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Call for Evidence on Effectiveness of Current TUPE Regulations

Response from the Employment Lawyers Association

31st January 2012

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INTRODUCTION

The Employment Lawyers Association ("ELA") is a non-political group of specialists in the field of employment law and includes those who represent Claimants and Respondents in the Courts and Employment Tribunals. It is therefore not ELA's role to comment on the political merits or otherwise of proposed legislation, rather to make observations from a legal standpoint. ELA's Legislative and Policy Committee is made up of both Barristers and Solicitors who meet regularly for a number of purposes including to consider and respond to proposed new legislation.

A sub-committee was set up by the Legislative and Policy Committee of the ELA under the chairmanship of Fraser Younson of Berwin Leighton Paisner LLP to consider and comment on the Call for Evidence on the Effectiveness of the TUPE Regulations. Its report is set out below. A full list of the members of the sub-committee is annexed to the report.

Our comments are divided according to the section and question numbers used in the Call for Evidence.

Clarity and Transparency of 2006 Reg Overall

Question 1: Have the 2006 amendments provided greater clarity and transparency on application of TUPE rules?

1.1 The introduction of the service provider change (SPC) provisions in the 2006 amendments have given a greater degree of transparency and clarity in the sense that there are far fewer disputes over whether or not TUPE applies in the context of outsourcing/insourcing or changes of provider. However this has, in turn, generated more legal activity concerned with attempts in the private sector to fragment the relevant activity or to change it with a view to dis-applying TUPE. In ELA's experience, the public sector, almost without exception, simply operates TUPE, as a matter of course, as part of its procurement processes, whereas there appears still to be an (increasing) number of companies in the private sector who will seek to design a structure to avoid TUPE applying. However some ELA members have seen instances in the last 12 months of even local authorities considering ways of circumventing the service provision changes rules within TUPE. This creates uncertainty both commercially and for employees, if there is a dispute over whether TUPE applies – particularly at the point of "transfer".

1.2 The Employee Liability Information (ELI) in reg II TUPE was a good idea to be introduced, but it does not provide the "level playing field" that was intended (especially for 2nd and subsequent generation contractors). The requirement (in reg 11(6) TUPE) to provide the ELI no later than 14 days before the transfer date is far too short. This impacts on the transferee's ability to decide what measures (if any) it might wish to take in respect of the transferring employees, so that these can be communicated to the transferor as part of the latter's provision of information obligations under reg 13 TUPE. ELA recommends a clearer notification structure as follows:-

- For transfers of up to 99 employees, the latest notification should be 30 days before the transfer date;

- For transfers of 100+ employees, the notification period should be at least 90 days before the transfer date;

- There should be an on-going duty on the transferor to advise the transferee of any material changes to ELI already given.

- Where the timing of a transfer is on short notice, the transferor should deliver the ELI as soon as is reasonably practicable or the transferor or transferee should be able to agree to modify the operation of reg. 11. Employee rights would not be impacted by this.

1.3 There are a number of other areas where the 2006 amendments have created a demand for more legal advice – for example, see ELA's comments below.

Question 2: Do the 2006 Reg provide enough transparency around employment rights and obligations being transferred to ensure a smooth transition? If not, how could this be improved?

2.1 The 2006 TUPE regulations on their own do not provide enough transparency to ensure a smooth transition. More detailed contractual provisions between the transferor and transferee, and/or a high degree of cooperation between them, are necessary to achieve that. Since there is usually no contractual connection between outgoing and incoming service providers, the TUPE underlying infrastructure becomes all the more important. The key issues are that:

a) The timescale for the provision of employee liability information under TUPE does not allow sufficient planning for transfer. The deadline for provision of the information is not less than14 days before the transfer – see ELA's comments in para 1.2 above.

b) In the absence of clear and appropriate contractual provisions, incumbent service providers will often refuse to provide data which is sufficiently

clear, or provided early enough, to allow parties tendering for work to cost accurately their bids at an early stage.

c) Transferors sometimes argue that data protection law precludes them from providing additional information, or providing information at an earlier time, than the current 14 days. While this is likely to be incorrect, arguing about these issues can cause significant delay and disruption.

d) The lack of sufficient clarify over who is assigned to an organised grouping of workers or undertaking often creates uncertainty and confusion, particularly in respect of those employees who have split functions or are temporarily working in the relevant undertaking or activity.

2.2 These issues could be addressed/improved by:

i) ELA's proposals set out in para 1.2 above.

ii) An obligation to provide employee liability information at the tender stage, again with an obligation on transferors to update the information in the event of material changes to it within a specified period (for example, 7 days). A mechanism to prevent frequent, repeated requests for data would be. needed.

iii) TUPE could be amended to confirm that providing information (anonymised where practicable) in accordance with TUPE is not a breach of the Data Protection Act.

iv) The ELI should be extended to include details of:-

- those employees employed in the organised grouping of workers/undertaking who are on long term sick or maternity absence (in excess of 3 months);
- any threatened industrial dispute covering the employees expected to transfer;
- immigration status of relevant employees - see ELA's comments in para 23.4 below.

v) Transferors should be required to deliver to the transferee a copy of the personnel records of each employee who transfers across – within, say, 21 days of the transfer date. At present, the incoming transferee has no entitlement to this (although, under TUPE, it steps into the transferor's shoes, and the ELI only relates to partial information and not actual documents.

2.3 There is occasionally confusion around exactly which employees are "assigned" to the undertaking/organised grouping of workers - particularly those whose have duties expand across a number of activities (including that being transferred), those who are seconded to work in it from another legal entity, those

who are on long term sickness absence and those temporarily transferred into it shortly before the transfer date. Whilst there have been some cases addressing some of these issues, the conclusions are very fact specific. Some guidance to cover these atypical situations would assist in providing a smoother transition process.

Question 3: Do employers and commissioners generally comply with the transparency obligations under the 2006 Reg? If not, are there particular problems around timing and/or accuracy of the information they provide; and are problems particularly noticeable in respect to transfers from the public or private sector?

3.1 ELA's impression is that, in the public sector, compliance with TUPE is consistently done as a matter of course, as part of the public sector's standard processes. In the private sector, the picture is that there is still quite a wide lack of understanding of TUPE (particularly for smaller enterprises), although compliance is higher for larger private sector companies. One of the reasons for this disparity is that the public sector is heavily unionised.

3.2 There is a greater tendency in the private sector for companies to seek to find ways to avoid the application of TUPE on change of service provider by fragmenting or restructuring the service provision model. This is not a surprising finding because the incoming (successful) provider of services may have won the tender due to reducing costs – in the context of a labour intensive activities, employment costs are often the central issue in costing the bid.

3.3 However, large private sector employers (particularly those who have a unionised workforce) do have well established processes for dealing with TUPE related activities and are mainly compliant with TUPE.

3.4 There are occasionally difficulties for an incoming second (or subsequent) generation service provider in outsourcing transactions where the outgoing supplier (almost invariably in the private sector) may not be fully co-operative with the incoming provider in providing sufficient information and/or in a timely manner. This can cause difficulties for the incoming service provider in costing and finalising its bid and in complying with its obligation under reg 13(4) to provide the transferor with details of the measures it envisages taking in respect of the transferring employees.

3.5 There is also some evidence that an outgoing service provider who has lost in the tender process for a service provision contract may seek to offload unwanted staff (in addition to those working in the organised grouping of workers) by "assigning" them to service shortly before the change of service provider, so that they transfer across to the incoming service provider on the transfer date.

Service Provision Changes

Question 4: Does inclusion of service provision changes within the 2006 Reg provide benefits in terms of increased transparency and reduced burdens on business? If yes what are these benefits? If no, what additional burdens have resulted from their inclusion?

