COMPARATIVE LABOR LAW DOSSIER
MODIFICATION OF WORKING CONDITIONS IN THE UNITED KINGDOM

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Introduction

In United Kingdom (hereafter, the UK) labor law there are in reality few limitations or restrictions on employers seeking to modify the terms and conditions of employment of their employees. This is because these matters remain primarily determined by the common law personal contract of employment between an employer and each *individual* employee.

Therefore, subject to statutory minimum standards such as the National Minimum Wage and the working time and paid holiday provision contained in the *Working Time Regulations 1998*, changes in the terms of employment (including, among other things, job functions, workplace/location, pay, hours and shift patterns) are a matter (in theory) for agreement between the two parties alone. Such agreement may arise as a result of express or implied terms in the original contract that permit the employer to make changes without further reference back to the employee(s) in question or as a result of a subsequent lawful and valid variation of the contract. The latter in principle requires the consent of each individual employee, which can include "implied" or "assumed" consent if the employer imposes changes unilaterally and an employee continues to work (depending on the nature of the change) without any or sufficient and continuous protest. In addition, employers can always lawfully terminate a contract of employment with proper notice and offer an employee a new one on changed terms.[1]

Consent may alternatively be obtained via collective bargaining agreements between an employer (or employers' association) and a trade union (or unions), with the substantive terms or outcomes being incorporated into individual contracts (see further Q4 below). This mechanism is, however, much less prevalent than it once was due to the steady decline in union membership over a number of years. This means that only 29.5% of all employees now have their terms and conditions determined to some extent by collective

[1] The notice required is either that stipulated in the contract itself or statutory minimum notice, whichever is longer. Statutory minimum notice is 1 week if an employee has been continuously employed for between 4 weeks and two years, rising to two weeks when the employee completes two years' service with an additional week's notice for every further year's service up to a maximum of 12 weeks' notice after 12 years' employment (see s. 86(1) of the *Employment Rights Act 1996* [hereafter 'the ERA']).

agreement, with this figure being as low as 16.6% in the private sector (the comparable public sector figure being a rather more healthy 63.8%).[2]

What it is also critical to understand is that there is *no* requirement in the UK to seek the prior authority, permission or consent of any external public regulatory authority or institutional body when changes are either contemplated or made by employers. If an employee believes that the employer did not have the *contractual* right to make a change or, for example, that dismissal for refusing to accept changes was "unfair" under *statutory* provisions on unfair dismissal the onus is on him or her to challenge this in, respectively, the civil courts or specialist Employment Tribunals.

We illustrate the relevant and often rather complex legal principles in answering the following questions.

1. Is it possible in the UK for the employer to unilaterally modify the worker's functions? If the answer is yes or if it is only allowed in cases of agreement with workers' representatives, public authority or a third party (for example, Labor Administration or arbitrator), what are the causes that allow this modification? What are the formal or procedural limits that must be followed?

Inherent "duty of adaptability"?

An employer will not generally act in breach of the contract of employment merely by changing working methods or introducing new procedures, as long as the employee's job functions remain essentially the same - for example:

> In *Cresswell v Board of Inland Revenue [1984] IRLR 190* – the Inland Revenue did not breach civil servants' contracts of employment when it asked them to carry out their duties by means of a new computer system instead of the previous manual methods. Although this inevitably meant some alteration to the jobs concerned, these alterations were not outside the original job duties of the grades concerned (clerical assistants and tax officers). The High Court said: "*there can really be no doubt as to the fact that an employee is expected to adapt himself to new methods and techniques introduced in the course of employment… Of course, in a proper case the employer must provide any necessary training or re-training.*" The Court also commented that, while "*a loss of job satisfaction is always regrettable*", this would not by itself provide a cause of action.

[2] Department for Business, Innovation and Skills, *Trade Union Membership 2013 – Statistical Bulletin*, May 2014.

Note that this duty does *not* permit unilateral changes in the specific terms and conditions under which the same work is done (e.g. pay, working hours or geographical location).

