Law Society of Scotland

Consultation Response

Consultation on clarifications to the Transfer of Undertakings (Protection of Employment) Regulations 2006 (TUPE) and abolishing the legal framework for European Works Councils

11 July 2024

Photo: Glasgow

Law Society of Scotland

Consultation on clarifications to the Transfer of Undertakings (Protection of Employment) Regulations 2006 (TUPE) and abolishing the legal framework for European Works Councils

Consultation Response

11 July 2024

Introduction

The Law Society of Scotland is the professional body for over 13,000 Scottish solicitors. We are a regulator that sets and enforces standards for the solicitor profession which helps people in need and supports business in Scotland, the UK and overseas. We support solicitors and drive change to ensure Scotland has a strong, successful and diverse legal profession. We represent our members and wider society when speaking out on human rights and the rule of law. We also seek to influence changes to legislation and the operation of our justice system as part of our work towards a fairer and more just society.

Our Employment Law sub-committee welcomes the opportunity to consider and respond to the UK Government consultation: *Consultation on clarifications to the Transfer of Undertakings (Protection of Employment) Regulations 2006 (TUPE) and abolishing the legal framework for European Works Councils.*[1] The sub-committee has the following comments to put forward for consideration.

Consultation Questions

Proposal 1: reaffirming that only employees are protected by TUPE

Question 1: What effect has the ruling in the case of *Dewhurst v Revisecatch* (that TUPE applies to workers) had on employers or workers?

While we can't comment from direct experience, anecdotally we are not aware of the ruling causing contentious issues in practice. Our understanding is that parties do not get overly troubled by the question of status. However, we understand that this is a point the government are seeking views on and we are certainly interested to hear other respondent views on this.

We understand from the supporting evidence to the consultation that there are not in fact a great deal of TUPE transfers per year (around 40,000 from data gathered in 2011), and even less involve workers (the consultation states that workers account for only 2.6% of the workforce, although there are no available figures as to how many are involved in TUPE transfers). We are not aware of any case authority which cites the *Dewhurst* case, at either tribunal or appeal level.

In terms of case law arising pre-*Dewhurst*, we are aware of the following:

John McCririck v Channel 4 Television Corporation and IMG Media [2014] PHR – at the pre-hearing review it was held that a worker could be considered an employee for the purposes of TUPE because of the language in regulation 2(1) of TUPE. In

[1] Consultation on clarifications to the Transfer of Undertakings (Protection of Employment) Regulations 2006 (TUPE) and abolishing the legal framework for European Works Councils - GOV.UK (www.gov.uk)

particular, it stated that this was the very purpose of the phrase 'under a contract of services …or otherwise'[2] (paragraph 61). *McCririck* was not cited in *Dewhurst*.

Governing body of Clifton Middle School and others v Askew [1999] EWCA Civ 1892 – the Court of Appeal considered that all that was necessary for TUPE to apply was some form of contractual relationship between the worker and the employer. *Askew* was cited in *Dewhurst* (paragraph 39).

Question 2: Do you agree that the government should amend the definition of 'employee' in the TUPE regulations to confirm the generally accepted principle that the regulations apply to 'employees' but not 'workers'?

We can see the benefit in providing clarity to both employers and workers, which is always welcome. However, it would seem on this point that the *Dewhurst* case (and the cases preceding *Dewhurst*), do not appear to have caused too much difficulty in practice (although as we say, it certainly will be interesting to view the feedback from other consultation respondents on this).

Potentially, if transferors are currently including workers in the transfer list based on the *Dewhurst* ruling they may need to be factored into the information (and possible consultation) process that is required under TUPE. Election of employee / worker representatives may also need to be considered. Inclusion of workers may also need to be factored into the due diligence exercise and requirement to provide employee liability information. Contractual warranties and indemnities need to be carefully drafted to ensure that workers are covered (if there is in fact a contractual relationship). We are not aware of how such processes are currently being managed in relation to workers.

Certainly, we have considered a number of arguments against the proposal. Logically it is sensible to ensure that the transfer encompasses those that are actually doing the work, regardless of label, whether worker or employee. This isn't just to protect the individuals involved, but also the business or service being transferred. The rise of the gig economy and businesses with modern workforces and workforce practices means to exclude workers from a transfer (whether a business or SPC model) will potentially leave employers and individuals exposed. The undertaking needs its workforce to do the work, however they are employed.

