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Transfer of Undertakings (Protection of Employment) Regulations 2006:

Consultation on Proposed Changes to the Regulations

Response from the Employment Lawyers Association

8 April 2013

Transfer of Undertakings (Protection of Employment) Regulations 2006: Consultation on Proposed Changes to the Regulations

Response from the Employment Lawyers Association

Please tick the boxes below that best describe you as a respondent to this:

Business association

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 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.

The Legislative and Policy Committee of the ELA set up a sub-committee under the chairmanship of Fraser Younson of Berwin Leighton Paisner to consider and comment on the BIS consultation paper Transfer of Undertakings (Protection of Employment) Regulations 2006: Consultation on Proposed Changes to the Regulations. Its report is set out below. A full list of the members of the subcommittee is annexed to the report.

Question 1: Do you agree with the Government's proposal to repeal the 2006 amendments relating to service provision changes?

No

a) Please explain your reasons:

The service provision changes (SPC) created an extra degree of complexity to an already complex area. On each occasion it was necessary for the parties to consider whether TUPE applied under reg 3(1)(a), as well as 3(1)(b) TUPE. The initial purpose of the SPC provisions – to provide certainty by providing a "level playing field" in seeking to ensure that TUPE would almost always apply in outsourcing/insourcing situations – has been, to some degree, undermined by recent decisions of the EAT over the last two years which have begun to limit the application of the SPC provisions. But there is still a material amount of case law on the application of the SPC provisions.

If the SPC provisions are repealed, it will shift the focus back to reg 3(1)(a) – i.e. whether there has been a transfer of an entity which has retained its identity.

This test is fact specific and focuses on what has happened to the relevant assets (including the workforce) of the relevant entity. ELA believes that there will still be cases arguing over whether sufficient of the key assets have transferred so that it could be said that its identity has been retained, but in new hands.

It also opens up the possibility that the employers could side step TUPE by arranging that none of the key assets transfer. Cases like *Oy Liikenne [2001] IRLR 171*) would mean that some service provision change cases would now fall outside TUPE where the transferee is selective in deciding which of the assets used by the transferor it will take on. This possibility does cause concern for those ELA members who predominantly act for employees or trade unions.

As a consequence, litigation on cases like *ECM v Cox [1999] IRLR 559 (CA)* would increase as we would expect to see legal challenges where transferee employers decline to take on the key assets of the entity. In labour intensive undertakings, this would mean that a prospective transferee could arguably simply decline to take on the relevant employees as a means of avoiding TUPE.

From a practical perspective, both employers and unions have got used to the SPC provisions and have developed processes and strategies to deal with them. Although it is gold-plating on top of the ARD, it is not seen as burdensome. Indeed many outgoing service providers welcome the application of the SPC, as it relieves them of the financial burden of having to make redundancies if they lose the service contract on re-tendering. Businesses like simple processes and the SPC meets that test.

b) Are there any aspects of the pre -2006 domestic case law in the context of service provision change cases which might need to be considered with a view to helping to ensure that the test in such situations is aligned with that in the Directive (as interpreted by the Court of Justice of the European Union)?

Since ECJ case law has indicated that art. 3(1) of the Directive is mandatory, it would be highly desirable, for the purpose of determining whether there has been a TUPE transfer, for some clarification on how the Court of Appeal's decision in *ECM v Cox [1999] IRLR 559* should be applied.

Question 2: If the Government repeals the service provision changes, in your opinion, how long a lead in period would be required before any change takes effect? (i) less than one year (ii)1- 2 years (iii) 3-5 years (iv) 5 years or more.

We believe that a "one size fits all" transition period will inevitably produce difficulties, since service provision contracts are of different duration. In addition, the incumbent service provider would have tendered its bid on the assumption that it would not have employee redundancy costs at the end of the contract, since the incoming service provider would inherit the relevant employees under the SPC. It would obviously be unfair on an incumbent service provider if the rules changed part way through the term of the contract. The repeal of the SPC should therefore not apply on the cessation of an existing SP contract which takes place within the next 2 years, but it will apply to any renewals or

extensions of those contracts. For those service provision contracts which have more than 2 years to run, this period should be sufficient to enable the incumbent service provider to negotiate revised exit arrangements or at least to plan mitigating actions. A longer transition period may be counter-productive, in that for a longer period of time contracting parties would need to assess which of the two regimes is more likely to apply (e.g. in the event of early termination).

a) Do you believe that removing the provisions may cause potential problems ?

