COMPARATIVE LABOR LAW DOSSIER
SUCCESSION AND TRANSFER OF BUSINESSES IN THE UK

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Introduction

The UK initially regulated the position of succession and transfer of businesses through the Transfer of Undertakings (Protection of Employment) Regulations 1981, which transposed into UK law the 1977 Acquired Rights Directive. This piece of legislation was later repealed and replaced by the Transfer of Undertakings (Protection of Employment) Regulation 2006 (hereinafter, TUPE 2006), which updated the UK's protection in light of the updated Council Directive 2001/23/EC of 12 March 2001 on the approximation of the laws of the Member States relating to the safeguarding of employees' rights in the event of transfers of undertakings, businesses or parts of undertakings or businesses.

This effectively ensures that the rights and obligations of employment transfer when a relevant transfer takes place, with special provision made for companies that are insolvent, with the unfair dismissal system offering protection against dismissals that are as a direct result of a transfer (unless in certain accepted situations).

1.b. What is the national law that implements the Council Directive 2001/23/EC?

The obligations contained within Directive 2001/23/EC are currently implemented in the UK through the Transfer of Undertakings (Protection of Employment) Regulations 2006 (hereinafter TUPE 2006). TUPE 2006 were updated and amended in 2014 by the Collective Redundancies and Transfer of Undertakings (Protection of Employment) (Amendment) Regulations 2014.

2. What are the situations that determine the situation of «transfer of businesses»? How does the legal system in your country regulate the phenomenon of a transfer of business established in a collective bargaining agreement? And how does it regulate the situation of transfer of business derived from a transfer of a group of workers?

Protection under the UK's TUPE 2006 is dependent on the existence of a 'relevant transfer', which is considered across two different situations:

1. Transfer of an undertaking, business or part of an undertaking or business (Regulation 3(1)(a) TUPE 2006)
2. Service Provision Change (Regulation 3(1)(b) TUPE 2006).

1. Standard relevant transfer

The position where the entire business is being transferred does not generally cause any problem in practice. The key question is whether the business is retaining its identity after the transfer. Accordingly, a test that has developed in this respect is whether the essential business activity is carried on by the new owner (see Kenny v South Manchester College [1993] IRLR 265). Factors to be considered include:

- Nature of the undertaking concerned, in particular whether it is labour intensive or asset-reliant.
- Whether tangible assets were transferred.
- The value of intangible assets at the time of transfer, and whether these are being transferred.
- The extent of employee transfers.
- Whether customers or customer goodwill was transferring.
- The degree of similarity of the business post-transfer with that pre-transfer.

Transfers of part of a business are also covered, so long as it is a recognized and identifiable part of the business as a whole. In such circumstances, in line with the ECJ decision in case 186/83 *Botzen* [1985] ECR 519, employees assigned to this part of the business will be transferred. Such a question is a question of fact.

2. Service provision change

A service provision change is defined as covering three categories:

- Activities cease to be carried out by a person ("a client") on his own behalf and are carried out instead by another person on the client's behalf ("a contractor");
- Activities cease to be carried out by a contractor on a client's behalf (whether or not those activities had previously been carried out by the client on his own behalf) and are carried out instead by another person ("a subsequent contractor") on the client's behalf; or
- Activities cease to be carried out by a contractor or a subsequent contractor on a client's behalf (whether or not those activities had previously been carried out by the client on his own behalf) and are carried out instead by the client on his own behalf

This covers situations described as first generation contracting out, second generation contracting out, as well taking services back in-house from a previous outsourced position.

Where the transfer is based on service provision change, there a number of condition, in addition to satisfying the above definition, that need to be satisfied, before it will be considered to be a relevant transfer for the purposes of attracting transfer of undertakings protection. These are listed at Regulation 3(3), and cover:

(a) …immediately before the service provision change—
  (i) there is an organised grouping of employees situated in Great Britain which has as its principal purpose the carrying out of the activities concerned on behalf of the client;
  (ii) 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 event or task of short-term duration; and
(b) the activities concerned do not consist wholly or mainly of the supply of goods for the client's use.

The focus under this form of transfer is on the activity itself rather than on the economic entity, as required under the standard transfer situation, discussed above.