To exclude workers by explicit regulation leaves such individuals in a potentially difficult and vulnerable position, especially in industries where there are a high proportion of TUPE transfers and SPCs (examples in the consultation include cleaning, catering, building maintenance and security). Workers potentially will get left behind, with the result that unless the transferor can use them elsewhere in the business, they will be dismissed. It could also create problems for the

[2] https://www.judiciary.uk/wp-content/uploads/JCO/Documents/Judgments/mccririck+judgment.pdf

transferee who may struggle to recruit to fill those positions, otherwise filled by workers left with the transferor. Those recruitment and administrative / time costs will need to be factored into the transfer (and indeed may run contrary to the stated aim to reduce the administrative burden and costs of the TUPE regulations for businesses[3]). We would not necessarily share the view that should the proposal become law this will be "at little to no cost to workers"[4].

The impact assessment seems to be based on the premise that providing TUPE protection to workers comes at a cost to businesses and a cost saving (in some cases) will be made by taking away that protection. In light of our above comments, we would not necessarily agree that this is correct in all cases.

To explicitly remove workers from the ambit of TUPE contradicts the increasing trend of affording protections to workers. Current rights include paid holiday, rest breaks, national minimum wage, written particulars of employment, whistleblowing and protection from discrimination. Later this year, the *Workers (Predictable Terms and Conditions) Act 2023* is due to come into force, giving workers and agency workers the right to request a predictable work pattern in certain circumstances.

Workers may currently transfer under TUPE but are not protected by unfair dismissal legislation (section 94, ERA 1996), statutory minimum notice requirements (section 86, ERA 1996) and are not entitled to redundancy pay (Part XI ERA 1996). This will mean they transfer but can be dismissed, without repercussions under the unfair dismissal legislation (although if there is a discriminatory reason for the dismissal, the Equality Act 2010 will be relevant). This however leaves workers in no worse a position than what they would be with the transferor.

Women make up the majority of workers on zero hours contracts (52%), casual workers (54.7%), part time casual workers (58%) and part time seasonal workers (52%)[5]. Those working in the gig economy are generally younger workers, and proportionately come from an ethnic minority background[6]. Potentially therefore those individuals may face greater impact and detriment as a result of the proposal becoming law. We are aware that the evidence from the government is that certain individuals that work in industries linked to SPCs are more likely to be aged 50 or over and male (along with other characteristics). It would make sense to receive further clarity where possible about who exactly would be impacted most by the proposals (and we understand that the government are actively seeking evidence on this point as part of the consultation, see our response to question 4 below).

[3] Aim 2, in the Introduction to the consultation document
[4] Annex, initial impact assessment of proposals
[5] Good Work: The Taylor Review of Modern Working Practices, Page 94
[6] As above, page 94

Another point to consider is the liability in respect of discrimination claims. Following the case of *Sean Pong Tyres Ltd v Moore(debarred) [2024] EAT 1*[7] earlier this year, the EAT held that TUPE does not transfer an employer's liability for discrimination where the perpetrator transfers but the claimant does not. So should the claimant be a worker, and remain with the transferor (as per the government's proposal), liability for discrimination will remain the transferor. This creates issues in terms of defending the claim (potentially, the transferor will struggle to seek to obtain the alleged perpetrator's co-operation where it is no longer the employer). If the worker transferred, the liability would too but the transferee would arguably be in a better position to handle the claim given it employs both parties in some capacity.

Question 3: Do you think that the government's proposal to amend the definition of 'employee' in the TUPE regulations by explicitly stating that limb (b) workers are excluded is the best way to achieve this?

Should the government go ahead with the proposal, we would suggest rather than defining "employee" be reference to an exclusion (of limb (b) workers), the amending regulations replicate the definition in the Employment Rights Act 1996 (ERA 1996). Replacing the current definition of "employee" in regulation 2(1) of the TUPE Regulations with the definition in section 230(1) and (2) of the ERA 1996, that is:

"*an individual who has entered into or works under (or, where the employment has ceased, worked under) a contract of employment*", where a contract of employment means, "*a contract of service or apprenticeship, whether express or implied, and (if it is express) whether oral or in writing*".

Defining by reference to exclusion of limb (b) workers has potential to muddy the waters as the terminology does not always have a precise meaning (it could encompass for example individuals working on zero hours contracts, casual workers, bank staff or seasonal workers).

Question 4: We have analysed the potential impacts of this proposal in the annex of this consultation. Are you aware of any other evidence to inform our analysis of impacts?

It is welcome to note that the Government have considered the potential equality impacts this proposal may have on those with certain protected characteristics. We agree that further stakeholder evidence should be produced on this point to

[7] https://assets.publishing.service.gov.uk/media/65b77b2cc5aacc0013a68425/Sean_Pong_Tyres_Ltd_v_Mr_Barry_Moore__De-Barred___2024__EAT_1.pdf

clarify the potential numbers affected, especially given that this proposal could have a negative impact on those with protected characteristics by removing potential protections under TUPE.

This is especially necessary given the changing nature of our economy and the increasing prevalence of "gig economy" work where individuals are more likely to fall within the limb (b) worker group.