Yes – in the sense that there will still be uncertainty and litigation over whether reg 3(1)(a) TUPE applies and the extent to which employers can organise their businesses to avoid taking on sufficient assets to prevent a transferred entity from retaining its identity. We believe that there will be more litigation on the extent to which an employer can "avoid" the operation of TUPE.

This in turn is likely to see the number of cases to the tribunals increasing. These cases are likely to be stayed, whilst test cases are taken to determine if the new provisions are complaint with the Acquired Rights Directive.

b) If yes, please explain your reasons.

We believe that rather than litigating over whether the SPC applies, the parties will litigate over whether there has been a transfer under reg 3(1)(a).

Question 3: Do you agree that the employee liability information [ELI] requirements should be repealed? **Yes No**

No. We believe that it would be a serious mistake to remove the ELI requirement. The provision was originally introduced to protect the position of second or subsequent generation contractors who have no contractual nexus with the outgoing service provider (who is unlikely to co-operate with its successor). Without the ELI, the incoming contractor is in effect taking on an unquantifiable employee liability, which means that it will have to build into its costings an amount to cover these. This in turn will increase in the price for providing the services and make them less competitive. It also does not create a level playing field between the incumbent contractor and competitors tendering for the contract.

It is insufficient to argue that the user of the services can require the outgoing service provider to provide the relevant ELI to the successful bidder to provide the services. Many service provision contracts do not have such a requirement and, even if they do, there is no effective remedy **in the hands of the service user** to enforce it. The second (and subsequent) generation service providers need a remedy to require the outgoing service provider to give the relevant ELI and for it to be accurate.

The real issue about ELI is **when** it is provided. As ELA indicated in its Response to the Call for Evidence, the current requirement that the ELI is provided no later than 2 weeks prior to the TUPE transfer is too late in the process. This information needs to be provided at the bidding stage so that all the potential bidders can see what potential employee liability they would inherit if their bid was successful, and cost their bids accordingly. At the very least it should be provided 2 months prior to the transfer date, with an obligation on the incumbent service provider promptly to inform the recipients of any material changes. If the timescale of a change of service provider is less than 2 months, the obligation should be as soon as reasonably practicable. This updating process is what happens when there is a due diligence exercise in the sale of a undertaking.

c) Do you agree, that there should be an amendment to regulation 13 to make clear that the transferor should disclose information to the transferee where it is necessary for the transferee and transferor to perform their duties under that regulation?

We do not agree. At present the transferee is required to inform the transferor of its envisaged measures in relation to the transferring employees. Arguably it might be said that, to enable it to identify what those measures are, it needs to have certain information from the transferor – e.g. to see whether it needs to change working arrangements. In the absence of information from a transferor, a transferee could likely not formulate "measures" resulting in a possible breach of Reg 13; or alternatively the transferee will have to blindly state that its policies will apply. But a statement of envisaged measures is not ELI, which covers matters such as existing and potential claims by transferring employees.

In addition, such an amendment to reg 13 means that a transferee would be relying on an actual or potential protective award claim by employees or their representatives as a mechanism for enforcement or deterrent, rather than giving the transferee a remedy directly.

Those ELA members who act for employees or trade unions believe that Regulation 13 should be amended to ensure that broader information is provided to the trade unions; and that the transferor and transferee should be obliged to provide information to each other to comply with the information and consultation process.

Question 4: Do you agree with the Government's proposal to amend the restrictions in regulation 4 on changes to terms and conditions so that the restriction more closely reflects the wording of the Directive (article 4, which is in relation to dismissals) and the CJEU case law on the subject? a) If you disagree, please explain your reasons. b) Do you agree that the exception for economic, technical, or organisational reasons should be retained?

a) In principle, yes. The proposed change seems sensible since a large number of changes can be said to be connected with a TUPE transfer, even if the TUPE transfer itself is not the reason for the change. However, we

have some concerns that, even if the test for nullification of changes to terms and conditions is restricted as proposed, there is still likely to be litigation on how far the words "reason for" is interpreted – bearing in mind the tribunals' obligation to apply a purposive approach.