3. Is the dismissal which its sole cause is the transfer of the business considered null/void (in the sense that the only effect is the worker's reinstatement)?

Regulation 7 of TUPE 2006 explains the legal position where a transferring employee is dismissed for a reason connected to the transfer, it being stated that:

> Where either before or after a relevant transfer, any employee of the transferor or transferee is dismissed, that employee shall be treated for the purposes of Part X of the 1996 Act (unfair dismissal) as unfairly dismissed if the sole or principal reason for his dismissal is—
> (a) The transfer itself; or
> (b) A reason connected with the transfer that is not an economic, technical or organisational reason entailing changes in the workforce.

This indicates that any such dismissal, unless an economic, technical or organizational reason exists (considered below), will be automatically unfair.

Lord Slynn answered the question concerning whether such a dismissal would be considered null and void when giving judgment in *Wilson v St Helen's BC* [1999] 2 AC 52, when he observed that:

> "[Regulation 7 of TUPE 2006 seems] *to me to point to the dismissal being effective and not a nullity. If there is no dismissal there cannot be compensation for unfair dismissal. It is because the dismissal is effective that provision is made for it to be treated as unfair for the purposes of awarding compensation under employment legislation* […] *It follows in my opinion that under the Regulation the dismissals are not rendered nullities; nor is there an automatic obligation on the part of the transferee to continue to employ –to find work for– the employees who have been dismissed*."

Consequently, dismissals of affected employees for reasons connected to a transfer will not be null and void. Instead they will be considered unfair dismissals.

The position regarding dismissals for a reason connected to the transfer but which are made for an ETO reason will also be considered under the unfair dismissal regime. Regulation 7(2) TUPE 2006 provides that such dismissals, where the ETO entailed a change in the workforce of either the transferor or the transferee, will be treated as either being for redundancy reasons, or a dismissal for some other substantial reason, both of which require the transferee to establish that dismissing for that potentially fair reason was actually fair; this also introduces the need to follow a fair procedure.

4. Does the legal regulation allow the transferee to modify the labor conditions of the workers affected by the transfer when these labor conditions are regulated in a collective bargaining agreement?

The position concerning collective bargaining agreements upon a relevant transfer was subject to change under the recent 2014 Regulations, noted above.

The general position is that collective agreements made between the transferor with a recognized trade union in respect of employees that are to be transferred, which are in existence at the time of the transfer, will be transferred and have effect as if the transferee was party to the agreement. This is contained at Regulation 5 of TUPE 2006. The rights contained within these collective agreements are therefore protected; however, any rights contained within collective agreements that have not yet come into force at the date of transfer, according to Regulation 4A TUPE 2006, will not transfer and have effect, unless the transferee is a party to the collective agreement (this is a new

insertion into TUPE 2006 and reflects the position following the CJEU's decision in Case C-426/11 *Alemo-Herron v. Parkwood Leisure Ltd*).

Variations of terms contained within collective bargaining agreements are dealt with by Regulation 4(5B) TUPE 2006. This provision allows transferees to renegotiate such terms, so long as the variation takes effect more than one year after the date of transfer, and the positions following variation does not introduce less favourable terms and conditions for the employee. This provision only applies to transfers that have taken place after 31 January 2014.

5. Does the legal regulation allow the modification of the labor conditions of the workers affected by the transfer when they are not regulated in a collective bargaining agreement?

The general position in the UK is that any modifications of the employment contract outside of a collective agreement that has a causative link to the transfer, or is for a reason connected to the transfer will be void pursuant to regulation 4(4) TUPE 2006, unless it is established that the modification is for an economic, technical or organizational reason (ETO). In circumstances that an ETO is established the employer and employee are either free to reach a bilateral agreement to change the terms and conditions (Regulation 4(5)), or alternatively the employer can invoke a contractual term, should one exist, enabling such modification. In other words, the employer is not able to unilaterally vary the terms and conditions of the contracts of affected employees. This effectively mirrors the seminal decisions by the ECJ of *Foreningen af Arbejdsledere I Danmark v. Daddy's Dance Hall A/S* [1988] IRLR 315 and *Rask and Christensen v. ISS Kantineservice A/s* [1993] IRLR 133.

