Technical Bulletin

Issue No 77. November 2006

Information issued by the Technical Committees of the Association of Business Recovery Professionals to members, subscribers and students

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77. The Transfer of Undertakings (Protection of Employment) Regulations 2006

1. Introduction

The Transfer of Undertakings (Protection of Employment) Regulations 2006 (SI 2006/246) came into force on 6 April 2006. They replace the Transfer of Undertakings (Protection of Employment) Regulations 1981, which are revoked. The new Regulations are intended to give effect to Directive 23/2001, which amends the original Acquired Rights Directive (77/187 EEC).

For insolvency practitioners the key points to note are:

- Where the transferor is subject to formal insolvency proceedings there is relief from the transfer of some liabilities.
- Where the transferor is subject to formal insolvency proceedings there is greater scope to vary terms and conditions of employment.
- There is a new requirement for the transferor to provide detailed information to the transferee about the employees who are to be transferred. There is no insolvency exemption.
- Liability for failure to inform and consult on the transfer with employees affected by the transfer is now joint and several on the transferor and transferee.

The Department of Trade and Industry has published a guide to the Regulations, which is available on its web site at:

http://www.dti.gov.uk/files/file20761.pdf

Before looking in more detail at the Regulations there are three important points to note:

- The insolvency provisions are defectively drafted. The language used is vague and imprecise to such a degree that it is not possible to discern with any certainty the circumstances in which each of the provisions are intended to apply.
- In places, the commentary and guidance issued by the DTI contradicts the apparent meaning of the Regulations.

The Redundancy Payments Directorate has issued guidance setting out how it proposes to operate the Regulations. Although the guidance is based on the RPD's own interpretation of the legislation (and, as such, it is in no way binding), it is likely to influence the way in which parties currently apply the Regulations. The text of the guidance is reproduced in the Appendix. The comments which follow represent the best understanding of the Technical Committee in the light of these difficulties of interpretation.

2. The Purpose of the Regulations – General

According to the guidance issued by the DTI the main changes in the new Regulations are:

- a widening of the scope of the Regulations to cover cases where services are outsourced, insourced or assigned by a client to a new contractor;
- a new duty on the old employer ('transferor') to supply information about the transferring employees to the new employer ('transferee');
- special provisions making it easier for insolvent businesses to be transferred to new employers;
- provisions which clarify the ability of employers and employees to agree to vary contracts of employment in circumstances where a relevant transfer occurs;
- provisions which clarify the circumstances under which it is unfair for employers to dismiss employees for reasons connected to the relevant transfer.

The rights and obligations under the 1981 Regulations remain in place, though the 2006 Regulations contain revised wording at some points to make their meaning clearer, as well as reflecting developments in case law since 1981.

As before, the main purpose of the Regulations is to preserve the rights and obligations under employment contracts when employees are transferred as part of an economic entity. Any dismissal of an employee is automatically unfair if the sole or principal reason for the dismissal is the transfer itself or a reason connected with it other than an economic, technical or organisational reason entailing changes in the workforce (an 'ETO reason'). These are set out in Regulations 4 and 7.

Regulation 4 also provides that any variation of an employment contract will be void if its sole or principal purpose is the transfer itself, or a reason connected with the transfer that is not an ETO reason. However, a transferor or transferee may agree with an employee to vary an employment contract before or after transfer where the sole or principal reason is a reason unconnected with the transfer or a reason connected with the transfer which is an ETO reason.

Furthermore, as noted above, special provisions have been introduced to facilitate variations of employment contracts where the transferor is subject to formal insolvency proceedings.

3. Insolvency provisions of the Regulations

3.1 What the Regulations say

One of the purposes of the new Regulations is to provide greater flexibility and some relief from the transfer of liabilities where a transfer takes place in the context of the formal insolvency of the transferor. Unfortunately it is not clear exactly how the Regulations are supposed to apply in such cases. This is because, instead of spelling out which types of insolvency procedure are covered by which of the new provisions, the Regulations simply

adopt the vague, generic language used in the Directive to indicate in general terms how they are to apply, but unfortunately without accurately reflecting the provisions of the Directive itself.

There are two sets of special provisions for transfers effected in the context of formal insolvency, depending on the type of insolvency procedure. These are set out in Regulation 8.