Express flexibility clauses

There may, however, be express terms (either written or oral) within the contract of employment that permit an employer to require functional flexibility - for example:

> In *White v Reflecting Roadstuds Ltd* [1990] IRLR 331, the employee's contract contained an express term stating that "*The company reserves the right, when determined by requirements of operational efficiency, to transfer employees to alternative work and it is a condition of employment that they are willing to do so when requested*." This permitted the employer to transfer him to a different department and function even though this also entailed a loss of pay. The Employment Appeal Tribunal (hereafter, the EAT) refused to imply a further contractual term that the employer's power would only be exercised in a reasonable manner and/or that there should be no unilateral loss of pay. Provided the express power had been exercised on "*reasonable and sufficient grounds*" – here the employee's poor attendance record which was having an adverse impact on other members of the team (including their earnings) in which he worked– there was no breach of contract. Unless a decision to exercise an express flexibility power was entirely "capricious" or "perverse", in matters of reorganization "*it* [was] *for management to reach the decisions provided that they* [did] *so responsibly*".

2. Is it possible for the employer to unilaterally modify the employee's workplace? If applicable, what are the causes that allow this modification? What are the formal or procedural limits that must be followed?

Express mobility clauses

If there is an express mobility clause or term in the contract of employment the employer is perfectly entitled to require an employee to move their geographical location or place of work in accordance with it – for example:

> In *Home office v Evans and another* [2008] IRLR 59, two employee Immigration Officers' contracts were found to contain an express clause to the effect: "*If your status is as a mobile member of staff you are liable to be transferred to any Civil Service post, whether in the UK or abroad*." According to the Court of Appeal,

> their resignation from their employment when they were instructed to move their work location from Waterloo International Terminal in London to London Heathrow Airport was not a "constructive" or "deemed" dismissal in response to any allegedly repudiatory (that is, a very serious or fundamental) breach of contract by the employer. The employees accordingly had no cause of action or remedy in this case.

But note that express mobility clauses may give rise to indirect sex discrimination under the *Equality Act 2010* if they put or likely to put women "*at a particular disadvantage*". If this is the case, the employer will have to justify them on the basis that they were a proportionate means of pursue a legitimate business aim (see the Court of Appeal in *Meade-Hill and another v British Council* [1995] IRLR 478).

Implied terms controlling exercise of express powers?

The exercise of such express powers may also be subject to *implied* terms (whether based on the facts of individual cases or implied by the judiciary as being characteristic of *all* employment contracts) that regulate the manner in which express power can properly be exercised – for example:

> In *United Bank Ltd v Akhtar* [1989] IRLR 507, the employee's contract of employment contained the following express term: Mr. Akhtar's contract of employment contained a mobility clause in the following terms: "*The bank may from time to time require an employee to be transferred temporarily or permanently to any place of business which the bank may have in the UK for which a relocation or other allowance may be payable at the discretion of the bank.*" On Tuesday 2 June 1987, he was informed orally that he was to transfer from his Leeds branch to a branch in Birmingham (almost 150km away) the following Monday (8 June), with this being confirmed in writing only on Friday 5 June. The employer refused to postpone the transfer or allow Mr. Akhtar to take annual leave to sort out his affairs and make the move. The EAT held that this breached implied terms of fact to the effect, among other things that: the employer should not act in a way that effectively prevented Mr. Akhtar from complying with his express contractual obligations; should have given him reasonable notice of the move; should not have refused to exercise its discretion in respect of relocation allowances. The employer was also in breach of the fundamental general implied duty in law not, without reasonable and proper cause, to act in a manner calculated or likely to destroy or seriously damage the relationship of trust and confidence between employer and employee.

Implied mobility clauses

In certain circumstances, UK courts and tribunals may decide that it is *necessary* on the facts a particular case to *imply* a mobility clause or term into a contract of employment, subject to qualifications of reasonable distance and reasonable notice of change (see the Court of Session in *Prestwick Circuits v McAndrew* [1990] IRLR 191). For example:

> In *Jones v Associated Tunnelling Co Ltd EAT [1981] IRLR 477*, the employer was a company that undertook bunkering and tunneling work on a job-by-job contract basis at various National Coal Board mining sites. The employee worked for just under 5 years at one site about two miles from his home and then moved to work at another site some 12-13 miles from his home. When the company's contract at the latter site ended, Mr. Jones was directed to move to a third site equally close to his home. He refused and said that his one and only place of work was the site at which he was working at any given point in time. The company argued that it had introduced a UK-wide mobility clause about seven years earlier (see further below). The EAT rejected both these contentions. But, it continued, a contract of employment "*cannot simply be silent on the place of work*" and it was necessary to imply some term in this case in order to give it "business efficacy". Applying these principles –and looking at, among other things, the peripatatic nature of the company's business and the fact that Mr. Jones had moved between sites on a previous occasion without protest– the EAT concluded that the employer should have *some* power to move his place of work "*and that the reasonable term to imply (as the lowest common denominator of what the parties would have agreed if asked* [at the start of the employment relationship]*)* [was] *a power to direct Mr. Jones to work at any place within reasonable daily reach of* [his] *home*."