It has been accepted that variations that are to the benefit of the employee will not be held to be void (*Regent Security Services Ltd v. Power* [2007] IRLR 226).

An understanding of the ETO reason is, as intimated above, crucial for determining when variations to the terms and conditions of an affected employee can be made and when a transferred employee can be dismissed. The concept, although appearing to be theoretically very wide, is generally restricted in practice. Government guidance, through DBIS, indicates that:

- Economic reasons relate to the profitability or market performance of the transferee's business
- Technical reasons relate to the nature of the equipment or production processes
- Organizational reasons relate to the organizational or management structures.

6. What is the regulation regarding pension commitments that the workers affected by the transfer had with the transferor?

The position with regards pensions on transfer is dealt with at Regulation 10 of TUPE 2006, which indicates that occupational pension schemes are not transferred. This is explained on two grounds: firstly, it is not based on contractual agreement, but is a creature of statute, and, secondly, it was initially outside the scope of the Acquired Rights Directive; however, although this is the general position, s.257 of the Pensions Act 2004 does make it clear that on a relevant transfer, affected employees who are currently a member of a scheme operated by the transferor, must ensure that the transferred employee is made eligible to join a scheme operated by the transferee or a stakeholder agreement. This is further expressed under the Transfer of Undertakings (Pension Protection) Regulations 2005, which provides that the minimum a transferee is obliged to do is to match the employee's contribution, up to a maximum of 6% of salary into the alternative.

7. Is the transferee liable for the labor debts (wages, Social Security...) that the workers affected by the transfer had with the transferor?

The transfer of liabilities in the UK is dealt with by Regulation 4 of TUPE 2006; with regulation 4(1) providing that the contract of employment "…*shall have effect after the transfer as if originally made between the person so employed and the transferee*". This is further complemented by Regulation 4(2) which states that on completion of the transfer "…*all the transferor's rights, powers, duties and liabilities*" will be transferred to the transferee.

What this all means is that there is automatic transfer of all existing terms and conditions of employment, along with any accrued rights and liabilities, which will include matters such as continuous service, which is important in the context of a number of UK statutory employment rights such as redundancy. Thus liabilities concerning salaries and economic compensations are covered and transferred.

An important obligation is placed on the transferor with respect existing liabilities, with the transferor obliged to notify the transferee as to his rights, duties and liabilities under or in connection with the employment contract of any employee being transferred pursuant to Regulation 11 and 12 of TUPE 2006. This will include:

- The identity and age of the employee
- Information contained within their statutory statement of employment particulars

- Information relating to any formal disciplinary action or grievances that have been raised in the previous two years
- Information of any court or tribunal case, claim or action brought by an employee against the transferor, within the previous two years or that the transferor has reasonable grounds to believe that an employee may bring against the transferee, arising out of the employee's employment with the transferor; and
- Information of any collective agreement which will have effect after the transfer.

There is further requirement to provide information on any employee who has been unfairly dismissed because of the transfer. In circumstances where there is an unfair dismissal in connection with the transfer the affected employee's right of action will lie against the transferee, as was held by the EAT in *Allen v. Stirling DC* [1994] ICR 434; as this is a liability which transfers.

The employee liability information should contain reference to a date at which the information is up to date, which is not to be more than 14 days before the date on which the transferee is to be provided with it (which in general is not less than 14 days before the relevant transfer).

There is an exception to the transfer of liabilities position outlined above, this being in relation to relevant debts owed to the relevant employees in circumstances of insolvency of the transferor. Such debts will not transfer to the employee but will be met by the Secretary of State.

8. If among the workers affected by the transfer are workers' representatives, do they maintain their representative status in the company of the transferee?

The UK's TUPE 2006 is quiet on the position of workers' representatives post-transfer, and as such their position of continuing as such is unclear.

9. Does the legal regulation include information and consultation rights in favor of the workers affected by the transfer and/or their legal representatives in the company of the transferee and/or the transferor? What are the consequences of a breach of these information and consultation obligations?

