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BRIEFING

TRANSFER OF UNDERTAKINGS (PROTECTION OF EMPLOYMENT) REGULATIONS 2006 ("TUPE 2006")

EXECUTIVE SUMMARY

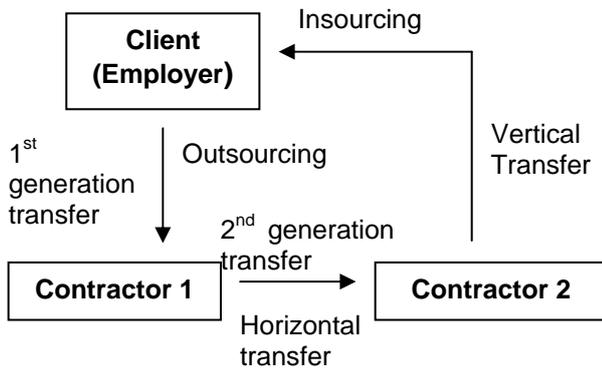
1. The Transfer of Undertakings (Protection of Employment) Regulations 2006 SI 2006 No 246 ("**TUPE 2006**") came into force on 6 April 2006.
2. The DTI has published guidance on TUPE 2006 ("**the DTI Guidance**").
3. TUPE 2006 provide employment rights to employees when their employer changes as a result of the transfer of an undertaking. It implements the European Community Acquired Rights Directive (77/187/EC as amended by Directive 98/50 EC and consolidated in 2001/23/EC).
4. The Transfer of Undertaking (Protection of Employment) Regulations 1981 ("**TUPE 1981**") are revoked. TUPE 1981 will still apply to transfers that have taken place before 6 April 2006 or transfers that take place later that are regarded by a relevant enactment as a relevant transfer within TUPE 1981 (Regulation 21(2)).
5. The main changes in TUPE 2006 are:
 -
 - TUPE is triggered by a "**service provision change**" where there is no transfer of an economic entity;
 - there is a new requirement on a transferor or to provide the transferee with employee liability information (including the names of transferring employees);
 - there is a clarification of the impact of variations of conditions of employment / dismissals which occur prior to or following a transfer;
 - it confirms that the transferor is not liable where a transferee fails to afford transferred employees any given level of occupational pension,
 - a transferor and a transferee are jointly and severally liable for any award of compensation by an Employment Tribunal for failure by the transferor to comply with the new information and consultation requirements;
 - a transferor and a transferee are jointly and severally liable in respect of claims under the Employers' Liability (Compulsory Insurance) Act 1969;

- there is a new provision to facilitate the sale of insolvent businesses as going concerns.

6. In this Briefing a reference to TUPE without a year means either TUPE 1981 or TUPE 2006.

TERMINOLOGY

7. The following diagram sets out some of the key concepts in how TUPE transfers operate.



Practical Implications

- A key process in analysing a proposed transaction is to map out in a contract structure diagram the links between the parties. The more parties/links and levels of relationship the more crucial it is to understand the legal issues that arise.

8. The entity transferring employees under TUPE (whether a contractor or client) is the “**transferor**”. The entity receiving employees in a TUPE transfer (whether a contractor or client) is the “**transferee**”. Each event is a TUPE transfer. There is no such thing as “reverse TUPE”.

WHEN DOES TUPE APPLY?

9. This is the issue at the heart of TUPE and much of the litigation surrounding TUPE. TUPE 1981 applies to the transfer of an undertaking, business or part of an undertaking or business to another employer where there is a transfer of an economic entity which

retains its identity. Since the leading case of *Ayse Suzen* in the European Court of Justice in 1997 there has been uncertainty about whether or not TUPE applies where there are no significant assets in the undertaking which are taken over by the transferee.

10. TUPE 2006 provides for TUPE to apply in 2 situations: -

- Firstly, it retains the TUPE 1981 event of the transfer of an undertaking or business situated immediately before the transfer in the UK to another person where there is the transfer of an economic entity which retains its identity (Regulation 3(1)(a)). An “economic entity” means an organised grouping of resources which has the objective of pursuing an economic entity whether or not that objective is actual or ancillary (Regulation 3(2)).

- Secondly, it introduces a new “service provision change” trigger event (Regulation 3(1)(b)). This is intended to cover labour intensive services.

11. The rationale for the new measure is that it will reduce uncertainty by establishing a position in which any UK service provision changes will, subject to certain specified exemptions, be comprehensively covered by TUPE 2006. The Government’s intention is to ensure a “level playing field” for contractors bidding for service contracts, so that tendering decisions are taken on a commercial merit rather than on differing views as to the employment rights of employees, and so that transactions risks and costs are reduced. These 2 categories are not mutually exclusive. An outsourcing of a service may meet both definitions.