4.1 At one level, the service provision changes have sought to create a "level playing field", with the effect that most service provision changes fall within the scope of TUPE. However, the inclusion of the service provision change rules has not increased transparency or reduced burdens on business. The provisions have created a new frontier for litigation and disputes, which continue despite leading decisions in this area. These areas include the fragmentation or re-structuring of the services required or a re-modelling of how they are provided and the some uncertainty over who falls within he "organised grouping of workers" carrying out the relevant activities.

4. 2 In addition, the introduction of the freestanding concept of the service provision change has increased the level of complexity of TUPE disputes. In a significant proportion of cases it is necessary to argue the case as to whether there has (or has not) been a TUPE transfer by reference to **both** the traditional (Acquired Rights Directive-derived) concept of the transfer of an identifiable economic entity **and** the service provision change regime.

4.3 The service provision change regime has increased the burdens on business by making it far more likely that TUPE will apply to outsourcing and changes of contractors in labour-intensive sectors. The application of TUPE in such sectors makes it considerably more difficult for a new contractor to reduce costs and so, many ELA members believe, creates an area of uncompetitiveness by giving the incumbent service provider a "built in" advantage. The users of the services are discouraged from seeking to change contractors in cases when they know that the existing workforce will almost certainly transfer with the contract. Likewise, potential new contractors are discouraged from bidding for contracts when they know that the workforce will almost certainly transfer to them, with practically all associated liabilities.

4.4 In many labour-intensive cases involving no transfer of physical assets, the new contractor may have no physical presence at or near the current location of the workforce. In such a scenario, the incoming service provider is potentially liable and responsible for managing the relocation or redundancy of the employees where there is no local presence to assist in this. Furthermore, the incoming service provider is not usually in a position to commence any formal consultation with the workforce and their representatives about relocation or redundancy until after the transfer has taken place, as it is not the employer until then. The required collective and individual consultation may take several months, during which the new contractor has the burden of the extra employment costs under the transferred contracts of employment.

4.5 The service provision change regime may also cause problems with regard to international competitiveness for British business in some sectors. For example, British-based shipping companies may be placed at a disadvantage in bidding for work, if it is realised that a British-based crew would be likely to transfer under TUPE on a change of contractors, whereas a crew based in France (for example) would not transfer under the equivalent French legislation.

4.6 However, those ELA members who predominantly represent employees and trade unions approach the issue from the stance of protecting employees' rights - namely that, the removal of the service provision change rules would significantly erode workers' protection. Some ELA members have reported that service provision change rules are not always popular amongst affected employees, particularly in some sectors (such as bus operators) where they result in frequent changes of employer and operating base.

4.7 However, the service provision change regime has to some extent increased certainty and has led to a greater degree of fairness as between contractors. Prior to their introduction, many service providers who had accepted the application of TUPE on the original outsourcing from the client (sometimes at the insistence of the client) found that when they lost the business on a re-tendering, the new contractor did not accept the application of TUPE, leaving the original service provider with the employee liabilities. In cases where the work was labour-intensive, this was (at least initially) relatively easy for new contractors to argue[1], as one of the main factors to be taken into account in that situation for the purposes of a traditional TUPE transfer is whether a major part of the workforce is taken on by the transferee employer. This led to transferor employers arguing that, taking a purposive approach to TUPE, the motive of the transferee employer in deciding not to take on a substantial proportion of the workforce should be taken into account by the Courts and Tribunals. Essentially, they argued that, if the motive was to avoid the application of TUPE, that should be taken into account as a factor in favour of a finding that there was a TUPE transfer. Arguments of this kind were upheld by the Court of Appeal.[2] No such analysis is necessary under the service provision change regime in order to find a TUPE transfer. So, the service provision change regime has reduced uncertainty in this area, but at the cost of substantially increasing the burdens on business.

4.8 Due to its constitutionally neutral position, ELA does not make any recommendation on whether or not the service provision change rules should be repealed. But if the Government does decide to repeal the service provision change regime, there would be a case for legislation to reverse the effect of the Court of Appeal decisions mentioned above. The argument that the motive of the transferee employer in not taking on a major part of the workforce should

[1] On the basis of the ECJ decision in *Ayse Suzen v Zehnacker etc* [1997] IRLR 255

[2] *ECM (Vehicle Delivery Service) v Cox* [1999] IRLR 559 and *ADI (UK) Ltd v Firm Security Group Ltd* [2001] IRLR 542 (Simon Brown LJ dissenting).

be taken into account has not been tested in the ECJ. As Simon Brown LJ points out in his dissenting judgment in the *ADI* case, construing TUPE purposively where it applies is one thing, but deeming TUPE to apply on a purposive basis is another. This approach would put the UK on the same footing as other EU jurisdictions, as they currently apply the Acquired Rights Directive in this regard.

4.9 Although it has no empirical evidence to support this, ELA's impression is that the case for the repeal of the service provision change rules may be stronger in some sectors (e.g. professional services) than others (e.g. cleaning services); but drawing the line for those sectors to be excluded may prove to be a challenging exercise.

Question 5: Have the 2006 amendments led to less need to take legal advice prior to tendering or bidding for contracts?

5.1 No. As indicated in response to questions 1 and 4, the service provision change rules have not only led employers to explore ways of circumventing TUPE but also opened up a new area of dispute between the parties - e.g. service provision fragmentation or re-modelling. So ELA's experience is that there has been no reduction in levels of advice being sought, but rather the areas where advice is being sought have shifted.

5.2 Furthermore, the definition and principles of a service provision change are still not embedded within many small to medium businesses. For these businesses, the notion that they would be required acquire staff when they have no need for them, is something which they often have difficulty in accepting.

Question 6: Have the 2006 amendments led to fewer tribunals resulting from service transfers?

6.1 ELA does not have the statistics to give a definitive answer to this question. ELA's impression is that the number of tribunal cases has not fallen. But even if the official statistics have shown a decrease in the number of TUPE tribunal cases, this may not necessarily be due to the 2006 amendments to TUPE. For example, the general decline in transactions due to the adverse economic conditions may also mean that there are less TUPE transfers taking place - with the natural consequence that there are (numerically) less tribunal cases.

Question 7: Is the inclusion of service provision changes in principle helpful, but there are alternative models for their inclusion that would lead to improvements? What might these look like?

7.1 Please see our response in paragraphs 4.6 - 4.8 above.

7.2 ELA has no proposals for alternative models. Some ELA members suggested that there might be an opt out facility, provided that certain minimum protections were put in place to protect employees. For example, there are often occasions where the corporate parties and the trade union wish to adopt the "retained employment model" (REM). There are different learned legal opinions over whether or not the REM is TUPE compliant. It seems to ELA that where all interested parties (with the relevant workforce being collectively represented) agree to an alternative framework, then this should be permitted under TUPE.

Question 8: Should professional services be included in the definition of service provision and be covered by TUPE?

8.1 If the service change provision regime is retained, the majority of ELA members believe that, in principle, professional services should be excluded from its ambit. In professional services, the calibre of the people providing the service is fundamental to the service itself. For a client to terminate its arrangement with a professional services provider only to find that, through the operation of TUPE, its new provider is obliged to field the same team of people (or to face substantial liabilities for not doing so) is anti-competitive and absurd.[3] ELA would generally support the exclusion of professional services from the service provision change rules.

8.2 However it is appreciated, however, that it may be difficult to draw the line around what should be considered to be professional services for this purpose. The only way of ensuring certainty over the scope of such a provision would be to produce a prescribed list of exempted professional services; although ELA anticipates that this is likely to spark a furious debate from a wide range of service providers who will assert that they too provide "professional services".

8.3 Even where certain professions are prescribed as exempted from the service provision change rules, there is still likely to be some debate of delineation. For example, medical care might reasonably be described as a professional service. But does this also include nurses, receptionists and other auxiliary staff etc? Similarly, PR might be regarded as a professional service, but is this limited just to the account managers, but include design staff, secretaries, the event organisers, the caterers for the PR events etc.

