

TUPE Regulations: More changes ahead?

23 May 2024

In May 2023, the UK Government announced proposed changes to the Transfer of Undertakings (Protection of Employment) Regulations 2006 (TUPE) as part of its policy paper "Smarter regulation to grow the economy".

The aim of the policy is to reduce regulatory burdens and drive economic growth. As part of this, changes were proposed that allowed small businesses to consult directly with employees on TUPE transfers (if there are no existing employee representatives in place) and permitting businesses of any size to consult employees directly where a transfer of a small number of employees is proposed. These changes have been adopted and will apply to transfers taking place on or after 1 July 2024.

The government has now also announced a further consultation on proposals to reaffirm that TUPE only applies to employees and to prevent employees from potentially being transferred to more than one employer when a business is split between multiple employers upon transfer.

Definition of employee

The proposed changes to the definition of "employee" in the TUPE regulations aim to clarify that workers are not protected by the regulations. This is in response to the 2019 employment tribunal decision in **Dewhurst v Revisecatch Ltd t/a Ecourier**, which held that workers were covered by the Acquired Rights Directive from which the TUPE regulations derive. Although only a first instance decision and therefore not binding on other tribunals, the decision creates risk and uncertainty as it potentially means that liabilities, such as holiday pay for workers, transfers to the transferee. There would also be an obligation to inform and consult with workers and the risk of a protected award in the event of breach.

The proposed amendment aims to remove ambiguity and provide clarity for employers involved in TUPE transfers.

Multiple transferees

In addition, the government proposes to clarify that an employment contract should only be transferred to one employer and should not be split between multiple employers. This was generally understood to be the position prior to the CJEU decision in **ISS Facility Services v Govaerts** where typically employees transferred to the employer who took the bulk of the services (unless it was so fragmented that TUPE did not apply). However, the CJEU held that it was possible for employees' contracts of employment to be split in proportion to the tasks performed for each company. Obviously splitting contracts in this way can pose difficulties and be impractical for employers and employees.

Under the new proposals, the employers taking over the business or service would be required to agree on who should be responsible for each employee's contract. However, more detail is needed to clarify how the agreement process would work and what the default position will be in circumstances where no agreement is reached.

What does this mean for employers?

Employers involved in transfers, particularly those in sectors such as transport and logistics and managed services where service provision changes are frequent, will no doubt welcome clarity on these points as it should reduce risk. The consultation on the proposed changes is open until 11 July 2024.

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