We also believe that the ECJ case law (*Daddy's Dance Hall*) permits even unilateral changes in terms and conditions, where this is permissible if a TUPE transfer had not taken place. Examples of this would be changes pursuant to a mobility or flexibility clause. The proposed wording of new clause 4(4) only seems to allow **agreed** changes. Although it could be argued that, by agreeing to an employment contract which contained a flexibility/mobility clause, an employee was in fact agreeing to such a change, in fact the employee would only be agreeing the employers ability to make unilateral changes, rather than the particular change itself. Reg 4(9) would also need to be amended to cater for this. There appears to be a serious mis-alignment between the excerpt from the ECJ's decision in the *Daddy's Dance Hall* case and the requirements of reg 4(9). Whilst the former permits changes to be made in employment contracts where this was permissible but for the TUPE transfer, the latter appears to allow employees to claim constructive dismissal for any significant changes in terms and conditions to their detriment – whether or not these are permitted by the existing employment contract or agreed between the parties.

Those ELA members who act for employees or trade unions do not agree that employers should have the ability to make unilateral changes to employees' terms and conditions which relate to a TUPE transfer. Their position is that the employment contracts as originally signed by the employees should be protected.

b) Yes. However we recognise that the proposed reg 4(5A) may not be compliant with the Directive because the Directive does not permit an "economic, technical or organisational" reason as an accepted derogation from the mandatory requirements of art. 3(1).

The *Delabole Slate Co v Berriman* restriction of the words "*entailing changes to the workforce*" to "numbers and functions of employees" should also be repealed generally; see further the ELA Response to the Call for Evidence, at section 16, and the response to question 8 below.

Question 5: The Government is considering using article 3.3 of the Acquired Rights Directive to limit the future applicability of terms and conditions derived from collective agreements to one year from the transfer. After that point, variations to those terms and conditions where the reason was the transfer would be possible provided that overall the change was no less favourable to the employee. Is this desirable in your view?

Those ELA members who mainly represent employees or trade unions do not agree with this proposal because the role of collective agreements in

the UK is different from those in many other EU Member States. This is because, for the most part, the contents of collective agreements are incorporated into individual contracts of employment. They also do not agree that any contractual terms and conditions contained in an individual's employment contract may be restricted in this way. This is because, in their view, this runs contrary to centuries old common law, to the implied term of trust and confidence, and also to Article 11 of the Convention on Human Rights.

a) However, this issue is particularly important for those who mainly represent employers, now that the Advocate–General has given his Opinion in the *Parkwood Leisure v Alemo-Herron c*ase. If the ECJ follows the Advocate-General's Opinion, the "dynamic effect" of collective agreements will continue to add additional costs to those employers who play no part, and have no influence over, the negotiation of collective agreements (post transfer) covering their employees. If this is the case, then those ELA members mainly representing employers would want the 1 year rule to be applicable. However, if the static approach is to be advisable, we think the non-applicability of such future collective agreements shall have immediate effect rather than delaying this for one year.

b) Do you agree that there should be a condition that any change after the one year period which is by reason of the transfer, should be no less favourable overall than the terms applicable before the transfer?

If the Government decides to adopt the 1 year rule, then ELA's view is that this protection should be included. However, we comment that this could be an area for litigation if the test of "no less favourable overall" is a subjective, rather than objective one. In addition we foresee practical difficulties in accessing whether those changes which have no financial value are "no less favourable overall", when weighed in the balance with financial changes.

c) If the outcome of the *Parkwood Leisure v Alemo-Herron* litigation is that a static approach applies under TUPE, do you think that such an approach would provide useful additional flexibility for changing such terms and conditions?

The Advocat-General's Opinion is that the "dynamic" approach is permissible. However it did not say that the "static" approach was not, but rather referred to how the particular incorporation clause is worded. This is a difficult test for many employers to understand.

Those members of ELA's committee who mainly act for employers agree that the proposed approach would assist employers' flexibility, and reduce the impact of the *Parkwood Leisure v Alemo-Herron* case, if a static approach is not rejected by the ECJ. However, those members mainly representing employees and trade unions no not agree with such a limitation on collective agreements.

d) Do you think there any other changes that should be made regarding the continued applicability of terms and conditions from a collective agreement (bearing in mind the limitations of Article 3(3) of the Directive)?

No. To make further changes would probably be in breach of the Directive.

Question 6: Do you agree with the Government's proposal to amend the wording of regulation 7(1) and (2) (containing the protection against dismissal because of a transfer) so that it more closely reflects the wording of the Directive (article 4) and the CJEU case law on the subject?

a) ELA believes that the proposal to remove the words "in connection with" is the correct approach. This aligns it with art. 4 of the Directive. The retention of those words significantly widens the scope for automatically unfair dismissal claims to be made, particularly when read in conjunction with reg 4(9).

b)

c) Do you agree that the drafting of the restrictions to terms and conditions in regulation 4 and the drafting of the protection in relation to dismissal (regulation 7) should be aligned?