Practical Implications

- TUPE 2006 will now apply to more situations than it did previously.
- The service provision change is particularly relevant as many local authority activities are by their nature labour intensive.
- A key impact is that it will be more difficult to construct arrangements which are genuinely secondments.
- Before the service provision change there is an organised grouping of employees situated immediately before the change in the United Kingdom which has as its principal purpose the carrying out of the activities concerned on behalf of the client; [The reference to “organised grouping” means there has to be a dedicated team of staff undertaking the service]; and

Service Provision Change

12. There are three types of service provision change namely: -

- **Outsourcing / contracting out** – i.e. where 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”) (Regulation 3(1)(b)(i));
- **A second generation transfer / reassignment** – i.e. where activities cease to be carried out by contractor on a client’s behalf and are carried out instead by another person (“a subsequent contractor”) on the client’s behalf (Regulation 3(1)(b)(ii));
- **Insourcing / contracting in** – i.e. activities cease to be carried out by contractor or a subsequent contractor on a client’s behalf and are carried out instead by the client on his own behalf (Regulation 3(1)(b)(iii)).

Practical Implications

- On the renewal of a lease if a lessee dispenses with the provision of services by a landlord and provides such services in-house this may trigger a TUPE transfer.
13. The relevant conditions for a service provision change to apply are: -

- 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 tasks of short term duration; and
- the activities concerned do not consist wholly or mainly of the supply of goods for the client’s use. (Regulation 3(3))

Local Government Act 2003

14. ODPM published draft Directions under S101 Local Government Act 2003 on 3 June 2005. The draft Directions are entitled “The Best Value Authorities Staff Transfer (General) Direction 2005. The directions would require best value authorities who are contracting out services to do so on the basis that existing employees will transfer to the contractor and that their terms and conditions (including pensions) are preserved: ODPM as at June 2006 was considering the response to the consultation exercise.

Practical Implications

- Once the Directions are in force they will reinforce the applicability of TUPE. Unless a carve out is provided for secondment, then the ability of a local authority to second staff may be severely limited.

Exceptions to Service Provision Change

15. One key exception is that TUPE will not apply to an administrative reorganisation of public administrative authorities or the transfer of administrative functions between public administrative authorities (Regulation 3(5)). Therefore if a local authority was restructured into a number of smaller local authorities then TUPE 2006 would not apply. However this would not preclude the Government where appropriate, and subject to prior consultation with interested parties, ensuring that TUPE equivalent protections are afforded to affected employees: -
- in case specific legislation, where that is the vehicle for effecting a particular transfer within public administration; or
 - by regulations under Section 38 Employment Relations Act 1999.

Practical Implications

- The reality behind a transfer of administrative functions is that they will be invariably underpinned by service provision if not also an undertaking with at least some assets.
 - If TUPE 2006 did not apply, there may nevertheless be a requirement to apply it either on account of ODPM Circular 03/2003 or the direction under S101 Local Government Act 2003 when it is in force.
16. The new service provision change will not apply where a client buys in services from a contractor on a one-off basis without intending to enter into an ongoing relationship with that contractor and then

subsequently buys in similar services from a different contractor (Regulation 3(3)(a)(ii)). This is similar to the principle of TUPE not applying to a programme specific works contract.

17. The service provision change also does not cover cases where the arrangement between the client and the contractor is wholly or mainly for the supply of goods for the client's use rather than for the carrying out of other service activities of the kind it is intended to catch (Regulation 3(3)(b)). The difference here is between for instance supplying food and refreshments for a canteen where TUPE 2006 would not apply, and the operation of a canteen where it would.
18. The service provision contract will not apply to single specific events or tasks of short-term duration. An example may be for the provision of project management. Project management for a single project would be caught by the exception, whereas a contract for ongoing project management services over a number of years for a variety of projects would not. (Regulation 3(3)(a)(ii).)

Practical Implications

- There has been some concern in the technical press that TUPE 2006 may result in professionals from a firm undertaking work for a client, on losing that contract on a re-tender transferring to the firm that win the tender.
- In reality firms may not have staff dedicated full time or primarily for a single client.
- Also client may purchase professional services through a call off panel as distinct to being locked into a contract with a single

strategic partner, in which case TUPE 2006 is less likely to apply.

When Does TUPE Not Apply?