Proposal 2: removing the obligation to split employees' contracts between multiple employers where a business is transferred to more than one new business.

Question 1: What effect has the ruling in the case of *ISS Facility Services NV v Govaerts and Atalian NV* had on how the TUPE regulations work?

Under TUPE, a service or entity may be transferred from a single entity to more than one transferee, or indeed part of a service or entity may remain with the transferor with part or parts transferred elsewhere. Before the judgment in *ISS Facility Services v Govaerts* (C-344/18) EU:C:2020:239 ("*Govaerts*"), it was generally understood that employees should transfer to just one transferee – the transferee acquiring the greater part of the activities carried out pre-transfer per *Kimberley Group Housing Ltd v Hambley & Ors*. The decision of the EAT in *McTear Contracts v Bennet & Ors* confirms that *Govaerts* applies both to service provision changes and business transfers. Accordingly, the effects of *Govaerts* apply across TUPE.

The approach envisaged by the decision in *Govaerts* splits an employee's employment potentially into numerous part-time contracts proportionate to the amount of time spent by the employee on different areas of a contract or work. The ECJ commented that this would only be the case were a split was possible and where it would not have an adverse effect on the employee's working conditions. However, the decision has led to a lack of clarity in how parties to a TUPE transfer should approach the common matter of employees who do not work on a single contract or area of a business. Employment Tribunals have, until now, been reticent about focussing on the percentage of time an employee works on a particular contract. The decision in *Govaerts* appears to bring percentages to the forefront of any decision on whether a contract of employment must be split.

In addition, the decision raises questions on whether an individual can be said to be 'assigned' to an organised grouping and multiplies the obligations on transferors and transferees to inform and, in many cases, consult on TUPE, increasing the administrative burden on employers and the potential stress on employees. The question of liability for breaches is potentially multiplied across

more parties. Where activities are randomly distributed among new contractors, this may lead to the conclusion that matters have become too fragmented and that there is no economic entity which retains its identity (or that it is not possible to identify where services have ended up in a service provision change). Post *Govaerts*, the issue of fragmentation is further complicated, the result of which is likely to be an increase in litigation.

The *Govaerts* decision puts transferees in a precarious position in respect of claims. The ECJ stated that liability would fall to the transferee in circumstances where splitting the employment contract was "impossible." It is unclear which transferee that would be (or likely all transferees). However, apportioning rights and obligations will only be possible where hours worked are easily identifiable; for example, work undertaken by cleaners across different sites or by care workers in different homes. Where the employee in question occupies a more senior role, it is unlikely that dividing their contract between multiple transferees will be practicable, leading to liabilities.

For those whose rights and obligations can be apportioned, it seems highly likely that working conditions will be detrimentally impacted by the division of labour across multiple different sites accounting for travel time and expenses. Additionally, many employees now face working for multiple employers as part-time employees, which leads to many issues which they may find unpalatable. The ECJ in *Govaerts* also commented that liability would fall to the transferee where dividing a contract "entails a deterioration in the working conditions and rights of the worker" (paragraph 37). The test for such deterioration is unclear but certainly travel time and expense are possible triggers.

Question 2: In your experience, how common are TUPE transfers involving multiple transferees, and what are the practical considerations that arise from these?

In certain industries, such transfers are quite common. Notably, in care and cleaning, it is quite common for a company to hold contracts to provide services for a number of clients and, as such, for an employee to work across a number of sites and/or contracts for a single employer. Where one or a number of contracts are lost by the incumbent, employees are currently potentially split across a number of new employers to work on a part-time basis for each of these.

The practical considerations are numerous. In terms of TUPE, the obligations on transferors and transferees are multiplied by splitting employees, leading to an increased administrative burden and increased risk of liability. Post-transfer, transferees inherit employees on a part-time basis which tends to present more difficulties for effective integration.

From an employee's perspective, the administrative burden is also onerous. To take the example of annual leave, post-transfer an employee has an annual leave

allowance which has been split between potentially multiple employers, each potentially with a distinct system of annual leave and obliging an individual to make multiple requests for annual leave to their employers, each of which has different pressures and considerations in deciding whether to permit the request. At the most basic level, a full-time employee of one employer will become, not through choice, a part-time employee of multiple employers. It is probable that this will not be the employee's preference and will lead to various complications in their experience of employment.

We observe that the types of industries which tend to be affected by this issue often employ a particular demographic. Care and cleaning, for example, employ a majority of lower-paid, female employees. Utilities tend to employ a majority of male employees. Care should therefore be taken in assessing the impact of any change on such groups in order to avoid the potential for indirect discrimination.

Question 3: Do you agree that the government should legislate to prevent employment contracts being 'split' between multiple transferees during a TUPE transfer, reverting to the generally accepted principle that existed prior to the *Govaerts* ruling?