8.4 ELA notes that even if professional services were excluded from the scope of the service provision change rules, some change of supplier arrangements might still be caught under "traditional" TUPE - provided the service being moved constitutes a discrete part of an undertaking which retains its identity.

[3] Which is essentially what happened in *Hunt v Strom Communications Ltd* ET/2702546/06

Question 9: Would the exclusion or professional services lead to uncertainty over whether TUPE did or did not apply, requiring businesses to seek further legal advice?

9.1 Please see our response in paragraphs 8.1 to 8.3.

Harmonisation of Terms and Conditions

Question 10: Is lack of provision for post-transfer harmonisation a significant burden? How might TUPE be adjusted to enable this whilst remaining in line with the Directive?

10.1 ELA's membership is divided on this point, depending on whether the members predominantly advises employers or trade unions/employees. The latter take the view that, subject to the suggestion in paragraph 10.5 below, any change in the current law would detract from the protection given by the Acquired Rights Directive (ARD) to employees and would potentially be non-compliant with the ARD.

10.2 There is a difference of view on the extent to which the ARD and the case law of the ECJ already allows employers and employees to agree post transfer changes in terms and conditions. The purpose of the ARD is to get the employees from A to B with their accrued rights (including their terms and conditions) preserved. Once that has been achieved the ARD has served its purpose and the parties should be able to mutually agree post transfer changes in terms and conditions. The *Daddy Dance Hall* case [4] and other subsequent cases have all be "point of entry" cases - where, in effect, the transferee would only accept the transferring employees if they agreed to the new terms and conditions. The key passage in the *Daddy Dance Hall* case has two elements:

a) "*An employee cannot waive the rights conferred upon him by the mandatory provisions of the Acquired Directive 77/187/EEC even if the disadvantages resulting from his waiver are offset from such benefits that, taking the matter as a whole, he is not placed in a worse position.*

b) *Nevertheless, the Directive does not preclude an agreement with the new employer to alter the employment relationship, in so far as an alteration is permitted by the applicable national law in cases other than the transfer of undertakings."*

The UK cases have focussed on part a), but have ignored part b). ELA considers that it would not be inconsistent with the requirements of the ARD for employers and employees/trade unions **after the transfer has taken place and the employees have arrived in the employment of the**

[4] *Foreningen af Arbejdsledere i Danmark v Daddy's Dance Hall A/S* [1989] 2 C.M.L.R. 517 ECJ,

transferee (with their acquired rights in tact) to be able to agree changes in terms and conditions going forward - provided that employees have the option to stay on their "TUPE conditions", if they so wish. This seems to accord with part b) of the *Daddy Dance Hall* case.

10.3 Needless to say those ELA members who mainly act for trade unions/employees do not agree with any policy approach which would diminish employees' rights. One concern is that, although in theory employees would have a choice whether to accept the new harmonised terms, in practice some unscrupulous employers might pressurise those employees who refuse to agree to the harmonised terms by withholding, for example, overtime opportunities from them. However, ELA believes that this threat could be addressed by a provision giving employees protection against dismissal or other detriment if they refuse to accept the new terms.

10.4 The current drafting of TUPE renders void any changes in terms and conditions if the reason is the TUPE transfer itself or any reason **connected with** the TUPE transfer. The transferring employees' terms and conditions will always be "connected to the TUPE transfer" to some extent and, this current restrictive meaning applied by the courts and tribunals seems to fly in the face of the second limb of the *Daddy Dance Hall* case dicta b). Absent a TUPE transfer, employees or their trade unions would be able to agree changes in terms and conditions.

10.5 However there was a degree of unanimity for allowing post transfer harmonisation of terms and conditions where the following conditions are in place:-

a) the employee has a free choice to sign up to the new terms and conditions or to remain on their TUPE ones;

b) the change is only agreed after the TUPE transfer has taken place - we suggest no earlier than 30 days after the transfer date;

c) the changes are agreed collectively by trade unions or elected employee representatives(this concept is already contained in reg 9 TUPE); and

d) employees are give protections against dismissal or adverse treatment if they exercise their right to remain on their TUPE terms.

10.6 Those ELA members who mainly represent employers believe that the current restrictive interpretation creates an anti-competitive environment for transferees and is harmful to business and, possibly, to job opportunities. The approach which we have suggested still leaves employees' rights protected - which is the prime purpose of the ARD.

10.7 If the Government decides not to permit post transfer changes in terms and conditions, then ELA recommends two adjustments to the current legislation:-

a) The current gloss applied by the UK courts and tribunals to the mandatory effect of Art 3 of the ARD - by extending its scope to changes made "**in connection with**" , rather than "**by reason of**" the TUPE transfer - should be reversed. This would be in accordance with the key extract from the *Daddy's Dance Hall* case, which refers to the latter formulation.

b) In the event that, as at present, employee can retrospectively unravel agreed changes in terms and conditions , as being null and void, this should be applied completely. This means that where the changes are part of a package, the employees (if they exercise their "TUPE rights") must revert to their original TUPE rights in their entirety and cannot "cherry pick" to retain those aspects of the new (harmonised) package of terms and conditions which are more favourable than their TUPE equivalents. ELA believes that this would be consistent with the ARD.

Question 11: Would it be helpful to have a provision limiting the future observance of terms and conditions derived from collective agreements?

11.1 ELA believes that there are two main issues here:

a) Should the Government adopt the static or dynamic approach to the transfer of applicability of collective bargaining machinery - e.g. where a local government activity is outsourced to the private sector, should the transferee continue to be bound by the future outcomes of the NJC negotiations?

b) Should there be a limit after which collective agreement can be changed by mutual agreement?

11.2 Due to ELA's constitutional neutrality on social policy, ELA does not make any recommendation as to whether the "static" or "dynamic" approach is preferable. The answer will depend on whether it is from employees/trade unions or employers. ELA believes that, due to the way that the questions referred to the ECJ were phrased, the outcome of the *Alemo-Heron & Ors v Parkwood* case it is very likely that the ECJ will rule that EU Member States can prescribe the "dynamic" approach, if they so wish.

11.3 However, ELA does have the following observations on this issue:-

a) Most employers believe that the static approach is the proper route because it creates an absurd situation whereby (especially in an outsourcing context) the incoming service provider would have to be bound by a third party collective bargaining body in respect of which it has no influence, membership or control. Such a body could agree changes in terms and conditions which the employer could not afford and which could override locally agreed arrangements. When bidding for an outsourcing contract the potential service providers would be

having to guess what such collective bargaining machinery would produce several years down the line. That could be construed as anti-competitive and favour in-house bids. On the other hand in *BET Catering Services Ltd v Ball* [5] Lindsay J stated:-

"we see no conceptual or legal difficulty in an employer agreeing (or being treated as having agreed) a system under which he agrees to pay his own employees wages which are determined, directly or indirectly, by some third party or by a reference to the awards of third parties purporting to be directed to categories other than his own employees. We do not see that to be commercially unreasonable and the experience of the members suggests that it is not uncommon. Nor is it the case, either for reasons of law or of business, that that would only occur where the employer could or might influence the third party. We have no difficulty in contemplating a contract by BET that has the effect that it should pay its employees NJC rates. We have been unable to see any reason....why a private sector employer should not be able to bind himself or be taken to have bound himself to pay public sector rates, nor any reason why Reg 5(1) should not operate so as to have the effect that he had so bound himself ".