19. As a consequence of the service provision change the circumstances in which TUPE does not apply will be quite limited. There will be cases where employees are not assigned to an undertaking because the greater percentage of their time is spent undertaking other duties, and therefore TUPE will not apply.

EMPLOYEE LIABILITY INFORMATION

20. For TUPE to operate fairly and effectively there needs to be early and full disclosure of workforce information by the transferor to the transferee. There is currently no statutory requirement on a transferor where TUPE applies to provide a transferee with any workforce information prior to a transfer date or even following a transfer date. Where a transferor and transferee have entered into a transfer agreement it should properly address the obligation of transferor and transferee prior to and after a transfer date with reciprocal indemnities. Prospective transferee's human resources advisers would normally undertake due diligence on such matters prior to a transfer.

Practical Implications

- Birmingham in 2006 was involved in a projective TUPE transfer where employee liability information provided was limited. It immediately requested a warranty as to the accuracy and completeness of information provided.

21. The employee liability information to be provided relates to 2 groups of employees. Firstly it applies to any person employed by the transferor who is assigned to the organised grouping of resources or employees that is the subject of the relevant transfer (Regulation 11(1)). It also relates to any person who would have been employed by the transferor and assigned to the organised grouping of resources of employees that is the subject of a relevant transfer immediately before the transfer if such employee had not been dismissed where the sole or principal reason for the dismissal is the transfer itself or a reason connected with the transfer that is not an economic, technical or organisational reason entailing changes in the workforce. (Regulation 11(4)).

22. The duty to provide employment liability information does not apply to a transfer that takes place on or before 19 April 2006 (Regulation 21(4)).

Scope

23. TUPE 2006 has at its core a definition of "employee liability information" (Regulation 11(1)). Employee liability information means:-

- the identity and age of the employee;
- those particulars of employment that an employer is obliged to give to an employee under S1 Employment Rights Act 1996;
- information of any:-
 - ❖ disciplinary procedure taken against an employee;

- ❖ grievance procedure taken by an employee;

within the previous 2 years, in circumstances where the Employment Act 2002 (Dispute Resolution) Regulations 2004 SI 2004 No 752 apply;

- information of any court or tribunal case claim or action
 - ❖ brought by an employee against the transferor, within the previous 2 years;
 - ❖ 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, in this application in relation to the employee pursuant to Regulation 5(a) (Regulation 11(1)).

24. Employee liability information has to contain information as at a specified date not more than 14 days before the date on which the information is notified to the transferee (Regulation 11(3)).

25. Disclosure of employee liability information will not contravene the Data Protection Act 1988 as there is an exception from the non-disclosure provisions where the disclosure is required by or under any enactment (Section 35(1)).

Practical Implication

- There is nothing to preclude a prospective transferee requesting considerably more information from a transferor as the liabilities

that transfer under TUPE are extensive.

26. **Appendix A** to this Briefing sets out a more comprehensive range of workforce information which it would be good practice to disclose.

Process

27. The transferor is obligated to notify the transferee in writing of the employee liability information (Regulation 11(1)).

28. Once notification of the employee liability information has been given then the transferor is still under a duty to notify the transferee in writing of any change in any employee liability information (Regulation 11(5)). Clearly in any large undertaking the profile of the workforce will materially change over a short period, as will the liabilities in respect of the transferring employees.

29. Notification has to be given not less than 14 days before the relevant transfer or if special circumstances make this not reasonably practicable as soon as reasonably practicable thereafter.

Practical Implications

- The provision of employee liability information 14 days before a relevant transfer is at a very late stage in the preparation for a transfer. A transferee is well advised to request the provision of such information at a considerably earlier stage in order to evaluate the cost and liabilities of the transferring workforce and the viability of the transfer.

30. The notification of employee liability information can be given in more than one instalment (e.g. the more personal information could be given later in the process). Notification can indirectly be given through a third party (e.g. where a

client is conducting a tendering exercise that may lead to a second generation TUPE transfer it may be securing employee liability information from an existing contractor in order to disclose to all bidders) (Regulation 11(7)). It would therefore wish to ensure that the same employee liability information is issued to all bidders at the same time.

31. The Government considers that this new requirement will be of benefit not only to the employees who transfer but also to the transferees themselves. It will help to ensure transparency in a transfer process and prevent incidences of sharp practice such as where shortly before a transfer is completed the transferor changes the terms and conditions and/or the composition of the workforce assigned to the undertaking in question to the disadvantage of the transferee.