Yes, except that whilst the Directive permits a "ETO" carve out for reg 7 (dismissal), it does not do so for reg 4 (terms and conditions).

Question 7 : Do you agree that TUPE should be amended so that regulations 4(9) and (10) are replaced by a provision which essentially copies out article 4(2) of the Directive?

ELA believes that where the changes to working conditions triggers a termination (as per art 4.2 of the Directive), it should not necessarily be treated as a dismissal particularly where the change is permitted by the contract of employment. We do, however, think that just copying out the wording of art. 4.2 is not sufficient. It is necessary to go on to specify that it does not constitute an automatic unfair dismissal for unfair dismissal purposes.

In addition it would be necessary to specify what rights are triggered by such a termination. At the very least this should cover damages for wrongful dismissal and make it clear that, if the changes imposed do entitle the employee to claim constructive dismissal, then reg 4(9) would not preclude an employee bringing such a claim.

Those ELA members who represent employers also fully support the proposal which is to ensure that the definition of a redundancy (for SRP purposes) counts as an ETO reason. This would include relocations of workplace. They believe it would be illogical if this were not the case since many outsourcing involve a change of workplace.

However, those ELA members acting for employees consider that relocations should only be permitted where contractual terms that transfer allow for mobility

clauses. Their view is that a change of location is void for certainty as it is not defined and is too wide. In any event a change of location is likely to be "substantial change in working conditions to the detriment of the employee" contrary to art. 4(2) of the ARD.

ELA also believes that amendments should cover the problem for transferors by virtue of the *Humphries v Oxford University* case – under which the transferor can be held liable for the transferee's acts and omission where an employee exercises his right of objection because the transferee refuses to honour his terms and conditions. Art 4(2) does not specify **which employer** should be responsible for the deemed termination. Under usual EU subsidiarity principles, it is open to the UK to specify that the transferee is liable for the situation where its own acts and omissions caused the employee(s) to claim constructive dismissal under reg 4(9) and exercise his right of objection. Otherwise the transferor would be held liable for matters beyond its control. Further, a cynical transferee could announce such unreasonable reductions in terms and conditions with the deliberate intent of provoking sufficient exercise of objections so as to ensure that TUPE does not apply or limit the transferee's exposure/costs post transfer.

Question 8: Do you agree with the Government's proposal that 'entailing changes in the workforce' should extend to changes in the location of the workforce, so that 'economic, technical or organisational reason entailing changes in the workforce' covers all the different types of redundancies for the purposes of the Employment Rights Act 1996?

Those ELA members representing employers believe that a location change should constitute an ETO reason, so that there is consistency between it and the definition of redundancy under the ERA 1996. In many cases an outsourcing necessitates a workplace relocation for the organised grouping of employees because it is the lower location costs that makes the outsourcing viable. To retain the current restrictive definition of "entailing chances in the workforce" could be viewed as anti-competitive.

However those ELA members who mainly represent employees or trade unions do not think that the proposed extension should take place. They consider that relocations should only be permitted where contractual terms that transfer allow for mobility clauses. Their view is that a change of location is void for certainty as it is not defined and is too wide. In their view a change of location is likely to be "substantial change in working conditions to the detriment of the employee" contrary to Article 4(2) of the ARD.

Question 9: Do you consider that the transferor should be able to rely upon the transferee's economic, technical or organisational reason entailing changes in the workforce in respect of pre-transfer dismissals of employees?

Yes. Some ELA members believe this should be possible. In practice this happens already and it gives the relevant employers more flexibility. ELA also believes that it may open the way for greater opportunities for re-deployment of the impacted staff with two employers involved. Perhaps the quid pro quo is that the transferee should be required to inform the impacted employees of existing

vacancies within its organisation, which they could apply for. This could be done through req 13 – i.e since such dismissals would be the transferor's measures, if these are to be made at the behest of the transferee, the transferee should be required to give this information also with its details of its own envisaged measures.

Question 10: Should there be an amendment to ensure that any actions of the transferee before the transfer takes place count for the purposes of the requirements to consult on collective redundancies (under the Trade Union and Labour Relations (Consolidation) Act 1992), therefore allowing consultations by the transferee with staff who are due to transfer to count for the purposes of the obligation to consult on collective redundancies?