3.1.1 'Insolvency proceedings opened not with a view to the liquidation of the assets of the transferor'

Regulation 8(1)-(6) deals with the position where:

'insolvency proceedings ... have been opened in relation to the transferor not with a view to the liquidation of the assets of the transferor and which are under the supervision of an insolvency practitioner'.

These are referred to as **'relevant insolvency proceedings.'** The Regulations make two special provisions in these cases.

First, certain of the transferor's debts to employees will not pass over to the transferee, but will be met out of the National Insurance Fund. Debts will be paid from the NI Fund in respect of both -

- employees who pass over to the transferee, notwithstanding that their employment has not been terminated, and
- employees who have been dismissed by reason of the transfer and therefore dismissed unfairly.

In the case of the former, according to the Redundancy Payments Directorate's latest guidance (set out in the Appendix - see note 4 below), the debts that will be paid from the NI Fund are those payable by the Secretary of State under the insolvency provisions of the Employment Rights Act 1996,[1] the date of transfer being treated as the date of termination for this purpose. In the case of the latter, the debts will be those payable by the Secretary of State under both the insolvency and the redundancy provisions of the Employment Rights Act.[2]

Any debts over and above these will pass to the transferee.[3]

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[1] i.e arrears of pay, holiday pay, amounts due for failure to give statutory minimum period of notice, and basic award for unfair dismissal, subject to statutory limits (s.182 Employment Rights Act 1996)

[2] i.e statutory redundancy pay (ss. 166 & 167 Employment Rights Act 1996)

[3] It should be noted that although the Regulations appear to restrict the payment of redundancy pay out of the NI Fund to employees who have been dismissed before the transfer, and this appears to be the view of the Redundancy Payments Directorate in its latest guidance (see Appendix), information given in the DTI's guide to the Regulations and its response to the earlier consultation on the draft Regulations conveys a different view, suggesting that redundancy pay is also payable to employees who transfer. The guide says (at page 29): 'the Regulations ensure that some of the transferor's pre-existing debts to the employees do not pass to the transferee. Those debts concern any obligations to pay the employees statutory redundancy pay or sums representing various debts to them, such as arrears of pay, payment in lieu of notice, holiday pay or a basic award of compensation for unfair dismissal. In effect, payment of statutory redundancy pay and the other debts will be met by the Secretary of State through the National Insurance Fund.' It adds in a footnote: 'The Regulations also provide for the payment of these sums on the date of the transfer even though they may not have actually been dismissed by the transferor on or before that date, as would normally be a requirement for such payments.' The response to the consultation says (paragraph 5.7): 'Where statutory redundancy payments are made under this provision, the effect is to ensure that the transferred workers have to build up their future entitlement to redundancy payments with the new employer from zero.' This is one example of the uncertainty which currently surrounds the interpretation of the Regulations.

These provisions are intended to give effect to Article 5(2) of the Directive.

Secondly, in these cases, there is greater scope for the transferor and/or transferee to vary the terms of an employment contract before or after the transfer takes place. Regulation 9 allows such variation to be made where the sole or principal reason is the transfer itself or a reason connected with it which is not an economic, technical or organisational reason entailing changes to the workforce, and is designed to safeguard employment opportunities by ensuring the survival of the whole or part of the undertaking. The variations must be agreed with representatives of the employees. Where there is a recognised trade union, this must be a union representative; otherwise it may be a non-union representative elected by the employees.

3.1.2 'Bankruptcy or analogous proceedings instituted with a view to the liquidation of the assets'

Regulation 8(7) deals with the position where:

'the transferor is the subject of bankruptcy proceedings or any analogous insolvency proceedings which have been instituted with a view to the liquidation of the assets of the transferor and are under the supervision of an insolvency practitioner'.

In this case, Regulations 4 and 7 do not apply. As noted above, these are the provisions which state that rights and obligations under employment contracts automatically pass to the transferee and that a dismissal made by reason of the transfer is automatically deemed to be unfair.

This is intended to give effect to Article 5(1) of the Directive.

