

## UK TRANSFER OF UNDERTAKINGS LEGISLATION

UK legislation gives wide protection for employees rights on the transfer of a business or the provision of a service. This article will consider the effects of the legislation for businesses operating in the UK and provide a practical guide for organisations commencing operations in the UK.

### **Background**

Protection of employment on the transfer of an undertaking originated from a European Union Directive, 77/187/EC, the “Acquired Rights” Directive. In the UK, the rights granted under the Acquired Rights Directive were transposed into UK law as the Transfer of Undertakings (Protection of Employment) Regulations 1981 (the “1981 Regulations”).

#### *The 1981 Regulations*

The 1981 Regulations covered the ‘transfer of an undertaking’ from one owner to another. This was generally the sale or other transfer of a business. If a transfer satisfied certain conditions, the 1981 Regulations operated to transfer the contracts of employment of the staff of the business from the seller or “transferor” to the buyer or “transferee”. Employees then became employees of the transferee on precisely the same terms and conditions as existed between the them and the transferor. This situation was known (and continues to be known under new legislation) as a “TUPE transfer”.

#### *The 2006 Regulations*

In 2006 a new directive, 2001/23/EC, consolidating the original provisions, was transposed into UK law as the Transfer of Undertakings (Protection of Employment) Regulations 2006 (the “2006 Regulations”). The 1981 Regulations were repealed in their entirety.

Under the 2006 Regulations, the business transfer provisions remain essentially intact, with some modifications. However, the 2006 Regulations go further than required by European law by introducing a definition of a second kind of transfer which will trigger the Regulations, that of a “service provision change”.

### **Requirements for a TUPE Transfer**

A TUPE transfer occurs where there is either a transfer of an undertaking, or a service provision change, which meets certain criteria.

#### *Transfer of an Undertaking*

A transfer of an undertaking takes place where there is a transfer of:

- an undertaking or part of an undertaking;
- which is situated immediately before the transfer in the United Kingdom; and
- which is an economic entity which retains its identity.

The legislation makes clear that the undertaking must be situated in the UK immediately before the transfer. DTI Guidance on the 2006 Regulations suggests that a TUPE transfer may take place even if the employees work outside of the UK, provided the undertaking itself, for example, premises, assets, fixtures, fittings and goodwill, is situated in the UK.

An ‘economic entity’ is defined in the 2006 Regulations as ‘an organised grouping of resources which has the objective of pursuing an economic activity’. In a straightforward business transfer, physical

assets such as cash, premises, staff, and intangible assets such as goodwill and intellectual property will almost certainly comprise an 'organised grouping of resources'.

### *Service Provision Change*

Under the 2006 Regulations, three situations will amount to a service provision change (provided certain other conditions are met, discussed below):

- **Out-sourcing** – where activities originally carried out by a person (the client) will be carried out instead by another person (the contractor), also called contracting-out;
- **Reassigning** – where activities carried out by a contractor on behalf of a client are carried out instead by another contractor; and
- **In-sourcing** – where activities carried out by a contractor on behalf of a client are carried out instead by the client on their own behalf, also known as in-sourcing or contracting-in.

In order for one of these situations to amount to a service provision change, three further conditions must be satisfied:

- **Organised Grouping of Employees** – there must have been, immediately before the service provision change, an 'organised grouping of employees...which has as its principal purpose the carrying out of the activities concerned';
- **Duration** – the client's intention must have been that, after the change had taken place, the activities would not relate to a 'single specific event or a task of short-duration'; and
- **Supply of Goods** – the activities must not relate wholly or mainly to the supply of goods for the client's use.

### **Effect of a TUPE Transfer**

#### *Transfer of employment contracts*

The effect of the 2006 Regulations is automatically to transfer the terms and conditions of those employees who were employed by the transferor immediately before the transfer to the transferee. The transferee will be required to honour all terms of employment, such as salary and working hours, and also benefits such as medical and health insurance. Further, the transferee will acquire liability for any act or omission of the transferor before the transfer, with the result that the transferee could find themselves defending a claim arising from the management of the employee by the previous employer.

The transfer of employees occurs by an operation of law, and can only be prevented by an objection on the part of the employee. In this case, the employment of the objecting employee will terminate on transfer of the business or contracts. Any agreement between the transferor and the transferee as to whether employees will or will not transfer will be void, as will any changes to terms and conditions of the transferring employees before and after the transfer. This means that any harmonisation of terms and conditions following the transfer must be made with caution.

Changes to terms and conditions could give rise to a claim for breach of contract by the employee, for a breach of their original terms (which the new employer should honour). Further, any dismissals or resignations which occur as a result of the TUPE transfer will be deemed to be automatically unfair, unless the employer can show that the dismissal was for a reason other than the transfer, or that the dismissal satisfied an exemption under the 2006 Regulations.

## **Commencing Operations in the UK: A Practical Guide to TUPE**

### *Entry to UK Market*

The concept of protection of employment on transfer of an undertaking is rare outside of Europe. The effects of the 2006 Regulations can have major implications for foreign businesses wishing to expand into the UK market. The purchase of an existing business, or part of an existing business, may well result in a TUPE transfer taking place, with the result that the foreign business would find itself immediately employing staff with rights under UK employment law. The transferee would need to ensure that these rights are not impinged, either as a result of the transfer, or by failure to adhere to requirements of UK employment law. Contracting with a third party to provide a service or services may also trigger the 2006 Regulations. Employees of the third party may allege employment status of the foreign business, either during but certainly on termination of the contract.

### *Due Diligence*

Foreign businesses should ensure that thorough due diligence is carried out when acquiring a UK business, and even when tendering for a contract for services in the UK. A due diligence exercise, most common in the acquisition of a company or business, will reveal the number of employees likely to transfer, and the terms and conditions under which they are employed. Details of any claims against the former employer, which could be passed on to the new employer, need to be considered.

A due diligence exercise should reveal contentious areas which can be dealt with by way of warranties and indemnities, or a reduction in purchase price, for straightforward business transfers. Where there is a service provision change, there is likely to be little contractual protection for the transferee. In such situations, the transferee may attempt to negotiate indemnities from the client, or, alternatively, should obtain insurance to cover any risk.

### **Conclusion**

Protection of employment legislation can create problems for businesses attempting to enter the UK market. Foreign businesses should take advice when considering entry into the UK market to ensure that potential risks can be evaluated in advance.