Note, however, that such a term will *not* be implied simply because it would merely be reasonable (or convenient to the employer) to include it (see the EAT in *Aparau v Iceland Frozen Foods plc* [1996] IRLR 119). *Necessity* is the touchstone here.

Implied consent by conduct?

The EAT in *Jones* also addressed the issue of the UK-wide mobility clause purportedly introduced by the employer and further commented:

> "*The extent to which an employee may be said that "to imply an agreement to vary or to raise an estoppel against the employee on the grounds that he has not objected to a false record by the employer of the terms actually agreed is a course which should be adopted with great caution. If the variation relates to a matter*

> *which has immediate practical application (e.g. the rate of pay) and the employee continues to work without objection after effect has been given to the variation (i.e. his pay packet has been reduced) then obviously he may well be taken to have impliedly agreed. But where… the variation has no immediate effect the position is not the same… it is asking too much of the ordinary employee to require him either to object to an erroneous statement of his terms of employment having no immediate practical impact on him or to be taken to have assented to the variation.*"

On this issue see also *Henry and others v London General Transport Services Ltd* [2002] IRLR 472 in Q4 below.

3. Is it possible for the employer to unilaterally decide a permanent or temporary transnational geographic mobility? In that case, what are the causes that allow this modification? And what are the formal or procedural limits that must be followed?

See the immediately preceding section – in essence the same *contractual* principles apply…

4. Is it possible for the employer to unilaterally modify the regulation established in collective bargaining agreements regarding working conditions (working hours, salary, holidays…)? If applicable, what are the causes that allow this modification? And what are the formal or procedural limits that must be followed?

In the UK there is a *statutory* presumption that collective agreements *do not* form legally binding and enforceable contracts between the trade union and employer parties involved, unless the parties expressly agree the contrary in writing[3] (which almost *never* happens in practice).

However, provisions in collective agreements that are deemed to be "apt" or "appropriate" for incorporation may take effect as terms of the individual contracts of employment of the employees covered by them (normally in specified grades, sections, or workgroups –note that in the UK unions do not, as such, bargain solely on behalf of their members in any agency sense). These are normally substantive (and not procedural) terms that are capable of impacting on the working conditions of the employees affected (see, for example, the Court of Appeal in *Malone v British Airways plc* [2011] IRLR 32). Such terms may be either expressly or impliedly incorporated into

[3] See s.179 of the *Trade Union and Labour Relations (Consolidation) Act 1992*.

individual contracts or may on occasion be so incorporated as a result a long standing custom and practice of collective bargaining.

These principles apply equally to changes in terms and conditions, including collective agreements that entail *detrimental* changes in pay or other elements of remuneration – for example:

> In *Henry and others v London General Transport Services Ltd* [2002] IRLR 472, the Court of Appeal held that collectively agreed changes to, among other things, basic pay rates, hours of work, holidays, sick pay, and overtime rates, leading to overall reductions in remuneration were either implied into the contracts of employment of the employees covered by "custom and practice" (though this might have required a ballot of employees) or, failing this, had been "impliedly" incorporated or "affirmed" by their conduct. In relation to the latter, although there had been some objection expressed in petitions by certain groups of the employees affected when the terms were first imposed by the employer they had then worked on for almost two years under those without further significant or continuous protest before commencing (failed) legal proceedings.

Absent such variations, however, an employer that seeks unilaterally to impose detrimental changes to terms and conditions previously incorporated from collective agreements into individual contracts of employment will be in breach of those contracts. If this leads to cuts in pay, employees may seek remedies for unlawful or unauthorized deductions from pay under part II of the ERA in an Employment Tribunal or claim in debt or damages for breach of contract in the normal civil courts (on the latter see, for example, *Burdett-Coutts and others v Hertfordshire County* Council [1984] IRLR 91 (High Court) and *Rigby v Ferodo Ltd* [1987] IRLR 516 (House of Lords)).