Employers would counter this by saying that, whilst it may be "conceptually or legally logical" for them to be bound forever into such collective bargaining machinery, it is not logical from a business perspective.

b) Of course, where the precise terms of employees' contract of employment provide that their terms and conditions will be governed by specific collective bargaining arrangements, then there is the argument that, as a clear contractual term, it should transfer to the transferee under the ARD/TUPE along with all other contractual terms. However, it may be debateable whether a term providing coverage by collective bargaining arrangements is apt for incorporation as a term of the employment contract enforceable by individual employees. In many cases, in the absence of clear intent to the contrary, the courts in the UK have concluded that collective bargaining **machinery** (as compared to the **fruits** of such negotiations) are not apt for incorporation.[6]

Question 12: Would it be helpful to agree with employees a renegotiation of their contract provided that overall the resulting contract was no less favourable than at the point of transfer?

12.1 Although ELA sees the initial attraction in having a not less favourable terms and conditions overall test (employment tribunals are well used to applying a similar test in maternity returners cases), there are some very real difficulties with it in practice. These include:

[5] in *BET Catering Services Ltd v Ball* EAT 637/96

[6] Alexander v STC (No.2)[1991] IRLR 286)

a) identifying which terms and conditions fall within this assessment;

b) some terms (which may be important to employees) are of a non-financial nature and so do not easily lend themselves to be measured in this way. For example how does one assess leave of absence (e.g. maternity or paternity leave), job content, workplace location or flexible working in terms of financial value, disciplinary and grievance procedures?;

c) some terms are of greater importance to some employees (e.g. sick pay or holidays etc), than other terms and conditions. This will vary from employee to employee.

12.2 It is certainly questionable whether such an approach is compliant with the ARD, since the mandatory requirements of Art 3(1) entitle employees to demand adherence to each of their terms and conditions.

12.3 Whilst ELA members who mainly act for employers would welcome such a proposal, those representing employees/trade unions are wary that it will erode employees' rights.

12.4 The general consensus is that the proposal may be helpful in some circumstances, but would need robust checks and balances in place to ensure employees were not "bullied" into compliance. There would need to be a protection that any changes had to be agreed collectively and must not be open to imposition by the employer.

12.5 Where there are mutually agreed terms, employees could be given a specified period in which to renounce them (e.g. 6 months) after which any right of having them declared void will be forfeited. Perhaps, to give such employees sufficient safeguards in this respect, there should be a "health warning" to this effect on the new contracts of such employees alerting them to this right. Where an employee does decide to renounce the new terms, TUPE should also provide a mechanism to enable the employer to unwind the beneficial changes in terms and conditions which had been agreed as a package - so that the employee is put back into the position he would have been had the new package not been agreed- i.e. on the TUPE transferred terms and conditions.

Insolvency and Liabilities

Question 13: Should more be done to clarify the application of TUPE in insolvency situations? If so, would this require changes to the legislation, for example, by setting out which insolvency procedures fall under which provisions, or would more detailed guidance than currently provided be sufficient?

13.1 The decision of the Court of Appeal in *Key2Law (Surrey) Ltd –v- De'Antiquis* [7] has provided judicial clarity to the confusion surrounding the potential application of reg 8(7) [in administration situations. Given the findings of the court, there seems little prospect of anyone successfully arguing that TUPE should not apply to sales by administrators. Consequently, there is probably little to be gained by legislating to confirm the position now achieved (albeit not at the first time of asking) by the courts. However, any renewed TUPE guidance should state the law as it is post *Key2Law (Surrey) Ltd –v- De'Antiquis* .

13.2 Now that the courts have clarified the position in respect of company administrations, ELA believes that this may be an opportune moment to clarify in Guidance the position on other insolvency routes.

Question 14: Have the 2006 amendments meant that transferees (ie businesses taking over the contract) have a greater awareness of potential liabilities, and has this helped to reduce transaction costs and risks? If not, how could this be improved?

14.1 There are at least four separate scenarios to consider.

a) A "normal" business transfer – in such situations, there is typically full co-operation between the parties and a full due diligence exercise will have taken place. The 2006 amendments therefore play no practical part.

b) A "distressed" business transfer – typically this would be a sale by an administrator either by way of pre-pack or otherwise. Administrators will almost always insist on a full indemnity from any buyer in connection with liabilities that derive in any way from TUPE obligations. Setting aside the issue of whether such indemnities would be enforceable, this has the practical effect that little or no information is provided. Often, such deals are negotiated over very short periods of time meaning that detailed due diligence would not be possible anyway. Pricing often reflects this reality. The 2006 amendments therefore have little effect.

c) A "managed" service provision change – most service provision contracts negotiated in recent years will contain detailed provisions on what the parties anticipate will happen on exit. The provision of information on re-tendering is usually part of this. This often takes place many months ahead of any service provision change. In such cases, the position is more analogous to a normal mergers and acquisitions due diligence exercise and therefore the 2006 amendments play little part.

d) An "unmanaged" service provision change – this will occur either where the parties did not anticipate the exchange of information ahead of any

[7] *Key2Law (Surrey) Ltd –v- De'Antiquis [2011] EWCA Civ 1567*

transfer when they negotiated their contract, or where there is a first change of contractor in circumstances where perhaps the parties did not anticipate that TUPE may apply. In these circumstances, the 2006 amendments do at least provide a legal framework in which some limited employee due diligence material must be provided. However, the key issue is one of timing. 14 days before the proposed transfer is far too late in the process to allow either (1) any scientific tendering by the proposed transferee, or (2) proper consultation if the information provided results in any measures being proposed by the transferee.

14.2 There is little (if any) incentive on the outgoing contractor to provide information to assist a competitor in pricing its tender effectively. Certainty would benefit all parties in such circumstances and one possibility would be to change the timing of the obligation to provide information to reflect what is very often the commercial position agreed by parties who consider it – see ELA's comments in para 1.2 above.

Question 15: Should liability for pre-transfer obligations be transferred entirely to the transferee as is the case currently in TUPE ie should the business taking on the contract take on all the liabilities of the business or part of the business they are taking over? Or should both parties be jointly liable, as permitted by the Directive.

15.1 The present formulation of a transfer of all liabilities has the merit of simplicity. Also, in cases where the transferor has no assets post-transfer, it ensures employees have an effective remedy. Transferees are (largely) familiar with the legal position and therefore there is certainty for all concerned.

15.2 However, undoubtedly it leaves open the possibility of injustice. An innocent transferee can be left facing a liability it did not create. Where a transferor still exists and has assets with which to meet any liabilities, it would seem just and equitable to allow Tribunals to make awards against such transferors in the first instance, with the backstop being that transferees will remain liable if there is no transferor or it is unable to meet its liabilities. Some may argue that this makes life harder for employees, but there are many examples of employees (or their representatives) bringing claims against both transferor and transferee to make sure they have covered all potential respondents (and this often happens where there is an alleged failure to consult).

15.3 An amendment to the legislation to provide for tribunals to make parties liable according to fault would therefore seem to offer flexibility to reflect the reality of a situation.

Guidance

Question 16: Is the provision on 'Economic, Technical or Organisational reason entailing changes in the workforce' sufficiently clear? Would additional guidance be helpful and if so in what form?

16.1 ELA believes that the provisions on "an economic technical or organisational reason entailing changes in the workforce" (ETO reason) are clear enough - after all, the words are a straight recitation of the ARD. ELA members who act for employers believe that the problem is the restrictive way in which the courts and tribunals have interpreted them - in particular the Court of Appeal's decision in *Delabole Slate Co v Berriman* [8] and as subsequently applied by tribunals. By restricting the words "*entailing changes in the workforce*" to "numbers and functions of employees", it has imposed unnecessary restrictions on the transferee to organise its workforce effectively. We give some examples of this below.

16.2 The ability of employers to dismiss and change terms and conditions of transferring staff in connection with a TUPE transfer is considerably narrower than the ARD permits and is out of step with the practice of many other EU member states. This is due to both the complex wording of Reg 4 and 7 of TUPE and the UK Courts' consistently narrow interpretation of these provisions.