Sanctions

32. If a transferor fails to comply with this notification obligation then a transferee may complain to an employment tribunal either on or after the relevant transfer (Regulation 12(1)).
33. Such complaint has to be made before the end of 3 months beginning with the date of the relevant transfer or within such further period as the tribunal considers reasonable in a case where it is satisfied that it was not reasonably practicable for the complaint to be presented before the end of that period of 3 months (Regulation 12(2)).
34. If the tribunal finds the complaint well founded it can require the transferor to pay compensation to the transferee (Regulation 12(3)). This shall not be less than £500 per employee unless the tribunal

considers it just and equitable to award a lower sum.

35. In setting the amount of the award the tribunal will take into account: -
- Any loss sustained by the transferee which is attributable to the matters complained of;
 - The terms of any contract between the transferor and the transferee related to the transfer under which the transferor may be liable to pay any sum to the transferee in respect of the failure to notify the transferee of employee liability information.

(Regulation 12(4))

Second Generation Transfers

36. A public authority managing a tender process where there may be a second generation transfer of employees has to have regard to the fact that: -

- It may have no contractual entitlement or sanction to secure the early and full disclosure of employee liability information;
- The consequence of TUPE applying or not applying may have no direct impact upon the authority's costs;
- Non compliance by the transferor with the new notification requirement may cause competition to be restricted or distorted;
- Bidders may seek the authority's assistance in securing employee liability information from the transferor / current contractor;

- The 14 day period prior to contract start for the purpose of employee liability information is within what would be termed a mobilisation period and well outside a bidding period.
- TUPE 2006 neither provides the authority with any additional rights nor subjects it to any liabilities where it is neither a transferor nor a transferee, but the client;
- TUPE is likely to apply to more contracts than previously was the case.

37. An authority will therefore need to have regard to the following issues:-

Practical Implications

An authority will need to:-

- Review its terms and conditions for contracts (particularly service contracts) to incorporate notification requirements on contract termination or expiry that are consistent with TUPE 2006.
- Open a dialogue with a transferor / current contractor before tenders for a new contract are invited in order to consider the likely applicability of TUPE and if applicable the setting of a timescale for the production of employee liability information.
- Make provision in the tender documents for any communication concerning employee liability information to be made to the authority, and for the requirements of the notification requirements and penalties for non compliance.

- Ensure that the same package of employee liability information is made available to all bidders at the same time.
- Ensure that it is not warranting the accuracy of any employee liability information provided or expressing a view as to the applicability of TUPE.

CONTRACTS OF EMPLOYMENT

38. The effect of a TUPE transfer upon any person employed by the transferor and assigned to the organised grouping of resources of employees that is subject to the relevant transfer, is that such person's contract has effect after the transfer as if originally made between that person and the transferee (Regulation 4(1)). The effect of this is that:-

- The transferee cannot pick and choose which employee to take on.
- The transferee cannot terminate contracts and dismiss employees just because the transfer has occurred.
- The new employer does not take over the contracts of any employees who are only temporarily assigned to the organised grouping. Whether an assignment is temporary will depend on a number of facts, such as the length of time the employee has been there and whether a date has been set by the transferor for his return or re-assignment to another part of the business or undertaking.

39. On the completion of a relevant transfer:-

- All the transferor's rights, powers, duties and liabilities under or in connection with any

such contract shall be transferred to the transferee; and

- Any act or omission before the transfer is completed, of or in relation to the transferor in respect of that contract or a person assigned to that grouping of resources or employees, shall be deemed to have been an act or omission of or in relation to the transferee.

(Regulation 4(2)).

40. It is therefore common practice for the transferee to require the transferor to indemnify it against any losses from such pre-transfer breaches of contract or employment law.

Practical Implications

- TUPE transfers are therefore often underpinned by very detailed transfer agreements.
- Birmingham City Council has been developing a TUPE Protocol with its recognised unions to set a framework of the type of terms and conditions that will be contained in transfer agreements.

Objection to Transfer

41. If an employee who would otherwise transfer under TUPE informs the transferor or the transferee that they object to becoming employed by the transferee, then such employee's contract of employment is not transferred. (Regulation 4(7)).
42. Where an employee so objects the relevant transfer operates so as to terminate his contract of employment with the transferor, but he is not treated as having been dismissed by the transferor (Regulation 4(8)).

43. However where a relevant transfer involves or would involve a substantial change in working conditions to the material detriment of a person whose contract of employment is or would be transferred under Regulation 4(1), such an employee may treat the contract of employment as having been terminated, and the employee shall be treated as having been dismissed by the employer (Regulation 4(9)).