3.1.3 Which insolvency proceedings are covered?

Unfortunately it is not clear which types of insolvency procedure are covered by which of these two aspects of the Regulations. With regard to 'relevant insolvency proceedings' the Guidance Note issued by the DTI in conjunction with the Regulations provided a different view from that expressed in the Redundancy Payments Directorate's latest guidance[4] (set out in the Appendix). The current view of the Redundancy Payments Directorate is that -

- in bankruptcies, compulsory liquidations and creditors' voluntary liquidations Regulations 4 and 7 will not apply at all;
- in members' voluntary liquidations Regulations 4 and 7 will apply in full, as they are not insolvency proceedings;
- in administrations, administrative receiverships and voluntary arrangements liabilities owed to transferring employees under the insolvency provisions of the Employment Rights Act[5] will be paid by the Secretary of State out of the National Insurance Fund. There is no mention of payments being made under the redundancy provisions of the ERA[6] in such cases.

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[4] At the time of writing the most recent guidance issued by the RPD was that circulated it insolvency practitioners on 8 June 2006. This supersedes the guidance circulated by the RPD on 3 April 2006.

[5] See note 1

[6] See note 2

3.2 What should members do?

Members should bear in mind that the view expressed by the Redundancy Payments Directorate reflects its interpretation of ambiguous legislation. Whilst it is likely to influence other parties' interpretation, it does not preclude another party from challenging it, and it does not constitute a statement of the law. In view of the uncertainties surrounding the interpretation of the Regulations, members should continue to approach the legislation with caution. In particular, they should avoid making any statements or representations to employees regarding their rights under the Regulations which are not qualified. For example, when notifying employees of a transfer, members may wish to inform employees that 'the Government's Insolvency Service has advised that…' the transfer falls within the provisions of the Regulations and that 'the Government's Insolvency Service has advised that…' the National Insurance Fund will meet the following liabilities…

At the time of writing the Redundancy Payments Directorate has not yet created a new form for dealing with claims under the new Regulations, but are still asking insolvency practitioners to give out RP1s to be adapted and completed as appropriate. It is suggested that claimants be asked to complete the following sections:

- sections 1 to 13 (at section 9, ignore the reference to the employer 'who made you redundant' and simply fill in the name of the company)
- sections 19 to 22
- section 29 and 30
- section 39 and if relevant section 40 (this will be relevant if the claimant wants payment to be made directly to his bank account); and
- the declaration at the end of the form.

4. New duty to supply information about transferring employees

The transferor employer must provide the transferee with a specified set of information which is intended to assist him to understand the rights, duties and obligations in relation to those employees who will be transferred. The information which must be provided is:

- the identity of the employees who will transfer ;
- the age of those employees ;
- information contained in the 'statements of employment particulars' for those employees required to be given under section 1 of the Employment Rights Act 1996 ;
- information relating to any collective agreements which apply to those employees ;
- instances of any disciplinary action within the preceding two years taken by the transferor in respect of those employees in circumstances where the statutory dispute resolution procedures apply;
- instances of any grievances raised by those employees within the preceding two years in circumstances where the statutory dispute resolution procedures apply; and
- instances of any legal actions taken by those employees against the transferor in the previous two years, and instances of potential legal actions which may be brought by those employees where the transferor has reasonable grounds to believe such actions might occur.

This information should be given at least two weeks before the completion of the transfer. However, if special circumstances make this not reasonably practicable, the information must be supplied as soon as is reasonably practicable.

It is not possible to contract out of this obligation, and there is no exemption in cases of insolvency. The question of whether insolvency would amount to a special circumstance will depend on the fact of each particular case.

It is not entirely clear what is required by 'identity of the employees' and in particular whether it is necessary to provide employee names or whether, for example, employee numbers will suffice. Members should seek advice regarding Data Protection Act issues.

If the transferor fails to provide the required information, the transferee may, within three months of the transfer, make a complaint to an industrial tribunal. The tribunal may make an award to be paid by the transferor to the transferee. The minimum amount of such an award is £500 per employee in respect of whom there has been failure to comply, unless the tribunal considers it just and equitable to award a lesser sum.