16.3 Issues arising from the "ETO reason" provisions may benefit from a change to TUPE itself, rather than the issue of additional guidance in this area. Focusing on areas where the UK law goes beyond the requirements of the ARD in particular:

a) In the ARD, the ETO reason is only referred to in the context of the reason for dismissal. The ARD Art 4(1) provides that: "*The transfer of an undertaking, business or [part of it] shall not in itself constitute grounds for dismissal by the transferor or the transferee. This provision shall not stand in the way of dismissals that may take place for economic, technical or organisational reasons entailing changes in the workforce*." Some EU Member States do not interpret the second sentence as being an exception to the first, but consider this allows the transferor or transferee to terminate for any good business reasons, e.g. redundancy, restructuring or reorganisation. Most ELA members believe that this is a reasonable interpretation which is consistent with the ARD.

b) The ETO reason wording is unnecessarily and confusingly applied in TUPE to changing terms and conditions (Regs 4(4) and 4(5)) and overrides the freedom of the parties to agree new terms in appropriate circumstances. The UK's approach is different from most other EU Member States. A survey undertaken by an ELA member firm on the approach to a post-transfer agreed change to terms and conditions received responses from law firms in 16 EU Member States, of which only the UK suggested the change would be unlawful.

[8] *Delabole Slate Co v Berriman [1985] IRLR 305*

c) The key ECJ decision of Daddy's Dance Hall [9] states that the employment relationship "could be altered with regard to the [transferee] within the same limits as for the [transferor], on the understanding that in no case can the transfer of the undertaking itself constitute the reason for the alteration." This is wider than TUPE, which outlaws not only dismissals or changes to terms and conditions by reason of the transfer itself (e.g. harmonisation), but also for a reason connected with the transfer, unless that reason is an ETO reason. TUPE could benefit from simplification here as it is unnecessarily over-engineered. Please also see ELA's comments in relation Question 10 above

16.4 UK case law has followed the unnecessarily restricted interpretation of what may amount to an ETO reason that was introduced by the Court of Appeal in the *Berriman v Delabole Slate* case:

a) *Tapere v South London and Maudsley NHS Trust* [10] highlighted a significant practical limitation caused by the *Berriman* decision: There will be no valid ETO reason whenever a transfer entails a change of location, but no change in the numbers of employees employed after the transfer or their job functions. Three employees had to relocate across London as a result of transferring to a new NHS Trust, but they were all still required and their jobs did not change. The Claimant's role at his place of work was genuinely redundant. The undesirable result for the transferee was that, although the Claimant was entitled to a statutory redundancy payment, she was also automatically unfairly dismissed under TUPE. The EAT's hands were tied by *Berriman*.

b) A similar result arose in *Royden v Barnetts Solicitors* [11]. Both the *Tapere* and *Royden* cases also highlight the dangers of employees claiming constructive unfair dismissal under Reg 4(9) whenever a transfer involves a relocation exercise. It also means that a transferee cannot lawfully dismiss after the transfer for a place of work redundancy unless it forces through job cuts or changes job functions, which runs contrary to TUPE's purpose.

c) *Hynd v Armstrong* [12] the Scottish Court of Session decided that dismissals by a transferor for reasons related to the transferee (i.e. the transferee's proposed measures) are not valid ETO reasons. This means in practice, the transferor cannot effect redundancies and, if employees want their redundancy pay, they have to transfer to become employed by the transferee, who will then make them

[9] *Daddy's Dance Hall* [1988] IRLR 315

[10] *Tapere v South London and Maudsley NHS Trust* (EAT) [2009] IRLR 972

[11] *Royden v Barnetts Solicitors* (ET 2103451/07, unreported).

[12] *Hynd v Armstrong* [2007] IRLR 33

redundant. Employees often do not want to do this. The decision to dismiss should be assessed on a case by case basis as to whether there was a genuine ETO reason, whichever party dismisses.

16.5 ELA's Proposals

Amended guidance should follow any change to the law, but ELA members who act for employers believe that the Government should consider first consulting on amending TUPE on the ETO reason provisions in the following ways:

a) Confining automatic unfair dismissal to dismissals by reason of the transfer itself (i.e. bringing Reg 7(1) and 7(2) in line with Art 4(1) of the ARD), and not extending it to dismissals "connected with" the TUPE transfer. The latter is potentially open-ended and brings with it uncertainty. See also ELA's comments in para 10.4 above.

b) Clarifying that any genuine dismissal for redundancy under s.139 Employment Rights Act 1996 (or perhaps more widely under s.188 TULRCA 1992) will be valid for an ETO reason.

c) Allowing the transferor to lawfully dismiss or agree with the transferred employee to seek to vary terms and conditions relying on the transferee's ETO reasons, if they are valid. This may be sensible if the UK opts to exercise the power under the ARD to provide for joint liability for employment claims between transferor and transferee.

d) Abolishing the requirement that, for a change to terms and conditions to be valid, it must be for an ETO reason, and allowing transferees to agree changes with employees, providing that the reason is not mere harmonisation. (i.e. bring Reg 4(4) and 4(5) into line with the principles in the *Daddy's Dance Hall* decision) - see ELA's comments in Question 10.

e) Confirming that the transferee has the same ability to dismiss and vary the terms and conditions of transferring staff as the transferor had when it employed them - save that the only reason that dismissals or variations to terms may not be effected is by reason of the transfer itself] (which is the basis of the *Daddy's Dance Hall case.*

16.6 Subject to no contrary amendment to the law, TUPE or its guidance could also be clarified to reflect other recent decisions of case law on ETO reasons, as follows:

a) An employer can establish an ETO reason even where the relevant change only applies to part of the workforce - *Nationwide Services v Benn* [13] ,
b) An employer may seek to validly changes terms and conditions to improve efficiency, productivity or service validity, even if this is

[13] *Nationwide Services v Benn* [2010] IRLR 922, EAT

connected to a relevant transfer - *Enterprise Managed Services v Dance* [14]

c) When an administrator is slimming down a business for sale, even where there is no transferee identified, it is not a valid ETO reason to dismiss prior to a transfer a post which will inevitably be required by a transferee - *Spaceright Europe v Balliavoine* [15] . However, this last decision is arguably not in keeping with promoting a rescue culture for businesses in administration.

Question 17: Are there other areas of TUPE that would benefit from additional guidance/clarification?

Although legislative amendment would be preferable to issuing additional guidance in respect of many of the following suggestions.

17.1 **Regs. 4(9) & 4910).** More detailed guidance could be provided on the effect and meaning of regs. 4(9) and 4(10). However, there is also a case for reforming these provisions, as they arguably interpret incorrectly the corresponding provision in the ARD.

17.2 **Reg 11:** ELA members hear of some transferors using data protection legislation as a reason for not providing ELI under until the last permitted moment, which can cause significant problems for transferees in practically co-ordinating the transfer (e.g. setting up payroll in adequate time). It is also practically difficult for a transferee to formulate its costs for a service and communicate the "measures" it may take in respect of the transferring workforce unless it knows what workforce it is inheriting and on what terms. Guidance could clarify therefore that:

a) it is not a breach of data protection legislation to provide Employee Liability Information (ELI) under reg 11 to the transferee ahead of the transfer;

b) employees' consent is not required to transfer the information required by TUPE; and

c) it is permissible to disclose staff costs and information on an anonymised basis to a client or tenderer for the purposes of tendering and before a transferee is identified, as long as, at that stage, the information does not reveal data from which the individual employees can be identified.

[14] *Enterprise Managed Services v Dance* [2010] IRLR 922, EAT

[15] *Spaceright Europe v Balliavoine* [2011] EWCA Civ 1565, CA

17.3 **Reg 11**: ELI should be amended to include all terms of the contract of employment. At the very least, it should include those relating to redundancy pay or agreed payments on termination of employment.