VARIATION OF CONTRACTS OF EMPLOYMENT/DISMISSAL

44. TUPE transfers may frequently be preceded by variations to terms and conditions of transferring employees and / or followed by dismissals of transferred employees. There has been uncertainty from case law as to what variations are void and what dismissals are unfair. TUPE 2006 sets out three different situations which have different consequences: -

- Firstly, variations / dismissals for which the sole or principal reason is the transfer itself or a reason connected with the transfer that is not an ETO reason. An ETO reason means an **“economic, technical or organisational reason incurring changes in the workforce”**. Variations in this category are void (ineffective). Dismissals in this situation are automatically unfair;
- Secondly, variations / dismissals for which the sole or principal reason is not the transfer itself but is a reason connected with the transfer that is an ETO reason. Variations in this situation are to be potentially effective (i.e. effective subject to being

agreed between the parties). Dismissals in this situation are subject to the normal test of reasonableness;

- Thirdly, variations / dismissals for which the sole or principal reason is unconnected with the transfer. TUPE 2006 has no bearing on variations / dismissals in this situation even though they may be made around the time of such a transfer.

(Regulations 4 and 7).

45. There is no statutory definition of an ETO reason. The DTI Guidance suggests that it is likely to include:-
- A reason relating to the profitability or market performance of the transferee's business (ie an economic reason);
 - A reason relating to the nature of the equipment or production processes which the transferee operates (ie a technical reason); or
 - A reason relating to the management or organisational structure of the transferee's business (ie an organisation reason).
46. The harmonisation of the terms and conditions of the transferred employees to those of equivalent grades and types of employees the transferee already has is not an ETO reason.
47. The DTI Guidance also advises that there is no "rule of thumb" used by the courts or specified in TUPE 2006 to define a period of time after the transfer where it is "safe" for the transferee to vary contracts because the reason for

the change cannot have been by reason of the transfer because of the passage of time.

PENSIONS

48. There has been an issue as to whether transferring employees had a TUPE related claim where the transferee does not provide an equivalent pension to that of the transferor (however such equivalence may be assessed). This has been clarified so that a transferor cannot be subject to a successful claim for breach of contract or constructive unfair dismissal claim if the transferee fails to afford transferred employees any given level of occupational pension entitlement following a transfer, unless the breach of contract / dismissal occurred prior to TUPE 2006 taking effect (Regulation 10(3)).
49. The DTI Guidance provides that where transferred employees were entitled to participate in an occupational pension scheme prior to the transfer, the transferee employer must establish a minimum level of pension provision for the transferred employees. This minimum 'safety net' requires the transferee to match employee contributions up to 6% of salary into a stakeholder pension, or offer an equivalent alternative.
50. The Local Government Act 2003 contains provision for Directions to be issued to local authorities concerning contracting out exercises. The 2003 Act also provides that the directions should make certain provisions concerning pension benefits for the local authority staff affected by those exercises. As at June 2006 the directions had not been made.

DUTY TO INFORM AND CONSULT

51. The practice of serving a formal Regulation 10 TUPE notice under TUPE 1981 (as developed by Birmingham City Council over a number of years) has ensured that the relevant information requirements were discharged. Regulation 13 TUPE 2006 mirrors Regulation 10 TUPE 1981. Whilst there is no requirement for a formal notice, its issue demonstrates a commitment to the provision of information and consultation and will assist in providing a defence to any claim of breach of Regulation 13. **Appendix B** sets out a precedent for a Regulation 13 notice.

Practical Implications

- It is important to note that whilst a notice under Regulation 13 will be issued at a critical point in a prospective transfer process it is not the first or final part in the consultation process.
- ODPM Circular 03/2003 sets out statutory guidance on when consultation should take place.
- Consultation by both transferor and transferee needs to be a regular process leading up to a TUPE transfer.

Affected Employees

52. Regulation 13 applies to “affected employees”. This means any employees of the transferor or the transferee (whether or not assigned to the organised grouping of resources or employees that is the subject of a relevant transfer who may be affected by the transfer or who may be affected by measures taken in connection with it. (Regulation 13(1))

53. The affected employees might include:-

- Those individuals who are to be transferred;
- Their colleagues in the transferor employer who will not transfer but whose jobs might be affected by the transfer; or
- Their new colleagues in employment with the transferee whose jobs might be affected by the transfer.

Timescale

54. There is no prescribed time to discharge the duty under Regulation 13. The requirement is that it is undertaken long enough before a relevant transfer to enable the employer of any affected employees to consult the appropriate representatives of any affected employees. (Regulation 13(2).) Clearly if work is being outsourced, until the new provider has been identified a meaningful discharge of this duty cannot take place.