Broadly yes – the additional certainty which the proposal should provide will be positive for employees and employers alike.

We do note that the Government's proposal suggests that transferees will require to 'agree' as to how the matter will be dealt with. The detail of what 'agreement' will look like and what the mechanism used will be are key to whether this proposal will work practically. Currently, the *Govaerts* decision provides that if it is "impossible" to split the employment the employment may terminate. If 'impossible' and 'failure to agree' equate to the same in practice, clearly there is a possibility of termination of employment and liability. Enhancing Employee Liability Information to include information on the split of individual employees' workloads and possibly providing this at an earlier stage could go some way to mitigating this risk.

We also note that the proposal puts 'agreement' in the hands of the transferees; it seems apparent that the transferor will be best-placed to assist with vital information on how employee time is apportioned and that they should play a role in the process. Given that the transferor will be required to inform employees or their representatives in any event, this should not be unduly onerous.

Question 4: We have analysed the potential impacts of this proposal in the annex of this consultation. Are you aware of any other evidence to inform our analysis of impacts?

Whilst "Savings for employers" is included within the Evidence Gaps portion of the Annex, it would be helpful to have greater understanding of the potential costs of these changes. Given that the transferor and transferee will have to agree who has responsibility for each employee's contract, it may be that more time and cost is incurred by the need for these negotiations.

We would also hope to understand the Government's proposals on what should happen where the transferor and transferee cannot agree on this division.

Proposal 3: abolishing the legal framework for European Works Councils

Question 1: Do you agree or disagree that the government should legislate to abolish the legal framework for EWCs?

We acknowledge the Government's proposal to repeal the legal framework which permits UK EWCs to continue in operation post-Brexit. We make the following observations.

It is understood that, pursuant to Council Directive 2009/38/EC (as amended), responsibility for any EWCs for which the UK was responsible prior to the transition date will have transferred to a continuing EU Member State. UK employees may be represented on that EWC but only if permitted by the EWC agreement. In parallel with this, the TICE Regulations 1999 (as amended), have been interpreted by the UK courts to provide that UK EWCs in existence prior to the transition date are to continue in operation.

The implications of this are that a company may have both a UK EWC and an EWC in another Member State – as was the situation in *Easy Jet PLC v Easy Jet EWC* (CA) on which UK employees are represented. This has the potential to lead to unnecessary duplication of effort, resources and potential conflict. The Government's proposal to abolish the legal framework which permits UK EWCs to remain in operation post-Brexit would address these issues.

The main downside to abolishing UK EWCs is the impact it will have on employee information and consultation on employment matters which relate to and/or interact with decision-making which affects more than one undertaking in the multi-national group. Whilst there may be opportunities in the UK for information and consultation arrangements to continue or be created under the ICE Regulations or Trade Union negotiated agreements, the dialogue arising from such agreements is unlikely to have the same trans-national nature. There may be the opportunity for unions and management representative bodies to enter Transnational Company Agreements, though it is noted these are entirely voluntary arrangements.

We understand that it will remain possible for UK employees to be represented on EWCs centrally managed in an EU Member State, provided this is permitted by the EWC agreement. We observe that this offers some opportunity for effective information and consultation dialogue on employment matters (of a regional nature) to continue. It is unclear, however, how many EWC agreements permit continuing UK representation and whether that will continue to be permitted by EU Law.

We would note that if the legal framework which permits UK EWCs to remain in operation is to be abolished, any national provisions which protect UK representatives on EWCs centrally managed in a Member State should nonetheless be retained to mitigate against the risk of a reduction in UK employee rights.

Question 2: Are there any other options the government should consider instead of abolishing the legal framework for EWCs?

We consider that an alternative option might be to facilitate the continued operation of existing UK EWCs in those cases where no UK representation is permitted at the EU EWC. This would ensure that employees retain an effective means by which they can receive information, and be consulted on, European and trans-national decision making which affects their employment and working conditions. If the EU EWC permits UK representation, then – to avoid duplication of effort, resources and possible conflict – the UK EWC could be disbanded.

Question 3: We have analysed the potential impacts of this proposal in the annex of this consultation. Are you aware of any other evidence to inform our analysis of impacts?

The committee members have limited experience of UK EWCs which is, perhaps, indicative of the limited number in existence. As such, we are not aware of existing evidence. However wee note it may be helpful to attain the following evidence:

- Quantitative or qualitative data on activity / effectiveness of UK EWCs post-Brexit.
- Quantitative data on EWCs which continue, post-Brexit, to permit UK representation.

The purpose of this would be to understand the quantitative and qualitative effect of removing UK EWCs.

For further information, please contact:

Terri Cairns
Policy Team
Law Society of Scotland
DD: 0131 476 8172
terricairns@lawscot.org.uk