17.4 In **Reg 13(6),** the duty to inform and consult appropriate representatives on "measures" is restricted to consultation by the employer taking those measures. In many cases, the transferor envisages no measures being taken in connection with the TUPE transfer, but the transferee does (e.g. redundancies, organisational change etc). This is a big lacuna in TUPE. The one person whom the appropriate representatives really need to talk to is the transferee, who is under no obligation to speak to them. Whilst some transferors apply best practice and ask the transferee to join them in meetings with the appropriate representatives, the TUPE does not encourage this. ELA proposes that:

a) TUPE should be amended giving the transferee the ability, if it so wishes, to start consultation with the appropriate representatives (e.g. on collective redundancies) prior to the transfer date and that the transferor would be obliged to allow the transferee access to those representatives "in good time to allow consultations to take place". There should be no compulsion on a transferee to do this, if it does not wish to.

b) if the transferee does engage in such pre-transfer consultation, the time so spent should be offset against the 30/90 day "consultation periods" under s. 188 TULRCA. This would shorten the timescale for the redundancy process, minimise unnecessary employment costs for the transferee whilst the (90 day) consultation process runs its course, and minimises uncertainty for employees. However some of ELA's members who represent trade unions do not believe that such an offset should apply, although this was a minority view among such members..

There is a view amongst some ELA members (mainly those representing trade unions/employees) that the UK should follow the French practice and make pre-transfer consultation by the transferee it mandatory - because, where collective bargaining arrangements are due to transfer (or for collective redundancies) there will have to be negotiation/consultation in any event after the transfer. By requiring the transferee to get involved pre-transfer it should shorten the timeline for the transferee's measures to be implemented and the transferee can control that the transferor does not make unauthorised commitments on its behalf (which TUPE will transfer across to the transferee). All interested parties win by this clarification in the law. Best practice guidance could also be issued on information and consultation obligations.

17.5 **Reg 13(10)**: What constitutes a "reasonable" time to allow for employees to elect representatives after being given the opportunity to do so is unclear. The provision does not work well in practice. In non-unionised workforces, transferors in smaller transfer exercises do not understand why they cannot simply give information on the transfer to and consult with all the transferring

staff without having to allow for representatives to be elected. The technical answer is that the transferor is not permitted to just give information to everybody, but in practice it often does. Given the penal nature of compensation for failure to inform and consult, this provision could benefit from clarification to prevent convoluted technical breaches.

17.6 **Reg 18:** Individuals should be able to waive claims for protective awards and breaches of reg 13 under the compromise agreement regime. The right to seek a protective award/reg 15 award lies with the appropriate representatives (and in limited cases individual employees), and this should not change. However, where an individual signs a compromise agreement to settle all claims, there seems no logical reason why this should not cover entitlement to receive a protective award/reg 15 award. In effect the employee would be waiving/compromising his right to enforce such an award, or personally bringing a claim (where there are no appropriate representatives) . The appropriate representatives would still have the right to lodge a claim for breach of reg 13 in the normal way, if there are any affected employees who are not compromised out.

Implementation of TUPE in other EU Member States

Question 18: Do you have experience of the implementation of the Acquired Rights Directive (TUPE) in other EU Member States? If so, are there any problems you have encountered, or conversely are there lessons that the UK could learn, from their implementation of the Directive?

18.1 ELA considers that there are four principal differences between implementation of the ARD in the UK and in other EU member states, as follows:

a) the circumstances in which the ARD applies;

b) an employer's ability to agree changes to terms and conditions of employment following a transfer;

c) joint and several liability between transferor and transferee for pre-transfer liabilities;

d) consultation obligations (although this is to a lesser extent).

ELA comments on each of these issue in turn.

a) ELA's experience is that the courts in other EU Member States are generally less likely to decide that TUPE should apply than the UK courts, particularly in outsourcing situations.

Since the 2006 TUPE Reg were implemented in the UK, we have been subject to the service provision change test, the stated purpose and effect of which is to ensure that TUPE applies more frequently in outsourcing situations. The service provision change test goes further than the ARD

itself and is not replicated in other EU member states (with a couple of arguable exceptions, namely the Czech and Slovak Republics).

However, even if one ignores the effect of the service provision change test and simply consider the traditional test as to whether TUPE applies (ie the test under current Reg 3(1)(a)), ELA's experience is that the UK courts are generally more willing to find that TUPE should apply than courts in other EU Member States in outsourcing situations.

To some extent, the difference in approach between the UK and other EU Member State courts perhaps reflects the level of outsourcing in the relevant jurisdictions - ELA's general experience is that outsourcing is more common and developed in the UK than other EU Member States.

From a policy perspective, the potential advantage of the UK courts' approach is that there is perhaps greater certainty that TUPE would apply and greater protection for employees (if you consider that employees are better protected by TUPE applying). The potential disadvantage is that there is less flexibility for businesses and service commissioners, particularly when restructuring outsourced functions.

b) ELA's experience is that employers generally have greater flexibility to change terms and conditions of employment following a TUPE transfer in other EU Member States than in the UK. This is despite the provisions of the ARD itself and the line of cases following the *Daddy's Dance Hall* case referred to in the response to question 10 above. In particular, in some EU member states (eg France, Germany, Greece, Netherlands, Sweden), employers can make certain changes either as part of their normal management prerogative or with trade union or employee consent. In some member states (eg Germany, Austria), certain terms and conditions can be changed by consent after the period of 12 months following the transfer.

c) ELA's experience is that in several EU Member States (eg Austria, Belgium, France, Germany, Greece, Italy, Spain), liability for pre-transfer liabilities is joint and several between the transferor and the transferee (at least for a period of time following the transfer, such as 12 months). Please see our response to question 15 above for a more detailed response on this issue.

d) ELA understands that, in certain EU Member States, relevant information and/or notice of the transfer effectively has to be given to employees a specified period of time in advance of the transfer (eg 25 days in Italy and in Germany employees can object to the transfer for up to one month after the relevant information is provided). Some ELA members have experienced difficulties in the UK arising from these obligations where business acquisitions or service provision changes have had to be carried out at short notice, perhaps due to major default by a contractor or its insolvency, or as part of a wider transaction across a number of jurisdictions. ELA's view is that these obligations reflect a particular culture of collective consultation in the relevant jurisdictions and are unduly prescriptive, particularly in respect of transfers involving small numbers of employees. We therefore suggest that this is not an area in which changes are required in the UK.

18.2 ELA members are aware that in some EU Member States (e.g. France) the ir equivalent of TUPE does not apply to transfers out of France but into another country (whether or not in the EU).

18.3 ELA considers that further BIS Guidance on the practical application of TUPE to transfers of undertakings/service provision across borders (e.g. from the UK to India or the Far East, where there is no equivalent to TUPE) would be helpful.

TUPE and other areas of employment law

Question 19: Have you experienced problems from the interaction of TUPE with other areas of employment law?

