

EXPLANATORY MEMORANDUM TO
THE COLLECTIVE REDUNDANCIES AND TRANSFER OF UNDERTAKINGS
(PROTECTION OF EMPLOYMENT) (AMENDMENT) REGULATIONS 2014

2014 No. 16

1. This explanatory memorandum has been prepared by the Department for Business Innovation and Skills (BIS) and is laid before Parliament by Command of Her Majesty.

2. Purpose of the instrument

2.1 These Regulations amend the Transfer of Undertakings (Protection of Employment) Regulations 2006 (“TUPE”) and Chapter 2 of Part 4, and section 299, of the Trade Union and Labour Relations (Consolidation) Act 1992 (“TULRCA”). These Regulations will come into force on 31 January 2014. The amendments to TULRCA are to the requirements regarding consultation on collective redundancies and their application in situations involving a transfer of an undertaking.

2.2 The Regulations are generally intended to provide employers and employees with more clarity and flexibility when involved in a transfer.

3. Matters of special interest to the Joint Committee on Statutory Instruments

3.1 None.

4. Legislative Context

4.1 These Regulations give effect to the Government’s decision to amend TUPE and the operation of the provisions on collective redundancy consultation in TULRCA in their application to a situation involving the transfer of employees from an undertaking (including under TUPE) to an employer who is proposing dismissals.

4.2 TUPE implements in the UK Council Directive 2001/23/EC ((the “2001 Directive”) (which consolidated the Acquired Rights Directive 77/187/EEC as amended by Directive 98/50/EC) 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. These Regulations change the implementation of the 2001 Directive in Great Britain, including by making use of options under that Directive that were not used in TUPE. A Transposition Note is at Annex A. Provisions of Chapter 2 of Part 4 of TULRCA implement in Great Britain Council Directive 98/59/EC on the approximation of the laws of the Member States relating to collective redundancies. These Regulations relate to the implementation of that Directive for situations involving the transfer of employees to the employer (who is proposing dismissals) from another undertaking.

4.3 A Call for Evidence and Consultation identified that TUPE was considered complex and overly restrictive relative to the requirements of the 2001 Directive. The amendments to TUPE and TULRCA are generally intended to reduce restrictions and give more flexibility for transfer situations, while ensuring that there are appropriate protections for affected employees.

5. Territorial Extent and Application

5.1 This instrument applies to all of Great Britain. It does not extend to Northern Ireland. Most of the provisions of TUPE extend to Northern Ireland (although there are some differences in how it applies), and they will continue to apply in Northern Ireland unaffected by these amendments.

6. European Convention on Human Rights

6.1 Jenny Willott, the Minister for Employment Relations and Consumer Affairs has made the following statement regarding Human Rights:

In my view the provisions of the Collective Redundancies and Transfer of Undertakings (Protection of Employment) (Amendment) Regulations 2014 are compatible with the Convention rights.

7. Policy background

- *What is being done and why*

7.1 These Regulations amend TUPE and insert provisions into TULRCA dealing with collective redundancy consultation in a situation involving a transfer under TUPE, or similar type of transfer. TUPE protects employees' employment rights when the business or undertaking for which they work transfers to a new employer. It sets down the circumstances in which employees transfer to the new employer and what happens to associated rights and liabilities. The Call for Evidence and Consultation on TUPE formed part of the Government's Employment Law Review, which is focussed on reforming employment laws so that they support flexibility, effectiveness and fairness in the labour market. The reforms set out in these Regulations are intended to address the problems with TUPE identified in the Call for Evidence and Consultation referred to in paragraph 4.3. Although quantitative information on the number of affected transfers is limited, we estimate that each year around 4% of workplaces with 5 or more employees are involved in such transfers, accounting for a relatively small proportion of the overall labour market.

7.2 One issue consulted on was the test for a TUPE transfer, which is wider than that under the Directive. This is because the definition of a relevant transfer in TUPE covers both the test set out in the Directive (a transfer of a business or undertaking) and also (subject to conditions) service provision changes (SPC). An SPC occurs when there is a change in the provider of a service to a client, either through contracting out, re-tendering a contract or bringing activities back in-house. Some but not all SPCs were covered by the Directive's test so the additional test in TUPE was introduced to provide greater certainty. To maintain this greater certainty, the part of the definition for a transfer which covers SPCs has not been revoked. However, to clarify on the face of the Regulations that differences in the activities performed before and after a change of service may be of such a degree that the change is not an SPC, there is an amendment setting out that the activities after the change must be fundamentally the same as those carried out before it for the SPC definition to apply. This reflects the test set out in case law.

7.3 Other amendments to TUPE reduce the risk that they are interpreted more restrictively than the 2001 Directive requires, while maintaining protection for employees. Parts of regulations 4 and 7 of TUPE on the restriction to changes to terms and conditions and the protection in respect of dismissal respectively, have been reworded so as not to refer to reasons "connected with" the transfer (this wording is not

used in the Directive). The amendments also (similarly to the position prior to these amendments) set out the position where the sole or principal reason for a dismissal or variation of contract is an economic, technical or organisational reason entailing changes in the workforce. In the case of variation of contracts, this allows the employer and employee to agree a variation. The Regulations also make amendments about the meaning of “changes in the workforce” so that a change to the place where employees are employed can be within that definition. In particular, this means that dismissals due to a transfer involving a change in the place of work, which can be fair on the basis of redundancy, are not automatically unfair in a TUPE situation.