5. Joint and several liability for failure to consult

Liability for failure to inform and consult on the transfer with affected employees is now joint and several on the transferor and transferee. An employee is entitled to complain to a tribunal about inadequate consultation and make a claim for what is generally described as a 'protective award' against either or both of the transferor and transferee. Where an award is made against the transferee, it will have a right of recourse against the insolvent transferor. Such an award or sum payable pursuant to a right of recourse, if considered to be an unsecured debt, could have a significant impact on returns to unsecured creditors. However, members should note that at the time of writing there has been no case law to give guidance on whether liability for failure to inform and consult under TUPE is to be treated as an administration expense. Again, it does not appear to be possible to contract out of these provisions.

6. Pension rights

The Regulations do not cover the protection of pension rights on transfers. This is dealt with by the relevant pensions legislation - see Technical Bulletin 70.6.

APPENDIX

GUIDANCE ISSUED BY THE REDUNDANCY PAYMENTS DIRECTORATE ON 8 JUNE 2006

Purpose of Guidance

1. The purpose of this guidance is to set out the Secretary of State's view of the application and effects of the Transfer of Undertakings (Protection of Employment) Regulations 2006 ('the 2006 TUPE Regulations') in the context of payments made by the Secretary of State to employees under the provisions of:

- Part XI of the Employment Rights Act 1996 (redundancy payments) and
- Part XII of the 1996 Act (payments on insolvency of employer).

2. This guidance is not an authoritative interpretation of the provisions of the 2006 TUPE Regulations. Only the tribunals and courts can give this. It however sets out the approach that the Secretary of State will apply in determining whether he is liable to make payments under the Employment Rights Act 1996 in the context of the 2006 TUPE Regulations. The 2006 TUPE Regulations apply to business and similar transfers on or after 6th April 2006 and replace the earlier 1981 Regulations. This guidance replaces earlier guidance in relation to the 2006 TUPE Regulations and insolvency.

2006 TUPE Regulations - Overview in the context of payments under the Employment Rights Act 1996

3. The 2006 Regulations apply to transfers of the whole or part of a business or undertaking or a change in a service provider (referred to in this note as “a relevant transfer”) subject to certain exceptions. Regulation 4 provides that a relevant transfer does not operate to terminate the contract of employment of employees who were working in the business at the time of the transfer but transfers their contracts to the transferee. Those who would have been so employed by the transferor had they had not been dismissed in a manner described by Regulation 7(1) (see below) also have their contract of employment transferred to the transferee. This means that the transferor's powers, rights and liabilities under or in connection with the contract of employment are transferred to the new employer (subject to certain exceptions - see further below). Where an employee's contract of employment is transferred pursuant to regulation 4 and his employment continues with the transferee, no redundancy payment will be payable as the employee has not been dismissed.

4. Regulation 7 provides that a dismissal because of the transfer or a reason connected with the transfer that is not an economic, technical or organisational one is automatically an unfair dismissal. Regulation 8 makes a number of alterations in relation to insolvency. In summary these are as follows:

- Regulations 4 and 7 do not apply where the transferor is subject to 'bankruptcy proceedings or any analogous insolvency proceedings which have been instituted with a view to the liquidation of the assets of the transferor'.
- Where there is a relevant transfer and the transferor is subject to 'relevant insolvency proceedings' (defined as insolvency proceedings which have been opened in relation to the transferor not with a view to the liquidation of the assets) regulations 4 and 7 do apply. However regulation 8 provides for sums of the kinds described in Part XII of the Employment Rights Act 1996 which are owed at the date of the transfer to employees who transfer to the transferee to be payable by the Secretary of State rather than the transferee.

In addition regulation 9 provides a procedure whereby appropriate representatives of employees who transfer under the Regulations and the transferor or transferee may agree variation of contracts of employment where the transferor is subject to relevant insolvency proceedings.

Application of the 2006 TUPE Regulations to specific types of insolvency proceedings

5. The position regarding specific types of insolvency proceedings is as follows:

Bankruptcy

Where a trustee in bankruptcy sells a business that was run by the bankrupt there is no question of the employees' contracts of employment passing to the purchaser. In such a case there will be a redundancy of the employees and redundancy and insolvency payments owed to employees will be payable by the Secretary of State in accordance with the provisions of Parts XI and XII of the Employment Rights Act 1996. The reason for this is that regulation 8(7) provides that neither regulation 4 nor regulation 7 is to apply to bankruptcy proceedings.