19.1 One area where members of ELA have experienced problems is in the interaction between TUPE and the Data Protection Act 1998 ("DPA"). ELA has a number of observations in this context:-

a) Reg 11 of TUPE requires that the transferor notify to the transferee the employee liability information of any person employed by him who is assigned to the organised grouping of resources or employees that is the subject of a relevant transfer. Employee liability information, which is defined in Reg 11(2) of TUPE, includes personal data as defined in the DPA, and may additionally consist of sensitive personal data. The DPA imposes certain requirements on those who hold the data of others, which limit disclosure of that data. However section 35 of the DPA exempts personal data from parts of the Act limiting disclosure, where disclosure is required by or under any enactment. Therefore where reg 11 of TUPE is engaged, disclosing the ELI does not breach the DPA. Paragraph 6 of schedule 2 additionally allows for disclosure where it is necessary for the purposes of legitimate interests pursued by the data controller or by the third party or parties to whom the data are disclosed, except where the processing is unwarranted in any particular case by reason of prejudice to the rights and freedoms or legitimate interests of the data subject. This will cover some circumstances where information is disclosed before reg 11 of TUPE is engaged, subject to appropriate safeguards being put in place. This only covers personal data and not sensitive personal data. ELA believes that an incoming transferee needs to know, for example, details of employee sickness (particularly long term sickness) in order to properly prepare its bid.

b) ELA members have observed that, particularly in the context of service provision changes following re-tendering of a contract, transferors cite their responsibilities under the DPA as a reason not to provide employee liability information, or to provide it as late as possible. This causes obvious difficulties for the transferee and, in many case, such reliance is not legally justified.

c) ELA members have also observed that, on occasions, potential bidders request very detailed employee liability information in advance of bidding to purchase a business or tendering for services. This causes an understandable tension for the transferor between ensuring that potential bidders can be given the information they need in order to tender appropriately, and complying with the provisions of the DPA.

d) In cases where the obligations under TUPE have not arisen, for example at the early stages of a tender process or bidding process, or where the information requested goes beyond that covered by TUPE, the Information Commissioners Office Good Practice Guidance suggests that employee's consent is sought in advance of disclosing information, or that appropriate safeguards are put in place. ELA's view is that seeking consent is not always practicable, particularly in larger workforces, and that more clarity around the relationship between the two provisions would be helpful. ELA notes that paragraph 6(2) of schedule 2 of the DPA allows the Secretary of State to specify by order particular circumstances in which the condition in schedule 6 is to be taken to be satisfied. ELA also notes that the Acquired Rights Directive allows member states considerable leeway in the measures that they adopt to ensure that the transferor notifies the transferee of the rights and obligations which will transfer. See also ELA's comments in para 17(2)(b) above.

19.2 Problems have been experienced in respect of the interaction between TUPE and the provisions relating to compromise agreements - see ELA's comment sin relation to para 17.6 above. Reg 18 of TUPE provides that Section 203 of the Employment Rights Act 1996 ("ERA") applies in relation to TUPE (except where TUPE specifically provides otherwise). Section 203 of ERA renders void any agreement which attempts to prevent a person from bringing a claim under ERA (and consequently TUPE). However there is an exception for certain specified claims, which may be settled provided that the conditions in section 203 are complied with. This allows for the settlement of, for example, claims for unfair dismissal, even where the dismissal is automatically unfair by virtue of TUPE. However claims relating to failure to inform and consult under TUPE cannot be settled in this way.

19.3 Guidance would be helpful on the application of TUPE to those situations where there is a relevant transfer or service provision change out of, or into, the UK.

Question 20: The Government is also calling for evidence on collective redundancy consultation rules. Please identify any issues that you have in terms of how the TUPE Reg and the rules on collective redundancy consultation fit together.

20.1 Reg 13 of TUPE requires the transferor and transferee to inform their respective appropriate representatives of employees affected by the transfer. Where an employer proposes to take measures in relation to

affected employees, it must consult on those measures with a view to seeking agreement. Each employer is only required to carry out consultation with its own employees on measures which it proposes. This is an apparent lacuna, in that it is rare for the transferor to propose measures in relation to the transferring employees, but measures are often proposed by the transferee. TUPE do not require the transferee, or indeed give the transferee the right, to consult with the transferring employees pre-transfer. Please see ELA's comments in para 17.4 above.

20.2 Facilitating pre-transfer information and consultation by the transferee with the appropriate representatives of the transferor's employees should allow for early engagement between the transferor and its new workforce, which should benefit both transferee and employees. Additionally this will give the transferee control over the representations made to the employees pre-transfer, which will prevent the transferor making unauthorised commitments on its behalf.

20.3 Section 188 TULRCA requires employers to consult collectively when it proposes to dismiss as redundant 20 or more employees. This consultation can only be undertaken by the relevant employer, so collective redundancy consultation cannot be commenced by the transferee until after the TUPE transfer has taken place. Where the transferee intends to take measures which would require consultation under TULRCA, they may, depending on the number of employees affected, have to go through a 30 or 90 day consultation period post-transfer before effecting any changes. As well as delaying any potential changes, this has the effect of subjecting the affected employees to two sets of consultation in quick succession, leading to additional uncertainty.

20.4 Therefore alongside the proposal that the transferee should be required by TUPE to consult with the transferring employees pre-transfer, ELA proposes that the transferee should be able to commence collective consultation under TULRCA with the transferring employees pre-transfer and that any such time should count towards the requisite 30/90 day period under s.188 TULCRA. This would shorten the timeline for implementation of the transferee's measures, allowing them to be introduced on or shortly after the transfer date. Additionally it would benefit employees, who would not be subjected to two consultation exercises (under TUPE then under TULRCA) in quick succession, together with a longer period of uncertainty.

20.5 ELA has also responded separately to the call for evidence on collective consultation.

Other

Question 21: Do you have particular concerns around the application of TUPE to different managerial levels of employees within the same organisation? If so, what are these and how would you like to see them addressed, bearing in mind the requirements of the Directive?

21.1 ELA does not believe that the ARD permits a distinction to be made between different levels of employees in an organisation this is made clear by the definition of "employee" in art 3(1)(d) of the ARD.

21.2 However there is a practical difficult in dealing with senior and supervisory employees whose time is split across different parts of a business or a client/customer base. TUPE currently apples to a transfer employees "assigned to the organised grouping of resources or employees". However, TUPE do not clearly define what is meant by "assigned". Whether an employee is assigned is therefore a question of fact, and case law emanating from the ECJ case of *Botzen v Rotterdamsche Droogdok v Maatschappij BV* [16] suggests that a number of factors, including the percentage of time spent working in the grouping being transferred, need to be taken into account. In ELA's experience the question of assignment is one that causes employers significant issues and this lack of certainty could be addressed by the implementation of detailed guidance on the question of assignment.

Question 22: Have developments in case law since 2006 raised issues that mean the 2006 Reg would benefit from updating?

22.1 *Kimberley Group Housing Ltd v Hanley*

a) This case was the first to deal with a situation where a contract for services transferred from one single provider to multiple new service providers. There was a dispute about whether the 2006 Reg applied to the transfer and, if so, to which of the new providers employees should transfer. The EAT clarified that to answer this question, it was necessary to focus on the link between the individual employee and the work or functions which they actually performed with the transferor.

b) In ELA's experience, there is currently a lack of clarity in the 2006 Reg in relation to transfers to multiple service providers, which can cause uncertainty to all parties. It may therefore be of benefit to state more clearly the *Kimberly* principle in ECJs et out for consideration in this situation in *Botzen v Rotterdamsche Droogdok Maatschappij* - see ELA's comments in para 21.2.

22.2 *Parkwood Limited v Alemo Herron*

a) In this ongoing case, employees transferred from a local council where their contractual remuneration was set from time to time by way of a collective agreement, rather than by the contract itself. The first transferee honoured the employees' collectively agreed terms. However, when the employees

[16] *Botzen v Rotterdamsche Droogdok v Maatschappij BV [1986] 2 CMLR 50*)

transferred for a second time, the new transferee argued that they had no obligation under the 2006 Reg to give the employees an increased rate of pay agreed under the collective agreement after the original transfer. The employees maintain that this duty does apply.

b) The case is now with the Supreme Court, who have referred a number of questions on it to the ECJ. This will ultimately result in a decision on whether new collectively agreed terms cease to apply after the date of transfer (the 'static' interpretation) or continue to apply after the transfer (the 'dynamic' interpretation). We refer to ELA's earlier comments in relation to question 11.