Representatives

55. The communication under Regulation 13 is to the appropriate representatives of the affected employees. Those appropriate representatives are:-

- If the employees are of a description in respect of which an independent trade union is recognised by their employer, representatives of the trade union; or
- Alternative there is a mechanism for employee representatives to be elected.

(Regulation 13(3).)

Practical Implications

- A good employer needs to engage in dialogue not just with union representatives but with the workforce themselves.
- Good communication will include both presentations at formal meetings, production of Frequently Asked Questions, issue of newsletters, use of intranet websites, and making available staff who are accessible to answer affected employee's concerns.

Prescribed Content

56. The Regulation 13 communication is required to provide the following information:-

- The fact that the transfer is to take place, the date or proposed date of the transfer and the reasons for it,
- the legal, economic and social implications of the transfer for any affected employee;
- the measures which the employer envisages it will, in connection with the transfer, take in relation to any affected employees or, if it envisages that no measures will be so taken that fact; and
- if the employer is the transferor, the measures in connection with the transfer, which the transferor envisages the transferee will take in relation to any affected employees of the transferee after the transfer or if the transferor envisages that no measures will be taken, that fact.

(Regulation 13(2).)

57. An employer of an affected employee who envisages that he will take measures in relation to an affected employee, in connection with the relevant transfer, shall consult the

appropriate representatives of that employee with a view to seeking their agreement to the intended measures. (Regulation 13(6).)

58. In the course of those consultations the employer shall:-

- consider any representations made by the appropriate representatives; and
- reply to the representative and, if he rejects any of those representations, state his reasons. (Regulation 13(7).)

59. The employer has to allow the appropriate representatives access to any affected employees and has to afford to the representatives such accommodation and other facilities as may be appropriate. (Regulation 13(8).)

60. If there are special circumstances which render it not reasonably practicable for an employer to perform any of the duties listed above under Regulation 13, that employer has to take all such steps to performing that duty as are reasonably practicable in the circumstances. (Regulation 13(9).)

Breach of Duty

61. The consequences of failure to inform or consult differ from TUPE 1981 in that they provide for the transferor and transferee to be jointly and severally liable for any award of compensation made by an Employment Tribunal for failure by the transferor to comply with the information and consultation requirements (Regulations 15(8) and 15(9)).

62. Where a Tribunal finds a complaint of a breach of Regulation 13 well founded it can order the transferor to pay appropriate compensation to such descriptions of affected employees as may be specified in

the award. The transferee is jointly and severally liable with the transferor in respect of such compensation. (Regulations 15(8) and 15(9).)

63. One of the requirements of the Regulation 13 notice is that it has to specify the measures which the transferee envisages he/she will, in connection with the transfer, take in relation to such of those employees as will become employees of the transferee after the transfer or if the transferee envisages that no measures will be taken that fact. The transferee has to communicate that information to the transferor so that the transferor can include that in the Regulation 13 notice. If the transferor fails to provide such information because the transferee had failed to give the transferor the requested information at the requisite time then the Employment Tribunal may order the transferee to pay appropriate compensation to such descriptions of affected employees as may be specified in the award provided that the transferor has given notice to the transferee of its intention to show such fact and had made the transferee party to the proceedings (Regulations 15(5) and (8)(b)).
64. There had previously been conflicting case law as to whether or not the liability for compliance with information and consultation requirements passed from the transferor to the transferee. The disadvantage with liability resting with the transferee was that there would be no incentive on the transferor to comply with the relevant information and consultation requirements.

Practical Implications

- It may therefore be good practice for the process of consultation and dialogue to be undertaken jointly

by transferor and transferee at meetings with the union representatives and the workforce.

EMPLOYERS' LIABILITY COMPULSORY INSURANCE

65. The Employers' Liability (Compulsory Insurance) Act 1969 ("ELCI") requires private sector employers to insure themselves against liabilities to employees for bodily injury or disease arising from their employment. Case law has determined that such liabilities, in the same way as other liabilities arising from the employment relationship, automatically transfer from the transferor to the transferee in a TUPE transfer. It has also determined that the benefit of the insurance cover bought by a transferor in compliance with ELCI similarly transfers, so that the transferee is able to call on that cover to meet any liabilities incurred whilst the business was in the hands of the transferor.
66. However, public sector employers are not generally covered by, or are exempted from, the requirement to effect insurance cover and therefore there is no cover to transfer.
67. The Government therefore has determined that transferor and transferee to be jointly and severally liable for liabilities to employees for injury or disease arising from their pre-transfer employment in those cases where the transferor is a public sector employer not subject to or exempted from the requirement to effect ELCI.
68. TUPE 2006 therefore provides that where, under the 1969 Act, the transferor is not required to or is exempted from the requirement of the Act to effect such insurance

then on completion of a relevant transfer the transferor and the transferee are jointly and severally liable in respect of claims under the Act, in so far as such liability relates to the employee's employment with the transferor (Regulation 17).