Those ELA members who represent employers agree with the proposal, but on the condition that the transferee has direct interface with the appropriate representatives in the information and consultation under s.188 TULCRA 1992 and/or reg 13 TUPE and does not hide behind the transferor as its "agent".

Those ELA members who represent for employees believe that the requirements under s.188 TULRCA 1992 seek to avoid dismissals and contain separate obligations under separate European Directives. They believe it is unworkable, because such consultation must happen with the employer, and not the proposed employer.

.**Question 11:** Rather than amending Regulation 13(11) to give clarity on what a 'reasonable time' is for the election of employee representatives do you think our proposal to provide guidance instead would be more useful?

ELA does not think that an amendment to reg 13(11) is really necessary. Since the timescales of TUPE transfers vary greatly and are case specific, having a fixed timescale lacks flexibility and, in some case, may not be feasible. We think that tribunals are well able to decide what is a reasonable timeframe.

Question 12: Do you agree that regulation 13 should be amended so that micro businesses are able to inform and consult with affected employees directly in cases where there is not a recognised independent union, nor appropriate existing employee representatives (under regulation 13(3)(b)(i)), rather than have to invite employees to elect representatives?

Yes. This is what happens in practice, anyway. However, ELA does not believe that the yardstick should be the total size of the employer's workforce, but rather the number of employees affected by the TUPE transfer. Sometimes, even for large employers, where only, say, 10 employees are affected by a TUPE transfer, those employees prefer to be dealt with directly, rather than have to hold elections and consulted indirectly. However, where there is a recognised trade union for the affected employees, there should be no ability to cut out the union in the information and consultation process even where there are small numbers of employees affected. The rationale for this is that, by recognising the union, the employer has accepted that the union has a important role to play on

organisational issues such as TUPE transfers and should be allowed to represent its members in this situation.

If, however, the Government is determined to have a size of employer threshold, ELA believes this should be 20 employees.

Question 13: Do you agree that micro businesses should be included under all the proposed amendments to the TUPE regulations?

a) Yes.

b) Do you think that any of these proposed changes are likely to impose additional costs on micro businesses?

No.

Question 14: Do you agree that apart from the proposals in relation to service provision changes, there are no other proposals which give rise to the need for a significant lead-in period?

No.

Question 15: Have you any further comments on the issues in this consultation?

a) The Government should declare its position on the "static" or "dynamic" approach on the transfer of collective agreements, once the ECJ has delivered its ruling. ELA believes that , unless the ECJ expressly precludes the UK from adopting a static approach, it should do so.

b) The Consultation Paper has not addressed the following issues which we raised in our Response to the Call for Evidence (references to our comments are in brackets)-

- A copy of the personnel records to be delivered to the transferee within 21 days of the transfer [para 2.2 (v)];

- If post-transfer variation is not permitted, no cherry-picking to be allowed when unravelling harmonised terms [para 10.7 (b)];

- Employees to have a "cooling off" period during which to renounce any post-transfer variation in terms, following which they have no right to have them declared void [para 12.5];

- Liability for pre-transfer obligations to be joint, and Tribunals to have the power to make parties liable according to fault [para 15.3];

- Employees to be able to waive claims for protective awards [para 17.6];

- Compensation for failure to inform and consult to be loss-based rather than fault based [para 23.3];

- Transferees to have 90 days in which to carry out immigration checks [para 23.4];

- The definition of "employee" to be the same as the definition in s.230 ERA [para 23.6];

- A timescale to be put in place for employees to object to transfer under regulation 4(7) [para 26.8];

- The retention of employment model to be included within the regulations [para 23.9];

- TUPE not to apply in cases where the service provided is for social or personal care [para 24.2];

- Guidance to be issued on the following areas:
    - Whether employees are assigned to the transferring undertaking in atypical situations such as secondments, and fixed term contracts expiring on the transfer date [paras 2.3 and 24.3];
    - Best practice on information and consultation obligations [para 17.4]; and
    - Cross-border transfers, particularly to countries where there is no equivalent to TUPE [para 18.3].

- ELI to include employees on long term sick or maternity absence, any threatened industrial dispute, and the immigration status of relevant employees [para 2.2 (iv)];

- Remedy for failure to provide ELI to be clarified [para 23.1]; and

- ELI to include all material terms of the contract of employment [para 17.3].

Question 16: Do you feel that the Government's proposals will have a positive or negative impact on equality and diversity within the workforce?

No – we do not think there will be any impact.

Employment Lawyers Association

8 April 2013

Members of ELA subcommittee
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