, it would still be sensible to give written notice.

One chance

The most important change to the final version of the Regulations is that since the draft Regulations, the option (which was in square brackets) for the transferee to make an unlimited number of elections to start pre-transfer consultation and to make subsequent cancellations has
been removed.

The transferee will only have one opportunity to elect to conduct pre-transfer consultation. A transferee cannot cancel and then restart the process. This may make sense from an employee relations point of view but the transferee must be ready for their one chance at pre-transfer consultation and ensure that the consultation is meaningful.

The transferee must also ensure that it complies with the normal principles for fair dismissal, which will include individual consultation before issuing any notices of dismissal. Also, the transferor cannot rely on the transferees' ETO to dismiss fairly pre-transfer. These points mean that pre-transfer consultation may not be as attractive to transferees as originally envisaged.

**Dismissals and changes to terms**

**New test**

The restrictions in Regulation 4 (changes to terms) and Regulation 7 (protection against dismissal) have been amended. The original aim was to more closely reflect the wording of the Acquired Rights Directive and so reduce the risk of TUPE being interpreted more widely than required.

A 'new test' is introduced for both changes to terms and dismissals, making these void or automatically unfair (as appropriate).

Under TUPE 2006, the protective provisions for dismissals and changes to terms apply if the sole or principal reason for the relevant action is either the transfer itself or in connection with the transfer (unless it is an economic, technical or organisational reason entailing changes in the workforce).

The final Regulations now confirm that the dismissal is automatically unfair or change void where the 'sole or principal reason' for the dismissal or changes is the 'the transfer'. References to the two distinct concepts of the 'transfer itself' and 'in connection with the transfer' have been removed and replaced with a single new concept of 'the transfer'.

This may appear to be a narrower test but the government had indicated that the new test would entail some overlap between the two previous concepts. So, presumably there will be examples from existing case law of the application of the 'in connection test' that could fall within the new test.

It is likely that the 'in connection with the transfer' part of the old test is subsumed into the new
test to a large extent, meaning this change is not as significant as it first seems. The new TUPE Guidance confirms this approach.

The final Regulations also include a reworked economic, technical or organisational (ETO) exception for both changes to terms and dismissals making them not void or automatically unfair where 'the sole or principal reason' is an ETO. (Where the sole or principal reason for the variation of contract is an ETO reason, the employer and employee still need to agree it for it to be valid).

However, the drafting still gives rise to potential confusion because the 'sole or principal' reason could be both the transfer and an ETO reason. The government's intention is to retain the ETO exception and this is confirmed in the Guidance, so presumably the tribunals will deal with the ETO reason as an exception.

The new tests will inevitably lead to (at least) short-term uncertainty and are inevitably fact-specific. However, it is unlikely that these changes will bring much more flexibility for employers and post-transfer 'harmonisation' of terms will remain void.

These new provisions apply where the transfer takes place on or after 31 January 2014 and:

- for variations: the purported variation is agreed on or after 31 January 2014 (or starts to have effect then if not agreed); or
- for dismissals: the date any notice of termination is given by an employer or employee in respect of dismissal is on or after 31 January 2014 (or when termination takes effect if no notice is given).

**Changes permitted by the contract**

Unilateral changes which are allowed in an employee's contract can be made provided 'the terms of that contract permit the employer to make such a variation'.

The example given in the Guidance is a mobility clause. There may be challenges to this provision claiming the drafting goes further than permitted in European case law.

However, employers cannot try and circumvent TUPE protection this way. So, if an employer tries to agree a term giving the employer power to make variations in the future, if the sole or principal reason for agreeing that power is the transfer, this will be caught by the general restrictions on variations of contracts and be void.
Other requirements for changes

The changes on variation ‘do not affect any other rule of law as to whether a contract of employment is effectively varied.’ So, the employer must consult and agree the changes in a reasonable way if required. Of course, with any changes, there may be risks of claims under regulation 4 (9) for a substantial change in working conditions to the material detriment of the employee.

Change of location

The definition of ETO will be amended to include a change of place (as found in the test for redundancy under the Employment Rights Act 1996). This amended ETO definition will apply both in relation to variations and dismissals. Previously there was a particular risk of automatically unfair dismissal claims on a relocation. This is due to the limited interpretation to the ETO exception, so this is a useful change for employers.

Of course, proposed relocations may still amount to an unfair dismissal under normal principles and/or a ‘substantial change in working conditions to the material detriment of the employee’. Additionally, the proposed change will not affect the operation of mobility clauses or normal contractual principles, so relocating on a transfer is still not risk free.

Micro-businesses

For transfers taking place on or after 31 July 2014, micro-businesses will be able to consult under TUPE directly with employees, rather than through representatives, where no union or existing employee representatives are in place and the employer has not invited any of the affected employees to elect employee representatives.

Micro-businesses are those with fewer than 10 employees at the time when the employer is required to give information to the representatives. There may be some dispute about this and scope for the employer to manipulate the number to fall within the exemption (although this might trigger other potential claims for unfair dismissal).

Our employment experts provide some recommended steps businesses should take to comply with the amended TUPE Regulations and to protect their business.

1. Check all relevant dates to confirm whether amended TUPE (or TUPE 2006) applies
2. Prepare to provide employee liability information 28 days before the transfer
3. Consider the risk v benefits of pre-transfer consultation
4. Consider a co-operation and indemnity agreement between the transferor and transferee if conducting pre-transfer consultation
5. Keep a paper trail of all stages of any pre-transfer consultation process
6. Always consider other legal obligations and requirements, such as ordinary unfair dismissal rights or obtaining employee's consent, before relying on the amended TUPE provisions
7. 'Harmonising' employment terms following a transfer will still not be valid.

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