MACFARLANES

NEW YEAR: NEW TUPE

EMPLOYMENT

In the last 12 months we have seen an exceptional level of legislative activity from the Coalition. One of the changes that has proved the most controversial has been the redrafting of the Transfer of Undertakings (Protection of Employment) Regulations 2006 - commonly referred to as "TUPE".
The revised regulations were laid before Parliament last Friday (10 January 2014) and are scheduled to come into force on **31 January 2014**.

WHY CHANGE?

The Coalition Agreement contained a commitment to repeal "gold-plated" legislation i.e. that which goes further than required by European law. TUPE was cited as an example. Following an initial consultation paper published in January 2013 the Government published its draft amendment regulations on 31 October. Though initial reports suggested that sweeping changes were on the horizon, in fact the proposals have been watered down at every stage.

This note looks at the changes in their (near) final form, and considers their impact in practice.

SERVICE PROVISION CHANGES TO STAY

The Government had originally planned to scrap the concept of TUPE applying on a service provision change (i.e. on an outsourcing, insourcing or change of third party service provider). This proposal was never as radical as it first appeared; it would not have meant that TUPE never applied to service provision changes, just that it was less likely to apply in marginal cases. Ultimately, the idea met with opposition due to concerns that wholesale abolition would simply increase uncertainty and generate confusion and, as a result, the proposal has been shelved.

BUT STILL SOME UNCERTAINTY

Case law has established that TUPE will only apply where the services in question are "fundamentally or essentially" the same as those provided by the previous service provider and the regulations will now be amended along the same lines to expressly provide that a TUPE transfer will only take place where the activities carried out by the new service provider are "fundamentally the same"

Where innovative new methods of providing services are concerned, there will still be room for argument on a case by case basis as to whether the new services are fundamentally the same as the old.

HARMONISATION OF TERMS REMAINS PROBLEMATIC

For obvious reasons, many businesses inheriting new employees by virtue of a TUPE transfer will want to harmonise the terms and conditions of its old and new staff cohorts.

TUPE has traditionally made effective harmonisation difficult. The Government made clear its desire to permit harmonisation, but has ultimately been constrained by the EU Acquired Rights Directive which underpins TUPE. European case law provides that contractual changes will be void if the reason for the variation is the transfer, and suggests that changes made with the intention of harmonising terms on transfer will fall foul of this provision.

Arguably, TUPE goes further than this by voiding changes which are not only made by reason of the transfer but also for a reason connected with it and so the Government will now amend TUPE to ensure that it does not inadvertently go further than required by Europe. Whilst this ought to reduce slightly the risk profile of TUPE related harmonisation, uncertainty is likely to bedevil transactions until litigation has clarified the scope of what is permitted under the new rules.

RELOCATION REDUNDANCIES FAIR AGAIN

Much more welcome is the clarification that a transferee can fairly dismiss employees for redundancy where this is required by a need to operate from different premises post transfer. This has been a common source of problems for employers of staff transferring to them under TUPE, so this revision should be of real assistance.

TRANSFEREES NOT BOUND BY FUTURE CHANGES TO COLLECTIVE AGREEMENTS

Avid followers of the employment law jurisprudence of the European Court of Justice will be aware of the controversy surrounding collective agreements and TUPE. The problem was exemplified in the recent case of *Alemo-Herro and others v Parkwood Leisure Ltd*. A private sector employer inherited staff from the public sector, all of whom had contracts linking their pay to the terms and conditions collectively agreed between various trade unions and the local authority employers. The question was whether the new private sector employer was bound by those terms as they were re-negotiated over time (and after the transfer) by the union/local authority bodies.

The ECJ concluded that it was not, and the Government will now encapsulate that position in statute, so that changes agreed by a collective process subsequent to a TUPE transfer and without the new employer's involvement will not automatically become binding on that new employer.

Still with collective agreements, the Government has also decided to take advantage of an exception in the underlying EU directive that permits changes to terms incorporated from a collective agreement, as long as the changes are made at least one year after the transfer. Somewhat oddly, given the Government's desire to eliminate gold-plating, an additional requirement not found in the Directive has been added: that the changes be no less favourable overall.

COLLECTIVE REDUNDANCY CONSULTATION MAY START BEFORE COMPLETION

Readers will know that any proposal to make 20 or more redundancies in a three-month period will trigger collective consultation obligations. Whether and how a consultation process could be started before a TUPE transfer, where the new employer is planning redundancies to take effect just after it, has been unclear for some time under the existing regulations.

The Government has tried to address this problem by providing that the new employer can elect to begin consultation before the transfer if the old employer agrees. This election will not be a once-and-for-all choice and the new employer can cancel the process at any stage and begin again after it has actually inherited the potentially redundant employees.

How that cancellation mechanism will operate in the real world will be a point to watch over the coming months, but in principle this change is a welcome endorsement of a relatively common practice.

MINOR CHANGES

There are two other minor changes to note:

- Information about those employees who are transferring must be given no less than 14 days before the transfer at present. This will increase to 28 days under the new regulations, with effect from 1 May 2014. The scope of information provided remains the same and is unlikely to be sufficient in most cases, so appropriate warranty and indemnity protection will still be needed in the transfer documentation.

- From 31 July 2014, employers with fewer than 10 employees will have a slightly relaxed obligation to inform employees ahead of the transfer. Oddly, this is not a question of the number of transferring employees, rather it is a relaxation in favour of small employers only.

Overall, these changes are substantially less significant than had been foreshadowed by the Government. The change to the redundancy rules is welcome, but the jury is out on whether the new revisions adequately tackle the question of harmonisation, which is likely to remain the most problematic element of TUPE in practice.

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