INSOLVENCY

69. The final change to TUPE is designed to promote the sales of insolvent businesses as going concerns. The new provisions apply to "relevant insolvency proceedings" which are defined as insolvency proceedings which have been opened in relation to the transferor not with a view to the liquidation of the assets of the transferor and which are under the supervision of an insolvency practitioner (Regulation 8(6)). It is therefore intended to include: -

- administration;
- company and individual voluntary arrangements;
- creditors' voluntary winding up;

but not: -

- administrative or any other receivership; or
- members' voluntary winding up.

70. The new scheme applies to "relevant employees" meaning: -

- employees who have passed from the transferor to the transferee in a relevant transfer; and
- those who would have done so but for the fact that they were unfairly dismissed by the transferor by the reason of the

transfer or a non-ETO reason connected with the transfer.

(Regulation 8(2)).

71. The effect of TUPE 2006 is to ensure that all relevant employees are entitled to receive payments from the Secretary of State in respect of relevant debts incurred by the transferor, just as if they had been dismissed by the transferor in circumstances where the dismissal would have been potentially fair (Regulations 8(3) to 8(5)).

72. The liability for any other debts owed by the insolvent transferor to the relevant employees will still pass to the transferee on the relevant transfer, as they would under TUPE 1981. This will therefore comprise debts that either fall outside the categories payable under the relevant statutory schemes or exceed the statutory upper limits on payments under those provisions.

73. Regulations 4 and 7 (which limit pre and post transfer variations of contracts of employment) do not apply to any relevant transfer where the transferor is 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. (Regulation 8(7)).

74. Further if at the time of a relevant transfer the transferor is subject to relevant insolvency proceedings, then TUPE does not prevent the transferor or transferee (or an insolvency practitioner) and appropriate representatives of assigned employees agreeing to permitted variations (Regulation 9(1)). A permitted variation is a variation to the contract of

employment if an assigned employee where:-

- the sole or principal reason for it is the transfer itself or a reason connected with the transfer that is not an economic, technical or organisational reason entailing changes in the workforce; and
- it is designed to safeguard employment opportunities by ensuring the survival of the undertaking, business or part of the undertaking or business that is subject of the relevant transfer.

(Regulation 9(7).)

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APPENDIX A
WORKFORCE INFORMATION

1. **Workforce Information**

This comprises in respect of a transferring employee his / her: -

- name (surname, forename, title and initials);
- date of birth;
- home address;
- job title;
- job description;
- place of work;
- date of commencement of service;
- period of continuous service and notice entitlement;
- normal hours of work;
- annual leave entitlement;
- annual leave not taken prior to the transfer date (accrued holiday entitlement);
- sick pay entitlement;
- maternity and other leave entitlements;
- National Insurance number and contribution rate;
- annual salary and rates of pay band/grade (including intervals at which remuneration is paid);
- other benefits to which the transferring employee is entitled under the contract of employment or which the transferring employee might legitimately expect to receive as a result of the contract of employment;
- bonus payments in the 12 months prior to the transfer date and details of how such bonuses were calculated;
- allowances and bonuses for preceding twelve month period
- tax code, five months' copy pay slip data, cumulative pay for tax and pension purposes and cumulative tax paid;
- any letters of appointment;
- written particulars of employment;
- ethnic category;
- contractual hours of work;
- contractual overtime;
- overtime history for preceding twelve month period and whether any member of staff has waived their right not to work in excess of forty eight hours per week under the Working Time Regulations 1998;
- one off task and finish payments;
- shift, unsociable hours or other premium rates of pay;
- local protection built into the individual contracts of employment;
- outstanding employee loans including car loans;
- contractual gratuity obligations;
- any recommendation for medical retirement;
- absence through maternity leave, or authorised paid or unpaid absence together with details of any action taken to date;
- sickness and absence records for the preceding 12 months including any records of parental leave taken;
- being in a redeployment pool or any allocation to light duties;
- working on duty, secondment or temporary upgrades listing date of commencement, period of this appointment and details of their substantive post;

