

## Employment

# Safeguard or straitjacket?

Parliament should tread carefully when considering calls to reform TUPE regulations, say **Chris Bryden & Michael Salter**

### IN BRIEF

- Some provisions of the TUPE regulations have been criticised for being more stringent than that required by European law.
- The service provision changes provisions of TUPE 2006 go a long way to removing the uncertainties that arose from the case law that spawned from the 1981 TUPE regulations.

Despite having been on the statute books since 1981, the Transfer of Undertakings (Protection of Employment) Regulations 2006 (SI 2006/246) continue to prove controversial. *The Times* in a recent leader (23 February 2011 “Terms and Conditions”) described them as “one of the chief obstacles to business in Britain” and as a “significant deterrent to competition”. It noted the European Court of Justice’s (ECJ) decree that there is nothing in the Acquired Rights Directive (ARD) that required this country, when implementing it, to draft its regulations as tightly as TUPE is framed.

### ARD v TUPE

An example of the extent of TUPE compared to the ARD, was provided in *CLECE SA v Maria Socorro Martin Valor and Ayuntamiento de Cobisa* (C-463/09), a referral from Spain to the ECJ, where the court held that a mere change in the provision of a service (here, the insourcing of a school cleaning contract) is not a relevant transfer for the purposes of the ARD. However, it is likely that reg 3(1)(b) would operate in the UK to result in the same situation giving rise to a transfer.

Thus where the effect of reg 3(1)(b) amounts to a transfer, this effect is apparently beyond what is necessary for

the UK to comply with its obligations in respect of implementing the ARD. It is perhaps therefore unsurprising that *The Times* referred to the regulations as being “the ARD with gold-plating attached”. Clearly it is open to the UK Government to frame its regulations in wider terms than the minimum required to comply with its European obligations, but it appears the TUPE regulations are likely to be subjected to calls from the business community for reform, under the banner of “removing red tape”.

**“ TUPE should not be thought of as a straitjacket inhibiting and restricting business and competition, but as a legislative balancing tool used to protect employees ”**

### Service provision changes

An argument for the removal of those parts of the regulations that deal with service provision changes (SPC) is likely, in principle, to find some support from the Conservatives in the coalition government. Before the election, Lord Hunt, then the Conservative Party’s shadow business secretary, indicated that a Conservative government would seek to rein in this aspect of TUPE. However, in November the government indicated that it had no intention of revisiting this issue. Whether the business community

feels emboldened by the weakness in the economy, fuelled by the call in *The Times* for reform, is another matter.

However, even if the SPC provisions of TUPE were repealed, it is submitted that the apparent evil highlighted by *The Times* would not be resolved. Such removal, while opening up to businesses the argument that a transfer did not take place, would lead to more uncertainty (which inevitably would lead to more litigation and therefore cost to business).

The SPC provisions as currently provided for in TUPE were introduced in 2006, and did not feature in the 1981 regulations. To remove them from the 2006 regulations



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from the 1981 TUPE regulations, the broad test amounted to being that when assessing whether there is an SPC style transfer, the tribunal must take all the relevant circumstances into account. Such a multifactorial test does not provide contractors with sufficient certainty on which to judge whether economically it is worth competing for outsourcing work.

### Olds v Late Editions

Certainty is at the heart of current judicial thinking in relation to TUPE 2006, which has at its heart the popular legislative idea of the rescue culture, arguably needed now more than ever. This thinking is clearly reflected by recent authority. On 16 February 2011 the Employment Appeal Tribunal handed down its decision in *Olds v Late Editions* UKEAT/0320/09/RN. This revisited the ground previously covered by the EAT in *Oakland v Wellswood (Yorkshire) Ltd* [2009] IRLR 250.