A duty to inform and consult with employee representatives exists pursuant to regulation 13, 15 and 16 of the TUPE regulations. The duty is imposed on both the transferor and transferee employee. Unlike the position that existed under the 1981 Regulations the transferor and transferee will be jointly and severally liable to pay compensation should there be a failure to comply with this obligation.

"Appropriate representatives of any affected employees" is defined at Regulation 13(3) to cover representatives from a recognized trade union, or representatives that have been appointed or elected by the affected employees, either for this purpose or other purposes, so long as they have authority to receive information and consult about the transfer on the affected employee's behalf. However, if the affected employees fail to elect appropriate employee representatives then the employer is obliged to provide information direct to each of the affected employees, this position being reflected in Regulation 13(10) and 13(11) TUPE 2006.

Regulation 13(1) TUPE 2006 defines an "affected employee" widely to not only mean employees that are being transferred alongside the business, but also includes any other employees, of wither the transferor or the transferee, who may also be affected by any measures that are taken in connection to the transfer.

There is special provision, under Regulation 13A TUPE 2006, which enables direct information and consultation with employees in micro-businesses: this will apply to businesses with fewer than 10 employees, where there are no appropriate representatives, and affected employees have not been invited to elect representatives.

- Information obligations

Workers' representatives have the right to be informed prior to the transfer regarding the following:

(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;
(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 measures will be taken, that fact; and
(d) Where the employer is the transferor, the measures in connection with the transfer he envisages the transferee will take in relation to any affected employees who will become employees of the transferee, or, if he envisages no such measures will be taken, that fact.

This information is to be provided "*long enough before a relevant transfer to enable the employer of any affected employees to consult the appropriate representatives of any affected employees*". Interestingly, it has been suggested that this does not strictly

introduce a statutory requirement to consult but only to provide information; however, the reality has been interpreted by case law, including *Cable Realisations Limited v GMB Northern* [2010] IRLR 42, to ensure information is provided in good time to enable voluntary consultation to take place, which in practice requires the employer to consult with affected employee representatives "*as soon as reasonably practicable after the election of the representatives*". The Regulations are quite on any timetable for the information and consultation process.

- Consultation obligations

According to Regulation 13(6) TUPE 2006, an employer of an affected employee who envisages that he will take measure in relation to a transfer that impact upon that employee will consult with the appropriate representatives, with the aim of reaching an agreement on the measures to be adopted. There is a clear need, pursuant Regulation 13(7) to at least consider representations forwarded by employee representatives, with a need to formally reply to them, with reasons attached should the representations be rejected.

- Remedies

Regulation 15 TUPE 2006 provides the Employment Tribunal powers to make an order of declaration and an order for compensation where there has been a failure to inform or consult.

Where there has been a complaint of a failing in this regard, and it is accepted by the Employment Tribunal then it must make a declaration reflecting this, before turning to consider its discretionary power in relation to compensation.

Regulation 16(3) provides the position that, in addition to a declaration, the Tribunal may award "appropriate compensation", which is defined as "*…such sum not exceeding thirteen weeks' pay for the employee in question as the tribunal considers just and equitable having regard to the seriousness of the failure of the employer to comply with his duty*".

10. Is there a special regulation if the transfer of the business takes place in a context of a bankruptcy proceeding?

The 1981 Regulations were unclear on the position of insolvent employers; however, this was clarified by TUPE 2006. Regulation 8(7) brought into effect the derogation contained within Article 5(1) of Directive 2001/23/EC, which enabled the exclusion

of the provisions of transfer of businesses when the company in question is in bankruptcy proceedings or analogous insolvency proceedings.

Regulation 8(7) TUPE 2006 provides that:

> "*Regulations 4* [transfer of employment contracts and liabilities] *and 7* [control of dismissals of employees because of relevant transfer] *do not apply to any relevant transfer where the transferor is the subject of 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.*"

This means that the protections will not apply where there are insolvency situations, such as compulsory liquidations, where the purpose is to bring the business to an end; however, conversely, the protections will apply where the purpose of the liquidation is to rescue the business (as was considered to be the correct position by the Court of Appeal in *Key2Law (Surrey) LLP v De'Antiquis* [2011] EWCA Civ 1567).