5. Is it possible for the employer to unilaterally modify the regulation of working conditions (working hours, salary, holidays…) not established in collective bargaining agreements? If applicable, what are the causes that allow this modification? And what are the formal or procedural limits that must be followed?

See Q1 and 2 above – in essence the same contractual principles apply (with terminology suitably modified). By way of example:

> In *Batemen v Asda Stores Ltd* [2010] IRLR 370, the company sought to harmonize the structure of pay and work conditions for all its employees. Following an extensive consultation process, almost half of the employees

affected still refused to consent individually to the changes and the company imposed them, relying on the following provision contained in its Staff Handbook: "*The company reserves the right to review, revise amend or replace the content of this Handbook, and introduce new policies from time to time to reflect the changing needs of the business and to comply with new legislation…*" The EAT held that these provisions formed part of the express terms of the employees' contracts of employment and that the employer was therefore entitled "*to introduce the new regime without first obtaining the consent of the* [employees]". There was no evidence that the employer "*had acted capriciously, or arbitrarily, or in any way breached mutual trust and confidence, in imposing the* [new regime]…"

6. With regard to modification of working conditions (functions, geographic mobility, working time, salary, holidays…), is there a different treatment depending on the size of the company? If applicable, what is the different regulation?

No. There is in principle no difference in UK Labor Law in relation to these issues in the treatment of employers depending on their size…

7. With regard to modification of working conditions (functions, geographic mobility, working time, salary, holidays…), is there a different treatment in the event of business transfers (when the modification of working conditions is needed to cause the transfer)?

Yes. There is some modification of the principles considered hitherto in the context of business transfers. Regulation 4(4) of the Transfer of Undertaking (Protection of Employment Regulations 2006 (hereafter, TUPE).[4] This renders void variations of the contract of employment the sole or principal reason for which was "the transfer". Such changes will not, however, be void if they are: (i) unrelated to the transfer; or (ii) integrally related to the transfer but made for an "economic, technical or organizational reason entailing changes in the workforce" (hereafter an ETO reason)[5] and either consensually agreed or an employee's contract permits such a variation. An ETO reason

[4] The forerunner to these Regulations was enacted in the UK in 1981 in order to implement the original European Union (then known as the European Economic Community) "*Acquired Rights" Directive* [No.77/187/EEC - see now Council Directive 2001/23/EC].

[5] See appendix 1 below for more detail on the meaning of 'ETO reason' culled from Department for Business, Innovation and Skills, *Employment Rights on the Transfer of an Undertaking: a guide to the 2006 TUPE Regulations (as amended by the Collective Redundancies and Transfer of Undertakings (Protection of Employment) (Amendment) Regulations 2014) for employees, employers and representatives*, January 2014.

can now include a change to the place where employees are employed by the employer to carry on the business of the employer or to carry out work of a particular kind for the employer

The prohibition also does not apply in respect of a variation of the contract of employment in so far as it varies a term or condition incorporated from a collective agreement, provided that:

(a) The variation of the contract takes effect on a date more than one year after the date of the transfer; and
(b) Following that variation, the rights and obligations in the employee's contract, when considered together, are no less favorable to the employee than those which applied immediately before the variation.[6]

8. With regard to modification of working conditions (functions, geographic mobility, working time, salary, holidays…), is there any specialty when the modification of working conditions is intended in an insolvent/bankrupt company?

Yes. Regulations 8 and 9 of TUPE give even greater scope to vary contractual terms and conditions where the transferor employer is subject to insolvency proceedings aimed at rescuing the business as a going concern. If the aim of the insolvency is the liquidation of the transferor's assets the principal provisions of TUPE do not apply at all.[7]

9. The worker affected by a modification of his or her working conditions (functions, geographic mobility, working hours, salary, holidays…), does he or she have the right to terminate the employment relationship with right to compensation?

Yes. Employees can terminate their contracts of employment with or without notice and claim that they have been "constructively" dismissed where the changes imposed by the employer amount to a repudiatory breach of contract. They may then pursue either common law *contractual* remedies for *wrongful* dismissal (with damages in essence limited to the notice period that the employer would have been required to give to terminate the contract lawfully) or, if qualified, a *statutory* claim for *unfair* dismissal (on the latter see the following section). The *Akhtar* case considered in Q2 above is an example of a successful unfair "constructive" dismissal claim.