22.3 *Todd v Strain and others*
Two significant principles issues from this case:

a) It provided clarification on the definition of "measures" in Reg 13 of the 2006 Reg. It confirmed that purely administrative changes (in this instance, a change of pay date) would fall within the definition. Consequently, there is a duty on employers to inform and consult representatives about such changes.
b) It confirmed that the duty to inform in Reg 13 is separate and independent from the duty to consult, and employers must ensure they comply with both.

ELA believes that Reg13 could usefully be updated to state each of these principles more clearly.

22.4 *Cable Realisations Ltd v GMB Northern*
This case confirmed that employers should take account of any holiday or closure dates affected their business when assessing the length of time they must allow to fulfill their information and consultation duties. Reg 13 or the guidance could be usefully updated to clarify this.

Question 23: Are there other areas of TUPE that would benefit from change/review? Conversely are there areas that it is important to keep?

23.1 The remedy for failure to provide employee liability information or failure to provide such information within the relevant timeframe is set out in Reg 12. The amount of compensation is stated to be such as the tribunal considers just and equitable in all the circumstances (Reg 12(4)) having regard in particular to any loss sustained by the transferee. However, a minimum award of £500 per employee is provided for in Reg 12(5) unless the tribunal considers it just and equitable, in all the circumstances, to award a lesser sum. In ELA's view Reg 12(5) tends to contradict Reg 12(4) in setting a minimum level of compensation which does not relate to loss sustained by the transferee. The Government, as a matter of policy, should clarify whether or not an award made pursuant to Reg 12 is to be based on loss or on the seemingly arbitrary sum of £500 per employee. ELA observes

that a single penalty of £500 per employee does not appear to be much of a deterrent to require the transferor to comply with its Reg 11 obligations.

23.2 ELA notes that in many cases an obligation to inform arises pursuant to Reg 13(2) but not an obligation to consult (on the basis of there being no measures envisaged pursuant to Reg 13(2) and therefore no obligation to consult pursuant to Reg 13(6)). In these circumstances consideration should be given to permitting expressly that such information can be given to employees individually without the requirement to involve employee representatives. The Directive des not compel the election of representatives in an unrepresented workforce. Art 7(5) of the ARD provides that Member States may limit the obligations to inform and consult to undertakings or businesses which, in terms of the number of employees, meet the conditions for the election or nomination of a collegiate body representing the employees. Art 7(6) provides that Member States shall provide that, where there are no representatives of the employees in an undertaking or business through no fault of their own, the employees concerned must be informed in advance of the relevant information that would otherwise have been provided to their representatives. ELA suggests that a number of options could be considered:

a) In the case of an unrepresented workforce, employers may either facilitate elections for representatives (complying with Reg 14), or choose to give the information to all staff and consult with them all on any measures envisaged.

b) The same as above, except that where there are 20 or more transferring employees, the election requirements set out in Reg 14 apply (i.e. in order to mirror the provisions set out in section 188 TULCRA.

23.3 Following the EAT's decision in *Sweetin v Coral Racing* [17] [tribunals assess the amount of compensation for failure to inform and consult pursuant to Reg 15 and Reg 16(3) in accordance with the guidelines set out by the Court of Appeal in *GMB v Ltd* [18] . As such, assessment of the award is punitive and measured on the basis of fault. ELA suggests that consideration should be given to calculating the award for failure to inform and consult based on loss rather than fault; however those ELA members who mainly represent employees/trade unions believe that the *Susie Radin* approach would provide a more effective deterrent.

23.4 The interaction between TUPE and potential employer liability for immigration offences could usefully be reviewed and the guidance joined up. At present, a transferee has 28 days following a transfer in which to carry out its own pre-employment immigration checks on any employees transferred under TUPE. This appears to ELA to be a policy decision aimed at the new employer weeding out potential illegal workers, in cases where

[17] *Sweetin v Coral Racing [2006] IRLR 252*

[18] *GMB v Susie Radin Ltd [2004] IRLR 400*

the previous employer has failed to do so, as the transferee seemingly cannot rely on records that the transferor carried out the appropriate checks at the time of the original recruitment. However, ELA also recognises that as the new penalties are a matter of civil liability pre-existing causes for liability would otherwise transfer and so this gives the new employer the benefit of the protection of immigration checks which would otherwise have to be carried out pre-employment. If this is to be retained then a 28 day period is in many cases considered to be too short, save in the case of the smallest of transfers. ELA notes that a 90 day period may seem more appropriate. The transferee might also be given the option of relying on the transferor's pre-employment checks where these can be evidenced.

23.5 Additionally, an employer only has 28 days in which to organise a certificate of sponsorship for any worker sponsored under Tier 2. This is a short period in the circumstances, particularly as there is no provision within TUPE for any disclosure of the existence of such employees in advance of a transfer. Whether employee liability information (if retained as a provision) is extended to any information relating to the immigration status of the employees, might be considered.

23.6 ELA considers that the application of TUPE to atypical workers could usefully be clarified. The definition of "employee" in Reg 2(1) refers to any individual who works for another whether under a contract of service or apprenticeship or otherwise. This differs from the definition in section 230 Employment Rights Act 1996 and there appears to be no justification for this given that Art 2(1)(d) of the ARD refers to an "employee" being an individual protected as such under national employment law.

23.7 It is notable that in the UK the transferor has very limited liability for its time as an employer in the event of a transfer under TUPE. This in itself places a significant burden and risk consideration on a potential transferee, particularly in scenarios where there are not sophisticated contracts managing prospective liability as between the transferor and transferee – as will often be the case in contracting out scenarios. Consideration could be given to joint/several liability so that a transferor remains liable for its acts or omissions. This is expressly permitted in Art3(1) of the ARD.

23.8 In ELA's view the law on when an employee might object to a transfer pursuant to Reg 4(7) could be reviewed and, in order to increase certainty, a specific timeframe given so that an employee is permitted to object at any point up to a transfer or within [X] days following the date when the transfer has been notified to the employee in writing.. ELA understands that one month is the timeframe that has been implemented in Germany.

23.9 ELA notes that the "Retention of Employment" (RoE) model adopted in particular in the public sector could, for the sake of certainty, be included within the scope of TUPE Under the RoE model, employees opt-out of the transfer of their employment pursuant to Reg 4(7). Their employment terminates automatically by operation of law on the date of the transfer and they are then immediately re-employed by the (typically public sector) employer on the same terms and conditions of employment and seconded to

the (typically private sector) provider. ELA notes that the case of *Capita Health Solutions v BBC and McLean* [19] casts doubt on whether RoE would be upheld if challenged and this uncertainty could be addressed within TUPE by setting out a process for lawfully implementing RoE

Question 24: Are there any other issues you wish to raise?

24.1 Some ELA members felt that there may be certain industries (e.g. public transport) where the application of the 2006 Regulations to service provision changes can be counterproductive for employees. This particularly occurs where a transfer involves relocation to new premises a considerable distance from employees' old location. Although the 2006 Regulations contain a right for an employee to claim unfair dismissal in this situation, doing so is complex, time consuming and potentially costly, with an uncertain outcome. Consideration could be given to simplifying this procedure.

24.2 It was also felt that TUPE should not necessarily apply in situations where the service provided is for social or personal care. In such situations, the change of provider can arise from dissatisfaction of the client and/or contracting party with the care given. Application of TUPE may in practice force the parties to continue to employ unsatisfactory or inadequate employees.

24.3 There is a lack of clarity in TUPEin respect of their application to employees who are not permanent employees and/or are not permanently assigned to transferring services or undertakings. For example, fixed term employees whose contract ends on the same day as the transfer, or permanent employees on secondment.

[19] *Capita Health Solutions v BBC and McLean [2008] IRLR 595*

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