- any industrial injuries notified to the transferor for a period of up to three years prior to the transfer date. Details of where liability has been accepted by the transferor and level of compensation paid for the same period;
- details of employer's liability insurance and if not is the transferor self-insured;
- claims, or potential claims outstanding for industrial injury and any payment made or to be made;
- claims, or potential claims, under the transferor's personal accident scheme and any payment made or to be made;
- Employment Tribunal claims, or other tortious liability claims;
- Employment Tribunal applications lodged in respect of sex or race discrimination that have been either successful or settled since 2 years prior to the transfer date;
- dismissals likely to be made by the Transferor in connection with this transfer;
- suspension, possible suspension or disciplinary action;
- live warnings and outstanding grievances;
- training records, performance or assessment details, existing training or sponsorship commitments;
- trade union recognition and trade union facilities agreements in place;
- all trade union/safety representatives;
- any disability;
- consultation and information correspondence sent by the transferor to the trade unions in connection with this transfer;
- statement of material benefits protection;
- temporary contract or a fixed term contract;
- any contractual right to return to work following a career of any other break in service;
- any agreement to carry over holiday from the current holiday year to the next holiday year;
- for pension purposes, the notional reckonable service date;
- pensionable pay history for three years to date of transfer;
- the amount of any deduction in respect of a contribution under Additional Voluntary Contribution arrangements;
- any other voluntary deductions from pay;
- bank/building society account details for payroll purposes;
- any letters or documents or collective agreements affecting terms and conditions of employment;
- outstanding loans/advances on salary or debts;
- emergency contact details;
- particulars of any service licence or service tenancy.

2. Transferring Employees Employment Information

This comprises relevant information relating to the transferring employees including: -

- all employment policies, documents, manuals, codes, handbooks, procedure guides, publication agreements;
- non-contractual policies and procedures;
- details of any pay structure that may be imposed by the transferor prior to the transfer date.

3. Transferring Employees Terms and Conditions

This comprises the terms and conditions and benefits (including retirement benefits) under which the transferring employees are employed including: -

- locally agreed conditions of service;
- contractual policies and procedures;
- collective agreements affecting terms and conditions of employment (including any letters or documents) relating to them.

APPENDIX B

BIRMINGHAM CITY COUNCIL

**TRANSFER OF UNDERTAKINGS (PROTECTION OF EMPLOYMENT)
REGULATIONS 2006**

[Name of Undertaking/Service]

REGULATION 13 NOTICE

*[Name of representative of
affected employees including
full-time official or recognised
trade unions]*

[Date]

Dear *[name]*

1. **Notice**

I am writing to you in accordance with Regulation 13 of the Transfer of Undertakings (Protection of Employment) Regulations 2006 ("**Regulations**") to inform you of the Council's proposal to transfer the group of staff undertaking *[describe the undertaking]* ("**the Undertaking**"). The transfer will be to *[identify the Transferee]*.

2. **Transfer date**

It is proposed that the transfer of the Undertaking will take place on *[date]*
[Explain how the date is arrived at eg start date of a contract.]

3. **Reason for transfer**

The reason for the transfer is *[set out details]*.

4. **Numbers affected**

The proposed transfer will affect the following *[number of employees]* of whom *[no]* are to transfer. *[They can be listed if the number is small – otherwise state how they are identified]* ("**Transferring Employees**") and *[no]* are to remain employed by the Council ("**the Retained Employees**").

5. **Legal, economic and social implications**

From a legal standpoint the Transferring Employees will, by virtue of the operation of the Regulations, transfer on their existing terms and conditions of employment with continuity of employment for statutory and contractual purposes. *[As there will be no changes to existing terms and conditions of employment except in respect of pensions in accordance with **Paragraph 7**, it is not envisaged that there will be any economic implications arising from the transfer nor will there be any social implications.]*

[Set out implications for Retained Employees]

6. **Council's measures**

[Identify any measures] [or]

[It is not envisaged that the Council will be taking any measures in relation to the Transferring Employees/Retained Employees.]

7. **Pensions**

[A statement in respect of pension provision is advisable, having regard to the requirements of ODPM Circular 03 / 2003. This will usually be by reference to entry into an admission agreement with Wolverhampton City Council.]

8. **Transferee's measures**

[Identify any measures that have been identified by the Transferee.] (“**the Transferee’s Measures**”)

9. **Consultation**

*[I would be pleased to meet with you to discuss the proposed transfer of the Transferring Employees and to consult with you about the measures identified in **Paragraph 8** and to consider a / reply to any representations which you wish to make on the subject of the Transferee's Measures.]*

10. **Transferee Consultation**

I will be making arrangements for representatives of the Transferee to meet with you.

Yours sincerely

***[Chief Officer / Deputy Chief Officer
responsible for the undertaking]***