[6] Ibid.
[7] Ibid – see appendix 2 below for more details on this question.

10. Is there a special judicial procedure to substantiate claims regarding modification of working conditions?

Whether a dismissal is "constructive" (as immediately above) or a direct and express dismissal by the employer, an employee who has two years' continuous service if employed on or after 6 April 2012 (or one year's service if employed before that date) may make a claim of unfair dismissal to an Employment Tribunal under Part X of the *ERA 1996*.

The burden then falls on the employer to show a *potentially* fair reason for dismissal, which in cases of the modification of working conditions is likely to fall under the rubric of "*some other substantial reason*" (hereafter, SOSR) that *could* justify dismissal in the circumstances. An SOSR reason must be more than "trivial" or "unworthy". A reorganization entailing changes in working conditions is likely to amount to an SOSR if there is a sound business reason for it –that is, a reason which management thinks on reasonable grounds is sound. Whether or not the dismissal is unfair (that is, unreasonable) is determined by the Tribunal on a "neutral" burden of proof.

Where an employee is dismissed for refusing to accept a change to his or her contract, Tribunals must not concentrate on the reasonableness of the employee in rejecting the new terms offered. The focus is therefore on the reasonableness of the employer's decision to dismiss (which includes consideration of the likely impact on employees) and it is not necessary for the employer to show that the situation of the business was so desperate that the only way of saving it was to impose changes (including pay cuts). It will also be relevant to consider how many of the other employees affected have agreed to changes. Broadly speaking, when a Tribunal is determining the fairness of a reorganization dismissal, the normal considerations of reasonable procedure, including consultation, warning and attempts to resolve the issues before dismissal, will be taken into account.

In 2013/14, the median award of compensation in *all* successful unfair dismissal claims were only £5,016 and the average award £11,813. Reinstatement or re-engagement was ordered in only 13 cases (just 0.1% of all cases that went to a tribunal hearing).

11. Other relevant aspects regarding modification of working conditions

As indicated in our introduction, in the UK the onus in challenging changes to or the modification of working conditions falls squarely on the individual employee. This raises significant issues of access to justice and the effective enforcement of employment rights, especially in situations where individuals are unable to access the

support of a trade union. The introduction of Employment Tribunal fees on 29 July 2013[8] has only exacerbated these problems. Worryingly, the latest available statistics[9] demonstrate that there was a 70% overall drop in claims to Tribunals comparing April–June 2014 with the same quarter in 2013.

12. Appendix

Appendix 1: "Economic, technical or organizational" reasons entailing changes in the workforce

As mentioned above, the employer and employee can agree to vary terms and conditions if the sole or principal reason for the variation is an economic, technical or organizational reason entailing changes in the workforce.

a. What is an "economic, technical or organizational" reason?

There is no statutory definition of this term, but it is likely to include: (a) a reason relating to the profitability or market performance of the new employer's business (i.e. an economic reason); (b) a reason relating to the nature of the equipment or production processes which the new employer operates (i.e. a technical reason); or (c) a reason relating to the management or organizational structure of the new employer's business (i.e. an organizational reason).

b. What is meant by the phrase "entailing changes in the workforce"?

There is no exhaustive statutory definition of the term "entailing changes in the workforce" Interpretation by the courts has restricted it to changes in the numbers employed or to changes in the functions performed by employees. A functional change could involve a new requirement on an employee who held a managerial position to enter into a non-managerial role, or to move from a secretarial to a sales position. The amendments made by the 2014 Regulations have added a further situation covered by the phrase, essentially a change to the place where employees are employed to carry on the business of the employer, or particular work for the employer.

[8] For more detail on the new fees regime see Walden, R.M, *Controversial New Fees, Revised Tribunal Rules and Lower Cap for Most on Unfair Dismissal Compensation*, [2013] *Business Law Review* 34/5, pp.195-197.

[9] Ministry of Justice, *Tribunals Statistics Quarterly - April to June 2014*, 11.09.14.

c. Does the scope to vary contracts permit the new employer to harmonize the terms and conditions of the transferred workers to those of the equivalent grades and types of employees they already employ?