Compulsory liquidation

Where a company is wound up by an order of the court on grounds that it is unable to pay its debts, regulations 4 and 7 of the 2006 TUPE Regulations do not apply as such proceedings are liquidation proceedings under the supervision of an insolvency practitioner that are analogous to bankruptcy proceedings. The position under case law was that on the making of a winding-up order this operates to terminate the contracts of employment of any employees as at the date of the making of the order. Employees will be entitled to insolvency and redundancy payments out of the National Insurance Fund in accordance with the provisions of the Employment Rights Act 1996.

Creditors' voluntary liquidation

Where a liquidator sells a business run by a company that is in creditors' voluntary liquidation regulation 4 and regulation 7 will not apply. These provisions are disapplied by regulation 8(7) by virtue of the fact that creditors' voluntary liquidations are liquidation proceedings under the supervision of an insolvency practitioner that are analogous to bankruptcy proceedings. Accordingly a transfer of a business by the liquidator in a creditors' voluntary liquidation would cause the dismissal of those employees who immediately prior to the transfer were employed by the company unless prior to the transfer there is an agreement between the parties (including the employees) that the transferee is to be substituted as their employer. In the absence of any agreement substituting the transferee as their employer, employees whose contracts of employment with the transferee are terminated will be entitled to be paid redundancy payments and arrears of wages etc. from the National Insurance Fund in accordance with the provisions of the 1996 Act.

Members' voluntary liquidation

Members' voluntary liquidation is not an insolvency proceeding. It is by definition a solvent winding up. Therefore regulations 4 and 7 apply if there is a relevant transfer and regulation 8 is not applicable at all.

Administration

The Secretary of State takes the view that regulations 4 and 7 will always apply in relation to a relevant transfer that is made in the context of an administration. He takes the view that such proceedings do not fall within regulation 8(7). For this exception to apply the proceedings must be analogous to bankruptcy proceedings and involve the liquidation of the assets under the supervision of an insolvency practitioner. Administration is not in the view of the Secretary of State analogous to bankruptcy proceedings. The correct approach is to look at the main or sole purpose of the procedure rather than its outcome in a specific instance. The main purpose of bankruptcy proceedings is to realise the free assets of an insolvent debtor and share the proceeds after deduction of costs and expenses amongst all the debtor's creditors. This is not the main purpose of administration. It follows that Regulation 8(7) will not apply to administration. It is also the view of the Secretary of State that regulations 8(2) to (6) will apply to administration so that liabilities owed to transferring employees at the transfer date of the kinds described in Part XII of the Employment Rights Act 1996 would fall to be paid out of the National Insurance Fund by the Secretary of State and not by the transferee.

Voluntary Arrangements

A transfer in the context of a voluntary arrangement is subject to regulations 4 and 7 for the same reasons referred to in relation to administration. In a voluntary arrangement the debtor is left in control of the assets and the function of the insolvency practitioner is merely to supervise the arrangement. Regulations 8(2) to (6) will apply in relation to a relevant transfer where the transferor is subject to a voluntary arrangement. Liabilities owed to transferring employees at the transfer date of the kinds described in Part XII of the Employment Rights Act 1996 do not transfer to the transferee and would fall to be paid by the Secretary of State out of the National Insurance Fund.

Administrative Receivership

Regulations 4 and 7 will apply to administrative receiverships. They are not analogous to bankruptcy proceedings since they are not collective proceedings and the exception in regulation 8(7) will accordingly not apply. Where there is a relevant transfer regulations 8(2) to (6) will apply so that liabilities owed at the transfer date to transferring employees of the kinds described in Part XII of the Employment Rights Act 1996 do not transfer to the transferee and would fall to be paid by the Secretary of State out of the National Insurance Fund.

Other types of receivership

Other types of receivership are not insolvency proceedings and so the provisions of regulation 8 do not apply to them. A relevant transfer by a receiver will therefore be subject to regulations 4 and 7.

Proceedings in other jurisdictions where a relevant transfer occurs in Great Britain

In this case it is necessary to consider whether the foreign proceedings are analogous to bankruptcy proceedings. If they are then the exception in regulation 8(7) will apply.