Briefing number 50 February 2014

Legislation Update

TUPE 2014

UNISON Scotland

BARGAINING BRIEFING

The new TUPE Regulations came into force on 31 January 2014. The new regulations, the Collective Redundancies and Transfer of Undertakings (Protection of Employment)(Amendment) Regulations 2013 ("CRATUPE"), amend the 2006 version, and also the provisions of the Trade Union and Labour Relations (Consolidation) Act 1992 ("TULRCA") relating to collective redundancies.

What is not Changing?

- Transfers following a 'service provision change' remain protected.
- An employee still has the right to claim he or she has been dismissed if the transfer involves a substantial change in working conditions to their material detriment.
- Variations to individual terms and conditions remain void where the sole or principle reason is the transfer itself.
- Dismissals where the sole or principle reason is the transfer itself remain automatically unfair.

What is Changing?

For TUPE transfers on or after 31st January 2014:

- A 'service provision change' will constitute a 'relevant transfer' only if the activities before and after the transfer remain 'fundamentally the same.'
- Terms derived from collective agreements can be renegotiated to take effect one year post transfer, even if the change is because of the transfer itself. This is providing that the changes leave the terms and conditions no less favourable overall.
- The 'static' approach to the transfer of collective terms is confirmed. That is, a transferred employee cannot claim subsequent improvements negotiated in the collective agreement following the transfer where the new employer is not a party to the negotiations.

KEY POINTS:

- **Service provision changes remain 'relevant transfers' protected by TUPE**
- **Terms and conditions are still protected on tranfer**
- **Renegotiation of collective terms must result in terms being 'no less favourable overall'**
- **Collective redundancy consultation may begin before the transfer.**

bargaining & campaigns team

Contact UNISON's Bargaining & Campaigns team:

Dave Watson
d.watson@unison.co.uk

Suzanne Craig
s.craig@unison.co.uk

0845 355 0845

- A change in the location of the workforce now constitutes an 'economic, technical or organisational reason involving changes in the workforce (an ETO reason). Under the 2006 Regulations an ETO reason had to involve a reduction in the workforce.
- The new regulations make changes to collective redundancy consultation requirements and allow consultation that begins before the transfer to count for the purposes of complying with the duty to consult on redundancies that take place after the transfer.

What does this mean?

The two main areas of concern are the changes relating to collectively bargained terms and conditions and the introduction of pre-transfer collective redundancy consultation. It remains questionable whether these changes comply with the Acquired Rights Directive and the Collective Redundancies Directive.

The ability to negotiate changes to collective terms and one year after the transfer will create a two-tier system of contractual rights. Purely individual terms will have greater protection against variation than collective terms. But questions will remain as to the lawfulness of the act of re-negotiation. It seems that the re-negotiation will involve the making of an offer to give up collectively bargained terms, which the European Court of Human Rights found to infringe Article 11 of the European Convention on Human Rights in the Wilson v Palmer case. It would also potentially be an unlawful inducement in breach of section 145B of the Trade Union and Labour Relations Consolidation Act 1992. (TULCRA)

The introduction of the ability of the transferee to count pre-transfer consultation for the purposes of section 188 of TULRCA is also very concerning. The transferee will be able to implement redundancies more quickly after transfer, with workers losing pay and holiday entitlement. The Collective Redundancies Directive requires the 'employer' to consult, and since the transferee does not become the employer until after the transfer, it is doubtful whether the new provision complies with the Directive.

The new regulations also reverse the decisions of the Employment Appeal Tribunal in Tapere v South London and Maudsley NHS Trust and Abellio London v CentreWest London Buses, both of which held that a change of location post transfer was automatically unfair. It remains to be seen whether the CJEU will find that a change in location is capable of being an economic, technical or organisational reason involving changes in the workforce, as provided in the Acquired Rights Directive.

Action for Branches

Where the new employer is proposing to relocate the workforce post transfer, contact the Region for advice and support

If the new employer seeks to renegotiate collective terms and conditions post transfer, consider whether this involves an attempt to induce members to abandon collective bargaining.

Raise the requirement to inform and consult under both TUPE and TULCRA with both employers at the earliest opportunity.

bargaining & campaigns team

Contact UNISON's Bargaining & Campaigns team:

Dave Watson
d.watson@unison.co.uk

Suzanne Craig
s.craig@unison.co.uk

0845 355 0845