No. According to the way the courts have interpreted the Acquired Rights Directive, the desire to achieve "harmonization" is by reason of the transfer itself. It cannot therefore constitute "*an economic, technical or organizational reason entailing changes in the workforce*".

d. Is there a time period after the transfer when it is "safe" for the new employer to vary contracts because the sole or principal reason for the change cannot have been the transfer due to the passage of time?

There is likely to come a time when the link with the transfer can be treated as no longer effective. However, this must be assessed in the light of all the circumstances of the individual case, and will vary from case to case. There is no "rule of thumb" used by the courts or specified in the Regulations to define a period of time after which it is safe to assume that the transfer did not impact directly or indirectly on the employer's actions.

e. How does the Regulations affect annual pay negotiations or annual pay reviews?

These should be little affected, and should continue under the new employer in much the same way as they operated with the transferor employer.

f. What is the effect of a relevant transfer on an employee's terms and conditions which are incorporated from a collective agreement?

Terms and conditions provided for in collective agreements would continue to be and are subject to the provision that purported variations to contracts are void if the sole or principal reason for the variation is the transfer. The 2014 Regulations provide that this restriction does not apply to changes to terms and conditions provided for in collective agreements in the following circumstances: the variation takes effect more than a year after the transfer; and following the variation the terms and conditions of the employee's contract are no less favourable overall than those which applied immediately before the variation.

g. What happens if terms and conditions which were set out in a collective agreement are changed after a year and are overall less favourable?

If the change is overall less favourable and the sole or principal reason for it is the transfer, then it is void.

Appendix 2: The position of insolvent businesses

To assist the rescue of failing businesses, the Regulations make special provision where the transferor employer is subject to insolvency proceedings.

First, the Regulations ensure that some of the transferor's pre-existing debts to the employees do not pass to the new employer. Those debts concern any obligations to pay the employees statutory redundancy pay or sums representing various debts to them, such as arrears of pay, payment in lieu of notice, holiday pay or a basic award of compensation for unfair dismissal. In effect, payment of statutory redundancy pay and the other debts will be met by the Secretary of State through the National Insurance Fund. However, any debts over and above those that can be met in this way will pass across to the new employer.

Second, the Regulations provide greater scope in insolvency situations for the new employer to vary terms and conditions after the transfer takes place… the Regulations place significant restrictions on new employers when varying contracts. These restrictions are in effect waived, allowing the transferor, the new employer or the insolvency practitioner in the exceptional situation of insolvency to reduce pay and establish other inferior terms and conditions after the transfer. However, in their place, the Regulations impose other conditions on the new employer when varying contracts:

- The transferor, new employer or insolvency practitioner must agree the "permitted variation" with representatives of the employees. Those representatives are determined in much the same way as the representatives who should be consulted in advance of relevant transfers (see Q5 for more details).

- The representatives must be union representatives where an independent trade union is recognized for collective bargaining purposes by the employer in respect of any of the affected employees. Those union representatives and the transferor, new employer or insolvency practitioner are then free to agree variations to contracts, though the speed of their negotiations may be faster than usual in view of pressing circumstances associated with insolvency.

In other cases, non-union representatives are empowered to agree permitted variations with the transferor, new employer or insolvency practitioner. However, where agreements are reached by non-union representatives, two other requirements must be met. First, the agreement which records the permitted variation must be in writing and signed by each of the non-union representatives (or by an authorized person on a representative's behalf where it is not reasonably practicable for that representative to sign). Second, before the agreement is signed, the employer must provide all the affected employees with a copy of the agreement and any guidance which the employees would reasonably need in order to understand it; the new terms and conditions agreed in a "permitted variation" must not breach other statutory entitlements. For example, any agreed pay rates must not be set below the national minimum wage; and a "permitted variation" must be made with the intention of safeguarding employment opportunities by ensuring the survival of the undertaking or business or part of the undertaking or business.

What types of insolvency proceedings are covered by these aspects of the Regulations?

These provisions are found in Regulations 8 and 9. Those two Regulations apply where the transferor is subject to "relevant insolvency proceedings" which are insolvency proceedings commenced in relation to him but not with a view to the liquidation of his assets. The Regulations do not attempt to list all these different types of procedures individually. It is the Department's view that "relevant insolvency proceedings" 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 to 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.