7.4 Reflecting many consultation responses identifying the burden placed on employers by the restrictions on varying contracts of employment in transfer situations, the Regulations also give additional flexibilities on varying contracts. The Regulations set out new exceptions to the rule that if the sole or principal reason for a variation of contract is the transfer, the variation is void. There can be a variation if the terms of the contract permit the employer to make such a variation. Also, more than one year after the transfer, terms and conditions incorporated from collective agreements can be effectively varied, provided that the varied terms are no less favourable overall to the employee than before the variation. This will enable employers and employees to consider changes that are mutually beneficial, whilst still affording some protection to employees. Also, both these exceptions are subject to rules of law as to whether a contract of employment is effectively varied.

7.5 There is also an amendment to make express provision on the effect of a transfer on contracts of employment which incorporate provisions of collective agreements as may be agreed from time to time. This issue has been litigated, resulting in the Supreme Court referring the issue to the Court of Justice of the European Union (*Alemo-Herron v Parkwood Leisure C-426/11*). The Supreme Court has yet to give its final judgment. The amendment is to the effect that in such cases, the new employer is not bound by provisions of collective agreements, which are agreed after the date of the transfer if the new employer does not participate in the collective bargaining for the new provision. It will give greater certainty for transfers which take place after commencement of these Regulations.

7.6. These Regulations also amend TUPE with the intention of providing transferees with earlier knowledge of the main transferring liabilities. This will give them more time to plan to be ready to meet obligations to transferring staff on transfer, thus benefitting transferring employees. These Regulations change the usual deadline for the providing the information from not less than 14 days before the transfer to not less than 28 days (the exception relating to special circumstances will continue to apply). Further, to potentially reduce the regulatory burden on micro-businesses (employers with fewer than 10 employees at the time the employer is required to give information), these Regulations enable them to inform and consult directly with affected employees. This is only if there is neither a recognised independent union in respect of the affected employees, nor any existing employee representatives and the employer has not invited the affected employees to elect representatives. This will allow small employers to avoid the bureaucracy of holding elections for employee representative in these circumstances.

7.7 Evidence from the consultation suggested that in some TUPE transfers the transferees conduct pre-transfer consultations on collective redundancies but are unclear whether steps taken pre-transfer can count towards compliance with the rules on collective redundancy consultation. These Regulations therefore amend TULRCA, to set out the circumstances in which a transferee employer may elect to consult on

proposed collective redundancies affecting transferring staff before a transfer of an undertaking to that employer, and how the requirements apply in such a situation. The transferor must consent to such pre-transfer consultation and the consultation must still meet the requirements of TULRCA (which implement Directive 98/59/EC)

- **Consolidation**

7.7 BIS does not intend to consolidate either the TUPE regulations or TULRCA.

8. Consultation outcome

8.1 BIS consulted on a range of proposed changes to the 2006 TUPE regulations over a 12 week period concluding on 11th April 2013. The consultation was open to any interested parties, with relevant documents available online. 178 consultation responses were received through the online survey or individual submissions. The respondents represented a wide range of interested parties, including individual businesses (from micro to large), employee representatives, business representatives, service providers, charities, individuals, local government and employment law specialists.

8.2 In two main areas, the responses were heavily opposed to the policy proposals, and the Government decided against pursuing those proposals. 67% of respondents were opposed to the proposal to repeal the part of the test for a transfer which covers service provision changes (which was introduced in 2006), with 28% in favour. Those opposed to repeal viewed these provisions as providing clarity to employers and employees, leading to a reduction in litigation and risk compared to before 2006. A repeal was considered likely to reverse this. The proposed repeal of the requirement on the transferor to provide particular information about employee liabilities to the transferee, was opposed by 75% of respondents with 16% in favour. Provision of this information by the transferor employer was viewed as a significant, commercially important, part of the TUPE process. Some suggested a strengthening of these requirements to require earlier information provision, for which these Regulations provide.

8.3 The consultation covered a number of other proposed changes to the TUPE regulations, most of which have been made. For these proposals, the percentage of respondents in favour varied from around six in ten to over three-quarters, while those opposed accounted for between one in five and a third. BIS published the Government's Response to the consultation on www.gov.uk website on 5 September 2013, reporting on the consultation responses, and setting out the reform package. Where respondents have given permission, BIS has published responses on this website. Draft regulations were published on www.gov.uk on 31 October 2013 and comments received from interested parties have been considered.

9. Guidance

9.1 There is both basic and detailed guidance available on the www.gov.uk website, which is being updated. New detailed guidance is being published, which covers the amendments and other matters arising out of the consultation. This will be available on www.gov.uk, and we will be providing copies to the libraries of the House.

10. Impact

10.1 An impact assessment was prepared to accompany these regulations and is attached to this memorandum at Annex B. The Regulatory Policy Committee assessed

and validated the equivalent annual net cost to business as an £8.7 million per annum benefit to business.

10.2 The impact on the public sector is estimated in the impact assessment as one-off transition costs of around £0.1 million for training Employment Tribunal judges and writing new guidance, with an ongoing annual benefit due to a reduction of employment tribunal claims of £2.7 million.

11. Regulating small business

11.1 The legislation applies to small business (see the small firms impact assessment in the Impact Assessment).

12. Monitoring & review

12.1 The effectiveness of these Regulations will be reviewed by BIS in 2019, primarily through further consultation with interested parties, such as those responding to the consultation, and the gathering of evidence from businesses that have undergone a transfer.

13. Contact

Andrew Miller at the Department for Business, Innovation and Skills (Tel: 020 7215 6198 or email: Andrew.miller@bis.gsi.gov.uk) can answer any queries regarding the instrument.