*Oakland* decided that the application of reg 8(7)—which effectively dis-applies the core provisions of TUPE where the transferor is the subject of bankruptcy proceedings or analogous insolvency proceedings instituted with a view to the liquidation of the assets—was essentially one of fact when faced with a pre-pack administration. The EAT's decision in *Oakland* was the subject of an appeal to the Court of Appeal (see [2010] ICR 902), although the appeal was decided on another ground.

In *Olds* however, the EAT took a different view. Underhill P gave an expository *tour de force* judgment in relation to the ARD, TUPE and extracted elements of the Insolvency Act 1986. Eschewing the flexibility of the factually dependant approach in *Oakland*, in favour of a more certain and blanket approach Underhill P stated: "The one point in Judge Clark's reasoning which we should specifically address is his view...that the fact-based approach accords with the policy underlying art. 5.1, in that it promotes a rescue culture under which potential purchasers of an insolvent business are not deterred from taking it on by the prospect of inheriting the entire workforce on its previous terms.

We agree that in principle we should take a purposive approach. But that approach does not yield a simple answer. The purpose of the Directive taken as a whole is avowedly to safeguard the rights of workers. We accept that there is in the case of an insolvency-related transfer a tension between safeguarding the rights of individual workers, namely those who are liable to be dismissed or have their terms downgraded on a transfer, and the interests of the workforce more generally, most of whom at least may preserve their jobs if the business is purchased but who will lose out if a potential purchaser is deterred by the prospect of the application of Arts 3 and 4 (ie, regs 4 and 7 of TUPE). The existence of this tension is self-evident... "Promoting a rescue culture" may favour the interests of the workers generally (though no doubt there are benefits to the wider economy too), but the Directive plainly proceeds on the basis that a balance requires to be struck between those interests and the rights of individuals prejudiced by a transfer by an insolvent transferor. It is for that reason that it maintains the distinction... between liquidation proceedings on the one hand and other forms of insolvency proceedings on the other."

Accordingly, the division is "blunt": if the insolvency proceedings are commenced with a view to liquidation of the assets then contracts of employment do not transfer. However if the insolvency proceedings are not started with a view to liquidation then the contracts do transfer, but certain debts do not (but are paid from the national insurance fund), and terms and conditions of employment can be varied.

Such stark simplicity cannot be achieved for the core question of whether there has been a transfer at all, as the diversity of business and suppliers is too wide. There is therefore, a need for each case to be determined based upon its circumstances. However the SPC provisions of TUPE 2006 go a long way to removing the uncertainties that arose from the case law that spawned from the 1981 TUPE regulations in this regard.

### Policy considerations

While the *Times* article is correct that many businesses are caught by the SPC provisions, this is for good policy reasons. Any business tendering for a contract should as a matter of course undertake due diligence. To not conduct that exercise and then later discover that a transfer has taken place amounts to neglect by the tenderer to carry out checks in its own interest, and as such the consequences should be borne.

In determining whether to tender at all, the fact of a transfer is an important aspect. To argue that TUPE inhibits competition is wrong, as any business is entitled to conduct itself in a competitive way and to factor into bids the reality of the transfer. Employees can anyway still be dismissed for redundancy if they are unnecessary, or for any reason that related to the transfer that is an economic technical or organisational reason that entails a change in the workforce, and terms and conditions can be amended on similar grounds.

TUPE should not be thought of as a straitjacket inhibiting and restricting business and competition, but as a legislative balancing tool used to protect employees against the unscrupulous, who would seek to change their workforce's employer and use the threat to employees of losing their jobs as a screen for lowering terms and conditions to the minimum required by law. Regulation 3(1)(b) is a valuable protection for employees and, while employers may complain that it is not required by European legislation, it is an important safeguard that Parliament should not be tempted to remove. NLJ

**Chris Bryden**, 4 King's Bench Walk.

Website: [www.4kbw.co.uk](http://www.4kbw.co.uk).

**Michael Salter**, Ely Place Chambers.

Website: [www.elyplace.com](http://www.elyplace.com)



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